1974

Controversial Subjects of Contemporary International Law

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C.N. Okeke

Controversial subjects of contemporary international law

Rotterdam
University Press
This study attempts to analyze the degrees of importance, the reasons why contemporary international law is so proliferated and the factors that have affected and continue to affect the proliferation of international law. The study is divided into three parts: (1) the definition of international law; (2) the jurisdiction of States; and (3) the legal personality and treaty-making power of international law. The inquiry reveals that absolute sovereignty and unrestricted liberty of action of the subjects of the law, is clearly unreasonable and unacceptable in the circumstances of today. It is no longer a condition sine qua non to qualify as a subject of international law. In the second part of the investigation, the extent of the treaty-making power of a federal union, is a subject of urgent and continuous preoccupation in the conduct of modern international relations. The case of Rhodesia is used as an illustration. The international legal status of the Holy See (The Vatican) is considered. In the third part of the investigation, reasonable attention is given to the discussion of a very topical and delicate issue of our time — the legal personality and treaty-making capacity of National Liberation Movements (Nations and Peoples fighting to establish an independent government of their own). A comparative case study of Bangladesh and Biafra is used to illustrate the inconsistency in state practice in connection with the implementation of the 'principle of equal rights and self-determination of nations and peoples'. We believe that the principle forms the legal cornerstone to justify these struggles. However, we doubt if its present formulation by the United Nations Organization is very realistic and useful. The facts of particular...
Controversial subjects of contemporary international law

An examination of the new entities of international law and their treaty-making capacity

CHRIS N. OKEKE, LL.M., PH. D.

Foreword by
His Excellency Sir G.G. Fitzmaurice, G.C.M.G., Q.C.,
former judge of the International Court of Justice

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Rotterdam University Press/1974
To my beloved parents with profound gratitude
and
In humble respect and grateful memory of

Peter Chijioke Enewally
April 18, 1922-January 13, 1970

Nicholas Anyaka Ugwu
December 6, 1942-August 30, 1971
Foreword

It gives me much pleasure to write this brief foreword to Dr. Okeke's work the progress of which I had the privilege of following from time to time, and with great interest. It is a work that cannot fail to provoke thought, written positively yet with restraint, it makes a balanced presentation of the various topics that the author deals with, and comes to conclusions that are defensible even where controversial; and controversy is, after all, to be welcomed. This is all the more to be commended in that many of these topics are amongst those that are generally regarded as highly sensitive at the present time.

The significance of the book lies in the fact, firstly, that it is the work of a young jurist from a young country, looking at matters familiar to the international lawyer in new ways which, if sometimes unorthodox, are sincerely felt and honestly very persuasively set forth. Secondly, despite the limitations of the framework of treaty-making capacity within which the author sets his study, he has succeeded in relatively brief compass, in ranging widely, and in covering a considerable number of individual subjects. The result is that things are seen from a novel angle that brings out points often overlooked or not given their full weight.

The effect of the work is to show that, without any call for iconoclasm or abrupt breaks with the past, there is room in the international legal field for adjustments and fresh insights that international lawyers will do well to be thinking about. In this way it makes a real contribution to better understanding. It is greatly to be hoped that it will be followed up in due course by further work in a field for which the author is so evidently well qualified.

The Hague, 1973

G. G. Fitzmaurice
Practitioners, scholars and writers of international law have given this term countless definitions and interpretations. Every writer, it seems, feels compelled to redefine the concept. And I am no exception. For the confusion resulting from this semantic Tower of Babel impinges on the practice of international law itself.

How can one evaluate a phenomenon when there is little agreement about what it is? How may one say that international law is good or bad or in between when there are no accepted criteria for determining degrees of success or failure? Judgement of the performance of international law rests mainly upon the nature of the expectations it arouses; and these expectations naturally vary with the definition one adopts.

We find the view that law is a sociological notion from which legal consequences ensue valid. It (law) should never prevent the normal functioning of life, be it on the national or on the international plane. All law consists, and consists necessarily, in the regulation of the action of those who are subject to it, and it is therefore in its very being and essence quite incompatible with notions of unrestricted liberty, or rather, in this context, of what would amount to licence. Those who are directly involved in the science and practice of this science must of necessity adhere to the changes that are taking place in society. ‘It is not so much because, like spectators at a show, we are interested — but dispassionately so — in what is going to happen; — it is rather because, like players on a field, we are passionately interested in what is happening now, and are noting it, some of us with approval, some with mixed feelings, — but none with indifference.’

In this connexion we cannot do better than quote the great authority of Lauterpacht, who writing under the heading of ‘The Problem of Change in International Relations’, said:

The problem of adjusting the functioning of the law to the perpetual antimony of change and stability, and of justice and security, is not one peculiar to international law. It is a general legal phenomenon, common to every political society. It is one of the central problems of legal philosophy. Experience teaches that in this struggle the element of change is not always victorious, for the simple reason that stability and security are in themselves powerful constituent elements of justice. There is, as Montesquieu already pointed out, a limit to the possible sacrifice of security to progress. The same experience teaches that there is ultimately no more effective challenge to the maintenance of the law than an immutability impervious to the needs of life and progress. As Ihering said: "A concrete law, which because it has once existed, claims absolute and accordingly perpetual existence, is like a child who strikes his own mother, it derides the idea of law even in invoking it, for the idea of law is perpetual becoming..."

The Second World War and its aftermath have precipitated revolutionary changes, firstly, in the political, social and economic fields, and, secondly, in the scientific and technological fields. It may well be the tragedy of modern international law that it was undermined by a nineteenth century conception of state and international relations at the very moment it was challenged by modern social, international and technological developments. In its attempt to survive the first (political, social and economic), it failed to cope with the second (scientific and technological).

The present study attempts to explore the impact of these changes on the law. Our point of departure is on the basis of the general conception that contemporary international law can no longer be reasonably presented within the framework of the classical exposition of international law as the law governing the relations between States, but must be regarded as the law guiding and regulating the activities of the proliferating new actors in international relations. Faced with exigencies of space, we have chosen to concentrate the test of our thesis on the discussion of selected topics which are amongst those that are generally regarded as highly sensitive and controversial at the present time.3

The subjects chosen for discussion have been selected as illustrations of changes in the political, social, economic, scientific and technological fields which are of major significance in the development of contemporary international law. An inclusion of a case study on the legal position of the Provisional Government of South Vietnam would have, undoubtedly, illustrated another instance of the inaptness of present-day international law to cover the realities of life. We skipped this because of the original scope intended for this study.

The discussion of the problems made clear the rather often constant inter-play of international law, international politics and ideology. This became even more so as efforts were made, where appropriate and possible, to compare the East European approach to international law with that of their Western counterparts.

We fully realise that any one who attempts to encompass so wide and controversial a field must take the risk that his knowledge of certain parts of that field may fall short of reasonable standards of adequacy. But in the belief that breadth of outlook and boldness in approach are essential ingredients to the positive progress of contemporary international law in the present critical stage of world affairs, we have preferred to take that risk and to rely upon the indulgence of the reader.

That indulgence we now seek.

The Hague, 1973

Chris Okeke

3. For expert and current statements on some of these topics, see, Sir Fitzmaurice's Special Report at the Centenary Session of the Institute of International Law, Rome, September, 1973. The learned scholar and judge discussed present trends and attitudes on these matters under the heading 'Challenge and Controversy.' See, Fitzmaurice, op. cit. at pp. 18-41.
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Acknowledgements

Various scholars were kind enough to read and comment upon this study. I wish to record my profound gratitude to two of these personalities, namely Professor Dr. P. H. Kooijmans, formerly a Professor of Public International Law at the Free University of Amsterdam, now a State Secretary for Foreign Affairs in the Netherlands Government, and His Excellency Judge Sir Gerald Fitzmaurice, G. C. M. G., Q.C., former Judge of the International Court of Justice at the Hague. Their comments saved me from many an error of omission and commission, and in general, enhanced this study greatly.

I am obliged to single out His Excellency Judge Sir Gerald Fitzmaurice, not only for his constant help and encouragement over the years, but also for his kind consent to contribute a foreword to this volume.

In the long course of my research, I had the occasion to make extensive use of the facilities of the Carnegie Foundation Library at the Peace Palace, The Hague, and the United Nations Depository Library in Amsterdam, and I wish to record my appreciation to their librarians for their cheerful and gracious help.

Messrs. W. Piersma, J. H. van Vloten and J. C. den Besten, all of the Rotterdam University Press, were more than considerate and helpful in producing this book in a very impressive record time, and I warmly thank each of them.

Despite the many helpful comments made on this study by others, I alone am responsible for the views expressed therein.

Amsterdam, 1973

Chris Nwachukwu Okeke
AJIL American Journal of International Law.
BFSP British and Foreign State Papers.
BNA British North America Act.
BSAC British South Africa Company.
BYIL British Yearbook of International Law.
COMECON Council of Mutual Economic Assistance.
ECTO European Central Transport Organization.
ECSC European Coal and Steel Community.
EEC European Economic Community.
HARKWORTH Green H. Harkworth's Digest of International Law (1940-1944).
HAGUE RECUEIL Recueil de Cours de l'Académie de Droit International de La Haye.
ICJ International Court of Justice.
ICJ REPORTS International Court of Justice, Reports of Judgements, Advisory Opinions and Orders.
ICRC International Committee of the Red Cross.
ILC International Law Commission.
ITU International Telecommunications Union.
KEA Keesing's Contemporary Archives.
LNTS League of Nations Treaty Series.
NGOS Non-Governmental Organizations.
OAU Organization of African Unity.
PCIJ Permanent Court of International Justice.
SC Security Council.
SEC Social and Economic Council.
SEMP Sovetskii Ezhegodnik Mezhdunarodnogo Prava. (Same as Soviet Yearbook of International Law published by Soviet Association of International Law.)
SYIL Soviet Yearbook of International Law.
TAASS Telegraphic Agency of the Soviet Union.
TC Trusteeship Council.
UNESCO United Nations Education and Scientific Organization.
UNO United Nations Organizations.
UNYIL United Nations Yearbook of International Law.
WHO World Health Organization.
WTUF World Trade Union Federation.
YILC Yearbook of International Law Commission.
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1. See the Appendix attached to Chapter 4, infra for other international treaties and instruments.
Introduction

The subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community. Throughout history, the development of international law has been influenced by the requirements of international life, and the progressive increase in the collective activities of States has already given rise to instances of action upon the international plane by certain entities which are not States. ICJ, Advisory Opinion on Reparation for Injuries Suffered In the Service of the United Nations Organization, ICJ Reports, 1949, at 178.

International law has experienced profound transformations in the course of the last century. Among such transformations, none has been more significant or far-reaching than the fact that international law has changed from the law of a family of nations based on Western Christendom into the law of a universal world community. This community has a fundamentally changed composition and distribution of influence which makes it even more necessary to have a legal system with sufficiently broad and deep foundations effective enough to command the allegiance of the community.

The present study is an attempt to analyse, in their relative degrees of importance, the remarkable changes that have affected and continue to affect contemporary international law with special reference to the expansion of its subjects as evidenced by their treaty-making capacity. The notion of 'subjects' of any given law, be it municipal or international law, denotes those entities to which the norms of the legal order in question apply, and whose conduct this order regulates or licences by imposing duties or conferring rights. The important point is that any
subject of law must be capable of having certain rights and duties under
the given legal system, any differences in the degree of capacity not-
withstanding.

The fact can hardly be denied that among the striking problems aris­
ing in the development of contemporary international law, the prolifera­
tion of new actors on the international scene must surely take a signif­
ificant place. Indeed present-day international relations are undergo­
ing an important process of change both in structure and scope with great
speed.1

Thus, the proposition that international law governs the relationships
between States while still mainly true is very much less exclusively true
than it used to be. Such a position now represents a largely formalistic
view which has little relation to the current content of international
law, much of which deals in practice with legal relationships that are
by no means exclusively, and are not always primarily, relationships
between states. The structure of international law reflects that of in­
nernational relations. This being so, international law can no longer be
reasonably or adequately defined or described in the traditional manner
as being solely the law governing the mutual relations, and in particular
delimiting the jurisdiction of States.2

While States will remain by far the most important subjects of the law
of nations, as long as legal powers and prerogatives are concentrated

1. See, Friedmann, W., The Changing Structure of International Law, 1964;

2. This view has been widely recognized by a good number of authoritative
writers of international law who have devoted special studies to the matter. Dr.
Knubben, in the most exhaustive work yet published on the subjects of inter­
national law, Die Subjekte des Völkerrechts (1928), reaches the conclusion that
the traditional view is antiquated and no longer tenable. He defines interna­tional
law as a law regulating the mutual relations of States and the inter­
rnational relations of other subjects, in particular those of States and of entities other than
States (at p. 527). Professor Spiropoulos, in an important essay published in the
same year and anticipating more recent developments such as an Interna­tional
Bill of Human Rights, L'individu en droit international, arrives at the same view.
So did H. Lauterpacht, Private Law Sources and Analogies of International Law,
1927, pp. 73-79; Politis, N., Les nouvelles tendances du droit international, 1927,
pp. 55-93. Most recently, Professor Jessup upheld the view that generally persons
and bodies other than States have in many respects acquired a status in inter­
national law: See, Jessup, Responsibility of States for Injuries to Individuals, in
Columbia Law Review, 46 (1949), pp. 903-928; The Subjects of a Modern Law of
national Contractual Agreements, in AJIL, 41 (1947), pp. 378-403. The substance
of these articles is included in Jessup, A Modern Law of Nations, (1948), 2nd ed.
in the hands of the nations they are no longer the exclusive subjects of
international law. Apart from the United Nations Organization and its
related agencies, there are increasing numbers of functional interna­tional
organizations, as well as other entities which operate on the
international plane. For example, such organizations as the European
Economic Community (EEC), the International Committee of the Red
Cross (ICRC) and many others engage in a multitude of international
actions and transactions that belong to the sphere of public, not of
private international law. Of equal significance are the activities of such
entities as the component units of federal states, belligerent organs of
national liberation movements, the Holy See, and unrecognized States.
These participate in no small measure in reshaping the structure of
modern international law and international relations. They must now
be recognized as being subjects of international law, for they already
have to varying degree international legal personality. To a much less
clearly defined extent, private corporations are now active participants
in the evolution of public international law.

Since it is not practically possible to treat all the theoretical problems
with which international law is concerned regarding the problems we
are investigating, the author has decided to limit himself to only one
of the vital questions of modern international law—that of the expan­
sion of the new subjects of international law as evidenced by their
activity-making capacity which forms an important theme of the present
study.

Seen in true perspective, treaty-making has had a decisive and con­
cstructive impact on the development of international law. It has con­
tributed towards a renewed accentuation of the codification of interna­
tional law. Apart from being a common method of establishing a
relationship or creating rights and duties under international law, trea­
ties amongst other things, now form the principal instrument of inter­
national law-making. They are in that context the nearest equivalent
to municipal legislation.

Consequently, the collectivity of states and other subjects of inter­
national law and their combined treaty-making power is the nearest
equivalent to a State legislature—an instrument with which the society
of nations is equipped for the purpose of meeting many of the needs of
international life. The progressive development of this important field
of international law would have been badly hampered without the
activities and participation of the various growing new entities in inter­
national relations. All this should make it clear that renewed reflection
upon and reassessment of the impact of the increasing number of sub­
jects of international law is necessary, since it is on this that the future of the science and practice of international law largely depends. There are of course other treaties of a contractual rather than law-making character, and agreements that are not treaties, yet have an international aspect. In these too, new kinds of entities are involved.

As an exhaustive survey of the literature on the subject is impracticable, we propose to be illustrative rather than comprehensive, and provocative rather than authoritative. Most suggestions and/or conclusions which will be made in the course of discussing the matter are far from new; but it is believed that the time is ripe for a new attempt to reassess in empirical rather than abstract terms their cumulative importance for the general theory and structure of the law. In carrying out this investigation, it is hoped that by adopting the comparative method of approach where possible and necessary, that is, by looking at the problems involved from the stand-point of Western and Eastern legal systems, as well as that of the emerging younger nations of the world community, the study will shed some light on the current position of the law on the subject matter.

The first paragraph of chapter one of the inquiry will attempt a review of the general doctrine and the diverse stand-points of selected legal authorities of both West and East on the important theoretical issue of the definition of international law. The reasoning behind this approach is based upon the consideration that the question of who are the subjects of international law is closely bound up with the whole concept of international law itself. From this examination we shall reach the conclusion that the sum total of the doctrinal discussions so far has not greatly helped to formulate a concept of international law acceptable to all. The thesis is proposed that if an entity claims to have international legal capacity, no rule of international law comes into play until the entity appears and asserts itself. The section concludes by laying down the essential elements necessary for an entity to be a subject of a system of law, or to be a legal person within the rules of that system. It is cautioned, however, that it would be a mistake to suppose that by concluding that an entity is a ‘subject’ of the law, one is also formulating its capacities in law. Since the rule of law can determine alone both who or what is competent to act and to what effect, different kinds of entities may be subjects of the law and endowed with different legal functions.

Chapter two discusses the notion of states as subjects of international law and the important element of statehood-sovereignty. While we reject unequivocally, the suggestion of absolute sovereignty as the \textit{conditio sine qua non} to qualify as a subject of international law, still we find place to analyse such aspects of sovereignty as may have a direct bearing on the subject of study. This is based on three considerations: (i) the recognition that the principle of state sovereignty is still a cornerstone, so to say, on which the whole structure of international law rests; (ii) that many other principles of international law seem to revolve around this principle; (iii) that the principle of sovereignty can be used as a good starting-point for the consideration of the legal status and treaty-making power of subjects of international law other than States proper.

The second paragraph of chapter three looks into the problems of the international personality of component units forming a federal union and their capacity to make binding agreements under international law. The principal method of legal implementation of important international decisions is through the treaty. Therefore the extent of the treaty-making power of a government, and most particularly of the Federal Government in federal states, is a subject of urgent and continuous preoccupation in the conduct of international relations. In federal States there is the requirement of consent by the federal legislative body which, as the content of international treaties expands, increasingly clashes with the executive as regards the federal treaty-making power.

We have had recourse to various constitutions of selected federal States respecting their-power. Our findings led us to the view that the extreme traditionalist stand, that it is only the collective federal State as such which is a subject of international law and has treaty-making capacity, is incorrect. Component members of a federal State, depending on either their expressed constitutional rights or treaty-making practice that can be evidenced, apparently can and not infrequently do have quasi-international personality, but it is a limited personality – not fully sovereign or independent.

The third paragraph of chapter four proceeds to the examination of the status of the Holy See in contemporary international law. Our analysis will show that some contradiction exists between the theoretical position of certain legal systems on the issue, and the actual practices of States in their relations with the Holy See.

Not only is the Holy See a subject of international law, it also enjoys a wide range of treaty-making capacity. An appendix is attached to illustrate this fact.

The fourth paragraph of chapter five will discuss briefly the personality of ‘unrecognized States’ in international law, using a case study on Rhodesia as an illustration; while chapter six of part E will survey the United Nations efforts to codify the principles of international law.
with special reference to the principle of equal rights and self-determi-
nation of Nations and Peoples regarded by us as the legal corner-stone
upon which the activities of National Liberation Movements (NLM) are
based.

The six paragraphs of chapter seven, eight and nine are designed to
illustrate the practical application of the principle of equal rights and
self-determination of Nations and Peoples. Accordingly, the very dis-
similar stand of various selected States on a number of issues of a
relatively similar nature in the cases of Bangladesh and Biafra will be
considered. Apart from the fact that in these two conflicts, the operation
of the principle of equal rights and self-determination of Peoples through
secession was at issue, both of them are prominent amongst those which
have attracted the greatest international interest recently. It does appear
that the drama of Bangladesh ended where that of Biafra began.

The seventh paragraph of chapter eleven deals with the question of
International Organizations as subjects of international law and the basis
of their treaty-making capacity. Part eleven will be mainly concerned
with a brief analysis of Non-Governmental Organizations (Noos) and
Private Corporations as subjects of International law.

Chapter twelve of our study on the impact of the proliferation of actors
(States, International Organizations and other entities) in international
relations on international law will serve as a reappraisal and conclusion
of our examination.
1. The subject of international law: theoretical examination

1. GENERAL DOCTRINE

The subjects of a legal system as that term is used in general jurisprudence, are the persons or entities to whom the law attributes rights and duties. Consequently, if it is asked, ‘Who is the subject of a certain legal order?’, this means: ‘to whom do the norms of this legal order apply, whose conduct does this order regulate or license by imposing duties or conferring rights?’ However, this question itself conceals an ambiguity, for a legal system may in certain respects regulate or license the conduct of individuals or bodies without addressing itself directly to them. Thus, according to the classical or traditionalist view, international law directly concerns certain entities alone, principally States, and reaches individuals only through the medium of such entities by obligating or permitting the latter to regulate or license individual conduct in certain ways.

It is therefore clear that the question of who are the subjects of international law is closely bound up with the whole concept of international law itself, and its definition as propounded by writers and publicists; for according to the classical and traditional view, international law consists exclusively of the body of rules governing the conduct of states and related entities, in their relations with one another — a theory

1. Holland, Elements of Jurisprudence, chap. viii. The meaning ‘subject' in relation to international law is analysed in Spiropoulos, L'individu en droit international, where it is said, p. 32: ‘A subject of the law is one to whom the rules of a juridical system are immediately addressed, that is to say, one who is directly qualified or obligated by the rules of a juridical system.’ To the same effect. Kelsen, General Theory of Law and State, Cambridge (Mass) 1945, p. 343. But many writers use the terms ‘subjects', ‘persons', ‘international personality', as representative of the same notion.

2. Consequently, in Spiropoulos' definition as given in the preceding footnote, the key words are ‘immediately’ and ‘directly’. 
which makes such entities, as juristic persons, the only subjects of international law.

This view is strongly challenged in modern times, and it is desirable to draw attention at once to the fact that the classical definition of international law has itself undergone a remarkable change. It is interesting to review the definitions given by some authoritative writers in this field in our time, since they reflect the changing concept of international law, at least in theory. The definitions, in their respective groups, perhaps do not differ greatly from one another, but a number of writers seem to present a sociological rather than a juridical definition. Others emphasize the primacy either of states or of the individual as being the key subjects of international law.

Fauchille recognizes international law as the body of rules which determines the respective rights and duties of states in their mutual relations. Renault, in a sociological rather than a juridical definition, holds that the law of nations, or international law, is a body of rules meant to reconcile the freedom of everyone with the freedom of others. Ahrens differs in his own definition from the classical pattern, asserting that international law in its highest generality is the body of rules which governs the natural intercourse of peoples in conformity with the conditions of their coexistence, mutual assistance and international relations.

Anzilotti says briefly that international law is the legal order of the community of states. If we understand the term ‘community of states’, as so used, to mean all the independent states which maintain permanent relations inter se on the basis of some mutually recognized system of rules—this system being international law—the definition would not be satisfactory since it would explain the term to be defined by the use of the same term.

Another question-begging definition is Westlake’s who sees in international law the body of rules prevailing between states, while Lord Russell presents international law as ‘the sum total of the rules and usages which civilized states have agreed shall be binding upon them in their dealings with one another’. In a number of definitions as well as in other connections, the expression ‘civilized’ nation, or state, is used without further explanation. This expression, apart from the fact that it is unclear in itself, has various controversial implications. It seems to have been regarded as self-explanatory to such an extent that the drafters of the Statutes of the Permanent Court of International Justice and of the present International Court of Justice included it in Art. 38, para (c) which refers to ‘the general principles of law recognized by civilized nations’.

Some leading American and Soviet international lawyers, although using various wordings, accept the ‘classical’ definition in most cases by underlining the exclusivity of states as the only subjects of international law. Two leading American international lawyers, C. C. Soule and C. Macauley define international law as the system of rules that civilized nations acknowledge to be obligatory as their collective law for regulating their mutual rights and duties in peace and in war. This is merely a slightly different version of Lord Russell’s definition—and so is that of Hughes who writes that international law is the body of principles and rules which civilized countries consider as binding upon receiving the consent of sovereign states.

Charles Cheney Hyde stressed that the term international law may be fairly employed to designate the principles and rules of conduct which constitute it, and which states feel themselves bound to observe in their relations with each other—a very ‘circular’ definition. Charles Fenwick writes that international law may be defined in broad terms as the body of general principles and specific rules which are binding upon members of the international community in their mutual relations.

This definition equally appears not to advance matters, and still leaves us without an answer as to who make up the membership of this international community and what makes the law binding upon them. Nelsen contends that in principle only individuals are subjects of law, but recognizes that, as regards international law, states as legal

5. Ibid.
9. The Soviet doctrine of international law will be treated separately in the next section.
10. International Law for Naval Officers, Annapolis, 1928, p. 3.
persons are subjects of it. If he teaches that one may define international law as an interstate system, it is because this definition is not meant to refer to the specific objects of the system, but to the process of its creation; this process is characterised by the fact that the norms of international law are brought into existence by the collaboration of two or more states. This is true for conventional as well as for customary international law.

Nicholas Politis, however, sees international law as the body of rules governing the relations of men belonging to various political groups, and Scelle in his textbook of international law, published after the second World War, consistently taught that international law, in the most comprehensive sense of the term, is a legal order of the community of peoples of the universal society of men. In Scelle's conception, international law is superimposed—a final legal order, the norms of which prevail over those of all other systems of law: thus national, imperial and federal systems lie below international law.

As late as 1944, J. L. Brierly stated that the primary function of international law is 'to define or to delimit the respective spheres within which each of the sixty-odd states into which the world is divided for political purposes is entitled to exercise its authority.' This conception we submit is inadequate and unhelpful now.

The various opinions cited above represent the general trend of those definitions of international law which consider the state or the individual as the sole subject of that law. They can be said to illustrate in general the view of Western legal scholars on the topic. We must now move on from this general position to an examination of how the Soviet doctrine of international law looks at the problem. What has the Soviet concept of international law to offer on this controvertial issue?

2. THE SOVIET DOCTRINE ON THE SUBJECTS OF INTERNATIONAL LAW

We consider it essential to point out from the beginning that the academic debate on the question of the subjects of public international law has in no way been less controversial among Soviet legal scholars. No common opinion exists. However, in the Soviet concept of international law, there do exist two leading schools of thought on the general question of international personality in international law. The first school favours what we may call the 'traditionalist' or 'classical' concept which grants a monopoly of international personality to sovereign states, to the complete exclusion of all other entities operating on the international plane, including universal international organizations such as the United Nations and its related agencies. The chief protagonists of this view are Professor L. A. Modzhorian, Prof. V. M. Shurshalov, and a number of other Soviet writers on international law. According to Professor Modzhorian, the possession of sovereignty is a condition sine qua non for any international person; and so long as any entities are not sovereign entities they are ipso facto not subjects of international law. She writes that:

'A necessary attribute for any subject of international law is the capacity to be represented on the international plane by a supreme authority which is capable of participating in law-creating processes, is capable of undertaking international legal obligations and of fulfilling them, and is so capable of taking part in measures aimed at the enforcement of the observation of norms of international law by other subjects... All subjects of international law are sovereign, ipso facto, have equal rights.'

However, it is interesting to observe that, Professor Modzhorian later in the same book grants the possession of international personality to 'belligerent' nations and also to 'national liberation fronts'. In our opinion, this appears to be in contradistinction to her conclusion quoted above on what she considers to be the necessary attributes for any subjects of international law, for these entities, though enjoying a reasonable measure of international personality, do not meet up with her own requirements.

Turning to the second Soviet school of thought on this problem, the position is held strongly by G. I. Tunkin and others that in contemporary general international law a subject of international law is not merely an entity possessing international rights and obligations, but one which also actively participates in the international law-creating processes; and if only States did this, they alone would possess inter-

19. Ibid.
20. Ibid.
national personality. If not, however — in so far, that is to say, as other entities may now participate in these processes, sovereign states no longer possess a monopoly over international personality. We find that this point of view, which we submit represents a majority opinion in Soviet doctrine today, is shared by other Soviet authorities in international law such as S. B. Krylov, F. I. Kozhevnikov and D. B. Levin.

Professor Krylov, then a Judge of the International Court of Justice, in his Hague Academy lectures in 1947 defined international law as 'The body of rules which governs the relations between states in the course of their struggle and their cooperation, which express the will of the dominant classes in these states, and which is guaranteed by coercion applied by states separately or collectively'. Speaking about 'Subjects of International Law of the Future', Professor Krylov affirmed, and in our view rightly so, that one could envisage an enlargement of the circle of subjects of international law in the future, and maintained that for instance the World Trade Union Federation, on the one hand, and, on the other hand the Security Council, (sc), the Social and Economic Council and the Trusteeship Council as organs of the United Nations, have the right to conclude treaties with states or groups of states. This modern approach is maintained by Judge Krylov in his further studies.

D. B. Levin and F. I. Kozhevnikov, in their various works, wholly or partly recognize the expanding nature of the subjects of contemporary international law and international relations.

Eugene E. Korovin is another among the early well-known Soviet international lawyers of high repute whose views on this vital matter cannot be left out un-examined. Korovin, a leading Soviet Prof. of international law, boldly attacks the concept of the state as the sole subject of international law. He holds the view that the second World War shook that traditional conception and he writes that the tremendous activity, heroism and self-sacrifice of the working classes, and their influence on the outcome of the war received further consolidation in the establishment of such powerful international associations of the working people as the World Trade Union Federation, which numbers 65 million members. Can it now — Korovin asks — be stated without giving offence either to fact or to common sense, that while any state, even a tiny one, which plays no role whatsoever in international relations is a subject of international law, an organization of an international character with 65 million members (wtru), is a 'quantité négligeable' for international law? If international law is to deal with realities and not with fiction, it must admit that the concept of subjects is not an absolute category existing out of space and time. There was a period for example, when the Roman Catholic international personality to any people that have not yet created their own independent state. There can, however, be little doubt that a measure of international personality is possessed by part- or semi-sovereign states or protectorates. In certain cases, moreover, the right of the individual states, cantons or component territories to conclude treaties on their own account for certain purposes has been recognized.

22. S. B. Krylov (1888-1958) is doubt recognized in the eyes of Soviet legal scholars as one of the greatest authorities in this field, who has made innovative contributions to the development of Soviet doctrine of international law during its creative years 1946-47. He served as the first Soviet judge at the ICJ from 1946-1952. Perhaps his wonderful legal career is best seen from his personalia. See svi. 1958, at pp. 482-483.

23. F. I. Kozhevnikov served as a Soviet judge at the ICJ from 1953-1961. Professor Kozhevnikov, apart from being an important executive member of the Editorial Board of the svil, has been the editor responsible for many international law textbooks used in Soviet law faculties and other legal institutions.

24. Professor D. B. Levin has been rightly described by Chris Osakwe (op. cit. at p. 504) as the most prolific writer of all Soviet international legal experts. At 60, in December 1967, he had published over 120 scientific works on various aspects of international law.

25. For his Hague Academy Lectures, see Hague Recueil des Cours, 1947, No. 70.

26. His position (Krylov's) on this question is very clear from a standard textbook of international law, 1946, in Russian under the responsible editorship of himself and V. N. Durdenevskii, and published in Moscow by the Juridical Publishers of the Ministry of Justice of the Union of Soviet Socialist Republics (usssr). Commenting on the same point in this book, the authors recognized the fact that it is possible to suppose that as a result of the declaration made in the Charter of the United Nations Organization on the defence 'of human rights and fundamental freedoms', there will be cases in future when an individual will directly appear before international organs. See V. N. Durdenevskii, and S. B. Krylov, Mezhdunarodnoe Pravo-Uchebnik, vipusk 1, 1946, at 112, paragraph 6. However, another Soviet jurist, V. U. Eugeniev, asserts that neither international organizations nor individuals are subjects of international law. He also denies
Church was a subject of international law, and a highly influential one.

From the above analysis of the Soviet doctrine on the subjects of international law, one can hardly say that there exists a generally accepted position on this question among Soviet international lawyers.

The Soviet international law experts are unanimous on the point that States are the main subjects of international law. On the other hand, they are not, as Professor Ushakov claims, in agreement on the international personality of physical persons or individuals. The major bone of contention is that while some authors regard only States as subjects of international law, as well as peoples and nations fighting for their liberation, others consider that some international (inter-state) organizations are also subjects of international law. Although the latter view prevails at the moment among many Soviet jurists, it is often expounded with insufficient clarity.

However, we agree with Professor Ushakov that the question of the subjects of international law is primarily a theoretical problem with a great practical significance. It is undoubtedly one of the major problems in the theory of international law and the theory of law in general. He says that according to the general theory of law, the bearers of rights and duties are called subjects of law. The term ‘subjects of law’ is used to designate both persons capable of becoming bearers of rights and duties and persons already participating in legal relations. Thus a subject of law is (a) a person participating or (b) a person capable of participating in legal relations.

The concept of subject of law is, in essence, identical to the concept of a subject of legal relations. A subject of legal relations is a necessary component, an indispensable element, of legal relations. Law is always someone’s law and a duty is always someone’s duty. It finally must be noted that contemporary Soviet doctrine on the subjects of international law was formulated under the impact of the world community after the second World War. The above discussions show that at least ‘dogmatism’ in the formulation and interpretation of norms of international law is slowly but surely giving way to ‘realism’ among Soviet international lawyers on this controversial question, as well as on other questions of international law.

3. CONCLUSION

Having now reviewed the diverse standpoints of selected legal authorities of both West and East on this important theoretical issue of the subjects of international law, we may remark that the sum total of the discussions so far has not greatly helped to formulate a concept of international law acceptable to them all. At the same time, the discussion has achieved some useful purpose; and it must be explained that the main object of the survey on this question is to produce not so much a new definition generally acceptable to Western and Eastern lawyers alike, as well as to (emerging) (young) international lawyers from the new nations of the world, but a restatement of the essential elements and characteristics of the issues involved.

Even among the founders of modern international law, such as Vitoria, Suarez and Grotius, to mention only three outstanding names, the solution of this problem has not been possible. Each of them proceeded in their different ways upon the hypothesis that ‘the individual is the ultimate unit of all law, international and municipal, in the double sense that the obligations of international law are ultimately addressed to him and that the development, the well-being and the dignity of the individual human being are a matter of direct concern to international law’.

‘Controversies among those who are not held together by a common bond of municipal law’ writes Grotius, ‘may arise among those who have not yet united to form a nation and those who belong to different nations, both private persons and kings’, such controversies are governed by the law of nations which he describes as ‘the law which is broader in scope than municipal law’.

30. See N. A. Ushakov, Subjects of Contemporary International Law, Stjil, 1964, pp. 61-75. Professor Ushakov is the present Soviet member of the United Nations International Law Commission and Head of the international law section of the Institute of State and Law of the Soviet Academy of Sciences.

31. The Soviet view on the legal personality of National Liberation Movements will be treated separately in a sort of general way later in this study.


33. Ibid., op. cit., at p. 72.
It therefore appears that it would be a difficult task to elaborate such a definition of international law as to include all the diversity of entities apart from the states which play a role in contemporary international relations. On the other hand, it would, in the opinion of this author, be impossible as a matter of reason and reality, to continue to maintain that states are the sole subjects of international law.

The developments in the substance of international law which have occurred in the first half of the twentieth century have so transformed the character and content of the international legal system that it can no longer be satisfactorily presented within the framework of the former classical concepts. It should be recognized that international law has outgrown the limitations of a system which has consisted essentially, or perhaps primarily, of rules governing the mutual relations of states. While the primary function of international law remains that of regulating the relations of states with one another, contemporary international law has become increasingly concerned with international organizations and institutions, the individual and various other international units of limited legal capacity.

If an entity claims to have international legal capacity, no rule of international law comes into play until the entity appears and asserts itself. Then the question whether it is entitled to do so is substantially the same as whether the entity has the international capacity which it claims to have. If the answer is in the affirmative and so recognized, it means that a series of acts performed by that entity in the field of international relations are legal acts, and it is admitted to have the capacity to perform them.

It is obvious that within the framework of any given legal system not all the subjects of that system will possess exactly the same characteristics. In its Advisory Opinion on Reparations for Injuries to UN Servants, giving juridical recognition to the international legal personality of such entities as the United Nations, the International Court of Justice affirmed this, when it said: 'The subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights . . .'  40

It is a mistake, therefore, to suppose that merely by describing an entity as a 'subject' one is formulating its capacities in law. Since the rules of law can alone determine who or what is competent to act, they may select different entities and endow them with different legal functions.

To be a subject of a system of law, or to be a legal person within the rules of that system implies the following essential elements:

First, a subject of law has duties, thereby incurring responsibility for any behaviour at variance with that prescribed by the legal system.

Second, a subject of law is capable of claiming the benefit of the rights conferred by the content of the law. This is more than being the mere beneficiary of a right, since a considerable number of rules may serve the interests of groups of individuals who do not individually have a direct legal claim to the benefits conferred by the particular rules.

Third, to the extent recognized by the legal system, a subject of law possesses the capacity to enter into contractual or other legal relations with other subjects of the system, 41 but the extent of such capacity may vary with the nature of the person or entity concerned.

Possessing these essential elements so enumerated is of great importance. But we must keep in mind also another vital consideration—that as soon as an entity has asserted itself in international life and has acquired an authority of its own—whether it did so autonomously (liberation movements, unrecognized states etc.) or by virtue of a transfer of authority by other entities—(international organizations—governmental and non-governmental); or the component members of a federation which are independent with regard to certain functions of government, but subordinate to higher authority with regard to others and can for many purposes enjoy the rights and owe duties regularly connected with international persons; or the Holy See—such an entity should be awarded the status of subject of international law. The content of this personality depends upon the way it functions in international society, but this does not take away the substantial element of personality itself, which is not vested in them by international law but by the facts of international life itself. In this sense, personality itself is not totally a legal concept as such but also a sociological notion from which legal consequences ensue. In the past, international law has behaved itself according to this truth, vide the position of the Holy See and the component parts of federal states to which we have devoted two chapters in order to illustrate our main thesis. However, before discussing these two items, we consider it desirable first to examine the notion of states as subjects of international law separately.

40. ICJ Reports, 1949, at p. 178.

2. The notion of states as subjects of international law

1. THE GENERAL NOTION

In theory, a state is a permanently organized political society which occupies a fixed territory. The terms 'state' and 'nation' are sometimes used interchangeably. In the nineteenth century the alternative term 'nation' was frequently used to describe a body of people more or less of the same race, religion, language and historical traditions. In that sense, it is clear that nation and state do not necessarily coincide. A state should not be regarded as co-terminous and identical with the whole community of persons living on its territory. It constitutes, rather, the highest degree of political organization in national society and comprises within itself (though it also transcends) a multitude of other institutions such as churches, foundations and corporations which a community establishes for securing different objectives. Nor should a state be confused with a nation: although in modern times many states are organized on a national basis. Yet a state can consist of more than one nation (Austria – Hungary).

After the third partition of Poland in 1795, that country ceased to be a state, in the sense of international law, although the Polish nation survived. Long before the unity of Italy was achieved in 1870, she was a 'nation'. The nationality problem as it was presented in the nineteenth century was the problem of how to let the notions of 'nation' and 'state' coincide.

Today, the spirit of ardent nationalism is sweeping the continents of Africa, Asia and Latin America. In this era, as before, confusion exists, and indeed increases, in the terminology connected with states, nations and peoples, as found in international treaties made by experts of the law. Further, the term 'state' is relative, for there may, physically and geographically, be a state within a state. There is also a tendency to identify the notion of state with that of nation, and vice-versa. International law is not, however, concerned with all the institutions which in common parlance are called states, but only with those whose governmental powers extend, at least to some extent, to the conduct of their external relations. Whether a state has such powers or not is a question which must be answered by examining its system of government and its international position.

The state can of course be represented as a natural association of persons bound together by bonds of a common race, language, religion and historical tradition. But this would be far truer of the nation. The essential thing concerning states as subjects of international law is to determine those elements by which the 'state' is distinguished from the nation and derives its legal character. What elements mark off a state as having separate and independent legal personality, on the basis of which it claims admission to the membership of an international community? The political scientists represent the state as an abstract institution.

According to Chapter 2 Article 4, para. 1 of the United Nations Charter, membership of the organization is open to all 'peace-loving states' which accept and are 'able and willing to carry out' the obligations of the Charter. The Charter does not define what constitutes a 'state'. The only extra qualification is the provision in paragraph 2 of Art. 4, which reads: 'The admission of any such state to membership in the United Nations will be effected by a decision of the General As-

2. Article 1 of the Kellogg Pact: 'The High Contracting Parties... in the name of their respective peoples...' The term 'peoples' should mean either populations of a country, or a nation which is not politically organized, a social group without its own government, or a social group living under the government of a people which does not belong to that social group. The United Nations Charter starts with, 'We the Peoples of the United Nations...'. This wording was probably meant to portray and stress the direct interest and the role of the broad masses of the populations of the States which signed the charter, during the creation of the organization. Chapter XIV of the Charter dealing with the International Court of Justice uses only the term 'State' which is applied also in Art. 107, in all four paragraphs of Art. 110 and in Art. 111/1. The statute of the Court which provides that 'only States may be parties in cases before the court' (Art. 34/1) speaks only about states and not about nations or peoples.

3. For example, the Constitutional Principality of Monaco; the Holy See.

4. Few States in the real sense possess the characteristics which the above definition suggests.

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1. As in the title 'United Nations' which in fact is a league or an organization of states.
sembly upon the recommendation of the Security Council. It can be seen that this provision does not offer any clarification as to what constitutes a state. In our view, the term ‘peace-loving’, as applied to states seeking membership in the United Nations, has political rather than legal connotations; and even so it seems that often an applicant is judged in practice not on the basis of its being ‘peace-loving’ but on the basis of political affiliations.

It is clear that a majority of States which are members of the United Nations are organized groups that have succeeded in maintaining a separate legal personality by demonstrated effective political power. Others have been recognized as political units by their former colonial administrations and are accepted as such by the international community. There is hardly even any enquiry into the four theoretical elements of race, language, religion and traditions. However, it is doubtful whether these elements are satisfactorily prevalent within a given state. It is more of a coincidence if at all they occur. Of more importance are the so-called legal criteria of statehood in international law as enumerated, for instance, in the Montevideo Convention of 1933, on the Rights and Duties of States. From a legal point of view, these serve our purpose more than the socio-political elements, although they are not to be discarded entirely as unimportant.

In Article 1 of the Montevideo Convention it is laid down that a state as a subject of international law should possess a permanent population, a defined territory, a government and the capacity to enter into relations with other States. It is clear that the above qualities are present in a sovereign state in which there is one-central political authority, and where the government represents the state internally and externally.

It must be pointed out, however, that states acting on the international plane, may assume many different constitutional and political forms. The examination of these different forms in relation to the place of the states concerned as subjects of international law and their power to make agreements is of fundamental interest. It is important to examine further those essential characteristics which a state must possess to qualify it as a person in international law.

2. THE SOVEREIGN STATE AS A SUBJECT OF INTERNATIONAL LAW

The problem of sovereignty of states occurs in all fields of international law. This is for the simple reason that sovereignty constitutes the fundamental basis upon which the whole structure of international law as it stands at present is built. It is interwoven with the problem of the equality of states, since there is no organic bond between sovereignty and equality in the practice of international law. The problem of the subjects of international law is closely linked with that of sovereignty.

Sovereignty is often considered to be the essence of the state, at least from the point of view of law. The international community exists as one in which all the sovereign states are legal persons on the basis of the principle of sovereign equality. The nature of this community does not allow the occupation of a superior position juridically by any one state so as to regulate all international relationships. Dominance, if it exists, is de facto not de jure; and even so, no state today could afford to do so without cooperation with other states. The principle of sovereignty is, therefore, of the most vital importance in the relationship between the subjects of international law through their treaty-making capacities.

It may be observed that those who derive the concept of subjects of

6. These matters will be looked into in the sections that follow, particularly to what degree these elements are indispensable and if all of them must be existent in other subjects of international law before the latter can be accepted as such.

7. For our research, a detailed study of the doctrine of ‘sovereignty’ is not envisaged. Our examination of those aspects of sovereignty that may have a direct bearing on the subject of the study is based on three considerations: (i) the recognition that the principle of state sovereignty is a corner-stone so to say, on which the whole structure of international law rests, (ii) other principles of international law seem to revolve around this principle, (iii) the principle of sovereignty can be used as a good starting point for the consideration of the legal status and treaty-making powers of subjects of international law other than the state. Wherever possible and necessary in our present study, any question of sovereignty will be looked into summarily. For special studies on ‘sovereignty’, see: Thomas Hobbes, Leviathan, Chapter xviii, J. L. Brierly, The Law of Nations; J. L. Walter Jones, Historical Introduction to the Theory of Law, Oxford, 1940, pp. 79-97, about the theory of sovereignty: Jan Tomko, The Domestic Jurisdiction of States and the UNO, p. 9-47.

5. Montevideo Convention on Rights and Duties of States signed at Montevideo on December 26, 1933. The text of the convention is made up of versions in the Spanish, English, Portuguese and French languages. According to the editor’s note this convention is based upon a draft elaborated by the International Commission of American Jurists at Rio de Janeiro in 1927 meeting (Proceedings) iv, p. 19.
international law mainly from sovereignty seem to have adopted a correct starting-point which can be used to advantage for examining the question of other subjects of international law, so long as it is borne in mind that the extreme view of the absolute sovereignty of states as the only subjects of international law would not correspond with the admitted fact that other such subjects do exist. Therefore, the concept of sovereignty may never function as a bar against the recognition of the legal personality of non-state entities.

Thomas Hobbes in his famous work 'Leviathan', published in 1651, held the view that sovereignty was an essential principle of order. Hobbes believed that men need for their security, a common power to keep them in awe and to direct their actions to the common benefit. For him the person or body in whom this power resides, however it may be acquired, is the sovereign. Law, continues Hobbes, neither makes the sovereign nor limits its authority. It is might that makes the sovereign. Law is merely whatever he commands. Moreover, since the power that is the strongest clearly cannot be limited by anything outside itself, it follows that sovereignty must be absolute and illimitable: 'it appeareth plainly that the sovereign power . . . is as great as possibly men can be imagined to make it.' In our opinion, this would in modern times be rated as totalitarianism pure and simple. To identify sovereignty with might instead of legal right is to remove it from the sphere of jurisprudence where it now properly belongs, and to transfer it to that of politics, where it can only be a source of error.

Hobbes does not recognize the right of existence of any community as a nation, where such a nation cannot maintain its independence by its own forces against attack from outside. This belief was, in our opinion, reactionary even at that date. It amounts to the contention that only strong nations or perhaps peoples can have the right to be states.

A number of great theorists realized that if the concept of sovereignty in the sense of absolute freedom of action in international relations, and absolute power within the state, were applied consistently, the development and even the existence of international law as a legal discipline would be impossible.

According to Jean Bodin, for instance, the state is an entity in which the government is, as he calls it, a recta or a legítima gubernatio, that is to say, one in which the highest power, however strong and unified is still neither arbitrary nor irresponsible, but derived from, and defined by, a law which is superior to itself. To him, sovereignty (so regarded) is an essential principle of internal political order; and it was Bodin who, in 1576, in his De Republica, first explicitly formulated the doctrine of sovereignty. Subsequently, sovereignty became the central problem in the study of both the theory of the modern state and the theory of international law. It seems likely that Bodin's doctrine contains all the elements of the modern concept of the sovereignty of states in international law. He affirms that:

1. sovereign is he who has the supreme power over the territory and its inhabitants;
2. this power is under no restriction by any law or rule made by any other power on earth;
3. this power is, however, restrained by
   a. the law of God (Divine law);
   b. natural law;
   c. the ruler's own obligations towards other sovereigns or towards individuals, being nationals of his state or foreigners;
   d. the principle of pacta sunt servanda.
4. The Divine Law and the Law of Nature, which are supranational laws since they are objective provisions independent of the human will, are, in Bodin's view, superior to internal law, thus limiting the State's sovereignty to a greater extent than international law created by international agreements. This supranational law is of a permanent nature and even a formal agreement between sovereigns may not change it. It is what would today be called jus cogens.

Hugo Grotius, in his system of international law, asserts the existence of a body of rules and principles, which are binding on states and individuals according to natural law. He defines natural law as the dictate of right reason (dictate rectae rationalis); it can be disclosed by the work of the human brain, it can be ascertained by man, but never created by him. His doctrine concerning sovereignty is similar to Bodin's. He subordinates sovereignty to the rule of natural law in its universal, perpetual and immutable character. Grotius recognizes the right of independent states to war against other states. At the same time

9. Ibid.
10. See Max A. Shepard, 'Sovereignty at the Crossroads: A Study of Bodin,' in: the Pol. Science Quart., Vol. XIV (1930). The importance of Bodin's study lay more in the fact that he took the idea of sovereign power out of the limbo of theology in which the theory of divine right left it. By so doing it led both to an analysis of sovereignty and its inclusion in constitutional theory.
he strongly advises ‘three methods by which independent nations should settle their quarrels without recourse to the sword.’ He clearly recommends compromise in the case of those who have no common judge. To the Christian powers, he recommends general congresses for the adjustment of their various rights. For the Christian Kings and states, he favours the method of the balance of power and of settling peacefully their mutual pretensions.

We can say that Grotius’ importance in the history of jurisprudence rests not upon his theory of state or upon anything that he had to say about constitutional law, but upon his conception of a law regulating the relations between sovereign states. His contribution to the special subject of international law is beyond the limits of a history of political theory. The outstanding success of Grotius’ works which spread quickly over the whole of Europe, can be attributed in part to awakening realization in his time that war without limits in the last resort defeats itself; and in part to Grotius’ willingness to consider the sovereign state as the basic unit of international law.

From the history of the existence of states, it can be seen that the bearer of sovereignty (kings, governments) etc. have shown this awareness of being, within the state, the supreme power over its territory and its inhabitants. This power is independent of any other state. At least from the end of the middle ages, with the disappearance of the concept of the spiritual unity of mankind, the sovereign power of the state is independent from any other temporal power. But also before the middle ages in ancient Greece and Rome, independence had its legal definition and legal consequences. A number of historians of law agree that until the battle of Chaeronea (388 B.C.), Greece consisted of a number of ‘independent and sovereign’ cities, jealous of each others’ advancement in power and dominion, although this sovereignty and independence seemed at times to be modified, in greater or lesser measure, by the formation of leagues and combinations to repel the non-Hellenic invaders.

Belief in the doctrine of absolute sovereignty was very pronounced amongst the rulers of the 16th and 17th centuries. Writers of that time favoured the view that sovereigns had absolute power inside the state, and absolute freedom of conduct in their relationships with one another. In the 19th and 20th centuries in Germany, an important proportion of scholars, by giving the aggressive policy of the state their doctrinal support, created and fortified the German nationalist theory of sovereignty, which played a sinister role in international relations until after the second World War.

Georg Wilhelm Hegel (1770-1831) may be considered as a great philosopher who contributed in the highest degree to the German doctrine of sovereignty. He taught that absolute power in the world is incorporated in the state, which is a sovereign entity, independent of all other states. The law of nations is real law only if it emanates from treaties as an expression of the will of states, the validity of a treaty always depends on the will of the state. This view of course cancels itself out, for it means that a state is bound by a treaty which it concluded with another state only for a period of time depending on the will of the state. Power is for Hegel a symbol of law. The state is always free to have recourse to war, as it pleases, since war is ‘the highest manifestation of sovereignty’.

A doctrine of sovereignty which has obtained greater currency is the so called Vattel’s doctrine, which maintains that international law is a body of rules governing the intercourse of independent states, and that sovereignty means the supreme power of the state inside its territory and its independence of any external authority. Sometimes this is called the classical or traditional doctrine of international law.

With regard to the source of sovereignty, as distinct from its extension and amount, the 17th century concept of the ‘divine right of kings’ was confronted with a radical challenge, – for with the coming of constitutional government, Locke, and after him Rousseau, propounded the theory that the people as a whole was the sovereign, and in the 18th century this became the doctrine which was held to justify the American and French Revolutions.

12. Ibid.
13. Only ignorance of the continuity in the development of the concept of international law can explain the statement that Grotius is the father of contemporary international law. Nevertheless, he can claim to be a systematic expounder of it, on a scale not previously reached.
14. There are two concepts which are often used alternatively in relation to sovereignty, namely independence and self-determination. Although related they should be kept separate. These concepts will be looked into later.
As a fighting slogan, as a protest against arbitrary government and a
demand that government should serve the interests of the governed and
not only of the governors, the doctrine of sovereignty as being resident
in the people has had beneficial results. Still another modern develop-
ment of the theory of sovereignty lies in renouncing the attempt to
locate absolute power in any specific person or body within the state,
and in ascribing it to the state itself regarded as a juristic person. The
unqualified 'right to make war' which was considered an attribute of
sovereignty in the 19th century has happily ceased to figure as such.
Many jurists have urged that the term 'sovereignty' should be discarded,
as being out of harmony with the actual facts of modern international
intercourse. 19

3. QUALIFIED SOVEREIGNTY

It remains to give some consideration to the case of a number of states,
which, while sovereign, are nevertheless subject to certain restrictions
upon their freedom of conduct voluntarily assumed by them and not
common to other states. These cases are comparatively recent and are
of importance as marking an element in the development of interna-
tional law. 20

We have, up to this point, used the notions independence and sov-
ereignty without attempting to differentiate them; but it now seems
desirable to do so by way of concluding this section. Independence and
sovereignty can be seen as external and internal aspects of the state.
It may be right to say that independence is the external and inter-
national characteristic of a fully sovereign state. It describes legally
the right of the state generally to conduct its own affairs without direc-
tion, control or interference by any other authority. According to Judge
Anzilotti, independence is the political and legal autonomy of the state,
in its not being subject, except with its free consent, to any external
direction, interference or control by any like authority. 21

'Independence in regard to a portion of the globe is the right to exercise therein,
to the exclusion of any other State, the functions of a State... Territorial sov-
ereignty... serves to divide between nations the space upon which human
activities are employed, in order to assure them (th)at all points the minimum
protection of which international law is the guardian.' 22

Statehood is however, quite compatible with partial independence;
for the external independence of the state has nothing to do with
whether or how internal sovereignty is distributed or controlled within
it. It is clear that a country may have statehood without in actual fact
being independent. Countries in the British Commonwealth in the
period before formal political independence, such as Ghana before
1957, Nigeria before 1960, to mention only two -- though they had int-
ernal self-government -- were still under the United Kingdom Govern-
ment as regards the conduct of their external relations. While they had
their legislature and a cabinet of ministers responsible to it, they had no
independent status externally, and consequently were not states for
international purposes.” 23

Except under the peace settlements of Vienna in 1815 and Paris in
1919 and the Congress of Berlin in 1878, there have been few cases
during the last one hundred and fifty years in which the creation of
new states has come about as a result of collective action. 24

Independence may be attained by any of three other processes. The
first is the transfer of sovereign power by the metropolitan power to a
dependent territory. Examples of this are the separation of Iceland
from Denmark in 1928, and that of Brazil from Portugal in 1825. The
second process, where the dependent territory is not part of the meta-
ropolitan territory, is by unilateral declaration of independence, an
example of which is the case of Rhodesia. The third process, where
the territory is not 'dependent' but part of the same entity, is by an act of
secession as was the case when Norway seceded from Sweden in 1905,

21. Judge Anzilotti in Austro-German Customs Union Case (1931), PCIJ,
Ser. A/B 41.
22. Island of Palmas Arbitral Award (1928/2 RIAA 839).
23. Perhaps, the term 'autonomous' might be more appropriate for their status
then. Certainly, they were no sovereign states as such in the ordinary sense of
that concept.
24. See for example, on Greece (1890) British and Foreign State Papers
(BFSP); XVII, p. 191ff; on Belgium (1831); id. XVII, 645, 723ff; Serbia and
Rumana (1878), id. 1XXXI, 1136, 1186ff.
Biafra from Nigeria in May 1967, or the most recent — the secession of Bangladesh from Pakistan. 25

The concept of independence is often regarded as the normal characteristic of States as subjects of international law. A number of jurists have stressed independence as the decisive criterion of statehood. But this goes too far. If an entity has its own organs, such as law courts, legal system, and law of nationality, then one could say that there is a _prima facie_ case of statehood. Sovereignty on the other hand is power, in the form of legitimised authority over all persons and things within a defined area of jurisdiction, vested in certain bodies or persons who in the exercise of their authority are not subject to any other power. This area is domestic, and the principle of domestic jurisdiction is that the State shall be master in its own house.

It must be observed that, within the framework of international law, a state may by voluntary action impose or accept limits upon its exercise of sovereignty, though it will be difficult to determine how far such a limitation can be accepted without loss of independence.

The PCU addressed itself to this problem on more than one occasion. In the Wimbledon Case 26 it distinguished restrictions upon sovereignty from its abandonment — i.e., loss of independence.

The Court declined:

'...to see, in the conclusion of a treaty, by which a State undertakes to perform or refrain from performing a particular act, an abandonment of its sovereignty. No doubt any convention creating an obligation of this kind places a restriction upon the exercise of the sovereign rights of the State in the sense that it requires them to be exercised in a certain way. But the right of entering into international engagements is an attribute of State sovereignty.'

By now it has become only too clear that absolute sovereignty does

25. The last two recent cases of secession (Biafra and Bangladesh) will be treated in detail later.

26. In the case of the Wimbledon in 1923, the PCU had to decide the question whether the right of passage through the Kiel Canal was an improper limitation upon the exercise by Germany of sovereignty over its territory. Article 380 of the Treaty of Versailles provided that there should be a right of free passage for all vessels through the Kiel Canal in peace and war. The Wimbledon was a vessel carrying arms to Polish forces engaging in fighting the Russians. Germany argued that to require her to let the vessel pass through the Kiel Canal was to compromise her right as an independent and sovereign state to observe neutrality in face of the hostilities then in progress. The Court rejected this argument in the light of the clear provisions of Article 380 of the Treaty of Versailles which was a treaty of obligation accepted by Germany.

27. (1923) PCU, Ser. A.1., p. 25.
Part B
3. The international personality of states which are members of a federation

1. A FEW SHORT PRELIMINARY REMARKS AND DEFINITION OF TERMS

In the framework of our study, we have insisted that an entity should be granted legal personality in international law once it is satisfied that such an entity has acquired the necessary authority to carry out its functions as prescribed by international life. We have explained this position rather elaborately in the preceding two chapters. We have dismissed the concept of absolute sovereignty as undesirable to form a correct premise from which to determine who should be clothed with international legal personality and participate in international relations if we still wish to talk of an international law that should be aware of what is going on in international life. It is our view that any other type of international law outside the type we have in mind, will never go further than ordering and regulating yesterday's society, as it has done already too long to its own and the world's detriment.

We must therefore take as a basis for our study that the international world community is not a static phenomenon. It is in constant process of development blended with various changes. Therefore the law which should guide and regulate the needs of life in this international community ought not to be obsolete and should never be an impediment to the functioning of international life, but, on the other hand, it should be the vehicle, so to speak, through which international relations are canalized in an orderly and progressive manner. Perhaps, it is necessary here to stress the view which we have expressed earlier - that the substantial element of personality itself is not vested by international law but by the facts of international life. The content of this personality is not vested by international law but by the facts of international life. The content of this personality is another matter. In our opinion, it should depend upon the way an entity conducts its affairs in international society.

In this chapter and the one after, we intend to illustrate our main
train of thought by discussing the international personality of states which are members of a federal union, and then, that of the Holy See.

Our investigation on the legal personality of states which are members of a federal union is divided into three paragraphs, and aims to look into three questions—namely, (1) the theoretical aspects of the international personality of the component members of a federation; (2) a brief survey of the relevant characteristics of a number of federal constitutions with a view to establishing how they stand as regards the degree of separate participation in international relations of their member-states and (3) an examination of the treaty-making capacity of states members of a federation—based on an analysis of state practice.

Definitions of terms:
1. The terms ‘Federal State’ and ‘Federal Union’ will be used interchangeably and in a broad sense to cover all constitutional subdivisions of a state and component entities of a constitutional union or association.
2. ‘Treaty’ will be used in the widest possible sense as covering all international agreements between states and other subjects of international law, in accordance with the original concept of the International Law Commission, Draft Articles on the Law of Treaties, ILC YB. at 161-162 (1962/11).
3. ‘Constitution’ will be used in its formal sense, of a written one. Such a constitution makes it easier for a foreign state to determine whether the prospective other party possesses a capacity to conclude the treaty or not.
4. It should be mentioned that wherever necessary, a distinction will be made between the nature of a federation formed between states which were already sovereign and independent, for example, the United States of America or Switzerland, and colonial federations formed out of self-governing colonies—for example, federations of Australia, Canada, India, Nigeria, Rhodesia and Nyasaland and the West Indies, etc.

2. THE THEORETICAL ASPECTS OF THE INTERNATIONAL PERSONALITY OF COMPONENT PARTS OF A FEDERATION

We have pointed out that in the international system, the principal, though not the only subjects of international law are the sovereign independent states. The international community is not a stationary phenomenon devoid of development. It changes just like every other community. The laws regulating activities within it also continue to develop. As the community continues to grow day by day, so the problems facing it get more and more complicated. This persistent development in various fields renders it necessary to seek the solution of many international problems outside the exclusive field of the community of sovereign and independent states. It became essential to equip this community with additional machinery in order to regulate its multifarious and difficult tasks. Thus, at various times in history, states resorted to a number of different constitutional and political forms of unions in order to achieve their political and economic purposes. Most of those have gradually disappeared from the international scene. This is perhaps, because they failed to give the expected satisfaction to those who originally organized them. On the other hand, the explanation may also be that the conditions which called for such arrangements ceased to exist. Among all the types of unions, it seems that the Federal Union of States is the only one that has endured up to the present time, the difficulties and shortcomings surrounding it notwithstanding.

It is theoretically still an unresolved issue whether international law as such accords any measure of rights to the individual participating states of a federation to take part directly in international relations, as subjects of that law. There seem to be two main views on the problem. The traditionalists hold firmly to the position that it is only the collective federal state as such which is the subject of international law; therefore, states which are members of a federation are not themselves states in the sense of international law and cannot regard themselves or be regarded as possessing such rights. The other point of view is maintained by those who, while refusing to recognize component states of a federation as having full personality in international law, never-

1. We shall not therefore discuss here the question of such unions as ‘states in real union’ or ‘states in personal union’. While recognizing their usefulness in their time, they are undoubtedly obsolete now, and are of little practical importance. The same may be said of confederated states. Presently, there is no union of confederated states, unless that proposed between Egypt, Syria and Libya is to be regarded as one. The last confederation in existence—the Republic of Central America, which comprised the three fully sovereign States of Honduras, Nicaragua and San-Salvador, was established in 1895 and was dissolved three years later, in 1898. Notable historic confederations are those of the Netherlands from 1579-1795; the United States of America from 1776 to 1787; Germany from 1815 to 1866; Switzerland from 1291-1798 and from 1815-1848; and the confederation of the Rhine from 1806 to 1815.
theless consider that they may enjoy a measure of international personality, in so far as the federal constitutions of such states permit. Many other complex theories have been advanced in an effort to support one or the other of the above-named positions, but we do not intend to describe all these doctrines and theories or what has been said by the various protagonists to support or disapprove the various points of view. We shall restrict ourselves to a few that are representative of certain distinctive contributions to the main body of thought. It is our conviction that a more flexible approach to the controversy, taking cognizance of actual state practice in contemporary international life, may give the most reliable answer. Our specific aim, therefore, is to seek to establish to what extent doctrinal and theoretical views on this question agree with what obtains in practice.

We have set ourselves the strictly juristic task of describing the international legal status of states which are component members of a federation. Are they states within the meaning of international law? How far in the past have they participated in international relations independently of the federal authority? In order to find this out, it becomes important and interesting to devote some space to inquire into the treaty-practices of federal States with special reference to their component parts. This area has been chosen both because treaties lie at the centre of international legal relations and because the capacity to enter treaty relations with other subjects of international law is a very important attribute of personality in international law. This will be looked into in paragraph 3 of the present section. In this way, it may become easier to see how far federal constitutions which grant the right of participation in international relations to their component units, do so as a mere formality rather than as a reality as a result of the needs of genuine necessity of life. In other words, are such formal constitutional provisions in line with what takes place in the practical life of modern times. It is to these questions that we now turn.

It is not necessary for our purposes to devote time to an exhaustive inquiry into the definition of what a federal state is. It will suffice to say that a federal state is a union of several states which has organs of its own and is invested with certain powers, not only over the member states, but also over their citizens. The union is sometimes based on an international treaty between the component states followed by a subsequently accepted constitution of the federal state, sometimes a constitution only will do.

A federation is to be distinguished from a confederation where a number of states retaining and continuing to retain their political personality intact, combine without surrendering to the 'federal' union in which they all associate any rights whatever directly over their subjects or, as a rule, in regard to their own internal self-government. Thus, an important characteristic which distinguishes it from a confederated state, is that its central federal organs have certain direct powers over the citizens of both their own state and those of the component states.

Looking into these elements more closely, it becomes evident that when a federal state is formed out of sovereign states by means of an international treaty, such states agree under the treaty to transfer control over certain functions of government to a central federal authority. This central federal authority from then onwards is alone competent to deal with these particular transferred functions. At the same time, the component states retain their sovereignty in all other matters except those entrusted in the care of the central federal authority. The union itself is based on a subsequently accepted constitution, but what has just been said is also true for those cases where there is no treaty but only a constitution establishing a division of competences, whereby the component states retain their competences in all other matters except those entrusted to the federal authority. Here it needs to be pointed out that not only is the division of powers between the federation and the states laid down by a constitution, it is important that this constitution be a written one. In case of controversy between the members of the federation concerning any of the provisions of the constitution, the decision lies with a federal court of law.

The foregoing description offers a good starting-point for our discussions but although it reflects in the main the basic principles of the concept of federations formed out of already sovereign and independent states, it fails to accommodate the notion of federations formed within and out of already self-contained colonies, for in this case there is not a coalescence of previously separate states, but the splitting up of an existing unit into separate parts which however remain related under a federal system.

In addition it is necessary to recognize that if any federation is to prove satisfactory and to last, certain political conditions must be

They certainly cannot be full subjects of international law with all the rights and duties regularly connected with international personality. Their position, if any, within this circle is overshadowed by their federal state, they are part-sovereign states, and are consequently, international persons for some purpose only. If, of course, the constitution of a federal state confers completely on the central federal government the external representation of its member-states, so that, so far as international relations are concerned, the member-states do not make an appearance at all, no difficulty arises as regards the legal position internationally. The member-states remain autonomous, but only with regard to internal affairs. It will certainly be a fact that they are not international persons at all so long as all their external sovereignty is absorbed by the federal state.

Perhaps it will be useful at this juncture, while still examining the issue of the degree of statehood of states which are members of a federation, to refer to the conclusions made by an eminent British jurist and Judge of the International Court of Justice, Sir Gerald Fitzmaurice on the basis of the pronouncements of the International Court of Justice in the Injuries case, on the question of the international personality of international organizations, and in the Morocco case. Even though his conclusions relate specifically in the first case to the international personality of international organizations and in the second to the position of protected states, nevertheless they can by analogy, be said to have thrown some light on the question of the international personality of states which are members of a federation, and in fact, on the whole question of the subjects of international law.

From the Court's pronouncements, Sir Fitzmaurice came to the conclusion that the Court can be regarded as having affirmed the general propositions:

1. that all states are international persons; but not all international persons consist of states;
2. that there are entities which are not fully independent sovereign states but which are nevertheless states, so that statehood may be possessed by not fully sovereign entities — that in fact, statehood is an attribute of any territorial entity which enjoys some real degree of sovereignty in the international field.


Under the heading of what he described as ‘the hall-mark of international statehood’, Sir Gerald considers that ‘the essential factor that distinguishes international states, even semi-sovereign or Protected States, even States which have placed the whole conduct of their foreign relations in the hands of another State’ – from entities that are neither States nor international persons – ‘is not the mere fact that these latter entities are not independent, but the fact that they lack that capacity to enter into treaty or other international relationships which is possessed by all international persons, including international organizations (see the Opinion of the Court in the Injuries case) and which all international States possess, whether these are fully or only semi-sovereign, and whether the relationship is entered into directly or, through the agency of a third State having the conduct, in part or in whole, of the external relations of a Protected State’. 8

We share the views expressed in Sir Gerald’s statements on the basic principles underlying international statehood in general. However, he went on to deny that, normally, international statehood could be possessed by the component states of a federation, which meant in effect, denying them international personality. Yet, if it is agreed that treaty-making capacity constitutes the ‘hall-mark’ of an entity qualifying as an international person under international law – as Sir Gerald thought – the conclusion would be that states which are members of a federal union can possess separate international personality if they are invested with that capacity by the federal constitution.

If the Court (icj) in the Morocco case, affirmed the principle that protected or semi-sovereign states nevertheless have or retain international personality – are international persons, although their position within the international community, and their legal relationships to other states (or international persons not being states) is governed by special considerations, 9 it seems that the Court would not in principle have denied the possibility of such right to states members of a federation. The requisite personality in an international sense would be seen to exist if the entity claiming it had in fact entered into separate association or relationship with other members of the international society, for example, by treaty which, even if concluded by the federal government, could mark the existence of a self-contained relationship between itself and the other contracting party, even if, in case of violation by the component state, the federal state was held to be jointly responsible with it.

It is the possession and enjoyment of this capacity, with or without restriction, which distinguishes the state of international law from the large number of political entities also given that name, and yet which do not appear to be endowed with such a capacity. 10

As concerns the federal state itself, it is of course an international person, with all the rights and duties of a sovereign state in international law. 11 It is a sovereign state and, as such, is in its relations with other states and subjects of international law, bound by the rules of international law. Express assent to those rules is not required; from the day the federation acquires the status of an international person, it is subject to the law regulating the conduct of states in international intercourse.

To go into the theory of whether sovereignty is divisible is not now necessary, as this has been considered earlier. 12 Suffice it therefore, to re-emphasize that internally there is a division of sovereignty between the federal state on the one hand and the component member-states on the other.

3. CONSTITUTIONAL REVIEW: A BRIEF SURVEY OF THE CONSTITUTIONAL STIPULATIONS OF A NUMBER OF FEDERAL STATES, WITH AN AIM OF ESTABLISHING THEIR STAND ON THE ISSUE OF PARTICIPATION IN INTERNATIONAL RELATIONS BY THEIR MEMBER-STATES

After the foregoing theoretical discussion of the international legal personality of states which are members of a federation, we can proceed to review the relevant portions of specific federal constitutions and see how far they still correspond to, or to what extent they have rendered out of date our existing train of thought. For this purpose, we choose the constitutions of the Federal Republic of Germany, the Union of Soviet Socialist Republics, the Federation of Switzerland and the United States of America, and would like to treat them in that order.

The Federal Republic of Germany

Under the German Constitution as it existed before the First World

12. See, the section on The sovereign State as a Subject of International Law.
War, the member-states retained their competence to send and receive diplomatic envoys, not only in intercourse with one another but also with foreign states. Article 32 of the Constitution of the Republic of Germany, 1949, provides that in so far as the member-states are competent to legislate, they may, with the approval of the Federal Government, conclude treaties with foreign states. In Germany as well as in Switzerland, the member-states of these two countries have not only the right to conclude treaties between themselves without the consent of the Federal Central Authority, but they also retain a right to conclude treaties with foreign states on matters of common interest between them, the exception being that such a treaty should not be of a political nature.

The Union of Soviet Socialist Republics

The member-states of the Soviet Socialist Republics (USSR) existed as separate sovereign states until December 30, 1922, when the Union was legally formalised by the signing of the Union Treaty between the Russian Soviet Federative Socialist Republic, the Ukrainian Soviet Socialist Republic, the Byelorussian Soviet Socialist Republic and the three republics of the Transcaucasian Federation. In subsequent years nine more republics acceded to the treaty with the same rights and obligations as the original members.

In May 1945, the Republics of Ukraine and Byelorussia were separately invited to the San Francisco Conference. This was in accordance with the Yalta Conference agreement of February 1945.

13. Article 45 of the Weimar Constitutions of August 14, 1919. According to this article, 'The President of the Federation represents the Federation in its international relations. He concludes alliances and other treaties with foreign powers in the name of the Federation. He accredits and receives foreign Ambassadors. Declaration of war and conclusion of peace are effected by federal law. Alliances and such treaties with foreign states as refer to matters of federal legislation require the consent of the Reichstag'. Under Article 78, the administration of the relations with foreign States is the business of the Federation alone, but Bavaria was allowed to maintain intercourse with the Holy See. Oppenheimer, The Constitution of the German Republic (1923), p. 28.


16. The Yalta Conference took place in February 1945, between the three heads of States — of USA, USSR and Great Britain. The Conference is of great international significance. Its main task was the definition of all the principles under which the post-war peace was to be built; and particularly the position of post-war

Although both these countries are constituent republics of the Union of Soviet Socialist Republics, they were admitted as separate original members of the United Nations. Possibly in anticipation of or preparation for this, the Soviet Union had on February 1, 1944, adopted an amendment to its constitution by virtue of which each republic of the Union acquired the right to enter into direct relations with states, to conclude agreements and exchange diplomatic representatives with them. Article 13 of its present constitution provides that 'the Union of Soviet Socialist Republics is a federal state formed on the basis of voluntary union of equal Soviet Socialist Republics'. The Soviet Union Republics are sometimes referred to as a special type of federation with features of a confederation.

Article 18 (a) permits each Union Republic to enter into direct relations with foreign states and to conclude international agreements with them and exchange diplomatic and consular representatives too and Article 18 (b) provides that, 'Each Union Republic has its own Republics of Authority'. In the same manner, Article 60 (a) stipulates that 'The Supreme Soviet of a Union Republic decides upon the representation of the Union Republic in its international relations'. The issue of the international personality of the member-states of the Union of Soviet Socialist Republics remains controversial. Some writers deny completely the international personality of the Union Republics and others question strongly the degree of its federalism. Thus, Professor Rousseau, for example, writes that, 'the structure of the USSR remains very centralized and the federalism there is nothing but a facade'. Others think that the USSR is neither a confederation nor a federation but merely a unitary state. The question of international personality of the Union Republics of the USSR has always aroused wide interest among jurists of both East and West alike. Much effort has been expended in discussing this issue among Soviet international lawyers themselves. It may be fair to look briefly into their reasoning.

It seems that the Soviet legal science is unanimous in the opinion that the Union Republics are full subjects of international law.

Germany. It was here that the decision to occupy Germany by the armies of USA, USSR and Great Britain was taken.

17. Law of Granting to Union Republics of Authority in the Sphere of Foreign Relations; see Dobrin in Grotius Society, 30 (1944), pp. 260-283, and Aufricht in AJIL, 43 (1949), pp. 695-698.

V. M. Koretsky, I. I. Lukashuk, V. I. Losovski, M. V. Inovski, M. E. Korostarenko and A. N. Vinsnik to mention a few among the leading Soviet international jurists, agree that the Union Republics of the USSR are full subjects of international law, whose sovereignty is not limited. In furtherance of the same point of view, Prof. P. E. Nedbilo and V. A. Vasilenko vigorously argued that the Soviet Republics did not cease to exist as sovereign states after unifying into USSR. This, they continue to explain, is recorded and guaranteed by the constitution of the USSR, based on the fundamental principles of the Treaty of Union in 1922, and the constitutions of the Union Republics. Their articles record all the main attributes and elements of a sovereign state; territory, population, supreme organs of power and administration of the republic, budget, etc. Further, they argue that, 'Unity of sovereignty of the Union State and the Republics exists in the Soviet Federation in the form of the USSR. The USSR possesses sovereignty because it is an expression of the sovereignty of the Union Republics. The sovereignty of the USSR is a result of the sovereign will of the republics; they have created it and its supreme power by free voluntary and sovereign agreement. The sovereignty of the USSR, consequently, is based on the sovereignty of the Union Republics; without the sovereign Republics, there would not be a sovereign Union of Soviet Socialist Republics, either.'

We are not here concerned with the sovereignty of states which are members of a federation as such, but Prof. Nedbilo and Vasilenko’s arguments make it necessary to offer a few remarks. To argue that the Soviet Union Republics did not cease to exist as fully sovereign states after unifying into the USSR is begging the question. Granted that the Union Republics before joining to form the USSR under the Union Treaty of 1922 were fully sovereign and independent states, which, according to Nedbilo and Vasilenko freely and voluntarily agreed to give up part of their powers to make the formation of this Union possible, it is in our view contradictory to persist in maintaining that the Union Republics even after that still possess full sovereign status, on the basis of which they can claim full international personality. It may be correct to assert that the sovereignty of the USSR is a result of the sovereign will of the Union Republics. But to agree with Nedbilo and Vasilenko that these republics still have full sovereignty would be tantamount to agreeing with the Austinian theory of the indivisibility of sovereignty. After all, the formation of the USSR federation just like every other federation, presupposes that the former fully sovereign Union Republics transferred control over certain functions of government to a central federal authority, which thereafter alone assumes the competence to deal with these transferred matters.

In our opinion therefore, the attempt to describe the governmental structure of the USSR as confederation fails. We submit that the USSR is a federal State with special and peculiar features, which resulted from the historical situation at the time of its formation. Many would regard it as being in essence a unitary State that has been given the forms of a federal structure. In any case it is incorrect to maintain that it is a confederation because, in the first place, the Union has a common citizenship law which is under the jurisdiction of the Union’s highest organ of State power. In the second place, the Union Republics, practically speaking, do not enjoy one of the essential attributes of a Confederation — the right of secession. We, therefore, find it difficult to accept that the federation of the USSR has such a loose nature and organization (which it certainly has not), as to permit the assertion that the rights of the component states forming it are equal to those which are enjoyed by the member states of a confederation.

The fact cannot be denied that the component States of the Union of Soviet Socialist Republics participate in international relations, particularly the Ukrainian and Byelorussian Soviet Socialist Republics. Even then, the participation is not so unlimited as to give the Soviet Union the legal entitlement to claim for its Union Republics the position of separate, sovereign and independent subjects of international law.

22. Even though Article 17 of the Constitution of the Union of Soviet Socialist Republics reserves the right to every Union Republic to secede from the USSR, it is a mere formal stipulation and would be strongly resisted in practice. Attempts in the past by component units of a federation to secede have always been considered under the constitutional law of a federation as a revolutionary act and an act of high treason. This provision in Article 17, is therefore purely theoretical.
23. See Article 14 of the USSR Constitution, paragraphs (a), (x), (b), (q), (h), (i), (v). It is also necessary to remark that the membership of the Republic of the Ukraine and Byelorussia in the United Nations is really an historical accident brought about by the situation prevalent after the second World War.
**Switzerland**

Switzerland is one of the examples of Federal Unions whose member-States exercise the right to conclude treaties, not only between themselves, but also with foreign States in regard to certain specified matters. Article 9 of the Swiss Constitution provides: 'Exceptionally, the Cantons retain the right to conclude treaties with foreign States concerning matters of public economy, neighbourly relations and police, provided such treaties contain nothing contrary to the Confederation or to the rights of other Cantons'.

We may note here, that the authority and sovereignty of the cantons occupy an important place in the history of the constitutional development of the Swiss State. Thus, Sir J. A. R. Marriott writes that although the occupation and control of Switzerland was one of great strategical value to Napoleon, particularly in the campaign of 1799-1800, Napoleon was quick to perceive that the Unitary Republic imposed upon Switzerland by the French doctrinaires was quite incompatible to the traditions of the cantons. Accordingly, in the act of Mediation of 1803, Napoleon purported to restore the sovereignty of the cantons - some with their burgher aristocracies, others with representative democracies; but over all there was still superimposed a central Government with a Federal Diet.

The Act of Mediation lapsed on the fall of Napoleon in 1814, but it formed the basis of the new Federal Act which was approved by the Powers when by the Treaty of Vienna (1815) they guaranteed the independence and neutrality of Switzerland. The compromise attempted by the Federal Pact resulted in such acute friction between the cantons that in 1843 the Sonderbund or League of Swiss Roman Catholic Cantons, threatened to secede. Civil war broke out in 1847, but a brief and almost bloodless campaign resulted in the dissolution of the Sonderbund, and the Swiss, freed by the revolutions of 1848 from all interference on the part of the autocratic powers, carried out a radical revision of the makeshift constitution of 1815.

The constitution adopted in 1848 and extensively amended in 1874 still forms the basis of the Helvetic Confederation. It is at once truly federal and truly democratic; federal because, within their respective spheres, the national and cantonal governments are sovereign; democratic because ultimate sovereignty is vested in the people who exercise it by means of the Referendum and the Popular initiative.

According to Article 8 of the constitution, 'The Confederation alone has the right to declare war and to make peace, as well as to conclude alliances and treaties, especially customs and commercial treaties, with foreign states'. There is consequently some possibility of conflict between this provision and Article 9 (vide supra); but unless the latter is to be nullified entirely, the conclusion must be that the cantons retain the right under Article 9 to conclude with foreign states international agreements of the kind specified in that article.

**Federations of the former colonial self-governing countries**

The constitutions of the above class of countries are undoubtedly different in their nature and content from those so far considered, perhaps as a result of the conditions under which they were drawn up. The creation of federations after the second World War pursued, in the main, two objectives:

Firstly, to try in every possible way to camouflage the fact of colonial supremacy;

Secondly, to use the federal form of government to aggravate national incompatibilities with consequent prejudice to national liberation movements among the indigenous citizens of the colonies.

The essential difference from the earlier-mentioned federations is that these categories were superimposed and did not spring from historic sources and from deep-felt needs of the indigenous population.

Using different kinds of Colonial Federations, the colonial powers were guided above all by the aim of strengthening their position and, apart from that, of creating among the colonised people the expectation of a gradual grant of independence from above, not in the form of armed struggle but exclusively by peaceful means. In all cases, the colonial federations were completely dependent on the metropolitan country. Their constitution never reflected the will of the people of these colonies, since the great majority of the indigenous population were virtually without any political rights. The creators of these federations lost sight of basic important conditions; for example, that there should be a group of communities so united by blood or creed or language, or by political tradition, as to desire union; neither did they make any effort to ensure that there would be as little inequality as possible among the component units. Although this last desideratum may be a counsel to perfection, the fulfilment of which has so far

eluded all known federations, yet the possibility exists to minimize inequalities by various constitutional devices.

Instead, the constitutions were drafted and adopted by the governments of the metropolitan countries. Often the representatives of the colonies for whom they were introduced did not participate. The constitutions were the acts of these governments. In the case of Britain they took the form of an Order of the Sovereign in Council.

Analogically, any change or abolition of the constitution is effected by the same process. Such constitutions are typical colonial constitutions which, making use of the notion of federation, consolidated colonial supremacy. It is not surprising, therefore, that all forced colonial confederations have provoked strong opposition from the colonized people concerned, who fought actively against them. The laws which this state of affairs are painful to observe. A number of federations of this type have crumbled. Those which still remain are unstable, facing the challenge of time. This is an inevitable historical process.

4. AN EXAMINATION OF THE TREATY-MAKING CAPACITY OF STATES MEMBERS OF A FEDERATION BASED ON AN ANALYSIS OF STATE PRACTICE

In the previous sections, we discussed two main questions, namely, the theoretical aspects of the international personality of federal states and their components, and the constitutional position of federal states as regards the rights of their component states to participate in treaty-making processes. Thus, we were able to show that if international law governs the relations between subjects of international law, it does not follow that the municipal law has no concern with treaties. In fact, the subject of treaties is governed partly by international law and partly by municipal law, although the aspects which each system of law regulates are different.

Municipal law determines the competence of the government of a State, that is, of its treaty-making organs or organ, the procedure to be followed by them in the making of treaties, and the effects of treaties upon persons within its allegiance. We have pointed out that there is a significant link or relationship between international law and constitutional law with regard to the question of the division of the treaty-making power of a Federal State between its central government and its component units.

We now propose to examine the treaty-making procedures of a number of Federal States, paying particular attention to the position of their component units in this exercise. Another interesting question would be to determine whether the limited treaty-making rights granted by some Federal Constitutions to their component units have enabled the latter to attain international personality.

It is a universally accepted principle of international law in respect of the question of what authority or authorities shall exercise the treaty-making power of a sovereign state or other subject of international law; or what procedure is to be followed by its central or provincial governments, or executive organs, for making treaties internationally binding upon them; and of whether its political component units should have any part in their conclusion – that these are matters entirely for the constitution of the particular State or Organization to determine.\textsuperscript{26} A number of legal systems recognize this process. Thus, according to the view taken by English and American law, the authority in whom the treaty-making power is vested in any State depends upon the fundamental or constitutional law of that State.\textsuperscript{27} The Soviet legal system and practice also recognizes that “the determination of the authority to conclude a treaty lies with each State and is to be found in its Constitution.”\textsuperscript{28}

It must be observed here that a case may arise where the effective Constitution of a State may not be quite identical with its written Constitution. It often happens also that the treaty-making practice of a State differs considerably from the norms of its written Constitution. Thus, in the United States of America, the President makes executive agreements which are binding internationally as treaties, although they do not require to be approved by the Senate in the same way as treaties properly do. There is, however, a difference between municipal regulations determining the organs which can conclude treaties, and municipal regulations determining whether component States can conclude treaties. In the first case it is entirely for the national law to determine. It does not seem that in the second case the internal law is completely indifferent to it.

Where the Constitution of a Federal State grants the component members treaty-making power, international law recognizes this

grant and regards the treaties made by them as valid when they are within their constitutional contractual capacity. But if this grant is not expressed, and if the constitution is completely silent about who should have power to conclude treaties in a Federal State, the presumption in international law is that this power is vested in all its totality in the Central Government. 29 It seems that the reasoning behind this presumption in international law is that the general object of most federations is to prevent the component units from entering into international engagements which are inconsistent with national interest and policy, or which diverge inter se and to pursue a unified foreign policy vis-à-vis other members of the world community. In the absence of a clear authority conferred by the Federal Law, member-states of a federation cannot be regarded as possessing the power to conclude treaties. For according to international law, it is the Federation which, in the absence of provisions of constitutional law to the contrary, is the subject of international law and international intercourse. 30 But if, on the other hand, a Federal state by its constitution of treaty practices is not seen to deny its component units the right to enter into international relations with foreign countries through treaties, the treaties so concluded will be recognized as valid under international law. We hope that a survey of the treaty-making capacities of a number of Federal States as reflected in their treaty-practice will give an insight into the place of their component units, so far as the independent action of such units on the international plane is concerned, before and after the Second World War.

Canada

Although the Dominion of Canada falls within the group of Federal States where treaty-making power is concentrated in the hands of the Central Government, Canadian State treaty-making practices show that there have been and can be cases when the regional governments of the Dominion carry on treaty relations with other States.

The British North America Act of 1867 is very reticent of the powers of the executive, and about the treaty-making power. The Act contains no provision expressly vesting treaty-making power in the Dominion executive or distributing this power between it and the provincial governments. Even though the BNA act does not contain any provisions like those in the Constitutions of Switzerland, Germany and the USSR, which permit the member-states limited power to make agreements, yet the provincial legislative organs have the competence to legislate on certain enumerated subjects of which that of agreements with foreign countries is one – this matter being within their legislative competence. In this way, some of the provinces such as Quebec and Ontario have, no doubt, made in the past certain agreements with Britain and some of the member States of the United States, for encouraging prospective immigrants and promoting exports. It cannot be denied therefore that the Provinces have wielded diplomatic and treaty-making power in the past.

The current trends in Canadian treaty practice show that the limited power of the provinces to make treaties has not been completely abrogated. On March 1, 1965, the following question was asked in the House of Commons by Mr. Lambert, M. P.: ‘Since April 21, 1963, has the Government of Canada granted to the government of any provinces of Canada the right or privilege of negotiating and concluding with any foreign state either independently or in conjunction with the Government of Canada any agreement, accord or treaty of a commercial or cultural nature, whatsoever nature, and if so: (a) on how many occasions, to which provinces and what has been the nature of such agreement; (b) is it contemplated that any province shall have the right to participate as an independent signatory?’

The Honourable Paul Martin (Secretary of State for External Affairs) replied as follows:

‘In relation to question (a), there are two occasions, namely:

1. by an exchange of notes dated December 22, 1963 and December 27, 1963, between the Ambassador of France in Ottawa and the Secretary of State for External Affairs, the Canadian Government gave its assent to a program of exchanges and cooperation in the industrial and technical field being agreed upon between the Association pour l’Organisation des Stages en France (ASTER) and the Ministry of Youth of the province of Quebec and the University of Toronto.

2. by an exchange of letters dated February 27, 1965, between the chargé d’affaires a.i., of France in Ottawa and the Secretary of State for External Affairs, the Canadian Government gave its assent to an entente or understanding between France and Quebec covering a program of exchanges and of cooperation in the field of education being signed by the Minister of Education of Quebec and the Deputy Minister of Education of France and the director general of cultural and technical affairs at the Ministry of Foreign Affairs of France.

‘These two instruments relate to education and culture. They cover

matters such as the exchange of professors, scholarships, research, etc., which have traditionally been the object, on the provincial plane, of informal arrangements between Ministries of Education and universities in the English speaking provinces and corresponding institutions in English speaking countries, particularly the United Kingdom and the United States of America. Generally these countries prefer the informal non-governmental approach to cultural relations. On the other hand, many countries of Western Europe, and France in particular, prefer to place their cultural relations on a formal inter-governmental basis, wherever possible. This is a fact of international life which the federal government cannot ignore in carrying out its international responsibilities in respect of cultural relations'.

The answer of the Secretary of State for External Affairs to question (b) was in the negative. He explained that: 'On the international plane, the federal government represents all of Canada and under international law only sovereign states are recognized as members of the international community. One, if not the most important attribute of this international personality accruing exclusively to the Canadian government is the power to negotiate and conclude agreements or treaties of a binding character in international law to bind the whole country or of any part thereof with foreign countries.'

'The procedure followed on the occasion of the agreements cited above between France and Quebec is a reflection of and accords with the Canadian government's status under international law and the constitutional position in Canada. Standing alone, these agreements between France and Quebec could not have been regarded as agreements subject to international law. The Federal government stands ready to co-operate with any province in facilitating, in appropriate circumstances, the negotiation and conclusion in similar manner of agreements between the provinces and foreign governments in the field of education and culture'.

Some of Mr. Martin's views need to be commented upon. We fail to agree with the opinion of the Honourable Secretary of State for External Affairs that, on the international plane, only sovereign and independent states are recognised as members of the international community. Our contention on this and the reasons for holding these views have been stated earlier in this study.

It needs to be pointed out that the expansion of the international community in size and content since World War II made an increase in the legal persons of various capacities operating within it inevitable. This trend has been, in the main, a response to the evident need arising from international intercourse. The growth of international intercourse in the sense of the development of relations between different peoples was a constant feature of maturing civilizations. This is evidenced in the present position of the contemporary international community. The degree of intercourse among peoples of the world has ultimately called for regulation even by institutional means. To refuse to recognize these facts would be tantamount to a rejection of reality. Therefore, for the Honourable Secretary for External Affairs to find the basis for his answers, particularly on question (b), in the principle of the exclusive international personality of sovereign states under international law, is not convincing. It is even more doubtful when one considers the time he was giving the answers (March 1965).

No one doubts the fact that in a federal state such as Canada, where it is not otherwise stated in the constitution, the Central Government reserves the sole right to bind the whole country under an international treaty or agreement. In the case of Canada, the BNA Act of 1867 - the fundamental law on which the constitution is based - was not explicit as to who has the exclusive power to conclude international agreements - the Dominion or, whether such power can be distributed between the Union and the provincial governments. This leads one to at least two presumptions, namely:
1. that only the central government has it; or
2. that the provincial governments may also exercise treaty-making rights.

The Commonwealth of Australia

The treaty-making power of the Australian Federation seems to rest to a large extent with the Commonwealth Government. As with most federations formed with the British Empire or Commonwealth, the executive authority of the federation is vested in the Queen. This authority is exercised by the Governor-General who is the Queen's

33. The Commonwealth of Australia came into being on January 1, 1901. It was created by the Commonwealth of Australia Constitution Act, which had been passed by the Imperial Parliament. The Act received royal assent on July 9, 1900, and was proclaimed on September 17, 1900. It united the people of New South Wales, Victoria, South Australia, Queensland, Tasmania and Western Australia in a federal Commonwealth under the title of the Commonwealth of Australia.
representative. Under sections 51 XXIX and 61 of the Australian Constitution the Commonwealth Government was not competent to conclude international agreements before 1919.

According to the Sydney Draft of 1891 and the Adelaide Draft of 1897, covering clause 7, provided that 'all treaties made by the Commonwealth of Australia shall according to their tenor, be binding on Courts, Judges and peoples of every State, and of every part of the Commonwealth, anything in the laws of any State to the contrary notwithstanding'. Section 52, XXVI of these drafts vested the Commonwealth Parliament with power to legislate with respect to ‘external affairs and treaties’. Later in the final draft, the provisions relating to ‘treaties’ were ultimately dropped from the corresponding covering clause 5 and section 51, on the ground that being a part of the British Empire, Australia could not have treaty-making power of a sovereign State. But before the federation was formed, the individual Australian provincial colonies entered directly into certain agreements with foreign powers on technical matters. 35

However, an incident took place in 1902 which brought strongly in question the exclusive nature of the power of the Commonwealth Government to make treaties and power to legislate with respect to external affairs.

In 1902, Mr. Chamberlain, the colonial Secretary asked for a report from the Commonwealth Government of Australia in relation to a complaint made by the Netherlands Government that the authorities in South Australia failed to render help which they ought to have given to the Dutch Consul under article 10 of the Anglo-Dutch Convention of 1856, in connection with the arrest of the crew of a Dutch vessel, the ‘Voudel’ at Adelaide. The South Australian Premier, Mr. Jenks, refused the request of the Commonwealth Government to furnish it with the necessary particulars. The Commonwealth Government pointed out that its right to ask for particulars rested on the fact that the incident involved the observance of an imperial treaty and ‘matters affecting consuls’ which fell within federal competence under sections 51 XXIX and 75 (i) and (ii).


35. Postal Convention between the USA and New South Wales, January 15, 1874; Convention between USA and Victoria on Money Orders, October 5, 1881, etc. See Australian Treaty List (Australia Treaty Series, 1951, No. 1, Department of External Affairs, Canberra), p. 7.

The Prime Minister of South Australia’s refusal was based on the argument that the term ‘external affairs’ was not included among the subjects with respect to which the Commonwealth Parliament had exclusive competence. In the second place, in the opinion of Mr. Jenks, the term ‘external affairs’ was very vague, and might or might not mean that the Commonwealth Parliament had power to make laws to enforce imperial treaties. Under these circumstances, the Prime Minister claimed the right of the State of South Australia to communicate directly with the Imperial Government in all matters relating to the fulfilment of imperial treaties.

In 1906, just before the Colonial Conference of 1907, Australian States claimed the right to have direct representation at that conference. Their demand was that unlike the Canadian Provinces they were ‘independent of Federal Government’ which was not any better than their agent. The second contention was that several of the subjects proposed for discussion at the conference such as law, trade, communication, immigration, education and science affected their state rights. 36

The Colonial Secretary, Lord Elgin, refused to accept this view. He pointed out that the Commonwealth States were not separate political entities. They had surrendered some of the distinctive attributes of statehood, namely, power over defence, customs and excise, posts and telegraphs, etc. The British Government made an authoritative declaration in 1908, that ‘His Majesty’s Government is pledged to the view that, so far as the relations of Australia with foreign nations are concerned, the Government of the Commonwealth alone can speak, and that for everything affecting external communities the Government of the Commonwealth are alone responsible.’

The conclusion from the above discussion is that although the treaty-making power of the Commonwealth of Australia Federation seems to be largely vested in the Commonwealth Government, there is reason to think that the states do have dealings and enter into relations with foreign authorities on matters which are clearly seen to affect the interests of the state concerned. Thus, Australian states maintain agents in London for promoting their trade. They also hold direct communication with the United Kingdom Government in respect of certain matters which are not within the federal jurisdiction.

The Australian case shows again that there is in principle nothing inherently impossible in the exercise of treaty-making powers by the

36. Correspondence relating to the Colonial Conference, 1907, No. 3340, Statement of Mr. Thomas Price, at p. 9.
component states of a federation. Ultimately, whether they can or not, or can continue doing so, must depend on the Federal Constitution and its developments.

The United States of America

Article 1, Section 10, of the constitution of the United States of America has two clauses, one of which declared: 'No State shall enter into any treaty, alliance or confederation', and the other says: 'No State shall without the consent of Congress . . . enter into any agreement or Compact with another state or with a foreign power'.

There have been wide debates among the United States jurists in establishing the real differences between the two clauses. However, Professor Willoughby thinks that 'the possibility of the States entering into direct relations with foreign Powers provided the consent of Congress is obtained, is recognized, at least as regards certain but undefined agreements or compacts'. How often has the United States Congress consented to a state entering into agreements or compacts in practice?

In 1909, there was a question whether the State of Minnesota could enter into an agreement with Canada without the consent of Congress, for facilitating the construction of a dam on the Rainy River. In giving opinion about this, Attorney General Wickersham denied the capacity of the State to do so. He added, however, that by implication, Art. 1, Sec. 10, Cl. 3, permits such an agreement to be entered into if Congress had given its consent thereto. In 1917, the Supreme Court of North Dakota heard a case concerning certain counties of that State which had entered into an agreement with a municipality in the Canadian province of Manitoba for the construction of a drain for securing an outlet for surface waters. The contract was made under the authority of the State but without the consent of Congress, and involved expenditure of money in a foreign country. According to the opinion of the State Court, the agreement was not political in its nature and not calculated to encroach upon the authority of Congress. This being the case, it was not within the constitutional prohibition.

In 1934, there was a proposal for an agreement or compact between the State of New York and the Dominion of Canada for the establishment of the Buffalo and Fort Erie Public Bridge Authority. A Joint Resolution was passed by the Congress which ran as follows: 'Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, that the consent of Congress of the United States of America be, and it is hereby given to the State of New York to enter into the agreement or compact with the Dominion of Canada set forth in Chapter 824 of the Laws of New York 1933, and an Act respecting the Buffalo and Fort Erie Public Bridge Authority passed at the fifth session, seventeenth Parliament, Dominion of Canada, assented to March 28, 1934, for the establishment of the Buffalo and Fort Erie Public Bridge Authority as a municipal corporate instrumentality of the said State and with power to take over, maintain and operate the present highway bridge over the Niagara River between the City of Buffalo, in the State of New York, and the village of Fort Erie in the Dominion of Canada'.

Congress passed a joint resolution in 1947 which brought into effect the Agreement between the United States of America and the United Nations regarding the Headquarters of the latter. By this resolution, limited power was given to the member-States of the Union to enter into agreements with the United Nations. Section 4 of this resolution runs as follows: 'Any States, or to the extent not inconsistent with State law, any political sub-division thereof, affected by the establishment of the headquarters of the United Nations in the United States are authorized to enter into agreements with the United Nations or with each other, consistent with the same: provided that, except in case of emergency and agreements of a contractual character, a representative of the United States to be appointed by the Secretary of State, may, at the discretion of the Secretary of State, participate in the negotiation, and that any such agreement entered into by such States or political subdivisions thereof shall be subject to approval by the Secretary of State.'

The above discussion proves that the Constitution does not totally block the member-states of the United States from making agreements with foreign states, especially if such agreements are seen to be of importance to the State concerned and does not contradict the general interests of the Union.

Switzerland

The position of the Swiss Constitution in regard to the treaty-making power of its components has been stated. The Cantons have a reason-

able measure of right to enter into treaty relations with foreign powers in so far as the constitution permits. What is interesting here is to ascertain what procedures the member-States are required to follow in the making of treaties within their competence. The Central treaty-making procedure is governed by the provisions of the Federal and Cantonal Constitutions. The essential thing is that the treaties which the Cantons have power to make under Article 9 are required to be in conformity not only with the Constitution of the Federation and Federal Laws, but also with the public policy of the Federal Government. Further, they should not be opposed to the rights of any other Canton.

It is often the case that when a Canton wishes to make a treaty it asks the Federal Council to pass its correspondence to the foreign government concerned or to take other necessary action. Once the Council considers the treaty permissible under the Constitution, it begins the negotiation depending on the nature of the treaty. Where the matter involves technical issues on which the Cantonal officers are likely to possess better knowledge, or where local sentiments deserve special consideration, Cantonal officers are appointed as chief representatives. It could happen that at the end of negotiations, the treaty would be signed and concluded by the Federal Government in the name of the Canton, or the Canton itself might conclude it in its own name. In the first case, the treaty is still known as a cantonal agreement, as the rights and obligations under it are considered to be those of the Canton.

Treaties negotiated through the intermediary of the Federal Council but concluded by the Cantons in their own names are numerous. Such treaties relate to double taxation, e.g., the agreements made by Bâle-Ville with Prussia in 1910; by Soleurs with Alsace-Lorraine in 1911; by different Cantons with Germany in 1923; cross-frontier intercourse (e.g., the agreements made by Bâle-Ville with Baden in 1894 providing for the establishment of a ferry; by Berne with France in 1888, providing for schools in the frontier districts; by Bâle-Ville with Baden in 1894 regarding improvement of the river Wiese; by Bâle-Campagne and Argovie with Baden in 1907 for the establishment of a hydroelectric plant near August Wyhlen); police matters – e.g., St. Gall with Lichtenstein in 1916, providing for mutual judicial assistance; by Vaud with Austria in 1907, and St. Gall with Austria in 1908, each providing for the execution of civil judgements.41

Sometimes member-States of a Federation have common frontiers with foreign States. The necessity for occasional agreements between the border communities, particularly in police matters, cannot be denied.

5. THE INTERNATIONAL LAW COMMISSION’S VIEW ON THE TREATY-MAKING COMPETENCE OF COMPONENT UNITS WITHIN A FEDERAL STATE

In seeking to formulate a rule on treaty-making capacity within a federal structure which would make it possible to distinguish between the elements which derive from the constitutional law of that structure and those which derive from general international law, the Commission was faced with a problem similar to that relating to the international capacity of organizations. With regard to federal structures, the Commission finally lent its support to the idea that there was indeed a rule of general public international law on that subject, but that under each federal constitution had full competence to distribute capacity to conclude international treaties between the federation and its member-States.42

6. CONCLUDING REMARKS

The purpose of the comment under this subdivision has been to illustrate that facts of international life may, as a matter of great necessity, cause States to resort to different constitutional structures or forms resulting in their component parts being permitted, according to their respective constitutions, to interact directly in certain cases with other international legal persons operating on the international plane. Our discussion touched on three questions, namely, the theoretical aspects of the international personality of the component members of a federation; a brief survey of the relevant characteristics of a number of federal constitutions with a view to establishing how they stand as regard the degree of separate participation in international relations of their member-states; and finally – an examination of the extent of the treaty-making capacity of states-members of a federation.

pp. 460-462; Huber, H., How Switzerland is Governed, Zürich, 1946, p. 69. Recent examples of Cantonal treaties have not been possible to come by.

42. See, Bartos, Yearbook of International Law Commission, 1965, vol. 1, 779th meeting, para. 83.

41. H. Edward, De la Compétence des Cantons Suisses de conclure de traités Internationaux – Spécialement concernant le Double Imposition, Brussels, 1869.
Our theoretical analysis shows that in fact nothing, in principle, precludes the component units of a Federal State from exercising this right, unless otherwise prohibited by the constitution of the state concerned. This being so, it means that the extreme traditionalist view that it is only the collective federal state as such which has treaty-making capacity is exaggerating. The persistent development of the international community in various fields renders it necessary to seek the solution of many international problems outside the exclusive field of the body of sovereign and independent States.

Under the constitutional examination as we have seen from those of a number of federal States looked into, not all the constitutions give clear indication of the degree of separate participation of the component units in international affairs. We have established that in the treaty-practice of a number of Federal States, the component members of such states were granted the right to enter into international agreements with foreign states, even where the constitution was either silent or categorically opposed to such action. This practice of ignoring what the constitution permits, when considering whether to give a member-state of a federation the power to enter into an international agreement with a foreign country on specific matters, is probably a result of the changing nature of the world community coupled with increasing new nature of interests and aspirations of the member-States of the federation.

Treaties lie at the centre of international legal relations and the capacity to enter into treaty-relations with other subjects of international law is a very important attribute of personality in international law. Some component members of a federation have, or have had, explicit treaty-making capacity. In others this power is implied. The true position is seen clearly by an investigation into the treaty-making practices of such federations. The power to make treaties is more evident in some than in others.

From the foregoing discussions, and in the light of our earlier arguments, we come to the conclusion that component members of a federal state, depending on either their expressed constitutional rights or the state treaty-making practice which can be evidenced, apparently have international legal personality, but it is a limited personality – not fully sovereign or independent.
4. The 'debatable' subject of international law and its treaty-making capacity: the Holy See

1. INTRODUCTION

The notion 'debatable' as used here needs explanation. It is used to designate the entity or subject of international law which at first sight seems to be of doubtful status and relatively limited in its participation in international relations. This may possibly be so by virtue of its inherent nature, the particulars of which may be wholly different. However, it does have a place and plays a role which international law is not completely indifferent to.

It will be observed that the doubt as to what degree of international personality this entity possesses, emanates from its lack of one or more of the legal criteria or essential elements of statehood as until recently understood in international law. That is to say, it lacks one or more of such characteristics as: territory, population, governmental authority -- particularly in the conduct of external relations. But does this necessarily entail that it lacks the power to enter into international agreements? -- the latter being one of the most effective and important evidences of personality in international law.

The difficulty arises when semi-independent states or international institutions are wanting in one or some of these necessary features. What non-state institutions can perform juridical acts recognized by international law? Can non-territorial entities be endowed with international personality? This question presents itself in connection with the various organs of international cooperation among states, such as the United Nations Organization and its specialized agencies. The same question presents itself with reference to the entity enlisted here for investigation, though for different reasons.

To conform to the scope of the present study, we shall in the following discussion devote primary attention to the international personality of the Holy See and its treaty-making power.
2. HISTORICAL SUMMARY

In order to understand its true position in contemporary international law, a historical perspective is required. However, in view of the wealth of information and numerous studies available on the Roman question and its definitive settlement by the Lateran Agreements signed on February 11, 1929, it may be superfluous to attempt here any complete account of the historical diplomatic background.

When the law of nations began to grow among the Christian States, the Pope was the monarch of one of those States—namely, the so-called Papal States. Throughout the existence of the Papal States, until their annexation by the Kingdom of Italy in 1870, the Pope was a monarch and as such the equal of all other monarchs, but his influence and the privileges granted to him by the different states were due not only to his being the monarch of a state, but also to his being the head of the Roman Catholic Church. However this anomaly did not create any real difficulty, since privileges granted to the Pope existed within the province of precedence only.

The entity of the Papal States owed its existence to Pepin-le-Bref and his son Charlemagne, who established it in gratitude to the Popes Stephen II and Adrian I. It remained in the hands of the Popes until 1798 when it became a Republic for about three years.

In 1801, the former order of things was re-established, but in 1809 it became a part of the Napoleonic Empire. In 1814 it was once again re-established and remained in existence until 1870.

3. PRESENT ATTITUDES TOWARDS THE HOLY SEE

The question of the international legal personality of the Holy See has been much commented on by well-known international lawyers and writers, both before and after the final settlement of the Roman ques-


4. THE VIEW OF WESTERN COUNTRIES

Although Western jurists (Continental and Anglo-Saxon) were, for a long time, not in agreement on the question of the international personality of the Holy See, it seems that the dominant view among them today is that the Holy See does in fact possess such personality. The reason for this shift of opinion among modern writers on international law may not be far to seek.

For many years before 1914, the accepted conception of the international community was that of society comprised apart from the Holy See, only of sovereign independent states. It was, so to speak, an era of the 'European concert' in the history of international relations. It was a period of an exclusive club of sovereign states. According to the


4. For our purpose, the term concordat is an international bilateral agreement between the Holy See and a State, whereby the Holy See as the head of the Church regulates the relations of the Catholic religion in a given State with the Government of that State. We shall later note which agreements are in force between various States and the Holy See on behalf of the Church.

5. In the days of sovereignty over the Papal States, the Holy See was a sovereign state in every sense of the term and even during the non-territorial interregnum of 1871-1929, it was accorded sovereign status.
system at the time, institutions and other entities that were not sovereign independent states were without any personality in international law. This theory worked well and seemed to correspond to the needs of Europe up to the end of the First World War. For almost a century after the Napoleonic wars, Europe experienced no large-scale war. The few wars that did take place were brief and limited to a small number of States. It was still possible for a state to play a neutral part in international relations.

The cataclysm of 1914-1918 ended that phase. The sovereign state no longer sufficed as the only organ capable of representing people on the world juridical plane. It became necessary to create other instruments for international political action. Earlier, international organizations of a technical character existed, but the setting up of the League of Nations marked the first change in the old system, whereby states alone had political life on the international plane. This organization enjoyed some degree of juridical capacity. Today, the United Nations Organization and its numerous specialized agencies, enjoy uncontested international juridical personality. Such institutions were unthinkable to 19th century international lawyers. The wind has now changed, and as one result of this shift in doctrine, international law has become disposed to accord to a number of new entities, non-territorial in character, the juridical status unthought of before. The Holy See belongs to these entities.

5. THE ISSUE OF INTERNATIONAL PERSONALITY

Between 1870 and 1929 the Holy See possessed only a doubtful legal personality and sovereignty in the international sphere, but in the so-called Lateran treaty and Concordat of 1929, Italy recognized the personality of the Holy See in the international domain and its exclusive sovereignty and jurisdiction over the city of the Vatican, thus restoring to it in principle its territorial basis as a State, however small the area involved.

In discussing the status of the Holy See in international law, certain important issues necessarily come in. Firstly, the right to conclude concordats. Secondly, do concordats fall within the notion of treaties or conventions in international law? Thirdly, how far has the Holy See exercised the right of concluding international agreements? Fourthly, did the Holy See's right of diplomatic representation fall within the framework of international law?

The Holy See is recognized as enjoying an undisputed right to conclude concordats, and this is evidence of its possession of personality under international law, for these are international agreements, and only such entities as possess a measure of international legal personality (fully or in limited form) can conclude them in a legally binding fashion with other subjects of international law. We have already stated that it was a result of a treaty and concordat, signed between the Holy See and the State of Italy in 1929, that Italy formally recognized the personality of the Holy See in international law. These agreements are often described in the standard works on the Roman question as the Lateran Agreements. Through these agreements a Vatican State was created which, as already noticed constituted a physical basis for the legal personality of the Holy See in international law.

The view seems to be dominant today that the Holy See enjoys international personality. The international rights which the predominant doctrine recognizes in the Holy See include the conclusion of concordats and the right of active and passive legation. We shall return later to the Holy See's right to diplomatic representation.

As to the issue of whether concordats fall within the concept of treaties or conventions in international law, we naturally think that if the Holy See had no international juridical personality, it would have no capacity to conclude agreements legally binding in international law. If this were the case, the concordats would not fall under the heading of international treaties. But, since on the contrary, the Holy See does have such personality, and is a subject of international law as our discussion shows, then the concordats are as valid and obligatory as any legal commitment ratified between two States.

It now seems clear that the agreement-making capacity of the Holy See does not stop with concordats but extends to participation in other international agreements and conventions. For example, the Holy See has entered into treaties, particularly of a humanitarian nature, such as the Convention relating to the Status of Stateless Persons, 1954 (360 United Nations Treaty Series, 117). The Holy See has also been a

9. Ibid., at p. 261.
party to a number of multilateral conventions, including those on the Law of the Sea concluded in 1958. Having regard to its functions and in terms of its territorial and administrative organization, writes Judge Sir Gerald Fitzmaurice, the Vatican City is proximate to a State and is widely recognized as a legal person with treaty-making capacity.

The Pope's right of active and passive legation is a right of international law. The present prevailing opinion among writers is that envoys sent and received by the Holy See are diplomatic agents in the full sense. Their titles, such as nuncio, ambassador, envoy extra-ordinary and minister plenipotentiary are not merely ordinary titles. Above all, they, like other diplomats, enjoy the privileges and immunities of diplomatic agents. In the world of diplomacy, the Pope enjoys the right of active and passive legation. He can send and receive representatives who are public ministers in the sense of international law.

It is true that the Holy See belongs to that group of entities in international law which irrespective of their anomalous character participate in international relations. It is also true that there can be some negative consequences which may arise as a result of this fact of anomaly in an entity like the Holy See. But, it is also true that international law recognizes that provided no rule of jus cogens is infringed upon, the incidence of bilateral relations with other subjects of international law can do so much to obviate such consequences.

Functionally, the Vatican State is a state under international law. Its territorial and administrative organization do not differ essentially from those of other international persons. Besides, it is widely recognized as a legal person with treaty-making capacity. Even now, although there is a Vatican State which is under the territorial sovereignty of the Holy See, treaties are entered into not by reason of territorial sovereignty over the Vatican State, but on behalf of the Holy See.

6. SOVIET DOCTRINE AND DIPLOMATIC PRACTICE

The Soviet doctrine of international law does not recognize the statehood of the Holy See, nor does it recognize its international personality. According to the Soviet legal system the Holy See does not enjoy any measure of statehood in the international sense, essentially because it lacks some of the legal criteria of statehood required by international law. Professor L. A. Modzhorian argues that the Holy See has no territory, no citizens of its own in the strict sense of the word, and above all, no organs of public order.

It is perhaps not surprising that the Soviet Union has an entirely different view from that of Western countries on the question of the international personality of the Holy See. As a state which purports to establish a social order that will exclude, as a matter of national policy, any place for churches and religion as such, the Soviet Union, as a matter of course, does not maintain diplomatic relations with the Holy See. However, it does appear as will be seen later, that Soviet diplomatic practice is not compatible with its theoretical stand on the issue.

The Soviet government in the past is known to have entered into agreements with the Holy See in order to regulate matters of common interest. In 1920-21, for example, the Soviet Union accepted the offer of the Holy See to assist the Russian population afflicted by famine and by the resulting epidemics. It therefore made an agreement with the Vatican regarding the assistance to be given through the Catholic missions in Russia. During the early days of the revolutionary régime in Russia, the Soviet government concluded similar agreements with other charitable organizations and these were given special status and privileges as they were not endowed with an international personality and did not aspire to such a status. What is the legal nature of these kinds of agreements and how can they be interpreted? According to Soviet law it seems apparent that they will not be regarded as international agreements. Rather they will be placed in the same category as other contracts concluded with non-governmental international charitable organizations such as ICRC, Caritas International, Oxfam, etc. By this arrangement the issue of the international legal personality of the Holy See in Soviet legal theory is dismissed. This is an easy line to take and clearly saves much trouble. But is the solution convincing?

Modern Soviet diplomatic practice shows that its ministers and of-
ficials make visits to the Holy See. For example, Andrei Gromyko, the Soviet Foreign Minister and chief delegate to the United Nations, met the Pope during his visit to the United Nations in 1965. Later during his visit to Italy in 1967, Gromyko, together with the Soviet ambassador accredited to Italy, was received in an official audience by the Pope. 16 In 1967, Podgorny, the Soviet President and Chairman of the Supreme Soviet of the Soviet Union—a position corresponding to that of a ceremonial head of state—visited Pope Paul VI. He was received by the Pope in the presence of the Soviet ambassador to Italy in an official audience. Again, in the later part of 1970, President Podgorny made a similar visit to the Holy See. The legal meaning attributable to these events is a matter of conjecture.

It is clear that the Holy See is a party to a number of multilateral agreements and conventions to which the USSR is also a party. The Holy See has equally become a party to a number of them by accession. The Soviet Union has so far neither reserved its position in regard to the participation of the Holy See in these international acts, nor has it ever protested against the Holy See’s accession to those conventions that have long been in operation between state members of the international community.

By the Holy See’s ratification of the Vienna Convention on Diplomatic Relations, 1961, she became a full bearer of rights and obligations flowing thereupon. It does appear to us, therefore, that a nuncio appointed on a foreign diplomatic service by the Holy See falls within the category of diplomats whose welfare is covered by the Convention. If, for example, such a nuncio were to make a stop in the Soviet Union while proceeding to his destination, he would be entitled to all the respects and immunities due to normal state diplomatic agents.

The above illustrations added to the fact that in the Soviet diplomatic practice, Ministers pay official visits to the Holy See, leads us to the conclusion that the Soviet Union at least in practice recognized the international personality of the Holy See.

7. CONCLUSION

To sum up, it is common knowledge that until quite recently international lawyers were almost unanimous in denying international personality to all entities other than fully sovereign independent states.

But it is also common knowledge that the most recent doctrine and practice in international relations admits that in addition to states, which are the normal subjects of international law, there exist other subjects of international law with limited international personality. This view even goes so far as to reject the dogma that only states can be subjects of international law and, basing itself upon various theories supported by a diversity of arguments, considers as international persons—or at least as subjects of international law—institutions and groups which are not states. This is not the place to examine all these theories; it will be enough for our discussion here to recall that, in general, starting from the acknowledged fact that there are international rights of a mixed territorial-ecclesiastical character which belong to the Holy See, or which are at any rate exercised by it in its capacity of supreme organ of the Church, it has always been recognized that the Holy See possesses legal personality, or at any rate the status of a subject of international law.

The recognition has derived from the general principle of law that wherever there are rights and obligations, there is a person or subject of such rights and obligations. If, therefore, that if positive international law recognizes in the Holy See one or more international rights, then the Holy See is a legal person in international law. The existence of such rights is necessary, and it is also sufficient as the holder’s status as a subject of rights is neither increased nor diminished according to the quantity of rights held. So the fact that the Holy See happens to enjoy a lesser quantity of international rights than perhaps is enjoyed by states is no longer important in this connection, nor should the fact that it is in its true essence a non-territorial institution be any longer regarded as a reason for denying its international personality.

This points to the conclusion that there is no reason to withhold recognition of international personality from other non-state entities merely because their claim to it is not based on possession of the full attributes of an ordinary sovereign state, still less so seeing that in view of their greater numbers today the case is no longer exceptional, as perhaps it once was in regard to the Holy See.

Appendix

A. Agreements in force between various States and the Holy See on behalf of the Church

<table>
<thead>
<tr>
<th>State</th>
<th>Instrument</th>
<th>Date**</th>
<th>Other Particulars</th>
</tr>
</thead>
<tbody>
<tr>
<td>Switzerland (Cantons of Luzern, Bern, Solothurn and Zug)</td>
<td>Convention</td>
<td>March 26, 1828</td>
<td>Concluded by the Cantons on their own behalf</td>
</tr>
<tr>
<td>Switzerland (St. Gall)</td>
<td>Convention</td>
<td>November 7, 1845</td>
<td>Concluded on its own behalf</td>
</tr>
<tr>
<td>Haiti</td>
<td>Concordat</td>
<td>May 10, 1860</td>
<td></td>
</tr>
<tr>
<td>Switzerland (Ticino)</td>
<td>Convention</td>
<td>November 29, 1884</td>
<td>Concluded by the Swiss Federal Council on behalf of the Canton</td>
</tr>
<tr>
<td>Switzerland (Ticino)</td>
<td>Convention</td>
<td>December 2, 1884</td>
<td></td>
</tr>
<tr>
<td>Switzerland</td>
<td>Convention</td>
<td>November 29, 1884</td>
<td></td>
</tr>
<tr>
<td>Colombia</td>
<td>Convention</td>
<td>July 5, 1888</td>
<td>Concluded by the Swiss Federal Council on behalf of the Canton</td>
</tr>
<tr>
<td>Switzerland (Ticino)</td>
<td>Convention</td>
<td>July 15, 1888</td>
<td>Concluded by the Swiss Federal Council on behalf of the Canton</td>
</tr>
<tr>
<td>Colombia</td>
<td>Convention</td>
<td>July 2, 1893</td>
<td></td>
</tr>
<tr>
<td>Great Britain</td>
<td>Exchange of Notes</td>
<td>March 26, 1890</td>
<td>Concerning the Islands of Malta</td>
</tr>
</tbody>
</table>

** Dates are those on which the instruments came into force.

1. The Agreements listed here included bilateral as well as General International Agreements. They will be classified as follows:
   A. Agreements in force between various States and the Holy See on behalf of the Church;
   B. Agreements on behalf of the State of the Vatican City;
   c. General International Agreements to which the Holy See is signatory.
B. Agreements in force on behalf of the State of the Vatican City

<table>
<thead>
<tr>
<th>State</th>
<th>Instrument</th>
<th>Date**</th>
<th>Other particulars</th>
</tr>
</thead>
<tbody>
<tr>
<td>Italy</td>
<td>Agreement</td>
<td>June 30, 1930</td>
<td>On tariff</td>
</tr>
<tr>
<td>Italy</td>
<td>Convention</td>
<td>September 10, 1930</td>
<td>On telephone and telegraph</td>
</tr>
<tr>
<td>Italy</td>
<td>Convention</td>
<td>September 10, 1930</td>
<td>On car circulation</td>
</tr>
<tr>
<td>Italy</td>
<td>Convention</td>
<td>September 10, 1930</td>
<td>On Postal Matters</td>
</tr>
<tr>
<td>Italy</td>
<td>Convention</td>
<td>May 25, 1931</td>
<td>On Monetary Matters</td>
</tr>
<tr>
<td>San Marino</td>
<td>Convention</td>
<td>May 25, 1932</td>
<td>On Monetary Matters</td>
</tr>
<tr>
<td>Italy</td>
<td>Convention</td>
<td>May 8, 1933</td>
<td>On civil and Commercial Proceedings</td>
</tr>
<tr>
<td>Italy</td>
<td>Agreement</td>
<td>August 24, 1934</td>
<td>Railroad</td>
</tr>
<tr>
<td>Italy</td>
<td>Convention</td>
<td>October 4, 1934</td>
<td>On the use of Italian Hospitals by Vatican City Nationals</td>
</tr>
<tr>
<td>Germany</td>
<td>Exchange of notes</td>
<td>November 13, 1935</td>
<td>On Passport/Visas</td>
</tr>
<tr>
<td>Austria</td>
<td>Exchange of notes</td>
<td>April 30, 1935</td>
<td>On Passport/Visas</td>
</tr>
<tr>
<td>Italy</td>
<td>Agreement</td>
<td>December 16, 1955</td>
<td>Tax exemption for Italian Diplomatic Agents</td>
</tr>
</tbody>
</table>

** Dates are those on which the instruments came into force.

C. General International Agreements to which the Holy See is signatory*

<table>
<thead>
<tr>
<th>Date**</th>
<th>Nature of Agreements + Remarks</th>
</tr>
</thead>
<tbody>
<tr>
<td>February 1930</td>
<td>Motor and Highway Circulation</td>
</tr>
<tr>
<td>June 26, 1930</td>
<td>Universal Postal Union</td>
</tr>
<tr>
<td>January 3, 1931</td>
<td>International Radiotelegraph (adhesion)</td>
</tr>
<tr>
<td>December 27, 1932</td>
<td>International Telecommunication</td>
</tr>
<tr>
<td>September 12, 1935</td>
<td>International Union for the Protection of Literary and Artistic Works</td>
</tr>
<tr>
<td>June 26, 1948</td>
<td>Protection of Literary and Artistic Works (Ratification, 20th June, 1951)</td>
</tr>
<tr>
<td>July 28, 1951</td>
<td>Status of Refugees, extension of Obligations (Ratification, March 15, 1956)</td>
</tr>
<tr>
<td>May 10, 1952</td>
<td>Unification of rules relating to penal jurisdiction (Ratification, August 10, 1956)</td>
</tr>
<tr>
<td>May 10, 1952</td>
<td>Rules concerning civil jurisdiction (Rat., Aug. 10, 1956)</td>
</tr>
<tr>
<td>May 10, 1952</td>
<td>Arresting of Seagoing Ships (Accession August 10, 1956)</td>
</tr>
<tr>
<td>September 6, 1952</td>
<td>Universal Copyright Convention Protocol (Ratification July 5th, 1955)</td>
</tr>
<tr>
<td>April 29, 1958</td>
<td>Fishing and conservation of living resources of the High Seas</td>
</tr>
<tr>
<td>April 29, 1958</td>
<td>Territorial Sea and Contiguous Zone</td>
</tr>
<tr>
<td>April 29, 1958</td>
<td>Continental Shelf</td>
</tr>
</tbody>
</table>

* The source of Agreement listed under this sub-heading lies heavily on the UN Treaty Series.

** Dates are those on which the instruments came into force. Where the Holy See acceded later, it will receive comments as regards the date of accession under 'remarks'.

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<table>
<thead>
<tr>
<th>Date</th>
<th>Nature of Agreements + Remarks</th>
</tr>
</thead>
<tbody>
<tr>
<td>April 29, 1958</td>
<td>Convention on the High Seas Final Act</td>
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<tr>
<td>April 29, 1958</td>
<td>Optional Protocol of Signature concerning the compulsory settlement of disputes</td>
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<tr>
<td>June 10, 1958</td>
<td>Recognition and enforcement of foreign arbitral awards</td>
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<tr>
<td>March 30, 1961</td>
<td>Single Convention on Narcotic Drugs</td>
</tr>
<tr>
<td>April 18, 1961</td>
<td>Vienna Convention on Diplomatic Relations (Ratification, April 17, 1964)</td>
</tr>
<tr>
<td>September 18, 1961</td>
<td>Unification of rules relating to international carriage by air, performed by a person other than the contracting carrier</td>
</tr>
<tr>
<td>October 25, 1961</td>
<td>Protection of performers, producers, phonograms and broadcasting organizations</td>
</tr>
<tr>
<td>December 10, 1962</td>
<td>Marriage: consent, minimum age and registration</td>
</tr>
<tr>
<td>April 24, 1963</td>
<td>Vienna Convention on Consular relations</td>
</tr>
<tr>
<td>March 1, 1965</td>
<td>Suppression of counterfeiting currency (Acceded, March 1, 1965)</td>
</tr>
<tr>
<td>April 9, 1965</td>
<td>Facilitation of International maritime traffic</td>
</tr>
<tr>
<td>July 8, 1965</td>
<td>Transit trade of land-locked countries</td>
</tr>
</tbody>
</table>
5. The personality of unrecognized states in international law: A case study on Rhodesia as an illustration

1. INTRODUCTION

It is not our intention here to undertake a general study of the international personality of unrecognized states as this would go far beyond the original scope of the present work. Therefore, this section of our inquiry is directed towards using the case of Rhodesia to illustrate the personality of nonrecognized states in international law.

The question of the legal status of unrecognized states touches on a wide range of interesting issues connected with the theory and practice of contemporary international law. Undoubtedly, the role of such states in day-to-day international life is heavily on the increase. One modern author whose monograph dealt mainly with the question of Treaty Relations of Non-Recognized States, observes that there is a visible tendency today, to stress the position of the non-recognized regime as one of the component parts of the international community to which the framework of existing rights and duties called international law should somehow apply more extensively.¹

A state may exist without being recognized, and if it does exist in fact, then, whether or not it has been formally recognized by other states, has a right to be treated by them as a state. The act of recognition expresses the intention, on the part of the recognizing state, to observe in regard to the new state all rights and duties as prescribed by international law.² The primary function of recognition is, therefore, to acknowledge as a fact something which has hitherto been uncertain, namely, the independence of the body or unit claiming to be a state. The consequences of the acceptance of this fact is the normal courtesies of international intercourse.³

3. Brierly, ibid., at 139.
However, in the past as well as in the present, international relations have witnessed many cases of states or entities which although they play a leading role in the evolution of modern international life, are, nevertheless, denied that courtesy of cooperating normally with other established actors already operating on the international plane.

Examples of these are not far to seek and can be multiplied. For instance, until recently, the question of the Peoples Republic of China had been glaring. In refusing Communist China recognition, the United States, had often based its arguments on the principle of the so-called 'lack of democratic legality' by which the US holds the view that the Communist regime in China lacked positive support of the population. The same arguments are invoked by many other states that so far have withheld the official stamp of approval from the governments of DDR, North Vietnam, North Korea and even still Communist China.

It is necessary to observe that the test of the principle of democratic legality has never been consistently applied so as to make it one of the standard requirements for recognition and full participation in international affairs. Too many governments have been recognized that failed to meet the requirements and too often states that inserted the doctrine of popular support among their conditions for recognition closed their eyes to obvious violations when political climate demanded them to do so.

Often, a government which is confronted with this issue of recognition, will partly judge its acceptability on the basis of legal criteria for statehood formulated by international law. Meanwhile, we are concerned with the question whether the state of Rhodesia is one of the component parts of the international community capable of fulfilling its functions according to international law. In view of this consideration, we shall pay more attention to international standards. This simply means that we are not to concern ourselves much with the considerations advanced by municipal law. They deal mainly with the inner cohesion of the group acting as a state or with internal constitutional factors which may not have been observed by a new government nonetheless in firm control of the situation.

On the basis of its reciprocity, sovereign states as a rule treat each other's internal structure as a matter which is no concern of theirs, that is to say, as a matter of exclusively domestic jurisdiction. Thus, each sovereign state decides for itself whether it wishes to organize itself on democratic, authoritarian or totalitarian patterns or to turn its economy on lines of laissez-faire, state planning, state socialism, or communism. Similarly, subjects of international law do not necessarily concern themselves with the question whether the government of another sovereign state has come to power in accordance with its constitution.

In principle, however, the state refused recognition remains isolated until international approval has been granted to its new rulers. Until such a recognition is accorded, the establishment of diplomatic relations is not possible. Some authors are of the opinion that it is by the act of recognition that the sovereignty of the new government is internationally accepted and the body of rules regulating the normal intercourse between states becomes applicable without restrictions. In our opinion, this is not entirely correct. It is not generally right to maintain that every regime recognized by a certain number of governments would necessarily be a state or government in the international law sense. Many a time in state practice, reasons which are politically-motivated form the fundamental basis of recognition. In that case, the consistency of such an action with legal prerequisites raises some doubts.

In any case, the principle of nonrecognition needs to be of short duration in order to be effective. Otherwise, it will be reduced to a purely formal gesture. The Rhodesian case with which we are presently concerned is a case in point. Thus far, although the economic sanctions have considerable influence on the economic situation of that country, they have not accomplished the aim for which they were established. Besides, it does not appear that the general isolationist policy of the international world community declared towards her since 1966 is playing any significant role in bringing the Rhodesian regime to her heels.

To recapitulate: One of the questions we shall look into is the examination of whether, and under which conditions, it is theoretically feasible to also attribute to the unrecognised regime the capacity to participate, perhaps merely in a limited way in international intercourse. We consider that if we can confirm this capacity, then it may


6. Ibid.

7. Chen-Ti-Chiang, op. cit., at p. 97.
offer some help in determining the status as well as the rights and duties of an unrecognized state under international law.

Besides, it is considered useful and proper not to leave the reader completely unacquainted with the historical past of Rhodesia’s political origin and structure. A discussion of the legal nature of the unilateral declaration of independence is envisaged. To what degree has Rhodesia satisfied the essential legal criteria of statehood in international law? Is Rhodesia a state? An inquiry into the problem of recognition in so far as it relates to Rhodesia will be conducted. An effort will be made to see if international law places any obligation on its subjects to recognize the other emerging new ones. Also, we shall see how far the abortive Anglo-Rhodesian ‘talks’ implying recognition on the part of the British government. Finally, it does not seem to us to be entirely out of place to examine the scope of participation of unrecognized states and governments in international relations. This surely will lead us to reflect on the extent to which nonrecognized states can participate in bilateral treaties, multilateral treaties, and above all other relations.

2. RHODESIA AND THE QUESTION OF INDEPENDENCE (UDI)

The name ‘Rhodesia’ took its origin from Cecil Rhodes who, at the head of the British South Africa Company, conquered Mashonaland and Matabeleland with the assistance of regular British troops in the 1890’s. The British government formally took over the administration of the area from the British South Africa Company in 1923. After that, they were granted internal self-government. In late 1940, threatening African nationalist movements emerged in the copper-rich Northern Rhodesia (now Zambia) and labour-rich Nyasaland (now Malawi).

The European colonists had less political power or influence in these latter areas. As a diplomatic move, they persuaded Britain to establish in 1953 the federation of Rhodesia and Nyasaland, which was effectively ruled by the European settlers in Southern Rhodesia, but the African nationalist movement increased at the end of 1963 and led Britain to dissolve the federation. The two northern territories were allowed to prepare for independence under African majority rule. Thus, in 1964 the two independent states of Malawi and Zambia were born.


The 1962 Rhodesian constitution provided for a Prime Minister and a parliament of 65 members, elected under a complicated system designed to ensure that 50 were Europeans and 15 were Africans approved by the Europeans. The franchise was restricted on the basis of income, ownership of moveable property and education. The result was that virtually all voters were European.

In the May 1965 elections, the Rhodesian Front, which was pressing for independence under a European government, won an overwhelming majority of votes, the few eligible Africans having boycotted the elections. The leader of the Front, Ian Smith, was retained as Prime Minister. The central theme of the Front’s programme which Mr. Ian Smith was committed to execute was the retention of political and economic power in the hands of the white minority. Thus, on assuming power, his regime, apart from declaring the independence of Rhodesia unilaterally in November 1965, has suppressed and outlawed African nationalist organizations and has imprisoned the leading members of such organizations.

3. THE UNILATERAL DECLARATION OF INDEPENDENCE: ITS LEGAL NATURE

On 11 November 1965, the Rhodesian Prime Minister, Ian Smith, declared Rhodesia to be an independent and sovereign state. This act, which has incurred comments and criticisms from all over the world, was carried out despite strong objections from the British government, international public opinion and the United Nations Organization.

An interesting question which flows from this act of unilateral declaration of independence is to determine its legal nature, if any, under international law. Did it bring about any legal consequences? Did this declaration transform the original status of Rhodesia from that of a British Crown Colony into something else?

It seems that most, if not all doctrines of international law, recognize that the creation and appearance of a new state as a fact is a matter of internal law rather than of international law. On the other hand, such questions as whether, how far, and in what circumstances existing states may, should or must recognize the entity concerned as clothed with international status, is a matter of international law.

It is questionable if even as a matter of internal Rhodesian law whether the declaration of independence was valid. At the same time, it can be maintained with considerable force that Rhodesia had been in a condition of de facto independence for many years before the actual de-
clarion. In these circumstances, the declaration can be taken at its face value internationally, as a proclamation made publicly and formally in explicit terms on a specific state of affairs: as a statement by an entity that it regarded itself as a fully sovereign state in international law, that it no longer recognized the existence of any other higher authority, either as regards internal affairs or external affairs.

In consequence, Rhodesia on 11 November 1965 unilaterally made known to the other subjects of international law that it no longer accepted the jurisdiction of Britain over its territory, the British government's opposition to this step notwithstanding.

It is submitted here that in essence, the act of a unilateral declaration of independence falls within the category of international acts. Its unilateral character cannot however per se make the act illegal, for internationally an act constitutes a breach of international law just because, and only if, it is attributable to, or imputable to, a subject of international law. On this basis, unilateral declarations of independence, if illegal, would themselves create the conditions which made an international act a breach of law; and a logical objection to this view is, that it is based on an obviously circular process of reasoning.

Before an act can be imputable to an entity as an international wrong, that entity must be shown to be a subject of international law. Hence, even if Rhodesian independence originated in what was, on the internal plane (i.e., as a matter of United Kingdom or Rhodesian law or of the Anglo-Rhodesian constitutional set-up) an illegal act, it must be taken in the circumstances to have resulted in independence on the international plane. This kind of case is by no means the only one in which acts illegal in their origin can produce valid effects in the field of status.

Recognition is, of course, another matter. By the declaration of independence, Rhodesia notified the members of the international community of a new state of affairs. Naturally, by such a declaration, the entity making it anticipates that the notified situation will be recognized by other subjects of international law and thus acquire a definitive basis in that system. On the other hand, such recognition may take a long time to come, and existing international law is very unsettled as to the circumstances in which, and the moment at which, other states are, on the one hand, entitled to, or, on the other hand, bound to accord it. We shall return to this question of recognition at a later stage.


11. For a more detailed analysis of the conditions which make a breach an international act, see ibid., op. cit., p. 163.

4. IS RHODESIA A STATE?

It follows that in order to determine whether Rhodesia is a state as understood in international law, an examination of the concept of statehood is necessary.

Article 1 of the Montevideo Convention on the Rights and Duties of States provides that: 'The state as a person of international law should possess the following qualifications:

a. a permanent population;
b. a defined territory;
c. a government; and

4. capacity to enter into relations with other States'.

The above enumeration include the so-called legal criteria of statehood recognized among a good number of jurists. These criteria may, however, be regarded as constituting only the main elements of statehood as a sort of minimum and as no more than a starting point for further investigation. Other criteria considered by some authors as relevant in relation to the concept of statehood, are: independence; sovereignty; a certain degree of civilization; willingness to observe international law; ability to function as a state and a degree of permanence.

Even though we have considered most of the elements of statehood enumerated above, it is necessary to re-examine some of them strictly in relation to Rhodesia, in order to establish to what extent Rhodesia satisfies these conditions.

1. Population: The existence of a state is normally established within an organized community; it is the people that form the basis for this. Without a population, it would be difficult to establish such an existence. There is no doubt that Rhodesia meets this requirement.

12. Signed 26 December 1933.


16. We have considered these under the section, 'The general notion of states in International Law.'
2. Defined territory: It is often held among jurists that a state must have a specific territory with more or less defined boundaries.\textsuperscript{17} According to past practice, the existence of fully defined frontiers is not required.\textsuperscript{18} In the case of Rhodesia, it is very clear that she has a territory with defined boundaries.

3. Government: A State must have a stable government which is not subject to any other authority or government.\textsuperscript{19} A State is a stable political community, supporting a legal order in a certain area. The existence of effective government, with administrative and legislative organs, is the best evidence of stable political community.\textsuperscript{20}

4. Capacity: The government of Rhodesia is in fact subject to no other government. Britain is not effectively in control of that government which is in effective control of Rhodesia.

However, the question arises, whether it is always correct to think that the existence of effective government is a sufficient support for statehood. The principle of self-determination is already becoming a recognized principle of international law. Today, it can be set against the concept of effective government, more particularly when the latter is used in arguments for the continuation of colonial rule or the creation of a government which is in clear violation of human rights, such as, for instance, by the furtherance of the policy of apartheid.\textsuperscript{21} The question comes up, in whose interest and for what legal purpose is the existence of 'effective' government being pleaded? Lauterpacht\textsuperscript{22} had as late as 1947 prophesized that it is not inconceivable that in future, a rule of international law may be formulated whereby the recognition of a country in which human rights are violated would be considered as illegal. The government of Rhodesia may be effective, but it would appear that the way in which the government is organized with the economic and political power concentrated in the hands of a minority is, to say the least, a violation of human rights.

In the resolution adopted on November 17, 1970, the United Nations Security Council expressly urged all States 'not to grant any form of recognition to the illegal regime in Southern Rhodesia,'\textsuperscript{23} and if this is to be taken as mandatory the states, members of the United Nations organization cannot accord official recognition to the Smith regime, without implicitly violating the Charter of the organization itself, the letter and spirit of which also calls for promotion, encouragement and respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.\textsuperscript{24}

Independence and Sovereignty: These two categories (used synonymously) can only be applied concretely in the light of the legal purpose with which the inquiry is made and the particular facts. Many jurists stress that independence is the decisive criterion of statehood. Among the categories enumerated in the Montevideo Convention 1933, the concept of independence is represented by the requirement of capacity to enter into relations with other states.

It appears that Rhodesia has the capacity to carry out this function. How far she has been able to demonstrate this capacity in practice is another matter, but it is hard to believe that, after so many years of existence as a unilaterally declared state, Rhodesia has not been engaging in international intercourse with other states. One obvious illustration is that Rhodesia has an accredited representative in South Africa without being recognized by South Africa.

5. RHODESIA AND THE PROBLEM OF RECOGNITION—AN APPRAISAL

In international relations, states and other subjects of international law have basic rights and duties in the conduct of their affairs with one another.\textsuperscript{1} Often the question arises whether an unrecognized State (such as Rhodesia) can have rights and duties under international law. The answer to this problem is closely linked, to some extent, with the theories concerning the nature and function of recognition in international law.

The theories in relation to admission to the international community follow opposite conceptions:

1. The constitutive school: According to this school, a personality in

international law is created through a legal act, namely recognition which introduces into relations between a recognized and recognizing state (or states) the elements of rights and obligations. Recognition, so to speak, creates the international personality.

2. The declaratory school: According to this school, international personality pre-exists and the effect of recognition is limited to establishing legal relations between the two parties concerned because a new state (as shown by the fact that it already exists and exercises power over a territory) is already a member of the community of nations and under the protection of international law.

The Soviet theory and practice of recognition tend more towards the declaratory school. This derives from the premise that the creation of the state is the function of internal law rather than that of international law. V. M. Koretsky, making his contribution as a member of the International Law Commission in 1949, 'wondered whether it was necessary to set down the requirements for statehood, since until that time the declarative method in conjunction with diplomatic recognition had sufficed'.

He opposed any new proposal which would be a check on the legitimacy of the birth of a new state by postulating recognition as authorising existence; and any proposal which would introduce a new criterion transferring to the international community a power which rightly belonged to the people. That super-authority would be substituted for the principles of international law and he could not support that question. Only the sovereign people created the state; therefore he felt that the people's sense of sovereignty would object to that proposal, since it overlooked their fundamental right to choose in complete freedom the government they desired. They had sufficed.

According to Mr. Koretsky, 'the establishment of a state was a matter of municipal law. The supremacy of international law was a concept invented in an attempt to set up a supreme authority and should be rejected'.

Another Soviet jurist and former member of the International Law Commission, G. I. Tunkin was also opposed to concepts, provisions or definitions which would suggest that the legal personality of a state was dependent upon international law. The arguments of the Soviet authors mentioned here have something to do with criteria for statehood in international law discussed before, although in their observations, they fail to distinguish clearly the existing differences.

It is of interest to review what some well-known Western jurists think about the problem of recognition. Briefly, thought the conclusion that the unrecognized state has neither rights nor duties in international law 'might be startling', e.g., an intervention otherwise illegal, might be legal. Non-recognition may certainly make the enforcement of rights and duties more difficult than it would otherwise be, but the practice of states does not support the view that they have no legal existence before recognition.

Briggs holds that a state is bound to observe the principles of international law also towards those states which it has not recognized. The Charter of the Organization of American States, 1948 says that even before recognition a state has the right to defend its integrity and independence, to provide for its preservation and prosperity, to organize itself as it sees fit, to legislate concerning its interests, to administer its services and to determine the jurisdiction and competence of its courts.

It appears that the general view among Western jurists is that recognition is of no relevance for the granting of rights and duties which international law prescribes for a state.

H. Lauterpacht put forward a new theory on recognition. While generally he favoured the constitutive theory, he alleged that if a state meets the test of independent statehood, other subjects of international law have a duty to recognize it. Naturally, if this view is correct, Rhodesia is entitled to recognition. However, his view seems to be at variance with much of state practice which, we submit here, is of prime evidential value in the formulation of international law.

It is quite clear that the practice of most states tends to treat recognition as a matter of policy and not a matter of law. A state in the formulation of its policy, decides whether or not to recognize. Recogni-

7. Art. 7.
8. Starke, op. cit., p. 141, says it gets 'full privileges of membership of the international community'. See also, the Charter of the Organization of American States, Art. 10. 'Recognition implies ... the personality of the new State with all the rights and duties that international law prescribes.' See also, Oppenheim, op. cit., p. 121.
nition appears to be entirely discretionary. The fact that recognition is
a matter of policy and not of law as such seems to be more in harmony
with the declaratory theory, which, we submit, is the theory to be
preferred because it agrees more with the practice of states. However,
we do not go so far as to share the opinion that as soon as an entity
has the marks of a state it is a full member of the family of nations
and therefore entitled to treatment as such. This view is obviously an
exaggeration. Schwarzenberger draws attention to the fact that interna-
tional personality may be unlimited (full capacity) as in the case of
sovereign and independent states, or restricted (limited capacity). He
gives the following examples of the latter: international protectorates,
states in the process of colonial evolution, free cities, diminutive states,
the Holy See, international institutions, and in certain cases even individuals.

In the above cases there is recognition as an international person,
though for limited purposes. Is it possible then that an unrecognized
state may also enjoy a limited international personality with the capac­
ty to enjoy some rights and carry out some duties in international law?
On the other hand, recognition withheld on purely policy grounds
ought not to be allowed to deprive an entity of its rights as a state if in
fact it is one.

6. DUTY TO RECOGNIZE

In the light of the foregoing discussion, we come to the conclusion that
there is no duty under international law which places an obligation
upon the subjects of that law to recognize a state, even if it meets the
test of independent statehood; and if such a duty does not exist under

international law, Rhodesia is not entitled as of right to recognition
by other states. If Lauterpacht were correct, it would follow that the
States of DDR, Israel, People's Republic of China, and North Korea
would be entitled to recognition. The fact that a varying number of
states do not recognize them would appear to indicate clearly that state
practice is against this view. On the other hand, it is important to point
out that there are cases when there may be a duty not to recognize a
new entity as a state in the meaning of international law. If for exam­
ple, an entity secedes from its mother-state, premature recognition of
the new entity may be an international wrong against the mother-state.
It may constitute constructive intervention.

The question arises, when is recognition of an entity as a state
premature and when is it proper? There are various factors which may
indicate that recognition, if accorded, would no longer be premature,
e.g., if the revolutionary state has utterly defeated the mother-state;
if the mother-state is apparently incapable of bringing the revolutionary
state back under its control.

Thus, when the South American Colonies of Spain declared their
independence in 1810, no power recognized them for many years.
When it became apparent that Spain, although still maintaining its
claims, was not able to bring them under its sway, the United States of
America recognized them in 1822, and later the United Kingdom fol­
lowed in 1824 and 1825.

7. THE INTERNATIONAL PERSONALITY OF RHODESIA

The mere fact that Rhodesia is a state does not suggest or mean that
it is automatically a full international person. It also does not pre­
suppose that it is a full-fledged subject of international law ipso facto.

10. See, for example, Hall, op. cit., pp. 9-10.
12. Ibid., p. 54.
15. Ibid., p. 72.
16. Ibid., p. 73.
One of the most practical and important criteria of personality in international law, is the capacity to enter into international agreements with states and other subjects of international law, and the ability to bear rights and obligations emerging therefrom. How far Rhodesia satisfies this condition is not clearly known. However, one cannot deny that she is in de facto control of the territory. According to Dr. John Basset Moore, 19 the origin and organization of government are questions generally of internal discussion and decision. Foreign Powers deal with the existing de facto government, when sufficiently established to give reasonable assurance of its permanence, and of the acquiescence of those who constitute the state in its ability to maintain itself, and discharge its internal duties and its external obligations. 20 The same principle is advanced by Professor Borchard 21 who states that, '...The legality or constitutional legitimacy of a de facto government is without importance internationally so far as the matter of representing the state is concerned.'

It needs to be pointed out that in state practice, states for certain policy considerations desist from making a formal public statement of recognition of a new state or entity, while at the same time their conduct tends to imply recognition. Even though up to now no state has expressly recognized Rhodesia, the positions of South Africa and the United Kingdom deserve attention.

Since the unilateral declaration of independence, the South African Government had continued to allow normal trade relations with Rhodesia. Some jurists, particularly South Africans and their sympathisers, try to justify the existing trade relations between South Africa and Rhodesia from the standpoint that in international law, the principle exists that a government is not responsible for acts of its individual citizens. They reason that such actions on the part of private individuals cannot compromise the attitude of the South African government in the matter of Rhodesian recognition. This stand is not convincing and is open to argument. It is known that the normal trade relations which exist between Rhodesia and the Republic of South Africa since

20. Tinoco Concessions case, Great Britain - Costa Rica Arbitration (1923) 1 United Nations, Reports of International Arbitral Awards, 1948 - 369 (RIA). Moore regarded this principle as one which has had such universal acquiescence as to become well settled international law.

the unilateral declaration of independence seem to be manned by private South African citizens and companies. It is only a matter of guess-work what amount of the South African government’s quota of capital is involved in that country’s trade in oil as well as other business concerns with foreign states, Rhodesia in particular. To entrust certain external trade activities into the hands of private persons, associations and companies will, no doubt, give some leeway to the South African authorities when explaining their position in the event of any international criticism.

As Stanley Uys rightly pointed out, ‘An examination of Dr. Verwoerd’s statements since the UDI shows that he has been entirely consistent in a cunning sort of way; while proclaiming official ‘non-involvement’, he has given the go ahead to private traders, organizations and individuals to carry on trade with Rhodesia’. 22 This was precisely the policy of the South African government under Dr. Verwoerd. There appears to be no change in the policy of the subsequent government led by Mr. Vorster. 23

While addressing the South African Parliament on the stand of his Government in the Rhodesian crisis, on 25 January 1966, Dr. Verwoerd said: ‘I now turn to the question of petrol and oil supplies for Rhodesia. Here we continue to follow the fundamental principles we have laid down, namely, that we could not in any way or form participate in boycotts or sanctions. If there are producers or traders who have oil or petrol to sell, whether to this country or the Portuguese or Basutoland or Rhodesia or Zambia, then it is their business and we do not interfere. We do not prevent them from selling. If we were to try to prevent them, we would be participating in boycott.’ 24

On April 4, in a post-general election broadcast, Dr. Verwoerd repeated that South Africa did not take part in any measures directed by any state or group of states against any other, such as boycotts or sanctions. In other statements he made between January 25 and April 4, he said that ‘normal trade’ for South Africa included not only normal trade, but also the provision of items, such as petrol, which South Africa had never previously exported to Rhodesia, and any

23. The Prime Minister of South Africa, Dr. Verwoerd was assassinated on 7 September 1966. Seven days later, September 14, 1966, he was succeeded in office by Mr. John Vorster, the former Minister of Justice.
additional trade that might arise as a result of South African firms competing for new Rhodesian customers, further, he advised captains of South African ships not to disclose their cargoes if intercepted. 25

From Dr. Verwoerd's Parliamentary statement of January 25, 1966, and the other subsequent statements quoted above, 26 the following conclusions must be drawn, namely:

1. That the pronouncements have undoubtedly rendered useless the argument that the actions of the individual citizens of South Africa in perpetuating trade with Rhodesia cannot compromise the position of the South African Government on the Rhodesian dispute in general.

2. That they have disproved the assumption (optimistically entertained in certain diplomatic circles) that 'non-involvement' meant 'non-involvement'; it meant in fact that while Dr. Verwoerd's government was officially neutral towards UDI, the rest of South Africa could commit itself as much as it wanted.

3. That the other assumption, namely that Dr. Verwoerd's January 25 statement to Parliament may have been made under election pressure, and that after the general election on March 30, he would come round, has fallen to the ground because of his statement of April 4. Besides, Dr. Verwoerd's notice served on the United Nations not to try to divert him from his course shows that his true position was to continue to allow South African interests to assist Rhodesia as much as possible.

The next interesting point worth commenting on is the existence of an accredited representative of the Government of Rhodesia in South Africa. What is the legal consequence of this fact? It should be remarked that as a general rule of customary international law, the establishment of diplomatic relations between two states will imply recognition. 27

What exists between South Africa and Rhodesia is consular relations.

Under international law, the establishment of consular relations between two states can only imply recognition if there is an issue of the instrument of consular exequator. Even though it does appear that, so far, the current representatives of Rhodesia in South Africa fall short of this, we believe that what actually matters as regards the real situation of affairs, is what such Rhodesian representatives are permitted to do within the South African territory. For us, the fact that the persons representing Rhodesia in the Republic of South Africa are allowed to carry out official consular functions may, depending on exactly what these are, be sufficient evidence to assume that the recognition of Rhodesia by South Africa is in fact inexpressly accorded.

To our mind, the best way to throw more light to the legal nature of the Rhodesian representation in the Republic of South Africa is by quoting the relevant excerpt of an official letter addressed to us by the South African Embassy at the Hague to this effect dated 30, July 1973 in which the following was stated: 'The Union of South Africa and Rhodesia exchanged High Commissioners in 1951. This representation was continued during the Federation of Rhodesia and Nyasaland when this state came into existence. On South Africa leaving the Commonwealth, she insisted on the South African representation in the Federation of Rhodesia and Nyasaland having the same status as other Commonwealth countries. This request could not be complied with but the appointment of an Accredited Diplomatic Representative to the Federation was agreed upon. He would rank immediately after the High Commissioners of the Commonwealth countries. The Federation reciprocated by making a similar appointment in the Republic. After the dissolution of the Federation in 1963, the status quo was maintained with Southern Rhodesia.

The Accredited Diplomatic Representative is appointed by a letter of appointment to the Minister of Foreign Affairs of the receiving state, signed by the Minister of Foreign Affairs of the sending State.

On the South African Diplomatic List, the Accredited Diplomatic Representative of Rhodesia ranks immediately after the Chargé's d'Affaires en titre. 28

8. THE RHODESIAN INDEPENDENCE DISPUTE: THE BRITISH POSITION (DO THE ABORTIVE ANGLO-RHODESIAN 'TALKS' IMPLY RECOGNITION?)

Since the unilateral declaration of the independence of Rhodesia, the Government of the United Kingdom has at different times and stages conducted 'talks' or 'negotiations' with the representatives of the Government of Rhodesia. These 'talks' have been mostly described as exploratory in nature, in order to see if there are grounds upon which subsequent 'negotiations' for a settlement could proceed. They have

25. Ibid.
26. Ibid.
27. Starke, op. cit., p. 128; Oppenheim, op. cit., p. 143. It may, however, be vicariously liable for certain acts which are injurious to another State, Oppenheim, op. cit., pp. 330-331.
28. It must be held from the above that a clear element of recognition of the Rhodesian Government by the South African State is evident.
been conducted at different levels and are too many to be enumerated here. However, it is essential to mention that the most important of these series of talks were those of the ‘Tiger’ and ‘Fearless’. Apart from the fact that the leaders of the two governments participated in these talks, the other representatives from both parties included the topmost government officials.

Could such ‘talks’ or ‘negotiations’ imply recognition de facto of Rhodesia by the United Kingdom? It is a general rule of international law that while diplomatic relations normally imply recognition, initiation of ‘negotiations’ with a hitherto unrecognized entity does not necessarily do so. In all types of implied recognition, it is of paramount importance to consider the intentions of the party whose conduct is subject to scrutiny. Efforts ought to be made to establish what purpose is behind such moves. If it is evident enough beyond doubt that if an intention to recognize can be implied from such ‘negotiations’ or ‘talks’, there will be recognition but otherwise not. Thus, for example, negotiations with an entity for the purpose of protecting lives will not usually imply recognition.

It does appear that in the case of Rhodesia there has obviously been no intention to recognize on the part of the United Kingdom for the following reasons: the discussions have been described as ‘exploratory talks’. Secondly, the United Kingdom has expressly reserved its position by making it clear that the talks do not imply condonation of Rhodesian independence. It is not right also to suggest that the draft agreements between United Kingdom and Rhodesia during these talks automatically tantamounts to recognition of Rhodesia by Britain. It is, therefore, apparent that it may be incorrect to assert that the United Kingdom has by its conduct recognized the state of Rhodesia de facto.

At the same time, the results of the legal battles on the Rhodesian crisis up till now, those carried out under the auspices of the United Nations Organization and its organs, and within Rhodesia itself, show the British Government’s inability to bring the Rhodesian independence conflict under control. It is worthwhile reviewing some of these battles.

By a resolution passed at the United Nations on April 1966 on Rhodesia, implicit action was recommended against Rhodesia under Chapter VII of the United Nations Charter. The resolution advocated the use of force under Article 42. The main purpose of the resolution was to give the British Government United Nation’s authority and support to make existing sanctions effective, that government having preferred to act through the United Nations and to risk every sort of diplomatic frustration in the attempt.

On November 11, 1966, the United Nations General Assembly’s Trusteeship Committee adopted a resolution calling on Britain to use force to overthrow the one-year old Rhodesian régime. The vote on the draft – sponsored by 54 Afro-Asian and East European countries – was 94 to 2 with 17 abstentions (Portugal and South Africa cast the negative votes).

Furthermore, the factual situation in Rhodesia appears to expose the relatively weak position of the United Kingdom. This position was comprehensively investigated by the Rhodesian Appellate Division in Madzimba Muto v. Lardner-Burke and Another. Beedle, C. J., made the following findings in this case:

‘The factual position in Southern Rhodesia today may therefore now be summed up as follows: The present Government is in complete administrative and legislative control of the country and is continuing to maintain the existing courts of law, whose orders it is enforcing. None of the legislative acts of the United Kingdom has been recognized or enforced in the country since the Declaration of Independence.’

‘I am satisfied that few well-informed persons living in Rhodesia at the moment would disagree with the statement that the territory has been effectively governed during the past two years even though some may disapprove of the form of government. If the territory has been effectively governed, the question to be asked is: by whom?’

29. Starke, op. cit., p. 128; Whitman, op. cit., pp. 583-584. There are many acts which may safely be performed without an implication of recognition being drawn, e.g., giving relief to victims of disaster, informal calls on officials, informal diplomatic approaches, informal communications, conduct of routine matters, postal agreements, maintaining an agency, protesting -because of an outrage and dealing with postal orders issued by an unrecognized entity. Ibid., 526, 529, 530, 531, 532, 567, 577, 578, 595.
31. Schwarzenberger, op. cit., p. 64; Whitman, op. cit., p. 524.
33. 1968 (2) S. A. 284; It must be recalled that on September 10th, 1966, two judges, Justice Lewis and Mr. Justice Goldin, while declaring that the Smith Government was not the legal government of the country, and that the 1965 ‘independence’ constitution was not lawful, still dismissed the application of two political detainees Mr. Daniel Madzimba Muto and Mr. Leo Baron, who sought their release on the grounds that the government which detained them was illegal. The Judges based their rejection on the ground that Smith’s government was the effective and de facto government in Rhodesia.
34. Ibid., pp. 306-307.
The intention in this case was to see if the basis of negotiating the Privy Council would no longer have effect in Rhodesia. This was through the Anglo-Rhodesian agreement, the provisions of which were to be put before the Rhodesian people by a high-powered Commission set up by the British Government. The Commission was headed by Lord Pearce. Although the agreement as well as its implementation proved abortive, it is considered necessary to reflect on its nature in view of the arguments which have been advanced from certain quarters to the effect that the agreement amounted to an implied recognition of the Rhodesian regime by Britain.

After the election of the Conservative Government to power in Britain in June 1970, Sir Alec Douglas Home, announced a new attempt to negotiate with Rhodesia under the five principles. Lord Good-

9. THE ANGLO-RHODESIAN AGREEMENT

The Conservative British Government led by its Prime Minister Edward Heath made the latest effort to resolve the Rhodesian dispute. This was through the Anglo-Rhodesian agreement, the provisions of which were to be put before the Rhodesian people by a high-powered Commission set up by the British Government. The Commission was headed by Lord Pearce. Although the agreement as well as its implementation proved abortive, it is considered necessary to reflect on its nature in view of the arguments which have been advanced from certain quarters to the effect that the agreement amounted to an implied recognition of the Rhodesian regime by Britain.

After the election of the Conservative Government to power in Britain in June 1970, Sir Alec Douglas Home, announced a new attempt to negotiate with Rhodesia under the five principles. Lord Good-

35. Ibid., at p. 321.
36. Ibid., at p. 325.
37. 1968 (2) S.A. 457.
38. Lord Pearce was former Lord of Appeal in Ordinary, who after his retirement in 1969 became independent chairman of the Press Council and chairman of the Appeal's Committee of the City Panel on Takeovers and Mergers. His Commission which consisted of the Chairman, three deputy chairmen and 11 Commissioners and later increased to 18 was to test whether the settlement agreement would be acceptable to the people of Rhodesia 'as a whole' in terms of the British Government's 'five principles'..

man led the first of five talks missions to Salisbury to prepare the ground for an Anglo-Rhodesian summit in April 1971. On November 15, 1971, Sir Alec-Douglas Home and a British team of 27 arrived in the Rhodesian capital Salisbury for talks.

An agreement was officially signed in Salisbury on November 24, 1971. In a press statement issued immediately afterwards it was announced that British and Rhodesian delegations had 'reached agreement on proposals designed to bring to an end the constitutional dispute between the two Countries' and that these proposals would be 'submitted to the Rhodesian people through a test of acceptability ...' 39

The above agreement was followed by an exchange of notes on financial matters concerning Rhodesia's frozen assets in London and its foreign debts. 40

As we pointed out before, certain acts exist under international law which could be carried out without an implication of recognition being drawn. To deduce from an act the existence of an implied recognition, it is essential to study the conduct of the party in question and to consider the intentions of such a party. Let us therefore try to contrast the Labour Government's stand on the issue of Rhodesian independence dispute with that of the Conservative Government.

It is clear that obvious differences exist in their manner of handling the same problem. The 'talks' or 'negotiations' carried out between the representatives of the Rhodesian Government and the representatives of the British Labour Government were clearly described as 'exploratory'. The intention in this case was to see if the basis of negotiating a settlement could be found. There was no formal agreement reached on the settlement pattern.

In the case of the Conservative Government's initiative the existence of a basis for settling the dispute was not in question. It was on this basis that an agreement was negotiated by the accredited representatives of both governments, which was later signed by the Prime Minister of Rhodesia and the British Foreign Secretary. It follows that Britain impliedly recognized the Rhodesian regime as the de facto
authority in the country, and could have gone further to grant her *de jure* recognition if the terms of the agreement were accepted by the majority of the Rhodesian people.

10. **THE SCOPE OF PARTICIPATION OF NONRECOGNIZED STATES IN INTERNATIONAL LAW**

The observation we made in the introductory part of this section of our discussion— that the absence of recognition of a state by the other subjects or actors of international law results consequently in such a nonrecognized state living its life in a more or less isolation from others, should not be construed as meaning, *ipso facto*, that the concept of nonrecognition is a passive state of affairs. Far from that. It does not follow, therefore, that such an unrecognized state is completely inactive.

It should be borne in mind that an unrecognized state or regime is a political animal irrespective of lack of recognition. It is not a dormant organism. Since it is not, it engages upon international relations and establishes contacts with nonrecognizing states (as of right) so far as its situation permits. There is no denying the fact that it represents a factor in international life with the same aspirations and just in the same way as a fully-recognized state or government does.

So far, international law has not settled enough as to define the scope of contacts which states are permitted to engage in their relationship with the unrecognized states and governments.

The subject of treaty (bilateral as well as multilateral) and other relations with unrecognized states and governments is narrowly interwoven with the doctrine of implied recognition. Though there does not seem to be a general consensus on the competence of unrecognized regimes to enter into bilateral treaty-relations, it does appear that the most recent pronouncement on this issue with which we are conversant remains that of the American Law Institute which stated that unrecognized authorities cannot bind a state internationally. If this assertion were to be true, it would look as if states have frequently sinned against the rule proposed by the institute. To our mind, the participation of an unrecognized state in a bilateral treaty clearly confirms not only the *de facto* status of the authorities there in power, but also the existence of a separate entity, responsible for the proper execution of the treaty provisions within its territory. In our view, nothing precludes a nonrecognized state from actively participating in international relations if only the entity has the capacity to do so.

The participation of unrecognized states in international relations occur in the following forms, namely:

a. **Bilateral treaties**: Governments do, in practice enter into bilateral agreements with regimes they do not in the least intend to recognize. But then, if it is accepted that a bilateral treaty is a formal instrument which acknowledges the capacity of the parties to bind their respective states, the conclusion would inevitably be that a nonrecognizing state will hardly enter into such contacts with a nonrecognized regime without the intention to recognize, either immediately or after a relatively short lapse of time.

b. **Multilateral treaties**: Unrecognized states also participate in multilateral treaties. Even though participation in a multilateral treaty does not *per se* mean active intercourse with all the parties thereto, it can hardly be denied that there exists an implied recognition of the ability of the unrecognized state to carry out the rights and obligations resulting from such a treaty. On the other hand, when multilateral treaties would require unanimous approval of the original signatories for acceptance of a new member, and the new member happens to be a state or government not recognized by some of the parties, then co-signature of permission to adhere may amount to recognition.

c. **Other relations**: Relations with unrecognized states and governments transcend treaty relations. Trade agreements, for example, may result in an exchange of trade missions or even of consuls. One may not be too wrong to interpret the establishment of a trade mission and consular service with extensive powers as a first step towards recognition.

One can only conclude from the above that unrecognized states are states and that consequently they have the capability to enter into bilateral or multilateral treaty relations. Above all, they can participate in other forms of relations. In short they have international legal personality.


43. The capacity we have in mind here is not necessarily *legal* capacity.
There is considerable reason to support the thesis that a new state may come into being without recognition by other states. In general, it is admitted that an unrecognized state cannot be completely ignored in international law. It would be incorrect to regard the territory of such a state as belonging to nobody. Other states have no right to violate the territory of the unrecognized state, nor would it be right to consider ships flying its flags as stateless.44

It is a fact that many states do not recognize the German Democratic Republic. It is also a fact that several states though they do not officially recognize her, accept that it has become a party to the Nuclear Test Ban Treaty, 1963, by signing the copy of the treaty deposited with the Government of the Soviet Union.45

Unrecognized states, therefore, are bound to observe universally recognized rules of international law just as recognized states. For example, reference can be made to the statements made by the United Kingdom and United States Government on occasions when they have claimed compensation from the Formosa and Peking regimes respectively for damage caused to Britain and United States interests.46

The American Law Institute, has adequately summed up State practice in this field by providing that a regime which is not recognized as a state but meets certain requirements as to effective control of a defined territory and population has the rights and also the obligations of a State under international law.47

Article 1, paragraph 3 of the resolution of the Institute of International Law of 23 April 1963 on recognition of new States and Governments provides: 'that the existence of the new state with all the legal effects connected with that existence is not affected by the refusal of one or more States to recognize.'48

The conclusion should be that unrecognized states are states and that consequently they have the capacity to conclude treaties, in short they have international legal personality. It follows that Rhodesia ranks among the entities which are endowed with statehood under interna-

44. For statements on such questions, see Whiteman, Digest of International Law, vol. 2, para. 69, pp. 604.
49. Supra, chapter 8.
6. The status and treaty-making capacity of organs of national liberation movements'

1. INTRODUCTORY REMARKS

'... The range of subjects of international law is not rigidly and immutably circumscribed by any definition of the nature of international law but is capable of modification and development in accordance with the requirements of international intercourse.'

The message which Sir Hersch Lauterpacht conveys in the above observation is clear. It is a call for realism. It calls for a recognition of the fact of the proliferation of new types of entities which have been brought about by the nature of modern international relationships. Above all, it is a call for the development of the law applicable to the emerging multifarious new types of international entities.

The question of National Liberation Movements (i.e., nations and peoples who are fighting to set up independent and sovereign states of their own) is undoubtedly one of the hard facts of contemporary international life with which international law is concerned. The role of these movements is slowly but surely on the increase and has significant impact on the whole structure of international law.

But, unfortunately, the issue of their international legal personality

1. By the use of the term 'Organs of National Liberation Movements' in this context, we mean to cover all titles - mainly provisional in character which people have often adopted to designate and describe their governmental machinery during the period of their struggles to establish sovereign and independent states. Though these titles, as will be observed, may be different, nevertheless, they are the same in essence.


3. The notion 'peoples' as used here should be understood in its broadest sense to take into account all peoples, large and small and whether living in colonial territories or not. Other peoples living in an area which was geographically distinct and ethnically or culturally different from the remainder of the state, should with adequate safeguards be covered by this term.
and their treaty-making capacity, if any, have not received adequate attention in legal literature. Leaving aside international organizations and one or two particular institutions such as the Papacy, the view that entities other than States can be subjects of international law has been denied by many, and the effects of this position continue to linger, in some ways, in existing international law.

As we have previously said, this rigid exclusion of parties other than States from exercising their functional capacities under international law appears to be a consequence of the traditional concept of international law which seems obsolete and not useful today. An indisputable truth is that international relationships are becoming more than just covering the activities between the traditional subjects of international law — i.e., sovereign and independent states.

Our main task in this section of our investigation is to direct our study to those aspects of the matter which really require to be established in order to warrant the conclusion that organs of national liberation movements should or should not be granted personality in international law; the crux of the matter being whether there is a basis in law and in fact to justify the activities of peoples fighting to establish their own independent states and to participate in international relations. Have belligerent parties any personality in international law? What is the State practice with regard to belligerent parties engaged in liberation struggles to establish their own governmental authorities? And, to what degree if any, have they treaty-making capacity?

There are principles of international law which form the main fabric on which the structure of international relations could be said to rest. They are closely inter-related both conceptually and from the standpoint of their application in international life. It may not be difficult therefore, to understand why the United Nations General Assembly gave much thought to the problem of their successful codification by setting up a Special Committee for this purpose.

These principles, though they are important, do not find any place for comments here. Apart from the fact that considerations of space and scope of our study forbid a general analysis of them, and therefore are unnecessary for our immediate purpose. On the other hand, we shall focus our attention on the discussion of the principle concerning equal rights and self-determination of peoples with which we are principally concerned. It is hoped that it will be of some use and above all interesting to trace briefly the legal history of the United Nations Codification efforts of this principle in the Special Committee. Possibly, this method of approach will help to clarify the problems at issue and reflect on the efforts of divergent policies of States on the establishment of universal international legal norms.

2. THE UNITED NATIONS ORGANIZATION AND THE CODIFICATION OF THE PRINCIPLES OF INTERNATIONAL LAW WITH SPECIAL REFERENCE TO THE PRINCIPLE OF EQUAL RIGHTS AND SELF-DETERMINATION OF PEOPLES

a. Introductory considerations

The General Assembly at its seventeenth session by resolution 1815 (XVII) recognized 'the paramount importance, in the progressive development of international law and in the promotion of the rule of law among nations, of the principles of international law concerning friendly relations and co-operation among states and the duties deriving therefrom, embodied in the Charter of the United Nations, which is the fundamental statement of these principles' and resolved to 'undertake, pursuant to Article 13 of the Charter, a study of the principles of international law concerning friendly relations and co-operation among States in accordance with the Charter with a view to their progressive development and codification, as to secure their more effective application'.

Operative paragraph 1 of the same resolution listed seven 'notable' principles among which was — 'the principle of equal rights and self-determination of peoples'. Four of the seven principles were studied by the General Assembly at its eighteenth session, in accordance with operative paragraph 3 of resolution 1815 (XVII). At that session the Assembly adopted resolution 1966 (XVIII), whereby it decided to establish a Special Committee 4 on Principles of International Law concerning Friendly Relations and Co-operation among States, which was requested to study four of the principles and to 'draw up a report containing, for the purpose of the progressive development and codification of the four principles so as to secure their more effective applica-

4. The 1964 Special Committee was composed of the following twenty-seven Member States: Argentina, Australia, Burma, Cameroon Canada, Czechoslovakia, Dahomey, France, Ghana, Guatemala, India, Italy, Japan, Lebanon, Madagascar, Mexico, Netherlands, Nigeria, Poland, Rumania, Sweden, Union of Soviet Socialist Republics, United Arab Republic, United Kingdom of Great Britain and Northern Ireland, United States of America, Venezuela and Yugoslavia.

Burma was appointed to replace Afghanistan, one of the states originally chosen to serve on the Committee, which had resigned from membership before the Committee session (see A/5689 and A/5727).
tion, the conclusions of its study and its recommendations. By the same resolution, the Assembly decided to consider the report of the Special Committee and its nineteenth session, and also to study at that session three other principles including the principle of equal rights and self-determination of peoples.

b. First United Nations efforts to codify the principles of equal rights and self-determination

1. The 1964 Special Committee: The Special Committee established under the General Assembly resolution 1966 (XVIII), referred to hereafter in the present study as the 1964 Special Committee, met in Mexico City at the invitation of the Government of Mexico, from 27 August to 2 October 1964 and adopted a report of the General Assembly. The 1964 Special Committee discussed a number of principles but could not deliberate on the principle of equal rights and self-determination of peoples.

2. The 1966 Special Committee: The principle of equal rights and self-determination of peoples were discussed by the Special Committee at its fortieth and forty-first meetings on 7 and 11 April respectively and its forty-third and forty-fourth meetings on 12 and 13 April 1966. During the debate all the representatives recognized the importance of the principle as proclaimed in Article 1, paragraph 2, of the Charter and the desirability of codifying it. In connexion with the principle of equal rights and self-determination of peoples, three written proposals and one amendment were submitted to the Special Committee.

In those proposals it was emphasized that the principle of equal rights and self-determination of peoples was no longer merely a moral or political postulate, but had become a recognized and universal principle of contemporary international law. Today, a full respect for the principle was a pre-requisite for the maintenance of international peace and security, the development of friendly relations among states, and economic, social and cultural progress throughout the world. The Special Committee debate gave considerable weight to the salient developments connected with this principle. In this connexion for example, the French Revolution, the Declaration of Independence proclaimed by the United States in 1776, and the writings of various philosophers and thinkers were cited.

c. Relevance of the principle of equal rights and self-determination in the modern world

There was unanimity of opinion in upholding the view that the principle was closely connected with one of the outstanding events of the present age – the emancipation of colonial peoples, and that it therefore applied primarily to the peoples which were still struggling for independence. The realization of the principle constituted the aspiration and the ultimate goal of countries struggling against colonialism and exploitation. However, it was also rightly pointed out that it would be wrong to limit it to colonial situations, for a genuine principle of international law should not be subordinated to, or circumscribed by, certain contemporary political events which by their very nature were temporary and transitory. The principle of equal rights and self-determination of peoples was rooted in justice and law, and particularly in the right of collective expression vested in every human group.

Other interesting considerations about the principle aired in the Special Committee concerned the problem of translating the concept of self-determination into a body of legal rules intended to govern relations between sovereign states.

One group of states stressed that any codification of a legal principle must necessarily indicate what kind of entity (peoples or nations) enjoyed the rights and obligations established by the principle, and the conditions and manner in which they were to be exercised. In the view of others, the formulation of the principle consisted mainly in specifying generally the conditions of its applicability and in prescribing, in general terms, the legal conditions and consequences of its application. It seems to us however that, given that a permanent and universal right to self-determination, based on the Charter of the United Nations Organization and international practice, was proclaimed, it was absolutely essential to specify who should enjoy that right, against whom it could be invoked and what the conditions were for exercising it.

5. It may be well to point out that in addition to the countries originally appointed to serve under the Special Committee as indicated in footnote 4 above, Burma was nominated to join it. This was as a result of the resignation of Afghanistan from the membership before the Committee session (see A 5699 and A 3757).


However, the 1966 Special Committee ended its Session without reaching an agreement on the principle of equal rights and self-determination of peoples. In concluding its work, the Drafting Committee submitted to the Special Committee the following observations:

1. The Drafting Committee regrets that it has been able to present agreed formulations only on two of the seven principles referred to it.
2. The debates in the Special Committee as well as in the Drafting Committee have greatly contributed to clarifying the problems at issue.
3. The Drafting Committee established small informal working groups, one or another of which examined at length each of the seven principles.
4. The intensive discussions in the Drafting Committee and its working groups have demonstrated that the difficulties between the various viewpoints have been materially reduced.
5. Among the factors which hampered the achievement by the Drafting Committee of a greater measure of agreement was lack of sufficient time for additional deliberation and negotiation.  

Further efforts at codifying

1. The 1967 and the 1968 Special Committees. In 1967, the Special Committee met three times and considered the principle of equal rights and self-determination of peoples. It was noted that this principle was the basis upon which many of the peoples of Asia, Africa and other regions of the world had joined the community of nations as sovereign and independent States, and it continued to be of great importance to those still under colonial rule. The view was expressed that national liberation movements were an outstanding feature of present times. A people striving for independence was, it was argued, a subject of international law and was entitled to international protection. A violation of the rights of such people in the struggle was said to be an international crime and contrary to the purpose of the United Nations.

The relevant provisions of the proposals before the Special Committee differed in the manner in which they gave expression to the concept of self-determination. These proposals were submitted in 1966 by the following countries: Czechoslovakia, United Kingdom of Great Britain and Northern Ireland, joint proposal by 14 non-aligned countries, United States of America.

The proposals submitted by Czechoslovakia and by the non-aligned countries stated the concept as including the right of all peoples to self-determination, while the proposal submitted by the United Kingdom of Great Britain and Northern Ireland and by the United States of America provided that every State had the duty to respect the principle of equal rights and self-determination of peoples. Besides this, the United Kingdom proposed the introduction of a provision to the effect that every State had the duty to implement the principle in regard to the peoples within its jurisdiction, in as much as the subjection of peoples to alien subjugation, domination and exploitation constituted a denial of fundamental human rights, was contrary to the Charter and was an impediment to the promotion of world peace and co-operation; and that every State had the duty to accord to those peoples the right freely to determine their political status and to pursue their social, economic and cultural development without discrimination as to race, creed or colour.

Those who spoke in favour of the formulation in terms of a right of peoples to self-determination contended that the existence of such a right was recognized as a rule of contemporary international law and had been affirmed in a number of resolutions of the General Assembly. On the other hand, those who preferred the formulation of the concept of self-determination as a principle to be respected and complied with by all States, as an obligation upon those States to accord a right to peoples under their jurisdiction, explained that they opposed the formulation of the concept as a right of peoples primarily because of the almost insuperable difficulty of defining the meaning of a ‘people’ possessing the right. In any formulation of the rights and duties, they contended, the basic question was who was the repository of the right or duty. It must be observed here, that it would be absurd to consider that states were the only beneficiaries of the principle. It was also necessary to indicate how far the right went i.e. its content. Since the principle is a universal one, it should apply to all peoples and places, although of course, it is of immediate relevance to those who are still under colonial domination and are struggling for their independence.

It was also noted in the Special Committee debate that, considered

11. The Special Committee met at its 68th, 69th and 70th sessions on 3, 4 and 7 August 1967.
16. Ibid., para. 459.
in its broadest sense, the principle should be regarded as a general and permanent principle of international law, in the same way in particular as such other fundamental principles as non-intervention in matters within the domestic jurisdiction of any state and that of the sovereign equality of states. 17 A subject of some discussion in the Special Committee was the question as to what should be regarded as constituting full implementation of the principle. The popular view which we share, was that the principle could be regarded as fully implemented when the people concerned had attained the status of a sovereign and independent state. This position is quite satisfactory. At the same time, it would seem to us that there must be another form of implementation of the principle depending on given specific circumstances. In our view, there could be other ways through which a sound measure of what is involved in the principle can be realized, short of full independence. The essential consideration is whether the demand of a given people or nation to assert their right of declaring the nature of their socio-political status is basically recognized and encouraged. The final word on the form resides on the people or nation concerned. If, for example, a nation or people decides to remain within a given sovereign state and freely accepts to enjoy a reasonable quantum of autonomy, or any other form of accepted constitutional arrangement which satisfies their needs, 18 and which is based on democratic principles, we should consider that a satisfactory form of implementation of the principle. Questions concerning the implementation of the principle by a state with respect to peoples within its jurisdiction were also touched upon. A good number of the representatives drew attention to the close relationship between the principle of equal rights and self-determination of peoples and the respect for human rights and fundamental freedom which, they recalled, was made explicit in Article 55 of the Charter. In their view, an essential element of this latter principle is the duty of states to accord to peoples within their jurisdiction the right freely to determine their political status and to pursue their social, economic and cultural development without discrimination as to race, creed or colour; but presumably within the state, on a basis analogous to federation, since governments can hardly be said to be under a legal obligation to allow secession.

17. In certain circumstances a direct conflict might well arise between the principle of self-determination and the other principles here mentioned, formulated in a general way, but we shall come back to this point.

18. The recent case of the people of the Southern part of Sudan is a case in point.

19. Members of the Working Group included representatives of Czechoslovakia, United Kingdom and Japan.

20. The proposal was submitted by Czechoslovakia, Poland, Romania, Union of Soviet Socialist Republics. For the text of the proposal, see Official Records of the General Assembly, Twenty-fourth session, Suppl. No. 19 (A/7610), par. 145.
stood that agreement on one particular point would not prejudice the position of members with regard to other points or to the statement of the principle as a whole.  

Agreement was reached that the first paragraph of the declaration of the principle of equal rights and self-determination of peoples should contain a general statement of that principle, stressing its universality, and that it should be followed by a second paragraph spelling out in several sub-paragraphs the legal consequences deriving from it. There was no agreement as to whether rights or duties should appear first in this formulation.  

There was agreement on the following statements for inclusion among the sub-paragraphs of a second paragraph: 'Every State has the duty to render assistance to the United Nations in carrying out the responsibilities entrusted to it by the Charter regarding the implementation of the principle of equal rights and self-determination of peoples, and to contribute to the fulfilment of this principle in order to promote friendly relations and cooperation among States'.

'Every State shall refrain from any action aimed at the partial or total disruption of the national unity and territorial integrity of any other State or country'.

Other elements agreed for incorporation in the statement of this principle are as follows: 'The subjection of peoples to the alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and co-operation'.

Items on which agreement was not reached in the 1969 deliberations of the Drafting Committee included the right of peoples' defence against colonial domination and the rights of peoples to request and to receive assistance in their struggle; the mode of implementation of the principle; implementation of the principle by a State with respect to peoples within its jurisdiction and the criteria for applicability of the principle.

It was generally believed that a solid foundation had been laid for the future formulation of the principle of equal rights and self-determination.

23. Ibid.

3. The 1970 Special Committee. The Special Committee on Principles of International Law Concerning Friendly Relations and Co-operation among States met in Geneva from 31 March to 1 May 1970. This meeting was in fulfilment of resolution 2533 (XXIV) of 8 December 1969 of the General Assembly at its 24th session. The resolution requested the Committee to try and bring its work of codification of the principles of international law to a successful end so as to enable the General Assembly to adopt the final instrument during its 25th session marking the 25th anniversary of the inception of the United Nations Organization.

The principle of equal rights and self-determination of peoples as drafted by the Special Committee and adopted finally by the General Assembly at its 25th session, which is hereby reproduced in extenso, states:

'By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter.'

Every State has the duty to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples, in accordance with the provisions of the Charter, and to render assistance to the United Nations in carrying out the responsibilities entrusted to it by the Charter regarding the implementation of the principles, in order:

a. to promote friendly relations and co-operation among states; and
b. to bring a speedy end to colonialism, having due regard to the freely expressed will of the peoples concerned; and bearing in mind that subjection of peoples to alien subjugation, domination and exploitation constitutes a violation of the principle, as well as denial of fundamental human rights, and is contrary to the Charter.

The establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitutes modes of implementing the right of self-determination by that people.

Every State has the duty to refrain from any forcible action which deprives peoples referred to above in the elaboration of the present

principle of their right to self-determination and freedom and independence. In their actions against, and resistance to, such forcible action in pursuit of the exercise of their right to self-determination, such peoples are entitled to seek and to receive support in accordance with the purposes and principles of the Charter.

The territory of a colony or other non-self-governing territory has, under the Charter, a status separate and distinct from the territory or State administering it; and such separate and distinct status under the Charter shall exist until the people of the colony or non-self-governing territory have exercised their right of self-determination in accordance with the Charter, and particularly its purposes and principles.

Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.

Every State shall refrain from any action aimed at the partial or total disruption of the national unity and territorial integrity of any other State or country.

3. THE QUESTION OF INTERNATIONAL PERSONALITY OF NATIONAL LIBERATION MOVEMENTS: THE SOVIET VIEW

The preceding paragraphs have already, prematurely but unavoidably, introduced the key elements into the discussion: the principle of self-determination, which is accepted by us as the legal corner-stone from which justification is given to the activities of the national liberation struggles.

In furthering this debate, we set out in this section to ascertain why a number of jurists not only question the legality of the principle from which the justifications of the activities of these movements derive, which consequently denies them any measure of personality in international law, and why there are yet others who grant them limited international personality.

In the Soviet literature of international law, a number of leading Soviet authorities have given much attention to this problem. Professor F. I. Kozhevnikov for example, writes that, 'separate nations or peoples may show the potentials of being subjects of international law, and within well-known conditions, the question could arise about the recognition of this or that nation as having capacity of a transitional stage to a full recognition as a State (e.g., the Polish nation after World War I').

This conclusion in our view only begs the issue, for it does not give an answer to the question as to the conditions which transform or convert nations from 'potential' subjects of international law to 'real' subjects of international law.

Professor S. B. Krylov, went further to emphasize that 'in well-known stages of the fight for independence, nations may become subjects of international law'; this means recognizing the legal personality of the nation fighting for independence, but this again fails to show, as does Koshevnikov's definition, the concrete conditions or stages of such recognition.

Professor G. I. Tunkin, who is considered one of the most modern Soviet theoreticians in international law, also does not seem to provide an answer to the question. He lays emphasis only on the fact that 'nations fighting for independence and the formation of their own governments should be counted as subjects of international law'; this means recognizing the legal personality of the nation fighting for independence, but this again fails to show, as does Koshevnikov's definition, the concrete conditions or stages of such recognition.

An analogical opinion to that of Tunkin was given by Professor L. A. Modzhorian, who in 1958 commented that 'nations could be recognized as subjects of international law if such nations are organized governments or are waging wars for their formation'. In this author's monograph, she continues to talk of the necessity of recognizing the international personality of 'nations and peoples defending their independence, forming their organs of resistance, with an allotment of functions of public power, but which have not yet formed themselves into governments as a result of counter-action by the powers that


27. Prof. G. I. Tunkin, Osnovy Sovremenogo Mezdunarodnogo Prava (Moskva, 1956), at 17.

continue to pretend on the preservation of their sovereignty and rule over such nations and peoples.

If Professor Modzhorian had stopped with her first proposition that governments formed by nations or peoples on the basis of their right for self-determination ought to be granted a measure of personality under international law, we would have upheld her stand. But for her to insist on granting such entities recognition as full subjects of international law, even where it is unpredictable as to how the whole struggle is going to end does not sound plausible to us. It does not appear to us that the mere formation of certain organs of resistance, charged with some specific functions of public power is sufficient in itself to merit full international personality for such organs. The position would have been totally different if the organs so formed were seen to be performing those state functions, no matter the extent, in their relationship with other subjects of international law.

While recognizing that all peoples and nations may be subject to the right of self-determination, Professor D. B. Levin goes on to point out that the legal forms under which a nation continues to exist after the exercise of its right of self-determination are not identical and may relate both to state law and international law. As a result of self-determination there may arise new independent states or members of a federation which will be subjects of both state and international law or members of a federation and autonomous units which will be subjects of state law but not of international law.

Professor I. I. Lukashuk and Professor N. A. Ushakov seem to hold similar opinions on this problem. They contend that in contemporary international law, nations are the subjects of the right of self-determination of their existence. Lukashuk states that nations and peoples are not subjects of international law since they are incapable of participating in inter-state relations governed by international law. He continues to say that in some cases a nation or people rises up in a struggle for national liberation and organizes bodies which carry out public power and represent a nation or people in international law. They can be considered to have international legal personality, in which case, that personality means the personality of a new state which is the process of establishment.

On the other hand, N. A. Ushakov teaches that 'they (nations) are thus subjects of definite international legal relations and thereby are subjects of international law. Naturally, we speak of a nation as a subject of international law first of all as regards oppressed nations and peoples under colonial bondage. They have the right to demand political independence and to strive for it by all means at their disposal, up to armed struggle for national liberation.'

Continuing, he argues that a nation which has voluntarily become part of a multinational state and has created its own independent state is a subject of international law. As in the case of a state being subject of international law, a nation is a subject of international law, irrespective of any external reasons – for example, its recognition by the participants in international intercourse. A nation is a subject of international law solely by virtue of its existence.

What is in part at stake in Professor Ushakov's submission, is the vexed question as to whether the right to self-determination includes a right of secession. We have earlier stated our view on this, but may only add here that if the right of secession is eliminated, and the maintenance of the territorial integrity of states takes priority over the claims of 'peoples' to establish their own separate political identity, as the contemporary customary verdict shows, the room for self-determination in the sense of the attainment of independent statehood is very slight.

The various points of view analysed so far should be enough to illustrate the train of thought of Soviet writers of international law on the controversial issue of the international personality of national liberation movements. All the authors cited appear to have been in agreement on one basic point – that the principle of self-determination has attained an international legal right.

They are certainly not clear in answering such important questions as, from what moment nations or peoples fighting for their independence acquire international personality? Is it from the time they declare their intention, or is it from the time it becomes evident that they are indeed carrying out organized armed struggle to achieve

29. Professor Modzhorian must have considered governments which are enjoying 'effective' control of their territory to have attained this status.
31. Ibid.
34. Lukashuk, op. cit., at p. 9.
35. Ibid., at p. 10.
37. Ibid. He implies that all the components units forming the Soviet Republic are subjects of international law.
38. Ibid.
this purpose, or from the moment they succeed in the process of this movement in forming organs of public power supposed to represent them in international relations, or still later, when such organs are seen to be participating in international life?

Professor Lukashuk's stand illustrated earlier on, would have offered satisfactory answers to some of our questions, but for a slight ambiguity in his notion of 'inter-state relations governed by international law'. He rejects the fact that nations and peoples fighting for independence have personality under international law because according to him, they have not the capacity to participate in 'inter-state relations governed by international law'. Which elements fall within the concept of his 'inter-state relations' is a matter of conjecture.

It is evident that organs formed by nations or peoples fighting for their independence inter-act (in a limited form) with government and/or organizations which lend them moral and financial support, even though these transactions are often kept secret. Besides they are known to have participated, or at least have been observers, in a number of international regional conferences (particularly those of the non-aligned countries). Furthermore, customary international law regarding the conduct of wars extends to the activities of these organs. These are some of the forms of relations regulated by international law norms between various subjects of international law, unless, of course, Professor Lukashuk and his protagonists have in mind the 'traditional' or 'classical' international law, where its subjects are only sovereign independent states.

4. CONCLUSION

Summarizing this discussion, a number of essential points appear which need to be re-stated clearly. Even though the declaration on the principles of international law concerning friendly relations and cooperation among States in general, and that on the principle of equal rights and self-determination of peoples in particular, is not a legally binding instrument as such, nevertheless some of its provisions either constitute general principles of law, or represent elementary considerations of humanity. The Declaration has considerable indirect legal effect, and it is regarded by the General Assembly of the United Nations Organization as a part of the law of the United Nations. 39

39. See the Preamble of the Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Amongst States.

It is remarkable that the principle of equal rights and self-determination of peoples, which had never been accepted by many states as a right before, is now recognized as such. The significant implication of this is that some entities consisting of a 'People' must be the repository of such a right. The subjects of this right, we must add, are principally those groups of peoples or nations who, by being conscious of their common identity in distinction of other groups, strive after realization of this identity. The question whether some groups are entitled to the right can only be conclusively answered in the light of concrete circumstances. We earnestly submit, therefore, that the bearers of this right must potentially include all groups of people, large and small, whether they live within the territory of an already independent and sovereign State or not. This position is consequential upon the principle being a universal one and having been formulated on the basis of the principle of consensus.

The draft-declaration clearly creates duties for all States with regards to the implementation of the provisions of the principle. Thus the last part of paragraph 1 provides that every State has the duty to respect this right in accordance with the provisions of the Charter of the United Nations Organization. Another essential element is the obligation placed upon the States whether or not they like it, to promote the realization of the principle of equal rights and self-determination of people in accordance with the provisions of the Charter. Besides, paragraph 4 places the duty on States to desist from any forcible action directed towards the deprivation of the people referred to above from realizing their right to self-determination, freedom and independence. It is vital to underline, that the declaration clearly stipulates the fact that the territory of a colony or other non-self-governing territory has a status separate and distinct from the territory or State administering it. 40

On the other hand, the formulation of this principle is not entirely devoid of a major inconsistency. We find it highly contradictory to recognize in paragraph one of the text, that the principle of equal rights and self-determination of peoples is a right of all peoples, while at the same time, in the concluding two paragraphs, particularly the last requiring every State to refrain from any action aimed at partial or total disruption of the national unity and territorial integrity of any other State or country. This last provision is highly detrimental to the authenticity of the declaration and really defeated the purpose and

40. By this we mean that under no condition is the colonial territory part of the metropolitan territory. It has a separate existence which is only and basically one of dependence.
spirit of the declaration. Although, as we have observed earlier on, that
the document has no legally-binding effect on States *stricto sensu*, and
its shortcomings notwithstanding, one would have expected the UN
and States that comprised it, to take a more positive and clear position
in handling, for example, the Bangladesh conflict which was almost
simultaneous with the endorsement of the Declaration by the United
Nations General Assembly.

It must be pointed out that one of the important current problems of
the science of contemporary international law has not been mentioned
in the foregoing sections, namely, that of the practical application of
the principles of equal rights and self-determination (i.e. the emergence
of new entities – subjects of international law through the exercise of
this right) in modern international life. For our subject, the review of
this process with current specific examples is important and of great
interest. The discussion of this vital problem has intentionally been
left out to the moment when our views will be explained, because our
ideas can be best developed in the light of the discussion and analysis
of the legal status of organs of national liberation movements, as well
as the principles of international law that have to do with the activities
of these organs.

Now let us carry our investigation further using specific cases to
observe how far this inconsistency is manifested in the practice of
States. For in order to conduct a useful analysis as to whether any
particular governmental machinery or organ formed to lead these
struggles whatever its title, be it a 'Provisional Government', a 'Gov-
ernment-in-exile', a 'revolutionary government', enjoys any measure
of international personality and, as such, is attributed the competence
to act on behalf of a people fighting to organize its own State and
especially to conclude treaties on its behalf – the practice of States
on the whole issue of prospective incumbent, belligerent and non-
belligerent parties who may be directly or indirectly involved in such
struggles, must be examined.

Accordingly, the very dissimilar stand of various States on a number
of issues of a relatively similar nature in the two selected cases of
*Bangladesh* and *Biafra* will be considered. In these two conflicts,
the operation of the principle of equal rights and self-determination
of peoples through secession was at issue. At the same time, it would not
be true to say that the two cases were entirely identical. Both peoples
had in the process of the conflict similar experiences, such as an acute
movement of the innocent civilian population, hunger, disease, and lack
of adequate international action to relieve the disaster, to mention a
few. But these two cases, apart from perhaps Vietnam, are prominent
amongst those which have attracted the greatest international interest
recently. Also, the small difference in the time factor of their happen-
ing – the incidents taking place at an interval of a little over a year –
is in itself of some interest.

It does not seem unduly optimistic to expect that an examination of
these cases ought to uncover the criteria that are held to be decisive for
the attribution to one party – namely statehood of a standing – that
was denied to the other. These and other related problems will occupy
us in the next sections.
Part F. Practical application of the principles of equal rights and self-determination
7. The case of Bangladesh

1. BACKGROUND

The first Europeans arrived, initially as traders, during the late 15th and early 16th century in the area of the subcontinent which is now occupied by India, Pakistan and Bangladesh, which had already been subjugated by the Moslem invaders who founded the Mogul Empire in India about 1525. By the 17th century, the British East India Company had become dominant. Using local uprisings as a justification, the British and French in the mid-18th century fought for control of India.

By 1757, Great Britain had established its hold. The Indian National Congress, a political party founded in 1885, split into two branches in 1907, one committed to complete independence, the other seeking only dominion status.

The agitation for a separate Moslem state began in 1930 under the leadership of the poet and philosopher Mohammed Iqbal. In 1947, Great Britain reluctantly agreed to the formation of such a separate Moslem state, and India and Pakistan came into being as independent countries within the Commonwealth of Nations.

A new constitution for Pakistan was established in 1956, but was abrogated two years later when President Iskanda Mirza gave overall power to General Ayub Khan who ruled by decree, instituted a programme of land reform and promulgated a new constitution in 1962.

2. The Awami League under Sheik Mujibur Rahman won practically every seat in East Pakistan at the general election, and with a total of 151 seats had an overall majority in the National Assembly; Mr. Butto's Pakistan People's Party, with 81 seats, emerged as by far the largest and most important party in West Pakistan, but without a majority in the Assembly. (One of the two wings of Pakistan, had more than half the country's total population with about 73,000,000 inhabitants while West Pakistan had a population of about 60,000,000). As quoted in Keesing's Contemporary Archives, May 1-8, 1971, p. 24567.
For a long time, the Eastern Province of Pakistan had been demanding greater autonomy. The general elections held in Pakistan in 1970\(^3\) which were a tremendous victory for the East Pakistan National Party, the Awami League, and its leader Sheik Mujibur Rahman were followed by an extremely tense political situation.

Eventually, when round table talks\(^4\) in Dacca between President Yahya Khan, Sheik Mujibur Rahman and Mr. Butto, the West Pakistan Opposition leader, had ended again in complete deadlock, civil strife erupted.

Consequently, President Yahya Khan outlawed the Awami League and banned all political activities throughout the country imposing complete press censorship. He denounced Sheik Mujibur's non-cooperation movement as an act of treason, described Sheik Mujibur and his party as 'enemies of Pakistan' who wished to break away from the country and said that this crime will not go unpunished.'

Sheik Mujibur Rahman, at a press conference in Dacca on 24 February 1971 described as 'utterly false', the allegation that the Awami League was seeking to impose its six-point programme on West-Pakistan.

The six-point programme, explained Sheik Mujibur, was essentially designed to safeguard the autonomy of the federating units, and to stop perpetuation of the 'colonial status' and 'exploitation' of the 70,000,000 people of East Pakistan by their Moslem compatriots of West Pakistan.\(^5\) Addressing half a million demonstrators in Dacca on 7 March, Sheik Mujibur pur forward four conditions for the Awami League's participation in the Assembly session:

1. the withdrawal of martial law;
2. the return of troops to barracks;
3. an inquiry into killings which he alleged had taken place in Pakistan;
4. transfer of power to the elected representatives of the people.\(^6\)

An official statement in Dacca on 27 March said that reports of fighting in East Pakistan 'as carried by certain foreign news agencies' were completely without foundation. The martial law authorities also announced that Sheik Mujibur Rahman had been arrested at his residence on the night of 25-26 March.\(^7\)

On 11 April, the formation 'somewhere in Bangladesh' of a six-member Cabinet of the 'independent government set up its headquarters in the village of Chuadanga, where on 17 April, the 'Democratic Republic of Bangladesh' was formally proclaimed.

It must be observed that with the capture on 18 April by the Pakistan Army of the village of Chuadanga (300 yards from the Indian border) which had been proclaimed the provisional capital of Bangladesh, and with the Pakistan army in complete control of the Western frontier area bordering on India, all effective resistance by the Bangladesh 'liberation army' had virtually come to a halt by 18-19 April,\(^8\) though it was thought possible that some units of the liberation army in remote rural areas might resort to guerilla-type tactics.

2. THE INTERNATIONALLY RESPONSIBLE CHARACTER OP THE BANGLADESH PROVISIONAL GOVERNMENT-IN-EXILE\(^9\)

The term 'exiled' or 'refugee' government is well-known in contemporary international relations and does not call for explanation. At the time of the Second World War, as well as during earlier wars, the international scene witnessed the appearance of groups of persons who claimed to be the governmental authorities of various occupied states which they had left in order to be able to operate independently of the enemy occupying power.

Even though these groups of persons were deprived of the administrative control of the territories and peoples, the governments of which they purported to be, in many cases regular governments entered into international legal relations with them.

It is noteworthy however that not all such groups received recognition as governments. While some of them were seen as governments, others, though not so considered, were regarded at least as representing some kind of controversial subjects of international law. For example, how did people in 1945 know whether the sovereignty of the Baltic States of Estonia, Latvia and Lithuania was actually represented by

3. Three notable talks were held to try to resolve the constitutional differences – the talks were held on 15, 16 and 19 March 1971.
5. Ibid., p. 24566.
their recognized diplomatic missions, or whether it has been permanently extinguished?

In some recent international law books, the latter group is termed "authorities in exile" mainly for convenience sake. In some recent international law books, the latter group is termed "authorities in exile" mainly for convenience sake. According to Blix,11 the reason why the existence of authorities and governments in exile is possible at all lies in the circumstance that the international community is reluctant to concede title to a territory which has been subjugated by means of belligerent occupation; and it is indeed a well-established rule of international law that such occupation confers per se no ultimate title of right.

There is an unwillingness to sanction positions which have been attained by acts contrary to international law, and there is a corresponding awareness on the part of belligerent entities that occupation is an insufficient and insecure basis for any claim to rule permanently as of right.

This view is supported by the following opinion: '... in upholding the continued legal existence of an occupied State whose premature annexation has been pronounced by the occupying power, international law does not act on a certainty of its restoration but on an uncertainty of its extinction.'

Further support for the same view is found in the following statement by Professor Kelsen: '... as long as the status of the territory is that of belligerent occupation, and that means as long as there is war between the occupied state and the occupying state, the control exercised by the latter cannot be considered as "effective". Apart from the fact that it is restricted by international law, it is not firmly established; for there is war going on the purpose of which is to establish again the effective control of the government now in exile'.

The Bangladesh provisional government claimed competence to represent the State of Bangladesh on the international plane: the validity of this claim can best be ascertained by examining the basis of the international competence of that government.

3. THE BASIS OF THE INTERNATIONAL COMPETENCE OF THE PROVISIONAL GOVERNMENT OF BANGLADESH

The question arises whether there exist specific conditions necessary for the attribution of some competence under international law to an authority before it can be recognized as a government in exile. And if such conditions exist, did the provisional government of Bangladesh satisfy them?

We must here go back to the point at which we observed that the complete occupation of almost the entire Eastern Province of Pakistan by the army of President Yahya Khan between 18-19 April, forced the provisional government of Bangladesh to go underground. At the same time, the provisional government was not known to have withdrawn its earlier declaration of possessing jurisdiction and responsibility over the territory of Bangladesh. The likely position, as it became evident afterwards, was that the provisional government continued to claim this right and to reserve it to itself.

The general speculation at the time was that the provisional government had moved to India. Governments in exile are, of course, dependent for their functioning in the territory of a friendly host state upon a permission to do so given by the authority of that state, even though such a permission does not in itself automatically imply any recognition of a governmental competence upon them.

But here a vital distinction must be made between two separate cases. There is on the one hand the case of a government which, in time of declared war, leaves its territory in consequence of enemy occupation and obtains refuge in the territory of a State at war with the same enemy — in other words, a co-belligerent. This India may have become later in 1971, but it certainly was not so in April of that year, when it was formally at peace and in normal diplomatic relations with Pakistan.

14. There is need here for a distinction between cases where the host state to a provisional government is simply passive but not friendly to such a government. An example is the Provisional Government of the free Polish State in London. Another similar situation is in the Kingdom of the Netherlands where the government permits the political organ of the so-called Republic of the South Moluccas to have its headquarters. This permission does not ipso facto mean that the Government of the Netherlands recognizes the organ in question as the true representative of the people of the South Moluccas. These examples would, of course, differ from cases where the host state clearly supports the efforts or movements of a provisional government in its territory either by commission or omission.

On that basis (and this is the second case) international law prescribes as one of its best established rules that members of insurgent bodies can only be received as refugees on the basis of asylum, not as governments in exile, and must not be allowed to use the territory of the receiving state as a base of hostile operations against the state with which the receiving state professes to be at peace and in normal diplomatic relations.

Of course, any state, in the exercise of its sovereign powers, can decide on its own to accord an insurgent entity, not only asylum but also the right to operate in that country as a government in exile. However, a state deciding to do this would have to accept the risk (a) that the receiving state would be deemed to have extended a measure of recognition to the entity in exile — for instance of insurgency or belligerency — though this would not of course per se amount to recognition of full governmental and international status; and (b) that its action would be regarded as unfriendly if not illegal by the other state concerned, and such as to justify reprisals or counter-measures.

If the host state went further than this — for example by a formal act of recognition on its part — this would signalize the view that the recognized body had attained a definite degree of competence under international law as the lawful government of the territory it had come from, including — and this is of particular interest — the competence to engage the present and future responsibility of the territory by treaty.

But here again, unless the body in exile was in effective control of the territory it left, or at least of a substantial part of it (but if so, then why did it leave?) the host state risks that its recognition will be regarded as premature and legally ineffective, and in any case as amounting to an unfriendly act, if not a hostile one.

The case is of course quite different when what goes into exile is not a mere insurgent or disaffected group but an already recognized government which has been driven out or has elected to leave the country because of enemy occupation or some internal crisis such as a coup d'état. Even here however the host state must exercise considerable caution as to the activities it allows the government in exile to pursue in or from its territory, except in the case already noticed where it is itself a co-belligerent with that government, at war with a common enemy, or else where, having been continually in friendly and diplomatic relations with the government in exile, which was and still is recognized as the lawful government of the country it has left, it is invited by that government to assist it to return, in a situation which is still sufficiently fluid to make such a return a serious possibility. 15

There have been many cases where governments in exile have been allowed to function without these governments having at the time any control over any part of their national territory. But here again, a distinction must be made. Firstly, there are those governments whose heads and/or entire cabinets move from the national territory temporarily, during a time of crisis, 16 and go to that of a co-belligerent. This case has already been considered.

The other type of case is that of governments whose original formation took place abroad on friendly foreign soil. 17 Here there can hardly be any legal connection between the government in exile and the government operating on the national territory at the time. Indeed it must be doubtful if the term government 'in exile' is properly applicable at all in this class of case.

4. THE QUESTION OF TREATY-MAKING COMPETENCE, CONSTITUTIONAL VACUUM AND 'PRINCIPLE OF EFFECTIVENESS' IN THE BANGLADESH CASE

There is so far no clear evidence that the provisional government of Bangladesh purported to conclude any agreements with foreign states which could bind a future state of Bangladesh. If it did, our assumption would be that any regular governments which entered into such

15. Even then, this position remains controversial. We highly doubt the correctness of intervention in civil wars. International law of contemporary international relations should develop in the direction of neutrality in civil wars, otherwise, there will soon be 'Vietnams', 'Biafras' or 'Bangladeshs' all over the world.

16. During World War II, the governments of the Netherlands, Greece, Norway, Poland, Belgium, Yugoslavia and Luxembourg moved to London. These governments prior to the occupation of their national territories by enemy troops were the recognized governments of independent and sovereign states. Consequently, they needed no further formal act of recognition because there had been no break in their legal continuity. The case of the Bangladeshi provisional government is different from that of the governments enumerated above, for it was not an established and recognized government but was fighting to bring about the independence of a new nation, and its actual position remained an open question and was being vigorously contested.

17. This was the case of the Algerian provisional government established in Cairo prior to independence, and of the Angolan provisional government of Mr. Roberto Holden in Kinshasa. These governments sought or... claimed recognition ab origine. The case of the war-time Czechoslovakian government in London, though it was initially formed in London, and had not qua government left Czechoslovakia, really falls into the 'co-belligerent' category.
treaties did so generally in the anticipation that the provisional government would (in their assessment) eventually become competent under international law to assume treaty obligations on behalf of the international law subject whose interests it claimed to represent. But of course they took the risk that this might not happen, as well as the other risks already noticed. It therefore follows that in the conviction of such regular governments, the treaties so concluded were or could become binding under international law (at least in so far as they were concerned).

There is no duty under international law for a State to possess a treaty-making authority even though it is one of the essential characteristics of international personality. States have in any case no duty to enter into treaties. Of course these conclusions are based on purely theoretical considerations. In practice, all communities need and aspire to international intercourse. No one community can afford to exist in complete isolation from others. This being so, their relationships with other entities require regulation in a manner universally accepted under international law.

The competence of authorities in exile to undertake obligations by way of agreement is limited to matters which fall within their apparent ability of fulfilment, and the reason why sometimes these organs are not, correspondingly, recognized as having competence to engage the responsibility of their home states lies in the circumstances that their future standing and ability to assert themselves in these states seems uncertain.

The issue of constitutional vacuum is as keenly debated as those already observed. The various efforts aimed at clarifying the controversial problem of whether a government in exile needs to function on the basis of a regular constitutional origin may be conveniently catalogued into two major categories. A conservative position has maintained that, to be attributed the competence of a government, it is necessary and sufficient that the body in exile should be identical with the last government that was established in the State before occupation. This stand generally, could imply a government that has a regular constitutional origin.

Sir Hersch Lauterpacht appears to hold the view expressed above. With regard to the case of the Czechoslovakian government in exile based in London, Sir Hersch accepted the view that the presence in England of ‘the last freely elected Head of State’ of Czechoslovakia ‘and the government formed under him constituted the requisite link in legal continuity’. 18

Sir Hersch also expresses the opinion that one of the reasons why the Algerian authorities in Cairo were not recognized as a government lay in the circumstance that they were not ‘in a position to rely on legal continuity as being identical with or the constitutional successor of a previously recognized government’. 19

Other writers who have similar views to those of Lauterpacht in this respect include a German author, Dr. Mattern, and also Dr. Marek. Dr. Marek writes, for example: ‘... (that the character of a state organ can only be attributed to governments in exile which have been) constituted in their own countries and simply transferred their activities abroad, following the total occupation of their territories, with no break in their legal and actual continuity’. 20

A more progressive and perhaps liberal view, that constitutional origin is altogether irrelevant in order that a body which claims to be a government in exile should be competent in international law to act on behalf of a state, has been clearly stated by Professor Kelsen: ‘Just as international law does not require constitutionality of a government established on the territory of its own state, it does not require constitutionality of a government in exile’. 21

The conclusion might be therefore that neither constitutional origin, nor functioning in conformity with a particular constitution are necessarily required in order that a body that claims to be a government in exile should be competent in international law to act on behalf of a state. We do not however mean to suggest that the international community should be completely indifferent to such considerations. On the contrary, it is certain that international law does and must concern itself with them. But this is an area in which the law is still in process of formation in a situation of some fluidity.

However, in discussing the matter further, Dr. Marek finds it necessary to suggest another important but arguable element — that of ‘effectiveness’ which she considers to be an alternative source of international competence. 22

20. Marek, K., Identity and Continuity of States in Public International Law, Geneva 1954, p. 97. The words in brackets are ours.
21. Kelsen, H., op. cit., p. 290. But as already noted, it is doubtful whether the term ‘in exile’ is properly applicable to bodies of this kind, since it implies both a country from which they are exiled and some sort of previous governmental standing in that country — both of which features are, ex hypothesi, lacking in this class of case.
The degree of effectiveness which Dr. Marek has in mind is undoubtedly not without limitations, as it would seem unrealistic to expect from a government in exile whose territory is virtually occupied, the same measure of effectiveness that is normally required of a territorial government. Two authoritative views on this question are considered to be illustrative of this point; Professor Kelsen states: ‘The requirement of exercising effective control of the territory is replaced by the requirement of making efforts to regain effective control. This requirement, too, is an application of the principle of effectiveness. The efforts of the government in exile to regain control of the territory under belligerent occupation must be “effective” . . .

They are said to be effective . . . if they are made by means of war, that is to say, by armed forces sufficient to prevent the control of the occupying power from becoming firmly established’.23

To the same end, Oppenheim concluded: ‘The “effectiveness” which is usually associated with the exercise of territorial jurisdiction may be wholly lacking in the case of a government in exile. In this instance, its political effectiveness depends upon hazard of war.’24

Another important requirement is that the government in exile should be seen to be exercising some reasonable measure of political activity. This indeed really constitutes its effectiveness for the time being, as its future effectiveness seems, above all, to be highly dependent upon the support it enjoys, and is expected to enjoy, from the population which it claims to represent.

The difficulties discussed here are problems arising in the application of rules which were found to be established in the practice of states and accepted by writers. It only remains to restate them as the conclusion of this section by placing the case of the provisional government of Bangladesh in exile where it properly belongs in the light of the foregoing discussions and observations.

Bangladesh is a consequence of indefensible methods of suppressing the rights and aspirations of the peoples of East Pakistan. By placing Sheik Mujibur Rahman under arrest, President Yahya Khan forcibly excluded from political life the leader who had just received a mandate from an entire people. The provisional government during the crisis made efforts to carry out its political functions through its political organ specially designed for this purpose – the Consultative Committee.25

Besides, the Bangladesh struggle had adequate popular support and was not a mere putsch, coup d'état or palace revolution. It was genuinely an internal Pakistan movement, an expression and product of national economic and political contradictions. It was a spontaneous uprising of a whole people embodying the national will and it was clear that this national conscience and will seem to have been involved in the opposition manifested towards it. Above all, there was considerable evidence of a representative quality, and some assurance as regards the future authority of the exiled body, manifested by a number of political leaders whose past or present following in the State was not subject to doubt. Other Governments had thus some solid basis for recognizing the provisional government as competent under international law to conclude treaties on behalf of the state it purported to represent, since it appeared to wield effective authority; and there seemed to be a high degree of likelihood that it would in fact be able to fulfil any obligations undertaken on behalf of that state.

8. The international community and Bangladesh

1. INTRODUCTORY REMARKS

The weight of evidence from our discussion of the internationally representative character of the Provisional Government of Bangladesh led us to reach the conclusion that, on the whole, there was evidence that this government satisfied the conditions necessary to qualify as an international person and, as such, had the competence under international law to conclude treaties, since there were all the indications that it would fulfil its international obligations.

However, as the rampage in Bangladesh progressed, some governments continued to give the Pakistan government both diplomatic and military support—some even intensified their military supplies. It has always been held that, provided belligerent rights have not been granted to, or recognized in respect of, the insurgent authority (which would create a situation analogous to war proper), a government commits no ‘illegality’ by lending assistance to the legitimate government of the country with which it is in normal relations, if that government, being faced with insurrection or civil disturbance, requests, or consents to receive such assistance, if preferred.

The continuation of such an assistance may nevertheless tend to become an unjustified intervention where the status of this government is technically legitimate but appears to be unrepresentative of the people or nation as a whole and when it is losing ground.

Such assistance may then cease to be justified. If the struggle amounts, and has all the characteristics of what as between two inde-

1. The purpose of this section of our investigation is principally to describe the attitude of selected major countries directly or indirectly involved in the conflict. Our aim is to determine the extent of consistency in State practice shown on such matters when the practical implementation of the principle of equal rights and self-determination of peoples is at issue.

pendent countries, would be a state of war, other States must either recognize the existence of a state of belligerency, with the consequent duty to observe the rules of neutrality as between the contendants, or incur the same risks and perils as would be incurred by unneutral conduct in a war on the part of a State, not itself involved in the war. If insurgents have attained the specific qualifications of belligerents under international law, they must be treated in a legal manner by third States; and if these decide to join forces with the incumbent party to suppress the insurgent entity (which in such circumstances would be a breach of neutrality), the latter has the right to retaliate including the faculty to request for help from other powers.

It became clear in the Pakistan conflict, after some time, that the movement had adequate popular support embodying the national will. It is one thing for a government to lend assistance or support to another government threatened with overthrow or destruction by action of the coup d’état type, at the hands of a fascist minority or military junta, having little, or no, representative character, or to assist a government faced with a movement promoted from outside the country. But it is quite another to give such assistance, even to a technically legitimate government in order to suppress a spontaneous uprising of a whole people with a clear brand of national support. The legality of assisting the government must depend in the last resort on how far the true national conscience and aspiration seem to be involved in the opposition shown to it.

Although in international law there have not been, as yet, any settled and developed rules whereby the extent of an internal crisis could be determined and tested, so as to indicate how far it is a spontaneous uprising of a whole people; and to what degree broad national support is accorded to it; nevertheless we think that the national character of the movement may be seen from the general behaviour over a reasonable period of time of (a) the people concerned, judged from their general moral support evidenced from their war efforts, and their respect for the laws and regulations instituted by the appropriate organ of the community to protect their lives and property and to keep general law and order (b) the government representing such a group of people (provisional as it usually is) should be seen to be exercising some reasonable measure of political authority. The government’s representative quality may be determined from the records of its leaders if their present and past following were clearly not subject to doubts.

3. Fitzmaurice, Ibid., p. 179.
2. THE ACTIVITIES OF THE INDIAN AUTHORITIES

India is often accused of having 'fomented' the Bangladesh movement. How far this accusation is true or false will be seen in the course of our present discussion.

At the root of the latent instability in the Indian subcontinent during the last two-and-a-half decades, there lies in the first place the politically unacceptable fact (to India) of the partition of India and Pakistan on a religious basis; and, secondly, this instability was aggravated by the establishment of only one state for two territories which are more than 2000 kilometres apart. But it appears that in any event India was not through her own will, but through the simple fact of having become the asylum for an estimated ten million refugees from East Pakistan.

By admitting these refugees, India assumed an enormous burden which unbalanced her economic and social programme and gave her the moral right to demand such a solution of the internal situation in Pakistan as would permit a prompt return of the refugees to their homes.

The Indian Government's concern at the events in East Pakistan was first officially expressed in the 'Lok Sabha' on March 26, in statements by Sandar Swaran Singh, the Foreign Minister of India, and by Mrs. Indira Gandhi, the Prime Minister.

Swaran Singh, who accused the Pakistan Army of 'suppressing the people of East Pakistan' said that 'the government of India cannot but be gravely concerned at events taking place so close to our borders . . .'

We cannot but take note of the fact that such a large segment of humanity is involved in a conflict and that many people are suffering in the process . . .'

Mrs. Gandhi, who followed, said in her statement to the Lok Sabha: 'Something new had happened in East Bengal, democratic action where the entire people had spoken with almost one voice . . . It is not merely suppression of a movement but it is meeting unarmed people with tanks'.

Both Houses of the Indian Parliament passed on 31 March a resolution, moved by Mrs. Gandhi, expressing 'whole-hearted sympathy and support'. The resolution went on to say: ' . . . This House expresses its profound sympathy for and solidarity with the people of East Bengal in their struggle for a democratic way of life. This House records its profound conviction that the historic upsurge of 75 million people of East Bengal will triumph. The House wishes to assure them that their struggle and sacrifice will receive the whole-hearted sympathy and support of the people of India'.

On 18 April, the Pakistan High Commissioner in Calcutta Mr. M. V. Hussain Ali, announced his allegiance and that of other Bengali members of his staff to the 'sovereign democratic republic of Bangladesh', hoisted the Bangladesh flag over the mission, and stated that the latter would henceforth be known as the 'diplomatic mission of Bangladesh'. The Indian Government refused Pakistan's demand to evict Mr. Hussain, who remained in the mission as the self-proclaimed representative of Bangladesh. Mr. Mahdi Masud, who arrived in Calcutta, on the appointment of Pakistan to take over the mission, was constrained to take up residence in a hotel.

It must be observed that the hoisting of the flag of one country in the territory of another, if carried out as the official act of the first country, or by persons representing it, and without the consent of the local authorities is illegal under international law. It constitutes a violation of the sovereignty of the legitimate territorial authority in the nature of constructive or symbolic intervention. But in this case it appears that the Indian authorities were consenting parties, although of course they thereby raised a serious issue between themselves and Pakistan.

4. The 'democratic action' (in East Bengal) was 'the entire people speaking with one voice' not the 'meeting unarmed people with tanks' which was the action of the other side.


6. Fitzmaurice, op. cit., at pp. 174-175.
The Indian Foreign Minister in a speech he delivered in Washington, DC, USA at the National Press Club, spelt out further the policy of his government when he stated: '... The basic problem is a political one, and it calls for a political solution. Without a solution, the atmosphere of confidence and security, which is necessary for the return of refugees, will not be generated. There are two essential prerequisites: Firstly, the necessary political solution must be found urgently, and secondly, the solution to be effective and enduring must be in accord with the wishes of the people of East Bengal and their elected leaders. Any efforts to set up a regime in East Bengal which is not truly representative of the people will only prolong the agony and harden attitudes and pose hazards to the peace of the whole region.' 7 '... The point has now been reached where the actions of Pakistan's military government threaten to engulf our region in a conflict the end of which is not easy to predict. We have acted with patience, forbearance and restraint. But we cannot sit idly by if the edifice of our political stability and economic well-being is threatened'.

The full significance of this statement of the Indian position will appear when we come to consider Mrs. Gandhi's subsequent speeches in a number of public appearances during the crisis, and the Indian military action which soon became clearly evident.

At this stage of our inquiry, it may be interesting to observe that the Foreign Minister was openly referring to East Pakistan as 'East Bengal', in a speech delivered only four months after the hostilities began (17 June 1971).

His answer, when asked if by saying 'India will not sit idly by if the refugee flow continues', he meant that India would declare war on Pakistan, was: 'There are other ways of enforcing our wish than declaring war... At the present moment, we are engaged in the task of mobilizing public opinion, both governmental and private, to focus attention on the basic issues, the moral issues involved'.

The Prime Minister, Mrs. Gandhi, during her tour of six Western European countries, put across the views of her government precisely but forcefully. Addressing a public meeting in London on 31 October, Mrs. Gandhi said: 'We do not want the destruction of Pakistan or the destruction of her integrity. At the same time we do not want our freedom or our interests to be threatened, and we are determined to protect them with our strength.'

In a television interview on 8 November in Paris, Mrs. Gandhi said: 'It is perhaps inevitable today that Bangladesh should become independent', 'but I do not think that East Bengal would wish to be associated with the West Bengal, as the latter is industrialized and would be the dominant partner.'

Nothing could be more explicit, or more illuminating, of the Indian government's position than these words. At a press conference on 12 November, Mrs. Gandhi said that the Indian government had to give the Mukti Bahini11 a 'minimum of aid', because the Indian people, especially in West Bengal, demanded this, and also because it was unable to prevent them from using Indian territory for recruitment and training, as the frontier was too long for effective control.12

By 21 November, the Mukti Bahini launched an offensive against Jessore reportedly with Indian support. This fact was substantiated in the 'Daily Telegraph' of 29 November. It was reported beyond doubt here that Indian troops were involved. Of course, the full Indian military involvement was unequivocally conceded by the Prime Minister, Mrs. Gandhi, in her speech in the Rajya Sabha on 30 November. She declared: '... The fighting in Bangladesh was not between equals but between a fully equipped army and mostly unarmed people, and it was not in India's interest that the entire unarmed population of Bangladesh should be annihilated. She did not believe that Bangladesh would accept anything less than independence'.13

It is clearly evident from the foregoing analysis of the Indian Government's attitude to the Pakistan problem, that India's reactions were incompatible with her previous usual stand on the general and controversial question of the implementation of the principles of equal rights and self-determination of peoples. This is best illustrated by an earlier statement made by an Indian Foreign Minister: 'In the Political Committee,14 the Indian Delegation moved that in the first paragraph,

7. Swaran Singh, Bangladesh needs a political solution, Speech by the Indian Foreign Minister at the National Press Club of Washington D.C., USA, on 17 June 1971, p. 5. (The speech has been included in the US Congressional Record at the request of Representative Cornelius E. Gallagher).
8. Ibid., at pp. 11-12.
9. Ibid., pp. 11-12.

10. Mrs. Gandhi left New Delhi on 24 October for a tour of six Western capitals making stops as follows: Brussels (24-26 October), Vienna (26 October), London (29 October), Washington (4 November), Paris (7-10 November) and Bonn (10-13 November).
11. Mukti Bahini was the official name of the Bangladesh Liberation Army.
12. Ibid., op. cit.
Asian-African States, and self-determination of peoples'.

The Sheik declared: 'She (Mrs. Gandhi) talks of the will of the people of Bangladesh while she has blatantly suppressed the aspirations of the people of Kashmir. This is one of the greatest mistakes of the Government of India. Gandhi is on record for double standards, for while she was campaigning for the people of East Pakistan, that force will not solve anything and asked the world powers to understand the aspirations and urges of the people of Bangladesh, she conveniently forgets these ideals when it comes to the people of Kashmir.'

It is thought essential here to observe that the original instrument of accession of the province of Kashmir to India envisaged a large measure of autonomy for Kashmir (similar to Bangladesh's earlier demands for autonomy from the government of Pakistan). As the Sheik and other Kashmir leaders continue to maintain, their quarrel with the government of India is not about secession but is about the quantum of autonomy with residual sovereignty vested in the state of Kashmir.

Looking at the matter as a whole, the conclusion seems permissible that India's actions amounted to an illegal intervention in contemplation of international law. How far acts of intervention can be justified on humanitarian grounds is yet another matter and open to much argument. Certainly it falls beyond the terms of reference which we have set for ourselves, to attempt passing a judgement on the matter. At the same time, it is essential to observe that international writers recognize that an intervention (military or diplomatic) which is made as a result of an obvious necessity to save human lives is justifiable in international law. One excellent statement to illustrate this was made by a British scholar, Judge Sir Gerald Fitzmaurice, who said that 'Loss of life and certain kinds of grave physical injury are irremediable. No subsequent action, remedy, redress or compensation can bring the dead back to life or restore their limbs to the maimed. There is no remedy except prevention. In this lies the ultimate justification for intervention of this kind. Its objective is protective. Its humanitarian basis exists and cannot be overlooked'.

In this connexion, it may be recalled that in the Corfu Channel case, the International Court of Justice made an important pronouncement according to which humanitarian considerations were given the status of principle of law. The Court mentioned as giving rise to international obligations 'certain general and well-recognized principles'.

15. The above statement was made on behalf of India by its Foreign Minister during the Political Committee debate at the 1964 Cairo Conference of Heads of State or Governments of Non-Aligned Countries on the 'principle of equal rights and self-determination of peoples'. See, Text of International Declarations of Asian-African States, New Delhi-1, 1965, p. 86 in note.


17. Peter Hazelhurst, The London Times (Overseas), Friday, March 10, 1972.

18. Ibid.

and among those cited was 'elementary considerations of humanity even more exacting in peace than in war.'

Apart from any humanitarian aspect of the matter, it appears that the economic-self-defence argument of the Indian authorities was of prime moment in the final decision to intervene militarily in what was originally an internal Pakistan conflict. This stand is again open to serious contention. But, in our opinion, we would say that given a sufficiently strong factual case the use of any necessary force might be justified as a measure amounting to self defence, especially if there is as measure of illegitimacy in the acts of the other State. Directly related to this problem is that of refugee issue.

The refugee question is undoubtedly another area, in our opinion, where international law ought to occupy itself more than ever before. It must be recognized that the problem of refugees is principally a humanitarian one, and as such, the principles of international law must be invoked in its solution.

The roles of international universal law are already represented in this case by the United Nations Convention of July 29, 1951, modified by the protocol of 1967 – the United Nations Declaration on Territorial Asylum, of December 14th 1967; and the Universal Declaration of Human Rights, which dates from 1948.

While we recognize that this could be a useful and positive step, nevertheless, it will be much more realistic and helpful to develop rules within the framework of international law, whereby the root causes of refugee migration should be curbed to the minimum if not completely eradicated.

3. THE UNION OF SOVIET SOCIALIST REPUBLICS (USSR)

The Soviet government tried to justify its involvement in the Pakistan conflict by the Indo-Soviet Treaty hastily signed at the height of the conflict.


21. The Indo-Soviet Treaty of Peace, Friendship and Co-operation was ratified in New Delhi on 9 August by the President of India, and in Moscow on 13 August by the Præsidium of the Supreme Soviet of the USSR. See Keesing’s Contemporary Archives, 18-25 September 1971, p. 24820. For the full text of the treaty see Ibid., at p. 24773.

During the visit to New Delhi from August 8-12, 1971 by the Soviet Foreign Minister Mr. Andrei Gromyko, in the course of which he had talks with Mrs. Gandhi and Mr. Swaran Singh, the two countries signed on 9 August a treaty of Peace, Friendship and Co-operation concluded in the first instance for 20 years and automatically renewable thereafter for five-year periods unless either of the parties gave prior notice of termination. The treaty contained clauses which inter alia provided for immediate consultations between India and the Soviet Union in the event of either country being subject to attack by a third country, and which prohibited either country from entering into a military alliance which was directed against the other.

The Indo-Soviet Treaty consists of a preamble and 12 articles out of which Article 9 is of interest and relevant to the present discussion. This article states:

'Each High Contracting Party undertakes to abstain from giving any assistance to any third party, that engages in an armed conflict with the other party. In the event of either party being subjected to attack or threat thereof, the High Contracting Parties shall immediately enter into mutual consultations with a view to eliminating this threat and taking appropriate effective measures to ensure the peace and security of their country'.

It would seem that Mrs. Gandhi's official visit to Moscow between 27-29 September at the Soviet's invitation, during which time she had talks with President Podgorny, Mr. Kosygin and Mr. Brezhnev on the Pakistan question, was in keeping with the provisions of Article 9 of the treaty quoted above.

Mr. Kosygin said at a luncheon in the Kremlin on 28 September: 'It is impossible to justify the actions of the Pakistan authorities which compelled over 8,000,000 people to leave their country, land and property . . . At this crucial moment we address a call to President Yahya Khan to take the most effective steps for the liquidation of the hot-bed of tension that has emerged'.

Events that came to light months after Mrs. Gandhi's visit tend to show that the Soviet authorities' position was fast changing in support of Indian military intervention. It is important to recall that all along, the Soviet official stand was that of the Soviet Union's respect for the national unity and integrity of Pakistan. It is even strongly alleged
that President Podgorny at his talks with President Yahya Khan and President Giri of India in Persepolis on 15 October 1971, during the celebrations of the 2,500th anniversary of the Persian monarchy, assured President Yahya Khan that the Soviet Union’s treaty with India was not directed against Pakistan and that the Soviet Union would not encourage ‘aggression’ by India.  

However, Soviet criticisms of Pakistan’s policy in East Pakistan greatly increased after Mrs. Gandhi’s visit; statements condemning the trial of Sheikh Mujibur Rahman, for example, were issued by the Soviet Peace Committee on 30 September and by the Soviet Afro-Asian Committee on 3 October. Pravda commented on 28 November that ‘reactionary forces in Pakistan and abroad are doing everything to use the situation for aggravating Pakistan-Indian relations and for giving them the character of an international conflict’.

This statement was a clear indication of what the Soviet Union’s stand would be were the case to come to the Security Council of the UN. And so it came about that the Soviet Union rejected all attempts to involve the Security Council and the great powers in the crisis through the machinery of the world body, while at the same time increasing its shipments of military equipment and personnel to India.

Submitting the Soviet position in the conflict to a closer study, some interesting points emerge. It seems clear that a double pretension surrounded the so-called Indo-Soviet Treaty. One party made it possible for the other to launch subversion against a third country, while the first invoked the Tashkent spirit. By the Indo-Soviet Treaty, euphemistically described as a treaty of friendship and cooperation, the USSR had articulated a new ‘security doctrine’ for South East Asia. In our opinion, the treaty was nothing less than a military alliance. The proof of this cannot be far to seek. Events have conclusively proved that.

Immediately after the treaty was signed, a series of military consultations started in Moscow and New Delhi, and supplies of sophisticated armaments such as Mig-23’s, tanks and other military equipment were dispatched post-haste to Calcutta and other Indian ports. Having thus upset the balance of power in the sub-continent, the Indo-Soviet Treaty emboldened the Indians to opt for a military invasion of Pakistan.

4. THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

It seems that the United Kingdom’s involvement in the Pakistan conflict, unlike that of the Soviet Union, was clearly geared more to such a (political) solution of the problem as would bring a halt to human suffering for the entire population of East Pakistan.

The British Foreign and Commonwealth Secretary, Sir Alec Douglas-Home, made statements in the House of Commons on 8 and 9 June on the situation caused by the mass influx into India of refugees from East Pakistan and on British aid for the refugees.

According to Sir Alec, the British Government was concerned about three problems which were inter-related: ‘First - that of refugees - to halt the flow and to arrange their return, which in turn depends on a political settlement. Secondly, there is the ability of the Pakistan economy to sustain life throughout the whole country... There is finally, the possibility of widespread starvation later in the year in East Pakistan by reason of the disruption of communications and of short fall in the rice harvest...’

In another statement to the House of Commons on 23 June, Sir Alec Douglas-Home announced that the British Government would not grant any further aid to Pakistan unless there was ‘firm evidence of real progress towards a political solution.’ The Opposition Labour Party was in agreement with the Government on what must have been the ‘difficult decision not to give further aid to Pakistan until there is further progress towards a political settlement’. The withdrawal of foreign aid, particularly military, should be encouraged on the part of third States, where it is clearly seen to be directed towards minimizing the escalation and expansion of an internal conflict. In the opinion of Mr. Denis Healy (Labour), the best way to initiate progress would be for the Pakistan government to release Sheikh Mujibur Rahman from jail and begin negotiating with him as the elected representative of the overwhelming majority of the population in East Pakistan.

The first official demand for the British recognition of the Provisional Government of Bangladesh’ was tabled in a motion in the House on 15 June by 120 Labour MP’s. The motion urged in addition that the UN Security Council must be called urgently to consider the situation both as a threat to international peace and as a contravention of the Genocide Convention. According to this motion, until order was

24. This seems to be a normal Soviet tactic in such a situation as will be observed in her attitude to the Nigerian conflict which is discussed in the next section.
26. Ibid.
restored under UN supervision, the Provisional Government of Bangladesh should be recognized as the vehicle for the expression of self-determination of the people of East Bengal. This demand was considered inopportune by Sir Alec Douglas-Home on the grounds that it would be premature to involve the United Nations (in that respect) and besides, the Indian Government had made no such proposal.

In any case, it was considered necessary to despatch a Parliamentary delegation to East Pakistan to assess the situation first-hand.\(^27\) The confidential reports of the two separate British Parliamentary delegations which went to investigate conditions and the plight of the refugees from East Pakistan were made to Sir Alec Douglas-Home on their return. Both reports which later appeared in the national papers were generally in disfavour of the Pakistani authorities. It must be noted that the Pakistan government protested to the British Government three times in one week,\(^28\) against Sir Alec Douglas-Home's statement to the British Parliament in which he said Britain would withhold further aid to Pakistan until progress was made towards a political settlement in East Pakistan. In the view of Pakistani officials, Sir Alec's statement was considered to have exceeded established diplomatic norms. They thought that Sir Alec's views on Pakistan's internal affairs ought not to have been stated publicly but communicated through normal diplomatic channels.

We may sum up by submitting that the above discussion appears to confirm our earlier suggestion that the British Government's policy on the conflict in Pakistan was that the Pakistani authorities should create a political framework within which civil government could be restored and which would give confidence to the majority of the refugees to return home.

\(^27\) The first British Parliamentary delegation to East Pakistan was between 12-18 June 1971, consisting of Miss Jill Knight (Conservative), Mr. James Tinn (Labour), and Mr. James Rilfedder (Ulster Unionist). The second was announced by the Foreign and Commonwealth Office on 20 June, headed by Mr. Arthur Bottomly (Labour), who was Secretary of State for Commonwealth Relations (1964-66) and Minister of Overseas Development (1966-67) in the Labour Government. Its other members were Mr. James Ramsden (Conservative), a former Secretary of State for War; Mr. Reginald Prendice (Labour), Minister of Overseas Development in 1967-69; and Mr. Toby Jessel (Conservative).

\(^28\) The letters of protest were on 29 June, 3 July and 3 July 1971 respectively.

5. THE PEOPLE'S REPUBLIC OF CHINA

The Chinese government at first adopted a restrained attitude towards the crisis, suggesting that it wished to avoid becoming involved. However, Mr. Chou-En-lai, Prime Minister of the People's Republic of China, sent a message to President Yahya Khan on 12 April pledging China's full support for Pakistan in the situation arising out of the civil war in East Pakistan. He said: '... The Chinese Government holds that what is happening in Pakistan at present is purely an internal affair of Pakistan which can only be settled by the people of Pakistan themselves and which brooks no foreign interference ... Your Excellency must rest assured that should Indian expansionists dare to launch aggression against Pakistan, the Chinese Government and people will, as always, firmly support the Government and people of Pakistan in their struggle to safeguard the nation's sovereignty and independence.'\(^{29}\)

This stand was reiterated by the Chinese acting Foreign Minister, Mr. Li Shui-ching, Minister of the First Ministry of Machine Building, arrived in Pakistan on a week's visit at the invitation of the Pakistan government.

6. THE UNITED STATES OF AMERICA

The United States of America had been a 'traditional supplier' of arms

\(^{29}\) Keesing's Contemporary Archives, 29 May - 5 June 1971, p. 24629.
to the Pakistan regime. While events in East Pakistan forced a number of States which had equally been supplying arms to Pakistan to stop doing so, the Nixon Administration found it most difficult at first to put an end to its arms shipments to the military regime of President Yahya Khan.

The New York Times first reported the persistent continuation of arms shipments by the US to Pakistan. According to this paper, two Pakistan ships had sailed from New York in May with cargoes of US military equipments. The Indian Ambassador in Washington raised the matter with the State Department on June 22. In reply, the US Administration stated that no fresh foreign military sales to Pakistan had been authorised or approved, and no export licences for commercial purchases issued or renewed since March 25, 1971, when the civil war in East Pakistan began. It admitted, however, that the ships might have carried either foreign military sales items which had been approved or commercially purchased, and for which export licences had been issued before that date.

The Indian Government failed to obtain an assurance from the US authorities that its military aid to Pakistan would end. Even though there were strong demands on the US Senate Foreign Relations Committee for immediate suspension of US military aid to Pakistan as early as May 1971, it was only on November 8, that an announcement was made that the US Administration had revoked export licences for military equipment for the Pakistan Army valued at more than $3,000,000, although spare parts to the value of $16,000,000, which had been cleared by the customs but were held up by the dock strike, would be allowed to go through.

One can hardly deny that the East Pakistan question was essentially at least a humanitarian one. Can it therefore be argued that it constituted a violation of the rights of the people of East Pakistan for the US to remain impervious to their appeals, and indeed encourage the infringement of the people's interests by diplomatic and military assistance to what may be termed for short, 'the other side' for such a long period of time, even in the face of mounting international pressure against continuing such an action?

If this question is put on the basis of an infringement of human rights as such, the answer must probably be in the negative. Considered, however, from possible illegal intervention in the internal affairs of another country, the answer might be different. However, it must be observed, that later on increased international protests against the stand of Nixon's Administration in the conflict resulted in the US Government's shift of attitude. The United States Congress decided to suspend economic and military aid to Pakistan until such a time as it had resolved its internal conflict. The Senate Foreign Relations Committee voted to end all aid -- 'military, economic, grants, loans and sales' -- to Pakistan until President Nixon 'proves to Congress that Pakistan is helping to bring peace to Indian sub-continent and is letting refugees to return to heir homes.'

The US change of policy towards the settlement of the conflict can be further evidenced in the statements of Mr. Bush, the United States' representative at the United Nations Security Council debates on the matter. The salient points of his contribution were contained in the US draft resolution at the Security Council debate on Pakistan. The draft resolution failed to touch some vital issues in the crisis. It failed to get the Security Council 'call for a political settlement in East Pakistan which would inevitably result in a cessation of hostilities; and call upon the Government of Pakistan to take measures to cease all acts of violence by Pakistan forces in East Pakistan which have led to the deterioration of the situation'. On the other hand, the resolution failed to reprimand India for her open military intervention, nor did it call on her to desist from a continuation of such an act.

Having concluded our analysis of the complicated issues involved in the Pakistan conflict including the attitudes of the selected States in the matter, we now elect to examine the Nigerian conflict in the next chapter.

34. For the text of the draft resolution, see the UN Monthly Chronicle, January 1972. A vote was taken on the draft resolution submitted by the United States -- in favour: Argentina, Belgium, Burundi, China, Italy, Japan, Nicaragua, Sierra Leone, Somalia, Syrian Arab Republic, United States. Against: Poland, USSR, Abstentions: France, United Kingdom. The draft resolution was not adopted because of the negative vote of a permanent member of the Council.
9. The case of Biafra

1. BASIS OF THE INTERNATIONAL CHARACTER OF THE BIAFRA GOVERNMENT

The Nigerian conflict like the Pakistan question treated earlier, started as a purely internal dispute. In spite of the efforts of the Nigerian Federal Military Government to regard the war against Biafra as strictly an internal Nigerian affair all through, events that followed brought the matter within the bounds of international concern, in the first instance to Africa and secondly, to the world as a whole.

This view is justified by the following elements of the case which soon emerged.

1. Supply of arms, including aircraft and heavy guns, by the Governments of the United Kingdom, the USSR, Czechoslovakia, the UAR, and in small quantities by some other countries to the Federal Government and from officially undisclosed sources to Biafra.

2. The condition of Biafra's population, which was cut off from the sea and encircled by the federal troops became of great concern to the whole world.

3. The recognition of Biafra as an independent State by certain Governments which thus, so far as they were concerned, accorded Biafra the status of a full member of the international community (at least in the formal sense). These were the governments of Tanzania (13 April 1968), Gabon (8 May 1968), Zambia (20 May 1968) and lately Haiti. In a statement by General de Gaulle at a press conference in September 1968, French moral support was declared, and a decision to recognize in the future could not have been completely excluded.

4. To these must be added the fact that the Federal Nigerian Government submitted to the pressure of the Organization of African Unity (OAU) to discuss 'her internal dispute' with Biafra. The outbreak of hostilities resulted in mass movements of the civilian population, and starvation was heightened. Since the blockade prevented any importation of food, a world-wide campaign to save the starving women and children of Biafra was launched by the ICRC, the Churches and other international humanitarian bodies.

It can be firmly established from the above that the Nigerian conflict outgrew its national boundaries. We must now attempt a survey of vital legal questions connected with the matter of Biafra's international personality. Such questions would, undoubtedly, include the extent of Biafra's statehood in the sense of international law to qualify as one of its subjects. Of equal importance also is the issue of recognition and her competence to conclude international agreements which would be binding in international law.

2. THE EXTENT OF BIAFRA STATEHOOD IN INTERNATIONAL LAW

Doubt has often arisen as to the degree to which, during the conflict, Biafra attained the status of a State within the meaning of international law. Could it be said on the basis of any satisfactory reasoning that Biafra at any time enjoyed a measure of international personality?

Naturally, to determine the legality of the claim of statehood of Biafra, one would have to examine whether it had all, or at least the essential characteristics required by international law, namely, a representative and effective independent government, defined territory, and a sufficient degree of stability, evidenced by the support of the majority of the population.

We submit that most of these factors were present in the case of Biafra, though not completely without some legal queries. These factors are specifically examined below.

A representative organ -- the Consultative Assembly, which comprised 300 people drawn from all the areas of Biafra was set up by the military Government of Eastern Nigeria at the initial stage of the crisis. This organ had the power to take decisions of any sort in the best interest of the entire population of the former Eastern Nigeria. It was this body that mandated General Chukwuemeka Odumegwu Ojukwu on the eve of 30 May 1967 to declare the region an independent sovereign state at the earliest possible date. The Biafran government drew its authority for the conduct of the war with Nigeria through this organ.

Talking of Biafra possessing most of the essential elements of statehood listed above, we must point out that some of them underwent a
fundamental change after independence was declared on 30 May 1967.

Take for example the question of ascertaining the true wishes of the population. This posed a difficult problem in the face of hostilities. With the movement of the population during the war, it became increasingly difficult for the members of the Consultative Assembly to maintain contacts with those they represented. This, of course, is the consequence of war. Nothing short of a plebiscite could possibly resolve the issue of what the people desired. On the other hand, we must observe that this is not peculiar to Biafra, but is true of every other war. We may here recall the point we have made earlier to the effect that during the second World War and during earlier wars, the legitimacy of Provisional Governments and governments in exile was never questioned on the grounds that such governments had no contacts whatsoever with the people they claimed to represent. This position is still recognized in contemporary international practice.

Biafra officially proposed that a plebiscite be held to determine whether the people would like to remain Biafrans or be Nigerians on 29 June 1968. A statement said: 'The Government of Biafra offers a plebiscite to Nigeria as the converse of her insistence on a cease-fire first in regard to a negotiated settlement. Without asking Nigeria to drop her quarrel with Biafra, it only asks that this be prosecuted peacefully. It offers honourable peace in place of bloody battles. The Government of Biafra accepts the principle of self-determination ... The inhabitants of the disputed areas must be given the opportunity to decide by a free plebiscite whether they want to belong to Biafra or to Nigeria'. This offer was rejected by Nigeria.

For a state to qualify as one under international law, it is fundamental that the government formed to handle its affairs should have a representative character or at least be in effective control of the national territory. Is the new government entitled to speak in the name of the state, so that on the one hand it may assert the legal claims of the state and on the other hand assume responsibility on the part of the State for its conduct? It would seem that an affirmative answer to these questions could be given if the available evidence showed that the new government held office with the assent, or at least with the acquiescence, of the people. In the Biafran case, it is true that the Biafran Government could not persuade the Nigerian Government to accept the holding of a plebiscite to ascertain the wishes of the people in the disputed areas. However, it is also true that in normal usage assent or acquiescence is implied from the fact that the new government is in actual control of the administrative machinery of the state, is performing normal governmental functions, and is not meeting with open resistance to its authority. 'Stability' is the word which is often used to describe the de facto situation, and it is in practical application the equivalent of 'effective possession of authority'. There can hardly be any doubt that the Biafran movement had maximum support from the population concerned. It was not just the affair of a handful of people, but a national movement of national character and scale in which the Biafran will was manifested on a national basis. The governmental machinery functioned reasonably effectively until the end of the conflict, in so far as the circumstances permitted. There was never any instance of a wilful breakdown of law and order during the period of the twenty-seven months of its existence. In fact a government is considered to have acquired a reasonable degree of internal stability, if the government has been enjoying the habitual obedience of the bulk of the population.

International law follows the realistic rule of regarding such de facto control over a given period as implying the general acquiescence of the people. We can imagine the government though exercising effective de facto authority is nevertheless doing so clearly without the assent of the people it purports to represent. How long third States must wait before reaching the conclusion that there is general acquiescence is another matter.

We must observe here that the fact that past international law lendened support and recognition to de facto control of a territory over a given period as implying the general acquiescence of the people and as a decisive element justifying the legitimacy of a government is unfortunate. We submit that this position is highly unsatisfactory and should not be allowed to persist. Contemporary international law should no longer be satisfied with mere de facto control of a given territory as a yard-stick for determining the right government, but should interest itself how in actual fact the control is attained and being sustained. The important issue is whether the government in control enjoys the support of the people it governs or not.

By this stand, we do not, of course, mean to suggest — and this we have observed before in the example of the Czechoslovakian Govern-

2. Ibid.
ment – that in recent times, there do not exist governments which are factually in de facto control of certain territories, but nevertheless do not enjoy the support of its people. There is nothing one can do except to recognize this fact. It is lamentable and should be condemned and discouraged. The other question—of willingness on the part of the new government to observe the rules of international law and to fulfill the internal engagements of the states—has normally been judged by its actual performance after it has come into power.

A discussion of the territorial question of Biafra cannot, in our opinion, be separated from a discussion of the more general and controversial question of the concept of territorial integrity of States. It can hardly be disputed that Biafra started its war against Nigeria on a defined territory to which she continued to lay claim throughout the conflict. It is clear that the possession of a territory, a population and a sphere of jurisdiction is seen as a postulate of statehood itself rather than as a right conferred by international law on the State.

Those opposing the implementation of the principle of equal rights and self-determination of peoples, with regard to peoples already under the jurisdiction of sovereign and independent States, often point to the fact that it poses a great and continuous danger of conflicting with other norms of law, e.g., those of non-interference and non-intervention in the internal affairs of other states; of the illegality and possible nullity of territorial changes brought about by force, as well as of course the illegality of the use of force itself. The case was made against Biafra to the effect that recognition of her sovereignty would destroy the territorial integrity of Nigeria. Let us see how far this stand is correct.

The preservation of the territorial integrity of the State is an idea to which all States pay at least lip-service. Many international treaties and conventions contain clauses for the protection of the boundaries of the signatory powers. The United Nations Charter and the Charter of the Organization of African Unity are cases in point. But in binding one another to assist in preserving the existing boundaries, states are often driven not by any high-minded motives, but by the fear of losing territory already in their control.

The concept of territorial integrity was designed to discourage the ambitions of those states which did not adhere to it with regard to the territories of other states. It did not necessarily protect those states which regard themselves as bound by it. It has never been designed to guarantee the states that there will be no uprising from within the state itself. Moreover, like many international law precepts, it had in the last resort only a moral sanction. For international law recognized the right of states to acquire territory by conquest.

The Organization of African Unity in a Charter reminiscent of many aspects of the United Nations Charter has embraced the idea of the sanctity of the territories of member-states. The purpose stated in Clause (c) of Article 2 of the OAU Charter is to defend the sovereignty and territorial integrity and independence of member states. This aim is repeated in Clause (3) of Article 3 in which member-states affirm their ‘respect for the sovereignty and territorial integrity of each State and for its inalienable right to independent existence.’

When the OAU resolves to defend member’s territorial integrity it intends to defend it only under certain circumstances. For, to protect the territorial integrity of member states at all cost and in any circumstances would inevitably lead to situations of absurdity. For instance, suppose the member-state, in response to internal stresses within it, decides to break up into two or more states (Mali federation) — could the OAU go to war to prevent it from ruining its territorial integrity? Obviously not, because it would lead to the legal absurdity of interfering in the internal affairs of the other states which clause 2 of Article 3 clearly provides against. The intention, it would appear, is merely to protect the territory of a member state against other states and not against forces inside the state itself.

Again, could the OAU employ force or diplomatic pressure to compel a body of citizens of a member state, which has opted for self-determination against the will of that member state, to renounce their independence in order to preserve its territorial integrity? It could not because when it disapproves of the action of the breakaway section of the state it treats the matter as an internal affair, which does not permit of discussion under Clause 2 of Article 3 of its Charter. When it approves of or is neutral to the action of the new state, the only boundaries left for the OAU to protect are those boundaries of the original state that remain after the boundaries of the new state shall have been excluded.

The OAU recognizes the right of a new state to emerge from an existing state through the process of self-determination. The preamble to the OAU Charter states that the Heads of African States and Governments are ‘convinced that it is the inalienable right of all people to

4. We must remark that the point is not that it only had a moral sanction whereas other parts of international law had more than that, but that international law itself legitimized conquest, so only moral sanctions could prevent it.
control their own destiny'. It is pertinent to note that the OAU Charter does not limit the application of this principle and does not condemn secession in any member state, nor has the Charter been amended to insert this item.

Apart from the legal trip wire which could inevitably bring down the OAU if it sought to compel a member state to abandon its claimed independence, there is also a moral and philosophical argument in favour of part of a country breaking away in certain circumstances. This argument is derived from Locke's theory of society and government. The exercise of political power by the State springs from the will of the people. The power of the people over government, however, is still not quite as complete in Locke as it came to be in later and more democratic theories. Rousseau's theory of a social contract between the State and its citizens has some relevance in the present question under discussion. The exercise of political power by the State emanates from the will of the people by what he called the 'social contract'. Government exists as a result of a tacit agreement with each individual governed the State contracting to protect the life and property of the citizen who, for his part, surrenders the exercise of the powers of government to the State. Should the State prove unequal to the duty of protecting the lives and property of the citizens entrusted to her care, those citizens are justified in regarding the 'social contract' as at an end.

The application of this theory, not directly in relation to cases of secession, but rather significant as regards the implementation of the 'theory of right of resistance' has freed many nations from the shackles of absolutism and monarchical tyranny. For instance, it led in England to Cromwell's revolution which swept away the Stuarts and their 'divine right of Kings' ideas and replaced them by the parliamentary democracy. And in France it led to the people's revolution of 1789, to the overthrow of the Bourbon monarchy by republican democracy. In recent times, it has resulted in the birth of a new nation of Bangladesh as a result of the repressive and ruthless military rule of President Jahya Khan against its citizens in the Eastern wing of the country. It must be made clear that the Bangladesh case differs from the foregoing examples in that the uprising was aimed at secession and the creation of an independent State, while the revolutions in France and England aimed at changing the 'system' of government.

But the common feature is the crucial element of the right, and aspiration of the people to effect such fundamental changes.

Unfortunately there is still a very weak spot in legal reasoning — the failure to develop a clear formula in solving the problem of secession. Legal thoughts up till now have often centred around a nation, a government or a State.

From what has been said so far, the following conclusions emerge. Firstly, in breaking away from Nigeria, Biafra was not in breach of international law, nor of the Charter of the OAU, nor yet of any other recognized law. Secondly, there is nothing sacred about the concept of territorial integrity, for the territories of a state alter with the changing fortunes of the state, and sometimes even disappear altogether.

Before passing on to the special field of the recognition and treaty-making competence of Biafra, let us summarize what has been discussed so far. In carrying out our general analysis of the essential elements of statehood in international law, it has become clear that Biafra satisfied those minimum conditions. There is no doubt that Biafra met the requirements of population, government, permanence and a reasonable measure of effectiveness — for the time it lasted. It had a defined territory, the controversy on this being mainly restricted to the areas inhabited by the so-called minority groups of the region. The legal status of this part would have been finally determined through democratic means, in the event of a halt of hostilities, as was proposed by the Biafran government. The state of Biafra was not in fact subject to any other government and Nigeria was not in effective control of that territory which was in effective control of Biafra. The factual conditions constituting the basis of independence and sovereignty (two categories often used synonymously) are factual conditions which were present in the case of Biafra.

3. THE QUESTION OF RECOGNITION AND TREATY-MAKING COMPETENCE OF THE BIAFRAN RÉGIME

In present times, the founding of a State on a territory which is res nullius, belonging to no one, is such a rare phenomenon that it can well be left out of account. The modern occurrence is that new international entities originate mostly on or from the territory of existing States. In most cases they are established as a result of the division of an existing state or as the result of secession. The new States or entities start their new legal life side by side with the old state on the international plane.

Modern writers on international law hold the view that the question of recognition has become a political rather than a legal affair. Bot writes that the granting or withholding of recognition is nowadays often largely determined by political factors. This may be so, but if this observation actually represents the present trend of State practice with regard to recognition, we are inclined to doubt it, if it follows that every régime recognized by a certain number of governments would necessarily be held in strict law to have the characteristics of a state or government. We have our reservations on this: for political motives often inspire a course of action not consistent with legal prerequisites. But if, on the other hand, Bot has in mind the recognition of regimes or entities which answer all or the essential criteria of statehood in international law as mentioned above, he will be right. It definitely does not follow that all régimes or entities so endowed will become ipso facto recognized states, for recognition may be withheld for political reasons. (This is one aspect of the opposition between the declaratory and the constitutive theories of recognition.) It would however be incorrect to assert that the fact of a denial of recognition of a régime that has satisfied the essential elements of statehood suffices in itself to deprive it of statehood in law.

It should be borne in mind that a secession from an existing state, although constitutionally a breach of the law and therefore from the point of view of the parent state illegal, is not on that account contrary to international law. Certain authors maintain that it is a duty of States to recognize a new State which has come into existence as a result of secession. For example, according to Lauterpacht, ‘although rebellion is treason in the eyes of municipal law, it results, when followed by the establishment of an effective government wielding power over the entity of national territory, with the consent or the acquiescence of the people (for a reasonable period of time) in a duty of other States to recognize the change and to treat the new government as representing the State in international sphere.’

The explanation for Lauterpacht’s stand is not far to see. He is a recognized protagonist of the doctrine by which entities must be accepted as subjects of international law by the mere fact that they possess the normal characteristics of statehood. Recognition by other States is a recognition of this situation.

It would, however, seem that the practice of States does not support the view that new states like Biafra can have no legal existence prior to recognition. We consider it unnecessary to go into this any further here as we have discussed it in much more detail on the Rhodesian question. Certain quarters have argued that Nigeria recognized Biafra by accepting to go into peace talks with Biafra.

Without going deeper into the technicalities of the legal effects of the attitude of not recognizing the independent existence of Biafra, which was adopted by a large number of the members of the Organization of African Unity (OAU) – an attitude based on political rather than legal motivations – or the recognition of Biafra by four African countries and one Latin American country, or the official statement of support by a European country (France) or the fact that Nigeria herself maintained relations with Biafra at least during the peace talks under the auspices of both the Commonwealth Secretariat and the Organization of African Unity, we must not fail to observe that there can hardly be any force of reasonable argument to deny the fact that the conflict was internationalized to such an extent that Biafra’s existence was accepted as a fact, even if objected to on the basis of political and legal queries by her opponents. In the practice of states, the gap between the elements of the legal maturity of a state régime, and political acknowledgement of it, widens gradually and in more and more cases. Even though third states may wait indefinitely before according recognition to what is happening, nevertheless, the legal facts or actual state of affairs cannot be denied. The decision of either the incumbent or third states not to make its recognition of the legal facts based on the consideration of the political consequences with regard to its allies goes to widen the gap between the fact of legal maturity and political acknowledgement of that fact. But then what explains the fact that the widening of this gap is not consistent in the practice of States? It is true that in some cases the gap closes. In international practice recognition is sometimes even given to entities which are not yet in control of the territory. There are examples to illustrate this. For instance, Cuba and some other states recognized the Provisional Government of South Vietnam as opposed to the recognition by other States of the Republic of South Vietnam which is no longer in full control of the territory.

8. Lauterpacht, Recognition in International Law, 1947, p. 409. (Italics added.)
9. See the section on ‘The Personality of Unrecognized States in International Law’, Part D, chapter 5, infra.
10. But according to the orthodox view such recognitions are considered premature and not justified on the facts – therefore not really legitimate, and a species of intervention.
As regards the Biafran case under consideration, it would be difficult to deny that Biafra was tacitly recognized as having at least lawful belligerent status. With regards to the question of Biafra's treaty relations with other subjects of international law, it must be admitted that there is no evidence of this fact. This is consequential upon the fact that States are reluctant to make public their dealings with states and entities whose international personality still remains a matter of open controversy. Consequently, there is shortage of basic literature in this field.

In any event, there does not appear, in our opinion, any question of the right of the new revolutionary government to administer, so far as it can, the domestic affairs of the territory it purports to represent. It is the business of foreign diplomatic representatives to decide on which subjects they are convinced could be treated with the de facto authority. The established practice in this situation is that before a treaty may be signed with the de facto government, or other commitment entered into, third states seek to assure themselves that the government in question is sufficiently well-established to be taken as spokesman for the people of the State. To this extent, there is no avoiding some procedure which, if not recognition in form, would be the equivalent to it and leaves little or no doubt with regard to the fact that the de facto government is understood to represent an international legal person and is a subject of international law.

4. THE INTERNATIONAL RESPONSE TO THE BIAFRAN CASE

It was very difficult initially to determine the external forces that were involved in the conflict. However, on 30 July 1967 (barely two months after the declaration of the independence of Biafra) Chief Enahoro, Federal Nigerian Commissioner for Information and Labour and Mr. Ogbu, Permanent Secretary at the Federal Ministry of External Affairs were alleged by the Biafran authorities to have visited Moscow to negotiate for arms. This allegation was immediately denied by the Nigerian Embassy in Moscow on 1 August. On 19 August a total of 15 Soviet Antonov transport aircraft carrying inter alia six MIG fighters and six MIG trainers were reported to have landed at Kano airport with about 170 Russian technicians for assembling the aircraft. Arms did not come only from the Soviet Union but also from other communist countries in Eastern Europe. Two Czechoslovak-built jet fighters were reported on 8 August to have left Accra for Lagos; on 16 August a Polish ship was reported to be unloading five jet aircraft and supporting armaments from unknown sources to Lagos. It would appear that even though the Soviet Union and some other Western powers, particularly Britain, had at the outbreak of the conflict characterized it as an internal matter, both countries took action which eventually, and because of the way the situation developed and the character which the struggle took on, might be considered of an interventional nature.

In Britain, the grounds for the British position were laid in a message delivered by Mr. Michael Stewart (the then Foreign Secretary) to the British House of Commons during an emergency debate on 12 June 1968 concerning the Government's policy of continued arms supplies to the Nigerian Federal Government when he said: ‘If Britain had withheld arms from the Federal Government after Nigeria's independence it would have been tantamount to saying: We have put the Nigerians in a position where they are heavily dependent on us. Now that they are faced with a challenge, we are going to put them at a heavy disadvantage.' Sir Alec Douglas-Home (the previous Foreign Secretary) added weight to the argument supporting this policy by stating: If arms shipments ceased, Britain would lose all influence with the Federal Government. We cannot intervene in the internal affairs of an independent Commonwealth country. If we tried to do so, the Commonwealth would quickly disintegrate. There are other statements put out in defence of this policy which we do not consider necessary to reproduce here. Since those statements failed to differ substantially from the two quotations reproduced, they may be taken as endorsing the British Government's popular and official explanation for her persistent arms shipments to the Federal Government. It thus became evident that the British Government became a supporter for the preservation of the territorial integrity of Nigeria. It is perhaps early to say how consistent the British Government's policy was in this case.

12. An agreement described as dealing with cultural cooperation between Nigeria and the Soviet Union was signed the following day, August 2nd in Moscow. According to Tass, the official Soviet Government information media, this agreement was negotiated in Lagos in 1966.
15. Ibid.
It is also doubtful how convincing the arguments advanced in support of this stand are. For the moment, we may state that there has been little evidence of British influence with the Nigerian government being put to the test, if indeed it existed at all. The time it should have been put to the test was before the Kampala peace talks took place and if this had been successful these talks might not have been so inconclusive.

The other prophecy of the Commonwealth crumbling just because of a possible withdrawal of a member country must be rejected as improbable since events have conclusively proved that theory wrong. It is but fair to note that whilst supplying arms, there were two main British peace initiatives – one by the Government and the other by an independent body. Let us survey them briefly. Upon the breakdown of the Kampala talks, over conditions for a cease-fire, Lord Shepherd, Minister of State for Commonwealth Affairs, arrived in Lagos on 20 June and on the two following days had talks with General Gowon and senior Federal officials. The joint communiqué issued at the end of the talks concluded: ‘General Gowon reaffirmed that, provided agreement was reached on ending secession and preserving a united Nigeria, the Federal Government was agreeable to a cease fire arrangement involving an external observer force as means of giving a sense of security to the Ibo people. He emphasized the responsibility that he personally, and the Federal Government, felt responsible for the security, safety and well-being of all Nigerians wherever they lived in the Federation’. However, this mission achieved very little.

The private initiative of Lord Brockway was undoubtedly better prepared than that of the British Government, through Lord Shepherd. Lord Brockway went to Nigeria and Biafra in December 1968 on behalf of the British Commission for Peace in Nigeria. Lord Brockway, who was eighty years old, made the trip with James Griffiths, M. P. – an ex-Colonial Secretary. The initiative resulted in a brief Christmas truce, which it was hoped could be extended to provide an opportunity for further steps towards peace. The decision of the British Commission for Peace in Nigeria, which commanded much support in the British Isles, to sponsor an independent peace initiative under Brockway’s leadership, we believe stemmed from the fact that firstly, all the former British Government peace moves had failed to achieve any meaningful results; and secondly, it appeared that any future British Government effort at peace must be considered partial by the Biafran side. Lord Brockway outlined these measures:

1. cease-fire;
2. an international peace-keeping force;
3. negotiation for political settlement;
4. massive relief of hunger and sickness.

However, despite the attention with which Lord Brockway and James Griffiths were received by both General Gowon and General Ojukwu no progress was made in the direction of implementing Lord Brockway’s peace plans.

An important aspect of the British attitude to the Nigerian crisis concerned the dispute over payments of rents, royalties and taxes to the Biafran régime by the British oil company Shell-BP, which was operating on Biafran territory.

General Ojukwu signed a decree on 21 June ordering all oil companies operating in Biafra to supply information on oil revenues payable, under penalty of £5,000 for failure to comply. The Federal Government, on the other hand, claimed that all revenues were, as hitherto, payable to the Federal authorities. As a result, Shell-BP was faced with a dilemma of whether to pay the Federal Government revenue in respect of property over which the latter no longer had de facto control, or whether to accede to demands by the unrecognized régime in Enugu (capital of Biafra) which was in physical control of the Shell-BP assets in Nigeria. The British Government refused to make any foreign exchange available for payment to Biafra, and in fact no payment to the Biafran Government was made, although she proceeded to press her claim.

The largest share in Nigerian oil production is that of Shell-BP, who in 1966 opened a refinery near Port Harcourt in which the Nigerian Federal Government had a 50 per cent share. Other oil companies holding concessions in Nigeria are Gulf, Agip (a subsidiary of the Italian ENI), American Overseas, Tennessee, Mobil. But in Eastern Nigeria the only company operating besides Shell-BP is Sasfrap (of France).
The British Government's steps to block payments to the Biafran regime do not seem to agree with precedents in international law in general and the British practice in particular. As to whether there is an obligation on the part of an alien with respect to payment of taxes to insurgent authorities in de facto control of a territory, it is undisputed that taxes are properly payable by an alien to insurgents in de facto control of an area and accordingly in a position to compel payment of taxes. There have been various incidents in international law, whereby taxes of the USA and UK were paid by aliens to insurgents in de facto control of an area and accordingly in a position to compel payment of taxes. While we do not intend to undertake an elaborate illustration to prove this, a few examples are considered desirable. The United States Consul at Chihuahua, Mexico, informed the Department of State on March 23, 1912 that the Provisional Government of the insurrectionary forces in that place had demanded the mine taxes due to the Federal Government at the close of the month. The Consul was instructed by the Department of State on 27 March that such taxes should be paid under protest, that the protest should be made a matter of record in each case so far as possible and that properly authenticated receipts should be secured for all taxes paid. Americans were obligated to pay taxes to persons in de facto authority. However, the US Ambassador in Mexico City was instructed to lay the matter before the Mexican Government, calling attention to the extraction of taxes by insurrectionary forces and stating that the Government of the United States of America would regard payments of such taxes to persons exercising de facto authority as completely relieving American citizens from further obligation with reference to taxes paid in that way.

The next incident similar to the one just mentioned provides some further material of interest to the topic under discussion. On 29 August 1914, General Carranza, as first chief of the constitutionalist army 'in charge of the Executive' of Mexico issued a decree declaring null and void all matters transacted or decisions rendered since February 19, 1913 by the Departamento de Fomento and later, during the Huerta regime by the so-called Departamenta de Agricultura y Colonización. The American Consul at Chihuahua reported to the Department of State on November 21, 1914 that Mr. Louis Lane, an American citizen had on 26 August 1913 filed claims to 12 perteaencias of mineral land before the proper office in the city of Chihuahua and he now wished to know what steps should be taken to protect his titles, in view of the Carranza decree of 29 August 1914. The Consul pointed out that, though the mining interests of the Republic of Mexico were exclusively under the central government, nevertheless, no further relations were then maintained between the State of Chihuahua and the Central Government.

The Department of State replied on December 1914: 'So far as concerns the individual cases of American citizens affected by this decree, it would seem that the Department could offer them no further advice than to inform them that if they consider it advisable to attempt to comply with the provisions of the decree, under generally accepted principles of international law, they are entitled to pay taxes to persons in de facto authority.'

In March 1915, the Department of State instructed the Consul at Mexico City to advise American citizens that they were obligated under international law to 'pay taxes upon their property in Mexico to persons in de facto authority ... and that ... they would do well to consider the matter of the local control of the territory in which their properties are situated.'

With respect to British practice, the following appears typical: In 1865 an insurgent group was in possession of a custom house in Peru. The de jure Peruvian government issued a decree declaring that all duties collected by the insurgents would be considered as not paid and the government would require such duties to be paid again to its own offices as soon as its authority was re-established in the port. The British Law Officer Phillimore instructed the British Chargé at Lima thus: 'That, according to the universal usage of nations, dues paid by foreigners who take no part whatsoever in a civil war which breaks out in the country where they are peaceably resident and carrying on trade under the faith of Treaties and general international law, to a de facto Government which demands and has the power of compelling this payment must be considered to be paid to the Government of the country.'

It seems to us that international law and custom governing the question of payment of taxes and royalties to insurgent authorities in de facto control of a territory has been so consistent practice that it is doubtful whether the British Government was acting in accordance

23. Ibid., op. cit.
24. Ibid., at p. 139.
with international law when forbidding her subjects to pay royalties to the de facto authority of Biafra.

If the stand of the British Government was based on the consideration of the fact that Biafra was neither recognized as an insurgent nor as a belligerent by the British Government, it would still appear to contradict the British practice in such cases. It must be observed that the British practice in this respect distinguishes belligerency from recognition of either the parent or insurgent governments as the legitimate government. As stated by the British Foreign Secretary in 1937: "Recognition of belligerency is of course quite distinct from recognizing any one to whom you give that right as being the legitimate Government of the country. It is a conception simply concerned with granting rights of belligerence which are of convenience to the donor as much as they are to the recipients." Thus, in 1937, Britain conceded de facto recognition to the insurgents in the Spanish Civil War, in regard to the territory under their control, and also went so far as to exchange agents.

One would immediately pause to ask: where does the true explanation of the British attitude in the Biafran case actually lie? Was the Nigerian Federation really so sacrosant when the colonial federations within the Commonwealth had failed to be of any practical 26. The British practice in the matter of belligerent recognition was authoritatively stated by the Law Officers in 1867 (See Smith, Great Britain and the Law of Nations (1932), Vol. 1, at p. 263). According to the terms of this statement the mere declaration by insurgents that they have constituted a 'Provisional Government' is insufficient to justify belligerent recognition. Before the grant is made, consideration should be given to the length of time that the insurrection has continued; the number, order and discipline of the insurgent forces; and whether the newly constituted government is capable of maintaining international relations with foreign States. It is generally known that the operations of insurgent forces may attain such a degree that they are in effective occupation of, and constitute the de facto authority in a large part of the territory formerly governed by the parent government. In this case the problem is at once raised for outside powers of entering into some contact or intercourse with the insurgents as the de facto authorities in order to protect their nationals, their commercial interests and their sea-borne trade in regard to the territory occupied. We believe that the actual war between the Federal forces and the Biafran forces reached such dimensions as from 9 August 1967, when the Mid-Western state of Nigeria fell to the Biafran troops that outside powers were compelled to treat the war between the Federal military forces and the Biafran forces as a real war between rival powers and not as a purely internecine struggle - in other words, recognition of belligerency.


5. APPRAISAL OF THE STATUS AND TREATY-MAKING CAPACITY OF ORGS OF NATIONAL LIBERATION MOVEMENTS

The United Nations Charter refers to self-determination as a principle in Articles 1(2)31 and 55.32 Even though the Universal Declaration of Human Rights is silent on the subject, both of the international cove-

value? Could the reason be as certain quarters often tend to explain, the fact that two different governments handled both cases, Bangladesh and Biafra? Our view is that the government took the wrong decision and this decision was wrongly implemented throughout.

As concerns the position of other governments, the United States Department disclosed on July 11 1967 that it had refused a request by the Nigerian Government for military aid on the grounds that the dispute with Biafra was a purely internal matter to be settled by the Nigerians themselves.33

The Kingdom of the Netherlands and Belgium supplied arms to the Federal side for a part of the war. However, Dr. Joseph Luns, the then Netherland's Foreign Minister, announced in the Lower House of the States-General on 6 June 1968 that all arms deliveries to the Federal Government would be immediately suspended and that the Netherlands' Government would ask other countries to do the same pending a cease-fire in the civil war.34

Mr. Pierre Harmel, the Belgian Foreign Minister, told Parliament in Brussels on 5 July 1968 that all arms shipments to the Federal Government had been frozen, and on 15 July the Belgian Government announced its intention to withdraw licences for the export of arms to Nigeria following the confirmation of reports that a Sabena aircraft (the national airline of Belgium) which had crashed near Lagos on 13 July 1968 had been carrying arms for the Federal Government under an already existing contract.35

30. Ibid. In our view, these states did the right thing legally by stopping, to ship arms to the contending parties, even if their initial supplying of arms may be said not to have been illegitimate according to traditional international law.
31. One of the purposes noted in Art. 1(2) is to 'develop friendly relations among nations based on respect for the principles of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace...'.

33. Ibid.
34. Ibid. In our view, these states did the right thing legally by stopping, to ship arms to the contending parties, even if their initial supplying of arms may be said not to have been illegitimate according to traditional international law.
35. One of the purposes noted in Art. 1(2) is to 'develop friendly relations among nations based on respect for the principles of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace...'.

nants – the Covenant on Civil and Political Rights and the Covenant on Economic, Social and Cultural Rights adopted by the General Assembly in 1966 – provide in identical language in the first article that:

All peoples have the right of self-determination. By virtue of the right they freely determine their political status and freely pursue their economic, social and cultural development. 33

Six years earlier, in 1960, the Declaration on the Granting of Independence to Colonial Countries and Peoples 34 acknowledged the ‘right’ of ‘all peoples’ to self-determination. At its 25th session, the General Assembly unanimously declared that all peoples have the right to determine their political, economic, social and cultural destiny without any external interference. 35 Concomitantly, it urged all states to promote the principle of ‘self-determination of peoples . . .’. 36

If self-determination refers to ‘the freedom of a people to choose their own government and institutions and to control their own resources’ 37 there seems to be a striking contradiction between the right of ‘all peoples’ to self-determination and the right of a state to its ‘territorial integrity’, the latter precluding secession. This contradiction is also obvious in the UN prescriptions and practice in self-determination as well as in the practice of States as can be seen from the foregoing analysis of the Bangladesh and Biafra cases. For example, in the Nigerian conflict only five states recognized the Biafran claim to independence and despite a protracted struggle lasting over two and half years, neither the United Nations nor the Organization of African Unity spoke for Biafran self-determination. Earlier during the Congo crisis, the United Nations had been responsible for offering an organized opposition which prevented the Katangan claim to secession. 38

32. Art. 55 reads in part: ‘With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principles of equal rights and self-determination of peoples, the United Nations shall note . . .’

33. Art. 1 in both Covenants. The Covenants were adopted by General Assembly resolution 2200 (XXI) December 16, 1966, as contained in UN Monthly Chronicle (No. 2), at pp. 41-72. (February 1967).


35. General Assembly resolution 2625 (XXV) of 24 October 1970.

36. Ibid., See also General Assembly resolution 2787 (XXVI) of 6 December 1971.


38. See, generally, L. Miller, World Order and Local Disorder, 66-165 (1967).

There are many other instances where the world community has ignored claims for self-determination such as exist in Sudan, Chad, Ethiopia, Tibet, Kurdistan, Formosa and Guinea-Bissau.

It is submitted that the demands of self-determination must in the last resort be placed above those of the ‘territorial integrity’ and ‘non-interventionist’ stands taken by the United Nations. But the question is largely one of timing. Initially these latter principles must prevail. Rebellion inside a State, even if it gathers momentum so as to become a civil war or a bloody conflict – call it a revolution, should never be encouraged or exploited by outside forces or powers. No State big, medium-size or small, should try, through a treaty written or unwritten to exploit such a situation. The tragic position, in which humanitarian, economic and political problems are mixed in such a way as almost to defy distinction between them, presents a challenge to the international community as a whole which must be met. Under certain circumstances a claim to self-determination, even in a non-colonial setting, may be valid under international law. Third states must recognize and appreciate the concomitancy of two competing international personalities. They should refrain from giving support to either of them, precisely because both of them still enjoy international personality and as such should be protected by international law. If an insurrectionist movement has acquired sufficient force and stability to call for a recognition of its character as a movement of genuine self-determination, – which is not to say recognition of the insurgent authority as a government as such, other States are entitled, even bound, to recognize that they deal with the insurgent element qua belligerent not necessarily as a recognized government. It is but essential to recognize the legitimacy of its aim if it can achieve it, and if its status as a regular belligerent in the process, and for the purpose of doing so, if the situation warrants this.
Part G
10. International organizations as subjects of international law

1. INTRODUCTION

In looking for the answer to the question whether international organizations are subjects of international law, we should keep in mind the conclusion reached earlier, that if an entity claims to have international legal capacity no rule of international law comes into play until the entity appears and asserts itself. This conclusion was inspired by the following reasoning.

The question whether the entity is entitled to do so is substantially the same as whether it has the international capacity which it claims to have. If the answer is in the affirmative and so recognized, it means that a series of acts performed by that entity in the field of international law and relations are legal acts, and it is admitted to have the capacity to perform them. We must recall here that the subject of any given legal order means that entity to whom the norms of the legal order in question apply, and whose conduct this order regulates or licences by imposing duties or conferring rights.

It must be observed, however, that it is not always correct to assume that a legal system addresses itself directly to certain entities. Sometimes, a legal order may in certain respects regulate or licence the conduct of some entities indirectly. However, the important issue is that any subject of law should be capable of having certain rights and duties under the given legal system. The degree of this capacity may vary, but this is an entirely different matter.

For an entity to be regarded as a subject of international law, that entity must enjoy some measure of international personality. Thus, the...

1. The term 'international organizations' as used here refers to organizations the membership of which is confined to governments or governmental authorities - sometimes called inter - governmental organizations.
2. See, Chapter 1, Subjects of International Law - Theoretical Examination.
notion of international personality is a juridical concept which is regarded as essential to provide a legal basis for entitling a subject to rights, and submitting it to obligations under international law. Whether international organizations are subjects of international law has been a question of controversy for some time. This was a direct consequence of the basic premise of the classical view of international law which denied almost all entities other than states personality in international law.

This stand-point was evident in international law literature at a time when the development and expansion of international institutions had as yet made little impact on international law. Side by side with the development of international organizations there has been discernible in international law a trend towards the attribution in some degree of international personality to them.

The International Law Commission in its commentary to the Draft Articles on the Law of Treaties in 1969, noted, that entities other than States might possess international personality, which according to the Commission's view is a principle of international law. Examples of such entities are increasing gradually. They include inter-governmental organizations such as the United Nations, some dependencies and colonies which are on their way to statehood, and also 'communities' which have been customarily described as States which as a matter of internal and constitutional law can be considered States by virtue of their political cohesion, their internal autonomy and their historical status. International law writers on this intricate question have shown four approaches to which we shall now turn.

2. MODES OF APPROACH

a. The inductive approach

1. Existence of personality. Those who hold to this method of approach express the view that every organization possesses some rights and duties. These rights and duties are expressly conferred upon the organization. From this body of rights and duties, the organization derives a general international personality. Framing this in other words, the international personality of an organization according to the supporters of this position, is a consequence of the expressed or sometimes implied rights and duties, as can be evidenced from the constituent instrument of such an organization. Bowett writes: 'Whilst, therefore, specific acknowledgement of the possession of international personality is extremely rare, it is permissible to assume that most organizations created by a multilateral inter-governmental agreement will, so far as they are endowed with functions on the international plane, possess some measures of international personality ...

b. The objective approach

According to this approach, the structural content of an organization is considered to be of prime importance. Special attention is paid to the specific elements pertaining to composition, voting procedure, functions and above all, powers of the organization. Once these pre-requisites are established, then the personality of the organization is admitted. It is further thought that the foundation of the personality of an international organization is not the will of the States but is to be discovered in general international law. In the opinion of Seyersted, it is the international legal order which ascribes personality to an entity fulfilling certain conditions.

c. The formal approach

2. Content of personality if it exists. According to this approach, it is sufficient to arrive at the conclusion that an organization has specific

6. Yearbook of the International Law Commission (1953-11), p. 95. The Holy See, and the constituent units of some Federal States which belong to the latter group have been examined.
7. Our classification of these approaches is based on an article by Dr. Manuel Rama - Montaldo on 'International Legal Personality and Implied Powers of International Organizations', British Yearbook of International Law, 1970. It may be necessary to observe that these approaches are valid, and it is not so much a matter of argument as of appreciation and preference.

rights and duties from the simple premise that such organization is endowed with international personality. In order to ascertain whether an organization has the capacity which it claims, it is essential to have recourse to the provisions of the instrument setting up the organization. Dr. Brownlie observes that 'Particular care should be taken to avoid automatic implication from the very fact of legal personality of particular powers, such as the power to make treaties with third States, or the power to delegate powers.'

This point of view is held also by other writers such as Ingrid Detter and O'Connell. It seems to us that the 'material' and 'objective' approaches offer the best guidelines for focusing the problem of the legal personality of international organizations. By this we do not mean to imply that the approaches have in fact offered the answer being sought for. But, at least a close perusal of these approaches presents us with the following general picture: there is a recognition of the fact that in the international sphere several and different subjects of international law exist; also an admission of the distinct nature of the unidentical subjects of international law which, consequently, results in their differing rights and duties. We share Seyersted's view to the effect that the personality of an international organization is founded on general international law. This in turn is proved by international practice.

But, on the other hand, not all his points of view are, in our consideration, free from criticism. For example, he attempts to find in the practice of an international organization a clear equation of organizations and states. We consider that this is basically wrong in view of the evident differences in their legal nature. Furthermore, it is not clear from his attitude whether the 'international acts' and 'capacities' and the 'activities of international organizations' form a common category which may be considered as a necessary consequence of personality. As for the opinions of the three other publicists cited above namely, Brownlie, Detter and O'Connell, one essential and clear message is carried; they call for a further examination of the constituent instrument of a given international organization in order to establish its capacity in law.

3. The Soviet view. Meanwhile we must survey another important body of literature which has been more cautious and traditional in its approach to finding a solution to the question of international personality of international organizations. The Soviet jurists who have spoken on this problem can be conveniently grouped as follows: those of them who grant a monopoly of international personality to sovereign states to the complete exclusion of all international organizations, including the United Nations, and those who, while denying that international organizations are international persons, on the ground that they are fundamentally different from states, still concede to these entities some degree of international rights. We shall begin with the first group.

Professor L. A. Modzhorian maintains that as long as international organizations are not sovereign entities, they are ipso facto not sub-
jects of international law. To her, the attribution of personality to international organizations would undermine state sovereignty. The element of sovereignty is in her opinion indispensable as a certain criterion of personality in international law. V. M. Shurshalow denies that international organizations are international persons, on the ground that they are fundamentally different from states. All the same, he concedes some degree of international rights to these entities. Professor G. P. Zadorozhnyi writes that whereas only 'sovereign entities are subjects of international law, such entities like international organizations, juridical persons and physical persons, are, at least, only subjects of international relations and not of international law. It will be clear that the opinions of the above quoted Soviet international jurists, which in our view, represent a minority position among Soviet authorities in international law on the subject, still cling to a traditional view of international law. As a result of our earlier arguments it will also be clear that this train of thought is unacceptable. It is being overtaken by the course of events. Moreover, it neither serves a useful and objective purpose, nor is it in agreement with the realities of contemporary international life.

It is necessary to point out that in a recent article on 'Subjects of international legal responsibility', Professor Modzhorian gave what appears to be a modified view of her original stand on the question of subjects of international law and their international personality. She states: 'To bear international legal responsibility means to answer for one's actions and in certain cases, also for the actions of others, therefore, to be subjected to international legal capacity, i.e., international personality... The question of the international legal responsibility of international organizations cannot be decided other than in close association with their international personality. The highly limited and conditional personality which member states grant to international organizations must serve, in our opinion, as the basis for the determination of the international legal responsibility of these organizations.'

At the other end of the scale, is the next group of Soviet jurists who, while laying strong emphasis on states as the real subjects of international law, accept that international organizations possess some measure of international personality, whose derived and non-sovereign character must be emphasized and should be borne in mind at all times.

R. L. Bobrov writes: '... the United Nations is a secondary, derived (non-typical) subject of contemporary international law, created by the expressed will of sovereign states - the principal and real subjects of this law. Created as a centre for the co-ordination of the actions of states, in the name of peace and development of international co-operation based on democratic grounds, the UN is granted a certain measure of international personality which is essential and necessary if it is to execute its functions properly. The significant characteristics of the international legal personality of the UN are interdependent and in their totality constitute a specific legal personality which is based on legal grounds that are different from those upon which the legal personality of states is founded. The capacity of the UN is strictly to those powers granted under its Charter.'

Professor D. B. Levin posed the question whether international organizations can rightly be considered subjects of international law. To this he gave an answer in the affirmative thus: Undoubtedly, they can be, if such organizations, on the basis of their constituent instruments, possess some measure of individual rights and obligations vis-à-vis states especially the right to conduct external relations independently. According to him, the international personality of international organizations is founded on the fact that these organizations promote the common interests of member states in the sphere of maintenance of international peace and security and development of inter-state cooperation. These organizations, in his view, 'possess the right to take independent actions within the limits of these interests.'

Professor G. I. Tunkin, a leading Soviet jurist in the theory of international law, states that 'there is no generally accepted norm which defines the legal status of all international organizations... At the same time, international law does not contain any norm which precludes the granting of certain elements of international personality to this or that international organization. The scope of such personality shall be determined— in the case of such organizations, by the provi-

19. Ibid., at p. 8 See also by the same author 'O sub'ektakh mezhdunarodnogo prava' in Sovetskoe Gosudarstvo i prava, smp, 1956, No. 6, at pp. 95-97.
sions of the constituent instrument. This point of view is shared by G. I. Morozov, R. L. Bobrov, E. A. Shibaeva and a host of others.

Professor I. I. Lukashuk had as important conditions for the international personality of international organizations, the fact that members of such an organization must be states, duly represented by their governments, and, secondly, that a treaty between States must form the foundation of such an organization. Commenting on the same question, E. A. Shibaeva emphasized that: ‘From our point of view one can point to the following four criteria which must be satisfied by an international organization which lays claim to the status of an international person: first, the inter-state (inter-governmental) character of the organization; secondly, universal membership; ... thirdly, a specific charter provision granting legal capacity for certain international rights and obligations; and fourthly, compatibility of its aims and objectives with the generally recognized principles and norms of general international law.

A close analysis of some of these criteria shows significant inconsistency with modern international trends. The first requirement, namely, that the membership of an international organization, in order to claim international personality, must be made up of sovereign states is doubtful from the standpoint of theory as well as of practice. Theoretically speaking (and as we have observed elsewhere) no specific rules or norms of international law operate as a kind of precondition for the emergence of an international organization endowed with international personality. It does not seem to us that the ascertainment of the degree of international personality enjoyed by a given international organization is a matter of fact. For the purposes of this study one can point to at least four criteria which must be satisfied by an international organization and which, in our point of view, must precede its actual appearance in the international community: namely, that the membership of an international organization in order to claim international personality, must be universal in order to lay claim to international personality. The requirement is the fact that there exist many international organizations the membership of which is not exclusively restricted to States. The organizations of UNESCO, WHO and ITU are cases in point, to mention just a few organizations which grant associate membership to entities which are not responsible for their international relations. It would be a matter of guess to what extent the inter-state character of these organizations remains having regard to the express provisions of their constitutions. The matter will be different if what is meant by the specific requirement is that an organization formed initially by governments of sovereign states but later joined by non-sovereign state entities still retains its so-called inter-state character.

Shibaeva’s second requirement that an international organization must be universal in order to lay claim to international personality is unconvincing to us. There exists today a good number of international regional organizations which cannot be described as being universal in the strict sense of the word. Take for example, the EEC and the COMECON. These are clearly international organizations which are by no means universal. It will be hard to deny them international personality outright. The Soviet Union is a member of the COMECON and it does not seem to us that any Soviet scholar would deny the COMECON the attribute of international personality.

We feel convinced that the whole Soviet attitude towards the question of the legal nature of international organizations is connected with the general history of the participation of the Soviet state in international organizations. Commenting on this is beyond the scope we have set for ourselves on the present occasion. The denial of international personality to international organizations by Soviet writers seems to us to be based more on political than legal considerations. One can only hope that the apparent shift from the original traditional stand of Soviet international lawyers on the legal status of international organizations will continue to make substantial progress in view of the remarkable changes which are taking place in international law since the Second World War.

30. E. A. Shibaeva, op. cit., p. 32.
31. Article 11, paragraph 3 of the Constitution of UNESCO grants associate membership to ‘territories or groupings of territories which are not responsible for the conduct of their international relations’.
32. Article 8 of the WTO Constitution.
33. Article 1, para. 3, of the ITU Constitution.
34. For a clear and detailed analysis (historically approached) of the Soviet experiences in selected international organizations, see, Chris Osakwe, The Participation of the Soviet Union in Universal International Organizations, Leyden, 1972.
4. CONCLUSION

A further examination of the literature and Court decisions on the subject of the international personality of international organizations confirms that these organizations possess a degree of international personality.

The status of the League of Nations in international law was the subject of guarded appraisal in the fourth edition of Oppenheim: 'The League appears to be a subject of international law and an international person side by side with several States ... not being a State, and neither owing territories nor ruling over citizens, the League does not possess sovereignty in the sense of state sovereignty. However, being an international person sui generis, the League is the subject of many rights which as a rule can be exercised by sovereign States.'

The contemporary trend towards granting a measure of international personality to international organizations, was strengthened by the Advisory Opinion of the International Court of Justice on Reparations for Injuries Suffered in the Service of the United Nations. The request for the Opinion arose out of the assassination of the United Nations Mediator, Count Bernadotte, in Palestine. The Court found it necessary, first to affirm the international personality of the United Nations and then to consider whether the Organization had capacity to bring an international claim. In the opinion of the Court, the functions and rights attributed to the United Nations could only be explained on the basis of the possession of a measure of international personality. The Court continued: 'That it is not the same thing as saying that it is a State, which it certainly is not, or that its legal personality and rights and duties are the same as those of a State. Still less is the same thing as saying that it is a 'super State', whatever that expression may mean ... what it does mean is that it is a subject of international law and capable of possessing international rights and duties, and that it has capacity to maintain its rights by bringing international claims.'

From the foregoing discussion a number of points have become apparent. First, the fact that the concept of international personality seems to be firmly established; also, the general picture flowing from our analysis is that international organizations are international persons, though not on exactly the same footing as sovereign states. Various consequences and attributes flow from the concept of international personality, but the basis of what makes the law binding upon them may vary from organization to organization.

37. Ibid. For more examples from municipal courts on the question of the international personality of international organizations, eg. of the European Economic Communities, See, Detter, Law-Making by International Organizations, Stockholm 1965, under the section 'Delegation of Law - Making Powers to the European Communities,' pp. 271-318.
11. The basis of the treaty-making capacity of international organizations

1. INTRODUCTION

Treaty-making is a common method of establishing a relationship with, or creating rights and duties under international law for, public international organizations. In fact, in the years after the second World War, the practice of international organizations in the field of the law of treaties has grown extensively. There has been in the past (as well as in the present) a considerable amount of controversy on the question of whether international organizations possess the capacity to make treaties. Writers have sought different bases for the treaty-making capacity of international organizations and have in the process advanced various theories in an effort to establish the correct grounds. We may observe at this point that once we accept that international organizations have international personality and are therefore subjects of international law, it would be absurd, in our view, not to recognize the fact that they also enjoy some capacity to interact with other subjects of international law including sovereign states. This right of interaction automatically means the capacity to engage in certain international legal acts which will be binding and should be juridically determinable.

The increasing number of agreements concluded by international organizations particularly since 1945 has been described as an 'agreement explosion' by Professor Reuter in his remarkable first report on the question of Treaties Concluded between States and International Organizations or between two or more International Organizations. It is also worth recalling that during the 1965 session of the International Law Commission, one of its members, Mr. Briggs, stated that there were about 200 agreements concluded between international organizations, and over a thousand between international organizations and states. Professor Reuter gives interesting statistical information in his report regarding the amount of treaties concluded by international organizations. According to him, a count through volumes 1-598 of the United Nations Treaty Series gives, for the period 1 January 1946 to 31 December 1965, a total of 1,686 agreements, 1,317 of which were bilateral with one State, 176 between organizations, 47 between States and one organization and 10 between one State and two organizations.

In order to obtain a proper insight into what the prevailing views in doctrine are and how far these are supported by the jurisprudence and practice of international organizations on the question of the basis of the treaty-making capacity of international organizations, we propose to break down our analysis into three sections, namely:

a. Doctrinal pronouncements and authoritative opinions of writers and publicists on the treaty-making capacity of international organizations,

b. Judicial decisions on the subject; and,

c. The work of the International Law Commission (the Sub-Committee on Treaties concluded between Two or More International Organizations).

2. DOCTRINAL PRONOUNCEMENTS AND AUTHORITATIVE OPINIONS OF WRITERS AND PUBLICISTS ON THE TREATY-MAKING CAPACITY OF INTERNATIONAL ORGANIZATIONS

Proceeding on the assumption that capacity to conclude treaties is an


4. Ibid.

attribute of sovereignty, which is not possessed by international organizations, writers have sought different bases for their treaty-making capacity. Some writers consider the possession of this capacity by an international organization as a test of the recognition of its international personality. Others take a different position which considers capacity a consequence of international personality. This position does not seem to differ from the former in essence but in the matter of form.

Another group of writers separates the concepts, and believes that the treaty-making capacity of an international organization is to be deduced, if at all, not from the mere fact of its 'personality', but from the evidence pointing to its having that sort of personality which involves the capacity to make treaties.

Yet another group of writers takes a somewhat narrower view that such a treaty making power must be conferred expressly. Kelsen writes that 'the United Nations has legally only the power to enter into those international agreements which it is authorized by special provisions of the Charter to conclude.' In any event it seems that as a matter of principle an organization cannot make all kinds of treaties. The functional test requires that organizations can only conclude treaties which are in the context of their aims and functions, whether expressly or impliedly attributed.

There has been strong suggestion that the recurrence of past controversies and difficulties on the issue of the treaty-making capacity of international organizations can be avoided by including in the constitutions of new international organizations provisions conferring on these organizations either full legal personality or some measure of legal capacity with a defined content. This has been done in several recent cases. Thus the Constitution of the Food and Agriculture Organization of the United Nations provides that 'The Organization shall have the capacity of a legal person to perform any legal act appropriate to its purpose which is not beyond the powers granted to it

by this Constitution.' The Articles of Agreement of the International Monetary Fund and the International Bank for Reconstruction and Development provide that the Bank and the Fund respectively 'shall possess full juridical personality, and in particular, the capacity: (a) to contract; (b) to acquire and dispose of immovable and movable property; (c) to institute legal proceedings.' The International Civil Aviation Organization 'shall enjoy in the territory of each contracting State such legal personality as may be necessary for the performance of its function. Full juridical personality shall be granted wherever compatible with the constitution and laws of the State concerned.' The agreement concerning the establishment of the European Central Inland Transport Organization (eciro) provides that the organization shall have the capacity to perform any legal act appropriate to its object and purposes, including the power to acquire, hold and convey property, to enter into contracts and undertake obligations, to designate or create subordinate organs and to review their activity, subject to a limitation in respect to the ownership of transport equipment and material, and embodies undertaking by member governments to recognize the international personality and legal capacity which the Organization possesses. The Charter of the United Nations provides that, 'The Organization shall enjoy in the territory of each of its Members such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes.'

The United Nations has limited treaty-making power provided for in Articles 43, 57, 63, 77-83 and 105. Certainly the agreements entered into under these Articles are capable of being contracts in international law sense since some of them, particularly the Convention on Privileges under Article 105, are entered into with non-members, which takes them out of the category of acts merely internal to the organization.

While recognizing that the Charter of the United Nations contains provisions expressly authorizing certain agreements, Brownlie emphasizes that the existence of legal personality does not of itself support a
power to make treaties. According to him, everything depends on the terms of the constituent instrument of the organization which needs to be further interpreted by resorting to the doctrine of implied powers to establish the degree of its treaty-making power. In our opinion the matter can properly be given an even wider basis - see Schneider's view cited below.

There is little doubt that the inclusion of provisions conferring either full legal personality or some measure of legal capacity with a defined content into the constituent instrument of international organizations is a very useful contribution to test the treaty-making capacity of any given international organization. On the other hand, this certainly does not provide a conclusive solution to the problem. Schneider points out that 'constitutions have by no means adequate provisions to authorize the actual treaty-practice that is, by and large, uniform. The treaty-making power of international organizations cannot be completely traced back to their constitutions (only).'

"There are a number of agreements by which organizations define more in detail their respective competence which the constitutions either do not at all or not sufficiently delimit." Schneider also introduced another important view in his argument which we fully share. He writes that, 'the organizational movement after the last war has precisely gained such momentum through the steadily developing cooperation which does not permit that some of the interested agencies are lagging behind and cannot fulfill their part for reasons of insufficient capacities. Because organizations really form a unity in respect of their external cooperation the problem of their external capacities cannot be approached but by taking a general view which founds itself on the uniform practice that has developed in this very field of external relations."

It is of interest that in certain cases in which the instrument constituting an international organization does not specify that the organization will enjoy legal personality it has been found necessary for the organization to recommend governments to take any action required under their law to enable it to discharge its functions effectively, and governments have found it convenient to take such action in a form tantamount to the recognition of the legal personality of the international organization. Thus the Council of the United Nations Relief and Rehabilitation Administration adopted at its first session a resolution recommending member governments to take any steps that they might consider necessary to enable UNRRA to exercise within their jurisdiction the powers conferred by Article 1, paragraph 1, of the UNRRA Agreement, which provided that the Administration 'shall have power to acquire, hold and convey property, to enter into contracts and undertake obligations, to designate or create agencies and to review the activities of agencies so created, to manage undertakings, and in general to perform any legal act appropriate to its objects and purposes.'

The Soviet attitude to the question of treaty-making power of international organizations is that in exercising treaty-making capacity, international organizations must not exceed the sphere of their right as provided for in their respective constitutive instruments. One or two observations by Soviet jurists of authority on this subject will illustrate this position.

Writing on the treaty-making powers of international organizations, Koshevnikov states that, 'the subjects of an international treaty are, first and foremost, states. International organs can conclude international agreements within the limits of their powers as prescribed by their constituent instruments. However, in these treaties expression is given to powers delegated by States themselves, representing the principal subjects of international law.'

'This stand is more or less re-affirmed and summarized by Tunkin who observes: 'It is well-known that many international organizations are endowed, on the basis of their constituent instruments, with the right to conclude agreements with other international organizations as well as with States... These agreements establish international rights and obligations... However, the granting to international organizations of this capacity to enter into international agreements can be placed on an equal footing with agreements concluded by States inter se, nor does it mean that we can automatically extend to the former the application of norms of international law which are intended to regulate inter-state agreements.'

20. Ibid., at p. 136.
21. Ibid.
3. JUDICIAL DECISIONS

It may be recalled that the Advisory Opinion of the International Court of Justice of April 1949 concerning Reparations for Injuries Suffered in the Service of the United Nations affirmed the international personality of the United Nations and found evidence of that personality, inter alia, in the treaty-making powers conferred upon the Organization under the Charter. Having cited specifically the Convention on Privileges and Immunities of 1946, the Court concluded that 'it is difficult to see how such a convention could operate except upon the international plane and as between parties possessing international personality.' Further the Court stated that, 'under international law, the Organization must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties.'

In its opinion of Effects of Awards of Compensation made by the United Nations Administrative Tribunal, the ICJ pointed out that the Charter contains 'no express provision for the establishment of juridical bodies or organs and no indication to the contrary, but held that the capacity to establish a tribunal to do justice as between the Organization and the staff members arises by necessary intendment out of the Charter.'

4. THE WORK OF THE SUB-COMMITTEE OF THE ILC ON TREATIES CONCLUDED BETWEEN STATES AND INTERNATIONAL ORGANIZATIONS OR BETWEEN TWO OR MORE INTERNATIONAL ORGANIZATIONS

The question of treaties concluded between two or more international organizations was included by the International Law Commission in its general programme of work. In its work on treaties, the definition of a treaty adopted by the Commission has been framed broadly enough to allow recognition of the new development in international law – the increase role of international organizations in the field of the law of treaties. This recognition was again emphatically reaffirmed when the Commission held that, 'international organizations may possess a certain capacity to enter into international agreements and that these agreements fall within the scope of the Law of Treaties.'

Moreover, in Article 1(a) of part I, it defined the term 'treaty' as used in the draft articles, to mean 'any international agreement in a written form ... concluded between two or more States or other subjects of international law', and in the commentary upon this definition it explained that the term 'other subjects of international law' was designed to provide for treaties concluded by:

a. international organizations
b. the Holy See, which enters into treaties on the same basis as States, and;
c. other international entities such as insurgents, which may in some circumstances enter into treaties.

5. THE WORK OF THE INTERNATIONAL COMMISSION

Before the setting up of a special committee (officially called the Sub-Committee) on treaties concluded between States and international organizations or between two or more international organizations, the

25. G. I. Tunkin, Voprosy Teorii Mezhdunarodnogo Prava, Moskva, 1962, p. 82. See also the same author, Teorii Mezhdunarodnogo prava, Moskva, 1970. See also Lukashuk, 'An international organization as a party to international treaties (1960), YBL, p. 144.
26. ICJ Reports, 1949, at p. 179.
27. Ibid., at p. 182.
29. The Sub-Committee on treaties concluded between States and international organizations or between two or more international organizations was set up by the International Law Commission (ILC) at its 1069th meeting on 12 June 1970. The members are Mr. Reuter (chairman) and Meera, Alcivar, Castren, El-Brian, Nagendra Singh, Ramangasoovina, Rosenne, Sette Camara, Tabibi, Thiam, Tourovka, Ustorf, and Sir Humphrey Waldock.
See also the Report by Lauterpacht (A/CN/4164) 1953, commenting on Article 1.
32. At its 14th session, the ILC in reaffirming decisions which it had taken in 1951 and 1959 to defer examination of treaties entered into by international organizations until it had made further progress with its draft on treaties concluded by States, however, upheld this view. See Official Records of the General Assembly, 17th Session Supplement No. 9 (A-5209), para 21.
33. Ibid., para 8 of the commentary to Article 1.
34. The ILC session for 1972 met in Geneva during the month of April when the first report of the special rapporteur must have been tended on the topic of treaties concluded between States and international organizations or between two or more international organizations.
International Law Commission discussed widely the question of the treaty-making capacity of international organizations. In Sir Humphrey Waldock's draft articles on the Law of Treaties adopted by the ILC at its fourteenth session (24 April-29 June 1962) it is provided in Article 3, that: (the) capacity in international law (of international organization) (hereafter referred to as international capacity) to become a party to treaties is possessed by every independent State, whether a unitary State, a federation or other form of Union of States, and by other subjects of international law invested with such capacity by treaty or by international custom.

In the Commission's commentary to Article 3, paragraph 3, it is stated that the term 'constitution' had been deliberately used in preference to constituent instrument. For the treaty-making capacity of an international organization does not depend exclusively on the terms of the constituent instrument of the organization but also on the decisions and rules of its competent organs. Comparatively few constituent instruments of international organizations contain provisions concerning the conclusion of treaties by the organizations. Our understanding of the ILC's commentary is that an international organization can be a party to treaties in the sense of international law: in other words, that it has the capacity to conclude treaties. The important caveat is that such a capacity is not unlimited, as in the case of sovereign States, for example, but is subject to such limitations as result from its constituent instrument and from the decision or rules made in accordance with it.

The earlier sessions of the ILC at which there was discussion of the

35. The Commission's commentaries to the set of draft articles on the law of treaties provisionally adopted in 1962, and the commentaries to the final draft articles on that topic adopted in 1966, contain some indications of what the Commission had in mind when referring to 'other subjects of international law'. Paragraph 8 of the commentary to article 1 of the 1962 preliminary draft states: "The phrase "other subjects of international law" is designed to provide for treaties concluded by (a) international organizations, (b) the Holy See, which enters into treaties on the same basis as States and (c) other international entities such as insurgents, which may in some circumstances enter into treaties. The phrase is not intended to include individuals or corporations created under national law, for they do not possess capacity to enter into treaties nor to enter into agreements governed by public international law". Further, paragraph 2 of this commentary to article 3 of the same set of draft articles indicates: "The phrase "other subjects of international law" is primarily intended to cover international organizations, to remove any doubt about the Holy See, and to leave room for more special cases such as insurgent community to which a measure of recognition has been accorded'.

place of agreements concluded by international organizations in the different draft articles on the law of treaties presented by four eminent British scholars, namely: Brierly, Lauterpacht, Fitzmaurice and Waldock. They were characterized by sharp argument centered around whether to include or exclude such agreements. Professor Reuter in a precise and lucid manner analyses these 'shifts' in emphasis between 'inclusion' and 'exclusion' of agreements concluded by international organizations.

We do not intend to go into details of these debates here, save to observe that the various formulations used in the Commission reflected an attempt to describe a situation which, in the view of all members, was characterized by two elements: the competence of an international organization to conclude international agreements was limited in principle by its constitutional practice and this competence was not necessarily limited by its written constitution. The members of the Commission could not agree on the precise wording. However, the version which was finally adopted and justified by the Special Rapporteur read: 'The expression "the constitution of the organization concerned" had been chosen because it was broader than "constituent instrument"; it covered also the rules in force in the organization. In most organizations, the treaty-making capacity had been limited by the practice instituted by those who had operated the organization under its constitution.'

The final position of the Commission on the subject was summarized in the following terms: 'Accordingly, important although the provisions


41. Ibid., at p. 19.

of the constituent treaty of an organization may be in determining the proper limits of its treaty-making activity, it is the constitution as a whole — the constituent treaty together with the rules in force in the organization — that determine the capacity of an international organization to conclude treaties.\(^{43}\)

The observations made by two Governments in 1965 in relation to the question of the treaty-making capacity of international organizations require attention. Austria took a position in favour of very broad competence for international organizations. In the Austrian opinion: '...capacity to conclude treaties must be an inherent right of any international organization, if it is at the same time a subject of international law... the constitutions of many international organizations do not mention the question of the capacity of the organization in question to conclude treaties. In most of these cases, however, the organs of the organization in question have considered themselves competent to conclude treaties on behalf of the organization... If, on the other hand, the constitutions do contain provisions concerning the conclusion of treaties, they either relate to the questions which organs are competent for the purpose — in which case they are of procedural nature — or limit the extent of freedom to conclude treaties, which in principle is all-embracing by stipulating that only treaties on certain subjects are permitted.\(^{44}\)

The United States, having quoted the 1949 opinion of the International Court of Justice, called mainly for the replacement of the word 'constitutorcy' by a less limiting word, for example 'authority'.\(^{45}\) There was general support for the deletion of the article on capacity to conclude treaties.\(^{46}\)

Nevertheless, in concluding his report,\(^{47}\) Professor Reuter, while recognizing the capacity of international organizations to conclude agreements, cautioned that just as it was easy to declare that States have the capacity to conclude treaties (1969 Convention, Article 6), because that capacity is merely the expression of their 'sovereign equality' so it is difficult to deal with the same question in relation to international organizations, which are characterized by a fundamental inequality as between themselves and States.

6. CONCLUSION

The following propositions are tentatively advanced by way of a summary:

1. It appears that the prevailing view in doctrine, as supported by jurisprudence and the practice of international organizations is that the treaty-making capacity of such bodies is derived not only from specific provisions in their constituent instruments, but also by implication therefrom.\(^{48}\)

2. One point which should deserve detailed study is the one concerned with the organs through which the treaty-making power of international organizations is exercisable. Some writers have rightly contended that "the law of international organizations does not as yet contain any clear rules for determining where the treaty-making power of international organizations resides."\(^{49}\) It is most difficult to trace what Detter calls the 'whereabouts of the treaty-making power within the organization.'\(^{50}\)

3. In order to establish the basis of the so-called jus contrabendi — capacity to make treaties of international organizations, it would be appropriate to study the clauses in international organization constitutions, from which treaty-making power derives, trying to establish their nature and the circumstances in which they occur so as to arrive at a theory of the sources of the capacity of international organizations to conclude treaties. It is important to find out whether such capacity may spring from tacit authorization or if it will always call for express provisions.

4. Since it is widely accepted that treaties are means of developing peaceful co-operation among nations as the preamble of the Vienna Convention clearly states, and since international law will be only enhanced by the widest possible acceptance of the future rules to regulate

treaty-making practice between States and international organizations or between two or more international organizations and other non-governmental international organizations or even between international organizations and other subjects of international law, we dare to suggest that organizations such as the Organization of American States and the Organization of African Unity or other similar regional organizations may accept those rules that may be drafted and finally adopted by the ILC's Sub-Committee if they choose to do so.

5. In general, it would seem possible to conclude that once an international organization has asserted itself and therefore has international personality, it must be deemed, unless expressly denied, to have the capacity to enter into agreements, which are appropriate to its purpose.

12. Non-governmental organizations and private corporations as subjects of international law

A state-centric view of international relations has prevailed for a very long time. Even though the difference between public law and private law seems to be less absolute in recent times, nevertheless, public law still forms the basic aspect of the structure of contemporary international relations and law. Students and practitioners of international politics have traditionally concentrated their attention on relationship between states. Thus, the state is regarded as the basic unit of action whose agents are the diplomat and soldier.

On the other hand, few would question that the advancement of technology in various fields and better means of communication have dramatically altered the nature of twentieth century international relations. Today, a good deal of inter-societal intercourse takes place. In addition, there exists a wide variety of transnational phenomena: multinational business enterprises, trade unions and scientific research networks, international air transport cartels and communications activities in outer-space. These constitute a proof of continuous growth in world integration.

True, the destinies of the international society are still being shaped largely by the community of states and therefore, entities which are not sovereign States are still far from having a significant share in any one of the three basic attributes of sovereignty: international legislation, international administration, international judicial authority - although they are admitted to have, in each one of these spheres, some say, and

1. The term 'non-governmental organizations' is derived from the official United Nations usage as set down in the ECOSOC Resolution 288 (X) and 1296 (XLIV). The classification of such organizations under this resolution appears to be based purely on functional considerations rather than from the point of view of their composition, for it is known that governments or branches of governments are members of many non-governmental organizations.
though always limited still of varying, but never negligible degree.\textsuperscript{3}

This development was brought about through the political power of some NGOs. Important among such NGOs are the Churches, Trade Unions and Humanitarian Organizations proper, on the one hand, and by the totality of NGOs on the other hand. Though non-governmental organizations like the International Committee of the Red Cross (ICRC) and the World Council of Churches (WCC) have no recognized international status as subjects of international law, and may not be said to have international treaty-making capacity, there is a growing number of international transactions between governments of sovereign states and non-governmental international organizations which are humanitarian in character like the two institutions mentioned above. Both of them and a lot of others in that category contribute to mutual understanding amongst peoples.

The ICRC’s role since the last war in the international humanitarian front has tremendously increased. It includes agreements with governments in relation to questions of relief in distressed areas or war situations. It also works for the proper treatment of prisoners of war in the letter and spirit of the internationally recognized conventions on war.\textsuperscript{4} As a result of the atrocities of the Second World War and the surge of the movements for the international protection of human rights, there was a strong feeling that a minimum of humanitarian legal regulation should apply in all armed conflicts, regardless of their internal or inter-state character.\textsuperscript{5} It must be observed also that within the framework of the ICRC, the UN and other bodies are making efforts to re-examine and update the law of armed conflicts.\textsuperscript{6} It is important to

4. The four Geneva Conventions of 1949 deal respectively in a series of detailed provisions, with the amelioration of the condition of the wounded and sick in armed forces in the field, with the amelioration of the condition of wounded, sick and shipwrecked members of armed forces at sea, with the treatment of prisoners of war, and with the protection of civilian persons in time of war.

add that many of these non-governmental organizations participate in the work of public international organizations actively.

1. PRIVATE CORPORATIONS\textsuperscript{7}

In the arena of modern international relations, there are such big combines like Unilever concern, Royal Dutch Shell, General Motors Corporation, and a number of other gigantic private Companies. These are clearly commercial combines which in the words of Tinberg,\textsuperscript{8} ‘have a large extent wrested the substance of sovereignty from the so-called sovereign state.’

Many of the large companies get their capital from different countries, and often have subsidiaries or associates in foreign countries. The private non-profit institutions\textsuperscript{9} that make grants for public purposes depend for their existence on the private accumulation of wealth and of fiscal and moral incentives for its philanthropic use.

Again, though in terms of international expenditures they do not approach states in importance, nonetheless, the resources and attention of the larger philanthropic foundations, especially such as Carnegie, Ford, Rockefeller Foundations, can be critically important in specific sectors of other societies.

In comparing the international position of all these entities with that of international governmental organizations, one must start with the fact that they are in strict legal theory, subjects of private law.

But, however, the very fact that private corporations like those just named, and hundreds of others, are engaged in vast and complex international operations, which involve them in manifold contacts with different governments and in many cases with the public international financial agencies, suggests that the problem of their international status cannot be so simply dismissed.

7. Here the notion ‘private corporations’ is employed in the most general sense to designate all combines of non-governmental character which operate on the international sphere and play a more or less active role in re-shaping the structure of the contemporary international community.
Arnold Wolfers noted more than a decade ago that, 'the Vatican, the Arabian-American Oil Company, and a host of other non-state entities are able on occasion to affect the course of international events. When this happens, the entities become actors in the international arena and competitors of the nation state. Their ability to operate as international or transnational actors may be traced to the fact that men identify themselves and their interests with corporate bodies other than the nation state.'

Long before Wolfers, Eugene A. Korovin, a leading Soviet jurist and one of the founders of Soviet doctrine of international law had written in the same vein, challenging the notion of the state as the sole and executive subject of international law. He accorded recognition to the international personality of the World Trade Union Federation whose membership he reckoned near 65 million, without, however, drawing the legal consequences this recognition should have in law.

It will be useful to examine further what major international transactions these private corporations engage in with States. How are disputes between the parties arising out of such transactions resolved? What law is applicable in such contractual relationships?

2. SURVEY OF THE PRINCIPAL TYPES OF TRANSACTIONS BETWEEN PRIVATE CORPORATIONS AND STATES AND THEIR NATURE

a. concession agreements: The transactions between private corporations and governments are in many cases this type of agreements. To explain what we mean by this sort of agreement, we choose to adopt for our present purpose the working definition proposed by Fatouros. According to him, 'a concession agreement is an instrument concluded between a state and a private person and providing for the grant by the state to the individual of certain rights or powers which normally would belong to and be exercised by the state.' These may involve the permission given to a foreign company by the territorial government to exploit certain natural resources under specific conditions. Usually these conditions include normal rights and obligations of commercial transactions: time limits for delivery of goods or performances of services, obligations to proceed with proper care, the apportionment of profits, stipulations as to the manner and extent of permissible imports, the employment quota of foreign and local personnel and the repatriation of earnings and capital. Typical characteristics of concession agreements are that they relate to mineral and other natural resources or to the operation of enterprises of public utility. It is vital to add that concessions may vary in their object, type and legal nature, and therefore, may involve basically different legal transactions and relationships.

b. instruments of approval: A good example of such an instrument is the one issued in May 1956 by the Greek Government concerning the importation of capital for the exploitation of Greek asbestos by an American Corporation.

The decree starts with a statement of approval of the importation of capital up to the sum of $8,350,000, to be used by the investing company for exploration, research and mining of asbestos, and for its production and sale. The use of the capital for the purpose specified in the initial statement is an essential condition of the continued validity of the whole instrument. The form in which the capital is to be imported is clearly stipulated - namely, in the form of machinery and foreign exchange in equal parts, over a period of slightly more than four years.

Should the need arise the implementation of the provisions is to be ascertained by the Ministry of Industry of Greece whose report is subject to a review by a special Committee composed of representatives of two other ministries and of the investor, if the investor contests the accuracy of the Ministry of Industry's report. The investing corporation is allowed to transfer abroad, without limitation, the capital imported and profits. The investing corporation is granted exemptions from import duties and other charges on the machinery imported by it during the initial period of ten years.


11. For Korovin's observation, see infra, Chapter 1.
During the same period, it is also exempted from all city and other local taxes and charges. The employment of foreign personnel up to the number of twenty-five persons is permitted, and such personnel are allowed to export part of their salaries. Finally, the instrument contains detailed provisions for arbitration in case of dispute.

c. guarantee contracts: By this agreement a state gives an investor, under certain conditions, a number of guarantees or privileges, in the absence of special statutes regulating the granting of such guarantees. It must be pointed out, that though these three types of instruments appear similar in many ways, they are not identical.

They often differ in form as well as in content. While instruments of approval usually take the form of administrative acts, concession agreements and guarantee contracts often assume the form of legislation. In content they differ from the point of view of the fact that concession agreements cover a wider range of issues of a legal, economic and political character, than either guarantee contracts or instruments of approval. 14

d. economic development agreements: The modern economic development agreements made by developing countries with foreign corporations include: Ghana — Valco Agreement 1960, 15 India — Vacuum Oil Agreement 1952, 16 and the Iran Consortium Agreement, 1954. 17 Each of these agreements contains provisions for the submission of disputes to arbitration which will form the central point of the next question of our discussion.

15. This agreement was concluded on 17 November 1960, between the Government of Ghana and the Volta Aluminium Company (a Consortium of American and Canadian Companies) for the construction and operation of an aluminium smelter to utilize electric power produced from the dam to be constructed on the Volta river. For a detailed discussion of this agreement see, Nwogugu, The Legal Problems of Foreign Investment in Developing Countries, Manchester University Press, 1965, pp. 170-173.
16. This took the form of exchange of notes between the Government of India and the Standard Vacuum Oil Company for the construction of oil refineries in India.
17. The agreement was between the Government of Iran and the National Iranian Oil Company on the one hand, and a consortium of American, British, French and Dutch companies on the other, granting the consortium the right to prospect and produce oil for a period of twenty-five years, with provision for renewal.

3. ARBITRATION

The settlement of disputes between individuals appear to be the oldest form of judicial practice. It has preceeded the creation of judicial courts and tribunals. However, the settlement of disputes between states and individuals is a very recent phenomenon. The concept of the settlement of contractual disputes by means of an arbitration agreed upon directly between a State and an individual or corporation without the interposition of the state of which the individual or a corporation is a national, is a fairly recent development. 18 What explains this new trend one may ask? As we have observed above, contemporary international relationships have witnessed more efforts at integration between peoples, than perhaps at any other time in human history. The need for the settlement of contractual disputes between states and private parties is consequent upon the fact of the increase in foreign investments, concession as well as economic development agreements involving foreign capital and the expansion of international commercial transactions. Besides, a state's trading or industrial activities carried out under the shield of the state's jurisdictional immunities no longer produce maximum result.

Nwogugu has rightly remarked that arbitration provides flexible and important machinery not only for the settlement of investment disputes, but also for the settlement of commercial disputes. Such a procedure will help to limit the claim of sovereign immunity which constitutes a hindrance in suing a foreign state. 20

An arbitral tribunal could be national (i.e. local) or international, whose special characteristic is that the arbitrators are selected from different countries. Other important feature of an international arbitral
tribunal is that it may be either permanent or ad hoc. Nowadays, it is common to observe that arbitral machinery in contractual and commercial transactions between states and private corporations are found in a number of state contracts relating to oil concessions. A few examples will illustrate the nature of such provisions.

Henry Cattan quotes the Middle East Oil concession of 1910 granted to D'Arcey by the Persian Government as, perhaps, the first of such concessions to provide that disputes between the parties which are not settled by negotiation or mutual agreement shall be resolved by arbitration. According to Article 17 of the concession agreement, any disputes that may arise between the parties with regards to its interpretation or defining the rights and duties of the parties shall be submitted to two arbitrators at Teheran, one of whom shall be named by each of the parties, and to an umpire, who shall be appointed by the arbitrators before they proceed to arbitrate. The decision of the arbitrators or in the event of their disagreement, that of the umpire, shall be final.

Such concessional arbitration agreements and similar types of international transactions have been characterised by some writers as being akin to international treaties. This may be because in such transactions, public international law rather than the national system of law of any of the parties may be expressly, or by implication, indicated as the law governing the contract. Besides, certain arbitration agreements incorporate clauses providing for the appointment of a neutral arbitrator as chairman, and two arbitrators chosen by the parties which places the government and foreign private party or parties on the same legal footing, at least for purposes of the interpretation and adjudication of the agreement. But this ‘equality’ is anything but perfect, as the government party, invoking its sovereign powers, can in practice defy the arbitration clause as much as it can cancel or dis Honour the agreement as a whole.

It must be pointed out that even though there is a progressive trend whereby oil concessions between states and private corporations provided that disputes between the parties which are not settled by negotiation or mutual agreement shall be resolved by arbitration, there seems to be limited use being made of arbitration in practice. It does not appear that states wish to arbitrate such disputes. For public relations purposes, states opt for settlement through negotiations or mutual agreement rather than by arbitration as no state would like to be on record for failing to carry out its international obligations resulting from the decision of an international arbitration tribunal.

Sometimes the parties choose to invoke the so-called re-negotiation clause provided for in the contractual agreements between the state and private persons. According to this clause, any of the contracting parties reserves the right to call for a re-examination of the entire contract. But this must be requested in the manner agreed upon by the parties and within the time limit stipulated in the agreement. However, it is never certain what would result from such an exercise. The chances are even that the position of the party requesting a re-negotiation may become worse than at first. One reason why this system of settlement of disputes should be encouraged is that it leaves the door open for the parties to maintain constant contact with a view to assessing the progress of the implementation of their various undertakings. Above all, disagreements are contained within the circles of the contracting parties without much publicity which may throw the parties into an open embarrassment or loss of face.

4. THE LAW APPLICABLE IN CONTRACTUAL RELATIONSHIPS BETWEEN A STATE AND A PRIVATE PARTY

Just as no uniformity exists in the law applicable to state contracts generally, so also no uniformity exists in the law applicable to disputes arising from contracts between a state and a private person. However, modern contracts between a state and a private person usually include clauses indicating by what law they are to be governed. This principle is one of the important elements in contracts concerning more than one legal system.

Some writers have the view that public international law is not to be applied to contracts between a state and private party. This position which we find unacceptable has also been strongly criticised. Nothing

21. The Permanent Court of Arbitration has its seat in the Peace Palace at the Hague. It was created as a result of the Hague Convention for the Pacific Settlement of International Disputes of 29 July 1899 which was revised and later replaced by the 1907 Hague Convention.
22. Henry Cattan, supra, at 143.
23. Ibid.
25. Ibid.
26. Ibid., at footnote 5.
27. McNair, 33 BYIL (1957), p. 10; Cattan, supra, at 68.
prevents the parties, if they so desire to apply such principles of public international law as are capable of being applied to their agreements. The contracting parties are not restricted by any legal system in the choice of the proper law of their contract. This choice generally may be a particular municipal law system, international law, or general principles of law recognized by civilized nations. Naturally the mere fact that the parties by agreement make their contract to be governed by international law does not make the private entity concerned a subject of international law. It merely subjects the contract to that law.

In the Serbian Loans Case, the Permanent Court of International Justice held that, 'Any contract which is not a contract between states in their capacity as subjects of international law is based on the municipal law of some country.' There are cases to support the view that this pronouncement would be totally invalid in contemporary international transactions.

The arbitration clause included in Article 22 of the AIOC's concession agreement (1933) provided that, 'The award shall be based on the juridical principles contained in article 38 of the Statute of the Permanent Court.'

The Libyan Petroleum Law of 1955 was amended on November 25, 1965 to provide that the oil concessions granted in Libya shall be governed by, and interpreted in accordance with, the principles of international law, and in their absence, in accordance with the general principles of law including those applied by international tribunals. Furthermore, in the award of the arbitration between Saudi Arabia and Arabian American Oil Company (Aramco) of 1958, the tribunal came to the conclusion that: 'Public international law should be applied to the effects of the concession, when objective reasons lead it to conclude that certain matters cannot be governed by any rule of the municipal law of any state, as is the case in all matters relating to transport by sea, to the sovereignty of the state on its territorial waters and to the responsibility of states for the violation of its international obligations.'

Again, the Iranian Petroleum Act (1957) has defined 'force majeure' in article 13 as meaning 'occurrences which are recognized as such by the principles of international law.'

Finally, in contractual relationships between a state and a private corporation, the parties may expressly choose the general principles of law recognized by civilized nations as the proper law of their contract. A case in point is article 46 of the Iran Consortium Agreement of 1954 provides; In view of the diverse nationalities of the parties of this Agreement, it shall be governed by and interpreted and applied in accordance with principles of law common to Iran and the several nations in which the other parties to this Agreement are incorporated, and in the absence of such common principles, then by and in accordance with principles of law recognized by civilized nations in general, including such of those principles as may have been applied by international tribunals.

Again, the comment made above, just before the reference to the Serbian Loans case is equally applicable here.

Conclusions. The foregoing inquiry into the place of non-governmental organizations and private corporations in international law suggests that, though they cannot be said to enjoy international personality as ascribed to international governmental organizations, nonetheless, they conduct activities on the international plane with often significant political importance and with little or no governmental control. Their status is different from that of public international organizations (i.e. organizations formed by states), which are formed by international treaties concluded between sovereign States.

International law made only by States could be exclusive law only under the assumption that there are no trans-national relations outside

30. Article 16 of the Refinery Agreement between Nigeria and Shell-BP dated 25 July 1962 refers to Nigerian law as the proper law of the Agreement. The same is applicable to the Ghana – Valco Agreement of 1961 whose article 49 stipulates that the contract is to be governed by the law of Ghana as it existed on the date of execution.
31. P.C.H. Series A., Nos. 20/21, at p. 41. On April 19, 1928, the French and Serbian Governments agreed to submit to the Court, by Special Agreement, a difference which had arisen regarding the payment of certain Serbian loans issued in France between 1895 and 1913.
32. The Award, p. 65.
33. By Article 37(2) of the Iran – Pan-American Oil Company Agreement of 1958 the term 'force majeure' as used in the agreement means 'occurrences which are recognized as such by the principles of international law.' This agreement is discussed further by Ramazani, II International and Comparative Law Quarterly, 1962, p. 503.
34. Article 38 (1c) of the Statute of the I.C. authorizes the Court to apply general principles of law recognized by civilized nations. It is also usual that where the contracting parties are not clear on the law to govern their contractual relations, the arbitral tribunals apply general principles of law as was the case in the Lena Gold Field Case cited above.
the State i.e., that the State was the only social community in which the individual is living.

But it is true that a good number of trade unions take part in an organization which transcends the state territories. The Liberal state is transcended by a multitude of non-state, transnational communities, and particularly in the economic field. While international law was once a law of inter-state relations only, it is now seen to have become the law of all those relations which, not being localized nationally and functionally within the boundaries of specific State, and of one State only, involve intercourse among nations and organizations created by them, as well as with organizations created independently of States. In dealing with characteristic features of such entities and/or relationships which are specifically international, this law becomes more and more transnational, transorganizational, interorganizational. 35

13. The impact of the proliferation of new actors in international relations on international law

GENERAL CONCLUSIONS

International legal relations could not reasonably be understood if divorced from material relationships. International relations are animating factors of international law. They provide factual basis of the law. 1 The concept of international relations, as we understand it, includes the inter-action between all its participants. 2 This presupposes all the main international legal entities operating in the international arena irrespective of the differences in the extent of their rights.

Stated in another way, the very nature of international life is determined by the activities of its actors. They exert much influence on one another, sometimes directly, and at other times medially. Thus, international relations based on the realities of life determine the character and content of international legal rules. There can hardly be any international legal rules for which there is no objective premise or basis in international relations. It regulates political, economic, cultural and other kinds of relations. The whole system of international law aims at guaranteeing international peace and cooperation among peoples of the world. A peaceful international society is only possible when it is based upon the law and such a basis must be established in conformity with factual reality. Therefore, if international law failed to influence and to regulate adequately the course of international relations, it would have lost its value.

The circle of objects of international relations is almost unlimited. The central link in forming rules of international law highly necessary for this regulation consists of the treaty. Many important kinds of

international relations are difficult to regulate without a treaty. There are, for example, such vital problems as disarmament and control of its implementation, as well as economic, scientific, technical and other forms of specialized cooperation. The law of treaties, the law of contracts, to use the common law term, constitutes and essential part of any coherent legal system. A very large part of the day-to-day international legal relations is now governed by the treaty rather than by customary law. This is so both for bilateral relations and for multilateral relations.

In the foregoing parts of this study, we have directed our efforts towards describing the legal nature of the emerging new subjects of international law, their international personality, and their treaty-making capacity. We recognized that they play an important role in the evolution of contemporary international law. The considerable measure of international personality they possess, though not as fully as that of sovereign States, enables them to take part in the making and shaping of international agreements. In our discussions, we have not denied the fact that sovereign States, above all, by definition have full international personality, consequent upon which they exercise general treaty-making capacity, subject only to such restrictions as might be imposed by generally accepted norms of international law or by the state itself on the exercise of such powers.

On the international plane organizations and entities which are not of the characteristics of a State in the ordinary sense are on the increase. Even though these entities do not have full international personality, and full power to make agreements as they like, there is no denying the fact that they have made agreements amongst themselves, and sometimes with States if not for any other reasons, for the purpose of carrying out their functions. The participation of new subjects of international law in multilateral treaties is no longer a novel phenomenon and such a participation does not appear to alter the essential nature of such treaties.

Granted that these new subjects of international law make treaties, what is the nature of such agreements? Where does one have to look for the answer as regards their legal nature? Finally, to what degree does the treaty law of the 1969 Vienna Convention on Treaties apply to transactions in which entities with limited international personality are parties? We have tried to grapple with these problems in a general way, sometimes in lesser or greater detail, in the foregoing treatment of the selected entities falling within the terms of reference of our investigation. It now remains to sum up our views in this final concluding chapter.

In discussing these questions we shall not concern ourselves with the delimitation of the terms ‘treaty’ and ‘agreement’, for apart from the fact that there exists no generally accepted definition of them, such an exercise will not advance matters as far as our immediate task is concerned. For our present purpose, we understand them to cover agreements concluded between subjects of international law, whether they possess full or limited international personality. But here we raise another vital and debatable question: Are all agreements between subjects of international law international agreements? Judge Lauterpacht's report on the Law of Treaties, is of the opinion that in the last resort all agreements between subjects of international law are governed by international law. He wrote:

'It is not the subjection of an agreement to international law which makes it a treaty. It is the quality as a treaty which causes it to be regulated by international law. This is so even if... the parties stipulate that it shall be governed by the municipal law of one of them. For in that case the specific law thus agreed upon is the consequence of the will of the parties. As the result of some such provision the law applicable is transformed into conventional international law... Usually, however, such transactions are governed by principles of law applicable to them and the rules relating to the interpretation of treaties. For this reason, provided that the instrument otherwise fulfils the requirements of a treaty, it establishes ipso facto a relationship under international law.'


6. Lauterpacht, in his report on the Law of Treaties, UN (AC/4/163). In the commentary that follows his definition of a ‘treaty’ the learned author explains that the object of the article is not so much a definition as a statement of a treaty's essential requirements and characteristics (p. 16). The whole report is intended to be a formulation of the existing law (p. 3). The term ‘treaty’, has been used in that connection as a general and generic term and not as a specific denomination of a certain type of solemn agreement. International usage, does indeed appear, to sanction the use of the term ‘treaty’ in a kind of generic term.

7. For convenience sake we must note that another view exists. In Judge Fitzmaurice's report on the Law of Treaties, he excludes, for the purposes of his


Since therefore their situation is a fluid one, it would be a mistake to be either too positive or too negative as regards the nature of agreements made by subjects of international law endowed with limited international personality. On the other hand, the fact that an agreement has been made by full international persons may not automatically qualify it as an international agreement to be regulated by international law. As Lauterpacht rightly observed, much depends on the legal content of such an instrument. That means that its quality as an international agreement falls within the purview and regulation of international law.\(^8\)

It is important here to restate an observation we have repeatedly made in various parts of the present study to the effect that international law itself does not, and scarcely can, prescribe with any precision what entities are to be endowed with international personality. In the same way it does not stipulate the same quantum of rights for every entity which has something to do with international relations. As a matter of fact, nothing in the theory of international law, at least, precludes limited subjects of international law from making agreements to be regulated by the law. Thus, we have illustrated in our discussion that such entities like the Holy See, insurgent or belligerent parties, non-governmental organizations, or even international private corporations enter into internationally binding legal acts.

Needless to remark that in principle the personality and treaty-making capacity of governmental organizations is almost unchallengeable nowadays. At present the International Law Commission of the UN is busy with questions relating to treaties of this class.

Besides, this new trend in contemporary international relations has been recognized by modern writers as well.\(^8\) Taking Lauterpacht’s observation quoted above as a basis for further discussion on this issue, provided that an international instrument otherwise fulfils the requirements of a treaty, it establishes per se a relationship under international law. For an act to be considered as being such in international law, it is highly desirable that any disputes arising from it shall be juridically determinable. This immediately touches on the necessary elements of an international agreement which leads us to the next question in our investigation.

To a major extent, treaty law as it operates today on the international plane is already largely a transformation of the municipal law of contract. The general principles of obligation in law are basically the same whether in municipal or international law. According to the principle of ‘Ex consensu advenit viculum’, the foundation of treaty obligation is consent, coupled with the fundamental principle of law that consent gives rise to obligation.

In all legal agreements it is necessary that there must be a meeting of the minds of the parties concerned. This is an indispensable element of an international agreement as well. But the meeting of the minds is not automatically sufficient to justify the conclusion that a legal obligation has been created between the parties. It is of vital importance that this should have been their actual intention. The common factor is an understanding by the parties that the formulated provisions amount to rules of conduct, susceptible of juridical interpretation, which they are laying down for themselves. Any international agreement that does not lead to legal obligations between the parties does not, in our view, qualify as an act in international law.

The channel of consent is essential. Mere intention to be bound does not make an instrument an agreement or treaty if the intention is not mutual. The instrument is not an agreement if the governing law is municipal law and not international law.\(^9\) Even when the governing law is international law, the agreement must be made by persons duly authorised by their entities to enter into treaties.\(^11\)

The practice of states, and until very recently the only type of treaty which would be conceived was a treaty concluded between States. But starting with the League of Nations, and intensified by the United Nations, a new type of international agreement has become common, one to which at least a non-State entity is a party. See Rosenne, op. cit., at p. 44.

\(^8\) For example, see Johannes W. Schneider, Treaty-making Power of International Organizations, Geneva, 1959. He writes that ‘growth of the treaty-making power is the consequence of the impotence of States to fully organize the movement they have called into being. The organizations and other subjects of international law (italics added), cannot be blamed for having availed themselves of the possibilities left to them . . . Opposition of States to the conclusion of a considerable number of agreements between organizations does not immediately affect the treaty-making power of the latter, but should be considered as a mainly political question . . .’ Ibid., pp. 141-142. Similarly in his recent publication on the Law of Treaties, Ambassador Rosenne observed that as in the case of all international law, the international law of treaties developed from the
Given that the first elements are satisfied, the next point to ascertain is if the object of the treaty is legal and whether it is validly contracted. In order that a treaty shall be validly contracted, the parties to it must have and, if possible and necessary, prove their capacity to conclude it.

Validity is the condition necessary to give a treaty operative force and effect in law, and consists in the fulfilment of the aggregate of these requirements prescribed by the law in order that a treaty may have such force and effect. So long as international law does not stipulate for its subjects any specific form for making binding agreements under it, it may be concluded that the choice of a particular form is a matter of convenience. However, it is necessary to observe that certain constitutions of States or organizations make their position on this question clear. We therefore submit that the satisfaction of a totality of the above described elements, leads to an international agreement susceptible of being subject to international law.

Our last question is to what extent the treaty law of the 1969 Vienna Convention on Treaties applies to transactions in which entities of the sort we have discussed in this study are parties. We are convinced that whereas the Vienna Convention itself clearly concerns treaties concluded between States, there is however a general reservation to the effect that its articles do not relate to international agreements concluded between States and other subjects of international law, or between such other subjects of international law, but should not affect the legal force of such agreements or the application to them of any of the rules set forth in the Convention to which they would be subject independently of its provisions. Customary international law provides the background for this written law. Even though the convention embodies (for the most part) generally accepted rules of customary international law, it would seem that not only States, parties to the Convention, but also those which had not become actual parties, including other subjects of international law, would nevertheless be bound by its provisions — not as such, but as reflecting customary law — except in so far as it could be shown that particular provisions embodied something definitely new.

By way of summary, what we have tried to do in this study is to show how far the substance of International Law must be re-defined in order to bring the facts and the law ubi societas, ibi ius — in a harmonious relationship. Contemporary writers, scholars and practitioners of international law should learn to keep themselves in constant awareness of the increasing phenomenon of Non-State law existing parallel to State-made law. International autonomous entities are a necessary factor without which no realistic equilibrium is possible in present and future international relations. Perhaps, the best way to bring out our ideas clearly to light is to quote the wise observation of one Sir John Fischer Williams in connection with the Bank for International Settlements. He wrote: "We theorists have to take heed to build our doctrines on tendencies rather than on "facts"; otherwise, when we have finished constructing our systems, it may happen that the facts are no longer what they were when we began building, and the system is out of date before it is established."

13. However, States as well as other subjects of international law resort to various nomenclatures to designate treaties concluded by them, namely, treaty, agreement, convention, protocol, final act, general act, arrangement, statute, covenant, pact, concordat, unilateral declaration accepted by other States, etc.
15. For a more detailed discussion on this question, see Chris Okeke, The Conclusion of Treaties with Special Reference to Consent to be Bound by a Treaty and Reservations, an unpublished Research Paper presented at the 1970 session of the Hague Academy Centre for Studies and Research in International Law and International Relations.
16. Cf. Vienna Convention art. 43. The tremendous growth in international treaty-making can be seen when a comparison is made between the 205 volumes of the League of Nations Treaty Series and the United Nations Treaty Series, already over 650 volumes. See Rosenne, op. cit., at 47.
17. Chris Okeke, op. cit.
19. As quoted in Lador-Lederer, Ibid., op. cit.
Summary

We have tried throughout our investigation to stress the caution that the times are changed and changing, and that the laws are to be changed with them. We may be accused of just stating an obvious fact, in other words, confirming a truism. We do not deny the imputation - but may point out that in carrying out this exercise, we have tried to analyse the problems we chose to look into in a novel manner so as to illustrate that there is room in various fields of modern international law where fresh insights and adjustments are inevitable.

The study analyses, in their relative degrees of importance, the remarkable changes that have affected and continue to affect contemporary international law, with particular reference to the proliferation of its new actors as evidenced by their treaty-making capacity. In Chapter 1 we undertook a theoretical examination, in a general sort of way, of the doctrine of subjects of international law. Our belief that the question of who are the subjects of international law is basically related with the whole concept of international law led us to review the various definitions of international law. To our mind, these definitions reflect the changing concept of contemporary international law. The stand of leading authorities of international law of both West Europe and East Europe (led by the Soviet Union) was considered. We came to the conclusion that no rule of international law operates in respect of an entity which claims to possess international legal personality until such an entity appears and asserts itself. Whether or not that entity has the legal capacity which it claims depends upon the way it functions in international society. If the entity concerned is found to have the capacity which it claims to have, then the conclusion would be that a series of acts performed by that entity in the field of international relations are legal acts and it is admitted to have the capacity to perform them. The element of personality is not invested by international law but by the facts of international life itself.

In Chapter 2 the concept of the notion of States as the principal subjects of international law was introduced. A paragraph was devoted to the discussion of the sovereign state as a subject of international law. This approach was based on the reasoning that sovereignty forms a fundamental basis upon which the whole structure of international law as it stands today is built. We did not consider a detailed study of the doctrine of sovereignty desirable. We limited our discussions to those aspects of sovereignty that have a direct bearing on our subject of investigation. Three considerations guided this attitude namely: (i) the recognition that the principle of state-sovereignty is a cornerstone on which the whole structure of international law rests; (ii) other principles of international law seem to revolve around this principle; (iii) the principle of sovereignty can be used as a good starting point for the consideration of the legal status and treaty-making powers of subjects of international law other than the state which forms a vital motivation of our study. Our investigation led us to a rejection of the principle of absolute sovereignty. This we consider totally useless for the purpose of modern international relations.

Chapter 3 treated the question of the international legal personality of states which are members of a federation. A reasonably detailed discussion of the theoretical aspects of the international personality of component parts of a federation was undertaken. In order to illustrate how the theoretical position agrees with practice, we reviewed briefly the constitutional stipulations of a number of Federal States, the aim being to establish the stands of these Federal States on the issue of participation in international relations by their member states. Among the Federal States considered include - Union of Soviet Socialist Republics, Switzerland, Canada, The Commonwealth of Australia, United States of America, Federal Republic of Germany. An examination of the treaty-making capacity of the component units of these states was attempted.

In Chapter 4 we discussed the legal position of the debatable subject of international law - The Holy See, starting with a historical perspective. The present attitude towards the Holy See was investigated first by analysing the views of Western countries and second the Soviet doctrine and diplomatic practice. Thus, we came to the opinion that there is no reason to withhold recognition of international personality from other non-state entities proper merely because their claim to it is not based on possession of the full attributes of an ordinary sovereign state, still less so seeing that in view of their greater numbers today the case is no longer exceptional. The fact that the Holy See is not only a subject of international law, but does also enjoy a wide range of treaty-
making exercise is illustrated by an attached appendix showing bilateral as well as general international agreements to which the Holy See is a party.

Chapter 5 studied the personality of unrecognized states in international law using the Rhodesian question as the principal illustration of our views. The following issues were treated—a brief historical survey, unilateral declaration of independence—the legal character, Is Rhodesia a state?, Rhodesia and the problem of recognition, duty to recognize, the international personality of Rhodesia, and finally, a general discussion of the British Government’s position on the matter up to and including the Anglo-Rhodesian Agreement of November 24, 1971.

Chapters 6, 7, 8, 9, are fully devoted to the question of the status and treaty-making capacity of organs of National Liberation Movements. Chapter 6 traces the legal history of the principle of equal rights and self-determination of nations and peoples as developed by the United Nations Organization through its effort to codify the principles of international law by the Special Committee formed for this purpose. We recognize this principle as the legal basis justifying the struggles of peoples and nations to independent life by the formation of a state. Two recent and familiar cases—Bangladesh and Biafra in which this principle was put to the test were used to illustrate the practical application of this principle in international life. These two cases formed the central point of our discussion in Chapters 7, 8 and 9.

We considered the international responsible character of both the Government of Bangladesh and Biafra; the basis of their international competence; the question of treaty-making competence; constitutional vacuum and principle of effectiveness as well as the attitudes of some selected powers of international community directly or indirectly involved in the conflicts. Also of interest was the discussion of the extent of Biafran statehood in international law, its question of recognition and treaty-making powers. It is submitted that the demand of self-determination must in the last resort be placed above those of the ‘territorial integrity’ and ‘non-interventionist’ stands of the United Nations Organization. Rebellion inside a state, even if it gathers momentum so as to become a civil war or a bloody conflict—call it a revolution, should never be encouraged or exploited by outside forces or powers.

No state big, medium-size or small, should try, through a treaty written or unwritten to exploit such a situation. The tragic position, in which humanitarian, economic and political problems are mixed in such a way as almost to defy distinction between them, presents a challenge to the international community as a whole which must be met. A plea was made to the effect that under certain circumstances a claim to self-determination, even in a non-colonial setting, may be valid under international law.

Chapter 10 reappraised international organizations as subjects of international law while Chapter 11 proceeds to discuss the basis of the treaty-making capacity of international organizations. From our discussions it seemed possible to conclude that once an international organization has asserted itself and therefore has international personality, it must be deemed, unless expressly denied, to have the capacity to enter into agreements, which are appropriate to its purpose.

Chapter 12 looks into the issue of non-governmental organizations and private corporations as subjects of international law. Whereas they cannot be said to enjoy international personality as ascribed to international governmental organizations, nonetheless, they conduct activities on the international plane with often significant political importance and with little or no governmental control. While international law was once a law of inter-state relations only, it is now seen to have become the law of all relations which, not being localised nationally and functionally within the boundaries of specific state or states, and of one state only, involve intercourse among nations and organizations created by them as well as with organizations create independently of states. In dealing with characteristic features of such entities and/or relationships which are specifically international, this law becomes more and more transnational, transorganizational, interorganizational.

The conclusive part of the study is Chapter 13 which accesses the impact of the expanding new actors in international relations on international law itself. The substance of international law must be redefined in order to bring the facts and the law in a harmonious relationship. International autonomous entities are a necessary factor without which no realistic equilibrium is possible in present and future international relations.
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**B. Organizations:**
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cases are less of interest to us than the trends or attitudes they represent and illustrate. Questions of legal status and treaty-making capacity are undertaken in respect of International Organizations, Non-governmental Organizations (NGOs), Public and Private Corporations. Our general investigations conclude with a study of the impact of the expansion of new actors (Organizations - governmental and non-governmental; Organs of National Liberation Movements; Insurgent Parties, Belligerents; Private Commercial Corporations; The Holy See; Humanitarian International Organizations such as the International Committee of the Red Cross (ICRC), and the World Council Of Churches etc.) in international relations.

This book by a young African jurist, who has drunk deeply of two very different juridical cultures makes a timely and original contribution to the analysis of what is generally accepted today as controversial and sensitive topics of contemporary international law.

The author is a native of Obinofia Imezi in Eastern Nigeria. He received his pre-law education in Eastern Nigeria. From October 1963 - June 1969, he studied law at the State University of Kiev Law School in Soviet Republic of Ukraine. He obtained a Master's degree, LL.M., summa cum laude, specializing in Soviet Law, International Law and International Relations.

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Distributors: Academic Book Services Holland, P.O. Box 66, Groningen, the Netherlands