THE TAMIL NADU
Dr. AMBEDKAR LAW UNIVERSITY
(State University Established by Act No. 43 of 1997)
M.G.R. Main Road, Perungudi, Chennai - 600 096.

PUBLIC INTERNATIONAL LAW

LL.B. (Hons.) Degree Course

SECOND YEAR – 3rd SEMESTER

STUDY MATERIAL

By

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MESSAGE

Knowledge is power. Legal Knowledge is a potential power. It can be exercised effectively everywhere. Of all the domains of reality, it is Legal Knowledge, which deals with rights and liabilities, commissions and omissions, etc., empower the holder of such knowledge to have prominence over the rest. Law Schools and Law Colleges that offer Legal Education vary in their stature on the basis of their ability in imparting the quality Legal Education to the students. Of all the Law Schools and Colleges, only those that educate their students to understand the nuances of law effectively and to facilitate them to think originally, excel. School of Excellence in Law aims to be in top of such institutions.

The revolution in Information and Communication Technology dump lot of information in the virtual world. Some of the information are mischievous and dangerous. Some others are spoiling the young minds and eating away their time. Students are in puzzle and in dilemma to find out the right information and data. They do not know how to select the right from the wrong, so as to understand, internalise and assimilate into knowledge. Hence in the present scenario, the role of teachers gains much more importance in guiding the students to select the reliable, valid, relevant and suitable information from the most complicated, perplexed and unreliable data.

The teachers of the School of Excellence in Law have made a maiden attempt select, compile and present a comprehensive course material to guide the students in various subjects of law. The students can use such materials as guidance and travel further in their pursuit of legal knowledge. Guidance cannot be a complete source of information. It is a source that facilitates the students to search further source of information and enrich their knowledge. Read the materials, refer relevant text books and case laws and widen the knowledge.

Dr. P. Vanangamudi
Vice-Chancellor

PREFACE

Public international law is a law that regulates the relation between states. The syllabus for the subject is designed in such a way to facilitate the students to understand the nature and scope of international law and its increasing importance in the present day International relations. This course material on 'International law' is equipped solely with the principal aim of providing a comprehensive account of contemporary issues in the international arena prevailing in the relations between States. It is quiet undisputable fact that international law is one of the subjects of contemporary relevance. In an era of scientific and technological revolution the law has to keep its pace ahead and the subject of international law is not an exception to that.

With the increasing complexity in the state practice and the fast phase with which the relations of states are affected by new developments within the international community and subsequent effects on the interpretation of the legal rules requires serious consideration by international law. The subject covers an exhaustive area of study that starts from exercise of sovereignty over land to regulation of outer space. From earth to satellite mankind requires to be regulated for which international law plays a vital role thereby the international community lives in peace. This material gives an exclusive review of subjects of general relevance of international law from students' perspective. The study is comprehensive but not an exhaustive one as the study of international law requires an oceanic swot. At the outset this material provides an insight into what is international law and the key topics dealt under it. Apart from this material guidance there are numerous books and articles from international journals that are relevant to the subject. I wish to extend the tribute of bringing this Public international law course material to The TamilNadu Dr. Ambedkar Law University, Chennai.

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PUBLIC INTERNATIONAL LAW
HD5C
COURSE OUTLINE

UNIT – I

International Law – Definition, Basis and Nature – Codification – International Law Commission – Sources of International Law – Relationship between International Law and Municipal Law – Theories and State Practice.

UNIT-II

State and Individual as a subject – Rights and Duties / Responsibilities – State Recognition – Theories – Kinds and Legal Effects – Nationality –Acquisition and Loss related issues- Extradition-Asylum- Territorial Sovereignty – Modes of Acquisition and Loss of Territory- State Jurisdiction – State Succession and liability.

UNIT-III

Law of the Sea – Air and Space Law: Diplomatic Law- Agents Consular's, Immunities and Privileges- Refugee Law

UNIT-IV

Concept –Definition of International Treaties – Formation of Treaties and its stages – Reservation, Observance of Treaties, Interpretation of Treaties – Suspension and Termination of Treaties.

UNIT-V

Origin, Nature & scope of International Organisations-League of Nations, United Nations and its Organs – International Tribunals.

Books Prescribed

Starke – International Law

S.K.Kapoor – International Law

K.K. Bhattachary – International Law

Agarwal – International Law

Malcom N.Shah – An Introduction to International Law

Books for Reference

Oppenheim – International Law

Brierly – International Law

Schwarzenberger – International Law

R.P. Anand –Salient Documents in International Law

Antonio Cassese – International Law

Ian Brownlie – International Law

R.P. Anand – New States in International Law

D.J. Haris –Cases Materials on International Law

Andreas Zimmermann – Commentary on the Statute of ICJ

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INTERNATIONAL LAW COMPENDIUM

LIST OF TOPICS

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UNIT -I

INTRODUCTION TO INTERNATIONAL LAW

In the long march of mankind, a central role has always been played by the law. The basis behind the law is that peace and order is necessary and chaos is crucial to a just and stable existence. Law is that element which binds the members of the community together in their adherence to recognized values and standards. Law is both permissive and coercive in allowing individuals to establish their own legal relations with rights and duties in the former and as it punish those who infringe its regulations.[1]

Law is especially a set of rules which regulates behavior and respects the ideas and preoccupations of the society within which it functions. International law differs only in the sense that it regulates relations among nation states and municipal law regulates relation between individuals. The question *"Whether international law is a true law or not?"* should be considered as outdated. International law since the middle of the last century has been developing in many directions as the perplexities of life in the modern era have multiplied. A municipal law should be based on certain specific set of values – social, economic and political and these values form the base for legal framework which order the life in that environment. Similarly international law is a product of its environment. It has developed in accordance with the realities of the age.

Change is the only rule which is unchangeable. There is a continuing tension between those rules already established and the constantly evolving forces that seek changes within the system. One of the major problems of international law is to determine when and how to incorporate new standards of behavior and new realities of life into the already existing framework so that on the one hand, the law remains relevant and on the other, the system is not disrupted.

The scope of international law today is immense. From the regulations of space expeditions to the question of the division of the ocean floor, and from the protection of human rights to the management of international financial system its involvement has spread out from the primary concern of maintenance of peace and security to all the interests of contemporary international life.

The advent of nuclear arms created a status quo in Europe and a balance of terror throughout the world. The rise of international terrorism has posited new challenges to the system as States and international organizations struggle to deal with this phenomenon while retaining respect for the sovereignty of States and for human rights.

International law respects first and foremost the basic State oriented character of world politics, units of formal independence benefitting from equal sovereignty in law and equal possession of the basic attributes of statehood have succeeded in creating a system enshrining such values. Illustrations could be noted which include non intervention in internal affairs, territorial integrity, non-use of force and equality of voting in the UN General Assembly. But many factors cut across State borders and create a tension in world politics, such as inadequate economic relationships, and international concern for human rights. Law mirrors the concern of forces within states and between states.

International law has expanded horizontally to embrace the new States which have been established recently, it has extended itself to include individuals, groups and international organizations within its scope. It has also moved into new fields covering such issues as international terrorism, problems of environmental protection and mutual legal assistance in commercial and criminal matters.

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[1] Malcom N Shaw, International law, 5th edition, 2003.

The 19th century's theory of positivism had the effect of focusing the concerns of international law upon the sovereign States. States alone were considered to be subjects of international law and should be contrasted with the status of non-independent states and individuals as objects of international law. So the restrictions upon the independence of the State could not be presumed[2]. But the gradual sophistication of the positivist doctrine, combined with the advent of new approaches to the whole system of international relations, has broken down this exclusive emphasis and extended the roles played by non-state entities such as individuals, multinational firms and international institutions.

Together with the evolution of individual human rights, the rise of international organizations marks perhaps the key distinguishing feature of modern international law. The range of topics covered by international law has expanded hand in hand with the upsurge in difficulties faced and the proliferation in the number of participants within the system. Today international law is no longer exclusively concerned with issues relating to the territory or jurisdiction of States narrowly understood, but is beginning to take into account the specialized problems of contemporary society. Many of these have already been referred. So the focus of the present study or course material is the brief coverage of subjects that international law is concerned with.

ORIGIN, SCOPE AND NATURE OF INTERNATIONAL LAW

The law of Nations as it is understood firmly lies in the development of western culture and political organization. Sovereignty a European notion and the independent Nation State concept required a commonly accepted standards of behaviour among the states to conduct inter State relations. International law filled the gap. If we trace the early origins of international law it dates back to 1000 of years ago. In 2100 BC a treaty was signed between the rulers of Lagash and Uma in the area called Mesopatomia as historians call to be city states. The next important treaty signed between Ramese II of Egypt and the King of Hittities was more inclusive of different points covered under the agreement that is concerned not only the establishment of eternal peace and brotherhood but also respect for each other's territorial integrity, the termination of a State of aggression and the setting up of a form of defensive alliance.

Since then several agreements entered between the rival Middle Eastern powers. Ancient Israel contributed a Universal ethical stance coupled with rules of warfare and a fair system of law based on morality guided the subsequent generations.

The classical era of Greece about sixth century BC has contributed for a rational and critical thought of mind, and its constant questioning, argument and debate about man and nature spread throughout Europe along with Hellenic culture that penetrated western consciousness which lead to the birth of Renaissance. The City States of Greeks were linked together in a network of commercial and political associations through several treaties. Rights granted to the citizens of the State in each other's territories and the rules related to diplomatic envoys were developed.

The Romans gave profound respect for organization and law. Jus civille was applied among Roman citizens. As it was found to be insufficient to provide a background for expanding and developing nation it resulted in the augmentation of Jus gentium (law of Universal application). The middle ages were characterized by the struggle between religious authorities and rulers of Roman Empire and as Europe were of one religion ecclesiastical law applied to all. But secularism proved its victory shortly. Nevertheless commercial and maritime law developed as English law established Law Merchant, commercial rule of universal application. Mercantile courts were set up throughout Europe to settle disputes. This paved the way for the constitution of embryonic international trade law. Since trade developed among the States maritime law also kept its pace of development.

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[2]S.S.Lotus Case, PCIJ, Series A, No.10. p.18.

The rise of nation state of England, France and spain has developed territorially consolidated units and the need was felt that interaction between these sovereign entities must be regulated. The state's pursuit of political power and supremacy realized and recognized (Machiavelli's The Prince- 1513) which formed the basis for the evolution of the concept of an international community of separate, sovereign states that marks the beginning of what is understood by international law. Similarly the struggle by the city states of Italy for supremacy has resulted in the mean course for the development of many concepts of international law like diplomacy, Statesmanship, balance of power and community of States. The doctrine of sovereignty emerged with the rise of modern state and emancipation of international relations. Systematic analysis of the concept was done by Jean Bodin in 1576 (six livers de la Republique) who emphasized the necessity for the existence of sovereign to make laws. This idea of sovereign as supreme legislator mooted the principle of state supremacy in international relations.

BASIS OF OBLIGATION UNDER INTERNATIONAL LAW

Basically two theories constitute the basis of obligation under International law i.e., Naturalism and Positivism. Natural law, one of the most influential Greek concepts was taken up by Romans which was formulated by the Stoic philosophers of third century BC. These rules were rational, logical and rules of universal relevance because they were rooted in human intelligence which could not be restricted to particular group or individual but were of worldwide relevance.

Natural law is considered to be vital for the proper understanding of international law as this theory is considered to be the precursor for today's human rights law. Jus gentium of Roman law has incorporated Greek ideas of Natural law in order to enshrine rational principles common to all civilized nations. The early theories of international law have inculcated natural law principles as basis for international law. St Thomas Acquinas (13th century) merged Christian and natural law ideas and he maintained natural law formed part of law of God and rational creatures' participation in eternal law. Reason was the essence of man and must be involved in the ordering of life according to divine will. With this sophisticated intellectual background the scholars of the Renaissance period approached the question of the basis and justification of international law. The new approach to modern international law could be traced from the writings Spanish philosophers of 16th century like Franscisco Vitoria, Suarez, Alberico Gentilli (De Jure Belli- a comprehensive discussion of the law of war and a section of law of treaties). Hugo Grotius (father of International law) considered tobe supreme Renaissance man and his extensive work De Jure Belli ac pacis (1623-24) is considered to be remarkable.

POSITIVISM AND NATURALISM

Naturalism expounded by Pufendorf identified international law with law of nature and regarded natural law as moralistic system. Other naturalists also ignored actual practices of the States and made a theoretical construction of absolute values. The theorists who adhere to this theory are of the view that international law is part of the law of nature. States adhere international law because their relations were regulated by higher law i.e., the law of nature. Law of nature was connected once with religion. 16th and 17th centuries has secularized the concept of law of nature especially Grotius expounded the secularized concept of the law of nature and it was explained as the dictate of the right reason. Vattel also a natural law theory supporter expressed that natural law was the basis of international law. The other naturalists are Pufendarf, Christian Thomasius. So natural law is based upon "what ought to be".

Positivism is based on law Positivum which is opposed to what ought to be i.e., what it is?. The positivists base their theory on actual practices of the States. Positivists regard treaties and customs are the main sources of International law. Bynker-Shoek as one of the exponents of the positivist school, views in the ultimate analysis as Will of the States is the main source of international law. According to Brierly

positivism in International law is nothing but the sum of the rules by which they have consented to be bound. Anzillotti one of the chief exponents of the positivist school explains that the binding force of International law is founded on a supreme principle or norm known as Pacta Sunt Servanda i.e, agreements between the states must be respected and followed in good faith.

DEFINITION OF INTERNATIONAL LAW

The birth of International law can be traced back to ancient times. Jeremy Bentham has coined the word 'International law' in 1780 that means the body of rules which regulate the relations among the States.

Black's Law Dictionary defines law as, that "which is laid down, ordained, or established,"[3] and the international law is, "which regulates the intercourse of nations; the law of nations."[4] As per Oppenheim, "International law is the body of rules which are legally binding on states in their intercourse with each other."[5] Lord Coleridge, CJ, defined, "International law as the law of nations is that collection of usages which civilized states have agreed to observe in their dealings with one another."[6] Oppenheim defines 'Law of nations or International law is the name for the body of customary and conventional rules which are considered legally binding by civilized states in their intercourse with each other'. There are some other definitions by J.L.Brierly and Hackworth that says International law consists of a body of rules governing the relations between the States.

In *Queen V Keyn*, Lord Coleridge defines International law 'as the collection of usages which civilized nations agreed to observe in their dealings with one another' (also refer to *West Rand Central Gold Mining Company V R, & S.S.Lotus Case.)* However the definition of International law by Starke is considered to be appropriate for the simple reason that the definition is comprehensive and exhaustive as it reflects the present position of International law.

J.G.Starke defines "International law as that body of law which is composed for the greater part of the principles and rules of conduct which states feel themselves bound to observe and therefore do commonly observe in their relations with each other and which includes also

(a) the rules of law relating to the functioning of international institutions or organizations, their relations with each other and their relations with states and individuals and (b)certain rules of law relating to individuals and non state entities so far as the rights or duties of such individuals and non state entities are the concern of the international community.

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[3] See, Black's Law Dictionary, 700.
[4] See, Black's Law Dictionary, 649.
[5] See, Oppenheim's International law, Ninth Edition, vol. 1, PEACE, (ed. Sir Roberts Jennings and Sir Arthur Watts) (Pearson Education, Universal Law Publishing Company, 1996).
[6] See, Queen v. Keyn (1876).

SOURCES OF INTERNATIONAL LAW

CONTENTS

INTRODUCTION

The 'sources of international law' are those rules and principles based on which International Law is discovered or created, evolves and develops into binding law amongst the sovereign states. Unlike the domestic legal system where the sources of law can be ascertained with a greater degree of certainty, the sources of international law involves a tricky question as there is no hierarchical character of a legal order with gradation of authority to make law as it governs the conduct of sovereign states as such.[7]

The question of sources is primal in any system of law as law making is a continuous process in any viable legal system.

Herbert Briggs pointing the confusion of the term "sources" describes it as "the methods or procedures by which international law is created."[8] George Schwarzenberger "proposed the term law creating process for primary sources i.e. treaties, customs and general principles of law; and law determining agencies for 'subsidiary means for determination of law', i.e. judicial practice and doctrines."[9] Oppenheim contends that there is a difference between formal and material sources; formal being the source from which the legal rule derives its legal validity; and material providing the substantive content of that rule.[10] Long before the establishment of UN and ICJ, in the 19th and 20th centuries, many treaties and conventions played a great role in the development of international law, such as Geneva Convention 1864, Hague Conventions of 1899 and 1907, Treaty of Locarno 1925, to name a few. After establishment of UN in 1945,

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[7] See, Malcolm N. Shaw, International Law, Sixth Edition, Cambridge University Press, pp. 69-70.

[8] See, Herbert Briggs, The Law of Nations, 2nd ed., (New York, 1952), p. 44.

[9] See, George Schwarzenberger, International Law, p. 26-27.

[10] See, Sir Robert Jennings, Sir Watts Arthur, Oppenheim's International Law, (Indian Branch: Peerson Education, 1996), 23. (Cited by: Shagufta Omar, Sources of International law In the light of the Article 38 of the International Court of Justice)(available at: http://ssrn.com/abstract=1877123).

treaty acquired the most important mode of development of international law, starting from Bill of Rights and various sectoral instruments under the United Nations Treaty Series many thousand treaties have been registered with the United Nations. It is important to note that Art. 38 of the ICJ is generally regarded as an authoritative statement of the sources of international law, though it does not mean to provide an exhaustive list of the sources of international law. These provisions are in fact, expressed in terms of the function of the Court. The first three sources listed i.e. treaties, custom, and principles of law, are sometimes referred to as "primary sources", whereas the last two, judicial decisions and the teachings of publicists are referred to as "subsidiary" or "secondary sources" or evidence of international law rules. It shall not prejudice the Court's power to decide a case '*ex aequo et bono*' if the parties agree.[11]

TREATY AS A SOURCE OF INTERNATIONAL LAW:

The first though not the foremost source of international law is international treaties as laid down in Art. 38 of the ICJ Statute. A treaty is defined as " an international agreement concluded between states in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation."[12] Conventions, International Agreements, Pacts, General Acts, Charters, Concordants, Declarations and Covenants are some of the various designations of treaty.

The various titles assigned to these international instruments does not have any overriding legal effects. Both the 1969 Vienna Convention and the 1986 Vienna Convention[13] do not distinguish between the different designations of these instruments. Instead, their rules apply to all of those instruments as long as they meet certain common requirements.

Treaties, in contrast to custom constitute a more formal and conscious source of law. Treaties are expected to follow the precepts of the Vienna Convention on the Law of Treaties[14] which serves as the basis for the purpose of interpretation of treaties, whereas the contours of custom remain vague; the frequent repetition of certain practices may indicate the existence of a customary rule.

Treaty law is "made" by negotiators and their governments; customary law "emerges" in the daily practice, in legal opinions, writings of eminent scholars, etc., Similarly in cases brought before the World Court, one or several treaties will be invoked by the contesting States, their relevance or non relevance giving rise to differences between the parties, which the Court must solve in order to decide the dispute.

RELEVANCE OF TREATIES AS A SOURCE OF INTERNATIONAL LAW:

The United Nations Charter lays down its determination "to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained."[15] Thus a treaty is an important source of international law creating legal obligations on the parties to the same and they are bound to adhere and respect their treaty obligations. Consent to a treaty may be expressed by signature, ratification, or accession, and is binding on the parties to it. The principle that treaties are binding on the parties and have to be followed in good faith is derived from a rule of customary international law called as *'pacta sunt servanda'*.[16] Treaties could be a direct source of international law or reflective of a customary or general principles of law as evidence.

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[11] See, Statute of the International Court of Justice, Art. 38(2).

[12] See, The Vienna Convention on the Law of Treaties, 1969; Art. 2.

[13] Vienna Convention of the Law of Treaties between States and International Organisations or between International Organisations, 1986.

[14] The 1969 Vienna Convention has 114 parties (as of November 2014). This treaty is binding only among its parties and it is not a treaty with global participation, yet it is widely acknowledged that many of its provisions have codified existing customary international law. The customary International Law principles laid down in the VCLT is binding even on non-parties to the Convention.

[15] See, The United Nations Charter, 3rd Preambular Paragraph.

[16] See, The Vienna Convention on the Law of Treaties, 1969, Art. 26.

Permanent Court of International Justice in the *Wimbledon case*, inferred from Art. 380 to 386 of the Treaty of Versailles as well as Art. 2 and Art. 7 Hague Convention of 1907 in coming to a conclusion that a state remains neutral even though it allows passage through an international waterway of ships carrying munitions to belligerents.[17] In the *Nottebohm case*[18], the PCIJ has referred to the Bancroft Treaties and the Pan- American Convention of 1907 to which neither of the parties to the dispute were signatories in rendering its decision. The practise of citing treaties for substantiating the claim of a party in dispute though these treaties were not signed by them was widely prevalent.[19] A case in point would be the development of Air and Space Law where customary international law plays a very limited role due to the meteoric rise and growth of the subject within a short duration. Here treaties have given rise to the international rule of sovereignty over the superjacent airspace. International law has made several inroads in the maxim '*pacta tertiis nec nocent nec prosunt*' in the sense that it is said that when a rule is repeated in a large number of treaties the rule passes into customary law, or that when an important multilateral convention has been in existence for some time, its provisions become absorbed into customary international law.

LAW MAKING TREATIES AND TREATY CONTRACTS

Treaties are express agreements and are a form of substitute legislation undertaken by states. They bear a close resemblance to contracts in a superficial sense in that the parties create binding obligations for themselves, but they have a nature of their own which reflects the character of the international system.[20] Treaties require the express consent of the contracting parties and so they are considered to comprise of the most important sources of international law in the views of certain scholars. Treaties in this regard are viewed as superior to custom, which involves an agreement in tacit form.

Treaties may be divided into 'law-making' treaties, which are intended to have universal or general relevance, and 'treaty-contracts', which apply only as between two or a small number of states. Law-making treaties are those treaties which are of a norm creating Character and are also called as 'normative treaties'.[21]A Law-making treaty refers to those agreements whereby states augment their understanding of international law upon any specific topic or establish new rules which are to guide them for the future in their international conduct. Such law making treaties necessarily, require the participation of a large number of states to emphasize this effect, and may produce rules that will bind all. They include human rights treaties, boundary treaties and certain other instruments based on universal substantive legal principles such as the genocide convention and the UN Charter.

'Treaty-contracts' on the other hand are not law-making instruments in themselves since they are between only small numbers of states and on a limited topic, but may provide evidence of customary rules. The term 'treaty contract', refers to those treaties which resemble a contract treaty such as one in which a state agrees to lend money to another state are not sources of law, but merely legal transactions.[22] They create rights and obligations purely as regards the parties concerned and have not much of political and legal significance. States, international organizations, and the other internationally recognized entities alone can conclude treaties under international law. In the *North Sea Continental Shelf case*[23], the ICJ held that there was no obligation on the part of West Germany with respect to a provision in the Convention on Continental Shelf, 1958 which had not been ratified by it and the same had not entered customary

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[17] See, S.S Wimbledon Case, 1923 P.C.I.J. (ser. A) No. 1.

[18] See, Liechtenstein v. Guatemala 1955 ICJ 1.

[19] See, The Asylum Case (Colombia v. Peru) 1950 ICJ 6. In the instant case, Colombia cited different Extraditions treaties not signed by neither party to support their argument. It was rejected by the Court as not pertinent to the question of diplomatic immunity which was the matter in dispute.

[20] See, Malcolm N. Shaw, International Law, Sixth Edition, Cambridge University Press, p. 94.

[21] The term 'normative treaty' was used by the ILC in its study of the topic "The law and practice relating to reservations to treaties" (e.g. Report of the International Law Commission (Fifty-sixth session, 2004), GAOR Supplement No. 10 (UN Doc. A/59/10), p. 290).

[22] See, Michael Akehurst, Modern Introduction to International Law, Routledge, p. 39.

[23] See, Germany v, Denmark and Netherlands, (1969) ICJ 1.

international law status. The Court further ruled that, even non-parties are bound by treaties reflecting customary law not because it is a treaty provision but because it reaffirms a rule or rules of customary international law.[24]

CUSTOM AS A SOURCE OF LAW

The second source of international law listed in Art. 38 (1) of the Statute of the International Court of Justice is 'international custom, as evidence of a general practice accepted as law'. It is placed on the same footing as international conventions as a primary source of international law. A custom generally refers to an established pattern of behavior that can be objectively verified within a particular social setting i.e., "what has always been done and accepted by law." J.L. Brierly describes it as follows: "Custom in its legal sense means something more than mere habit or usage; it is a usage felt by those who follow it to be an obligatory one. There must be present a feeling that, if the usage is departed from, some form of sanction probably, or at any rate ought to, fall on the transgressor."[25] Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation.[26] International custom is described by Hans Kelsen as "unconscious and unintentional lawmaking". It does not arise from a deliberate legislative process, but rather as a collateral effect of the conduct of States in their international relations.[27] Thus international custom refers to those legal obligations which are recognized, applied and complied by states in the international arena though they are not explicitly codified by treaty law.

As confirmed by the ICJ in the *Nicaragua case*[28], custom is constituted by two elements, the objective one of 'a general practice', and the subjective one 'accepted as law', the so-called *opinio juris*. In the *Continental Shelf case*[29], the Court stated that the substance of customary international law must be 'looked for primarily in the actual practice and opinio juris of States'. A new rule of customary international law cannot be created unless both of these elements are present. Thus it is evident customary international law emerges from patterns of behavior among states. These behavior patterns are called state practice and along with a corresponding belief that this practice is based on a legal obligation or opinio juris, they are considered as customary international law.

Customary international law plays a pivotal role in international law as it creates binding legal obligations on all states on certain universal legal concepts of international law which attain the status of international custom. The legal standing of many of the most important humanitarian principles, including principles of human rights and humanitarian protections in war, may depend heavily on their status as international custom. And this, in turn, is especially important because principles of customary international law in many countries is treated as law of the law without explicit act of legislation and in some countries it is capable of overriding contrary domestic law. With respect to customary international law, states are bound in the same manner as treaty law. But the primary difference is that, with respect to international conventions as a general rule only consenting parties are bound while in the case of customary international law all nation states are bound by legal obligations arising out of it.

STATE PRACTICE: THE OBJECTIVE ELEMENT OF INTERNATIONAL CUSTOM

The scholars have classified the requirements in what is referred to as the two-element theory, by which for a customary rule to arise, two elements must be present: on the one hand, there must be a significant State practice, and, on the other hand, the practice must follow from opinio juris, i.e. the belief that such practice reflects international law. Firstly, let us deal with the objective or material element of customary international law; State practice, also referred to as "constant and uniform usage" in the *Asylum case*.

[24] See, Malcolm N. Shaw, International Law, Sixth Edition, Cambridge University Press, p. 95.
[25] See, J.L Brierly, The Law of Nations: An Introduction to the International Law of Peace, Oxford University Press, 1963. p. 59
[26] See, Restatement of the Law, Third, Foreign Relations Law of the United States, St. Paul, Minn.: American Law Institute Publishers, 1987.
[27] See, Antonio Cassese, International Law, Oxford University Press, p. 156.
[28] See, The Republic of Nicaragua v. United States of America - Case concerning the Military and Paramilitary Activities in and against Nicaragua (1986) ICJ 1.
[29] See, Libya v. Malta - Case concerning the Continental Shelf (1985) ICJ 13.

While assessing State practice, two distinct matters need to be addressed, viz., the selection of practice that contributing to the creation of customary international law and the assessment of whether this practice establishes a rule of customary international law. It is widely accepted that the reiterated conduct of States fulfills the objective element for the formation of customary norms.[30] The practice of the executive, legislative and judicial organs of a State can contribute to the formation of customary international law. The State comprises the executive, legislative and judicial branches of government. The organs of these branches can engage the international responsibility of the State and adopt positions that affect its international relations.[31]

The negotiation and adoption of resolutions by international organisations or conferences, together with the explanations of vote, are acts of the States involved. The greater the support for the resolution, the more importance it is to be accorded. Likewise, statements made by States during debates on the drafting of resolutions constitute State practice and have been included where relevant.[32]

International Organizations have international legal personality and can participate in international relations in their own capacity, independently of their member States. In this respect, their practice can contribute to the formation of customary international law. To establish a rule of customary international law, State practice has to be virtually uniform, extensive and representative. Although some time will normally elapse before there is sufficient practice to satisfy these criteria, no precise amount of time is required. As stated by the International Court of Justice in the *North Sea Continental Shelf case*[33]*:*

"the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law on the basis of what was originally a purely conventional rule, an indispensable requirement would be that within the period in question, short though it might be, State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked; and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved."

Different States must not have engaged in substantially different conduct, some doing one thing and some another. In the *Asylum case*[34], the International Court of Justice was presented with a situation in which practice was not sufficiently uniform to establish a rule of customary international law with respect to the exercise of diplomatic asylum. In this respect, it stated that:

"The facts brought to the knowledge of the Court disclose so much uncertainty and contradiction, so much fluctuation and discrepancy in the exercise of diplomatic asylum and in the official views expressed on various occasions, there has been so much inconsistency in the rapid succession of conventions on asylum, ratified by some States and rejected by others, and the practice has been so much influenced by considerations of political expediency in the various cases, that it is not possible to discern in all this any constant and uniform usage, accepted as law."

However, the Court in the *Fisheries case*[35] held that "too much importance need not be attached to a few uncertainties or contradictions, real or apparent" in a State's practice when making an evaluation. It is enough that the practice is sufficiently similar. It was on this basis that the ICJ found in the *Continental Shelf cases* that the concept of the exclusive economic zone had become part of customary law. Even though the various proclamations of such a zone were not identical, they were sufficiently similar for the Court to reach this conclusion.

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[30] See, Mark Weisburd, The International Court of Justice and the Concept of State Practice. University of Pennsylvania Journal of International Law, Vol 31:2 (accessed from: https://www.law.upenn.edu/journals/jil/articles/volume31/issue2/Weisburd31U.Pa.J.Int'lL.295(2009).pdf).

[31] See, Michael Akehurst, Modern Introduction to International Law, Routledge, p. 43.

[32] See, Jean-Marie Henckaerts and Louise Doswald-Beck, Customary International Humanitarian Law, Volume I: Rules (accessed from: https://www.icrc.org/eng/assets/files/other/customary-international-humanitarian-law-i-icrc-eng.pdf).

[33] See, Germany v. Denmark and Netherlands, (1969) ICJ 1 p. 43.

[34] See, Colombia v. Peru, (1950) ICJ Rep. 266.

[35] See, United Kingdom v Norway [1951] ICJ 3.

The ICJ jurisprudence shows that contrary practice itself does not prevent the formation of a rule of customary international law as long as this contrary practice is condemned by other States or denied by the government itself and therefore does not represent its official practice. Through such condemnation or denial, the original rule is actually confirmed.[36] The International Court of Justice dealt with such a situation in the *Nicaragua case*[37] in which it looked at the customary nature of the principles of non-use of force and non-intervention, stating that:

"It is not to be expected that in the practice of States the application of the rules should have been perfect, in the sense that States should have refrained, with complete consistency, from the use of force or from intervention in each other's internal affairs. The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolute rigorous conformity with the rule. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule. If a State acts in a way prima facie incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule.[38]"

It does not need to be universal; a "general" practice suffices and no precise number or percentage of States is required.[39] In the words of the International Court of Justice in the *North Sea Continental Shelf cases*, the practice must "include that of States whose interests are specially affected".

The International Law Commission has similarly considered verbal acts of States as contributing towards the creation of customary international law. It did so, for example, in the context of the Draft Articles on State Responsibility where it considered the concept of a "state of necessity" to be customary.[40]

The International Criminal Tribunal for the Former Yugoslavia has stated that in appraising the formation of customary rules of international humanitarian law, "reliance must primarily be placed on such elements as official pronouncements of States, military manuals and judicial decisions".[41]

In the *Lotus case*[42], the Permanent Court of International Justice rejected France's argument in favor of a rule restricting jurisdiction over negligent acts committed on board of a ship to the flag State, which it justified by citing the almost complete absence of prosecutions by States others than the flag State. The PCIJ considered that such omission was not a clear evidence of custom, since the abstention from prosecution could be motivated by various reasons—not necessarily by the existence of a customary norm. The same approach was taken by the ICJ in the *Nuclear Weapons case*[43] when it dismissed the argument that there was a customary rule prohibiting the use of such weapons because States had refrained from using them since 1945.

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[36] See, Gerald Postema, Customary International Law: A Normative Concept (accessed from: http://www.law.cam.ac.uk/microsites/philosophical_historical_and_legal_perspectives/documents/part_3/ii/4/GPostema_V1.doc.).)

[37] See, The Republic of Nicaragua v. United States of America - Case concerning the Military and Paramilitary Activities in and against Nicaragua (1986) ICJ 1.

[38] See, Jan Wouters and Cedric Ryngaert, The Impact of Human Rights and International Humanitarian Law on the Process of the Formation of Customary International Law, Institute for International Law Working Paper No. 121 - February 2008 (accessed from: https://www.law.kuleuven.be/iir/nl/onderzoek/wp/WP121e.pdf).

[39] See, Ian Brownlie, Principles of Public International Law, 4th ed. p. 8.

[40] See, ILC, Draft Articles on State Responsibility, Yearbook of the ILC, 1980, Vol. II, Part 2, UN Doc. A/CN.4/SER.A/1980/Add.1 (Part 2), 1980, pp. 34–52.

[41] See, The Prosecutor v. Dusko Tadiæ, Case No. IT-94-AR72, Decision on the defence motion for interlocutory appeal on jurisdiction, 2 October 1995, p. 99.

[42] See, France v. Turkey, (1927) PCIJ Series A no. 10.

[43] See, ICJ Advisory Opinion on Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion of 8 July 1996 - General List No. 95.

OPINIO JURIS: THE SUBJECTIVE ELEMENT OF INTERNATIONAL CUSTOM

The other requirement for the existence of a rule of customary international law, *opinio juris*, relates to the need for the practice to be carried out *as of right*. Mendelson defines *opinio juris sive necessitatis* as "a belief in the legally permissible or obligatory nature of the conduct in question, or of its necessity".[44]

The particular form in which the practice and this legal conviction needs to be expressed may well differ depending on whether the rule involved contains a prohibition, an obligation or merely a right to behave in a certain manner. The subjective or psychological aspect is known by the Latin expression *opinio juris sive necessitatis*, which literally translates as "opinion of law or necessity", or simply *opinio juris*. It is reflected in the text of Article 38 (1) (b), as it provides that, for custom to exist, a general practice must be accepted as law. It continues to be the most debated and least comprehended facet of customary international law.[45]

A good illustration would be the *Lotus case* in which France disputed Turkey's right to prosecute for a collision on the high seas. France argued that the absence of such prosecutions proved a prohibition under customary international law to prosecute, except by the flag State of the ship on board which the wrongful act took place. The Court disagreed because it was not clear whether other States had abstained from prosecuting because they thought they had no right to do so or because of some other reason, for example, lack of interest or belief that a court of the flag State is a more convenient forum. The Court stated there was no evidence of any consciousness of having a duty to abstain.[46]

The International Court of Justice in the *North Sea Continental Shelf case* dealt with another ambiguity in which Denmark and the Netherlands argued that a customary rule existed requiring a continental shelf to be delimited on the basis of the equidistance principle, *inter alia*, because a number of States had done so. The Court considered that the basis of the action of those States remained speculative and that no inference could be drawn that they believed to be applying a rule of customary international law. The States that had delimited their continental shelf on the basis of the equidistance principle had behaved in accordance with that principle but nothing showed that they considered themselves bound by it. The International Court of Justice held in this regard that:

"Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the opinio juris sive necessitatis."[47]

The State must follow the practice because of a belief that they are bound by law to do so rather than because of the demands of courtesy, reciprocity, comity, morality, or simple political expediency.

Therefore, only when it is accompanied by such conviction it becomes *opinio juris*. It becomes a *sine qua non* to distinguish a rule of customary international law from a rule of international comity, which is based upon a consistent practice in inter-State relations, but without the "feeling of legal obligation".

An example of a practice amounting to international comity, but not custom, is the saluting at sea by a ship of another ship flying a different flag. The ICJ has pointed this out in the *North Sea Continental Shelf case* judgment, establishing opinio juris as the main distinguishing feature between custom and comity or courtesy:

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[44] See, Maurice Mendelson, The Formation of Customary International Law. Vol. 272, p. 269.

[45] See, Jörg Kammerhofer, Uncertainty in the Formal Sources of International Law: Customary International Law and Some of Its Problems. European Journal of International Law, 2004: 523-553.

[46] See, France v. Turkey, (1927) PCIJ Series A no. 10.

[47] See, Germany v. Denmark and Netherlands, (1969) ICJ 1 p. 76.

"The frequency, or even habitual character of the acts is not in itself enough. There are many international acts, e.g., in the field of ceremonial and protocol, which are performed almost invariably, but which are motivated only by considerations of courtesy, convenience or tradition, and not by any sense of legal duty."[48]

Ian Brownlie argues that the International Court of Justice has taken two divergent approaches to *opinio juris*. Under the first approach, called no scrutiny, the court simply assumes *opinio juris* exists if there is uniform state practice. Under the second approach, called strict scrutiny, the court demands positive evidence that *opinio juris* exists. The stricter method was applied in three important cases: by the PCIJ in the Lotus case and by the ICJ in the North Sea Continental Shelf and Nicaragua cases. In these cases, a higher standard of proof was required, since the Court did not accept that a continuous practice was prima facie evidence of the belief in the existence of a legal obligation.[49]

JUS COGENS:

In international law, the term *"jus cogens"* (literally, "compelling law") refers to norms that command peremptory authority, superseding conflicting treaties and custom. *Jus cogens* norms are considered peremptory in the sense that they are mandatory, do not admit derogation, and they can be modified only by general international norms of equivalent authority.[50] *Jus cogens* refers to the legal status that certain international crimes reach, and obligatio erga omnes pertains to the legal implications arising out of a certain crime's characterization as jus cogens.

In other words, the norm describes such a bare minimum of acceptable behavior that no Nation State may derogate from it. It is argued by some that the overwhelming application of the norm against executing juvenile offenders has rendered it a *Jus cogens* norm. The treaties, pronouncements, and practices demonstrate that the prohibition has become as widespread and unquestionable as have the prohibitions against slavery, torture, and genocide. There are no contrary expressions of opinion by any country, nor by any agency charged with the enforcement and interpretation of the within-cited international accords.

The emergence of *Jus cogens* can be traced to the late 60s and rests upon the idea that a certain category of law that derives from reason and humanity (natural law) should prevail over man-made law (consent-based law).[51] The establishment for peremptory norms was a result of the initiatives of socialist and developing countries.

Art. 53 of the Vienna Convention on the Law of Treaties defines a peremptory norm which is a synonym to *Jus cogens* as "a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." Similarly, Art. 64 of the VLCT state that, "if a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates."

GENERAL PRINCIPLES OF INTERNATIONAL LAW

General principles of law recognized by civilized nations are often cited as a third source of International law.[52] Article 38 of the ICJ Statute lists "general principles of law recognized by civilized nations" as one of the sources of applicable law in cases of disputes arising under International Law. These are general principles that apply in all major legal systems. An example is the principle that persons who

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[48] See, Germany v. Denmark and Netherlands (1969) ICJ 1 p.79.
[49] See, Ian Brownlie, Principles of Public International Law, 4th ed. p. 10.
[50] See, Vienna Convention on the Law of Treaties, Art. 53.
[51] See, Evan J. Criddle & Evan Fox-Decent, A Fiduciary Theory of Jus Cogens, The Yale Journal of International Law, Vol. 34:331 (accessed from: http://www.yale-university.org/yjil/files_PDFs/vol34/Criddle_Fox-Decent.pdf).
[52] See, Statute of the ICJ, Art. 38 (1) (c).

intentionally harm others should have to pay compensation or make reparation.[53] General principles of law are usually used when no treaty provision or clear rule of customary law exists.[54]

General Principles of law in the international domain were already recognized in the Hague Conferences of 1899 and 1907. To adequately comprehend what exactly is at stake in the debate on the true nature of the "general principles of law", it is important to refer to the function that they are meant to serve. The general principles of law are primarily regarded as a mechanism to alleviate the problem of legal gaps. The main objective of inserting this paragraph in Article 38 is to fill in gaps in treaty and customary law and to meet the possibility of a *non liquet.*[55]

The rules of Pacta sunt servanda, that contracts must be kept[56]; the right of self defense[57]; for one's own cause no one can be a judge; that the judge must hear both sides; and the principle of *res judicata*[58] are all considered to be general principles of international law. Perhaps the most important general principle, inherent in international legal rules, is that of good faith[59], enshrined in the United Nations Charter, and its elaboration in the Declaration of Principles of International Law Concerning Friendly Relations and Co-operation among States adopted by the General Assembly in resolution 2625 (XXV).

The ICJ in the *Aegean Sea Continental Shelf case*[60] said that the judges are to interpret the rules of international law as they are in the present and not at the time of the drafting. Thus, the use and functionality of General Principles is not to be assessed based on the fact that the motive for their inclusion was the dislike for nonliquet so that it does not appear. The proliferation of legislation has in most parts eliminated this problem. However, General Principles are not excluded from finding a new position in the international law today.

Another important general principle of international law is that of equity, which permits international law to have a degree of flexibility in its application and enforcement. The Law of the Sea treaty, for example, called for the delimitation on the basis of equity of exclusive economic zones and continental shelves between states with opposing or adjacent coasts.

In a number of cases references to equity has been made as a set of principles constituting the values of the system. The decision of Judge Hudson in the *Diversion of Water from the Meuse case*[61] in 1937 regarding a dispute between Holland and Belgium is typical example.[62] The Netherlands complained that Belgium by constructing a lock in Belgian territory had violated an agreement between the two States that they would both take water from the River Meuse only at a certain point. However, the Netherlands had also constructed and operated for a period of time a similar 'unlawful' lock in its own territory.

Judge Hudson pointed out that what are regarded as principles of equity have long been treated as part of international law and applied by the courts. 'Under article 38 of the Statute', he declared, 'if not independently of that article, the Court has some freedom to consider principles of equity as part of the international law which it must apply.' However, one must be very cautious in interpreting this, although

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[53] See, Chorzow Factory Case, PCIJ, Series A, No. 17, 1928.

[54] See, Robert Beckman and Dagmar Butte, An Introduction to International Law (accessed from: http://www.ilsa.org/jessup/intlawintro.pdf).

[55] The term 'non liquet' means the possibility that a court or tribunal could not decide a case because of a 'gap' in law. Remarkably, the ICJ applied the doctrine of non liquet in the Nuclear Weapons case, Advisory Opinion, (1997) 35 ILM 809.

[56] See, Advisory Committee of Jurists, Procès-verbaux of the Proceedings of the Committee, June 16th – July 24th, 1920, with Annexes (1920) 335.

[57] See, The Republic of Nicaragua v. United States of America - Case concerning the Military and Paramilitary Activities in and against Nicaragua (1986) ICJ 1.

[58] See, The Corfu Channel Case (United Kingdom v. Albania); Assessment of Compensation, 15 XII 49, International Court of Justice (ICJ), I.C.J. Reports 1949, p. 244; General List No. 1, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007, p. 43.

[59] See, Nuclear Test case (Australia v France), ICJ Rep. 1974, 268, para, 46; cited by Shaw, International Law, 104.

[60] See, Aegean Sea Continental Shelf case (Greece v. Turkey), Judgment, I.C.J. Reports 1978, p. 3.

[61] See, (Netherlands v Belgium) [1937] PCIJ (ser A/B) No 70, 4.

[62] It has to be noted that this is an important case where the Permanent Court of International Justice applied the doctrine of 'clean hands' in delivering the judgment.

on the broadest level it is possible to see equity as constituting a creative charge in legal development, producing the dynamic changes in the system rendered inflexible by the strict application of rules. Equity has been used by the courts as a way of mitigating certain inequities, not as a method of refashioning nature to the detriment of legal rules.

Judge Anzilotti of the Permanent Court of International Justice, concurred, describing the maxim 'one who seeks equity must do equity' as: so just, so equitable, so universally recognised, that it must be applied in international relations. It is one of the general principles of law recognised by civilized nation.[63] In the *Rann of Kutch Arbitration*[64] between India and Pakistan in 1968 the Court agreed that equity formed part of international law and that accordingly the parties could rely on such principles in the presentation of their cases.

The *Anglo Norwegian Fisheries case* [65], provides an example of principle of estoppels or acquiescence. The British refrained for almost 300 years from fishing in Norwegian coastal waters until 1906 when a few British vessels started doing so. In 1911 when a British trawler was seized for violating Norwegian regulations as to permissible fishing zones, the United Kingdom complained that the Norwegian government had made use of unjustifiable straight base-lines across the fjords in delineating its sea-boundaries. The Court found that the boundaries imposed by Norway were not contrary to international law. As part of its finding, the Court considered it significant that Norway had applied its method of delimitation consistently over a very long period, that this was well-known to the United Kingdom, and, with this knowledge, it had abstained from making any complaint.

In the *Frontier Dispute case*[66], between Mali and Upper Volta, the Court stated that it would be unjustified in resorting to equity to modify an established frontier inherited from the colonial powers. Equity as a legal concept was said by the Court to be a direct emanation of the idea of justice – but it was not simply an arbitrary concept of 'fairness' which could be interposed at will by a court or tribunal. The Court declined to alter the frontier to reflect some argued concept of equity.

An intriguing application of the clean hands doctrine can be seen in the dissenting opinion of Judge Morozov in the *Tehran Hostages case*.[67] Following the 1979 occupation of the United States embassy in Tehran by militants, the United States brought a claim against Iran before the International Court pursuant to the Treaty of Amity, Economic Relations and Consular Rights of 1955. While the Court was deliberating the United States launched a military operation inside Iran in an attempt to rescue the hostages, as well as initiating economic sanctions. The Court, by majority, found in favour of the United States. Judge Morozov found against the United States because, by invading Iran and imposing sanctions, it had, in his view, deprived itself of the right to rely upon treaty obligations to bring its claim.[68]

Further the clean hands doctrine can also be seen in the recent dissenting opinion of Judge ad hoc Van den Wyngaert in the *Arrest Warrant case*.[69] The Democratic Republic of the Congo brought proceedings against Belgium, who had issued an arrest warrant in absentia in respect of its Foreign Minister, Mr Yerodia, alleging that Belgium was precluded from doing so on the basis of diplomatic immunity. Judge Van den Wyngaert found that the Congo was precluded from bringing its claim: because of its own failure to investigate and prosecute Mr.Yerodia it did not come to the Court with clean hands.[70]

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[63] See, Diversion of Waters from the River Meuse (Netherlands v Belgium) [1937] PCIJ (ser A/B) No 70, 4, 50.
[64] See, Rann of Kutch Arbitration (India v. Pak.) (The Indo-Pak. Western Boundary Case Trib. 1968), excerpts reprinted in 7 I.L.M. 633, 667 (1968).
[65] See, The Anglo Norwegian Fisheries case (United Kingdom v Norway) [1951] ICJ Rep 116, 124.
[66] See, Frontier Dispute, Judgment (Burkina Faso/Republic of Mali) I.C.J. Reports 1986, p. 554.
[67] See, Tehran Hostages Case(United States v Iran) [1980] ICJ Rep 3, [3] (Morozov J
[68] See, Justice Margaret White, Equity - A General Principle of Law Recognized by Civilized Nations? Vol 4 No 1 QUTLJJ (Queensland University of Technology Law and Justice Journal) (accessed from: https://lr.law.qut.edu.au/article/download/177/170).
[69] See, (The Republic of Congo v Belgium) [2002] ICJ Rep 2.
[70] See, Arrest Warrant (The Republic of Congo v Belgium) [2002[ICJ Rep 2, [35] (Van den Wyngaert J).

JUDICIAL DECISIONS AND SCHOLARLY WORKS AS A SOURCE OF INTERNATIONAL LAW

Subsidiary means are not sources of law; instead they are subsidiary means or evidence that can be used to prove the existence of a rule of custom or a general principle of law. Article 38 lists only two subsidiary means - the writings of the most highly qualified publicists (international law scholars) and judicial decisions of both international and national tribunals if they are ruling on issues of international law. The scope of the ICJ source of international law, "writings of most highly qualified publicists" includes authoritative writings by well-regarded scholars and jurists. However, the Statute is silent on the meaning of "most highly qualified", and the travaux préparatoires offer little guidance on this point.

The influence of writers such as Gentili, Grotius, Pufendorf, Bynkershoek and Vattel were considered authorities in determining the scope, form and content of international law is unparallel. Today, however, juristic writings are considered only as a material or evidential source only. They are used as a method of discovering what the law is on any particular point rather than as the source of actual rules, and the writings of even the most respected international lawyers cannot create law. There is considerable debate amongst the scholars as regards the relevance of subsidiary sources under Art. 38(1)(d) of the ICJ Statute.

Schwarzenberger in reference to the works of scholars states that they must try their hardest not to blur the border lines between *lex lata* (law as it is) and *lex ferenda* (law as it ought to be). In this context, the remarks of Justice Gray in the *Paquete Habana case,* that "such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be but for trustworthy evidence of what the law really was" is noteworthy.[71] The jurisdiction of the ICJ, specified in article 36 (1) of its Statute, "...comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force..." The United Nations' Charter further stipulates that all members of the United Nations are ipso facto parties to the ICJ Statute.[72]Besides decisions, the ICJ is authorized to render advisory opinions on any legal question, when requested by the General Assembly or the Security Council.

Other organs of the United Nations and specialized agencies may also request advisory opinions of the ICJ on legal questions arising within the scope of their activities, when authorized by the United Nations General Assembly (UNGA).[73] The ICJ, by the very nature of its functions, plays an important role in the development of international law. Thus International Court of Justice closely examines its previous decisions and will carefully distinguish those cases which it feels should not be applied to the problem being studied. [74]

Thus even as a subsidiary source, judicial decisions are important in the determination of the existence of the legal rules and their content. A unanimous, or almost unanimous, decision plays an important role in the progressive development of the law. In the *Anglo-Norwegian Fisheries case,* with its statement of the criteria for the recognition of baselines from which to measure the territorial sea, which was later enshrined in the 1958 Geneva Convention on the Territorial Sea and Contiguous Zone.

Further, the recent proliferation of international tribunals and courts, such as courts on human rights, international criminal courts and the Tribunal for the Law of the Sea is likely to lead to conflicting decisions on international law as there is no ultimate legal authority in the sense of a supreme court to harmonize such conflicts. The ICJ is not in such a position because it lacks any formal relations with other international courts and tribunals.[75]

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[71] See, Michael Peil, Scholarly Writings as a Source of Law: A Survey of the Use of Doctrine by the International Court of Justice, Cambridge Journal of International and Comparative Law (1)3: 136–161 (2012) (accessed from: http://joomla.cjicl.org.uk/journal/article/pdf/50).

[72] See, The UN Charter, Art. 93.

[73] See, The UN Charter, Art. 96.

[74] See, Shahabuddeen, Precedent (cited by: Malcolm N. Shaw, International Law, Sixth Edition, Cambridge University Press, p. 110).

[75] See, Michael Akehurst, Modern Introduction to International Law, Routledge, p. 51.

RESIDUARY SOURCES OF INTERNATIONAL LAW

Resolutions of the UN General Assembly or resolutions adopted at major international conferences are only recommendations and are not legally binding. However, in some cases, although not specifically listed in article 38, they may be subsidiary means for determining custom. If the resolution purports to declare a set of legal principles governing a particular area, if it is worded in norm creating language, and if is adopted without any negative votes, it can be evidence of rules of custom, especially if States have in practice acted in compliance with its terms. The examples of such UNGA Resolutions which have been treated as strong evidence of rules of customary international law include the Universal Declaration of Human Rights[76] (1948), the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Sovereignty[77] (1965), the Declaration of Principles of International Law Concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations[78] (1970). Some of these resolutions have also been treated as subsequent agreement or practice of States on how the principles and provisions of the UN Charter should be interpreted.

The Assembly has produced a number of highly important resolutions and declarations and they have definite impact upon the direction adopted by modern international law. The way states vote in the General Assembly and the explanations given upon such occasions constitute evidence of state practice and state understanding as to the law. Where a particular country has consistently voted in favour of, for example, the abolition of apartheid, it could not afterwards deny the existence of a usage condemning racial discrimination and it may even be that that usage is for that state converted into a binding custom.

The 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples[79], which was adopted with no opposition and only nine abstentions and followed a series of resolutions attacking colonialism and calling for the self-determination of the remaining colonies, has, it would seem, marked the transmutation of the concept of self-determination from a political and moral principle to a legal right and consequent obligation, particularly taken in conjunction with the 1970 Declaration on Principles of International Law.

HIERARCHY OF SOURCES

Article 38 of ICJ is not an exhaustive statement for describing sources of international law as since its formulation in 1945, many changes in the international community have taken place. In theory there is no hierarchy among the three sources of law listed in Article 38 of the ICJ Statute. In practice, however, international lawyers usually look first to any applicable treaty rules, then to custom, and last to general principles. In the drafting history of this provision the proposal was made that the sources listed should be considered by the Court 'in the undermentioned order' (a-d). This proposal was not accepted and the view was expressed that the Court may, for example, draw on general principles before applying conventions and custom.[80]

Judicial decisions and writings clearly have a subordinate function within the hierarchy in view of their description as subsidiary means of law determination in article 38(1) of the statute of the ICJ, while the role of general principles of law as a way of complementing custom and treaty law places that category fairly firmly in third place. The question of priority as between custom and treaty law is more complex. As a general rule, that which is later in time will have priority. Treaties are usually formulated to replace or codify existing custom, while treaties in turn may themselves fall out of use and be replaced by new customary rules.[81]

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[76] See, Part A of UN General Assembly Resolution 217 III, UN Doc A/RES/3/217/, 10 Dec. 1948.
[77] See, UN General Assembly Resolution 2131 (XX), UN Doc A/RES/20/2131, 21 Dec. 1965.
[78] See, UN General Assembly Resolution 2625 (XXV), UN Doc A/RES/25/2625, 24 Oct. 1970.
[79] See, UN General Assembly Resolution 1514 (XV), UN Doc A/RES/2/1514, 14 Dec. 1960.
[80] See, Michael Akehurst, Modern Introduction to International Law, Routledge, p. 56.
[81] See, Malcolm N. Shaw, International Law, Sixth Edition, Cambridge University Press, p. 123.

Article 38 makes no reference to such a hierarchy but it is possible to discern elements of a hierarchy in certain respects. The relationship between treaties and custom is particularly difficult.[82] Clearly a treaty comes into force, overrides customary law as between the parties to the treaty; one of the main reasons why states make treaties is because they regard the relevant rules of customary law as inadequate. Thus, two or more states can derogate from customary law by concluding a treaty with different obligations, the only limit to their freedom of lawmaking being rules of jus cogens, which will be discussed below.

But treaties can come to an end through desuetude—a term used to describe the situation in which the treaty is consistently ignored by one or more parties, with the acquiescence of the other party or parties.

There are two types of norms or rules not previously discussed which do have a higher status. First, peremptory norms or principles of *jus cogens* are norms that have been accepted and recognized by the international community of States as so fundamental and so important that no derogation is permitted from them.[83] Second, members of the United Nations are bound by the Article 103 of the United Nations Charter, which provides that in the event of a conflict between the obligations of members under the Charter - including obligations created by binding decisions of the Security Council - the Charter obligations prevail over conflicting obligations in all other international agreements.

Desuetude often takes the form of the emergence of a new rule of customary law, conflicting with the treaty. Thus, treaties and custom are of equal authority; the later in time prevails. This conforms to the general maxim of *lex posterior derogat priori* (a later law repeals an earlier law). However, in deciding possible conflicts between treaties and custom, two other principles must be observed, namely *lex posterior generalis non derogat priori speciali* (a later law, general in nature, does not repeal an earlier law which is more special in nature) and *lex specialis derogat legi generali* (a special law prevails over a general law).

Since the main function of general principles of law is to fill gaps in treaty law and customary law, it would appear that general principles of law are subordinate to treaties and custom. Judicial decisions and learned writings are described in Article 38(1)(d) as 'subsidiary means for the determination of rules of law', which suggests that they are subordinate to the other three sources listed: treaties, custom and general principles of law. Judicial decisions usually carry more weight than learned writings, but there is no hard and fast rule; much depends on the quality of the reasoning which the judge or writer employs. In sum, the different sources of international law are not arranged in a strict hierarchical order. Supplementing each other, in practice they are often applied side by side. But, if there is a clear conflict, treaties prevail over custom and custom prevails over general principles and the subsidiary sources.

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[82] See, Christopher Greenwood, International Law: An Introduction (accessed from: http://legal.un.org/ avl/pdf/ls/Greenwood_outline.pdf).

[83] See, Shagufta Omar, Sources of International law In the light of the Article 38 of the International Court of Justice)(available at: http://ssrn.com/abstract=1877123).

RELATIONSHIP BETWEEN INTERNATIONAL LAW AND MUNICIPAL LAW

CONTENTS

INTRODUCTION

The relationship between International Law and Municipal Law has been the subject of debate for a very long time. The role of the states and their functions in the contemporary world is really complex. According to legal theory enumerated by Malcolm N Shaw, each state is a sovereign state and is equal. In reality, with the phenomenal growth in communications and consciousness, and with the constant reminder of global rivalries, not even the most powerful of states can be entirely sovereign. Interdependence and the close-knit character of contemporary International commercial and political society ensures that virtually any action of a state could well have profound repercussions upon the system as a whole and the decisions under consideration by other states.[84] Thus, the theory of Monism, Dualism, Incorporation and Transformation emerged to elucidate with varying degree of success of the subject matter under study.[85]

International Law and Municipal Law have traditionally addressed relatively different issues. International Law is largely but not altogether concerned with relation among states; whereas Municipal Law controls relations between individuals within a state and between individuals and the state.[86]

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[84] Malcolm N. Shaw QC, International Law, Fifth edition, Cambridge University Press, Page No. 120.

[85] Duru, Onyekachi Wisdom Ceazar, International Law Versus Municipal Law: A Case Study Of Six African Countries; Three Of Which Are Monist And Three Of Which Are Dualist, Electronic copy available at: http://ssrn.com/abstract=2142977

[86] Duru, Onyekachi Wisdom Ceazar, International Law Versus Municipal Law: A Case Study Of Six African Countries; Three Of Which Are Monist And Three Of Which Are Dualist, Electronic copy available at: http://ssrn.com/abstract=2142977

Also, they differ altogether in their judicial processes both are usually applied by National court, which results in complete decentralization of the judicial function in International Law and effective centralization in Municipal Law. What is true of the judicial function is also true of the executive function. As tort in Municipal Law, traditional International Law always depended for its enforcement upon the initiative of the injured party. Most Municipal Law, on the other hand, is enforced by a responsible executive unknown to International Law.[87]

According to Oppenheim, The Law of Nations and the Municipal Law of the single States are essentially different from each other. They differ, *first, as regards their sources. Sources of Municipal Law are custom grown up within the boundaries of the respective State and statutes enacted by the Law-giving authority. Sources of International Law are custom grown up within the Family of Nations and Law-making treaties concluded by the members of that family.*[88]

The Law of Nations and Municipal Law differ, secondly, regarding the relations they regulate. Municipal Law regulates relations between the individuals under the sway of the respective State and the relations between this State and the respective individuals. International Law, on the other hand, regulates relations between the member States of the Family of Nations.[89]

The Law of Nations and Municipal Law differ, thirdly, with regard to the substance of their Law: whereas Municipal Law is a Law of a Sovereign over individuals subjected to his sway, the Law of Nations is a Law not above, but between Sovereign States, and therefore a weaker Law.[90]

International Law and Municipal Law are similar in their sources, chiefly customs and express agreements-with however substantial differences in legislative machinery. In fact, in recent times however, it cannot be denied that there is gradual convergence of interest and the ultimate goal of both is to secure the well-being of individuals. Areas where this common goal manifests itself include human rights Law, environmental Law and commercial Law, areas where there is increasing interaction between National Law and International Law.[91]

MONISM

Monists hold that International Law and State Law share a common origin-namely Law.[92] And the scholars and followers of this theory are called Monists. According to Monism, International Law is directly applicable in the National legal order. There is no need for any Municipal implementing legislation; International Law is immediately applicable within National legal systems unlike Dualism, without any incorporation or transformation.[93]

The theory of Monism itself has two parts according to Antonio Cassese, one which says that though the International Law and Municipal Law co-exist and is one and the same, but the Municipal laws principle is put forth as supreme is called *Monism I* and another which says though International Law and Municipal Law co-exist and are one and the same, but the International Law principle are put forth as supreme is called *Monism II.* Monism I was developed by German scholars, namely *Moser, Hegel, Bergbohm, Zorn, Wenzel* between the 18th and 19th centuries. And Monism II is also by German philosopher *Kaufmann* in 1899.[94]

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[87] D. N. Palmer and C. H. Perkins, International Relations: The World Community in Transition Third Revised Edition (India: A.I.T.B.S Publishers & Distributors, 2007) at 274.

[88] The Project Gutenberg EBook of L. OPPENHEIM, International Law, A Treatise, Vol. 1, Peace, Second Edition, Longmans, Green and Co., Produced by The Online Distributed Proofreading Team at http://www.pgdp.net (This file was produced from images generously made available by The Internet Archive/American Libraries.), http://www.gutenberg.org/files/41046/41046-h/41046-h.htm#Page_26

[89] ibid.

[90] ibid.

[91] R. F. Oppong, "Re-Imaging International Law: An Examination of Recent Trends in the Reception of International Law into National Legal Systems on Africa" (2006) 30(2) International Law Journal 2.

[92] I. Brownlie, Principles of Public International Law (Oxford: Oxford University Press, 1979) at 32-34.

[93] R. F. Oppong, "Re-Imaging International Law: An Examination of Recent Trends in the Reception of International Law into National Legal Systems on Africa" (2006) 30(2) International Law Journal 2.

[94] Antonio Cassese, Public International Law, Oxford University Press, 2001.

MONISM - I

Monism I put forth the idea that supremacy of Municipal (National) Law in the system. Monism I is of ideology that though both International and Municipal laws are laws and are applicable, Municipal Law principle are somewhat superior when compared to International Law. For illustration purpose, consider Municipal Law as Constitution and International Law as other laws in a state, thus it is like Constitution (Municipal Law) of a state having superiority over all other laws (International Law) in a state.

Monistic I Theory was developed by German scholars namely Moser, Hegel, Bergbohm, Zorn, Wenzel in late 18th and early 19th centuries. Monistic I thinkers believe that National Law subsume and prevail over International legal rules. Therefore International Law proper does not exist on its own, it's just the 'external Law' of National legal systems. This is the reflection of the extreme nationalism and authoritarianism of a few great powers.[95]

This theory says there exist only one set of legal system or the doctrine of legal order and International and municipal are two branches of a single tree serving the needs of human community in one way or the other. Both laws emanate from a unified knowledge of Law and are the species of same genus-Law.

MONISM - II

Monism II slightly different and is the latest and widely accepted theory of Monism. Though both International and Municipal laws are laws and are applicable, Monism II advances the idea that International Law principle are somewhat superior when compared to Municipal Law. If we take into account the above illustration, here International Law is like Constitution of a state having superiority over all other laws (Municipal Law) in a state.

Monism II theory was found by Kaufmann, a German philosopher, in the year 1899.This theory is born from the assumption of states self-interest clashing against common interests of the individuals. Rights and obligations enumerated in the International Law accrue to and are imposed on not only States but also on individuals.

According to Kelsen, Verdoss and Scelle, the subjects of International Law are not radically different from those of National Law and in both the legal system; individuals are seen as principal subjects. As International Law is superior to Municipal Law, it can be applied as such by Municipal courts, without any need for transformation. Therefore International legal system controls, imperfectly, all National systems.[96]

DUALISM

The important principle of Dualism is that, International Law and Municipal Law are two separate and distinct orders, in their objects and spheres of operation, such that the norms of one would not operate within the realm of the other without a positive act of reception or transformation, as the case may be.[97] The International Law and Municipal Law are two entirely different things and the International Law can never be applied in the state without incorporating or transforming it into Municipal Law.[98] In Dualism, at no circumstances, the International Law can prevail over the Municipal Law, and it is the Municipal Law which is always supreme.

Dualism concept starts from the assumption that International Law and Municipal legal systems are two distinct and formally separate categories of legal orders and these two systems differ as to their subjects, sources and functions according to Anzilotti.

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[95] Antonio Cassese, Public International Law, Oxford University Press, 2001.

[96] ibid.

[97] I. Brownlie, Principles of Public International Law (Oxford: Oxford University Press, 1979) at 32-34.

[98] Maluwa, T.; "The Role of International Law in the Protection of Human Rights under Malawian Constitution" (1996) African Year Book of International Law, p. 53; Morgenstern, F., "Judicial Practice and Supremacy of International Law" (1950); British Year Book of International Law, p. 27

The subject of the Municipal Law is primarily individuals and groups, and that of International Law is states.

The Sources of Municipal laws are parliamentary enactments and courts decision, and for International it is treaties, customs and general principles of Law recognised by the civilized nations.

The main function of Municipal Law is regulating internal functioning of the state, relation between the state and the individual, and function of International Law is to supervise the relations between states[99].

Therefore this theory holds that International Law cannot directly address itself to individuals; it must be transformed from International Law to National Law in order to have any effect on individuals.

Municipal Law is conditioned by the norm that legislation is to be obeyed, whereas International Law is conditioned by the *pacta sunt servanda* principle.[100] The latter principle commands that agreements between states are to be respected. This principle is at the heart of modern International Law, especially treaty Law, and underlies the basis for performance of treaty obligations.

Because of this consensual factor, Anzilotti concludes that the two systems are so distinct that no possible conflict is possible. In case of any conflict, National Law prevails; this is predicated on state sovereignty, which gives the right to the state to determine which rules of International Law are to have effect in a Municipal sphere.[101]

DIFFERENCES BETWEEN MONISM AND DUALISM

- In philosophical terms, monism is that talks of oneness of the soul and dualism is that talks of two entities, individual and supreme soul.
- When monism speaks of the oneness of existence, the term dualism does not endorse this view.
- Monism believes in the fusing of the self into supreme self. On the contrary, the term dualism does not believe that the individual self unites with the supreme self.
- In International Law, monism believes that International and National legal systems can become a unity. Dualism states that there is a difference between internal and International Law.
- There is no need for translating the International Law into a National Law in a monist state. Unlike monism, there is a need for the translation of International Law into National Law. Unless the translation takes place, the International Law is not accepted.

CRITICISMS OF MONISM AND DUALISM[102]

- The criticism of Monistic Theory I is that, it is devoid of scientific value and intended to underpin ideological and political positions.
- The criticism of Monistic Theory II is that, it is nice in theory, but really utopian and did not reflect reality. But it had important psychological impact and helped to introduce idea of responsibility of state officials as individuals.
- The criticism of Dualistic Theory is that, it did reflect legal reality of 19th and 20th century, but couldn't explain some things, like the fact that some int'l rules do impose obligations on individuals (e.g. piracy).

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[99] Antonio Cassese, Public International Law, Oxford University Press, 2001.
[100] J. G. Starke, and I. A. Shearer, Starke's International Law (London: Butter Worth's, 1994) at 64.
[101] J. G. Starke, and I. A. Shearer, Starke's International Law (London: Butter Worth's, 1994) at 64.
[102] Antonio Cassese, Public International Law, Oxford University Press, 2001.

TRANSFORMATION THEORY

International Law undergoes transformation as it spreads universally.[103] Unless transformed, it cannot be applied to Municipal Law. States incorporate treaties and norms into their Municipal laws by specific "transformational" devices.

SPECIFIC ADOPTION THEORY

A second method, special adoption, requires legislation in order to give treaties Municipal effect. Specific Adoption Theory says that International Law cannot be applied in sovereign states unless and until the sovereign state specifically adopts that Law by way of enactments. Positivists support this theory. For example, International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights have been adopted in India under the Protection of Human Rights Act, 1993.[104]

DELEGATION THEORY

International Law delegates the rule-making power to each State in accordance with the procedure and system prevailing in each state in accordance with the Constitution and Rules of the Treaty or Convention that member states sign and agree upon.[105]

RELATION BETWEEN INTERNATIONAL LAW AND MUNICIPAL LAW OF UNITED STATES OF AMERICA

A principle recognized both in International case Law (e.g., the *Alabama* claims case between the United States and the United Kingdom following the American Civil War) and in treaties (e.g., Article 27 of the 1969 Vienna Convention on the Law of Treaties) is that no Municipal rule may be relied upon as a justification for violating International Law. The position of International Law within Municipal Law is more complex and depends upon a country's Municipal legislation.

The Constitution of the United States stipulates (Article VI, Section 2) that treaties "shall be the supreme Law of the Land." In *Paquete Habana*, the Court reaffirmed the Municipal status of customary International Law in the United States. Relying on scholarly sources, the Court acknowledged a long-held customary norm against seizing the coastal fishing vessels of a belligerent. The court held that International Law is part of the United States Law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination.[106] Treaties are negotiated by the president but can be ratified only with the approval of two-thirds of the Senate (Article II)—except in the case of executive agreements, which are made by the president on his own authority. Further, a treaty may be either self-executing or non-self-executing, depending upon whether Municipal legislation must be enacted in order for the treaty to enter into force. In the United States, self-executing treaties apply directly as part of the supreme Law of the land without the need for further action. Whether a treaty is deemed to be self-executing depends upon the intention of the signatories and the interpretation of the courts.

In *Sei Fujii* v. *State of California* (1952), for example, the California Supreme Court held that the UN Charter was not self-executing because its relevant principles concerning human rights lacked the mandatory quality and certainty required to create justiciable rights for private persons upon its ratification; since then the ruling has been consistently applied by other courts in the United States.

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[103] Referred from http://www.lawnotes.in/Theories_relating_International_Law_and_Municipal_ Law#ixzz3LFdsxNky.
[104] Referred from http://www.lawnotes.in/Theories_relating_International_Law_and_Municipal_ Law#ixzz3LFdsxNky.
[105] Referred from http://www.lawnotes.in/Theories_relating_International_Law_and_Municipal_ Law#ixzz3LFdsxNky.
[106] Referred from Nemanjalo Sukalo http://www.academia.edu/1114626/How_International_law_is_incorporated _into_Municipal _law_and _why_ is_it_important.html.

UNITED KINGDOM

The United Kingdom takes an incorporationist view, holding that customary International Law forms part of the common Law. British Law, however, views treaties as purely executive, rather than legislative acts. Thus, a treaty becomes part of Municipal Law only if relevant legislation is adopted.

INDIA

Indian position on the relationship between international law and municipal law depends upon the provisions of the constitution (Art.253 & Art.51). However the relationship between both legal systems is not clearly defined by the constitution and an analysis of judicial decision shows that in India dualism is followed. Customary rules of international law are part of municipal law provided they are not inconsistent with any legislative enactment or the provisions of the constitution of India. As regards treaty rules the British dualist model is followed is India[107]. In case of conflict between a provision of an International treaty and a provision of a state statute it is the latter which shall prevail if the international treaty in question has neither been specifically adopted in the municipal field nor has undergone transformation.[108] However the recent position seems different as if there is no conflict between IL and ML. in the case of *Vishaka V State of Rajasthan*[109] in the absence of domestic law occupying the field to formulate effective measures to check the evil of sexual harassment at work places the contents of international conventions and norms are significant for the interpretation of the guarantee of gender equality and right to work with dignity.

EMERGING TRENDS[110]

International Law, no longer constitute a sphere of Law tightly separate and distinct from the sphere of Law of National legal systems. It isn't a different legal realm from National Law; it has had a huge daily direct impact on National Law. Many International rules now address themselves directly to individuals, without intermediary of National systems (e.g. International crimes) or grant individuals rights before International bodies.

Courts may play a crucial role in ensuring compliance at National level with International legal standards. They can use two interpretive tools – ***presumption in favour of International treaties*** and ***presumption that treaty-implementing National Law is "special"***. This can advance International Law over Municipal Law.

Furthermore, there are more International rules that address themselves directly to individuals, either by imposing obligations or granting rights. These International rules reach individuals directly, not via Municipal Law.

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[107] ADM Jabalpur V Shukla, I.J.I.L Vol.9(1969), p.244.
[108] Jolly George Varghese V Bank Of Cochin, AIR 1980 SC470.
[109] AIR1997SC3011; See also Apparel Export Promotion council V A.K.Chopra,& Chairman, Railway Board and others V Chandrima das and others.
[110] Inspired from Antonio Cassese, Public International Law, Oxford University Press, 2001.

SUBJECTS OF INTERNATIONAL LAW

CONTENTS

INDRODUCTION

International law is the universal system of rules and principles concerning the relations between sovereign States, and relations between States and international organisations such as the United Nations. The modern system of international law developed in Europe from the 17th century onwards and is now accepted by all countries around the world.

SUBJECTS OF INTERNATIONAL LAW

A subject of international law (also called an international legal person) is a body or entity recognised or accepted as being capable of exercising international rights and duties. The main features of a subject of international law are

a) The ability to access international tribunals to claim or act on rights conferred by international law;

b) The ability to implement some or all of the obligations imposed by international law; and

c) Possession of the power to make agreements, such as treaties, binding in international law;

d) To enjoy some or all of the immunities from the jurisdiction of the domestic courts of other States.

Although this is a somewhat circular definition, there are at least two definite examples of subjects of international law, namely, States and international organisations. In the *Reparations Case* the International Court of Justice confirmed that the United Nations could recover reparations in its own right for the death of one of its staff while engaged on UN business. International personality was essential for the UN to perform its duties, and the UN has the capacity to bring claims, to conclude international agreements, and to enjoy privileges and immunities from national jurisdictions. It is accepted that international organisations are subjects of international law where they are a permanent association of

States, with lawful object, have distinct legal powers and purposes from the member States and can exercise powers internationally, not only within a domestic system. Examples of this type of international organisations are the *European Union, the Organisation of American States, the African Union, and Organisation of the Islamic Conference and specialised UN agencies.*

The International Committee of the Red Cross, based in Switzerland, has a unique status in international law as an inter-governmental organisation as guardian of the Geneva Conventions of 1949 for the protection of victims of armed conflict. It is neither an international organisation nor a non-governmental organisation, but has a special legal status under treaty law by virtue of its important functions in upholding legal protections in situations of armed conflict.

Traditionally, individuals were not regarded as having the capacity to enjoy rights and duties under international law in their own right, but only as those rights and duties derived from the State to which they 'belonged'. However, there is no principle in international law that prohibits individuals being recognised as subjects of international law. It will depend on the circumstances. The development of human rights law has advanced the recognition of individuals in international law because at its heart is the idea that individuals have rights and can assert them against States under international law.

THEORIES

(I) TRADITIONAL DOCTRINE OF INTERNATIONAL LAW

It would be superfluous to cite all the international lawyers who believe that states only are subjects of international law. In between the world wars, and particularly after the second, many of these scholars started to recognize the international personality of some interstate organizations. It is worthy to mention the following thinkers, among others, Anzilotti, Kaufmann, Makowski, Winiarski, Triepel, Strupp, and Erich. Robert Redslob, joined the above-mentioned scholars in their writings after the last World War. He contends that only states can be subjects of rights and duties established by the law of nations. *Collectivities of other kinds and individual persons are, in consequence, excluded from participation in the law of nations.* These few scholars have been chosen from a multitude of writers who support the traditional doctrine because they belong to the "irreconcilables" and fight the implementation of "erroneous conceptions" in the practice of international law. The predominant role of the states as international persons is generally recognized as an unchallenged principle of international law, since even the overwhelming majority of those writers who have declared themselves to be partisans of the international personality of individuals as well as of that of states, do not fail to stress that,

(a) The personality of individuals as it exists now in international law is an exception to the general principles of international law;

(b) Individuals may be only limited subjects of the law of nations, since their personality depends on the will of states and on the agreements which those states conclude on behalf of individuals as a *"Pactum in favorem tertii."*

(II)THE INDIVIDUAL AS THE SOLE SUBJECT OF INTERNATIONAL LAW

Belonging to another category of theorists who believe in the international personality of the individual are writers who try to destroy the whole present structure of public law by depriving the state of its legal personality and conferring this quality exclusively on the individual. This trend was started in 1901 by *Léon Duguit*[7], who greatly influenced a certain number of writers in international law in several countries. For him not states but individuals are subjects of international law. The state is a subject neither of international law nor of municipal law, and not being a person, it cannot have any rights whatsoever.

Gaston pronounced himself immediately in favor of Duguit's conceptions of state, law, and rights, conceptions which were supposed to create a new "sociologist' or "positivist" school of law. *Krabbe*, apparently under Duguit's influence, develops his theory that individuals only may be subjects of law. In 1908, *Nicolas Politis*, then professor in Poitiers, aceeded to these ideas with his usual enthusiasm, and has been faithful to them in his writings on international law. He claimed that international law can only be a body of rules governing the intercourse of men who belong to various political groups.

(III) BOTH STATES AND INDIVIDUALS AS SUBJECTS OF INTERNATIONAL LAW

The idea that 'international law' rules not only the intercourse of independent states but also that its provisions are directly binding on individuals without the intermediary of their state, is at least as old as the science of international law, which originated in the sixteenth century. *Grotius* considered the law of nations as a body of rules governing the activities of individuals in international relations rather than as a body of provisions binding on states in their relations with other states. *Pufendorf* stresses the identity of the natural law binding for individuals and states. *Hobbes* expresses a similar opinion.

PLACE OF STATE IN INTERNATIONAL LAW

Until recently, an overwhelming majority of writers on international law appear inclined to advocate that states only be recognized as legal persons, thus subjects of International law. In spite of the growth of international organizations with the power of independent action in the international plane and the growing importance of individuals having certain international rights and duties, the state is still the typical subject of international law. But what is a state?

CRITERIA FOR STATEHOOD

In the domain of municipal law, the word 'State' is commonly used to denote an organized political society as distinct from its indi-vidual members. The terms "State" and "Nation" are sometimes used inter--changeably. The concept of "State" is the antithesis of the concept of the empire. It means local sovereignty as opposed to universal dominion. The existence of the concept was influenced by the writings of a large number of political philosophers including *Bodin, Althusius, Machiavelli, Hobbes and Locke* among others. It is generally acknowledged that the system of States is "legislated into existence, or at least confirmed, by the Peace treaty of Westphalia of 1648".

To the so-called father of International Law, *Hugo Grotius,* State is "a complete association of free men, joined together for the enjoyment of rights and for their common interest". Much the same way, Pufendorf defined the State as "a compound moral person, whose will, international and united by the facts of a number of men is considered the will of all, so that it is able to make use of the strength and faculties of the individual members for the common peace of security".

The external sovereignty, on the other hand, may require recognition by other States in order to render it perfect and complete. Be that as it may be the criteria for statehood according to the naturalist and according to the positivist schools of thought, the most authoritative and widely accepted formulation of the qualifications for the State as a person of international law is contained in *the Montevideo Convention on Rights and Duties of States 1933.* The Convention was adopted by the Seventh International Conference of American States. Fifteen Latin American States and the United States are parties to it. The Convention is accepted as reflecting, in general terms, the characteristics of statehood at customary international law.

Article 1 of the *Montevideo Convention* enumerates the following requirements of the State as a person of international law:

(a) A permanent population

(b) A defined territory

(c) Government

(d) Capacity to enter into relations with other States

(a) POPULATION

To constitute a State, first of all, there must be people. People are an aggregate of individuals of both sexes who live together as a community. It does not matter whether they are of the same race, colour or creed. A community is not prevented from becoming a State because it includes a minority population. The heterogeneity of population does not by itself constitute an impediment to statehood. There is no minimum limit to the size of a State's population. The Vatican City has even fewer permanent residents. The rule requiring States to have a permanent population does not relate to the nationality of that population." The grant of nationality is a matter of domestic legislation and falls within the domain of municipal law and not international law. Nationality is thus dependent on statehood, but the reverse does not appear to be true.

(b) TERRITORY

Another characteristic of States is to have a territorial basis and thus to enjoy the territorial sovereignty. Territorial sovereignty may be described as the power of a State to exercise an exclusive authority over all persons and things within its territory. In the arbitral award

in the Island of Palamas case15, Judge Max Huber said: "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. The development of the national organization of States during the last few centuries and as a corollary, the development of international law, has established this principle of the exclusive competence of the State in regard to its own territory in such a way as to make the point of departure in settling most questions that concern international relations."The territory of a State is that portion of the earth's surface over which it exercises supreme and exclusive sovereignty. It comprises land territory, territorial waters, national waters and air space over the territory as also the subsoil underneath. Thus territory being a fundamental concept of international law, a State cannot exist without that. The Holy Sea, for example, had long been considered a subject of international law with capacity to make treaties and to send diplomatic representatives. Yet it was not regarded as a State until it achieved a small piece of territory and became the Vatican City after the conclusion of the Lateran Treaty of 192913. There is no rule prescribing the minimum size required of the territory of a State and there are several examples. For instance, Monaco and Nauru, the so-called mini – States, in the present day, "Family of Nations".

(c) GOVERNMENT

Another requirement of statehood is a Government. A government may be defined as, "A political organization by which relations in the community are regulated and through which the rules are upheld". The Government should enjoy habitual obedience of the bulk of the population. For example, in 1920, the Committee of Jurists of the League of Nations reported that Finland was not a State by stating that: "For a considerable time, the conditions required

for the formation of a sovereign State did not exist. In the midst of revolution and anarchy, certain elements essential to the existence of a State were lacking for a fairly considerable period. It is therefore difficult to say on what exact date the Finnish Republic, in the legal sense of the term, actually became a definitely constituted sovereign State. This certainly did not take place until' a stable political organization had been created."

(d) CAPACITY

Capacity to enter into relations with other States referred to in the Montevideo Convention means independence, that is independence in law from the authority of any other State and hence the capacity in law to conduct relations with other States. The concept of independence implies that a State is free to adopt any constitution it likes, is free to deal with its own citizens (either inside or outside its territory) and aliens within its territory, is at liberty to shape its foreign policy, to join any block or adopt a neutral attitude and to conclude agreements with other States or international organizations to suit its interests, without any intervention by other nations.

(e) STABILITY

Though stability is not a requirement in accordance with the generally accepted definition of a State as a prerequisite for state- hood[20], stability "has an obvious rationale". Even if it is not an indispensable attribute, it is "a sometimes important piece of evidence as to the possession of these attributes". Without the existence of a certain measure of stability, the entity will not be viable and able to discharge its international obligations effectively. It is not easy always to predict the stability of a newly born State with certainty.

SELF-DETERMINATION AND THE CRITERIA FOR STATEHOOD

It is the criterion of government which has been most affected by the development of the legal right to self-determination. The traditional exposition of the criterion concentrated upon the stability and effectiveness needed for this factor to be satised, while the representative and democratic nature of the government has also been put forward as a requirement. The evolution of self-determination has affected the standard necessary as far as the actual exercise of authority is concerned, so that it appears a lower level of effectiveness, at least in decolonisation situations, has been accepted. This can be illustrated by reference to a couple of cases.[21]

The former Belgian Congo became independent on 30 June 1960 in the midst of widespread tribal ghting which had spread to the capital. Within a few weeks the Force Publique had mutinied, Belgian troops had intervened and the province of Katanga announced its secession. Notwithstanding the virtual breakdown of government, the Congo was recognised by a large number of states after independence and was admitted to the UN as a member state without opposition. Indeed, at the time of the relevant General Assembly resolution in September 1960, two different factions of the Congo government sought to be accepted by the UN as the legitimate representatives of the state. In the event, the delegation authorised by the head of state was accepted and that of the Prime Minister rejected. A rather different episode occurred with regard to the Portuguese colony of Guinea-Bissau. In 1972, a UN Special Mission was dispatched to the 'liberated areas' of the territory and concluded that the colonial power had lost effective administrative control of large areas of the territory. Foreign observers appeared to accept the claim of the PAIGC, the local liberation movement, to control between two-thirds and three-quarters of the area. The inhabitants of these areas, reported the Mission, supported the PAIGC which was exercising effective *de facto* administrative control.

RECOGNITION

Recognition is a method of accepting certain factual situations and endowing them with legal signicance, but this relationship is a complicated one. In the context of the creation of statehood, recognition may be viewed as constitutive or declaratory. The former theory maintains that it is only through recognition that a state comes into being under international law, whereas the latter approach maintains that once the factual criteria of statehood have been satised, a new state exists as an international person, recognition becoming merely a political and not a legal act in this context.

PLACE OF INDIVIDUALS

The ancient Roman system of dividing everything into personae & *res* is still made in all legal systems. This division, from its beginning, did not necessarily correspond to biological realities; on the contrary, human beings could be regarded as *res,* while institutions could be legal persons. Similarly, under contemporary international law, individuals can be the *res* (i. *e.,* the objects); the *personae* (i. *e.,* the subjects) of international law need not be physical persons. In fact, scarcely any law deals so much with legal persons as the law of nations; this is important to bear in mind while analysing the concept of personality in international law. This being the incontestable nature of international law, it is evident that there is only very little room left for the individual, if any at all, to possess subjectivity under that law. The Genocide Convention constitutes one of the most frequently cited examples. But it is undoubtedly not the only one. Similar provisions exist in other legal instruments with regard to slavery, piracy, satellite piracy, blockade, etc. Further, it is worthy to mention the *Danzig Railway Officials Case*[21a], *in* which, the PCIJ has held that if the intention of the parties was to confer certain rights to third parties, then the court shall not only recognize the rights of such individuals but shall also enforce them.

Finally, it is worth mentioning that individuals may often be parties to international arbitrations (or other special procedures), as is the case with the *Iran - United States Claims Tribunal,* established by the declaration of Algiers, which mainly adjudicates a great number of individual claims against the Islamic Republic of Iran. Many such arbitral tribunals or claims commissions have existed in the past as, for example the United States - Mexican Commissions, whose history goes back to the prior century."

UNIT - II

STATE RESPONSIBILITY

CONTENTS

INTRODUCTION

ILC was established by U.N in 1948. Its main objective is to promote codification of international law and solving problems within both public and private international law. The draft articles are the general conditions under international law for making State responsible for its wrongful actions or omissions, and the legal consequences which arise there from. At ILC's First session in 1949, the Commission selected State responsibility as one of the topics for codification. In 1955, ILC appointed F.V Garcia Amador as Special Rapporteur for the topic. In 1969, the Commission requested Mr. Ago to prepare a report containing the first set of draft Articles. Between 1969 and 1980, Mr. Ago produced eight reports with the Commission Provisionally adopting 35 Articles. This was the origin of the draft articles on State Responsibility. At the 53rd session in 2001 the Commission adopted the entire draft comprising of 59 articles.

Art 1 of the draft article explains state responsibility as 'Every internationally wrongful act of a State entails the International responsibility of that state'. An international wrongful act of a State may consist in one or more actions or omissions or a combination of both. Art 1 states the basic principle that every internationally wrongful act of a State entails its international responsibility. In *Rainbow Warrior case,* the arbitral tribunal stressed that any violation by a State of any obligation of whatever origin gives rise to State responsibility. This case was pertaining to a dispute between New Zealand and France that arose in the aftermath of the sinking of the *Rainbow Warrior ship.* On 10 July 1985, an undercover operation conducted by the French military security service sank the Dutch-registered Greenpeace ship "Rainbow Warrior" berthed in Auckland Harbour. The Greenpeace ship was planning to disrupt French Nuclear tests on the islands of French Polynesia. New Zealand subsequently caught and convicted two members of the French secret forces. The agents, Mafart and Prieur, were extradited and New Zealand sought reparation from the incident. The agents were transferred to a French military facility and subsequently transported to Paris on the basis that they needed medical attention. This dispute was brought before an arbitral tribunal in which New Zealand demanded a declaration that France had breached its obligation and ordered that it return the agents to the facility for the remainder of their sentences.

Article 2 specifies the conditions required to establish the existence of an international wrongful act of the State, i.e. the constituent elements of such and act. Two elements are identified.

First, the conduct in question must be attributable to the State under international law. *Secondly,* the conduct must constitute a breach of an international legal obligation in force for that State at that time. Therefore State responsibility arises from Conduct (as act/omission), attributable to a state, which breaches an international obligation. These elements were referred to in the *United States Diplomatic and Consular Staff in Tehran case* where United States diplomatic offices and personnel were seized by militant revolutionaries in Tehran. The Court decided (1) that Iran has violated obligations owed by it to the United States; (2) that these violations engage Iran's responsibility.

Further the ICJ pointed out that in order to establish State responsibility:

i) It must consider the compatibility of the Iran's international obligation and

ii) How far the acts in question may be attributed to the Iranian State.

Conduct attributable to the State can consist of actions or omissions. For, example, in the *Corfu Channel case,* ICJ held that it was a sufficient basis for Albanian responsibility that it knew, or must have known, of the presence of the mined in its territorial waters and did nothing to warn third States of their presence. So Albania is responsible for omitting to perform an international obligation. It is also a generally accepted principle that national law is no defence to an international obligation.

This was explained in the *S.S. Wimbledon case* where the PCIJ expressly recognised this principle. The facts of the case are as follows: An English ship chartered by French company was taking cargo of ammunition and artillery stores. It arrived at Kiel Canal and was refused permission to pass through due to German neutrality orders. Ship was forced to take longer route. The court observed that a neutrality order issued by an individual State cannot prevail over the provision of treaty of peace. The second condition is that a State is responsible for the conduct of its organs. A State organ includes any person or entity which carries out state function that included any organ with that status under national law.

BREACH:

Art 12 states that there is a breach of an international obligation by a State when,

"an act of that State is not in conformity with what is required of it by that obligation"

Essentials to constitute breach:

- Obligation must be in force for the State at the relevant time. (Art 13)
- Breach may be continuing (Art14)
- A series of actions or omissions may also constitute breach (Art 15)

State responsibility can arise from breaches of bilateral obligations or obligations to the international community as a whole. In the *Gabcikovo Nagymaros case* where Hungry and Slovakia had agreed in 1977 to build and operate a system of locks along the Danube River comprising a dam, reservoir, hydroelectric power plant, and flood control improvements. This project was never completed and both countries underwent changes in their political and economic systems beginning in 1989. Hungary first suspended and then abandoned its part of the works and later gave notice of termination of the treaty. In 1992, Hungary and Slovakia asked the ICJ to decide on the basis of international law whether Hungary was entitled to suspend, and subsequently abandon its part of the works. The ICJ held that when a state has committed an internationally wrongful act its international responsibility is likely to be involved whatever the nature of the obligation it has failed to respect.

SERIOUS BREACH (Art 40 and 41):

In terms of breach, the question of gravity of offence comes up only when deciding the consequences. Further Art 40 and 41 explains about "Serious breaches' of international obligations. Serious breach means "a gross or systematic failure of responsible State to fulfill the obligation.' It means violating the peremptory norms of international law (Juscogens). In the *Barcelonea traction case,* the Court held that an essential distinction must be drawn between the obligation of a State towards the international community as a whole and those arising vis-a-vis another state in the field of diplomatic protection. The former is the concern for all nations. In view of the importance of the rights involved all States can be held to have a legal interest in their protection. This is called obligation *erga omnes.*

CONSEQUENCES OF SUCH BREACH UNDER ART 41:

All States are under a duty:

1. To Co-operate to bring the breach to an end

2. Not to recognize the lawful situation created by such serious breaches.

In the Namibia case, South Africa occupied Namibia under a claim of right to annex the territory but in violation of the Security Council mandate. Such a violation constitutes a serious breach of international obligation since the obligation is erga omnes in character and it is opposable by all States even non-members of U.N.

3. Not to aid or assist such breach.

DEFENCES TAKEN BY THE RESPONSIBLE STATES:

1. CONSENT (Art 20)

If a State has consented to and act then it is not a wrongful act.

Eg. A State consenting to station troops inside its borders, transit through airspace, internal waterways.

2. COUNTER MEASURE (Art 49)

Under limited circumstances States may take unilateral action to secure their rights. The principal form of such self-help is taking counter measures, in invoking counter measure it must be directed against the responsible State only and the main aim is to end the breach.

Eg. The suspension of an international obligation by an injured State in order to induce a wrong doing State to resume compliance with their legal obligation.

3. FORCE MAJEURE (Art 23)

The state can defend itself by stating that there was an irresistible force for an unforeseen event which led to the breaching of an obligation. Secondly actions beyond the control of the State can be excused.

[Eg: stress of weather which may divert State aircraft into the territory of another State]. Thirdly certain events make performance of the obligation materially impossible.

4. DISTRESS (Art 24)

The defence of distress can be invoked where a person whose acts are attributable to the State has no other reasonable way of saving his/her life or lives of other persons entrusted to his/her care.

Eg. It mostly involves cases of aircrafts/ ships entering another State's territory under stress of weather or mechanical failure.

5. NECESSITY (Art 25)

Necessity may not be invoked...unless the act;

a) is the only way for the State to safeguard an essential interest against a grave and imminent peril;

b) does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.

In *Fisheries Jurisdiction case,* Canada took regulatory measures to conserve straddling stocks. They seized a Spanish ship on the high seas. Canada justified its action by saying that measured need to be taken to stop overfishing in that area. So the defence of necessity was invoked here.

CONSEQUENCES OF SUCH BREACH

A. CONTINUED DUTY OF PERFORMANCE (ART 29)

The breach does not extinguish the obligation. For eg. A bilateral treaty has been breached by one State and the mere fact of a breach or even of a repudiation of a treaty does not terminate the treaty.

B. CESSATION OF WRONGFUL ACT (ART 30)

The State responsible for the internationally wrongful act is under an obligation:

- To cease that act if it is continuing,
- To offer appropriate assurances and guarantees of non-repetition if circumstances so require.

In the *Rainbow warrior case* there was a continuing breach by the French government due to its inaction. So there was no act of cessation by the responsible State. The function of Cessation is to put an end to the violation of international law and to safeguard the continuing validity and effectiveness of the underlying primary rule.

C. THE OBLIGATION TO MAKE FULL REPARATION (Art 31)

This can be done in three ways:

i. Restitution (Art 35)

ii. Compensation (Art 36)

iii. Satisfaction (art 37)

i. RESTITUTION (Art 35)

It means 'putting things back as exactly as it was before'. *Factory at Chrozow case* is a good example where there was a dispute between Germany and Poland.

ii. COMPENSATION (Art 36)

It is mainly applied for financially assessable damage where restitution is not possible. The notion of damage includes both material and moral damage. This was elucidated in *Corfu channel case; Gabcikovo Nagymaros case.*

iii. SATISFACTION (Art 37)

This is used in addition or where restitution or compensation is not possible or appropriate i.e if the remedy for those injuries is not financially assessable.

Eg: apology/formal acknowledgement.

STATE RESPONSOBILITY IN INTERNATIONAL DELINQUENCY

State responsibility in International delinquency arises when a State commits a wrongful act on the aliens of another State, either directly or indirectly. The general remedy in such a case is pecuniary compensation. The State is imputed (charged) and is held responsible because its officials failed in their duty to prevent the act from occurring or because the wrong-doer is the State itself. State responsibility begins where imputation ends.

CONDITIONS FOR IMPUTATION

- Wrongful act must have been done by a Government Department / Organ / official of a State against an alien
- Wrongful act should have been done against the principles of International Law.

US v. Mexico (1926) (You Man's case)

In this case there was a riot in Mexico. The mayor of the city ordered Army forces to suppress the riot and disperse the American citizens. The army acted against the orders and fired at the Americans. As a result three Americans were killed. The Mexican government was held responsible for the wrongful acts of the troops. It was imputed against Mexican government that army acted without authority and therefore it was responsible for international delinquency. Subsequently the U.S v. Mexican general claims Commission ordered Mexican government to pay compensation to America.

U.S. v. Iran (1987) (Yeager v. Iran)

Yeager was an American national. He was employed by BHI under a two year contract in Iran. In February 1979, the Islamic revolution took place. The revolutionary guards came to the apartment of Yeager and ordered him to leave the country within 30 minutes. Later he was taken to the Hilton hotel and was detained there for several days. At last he escaped from Iran. He claimed compensation. The Iran – U.S claims Tribunal ordered the Iran government to pay the compensation to Yeager.

STATE RESPONSIBILITY FOR INJURY TO ALIENS

Every state has to protect Aliens nationals under the terms of International Law. The State responsibility changes depending on the circumstances and is of three types:

- State responsibility for the acts of individuals
- State responsibility for acts of mob-violence
- State responsibility for acts of insurgents
- State responsibility for the acts of individuals

When a resident of a state injured an alien national, the resident is to be punished according to the municipal law and the resident is individually responsible to compensate for the loss of the alien national. When the compensation is not sufficient, the alien can approach his home country to initiate a dialogue and claim the full and complete compensation.

US vs. Mexico (1926) (Janes Claim)

Byron Everett Janes, an American was murdered on 10.07.1918 in a mine near EL tigre, Mexico. Carbajal, a Mexican killed that American, while several persons were seeing the incident. Carbajal was not arrested by the Mexican government ever after eight years. The American government claimed compensation on behalf of the deceased wife and children. The U.S- Mexican general claims commissions passed and award ordering the Mexican government to pay compensation.

STATE RESPONSIBILITY FOR ACTS OF MOB-VIOLENCE

According to the Calvo Doctrine propounded by Calvo, no State is liable to pay any compensation to the injured / suffered alien at time of civil war of a State. However, every State should advice to its nationals not to visit certain countries and certain areas from time to time.

Example: The US government releases travel advisories to avoid travel to certain countries because of some specific reasons.

Great Britain vs. US (1925) (Zafiro Claim)

A war broke out between Spain and U.S in 1898 in phillipines. The Zafiro, a private ship with Chinese crew was attacked and partly looted by American navy. Later Filipino insurgents attacked and looted Zafiro. After these two incidents the Chinese crew looted the remaining belongings. The British government claimed compensation. The American and British Claims Arbitration Tribunal dismissed the claim holding that it was not possible to ascertain the portions of damage done by three lootings.

STATE RESPONSIBILITY FOR ACTS OF GOVERNMENT ORGANS

State Responsibility for acts of Government organs (Departments, Institutions pr officers) is direct. Hence the State Government has to pay compensation to the alien.

GERMANY VS. POLAND (1928) (CHORZOW FACTORY CASE)

There was a German factory situated at Chrozow in Upper Silesia. The Poland government expropriated that factory. Germany claimed compensation as an indemnity for the damage caused. It also contended that Poland acted against the spirit of the Geneva Convention 1922. The PCIJ gave its judgement in favour of Germany.

STATE RESPONSIBILITY FOR CONTRACTS WITH FOREIGNERS

State Responsibility for contracts made with other States or with foreigners on a commercial basis is valid. Hence a breach of contract allows the foreigner to ask for compensation according to the municipal law. When the municipal law fails to compensate properly, the foreigner can seek help to initiate a legal proceeding at the International Court of Justice through his home state.

U.S VS. GREAT BRITAIN (1924) (Union Bridge Company claim)

A war broke between Great Britain and Orange Free State of U.S.A. in 1899. The Union Bridge company supplied certain materials to Port Elizabeth under a contract with the government of Orange Free State. The officials of Orange Free State removed the materials and sold them without taking the consent of the company. The company claimed for damages. The American and British claims Tribunal gave its award in favour of the company.

STATE RESPONSIBILITY FOR BREACH OF TREATY

The state is held responsible for breach of a treaty it entered with other States. The degree of responsibility differs from case to case.

I Am Alone Ship Case (1928)

Certain Americans purchased a British ship known as 'I Am Alone' and got it registered in Canada and used it for smuggling liquor. There was liquor treaty between U.S.A and U.K. In September 1928 the American officers fired and sunk the vessel 'I Am Alone' after chasing at a distance of 200 miles away from American territory in the high seas. The Canada government sued America for its wrongful act. The U.S – Cnanada Compensation tribunal awarded compensation to Canada and held America liable.

CONCLUSION

Thus the codification of the draft articles on Responsibility of States for Internationally Wrongful Acts has not been accomplished yet. But the ICJ has relied upon these articles in its judgments. The law of State responsibility is still in the nascent stage of development and steps must be taken to adopt it into the mainstream codified law.

NATIONALITY

CONTENTS

1. Definition and meaning
2. Modes of acquisition of Nationality
3. Nottebohm's Case
4. Loss of Nationality

DEFINITION AND MEANING

Nationality may be defined ".....as the legal status of membership of the collectively of individuals whose acts, decisions and policy are vouchsafed through the legal concept of the State representing those individuals".[112] Fenwick defines the term 'Nationality' in the following words; "Nationality" may be defined as the bond which unites a person to a given State which constitutes his membership in the particular State, which gives him a claim to the protection of that State and which subjects him to the obligation created by the laws of that State".[113]

A Similar definition was given by the International Court of Justice in *Nottebohm case* (Second phase).[114] According to the World Court under international Law, nationality is "a legal bond having as its basis a social fact of attachment, genuine connection of existence and sentiments together with the existence of reciprocal rights and duties. It may be said to constitute a juridical expression of the fact that the individual upon whom it is conferred either directly by the law or as a result of an act of the authorities, is in fact more closely connected with the population of State conferring nationality than with that of any other State".

As pointed out by Starke, the laws relating to nationality have following importance under international law:

- The protection of rights of diplomatic agents is the consequence of nationality.
- If a State does not prevent offences of its nationals or allows them to commit such harmful acts as might affect other States, then that State shall be responsible for the acts committed by such a person.
- Ordinarily, States do not refuse to take the persons of their nationality. By nationality we may mean loyalty towards particular State.
- Nationality may also mean that the national of a State may be compelled to do military service for the State.
- Yet another effect of nationality is that the State can refuse to extradite its own nationals.
- According to the practice of large number of States during war, enemy character is determined on the basis of nationality.
- States frequently exercise jurisdiction over criminal and other matters over the persons of their nationality.

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[112] J.G.Strake, Introduction to international Law, Tenth Edition (Butterworths,Singapore,1989)p.340.
[113] .Charcles G.Genwick, International Law (Third Indian Reprint,1971),pp301-302.
[114] I.C.J.Rep.(1955),at p.23.

MODES OF ACQUISITION OF NATIONALITY[115]

Following are the modes of acquisition of nationality:

1. By Birth.

2.Naturalisation[116] - When a person living in a foreign State for a long time acquires the citizenship of that State then it is said to the state of nationality acquired through naturalization.

NOTTEBOHM AND THE PRINCIPLE OF EFFECTIVE NATIONALITY

The case involved proceedings by Liechtenstein on behalf of Nottebohm, a naturalized citizen of Liechtenstein, for damages arising from the acts of Guatemala. The Court ruled the claim inadmissible, holding that Nottebohm lacked the real and effective links with Liechtenstein on which Liechtenstein could exercise diplomatic protection on his behalf:

Facts – Born in 1881 in Germany Friedrich Nottebohm went to Guatemala in 1905. He has German nationality by birth and remained a German national until 1939. Since 1905 he resided in Guatemala where he carried on the business of banking, commerce and plantation. But he continued his business relations with Germany and went to Germany several times. After 1931 he visited his brother who resided in Lichtenstein. In 1938 he left Guatemala. After reaching Lichtenstein, he through his attorney, submitted an application for naturalization as a citizen of Lichtenstein, and the same was granted on 13 October 1939. Thereafter he conducted himself exclusively as a national of Lichtenstein, particularly with regard to Guatemala. He returned to Guatemala at the beginning of 1940 on Lichtenstein passport and in Guatemala his change of nationality was enrolled on the register of aliens. As a result of war measures his property was seized in 1943 and he was arrested by Guatemalan authorities and handed over to the armed forces of the U.S. in Guatemala. Later on, he was deported to the U.S and interned there for more than two years. In 1944, as many as 57 legal proceedings were started against him in Guatemala obviously to confiscate all his properties. After his release form internment in the U.S. he wanted to go to Guatemala to oppose cases filed against him but he was refused readmission to Guatemala. In 1946 he went to Lichtenstein and lived there thereafter. In 1949 his properties in Guatemala were confiscated under the law of Guatemala.

After having been domiciled in Lichtenstein for five years, Lichtenstein espousing his case, filed a case in the International court of Justice on 11 December 1951. By its judgment dated 18 November 1953, the court rejected the preliminary objection of Guatemala against the jurisdiction of the Court.. In the second phase the court considered only admissibility of claims (of reparation summing into ten millions Swiss Frances) and held by a majority of eleven to three that Lichtenstein was not entitled to extend its protection vis-à-vis Guatemala. Thus the International court of Justice rejected the claims made by Lichtenstein espousing the case of Nottebohm to be inadmissible. Further, the World Court had to decide whether by the fact of grant of nationality by the naturalization to Nottebohm by Lichtenstein would directly entail an obligation on the part of Guatemala to recognize Lichtenstein's right to exercise its protection over Nottebohm. Propounding the principle of ***effective nationality,*** the World court observed:

"It must ascertain whether the factual connection between Nottebohm and Lichtenstein in the period preceding, contemporaneous with and following his naturalization appears to be sufficiently close, so preponderant in relation to any connection which may have existed between him and any other State, that it is possible to regard the nationality conferred upon him as real and effective as the exact juridical expression of a social fact, of a connection which existed previously or came into existence thereafter.[117]

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[115] .see also for P.C.S (!971), Q.No.7(a); P.C.S.(1968), Q.No.8;P.c.S.(1981), Q.Note.8(a);P.C.S.(1988), Q.7; C.S.E.(1993)Q.8(D)

[116] .See also for P.C.S.(1975),Q.no.2(c); C.S.E (1985), Q.No.5 (a)

[117] The Court further observed: "In order to decide upon the admissibility of the application, the Court must ascertain whether the nationality conferred on Nottebohm by Lichtenstein by means of a naturalization which took place in circumstances which have been described, can be validly invoked as against Guatemala, whether it bestows upon Lichtenstein a sufficient title to the exercise of protection in respect of Nottebohm as against Guatemala.... What is involved is not recognition for all purposes but merely for the purposes of the admissibility of the application and secondly, that what is involved is not recognition by all States but only by Guatemala." Ibid., at 16-17, see also p.20

The Court noted that Guatemala was the main centre of Nottebohm's business and the remained there for as many as 34 years. Even after his removal in 1943 as a result of war measures Guatemala remained the main seat of his business. As compared to this, in connection with Lichtenstein were extremely tenors. At the time of his application for naturalization, he had neither any settled abode nor had resided in that country for a long time. Nor did he intend to transfer his business activities to Lichtenstein. Applying the above principle the Court held that Nottebohm did not enjoy the nationality of Lichtenstein. The Court said that it was the bond of nationality between a State and an individual which alone conferred upon the State the right to put forward claim on his behalf on the international plane, the grant of nationality was entitled to recognition by other States only if it represented a genuine connection between the individual and the State granting its nationality. Nottebohm's nationality was not based on any genuine prior link with Lichtenstein and the object of his naturalization was to enable him to acquire the status of a neutral national in time of war. On the basis of these reasons, the Court held that Lichtenstein was not entitled to espouse his case and put forward an international claim on his behalf against Guatemala.

3. By Resumption – Sometimes it so happens that a person may lose his nationality because of certain reasons. Subsequently, he may resume his nationality after fulfilling certain conditions.

4. By Subjugation – When a State is defeated or conquered; all the citizens acquire the nationality of the conquering State.

5. Cession - When a State has been ceded in another State, all the people of the territory acquire nationality. For example, if a person is appointed in the public service of another State, he acquires the nationality of that State.

Loss of Nationality[118]

1. By Release
2. By deprivation
3. Long residence Abroad
4. By Renunciation
5. Substitution.

[1] See, for P.C.S.(1971), Q.No.7(b); P.C.S.(1988),Q-7.

LAW OF EXTRADITION

CONTENTS

DEFINITION

Extradition is the formal process whereby a fugitive offender is surrendered to the State in which an offense was allegedly committed in order to stand trial or serve a sentence. Extradition was defined by the court of the United States through Chief Justice Fuller as follows:"The surrender by one nation to another of an individual accused or convicted of an offence outside of its own territory and within the territorial jurisdiction of the other, which, being competent to try and punish him, demands the surrender."[119]

Oppenheim's International law defines Extradition as, "Extradition is a delivery of an accused or a convicted individual to the State on whose territory he is alleged to have committed or to have been convicted of a crime, by the State on whose territory the alleged criminal happens to be for the time."[120]

This law is undoubtedly based on the broad principle that a criminal should not escape from the clutches of law. So it becomes the duty of every nation to afford to another State necessary assistance to bring a criminal/convict to the criminal justice system of such State. In a civilized community as it is the responsibility of every State to bring the guilty of crimes to justice. Extradition is an accepted legal process which is generally adopted by the States to bring such criminals back and acquire jurisdiction over fugitives in order to preserve peace, law, order and security within their State. The convenience of trying crimes in the country where they were committed is obvious. The State on whose territory the crime has been committed is best able to try the offender because it is much easier to transport the criminal to the place of his offence than to carry all the witnesses and proofs to some other country where the trial is to be held. So the extradition of fugitive is necessary to bring the offender to justice.

IMPORTANCE OF INTERNATIONAL EXTRADITION

Extradition is a great step towards international cooperation in the suppression of crime.[121] There is no general rule of International law that requires a State to surrender fugitive offenders and extradition arrangements proceed on the basis of a formal treaty or a reciprocal agreement between States. The increase in the mobility of suspects has resulted in the increased willingness of States to use this form of mutual legal assistance to enforce their domestic criminal law. While United States continues to prefer bilateral treaties as a legal basis for extradition, European States are increasingly reliant upon multilateral regional treaties. The process of extradition which is founded on the concept of reciprocity, comity and respect for differences in other jurisdictions, aims to further international cooperation in criminal justice matters and strengthens domestic law enforcement.

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[119] *Terlinder v. Ames* 184 US Reports 270. p.289.
[120] Oppenheim, International law, 8th edi, vol.I , p.696.
[121] See R.C. Hingorani, The Indian extradition law, 1969, p.5.

HISTORY OF EXTRADITION

Fugitive offenders ought to be returned by extradition and the practice has a long history which has been a subject of extensive research by different scholars.[122] The evolution of the subject for the past two centuries through practice and comment, of statute and case law are distinct and sufficient, for the understanding of the historical development of extradition law and also it provides insights into some of the present problems.

Writers agree that the first treaty dealing with extradition was concluded in 1280 BC by Ramese II, the pharaoh of Egypt and the Hittite Prince Hattusili III.[123] This treaty applied to the surrender of 'great man', which has been taken to refer to political offenders and not criminals; extradition treaties today, on the other hand, specifically exempt political offenders from surrender. Blakesley has noted,[124] even if the term was unknown, extradition was in use in Pre Christian times with very few procedures of today were incorporated. Usually the 'diplomatic request' was accompanied by a threat of war if the fugitive were not to be surrendered. Shortly after the agreement between the Egyptians and the Hittites, one finds extradition taking place, if rarely, in ancient Israel, and the Hindu code of Manu also made provision there for. Moreover the whole tenor of these procedures indicates the system was designed to return common criminals as well as 'great men.' The Romans also practiced extradition, at least up to about 100 B.C.[125] Thus extradition was known in ancient times though its practice would bear little relation to the system in operation today. For the period of the dark ages there is little available evidence one way or the other about the practice of extradition; nevertheless, a treaty concluded in the 10th century by the rulers at Byzantium and the princes of Kiev did allow for it.[126]

Most likely the first treat that dealt with extradition in Europe was made in 1174 between England and Scotland. Similar to most extradition treaties of the pre modern period, extradition was but one issue in a comprehensive interstate agreement. In continental Europe, France was providing for the extradition of common criminals as early as 1376.[127] Although even before then, it concluded a treaty with England in 1303 that allowed for the handing over of political opponents of the requesting State. Earlier writers have said that English extradition up to 1794 was generally exercised on an adhoc basis for there were very few treaties[128] and that it was only used to return political offenders.[129] But O' Higgins[130] has shown that many treaties contained provisions dealing with extradition during the middle ages and that all types of offender were returned, usually only if such a treaty provision existed; the Anglo Dutch Treaty of 1662, even though primarily designed to obtain a return of political enemies also allowed for the return of any other offender requested.

Nevertheless with regard to continental European treaties, where flight across a border was easy, the position seems to have been closer to present practice. The modern law of extradition started to evolve

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[122] Shearer, Extradition in International law. p.5-19, (1971). O' Higgins, The History of extradition in British Practice, 13. IND YB INT'L AFF 78 (1964). Blakesley, *The practice of Extradition from Antiquity to Modern, France and the United States. A brief History,* 4 BC Int'L & comparative L J 39 (1981). Blakesley actually considers the whole history of extradition, not just French and American, although his review does skip from pre Christian Extradition arrangements to those of medieval times.),Cf, Geoff Gilbert, Transnational fugitive offenders in International law- Extradition and other mechanisms, (International studies in human rights, vol 55.) 1998.

[123] I.A. Shearer, supra note 45, p.5; Kai I Rebane, 'Extradition and Individual Rights: The need for an International criminal court to safeguard Individual Rights, 19 Fordham Int'LJ 1636, 1645 (1996).

[124] Antiquity, supra 45, at pp 41 et seq.

[125] Sir Edward Clarke, A treatise upon the Law of Extradition, pp. 16-29 (2nd ed., 1874)). Cf, I.A.Shearer, International extradition, 1971.

[126] Schmid. Extradition and International Judicial and Administrative Assistance in penal matters in East European states, 34 Law in E. Europe 167 at p. 174 (1988). Cf, Geoff Gilbert, Transnational fugitive offenders in International law- Extradition and other mechanisms, (International studies in human rights, vol 55.) 1998.p.18.

[127] Blakesley, The practice of Extradition from Antiquity to Modern, France and the United States. A brief History, 4 BC Int'l & comparative L J at p.48. Id.

[128] Clarke, Extradition, pp -18-22(4th edi. 1923).Id.

[129] The Anglo French and Anglo Dutch treaty of 1661 and 1662 , respectively referred to in Blakesley, Antiquity at p.49.

[130] O'Higgins, The History of Extradition in British Practice, 13, IND.YB.INT'L AFF.78 (1964).

during the 18th century in Europe between adjoining States. Since the UK is an island, it was insulated from the rest of the continent's fleeing fugitives and so did not enter into as many extradition treaties at that time. England and United States were naturally protected by geography until the more sophisticated means of transport enabled criminals to move frequently over the border. By comparison, France led the way in concluding extradition treaties[131] and it was truly the founder of modern extradition practice. Clearly the leading country in the field of extradition from the end of the eighteenth to the nineteenth century was France. The important substantive treaty provisions commonly contained in modern extradition treaties were initiated by France like non extradition of nationals, the exception of political offenders, the concept of specialty, the exception of prescriptive offences and the inclusion of convicted as well as accused offenders all find their beginnings in treaties negotiated by France. When compared with America and Britain, the French courts had not built up a great body of jurisprudence. This was due to the fact that extradition in France (and most of Europe) was for a long time a matter more with in the province of the executive than of the judicial branch of government.[132] However the original creative role was played by the French treaty-makers.

According to the Russian scholar de Martens[133] almost one hundred treaties pertaining to extradition were made during the 18th and early part of the 19th centuries (1718-1830). As might be anticipated these agreements were usually between contiguous States the fugitive would not flee far from home. The ease of movement around the world available today obviously did not exist, but, as others have noted too, this was coupled with the fact that people would ordinarily remain in the community into which they were born all their lives and the arrival of a stranger would not necessarily be welcome. Even if he had committed a crime, the offender would not readily flee because of the loss of livelihood and community that accompanied his fight. Nevertheless, extradition treaties proved increasingly necessary during the 18th century.

The rise of extradition as the appropriate means of dealing with fugitive offenders probably stems from 2 movements also arising in that century. The first is the rise of the nation-state and second the concept of coequal sovereignty in Europe. To assert independent authority and equality in all matters, the emerging States promulgated treaties on various matters as extradition was part of this. The other movement was the development of a burgeoning law of human rights.[134] The emerging States tended to have broken away from the autocratic empires in an attempt to assert individual freedoms, as extradition treaties, by providing a system that regulated the surrender of fugitives, protected those individual freedoms. Now, to say these developments all occurred at once in the law of extradition creating the practice and procedure today would be ludicrous. For instance it took until 1850 for the principle of specialty to be fully worked out in the Franco- Saxon treaty of that year.[135] However the prevailing philosophies of the 18th century shaped the development of extradition law under the unfolding umbrella of International Law. The 18th century ensured that extradition would be the appropriate method of returning fugitive offenders rather than any other system. The 19th century's liberalism developed the detail of the process known now.

The United Kingdom's modern law began in 1794 with the Jay treaty, (Treaty of Amity, commerce and navigation with Great Britain)[136] concluded with the United States. It included many features known in today's treaties, such as the need for a prima facie case and the requisition process being initiated by diplomatic communications. The mid 19th century saw three treaties being concluded[137] with the USA,

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[131] Shearer, Extradition in International law, (1971), at pp 8-11.

[132] Judicial was substituted for executive control by the law of March,10, 1927 arts.10-17: Harvard Research: Extradition, 382. I.A.Shearer, supra note 54, at p.17.

[133] Recueil De Traites, 7vols.1791-1826; Supplements Au Recueil Des Prin (1 Paux Trates, 20 vols.1802-42.see Geoff Gilbert, Transnational fugitive offenders in International law- Extradition and other mechanisms, (International studies in human rights, vol 55.) 1998. p.19.

[134] Best, Humanity in Warfare, pp31 et.seq. (1983). See for example, Thomas Paine, The Rights of Man.

[135] Shearer, Extradition in International law, (1971), at p.18.

[136] I.B.P.S.P.784; 5 MARTENS (I) 640.

[137] USA, 1842 (The Webster- Ash Burton Treaty), 30 B F.S.P. 360; 3 MARTENS (III) 20; France 1843, 31 B.F.S.P 194; 5 Martens (III); Denmark 1862, 54.B.F.S.P 27.

France and Denmark respectively. Each of these treaties was implemented by a separate statute. None of them contained provisions dealing with political offences or the principle of specialty (that is that the fugitive may only be dealt with for the offences for which he was returned), both of which appear in every modern day United Kingdom treaty on extradition. But the Anglo French Treaty and the Webster- Ash Burton Treaty were given the force of law by two Acts of Parliament in 1843. These Acts permitted extradition only for a limited number of serious crimes but were notable in that they contained the requirement for dual criminality. By comparison, France had established extradition relations with not only most of Europe, but also with many emerging States in Latin America.[138] These agreements incorporated most of the provisions seen in the present day extradition treaties.

The most significant treaty of this period was that negotiated with France in 1852 and for the first time in British practice the exemption of political offenders, the non extradition of nationals, the principle of specialty and the resolution of conflicting requisitions was included. But however the treaty did not receive the parliamentary approval in Great Britain. The problems created by land borders meant that fleeing criminals were much more prevalent for France than for the United Kingdom before the end of the 19th century and so extradition treaties were essential if France was to sustain a credible system of criminal justice. As the ease of movement improved however, the UK too had to make extradition arrangements,[139] although even now the UK only surrenders between 30 and 40 fugitive offenders per year. These were often in the form of bilateral treaties. But within the British Empire, as it then was, extradition was governed by the Imperial Fugitive Offenders act 1881 with no treaties at all. When the empire turned into the commonwealth, this less formal system was retained, even though the relationship had changed into one of equal, sovereign States. Functionally, however, the commonwealth scheme is the same as a multilateral treaty. Modern extradition was fully in place by the turn of the century.

GENERAL PRINCIPLES OF EXTRADITION

3.1 EXTRADITION PROCESS - GENERAL PRINCIPLES

Three widely accepted principles of extradition law and procedure may be expressed conveniently in the following simple terms:

(i) DOUBLE CRIMINALITY: A person may be extradited only for conduct which is criminal in both requested and requesting jurisdictions.

(ii) SPECIALTY: A person shall be tried or punished after extradition only for the criminal conduct for which his surrender has been made, unless the requested State after surrender, gives consent to further trial or punishment.

(iii) POLITICAL OFFENCE EXCEPTION: A person who is accused of political crimes shall not be extradited.

PRINCIPLE OF DOUBLE CRIMINALITY: DEFINITION AND PURPOSE:

Double criminality has been a traditional requirement of extradition. Oppenheim defines the principle, also called the rule of dual criminality as follows:

No person is to be extradited whose deed is not a crime according to the criminal law of the State, which is asked to extradite as well as the State, which demands extradition.[140]

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[138] Geoff Gilbert, Transnational fugitive offenders in International law- Extradition and other mechanisms, (International studies in human rights, vol 55.) 1998, p.20.

[139] Until 1995, thirty four of the United Kingdom's 43 extant treaties were concluded between 1870 and 1914 although several of these are now supplanted by the European extradition convention 1957, ETS 24.

[140] L.Oppenheim, International law, Vol.1, eighth edition, 1955, London, p.701.

This protection limits extradition to those crimes, which are punishable by the laws of both of the contracting parties. It is well recognized that the right of an individual to his personal liberty, in so far as he does not transgress substantive law of the realm or infringe the legal rights of others, is irrefutable and the person so deprived of his liberty has access to the courts to protect him from any violation of that right. Hence, criminality of the act or acts charged must be proved or determined in accordance with the national laws of the place where the fugitive or the person so charged is apprehended or detained[141] because the executive does not have the prerogative to deprive an individual of his liberty arbitrarily in the absence of a positive law and without due process of law. The general rule therefore is that the offence in respect of which extradition is requested must be an extraditable offence not only under the law of the requesting State but also under the law of the requested State. Extraditable offences in treaties may be designated and achieved by one of two methods, enumerative or eliminative.[142]

1. The enumerative method, by which the offenses are named and defined, has a limitative effect, confining the application of the treaty to stated offences.
2. Eliminative method, which is indicative rather than limitative, specifies as extraditable those offences which under the laws of both States are punishable by an agreed degree of severity, usually a minimum penalty.

"The Broad Conduct Test": The Rule in Nielsen and Mccaffery[143]

Nielsen was charged in Denmark with "breach of trust" which appeared to be a broad continuing offence of dishonesty by a person occupying a fiduciary position as a company director, and which embraces many accusations of individual acts. In 1984 the House of Lords held conclusively that in order to determine whether a person who was alleged to have committed an "extradition crime" in a foreign State with which a bilateral arrangement had been made, it was necessary to look only at the conduct disclosed in the evidence supplied by the requesting State in or pursuant to its request.

It would be relevant to refer to the recent decision of the Canadian Supreme court on double criminality in *Canada (Justice) v. Fischbacher*[144] *Per* McLachlin, C.J.,and Binnie, LeBel, Deschamps, Abella, Charron, Rothstein and Cromwell JJ: The principle of double criminality codified in s. 3 of the Extradition Act has two components, one foreign and one domestic. The foreign component requires that the offence upon which extradition is requested be criminal in the requesting State and carry the specified penalty. The domestic aspect requires that the conduct underlying the foreign offence amount to a criminal offence under Canadian law with the specified penalty. Consistent with prevailing international practice and the principle of comity, Canada has adopted a conductbased approach to determining double criminality and, as a result, it is not necessary that the Canadian offence described in the authority to proceed or the committal order "match" the foreign offence for which the person is sought or surrendered in name or in terms of its constituent elements; it is the essence of the offence that is important under the conductbased approach.

RULE OF SPECIALTY - DEFINITION AND MEANING

A decision on the extradition request by the requested State is a final verdict and is not open to challenge in the courts of the requesting State. A fugitive criminal brought back to a country cannot be tried for any other offences except the one for which he has been extradited. This is known as the rule of Specialty.[145]

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[141] Satyadeva Bedi, Extradition in International law and practice (1991), vol.1, p.125.

[142] M.Cheriff Bassiouni, International Extradition United States law and practice, 4th edi, (2002).

[143] Re Nielsen (1984) A.C.606; Government of the USA v. Mccaffery (1984) 1 WLR 867.

[144] 2009 SCC 46, [2009] 3 S.C.R. 170.

[145]. This word is also written as "speciality," which may be the preferred spelling because it resembles more closely the French term "specialite," the original term for the doctrine. See Christopher L. Blakesley, *Extradition between France and the United States: An Exercise in Comparative and International Law,* 13 Vand. J. Transnat'l L. 653, 706 (1980); Christopher J. Morvillo, Note, *Individual Rights and the Doctrine of Speciality: The Deterioration of United States v. Rauscher,* 14 Fordham Int'l L.J. 987,(1990-91). The Supreme Court, however, has used the term "specialty." See *Van cauwenberghe v. Biard,* 486 U.S. 517,525-26, Cf. Jacques Semmelman, *The Doctrine of Specialty in the Federal Courts: Making Sense of United States v. Rauscher,* 1993, (34 Va. J. Int'l L. 71).

When a person is extradited for a particular crime, he can be tried for that crime only. This protection is designed to limit prosecutions in the requesting country, after extradition specifically to those for which extradition was officially requested or granted (unless, the extradited commits further offences after his arrival in the requesting country). Specialty's origin is in the French word specialite, which means particularity. Specialty is frequently referred to as a principle because it is so broadly recognized in international law and practice that it has become a rule of customary international law.[146] The U.S. Supreme Court first recognized the doctrine of specialty in *US v. Rauscher.* In that case, the U.S. asked for the extradition of William Rauscher, an officer on an American vessel at the time of his alleged crimes, to stand trial on a charge of murder on the high seas from Great Britain. Great Britain agreed. Once Rauscher arrived in the United States, he was also charged with infliction of cruel and unusual punishment, a charge not included in the extradition request[147] from the surrendering country, from which the defendant's treaty rights are derived.[148] The court stated that it is unreasonable to infer that the asylum country would deliver an accused to be prosecuted by the requesting government without any limitation, implied or otherwise.[149]

POLITICAL OFFENCE EXCEPTION- ORIGIN AND BACKGROUND

Recognition of political offence as worthy of exemption from extradition is of a comparatively recent origin, dating largely from the time of French Revolution, although the principle is found to have been asserted in a publication of 1755.[150] The purpose behind POE is to reconcile the purposes of extradition[151] i.e., the right to promote political change by balancing the interests of the person sought, the requesting and requested States, and the international legal order. In fact, until the French Revolution in 1789, the primary purpose of extradition had been to expedite the return of political offenders. The primary interest of the medieval State was the preservation of its political system. Consequently arrangements were made for their extradition. Both the exclusion of political offenders and the inclusion of common criminals are relatively recent additions to extradition practice.[152] Thus Grotius mentioned that the right of demanding for punishment those who have fled beyond the frontier had been exercised in the majority of the States of Europe only with respect to those crimes that affected the public weal, or which manifested extraordinary wickedness.[153] Hobbes recommended more severe penalty for political crimes than for ordinary crimes, the former being graver than the latter.[154]

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[146] M.Cheriff Bassiouni , International Extradition United States law and practice, 4th edi,2002, p.512.

[147] *Rauscher,* 119 US at 409.

[148] Even courts that believe defendants should be given broad standing rights concede that any rights defendants obtained from treaties are derivative in nature, see, for example *Leighnor v. Turner,* 884 F 2d 385, 389(8th cir 1989).

[149] *United States v. Rauscher,* 119 U.S. 407,424 (1886). It is unreasonable, however, to expect requested countries to oversee every prosecution resulting from extradition. Morvillo, *Individual Rights and the Doctrine of Specialty: The Deterioration of United States v. Rauscher,* 14 Fordham Int'l L.J., at 1023 (stating requested countries rely on requesting countries to fulfill treaty obligations)

[150] F.Hutcheson, System philosophy, Book 3, ch.10, s.9, 105(1755) also Oppenheim, International law, ed. b H.Lauterpacht, Vol.I. 704 (8th ed.,1955). Cf,Prakash Sinha, Asylum and International law, 1971, p.170.

[151] Extradition serves three purposes. First, it allows international fugitives to be brought to justice, see Harvard Research, Research in International Law and Draft Convention on Extradition, art. 5(b), 29 Am. J. Int'l L. 1, 22, 112-13 (Supp. 1935) at 34.

[152] C. Van den Wijngaert, The Political Offence Exception to Extradition (1980), at 5.

[153] H.Grotius, De Jure Belliac Pacis Libri Tres, 1625, Book-II, ch.21, s.5(5), translated by F.W.Kelsey (1925). Prakash sinha, Asylum and International law, 1971, p.171.

[154] Hobbes, Leviathan, 236 (ed.by W.G.P.Smith, 1947).Id.

ASYLUM IN INTERNATIONAL LAW

CONTENTS

1. Meaning
2. Basis of Asylum
3. Kinds of Asylum

MEANING

Asylum is as old as the history of mankind. The word "Asylum" is of Latin origin, which derives from the Greek word Asylon, meaning a place which shall not be violated. Historically, asylum has been regarded as a place of refuge where one can enjoy the protection of the state that granted asylum. The concept of asylum under international law involves two elements, firstly shelter which is more than merely temporary refuge. Second a degree of active protection on the part of the authorities in control of the territory of asylum.[155] The Institute of International Law at its Bath session in 1950, defined asylum as "the protection which a state grants on its territory, or in some other places under control of certain of its organs, to a person who comes to seek it."[156]

The right of asylum is a collection of certain manifestation of state conduct, these are

- to admit a person to its territory,
- to allow the person to sojourn there,
- to refrain from expelling person,
- to refrain from extraditing person to refrain from prosecuting punishing or otherwise restricting the person's liberty.[157]

BASIS OF ASYLUM IN INTERNATIONAL LAW

States' right to grant asylum to a person, flows from the principle of sovereignty. State has right to control everything within its territory. This type of jurisdiction is termed territorial jurisdiction. It denotes that state enjoys civil as well as criminal jurisdiction over all persons and things within its boundary. To exercise jurisdiction is a right of a state and it's also manifestation of sovereignty. The Draft Declaration on the Rights and Duties of states prepared by the International Law Commission in the year 1949 laid down that every state has the right to exercise jurisdiction over all persons and things therein. The Draft Convention on Territorial Asylum adopted by the General Assembly in 1974 has recognized that granting asylum is a sovereign right of a state.[158] The right of territorial jurisdiction extends to embassies, legations, vessels and aircrafts. States are free to impose restriction on their territorial jurisdictional right. Thus, states may conclude treaties for extradition of fugitive criminal. If two states conclude an extradition treaty, legal obligation arise on the part of the states not to grant asylum and extradite in accordance to rules laid down in the extradition treaty.

KINDS OF ASYLUM

Asylum maybe territorial or internal, i.e., granted by a state within its territory, or it may be granted extra territorial; which is granted within the premises of legations, consular premises, international headquarters and warships.

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[155] Starke 'International Law', 11th ed. 1994.
[156] Institute de Droit International, Session De Bath, Art. 1 of the Resolution.
[157] Roman Boed, The state of the Right of Asylum in International Law, 5 Duke J. Comp. & Int'l L. 1 1994-1995.
[158] Draft Convention on The Territorial Asylum, 1974, Article 1.

TERRITORIAL ASYLUM

When Asylum is granted by a state within its territory, it's called territorial asylum. The right to grant asylum by a state to a person on its own territory proceeds from the principle of state sovereignty. And one of the exhibitions of state sovereignty is exclusive jurisdiction over all people and everything found in the territory. A state has complete right to admit or expel any person found in its territory. The states exercise full discretion in deciding whether asylum is to be granted to a person unless it is bound by any legal obligation to grant asylum to a person. Declaration on Territorial Asylum was adopted by the General Assembly in the year 1967, on December 14th. The Declaration consists of a preamble and four Articles which deal with principles relating to the grant or refusal of asylum.

EXTRATERRITORIAL ASYLUM

When asylum is granted by a state at the places outside its own territory, it's called extraterritorial asylum. According to M'cNair, the term extraterritorial asylum is usually described to those cases in which a state declines to surrender a person demanded who is not upon its own physical territory but is upon one of its public ships laying in foreign territorial waters or upon its diplomatic (or rarely consular) premises within foreign territory.[159] Thus, asylum given within the premises of legations, consular premises and on the warships are instances of extraterritorial asylum.

ASYLUM IN LEGATION

When asylum is given by a state within its premises of embassy situated in foreign countries, it's known as asylum in legation or diplomatic asylum. Asylum on legation is based on the principle of extraterritoriality, a fiction in which legation premises were regarded as representing an extension of the sending state's territory within the territory of receiving states.[160] Asylum in consulates or consular premises – Similar principles as well as exceptions would apply to consulates or consular premises. The crucial difference between the legations and consulates is that recognized immunities attach to the legations, while the same is not true for consulates. It's to be noted that even immunities of legations don't include general right of asylum.

ASYLUM IN WARSHIPS

One theory is that the warships are extraterritorial. According to Oppenheim, "public ship is floating portion of the flag state.[161] Thus, all persons and goods on board remains under jurisdiction of the flag state even during the stay of her in foreign waters, that maybe in ports or internal waters. According to J.G Starke "Warships and public vessels of foreign states, while in the ports or internal waters of another state are in great measure exempt from the territorial jurisdiction.[162] Public vessels and warships are required to observe the ordinary laws of the port.

ASYLUM IN MERCHANT VESSELS

Merchant vessels don't enjoy any such immunities granted to warships, therefore they are not exempted from the local jurisdiction, thus cannot grant asylum to the local offenders, fleeing from local authorities. There is, therefore a rule that asylum is not granted on merchant vessels.[163] However states may grant asylum if they conclude a treaty to this effect. For example Central American Republics have concluded a contract which binds them to respect the inviolability of the right of asylum abroad the merchant vessels of whatsoever nationality anchored in their waters. However the treaty is only binding upon the signatories.

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[159] M'cNair, 'Extradition and Extraditional Asylum', BYIL VOL. 28, 1951, Page, 172.
[160] M. G. Kaladharan Nayar, The right of Asylum in International law: Its status and prospects, 17 St. Louis U. L.J. 17 1972-1973.
[161] Oppenheim's International Law, Page 764.
[162] Stark's International Law, 11th ed. 1994, Page 203.
[163] O'Connell, 'International Law', Vol. (ii) Page 814.

ASYLUM IN THE PREMISES OF INTERNATIONAL INSTITUTIONS

The Headquarters Agreement of the United Nations in 1946 acknowledged the immunity of the headquarters area and of the buildings and forbids the United States officials from entering without the permission of the Secretary – General.[164] However the Agreement proves that "the United Nations shall prevent the headquarters district from becoming a refuge either for persons who are avoiding arrest under the federal, state, or local law of the United States or are required by the Government of the United States for extradition to another country, or for persons who are endeavoring to avoid service of legal process."[165] But the Headquarters Agreement of the U.N. and of other specialized agencies disclose no general right to international institutions to grant asylum or even refuge in their premises to offenders as against territorial state. However a right to grant temporary refuge in extreme circumstances of danger from mob cannot be ruled out.

ASYLUM AND EXTRADITION

The liberty of state to bestow asylum to a person overlaps to an extent with its liberty to refuse extradition. Stark says "Asylum stops where extradition begins." The relationship between two concepts makes it impossible for either to be considered in isolation. The term extradition has derived from two Latin words ex and traditum. Ordinarily it means 'delivery of criminals' or 'surrender of fugitives'. Extradition can be defined as 'surrender of accused or a convict by the state on whose territory he is found to the state on whose territory he alleged to have committed a crime or to have been convicted of a crime. The practice of extradition is based on some prudence. It's a common desire of every state that serious crimes must not go unpunished. Criminals are extradited as the state on whose territory the crime alleged to have been committed, is always in a better position to try the offender in relation to jurisdictional issues or evidential matters. The international law applies maxim "aut punier, autdedere" which means the offender must be punished by the state if refuge or extradited to the state which is willing to prosecute and punish the offender. The person who is not extradited, is said to have been given asylum. Normally asylum is granted to political offenders, religious and military offenders because the rules of international law prohibit extradition of such persons. The extradition and asylum are two interdependent concepts but the distinction between them must be kept in mind. It's normally considered that extradition process falls within the ambit on international law, whereas the issue of asylum comes within the purview of internal law, an immigration matter. Extradition is to be decided on the basis of treaty binding on the two states concerned or in the absence of the treaty on the basis of customary law or reciprocal relations. Asylum process is deemed to be considered as internal matter and to be decided on national considerations.

[164] Agreement with the United Nations regarding the Headquarters of the United Nations, signed in 26th June, 1947.
[165] Agreement with the United Nations regarding the Headquarters of the United Nations, signed in 26th June, 1947, Article 1 (b)

ACQUISITION AND LOSS OF STATE TERRITORY IN INTERNATIONAL LAW

CONTENTS

MEANING

The acquisition of territory by a state can be more correctly referred to as acquisition of territorial sovereignty, by an existing state and member of the international community over another state. At the very outset it needs to be made clear that the recognition of a new state cannot be considered as acquisition of territory. There are five modes of acquiring territory that have been traditionally distinguished into: cession, occupation, accretion, subjugation and prescription. Before looking into these modes of acquisition which have been derived from Roman law rules on property it is necessary to understand that they are no longer appropriate or applicable. However, these "modes" of acquisition of territory still help us explain how countries got their titles. Also these methods are divided into two categories: original and derivative mode of acquisition. This division is on the basis of whether the title given to the state is derived from a prior owner-state or not. Hence, only cession is a derivative mode.

CESSION

Cession of territory is a transfer of sovereignty from one sovereign to another. Its basis lies in the intention of the concerned parties to transfer sovereignty over the territory in question, and it rests on the principle that the right of transferring its territory is a fundamental attribute of the sovereignty of a State. It occurs by means of an agreement between the ceding and the acquiring States. The cession may comprise a portion of the territory of the ceding State or the totality of its territory. In the latter case, the ceding State disappears and merges into the acquiring State.

Cession of territory may be voluntary as a result of a purchase, an exchange, a gift, a voluntary merger, or any other voluntary manner, or it may be made under compulsion as a result of a war or any use of force against the ceding State. History provides a great number of examples of cession. Examples of voluntary cession are the United States' purchase of Alaska from Russia in 1867, the exchange of a portion of Bessarabia by Romania to Russia in exchange for Dobrudja in 1878, the France's gift of Venice to Italy in 1866, and the voluntary merger of the Republic of Texas into the United States in 1795. Examples of cession as a result of a war are the cession to Germany by France of the region of Alsace- Lorraine in 1871, and the merger of Korea into Japan in 1910.

However, Article 52 of the Vienna Convention on the Law of Treaties says that if the conclusion of a treaty has been procured by threat or use of force in violation of the principles of International Law embodied in the Charter of the United Nations, then it is void. Hence, such forceful signing of agreements to cede territories would be invalid today.

OCCUPATION

Occupation is a state's intentional claim of sovereignty over territory treated by the international community as terra nullius, or territory that does not belong to any other state. Jennings writes it is "the appropriation by a state of a territory, which is not at the time subject to the sovereignty of any other state." Article 42 of The Hague Regulations of 1907 defines occupation as follows: "Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised." The only territory which can be the object of occupation is that which doesn't already belong to any state, whether it is unhabited, or inhabited by persons whose community is not considered to be a state. In another a scenario, a territory which belonged to a state, but was afterwards abandoned maybe occupied later by another state. A territory, the sovereignty over which is unclear or disputed cannot become an object of occupation. Acquiring states substantiate their claim by establishing administration over the territory.

In the Eastern Greenland case[166], the International Court of Justice stated that claims to sovereignty "based not upon some particular act or title such as a treaty of cession but merely upon continued display of authority, involve two elements, each of which must be shown to exist: the intention and will to act as sovereign, and some actual exercise or display of such authority."

ISLAND OF PALAMAS ARBITRATION[167]

Both the United States laid claim to the ownership of the Island of Palamas. While the U.S. maintained that it was part of the Philippines, the Netherlands claimed it as their own. The claim of the U.S. was back up with the fact that the islands had been ceded by Spain by the Treaty of Paris in 1898, and as successor to the rights of Spain over the Philippines, it based its claim of title in the first place on discovery. On the part of the Netherlands, they claimed to have possessed and exercised rights of sovereignty over the island from 1677 or earlier to the present. Can a title which is inchoate prevail over a definite title found on the continuous and peaceful display of sovereignty?

Held No, that a title that is inchoate cannot prevail over a definite title found on the continuous and peaceful display of sovereignty. The peaceful and continuous display of territorial sovereignty is as good as title. However, discovery alone without subsequent act cannot suffice to prove sovereignty over the island. The territorial sovereignty of the Netherlands was not contested by anyone from 1700 to 1906. The title of discovery at best an inchoate title does not therefore prevail over the Netherlands claims of sovereignty.

Possession and Administration are the two essential factors required to constitute an effective occupation. For possession the territory must be taken under the state's sway (corpus) and with the intention of acquiring sovereignty over it (animus). Possession generally involves a settlement and some sort of formal act which announces and shows intention of the occupying state. After taking possession, the state has to establish an administrative system within a reasonable period of time. Administrative function is necessary because only then it is the possessor state exercising sovereignty over the territory.

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[166] Legal Status of Eastern Greenland, (Den. v. Nor.), 1933 P.C.I.J. (ser. A/B) No. 53
[167] PCA 2 U.N. Rep. Int'l Arb.Awards 829 (1928).

ACCRETION

Accretion is a geographical process by which new land is formed mainly through natural causes and becomes attached to existing land. Examples of such a process are the creation of islands in a river mouth, the drying up or the change in the course of a boundary river, or the emerging of island after the eruption of an under-sea volcano. When the new land comes into being within the territory of a State, it forms part of its territory. However, in case of a drying or shifting of a boundary river, the general rule of International Law is that if the change is gradual and slight, the boundary may be shifted, but if the change is violent and excessive, the boundary stays at the same point along the original river bed.

Where a new territory is added, mainly through natural causes, to territory already under the sovereignty of the acquiring State, the acquisition and title to this territory need no formal act or assertion on part of the acquiring State. An interesting case in this respect is that of The Anna. During war, the British privateer Minerva captured the Spanish vessel Anna near the mouth of the river Mississippi. When it was brought to British Prize court, the United States claimed her on the ground that she was captured within American territorial sea. Lord Stow ell gave the claim to the Americans because though the capture actually took three miles off the coast of the continent, the place of capture was within 3 miles of some mud islands composed of earth and trees which has drifted down the sea.

SUBJUGATION/ ANNEXATION

Subjugation is the acquisition of territory by conquest followed by annexation. This direct mode of acquisition is often called title by conquest. In those days war wasn't illegal and so making of war was recognised as a sovereign right. There is a very fine distinction between cession and subjugation. Like compulsory cession, conquest followed by annexation would transfer territory by compulsion, but unlike cession, it involved no agreement between the concerned parties. In most cases the victors in a war enforced a treaty of cession. Simple title by subjugation is rare. Article 10 of the League of Nations Covenant made it unlawful to wage war for the purpose of acquiring territory. The acquisition of territory through the use of force is also outlawed by the Charter of the United Nations[168], which obliged the member States to refrain from the use of force against the territorial integrity or political independence of any State. This same principle is reaffirmed in the 1970 General Assembly "Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations". This Declaration adds that the territory of a State shall not be the object of acquisition by another State resulting from the threat or use of force, and that no territorial acquisition resulting from such act shall be recognized as legal.It is to be noticed that conquest alone doesn't ipso facto make the conquering state the territorial sovereign of the conquered state. The conqueror has to after firmly establishing the conquest, formally annex the territory once the war had ended.

After the Second World War Germany had surrendered unconditionally as Great Britain, U.S.A, Russia and France signed a joint declaration and assumed 'supreme authority' with respect to Germany. It was stated that the assumption of these powers did not effect annexation of Germany and that her future status would be determined by the four states issuing a declaration. In 1990 Federal Republic of Germany and German Democratic Republic became territory of the German state when the four powers renounced pursuant to agreements their original status as occupants. Although subjugation is an original mode of acquisition, since the sovereignty of the acquiring state is not derived from that of the state formerly sovereign of the territory, the new sovereign is nevertheless the successor of the former. Doctrine and practice suggest that the national status of the subjects of the subjugated state and those domiciled on the annexed territory who remain on the annexed state become ipso facto subjects of the subjugating state by the act of subjugation. A more recent example of annexation would be that of Iraq over Kuwait in 1990.

[168] Art. 2(4) All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

Iraq accused Kuwait of stealing Iraqi oil through slant drilling. The Iraqi invasion and occupation of Kuwait was unanimously condemned by all major world powers. Even countries traditionally considered to be close Iraqi allies, such as France and India, called for immediate withdrawal of all Iraqi forces from Kuwait. On 3 August 1990, the UN Security Council passed Resolution 660[169]condemning the Iraqi invasion of Kuwait and demanding that Iraq unconditionally withdraw all forces deployed in Kuwait.

PRESCRIPTION

Prescription can be defined as 'the acquisition of sovereignty over a territory through continuous and undisturbed exercise of sovereignty over it during such a period as is necessary to create under the influence of historical development the general conviction that the present condition of things is in conformity with the international order'.[170]

A title by prescription to be valid under International Law, it is required that the length of time must be adequate, and the public and peaceful exercise of de facto sovereignty must be continuous. The Possession of Claimant State must be public, in the sense that all interested States can be made aware of it. It must be peaceful and uninterrupted in the sense that the former sovereign must consent to the new sovereign. Such consent may be express or implied from all the relevant circumstances. This means that protests of whatever means by the former sovereign may completely block any claim of prescription. As the requirement of adequate length of time for possession is concerned, there is no consensus on this regard. Thus, the adequacy of the length of period would be decided on a case by case basis. All the circumstances of the case, including the nature of the territory and the absence or presence of any competing claims will be taken into consideration.

Modern authors like to divide Prescription into two types: either 'extinctive' or 'acquisitive'. Prescription used in the sense of extinctive prescription can be similar to "law of limitation". Suppose country A has an International claim against country B but fails to bring it before any international tribunal within a reasonable period of time without any obstruction from country B then, it may be rejected by the tribunal later. This feature as applied to property law says that his substantive rights are not abolished though he cannot enforce them with action anymore. 'Acquisitive Prescription' deals with cases where the original title is invalid or where original title of the territory is impossible to prove. The doctrine says that the party who succeeds in establishing its title gets the substantive rights while those of the former state are abolished.

LOSS OF STATE TERRITORY

The above discussed are the modes of acquiring territory and the same points out the corresponding modes of losing territory. These are cession, dereliction, operation of nature, subjugation, prescription and there is a sixth mode that is Revolt. Loss of territory by subjugation, cession and prescription is pretty straightforward and requires no further explanation. It's simply the corresponding loss of a territory due to the gain of that territory by another state. Revolt on the other hand has been accepted as a mode of losing territory to which there is no corresponding mode of acquisition. There is no hard and fast rule regarding the time when a state which has broken off from another can be established permanently as another state. A revolt however seems to be more of a political issue than a legal mode of loss of territorial sovereignty.

Dereliction as a mode of losing territory corresponds to occupation. Dereliction frees a territory from sovereignty of the present state possessor. When the owner state completely abandons a territory with the intention of withdrawing from it permanently and relinquishing sovereignty over it dereliction is affected. Actual abandonment alone cannot amount to dereliction as it is assumed that the owner will and can retake possession. Hence, just like occupation there has to be an abandonment of territory (corpus) and an intention (animus) to withdraw too.

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[169] Resolution 660 (1990), Adopted by the Security Council at its 2932nd meeting, on 2 August, 1990

[170] Sir R.Jennings and Sir A.Watts, Oppenheim's International Law – Vol.I Peace, 9th ed., Longman 1996, p.706

STATE JURISDICTION

CONTENTS

JURISDICTION IN INTERNATIONAL LAW

The exercise of jurisdiction by a State is an essential attribute of State sovereignty. The State jurisdiction signifies the power of the State to exercise control over persons, Property, acts and events under its national law. This includes the power to prescribe (Prescriptive jurisdiction) and enforce (enforcement jurisdiction) legislative, executive and judicial rules. Every State exercises exclusive jurisdiction within its territory. But international law does not put any limitation on the State's power to exercise jurisdiction beyond its territorial limits. The Permanent Court of International Justice, in the *S.S. Lotus case*[171] laid down that there is no restriction on the exercise of jurisdiction by any State unless that restriction can be shown by the most conclusive evidence to exist as a principle of international law.

BASIS OF JURISDICTION

a. TERRITORIAL JURISDICTION

The power of the State to exercise jurisdiction over persons, property or events occurring within its territory is conceded by International law. It is generally presumed that the laws and statutes of a country are limited to its territory unless a contrary intention appears and an extraterritorial application is established. In the *Lotus case*, the Court observed that:

Jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom of from a convention.

Normally, no problem will arise for an offence of it is either exclusively committed within the State territory or outside that territory. But it becomes problematic if the crime has been planned and set in motion in one State and has its effects in the territory of another State. For example, if A in State X, shoots and kills B in State Y, or if A obtains money by false pretences by means of a letter posted in State X to B in State Y, an offence is probably committed in both the States, depending upon the constituent elements of murder and related offences in the criminal law of each of them.

In such circumstances, the States arrogate to themselves jurisdiction by technically extending the territorial jurisdiction on the basis of subjective territorial principle and objective territorial principle. According to subjective territorial principle, a State has jurisdiction over a crime when it is commenced within the State but completed or consummated abroad. The objective territorial principle applies in reverse order, i.e., when a crime commenced in another State but was completed or consummated with its territory.

[171] PCIJ, Series A, No.10 (1927)

Mubarak Ali Ahmad v. The State of Bombay,[172] the Supreme Court of India observed; " the fastening of criminal liability on a foreigner in respect of culpable acts or omissions in India which are juridically attributable to him notwithstanding that he is corporeally present outside India at the time, is not to give any extra-territorial operation to the law; for it is in respect of and offence whose locality is in India, that the liability is fastened on the person and the punishment is awarded by the law, if his presence in India, for the trial can be secured'.

The principle also received a fillip from the permanent Court of International Justice in the Lotus case. The case originated in a collision on the high seas between the French ship, the Lotus, and the Turkish vessel Boz-Kourt, resulting in the sinking of the latter and the death of eight Turkish nationals. On reaching Constantinople, the French officer of the watch and the Captain of the Boz-Kourt were arrested and convicted with manslaughter by a Turkish Court, France protested and challenged the legality of the Turkish action and by an agreement between the parties, and the dispute was submitted to the permanent Court of International Justice. The majority opinion of the Court, thus, clearly brought the case under the principle of the "objective territorial jurisdiction". On the territorial jurisdiction, the court remarked: Though it is true that in all systems of law the territorial character of criminal law is fundamental, it is equally true that all or nearly all of these systems of law extend their action to offences committed outside the territory of the State which adopts them, and they do so in ways which vary from State to State. The territoriality of criminal law, therefore, is not an absolute principle of international law and by no means coincides with territorial sovereignty.

JURISDICTION ACCORDING TO NATIONALITY PRINCIPLE

Distinct from territorial jurisdiction, a State may exercise jurisdiction on the basis of the nationality of the person involved in a particular legal situation. The person concerned is its national who is either the one which has committed the crime or, is the one who is the victim of the crime. The jurisdiction may be exercised on either of the two grounds; active nationality principle and the passive nationality principle.

1. ACTIVE NATIONALITY PRINCIPLE

A State may exercise civil or criminal jurisdiction over its national on the basis that the nationality is mark of allegiance which the person, charged with the crime, owes to his State of nationality. For this allegiance, the State provides diplomatic protection to its nationals.

2. PASSIVE NATIONALITY PRINCIPLE

A State, may assume extra-territorial jurisdiction over aliens if the person suffering injury or a civil damage is its national. In the *Lotus case* although the Court upheld the Turkish jurisdiction on this ground, it did not delve on the extent of the right of the State to protect its citizens abroad. The provisions similar to Turkish Penal Code are found in the penal codes of several countries, such as Mexico, Brazil, Italy etc. The Harvard Draft Convention, 1935, lists over 20 States making use of passive personality principle.

In the *Cutting case*,[173] the United States Government protested the exercise of jurisdiction by a Mexican Court over Cutting, an American citizen, for an alleged offence of defamation of a Mexican national in Texas, when he visited Mexico. There was no evidence that the alleged libelous article, published in Texas, was circulated in Mexico. The United States maintained that Mexico cannot try Cutting for a crime committed and consummated entirely abroad earlier, merely because the person suffering injury happened to be a Mexican citizen. The trial court convicted Cutting by applying the passive personality

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[172] AIR 1957 SC 857

[173] J.B.Moore, Digest of International law, Vol.III, pp. 228-242 (1996)

principle. The rationale for the exercise of passive personality or nationality jurisdiction is that a State is entitled to protect its national for the injury suffered by them abroad if the territorial State fails to punish the offender and the State of the forum may get hold of him, if he comes there voluntarily or through extradition.

JURISDICTION ACCORDING TO PROTECTIVE PRINCIPLE

A State can assume jurisdiction over aliens for the acts done abroad affecting its security, integrity and independence, including its vital economic interests. International law recognizes such a right which is embodied in the criminal code of many countries. The Anglo-American countries, which oppose the passive personality principle, quite often resort to protective principle to exercise jurisdiction over crimes committed by aliens abroad. In England, the House of Lords upheld the principle in Joyce v. D.P.P.[174] by holding that an alien owing allegiance to the Crown can be tried by British courts for the crime of treason committed abroad. The Court stated that no principle of international law demands. "that a State should ignore the crime of treason committed against it outside its territory. On the contrary, a proper regard for its own security requires that all those who commit that crime, whether they commit it within or without the realm, should be amenable to its laws".

JURISDICTION ACCORDING TO UNIVERSALITY PRINCIPLE

States generally exercise jurisdiction over certain offences regardless of the nationality of the offender or the place of commission of crime. These offences are considered to be against international public policy *(jus cogens)* and they are treated as *delicts jure genium.* Any State may arrest persons committing these crimes and try them under its domestic law. Examples of such crimes are piracy, war crimes and slave trade.

In *Attorney General of the Government of Israel v. Eichmann (Eichmann case),* [175] the principle of universal jurisdiction was relied in part by the Supreme Court of Israel to uphold Eichmann's conviction for war crimes and crimes against humanity committed by him as the Head of the Jewish Office of the German Gestapo, whose actions led to the death of millions of Jews during the Second World war. Universality principle finds expression in a limited way in a number of treaties on matters concerning the international community, such as genocide, drug traffic, trafficking in women and children, counterfeiting of currency, taking of hostages, torture, apartheid, attacks on diplomats and hijacking. But contrary to their being delicts jure gentium (which can be tried by all States), these crimes are dealt on the principle of *aut punier, aut dedere*, i.e. the offenders are either to be punished by the State where they are found or to be surrendered to the State competent and desirous to exercising jurisdiction over them.

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[174] (1946) AC 347
[175] 36 ILR 277(1962)

STATE SUCCESSION

CONTENTS

INTRODUCTION

The emergence of new States and disappearance of old States have become an important aspect of International Law framework. State succession is one of the oldest subjects of international law. After the World War II, state succession has become increasingly important as it affects more States and more legal relationships than ever before. Approximately 100 new States emerged with the end of decolonization. Succession to states under International Law is different from succession to government.

What is State Succession? When a state acquires a portion or absorbs the whole of the territory of another state or states, or where part of a state becomes a new state, there is state succession, a change of sovereignty takes place. Such a change of sovereignty raises a number of questions as to its effect on public and private rights[176]. International law relating to state succession is concerned mainly with the question as to what rights and obligations of the predecessor devolve and remain incumbent upon the successor state.

Oppenheim has stated that a succession of international persons occurs when one or more international persons takes the place of another international person, in consequence of certain changes in the latter's condition.

Succession of States in international law consists of a set of express rules and related principles that define the legal consequences of changes in the territorial sovereignty of States[177]. State succession maybe briefly defined as the replacement of one state by another in the responsibility for the international relations of territory[178]. The legal problem of succession does not arise when governments- that is, internal political regimes-changed, no matter how profound or revolutionary a change is. This principle can be traced by scholars to Grotius which has been generally accepted by scholars, courts and foreign ministries.

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[176] Francis Deak, *Succession to States*, Proceedings of the American Society of International Law at Its Annual Meeting(1921-1969), Vol. 24 (APRIL 23-26, 1930), pp. 51-63

[177] Dr Enver Hasani, *The Evolution of the Succession Process in former Yugoslavia*, Thomas Jefferson Law Review, Vol. 29:111.

[178] Article 2 of the Vienna Convention of both 1978 and 1983 and opinion No. 1 of the Yugoslav Arbitration Commission, 92 ILR, pp. 162, 165. See also *Guinea-Bissau v. Senegal*, 83 ILR, pp. 1, 22. Oscar Schachter, *State Succession: The Once and Future Law*, Virginia Journal Of International Law, Vol. 33:253, pp.254.

State succession governs with the rights and duties of the Predecessor State regarding international treaties, foreign debt, archives, private property, and acquired rights. There are two relevant conventions in relation to State Succession. They are the following the Vienna Convention On Succession Of States in respect to Treaties, 1978 which came into force in 1996 and the Vienna Convention On Succession Of States In Respect Of State Property, Archives' And Debts, 1983 which is yet to come into force even so many of the provisions established in this Convention are a reflection of the prevailing International Law. However, there exists a vacuum on the subject of succession to states. The Yugoslavia Arbitration Commission stated that '*there are few well established principles of International Law that apply to state succession. The application of these determined case by case, though the 1978 and 1983 Vienna Conventions do offer some guidance*[179].

There are two Kinds of State succession. They are the following:

❖ Universal Succession

This type of succession takes place when a state completely merges with another either through subjugation or voluntary merger. Universal succession may also be said to exist where a state breaks into several parts and each is a separate international person. The rights and obligations of the extinguished state are succeeded by the annexing or absorbing state.

❖ Partial succession

Partial succession takes place in the following cases[180]

- When a state acquires a portion of territory of another through cession or conquest.
- When a new state is formed in consequence of successful revolt or declaration of independence.
- When a fully sovereign state loses a portion of its external sovereignty or independence through incorporation into a federal union, places itself under the protectorate of a stronger power.
- When the latter process is reversed, and a state under suzerainty or protectorate, or members of federal state, becomes a fully sovereign state.

DOCTRINES FOLLOWED

When one government succeeds another (transition of government), international law clearly provides that the change in government does not affect the state's rights, capacities, and obligations[181]. In contrast the law regarding state succession in the event of decolonization, uniting, dissolution and separation of states or parts of territory is still in an unsettled state. Customary international law does not provide a general rule about state succession to treaty obligations. It acknowledges the existence of two competing doctrines. They are the principle of continuity and the clean slate principle.

PRINCIPLE OF CONTINUITY

Under this principle the change of government of a state does not affect the legal personality of the state. This theory propounds that all the obligations of the predecessor state automatically devolve on and bind the successor state. This theory recognizes some practical aspects of international life, namely, international relations should not be severed abruptly and that there must be some continuity, in areas fundamental to the existence of states[182]. The example of this is the succession of Yugoslavia for Serbia.

[179] Opinion No. 13, 96 ILR, pp. 726,728.
[180] Amos S. Hershey, *The Succession of States,* The American Journal of International Law, s Vol. 5, No. 2, Apr., 1911, pp.285.
[181] Louis Henkin, International Law Cases And Materials, 266-67 (2d ed. 1987)
[182] N.S Rembe, The Vienna Convention on State Succession in respect of Treaties: an African perspective on its applicability and limitations, The Comparative and International Law Journal of Southern Africa, Vol. 17, No. 2 (July 1984), pp. 131-143.

Whether a State has lost its identity and continuity is a matter decided by the international community. A State could totally dissolve. But for the purposes of international law, the Predecessor State has preserved its identity and continuity despite its dissolution[183]. Upon the demise of the former USSR, the Russian Federation took the position that it was the continuation of USSR especially in the membership of the UN this was asserted[184]. It is accepted that India is the successor of British India whereas Pakistan is treated as a new state.

Cession of a territory from an existing state will not affect the continuity of the latter state, even though its territorial dimensions and the population have been diminished. Good example is the cession of Bangladesh from Pakistan. The successor state is responsible for the previous state's legal relationships and its treaty obligations.

CLEAN-SLATE PRINCIPLE

The clean-slate theory or *tabula rasa* propounds that a new state enters international life much as a new-born child, with no commitments and with total freedom of choice. It is no longer disputed that the clean slate theory forms part of customary international law[185]. It has been applied to earlier cases of newly independent states emerging from decolonisation or secession.

The doctrine denies the transmission of rights, obligations and property interests between the successor and predecessor sovereigns. This emerged in the nineteenth century during the time when positivism was at the top. The dictates an opposite result, at least with respect to "newly formed states," they are bound by none of their predecessors' treaty obligations. Under a corollary to the clean slate theory, newly formed states while not required to, may voluntarily succeed to any or all treaties to which its predecessor was a party[186].

RIGHTS AND DUTIES ARISING DUE TO STATE SUCCESSION

SUCCESSION TO TREATIES

The basis of treaties under international law is upon the indispensable norm of *pacta sunt servanda.* The 1969 Vienna Convention on the Law of Treaties codified customary international law on the law of treaties and other international agreements that regulate states behaviour. There are number of treaties such as bilateral treaties, multilateral treaties, treaties concerning territories, international human rights and treaties that are political in circumstances.

The rules concerning succession to treaties are governed by the Vienna Convention on Succession of State in Respect to Treaties, 1978. It came into force on the year 1996. The Vienna Convention on Succession of State in Respect to Treaties, 1978 sought to codify the law of state succession to treaties and to replace all of the previous customs. Its goal was to achieve progressive development of the law in addition to pure codification of existing law. The convention deals with succession under three broad headings, namely: succession in respect of part of a territory;[187] newly independent states;[188] and uniting and separation of states[189]. The convention contains in all 50 articles sub-divided into seven parts. Part III is further sub-divided into five sections. In addition to the above, the convention contains a Preamble, an Annex and a Final Act.

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[183] Matthew C. R. Craven, The Problem of State Succession and Identity Under International Law, 9 EUR. J. INT'L L. 142 (1998)

[184] Y. Blum, Russia takes Over the Soviet Union's Seat at the United Nations, 3 EJIL, 1992, p. 354.

[185] N.S Rembe, The Vienna Convention on State Succession in respect of Treaties: an African perspective on its applicability and limitations, The Comparative and International Law Journal of Southern Africa, Vol. 17, No. 2 (July 1984), pp. 131-143.

[186] Lucinda Love, International Agreement Obligations after the Soviet Union's Break-Up: Current United States Practice and Its Consistency with International Law, J. TRANSNAT'L L., pp. 377 (May 1993).

[187] See Part II art 15.

[188] See Part III arts 16-30.

[189] See Part IV arts 31-38

The treaties for the purpose of succession can be divided into three categories:

➢ Territorial – these treaties are generally binding upon the successor. Article 11 provides that succession does not affect treaties establishing boundaries. By their very nature, boundary treaties have been subject to exceptions under general international law and under article 62 of the Vienna Convention on the Law of Treaties. The Latin American states adopted the policy principle of *uti possidetis* which recognized respect for the administrative units of the Spanish Empire. One of the earliest applications of the doctrine occurred during the independence of the States of Central and South America. By permitting the new States to adopt the boundary lines of the former colonies from which they emerged. The principle of succession to colonial border was underlined by the International Court in the ***Burkina faso/Mali Case***[190]. Despite the artificial nature of African boundaries, in 1964 the Organization of African Unity passed a resolution initiated by Tanzania, to respect the boundaries as they existed at the time of independence. The Helsinki Agreement signed in 1976 affirmed the same principles for Europe[191]. In the case of Eritrea/Yemen the tribunal emphasised that boundary and territorial treaties made between two parties constituted à special category of treaties representing a 'legal reality which necessarily impinges upon third states, because they have effect *erga omnes*[192]'. States throughout the world have justified territorial acquisition by way of *uti possidetis*, including the States that emerged from Yugoslavia in the latter decades of the twentieth century.

➢ Political or personal treaties – treaties establishing rights or obligations linked with a particular regime in power in the territory in question and to its political orientation are not binding upon the successor state

➢ Other treaties – the certain multilateral treaties are adopted due to a tendency or general inclination. However this is not a general rule. The clean slate approach are been practiced by countries like US, Panama, Belgium and Finland in regard to succession to treaties generally.

MOVING TREATY FRONTIERS

Part II of the convention contains one single article[193] which governs a situation whereby territory is added to an existing state without involving a union of states or a merger of one state with another. This phenomenon is usually referred to as "moving treaty frontiers". It presents a special category of succession and was treated as such, because here the territory (rather than the state) undergoes a change of sovereignty and the successor state is already an existing state. In the event of such occurrence, the territory undergoing change passes automatically out of the treaty regime of the predecessor state into the treaty regime of the successor state.

NEWLY INDEPENDENT STATES

This is the most central part of the convention. Under this part III, the cloud that obscured the position of newly independent states vis à vis the treaty obligations of predecessor states has now dissipated. Article 16 provides that newly independent states start their international life with a clean slate, unencumbered by the obligations of the predecessor colonial states. This rule has crystallised into customary international law and reflects the practice of states. Example, the position of Pakistan in 1947 was that of a new state and was not bound by the treaty rights and obligation of the old state[194].

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[190] ICJ Reports 1986, pp.554,565.
[191] See Conference on Security and Cooperation in Europe Final Act Principle I-IV.
[192] Shaw, Title to Territory, pp.244-248.
[193] Art 15.
[194] Yearbook of the ILC, 1947, vol. II, part 1, , p. 211.

UNITING AND SEPARATION OF STATES

Part IV governs succession of states arising from uniting of states which had separate international personalities at the date of succession and separation of states[195]. The provisions of this part propound the principles of ipso jure continuity or de jure continuity of treaties in force at the date of succession of states. In the event of states uniting, treaties applicable to the previous extinguished personalities remain, with few exceptions, in force and bind the new personality.

INTERNATIONAL HUMAN RIGHTS TREATIES

When a state party to human rights treaty disintegrates and forms a new state if the classical rules of succession is followed then the people protected under the treaty are deprived of such protection. The Commission on Human Rights adopted a resolution 1994/16 on 25 February 1994 which states that a successor state which have not yet confirmed to appropriate depositories continue to be bound by the obligations under the International Human Rights Treaties.

Recent developments reveal an attempt to establish a principle of automatic succession to human rights treaties on the basis of the very nature of such treaties[196]. The International Court in the *Reservations to the Genocide Convention case*[197] emphasised '*in such a convention the contracting parties do not have any interests of their own, they merely have one and all a common interest namely the accomplishment of those high purposes which are the raison d'etre of the Convention*'. There are no doubt good policy reasons that such a principle should be supported. However laudable and encouraging an attempt it may be, it is too early to conclude that, as a matter of general international law, a successor State will automatically succeed to the obligations of a human rights treaty assumed by the predecessor States[198].

SUCCESSION TO ASSETS AND DEBTS

The Vienna Convention on Succession to State Property, Archives and Debts, 1983 governs the aspect of succession to assets and debts. They incorporate the customary law governing this area. This Convention is not in force yet.

STATE ARCHIVES

Archives are a part of heritage of a community and consist of documents, numismatic collections, iconographic documents, photographs and films. Article 25 of the Vienna Convention on Succession to State Property, Archives and Debts, 1983 emphasis on preserving the integral character of grounds of state archives of the predecessor state. According to the principle of integrity of archives, successor States on the occasion of their division-should ensure the data and other information contained therein is not damaged. It must also be preserved in its entirety. This principle is confirmed in Yugoslav Agreement on Succession Issues, 2001.

STATE PROPERTY

The classic rule is that only public property of the predecessor state passes automatically to the successor state. But there arises a question of definition of public property. Article 8 of the 1983 Convention defines state property means property, rights and interests which, at the date of the succession of states were according to the internal law of the predecessor state owned by the state. The commission on Yugoslavia reiterated this position.

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[195] Arts 31-38.

[196] Johannes Chan, State Succession to Human Rights Treaties: Hong Kong and the International Covenant on Civil and Political Rights, The International and Comparative Law Quarterly, Vol. 45, No. 4 (Oct., 1996), pp. 928-946.

[197] ICJ Reports, 1951, pp. 15, 23.

[198] Jayawickrama, Human Rights in Hong Kong: The Continued Applicability of the International Covenants, (1 995)2 5 H.K.L.J1. 71-17

According to the Convention 1983, immovable property belongs to the successor States in whose territory that property is located. This rule foresees possible compensation in those cases where succession produces inequitable results for other successors. Such compensation has been demanded by other Yugoslav republics apart from the Serbs, who did not ask for it since they possessed the majority of the former Yugoslavia's immovables. This repeats the scenario played out in former Soviet Republics and the Czech and Slovak Republics[199], but without success.

In case property is situated outside the territory article 17(1)(c) of the convention states that such a property will pass to the successor state in an equitable proportion. This is regarded as controversial proposition since it modifies the territorial approach to succession to state property. The arbitration Commission on Yugoslavia laid the general principle that the state property (movable outside the territory), assets and liabilities should be divided such that the overall outcome is equitable[200]. Depending upon agreement between the states there exists certain exceptions to basic rules. Former Czech and Slovak Federal Republic, the successor states agreed to divide the assets and liabilities of the predecessor state.

PUBLIC DEBTS

There exists uncertainty and doubt in this particular aspect, related to rule of succession. Agreements entered into by the parties as well as political and economic aspects play a major role. Public debt or national debt is that debt assumed by the central government in the interests of the state as a whole[201]. It constitutes as a sensitive issue since third parties are involved who are often reluctant to accept a change in the identity of the debtor. Thus this encourages an approach based on the continuing liability for the debt in question and in situations where a division of debt has taken place for that situation to continue with the successor state being responsible to the predecessor state for its share than to the creditor directly.

Article 36 of the convention of 1983 provides that the succession of a state does not affect the rights and obligations of creditors. Further when the successor state is a newly independent state, no state debts pass to the new state unless there is an agreement between the two states providing otherwise[202]. Public debts are divided into national debts (owned by the state as a whole), local debts (debts by sub governmental territorial unit or local authority) and localized debts (debts incurred by government for purpose of local projects)[203].

In the case of India and Pakistan, the former took the responsibility of all the financial obligations, including loans and guarantees, of British India remaining the sole debtor of the national debt. Whereas Pakistan's share which was a new state was established upon the basis of proportionality of the share of assets of British India it received became a debt to India.

SUCCESSION IN RESPECT OF DELICTS

The international law *locus classicus* on state succession in respect of delicts is the ***Robert E Brown Claim***[204] rendered by the American and British Claims Arbitration Tribunal in 1923.This case also concerned a delict perpetrated in South Africa, viz a denial of justice committed by the former South African Republic against an American citizen. The question before the tribunal was whether by annexing the South African Republic, Britain had taken over the claim by the American citizen. The tribunal held that Britain had not assumed any liabilities in respect of the delict as a result of the annexation. The tribunal took care to point out that the particular claim was a pending one which had never become a liquidated debt of the extinguished state. No question of state succession was actually involved[205].

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[199] Paul Williams & Jennifer Harris, *State Succession to Debts and Assets: The Modern Law and Policy*, 42 HARV. INT'L L.J. (1994) pp. 400-407.
[200] Opinion No. 14, 96 ILR, pp. 731.
[201] Malcolm N. Shaw, *International Law*, Cambridge University Press, sixth edition.
[202] Article 38 of the Vienna Convention on Succession to State Property, Archives and Debts, 1983.
[203] O'Connell, *State Succession*, vol. I, chapters 15-17.
[204] 6 RIAA, p. 120 (1923).
[205] Hercules Booysen, *Succession to delictual liability: a Namibian precedent*, The Comparative and International Law Journal of Southern Africa, Vol. 24, No. 2(JULY 1991), pp. 204-214.

Generally, writers accept the principle embodied in the Brown case as valid in international law. The reason given is the highly personal nature of delicts or because the torts were the torts of the (former) Government and not the torts of the territory. The Permanent Court of Arbitration in *the Lighthouse Arbitration between France and Greece*[206] rejected the argument that delictual liability cannot be succeeded because of its personal nature. It said that the solution depends on the particular circumstances of each case.

Although whether the delictual liability originates in international or municipal law appears to play a role in state succession, the nature of this role is uncertain. The *Brown case* involved an international wrong - a denial of justice by the state - while the *Hawaiian case*[207] involved municipal law delicts - like false imprisonment - both, however, exposed the same principle.

SUCCESSION TO CONTRACTS

In the case of contracts the view followed is expressed in the case of *West Rand Central Gold Mining Co. Ltd v. King*[208]. The court said that upon annexation, the new sovereign may choose which of the contractual rights and duties adopted by the previous sovereign it wishes to respect. In this case prior to the outbreak of the war between Great Britain and the South African Republic, gold belonging to the Company was wrongfully seized by the Republic. Soon afterwards war broke out and the Republic was conquered and its territory was annexed by the Crown. The Company claimed by petition of right that in consequence the obligations of the Republic with respect to the gold had devolved on the Crown. It was held that

- the Sovereign of a conquering State was not liable for the obligations of the conquered, in the absence of stipulation or convention
- International law formed part of the law of England to the extent that it had received the common consent of civilised nations. Such rules of international law must be shown to have been actually accepted as binding between nations by satisfactory evidence of international agreement or usage
- Acts of State are not cognisable by the English Courts.

SUCCESSION AND NATIONALITY

State succession is linked with questions of nationality and human rights, as the former may affect the legal status of people who have been nationals of a predecessor state but who want, or are entitled, to be nationals of a successor state. In principle, the issues relating to nationality depend on the municipal laws and regulations of the predecessor with regard to extent of the inhabitants ceded to another authority will retain their nationality and the successor state will prescribe the conditions under which the new nationality will be granted. Generally nationality will change with a change of sovereignty.

CONCLUSION

The future law of state succession rests on what appear to be the political trends relating to changes and turbulence in the nation-state system. It also gives weight to the practical aspects of administering the complicated effects of transfers of sovereignty and the need to avoid rigidity and doctrinaire solutions. Yet there are various aspects of state succession lacks codification. The succession of States is a contextual issue in which legal rules have a role to play only at the level of general principles. The principle of cooperation in good faith among the succession parties and *rebus sic stantibus* are key topics for analysis of State succession issues. Thus state succession is one of the important areas of International Law and steps should be taken to that State succession should not lead to a disruption of legal relationships at all levels and promote peaceful co-existence.

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[206] 23 ILR 79 at 93.
[207] 20 (1926) AJIL 381
[208] (1905) 2 KB 391.

UNIT - III

LAW OF THE SEAS

CONTENTS

INTRODUCTION - TERRITORIAL WATERS

Territorial waters, or a territorial sea, were defined by the 1982 United Nations Convention on the Law of Sea in Article 1. "The sovereignty of a State extends, beyond its land territory and its internal waters, to a belt of sea adjacent to its coast, described as the territorial sea." It is a belt of coastal waters extending at most 12 nautical miles (22.2 km) from the baseline which is normally measured from the low-water line along the coast as marked on large-scale charts officially recognized by the coastal state.

If this would overlap with another state's territorial sea, the border is taken as the median point between the states' baselines, unless the states in question agree otherwise. A state can also choose to claim a smaller territorial sea. Conflicts still occur whenever a coastal nation claims an entire gulf as its territorial waters while other nations only recognize the more restrictive definitions of the UN convention. Eg. Two recent conflicts occurred in the Gulf of Sidra where Libya has claimed the entire gulf as its territorial waters and the U.S. has twice enforced freedom of navigation rights, in the 1981 and1989 Gulf of Sidra incidents

Straight baselines can alternatively be defined connecting fringing islands along a coast, across the mouths of rivers, or with certain restrictions across the mouths of bays. In this case, a bay is defined as "a well-marked indentation whose penetration is in such proportion to the width of its mouth as to contain land-locked waters and constitute more than a mere curvature of the coast. An indentation shall not, however, be regarded as a bay unless its area is as large as, or larger than, that of the semi-circle whose diameter is a line drawn across the mouth of that indentation". The baseline across the bay must also be no more than 24 nautical miles (44 km; 28 mi) in length.

The territorial sea is regarded as the sovereign territory of the state, although foreign ships (both military and civilian) are allowed innocent passage through it; this sovereignty also extends to the airspace over and seabed below. Adjustment of these boundaries is called, in international law, maritime delimitation. The coastal state is free to set laws, regulate use, and use any resource. Vessels are given the right of innocent passage through any territorial waters, with strategic straits allowing the passage of military craft as transit passage. "Innocent passage" is defined by the convention as passing through waters in an expeditious and continuous manner, which is not "prejudicial to the peace, good order or the security" of the coastal state. Fishing, polluting, weapons practice, and spying are not 'innocent", and submarines and other underwater vehicles are required to navigate on the surface and to show their flag. Nations can also temporarily suspend innocent passage in specific areas of their territorial seas, if doing so is essential for the protection of its security.

Beyond the territorial sea, states have a contiguous zone, not exceeding 24 nautical miles, in which they may exercise jurisdiction over certain infringements of their customs, fiscal, immigration, or sanitary regulations. A United Nations Conference on the Law of the Sea that was convened at Geneva in 1958 and attended by 86 nations developed a convention affirming the commonly accepted principles of the legal nature of the territorial sea and the right of innocent passage. The rights governed under 1958 Convention, represents the position under customary international law. This convention took effect in 1964 and by 1970 had been ratified by almost 40 states.

New rules were proposed in a 1982 United Nations Convention on the Law of the Sea. A coastal state exercises sovereignty over its territorial waters, which includes, in particular, the following:(1) An exclusive right to fish and to exploit the resources of the seabed and subsoil of the seabed and exclusive use of the airspace above the territorial sea.(2)The exclusive right to use the territorial waters to transport people and goods from one part of the state to another.(3) The right to enact laws concerning navigation, immigration, customs dues, and health, which bind all foreign ships.(4) The right to ask a warship that ignores navigation regulations to leave the territorial waters.(5) Certain powers of arrest over merchant ships and people on board and jurisdiction to try crimes committed on board such ships within the territorial waters.(6) The right to exclude fighting in the territorial waters during a war in which the coastal state is neutral. All foreign ships, however, have a right of innocent passage through the territorial sea, i.e. the right to pass through, provided they do not prejudice the peace, security, or good order of the coastal state (submarines must navigate on the surface.[209] Internal waters are different from the territorial waters. Waters landward of the baseline are defined as internal waters, over which the state has complete sovereignty: not even innocent passage is allowed.

RIGHT OF INNOCENT PASSAGE

One of the fundamental tenets in the international law of the sea is that all ships of all States enjoy the right of innocent passage through the territorial sea of other States. The LOS Convention provides definitions for the meaning of "passage" (Article 18), 2 and of "innocent passage" (Article 19), and lists those activities not innocent or "prejudicial to the peace, good order or security of the coastal State" (Article 19(2) a-i).

PERMISSABLE RESTRICTIONS ON INNOCENT PASSAGE

For purposes such as resource conservation, environmental protection, and navigational safety, a coastal State may establish certain restrictions upon the right of innocent passage of foreign vessels. Such restrictions must be reasonable and necessary, and not have the practical effect of denying or impairing the right of innocent passage. The restrictions must not discriminate in form or in fact against the ships of any State or those carrying cargoes to, from, or on behalf of any State. The coastal State is required to give appropriate publicity to any dangers to navigation within its territorial sea of which it has knowledge. A coastal or island nation may suspend innocent passage temporarily in specified areas of its territorial sea, when essential for the protection of its security.

CONTIGUOUS ZONE

The contiguous zone is a band of water extending from the outer edge of the territorial sea up to 24 nautical miles (44.4 km; 27.6 mi) from the baseline, within which a state can exert limited control for the purpose of preventing or punishing "infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea". It consists of an area beyond the territorial sea in which the coastal State may act to prevent any violation of its customs, fiscal, immigration or sanitary laws and regulations. The principle of freedom of navigation applies in this zone as well as elsewhere outside the territorial sea, but other states are to have due regard for the rights of the coastal state in the exclusive economic zone and to comply with its laws and regulations. Unlike the territorial sea, there is no standard rule for resolving such conflicts and the states in question must negotiate their own compromise.[210]

[209] http://www.nauticalcharts.noaa.gov/staff/law_of_sea.html

[210] Ashley & Robert ,contiguous zone International law studies volume 66 p 103

The concept of the Contiguous zone has a customary foundation and its origins can be traced back to the 18th century. It enjoyed its hour of glory on the occasion of the Conference of The Hague in 1930 and was put into explicit form in the Geneva Conventions of 1958 and 1960.[211]

Contiguous zones may be proclaimed around both islands and rocks following appropriate baseline principles. Low-tide elevations which are not part of the baseline (i.e., those situated beyond the territorial sea as measured from the mainland or an island) and artificial islands, installations and structures, cannot have contiguous zones in their own right. Such man-made objects include oil drilling rigs, light towers, and off-shore docking and oil pumping facilities.[212]

DEFINITION

Article 24 of the Convention on the Territorial Sea and the Contiguous Zone 1958
1.In a zone of the high seas contiguous to its territorial sea, the coastal State may exercise the control necessary to:

(a) Prevent infringement of its customs, fiscal, immigration or sanitary regulations within its territory or territorial sea;

(b) Punish infringement of the above regulations committed within its territory or territorial sea.

2. The contiguous zone may not extend beyond twelve miles from the baseline from which the breadth of the territorial sea is measured.

3. Where the coasts of two States are opposite or adjacent to each other, neither of the two States is entitled, failing agreement between them to the contrary, to extend its contiguous zone beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of the two States is measured.

RIGHTS OF FOREIGN NATIONALS IN CONTIGUOUS ZONE

Activity	Rights of Foreign Nationals in the Contiguous Zone
Navigation	Full navigation rights if compatible with Convention (Articles 58,
	Paragraph 1, and 87; 58, Paragraph 2, and 88-115)
	Restricted by Article 33 (see above) in, general only; boarding and search by coastal state only to prevent and punish infringement of specific coastal state laws Removal of historical and archaeological objects only with approval of coastal state (Article 303, Paragraph 2)
Over-flight	Full rights of over-flight
Fishing	No rights after establishment of exclusive economic zone (Exceptions: Article 62, Paragraph 2)
Scientific Research	Consent of coastal state is required when economic zone has been established (Article 246)
Laying of Cable	Full rights (Article 58, 79), consent of coastal state for routing required (Article 79, Paragraph 5)
Mining	No rights (Rights of coastal state over continental shelf need not be claimed) (Article 76, Paragraph 3)
Observance of environmental legislation	Must observe sanitary laws of coastal state (Article 33); must observe pollution laws (Part XII) applicable in exclusive economic zone

[211] http://iucn.org/about/union/secretariat/offices/iucnmed/iucn_med_programme/marine_programme/governance/glossary/?11322
[212] http://www.bernaerts-sealaw.com/THE%20CONTIGUOUS%20ZONE.pdf

CONTINENTAL SHELF

The continental shelf is an underwater landmass which extends from a continent, resulting in an area of relatively shallow water known as a shelf sea. Much of the shelves were exposed during glacial periods and interglacial periods.[213] Under the United Nations Convention on the Law of the Sea, the name continental shelf was given a legal definition as the stretch of the seabed adjacent to the shores of a particular country to which it belongs. The legal definition of a continental shelf differs significantly from the geological definition. UNCLOS states that the shelf extends to the limit of the continental margin, but no less than 200 (NM) Nautical Miles from the baseline. It is the submarine prolongation of a coastal state's landmass to the outer edge of the continental margin. [214]

The continental shelf falls under the coastal state's jurisdiction. Areas beyond the continental margin are, however, part of the international seabed area. Most commercial exploitation from the sea, such as metallic-ore, non-metallic ore, and hydrocarbon extraction, takes place on the continental shelf. Sovereign rights over their continental shelves up to a depth of 200 m or to a distance where the depth of waters admitted of resource exploitation were claimed by the marine nations that signed the Convention on the Continental Shelf drawn up by the UN's International Law Commission in 1958.

This was partly superseded by the 1982 United Nations Convention on the Law of the Sea which created the 200 NM exclusive economic zone and extended continental shelf rights for states to 350 NM.[215] Coastal states have an exclusive right to explore and exploit both living and non-living resources on their continental shelf. Along with the right they have a duty to safeguard the environment on their continental shelf, and an obligation to let other states use the shelf for certain purposes, such as the laying of pipelines and cables. Coastal states' inherent right to their continental shelf is a fundamental principle of the Law of the Sea.

DEFINITION

In *re the Seabed*, the Supreme Court of Canada[216]

"International law was forced to take note of the continental shelf when, in the middle of the century, the technology was developed to exploit offshore resources. A consensus developed that the exploitation should be under the control of the coastal State. The 1958 Geneva Convention was drafted so as to do no more than was necessary to achieve this result. Thus the Convention does not grant sovereignty over the continental shelf but rather sovereign rights to explore and exploit. These limited rights co-exist with the rights of other nations to make use of the seabed for submarine cables and pipelines and do not affect the status of the superjacent waters and airspace". In the 1969 *North Sea Continental Shelf Cases*, the International Court of Justice wrote: "The right of the coastal State to its continental shelf areas is based on the sovereignty of the land domain of which the shelf area is the natural prolongation into and under the sea."

ARTICLE 2 OF THE 1958 GENEVA CONVENTION ON THE CONTINENTAL SHELF, SIGNED IN 1958.

"The coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting (test of exploitability) its natural resources. (These) rights ... are exclusive in the sense that if the coastal State does not explore the continental shelf or exploit its natural resources, no one may undertake these activities, or make a claim to the continental shelf, without the express consent of the coastal State. The rights of the coastal State over the continental shelf do not depend on occupation, effective or notional, or on any express proclamation.

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[213].http://prezi.com/dfmd-0xxclxy/life-on-the-continental-shelf/

[214] Pinet, Paul R. (1996) Invitation to Oceanography. St. Paul, MN: West Publishing Co., 1996. ISBN 0-7637-2136-0 (3rd ed.)

[215] Gross, Grant M. Oceanography: A View of the Earth. Englewood Cliffs: Prentice-Hall, Inc., 1972. ISBN 0-13-629659-9

[216] http://www.duhaime.org/LegalDictionary/C/ContinentalShelf.aspx

ART76 OF THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA (UNCLOS)

'The continental shelf of a coastal state comprises the sea-bed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental shelf does not extend up to that distance....

"The continental margin comprises the submerged prolongation of the land mass of the coastal State, and consists of the sea-bed and subsoil of the shelf of the slope and the rise. It does not include the deep ocean floor with its oceanic ridges or the subsoil thereof."

THE 1945 TRUMAN PROCLAMATION & OTHER UNILATERAL STATE DECLARATIONS

It was the U.S. Proclamation of 1945 (aka) the Truman Proclamation that gave birth to the modern concept of the Continental Shelf. The United States declared the natural resources of the seabed and subsoil of the continental shelf, although technically high seas nevertheless lay contiguous to the United States coasts, to be under its jurisdiction and control. In its preamble, the proclamation stated that the rationale followed was recognizing the growing United States need for new sources of petroleum and other minerals and the discovery that the resources could be found along the continental shelf, beyond the 3M sea limit.

On 28 May 1949, the Kingdom of Saudi Arabia, for example, issued a royal pronouncement on the subsoil and seabed areas of the Persian Gulf outside of its territorial sea. One scholar observed that the royal decree was "obviously inspired by the Truman Proclamation" but that it was a "broader assertion" of rights since the Persian Gulf did not have a continental shelf. The decree thus latched on to the concept of contiguity and not to that of geological continental shelf.

In the 1958 Convention on the Continental Shelf, the ILC definition of and limits to the juridical continental shelf were principally retained in Article 1 of the 1958 Convention which provides that:

"the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas; and also to the seabed and subsoil of similar submarine areas adjacent to the coasts of islands."

The exploitability factor as one of the limits of the continental shelf was both a strength and weakness of the 1958 Convention. It afforded flexibility to states who might one day acquire technology to exploit the continental shelf beyond 200 meters. However, it also meant that there were actually no real limits to the juridical or legal continental shelf. The exploitability factor was criticized, in particular as regards the delimitation of overlapping shelves. The 1958 Convention was ratified by 58 states.

RIGHTS OVER CONTINENTAL SHELF UNDER THE 1982 CONVENTION

The state sharing coastal boundaries may exercise their 'sovereign rights' over the region of their continental shelf for exploring and exploiting the natural resources under article 77 of the 1982 Convention. These rights are such that no other state may conduct such activities without the consent of the coastal state. These sovereign rights are independent of occupation or express proclamation.

FACTOR OF NATURAL PROLONGATION

The idea that the continental shelf is the natural extension or appurtenance of the land territory or domain over which the coastal state has complete sovereignty was at the basis of the Truman Declaration of 1945 which, as stated by the International Court in the North Sea Continental Shelf Cases. Indeed, the

Proclamation of President Truman on September 28, 1945 specified in its Preamble as one of the reasons for claiming jurisdiction over the mineral resources of the continental shelf that "the continental shelf may be regarded as an extension of the land-mass of the coastal nation and thus naturally appurtenant to it".[217] The Proclamation further stated that "these resources frequently form a seaward extension of a pool or deposit lying within the territory". The concept was also recognized by the International Law Commission.).

The fundamental importance of the concept of "natural extension" was also emphasized by the International Court in the *North Sea Continental Shelf Cases.* In -refuting Germany's argument that a coastal state was entitled to a just and equitable share of the available continental shelf, the Court made the following pronouncement:

"the doctrine of the just and equitable share appears to be wholly at variance with what the Court entertains. No doubt is the most fundamental of all the rules of law relating to the continental shelf, enshrined in article 2 of the 1958 Geneva Convention, though quite independent of it, namely that the rights of the coastal State in respect of the area of continental shelf that constitutes a natural prolongation of its land territory into and under the sea exist ipso facto and an initio, by virtue of its sovereignty over the land, and as an extension of it in an exercise of sovereign rights for the purpose of exploring the seabed and exploiting its natural resources."

NORTH SEA CONTINENTAL SHELF CASES AND NATURAL PROLONGATION

The equidistance principle does not signify the general rule of international law as held in the North Sea Continental Shelf cases. After this ruling and reasonable jurisprudence, applicable rules of customary international law have taken the shape of 'equitable principles' as discussed in the course of the judgments of the International Court and other tribunals.

III. PRINCIPLES DERIVED FROM THE CASE

The principles that are derived from the North Sea Continental Shelf cases may be summarized up as follows:-

1. The exercise of equidistance method of delimitation is not obligatory between the parties.
2. The use of single method of delimitation, since there is no other method, is in all circumstances obligatory.
3. The principles of international law as applicable to the rule of delimitation between the contesting parties of the regions of the continental shelf around the North Sea which concern the parties beyond the partial boundary was determined by the agreements of 1 December 1964 and 9 June 1965 respectively. Some of them are as follows:
   a. Delimitation is to be effected by mutual agreement consistent with equitable principles, in such a manner so as to leave a possibility to an individual party for all those sections of the continental shelf that make up a natural prolongation of its landmass into the area under the sea.
   b. If the above principle is applied, the delimitation essentially leaves to the parties with areas that overlap. Such areas are to be divided amongst them in an agreed proportion or failing agreement, equally, unless they choose to adopt a regime of common jurisdiction, or exploration of the zones that overlap.

[217] 21 San Diego L. Rev. 769 1983-1984

4. In the course of discussions between nations, the following factors are to be taken into account:-

   a. General configuration, which means a proper outline of coasts of contesting parties, as well as existence of any unusual features.

   b. So far as easily ascertainable, the physical, geographical and geological structure, and undersea natural resources, of the continental shelf zone involved.

   c. Factor of reasonable level of proportionality, which a delimitation when carried out in consonance with equitable principles ought to conclude between the nature and extent of the continental shelf areas pertaining to the coastal State (the state in question) and the size of its coast measured in the common direction of the coastline, while also taking into consideration, of the effects, which may be actual or prospective, of any other continental shelf delimitation between adjacent States in same area.

TUNISIA/LIBYACONTINENTAL SHELF CASE AND EQUITABLE PRINCIPLES

In this case the international court ruled a major shift from the natural prolongation principle to the principles of equity. It also did not dismiss the conception given in the former for deciding this case.

PRINCIPLES DERIVED FROM THE TUNISIA-LIBYA CASE

The Tunisia-Libya case primarily concerned the delimitation of the continental shelf. The general guidelines stated by the Court and its manner of scrutiny appear to adapt the delimitation of the EEZ and of the unitary maritime boundaries outlining the continental shelf. In this relation, the following significant points stand out:

1. The commonly accepted principle that delimitation is to be applied in consonance with equitable principles is a basic guideline that can be applied to almost every maritime delimitation. Even if this formula is vague and general in itself, the Court has provided other indications of the ideologies and situations that are applicable to maritime delimitation.

2. Delimitation in consonance with equitable principles will respect the natural prolongation of the coastal boundaries of the nations into and under the sea. This delimitation will correspond to the general geological and geographic association of the coasts of the nations, and therefore will not give such an effect to significant features. This will result in a strip that detaches the coast of a party from the maritime zones located in front of that coast. The rule of non encroachment appears to be relevant equally to the shelf and to the adjoining waters.

3. The equitable nature of delimitation will be testified by the principle of proportionality as outlined by the Court in the North Sea cases.

4. Finally, the Court will give relative importance to the previous conduct of the parties where such conduct portrays that both parties established the same line as a boundary/limit for significant reasons over a relatively long period of time.

ANGLO-FRENCH CONTINENTAL SHELF CASE

It was reiterated that the correctness of the equidistance method or any other accepted method for the reason of effecting an equitable delimitation is a function of the geographical circumstances of each individual case. The methodological aspect here is noteworthy because it is based upon the requisite geographical structure. A meticulous approach is less apparent in the Tunisia/Libya case, but the prominence upon the solution, was reflected in recent cases. Article 83 of the 1982 Convention, indeed, provides that delimitation 'shall be effected by agreement on the basis of international law in order to achieve an equitable solution'.

GULF OF MAINE CASE

It focused mainly on the delimitation of both the continental shelf and fishing zones of Canada and the United States of America, the bench of the ICJ provided a couple of principles which spoke about what common international law prescribes in most cases of maritime delimitation. They are elaborated as follows:-

1. There is no possibility of unilateral delimitations. These had to be managed and effected by mutual agreement between the parties or, if and where necessary, with the help of third parties.

2. Secondly, the Court held that the principle of delimitation is to be used by the application of equitable criteria and by the use of rational methods capable of ensuring, with respect to the geographic design of the area, an equitable result.

AGEAN SEA CONTINENTAL SHELF CASE

This philosophy was equally highlighted by the ICJ in a well known passage from the Aegean Sea Continental shelf cases that "...it is solely by virtue of the coastal state's sovereignty over the land that rights of exploration and exploitation in the continental shelf can attach to it, *ipso jure*, under international law. In short, continental shelf rights are legally both an emanation from and an automatic adjunct of the territorial sovereignty of the coastal state.

EXCLUSIVE ECONOMIC ZONE

An exclusive economic zone (EEZ) is a sea zone prescribed by the United Nations Convention on the Law of the Sea, over which state has special rights over the exploration and use of marine resources, including energy production from water and wind. It stretches from the baseline out to 200 NM (370km) from its coast or baseline. The exclusive economic zone is a 'sovereign right' which refers to the coastal state's rights below the surface of the sea.[218]

The exception to 200 NM rule occur when EEZs would overlap; that is, state coastal baselines are less than 400 nautical miles (740 km) apart. When an overlap occurs, it is up to the states to delineate the actual maritime boundary. Generally, any point within an overlapping area defaults to the nearest state. The EEZ includes the contiguous zone. States also have rights to the seabed of what is called the continental shelf up to 350 nautical miles (648 km) from the coastal baseline, beyond the EEZ, but such areas are not part of their EEZ.

There is no inherent right to a EEZ; a coastal State must make a claim through a declaration or proclamation or through enactment of domestic legislation The EEZ consists of the superjacent waters in the zone as well as the seabed and subsoil underlying the waters Under Article 56, in the EEZ the coastal State enjoys "sovereign rights for the purposes of exploring and exploiting, conserving and managing the natural resources, whether living or non-living..." It is a right that is lower in status than sovereignty and is a creation of UNCLOS. The coastal State has no sovereign rights over resources that are not "natural" such as wrecks and other artificial remains in the seas that are subject to the law of salvage. In the EEZ, under Article 56, the coastal State also has jurisdiction with regard to the establishment and use of artificial islands, installations and structures; marine scientific research; the protection and preservation of the marine environment.

The regime of the exclusive economic zone is clearly a revolutionary legal concept which evolved very quickly. In about a 30-year time span, an ocean regime has emerged from many diverse ideas and interests and has found universal acceptance establishing the unlikely proposition that the whole is greater

[218] 13 Cal. W. Int'l L.J. 181 1983

than the sum of its parts. Contrary to its name, the exclusive economic zone 'is exclusive only in so far as [mineral resources] are concerned; it is essentially only preferential so far as [living resources] .. .are concerned.' However, the EEZ is truly an economic zone because the coastal State has varying rights to anything of economic value in the zone. Beyond the traditionally exploited living and mineral resources, the EEZ gives the coastal State the exclusive right to produce and exploit nontraditional energy resources within 200 miles of its baseline. Wind and ocean currents, wave motion, and thermal gradient's are the major energy sources currently being exploited. [219]

THE THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA

The Third United Nations Conference on the Law of the Sea began its work on 3 December 1973. Three main committees were established. Maritime areas subject to national jurisdiction and the high seas, including the territorial sea, continental shelf, the exclusive economic zone and the regime of straits used for international navigation were assigned to the Second Committee.

THE EXCLUSIVE ECONOMIC ZONE REGIME, 1982 CONVENTION

Coastal states have sovereign rights for the purpose of exploring and exploiting, conserving and managing the living resources of the exclusive economic zone (Article 56). The provisions relating to non-living resources are subsumed in the continental shelf provisions, although jurisdiction over the part of the continental shelf which lies within the exclusive economic zone is not dependent on geophysical considerations. With respect to living resources, the coastal state has broad regulatory and management powers. The coastal state, however, must ensure that the resource is not endangered by over-exploitation and it must do this through proper conservation and management (Article 61). Coastal states also have the obligation to promote the objective of optimum utilization of the living resources. The coastal state is obliged to assess the allowable catch and to determine its own capacity to harvest the resources. If it does not have the capacity to harvest the entire allowable catch, it must give other states access to the surplus (Article 62).

Land-locked and geographically disadvantaged states have the right to participate, on an equitable basis, in the exploitation of an appropriate part of the surplus of the living resources subject to arrangements with the coastal state involved (Articles 69 and 70).

There are special provisions for straddling stocks (Article 63), anadromous species (Article 66), catadromous species (Article 67), sedentary species (Article 68) and marine mammals (Article 65). With respect to highly migratory species, the coastal state and other states whose nationals fish in the region shall cooperate directly or through appropriate international organizations with a view to ensuring conservation and promoting the objective of optimum utilization of such species, both within and beyond the exclusive economic zone (Article 64). In exercising its sovereign rights, the coastal state is empowered to take a wide range of enforcement measures such as boarding, inspection, arrest and judicial proceedings (Article 73).

Finally, a description of the regime would not be complete without mentioning the subject of dispute settlement as it is detailed in Article 297(3). With regard to fisheries disputes concerning the interpretation or application of Convention provisions, they are to be settled by a binding form of dispute settlement. However, coastal states are not obliged to submit disputes relating to the exercise of sovereign rights with respect to living resources in the exclusive economic zone to any form of compulsory dispute settlement procedures. The issues under this exception include the coastal state's discretionary powers for determining allowable catch, its harvesting capacity, the allocation of surpluses to other states and the terms and conditions established in its conservation and management laws and regulations.

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[219] http://digitalcommons.law.lsu.edu/cgi/viewcontent.cgi?article=4933&context=lalrev

However, a coastal state would be obliged to submit to conciliation certain specific disputes - those arising from an allegation that:

(i) a coastal state has manifestly failed to comply with its obligations to ensure through proper conservation and management measures that the maintenance of the living resources in the exclusive economic zone is not seriously endangered;

(ii) a coastal state has arbitrarily refused to determine, at the request of another state, the allowable catch and its capacity to harvest living resources with respect to stocks which that other state is interested in fishing; or

(iii) a coastal state has arbitrarily refused to allocate to any state, under Articles 62, 69 and 70 and under the terms and conditions established by the coastal state consistent with the Convention, the whole or part of the surplus it has declared to exist.

HIGH SEAS

High seas in maritime law, all parts of the mass of saltwater surrounding the globe that are not part of the territorial sea or internal waters of a state. For several centuries beginning in the European Middle Ages, a number of maritime states asserted sovereignty over large portions of the high seas. Well-known examples were the claims of Genoa in the Mediterranean and of Great Britain in the North Sea and elsewhere.[220]The doctrine that the high seas in time of peace are open to all nations and may not be subjected to national sovereignty (freedom of the seas) and this concept was put forth by Hugo Grotius as early as 1609. It did not become an accepted principle of international law, until the 19th century. Freedom of the seas was ideologically the 19th-century freedoms, particularly laissez-faire economic theory, and was vigorously pressed by the great maritime and commercial powers, especially Great Britain.

Freedom of the high seas is now recognized to include freedom of navigation, fishing, the laying of submarine cables and pipelines, and overflight of aircraft.[221]By the second half of the 20th century, demands by some coastal states for increased security and customs zones, for exclusive offshore-fishing rights and for conservation of maritime resources including exploitation of resources, caused serious conflicts. The first United Nations Conference on the Law of the Sea, meeting at Geneva in 1958, sought to codify the law of the high seas but was unable to resolve many issues. A second conference (Geneva, 1960) also failed to resolve this point; and a third conference began in Caracas in 1973, later convening in Geneva and New York City.[222]

THE AREA

As regards the seabed beyond the limits of national jurisdiction, Part XI of UNCLOS, as elaborated by the 1994 Part XI Agreement, provides that the Area and its resources (dened in article 133 as all solid, liquid or gaseous mineral resources in situ in the Area at or beneath the seabed, including polymetallic nodules) are the common heritage of humankind. The International Seabed Authority (ISA) is the organization through which States organize and control activities in the Area, particularly with a view to administer the resources of the Area and to share the benets arising from activities thereof. Activities in the Area include all activities of exploration for and exploitation of the resources of the Area (article 1.3). ISA exercises control over activities in the Area, while States parties are responsible for taking all necessary measures to ensure compliance to laws by those subject to their jurisdiction or control. The Authority is further charged with establishing a staff of inspectors to determine compliance to rules and laws.[223]

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[220] 7 San Diego L. Rev. 371 1970
[221] 33 Tul. L. Rev. 339 1958-1959
[222] http://www.britannica.com/EBchecked/topic/265375/high-seas
[223] 2 J. Hist. Int'l L. 91 2000

HIGH-SEAS LIVING RESOURCES

The freedom of shing on the high seas is qualied by the Convention's provisions on the conservation and management of high-seas living resources (Part VII, section 2). These require all States to take such measures for their nationals as may be necessary to conserve high-seas living resources. Furthermore, States must cooperate in the conservation and management of these resources; in particular, States whose nationals exploit the same living resources, or different living resources in the same area, must enter into negotiations with a view to take the measures necessary for the conservation of the resources concerned.

The Convention also provides for stricter measures to prohibit, limit, or regulate the exploitation of marine mammals, adopted through a competent international organization. Further development of UNCLOS provisions on marine environmental protection and conservation and management of high-seas are living resources. Regarding pollution from land-based sources and seabed activities subject to national jurisdiction, States are to endeavor to harmonize their policies at the appropriate regional level.[224]

REGIME FOR THE AREA

The regime of the Area is set forth in UNCLOS (Part XI) and the 1994 Part XI Agreement. The latter is to be applied and interpreted together with UNCLOS as a single instrument. This regime expressly governs exploration and exploitation ("activities in the Area") regarding Area resources (as dened in the Convention), including related environmental impacts and marine scientic research in the Area. In addition to general rules of international law applicable to the conduct of all States, several other principles apply to the Area. These include that the Area and its resources are the common heritage of mankind and that no State may claim or exercise sovereignty or sovereign rights over any part of the Area or its resources, nor may any part be appropriated by a State or natural or juridical person.

All rights in the resources are vested in humankind as a whole. Moreover, all humankind is to benet from activities in the Area, from marine scientic research carried out in the Area, and from objects of an archaeological and historical nature found in the Area. Additional principles call for necessary measures to ensure protection of the marine environment from harmful effects of these activities and liability for damage from activities in the Area. High-seas freedoms must be exercised with due regard for rights under the Convention with respect to activities in the Area, and, conversely, activities in the Area are to be carried out with reasonable regard for other activities in the marine environment.[225]

It is the responsibility of the International Seabed Authority to adopt the necessary measures on environmental protection such as rules, regulations and procedures inter alia to prevent, reduce and control pollution, to protect and conserve the natural resources of the Area, and to prevent damage to the ora and fauna of the marine environment.

Among the rules and regulations called for in the Convention, and reected in the rules and regulations so far adopted, is a requirement that the Authority disapprove areas for minerals exploitation "in cases where substantial evidence indicates the risk of serious harm to the marine environment". The rules and regulations on polymetallic nodules require that when a contractor applies for exploitation rights, it must propose areas to be set aside and used exclusively as "preservation reference zones" in which no mining shall occur, so that representative and stable biota of the seabed remain in order to assess any changes in the ora and fauna of the marine environment due to mining.

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[224] http://highseasalliance.org/about-us

[225] San Diego L. Rev. 371 1970

AIRLAW

1. INTRODUCTION

State exercises complete sovereignty over its territory which comprises of lands, waters, maritime belts, air space etc. Various theories prevail with respect to exercise of jurisdiction over air space. There exists a great controversy in respect of law relating to airspace. The sovereignty over air space is essential for defence and security of the State. But at the same time there is need for the freedom of aerial navigation for commercial, scientific and humanitarian purposes. To reconcile conflicting needs the concept of functional sovereignty is suggested.

A number of international conventions have been concluded to regulate aerial navigation. They are

i. Paris Convention of Aerial Navigation 1919
ii. Havana Convention 1928
iii. Warsaw convention 1929
iv. Chicago Convention on International civil aviation 1944

The Paris convention for the regulation of aerial navigation was concluded which accepted a State's complete and exclusive sovereignty over the air space above its territory. Havana convention on Commercial Aviation of 1928 among American States contained substantially similar provisions as the hall mark of the interwar period was the complete sovereignty of the State in its airspace. The grant of landing rights for foreign aircrafts was within the absolute discretion of the state concerned. The Chicago convention further reaffirmed this position of customary international law rule with regard to rights of subjacent state in the air space. The Paris convention contained detailed provisions for the regulation of aerial navigation. The Chicago Convention 1944 aimed at the adoption of a multilateral agreement to regulate the international air transport and set norms for technical and navigational matters relating to civil aviation. United States has proposed the theory of open skies and five freedoms of air

i. To fly across foreign territory
ii. To land for non traffic purposes
iii. To disembark in a foreign country, traffic originating in the state of origin
iv. To pick up in the grantor country traffic destined for the flag state of the air craft
v. To carry traffic between two grantor countries

The first two freedoms were solely transit rights and the other three were transport or traffic rights. As there existed disagreement between the parties on above said freedoms it resulted in adoption of two separate agreements: the International Air Services Transit Agreement and the International Air Transport Agreement. The Chicago convention has established a permanent organization called ICAO (International Civil Aviation Organisation) to look into the implementation and enforcement of the convention and the resolution of disputes. The convention enforces exclusive sovereignty concept of the Paris convention as well as maintained the distinction between scheduled and non scheduled international air services. This convention is applicable to civil aircrafts. State aircrafts, including military aircrafts, have no right of transit without special authorization. The convention has left unregulated the international air traffic. So there arose the possibility of bilateral agreements for e.g., Bermuda Agreement between United States and United Kingdom in 1946, which showed synchronization of opposing views. This agreement has provided for the regulation of air transport on bilateral basis and served as a basis for future bilateral agreements.

AERIAL INTRUSION

As the state enjoys complete sovereignty over the air space unauthorized intrusion is prohibited. The unauthorized entry by the aircraft leads to serious consequences. One possible reason for intrusion in foreign airspace could be in distress. Article 25 of the Chicago Convention imposes a duty on each contracting party to provide such measures of assistance to aircraft in distress in its territory as it may find practicable. But if a state chooses not to accept any limitation on its sovereignty it has got complete freedom to deal with the intruding aircraft, including the use of force. But shooting down of a civil aircraft is looked with aversion as the incident of (KAL) explains the same. The Korean airline was shot down by USSR in August 1983,that killed 269 persons on board. This incident led to the unanimous adoption by the ICAO assembly of Art.3bis of the Chicago convention which prohibits absolutely the use of weapons against civil aircraft in flight except where permitted under the United Nations Charter on obvious reference to the right of self defense under Art.51 of the charter. However the right to use of force against a straying military aircraft has been accepted as a legitimate right of the territorial state.

OUTER SPACE

CONTENTS

1. Introduction
2. Outer Space Treaty
3. Recent developments

The launching of the first artificial satellite in 1957, by the Soviet Union opened up a new vista of outer space. This was soon followed by space activities on a constantly increasing scale. There has been orbiting of the earth through manned and unmanned satellites of varying weight and arbitral ranges, launched for different functional purposes, viz., for telecommunication, remote sensing of the earth resources, earth survey, meteorology, monitoring of pollution, missile detection, espionage etc. These activities are being carried out without any effective protest from the territorial States. At one time it was believed that the States exercised sovereignty over its outer space to the unlimited extent. The rapid progress of science and technology has made this view meaningless.

Many efforts have been made to conclude international agreement in regard to the outer space. The first phase of the space developments started on 1st October 1957, when the Soviet Union launched its first sputnik. Since then efforts have been made to achieve international co-operation in this field. The early perspectives were provided by jurists and intellectuals. Subsequently the United Nations passed a resolution,[226] wherein it recognized 'the common interest of making peace in outer space' and 'that it is the common aim that outer space should be used for peace full purpose only." The last resolution i.e., dated 13 December, 1963, entitled "Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space" which was unanimously adopted by the General assembly is very important, particularly because most of the principles were incorporated in the Treaty of Principles Governing the Activities of States in the Exploration and Use of outer space including the Moon and other celestial bodies, 1966[227] "*the Outer Space Treaty*".

OUTER SPACE TREATY

The Outer Space Treaty established the legal regime of outer space and lays down the premise of other conventions, concluded so far in this area. It is the constitution of the outer space regime. It clearly leaves outer space outside the sovereignty of States and declares that the area of the outer space "is not subject to national expropriation" (Art.2). On the other hand, the outer space, including moon and other celestial bodies, are subject to international law and the United Nations charter, and are "free for exploration and use by all States ... on a basis of equality and in the interests of all countries (Art. 1). Parties to the Treaty undertake not to place in orbit round the earth, or install in space, weapons of mass destruction, and use the moon and other celestial bodies exclusively for peaceful purposes. The installations and fortifications, the testing of any type of weapons and the conduct of military maneuvers on celestial bodies is forbidden (Art.4). The Treaty emphasizes on international cooperation in the exploration and use of outer space, and carrying out outer space activities.

Article 6 of the Outer Space Treaty deals with the problem of imputability in respect of any liability that may arise from space activities. It sets out the international responsibility of States parties for national activities in outer space. If the activity is carried out by an international organization, it will bear the responsibility along with the States parties to the Treaty participating in such organization. Article 7 further lays down that each State party "that launches or procures the launching of a space object", or "from whose territory or facility and object is launched, is internationally liable for damage" to another State party or to its natural or juridical persons such objects on earth, in the airspace, or in outer space.

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[226] Resolution 1348 (XIII)

[227] See U.N.Doc.A/6621,17 December,1966,pp.11-18

Yet another landmark in the development of space law is the Agreement on the rescue of Astronauts, The Return of Astronauts and the Return of Objects Launched into outer space which was commended upon by the General Assembly on December 10, 1967. The third great landmark in the development if international space law is the Convention on international Liability for Damage caused by Space Objects, which was agreed on and commended by the General Assembly on November 29, 1971.[228] The fourth landmark is Convention or Registration of Objects Launched into Outer Space which was adopted by the U.N. General Assembly in 12 November, 1974 as an annex to Resoluation 3235 (XXIX). The fifty landmark is the Agreement Governing the Activities of States on the Moon and other celestial Bodies which was adopted by the General assembly on 5th Dcember,1979 as an annex of resolution 34/68. It entered into force in 1984 when the fifth country, Australia, ratified the agreement.

All activities on the moon, including its exploration and use, shall be carried out in accordance with international law, in particular the charter of the U.N. and taking into account the Declaration of principles of International law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations adopted by the General assembly on 24 October, 1970, in the interest of maintaining international peace and security and promoting international cooperation, and mutual understanding and with due regard to the corresponding interests of all other States Parties.[229]

VIENNA CONFERENCE ON THE EXPLORATION AND PEACEFUL USES OF OUTER SPACE (UNISPACE-82 or UNISPACE II)

The UNISPACE-82 was held at Vienna from August 9 to August22, 1982. with 94 states participants and 45 observers. The Conference reviews the developments in the field of outer space taking place since 1968. The conference appealed the States not to increase arm race beyond earth.

UNISPACE-III

The key objective of the conference was to create a blueprint for the peaceful uses of outer space in the 21st century. It considered the following subjects.

i. Future of Exploration of Planets;

ii. Use of Micro-wave systems or micro-satellites in the exploration of outer space;

iii. Security of future outer space programs in respect of debris of outer space;

iv. Maintenance and supervisor of outer space based environment; and

v. Use of Mobile Satellite Communication.

[228] See General Assembly Resolution 2777 (XXVI).
[229] Article 2.

LAW OF DIPLOMACY

CONTENTS

INTRODUCTION

Diplomacy simply means "making a deal with other countries". The word 'diplomacy' is derived from the Greek word 'diploma' meaning "a letter folded double- a document; it is a writing conferring some honor or privilege". The act of "Diplomacy" in international law means the method by which the states establish or maintain mutual relations or carry out the political and legal transactions based on their foreign policies.

Rules regulating the various aspects of diplomatic relations constitute one of the earliest expressions of international law. Whenever in history there has been a group of independent states co-existing, special custom have developed on how the ambassadors and other special representatives of other states were to be treated.[230]

Diplomacy as a method of communication between various parties, including negotiations between recognized agents, is an ancient institution and international legal provisions governing its manifestation are the result of centuries of state practice. The special privileges and immunities related to diplomatic personnel of various kinds grew up partly as a consequence of sovereign immunity and the independence and equality of states, and partly as an essential requirement of an international system. States must negotiate and consult with each other and with international organizations and in order to do so need diplomatic staffs. Since these persons represent the states in various ways, they thus benefit from the legal principles of state sovereignty.

Diplomatic relations have traditionally been conducted through the medium of ambassadors[231] and their staffs, but with the growth of trade and commercial intercourse the office of consul was established and expanded. The development of speedy communications stimulated the creation of special missions designed to be sent to particular areas for specific purposes, often with the head of the state or government in charge. To some extent, however, the establishment of telephone, telex and fax services has lessened the importance of the traditional diplomatic personnel by strengthening the centralizing process. Nevertheless, diplomats and consuls do retain some useful functions in the collection of information and pursuit of friendly relations, as well as providing a permanent presence in foreign states, with all that implies for commercial and economic activities.

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[230] G. Mattingly, Renaissance Diplomacy, London, 1955, and D. Elgavish, 'Did Diplomatic Immunity Exist in the Ancient Near East?', 2 Journal of the History of International Law, 2000, p.73.

[231] See, as to the powers of ambassadors, First Fidelity Bank NA v. Government of Antigua and Barbuda Permanent Mission 877 F. 2d 189 (1989); 99 ILR, p. 125.

VIENNA CONVENTION ON DIPLOMATIC RELATIONS, 1961

The Vienna Convention on Diplomatic Relations of 1961 is an international treaty between independent countries. It specifies the privileges of a diplomatic mission that enable the diplomats to perform their function without fear of coercion or harassment by the host country. This forms the legal basis for diplomatic immunity. Its articles are considered a cornerstone of modern international relations. As of April 2014, it has been ratified by 190 states.

Throughout the history of sovereign nations, diplomats have enjoyed a special status. Their function to negotiate agreements between states demands certain special privileges. An envoy from another nation is traditionally treated as a guest, their communications with their home nation treated as confidential, and their freedom from coercion and subjugation by the host nation treated as essential.[232] The first attempt to codify diplomatic immunity into diplomatic law occurred with the Congress of Vienna in 1815. This was followed much latter by the convention regarding Diplomatic Officers (Havana, 1928).

The present treaty on diplomatic relations was the outcome of a draft by the International Law Commission. The treaty was adopted on 18 April 1961, by the United Nations Conference on Diplomatic Intercourse and Immunities held in Vienna, Austria, and first implemented on 24 April 1964. The same conference also adopted the optional protocol concerning Acquisition of Nationality, the optional protocol concerning the compulsory settlement of disputes, the final act and four resolutions annexed to the act[233]. Two years later, the United Nations adopted a closely related treaty, the Vienna Convention on Consular Relations.[234]

FUNCTIONS OF DIPLOMATIC AGENTS

"Diplomatic Agents are ambassadors residing in a foreign country as representatives of the states by whom they are dispatched. In a broad sense, an ambassador represents not merely one government to another government but even one nation to another nation so that they may understand each other." The functions[235] of diplomatic agents given under Vienna Convention on Diplomatic Relations, 1961:

(1) REPRESENTATION :Diplomatic agents represent the state by which they are sent in the state where they are accredited. Representation is entrusted primarily to the head of the mission, but other diplomatic agents may also participate at the appropriate level.

(2) PROTECTION: Diplomatic agents protect the interests of the sending states and also of its nationals, within the limits permitted by municipal law. The limit is prescribed not by International Law but by the municipal law and regulations of the sending state within which an envoy affords protection.

(3) NEGOTIATION: Negotiation is the most important function which the diplomatic agents perform. They negotiate on various aspects on behalf of the sending state with the state to which they are accredited in order to maintain friendly relationship between the two. They are required to communicate the outcome of the negotiation to the sending state from time to time.

(4) OBSERVATION: Diplomatic agents are required to observe those happenings and events which may take place in the state where they are accredited, especially those which may have effect in the State by which they are sent. After making observations they are required to make periodical reports as well as special reports thereon to the government of the sending state.

(5) PROMOTION OF FRIENDLY RELATION: Diplomatic agents are required to promote friendly relations between the sending state and the receiving state. They also have a function to develop the economic, cultural and social relations between the two states.

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[232] Dr. H. O. Agarwal, International Law and Human Rights, 19th 2013, Central Law Publications.
[233] Malcom. N. Shaw, International Law, Sixth edition, Cambridge University Press.
[234] Article 3(1) of Vienna Convention of Diplomatic Relations, 1961.
[235] Dr .SK Kapoor, International Law, 8th edition, Central Law Agency, Allahabad.

THEORIES RELATING TO THE GRANTING OF DIPLOMATIC PRIVILIGES AND IMMUNITIES

1)EXTRA-TERRITORIAL THEORY

According to this theory, diplomatic agents are deemed not to be within the territorial jurisdiction of the state where they are accredited, but to be at all times within that of the sending state. This theory is also called fictional theory as extra-territoriality is based merely on a fiction. The theory of extra-territoriality was adopted by many writers of the nineteenth century. However, the theory has been discarded by the modern jurists. According to them, the basis of giving immunities and privileges to the diplomatic agents is not that of extra-territoriality. It is a fiction and like most legal fictions, this also is of only limited usefulness. Decisions of the different municipal courts have also discarded this theory.[236]

(2) REPRESENTATIONAL THEORY

According to this theory, the diplomatic agents are regarded as agents or the personal representatives of the sovereign of the sending states. They therefore are given the same degree of privileges which are given to the prince or to the sovereign. The theory was reflected in the regulations concerning the rank of diplomats at the Vienna Congress of1815. However, this theory is subject to criticism in the sense that extension of the immunities of the sovereign to the diplomatic agents by no mean is logical. The courts have therefore not accepted the analogy between sovereign and diplomatic immunities except in the most general way[237].

(3) FUNCTIONAL THEORY

This theory lays down that diplomatic agents are given immunities and privileges because of the nature of their functions. The duties which the diplomatic agents are required to perform in many cases are far from easy. In other words, their functions are of special, or to say, of typical nature. They are allowed immunities from the legal and other processes of the state where they are accredited show that they may perform their functions freely. The typical functions which diplomatic agents are required to perform have made it necessary to give them immunities and privileges.

IMMUNITIES AND PRIVILIGES OF THE DIPLOMATIC AGENTS

Vienna Convention of 1961 lays down the different immunities and privileges granted to the diplomatic agents they are:

(1)INVIOLABILITY OF DIPLOMATIC AGENTS

Diplomatic Agents are inviolable. This principle is recognized in International law much before the adoption of the convention of 1961[238]. The person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention. The receiving state shall treat him with due respect and shall take all appropriate steps to prevent any attack on his person, freedom or dignity. The immunity of inviolability given to the diplomatic agents is not absolute.[239] Devyani Khobragade case, 2012.

(2) INVIOLABILITY OF THE STAFF OF THE MISSION

Immunities which are given to the "head of the mission" also extend to the members of the staff of the mission. It lays down regarding the immunities to the members of the mission together with the members of their families forming part of their households, only if they are not nationals of their households, only if they are not nationals of or permanent resident in the receiving state, then they enjoy privileges and immunities.

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[236] See, Fatemi et al v. United States, 192 A 2d 525 (1963); International Law Reporter; 34 p. 148

[237] In Bergman v. De Sieyes, the District Court of New York held that a foreign minister is immune from the jurisdiction in the country to which he is accredited on the ground that he is a representative of his sovereign (71 F Supp. (1946) p. 334).

[238] Article 29 of the Vienna Convention on Diplomatic Relations, 1961

[239] Devyani Khobragade case, 2012.

(3) INVIOLABILITY OF PREMISES

A permanent diplomatic mission needs premises from which to operate and the receiving state must help the sending state obtain premises for the mission. There is a right to use the flag and emblem of the sending state on the premises of the mission, which would help in clearly identifying them. Customary international law has recognized the inviolability of such premises before the convention, private residence of a diplomatic agent enjoy the same inviolability.

(4) IMMUNITY FROM THE LOCAL JURISDICTION

Diplomatic agents enjoy immunity from the jurisdiction of the local courts. The immunity extends to criminal as well as civil and administrative jurisdiction. A diplomatic agent shall not enjoy immunity from the criminal jurisdiction of the receiving state. Thus, the receiving states have no right, in any circumstances whatever, to prosecute and punish diplomatic agent.

Similarly, no civil action of any kind can be brought against the diplomatic agents in the civil courts of the receiving state. However, this immunity does not extend to the private property owned by the diplomatic agents in the receiving state.

(5) FREEDOM OF COMMUNICATION

Diplomatic agents are free to communicate any information for official purposes to the state by which they are accredited.[240]

(6) IMMUNITY FROM SOCIAL SECURITY PROVISIONS

A diplomatic agent shall with respect to services rendered for the sending state is exempted from social security provisions which may be in force in the receiving state.[244]

U.S. v. Iran[242]

There was revolution against the Shah Government in Iran. Shah was deposed from kingship by the revolutionary group under the leadership of Ayatollah Khomeini. He fled to America. America gave him asylum under the pretext of medical treatment. This caused annoyance to the Iranian students. Several hundred Iranian students and other demonstrators took possession of the United State Embassy in Teheran by force on 04-11-1979. The Iranian Government did not take any step to protect the embassy and the life of the staffs. The security forces simply disappeared from the scene. The students captured the documents and 52 persons of embassy. America filled a case against Iran. The International Court of Justice declared that Iran violated the principles of Vienna Convention on Diplomatic Relations, 1961. The ICJ also decided unanimously, that Iran 'must immediately take all steps to redress the situation resulting from the events' including the release of the hostages and the return of the premises, documents, etc, to the United States.

CONCLUSION

Diplomacy which helps in creating mutual relations between the states is a very important concept under international law. Without diplomacy there cannot be a proper relation between the states. It helps to establish a social, economic, cultural development between the states.

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[240] Article 27 of the Vienna Convention on Diplomatic relations, 1961
[241] Article 33 of the Vienna Convention on diplomatic relations, 1961
[242] United States Diplomatic and Consular Staff in Tehran, Judgment, 1. C. J. Reports 1980, p.3.

REFUGEES

INTRODUCTION

Refugees are a special class of migrants who under international law deserve specific protection by their host state. Every year, millions of persons invoke the protection of international refugee law, making it one of the most relevant international human rights mechanisms. The only international legal norms applying specifically to refugees at global level are the 1951 UN Convention relating to the status of refugees (Geneva Convention) and the 1967 Protocol relating to the status of refugees. The Geneva Convention and its Protocol have been ratified by almost 150 states to date (however a number of countries, such as the Gulf States and India, are not among the signatories). The Convention was drafted under the specific conditions of the post-war period, applying only to persons who became refugees as a result of events occurring before 1 January 1951 in Europe. This temporal and geographical limitation was removed by the 1967 Protocol. Refugees are a special class of migrants who under international law deserve specific protection by their host state.

DEFINITION

According to Article 1 of the 1951 UN Convention, as modified by the 1967 Protocol, a refugee is defined as a person who 'owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country.' This definition implies that several qualifying conditions apply to be considered a refugee: (1) presence outside home country (2) well-founded fear of persecution (being at risk of harm is insufficient reason in the absence of discriminatory persecution (3) incapacity to enjoy the protection of one's own state from the persecution feared.

The definition of refugees was actually intended to exclude internally displaced persons, economic migrants, and victims of natural disasters, and persons fleeing violent conflict but not subject to discrimination amounting to persecution. A refugee is not the same as an asylum-seeker. According to the United Nations High Commissioner for Refugees (UNHCR) 'an asylum-seeker is someone who says he or she is a refugee, but whose claim has not yet been definitively evaluated'. In the case of mass refugee movements (usually a result of conflict), the reasons for fleeing are evident and there is no capacity to conduct individual interviews, such groups are often declared *prima facie* refugees.

RIGHTS OF REFUGEES AND ASYLUM-SEEKERS

International refugee law or international human rights treaties neither articulate an explicit entitlement to asylum for the individuals concerned, nor impose an obligation on states to grant asylum. Individuals have a right to *seek* asylum, not to be *granted* asylum, and the states have the right to grant asylum, but no obligation. The Geneva Convention does not guarantee asylum-seekers the right to be granted refugee status, even if they fulfil the conditions to be considered refugees; this remains at state discretion. States have, however, to refrain from actions that would endanger asylum-seekers, especially from returning them to their country of origin. Each state is also free to establish the conditions for granting asylum. This situation is reinforced by the fact that nobody is entitled to interpret the Geneva Convention authoritatively, unlike most other international human rights treaties. The United Nations High Commissioner for Refugees (UNHCR) has the duty to supervise its application, but has no authority to provide mandatory interpretations. The task of interpreting the Convention has thus fallen to domestic law-makers and courts.

Because of their vulnerable situation, asylum-seekers are sometimes forced to enter their country of refuge unlawfully. The Geneva Convention does not stipulate that states are required to grant asylum-seekers entry to their territory. Entering a state party to the Convention unlawfully does not forfeit protection (Article 31) and illegal entrants can still qualify as refugees if they fulfil the relevant criteria. 'Refugees unlawfully in the country of refuge' should not be punished for their illegal entry if they come directly from the territory where their life and freedom was threatened and if they report themselves immediately to the authorities, showing good reason for their illegal entry (Article 31). Restrictions on their movement can be imposed until their status is regularised. To 'refugees lawfully in the territory,' Article 26 of the Convention grants the right to choose their residence and to move freely.

The UNHCR considers that detention of asylum-seekers should be a measure of last resort. It has drafted a set of guidelines for the use of detention of asylum-seekers. In certain countries, refugees are confined to refugee camps and their movement is restricted. In other countries, including in many developed countries, detention of irregular migrants until their status as refugees is determined is a common practice. The Convention establishes a duty on states to accord rights to refugees that in certain areas are on a par with those of their population, while in others are similar to those granted to the most favoured aliens or to aliens in general. Rights accrue to refugees incrementally depending on the legality of their situation in their host country and the duration of their stay there. The first tier of rights applies merely on the basis of presence within a state party's territory, even if this presence is illegal. Such rights include freedom of religion (Article 4), property rights (Article 13), the right to primary education (Article 22), the right to access to the courts (Article 16(1)), a limited right to move freely, subject to justifiable restrictions (Article 31(2)) etc. The second tier of rights are to be granted when refugees are 'lawfully present' in the host state (for example while their asylum claim is processed), including the right to self-employment (Article 18) and the right to move freely, subject to regulations applicable to aliens in general (Article 26). Other rights are accrued when refugees are 'lawfully staying' in a state party (usually after recognition of their refugee status by the state concerned), including the right to paid employment (Article 17) under conditions no less favourable than for other aliens. The right to work without any restriction accrues only after a period of three years' extended residence (Article 17(2)). The absence in the Convention of a definition of the concepts of 'present lawfully', 'staying lawfully', or 'residing lawfully' affords states considerable discretion in according rights to refugees. In practice, states are free to grant permanent or temporary residence and to assign, or decline rights to work and move freely. This leads to great differences as regards refugees' rights.

THE PRINCIPLE OF *NON-REFOULEMENT*

The purpose of the Convention is to assure protection to refugees, as defined in the Convention, by ensuring that they are not returned to their country or sent to any other territory where they could face persecution. Article 33 puts forward what has become known as the principle of *non-refoulement*: 'No Contracting State shall expel or return ('*refouler*') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion'. This protection does not apply however to persons who represent a security threat to their host country (Article 33(2)).

This principle has become part of other international human rights treaties either explicitly (Convention against Torture, Article 3) or implicitly through the relevant jurisprudence (European Convention on Human Rights, Article 3 and International Covenant on Civil and Political Rights, Article 7) and, according to some scholars, also part of customary international law, making it universally binding.

UNIT - IV

THE LAW OF TREATIES

(Read with the Vienna Convention on the Law of Treaties, 1969.)

CONTENTS

INTRODUCTION

Treaties along with customs, general principles of law and judicial decisions constitute the core sources of international law[243]. A treaty can be defined as "an agreement or contract between two or more nations or sovereigns, formally signed by commissioners properly authorized, and solemnly ratified by the several sovereigns or the supreme power of each state[244]." The Treaty of Kadesh[245] is the oldest written treaty to survive to-date. Treaties are known by a variety of differing names, ranging from Conventions, International Agreements, Pacts, General Acts, Charters, Declarations and Covenants etc. All these terms refer to a similar transaction, which is the creation of written agreements whereby the states participating bind themselves legally to act in a particular way or to set up particular relations between themselves. A series of conditions and arrangements are laid out which the parties oblige themselves to carry out. These rules were to a large extent codified and reformulated in the Vienna Convention of the Law of Treaties*, which was concluded on 23rd May 1969. However it is important to note that the VCLT is not the complete code governing treaty law.

There are different kinds of treaties like law-making treaties, human rights treaties, bi-lateral and multi-lateral treaties etc. Law making treaties are agreements entered into by many nations by virtue of which they frame new rules regarding a particular topic in international law. It will act as guidelines for all future conduct of the States regarding that topic. Such treaties are also known as 'normative treaties', eg. Genocide Convention etc.

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[243] Art 38(1) of the ICJ

[244] The Black's Law Dictionary, 2nd Edn*-Hereinafter referred to as the VCLT.

[245] The Egyptian-Hittite peace treaty (1259 BC). The purpose was to establish and maintain peaceful relations between the parties.

What Can A Treaty Do?

A treaty[246] can do the following:

- Setup binding rights and obligations – CEDAW (1979) mandates the states which have ratified to legislate laws relating to women empowerment and enhance gender equality amongst other things.
- Terminate and declare wars – Paris Peace Treaties (1947) formally ended WW-II.
- Settle disputes – Boundary Treaty (1970) settled the boundary disputes between USA and Mexico.
- Acquire and cede territories – Treaty on the Creation of USSR (1922) legalized the creation of a union of several Republics of the Soviet Union in the form of the Union of Soviet Socialist Republics (USSR).
- Establish alliances – The Triple Entente created the alliance between Russia, France and UK before WW-I.
- Create international organizations – The United Nations Charter established the UNO in 1945.

FORMALITIES IN THE MAKING OF A TREATY

There is no prescribed form or procedure to create a treaty. There are also no fixed rules as to who should sign the treaty to make it legally binding on the States for that will depend on the intention and agreement of the States concerned. The treaties may be entered into between States, or governments, or heads of states or governmental departments, whichever is convenient. In the UK, the treaty-making power is within the prerogative of the Crown, whereas in the US it resides with the President, though the approval of the senate and a 2/3rd majority of the senators is prerequisite. In *Cameroon v. Nigeria*[247] it has been stated that International law has left the power of treaty-making and such matters to the domestic law of the state.

However, the concept of full powers is to be followed stringently while forming treaties. Article 7 of the VCLT explains about 'full powers'. It states that only a person representing a state with proper documents can act as a signatory on behalf of the state. The state should have conferred all the necessary powers on that person. Heads of states[248] and heads of diplomatic missions are considered as the representatives of their states.

If a treaty is entered into by a person who does not have sufficient authority then it will have to be confirmed by the concerned state afterwards, till which it will not have any legal effect. The provision for such confirmation at a later time has been given in Article 8 of the VCLT.

CONSENT IN TREATY LAW

The consent to a treaty by the states who are parties to it is a vital factor because they can be bound only by their consent. According to Article 11 of the VCLT the consent may be signaled by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession.

Signature[249] of a treaty is an act by which a State provides a preliminary endorsement of the instrument. Signing does not create a binding legal obligation but does demonstrate the State's intent to

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[246] Article 2 (1) of VCLT, "Treaty" means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.
[247] ICJ Reports, 2002, pp 303,429.
[248] Genocide Convention (Bosnia v. Serbia), ICJ reports, 1996 pp. 595, 622
[249] Article 12 of the VCLT

examine the treaty domestically and consider ratifying it. While signing does not commit a State to ratification, it does oblige the State to refrain from acts that would defeat or undermine the treaty's objective and purpose. 'Ratification[250]' is an act by which a State signifies an agreement to be legally bound by the terms of a particular treaty. To ratify a treaty the State first signs it and then fulfils its own national legislative requirements through the appropriate national organ of the country – Parliament, Senate, the Crown, Head of State or Government, or a combination of these. It follows domestic constitutional procedures and makes a formal decision to be a party to the treaty. The instrument of ratification, a formal sealed letter referring to the decision and signed by the State's responsible authority, is then prepared and deposited with the United Nations Secretary-General in New York.

'Accession[251]' has the same legal effect as ratification, but is not preceded by an act of signature. The formal procedure for accession varies according to the national legislative requirements of the States.

RESERVATIONS

A reservation is defined in Article 2(d) of the VCLT as "a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State." The capacity of a state to make reservations to an international treaty illustrates the principle of sovereignty of states, through which a state may refuse its consent to particular provisions so that they do not become binding upon it. A reservation can be effected principally by:

1. Express provision in the treaty itself;
2. By agreement between the contracting states; or
3. By a reservation duly made.

It is pertinent to note that reservations cannot be made by states which are parties to bilateral treaties. In case of multilateral treaties though the scenario is different, the parties to such treaties can announce their intention to dissent from certain provisions by omitting them *in toto* or by understanding them in a certain way. Also it facilitates negotiations between the parties and encourages ratifications too. A reservation allows the state to be a party to the treaty, while excluding the legal effect of that specific provision in the treaty to which it objects. States cannot take reservations after they have accepted the treaty. A reservation must be made at the time that the treaty affects the State. The effect of a reservation is simply to exclude the treaty provision to which the reservation has been made from the terms of the treaty in force between the parties[252].

Reservations are defined under the Vienna Convention and interpretative declarations are not, the two are sometimes difficult to discern from each other. Unlike a reservation, a declaration is not meant to affect the State's legal obligations but is attached to State's consent to a treaty to explain or interpret what the State deems unclear. But despite its name, an interpretative declaration may have the effect of a reservation. If an interpretative declaration seeks to limit a state party's obligations under the instrument, then the declaration constitutes a reservation[253].

INTERNATIONAL HUMAN RIGHTS INSTRUMENTS

International human rights instruments are treaties and other international documents relevant to international human rights law and the protection of human rights in general. They can be classified into

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[250] Article 14 of the VCLT
[251] Article 15 of the VCLT
[252] *Legality of the Use of Force (Yugoslavia v. USA)*, Provisional Measures Order, ICJ Reports, 1999, pp. 916, 924.
[253] *Belilos v. Switzerland*, ECHR 19 ICLQ, 1990 p. 300.

two categories: declarations, adopted by bodies such as the United Nations General Assembly, which are not legally binding although they may be politically so as soft law; and conventions, which are legally binding instruments concluded under international law. International treaties and even declarations can, over time, obtain the status of customary international law.

International human rights instruments can be divided further into global instruments, to which any state in the world can be a party, and regional instruments, which are restricted to states in a particular region of the world. There are about 10 core international human rights treaties including the ICERD, ICCPR, ICESCR, CEDAW, CAT, CRC and the Optional Protocols of these treaties etc[254]. In addition to these core instruments there are also other human-rights centered treaties, declarations etc including the Convention on the Prevention and Punishment of the Crime of Genocide, Standard Minimum Rules for the Treatment of Prisoners etc[255].

Only some international human rights instruments allow derogations from its provisions and that too it should be made strictly proportionate to the circumstances of the public emergency, else it is not valid[256]. A denunciation is possible only if it is established that the parties intended to allow for this, or the ability to do so is implied from the nature of the treaty[257].

LIMITATIONS TO RESERVATIONS

The general rule regarding reservations was that they could only be made with the consent of the all the other states involved in the process. If this was not possible, that state could either become a party to the original treaty (minus the reservation) or not become a party at all. But then, this restrictive approach was not accepted by the International Court of Justice in its advisory opinion in the *Reservations to the Genocide Convention* case[258]. According to Article 19 of the VCLT, *"A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless:*

(a) The reservation is prohibited by the treaty;

(b) The treaty provides that only specified reservations, which do not include the reservation in question, may be made; or

(c) In cases not falling under sub-paragraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty."

A reservation expressly authorized by a treaty does not require any subsequent acceptance by the other contracting States unless the treaty so provides[259]. When there is only a limited number of parties to a treaty and if the object and purpose of the treaty would be defeated if the consent of all the parties is not obtained, then a reservation requires explicit acceptance by all the parties[260]. There have always been a lot of doubts regarding the effect of reservations with respect to human rights treaties. International human rights instruments are treaties and other international documents relevant to international human rights law and the protection of human rights in general. The problem of inadmissibility of reservations is more common in human rights treaties but not many states make their objections and even if they do, they do not sever the ties between themselves and the state which makes such objectionable reservations, in the hope that those states will accept all the provisions in the treaty.

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[254] http://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx
[255] http://www.ohchr.org/EN/ProfessionalInterest/Pages/UniversalHumanRightsInstruments.aspx
[256] Ed Bates, "Avoiding Legal Obligations Created by Human Rights Treaties", ICLQ VOL 57, October 2008
[257] Article 54 of the VCLT
[258] ICJ Reports, 1951, p. 15; 18 ILR, p. 364.
[259] Article 20(1) of the VCLT
[260] Article 20(2) of the VCLT

A certain standard of human rights has to be regarded as universal and inherent in every culture, applying to every human being in the world. Excluding certain rights in certain regions also violates those rights which are said to be guaranteed in this region; thus, a reservation saying that certain rights do not apply in certain countries is a violation of human rights. So some scholars including the author of the article feels that reservations are incompatible with human rights[261].

It has been stated that "good faith compliance is of even greater importance in the area of international human rights law, where what is at stake is not the impersonal interests of states but the protection of the fundamental rights of the individual[262]." It is pertinent to note that human rights treaties concentrates on the protection of the inherent rights of each individual and thus this overshadows the interest of the nations.

Whether or not a reservation to a human rights treaty is void depends on the extent to which it is bound by the 'object and purpose' of the treaty. According to the Human Rights Committee, reservations that offend peremptory norms (*jus cogens*) would be incompatible with the object and purpose of a treaty. Article 31 of the VCLT provides a list of places, where one might find indications for the object and purpose of a treaty, namely: the text including preamble and appendix; agreements and instruments relating to the conclusion of the treaty[263]. It remains unclear to what extent incompatible reservations are void. Both the ICJ and the ECHR apply the so-called "severability-doctrine", according to which incompatible reservations are "severed" from the reserving state's ratification. Thus, the reserving state becomes a state party to the treaty without benefiting from the incompatible reservation[264].

The Court has stated in the *Reservations to the Genocide Convention Advisory Opinion* that the State which has made and maintained a reservation which has been objected by one or more of the parties to the Convention but not by the others, can be regarded as being a party to the Convention, if the reservation is compatible with the object and purpose of the Convention; otherwise, that State cannot be regarded as being a party to the Convention. Though sometimes the vagueness of the reservations create a lot of confusion and complicates the problem further as in the case of the CRC where Pakistan has made a reservation which states that: *"the provisions of the Convention shall be interpreted in the light of the principles of Islamic laws and values."* Now such a reservation can affect the working of almost all the provisions of the convention despite not being totally against the aims, object and purpose of the treaty[265].

In his article[266] Mr. M. Fitzmaurice states that the collegiums system of reservations which is adopted by many human rights treaties is not operative all the time. Instead he suggests that the parties make fruitful interactions with the Committee to come to a conclusion regarding those issues which pose a challenge.

It has been stated in the case Soering v. United Kingdom and Germany[267] that "reservations should be continually reexamined in light of evolving interpretations of the norms of international human rights law."

Despite the provisions given by the VCLT to handle the complex issue of reservations, many scholars including Q.M. Maarij-Uddin have stated that nothing in it can prevent a state from invoking a reservation to a provision of any human rights treaty-at least against those provisions which have not acquired the status of per-emptory norms in international law[268]. This narrows down those areas in which reservations are prohibited and it does not help in the protection of the rights of the people.

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[261] Johanna Fournier, *Reservations and the Effective Protection of Human Rights*, Goettingen Journal of International Law 2 (2010) 2, 437-462
[262] Concurring Opinion of Judge Jackman in *Caesar v Trinidad and Tobago* (n 18)
[263] Article 31(2) of the VCLT
[264] Johanna Fournier, *Reservations and the Effective Protection of Human Rights*, Goettingen Journal of International Law 2 (2010) 2, 437-462
[265] William A. Schabas, *"Reservations to the Convention on the Rights of the Child"*, Human Rights Quarterly,18 Hum. Rts. Q. 472 1996.
[266] M.Fitzmaurice, "On the Protection of Human Rights, the Rome Statute and Reservations to Multilateral Treaties", 2006 Singapore Year Book of International Law and Contributors.
[267] 161 Eur. Ct. H.R. (ser. A)
[268] Q.M. Maarij-Uddin, "Reservation to Human Rights 'Treaties – A Threat to the "Universality" of Human Rights", 8 Student Advoc. 81 1996

GENERAL PRINCIPLES OF TREATY LAW

The fundamental principle of treaty law is the proposition that the treaties are binding upon the parties to them and must be performed in good faith[269]. This rule is termed as *'pacta sunt servanda'*, which means "agreements must be kept". This rule is presumed to be the oldest principle of international law. It has been clearly mentioned in Article 26 of the VCLT[270].

'Pacta tertiis nec nocent nec prosunt', this refers to a general principle of the law of treaties, i.e. Treaties do not create either obligations or rights for third states without their consent. This principle is included in the VCLT by virtue of Article 34[271].

The concept of 'jus cogens' is also highly important in the law of treaties. Article 53 of the VCLT deals with 'jus cogens', Ie. "A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law." A peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

INTERPRETATION OF TREATIES

There are 3 Basic Approaches of the Interpretation of Treaties: (Articles 31-33 of the VCLT) ie, the actual text of the agreement (Objective Approach), In case of ambiguity – the intention of the parties to the treaty should be considered (Subjective Approach) and Object and purpose of the treaty[272].

General Principles of Treaty Interpretation

- Grammatical interpretation and the intention of the parties:
  - Words and phrases are in the first instance to be construed according to their plain and natural meaning. In case of any absurdity or conflict with the intention of the parties, then this grammatical rule need not be followed. A treaty should not be interpreted in a way in which it violates the rights of the persons it intends to protect[273].
- Object and context of treaty:
  - If particular words and phrases in a treaty are doubtful, their construction should be governed by the general object and the context of the treaty. Preamble[274], annexes and related agreements to the treaty can be considered for the purpose of interpretation.
- Reasonableness and consistency:
  - In accordance with the principle of consistency, treaties should be interpreted in accordance with the existing international law[275]. The Special provisions are greater than the general provisions (except when expressly provided otherwise.) Also consistent meaning should be given to different portions of the treaty.
- The principle of effectiveness:
  - The treaty should be given an interpretation which on the whole will render the treaty most effective and useful[276]. The interpretation should be within the letter and spirit of the treaties[277]. This is an important principle in multilateral treaties.

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[269] The Nicaragua Case, ICJ Reports 1986, pp. 392, 418; The Gabcikovo-Nagymaros Project case (Hungary v. Slovakia), 116 ILR

[270] Article 26 - Every treaty in force is binding upon the parties to it and must be performed by them in good faith.

[271] Article 34 - A treaty does not create either obligations or rights for a third State without its consent.

[272] *Beagle Channel Arbitration* case, (Argentina v. Chile) 52 ILR 93.

[273] *Kolovrat and Oregon*, 366 US 187 (1961)

[274] Beagle Channel Arbitration case, (Argentina v. Chile) 52 ILR 93

[275] Golder Case

[276] United States Diplomatic and Consular Staff in Tehran

[277] South West Africa Cases, 2nd Phase

- Recourse to extrinsic materials:
  - The treaty is not the only source for interpretation. In case of ambiguity regarding certain provisions the following materials can be used: Past history, *Travaux preparatoires* (Preliminary drafts) and Interpretative protocols, resolutions, committee reports and subsequent agreement between the parties regarding the interpretation.

INVALIDITY OF TREATIES

There are some similarities between contracts and treaties in the case of the invalidation of the treaties. The 6 grounds for making a treaty invalid according to the VCLT are:

- Treaty-making incapacity (Art 46): This cannot be held as a valid reason unless the representative has blatantly breached his powers or if the treaty violates an internal law of fundamental importance.
- Error (Art 48): This can be relied upon as a ground only if the error is related to a fact or situation which was essential at the time of concluding the treaty. It is not a valid reason if the error was made by the party claiming it as a reason to invalidate the treaty by its own conduct.
- Fraud (Art 49): This applies when a state which is a party to the treaty has been induced by the fraudulent conduct of another negotiating state. But the core ideas regarding 'fraud' have not been defined in the VCLT.
- Corruption (Art 50): If the representatives of a state party have been corrupted by another negotiating state and if the treaty was formed, then that state whose officials were corrupted can use this as a ground to invalidate the treaty.
- Coercion (Art 51-52): If a treaty had been concluded because of the undue influence (be it economic/political) or threats or use of force by one state party over another, then such treaties can be made invalid.
- Conflict with a norm of *jus cogens* (Art 53): If the provisions of a treaty conflict with the fundamental rules of humanitarian nature which includes prohibition of genocide, slavery, racial discrimination and protection of essential human rights during times of both peace and war etc, then such a treaty can be invalidated.

TERMINATION OF TREATIES

Treaties may be terminated by:

- Operation of law:
  - By way expiration and extinction of the time-period and/or the subject-matter of the treaty or the extinction of either party to a bilateral party. Even state succession can complicate these matters.
  - By way of an outbreak of war between the States who are parties to the treaty. It is pertinent to note that the VCLT is silent regarding this issue, but, the Institute of International Law has adopted a Resolution containing a set of rules in 11 articles to govern the subject, applying both to war and non-war conflicts.
  - In case of impossibility of performance of the treaty due to the permanent disappearance or destruction of an object indispensable for the execution of the treaty.

- By the working of the doctrine, "rebus sic stantibus". That is, the treaty obligations subsist only so long as the essential circumstances remain unchanged. Thus treaties can be terminated if there is a fundamental change if circumstances (Art 62).
- If the treaty provisions are contrary to the new peremptory norms (Art 64) that are established then such a treaty can be struck down.

➢ Act or acts of the state parties:

- By way of breaches by the parties to the treaty.
- If the subsequent treaties are conflicting with the main treaty.
- By way of proper withdrawal of parties, which is by giving a notice of termination or by an act of denunciation (if provided for in the treaty itself).

CONCLUSION

It is evident that the treaties play a very important role in shaping international law. It sculpts the various facets of the laws of the nations. The human rights treaties are one of the biggest milestones in treaty law for they contribute to the well-being of each and every individual on this planet by breaking barriers of state religion, creed, gender and boundaries. There are discrepancies in case of reservations but that is mostly due to the power struggles of the nations and the aim of establishing their ideologies over the rest of the world. This will take a lot of time, discussion, analysis and patience to be resolved. The VCLT has managed to bring under its ambit a wide variety of treaties and its rights and obligations, thus despite its shortcomings it has proved to be quite an effective governing body.

THE LEAGUE OF NATIONS

The League of Nations is an international organization, headquartered in Geneva, Switzerland, created after the First World War to provide a forum for resolving international disputes. Following World War I after much deliberation the league was established by the Paris Peace Treaty. The league provided the first practical experience in managing a general international organization, and formed the foundation on which the United Nations was later shaped and established. League of Nations was first proposed by President Woodrow Wilson as part of his Fourteen Points plan for an equitable peace in Europe. Speaking before the U.S. Congress on January 8, 1918, President Woodrow Wilson enumerated the last of his Fourteen Points, which called for a "general association of nations...formed under specific covenants for the purpose of affording mutual guarantees of political independence and territorial integrity to great and small states alike."[278] President Wilson 's fourteen points:- Open diplomacy, Freedom of the seas, Removal of economic barriers Reduction of armaments, Adjustment of colonial claims, Conquered territories in Russia, Preservation of Belgian sovereignty, Restoration of French territory, Redrawing of Italian frontiers, Division of Austria-Hungary, Redrawing of Balkan boundaries, Limitation on turkey, Establishment of an independent Poland, Creation of an association of nations.

The purposes of the League of Nations were stated as

- to promote international cooperation and
- to achieve international peace and security.
- accepting the obligation not to resort to war
- maintaining open, just and honorable relations among themselves,
- accepting international law as rule of conduct among governments and
- scrupulously observing treaties and maintaining justice.

The league had original or founding members and subsequently admitted members. Admissions were by the league assembly by a vote of two-thirds majority. A member was at liberty to withdraw from the league by giving two years notice, at the end of the two year period. The league had three principal organs namely the Assembly, the Council and the Secretariat. The Assembly consisted of the representatives of all members; each member had one vote and was entitled to have up to three representatives. The power to deal with disputes belonged to the Council, but if the council referred the dispute, at the request of either party to the Assembly, then it has the competence to deal with it. The competence of the Assembly in other matters was wide and it could deal with any matter that was within the sphere of action of the League or affected the peace of the world.

The League Council acted as a type of executive body directing the Assembly's business. It began with four permanent members (Great Britain, France, Italy, and Japan) and four non-permanent members that were elected by the Assembly for a three-year term.. Any member of the League was competent to bring the dispute before the council if the dispute threatened to disturb international peace. The council's power was limited. It might by diplomatic process settle the dispute. If the council did not succeed in settling the disputes, it was under a duty to publish a report containing a statement of the facts of the dispute and the council's recommendation to the parties. The Permanent Secretariat, established at Geneva, comprised a body of experts in various spheres under the direction of the General Secretary.

[278] President Wilson's fourteen points:- Open diplomacy, Freedom of the seas, Removal of economic barriers Reduction of armaments, Adjustment of colonial claims, Conquered territories in Russia, Preservation of Belgian sovereignty, Restoration of French territory, Redrawing of Italian frontiers, Division of Austria-Hungary, Redrawing of Balkan boundaries, Limitation on turkey, Establishment of an independent Poland, Creation of an association of nations.

UNITED NATIONS ORGANISATIONS

The United Nations was established following the conclusion of the Second World War and in the light of the Allied planning and intentions expressed during that conflict.[279] The UN is an international organization founded in 1945. It is currently made up of 193 Member States. The mission and work of the United Nations are guided by the purposes and principles contained in its founding Charter. Due to the powers vested in its Charter and its unique international character, the United Nations can take action on the issues confronting humanity in the 21st century, such as peace and security, climate change, sustainable development, human rights, disarmament, terrorism, humanitarian and health emergencies, gender equality, governance, food production, and more.

GENERAL ASSEMBLY

The General Assembly is the main deliberative, policymaking and representative organ of the UN. All 193 Member States of the UN are represented in the General Assembly, making it the only UN body with universal representation. Each year, in September, the full quest UN membership meets in the General Assembly Hall in New York for the annual General Assembly session, and general debate, which many heads of state attend and address. The Assembly has established a variety of organs covering a wide range of topics and activities. It has six main committees that cover respectively disarmament and international security; economic and financial; social, humanitarian and cultural; special political and decolonization; administrative and budgetary; and legal matters.[280] Decisions on other questions are by simple majority. There are also two Standing Committees dealing with inter-sessional administrative and budgetary questions and contributions, and a number of subsidiary, ad-hoc and other bodies dealing with relevant topics, including the International Law Commission, the UN Commission on International Trade Law, the UN Institute for Training and Research, the Council for Namibia and UN Relief and works Agency.[281] The General Assembly each year elects a General Assembly President to serve a one-year term of office.

FUNCTIONS AND POWERS OF THE GENERAL ASSEMBLY

According to the Charter of the United Nations, the General Assembly may:

- Consider and make recommendations on the general principles of cooperation for maintaining international peace and security, including disarmament;
- Discuss any question relating to international peace and security and, except where a dispute or situation is currently being discussed by the Security Council, make recommendations on it;
- Discuss, with the same exception, and make recommendations on any questions within the scope of the Charter or affecting the powers and functions of any organ of the United Nations;
- Initiate studies and make recommendations to promote international political cooperation, the development and codification of international law, the realization of human rights and fundamental freedoms, and international collaboration in the economic, social, humanitarian, cultural, educational and health fields;
- Make recommendations for the peaceful settlement of any situation that might impair friendly relations among nations;
- Receive and consider reports from the Security Council and other United Nations organs;
- Consider and approve the United Nations budget and establish the financial assessments of Member States;
- Elect the non-permanent members of the Security Council and the members of other United Nations councils and organs and, on the recommendation of the Security Council, appoint the Secretary-General.

[279] See UNCIO, San Francisco, 15 vols., 1945

[280] Broms, United Nation, pp.198 ff. Note that in Special Political Committee was merged with the fourth committee on decolonization; see General Assembly resolution 47/233

[281] See 2001 United Nations Handbook, Wellington, 2001, pp.27 ff. There is also an investment committee and a Board of Auditors.

SECURITY COUNCIL

The Security Council has primary responsibility, under the UN Charter, for the maintenance of international peace and security. It has 15 Members (5 permanent members being USA, UK, Russia, China, and France). These permanent members, chosen on the basis of power politics in 1945, have the veto. Each Member has one vote. Under the Charter, all Member States are obligated to comply with Council decisions. The Security Council takes the lead in determining the existence of a threat to the peace or act of aggression. It calls upon the parties to a dispute to settle it by peaceful means and recommends methods of adjustment or terms of settlement. In some cases, the Security Council can resort to imposing sanctions or even authorize the use of force to maintain or restore international peace and security. The Security Council has a Presidency, which rotates, and changes, every month.

ECONOMIC AND SOCIAL COUNCIL

The Economic and Social Council is the principal body for coordination, policy review, policy dialogue and recommendations on economic, social and environmental issues, as well as implementation of internationally agreed development goals. It serves as the central mechanism for activities of the UN system and its specialized agencies in the economic, social and environmental fields, supervising subsidiary and expert bodies. It has 54 Members, elected by the General Assembly for overlapping three-year terms with staggered elections. Each member has one vote.[282] It is the United Nations central platform for reflection, debate, and innovative thinking on sustainable development and its most prominent function has been in establishing a wide range of economic, social and human rights bodies.[283]

THE INTERNATIONAL COURT OF JUSTICE

The Covenant of the League of Nations called for the Formulation of proposals for the creation of a world court and in 1920 the Permanent Court of International Justice was created. It stimulated efforts to develop international arbitral mechanisms. The PCIJ was superseded after the second world war by the International Court of Justice (ICJ), described in article 92 of the charter as the 'Principal judicial organ' of the United Nations.

THE ORGANIZATION OF THE COURT : The ICJ is composed of fifteen members:

Elected regardless of their nationality, from among persons of high moral character who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are juriconsults of recognized competence in international law.[284] The members of the court are elected by the General Assembly and Security Council (voting separately) from a list of qualified persons drawn up by the national groups of the Permanent Court of Arbitration, or by specially appointed national groups in the case of UN members that are not represented in the PCA.[285] The elections are staggered and take place once in every three years, with respect to five judges each time. The members of the court are elected for nine years and may be re-elected[286].

JURISDICTION OF THE COURT

The International court is a judicial institution that decides cases on the basis of international law as it exists at the date of the decision. It cannot formally create law as it is not a legislative organ.[287] However the matters come before it are invariably intertwined with political factors. The international

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[282] Article 61 of the charter. Note that under article 69, any member of the UN may be invited to participate in its deliberations without a vote. Cot et al., charter, pp.1581 ff.

[283] ECOSOC is considering a range of reforms, including holding annual ministerial substantive reviews (AMR) to assess the progress made in the implementation of the outcomes of major UN conferences and summits and internationally agreed development goals: see General assembly resolution 61/16, 2006, and ECOSOC resolution E/2007/274, 2007.

[284] Article 2, statute of the ICJ.

[285] Article 4 and 5 of the ICJ statute. In practice, governments exercise a major influence upon the nominations of the national groups; see Merrill's, International Dispute Settlement, pp.147 ff.

[286] Article 13 , statute of ICJ

[287] The fisheries Jurisdiction case, ICJ reports, 1947, pp, 3, 19; 55ILR, pp.238, 254

court of justice by virtue of article 92 of the charter is the 'principal judicial organ of the united nations'. The International Court of Justice possesses two types of jurisdiction.

I. CONTENTIOUS JURISDICTION

Contentious jurisdiction involves States that submit the dispute by consent to the Court for a binding decision. Contentious jurisdiction is further divided into voluntary jurisdiction and compulsory jurisdiction based on optional clause.

II. ADVISORY JURISDICTION

Advisory jurisdiction, on the other hand, concerns questions referred to the Court by the General Assembly, the Security Council or other organs and specialized agencies of the United Nations. Those questions can only refer to legal questions arising within the scope of their activities. Advisory opinions given by the International Court of Justice are not binding.[288]

The basis for jurisdiction is the consent of the States parties to a dispute. Consent can be expressed in one of the following ways:[289]

- The conclusion of a special agreement (compromise) to submit the dispute after it has arisen. For example, a compromise was concluded between Hungary and Slovakia on 7 April 1993, by which they submitted to the Court the dispute concerning the Gabcikovo Nagymaros Project.[290] The dispute concerned the construction and operation of the Gabcikovo-Nagyamaros Barrage system. See Gabcikovo-Nagymaros Project (Hungary v. Slovakia), ICJ Reports, 1997, p. 7.

- Jurisdictional Clause – Article 36(1) of the statute -Another way of conferring jurisdiction on the Court is through the inclusion of a jurisdictional clause in a treaty. Generally, through this compromissory clause the States parties agree, in advance, to submit to the Court any dispute concerning the implementation and interpretation of the treaty. "The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force." Several treaties contain such compromisory clauses conferring jurisdiction upon the Court in respect of the parties to those treaties. The jurisdiction of the International Court of Justice also exists by virtue of declarations made by States, that they recognize as compulsory its jurisdiction in relation to any other State accepting the same obligation in all legal disputes concerning the matters specified in Article 36(2) of the Statute. This method of conferring jurisdiction on the ICJ is also known as the Optional Clause.[291] The States Parties to the present Statute may at any time declare that they recognize as compulsory ipso facto and without special agreement in relation to any of the States accepting the same obligations, the jurisdiction of the court in all legal disputes concerning: a) the interpretation of a treaty; b) any question of international law; c) the existence of any fact which, if established, would constitute a breach of an international obligation d) the nature or extent of the reparation to be made for the breach of an international obligation.

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[288] Since 1946 the Court has given 24 Advisory Opinions, concerning, inter alia, the admission to United Nations membership, Reparation for injuries suffered in the service of the United Nations, the territorial status of South-West Africa (Namibia) and Western Sahara, expenses of certain United Nations operations, the applicability of the United Nations Headquarters Agreement, the status of human rights rapporteurs, and the legality of the threat or use of nuclear weapons. See the general information concerning the International Court of Justice, of 25 October 2002 (www.icj-cij.org).

[289] Even though the engagement of jurisdiction of the Court is essentially based on the concurring wills or consent expressed through declarations submitted by States, such an engagement is not treated in the practice of the Court as a treaty arrangement. In interpreting this engagement, "the Court will look at the underlying intention of the State making the declaration, the declaration itself being the expression of a unilateral act of policy to accept the jurisdiction of the Court for disputes coming within its scope" (Rosenne S, 1997 p. 812).

[290] The dispute concerned the construction and operation of the Gabcikovo-Nagyamaros Barrage system. See Gabcikovo-Nagymaros Project (Hungary v. Slovakia), ICJ Reports, 1997, p. 7.

[291] States enjoy wide liberty in formulating, limiting, modifying and terminating their declarations under Article 36(2), Fisheries Jurisdiction Case (Spain v. Canada), and ICJ Reports 1998, paras. 44, 52 and 54. See also Phosphates in Morocco judgment, 1938, PCIJ Series A/B No. 74, p. 23 (the jurisdiction exists only in the limits within which it has been given and accepted). The Anglo-Iranian Oil Co. case (United Kingdom v. Iran), ICJ Reports 1952, p. 104. (In interpreting the intention of the parties the Court would look to all the elements in a declaration as a unity and not seek a mere grammatical interpretation.)

APPLICABLE LAW

Article 38(1) statute of ICJ:

Matters before the International Court of Justice are decided in accordance with international law. According to the Statute, the Court is required to apply:

- International conventions, whether general or particular, establishing rules expressly recognized by the contesting States;
- International custom, as evidence of a general practice accepted as Law;
- The general principles of law recognized by civilized nations;
- 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 rules of law.

Further, while the primary function of the Court is to settle the dispute in accordance with international law, Article 38(2) gives power to the Court to decide a dispute ex aqueo et bono that is on the basis of equity, if the parties agree[292].

[292] This provision shall not prejudice the power of the Court to decide a case ex aequo et bono, if the parties agree thereto.

UNIT - V

INTERNATIONAL TRIBUNALS

CONTENTS

"All Crime is a Kind Of Disease And Should Be Treated As Such" – Mahatma Gandhi

The international legal provisions on war crimes and crimes against humanity have been adopted and developed within the framework of international humanitarian law, the law of armed conflict and a special branch of international law which has gone through an intense period of growth and development in the last 50 years. The rules of humanitarian law, concerning international crimes and responsibility, however, have not always appeared as sufficiently clear. In fact, one of the biggest problems is that relating to the legal nature of the international crimes committed by individuals[293]. This is because such crimes as genocide, war crimes, aggression, etc are hardly committed by individuals; rather, they connote a plurality of offenders, particularly in the execution of a crime. Thus, to establish individual criminal responsibility, or to hold an individual liable, an assessment of the relationship between the executor of the crime and the planner of the crime is to be established[294]. This is hard to determine, thus making individual criminal responsibility difficult to define.

EVOLUTION OF THE CONCEPT

Initially, only those persons who committed the offences of piracy and slave trading were held directly or individually responsible for their acts and could be punished by any international tribunal or by any state at all. That is, although the concept of individual criminal responsibility gained importance since the 1950s, the placing of obligations upon persons directly as opposed to states had a narrow view[295].

[293] www.icrc.org
[294] UK.catalogue.oup.com
[295] Malcom N. Shaw on international law, 6th edition, Cambridge university press

BEFORE THE FIRST WORLD WAR

Although the Nuremberg and Tokyo Trials established the starting point of individual criminal responsibility, this concept was found to have existed even earlier. For example, in the 'Ordinance for the Government of the Army', published in 1386 by King Richard II of England, provisions were contained, limiting the conduct of individuals, and the individuals were held directly responsible for the acts of violence against women, children and priests, and the acts of burning down houses and churches. Provisions of the same nature were found in the codes issued by King Ferdinand of Hungary and King Maxmillan II.

THE FIRST WORLD WAR

After the First World War, a commission was set up by the Allied Powers, recommending that those defeated powers that violated the laws of war should be prosecuted for the ordering of such crimes by virtue of the principle of Commandant Responsibility. Accordingly, the Treaty of Versailles, 1919 made provisions recognizing the right of the Allied Powers to bring any individual accused of war crimes before any military tribunal under article 228. The famous Leipzig Trial, which formed the basis of individual criminal responsibility, established the individual responsibility of Kaiser under article 227 of the Treaty[296].

THE NUREMBERG TRIAL[297]

It was only after the Second World War that a movement started within the international community with regard to both the traditional responsibility of states as well as the personal responsibility of individuals. The second world witnessed many war crimes committed by Germany, namely, the Holocaust of the Jews, the Massacre of the civilians in USSR and the Destruction of Poland. To bring the criminals to justice, the Nuremberg trial was held by the Allied Powers in 1945. This was the most noted trial for the prosecution of the military, economic and political leadership of Nazi Germany. The tribunal consisted of four major judges and four additional judges from USA, UK, USSR and France and was the first international criminal tribunal to be established. The tribunal confirmed in its judgment that international law imposes duties and liabilities on individuals as much as it does on the states. In addition to this, a number of war crimes tribunals were established under the tribunal. Article 6 of the International Nuremberg Military Tribunal Charter, sets out the legal basis for trying individuals accused of the following crimes:

a. Crimes against peace – Art. 6 (a)

b. War crimes – Art. 6 (b)

c. Crimes against humanity – Art. 6 (c)

The charter also provided that Genocide is a crime in international law bearing individual criminal responsibility. This was re-affirmed in the Genocide Convention of 1948. A Draft Code of Offences Against Peace and Security of Mankind were created, Article 1 of which provided that such offences are crimes under International law and the responsible individuals shall be punished. Individual criminal responsibility had also been confirmed with regard to the Geneva Conventions and the Additional Protocols I and II of 1977. The Tribunal had held that the defence of command or superior responsibility was not applicable and held it as useless.

THE TOKYO TRIAL:

In this case, the defendant (Japan) was accused of promoting a scheme to ill-treat, maim and murder prisoners of war, and rape, plunder, burn down the houses and perform other such barbaric cruelties upon the civilians of the over-run countries. It was for this purpose that the Tokyo Tribunal was established in

[296] "Principles of International Law", by Ian Brownlie

[297] http://www.history.com/topics/world-war-ii/nuremberg-trials

April 1946. Also called the Tokyo War Crimes Tribunal and the International Military Tribunal for the Far East, it was set up to implement the Potsdam declaration which called for trial of those people who deceived and misled the Japanese people into war. The charter of the Tokyo Tribunal essentially followed the model of the Nuremberg Charter.

POSITION AFTER THE NUREMBERG AND TOKYO TRIALS:

Both the above trials, by virtue of their judgments, helped to mark a gradual process of formulation and consolidation, of rules and principles relating to the concept of individual criminal responsibility. In 1948, when the Universal Declaration of Human Rights was adopted, another convention was adopted, namely the Convention on the Prevention and Punishment of the Crime of Genocide. It came into force in 1951.

a. Article 2 – Defines Genocide.

b. Article 3 – Makes genocide a punishable offence.

c. Article 4 – Extends the punishment to individuals.

d. Article 6 – Provides jurisdiction to both international as well as domestic courts to try the individual offenders.

Similar provisions were also found in the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, 1954.

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER, YUGOSLAVIA:

An important step in developing the concept of individual criminal responsibility was the setting up of two Ad Hoc tribunals for prosecuting those responsible for the Massacres in Yugoslavia and Rwanda.

HISTORY OF YUGOSLAVIA:

Created in the aftermath of the First World War, Yugoslavia lasted from 1918 to 1941. In 1941, it was invaded by the axis powers. A new government formed in 1943, called the Socialist Federal Republic of Yugoslavia. The republic remained non- aligned during the cold war. However, clashes between the Muslim minorities and the Slavic Christians led to the fighting of four wars between 1991 and 1999, resulting in the break-down of the republic. The wars fought were:

a. War in Slovenia – 1991 – called the 10 day war.

b. Croatian War of Independence – 1991-1995

c. Bosnian War – 1992-1995

d. Kosovo War – 1998-1999 – NATO Bombing of Kosovo.

WAR CRIMES

The main crime committed in this war was that of war rape. It occurred due to official orders of ethnic cleansing, to displace the Muslims of the region. These camps were kept in the Bosnian and Croatian Camps. The main aim of these camps was to impregnate the Bosnian and Croatian women and destroy, completely the Muslim race. More than 35,000 women were kept in these camps. On seeing the crimes committed in Yugoslavia, the UN Security Council under its Resolution 827, established the tribunal, to prosecute the accused for the crimes committed during the war.

OPERATION OF THE TRIBUNAL

In 1994, the first indictment was issued against the Bosnian Serb Rape Camp Commander. In 1995, 2 more indictments were issued against 21 individuals. Between 1995 and 1996, another 10 indictments were issued against 33 individuals. As of August 2014, 161 individuals were indicted, the proceedings are completed with 141 persons: 18 were acquitted, 74 sentenced, 13 cases were transferred, 36 were terminated, 4 trials ongoing and 5 on appeals.

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

THE GENOCIDE

There was a mass slaughter of ethnic Tutsi people by the Government directed gangs of Hutu in Rwanda in 1994. The Tutsi, who were the minorities of the region, were said to have enjoyed power while the Hutus were under Belgian rule. Due to historical resent, the genocide continued for 100 days.

ESTABLISHMENT OF THE TRIBUNAL

The international response to the events that occurred in Rwanda was very poor. In fact, most states denied the fact that the events that had taken place constituted genocide. Finally, at the insistence of the UN, an investigative team was sent to Rwanda to look into the events and to prosecute those responsible for this massacre. The Tribunal was finally established in November 1994, under resolution 955 of the UN Security Council. The following 2 cases were decided in this regard.

THE CASE OF JEAN PAUL AKAYESU[298]

It was established in this case that genocide rape falls within the purview of genocide. In this case, after the massacre at Rwanda, the surviving Tutsi refugees had migrated to another city, where they were mercilessly raped repeatedly with the intention of finally killing them. Akayesu stood trial, being charged for genocide, and rape during the genocide and violation of the Geneva Conventions.

THE CASE OF FERDINAND NAHIMANA AND JEAN BOSCO BARAYAGWIZA[299]

This trial was one against hate media. Both the accused were charged for encouraging and propagating the genocide of 1994 through their radio channel. Nahimana was sentenced with 30 years of imprisonment and Barayagwiza, with 32 years.

THE INTERNATIONAL CRIMINAL COURT

Article VI of the Genocide Convention provided that persons charged with genocide should be tried by a court in the territory where the act has been committed or for an international penal tribunal to be established to try such individuals. It was in this regard that the International Law Commission established the International Criminal Court in 1994. The International Law Commission, in establishing this court, also established the Rome Statute on the International Criminal Court. The court is the product of an international treaty. The statute provides that the jurisdiction of the Court is limited to the most serious crimes, those that affect the international community as a whole, those crimes being genocide, war crimes, crimes against humanity and aggression and that person, who commits such crime within the jurisdiction of the court, shall be liable for punishment in accordance with the statute. This indicates the limited jurisdiction of the International Criminal Court, which is said to be of territorial or personal nature and not of universal nature, meaning that it can be approached only by the member states and not by all other states. Also, it is not practical to have such a court insofar as it is based on the principle of complementarities, where, if there is a clash between the ICC and a domestic court, the domestic court will be given more

[298] ICTR - 96 - 4 (1998)
[299] ICTR - 99 - 52 - A
[300] Art 11 of the Rome Statute

importance[300]. For example, if India has the jurisdiction to try a particular case of this type, and is willing to exercise its power, the ICC will not have any voice in that regard. However, subject to another provision of the Rome Statute[301], a declaration may be made for the state to exercise its jurisdiction in the particular case. The state, however, may decide not to accept such jurisdiction of the International Court for a period of seven years[302]. France and Columbia are the only states who have taken advantage of the provision.

ARTICLE 25 OF THE ROME STATUTE[303]

This article speaks of Individual Criminal Responsibility. It reads as follows:

The court shall have jurisdiction over natural persons pursuant to the statute.

1. A person who commits a crime within the jurisdiction of the court shall be individually responsible and liable to be punished in accordance with the statute.
2. This clause speaks about the essential ingredients needed to be held as individually responsible :
3. A person should commit a crime, as an individual or a group or through another
   a. He should order, induce or solicit the commission of a crime.
   b. He should facilitate the crime by aiding or abetting it.
   c. In any other way, contributes to the crime
4. No provision in this statute relating to individual criminal responsibility shall affect the responsibility of the states under international law.

INTERNATIONALISED DOMESTIC COURTS AND TRIBUNALS

In addition to the temporary and geographically limited courts and the permanent international criminal court, a new style of judicial institutions has made an appearance recently, namely the internationalized domestic courts or the hybrid courts, where both national and international elements and principles co-exist with each other at different combinations. The domestic courts incorporate certain international principles to guide them in solving the dispute. These are the following hybrid courts that have been established:

THE SPECIAL COURT FOR SIERRA LEONE

The court was set up in Sierra Leone, following a particularly violent civil war pursuant to Security Council Resolution number 1315 in order to prosecute those persons who were responsible for the crimes against humanity on the basis of individual criminal responsibility. The court consists of two trial chambers, two appeals chambers, the Prosecutor and the Registry. Three judges serve in each of the chambers. The court has jurisdiction with regard to crimes against humanity, violations of the Geneva Conventions and other serious violations of international humanitarian law[304]

THE EXTRAORDINARY CHAMBERS OF CAMBODIA[305]

The Khmer Rouge Regime took power in the Cambodian region and proceeded to commit wide scale atrocities which are believed to have resulted in the death of over one million people. On 13th May, 2003, after a long period of negotiation, the United Nations approved the draft agreement relating to the provision

[301] Art 12(3) of the Rome Statute
[302] Art 124 of the Rome Statute
[303] www.legal.un.com
[304] Art 12(1) of the Statute of the Court
[305] R.Williams, "The Cambodian Extraordinary Chambers"

of extraordinary chambers in Cambodia to try the individuals responsible for the massacre. The agreement stated that the Chambers must have the same jurisdiction as is laid down in Cambodian law. The chamber is composed of a Trial Chamber comprising three Cambodian judges and two International judges and a Supreme Court Chamber, serving as an Appellate Chamber, comprising of four Cambodian judges and three international judges. The chamber can try all cases regarding genocide, as given under the convention of 1948.

KOSOVO REGULATION[306]

Following the conflict between Yugoslavia (now Serbia) and NATO in 1999, the Security Council adopted resolution number 1244 which called for the establishment of an international civil presence in Kosovo. This was titled as the United Nations Mission in Kosovo (UNMIK). There were 64 panels created, consisting of three judges, including two international judges, functioning as regular judges, with powers derived from domestic legislations.

EAST TIMOR SPECIAL PANELS FOR SERIOUS CRIMES[307]

Following a period of violence in East Timor under the rule of Indonesia, the Security Council of the United Nations called for the establishment of certain panels and courts to try serious crimes. These crimes included war crimes, genocide, and crimes against humanity, sexual offences, murder and torture. The courts were composed of two international judges and one Timorese judge.

BOSNIA WAR CRIMES CHAMBER[308]

2003, the Office of the High Representative at Bosnia and the International Criminal Tribunal for the Former Yugoslavia issued a set of joint conclusions recommending the creation of a specialized chamber within the state court of Bosnia to try cases of war crimes. This was supported by the United Nations. The chamber currently has both trial and appeals chambers and consists of five judicial panels with two international judges and one Bosnian judge.

THE SPECIAL TRIBUNAL FOR LEBANON[309]

After the assassination of Rafiq Hariri, the former Prime Minister of Lebanon, the Security Council established a committee to help the Lebanese Government in their investigation. At the request of the Lebanese government, the United Nations established a tribunal of an international character to try those responsible for the assassination.

THE SERBIAN WAR CRIMES CHAMBER[310]

In 2003, the Serbian National Assembly adopted a law establishing a specialized war crimes chamber to prosecute and investigate crimes against humanity and serious violations of international humanitarian law as defined in Serbian law. A war-crimes Prosecutor's office was established in Belgrade. The chamber consists of two panels of three judges each.

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[306] J.Cerone and C.Baldwin, "Explaining and Evaluating the UNMIK Court System"
[307] Melbourne Journal of International Law(2002), pg.414.
[308] Cryer – "An Introduction to Criminal Law"
[309] Journal of International Criminal Justice (2007), pg. 1091, 1107, 1125
[310] Berkeley Journal of International Law (2004), pg. 165

INTERNATIONAL CRIMES

The main features of crimes for which individual criminal responsibility now exists are as follows:

a. GENOCIDE

This is regarded as a crime in international law since the Second World War and the genocide convention is a positive step in this regard. Article 2 of the convention defines genocide and Article 4 speaks of punishment. In the JELISIC[311] case, it was held that it is mens rea or a guilty intention that gives genocide its specialty and distinguished it from other crimes.

b. WAR CRIMES

This is essentially a violation of the rules of customary law and treaty law. It is also known as the Law Governing Armed Conflicts. Article 2 of the ICTY statute provides jurisdiction with regard to the violations of the Geneva Conventions and Article 3 of the statute speaks of the jurisdiction of international courts and domestic courts with regard to the violations of the laws of war. It has been accepted as a criminal offence in international law bearing individual criminal responsibility and is included in article 6 (b) of the Nuremberg Charter.

c. CRIMES AGAINST HUMANITY

Provided for in Article 6(c) of the Nuremberg Charter, crimes against humanity includes offences such as murder, deportation, extermination, slavery, and persecution on racial, political and religious grounds.

d. AGGRESSION

Recognized as a crime under customary international law, it is defined in Article 6 of the Nuremberg Charter as a crime against peace that is the planning, preparation, initiation or waging of a war of aggression in violation of an international treaty or an agreement. The Tokyo Charter embodies this principle. Article 5 of the Rome Statute also speaks of aggression. A number of people have been convicted under this offence.

FAIR TRIAL PROVISIONS

The accused is entitled to the following minimum rights and guarantees:

ARTICLE 21, ICTY STATUTE

1. All persons shall be equal before the international tribunal
2. The accused shall be entitled to a fair public hearing
3. The accused shall be presumed innocent until proven guilty
4. The accused shall be entitled to the following minimum guarantees. :

a. To be informed in detail in a language he understands of the nature and consequence of his act
b. To have adequate time and facilities to prepare his defense with the counsel of his choice
c. To be tried without undue delay
d. To be tried in his own presence
e. To be not compelled to testify against himself
f. To have the free assistance of an interpreter.

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[311] IT - 95 - 10 Paras 100-1

Similar provisions have been made in articles 55, 66 and 67 of the Rome Statute on the International Criminal Court. The category of crimes for which individual criminal responsibility exists has improved considerably since the Second World War.

INTERNATIONAL ORGANIZATIONS AS SUBJECTS OF INTERNATIONAL LAW

International organization is a characteristic feature of the present day world society. Although we speak of international organization, strictly speaking what we are concerned is about inter-State organization. A nation is a social group united by common ties of kinship, by common culture, religion and language, while a State, on the other hand, is a social group united under one political organization.

Generally speaking, *there are four characteristic features of an international organization:*

- It is an association of States as distinct from an association of private individuals, professional organizations or religious groups.
- An international organization has a conventional basis, a multilateral treaty which forms the constitution of the organization.
- The constitutive instrument will have established organs of the institution.
- The institution thus established assumes corporate identity distinct from that of the component member States.

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 its history, the development of international law has been influenced by the requirements of international life, and the progressive increase in the collective action of States has already given rise to instances of action upon the international plane by certain entities which are not States.

This development culminated in the establishment in June 1945 of an international organization whose purposes and principles are specified in the Charter of the United Nations. But to achieve these ends the attribution of international personality is indispensable. Accordingly, the Court has come to the conclusion that the Organization is an international person in the case of Reparation for injuries suffered in the service of the UN. That is not the same thing as saying that it is a State, which it certainly is not, that its legal personality, rights and duties are the same as those of a State. Still less is it the same thing as saying that it is a "Super State," whatever that expression may mean. It does not even imply that all its rights and duties must be upon the international plane, any more than all the rights and duties of a State must be upon that plane. 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 bringing international claims.

CONCLUSION

In the contemporary world, the question of the subjects of international law has acquired great significance. State practice has abandoned the traditional orthodox positivist doctrine that States are the exclusive subjects of international rights and duties and individuals, mere objects. Although States are still considered the principal subjects and the primary function of international law remains regulation of the relations of States with one another, contemporary international law has become increasingly concerned with international organizations and with the individuals.

PUBLIC INTERNATIONAL LAW

Time: 2 ½ hours Maximum: 70 marks

PART A – (2 X 12 = 24 marks)

Answer TWO of the following in about 500 words each.

1. "Every international wrongful act of a State entails international responsibility of that State" – Elucidate.
2. Explain State Succession. What are the rights and obligations that are transferred to the Successor State?
3. Describe the rights of the Coastal State in the 'Continental Shelf' and the 'Exclusive Economic Zone'.

PART B – (2 X 7 = 14 marks)

Answer TWO of the following in about 300 words each.

4. Enumerate the various modes of acquiring and losing Nationality.
5. Examine the scope of Advisory Jurisdiction of International Court of Justice.
6. Describe the distinction between Recognition of State and Recognition of Government.

PART C – (5 X 4 = 20 marks)

7. Write short notes on FIVE of the following:

a) Monism

b) Statelessness

c) Stimson Doctrine

d) Vassal State

e) Domestic Jurisdiction

f) Trial Smelter Arbitration Case

g) Ex Aequo et bono.

PART D – (2 x 6 =12 marks)

Answer TWO of the following by referring to the relevant provisions of law and decided cases. Give cogent reasons.

8. 'R' a merchant ship belonging to state 'A' collied in the Contiguous Zone with another ship 'M' belonging to state 'B' which was not carrying the lights as required by the laws which has resulted in huge loss. State 'B' brings a claim for damages against state 'A'. Is it sustainable? Decide.
9. Mr.Renolt, a national of State 'V' Committed murder of Mr. Valier, who is a merchant in the state 'V' and then escapes to state 'R'? State 'V' and 'R' does not hold good relationship. Decide the options available for state 'V' to get back Mr. Renolt.
10. State 'A' and 'B' had boundary disputes for several decades and had refrained from all diplomatic relations. When the aircraft of state 'A' flew across state 'B', it was shot down by state 'B'. Decide the available remedies for state 'A'.

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