

Hart argues that for a set of laws to be a true legal system, there must be a single overarching rule of recognition which validates all the primary rules of obligation and which ranks them in a normative hierarchy in the event of a conflict between them (for example, statutes take precedence over common law rules).

Hart also says that although international law is a set of real laws, it is not a legal system, partly because it apparently lacks an overarching rule of recognition which both provides an ultimate validation of all laws in the set and which authoritatively creates a definite hierarchy among them. Nevertheless, in Hart's own view, different classes of primary rules (for example, enactments, customs, etc) are capable of being validated by reference to different criteria. Different rules of recognition would, therefore, seem capable of existing even in the absence of a single overarching rule of recognition. Consequently, rather than asserting that there is no system of international law because it fails to replicate all the structures of most national legal systems, it is perhaps more accurate to say that international law is a less developed or less tightly structured system than most national legal systems.

2.7 These secondary rules of recognition must exist even in the most primitive legal systems, if only to distinguish rules of law from non-legal standards of conduct (such as etiquette, tradition or fashion) which do not attract publicly recognised sanctions in the event of a breach. It is these rules of recognition that are the 'sources' of law possessed by every legal system, even where the system consists entirely of customary norms. If law provides reasons for action and decision, then the sources of law are the sources of reasoning in any legal system.

The sources of law are the cornerstone of every system of positive law, though their structure can take different forms across systems. Consequently, in some legal systems, judicial decisions, customs or royal decrees are sources of law, while in others they are not. What, then, are the sources of reasoning in international law?

RANGE OF SOURCES

2.8 Article 38(1) of the Statute of the International Court of Justice provides as follows:

The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

- a. international conventions, whether general or particular, establishing rules recognised by the contesting states;
- b. international custom, as evidence of a general practice accepted as law;
- c. the general principles of law recognised by civilised nations;
- d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of the rules of law.

2.9 Although Art 38(1) was adopted for the relatively limited purpose of specifying the sources of law which the ICJ is to use in deciding cases before it, the provision is widely regarded as identifying the sources of international law generally.

2.10 Many publicists draw a distinction between 'formal sources of law' and 'material sources of law'. A material source of law is that which specifies the content of a legal obligation or entitlement in a particular case, whereas a formal source of law is that which endows the obligation or entitlement with a legally binding character. A 'material source of law' is, therefore, perhaps better understood as a 'source of obligation' (which obligation might or might not be legally binding depending on whether it is also encompassed by a formal source of law).

Thus, a treaty or contract, considered in itself as a litany of promises and undertakings, is a source of obligation; it specifies merely the content of certain obligations which the parties have freely assumed towards each other. Yet it is perfectly possible for States and individuals to undertake obligations which are not legally binding (for example, 'understandings' or social promises). The formal source of law for a treaty or contract is the general principle of law known as *pacta sunt servanda* (agreements are to be honoured), which general principle is enlivened when all the elements specified by the positive law for the creation of an enforceable treaty or contract are in existence.

Similarly, a social practice does not per se create a customary law obligation or right. Such a practice will tell us about the way States or people habitually behave on certain occasions, and even perhaps that there is a social expectation of conformity to that behaviour. It tells us *what* States or people habitually do and, perhaps, that they are in some sense *obliged* to do it. The widespread practice is, in itself, at most a source of obligation. That obligation assumes a legal character only when the positive law requirements relating to the consistency of the practice and the way in which the community regards it ('a general practice accepted as law') are in existence.

Only after an agreement or a social practice falls within the scope of a formal source of law is it really appropriate to speak of that agreement or practice as a 'material source of law' instead of a mere 'source of obligation'.

2.11 Only Art 38(1)(a)-(c) of the ICJ Statute specifies formal sources of international law. Consequently, only conventions (that is, treaties, understood as including all the positive law elements which enliven *pacta sunt servanda*), custom (understood as 'a general practice accepted as law'), and the general principles of law are formal sources of law.

2.12 The materials referred to in Art 38(1)(d) are, as the text itself makes plain, 'subsidiary means for the determination of the rules of law'. Judicial decisions and the teachings of publicists are not themselves sources of law. Rather, they can be used to help prove the existence and content of legal norms sourced in treaties, custom or the general principles. They are among the objects that constitute evidence of the legal status and content of putative norms of international law.

Provisions which express only political aspirations, are highly vague, or which are couched in platitudinous terms, are unlikely to have been adopted with the requisite intention.

3.18 States also sometimes conclude agreements among themselves which, although intended to be legally binding, are not necessarily intended to be governed by international law. Common among such agreements are contracts of a commercial character (for example, sale of goods and property, leasing arrangements, dealings in securities, etc). In each case, careful attention to the form, terms and circumstances of the agreement may be required in order to determine whether parties intended the agreement to be governed by international law or domestic law. If the former, the agreement will be a treaty. If the latter, the agreement will be a contract under domestic law, the enforcement of which may involve issues of sovereign immunity: see 6.37-6.49.

FORMATION

The capacity of States to conclude treaties

3.19 Article 6 of the VCLT provides:

Every State possesses the capacity to conclude treaties.

Not only are States capable of concluding treaties, but the capacity to conclude treaties is evidence of statehood: see 4.12-4.14.

3.20 States may perform certain acts in the course of bringing a treaty into existence. Typically, there is a proposal for a treaty, followed by negotiations. Thereafter, if negotiations proceed fruitfully, the participating States may adopt a text of the treaty (see 3.24-3.26) which means that the negotiators settle upon a final text which is open for signature. Adopting a text is more important in the case of multilateral treaties than in the case of bilateral treaties. The adopted text may sometimes require authentication (see 3.27) which means that States' representatives certify that a document faithfully reflects the text which the States agreed to adopt. Finally, States may express their consent to be bound by a treaty, which almost always involves a signature, but which may also necessitate an exchange of instruments, and acts of ratification, acceptance, approval or accession: see 3.28-3.35.

Full powers

3.21 Being legal persons, States can perform acts relating to the formation of treaties only through the agency of natural persons. Before a natural person can commit a State to an act of treaty formation, he or she must be legally authorised to do so. Sometimes, this will involve the production of 'full powers', which are defined in Art 2(1)(c) of the VCLT to mean:

... a document emanating from the competent authority of a State designating a person or persons to represent the State for negotiating, adopting or authenticating the text of a treaty, for expressing the consent of the State to be bound by a treaty, or for accomplishing any other act with respect to the treaty.

The function of full powers is specified by Art 7(1) of the VCLT:

1. A person is considered as representing a State for the purpose of adopting or authenticating the text of a treaty or for the purpose of expressing the consent of the State to be bound by a treaty if:
 - (a) he produces full powers; or
 - (b) it appears from the practice of the States concerned or from other circumstances that their intention was to consider that person as representing the State for such purposes and to dispense with full powers.

Consequently, any person may commit a State to any of the acts leading to treaty formation to the extent that the person is authorised by his or her full powers. The necessity for full powers may be impliedly dispensed with where circumstances justify concluding that the States involved considered the person as representing his or her State for the purposes of the acts he or she performed.

3.22 Certain classes of persons are, without the need to produce full powers, deemed to be capable of representing their State. The extent of their capacity depends on the nature of their official office. These rules are contained in Art 7(2) of the VCLT:

2. In virtue of their functions and without having to produce full powers, the following are considered as representing their State:
 - (a) Heads of State, Heads of Government and Ministers for Foreign Affairs, for the purposes of performing all acts relating to the conclusion of a treaty;
 - (b) heads of diplomatic missions, for the purpose of adopting the text of a treaty between the accrediting State and the State to which they are accredited;
 - (c) representatives accredited by States to an international conference or to an international organization or one of its organs, for the purpose of adopting the text of a treaty in that conference, organization or organ.

Only Heads of State, Heads of Government and Foreign Ministers are deemed to be capable of representing a State for the purpose of performing all acts in the process of concluding a treaty. Therefore, if State A wishes to have its ambassador to State B sign a treaty on its behalf with State B, the ambassador must satisfy the requirements of Art 7(1): he or she will need either to be furnished with full powers or there will need to be other evidence that States A and B regarded the ambassador as representing State A for the purpose of signing the treaty. That other evidence could be provided by the past practice of the two States or 'other circumstances', which might include diplomatic communications prior to the act of signing.

3.23 Article 8 of the VCLT specifies that an 'act relating to the conclusion of a treaty performed by a person who cannot be considered under Art 7 as authorised to represent a State for that purpose is without legal effect unless afterwards confirmed by that State'. Failures of the kind envisaged by Art 8 are extremely rare. Where they occur, States are clearly permitted to disavow the *ultra vires* act and to regard it as lacking legal consequence.

He also requested that Australia acknowledge that the Lorku people were legally entitled to their self-determination, and that Lorkunia was a State since the formal declaration of independence in October 1999.

The SRT ambassador at the UN is opposing Lorkunia's bid for UN membership on the basis that no such State exists and that the LAR is part of the SRT's sovereign territory. Similarly, the SRT ambassador in Canberra is insisting that any Australian recognition of Lorkunia's statehood or government would constitute an unlawful interference in the SRT's internal affairs.

The Australian Foreign Minister seeks your legal advice. You may assume that Lorkunia is not a party to any treaties, and that the only treaty to which the SRT is a party is the UN Charter.

Answer

There are several distinct issues here:

- ◆ is Lorkunia a State?
- ◆ is Australia obliged to recognise Lorkunia's statehood and government?
- ◆ may Australia or the UN bring an international claim against Lorkunia in respect of the building fire?
- ◆ should Australia support Lorkunia's application for UN membership?

Lorkunia's statehood

Customary international law prescribes four criteria, all of which must be met in order for an entity to be regarded as a State. These criteria are conveniently codified in Art 1 of the Montevideo Convention on Rights and Duties of States. A State should have:

- (a) a permanent population;
- (b) a defined territory;
- (c) a government; and
- (d) the capacity to enter into relations with other States.

(i) *Population*. Lorkunia has a permanent population of only about 300,000. This is a small number, but the number does not need to be large. There are already a few States with far smaller populations than Lorkunia, for example, Seychelles (80,000), Nauru (13,000) and the Vatican City (around 1,000). Lorkunia satisfies this criterion.

(ii) *Defined territory*. Lorkunia claims that its territory is co-extensive with that of the old LAR. It appears, further, to be exercising actual control over that territory. The SRT denies the existence of any international border between itself and Lorkunia. However, the fact that an international border is contested does not justify an assertion that the affected State lacks a defined territory. It is enough that the territory in question possesses a 'sufficient consistency, even though its boundaries have not yet been accurately delimited': see *Deutsche Continental Gas-Gesellschaft v Polish State*.

In any event, if Lorkunia has indeed emerged as a State, then its territory would appear to be precisely defined. The principle of *uti posseditis iuris* requires that when an entity emerges as a State, any applicable pre-independence administrative or colonial boundaries should remain intact until an agreement to alter them is reached. This principle was applied to preserve Spanish imperial administrative boundaries as international boundaries in the 19th century, and has been applied to post-colonial boundaries in the 20th century as a matter of customary international law: see *Frontier Dispute* case. The principle has also been applied to transform the internal boundaries of a disintegrating federal State (Yugoslavia) into international borders for the new States which emerged: *Badinter Commission, Opinion No 2*. The principle of *uti posseditis iuris* is almost certainly applicable to situations, such as the present, where internal administrative boundaries serve as the basis for a breakaway State's international frontier.

Lorkunia satisfies the criterion of defined territory.

(iii) *Government*. The requirement of government is not satisfied unless the governing authority is both formally independent and actually effective. There is no reason to believe that the Lorkunian government is not independent. The government was not, however, effective between the declaration of independence (October 1999) and the withdrawal of SRT troops (August 2002). During this time, the civil war prevented the Lorkunian authorities from asserting themselves. It was only after SRT troops departed that a stable political organisation was created, and the Lorkunian government became strong enough to assert itself throughout Lorkunia: see the *Aaland Islands* case.

Accordingly, Lorkunia satisfies the criterion of government, but only from August 2002.

(iv) *Capacity to enter into relations with other States*. Lorkunia's statehood has already been recognised by more than 20 States who, presumably, stand ready to establish diplomatic and treaty relations with it. Further, the fact that these other States recognise Lorkunia is strong evidence, albeit not conclusive proof, that Lorkunia satisfies all the criteria of statehood: see *Timoco Arbitration*. Whether one embraces the declaratory or constitutive theory of recognition, it would appear that Lorkunia possesses the capacity to enter into relations with other States.

It would, therefore, appear that, as from August 2002, Lorkunia satisfied all the criteria for statehood required by international law.

Recognition of Lorkunia's statehood and government

Recognition of statehood

It is occasionally suggested that a State is legally entitled to be recognised if it fulfils all the criteria of statehood. Were this true, Australia would currently be obliged to recognise Lorkunia as a State. However, the preponderance of State practice and most publicists support the view that recognition is a discretionary act which is validly subject to political considerations.

The Montreal Convention requires States to establish their jurisdiction of the offence in substantially the same circumstances as apply under the Hague Convention: Arts 5(1)(c) and 5(2). Accordingly, Tuvalu must either prosecute Carla for the act of sabotage or extradite her to New Zealand, being the State of the aircraft's registration.

Once the aircraft landed in Tuvalu, Carla committed the crime of hostage-taking within the meaning of Art 1 of the International Convention Against the Taking of Hostages 1979; she seized and threatened to kill people in order to compel Australia to release the Remoran Hyena terrorists from prison.

Tuvalu may exercise jurisdiction over the act of hostage-taking by virtue of the subjective territorial principle, or simply by virtue of the fact that Carla is now in its custody. According to Art 6, Tuvalu must either prosecute Carla for the hostage-taking or extradite her to Australia (the State against whom her demands were directed), France (the State of her nationality), or any State whose nationality any of the hostages possessed, that is, Australia and New Zealand.

For the purposes of this exercise, Tuvalu is not a party to the Hague Convention, the Montreal Convention or the Torture Convention. However, the fact that the Hague and Montreal Conventions each has over 170 parties and that the Torture Convention has over 120 parties, strongly indicates that their norm-creating provisions are part of customary international law.

Australia

There were Australian nationals aboard the hijacked flight, including the co-pilot and Brenda who were both killed. Although some States regularly assert criminal jurisdiction over offences committed against their nationals abroad in accordance with the passive nationality principle, this basis of jurisdiction has traditionally been the most controversial and uncertain (for example, Judge Moore's dissenting opinion in the *Lotus* case). Nevertheless, in more recent times, the passive nationality principle has been increasingly used to justify assertions of jurisdiction where the prosecuting State's nationals have been victims of terrorist acts (for example, *United States v Yunis*). Carla killed Brenda because she was an Australian national, and it appears that she intended to kill all the other Australians aboard the flight unless her demands were met. This probably justifies an assertion by Australia of criminal jurisdiction over Brenda in connection with the two killings, the aircraft sabotage, the hijacking and the hostage-taking.

Australia would, as we have already seen, also have jurisdiction to prosecute Brenda for the hostage-taking by reason of Tuvalu's obligations under customary rules reflected in the Montreal Convention.

Conclusion

There is no formal hierarchy among the various bases for exercising jurisdictional sovereignty. This means that if a State has actual custody of Carla and if it can invoke any one of the recognised bases for exercising jurisdiction, it is free to arrest, detain, prosecute and punish her notwithstanding the existence of competing claims by other States.

Tuvalu must either prosecute Carla or extradite her to one of the States mentioned in the Hague, Montreal and Torture Conventions. New Zealand is the only State to which Tuvalu could extradite Carla consistently with the requirements of all three conventions. New Zealand also has a basis for exercising jurisdiction in respect of all Carla's offences. If Tuvalu chooses not to prosecute Carla, it should extradite her to New Zealand in order to face charges there.

Suing the New Zealand airline in Australia

The New Zealand aircraft was owned by a commercial airline company which was in turned owned by the New Zealand government. This presents an issue as to whether New Zealand could raise a claim of sovereign immunity in respect of any suit brought against the airline in an Australian court.

Sovereign immunity prevents a State being subjected against its will to another State's jurisdiction. A State, including one of its courts, commits a violation of international law when it persists in exercising jurisdiction against another State in the face of a valid claim of sovereign immunity.

In States sharing a common law tradition, the view for much of the 20th century was that sovereign immunity was absolute. Any foreign State, organ of a State, State-owned property, or State-owned entity was completely immune from another State's jurisdiction, even if the entity had a separate legal personality (*Baccus SRL v Servicio Nacional del Trigo*) and even if its activities were purely commercial in character: *The Porto Alexandre*.

By the 1970s, however, most common law States had modified their approach and embraced a doctrine of qualified sovereign immunity closely resembling the model favoured by most civil law States. Qualified sovereign immunity protects foreign States from exercises of jurisdiction only where the activities or property in question were for a governmental or public purpose (*jure imperii*), and not for some commercial or other essentially private purpose (*jure gestionis*). By the early 1980s, it was possible to discern a broad international consensus in favour of qualified sovereign immunity.

To the extent that the proposed suit against the airline rests upon 'differences related to a commercial transaction', including a contract for the supply of services, New Zealand would probably not be able to invoke sovereign immunity as a matter of international law. Thus, a claim that the airline was in breach of its contract for services with Brenda — by permitting Carla aboard the flight while armed with a gun and a bomb and in failing to protect her from Carla on board the aircraft — would not be covered by sovereign immunity: Arts 10(1) and 1(c), Draft Articles on Jurisdictional Immunities of States and Their Property; *semble* s 11, Foreign States Immunity Act 1985.

To the extent, however, that the proposed suit is based on the law of torts it would be more likely to attract a successful claim of sovereign immunity in international law. Draft Article 12 effectively preserves a State's right to claim sovereign immunity in a 'proceeding which relates to pecuniary compensation for death or injury to the person' unless the act or omission occurred in whole or in part in the territory of the forum State and if the

an effective one. The principles of article 13 relating to appeal against expulsion and the entitlement to review by a competent authority may only be departed from when "compelling reasons of national security" so require. Discrimination may not be made between different categories of aliens in the application of article 13.

10.62 As to the customary international law of diplomatic protection regarding expulsion of aliens, see **5.86**.

Equality before the law and fair trial

10.63 The maintenance of human rights and fundamental freedoms is impossible without the rule of law, and an essential component of the rule of law is every person's equality before the law and the courts, and the fairness of trials before those courts. These concerns are addressed in Arts 6, 7, 10 and 11 of the UDHR and are the subject of the most detailed substantive provision in the ICCPR:

Article 14

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.
2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.
3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
 - (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
 - (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
 - (c) To be tried without undue delay;
 - (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and

- without payment by him in any such case if he does not have sufficient means to pay for it;
- (e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
 - (f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;
 - (g) Not to be compelled to testify against himself or to confess guilt.
4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.
 5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.
 6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.
 7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

10.64 These extensive requirements were the subject of the Human Rights Committee's General Comment No 13 of 1984:

1. ... All of [Article 14's] provisions are aimed at ensuring the proper administration of justice, and to this end uphold a series of individual rights such as equality before the courts and tribunals and the right to a fair and public hearing by a competent, independent and impartial tribunal established by law. ...
3. ... States parties should ... ensure that [the courts] are independent, impartial and competent, in particular with regard to the manner in which judges are appointed, the qualifications for appointment, and the duration of their terms of office; the conditions governing promotion, transfer and cessation of their functions and the actual independence of the judiciary from the executive branch and the legislative. ...
5. ... [Article 14(1)(3)] elaborates on the requirements of a "fair hearing" in regard to the determination of criminal charges. However, the requirements of paragraph 3 are minimum guarantees, the observance of which is not always sufficient to ensure the fairness of a hearing as required by paragraph 1. ...
7. ... By reason of the presumption of innocence, the burden of proof of the charge is on the prosecution and the accused has the benefit