Ahmednagar Jilha Maratha Vidya Prasarak Samaj's

NEW LAW COLLEGE, AHMEDNAGAR

PUBLIC INTERNATIONAL LAW

(Subject Code-LC 0703)

STUDY MATERIAL

FOR

LL.B.-II (Sem-III) and BA.LL.B-IV (Sem-VII) Pattern 2017

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ACADEMIC YEAR

2020-21

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Module 1:

1. **Nature and development of International law**
2. **Theoretical basis of International Law-Natural Law Theory, Positive Law Theory , Grotius Theory-consent theory**
3. **Historical perspective of International Law- Codification of work of International Law Commission**
4. **India's contribution for the development of International Law- Ancient time to modern times**

1. Nature and development of International Law

The term international law has been defined in a variety of ways by different jurists. Some of the definitions may be given as under:

In the view of European Scholars, modern International Law is determined by the modern European system. According to Oppenheim, International Law is "essentially product of Christian civilization and began gradually to grow from the second half of the Middle Ages." This view is subject to criticism because there are several such principles and rules of International Law as existed in their developed form in the ancient period.
Some of them are such as existed in their developed form in ancient India. The view of Oppenheim and other Western jurists that International Law owes its birth to the modern European system is not correct. International Law was in a developed state in the Ramayana and Mahabharat period.
The example of International Law relating to Diplomatic Agents may be cited in this connection. Thus the birth of International Law can be traced back to ancient times.' However, it cannot be denied that the words International Law' were used for the first time by eminent British jurist, Jermy Bentham in1780 .
Since then, these words have been used to denote the body of rules which regulate the relations among the States. Though International law can be traced to ancient Greece, Rome and India, it cannot be denied that the public International law which we know today, study and practice has

come to us through Europe. It is determined by the modern European system. It will, therefore, be proper to refer it as 'modern international law.'

Definition

1. **ILL. Oppenhelm**.— ProfeSsor Oppenheim has defined International Law in the following words Law of Nations or International Law is the name for the body of customary a conventional rules which are considered legally binding by civilized States in their intercourse with each other.

Criticism.—Professor Oppenheims definition suffers from several serious defects.

It might have been good and adequate when it was given but now it has outlived its utility and has become obsolete and inadequate.

"Indeed every important element in it can now be challenged." The definition of Oppenheim has been subjected to following criticism -

In the first place, "it is now generally recognized that, not only "States" but public international organisations, have rights and duties under International Law, even though they may not have all the rights and duties that States have." In fact, "The future of International Law is one with the future of International organisation."The use of the term 'civilized states' by Oppenheim is also severely criticized. The criterion of distinguishing so-called 'uncivilized states' was neither long history nor culture. Even though China had 5,000 years old culture, she was not included in the group of civilized slates. So was the case of oriental States. In not too distant past, the Western States regarded only the Christian States' as 'Civilized States'.

This criterion was undoubtedly wrong. At present there are as many as 193 members of the U.N. which include Christian as well as non-Christian States. That is why, in later editors of Oppenheim's book have deleted the term 'civilized slates'.

Thirdly, "More controversial but no longer untenable is the view that even individuals and other private persons may have some such rights and duties."

Fourthly, "it is now widely recognised that International Law consists not only customary and conventional rules but also of General Principles of Law.

Article 38 of the Statute of the International Court of Justice mention General Principles of Law Recognised by Civilized States' as the third source in order under which the sources of International Law are to be used while deciding an international dispute. That is to say, if the

Court does not find any International Treaty or International custom on a particular point under dispute, the Court may take the help of 'General Principles of Law Recognized by Civilized States'. As aptly pointed out by Lord McNair, it describes, 'the inexhaustible reservoir of legal principles from which tribunals can enrich arid develop public International Law."

2. **Hall.**—In the words of Hall : International Law consists of certain rules of conduct which modern civilized states regard as binding on them in their relations with one another with a force comparable in nature and degree to that binding the conscientious person to obey the Jaws of his country and which they also regard as being enforceable by appropriate means in case of infringement.'[1]
3. **Chinese Definition and approach to International Law.**— According to a Chinese writer: "International Law like all other branches of law, is created in a definite stage of mankind's social development. The origin of international law is directly related to the creation of the state. International law is created as the political, economic, and the relations among states emerge.

In his view, only the definition of international law given by Soviet scholars (for example, by Vyshinsky given earlier), explains the question of thecontents and substance of international law. This definition (i.e, of Vyshinsky) is adaptable to the 'international law of various historical periods including the modern one."

He points out that international law possesses the following characteristics of law in general :

(i) it expresses the will of the ruling class;
(ii) it is the aggregate of norms adjusting definite social relations; and
(iii) it is guaranteed by enforcement measures. In his view, therefore, international law is a kind of law possessing legal validity; it is not what are called self-executing norms of morality.

The words of a Chinese author, 'International law, in addition to being a body' of principles and norms which must be observed by every country, is also, just as any law

a political instrument whether a country is a socialist or capitalist, it will to a certain degree utilize international law in implementing its foreign policy"

4. Charles G. Fenwick.—In the words of Fenwick"International law may be defined in broad terms as the body of general principles and specific rules which are binding upon the members of the international community in their mutual relations".

Appraisal. Fens definition is better than all the above-mentioned definitions because instead of the word states he uses the words members of the international community' which include states, international institutions, individuals and non-stateentities. He also uses the term 'general principles',

His definition is very short but pregnant with meaning and takes into account the changes that have taken place after the Second World War. Indeed it is an appropriate and correct definition of international law.

5. **Whitemafl:** defines International Law in the following words"International law is the standard of conduct, at a given time, for states and other entities subject thereto."

Evaluation.—This is a very brief but adequate definition. The words "other entities subject thereto" may include international organisations, individuals and non-State entities. The words used in the definition are apparently very simple but they are pregnant with meaning and very vast in their scope.

6. J.G. Starke.—In the words of Starke "International Law may be defined as that body of law which is composed for its 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 organisations, their relations with each other, and their relations with States and individuals and

(b) certain rules of law relating to individuals and non-States entities so far as the rights or duties of such individuals and non-state entities are the concern of the international community."

The definition of Starke is appropriate because it takes into account the changing

character of international law and truly reflects the present position of international law.

Basis of International Law

After having arrived at the conclusion that International Law is Law in the true sense of the term, it is necessary to see as to what is the true basis of international law. There are two main theories in this connection.

They are:

(1) Theories as to Law of Nature and

(2) Positivism.

(1) Theories as to Law of Nature.—The jurists who adhere to this theory, are of the view that International Law is a part of the Law of Nature. In their view, States follow International Law, because it is a part of the Law of Nature. Explaining the view point of Natural Law Theorists, Starke has written : .....States submitted to International Law because their relations were regulated by higher law, the law of nature of which International Law was but a part" 67 I n order to understand this theory, it is necessary to understand the meaning of Law of Nature. In the beginning, Law of Nature was connectod with religion. It was regarded as the divine law. The jurists of 16th and 17th centuries secularised the concept of Law of Nature. Much of the credit for this goes to the eminent jurist, Grotius.

He expounded the secularised concept of the Law of Nature. According to him, natural law was the dictate of right reason. His followers applied the law of nature as an ideal law which was founded on the nature of man as a reasonable being. International law was considered binding because it was in fact, natural law applied in special circumstances. Vattel, a famous jurist of 18th century also expressed the view that natural law was the basis of International Law. Pufendorf, Christian Thomasius, etc. are other prominent exponents of Law of nature.

Criticism—The exponents of natural law are of the view that it is the basis of international law and has conferred binding force on international law. It may, however, benoted that each follower of the law of nature gives its different meaning.

They use it as a metaphor. Different jurists give its different meaning such as, reason, justice, utility,

general interest of international community, etc. Hence the meaning of law of nature is very vague and uncertain. Moreover, the main defect of this theory is that it is not based on realities and actual practices of the States.

Influence—Despite the above criticism, the Law of Nature has greatly, influenced the growth of International Law. 'Traces of 'Natural Law' theories survive today, albeit in a much less dogmatic form." bb The ideal nature of the Natural Law has also greatly influenced the growth of international law.

(2) Positivism—Positivism is based on law positivum i.e. law which is in fact as contrasted with law which ought to be.

According to the positivists, law enacted by

appropriate legislative authority is binding. The positivists base their views on the actual practice of the States. In their view, treaties and customs are the main sources of International Law. The positivist's view was in vogue in the 18th century. Bynker-Shoek, one of the chief exponents of the Positivist School, wrote several books to popularise his views. In the view of the positivists, in the ultimate analysis, will of the States is the main source of International law.

1. **Starke:**

As pointed out by Starke. "... .International law can in logic be reduced to a system of_rules depending for their validity only on the fact that States have consented to them. ""

2. **Brierly :**As pointed out by Brierly, The doctrine of positivisms is the basis of international law. teaches that international law is the sum 01 rules by which States have consented to be bound, and that nothing can be law to which they have not consented to be bound."·'"

The concept of the will of State was first propounded by the German Philosopher 3.

3. **Hegel.**

According to the positivists, international law is a body of rules which has been consented to by the States and accepted as binding by way of voluntary restriction or 'auto limitation.'

The Italian jurist, Anzilotti, one of the chief exponents of the Positivist School deserves a special mention. According to him, the binding force of international .law is founded on a supreme principle or norm known, as pacta sunt servanda. In his view the basis of each rule of international law is pacta sunt servanda in some or the other way.

The positivists admit that their view fails to explain the basis of customary international law. In their view, there is an implied consent in regard to customary rules of international law .

Criticism.-The positivist theory is based mostly on the actual practices of States. But this view has been subjected to a lot of criticism. It can be criticised on the following

Grounds :

(1) The concept of the will of State presented by the positivists is purely metaphorical.

(2) The view of the positivists that the whole of international law is based on the consent of the State is far from truth. As pointed out by an eminent author, 'custom i:; said to be evicencc of a general practice accepted by law'. It is not required that there should be any express recognition by States in order that this practice or international custom shall be binding upon them.

The extreme positivist view which seeks to base all international law on th e 'consent of states' has tried to establish that the rules of international custom are based on "tacit agreements' between' states . But in reality it is not possible to" prove that these rules come into existence in such a way. This is shown by among other things, the fact that a new State entering the community of nations at once becomes bound by the international customary rules and it is never suggested that any of these rules would not be binding on it. It never happens that the State consent is sought or that it enters into any agreement on the matter with the already existing States. On the other hand, the new State is not bound by any international convention already in force unless it expressly adheres to it. International custom constitutes genre of States. From this it

follows that the dictum pacta sunt servanda cannot be the 'basic norm' of international law, it is itself a rule of international custom.

(3) In practice, it is not always necessary to show that in regard to a particular rule of general international law, the State had given their consent.

(4) There are some principles of international law which are applicable on States although States did not give their consent for them. The principle propounded under Article 2(6) provides that the organisation shall ensure that States which are not members of the U.N. act in accordance with the principles (contained in Article 2 of the Charter) so far as may be necessary, for the maintenance of international peace and security.

(5) The norm 'pacta sunt servanda, "has been abandoned by most theorists, since it seems incompatible with the fact that not all obligations under international law arise from 'pacta ', however widely that term is construed, so it has been replaced by something less familiar ; the so-called rule that States shoula behave as they customarily have."

(6) "Even apart from its lack of accord with reality the theory that international law rests on agreements is problematic in another respect. Declarations of will are, of course, in themselves pure facts which have legal effects only because some rule of law gives them such effects ."

(7) According to the positivist view, treaties and customs are the only sources of international law.

Grotius theory of law:

Grotius made distinction between the Jus Gentiurn, the customary Lawof Nations (which he called Jus Voluntarium or Voluntary Law) and Jus naturrae or natural Law of Nations. He concentrated more on the natural Law and regarded voluntary law of less importance. The Grotians were somewhat between the Naturalists and the positivists. They maintained the distinction between natural and Voluntary Law of Nations but they considered positive or voluntary laws of equal importance to the natural laws.

Thus, according to the Grotians, international law has originated not only from customs and treaties but also from natural law. This view, obviously, is not in conformity with thepositivist view. The positivist view that treaties and customs are

only sources of international law is also not in conformity with Article 38 of the Statute of International Court of Justice according to which General Principles of Law Recognised by Civilized Nations" are also the sources of International Law. As pointed out Manley Hudson, the provision relating to "the general principles of law recognised by civilized nation"serves a useful purpose in that it emphasizes the creative role to be played by the court.

It confers such a wide freedom of choice that no fixed and definite content can be assigned to the term employed. It has widely hailed as a refutation of the extreme positive conception of international laws.

(1) **Theory of Consent.—**In the view of the supporters of this theory, consent of States is the basis of international law. States observe rules of international law because they have given their consent for it. Positivists have given much support to this view. The chief exponents of this theory are Anzilotti, Triepel, Oppenhetm. etc. This theory fails to explain the basis of customary international law. In the view of the supporters of this theory, States are bound to observe customary rules of international law, because they have given their implied consent for their acceptance. This theory has been subjected to severe criticism by many jurists, such as, Starke, Brierly, Kelsen, Fenwick, etc. Following are some of the points of criticism levelled against the theory :-

(i) As pointed out by Starke, in practice it is not necessary to prove that the other State or States have given their consent n regard to a specific rule of international law According to Prof. Smith, all States are bound by international law, no matter whether theyhave given their consent or not.

(ii) In regard to customary rules of international law, the basis of implied consent is far from correct. "The States are bound by general international law even against their will."

Professor Kelsen has cited the example of new States, which get rights and duties under international law immediately after becoming the subject of International law.

(iii) In the view of Fenwick, the theory of consent is not correct because it is against the principles and things which the States have been accepting since the beginning of

intemational law.

(iv) Theory of consent fails to explain the case of recognition of new State. The granting of recognition is the act of other States and hence it would be wrong to say by getting recognition, the recognised State has given its consent in respect of international law.

(v) According to Brierly the theory of consent cannot explain the true basis of International law even if we distort facts and try to fit them in the theory.

Thus we see theory of consent cannot explain the true basis of international law and can be severely criticised. As pointed out earlier, States follow international law for the simple reason that they are States. As an ordinary person has to obey municipal law, evenagainst his will, similarly, States are bound to follow international law. To quote Sir CecilHurst again, "International law is, in fact, binding on States because they are States.

Thus, "consent can never be the ultimate force of legal obligation" . 92 However, as noted earlier 'common consent can be said to be the basis of international law as a legal system in the sense that we "see the basis of international law in the existence of an international community the common consent of whose members is that there shall be a body of rules of law—international law—to govern their conduct as members of that community."

3. Historical Development of International Law: Development of International Law by International Organizations

A brief reference may also be made here to the development of international law by the organs of the international organisations. The organs of international organizations contribute to the clarification and development of international law. They help to create opinio juris but "state practice becomes evidence of law only when the vast majority of states believe themselves to be legally bound.

These organs often invoke legal principle in order to reach normative decisions. As pointed out by Rosalyn Higgins. 'The collective processes in a United Nations organ help to focus attention upon the need for mutual observance of the rules. Indeed, in some cases reference to a widely accepted rule of law can serve a bridge between differing ideologies.

The constituent instruments of international organisations represent an advanced stage of the development of international law. They have "introduced a quasi-legislative element in the law making processes at the expense of contractual element, facilitating a quicker response to the problems of international social order What is true of the organs of the U.N. is also, even more, true of the organs of the specialized agencies of the U.N. For example, both the World Health Organisation (WHO)and the International Civil Aviation Organization (ICAO) carry out a wide range of activities which contribute to the development of International Law.

This has become possible due to the provisions of the constitutions of these specialized agencies. Under Article 21 ofthe Constitution of WHO, each Member has undertaken the obligation to take action relative to the acceptance of the Conventions (adopted by a two-thirds votes of theHealth Assembly) or agreement within a period of 18 months after its adoption by the Health Assembly. In case a Member does not accept the convention or agreement within the said time, it is required to furnish the Director-General with a statement of the reasons for non-acceptance. Article 37 of the I.C.A.O. convention authorises the l.C.A.O. to adopt regulations 99 with a wide variety of technical matters essential to the safe and swift operation of international civil aviation. According to Article 90, an annex may be adopted by a two-thirds majority vote of the members of the Council.

A regulation thus adopted comes into force three months after its submission to the member-States or within the time specified by the Council. unless the majority of contracting States register their disapproval with the Council." Under Article 38 of the I.C.A.O. convention, it a member finds it difficult or impracticable to comply with any of the international standards or procedures adopted by the Council, it is under the obligation to notify LC.A.O. immediately of the differences between its own practices and the practice established by the Annex. If the member concerned fails to notify or remains silent, it will amount to approval.

Under the Constitution of the ILO, members have undertaken an obligation to submit conventions and recommendations adopted by the conference by a two-thirds majority for the consideration of the national authorities competent to give effect to their provisions. Once accepted, these conventions become binding upon members. The legislative procedure of the ILO, when introduced in 1919, was a radical innovation in following three respects :

"The whole conception of a convention being adopted by an international conference by a two-thirds majority and authenticated by the President and the Secretary-General of the conference instead of being signed by plenipotentiaries was then new." (2) "An even more radical innovation than the substitution of adoption for signature was the participation in the act of adoption of non-government delegates voting independently. This has remained a unique feature of ILO procedure. "No less radical and unprecedented an innovation was the obligation to submit conventions adopted by the International Labour Conference by a two-thirds majority for parliamentary consideration irrespective of the attitude towards the convention of the representatives of the Government concerned.

A brief reference may also be made to a similar provision in the Constitution of the Universal Postal Union (UPU) which provides that those postal administrations which do not respond to a proposal put to them by the International Bureau within a period of three months, will be considered to be in agreement with the proposal.

As written by Codding, Jr., "The experiences of WHO and ICAO have a high potential value. Other international agencies could possibly adopt them profitably to their own use, particularly those agencies

whose activities are of a technical nature. A combination of all the specialprocedures of ILO, WHO. ITU and UPU in one international organization provides

speculation. In any case, it is becoming increasingly obvious that some major changes are needed in the international legislative process if the international community is to be able to keep up with the amount of work that is being delegated by States to international organizations. The WHO and ICAO have, at least, made a start."

Now the world is witnessing the third phase of the post-war development of international organisations.

The first phase started immediately after 1945 when U.N.

system including the International Monetary Fund (IMF) and the World Bank was established. The second phase started near about 1960 when common market, organisation of European Co-operation and Regional Development Bank etc. were established. The third phase started near about 1973 and is still continuing. In the third phase, U.N. Environment Programme World Food Council, International Energy Agency (lEA) etc. have been established.

4. India’s contribution in development of international law:

A brief reference may also be made here of India's position in regard to the rules and principles of international law. Like other new states, India has also sought to reject or modify some of the rules and principles of the traditional international law. India has neither accepted the whole nor has rejected the entire fabric of the traditional international law. "India, like many other new nations, has expressed dissatisfaction with some of the rules of international law as developed in the West. This, however, does not mean that India's challenge of some of the rules of international law is motivated by any desire to subvert the international legal order. Nor is India's opposition of the same kind as that of the Soviet Challenge."

Further, 'In fact, India's argument would seem to indicate that it is far more influenced by the Western rather than Soviet concepts of international law.

This should not be surprising. However, It must not be supposed that India would agree to all the rules and principles that are identified as international law in the West. Rather, it does not challenge the doctrine of international law in the same way as the Soviets challenge it." Since her emergence as new state after the attainment of independence,

India Constitution of India and International Law:

The ties of India’s Constitution with international law date back to the pre-independence days. India was the separate member of the League of Nations. It is also the founding-member of the United Nations. In this section, we will see the general scheme of the Constitution with reference to international law and further proceed to analyse other provisions and aspects.

Article 51 is considered the concrete provision dealing with the relation of Indian Constitution and international law. But before we go into detailed analysis of it, we should look at the Preamble, Part III and Part IV of the Constitution. The Preamble enumerated certain basic values that India guarantees to its citizens and strives to achieve. These values are accepted as universal and basic by most nations throughout the world. The fundamental rights in Part III and the positive mandates

to the State in form of Directive Principles can be compared with the Universal Declaration of Human Rights and commonalities can be traced. Shri Subhash C Kashyap has prepared a detailed chart on the common principles in these two parts as well as certain other laws of India

General Principles of International Law: India's position and contribution on the general principles and major issues of contemporary international law such as recognition, self-determination, principles of non-use of force and non-intervention, state responsibility, prohibition of use of nuclear weapons, terrorism, legislative role of the UN Security Council, judicial review of the decisions of the UN organs, terrorism, legislative role of the UN Security Council, judicial review of the decisions of the UN organs, terrorism, jus cogens and erga omnes obligations, the jurisdiction of the International Criminal Court, emerging system of multilateral order and the United Nations and peaceful settlement of disputes, illustrates the importance and consistency of the role India has been playing in the pre-colonial era and in the post-independent phase in promoting rule of law in international relations.

World Trade Organisation: With regards to the trade in services, it is clear that services are subject to a number of non-tariff barriers, which mostly remain invisible. This, most of the time, makes it difficult to quantify the exchange of concessions. There is a need to have total transparency, along with a legally binding international code on restrictive business practices. It is pertinent that developing countries should have a proper legislative framework on restrictive practices. India has already adopted the Competition Act, 2002 (partly in force), which, though not service specific legislation, will address the anti-competitive practices of the enterprises.

Module 2: Sources of International Law

Topics for study;

1. ***Statute of International Court of Justice ,1945(Article 38)***
2. ***International treaties, convention, international cutom***
3. ***Law Recognized by Civilized Nations- Judicial Decisions***
4. ***National Courts-Juristic opinion***
5. ***Other sources of International Law-Resolution of General Assembly, Resolution of Security Council***

1. Statute of International Court of Justice ,1945(Article 38)

As pointed out by Starke, 'The material sources of international law may be defined as the actual materials from which an international lawyer determines the rule applicable to a given situation."

The term 'source' refers to methods or procedure by which International law is created. A distinction is made between the formal sources and material sources of law. As pointed out by G. Fitzmaurice they may also be described as, respectively, as direct and indirect, as proximate or immediate and remote or ultimate.

Material sources may also be described the "origins" of law while the material, historical or indirect sources represent the stuff out of which the law is made, that is to say, they go to form the content of the law, the formal, legal and direct sources consist of the acts or facts whereby this content is clothed with legal validity and obligatory force. The essence

of the distinction, therefore, is between the thing which inspires the content of law, and the thing which gives that the content its binding character as law. 'The former are those legal procedures and method for the creation of rules of general application whicli are legally binding on the addressee. The material sources provide evidence of the existence of rules which, when proved, have the status of legally binding rules of general application."

The sources of international law may be classified into five categories—
(1) International conventions;
(2) International customs
(3) General Principles of Law Recognized by civilized Nations;
(4) Decisions of Judicial or Arbitral Tribunals and Juristic works
(5) Decisions or Determinations of the Organs of International Institutions.
The above-mentioned third source 'General Principles of Law Recognised by Civilized Nations' was first mentioned in Article 38 of the statute of the Permanent Court of International Justice, It was retained in Article 38 of the statute of the International Court of Justice which mentions the following sources of international law.
(1) International conventions ;
(2) International customs;
(3) General principles of law recognized by civilised nations; and
(4) Judicial decisions and the teachings of most highly qualified
publicists of the various countries as subsidiary means for the determination of rules of law. The above-mentioned Fifth source, i.e., Decisions or determinations of the Organs of International institution does not find mention in Article 38 of the statute of the court but it has now become a well-recognized source.

1. **International Convention:**

   In the modern period, international treaties are the most important source of international law. This is because the reason, inter a/ia, that states have found in this source a deliberate method by which to create binding international law. Article 38 of the statute of the International Court of Justice lists international conventions whether

general or particular, establishing rules expressly recognized by the contesting States' as the first source of international law.

According to Article 2 of the Vienna Convention on the Law of the Treaties, 1969, 'A treaty is an agreement whereby two or more States establish or seek to establish relationship between them governed by international law".

But this definition is narrow and does not seem to be correct. As correctly pointed out by Prof. Schwarzenberger, 'Treaties are agreements between subjects of international law creating a binding obligation in international law."

However, it would be wrong to say that Vienna Convention does not show its awareness to this fact for Article 3 provides that the fact that the present convention does not apply to international agreements concluded between states and other subjects of international law, or between other subjects of international law, or to international agreements not in written form, shall not affect

(a) The legal force of such agreements

(b) The application to them of any of the rules set forth in the present convention to which they would be subject under international law independently of the convention

(c) The application of the convention to the relations of states as between themselves under international agreements as to which other subjects of international law are also parties.

International treaties may be of the two types :

(A) Law-making treaties and

(B) Treaty contracts

(A) Law-making treaties—The provisions of law-making treaty are directly the source of international law. The development of law-making treaties received an impetus from the middle of 19th century. The main reason for this was that in view of the changing circumstances, customs, which were hitherto the most important source of international law, were proving to be inadequate. Consequently, States regarded it necessary and expedient to enter into treaties and thereby established their relations in accordance with the changing times and circumstances. Law-making treaties may again be divided into

following two types:—

(a) Treaties enunciating rules of universal international law.—United Nations Charter is the best example of such type of treaty.

(b) International treaties which lay down general principles—These treaties are entered into by a large number of countries. 1958 Geneva Conventions on the law of the Sea and Vienna Convention on the Law of Treaties, 1969 are good examples of such type of treaties.

Law-making treaties perform the same functions in the international field as legislation does in the State field. Law-making treaties are the means through which International law can be adapted to in accordance with the changing times and circumstances and the rule OT law among the States can be strengthened. Treaty process is also a useful means to develop universal international law. But an international treaty can enunciate universal principle only when it receives the support of the essential States.

For example a law-making treaty which does not receive the support of nations, such as, Russia, Britain, America, France and China, cannot effectively enunciate general or universal rules.

(B) **Treaty contracts:** As compared to law-making treaties, treaty contracts are entered into by two or more States.

The provisions of such treaties are binding on the parties to the treaty. Such treaties also help the formation of international law through the operation of the principles governing the development of customary rules. This may happen when a similar rule is incorporated in a number of treaty contracts. Beside this a treaty enter into by a few States is subsequently accepted by many other States as they enter into similar treaties. Finally, A treaty may be of considerable evidentiary value as to the existence of a rule which has crystallised into law by an independent process of development."

2. International custom:

International customs have been regarded as one of the prominent sources of International law for a long time. It "is the oldest and the original source, of international as well as of law in general." 7 It is only in the modern period that the importance of customs has suffered a setback. However, even today it is regarded as one of the

important sources of international law. Customary rules of international law are the rules which have been developed in a long process of historical development.

Article 38(b) of the Statute of International Court of Justice recognises International Custom, as evidence of general practice accepted as law', as one of the sources of International law.

In order to understand the meaning of custom', it is necessary to know the meaning of the word usage'. The words 'custom' and 'usage' are often used as synonymous. In fact, there is difference between the usage and custom, and they are not synonyms. Usage is in fact the early stage of custom. By usage we mean those habits which are often repeated by the States. As pointed out by Starke, where a custom begins, usage ends. Usage is an international habit which has yet not received the force of law.

In the words of Starke, "Usage represents the twilight stage of custom, custom begins where usage ends. Usage is an international habit of action that has yet not received full legal attestation. Usages may be inconsistent and opposed to each other. But this can never be the case with the custom. When States in their international relations start behaving in a particular way in certain circumstances, it is expected that in the similar circumstances they will behave in the same way. This is called the usage. But when this usage receives the general acceptance of recognition by the States in their relations with each other, there develops a conception that such a habit or behaviour has become right as well as obligation of the States and in this way usage becomes the custom. As aptly remarked by Viner "A custom, in the intendment of law, is such usage as that obtained the force of law".

Ingredients or elements of custom

Following are the main ingredients of an international custom:-

(i) **Long Duration**—Long duration is generally said to be an essential ingredient of a custom. This is particularly true of a custom in Municipal Law. In Municipal Law, a custom is required to be ancient and immemorial. But this is not necessary for an international custom. Article 38 of the Statute of the International Court of Justice directs the World Court to apply 'international custom, as evidence of a general practice accepted as law.

Emphasis is not given on a practice being repeated for a long duration. What is more

important is the practice of States accepting the practice concerned as law. In the field of international law, customs have emerged in a short duration, for example, custom relating to sovereignty over air space and the continental shelf.

(ii**) Uniformity and consistency**—The custom should also be uniform and consistent.

In the Asylum case, the International Court of Justice observed that the rule invoked should be 'in accordance with a constant and uniform usage practised by the States in question, and that this usage is the expression of a right appertaining to the State granting asylum and a duty incumbent on the territorial State.' This follows from Article 38 of the Statute of the Court which refers to international custom 'as evidence of a general practice accepted as law'. According to Mannley , Hudson, "The elements necessary are the concordant and recurring action of numerous States in the domain of international relation, the conception of each case that such action was enjoined by law, and the failure of other States to challenge that conception at the time". It may, however, be noted that complete uniformity is not necessary. Nevertheless, there must be substantial uniformity.

(iii) **Generality of Practice**.: Although universality of practice is not necessary, the practice should have been generally observed or repeated by numerous States.

(iv) **Opinio juris et nessitatis**: Accordiflg to Article 38 of the Statute of the International Court of Justice, international custom should be the evidence of general practice "accepted as law".

It is an important matter to see as to how international custom will be applied in International law.

Leading cases on the point

(a) **West Rand Central Gold Mining Company Ltd. v. R**.—In this case a test regarding the general recognition of custom was laid down. The Court ruled that for a valid international custom if is necessary that it should be proved by satisfactory evidence that the custom is of such nature that it has received general consent of the States and no civilized State shall oppose it.

(b) In case concerning Military and Para-Military Activities in and Against Nicaragua, the World Court observed

"If a state acts in a way prima facie in 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."

3. General Principles of Law recognized by State: As per Para1(c) of art.38 of International Court of Justice it is the third source of International Law In the modern period, it has become an important source. It constitutes an important landmark in the history of international law inasmuch as the State Parties to the statute did expressly recognise the existence of third source of international law independent of custom or treaty. This source helps international law to adapt itself in accordance with the changing times and circumstances.

   Following are some of the important cases relating to the general principles of law recognized by civilized States :-

   (a) R. V. Keyn:- In this case the Court ruled that international law is based on justice, equality and conscience which has been accepted by long practice of States

   (b) United States v. Schooner.-In this case Justice Storey of United States of America ruled that International law should be based on the general principle of law recognized by civilized States. He was giving decision relating to abolition of system of Slavery.

   The International Court have recognised as general principles:

   (i) good faith;

   (ii) responsibility ;

   (iii) prescription ;

   (iv) in the absertne of any express provision to the contrary, every Court has right to determine the limits of its own jurisdiction ;

   (v) a party to a dispute cannot himself be an arbitrator or judge ;

   (vi) res judicata; and

   (vii) in any judicial proceeding the Court shall give proper and equal opportunity of hearing to both parties.

Since these principles have been recognised and applied by the Courts many a times, Cheng has, and rightly too, suggested that these and such other principles should be codified.

4. **Decisions of Judicial or Arbitral Tribunal:** International Judicial Decisions. ,ln the modern period International Court of Justice is the main International Judicial Tribunal. It was established as a successor of the Permanent Court of International Justice. It may, however, be noted that the decision of International Court of Justice does not create a binding general rule of international law. Article 59 of the Statute of the International Court of Justice makes it clear that the decisions of the court will have "no binding force except between the parties and in respect of that particular case". Earlier decisions of the Court are not binding on the Court itself and the Court is free to deviate from its earlier decisions.

   However, ordinarily the Court does not deviate from its earlier decisions and it changes its earlier decisions only in very special circumstances. Thus while in principle it does not follow the doctrine of precedent, in practice, it ordinarily follows it. So far as the advisory opinion of the 'International Court of Justice is concerned, it is not binding at all. But it clarifies the rule of International law on a particular point or matter.

   According to Article (38)(1) (d), subject To the provisions of Art. 59 judicial decisions are "subsidiary means for the determination of rules of law'. Thus judicial decisions, unlike customs and treaties, are not direct sources of law, they are subsidiary and indirect sources of International Law.

   Decisions of International Arbitral Tribunals—In the view of some jurists the decisions of International Arbitral Tribunals cannot be treated as source of internationallaw. These jurists have, rightly too, pointed out that in most of the arbitral cases,arbitrators act like mediators and diplomats rather than as judges. The Kutch Award (1968) bears testimony to this fact. Consequently, their decisions should be treated as source of International law. Generally the said criticism is correct. It may, however, be noted that some of the decisions of the Permanent Court of Arbitration are treated as weighty precedent and can be

regarded as source of International law. Judge Lauterpacht has aptly written, "One of the reasons usually given for its (in. Permanent Court of Arbitration) inadequacy was that the awards rendered by its tribunals were not legal in form and substance that they tend to confuse law with a diplomatic solution aiming at pleasing both parties.

Juristic works:-Although juristic works cannot be treated as an independent source of International Law. yet the view of the jurists may help in the development of law.

The views of the jurists are not direct sources of international law. But they sometimes become instrumental in the development of international customs According to Article 28 of the International Court of Justice, the works of highly qualified jurists are subsidiary means for the determination of the rules of international law.

5. **Decision or determinations of the organs of International institutions**

Before the establishment of League of Nations, International Customs and International Conventions were recognized as the main source of International Law. In addition to these morn sources juristic works and decisions of judicial and arbitral tribunals were regarded as subsidiary means for the determination of rules of law. The statute of PCIJ under Art. 38 incorporated these sources and also introduced one new source namely General principles of law recognised by civilized nations". Article 38, however, did not at all mention decisions or determinations of organs of International institution as source of law. The reason for this was quite obvious that by this time International organizations had not assumed such an important role as they have done now.

The evolution of International organisation represents a significant stage in the history and development of International law. International organization in its wider sense, is the process of organising complexity of International relations. In a narrow sense, it is an International institution based on multilateral international agreement entered into by sovereign states, its organs having autonomy of will, having permanent organs and having distinct entity or personality separate from its total of its membership. Even before the establishment of the League of

Nations, some experiments were made for development of international organisations.

In the view of Starke, organs of international institutions may lead to the development of international law in the following ways

(i) In international matter their decisions are the intermediate or final steps in the development of customary rules. For example, it was ruled by Security Council of the United Nations that if any member absent from the Security Council meeting then it will not be deemed to be a veto. This decision has helped in the development of the international custom on this point. Similarly, the Security Council can decide whether matter is procedural or important. Such decisions may help in the development of an international custom on the point.

(ii) The resolutions of the organs of international institutions may be binding on the members in regard to the internal matters of the institution.

(iii) Organs of international institution can decide the limits of their competence. Sometimes the organs of international institution may make the interpretation of the different provisions of their constitutional instruments. This decision becomes a part of the law of international institution which in its turn becomes a part of the international law.

6. Other Sources of International Law

Resolution and Declarations of General Assembly of the U.N. as the Source of Universal International Law: There is a great controversy in regard to the legal significance of the resolutions and declarations of the General Assembly of the United Nations. Some Jurist are of the view that they are only of political significance and have The decisions taken by the General Assembly prove to be helpful in the development of International law. These decisions are in the form of recommendations and resolutions and some of them are never implemented yet they are helpful in the agreement

between Stains and contribute in preparing the necessary environment for the development of the rules of International law no legal importance On the other hand, some jurists hold the view that under certain special circumstances they may have legal implications and some of them may even have binding effect.

7. Art. 38 of Statute of International Court of Justice

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

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

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

Chapter 3: Relationship between International Law and Municipal Law

Theories- Monistic Theory, Dualist Theory, Transformation Theory, Specific Adoption Theory

Practice of State; United Kingdom,United States of America and India

Certain theories have been propounded to explain the relationship between International Law and Municipal Law. Following are some of the prominent theories in this connection

(1) Monism
(2) Dualism ;
(3) Specific Adoption theory
(4) Transformation theory and
(5) Delegation theory.

These theories have been put forward to explain the relationship between International Law and State Law, Of all these theories the most popular Monism' arid Dualism' and they are diametrically opposed to each other.

1. **Monism**: The exponents of this theory emphasis on the scientific analysis of the internal structure of law. According to them law is a unified branch of knowledge no matter whether it applies on persons or other entities. "According to monist belief, international obligation and municipal rules are facets of same phenomenon, the two deriving ultimately from one basic norm and belonging to the unitary order comprised by the conception of law."

According to the exponents of Monism International Law and Municipal law are intimately connected with each other. International Law and Municipal Law are the two branches of unified knowledge of law which are applicable to human community in some or the other way. In the view of the monistic writers, in the ultimate analysis of law we find that man is at the root to all laws. All laws are made for men and men only in the ultimate analysis.

Criticism. --Monism is a very sound theory. It is very difficult to disprove the view of Kelsen that man lies at the root of all laws. But in actual practice states do not follow this theory. They contend that Municipal Law and International Law are two separate systems of law. Further, each state is sovereign and as such is not bound by international law.

States follow international law simply because they give their consent to be bound and on account of other reasons.

2 . Dualism: In the view of the dualistic writers, international law and State law are two separate laws. "The Monist view of law is part of philosophy according to which totality is a single structure. But within the framework of the unitary universe is diversity of phenomenon .Differences are significant and the dualist considers that Municipal law differs markedly from international precepts." Monism remained in vogue for a long time. Monism exercised a great influence upon international law, because it had closeassociation with natural law. In the 19th century, however, the existence of State-will and complete sovereignty of the State were emphasized. The conception of State-will was taken from Hegel, a German scholar and was further developed. Dualism is based on the complete sovereignty of States. The chief exponents of this theory are Triepel and Anziloti. Triepel has pointed out the following differences between International Law and State law

(a) **Regarding subject. _**—Individual is the subject of State law, whereas State is the subject of international law.

(b) **Regarding origin**—Origin of State law is the will of the State whereas origin of the international law is the common will of States. -

Criticism—It is not correct to cortend that International Law is binding only on States. In the modern period, International Law is applicable on States, individuals and certain other non-State entities. Besides this, the conception of State-will as the sourceof State law is incorrect. In tact State-will is nothing but the will of the people who compose it. Similarly, it is not correct to say that the origin or source of international law is common will of the States. There are certain tundamental principles of international law which are binding upon the State, even against their will. "Furthermore, it may be objected to Triepel's theory that it does not explain the existence of a general International law. Even international customary law becomes particular law for Triepel, its rules apply only to the State which by conclusive acts have declared adherence to the 'tacit' agreements' upon which they rest—a view that is at variance with reality. Anziloti has tried to explain the difference between international law and State law in a different way. According to him, there is a difference between the fundamental principles of international law and State law.

The fundamental principle of the State law is that laws, pacta sund servanda, namely, agreement between States are to be respected. On this basis, Anzilloti contends that the legal systems of international law and States laws are different. It cannot be denied that pacta sunt servanda is an important fundamental principle of international law. But to assert that it is the only basis of international law seems to be far from truth. In fact, it is an important illustration of all the important fundamental principles of international law. It fails to explain the binding force of customary rules of International Law in regard to which the States have not given their consent.

Whether Monism or Dualism is the correct theory.—On the basis of above discussion, monism appears to be the correct theory but no theory can be complete in itself and it is not possible to include all the elements in it. The practice of States indicates that sometimes there is the primacy of international law, sometimes there is the primacy of the Municipal law and sometimes there is mixture of different legal system.
For example in the Greco-Bulgarian Communities case , The permanent Court of International Justice held, it is a generally accepted principle of international law that in relations between powers who are contracting parties to a treaty, the provisions of the municipal law cannot prevail over the treaty." On the other hand, when the Municipal Courts find that the conflict between the International law and Municipal law is of such nature that cannot be avoided, they give primacy to the Municipal law. In this connection, Mortensen v. Peters'and Sri Krishna Sharma v. The State of West Bengal deserve a special mention.

2. **Specifc adoption Theory:** According to the positivists, international law cannot be directly enforced in the field of State law. In order to enforce it in the field of Municipal Law, it is necessary to make its specific adoption. In short International Law can be applied in the field of Municipal law only when Municipal law either permits it or adopts it specifically. This view is generally followed by States in respect of International Treaties. It is argued that unless there is specific adoption of the International Treaties(such as TkCOflVenti0n Act, 1975 and Vienna Convention of Diplomatic Relations Act,1972 enacted by Indian Parliament) or there is some sort

of transformation, International Treaties as such cannot be enforced in the municipal field. While considering the International Covenants on Human Rights, the Supreme Court of India observed, in Jolly George v. The Bank of Cochin,

"The positive commitment of the its Parties ignites legislative action at home but does not automatically make the covenant enforceable part of the corpus juris of India")

As regards specific adoption of international treaties by Indian Parliament the Anti-Apartheid (United Nations Convention) Act, 1981, the Anti Hijacking Act, 1982, the Suppression of Unlawful Act against the safety of Civil AviationAct, 1982 and the International Monetary Fund and Bank (Amendment) Act, 1982 deserve a special mention.

Cri!icism. —This view is not correct in respect of the whole of international law because there are many principles of international law (especially are applied in the field of municipal law without specific adoption.

3. **Transformation Theory**.—The exponents of this theory contend that for the application of international law in the fie l d of municipal law, the rules of international law have to undergo transformation. Without transformation they cannot be applied in the fie ld of municipal law.

Criticism—This theory is based an consensual theory which has already been criticized, it may also be noted that it is not necessary for all treaties to undergo the process of transformation for their application in the field of municipal law. There are several law-making treaties which become applicable to the States even without undergoing the process of transformation. This theory has been severely criticized by the critics. It is, therefore, incorrect to consider that the transformation from one to other is materially essential.

Delegation Theory.—As pointed out earlier, transformation theory has been severely criticized by a number of jurists. The critics of transformation theory have put forward a new theory called Delegation theory. These critics point out that the constitutional rule of international law permit each State to determine as to how international treaties will become applicable in the field of State law. Thus, in fact, there is no transformation nor is there specific adoption in every case. The rules of international law are applied in the field of State law in accordance with the procedure and system prevailing in each State in accordance with its Constitution.

Criticism. —This theory can be regarded simply as a reaction against the theory of "dualism" and other theories based on positivism, one may ask where are and what are the constitutional rules of international law? When and how these rules have delegated power to state constitutions? This theory is far from true. In fact, each-state is equal and Thus there is a great controversy in regard to application of international law in the field of municipal law. In order to arrive at the right conclusion, it is necessary to go through the practice of States in this respect. But before we do so, it will be desirable first to consider the question of primacy.

Thus the view that State law will prevail in case of conflict between State law and international law is not correct. If we accept this theory, it will mean that there will be the primacy of more than 1193 state legal systems. Acceptance of such theory will create anarchy and disorder in the international field. Besides this, this view is subject to the following criticism

(a) If it is accepted that international law derives validity from the State Constitution, it will mean that with the disappearance of the State Constitution, the validity of the rules of international law will also disappear. This is a very absurd suggestion and cannot be accepted. Almost all the jurists are agreed on the point that the disappearance of State Constitution will not affect the validity of the rules of international law.

(b) When a new State is admitted to the family of nations, it becomes bound to obey the rules of international law even against its will. In fact, the duty of each State is to adopt its law and Constitution in accordance with the rules and principles of international law.

(c) Most of the States have accepted the supremacy of International law in their Constitutions.

4. Practices followed in U.K., U.S.A ,and India

A. **U.K British Practice**. —For the application of international law in Britain, distinction is maintained in regard to the customary rules of international law and the rules laid down by treaties. It will, therefore, be desirable to discuss them separately.

(A) British practice in regard to customary rules of international law.---In Britain,customary rules of International Law are treated as a part of British laws. British courts treat customary rules of international law as apart of their own law subject however to the following conditions.

(a) Rules of international law should not be inconsistent with the British Statutes ; and

(b) If the highest Court once determines the scope of a customary rule of international law, then all the courts in Britian are bound by it.

Influence of the above practice—Following is the influence of the British practice in regard to the customary rules of international law

(a) Rules of Construction—The British Courts interpret the Parliamentary Statutes in such a way that they should not go against international law. In this connection the presumption is that Parliament never intends to violate international law. This rule is applicable only when the provisions of the Statutes are ambiguous. In case the provisions of the Statutes are clear and unabmiguous, they prevail over the rules of international law.

(b) Rule or Evidence—In Britain, the rules of international law need not be proved through evidence.

Following are the exceptions of the British , practice in regard to customary rules of international law:Acts of State do not come within the purview of the British courts, irrespective' of the violation of international law.

(ii) Prerogative powers of Crown.—In some matters the British courts are bound to obey the prerogative powers of Crown. For example, if the Crown grants recognition to any State, the British courts are bound to accept it. They can not question the matters coming within prerogative powers of the Crown.

(B) British Practice as to Treaties—In Britain the practice regarding the rule laid down by treaties is different from the practice in regard to the customary rule of international law. in regard to treaties, the British practice is based on the constitutional principles governing the relationship between Executive or Crown and Parliament.

In regard to treaties, the matters, relating to negotiations, signatures, etc. are within the prerogative powers of the Crown.

In Britain it is necessary that some type of treaties should receive the consent of Parliament. Either the Parliament accords its consent or adopts it in State law through the help of a statute. Such type of treaties are

(a) Treaties which affect the right of British citizens;

(b) Treaties which amend —or modify common law or Statute law of Britain ;

.c) Treaties which confer additional powers on Crown ; and

(d)Treaties which impose additional financial burden on the Government.

In addition to these, treaties which expressly provide that for their application the consent of the Parliament is required, consent of the Parliament is essential for their application.

5. Practice in America: In America also, the practice regarding customary rules of international law and the rules laid down by treaty is different.

(A) American practice regarding customary rules of international law.—

The American practice regarding customary rules of international law is more or less same as the British practice. In America also customary rules of international law are treated as a part of American law. In the leading case Panama Habana Justice Gray remarked,

"International law is a part of our law and must be ascertained and administreded by the courts of justice of appropriate jurisdiction as often as questions of rights depending on it are duly presented for their determination. For this purpose, "where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations ; and, as evidence of these, to the works of jurists and commentators, who by years of labour, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat."

Such works resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for the trustworthy evidence of what the law really is.

B) American practice regarding rules laid down by Treaties—American practice regarding rules laid down by treaties is different from British practice. In case of international treaties, the American practice is not based on the constitutional rules governing the relationship of the executive and Congress. In America, everything depends upon the provisions of the Constitution. Article VI of the American Constitution provides that Constitution of the United States, all1iws made in pursuance thereof and the international treaties entered into under the authority of the United States shall be the supreme law of the land. Thus international treaties have been placed in the same category as State law in America. It may, however, be noted that in America the practice is that if there is a conflict in between international treaty and a State law, whichever is
later in date shall prevail. If there is a conflict between American Constitution and an International Treaty, the former (i.e. the Constitution) will prevail.

C. Practice in India:

Before the adoption of Indian Constitution the Indian practice in respect of relation of international law to internal law was similar to the British practice. After the adoption of the Constitution of India everything depended upon the provisions of Constitution. In order to know the position of International Law in the post Constitution period, it is necessary to examine the relevant provisions of the Constitution of India.

Art.51: The most relevant provision is contained in Article 51 which runs as follows:

"The State shall endeavour to—(a) promote international peace and security
(b)maintain just and honourable relations between nations
(c) foster, respect for international law and treaty obligations in the dealings of organised peoples with one another; and (d) encourage settlement of international disputes by arbitration.

But Article 51 does not give any clear guidance regarding the position of international law in India as well as the relationship of municipal law and international law because this article is contained in Part IV of the Constitution of India. Part IV of the
Constitution deals with the Directive Principles of State Policy. Article 37 of this Part

clearly provides that the provisions contained in this Part shall not be enforceable by any court. "This Article (Article 51) falls in the Chapter on 'Directive Principles of State Policy' which are non-justiciable.

Secondly, it is doubtful if the expression State includes the courts also within its ambit and if the Directive Principles have been addressed to them too." However, it would be wrong to contend that Article 51 is of no relevance and provides no guidance at all. Article 37 which provides that provisions contained in Part IV of the Constitution are non-justiciable, adds in unmistakable terms that the principles therein laid down are "nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws." The majority of constitutional experts in the country now subscribe to the view that simply because the principles contained in Part Ill are non-justiciable, it cannot be successfully contended that they are of no significance or even of less significance than the fundamental rights contained in Part IV which are justiciable.

Art.372: Art. 372 (1) clearly provides : "Notwithstanding the repeal by this Constitution of the enactments referred to in Article 395 but subject to other provisions of this Constitution, all the laws in force in the territory of India immediately before the commencement of this Constitution, shall continue in force therein before until altered or repealed or amended by a competent Legislature or other competent authority."

Before the adoption of the Constitution of India, the British practice that customary rules of international law are part of the law of the land, applied in India also. This practice continued even after the adoption of the Constitution by virtue of the provisions of Article 372 until it was altered or repealed or amended by a competent Legislature or other competent authority .

The Constitution of India did not alter that position for it provided, for the continued operation of the law in force immediately preceding the commencement of the Constitution. Therefore, on the analogy of the English Common law, the municipal courts of India have applied the provisions of the treaties entered into by India if they have been incorporated into municipal law through legislation, and the well recognised principles of international customary law have been applied because they are supposed to form part of the law of the land. It is thus the dualist view of international law which has been commenced by the British and Indian courts, viz., that international law can become a part of municipal law only by specific incorporation.

Thus, so far as customary rules of international law are concerned, the position prevailing immediately preceding the commencement of the Constitution continues even after the coming into force of the Constitution. In India also customary rules of international law are part of the municipal law provided that they are not inconsistent with any legislative enactment or the provisions of the Constitution of India. As regards the treaty rules also. India follows more or less the British dualist view. That is to say, ordinarily, international law can become part of municipal law of India if it has been specifically incorporated.

In State of Madras v. G.G. Menon, [2] the Supreme Court held

"The Indian Extradition Act, 1903, has been adopted but the Fugitive Offenders Act of the British Parliament has been left severely alone. The provisions of the Act could only be made applicable to India by incorporating them with the appropriate changes into an Act of Indian Parliament and enacting on Indian Fugitive Offenders Act. In the absence of any legislation on these fines it seems difficult to hold that sections of the Fugitive Offenders Act, have force in India by the reason of the provisions of Article 372 of the Constitution.

Justice lyer reaffirmed view of H.R. Khanna, J. in

A.D.M. Jabalpurv.v. Shukla. [3]which that in case there is no conflict between municipal law andInternational law or where two constructions of municipal law are possible, Indian Courts can give effect to International law by giving harmonious construction.

Present Legal Position in India—But the position will be different when there is no conflict between International Conventions and the domestic law. As pointed out by the Supreme Court in Vishaka v. State of Rajasthan, [4] in the absence of domestic law occupying the field to formulate effective measures to check the evil of sexual harassment of working women at all work places, the contents of International Conventions and norms are significant for the purpose of interpretation of the guarantee of gender equality and right to work with human dignity in Articles 14, 15, 19(1)(g) and 21 of the Constitution and the safeguards of sexual harassment implicit therein. Any

[2] State of Madras v. G.G. Menon, AIR. 1954 S.C. 517.

[3]A.D.M. Jabalpurv.v. Shukla A.I.B. 1976 S.C. 1207.

[4] . Vishakha v. State of Rajsthan,AIR 1997 Sc 3011.

International Convention not inconsistent with the fundamental rights and in harmony with its spirit must be read into these provisions to enlarge the meaning and content thereof, to promote the object of constitutional guarantee. This is implicit from Article 51(c) and the enabling power of Parliament to enact laws for implementing International Conventions, and norms by virtue of Article 253 read with Entry 14 of the Union List in the Seventh Schedule of the Constitution.

In this case, the Apex Court was dealing with the problem of harassment of working women. Delivering the Judgement of the Three Judge Bench, J. S. Verrna, C II.. observed that the meaning and content of the fundamental rights guaranteed in the Constitution are of sufficient amplitude to encompass all the facets of gender equality including prevention scheme. The Internationat Conventions (especially Convention on the Elimination of All Forms of Discrimination Against Women) and norms are to be read into them in tile absence of enacted domestic law occupying the field when there is no inconsistency between them. It is now an accepted rule of judicial construction that regard must be had to International Conventions and norms for construing domestic law when there is no inconsistency between them and there is a void in the domestic law.

Module 4: Subjects of International Law

Topics for study:

1. ***Meaning and definition of State***
2. ***Kinds of Different States in International Law – Sovereign States, Semi Sovereign States, Protectorate- Vasssal- Trust Territories***

Neutralized States, Holy

3. ***Individuals as subjects and object of International Law,***

4. Role of MNCS

1. Meaning and definition of state:

State is the main subject of international law. It is very difficult to define the term 'State', but certain jurists have made their endeavours to this respect.

Salmond : According to Salmond, State is a community of people which has been established for some objectives such as internal order and external security.

Lawrence : In the view of Lawrence, State is a society which is politically organised and its members are bound with each other by being under some central authority and most of the people automatically follow the rules of this central authority.

Oppenheim : As Pointed out by Oppenheim, the existence of State is possible only when People of State have settled under highest government authority and habitually follow its orders.

H.L.A Hart: According to Prof. H.L.A. Hart, "The expression 'a State' is .....a way of referring to two facts : First, that a population inhabiting in a territory live under that form of ordered government provided by a legal system which its characteristic structure of Legislature, Courts, and primary rules ; and secondly, that the government enjoys a vaguely defined degree or independence.

Essential Elements of a State.—According to Article 1 of Montevideo Convention 1933, "The State as a person of international law should possess the following qualifications :

(a) A permanent population

(b) A definite territory

(c) A Government and (Capacity to enter into relations with other States".

Oppenheim has pointed out the following essential elements of a State

(1) Population

(2) A definite territory ,

(3) Government and

(4) Sovereignty.

The famous jurist Holland has added one more essential element, namely, to some extent, 'civilization' because of which the State becomes the member of international community.

Functions of States.—Modern period has witnessed revolutionary changes in regard to functions of a State. Previously there was the conception of a police Stale, according to which, the essential functions of a State were to maintain internal peace and order and to defend it from external aggression. It cannot be denied that even today these are the essential functions of a State but in the present period the conception of State has undergone significant changes. Instead of the conception of police State, the present conception is that of a welfare State. That is to say, for the benefit of the people, State has to perform many social, economic, educational and cultural functions. But these functions do not come under the category of essential functions. They are in fact subsidiary functions. Nevertheless these are also the functions of a State in the modern time and the importance of these functions is constantly increasing.

Kinds of State:

1. Sovereign State:

   In the view of jurists, only sovereign States are entitled to be the members of the Family of Nations. According to Austin, "If a determinate human superior, not in the habitof obedience to a like superior, receive habitual obedience from the bulk of a given society, that determinate superior is sovereign in that society, and the society, (including determinate superior) is a society political and independent'. In relation between States, Max Huber defines the concept of sovereignty as

   "Sovereignty in the relation between States signifies independence.

   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".

   Every sovereign State can exercise the functions of State, to the exclusion of all other States. In other words, it exercises complete sovereignty within its territories. Since territories, of a State are circumscribed by its boundaries, it has been rightly said, 'Boundaries are one of the most significant manifestation of State territorial

sovereignty". According to Austin, sovereignty is indivisible and illimitable.

In International law of a good example of the application of the principle sovereignty is the 'Theory of auto-limitation'. According to the theory, States follow international law because they have by their consent reduced their powers. This principle is based on the principle of State sovereignty. The chief exponents of this principle were Anzilotti and Triepel. It has been pointed out in an earlier chapter that the theory of auto-limitation suffers from several defects and does not appear to be correct. It has been severely criticized by many jurists. In the modern period, there have been revolutionary changes in respect of the theory of sovereignty of States. In the present time it is not proper to say that State sovereignty is indivisible and illimitable. Ordinarily over one and the same territory there can be only one sovereign. In practice, however, there can be several exceptions such as the first and probably the only real exception is the condominium which existsbetween two or more States exercising sovereignty jointly over a territory, e.g.,condominium of Austria and Prussia over Schleswig Holstein Lanenburg from 1864 till1866, condominium of Great Britain and Egypt over Sudan from 1898 to 1955 and condominium of Great Britain and France over the New Hebrides (now the independent State of Vanuatu) can be cited as example.

(2) **Semi- Sovereign State:**

One State exercising sovereignty which is, in law vested elsewhere, i.e., where a territory is administered by a foreign power with the consent of the owner State. For example, Great Britain exercised sovereignty over Turkish Island from 1878 to 1914.

(3) The third exception is that of giving territory on lease or pledge by the owner State to a foreign power. For example, in 1998 China leased the district of Kiaochow to Germany, Wei-Hai-Wei and the land opposite the Island of Hongkong to Great Britain, Kuang Chouwan to France and Port Arthur to Russia.

(4) Where the use, occupation and control of the territory are granted in perpetuity by the grantor State to the other State. For example, in 1903 the Republic of Panama transferred to the United States of America a ten-mile territory for construction, administration and defence of the Panama Canal.

3) Condominium.—W hen two or more States exercise rights over a territory, it is called Condominium. "A Condominium exists when over a particular territory joint dominion is exercised by two or more external powers." 36 New Hebrides is a good example of a Condominium. Both England and France exercised control and had rights over the territory of New Hebrides between 1914 and 1980. Thus there is a joint sovereignty of France and Britain over New Hebrides. Other examples of condominium are those of Austria and Prussia over Schleswig-Holstein and Lanenburg from 1864 till 1866, of Great Britain and Egypt over Sudan from 1898 to 1955, and of Great Britain and France over Islands of Canada and Endenbury after 1939. In respect of rivers, gulfs or bays also sometimes the idea of condominium is used.

(4) **Vassal State**.—A State which is under the suzerainty of another State is called a Vassal State. Its independence is so restricted that it has no importance under international law. As remarked by Starke, 'Vassal State is one which is completely under the suzerainty of another State. Internationally its independence is so restricted as scarcely to exist at all .38 In its foreign affairs, the Vassal State possesses no power and all its foreign policies are governed by the State of which it is a Vassal State.

(5) **Protectorate State**.—According to Starke, "Although not completely independent, a Protectorate State may enjoy a sufficient measure of sovereignty to claim jurisdictional immunity in the territory of another State, If may also still remain a State under international law."

Often Protectorate Sates entrust matters of foreign policy and the matters regarding defence to other States. For example, Sikkim was a protectorate State of India before it was made an associate State of India. Subsequently, it was completely merged in India and became a State in the Indian Union. Thus it lost all vestige of international personality and became a constituent unit and a part and parcel of India.

Starke has rightly pointed out, "Protectorates in the strict sense, have for all practical purposes now disappeared from the international scene.

(6) Holy See or Vatican City:

Holy See or Vatican City is a place where the religious head of Catholic Christians (Pope) resides. Holy See is smallest sovereign State. In the middle of 19th century, the

rulers of Italy seized the territory of Pope and occupied his capital, Rome. Consequently Pope went away and settled in his residential place called Vatican City. Since Pope was religious head, the Government of Italy passed a law in 1871 whereby some guarantee was given to Pope. The said Act conferred some privileges and immunities upon Pope more or less equal to those privileges and immunities which are enjoyed by head of the States. Next important change took place in 1929 when a treaty was concluded between Pope and the Government of Italy whereby Vatican City comprising of 100 acres of land was accepted as a State and Pope was conferred upon the rights to enter into diplomatic relations with other States. Thus by the treaty of 1929, Vatican State assumed the status of an international person under the international law. The present position of Vatican City is that it is an international person and possesses all the rights and duties of a sovereign State. It is a natural State. It is not a member of the United Nations. In short, Vatican Cityis an international person and is fully independent and sovereign State under International Law.

(7) Neutral State:

According to Grotius, "It is the duty of those who keep out of war to do nothing whereby he who supports a wicked cause may be rendered more powerful, or where by the movements of him who wages an unjust war may be hampered." These duties, however, did not include the positive obligation to assist actively the state fighting a just war. Neutral state do not support either party during war. it is generally deemed a temporary statue and can be terminated by joining either of part at war. Neutralised state is such state whose independence collectively accepted by big powers thought some agreement.

(8) Trust State:

The State, which is given a mandate or a trust territory, exercises sovereignty over it although the territory is not its own.

In the present time, States have accepted many restrictions under international - treaties and in international institution whereby they have impliedly surrendered a part of their sovereignty. For example, the members of the United Nations and International Labour Organization, have accepted many obligations because of which their sovereignty has ceased to be illimitable and indivisible. Thus, "Sovereignty" has a much restricted

meaning today than in eighteenth and nineteenth centuries, when, with the emergence of powerful highly nationalised States, few limits on States autonomy were acknowledged. At the present time there is hardly a State which in the interests of the International community, has not accepted restrictions on its liberty of action.

Individuals as subject of International Law:

There are certain jurists who have expressed the view that in the ultimate analysis of international law it will be evident that only individuals are the subjects of international law.

The chief exponent of this theory is Prof. Kelsen. Even before Kelsen, Westlake had remarked, "The duties and rights of the States are only the duties and rights of men who compose them." 9 Kelsen has analysed the concept of State and expressed the view that it is a technical legal concept and includes the rules of law applicable on the persons living in a definite territory. Hence, under international law the duties of the States are ultimately the duties of the individuals. Truly speaking there is no difference between international law and State law. In his view, both laws apply on the individuals and they are for the individuals. He, however, admits that the difference is only this that the State law applies on individuals 'intermediately' whereas international law applies upon the individuals 'mediately'.

Criticism.—I's views appear to be logically sound. But so far as the practice of the States is concerned it is seen that the primary concern of the international law is with the rights and duties of the States. From time to time certain treaties have been entered into which have conferred certain rights upon individuals. Although the statute of the International Court of Justice adheres to the traditional view that only States can be parties to international proceedings, a number of other international instruments have recognised the procedural capacity of the individuals. Although, individual possesses a number of rights under international jaw, his procedural capacity to enforce the observance of these rights is grossly deficient. In most of the cases claim on his behalf can be brought only by the State whose national he is and as pointed out by the Permanent Court of International Justice. "It is an elementary principle of international law that a State is entitled to protect its subjects when injured by acts contrary to

international law committed by another State,from whom they have been unable to obtain satisfaction through the ordinary channels.

By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights—its right to ensure, in the person of its subjects respect for the rules of international law" one may, however, still argue that the substantive right belongs to the individual because the amount of the claim is based on the injury suffered by the individual and normally the award is given to him. It may, therefore, be concluded that the extreme view that the individuals alone are the subjects of international law cannot be accepted.

Individuals are now recognized as subject of international law and they can now (although in a very few rather negligible cases) even claim rights against States (including his own) ' but their procedural capacity to enforce their rights is grossly deficient. In practice, International law for its major part still deals with the rights and duties of States.

Therefore, it would be absurd to contend that States are not the subjects of international law. The correct position therefore is that besides States, individuals, public international organisations and some non-State entities are also the subjects of International law.

Module 5: Recognition of States

1. Meaning and significance of Recognition

2. ***Theories of Recognition- Constitutive Theory, Declaratory Theory, Stimson Doctrine and Estrada Doctrine***
3. ***Types of Recognition-De-facto and De- Jure***
4. ***Recognition of Insurgency and Belligerency***

1. **Meaning and significance of Recognition**:

   Professor G. Schwarzenberger : As aptly remarked by Professor G. Schwarzenberger, "The growth of international law is best understood as an expanding process from a nucleus of entities which have accepted each others negative sovereignty and on the basis of consent, are prepared to maintain and possibly expand the scope of their legal relations. Like most clubs, the society of sovereign states is based on the principle of co-option. In exercising this prerogative the existing subjects of international law employ the device of recognition.

2. **Prof. L. Oppenheim :** According to Prof. L. Oppenheim, "In recognising a State as member of international community, the existing States declare that in their opinion the new State fulfils the conditions of statehood as required by International law."
3. **Fenwick :** Fenwick also subscribes to theview that through recognition the members of the international community formally acknowledge that the new State has acquired international personality.
4. **The Institute of International Law** has defined the term recognition in the following words it is " the free act by which one or more States acknowledge the existence of a definite territory of a human society politically organized independent of any other existing States and capable of observing obligations of international law by which they manifest through their intention to consider it a member of international community.
5. **According to Kelsen,** a community to be recognised as an international person must fulfill the following conditions:

   (1) The community must be politically organised

   (2) It should have control over a definite territory ;

   (3) This definite control should tend towards permanence ; and

(4) The community thus constituted must be independent.

In short, we may say that through recognition, the recognising State acknowledges that the recognised State possesses the essential conditions of statehood. However, international law does not provide as to how these essential conditions are to be determined. In fact, international law leaves members of international community free to determine by themselves whether the recognised States contain the essential conditions of statehood. It is because of this reason that very often recognition is said to be a political diplomatic function .

Essentials: – The main essentials of recognition may be given as under:

1. That the community (of new state) must be politically organized,
2. That it should have control over a definite territory,
3. That the control should tend towards permanency,

That such community must be independent. In other words, the attributes of statehood are people, territory, Government, and sovereign

Theories of Recognition:

There are two main theories of recognition

(1) Constitutive theory ; and

(2)Declaratory or Evidentiary theory.

(1) Constitutive theory:

According to this theory, recognition clothes the recognized State with rights and duties under International law. Recognition is a process through which a political community acquires international personality by becoming a member of family of nations. Hegel, Anzilloti, Oppenheim, etc are the chief exponents of constitutive theory. In the words of Professor Opperiheim, "A State is, and becomes, an international person, through, recognition only and exclusively."

"According to the Constitutive theory, statehood and participation in the international legal order are attained by political group only in so far as they are recognised by established State."

Holland also supports the Constitutive theory. In his view, recognition, confers maturity upon State and until and unless a State is recognised, it cannot acquire rights under international law.

In the view of Judge Lauterpacht, Constitutive theory is in accordance with the practices of the State and is based on sound legal principles. The practice of States, however, indicates the contrary. In practice most of the States accept the Declaratory theory. In this connection, Judge Lauterpacht has remarked that the wide acceptance of Declaratory theory is due to the reaction against the traditional conception of recognition as a political act purely and simply. In his view, there is a legal duty on the part of the State to recognize any community that has in fact acquired the characteristics.

of statehood. the Constitutive theory. The view of Judge

Criticism. —jurists have criticized Lauterpacht that there is legal duty on the part of the existing States to recognize any community that has in fact acquired the characteristics of statehood, does not seem to be correct. In practice. State do not accept any such obligation. "The practice indicates, however, that although established States normally recognize new States and new governments that in fact exist, they have not consented to law norms that obligate them to do so." Besides this, the Constitutive theory presents several other serious difficulties. According to this theory, if a State is not recognized it can have neither duty nor rights under international law. This is a very absurd suggestion. If we accept this preposition, it will create difficulties in the case of new State which is recognized by some States but not recognized by others. The examples of China and Bangladesh can be cited in this connection. China was not recognized by America and other Western countries for a number of years although China possessed all the essential attributes of State. But to assert that China, therefore, did not have rights and duties under international law would be an absurd proposition. Similarly, Bangladesh was not recognised for sometime by China, Pakistan, Albania, etc.

However, in support of the Constitutive theory, it must be admitted that once a state cognized as such by the municipal courts of the is recognized it acquires status and is re

recognising state.

2) Declaratory Theory:

According to this theory, statehood or the authority of the new government exists as such prior to and independently of recognition. Recognition is merely a formal acknowledgment through which established facts are accepted.

The act of recognition is merely declaratory of an existing fact that a particular State or government possesses the essential attributes as required under international law. The chief exponents of this theory are Hall,Wagner, Brierty, Pitt Cobbet and Fisher.

According to Prof. Hall, a State enters into the family of nations as of right when it has acquired the essential attributes of statehood. Pitt Cobbet has expressed the view that existence of a State is a matter of fact. In his words, "So long as a political community possesses in fact the requisites of a statehood, formal recognition would not appear to be a condition precedent to acquisition of the ordinary rights and obligaitons incident thereto."

Brierly has also remarked, "the granting of recognition to a new State is not a 'Constitutive' but a 'Declaratory' act. A State may exist without being recognized and if it exists in fact, then whether or not, it has been formally recognized by other States it has a right to be treated by them as a State."

Soviet view and practice are also in favour of the declaratory theory of recognition. According to the Soviet view, birth of a State is the act of internal law rather than that of International law.

Criticism—This theory has also been subject to criticism. The view that recoginition is only a declaratory of an existing fact is not completely correct. In fact when a State is recognized, it is a declaratory act. But the moment it is recognized, there ensue some legal effects of recognition which may be said to be of constitutive nature.

Conclusion.—On the basis of the above discussion, it may be concluded that recognition is declaratory as well as constitutive act. "Probably the truth lies somewhere between these two theories The one or the other theory may be applicable to different sets of facts. Judge Lauterpatcht has also expressed the view that it is declaratory of a simple fact of existence of political community after ascertaining facts of statehood in

the functional way.

On such declaration of statements, recognitionis constitutive of certain legal consequences. Svarlien has also subscribed to this view. Prof. Oppenheim who has been classed among the exponents of constitutive theory, has admitted that "Recognition is declaratory of an existing fact but constitutive in nature."

In the Ninth Edition of Oppenheim's International Law it has been pointed out that there is "no settled view whether recognition is the only means through which a new State becomes part of the international community". On the one hand there is the view that a new State comes into existence as a matter of fact and becomes a member of international community irrespective of the fact whether it has been recognised or not. On the other hand the view is that recognition constitutes the new State as a member of the international community no State has a duty to recognise a new State and that no new State has a right to be recognised by other State.

Indeed, "The problem is largely theoretical because state practice is inconclusive and may be reationalised either way.' Prof. Briggs has rightly remarked, "Juridical theories of recognition deduced from jurisprudential concepts fail to explain the facts of State conduct, and inductions from State conduct have failed to provide a juridical unambiguous theory of recognition."

The exponents of constitutive theory want the institution of recognition to be under a system of law and that is why, Lauterpacht the chief exponent of constitutive theory, posits a legal duty on the part of existing States to recognize any community that has in fact acquired the characteristics of statehood. The act of recognition is thereby defined as a clearly legal act, with new States having the legal right to be recognised and established States having the legal duty to recognize them. Similar reasoning is used to posit a legal duty to recognize new governments that in fact come to power in existing States."

On the other hand, exponents of declaratory theory contend that international personality does not depend upon recognition. They regard the State as the ultimate source of international rights and on the other hand, exponents of declaratory theory contend that international personality does not depend upon recognition.

They regard the State as the ultimate source of international rights and duties. According to them, there is no legal duty to recognise State even after it has attained Statehood.

Thus, according to the declaratory theory, recognition depends upon the discretion or sweet will of the recognising States. States are, in practice, not prepared to be bound by any norms in this connection. However as was aptly remarked by an eminent writer Non-recognition based n political considerations has lost most of its meaning.

It no longer produces all the effects it was meant to in the past .....Since institutions of international law are but reflex of history, they are produced by it and in turn influence its further course. That is why in the long turn the institution of recognition will surely be more and more affected by inevitable trend towards greater mutual understanding and towards the adoption of principles and criteria reflecting the growing co-operation of States of different political and economic structure."

3. Estrada Doctrine

This doctrine was propounded by Mr. Estrada, the Foreign Minister of Mexico. In this doctrine he declared that regarding the establishment of diplomatic relations with other States, Mexico Government considers itself free to determine it in accordance with the facts and circumstances of each case. In other words if the Mexico Government considers that after the change of government in any State through revolution, a revolutionary government commands the support of the people, it may establish diplomatic relations with A. This doctrine has been subject to servere criticism because it disregards the rules of International Law. It encourages the individual appraisal in this field. However in practice it takes a new way so far as the recognition of new States are concerned. As pointed out by Philip C. Jessup.....the Estrada doctrine properly assumes that diplomatic representatives should be considered as accredited to the State and not to the governmenthis doctrine, therefore, does not seem to be correct aid needs to be discouraged.

5. Stimson Doctrine

This doctrine was propounded by Mr. Stimson, Secretary of State of the United States of America. This doctrine is also often called the doctrine of non-recognition. According to this doctrine if a State grants recognition to another State in violation of international treaty, such a recognition would not be valid. By international treaty, the Stimson doctrine mainly meant the Pact of Paris, 1928, or Kellog Briand Pact, through which the State parties renounced war as an instrument of their national policy. The

League Assembly also passed a resolution that any State who violated the Pact of Paris. 1928, would not be granted recognition. The Secretary of the State of the United States of America prpounded this doctrine,after Japan attacked Manchuria in 1931. In this doctrine the American Secretary of States declared that any contract or treaty which was contrary to the Paris Pact of 1928 would not be acceptable. it may be noted here that China, Japan and America were all parties to the Pans Pact, 1928. Although this doctrine has much to recommend itself, it is not always followed by the States so far as the grant of recognition to new State is concerned. States refuse to accept any such obligation and treat recognition as a political diplomatic function.

Modes of Recognition

Recognition may be of two kinds—De facto and do jure recognition. The practice of States shows that in first stage the State generally give do facto recognition. Later on, when they are satisfied that the recognized State is capable of fulfilling international obligations, they confer do jure recognition on it. That is why, it is sometimes said, do facto recognition of State is a step towards do jure recognition

De facto Recognition

According to Prof. G. Schwarzenberger, "When a State wants to delay the de jure recognition of any State, it may, in the first stage grant de facto recognition." The reason for granting do facto recognition is that it is doubted that the State recognized may be stable or it may be able and willing to fulfil its obligations under international law. Besides this, it is also possible that the State recognized may refuse to solve its main problems.

De facto recognition means that the State recognized possesses the essential elements of statehood and is fit to be a subject of international law. However, the effects of do jure recognition are more far-reaching. In the words of Oppenheim, "The de facto recognition of a State or government takes place when, in the view of the recognising State the new authority although actually independent and wielding effective power in the territory under its control, has not acquired sufficient stability or does not yet offer prospects of complying other requirements of recognition such as, willingness or ability to fulfil International obligations." In the view of Judg; Lauterpacht, do facto recognition shows

that the recognizing State wants to establish its relations with the recognised State without establishing diplomatic relations. As remarked by Prof. Oppenheim, “De facto recognition is, in a sense, provisional and liable to be withdrawn if the absent requirement of recognition fails to materialize”.

In the view of Judge Philip C. Jessup, "Do facto recognition is a term which has been used without precision when properly used to mean the recognition of the do facto character of a government, it is objectionable and indeed could be identical with the practice suggested of extended recognition without resuming diplomatic relations."

2. De jure Recognition

De jure recognition is granted when in the opinion of recognizing State, the recognized State or its Government possesses all the essential requirements of statehood, and it is capable of being a member of the international community. As pointed out by Prof. H.A. Smith, the British practice shows that three conditions precedent are required for the grant of de lure recognition of a new State or a new Government. The three conditions are as

(i) A reasonable assurance of stability and permanence

(ii) statehood

As observed by Prof. G. Schwarzenberg, "De juro recognition is by nature provisional and may be made dependent on conditions with which the new entity has to comply. It differs from De jure recognition in that there is not yet formal exchange of diplomatic representatives De jure recognition .....is complete implying full and normal diplomatic relation." In the words of Kelsen ;" .....de jure recognition is final, whereas de facto recognition is only provisional arid thus may be withdrawn."

According to Prof. Oppenheim,so far as the legislative and other internal acts of the State recognized are concerned, there is hardly any difference between de facto and do jure recognition . Thus we see that from the point of legal effect, there is hardly any difference between De jure and do facto recognition of a State. As a matter of fact, De facto Government enjoys same immunities from suits as De jure Government. However, diplomatic courtesies and representations are usually not accorded to de facto government except in

extraordinary circumstances occurring in limes of war. Thus, "The distinction between De jure and De facto recognition is in essence that the former is the fullest kind of recognition while the latter is a lesser degree of recognition, taking account on a provisional basis of present realities."

Recognition of Insurgency:

Insurgency denotes the state of political revolt in a State. Insurgency, presupposes a civil war .

"Insurgency is used to denote the condition of political revolt in a country where the rebels have not attained the character of belligerents. Thus insurrection is a war of citizens against the State for the purposes of obtaining power in the whole or part It always implies a sustained armed struggle by a group of citizenry against an established order in fact, insurgency is an intermediate stage between tranquility and belligerency In the view of Judge Lauterpacht if the State recognizes the insurgents of another State, it would imply that it would not treat such insurgents as violators of law. It also implies that such a State wishes to establish relations with such insurgents on a temporary basis The ettect of insurgency is that it partially internationalises the conflict In the view of Judge LauterPacth. it is not against international law to recognize insurgent as a de facto government over the territory under their control. It is merely an acknowledgment of tact situation for practical purposes.

Essential Conditions:

(1) Control over a considerable part of the territory

(2)Considerable support to the insurgents from the majority of the people living in the territory and

(3)insurgents should have the capacity and will to carry out the international obligations.

Effects of recognition of insurgency—The recognition of insurgency is less important than the recognition of belligerents. The following effects ensue from the recognition of insurgency

(1) They (i.e. insurgents) are not treated as pirates

(2) The rebels of civil strife are treated as hostes generis humani (the public enemy)until they are recognized as insurgents

(3) The international rules of war become applicable to them.

Recognition of belligerency:

When the insurgents are well organized, conduct hostilities according to laws of war and have a determinate territory under their control they may be recognized as belligerents whether or not the parent State has already recognized that status." As in the case of a recognition of a State recognition of belligerency is the question of policy and not of law. Consequently some States find It convenient to recognise belligerency and some do not. The policy of State in this regard hinges upon national interest of recognizing State. The belligerency is in fact the final status of three stages of the ascending Intents of the conflict which presents a 'violent challenge to the sovereign authority within a State'. "Recogniton of belligerency is the acknowledgment of a juridical fact that there exists a state of hostilities between two factions contending for power or authority.

Essential conditions for the recognition of belligerents

Recognition of belligerency is treated to be an unfriendly act until the following conditions are present:

(1) The armed conflict is to be of general character;

(2) The insurgents occupy and administer a considerable portion of the national territory.

(3) They conduct hostilities through armed forces under a responsible authority. Moreover, they conduct hostilities in accordance with the rules of war; and

(4) The hostilities are to be of such magnitude that the foreign States may find it necessary to define their attitude towards the belligerents and the established government.

Effects of recognition of belligerents.— Following are the effects or consequences of the recognition of belligerency:

(1) From the date on which the recognition of belligerency is accorded international law rules governing the conduct of hostilities apply.

(2) The conflict is internationalised and the belligerents get some rights under International Law.

(3) The relations between the recognized belligerent authorities established government and the recognising States are governed by International Law rather than Municipal law.

MODULE 06 STATE TERRITORY AND STATE SUCCESSION

1. MEANING AND DEFINITION OF STATE TERRITORY

State territory has been defined as portion of globe which is subjected to the sovereignty of a state. A state without a territory is not possible, although the necessary territory may be very small, as with Vatican City A wandering tribe, although it has a government and is otherwise organized, is not a state until it has settled down in a territory of its own.[5] The importance of state territory is that it is the space with in which the state exercises its supreme and normally exclusive authority. The exclusive domain of a state with in its territory is basic to the international system

The words "territorial sovereignty" implies the authority and control exercised by a State within its boundaries over individuals and property to the exclusion of other States. In the case of **Island of Palmas Arbitration**[6]Max Huber, the Arbitrator described territorial sovereignty in the following words. "Sovereignty in the relation between States signifies independence. Independence in regard to a portion of the
globe is the right to exercise therein, to the exclusion of any other State."

In **Western Sahara Case,**[7]the International Court of Justice gave a landmark opinion where it pointed out that one of the characteristics of the existence of territorial sovereignty is State activity on an adequate scale showing conclusively the exercise of authority.

Article 2(4) of the UN Charter requires all members to restrain in their international relations from the threat or use of force against the territorial independence of any state.It comprises land territory, territorial waters, national waters and air-space over the territory and also the subsoil.

According to kelson: "the territory of the state is a space with in which the acts of the state, and especially its coercive acts are allowed by general international law to be carried out, a space with in which the acts of a state may legally be performed.[8]

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[5]Oppenheim's International Law (eds. R. Y. Jennings and A. D. Watts), 9th edn, London, 1992, chapter 5

[6](1928) 22 Am J Int'l L. 875,

[7] Advisory Opinion, ICJ Rep 1975, 12.

[8]S. P. Sharma, Territorial Acquisition, Disputes and International Law, The Hague, 1997

According to Savarlien: “the territory of a state composed of all the land and water surface within its boundaries and jurisdiction, all the earth and water below this surface, and all the air above it.[9]

Oppenheim has defined the word“State Territory” as “a portion of globe which is subjected to the sovereignty of a State. AState without territory is not possible, although the necessary territory may be very smallas with Vatican City. A wandering tribe, although it has a government and is otherwiseorganized is not a State until it has settled down in a territory of its own”.[10] The importanceof State territory is that it is the space within which the State exercises its supreme andnormally exclusive authority

2. TYPES OF ACQUIRING AND LOSING STATE TERRITORY

The five common modes of acquiring territory are occupation, prescription, accretion, cession and conquest.

2.1. OCCUPATION

Oppenheim has defined the term “occupation” as the act of appropriation by a State by which it intentionally acquires sovereignty over such territory as it is at the time not under the sovereignty of any other State. It should be kept in mind that the subject matter of occupation is terra nullius. Hence the territory which is a subject matter of occupation should not belong to any State. Thus occupation consists in establishing sovereignty over a territory not under the authority of any

other State whether newly discovered or an unlikely case abandoned by the State formerly in control.[11] Merely occupying territory does not amount to occupation because there should be effective occupation.

To determine whether there is effective occupation of a territory by a State it is necessary that two essential conditions must be fulfilled. *Firstly*, possession and *secondly*, administration. Once possession is established over a territory, the State possessing the territory must establish some kind of administration over the said territory.

[9] Ibid p. 231

[10] Supra Note 1, p. 236

[11]N. Hill, Claims to Territory in International Law and Relations, London, 1945

In **Eastern Greenland case (Denmark Vs Norway),**[12]It was in clear cut terms held by the Permanent Court of International Justice that foroccupation of a territory, the occupying State must fulfill two conditions:

1. An intention or will to act as sovereign
2. Adequate exercise of display of sovereignty

The intention of the State occupying the territory to act as sovereign is ascertained from the underlying circumstances. The intention must be to assume permanent control of the occupied territory. To make the occupation look real and as a consequence to transform the inchoate title of the occupying State into a perfect title it is important that the second condition also be fulfilled by the occupying State's legislative or executive measures affecting the occupied territory i.e. signing treaties with other States concerning sovereignty of the said territory and the fixing of the boundaries in respect of that territory.

In another case i.e. the **Island of Palmas (United States Vs Netherlands),**[13]The dispute wasbetween United States and the Netherlands wherein the United States claimedsovereignty over the island on the basis of a treaty which it signed with Spain in theyear 1898. Netherlands contented that it was in possession of the island over a longperiod and also established sovereignty over the island. Spain at no point of time hadoccupied the island although it had discovered the island and since its title wasdefective, it had no right to transfer the island to the United States.

However, both theStates decided to refer the matter to arbitration. Arbitrator Huber ruled that a mere actof discovery by one State is not sufficient to confer a title by occupation and gave thedecision in favour of Netherlands on the ground that Netherlands not only exercised a long, continuous and effective authority over the island but also established contacts with the inhabitants of the island.

2.2. PRESCRIPTION

Another method of acquiring territory is prescription. Where a State establishes occupation and exercise control over a certain territory for a long duration of time, it is deemed

[12]1933 PCIJ [(Ser. A/B) No. 53].

[13]2 UN Rep Int'l Arb Awards 829 (1928): (1928) 22 Am J Int'l L 875.

that the State exercises de-facto sovereignty over the territory then as a consequence the said territory becomes a part of the territory of that State.[14]

In the words of **J.G. Starke** "Title by prescription i.e. acquisitive prescription is the result of the peaceable exercise of de-facto sovereignty for a long period over a territory subject to thesovereignty of another and this may be as the consequence of immemorial exercise of suchsovereignty (i.e., for such period of time as in effect to extinguish memories of the exerciseof sovereignty by a predecessor) or as the result of lengthy adverse possession only".[15] A State may acquire territory by prescription only when some conditions are satisfied such as:

1. A State may acquire some territory by prescription only when it has not accepted the sovereignty of any other State over the said territory.
2. Possession must be peaceful and uninterrupted.
3. Possession should be in public.
4. Possession should be for a definite period of time.

Some jurists are of the opinion that international law does not recognize the acquisition of territory through prescription but, another section of jurists are of the opinion that some precedents exist in international law, precedents such as the case of Island of Palmas Arbitration.

2.3. ACCRETION

Accretion is the name given for the increase or decrease of land through new formations. Title by accretion occurs when new territory is added mainly through natural causes or calamities (such as earthquakes, volcanic eruptions, tsunami or even flash floods in international rivers), to territory already under the sovereignty of the acquiring State. In all such cases there is no need for any formal act or assertion of title. For instance, an island may rise within the territorial waters of a State then the State ipso facto acquires sovereignty over the new formation.[16]

It is a customary rule of international law that any enlargement or expansion of territory of a State as a result of new formations, the State takes it ipso facto through accretion without the State concerned taking any special step for the purpose of extending its sovereignty.

[14] Supra Note 7, p. 136

[15] J.G. Strake, Introduction to International Law, (10th Ed. 1994), p. 232

[16] Ibid p. 244

2.4. CESSION

Through cession also territory may be acquired. Cession of State territory is the transfer of sovereignty over State territory by the State which owns the territory to another State. The cession of a territory may be voluntary it may be made under compulsion as a result of war fought successfully by the State to which the territory is to be ceded. Cession is affected through a treaty or agreement between the ceding State and the acquiring State. However, such treaties or agreements could be a result of peaceful negotiations or war. Cession is considered valid only when sovereignty of a territory is transferred to another State.

In the case of **In re Berubari Union and Exchange of Enclaves**[17]The Supreme Court of India observed: *"*…it is an essential attribute of sovereigntythat a sovereign State can acquire foreign territory and can, in case of necessity, cede apart of its territory in favour of a sovereign State and this can be done in exercise of itstreaty making power. Cession of national territory in law amounts to transfer ofsovereignty over the said territory by the owner State in favour of another State…. Thispower, it may be added, is of course subject to the limitations which the constitution of theState may either expressly or by implication impose in that behalf."

A similar view was taken by the Supreme Court of India i.e. cession indisputably involves transfer of sovereignty from one sovereign State to another, in the case of ***Union of India*** **v.*Sudhansu Mozumdar,***[18]

In another case i.e. ***Sugandha Roy*** **v.** ***Union of India,***[19]the Calcutta High Court had to determine the question whether giving of Teen Bigha (Zameen) to Bangladesh on lease in perpetuity under agreements between India and Bangladesh of 1974 and 1982 amounted to cession of territory. The Calcutta High Court held: "the implementation of these two agreements would not involve cession of anyterritory to Bangladesh in respect of Teen Bigha. There is no question of transfer ofsovereignty, wholly or partially, in respect of the said area. What has merely been done isto enable the Government of Bangladesh and its nationals to exercise certain rights inrespect of the said area which otherwise they would not have been able to enjoy"

[17]AIR 1960 SC845

[18](1971) 3 SCC 265: AIR 1971 SC 1594.

[19](AIR 1983 Cal 468)

2.5. DISMEMBERMENT

The dismemberment of a state takes place when its territory becomes the territory of two or more new states. Consequently, the predecessor state ceases to exist and the newly formed States are regarded as its successors (Art.18 of Vienna Convention)

2.6. RETROCESSION

It is a process through which certain territories are returned peacefully to its original State by executing special agreement. The People's Republic of China and Great Britain have set a precedent in negotiating the peaceful return of Hong Kong's sovereignty and administration to China.[20] The Joint Declaration on Hong Kong establishes the legal framework for continued prosperity and stability in Hong Kong to the year 2047 under Chinese leadership.

The Joint Declaration states:

The Hong Kong Special Administrative Region Government shall maintain the rights and freedoms as provided for by the laws previously in force in Hong Kong, including freedom of speech, of the press, of correspondence, of travel, of movement, of strike, of demonstration, of choice of occupation, of academic research, of belief, inviolability of the home, the freedom to marry and the right to raise a family freely.[21]

3. MEANING AND CONCEPT OF STATE SUCCESSION

The concept of State succession has its origin in the Roman legal system and was made a part of international law by Hugo Grotius. Under the Roman legal system when an individual dies his rights and duties are succeeded to by his successors or legal heirs. This principle was applied by Grotius in International Law as well.[22]

Succession of states means the replacement of one state by another in the responsibility for the international relations of territory. There is a succession of states where the territory of one state passes from its supremacy to that of another. The state the territory of which passes to another state, or the sate which has been replaced by another state on the occurrence of a

[20]R. Y. Jennings, The Acquisition of Territory in International Law, Manchester, 1963

[21]D. P. O'Connell, State Succession in Municipal Law and International Law, Cambridge, 2 vols., 1967

[22]K. Zemanek, 'State Succession after Decolonisation', 116 HR, 1965, p. 180

succession of states, is termed as the predecessor state.[23]While the succeeding state, or the state which has replaced another state on the occurrence of a succession of states, is called the successor state.

OPPENHEIM: A succession of International person occurs when one or more international person take the place of another international person, in consequences of certain changes in the latter's condition.[24]

STARKE: transmission of rights and obligations from States which have altered or lost their identity to other state or entities, such alteration or loss of identity occurring Primarily when complete or partial changes of sovereignty take place over portions of territory.[25]

VIENNA CONVENTION ON SUCCESSION OF STATES, 1983 (ART. 2): The replacement of one state by another in the responsibility for the international relations of territory.State Succession occurs through Universal Succession and Partial Succession.

According to O'Connell, "If the legal identity of a community is completely destroyed there issaid to be a 'total succession' of States. If the territory is lost while personality and legalresponsibility remain untouched, the process is described as 'partial succession'. This does notimply a total or partial succession respectively to the legal relation of the previous sovereign,but is merely an abbreviated way of defining the extent of the change. *"*[26]

3.1. DIFFERENCE BETWEEN STATE SUCCESSION AND SUCCESSION TO GIVERNMENTS

A succession of government occurs, when the government of a state is replaced with a new one. State succession occurs when sate ceases to exist or a new state is formed within the territory of an existing State or a territory is transferred from one state to another state.

[23]Oppenheim's International Law (eds. R. Y. Jennings and A. D. Watts), 9th edn, London, 1992, p. 208

[24] Ibid p. 218

[25] Ibid p. 228

[26] Supra Note 17, p. 116

According to Edward Collins “A succession of government occurs when the government of a State is replaced with a new one. State succession occurs when a State ceases to exist or a new State is formed within the territory of an existing State or territory is transferred from one State to another State. When a succession situation arises, the point of chief legal interest is the effect, if any, on the rights and obligations of the State or States concerned.”[27]

4. CONSEQUENCES OF STATE SUCCESSION

4.1. TREATIES

Vienna Convention on Succession of States in Respect of Treaties was adopted on 23rd August 1978 it came into force on Nov.6 1996. As per this convention clean state rule has been followed and due recognition has been given to the consent of states.According to clean state rule, a newly independent state is unencumbered by the obligations and commitments of the predecessor state.It has full freedom to continue or discontinue the treaties.[28]

The traditional doctrine of state succession in respect of treaties has been rejected bythe large number of newly independent states. These newly independent states haverelied upon the rules of *"moving treaty frontiers"* and *"clean slate"*. These rules are notsimply reactions against the inheritance treaties and devolution agreements but werenecessitated by the changing times and circumstances.[29]*Clean Slate* rule lays down thatwhen a State succeeds over the territory of another state, it wipes of all the obligationsof the earlier state arising from the treaties signed by the extinct State and start afresh.

The rule of moving treaty frontiers lays down that when a State succeeds over theterritory of another state, it claims membership to multilateral treaties which have beensigned by the extinct state on the basis of prior nexus of the extinct state with suchtreaties.

[27] Ibid p. 144

[28]International Law Association, The Effect of Independence on Treaties, London, 1965

[29]O. Udokang, Succession of New States to International Treaties, New York, 1972

4.2. MEMBERSHIP OF INT. ORGANIZATION

It is settled that membership of International Organizations and the obligations incidental thereto do not pass to a successor State.India continued to be a member of the United nations, and Pakistan was subsequently admitted to membership as a new State on September 30, 1947.[30]The question of succession regarding membership of the United Nations came up after the partition of India and Pakistan. India was originally a member of the United Nations. After partition, Pakistan claimed that since it was part of India, it should get themembership of the United Nations in succession automatically.

The General Assembly ofthe United Nations rejected this claim of Pakistan and stated that it can become themember of the United Nations only after it is admitted in accordance with the provisions ofthe Charter by applying for the membership. A State is admitted as a member of UnitedNations by the decisions of the General Assembly by two third majority of the memberspresent and voting on the recommendation of the Security Council.[31] Thus, the principle ofsuccession does not apply in case of membership to the United Nations.

4.3. PUBIC PROPERTY

The Vienna Convention of 7th April, 1983, on State Succession in respect of State Property, Achieves and Debts enumerates provisions as to the passing of State property to the successor state. The successor state takes all the public and proprietary rights of the predecessor state. Such as, State Property, State railways and fiscal funds. It also takes all the assets of predecessor state, including such assets as state funds, funds invested abroad, movable and immovable property. It also acquires the right to collect taxes due to the predecessor state. It also acquires the right to collect taxes due to the predecessor state. The successor state in general, takes over the predecessor's State property without compensation When part of the territory of a state is transferred to another state, in the absence of any agreement, immovable property situate in the territory taken over by the successor State is to pass to it.

[30] Gurdip Singh, International Law (2nd ed., 2011)

[31]UN, Materials on Succession of States in Matters Other than Treaties, New York, 1978

4.4. PUBIC DEBT

There is a controversy in regard to the succession of public debts. Jurists are of the view that it depends upon the discretion of the succeeding state whether to pay the public debts of the predecessor state. The succeeding states in such cases gives due regard to the purpose of the debt i.e. whether they are taken for the financing of wars or other hostile undertaking against the successor state. Part IV of the Vienna Convention on State Property, Archive and Debts, 1983 deals with state debts[32]

Art. 36 –Succession does not affect the rights and obligations of creditors. When the successor state is newly independent state, no state debt shall pass to the new state, unless an agreement between the two states provides otherwise.

Art. 40- in case of separation of part of the territory of state debt of predecessor state should pass to the successor state in an equitable proportion.

4.5. CONTRACTS

A Majority of the jurists are of the view that the succeeding state shall be bound by the contracts entered into by the extinct state. But, in the **West Rand Central Gold MiningCo Ltd v. King,[33]** the King's Bench of England ruled just the reverse. In this case, the court ruled that the succeeding state is entitled to decide whether it would accept the financial obligations of the former state. In the instant case, West Rand Central Gold Mining Co. Ltd., was registered in England.

It was engaged in digging gold mines in Transvaal, South Africa. In 1899, two parcels containing, gold was seized by the officers of the South African state and according to the law prevailing at the time, it was the responsibility of the South African State to return the parcels of gold or equivalent money in place of the parcels. Subsequently war broke out between Britain and the state of South Africa and the latter was annexed by Britain in October 1899.[34]

West Rand Central Gold mining Co Ltd, filed a petition to claim the parcels of gold on the ground that after conquering the South African State, the obligations of the State of South

[32] Ibid p. 311

[33](1905) 2 KB 391

[34] Supra Note 28, p. 335

Africa automatically became the obligations of Britain. It was, therefore, argued that the British government was liable to return either the parcels of gold or pay its value in money.

The court rejected the Private contractual obligations of the conquered state. International law does not impose any obligations upon the conquering state to fulfil the obligations of the conquered state. The court further observed that 'Acts of State' are beyond the jurisdiction of municipal Courts. Conquest of the state of South Africa being an 'act of State' the appellant company will not have any relief in a municipal court.

4.6. TORTS

The succeeding states are under no liability for the torts of the predecessor state This was held in **Robert E. Brown's claim (1923)**[35] Robert E Brown was an American Citizen, in 1894 he went to south Africa and started the work of digging gold mines. After some time the head of the state of South Africa declared that in the eastern part of that area, State would undertake the work. Robert Brown submitted an application of Licence for carrying on digging of goldmines but it was rejected. Later on the Government withdrew its earliaer order for carrying on digging of goldmines. Robert brown filed suit in 1895 for recovery of compesnation.

But the case could no proceed because in the men time Great Britain conquered South Africa and incorporated it in its Empire. The Government of America contended that her citizen Mr, Brown had been authorized to carry on digging of goldmines but this right subsequently snatched from him before South Africa was annexed by Britain. It was agreed to refer this dispute arbitrators. The arbitrators had to decide mainly two questions.

1. whether South Africa refused to do justice to Robert E. Brown? And
2. if justice was denied to him, whether the succeeding state of South Africa would be responsible for the loss and damages.

In other words, whether Britain was liable to pay compensation?

[35] Supra Note 29, p. 211

In reply to the first question, the arbitrators held that justice was denied to Robert E. Brown because if the case had, proceeded, South Africa would have been liable to pay damages.

In reply to the second question refereed to them, the arbitrators decided that the peace agreement under which South Africa surrendered Great Britain, Britain did not undertake the liability for tortscommitted by South Africa, hence Britain was not liable. But if the former state had accepted or had decided to pay the compensation, then the succeeding State should pay the damages for torts

4.7. ARCHIVES

Art. 25 of Vienna Convention on State Property, Archive and Debts, 1983 lays special emphasis on preserving the integral character of grounds of State Archives of the predecessor State. It provides that the passing of or appropriate reproduction of State archives of the predecessor state to a newly independent successor state should be determined in such a way that, Each of those states can benefit as widely and equitably as possible from those achieves. Bilateral agreements between the two states should not infringe the right of the peoples of those states to development, to information about their history, and to their cultural heritage,

5. THEORIES OF STATE SUCCESSION

5.1. NEGATIVE SUCCESSION

Since the universal succession theory did not take into account the existing facts of international practice, negative theories were developed during the latter half of the nineteenth century and early part of the twentieth century. According to these theories "the Sovereignty of the predecessor state over the absorbed territory is abandoned.[36] The successor state does not exercise its jurisdiction over the territory in virtue of a transfer of power from its predecessor, but solely because it has acquired the possibility of expanding its own sovereignty in the manner dictated by its own will. None of incidences of the sovereignty passes to the successor state. The latter seizes what it can and repudiates what it will.

[36]M. Craven, 'The Problem of State Succession and the Identity of States under International Law', 9 EJIL, 1998, p. 142

5.2. THE UNIVERSAL SUCCESSION THEORY

According to this theory upon change of sovereignty over a given territory, the new soverign i.e. successor state succeeds all the rights and obligations of the predecessor state in relation to the territory affected by such change, without exceptions and modifications. [37]This theory says that all the rights and obligations of predecessor state pass to successor state upon change of sovereignty.

5.3. NYERERE DOCTRINE OF STATE SUCCESSION

Julius Nyerere, the first President of Tanzania, considered that international agreements dating from colonial times should be renegotiated when a State becomes independent, as the nation should not be bound by something that the nation was not in a sovereign position to agree to at that time. According to this doctrine, a newly independent State can – upon independence – review the international treaties that it stands to inherit and decide which of the agreements it will accept and which it will repudiate.[38] Although such an "optional" approach to events of State succession was not new and was already recognized by customary international law,

Nyerere is recognized for the modern formulation of the optional doctrine of the law of State succession. It is worth mentioning that this doctrine came to existence after Nyerere (the Prime Minister of newly independent Tanganyika) made a unilateral declaration to the Acting general Secretary of the UN in 1961. Nyerere doctrine is advantageous in several ways; such as it allows states to fill the void created by the lapse of predecessor's treaties while maintaining the right to examine each treaty individually before deciding whether to maintain such legal obligations.

With the above advantage, Nyerere doctrine is also important as it rectifies the aforementioned shortcomings with regards to negative succession or clean-slate doctrine.[39]Unlike the clean-slate doctrine under which a new State starts without any of the obligations of the predecessor State, Nyerere doctrine of succession however, does not rule out

[37]Yearbook of the ILC, 1962, vol. II, pp. 101–3.

[38]O'Connell, State Succession, vol. II, pp. 155–7

[39] Ibid p. 176

or prejudice the possibility or desirability of renewal (after a legal interruption during the succession) of commitments or agreements of mutual interest to the parties concerned..

6. CONCLUSION

Succession is a concept that has been taken from traditional rules of international law and denotes a transmission of rights and obligations of one state to another, in consequence of occupying territory or has changed or lost its identity to the other state or entity.

MODULE 07 STATE JURISDICTION

1. TERRITORIAL JURISDICTION

Power of the state under international law to regulate or otherwise impact upon people, property and circumstances and reflects the basic principles of state sovereignty, equality of states and non-interference in domestic affairs. Each state has its own territorial Jurisdiction over its people property etc. each state is sovereign in its territories. it can make civil or criminal law for its people. it is called as territorial Jurisdiction of a state or protective Jurisdiction.[40] State Jurisdiction is the power of a state under international law to govern persons and property by its municipal law, it includes both the power to prescribe rules prescriptive Jurisdiction and power to enforce them enforcement Jurisdiction[41]

2. CIVIL JURISDICTION

The municipal courts apply private international law in those cases where foreign element is involved. "Substantial Connection" between foreign elements and forum either by allegiance or by domicile is necessary absence of such connection leads to international responsibility of state.[42]

3. CRIMINIL JURISDICTION

In criminal matters also, "the substantial connection" between the alleged offender or the offence with the state exercising jurisdiction is necessary. The state practice discloses four general principles on the basis of which states generally claim penal jurisdiction. First, territorial principle determines jurisdiction by reference to place where the offence is committed. Second, the nationality principles which determines jurisdiction by reference to nationality either of the people committing the offence even with respect to events occurring entirely abroad or with reference to the nationality of the person injured by the offence. Third, the protective principle

[40]M. Akehurst, 'Jurisdiction in International Law', 46 BYIL, 1972–3, p. 145

[41]F. A. Mann, 'The Doctrine of Jurisdiction in International Law', 111 HR, 1964, p. 1

[42]M. Hirst, Jurisdiction and the Ambit of the Criminal Law, Oxford, 2003

refers to jurisdiction according to national interest of the state. Fourth, the universality principle provides jurisdiction by reference to the nature of crime. E.g. piracy.[43]

4. UNIVERSAL JURISDICTION

The term **"universal jurisdiction"** refers to the idea that a national court may prosecute individuals for serious crimes against international law such as crimes against humanity, war crimes, genocide, and torture based on the principle that such crimes harm the international community or international order itself.[44] Generally, universal jurisdiction is invoked when other, traditional bases of criminal jurisdiction are not available, for example: the defendant is not a national of the State, the defendant did not commit a crime in that State's territory or against its nationals, or the State's own national interests are not adversely affected.[45] National courts can exercise universal jurisdiction when the State has adopted legislation recognizing the relevant crimes and authorizing their prosecution. Sometimes this national legislation is mandated by international agreements, such as the Convention against Torture and Inter-American Convention to Prevent and Punish Torture, which require States parties to adopt the laws necessary to prosecute or extradite any person accused of torture who is within the State party's territorial jurisdiction.[46]

A national or international court's authority to prosecute individuals for international crimes committed in other territories depends on both the domestic legal framework and the facts of each particular case.

5. STATE JURISDICTION AND STATE TERRITORY

For the purpose of exercising State Jurisdiction customary international law recognizes the state territory as follows

[43] Ibid, p.226

[44]L. Reydams, Universal Jurisdiction: International and Municipal Legal Perspectives, Oxford, 2002

[45] Ibid, p.22

[46] Ibid, p.43

5.1. LAND TERRITORY

It consists of land within its boundaries. A boundary is a line on the surface of the earth which separates the territory of one state from that of other or from un appropriated territory. Boundaries may be of two kinds, Natural boundaries, such as rivers, arrange of rocks or mountains, deserts or forest and Artificial boundaries, which are constructed for the purpose of dividing territories.[47] They may consist of walls pillars, poles and trenches etc. Boundaries may be demarked either by the States concerned themselves or by the international agencies. Demarcation of Boundary in 199l between Iraq and Kuwait by iraq-kuwait Boundary Demarcation Commission set up by the Security Council of the UN.[48]

5.2. NATIONAL WATERS

It includes waters in its rivers together with their mouths, canals, ports, harbors and in some of its gulfs and bays it was also referred as internal water. Rivers are of four kinds. Those who flow from its source to its mouth, within the boundaries of one and the same state called as national rivers. Rivers which separate two different states from each other called as Boundary Rivers. Rivers which runs successively through two or more states and therefore called as multilateral or plurilateral or non-national rivers.[49] They are owned by one or more states. Fourthly that plurilateral river which are navigable from the open sea and which, though belonging to the territories of the different states concerned, are nevertheless named international rivers.[50] For such rivers there is a rule of international law that a state cannot alter the natural flow of the river .

5.3. TERRITORIAL SEA

As per United Nations convention on the law of sea 1982 territorial sea is a belt of coastal waters extending at most 12 nautical miles 22.2 kilometers from the baseline of a costal state, it is regarded as a sovereign territory of a state, although foreign ships are allowed innocent

[47]N. Hill, Claims to Territory in International Law and Relations, London, 1945

[48] Ibid, p.122

[49]Brown, International Law of the Sea, vol. I, chapter 5

[50]O'Connell, International Law of the Sea, vol. I, chapter 9

passage through it.[51] This sovereignty also extends to the airspace over and seabed below. Adjustment of these boundaries is called as maritime delimitation. If it overlaps with other states territorial sea the border is taken as the median point between the states baseline. Unless a state in question agree otherwise. A state can also choose to claim a smaller territorial sea.[52]

5.4. THE CONTIGUOUS ZONE

The contiguous zone is a band of water extending further from the outer edge of the territorial sea to up to 24 nautical miles 44.4 kilometers from the baseline, within which a state can exert limited control to prevent and punish infringements of its customs, fiscal, immigration, and sanitary law with in its territory or territorial sea[53]

5.5. EXCLUSIVE ECONOMIC ZONE

An exclusive economic zone is a sea zone prescribed by the 1982 United Nations Convention on the law of Sea over which a state has special rights regarding the exploration and use of marine resources, including energy production from water and wind. From baseline to two hundred nautical miles [three seventy kilometers from its cost][54]

The difference between the territorial sea and the exclusive economic zone is that the first confers full sovereignty over the waters, whereas the second is merely a sovereign right which refers to the sea. The surface waters are international waters. The law relating to this is codified by the United Nations convention on the Territorial Sea and Contiguous Zone, 1958.[55] The difference between the territorial sea and the exclusive economic zone is that the first confers full sovereignty over the waters, whereas the second is merely a sovereign right which refers to the sea. The surface waters are international waters. The law relating to this is codified by the United Nations convention on the Territorial Sea and Contiguous Zone, 1958, which came into force from Ten Sep 1964. The Parliament of India al so enacted an act named as Territorial Waters,

[51]Churchill and Lowe, Law of the Sea, pp. 65

[52]Article 5(1) of the 1958 Convention on the Territorial Sea and article 8(1) of the 1982 Convention.

[53]W. M. Reisman and G. S. Westerman, Straight Baselines in International Maritime Boundary Delimitation, New York, 1992

[54]J. A. Roach and R. W. Smith, United States Responses to Excessive Maritime Claims, 2nd edn, The Hague, 1996

[55] Ibid, p.22

Continental Shelf, Exclusive Economic Zone and Other Maritime Zones Act, 1970 to implement this convention and convention on law relating to Sea.[56]

5.6. AIR AND OUTER SPACE

1.6.1. AIR SPACE

Air space means all space in which man made instruments- air crafts weather controlled or not, can be in operation at any given time. There were five theories in connection with the questions of the sovereignty of a state over the superjacent air space. The subjacent territorial state has absolute sovereignty over the whole space of atmosphere above its territory to unlimited height.[57] The air space is absolutely free and open being analogous to high seas. The territorial sovereignty of subjacent state extends only up to a particular height of the air space. The remaining part of the airspace is free and open. A subjacent state has a right to impose regulations, to protect its interest, on passing foreign aircrafts even above the air belt though such air space beyond the belt is not subject to sovereignty of the state[58]

The sovereignty of the subjacent state extends to the unlimited air space but the other State has a servitude or right of innocent passage for their civil aircrafts. After the outbreak of First World War the question of sovereignty over air space underwent a radical change. The only theory that was universally accepted was the first theory, which conceded sovereignty to an unlimited height over the subjacent air space.[59]

In 1919, the conference of Paris adopted the convention for the regulation of aerial Navigation. This convention accepted the following four broad principles.[60]

- The subjacent state has absolute sovereignty over its air space in peace time,

[56] Shilpa Jain: Introduction to Public International Law (EBC 2016)

[57]C. Q. Christol, The Modern International Law of Outer Space, New York, 1982

[58]S. Gorove, 'International Space Law in Perspective', 181 HR, 1983, p. 349

[59]B. Cheng, 'The 1967 Space Treaty', Journal de Droit International, 1968, p. 532

[60]Cheng, 'The Legal Status of Outer Space', Journal of Space Law, 1983, p. 89

- Freedom of innocent passage is to be accepted to aircrafts of the parties to the convention, but regular international Airlines have no such right unless the subjacent territory gives its consent.
- No aircraft is to be registered in a country unless it belongs only to the nationals of that country
- No aircrafts can be registered in more than one country

Chicago Conference, 1944,[61] certain freedoms were granted to airlines of each state, modern state use to establish closed air space for security purpose. Air defense identification zones reserved for the aircrafts of subjacent state only called as 'Air corridors'

Euro-control an International agency for common air traffic control service for upper air space established by six states in western Europe including UK.[62]

1.6.2. OUTER SPACE

According to NASA outer space to be the area beyond fifty miles about eighty Kilometers above sea level, outer space is the area beyond the Karman line, which is about sixty two miles above sea level[63] According to scientist the inner boundary of outer space is 100+ 10 Kilometer above sea level. The boundary between air and outer space is generally accepted as above 100 Kilometer because space craft cannot descend below this height, and aircraft cannot climb at these altitudes.[64] There is no definition given by the United Nations as to where outer space begins.

1.6.3. LAW RELATING TO OUTER SPACE

The initial phase of development started in 1957, when the Soviet Union launched its first satellite (Sputnik). On 13th December, 1958, the GA of the UN passed a resolution, recognizing "the common interest of mankind in outer space" and "that it is the common aim that outer space

[61] V.K. Ahuja, Public International Law (Lexis Nexus 2016)

[62]Cheng, 'The UN and the Development of International Law Relating to Outer Space', 16 Thesaurus Acroasium, Thessaloniki, 1990, p. 49,

[63]Shaw, M. N. (1997). International Law. Cambridge University Press.

[64] S.K. Verma: An introduction to Public International Law (Prentice Hall 1998)

should be used for peaceful purposes only."[65] "Declaration of Legal Principles Governing the Activities of States in the Exploration and use of Outer Space" was unanimously adopted by the General Assembly 13th December, 1963

The Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space, 1967

1.6.3.1. THE OUTER SPACE TREATY, 1967

Outer space, which includes the moon and other celestial bodies, shall be free for exploration by all States without any discrimination. There shall be freedom of scientific research. Outer space is not subject to national appropriation by claim of sovereignty, by means of occupation, or by a other means. State parties to the treaty undertake not to place in orbit around the earth objects carrying nuclear weapons or weapons of mass destruction, install such weapons on celestial bodies or station such weapons in outer space.[66]

The moon and other celestial bodies shall be used by all States parties to the treaty exclusively for peaceful purposes. State parties to the treaty shall treat astronauts as envoys of mankind in outer space, provide all possible assistance in the event of accident, distress or emergency landing on the territory of another State Party or on the high seas. When astronauts make such a landing they shall be safely and promptly returned to the state of registry of their space vehicle. The establishment of military bases, installations and fortifications, the testing of any type of weapon, conducting of military exercises on celestial bodies shall be forbidden. State Parties to the Treaty shall bear international responsibility for national activities in outer space.[67]

Each State Party to the Treaty that launches or procures the launching of an object in outer space, the moon and other celestial bodies and each State Party from whose territory or facility an object is launched, is internationally liable for damage to another state party by such object or its component parts on the earth, in air space or in outer space. A State Party which

[65]N. Matte, Treatise on Air– Aeronautical Law, Montreal, 1981, chapters 4 and 5

[66] Ibid p. 31

[67]Cheng, 'The Moon Treaty', 33 Current Legal Problems, 1980, p. 213

launches an object in outer space shall retain jurisdiction and control over such object and personnel while in outer space including celestial bodies.[68]

- The Convention on International Liability for Damage caused by Space Objects -1971
- The Convention on Registration of Objects Launched into Outer space – 1974
- The Agreement Governing the Activities of States on the Moon and other Celestial Bodies – 1979
- Vienna Convention on the Exploration and Peaceful Uses of Outer-space (UNISPACE II) AND (UNISPACE III)

6. THE EXTRA-TERRITORIAL JURISDICTION

The 'extra-territorial operation' constitute of two key words, 'extra-territorial' and 'operation'. The term extra-territorial connotes the exercise of jurisdiction, or legal power, outside territorial borders. The Constitution of India authorizes the Parliament to legislate with extra-territorial operation of law.[69]

The concept of 'extra-territorial operation of law' is an extension as well as a contradiction to the concept of sovereignty and refers to the application of the laws of one country to persons, conduct, or relationships outside of that country.[70] The very first line of the preamble of the Constitution of India declares that India is a Sovereign country. Chapter-1 of the Part XI of the Constitution of India provides distribution of legislative powers. Article 245 provides for the extent of laws made by Parliament and by legislatures of States subject to the provisions of the Constitution. The Parliament makes laws for the whole or any part of the territory of India, and the legislature of a State may make laws for the whole or any part of State. Clause 2 of article 245 provides that no law made by Parliament shall be deemed to be invalid on the ground that it would have extra-territorial operation.[71]

[68] Ibid p. 45

[69] Gurdip Singh, International Law (2nd ed., 2011)

[70] Ibid p. 66

[71] Ibid p. 78

The Legislature of State has no power to legislate on the matter of extra-territorial law. Following legislations enacted by Parliament contains a Provisions having extra-territorial operation.

- Indian Penal Code 1908 (Section 3 and 4)
- Code of Criminal Procedure 1973 (Section 188)
- Hindu Marriage Act 1955 Section 1(2) and 19
- Income Tax Act, 1961 Section 9 (1)
- Information Technology Act, 2000 Section 1(2) and 75
- Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act, 2016 Section 2(1)

7. JURISDICTION BASED ON NATIONALITY

Nationality is the principal link between an Individual a d International Law. Nationality is often determined by State laws. Under International law, nationality has often been used as a justification for the intervention of a Government to protect another country. It may, however, be noted that international law does not create a correlative right in favor of the individuals. It creates rights only in favor of the states whose nationals they are. As pointed out by Starke, the laws relating to nationality have following importance under International Law.[72]

- The protection of rights of Diplomatic agents
- Responsibility of state for harmful acts committed by its nationals against other state
- Loyalty towards particular state
- Compelled to do military services for the state
- State can refuse to extradite its own nationals
- During war enemy character is determined by nationality.
- It is basis to exercise jurisdiction over criminal and other matters by the state.

[72] Oppenheim's, International Law, (9th Ed. 1992) p. 188

7.1. MEANING OF NATIONALITY

It is 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 subject him to the obligation created by the laws of that state.[73]

NATIONALITY AND DOMICILE

Nationality denotes the relation of man with his nation which protects him and the person is bound to follow the rules enacted by that state. Domicile denotes the residence of the person. Person may acquire nationality through domicile. In different countries there are different rules and processes in regard to the acquisition of nationality through domicile.[74]

NATIONALITY AND CITIZENSHIP

Nationality means the legal relationships which exist between the Nation and the Individual. Citizenship, on the other hand, denotes the relations between the person and the state law. In other words through nationality the civil and natural rights of a person may come under international law whereas the rights of citizenship are the sole concern of the state law.[75] It is possible that all the citizens may possess the nationality of a particular State, but it is not necessary that all the nationals may be the citizens of that particular state. Citizens are those persons, who possess full political rights in that state. But a person who possesses only nationality in a particular State may not possess all political rights.[76]

7.2. MODES OF ACQUISITION OF NATIONALITY

- Article 15(1) of the Universal Declaration of Human Rights (UDHR), 1948 provides, *"Everyone has a right to nationality"*.
- Article 20(1) of American Convention on Human Rights, 1969 says, *"every person has a right to nationality"*.

International law, however, does not provide for a particular way in which a state may make law for acquisition of nationality. There are two main principles, on which nationality is based, firstly bloodline or lineage (*jus sanguinis*) and Secondly birth on the soil of a State's territory

[73] Ibid p. 195

[74] Ibid p. 98

[75] Ibid p. 111

[76] Ibid p. 134

(*jus soli*). Experts generally consider these two principles to be sanctioned by customary international law.[77]

MODES OF ACQUISITION OF NATIONALITY

By Birth: a person acquires nationality of the state where he is born. He also acquires the nationality of his parents at the time of his birth.

Naturalization: when a person living in a foreign state for a long time acquires the citizenship of that state.[78]

By resumption: sometimes it so happen that a person may lose his nationality because of certain reasons. Subsequently, he may resume his nationality after fulfilling certain conditions.[79]

By Subjugation: when a state is defeated or conquered, all the citizens acquire the nationality of the conquering State.[80]

Cession: when a state has been ceded in another state, all the people of the territory acquire nationality of the state in which their territory has been merged.[81]

Marriage: The laws of many States provide that on marriage, a woman will acquire the nationality of her husband. Under the Convention on Nationality of Married Woman, 1957, more protection is given to the woman, as the Convention provides that upon marriage with a foreigner, it does not automatically affect the nationality of the woman.[82]A similar provision also exists in Article 9 of the Convention on the Elimination of all Forms of Discrimination Against Women, 1979, which, inter alia, requires the state parties to grant women equal rights with men to acquire, retain or change their nationality and upon marriage with an alien, will not change nationality automatically.[83]

In India a similar provision exists under the Citizenship Act, 1955.

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[77] Ibid p. 212

[78] Ibid p. 218

[79] Ibid p. 225

[80] Ibid p. 232

[81] J.G. Strake, Introduction to International Law, (10th Ed. 1994), p.132

[82] Ibid p. 141

[83] Ibid p. 148

Adoption and Legitimation, According to the laws of some States, adoption and legitimation creates new nationality for a child.

7.3. MODES OF LOSS OF NATIONALITY

International law does not prescribe any rule under which a person may lose his nationality. It is left to the discretion of the States. However, this is directly a matter of international law, for a person without nationality is a stateless person and survival for such a person becomes difficult in the international community. Generally, a person may lose his nationality by certain modes, which are discussed below:

RELEASE: Some States authorize their citizens to seek release from their nationality. Such release, when granted, deprives the person of the nationality of the State granting such release.[84]

DEPRIVATION: Many countries have laws, which provide that a particular act or conduct of a national will deprive him of his nationality. Acts such as entering into Foreign Service, taking oath of allegiance to a Foreign State, joining foreign armed forces, unlawful trading with the enemy during war and prolonged stay abroad are some of such grounds.[85]

Article 15(2) of UDHR, 1948 provides that *no one shall be deprived of his nationality*. But, the above grounds are not arbitrary and justified for depriving a person of his nationality.

EXPIRATION: Some States have laws, which provide that nationality of a person expires when he has left the country and resided abroad for a long duration of time.

Thus, the Indian Citizenship Act, 1955 provides that an ordinary citizen of India, if stays beyond seven years abroad without approved course, shall cease to be a citizen (National) of India.

RENUNCIATION:A person may renounce his nationality in a manner prescribed such as signing a deal before the designated authority or by exercising the right of renunciation on attaining majority or acquiring the nationality of more than one country.[86]

SUBSTITUTION: This is not a universal mode of losing nationality. Under the British Nationality Act, 1981, naturalization in a foreign State does not involve loss of nationality.Britain does not object to their citizens acquiring another nationality apart from the

[84] Ibid p. 152

[85] Ibid p. 158

[86] Ibid p. 161

one they already possess. But in many States, naturalization abroad, ipso facto, terminates the original nationality of a person.[87]

7.4. DOUBLE NATIONALITY

Due to variations on domestic law of countries, there may be situations where persons may have dual nationality or no nationality at all i.e. statelessness. International law does not have binding rules on nationality and the States have discretion to formulate their own laws.

A is born in X State where nationality is based on *jus soli* (place of birth). A gets the nationality of state X. If A is the child of a foreign couple who belong to a State where the nationality law is based on *jus sanguinis* (by descent), A also gets the nationality of his parents. Thus, A has double nationality or dual nationality.[88]

In cases of dual nationality, some States provide that a person may, on attaining majority, give up one of the nationalities. Dual nationality may be acquired by a woman through marriage also Suppose A is born in Z State while his parents belong to Y State. If they happen to be in Z State at the time of birth of A. If the rule of nationality in Z State is based on *jus sanguinis* and since the parents of A are not nationals of that State A does not get their nationality. Since the nationality rule of state Y is based on the principle of *jus soli*, A again does not get the nationality of State Y because he was born on foreign soil. Therefore, he ends up without any nationality and becomes stateless.

7.5. EFFECT OF DOUBLE NATIONALITY

The position of an individual having double nationality is an awkward one. Being a national of two States, both may claim his allegiance. While in the State of second nationality, he cannot avail himself of the protection of the first State's nationality against the authorities of the foreign country i.e. a third State.

The Hague Convention on Certain Questions Relating to Conflict of Nationality Laws, 1930 provides that if a person has more than one nationality, he shall, within the third State, be treated as if he had only one and it will be determined by applying the test of *"Genuine link or effective nationality"* or *"real connection"*.[89]

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[87] Ibid p. 165

[88] Ibid p. 171

[89] Malcom N Shaw. International law; 5th edition. Cambridge University Press, 2003.

7.6. NATIONALITY OF MARRIED WOMEN

Marriage of a woman with a foreigner may change her nationality and on dissolution of marriage, she may lose her nationality and thus become a Stateless person. This problem has been a concern of international law. The Hague Convention on Conflict of Nationality Laws, 1930 regulates some aspects of nationality of married women Convention on the Nationality of Married Woman 1957 provides that celebration or dissolution of marriage between a States national and an alien or change of nationality by the husband during marriage shall not automatically affect the nationality of the wife.[90]

Convention on the Elimination of all Forms of Discrimination Against Woman, 1979 also obligates States to ensure that women should be given equal rights and that women are not rendered stateless on account of marriage with aliens or change of nationality by husbands.[91]

8. STATELESSNESS

A person without any nationality is known as a Stateless Person. This situation may arise through conflict of nationality laws, change of sovereignty over territory or denationalization by the State of nationality.[92] All individuals who have lost their original nationality without having another are Stateless persons. According to traditional international law, persons having lost the link of nationality between them and international law did not get any protection of the latter.[93] Even under modern rules of international law, they cannot get diplomatic protection, consular assistance and international claims for the damage suffered at the hands of a state.

8.1. INTERNATIONAL EFFORTS TO REDUCE STATELESSNESS

- The Convention on the Conflict of Nationalities Laws, 1930
- The Convention Relating to the Status of Stateless Persons, 1954
- The Convention on the Reduction of Stateless Persons 1961
- The Convention on the Reduction of Statelessness, 1961

[90] Prof lauterpacht H. Problems of jurisdictional immunity of foreign states, Year book of International law 1951, Oxford University press p.228

[91] Ibid p. 332

[92] Ibid p. 335

[93] Ibid p. 342

Inter alia provides that a contracting State shall grant its nationality to a person born on its territory who would otherwise be stateless. A child born of wedlock on the territory of a state party to the convention and whose mother is a national of that state will get the nationality of his mother if he would otherwise be stateless. Renunciation of nationality shall not result in loss of nationality unless the person has acquired another nationality.[94]

The 1954 Convention Relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness are key legal instruments in the protection of stateless people around the world and in the prevention and reduction of statelessness. While they are complemented by regional treaty standards and international human rights law, the two statelessness conventions are the only global conventions of their kind. As on 6 July 2015, there are 23 signatories and 86 parties to the 1954 Convention and five signatories and 63 parties to the 1961 Convention.[95]

8.2. ROLE OF UNHCR FOR STATESSNESS

Its primary purpose is to safeguard the rights and wellbeing of refugees, It strives to ensure that everyone can exercise the right to seek asylum and find safe refuge in another state, with the option to return home voluntarily, integrate locally or to resettle in a third country.[96] Headquarter is in Geneva, Switzerland and it is a member of the United Nations Development Group. It has won two Nobel peace prizes, once in 1954 and again in 1981. UNHCR activities in the field are grouped into four categories.[97]

Identification- gathers information on statelessness, its scope, causes and consequences

Prevention- Address the causes of statelessness and promote accession to the 1961 Convention on the reduction of statelessness

Reduction- support legislative changes and improvements to procedures to allow stateless people to acquire a nationality and help individuals to take advantage of these changes.

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[94] Ibid p. 345

[95] See report of the International Law Commission, 1991. P.134

[96] Ibid p. 145

[97] Ibid p. 152

Protection- intervenes to help stateless people to exercise their rights and promote accession to the 1954 Convention relating to the status of Stateless persons.

9. MEANING AND DEFINITION OF EXTRADITION

A person after committing a crime may flee to another State. The State has territorial sovereignty and it may permit an alien to stay on its territory. Such a criminal shall not be arrested or prosecuted by the State, where he happens to reside since he has not committed any crime on the territory of that state. The first State where he is alleged to have committed the crime cannot arrest and prosecute him due to the territorial sovereignty of the other State. But the aim of the law is to punish the criminal. Therefore, the State on whose territory the criminal has committed the offence may request the State on whose territory the criminal is physically present or residing to deliver him for his trial and prosecution. Such a process of demanding the criminal from the latter State by the former is called extradition.

a. DEFINITION OF EXTRADITION

Extradition is the formal surrender of a person by one state to another state for prosecution or punishment.

OPPENHEIM "Extradition is the delivery of an accused or convicted individual to the State where he is accused of or has been convicted of a crime, by the state on whose territory he happens for the time to be."[98]

"Extradition" means the delivery of a person by one State to another as provided under a treaty, convention or national legislation. Customary international law does not impose any duty on States to surrender criminals. States have, in the absence of a treaty, upheld their right to grant asylum to foreign individuals on the basis of territorial sovereignty.[99]

[98] Philip. C. Jessup, A Modern Law of Nations: An Introduction ,(1968)

[99] Ian Brownlie, Principles of Public International Law, (5th Ed. 1998), p. 287

PROCESS OF EXTRADITION

EXTRADITION TREATIES

Modern civilization demanded extradition of criminals as a rule and, as such, prior treaties between States were concluded. In the beginning, initially there were bilateral treaties which gradually have been extended as multilateral.

MUNICIPAL LEGISLATION

Various States have enacted extradition laws which lay down the procedure and a list of extraditable crimes. Belgium was the first country which enacted such legislation in 1833.[100] The UK enacted the Extradition Act, 1870 which has been replaced by the Extradition Act, 1989. Extradition Act, 1903 was modeled on the British enactment. Now, the Extradition Act, 1962 is on the Indian statute book.[101] Grant of extradition and procedure are generally matters of national law and, therefore, there is no uniformity in such laws. But certain principles are now established.

The law of extradition is a dual law. It is ostensibly a municipal law, yet it is a part of international law also. Request for extradition is made through the diplomatic channel. There should be an extraditable person as well as an extraditable crime.[102]

PRINCIPLE OF DOUBLE CRIMINALITY

States refuse to grant extradition under this rule which is normally incorporated in the extradition treaties. Under this principle extradition is granted only when the act committed constitutes an offence under the laws of both the requesting and the requested States.[103]

In ***Factor v. Laubenheimer,***[104]British authorities sought the extradition of Factor on the charge of receiving in London money which he knew to have been fraudulently obtained. When

[100] Deng F, Sovereignty, Responsibility and Accountability ,(1995), p.115

[101] Ibid, p.122

[102] Ibid, p.128

[103] Ibid, p.132

[104](1933), 290 US 276

extradition was initiated, Factor was residing in the State of Illinois in the US. The offence for which Factor was charged was not an offence in Illinois.

The US Supreme Court held that this did not prevent extradition if, according to criminal law generally of the US, the offence was punishable. The above being the first dimension of the principle, a second dimension was added to the principle which stated that even the punishment for the offence committed must be the same under the laws of both the requesting and the requested states.

This dimension was the result of the **Soering case.**[105] where Mr. Soering, a German national while pursuing higher studies in an American university fell in love with an American girl who was his classmate. Both wanted to get married but, the parents of the girl were against the marriage which prompted them to murder the parents of the girl. Subsequently both fled to U.K. and when U.S. government initiated proceedings for their extradition the U.K. government stated that even the punishment must be the same. Since punishment for murder under U.K. law was imprisonment for life because the European Union and many countries have abolished death penalty as punishment and in United States it is death penalty, the British government refused to extradite. However, the British government tried and punished Soering and his girlfriend under British criminal law.

RULE OF SPECIALTY

This rule also finds place in the extradition treaties and national laws. According to the rule, the requesting State can punish the extradited person only for the offence for which he was extradited and for no other offence. If a person is extradited for murder, he shall not be tried for causing grievous hurt.[106]

RENDITION

The States on the basis of reciprocity may make ad hoc arrangements under which an offender may be returned to a State to be tried by that State. This is called Rendition.[107]

TYPES OF OFFENDERS

[105](1989) 11 ECHR 439

[106] Bin Cheng, General Principles of Law as Applied by International Courts and Tribunals, (1953), p.122

[107] Ibid p. 131

There is no legal prohibition in extraditing a person for any crime. However, in general, extradition is made in respect of crimes of a more serious nature. It is evident from the common practice of the states to list such crimes in a bilateral extradition treaty. Generally the following crimes are not subject to extradition proceedings under customary rules of international law, Crimes such as Political Crimes, Military Offences, for example desertion, and Religious Offences.[108]

POLITICAL CRIMES

There is no agreed definition of political crime under international law. The definition of such a crime has been left to the national laws. The States now accept the rule that political criminals should not be extradited. But the experts of international law have expressed doubts regarding the existence of any rule of customary international law which prevents a State from extraditing political offenders. Various criteria have been adopted to define a political crime such as:[109]

- The motive behind the crime
- The circumstances under which it was committed
- It would embrace specific offences such as treason or attempted treason.
- The act should be directed against any political organization on the territory of the requesting State.
- There should be political unrest and the existence of two political parties striving for establishment of political control in the State.

The difficulty in defining a political crime or offence is inherent in the very nature of the concept. A group of States may consider a particular movement for achieving political ends as deserving protection; while another group of states may consider the members of such a movement as a "band of criminals" deserving punishment.[110] Sometimes ordinary criminals might be sought in extradition by a State on political considerations. Mutual relations between

[108] Ibid p. 135

[109] Ibid p. 139

[110] Ibid p. 142

the demanding state and the extraditing State may also play a significant or important role. This is evident from the decisions of courts of law. Some of the landmark cases are discussed below.

Castioni, Re[111] In the instant case, the prisoner was a Swiss national, who was arrested by the British authorities on a warrant for his extradition to Switzerland. He was accused of the charge that he had in an uprising, shot a member of the member of the Council of the Canton of Ticino in the course of seizing the municipal Palace. The British court discharged the prisoner on the ground that his crime was of a political nature. The court noted three things for a political crime namely: (1) acting in pursuance of political ideals (2) political unrest, and (3) a conflict between two or more political parties in the State trying to establish a Government.

Meunier, Re[112] According to the facts of this case, the prisoner was an anarchist who had caused two bomb explosions in a military barrack in France in which two individuals were killed and who fled to England. However, the British court refused to accept his crime as political by excluding anarchist and terrorist acts from the category of political crimes.

France v. Great Britain **(Reports of International Arbitral Awards,**[113] **Savarkar Case:** Savarkar, a freedom fighter from India was beingbrought to India from Britain. While the British ship was anchored at a French port, Savarkarjumped from the ship and swam ashore in Marseilles Harbour. A French policeman arrestedhim and handed him over to the British ship captain. French authorities realized that therewas no obligation on their part to return Savarkar and therefore asked for the return ofSavarkar.

The British ship captain refused to return Savarkar, giving rise to a disputebetween the two countries. The permanent Court of arbitration decided in favour of GreatBritain. It observed, "while admitting that an irregularity was committed by the arrest ofSavarkar and by his being handed over to the British police, there is no role of international lawimposing, in circumstances such as those which have been set out above, any obligation on thePower which has in its custody a prisoner, to restore him because of a mistake committed bythe foreign agent who delivered him up to that Power."

R. v. Governor of Brixton Prison, Ex parte Kolczynski & others[114]

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[111](1891) 1 QB 149

[112](1894) 2 QB 415:

[113]Vol.11, 24-2- 1911, 243-55)

[114](1955) 1 QB 540

In this case the facts are as follows. Seven Polish seamen had overpowered the captain and other members of a Polish vessel and had brought it to England and sought asylum. The government of Poland initiated extradition proceedings and requested the British government to extradite them. The English court refused the extradition on the ground that the act of the seven crewmen was of a political nature. In this case, the court did not follow *Castioni re* case because in Poland there was no struggle between two political parties for political power. The court, instead observed that the words *"offence of a political character"* must always be considered according to the circumstances existing at the time when they have to be considered.

Govt. of India v. Mubarak Ali Ahmed[115]

In the instant case, the prisoner had committed forgery and crossed over to Pakistan. India could not get the accused extradited from Pakistan. Subsequently the prisoner left Pakistan and went to England. India requested for his extradition. He pleaded that he would not get a fair trial in India for political reasons. The court, however refused to treat him as a political criminal.

The court further observed that the fact that the prisoner has been a subject of a cute political controversy in the requesting State, does not make him a political offender. International law leaves it to the States to determine whether a particular act is of political nature or not. But, it seems reasonable that the discretion of the States in this regard would be restricted by the general rules of international law.

Therefore, States will be under pressure to extradite persons who have committed acts of genocide, war crimes, crimes against humanity and terrorist acts. Such offenders cannot be protected under the category of political offenders.

Abu Salem Extradition case[116]Abu Salem was charged for various offences including the 1993 Mumbai bomb blasts. After the blast he left India and subsequently located himself in Portugal. India did not sign an extradition treaty with Portugal. However, India sought extradition under the United Nations Convention on Suppression of Terrorism, 2000. Since India and Portugal are parties to this Convention they are under an obligation to help each other in the war against terrorism. Meanwhile, Abu Salem and his girlfriend Monica Bedi were prosecuted and sentenced by the court of Law in Portugal.

[115](1952) 1 All ER 1060

[116] www.theguardian.com

The court also ordered the extradition of both the fugitives to India after completion of the sentence. Abu Salem and Monica Bedi moved the European Court of Human Rights against extradition, which refused to intervene in the matter. They were extradited on the assurance of the

government of India that they would not be sentenced to death. However, in India, the CBI included a new charge, which was against the Rule of Speciality.

On Salem's application, the Supreme Court of Portugal terminated his extradition to India. On a direction given by the Supreme Court of India, the CBI dropped the additional charge against Abu Salem. His trial is in progress. In ***CBI v. Abu Salem Abdul Kayyam Ansari i.e. (Pradeep Jain's murder case),***[117]Abu Salem has been sentenced to life imprisonment.

INITIATIVES TO RESTRICT THE SCOPE OF POLITICAL OFFENCES

The term "political offence" has been vague. There is no internationally agreed definition of this term. It is argued that the most heinous crimes such as genocide, war crimes and crimes against humanity, are not political crimes for refusing extradition. International

law has, however, made various efforts to limit the meaning and scope of this term. Some of these initiatives are listed below:[118]

Attentat clause: It originated in 1856 in Belgium and was followed by other States. This clause provides that a murder of the head of a foreign State or of a member of his family should not be considered as a political crime.

Genocide Convention, 1948: Under Article 7 of this Convention states that the crime of genocide is not to be considered as a political crime as it is excluded from the category of political offences for the purposes of extradition.

The European Convention for the Suppression of Terrorism excludes terrorist acts from the ambit of political crimes.

The Statute of the International Criminal Court, 1998 puts a general obligation on the States parties to the convention to "cooperate fully with the court in its investigation and prosecution of

[117] www.theguardian.com

[118] Ibid p. 178

crimes within the jurisdiction of the court". Crimes within the jurisdiction of the court are the crimes of genocide, crimes against humanity, war crimes and the crime of aggression.

CONCLUSION

The concept of extradition is one of the principal concepts that was developed by International jurists for the purpose of proper administration of criminal justice. A person who commits an offence on the territory of one State and escapes to another State, the State on whose territory the offence was committed is unable to punish him. The State on whose territory the offender resides through the concept of extradition should surrender him to the other State. If due to restrictions imposed by international law the State is not in a position to extradite, then it has to punish him under its own laws. Therefore no offender shall go unpunished in the world.

10. DEFINITION AND SIGNIFICANCE OF ASYLUM

The literal meaning of the term 'Asylum' is sanctuary or place of refuge and safety especially for criminals. In international law, it is more than a temporary refuge followed by a degree of active protection on the part of the state granting asylum to a person of another state who seeks such refuge and protection.[119] A State may, at its discretion, grant or refuse to grant asylum. This right is an incident of territorial supremacy. Extradition and asylum are closely connected and very commonly stated that extradition starts where asylum ends. Writers on international law have expressed a doubt whether the right of asylum is recognized by general international law. Since most of the extradition treaties generally refuse extradition of political offenders, the practice to grant asylum is closely connected with the principle of non-extradition of political offenders.[120]

Article 14 of the Universal Declaration of Human Rights, 1948 states that every person has a right to seek and enjoy in other countries asylum. The Universal Declaration of Human Rights while conferring the right of asylum to individuals does not impose an obligation upon the States to grant asylum. Similarly the Declaration on Territorial Asylum, 1967 makes certain

[119] J.G.Strake, Introduction to International Law, (10th Ed. 1994), p.144

[120] Ibid p. 148

recommendations to States on asylum.[121] The United Nations Declaration on Territorial Asylum was adopted by the General Assembly and the Declaration called upon governments to refrain from taking steps such as rejecting the persons seeking asylum at the frontier itself. It has been claimed that these instruments do not confer a right to receive asylum.[122] However, humanitarian considerations influence States in granting asylum. The so called right of asylum is actually the competence of every State to allow a prosecuted alien to enter and remain on the territory under its sovereignty. Such fugitive alien enjoys hospitality of the State which grants him asylum It is absolutely necessary for him to be placed under surveillance or even to confine him in some place to make his entry conditional.[123] It is an obligation of every State in the international community to prevent individuals living on its territory from posing to the state on whose territory he is alleged to have committed an offence, any kind of threat or danger to the safety and security of the head of the State, members of its government or its property.

10.1. KINDS OF ASYLUM

Asylum is either territorial or extra-territorial. Territorial asylum is again an incident of territorial sovereignty and extra-territorial asylum is derogation from the sovereignty of the territorial state.

10.1.1. TERRITORIAL ASYLUM

Granting asylum to all kinds of refugees including fugitive offenders in its territory emanates from the doctrine of territorial supremacy. Generally, a State may not grant asylum to aliens on a vessel anchored or sailing in its territorial sea.[124] According to the World Court, in the case of territorial asylum, the refugee is within the territory of the State of refuge and a decision relating to extradition depends upon the normal exercise of territorial sovereignty.[125] In other words, the refugee is outside the territory of the State where the offence was committed and a

[121] Ibid p. 155

[122] Ibid p. 162

[123] Ibid p. 168

[124] Ibid p. 172

[125] Ibid p. 181

decision to grant asylum to such a person does not in any manner derogate from the sovereignty of that State.

However, there is no unanimity on the issue whether a State can grant asylum to prisoners of war belonging to a state which has been conquered, and who are not willing to be repatriated for fear of prosecution. Territorial asylum is granted by a State on its own territory and is considered as an attribute of the territorial sovereignty of that State.[126] The Convention on Territorial Asylum was signed in 1945.

Article 1 of the Convention states that "Every State has a right in the exercise of its sovereignty, to admit into its territory such persons as it deems advisable without, through the exercise of the right giving rise to a complaint by any other State."

In the year 1967, the General Assembly of the United Nations recommended that, the States in practice should do the following:[127]

When a person requests for asylum, his request should not be rejected or if he tries to enter the territory of such State he should not be expelled from the frontier itself but, when they come in large numbers the request for asylum could be rejected on the ground of national security of its own people. If any State experiences difficulty in granting asylum, it should adopt appropriate measures by considering it as an international duty, through the medium of individual states or the United Nations.

When State grants asylum to the fugitives, other States must respect such a decision of the State granting asylum, Political asylum, in the case of defectors. Refugee asylum, in the case of persons who genuinely fear persecution or prosecution in their own country; and finally General Asylum, in the case of persons who have fled their country for economic betterment and have no status of immigrants.

[126]Gray, C. (1987). Judicial Remedies on International Law. Oxford.

[127]Shaw, M. N. (1997). International Law. Cambridge University Press.

10.1.2. EXTRA-TERRITORIAL ASYLUM

In the case of extra-territorial or diplomatic asylum, the person who is given refugee status is within the territory of the State where he is alleged to have committed an offence. Any decision on the part of the other State to grant diplomatic asylum in the premises of its embassy is deemed to be derogatory to the sovereignty of the territorial State because it withdraws the offender from the jurisdiction of the territorial State and constitutes an interference in a matter which is essentially and exclusively within the competence of that State.[128]

States enjoy certain privileges and immunities on the territories of other States in respect of places such as the diplomatic missions of other States. Extra-territorial Asylum or Diplomatic Asylum is granted by a State outside its territory, such as in its embassy premises or its war ships sailing on the high seas or the oceans.[129] As far as granting of diplomatic asylum is concerned, international law does not recognize a general right of a person heading a mission to grant asylum in the premises of the embassy or legation, for the obvious reason that such an act would prevent territorial law from taking its own course and would involve a derogation from the sovereignty of that State.

The premises of diplomatic envoys are notionally treated as the territory of the sending State and, therefore, immune from the jurisdiction of the receiving State. Likewise, a warship has a special status and immunity from the jurisdiction of other States even in the territorial sea.[130] A person of the coastal State after committing an offence may be given refuge in a warship. Such Asylum is called extra-territorial asylum. But grant of such asylum is not an absolute right and rules of international law or not well settled on such asylum. Such asylum may take place in the following ways:

Diplomatic Asylum: Oppenheim traces the history of diplomatic asylum in ancient practice where the envoy's residence was considered in every aspect outside the territory of the receiving State and even extended to the whole quarter of the town in which such residence was

[128] Gurdip Singh, International Law (2nd ed., 2011)

[129] V.K. Ahuja, Public International Law (Lexis Nexus 2016)

[130] Ibid p. 132

situated.[131] This used to be called *franchise du quartier* and interference from this was the so-called right of asylum, whereby envoys claim the right, within the boundaries of the residential quarters, to any individual who took refuge there.

This was opposed by the States and by the 19th century, the general right to grant extra-territorial asylum vanished leaving only traces of it in the Latin American practice. Under the Vienna Convention on Diplomatic Relations, 1961, the premises of the embassy is inviolable and immune from search, acquisition, attachment or execution. The private residence of a diplomatic envoy is likewise inviolable.[132] The Convention, however, does not mention the right of diplomatic asylum.

In fact, Article 41(1) states that it is a duty of "all persons enjoying privileges and immunities to respect the laws" of the receiving State and "not to interfere in the internal affairs of that State". Again, clause (3) of article 41 lays down that the premises of the mission is not to be used in any manner incompatible with the functions of the mission. Granting diplomatic asylum is not the function of the mission and Article 3 of the Convention. Therefore, it may be concluded that present international law does not endorse diplomatic asylum.

DALAI LAMA ASYLUM

Due to the oppressive and repressive policies of China, the spiritual leader, Dalai Lama and his followers fled from Tibet and took political refuge in India. China accused India of interfering in its internal affairs. India on its part was fully within its legal parameters while granting asylum to *Dalai lama* because India as a sovereign country has exercised the right conferred on it by international law. Therefore, there is no violation of International Law.[133]

REFUGEES FROM BANGLADESH

The atrocities committed by the military regime of General Yahya Khan and the intentional and well planned war crime of genocide committed by the military personnel of Pakistan compelled millions of refugees to seek political refuge in India. India had not only

[131] Ibid p. 138

[132] Ibid p. 141

[133] Ibid p. 145

granted refugee status, but also proved to the world by providing hospitality although it was not a party to the Refugee Convention and which was unparalleled in the annals of the history of international relations. If not for this great and magnanimous gesture by India, the return or expulsion would have resulted in compelling them to return and to remain in a territory where there was well-founded fear of persecution endangering their lives or physical integrity.[134]

JULIAN ASSANGE WIKI LEAKS ASYLUM CASE

Julian Assange had taken shelter in the embassy of Ecuador in United Kingdom. The wiki leaks editor Assange is an Australian and faces prosecution in the United States for allegedly leaking United States classified documents. Assange has also been charged by Sweden of sexual assault. Arrest warrant (European) was issued for his arrest and since June 19 2012 he has been in the Ecuadorian Embassy in London. Assange claims that his extradition to Sweden is a ploy to hand him over to the United States.[135]

EDWARD SNOWDEN CASE

Edward Snowden is an American national, who worked for National Security Agency (NSA) of United States as a contractor. He left United States in May 2013 and travelled to Hong Kong and leaked through Guardian and the Washington post newspapers the covert mass internet surveillance by National Security Agency of the US. The US has charged him with theft and under the Espionage Act, 1917. After he left Hong Kong, he was stuck in the transit area of Sheremetyevo International Airport in Russia as the US cancelled his passport.[136]

Snowden sought asylum from several countries including India without success. In the absence of a passport he cannot travel to any country. However, he can be granted asylum under Article 31 of the UN Convention Relating to the Status of Refugees, 1951 as he is a political offender. Russia granted temporary asylum to Snowden on August 2013 for one year. Russia has granted him a resident permit and Snowden is in Russia from July 2015.[137]

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[134] Ibid p. 148

[135] www.bbc.com

[136] www. indiatoday.in

[137] www.theguardian.com

MODULE 08 STATE IMMUNITIESAND PRIVILEGES

1. STATE IMMUNITY

State Immunity is a principle of public International Law that is often relied on by states to claim that the particular court or tribunal does not have jurisdiction over it or to prevent enforcement of an award or judgment against any of its assets. In other words, it can create difficulties for a counter party seeking to enforce its contractual rights against a State, as such state Immunity should always be considered when dealing with States. In International Law, certain persons and institutions are immune, from the jurisdiction of foreign Municipal courts. The principal ones are sovereign states and foreign heads of state, diplomatic agents', consuls and International institutions, their officials and agents. It is a basic principle of International Law that a sovereign state does not adjudicate on the conduct of a foreign state.[138] This immunity extends to both criminal and civil liability.

2. ABSOLUTE IMMUNITY

Initially, the first and only approach, the absolute doctrine still applies in some Jurisdictions, notably China and Hong Kong. Under this doctrine, any proceeding against foreign States are inadmissible unless the State expressly agrees to waive Immunity. This simply means that no sovereign State could be impleaded in the court of another without its consent. States based on this rule to enjoy absolute immunity in all their acts, is they public or private.[139] Absolute Immunity thus refers to the privileges and exemptions, granted by one state through its judicial machinery to another, against whom it is sought to entertain proceeding, attachments of property or the execution of judgments.

The relatively uncomplicated role of the sovereign and of the government in the 18th and 19th century, logically gave rise to the concept of absolute Immunity whereby the Sovereign was completely immune from foreign Jurisdiction in all cases regardless of circumstances. However the unparalleled growth in the activities of the State, especially with regard to commercial matters, has led to problems in most countries to a modification of the above rule.[140]Furthermore,

[138]H. Fox, *The Law of State Immunity*, Oxford, 2002

[139] Ibid, p.22

[140] Ibid, p.28

commercial activities like any other individual and the growth of the activities of the state in commercial matters, the concept of absolute immunity has been called to question: the base of the question is that granting Absolute Immunity to state will give them advantage over private enterprises that engage in commercial contract with that State. Accordingly many states began to give their support for the restrictive [141]Immunity approach, which shall be discussed later.

Immunity was available as regards governmental (acts *Jure Imperii)* but not for commercial acts which are termed (*Jure gestionis)*. The classical case of the doctrine of absolute Immunity is the case of ***Schooner Exchange V Mc Faddon***[142]where Marshall, CJ delivering the judgement of the United States Supreme court held; that the vessel of war of a foreign State with which the United States was at peace and which the government of the United states allowed to enter its harbours, was exempted from the jurisdiction of its courts.

3. RESTRICTIVE IMMUNITY

Due to the increasing involvement of states in World Trade activities, led to the development of a more restrictive approach to State Immunity, where a distinction is drawn between acts of a foreign sovereign nature (*act jure imperii*) and acts of a commercial nature (*acts Jure gestionis*).[143] Under the restrictive approach, Immunity is only available in respect of acts resulting from the exercise of a Sovereign power. As such, States may not claim immunity in respect of commercial activities or over commercial assets. Immunity from Jurisdiction is usually available in the case of Jure Imperii but usually denied in the case of Jure gestionis. A number of States in fact started adopting the restrictive approach to Immunity at early stage. The Supreme Court of Austria in 1950 concluded that in the light of the increased activity of states in the commercial field, the classic doctrine of absolute Immunity had lost its meaning and was no longer a rule of International law **Dralle V. Republic of Czechslovakia**[144]

4. WAIVER OF IMMUNITY

[141] Ibid, p.34

[142] Ibid, p.40

[143] Ibid, p.56

[144] (1950) 17 international law report (ILR) p.155

Waiver of Immunity connotes the willing submission of a foreign Sovereign or Sovereign representative to the Jurisdiction of the Courts in another State. Immunity belongs to the state and not to the Individual beneficiary, therefore it is only the state and not to the Individual beneficiary, hence it is only the State that has the capacity to waive the Immunity.

In a Memorandum entitled: Department of State guidance for Law enforcement officers with regard to personal rights and Immunities of foreign Diplomatic and consular personnel, the point was made that waiver of Immunity does not belong to the Individual concerned, but is for the benefit of the sending state. The issue of waiver is provided for in Article 32 of the Vienna Convention on diplomatic Immunities.

5. SIGNIFICANCE AND IMPORTANCE OF DIPLOMATIC AGENTS

The opinion of Oppenheim and other Western jurists that international law originated in Europe and its credit goes to the Western civilization is not correct. The study of the original text books of Ramayana and Mahabharata prove that the contention of western jurists is false. In his view, during the period of Ramayana and Mahabharata some aspects of international law were in an advanced stage.[145] The permanent appointment of diplomatic envoys began from the 17th century. The rights, duties, immunities and privileges etc., of the diplomatic agents which began in 18th and 19th centuries were mostly in the form of customary rules of international law.

The first landmark event, therefore, was the Congress of Vienna, 1815 wherein the customary law relating to diplomatic agents was clarified and codified. After 1815 also, the law relating to diplomatic agents was in the process of development and eventually a Convention was adopted in April 1961.[146] This convention is known as the Vienna Convention on Diplomatic Relations. Along with this convention an optional Protocol relating to compulsory settlement of disputes was signed in April 1961. The Protocol provided that disputes arising out of interpretation and application of the provisions of the convention shall be referred to the compulsory jurisdiction of the International Court of Justice.

5.1. CLASSIFICATION OF DIPLOMATIC AGENTS

[145]E. Denza, *Diplomatic Law*, 3rd edn, Oxford, 2008

[146]B. Sen, *A Diplomat's Handbook of International Law and Practice*, 3rd edn, The Hague, 1988

The diplomatic agents have been categorized in accordance with their status and functions. The first classification of diplomatic agents was made in the Congress of Vienna, 1815. The Congress of Vienna, classified the diplomatic agents as follows:[147]

- *Firstly*, Ambassadors and legates;
- *Secondly*, Ministers Plenipotentiary and Envoys extraordinary; and
- Thirdly, Charge-d'affaires.

In the Vienna Congress fourth category of diplomatic agents namely Ministers Resident was added and kept in the third place in order of priority, but was dropped by the 1961 Convention on Diplomatic Relations. Thus, at present, the classification of diplomatic envoys is as follows:[148]

5.1.1. AMBASSADORS, HIGH COMMISSIONERS AND LEGATES

They are diplomatic agents of the first category. They are the representatives of the completely sovereign states. They are either appointed as Ambassadors or Permanent Representatives of their countries in the United Nations.[149] The representatives appointed by the commonwealth countries are known as High Commissioners and when appointed by the Pope are known as Legates.

5.1.2. MINISTERS PLENIPOTENTIARY AND ENVOYS EXTRAORDINARY

They are diplomatic agents of the second category and as compared to the diplomatic agents of the first category; they enjoy less privileges and immunities.[150]

5.1.3. CHARGE-D' AFFAIRES

[147] Ibid, p.55

[148] Ibid, p.66

[149] J. Brown, 'Diplomatic Immunity: State Practice under the Vienna Convention on Diplomatic Relations', 37 ICLQ, 1988, p. 53

[150] Ibid, p.45

They are diplomatic agents of the last category. The main reason for this is that they are not appointed by the head of the State. But they are appointed by the Foreign Ministers of States.[151] In rights and status they are considered below the Minister resident.

FUNCTIONS OF DIPLOMATIC AGENTS

According to Article 3 of the Vienna Convention on Diplomatic Relations, the functions of a diplomatic mission consist of the following:

- Representing the sending State in the receiving State;
- Protecting in the receiving State the interests of the sending State and its nationals, within the limits permitted by international law;
- Negotiating with the government of the receiving State;
- Ascertainment by lawful means and conditions and developments in the receiving State; and
- Reporting thereon to the government of the sending State;
- Promoting friendly relations between the sending State in the receiving State, and developing their economic, cultural and scientific relations.

6. THE BASIS OF IMMUNITIES AND PRIVILEGES

Before discussing the immunities and privileges of the diplomatic agents, it will be necessary and desirable to know as to what is the basis of these immunities and privileges. To put it more precisely, the question as to why diplomatic agents are given certain immunities and privileges?

There are two theories prevalent in this connection, the first one is Theory of Extraterritoriality and *secondly*, Functional Theory.[152]

Theory of Extraterritoriality:

According to this theory, the diplomatic agents enjoy immunities and privileges because they are deemed to be outside the jurisdiction of the State in which they are appointed.

[151] Ibid, p.88

[152] Ibid, p.95

Functional Theory:

In fact, the true basis of the immunities and privileges enjoyed by the diplomatic agents is not the theory of extraterritoriality but the special functions which these agents perform.

That is diplomatic agents are given certain immunities and privileges due to the special functions which they perform. It is thought necessary and expedient to grant these immunities and privileges to them, otherwise they would be greatly hampered in the performance of their functions.

7. IMMUNITIES AND PRIVILEGES

Inviolability of the Person of envoys:

It is a well recognised principle of international law that the person of envoys is regarded inviolable. It may be noted here that international law relating to inviolability of the persons of envoys was recognised in India from very ancient times.[153] In the Ramayana this very principle-the inviolability of person of the envoy is affirmed and enforced on several occasions-sometimes even against the wishes of the sovereign who in a fit of anger wanted to slay the envoy for having delivered a rude ultimatum on behalf of his sovereign."[154] In this connection the example of Lord Hanuman who was sent as a messenger to the court of Ravana may be cited. On the basis of inviolability of person of envoys, diplomatic agents cannot be arrested for debts et cetera. If a diplomatic agent is attacked and insulted, it is considered to be an attack on and an insult to the sovereign of the state whose representative he is.

On this basis, all cases against him are invalidated. In the present period this immunity has been incorporated in Article 29 of the Vienna Convention on the Diplomatic Relations.

Immunity from criminal jurisdiction

The diplomatic agents also enjoy immunities from criminal jurisdiction of courts. However, it is generally understood that they will not violate the provisions of the law of the State where they are appointed. Apart from this it must be noted that there are conditions under

[153]C. E. Wilson, *Diplomatic Privileges and Immunities*, Tucson, 1967

[154] Ibid, p.61

which the diplomatic agents may lose their immunities.[155] For example, they will lose the immunity if they are guilty of conspiracy against the head of the State.

Immunity from civil jurisdiction

The diplomatic agents enjoy immunities from the jurisdiction of civil courts. Suits for recovery of debt or breach of contract cannot be filed against diplomatic agents. However, there are certain exceptions to this rule. Article 31 of the Vienna Convention which recognizes this immunity also provides three exceptions.[156]

- *Firstly*, An action relating to private immovable property situated in the territory of the receiving State unless he holds it on behalf of the sending State for the purposes of the mission;
- *Secondly*, an action relating to succession in which the diplomatic agent is involved as executor, administrator or legatee or as a private person and not on behalf of the sending State; and
- *Thirdly*, an action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State which is outside his official functions.

Immunity of residence

Yet another immunity enjoyed by the diplomatic agents is regarding the residence. the residences are regarded inviolable. This immunity has been reaffirmed by the International Court of Justice in the Case concerning the **United States Diplomatic and Consular Staff in Tehran**[157] if a person is wanted by police and he's not enjoying any immunity from arrest, then the proper course is that, the diplomatic agents should hand over such a person to the police. Ordinarily, the diplomatic agents resort to such behaviour.

Immunity from being presented as witness

[155] Ibid, p.72

[156] Ibid, p.78

[157] (I.C.J. Reports (1980) page.3)

Diplomatic agents enjoy immunity from being presented as a witness in a court of law. They cannot be compelled to come to the court and give evidence in a case whatsoever the case may be. But if any diplomatic agent himself waives this immunity then he may personally present himself and give evidence, then he will be subject to the jurisdiction of the court for it will be deemed that he had waived his immunity in this regard.[158]

Immunity from taxes and dues

Under international law the diplomatic agents are immune from payment of taxes, etc. These immunities are incorporated in articles 34 and 36 of the Vienna Convention on Diplomatic Relations. Article 34 provides that a diplomatic agent shall be exempt from all dues and taxes, personal or real, national, regional or municipal, except:[159]

a) Indirect taxes which are normally incorporated in the price of goods and services;

b) Reducing taxes on private immovable property situated in the territory of the receiving State, unless he holds it on behalf of the sending State for the purposes of the mission;

c) A State succession or inheritance duties levied by the receiving State, subject to the provisions of paragraph 4 of Article 39;

d) Reducing taxes on private income having its source in the receiving state and capital taxes on investments made in commercial undertakings in the receiving State;

e) Charges levied for specific services rendered, registration, court or record fees, mortgage dues and stamp duty, with respect to immovable property, subject to the provisions of Article 23.

Immunity from police rules

[158] Ibid, p.82

[159]J. C. Barker, *The Abuse of Diplomatic Privileges and Immunities*, Aldershot, 1996

The diplomatic agents are immune from the police rules of the States in which they are appointed. However, by courtesy and for the sake of good relations with the receiving State they generally follow such rules.[160]

Right to worship

The diplomatic agents enjoy the right to worship and no interference can be made in this respect. They are free to follow any religion or perform the religious rituals, ceremonies, etc. in their own way.

Right to exercise control and jurisdiction over their officers and families

The diplomatic agents have right to exercise control and jurisdiction over their officers and families.

Right to travel freely in territory of the receiving State

This new right was, for the first time introduced in Article 26 of the Vienna Convention on Diplomatic Relations. Article 26 provides that diplomatic agents can travel anywhere in the territory of the receiving State subject to the condition that they cannot go to prohibited places or places which are important from the point of view of the security of the receiving State.

Freedom of communication for official purpose

The freedom has been conferred upon by Article 27 of the Vienna Convention on the Diplomatic Relations. This Article provides that they have freedom to communicate with the home-State in connection with their functions and duties.

Immunity from local and military obligations

Diplomatic agents are also exempt from local and military obligations. This provision has been incorporated in Article 35 of the Vienna Convention.

Immunity from inspection of personal baggage

[160] Ibid, p.54

Article 36(2) of the Vienna Convention provides that the personal baggage of a diplomatic agent should be exempt from inspection, unless there are serious grounds for presuming that it contains articles not covered by the exemptions mentioned in paragraph 1 of this Article, or Articles the import of which is prohibited by the law or controlled by the quarantine regulations of the receiving State.

State inspection shall be conducted only in the presence of the diplomatic agent or his authorized agent.

Immunity from Social Security Provisions

According to Article 33, a diplomatic agent shall with respect to services rendered for the sending State be exempt from Social Security provisions which may be in force in the receiving State.

8. DUTIES OF DIPLOMATIC AGENTS

1) **Duty to respect laws and regulations**

   According to paragraph 1 of Article 41 of Vienna Convention on Diplomatic Relations, without prejudice to the privileges and immunities, it is the duty of all persons enjoying such privileges and immunities to respect the laws and regulations of the receiving State.

2) **Duty not to interfere in Internal Affairs**

   They have a duty not to interfere in the internal affairs of that State.

3) **Official business to be conducted only through the Ministry of foreign affairs of receiving State**

   All official business with the receiving state entrusted to the mission by the sending State shall be conducted with or through the Ministry of foreign affairs of the receiving State or such ministry as may be agreed.

4) **Premises of Mission not to be used in any manner inconsistent with the Mission**

   Article 41, paragraph 3 provides that the premises of the mission must not be used in any manner incompatible with the functions of the mission as laid down in the Vienna Convention or by the rules of general international law or by special agreements in force between the sending and the receiving State.

5) Diplomatic agent not to establish office of profit

According to article 42 of the Vienna Convention, a diplomatic agent shall not in the receiving State practice for personal profit or pursue any professional or commercial activity.

MODULE 09 LAW OF STATE RESPONSIBILITY

1. INTRODUCTION

In international law, responsibility is the corollary of obligation; every breach by a subject of international law of its international obligations entails its international responsibility. The law of State responsibility concerns the breach by a State of one or more of its international obligations. The law of State responsibility defines when an international obligation is to be held to have been breached, as well as the consequences of that breach, including which States are entitled to react, and the permissible means of that reaction.

International law does not concern itself with the source of the obligation that is breached; in principle (and unless otherwise specifically provided) the same rules apply to the breach of an obligation whether the source of the obligation is a treaty, customary international law, a unilateral declaration, or the judgment of an international court.

2. NATURE AND BASIS OF STATE RESPONSIBILITY

The doctrine of state responsibility is one of the core tenets of international law. Legally speaking state responsibility is 'simply the principle which establishes an obligation to make good any violation of international law producing injury'. State responsibility arises out of the legal maxim stated by Grotius in 1646 that 'every fault creates the obligation to make good the losses'.[161]

As states are the conventional subjects of international law, technically the principle of state responsibility applies only on the state-to-state level

VIOLATION OF INTERNATIONAL LAW

In order to establish the existence of a violation of International law, it is necessary to establish, firstly, that there is a specific behavior consisting in action or inaction, that may, according to international law, be imputed to a given state, and secondly that such behavior constitutes a violation of that states in international obligations.[162] As a rule, responsibility arises

[161] J. Crawford, The International Law Commission's Articles on State Responsibility, Cambridge, 2002

[162] C. Eagleton, The Responsibility of States in International Law, New York, 1928

when actions by the state violating the law cause material or non-material damage to the legitimate interests of another state.

However, in the case of violations that are especially dangerous, responsibility may arise on the grounds that the damage affects the international community as a whole. Liability arises only when there is a direct causal relation between the damage that is experienced and the illegitimate behavior of a given state

STATES MAY PERFORM ACTIONS OR FAIL TO ACT ONLY THROUGH NATURAL PERSONS

In 1947 the International Military Tribunal at Nuremberg stated that "crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced" [163]A state can be liable only on the grounds of the behavior of persons possessing specific legal relations with that state, in those who are its organs or officials. Thus the term "liability" is employed in international practice to denote a specific relationship between a persons or a group of persons that commit a certain action or inaction, on the one hand, and the state that is responsible for their activities, on the other.[164] This means that, from the point of view of international law, they must be viewed as activities, on the other. This means that, from the point of view of international law, they must be viewed as activities of that state.

THE POSITION OF CORRESPONDING STATE BODIES

The position of corresponding state bodies within that states organizational structure does not pay a substantial role in the emergence of the state 's international legal responsibility. The actions of legislative bodies leading to international responsibility include primarily the adoption of laws or any other normative acts that contradict the state's international obligations.[165] In such cases it becomes liable immediately upon the promulgation of the law.

[163]Nuremberg trial

[164] I. Brownlie, System of the Law of Nations: State Responsibility, Part I, Oxford, 1983

[165] Bin Cheng, General Principles of Law as Applied by International Courts and Tribunals, London, 1953

The failure to pass a law needed to carry out an international obligation gives rise to international liability only when there have been unlawful acts resulting from the failure to pass such laws[166]

The state is also subject to international legal responsibility for actions by its executive organs (ranging from the government itself to representatives of lower levels of the executive power), these bodies account for the majority of violations, there have been numerous instances of diplomats of imperialist states committing a variety of hostile acts against host countries, including direct violations of their laws, helping to organize conspiracies and coups d'etat, engaging in an espionage etc.,

A state's international obligations may also be violated by the actions or failures to act of national courts since them, too, are organs of the state. The principle of the independence of the juridical power does not preclude the state responsibility, for this principle refers to the independence of courts in relation to governments, not to states.

The first, and clearest, case of attribution is that of the organs of the State (e.g., police officers, the army) whose acts are attributable to the State even in instances where they contravene their instructions, or exceed their authority as a matter of national law.[167] No distinction is made based on the level of the particular organ in the organizational hierarchy of the State; State responsibility can arise from the actions of a local policeman, just as it can from the actions of the highest officials, for instance a head of state or a foreign minister.[168] Nor is any distinction made upon the basis of the separation of powers; State responsibility may arise from acts or omissions of the legislature and the judiciary, although by the nature of things it is more common that an internationally wrongful act is the consequence of an act or acts of the executive.

ORGANS OR OFFICIAL PERSONS ACTING OUTSIDE THEIR FORMAL COMPETENCE,

State responsibility also arises for actions by its organs or official persons committed outside their formal competence, i.e. if they have exceeded their powers or violated instructions.

[166] G.I. Tunkin, International Law, (1986), p. 225

[167] Deng F, Sovereignty, Responsibility and Accountability ,(1995), p.5

[168] Ibid, p.22

Acts by an official person who uses his official position or service equipment to harm a foreign state or its citizens are viewed as actions by the state itself, for which it is held responsible.

ACTS COMMITTED ON ITS TERRITORY BY PRIVATE PERSONS

A state's responsibility may arise as a result of acts committed on its territory by private persons (its own citizens or foreigners) and their organizations. States are not responsible for the actions of private individuals, but for the behavior of their organs in failing to prevent such action or to punish the guilty parties, as they are obliged under the law. This is especially serious in the case of such acts by private individuals as international terrorism, war propaganda, racial discrimination and genocide.[169]

It is generally recognized in international relations that a state cannot avoid international responsibility by referring to its domestic law, i.e. by arguing that its organs acted in full compliance with the prescriptions of domestic law. A state's responsibility under international law relates exclusively to inter-state relations, and a state is responsible for the non-fulfillment of its international obligation independently of legislative acts relating to its domestic law

RESPONSIBILITY OF A STATE ARISES FROM ACTIONS BY ORGANS OF OTHER STATES

It has already been noted earlier that, in principle, as a subject of international law, the state bears international legal responsibility only for its own actions, i.e. those of its own organs. This also applies to cases in which the responsibility of a state arises from actions by organs of other states that contradict international law and are initiated on its territory, or else from its territory against third states.[170]

Two categories of such actions should be distinguished, namely, actions by another state carried out on the territory of the given state within its consent, and actions performed without its consent.

If actions of another state, directed against a third state and violating international law, are conducted on the territory or from the territory of the given state with its consent it becomes a

[169] Ibid, p.28

[170] Ibid, p.32

party to the foreign states unlawful actions. This consent may be either adhoc or general. This issue often arises when there are imperialist military bases on the territory of another state. The state on whose territory there exist foreign military bases which are used for unlawful activities, in relation to a third state is an accomplice in such actions and bears responsibility for them since they are conducted with its consent, expressed in the agreement on the establishment of these bases.[171]

When, on the other hand, illegitimate actions by a foreign state directed against a third state are conducted on the territory or else from the territory of a given state without its clearly expressed or tacit consent, then it is responsible for such activities only if it organs have not shown' due diligence in taking measures to end such activities by foreign states. When a state permits on its territory activities by a foreign state that are, by their very nature, directed against another state the problem of due diligence' does not arise, and such a state is responsible as an accomplice for any illegitimate activities by the foreign state initiated on its territory or else from its territory against a third state

3. ELEMENTS OF STATE RESPONSIBILITY

State responsibility is mainly founded on three key elements:[172]

- The existence of an international legal obligation
- The omission of an act or occurrence of a wrongful act in its violation
- Loss or damage must result from such a wrongful act or omission.

ATTRIBUTABLE TO A STATE

A State is international responsible when it has performed an internationally wrongful act, meaning conduct consisting of an action or omission that is attributable to a State under international law and that constitutes a breach of the international obligation of the State.[173] In some cases, a State's actions may be justified because of circumstances precluding wrongfulness.

[171][171] Ibid, p.39

[172] Ian Brownlie, System of the Law of Nations – State Responsibility, Part I (1983), p. 35

[173] C. Eagleton, The Responsibility of States in International Law, New York, 1928

Examples of such circumstances are consent, self-defence, force majeure, distress and necessity. This is for the respondent State to assert and prove.[174]

The rules of attribution specify the actors whose conduct may engage the responsibility of the State. A State will generally only be liable for its conduct of its organs or officials acting as such.[175] Acts of private persons will usually not lead to State responsibility. However, a State may be liable for its failure to prevent such acts, or to take action to punish the individuals responsible.[176] The acts of mobs or private individuals may also be attributable to the State if the State had authorized or controlled the acts,[177] or if and to the extent that the State acknowledges and adopts the conduct in question as its own.[178]

BREACH OF A LEGAL DUTY

There must as well be a breach of a legal duty in order for international responsibility to incur. It does not matter if it is a treaty obligation or customary international law or any other obligation owed under international law. Neither does the kind of conduct matter. Lysén exemplifies that State conduct might be comprised of "positive acts, omissions, failure to achieve a certain result, or failure to meet a standard of due care, or diligent control or pure lack of vigilance that is lawful according to the national law of that State"[179]

4. STATE RESPONSIBILITY IN DIFFERENT FIELDS

4.1.INTERNATIONAL DELINQUENCY

Is any injury to another state committed by the head or government of a state in violation of an international legal duty. It is equivalent with the act of officials or other individuals commanded or authorised by the head.It rages from ordinary breaches of treaty obligations,

[174] ILC's Draft Articles on Responsibility of States for Internationally Wrongful Acts, Article 1

[175] Ibid., Article 4.

[176] Crawford, and Olleson, p. 455. For example, in the Tehran Hostage Case, Iran was held to have breached its special obligation of protection of the US embassy, even before the students occupied the embassy. ICJ Reports 1980, p. 32, paragraph 63

[177] ILC's Draft Articles on Responsibility of States for Internationally Wrongful Acts, Article 8

[178] Ibid., Article 11. An example of this is the Tehran Hostage Case where the students' acts were translated into acts of Iran subsequent a decree of Ayatollah Khomeini. ICJ Reports 1980, pp. 35-6, paragraphs 73-4

[179] Ibid, p.55

involving not more than pecuniary compensation to violations of international law amounting to a criminal act in the generally, accepted term.[180]

According to starke, international delinquency is a wrongful act committed by a state which is not a breach of a purely contractual obligation. It is wrongful act committed by an official or organ of the state concerned which may be imputed or attributed to the state.[181]

4.2.IN1URY TO ALIEN

State is under obligation to protect rights of aliens in the same way as they protect the rights of their citizens. State responsibilities towards aliens may be of following types.[182]

4.2.1. FOR ACTS OF PRIVATE INDIVIDUALS

State in under duty to exercise due diligence to prevent its own sub1ects as well as foreign sub1ects who live within its territory from committing injurious acts against other states. State responsibility for official acts of administrative officials and members of armed forces is extensive,[183]

Responsibility for private persons is limited because in practice it is impossible for a state to prevent a private person from committing in1urious act against a foreign state.

The duty of state is simply to exercise due diligence and where in1urious acts have nevertheless been committed, to procure satisfaction and reparation for the wrongful act, as far as possible, by punishing the offenders and compelling them to pay compensation if necessary. Acts of private individuals are attributable to the State if those individuals are acting on the instructions of the State, or under its effective direction or control[184]. Fourth, in exceptional circumstances in which there is an absence or default of governmental authority, the acts of private individuals may be attributable to the State if those individuals, in effect, step into the breach and perform necessary governmental functions.[185]

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[180] Ibid, p.112

[181] Ibid, p.122

[182]International Law of State Responsibility for Injuries to Aliens (ed. R. B. Lillich), Charlottesville, 1983

[183] Ibid, p.36

[184] Ibid, p.45

[185] Ibid, p.65

With regard to certain obligations, a State may incur responsibility even though actions have been carried out by private individuals, because the essence of the obligation was to ensure that a given result occurred. For instance, if a foreign embassy is overrun by a mob, or harm is done to diplomatic staff by private individuals, as occurred with the U.S. embassy in Tehran during the Iranian revolution of 1979 to 1980, a State may incur responsibility, even if those individuals act on their own initiative.

Equally, under Article V of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, the obligation of a State to punish those responsible for genocide earlier on related to genocide may be breached in instances in which a State fails to punish any person responsible for the genocide, "whether they are constitutionally responsible rulers, public officials, or private individuals."[186] There is probably a similar rule in general international law in relation to crimes against humanity. In both cases, the basis of responsibility here is not the attribution to the State of the acts of the individuals; it is the failure by the State as an entity to comply with the obligations of prevention and prosecution incumbent on it.

4.2.2. FOR ACTS OF MOB VIOLENCE

Same as for acts of private individuals, generally state may be held responsible for mob violence only when it had not made due diligence to prevent it. United states diplomatic and consular staff in Tehran reports Rioters and other militants attacked and occupied us diplomatic and consular premises in Iran They also seized the occupants and held them as hostages.[187]

Since the rioters and militants were persons without official status in the initial stages their acts could not be imputed to the state, the IC1 held Iran not responsible for the initial stages of their acts. But subsequently the situation changed when the militants became agents of the state and hence Iran was held responsible for their acts The Israel government was held responsible to pay compensation.

[186] R. B. Lillich, 'Duties of States Regarding the Civil Rights of Aliens', 161 HR, 1978, p. 329

[187]United Nations Codification of State Responsibility (eds.M. Spinedi and B. Simma), New York, 1987

4.2.3. FOR ACTS OF INSURGENTS

The state is not responsible for acts of the insurgents, but is only obliged to exercise due diligence to prevent or immediately crush the insurrection, and to punish those responsible for in1uries to foreigners.[188]

A somewhat anomalous instance of attribution is that covered by Article 10. As was noted above, in the normal course of events, a State is not responsible for the acts of private individuals; a fortiori, it is not responsible for the acts of insurrectional movements, because, by definition, an insurrectional group acts in opposition to the established state structures and its organization is distinct from the government of the State to which it is opposed. However, Article 10(1) provides that "the conduct of an insurrectional movement which becomes the new government of a State shall be considered an act of that State under international law."

Article 10(2) provides for a similar rule with respect to an insurrectional movement that succeeds in establishing a new State within the territory of a pre-existing State. The effect of the rule is to attribute retrospectively the conduct of the movement in question to the State. In the case of a successful insurrectional movement, the acts of the movement are attributed to the State as if the movement had been the government at the time of its acts, even though, if the insurrection had failed, no attribution would be possible. In the case of the establishment of a new State, the effect is even more drastic because acts are attributed to the State retrospectively to a time when it did not yet definitively exist.

Except in this case, there is no established machinery for attributing collective responsibility (e.g., for war crimes, genocide, or crimes against humanity) to an armed opposition group. In such circumstances individual responsibility is the only possibility at the international level of ensuring a degree of responsibility for criminal acts.

5. THEORIES OF STATE RESPONSIBILITY

There exist various theses about international responsibility of States; most of them concern responsibility of some kind for a wrongful act and one is about liability without a wrongful act. Thus, there is a difference between the terms *responsibility* and *liability* in contemporary international law. By *responsibility*, it is usually meant the consequences arising

[188] Ibid, p.211

from the breach of an international obligation while *liability* means the duty to compensate damage in the absence of a violation of international law.

5.1. FAULT OR SUBJECTIVE THEORY

Fault responsibility (or subjective responsibility) mostly refers to the intention (dolus) or negligence (culpa) of the actor. State is not responsible to another state for unlawful acts committed by its agents unless such acts are committed willfully and maliciously or with culpable negligence.[189] The necessary measures have thus not been taken to avoid the injurious event .

In situations where acts of private persons result in damage and the acts are not attributable to the State, the State may still be responsible because of failure to control. In the ***Corfu Channel Case***[190]**,**where Albania was held responsible since it must have known that the mines had been recently laid and even so failed to warn the British warships passing through the strait of the imminent danger, the court said that:

It is clear that knowledge of the mine laying cannot be imputed to the Albanian Government by reason merely of the fact that a minefield discovered in Albanian territorial waters caused the explosions of which the British warships were the victims It cannot be concluded from the mere fact of the control exercised by a State over its territory and waters that that State necessarily knew, or ought to have known, of any unlawful act perpetrated therein, nor yet that it necessarily knew, or should have known, the authors. This fact, by itself and apart from other circumstances, neither involves *prima facie* responsibility nor shifts the burden of proof.

5.2. RISK OR OBJECTIVE THEORY

This theory is based on the premise that a state must be liable once an unlawful act which violates a clear international obligation is done, notwithstanding the intention of the official involved or any fault. "[191] the doctrine of the "objective responsibility" of the state, that is the responsibility for the acts of the officials or organs of a state …may devolve upon it even in the

[189] Ian Brownlie, System of the Law of Nations – State Responsibility, Part I (1983), p. 55

[190] ICJ Reports 1949

[191] Ian Brownlie, Principles of Public International Law, (5th Ed. 1998), p. 281

absence of any "fault" of its own … The state also bears an international responsibility for all acts committed by its officials or its organs which are delictual according to international law, regardless of whether the official organ has acted within the limits of its competence or has exceeded those limits …

However, in order to justify the admission of this objective responsibility of the state for acts committed by its officials or organs outside their competence, it is necessary that they should have acted, at least apparently, as authorised officials or organs, or that, in acting, they should have used powers or measures appropriate to their official character".[192]

5.3. ABSOLUTE LIABILITY

Lastly, alongside the various theories of responsibility for a wrongful act, there is also the regime of liability without a wrongful act. Here, the causal link between the activity and the damage done leads to the obligation to pay compensation, or liability, even though the damage occurred from a lawful activity.[193] It has often been for practical reasons, because of scientific and technological developments,[194] that international liability has advanced. The developments have lead to activities that are beneficial to society, but that also involve a certain degree of risk of causing harm. Examples of such activities are the transportation of oil, the production of nuclear energy and operations in outer space.[195]

This has resulted in several treaties regulating these activities contain special liability rules.[196] Most treaties containing rules on liability concerns civil liability, meaning that the operator or owner of a certain activity is obliged to pay compensation for damage resulting from the activity. The liability regarding an accident is restricted to an insurable sum of money and the national courts are the forum for a proceeding.

The point is that victims should be appropriately compensated and status quo be restored. A few conventions have assumed international liability.46 Since the State parties are not too fond of such solution they instead prefer definite standards to be met by the State parties and/or

[192] Ibid, p.286

[193] Ibid, p.289

[194] Ibid, p.292

[195] Ibid, p.296

[196] R.Ago, Eight Report on State Responsibility, Circumstances Precluding Wrongfulness, (U.N. Doc. A/CN. 4.318/Add. 1-7); Reports of the ILC on the work of its XXXI and XXXII Sessions, New York, 1979 and 1980 (U.N.Doc.A/34/10, pp. 239-69 and U.N.Doc. A/35/10, pp.59-135)

creating civil liability regimes.[197] Conclusively, there is not a very large amount of treaties containing liability, and liability is neither common in customary international law.[198]

5.4. ECLECTIC THEORIES OF RESPONSIBILITY

There are also eclectic theories of responsibility that are a compromise between the fault theory and the theory of objective responsibility. This idea concerns the objective and relative responsibility together with a special regime for the particular rules containing the duty of diligence. There are various opinions about this theory. One group of authors claim that it is the interpreter alone, who shall estimate if the wrongful act requires fault.[199]

Swarzenberger believes "the judge's discretion, reasonableness and equity are the guide for seeing whether, in each specific case, in order to have a wrongful act, an additional element to the breach of an international obligation must be required". Subjective fault sometimes may be considered, especially "when the international obligation is defined in terms of goals and when the lawfulness of the State conduct is to be judged by reference to given standards of diligence.[200] Some authors are instead more careful about distinguishing between cases adhering to fault responsibility and those subject to the principle of objective responsibility.

In order to do so, they differentiate among groups of wrongful acts and sometimes among groups of norms or of international obligations. Brownlie has argued that objective responsibility is the main rule, but that fault may come into play when a State is obliged by international law to exercise control, accordingly standards of due diligence, over specific activities in order not to cause harm.[201]

Thus, it is the content of the international norm in question, which settles whether fault is relevant Because of the lack of consensus among the authors, it is therefore doubtful whether the eclectic theories can be considered to be a theory of the same significance as the theories of objective responsibility and of fault responsibility.

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[197] Ibid, p.67

[198] Ibid, p.73

[199] Report of the International Law Commission on the work of its 25th session, 1973, Paragraph 58, in notes on Draft Article 3 on State Responsibility, referring to this case of negligence Rebecca. M.M. Wallace, International Law; (2nd Ed.1993), p. 169

[200] Ibid p. 172

[201] Ibid p. 178

6. SIGNIFICANCE OF DOCTRINE OF CULPA

Culpa can be explained as the actor's attitude of will, blameworthy because of reasonable foreseeability or recklessness. The necessary measures have thus not been taken to avoid the injurious event. In situations where acts of private persons result in damage and the acts are not attributable to the State, the State may still be responsible because of failure to control.[202] Standards of due diligence may be considered to determine the possible fault of a State. The claimant State then has to prove, in addition to the breach of the international obligation, the wilful or negligent conduct of the organs of the respondent State of the wrongful act.[203]

Fault responsibility (or subjective responsibility)[204] mostly refers to the intention (dolus) or negligence (culpa) of the actor. Dolus means that the actor behaves in a certain way with the intention to cause harm. Dolus can be helpful in solving the problem of attributability and determining the breach of duty as well as having effect on the remoteness of damage.

Noteworthy is that even in case of an ultra vires act of a State organ performed with dolus and, independent of whether the act is permitted by law or not, the responsibility of the State is not affected.[205]

7. DEFENSES PRECLUDING STATE RESPONSIBILITY

Certain circumstances may serve to preclude the wrongfulness of a breach of international law by a State, in much the same way that defenses and excuses work in national criminal law. In international law these are termed "circumstances precluding wrongfulness"[206]

CONSENT

For a state to successfully plead this defense there must be existence of a valid consent. It must be shown that the state that breached its responsibility was within the scope of that consent.

COUNTERMEASURES

[202] Ibid p. 182

[203] Ibid p. 185

[204] Ibid p. 189

[205] Ibid p. 194

[206] Supra Note 39, p. 122-143

The International Law Commission Articles recognize the fact that states are entitled to resort to countermeasures. Countermeasures MUST NOT be forcible. Non-forcible anticipatory countermeasures are unlawful. This is because countermeasures constitute a response to an unlawful act. Countermeasures are temporary, reversible steps aimed at inducing the wrongdoing state to comply with its obligations under international law.

FORCE MAJEURE

Article 23 of the ICL Articles defines force majeure as 'the occurrence of an irresistible force or of an unforeseen event, beyond the control of the state, making it materially impossible in the circumstances to perform the obligation'. However, paragraph 2 of art 23 excludes a defence based on force majeure:

a) situation of force majeure is due, either alone or in combination with other factors, to the conduct of the state invoking it; or
b) The state has assumed the risk of that situation occurring. Force majeure was pleaded by Albania in the **Corfu Channel Case (1949) ICJ.**

The ICJ rejected the defence on the ground that Albania did not show that it was an absolute impossibility to notify the existence of a minefield in its territorial waters to the UK warships

NECESSITY

1. There must be exceptional circumstances of extreme urgency,
2. The status quo ante must be re-established as soon as possible and
3. The state concerned must act in good faith. Article 25 of the International Law Commission Articles defines the conditions for invoking a defence based on necessity.

DISTRESS

Article 24 of the ILC Articles provides that the situation of distress occurs when 'the author of the act in question has no other reasonable way, in a situation of distress, of saving the

author's life or the lives of other persons entrusted to the author's care'. Under art 24 it provides that distress cannot be invoked if:

- The situation of distress is due, either alone or in combination with other factors, to the conduct of the state invoking it;or
- The act in question is likely to create a comparable or greater peril.
  In a situation of distress there is always a choice

1. To respect an international obligation
2. To sacrifice one's life or the lives of others who are in one's care

To illustrate a situation of distress, the International Law Commission gave an example of the unauthorized entry of an aircraft into a foreign territory to save the life of a passenger or passengers.

SELF-DEFENCE

Self-defence as defined in international law, especially under art 51 of the Charter of the United Nations and in customary international law, will preclude the wrongfulness of the conduct concerned.

In customary international law, under the principles established in the **Caroline Case: USA v UK (1837),** a pre-emptive strike was a perfectly lawful means of anticipatory self-defence in the face of a threat of force; indeed, it was the only possible means of defence against such threats as they could only be countered by an attack to pre-empt the harm that they would otherwise cause.

MODULE 10 LAW OF TREATIES

1. INTRODUCION

In the modern day period international treaties have become the first and foremost source of international law pushing custom to the second position. The reason being that after the Second World War, the States felt that they should sign a large number of treaties to lend support to the newly established United Nations Organization. Therefore modern international law comprises of treaty rules or positive rules of international law. The significance of treaties is evident from the fact that whenever the International Court of Justice has to decide an international dispute, its first endeavor would be to find out whether there is any international treaty or convention on the point in dispute. In case there is an international treaty governing the matter under dispute, the decision of the court is based on the provisions of that treaty or convention.[207]

2. MEANING AND DEFINITION OF A TREATY

In the view of Prof Oppenheim, *"International treaties are agreements of a contractual character between States or Organisations of States creating legal rights and duties".*[208]
According to Starke, *"In nearly all the cases the object of the treaty is to impose binding obligations on the States who are parties to it. The term "treaty" has also been defined in the*[209] *Vienna Convention on the Law of treaties, 1969. Article 2 (1)(a) of the Convention defines treaty as an international agreement concluded between States in written form and governed by international law."*[210]

The basis for the binding force of International treaties is the concept of *Pacta Sunt Servanda*. There is a great controversy among the jurists with regard to the binding force ofan international treaty. In the view of Italian jurist, Anzilotti, the binding force of aninternational

[207] Oppenheim's, International Law, (9th Ed. 1992) p.55

[208] A. D.McNair, *The Law of Treaties*, Oxford, 1961, pp. 81–97

[209] Ibid, p.111

[210] Ibid, p.116

treaty is because of the fundamental principle known as *Pacta Sunt Servanda* the meaning of which is "obligations must be kept in good faith".[211]

In view of the significance of the Law of the treaties, the International Law Commission decided in 1945 to attempt its codification by preparing a Draft Convention on the Law of the Treaties. The commission completed its work in 1966. On 23rd May, 1969, the United Nations Conference on the Law of Treaties adopted the Vienna Convention on the Law of the Treaties.[212]

3. TYPES OF TREATIES

McNair has classified the treaties under the following categories: (1) Treaties having the character of conveyances;[213]

(2) Treaty contracts;

(3) Lawmaking treaties; and

(4) Other treaties, such as the Treaty of Universal Postal Union.

4. PARTIES TO TREATY

Generally speaking, only sovereign States are competent to sign a treaty. In accordance with the principle of sovereignty, sovereign States have unlimited powers to sign treaties. Those States which are not completely sovereign are not competent to sign it. Mostly the representatives of the sovereign States initially sign the treaties but the treaties that are signed do not bind the governments or States until such treaties are ratified.[214]

Various modes by which a State may express its consent to be bound by a treaty may be expressed in the following means:[215]

1. By Signature

The consent of the State to be bound by a treaty is expressed when its representative puts his signature on the text of the treaty and when:[216]

- the treaty provides that signature shall have that effect;

[211]Ibid, p.122

[212] Ibid, p.132

[213]A. Aust, *Modern Treaty Law and Practice*, 2nd edn, Cambridge, 2007, chapter 10

[214] Ibid, p.65

[215] Ibid, p.76

- it is otherwise established that the negotiating States have agreed that signature should have that effect; or
- the intention of the State to give that effect to the signature appears from the full powers of its representative or was expressed during the negotiation.

2. **By an exchange of instruments consisting of the text of the treaty**:

The consent of States to be bound by a treaty may also be expressed by an exchange of instruments constituting the text of the treaty between them when:

- the instruments provide that the exchange shall have that affect;
- it is otherwise established that the States have agreed that the exchange of instruments should have that effect.

3. **By Ratification, acceptance or approval:** The consent of a State to be bound by a treaty is expressed by ratification when:

- the treaty so provides for such consent to be expressed by means of ratification or
- it is otherwise established that the negotiating States have agreed that ratification should be required or
- the representative of the State has signed the treaty subject to ratification; or
- the intention of the State to sign the treaty is subject to ratification appears from the full powers of its representative was expressed during the negotiation.
- The consent of a State to be bound by a treaty is expressed by acceptance or approval under conditions similar to those which apply to ratification.

4. **By Accession**: The consent of a State to be bound by a treaty is expressed by accession when:

- A treaty provides that such consent may be expressed by that State by means of accession; or
- it is otherwise established that the negotiating States have agreed that such consent may be expressed by means of accession; or
- All the parties have subsequently agreed that such consent may be expressed by a State by means of accession.

5. FORMATION OF TREATIES

A formation of a treaty involves the following stages:[217]

1) **Accrediting of persons on behalf of contracting parties**: The first step in the formation of a treaty is the accrediting of persons on behalf of the contracting parties. States authorize some representatives to represent them during the negotiation, adoption and signature, etc. of a treaty. Unless these representatives are accredited or authorized, they cannot participate in the negotiations and deliberations of a treaty or conference.

2) **Negotiation and Adoption:** The accredited persons of contracting parties enter into negotiations and deliberations for the adoption of the treaty. After the States come on to a common platform in respect of their interests and the matter is settled then the treaty is adopted.

3) **Signatures**: After negotiation, the next important stage is the signature of the accredited persons of the contracting parties. The authorized representatives of the State parties sign a treaty on behalf of their States. It may however, be noted that the treaty does not become binding upon the States until it is formally ratified by the respective States.

4) **Ratification:** Ratification is a very important step in the formation of a treaty. Generally speaking, until and unless a treaty is ratified it does not bind the States concerned. By ratification it is meant that the head of a State or the government of a State in accordance with the provisions of the Constitution confirms or approves the signature made by the authorized representatives of the State to the treaty. The States parties become bound by the Treaty after ratification.

The advantage of ratification is that the government of a State gets the opportunity to read the text of the treaty between the lines to ensure that any provision or provisions of the treaty are not in conflict with the interests of the State, if they are then to exclude totally, alter, modify or amend such provision or provisions and also to extract opinion from the public on the question whether the State should sign the treaty or not.

5) **Accession or Adhesion**: The practice of the States show that those States which have not signed the treaty may also accede to it later or subsequently. This is called accession. The treaty comes into force only when it is ratified by the prescribed number of States which are parties to the treaty. Even after the prescribed numbers of State parties have ratified the treaty, other States may at any point of time also adhere to the treaty by subsequently signing it. This is called adhesion.

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[217] Ibid, p.78

6) **Entry into force**: The entry into force of the treaty depends upon the provisions of the treaty. Some treaties enter into force immediately after the signatures. But a treaty for which ratification is necessary to enter into force shall come into force only when it is ratified by the prescribed number of State parties. Now the question is whether a treaty becomes binding law only among the States which have signed and ratified such a treaty. It is a fundamental principle of international law that only parties to a treaty are bound by that treaty, this is often expressed by the maxim *'pacta tertiis nec nocent nec prosunt'*.

7) **Registration and Publication:** After a treaty comes into force its registration and publication are also ordinarily considered essential. Article 102 of the United Nations Charter provides that the registration and publication of every international treaty entered into by the members is essential. It is made clear in this article that if an international treaty or agreement is not registered, it cannot be invoked before any organ of the United Nations.

Therefore, international treaties or agreements should be registered and published. This provision, however, does not mean that if a treaty is not registered and published it will not come into force or become invalid. In fact Article 102 means that if a treaty is not registered with the United Nations, it cannot be invoked before any organ of the United Nations. The object of Article 102 was to prevent the practice of secret agreements between States, and to make it possible for the people of democratic States to repudiate such treaties when publicly disclosed.

8) **Application and Enforcement**: The last stage in the formation of the treaty is its application and enforcement. After a treaty is ratified, published and registered, it is applied and enforced.

Ratification

The principle of ratification of a treaty means, as pointed out earlier ratification is an important stage in the formation of a treaty. Normally, without ratification a treaty shall not become binding. Ratification means that the head of the State or its government approves the signatures of its authorized representative.[218] Article 2 of the Vienna Convention on the Law of Treaties lays down that *"Ratification is an international act ... ... Whereby a State establisheson*

[218] Ibid, p.85

the international plain its consent to be bound by a treaty. It is generally agreed thatratification becomes effective from the day when it is made". There is no retroactive effect.[219]

On the basis of the principle of sovereignty sovereign States possess unlimited powers in respect of treaties. If a treaty has been signed by the authorized representative of the State, it does not create binding obligations on the State concerned nor is the concerned State bound to ratify such a treaty. In other words, we may say international law does not impose any duty upon the States to ratify those treaties which have been signed by their representatives.[220] Nor is it necessary for the States to explain the reason for not ratifying the treaty.

In fact, it depends upon the sweet will of the State concerned whether or not to ratify a treaty. Ordinarily State parties are not bound by treaties until they ratify them. Hence ratification of the treaty is very important. However it may be noted that it is not necessary in all cases of a treaty to be binding without ratification. If a State party has intended that the ratification was essential then the treaty becomes enforceable in law only after ratification. But if ratification is not essential then under some special circumstances the provisions of a treaty may create binding force.

Reservation

Reservation to treaties in the modern day period has created a great controversy. There are very few aspects of the law of the treaties that have generated greater controversy in the past 20 years than the question of reservation to multilateral treaties and conventions.[221]

The term reservation has been defined in Article 2(1) of the Vienna Convention on the Law of the treaties, 1969. It runs as follows: *"Reservations means a unilateral statement ... ... Madeby a State when signing, ratifying, accepting, approving or acceding to a treaty, whereby, itpurports to exclude or modify the legal effect of certain provisions of the treaty in theirapplication to the State"*.[222]

Where a State makes a reservation to a bilateral treaty, it is not a problem because the other State is entitled to terminate the treaty, but a reservation when made to a multilateral treaty

[219]R.Higgins in *The Effect of Treaties in Domestic Law* (eds. F. Jacobs and S. Roberts), London, 1987, p. 123

[220] Ibid, p.133

[221] Ibid, p.138

[222] Ibid, p.142

or convention by one or more parties creates a problem. The controversy regarding reservation being made to multilateral treaties and conventions was finally settled by the International Court of Justice through its advisory opinion given in the year 1950 when reservations were made to the Genocide Convention-1948 by Germany. The opinion was given in a three stage formula.[223]

6. SIGNIFICANCE OF PACT SUNT SERVANDA

It is doctrine borrowed from the Roman law and has been adopted as a principle governing treaties in international law.[224] In the view of Italian Jurist Anzilotti, *pacta sunt servanda* is the basis of the binding force of international law. This principle means that states are bound to fulfill in good faith of the obligations assumed by them under agreements.[225]

According to Prof. Oppenheim, "treaties are legally binding because there exists a customary rule of international law that treaties are binding. The binding effect of that rule rests in the last resort on the fundamental assumption. This is neither consensual nor necessarily legal of the objectively binding force of an international law."[226] This assumption is frequently expressed by the norm or principle, *'pacta sunt servanda'*. The International Court of Justice has described it as 'a time knowned basic principle'.[227]

Accordingly to Fenwick, "philosophers, theologians and jurists have recognized with unanimity that unless the pledged word of a state could be relied upon the relation of the entire international community would be imperiled and law itself would disappear".[228]

The PCIJ has consistently held that the provisions of municipal law cannot prevail over these of treaty. The Court observed in the case concerning the *Treatmentof Polish National in Danzig*: "a state cannot adduce as against another state its own constitution with a view to evading obligation incumbent upon it under international law or treaties in force".[229] Again it was observed in the ***Free Zone case*;** "it is certain that France cannot rely on her own legislation to limit the scope of international obligations". The same view was repeated in the Greco

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[223] Ibid, p.144

[224]M.P.Tandon, *Public International Law*, (2001), p. 250

[225]I. Sinclair and S. J. Dickson, 'National Treaty Law and Practice: United Kingdom' I *National Treaty Law and Practice* (eds.M. Leigh and M. R. Blakeslee), 1995, p. 223

[226] Ibid, p.232

[227] Ibid, p.242

[228] Ibid, p.248

[229] Ibid, p.252

Bulgarian Communities by the PCIJ in its Advisory Opinion; "it is a generally accepted principle of international law that in the relations between powers who are contracting parties to a treaty, the provisions of municipal law cannot prevail over those of the treaty".[230]

Article 26 of the Vienna Convention on the Law of Treaties 1969, specifically embodies the doctrine of *Pacta Sunt Servanda* when it lays down that every treaty in force is binding upon the parties to it and must be performed by them in good faith[231]. It is not hard to see why this is so. In the absence of a certain minimum belief that states will perform their treaty obligations in good faith, there is no reason for countries to enter into such obligations with each other.

In Paul Reuter's words, the principle can be translated by the following formula: treaties "are what the authors wanted them to be and only what they wanted them to be and because they wanted them to be the way they are". A party is not authorized to invoke the provisions of its internal law as justification for its failure to perform a treaty (Article 27). Generally speaking, this solid legal link neither is nor even weakened in the case severance of diplomatic relations between the parties to a given treaty (Article 63).[232] But apparently states expect increasingly out of realism that the treaties they conclude in certain areas, in particular with regard to the protection of the environment, will note be properly implemented by all states parties just out of respect for the "*Pacta Sunt Servanda*" rule.

7. SIGNIFICANCE OF JUS COGENS

A peremptory norm is a fundamental principle of international law, which is accepted by the international community of states as a norm from which no derogation is ever permitted. There is no clear agreement regarding precisely which norms are neither *Jus Cogens* nor how a norm reaches that status, but it is generally accepted that *Jus Cogens* includes the prohibition of genocide, maritime piracy, slaving in general (to include slavery as well as the slave trade), torture, and war of aggression.[233] Unlike ordinary customary law, this has traditionally required consent and allows the alteration of its obligations between states through treaties. Peremptory

[230] Ibid, p.255

[231]Ibid p.251

[232] Shilpa Jain : Introduction to International Law (2016) Eastern Book Company

[233] V.K. Ahuja, Public International Law (Lexis Nexus 2016)

norms cannot be violated by a state "through international treaties or local or special customs or even general customary rules not endowed with same normative force"[234].

Under the Vienna Convention on the Law of Treaties, any treaty that conflicts with a peremptory norm is void[235]. The treaty allows for the emergency of new peremptory norms, but does not it self specify any peremptory norms. "A treaty is void if, at the time of its conclusion it conflicts with a peremptory norm of general international law. For the purpose of the present convention, 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"[236].

The number of peremptory norms is considered limited but not exclusively catalogued. They are not listed or defined by any authoritative body, but arise out of case laws and changing social and political attitudes. Generally included are prohibitions on waging aggressive war, crimes against humanity, war crimes, maritime piracy, genocide, apartheid, slavery and torture[237].

8. SIGNIFICANCE OFREBUS SIC STANTIBUS

Rebus sic stantibus is also a ground for the termination of treaty. The maxim *Rebus sic stantibus* means that when the fundamental circumstances under which the treaty was entered into change then this change entitles the other party to terminate the treaty.

9. PROCEDURE FOR TERMINATION OF TREATIES

Treaties may be terminated by operation of law or by act of the State parties.

1. **By Operation of Law:** Termination of treaties by operation of law may be made in the following ways:

[234]*Prosecutor V Furodzila, International Criminal Tribunal for the Former Yugoslavia,* (2002), 121 International Law Reports 213 (2002)

[235]Vienna Convention on the Law of Treaties, Article 53, May 23,1969, 1155 U.N.T.S 331, 8 International Legal Materials 679 (1969)

[236]U.N.Doc. A/CONF, 39/27 (1969), reprinted in 63 Am.J. Int'l L 875 (1969)

[237]International Law Reports, 213, (2002)

- When **either party to a bilateral treaty becomes extinct** it may amount to termination of the treaty.
- **Outbreak of war**: According to the old view, the outbreak of war between parties resulted in the termination of the treaties. But in the modern period all treaties do not end at the outbreak of war. With regard to the operation of treaties at the outbreak of war, Starke has pointed out as follows:

  1) Treaties between States for which general, political and good relations are essential, cease at the outbreak of war because political treaties depend upon friendly relations.

  2) Treaties relating to completed situations, such as fixation of boundaries remain unaffected by war.

  3) Treaties dealing with the rules of international law relating to war remain in force and it is binding upon the parties. Hague Convention of 1899 and 1907 and the four Geneva Conventions of 1949 are the standing examples of such type of treaties.

  4) Some multilateral treaties relating to health, service, protection of industrial property, etc., do not totally end at the outbreak of war. They simply remain suspended during the period of war and revived as soon as the war ends.

2. A material breach of bilateral treaty: A material breach of a bilateral treaty by one party entitles the other party to terminate the treaty.

3. Impossibility of performance: The impossibility of performance of a treaty also is a valid ground for determination of a treaty. This provision is contained in Article 61 of the Vienna Convention on the Law of the treaties, 1969.

4. Rebus sic stantibus: *Rebus sic stantibus* is also a ground for the termination of treaty. The maxim *Rebus sic stantibus* means that when the fundamental circumstances under which the treaty was entered into change then this change entitles the other party to terminate the treaty.

5. Expiration of fixed term: If the treaty has been concluded for a fixed period, the expiry of the fixed term will automatically terminate the treaty.

6. Successive denunciation: Successive denunciation may also lead to the termination of a treaty. The provision relating to this is contained in Article 55 of the Vienna Convention on the Law of treaties, 1969.

***7. Jus Cogens* or emergence of a new peremptory norm of general international law**: According to article 64 of the Vienna Convention, if a new peremptory norm ofgeneral international law emerges any existing treaties which are in conflict with thatnorm becomes void and automatically terminates.

International treaties have been signed by the States from a very long period. Initially customs played an important role in the settlement of disputes in the international community. After the two world wars a large number of treaties were signed by the States and therefore modern international law today is composed of treaties and conventions. Treaties play a very significant role in bringing the States together and also in governing their relations.

MODULE 11 SETTLEMENT OF DISPUTE

1. INTRODUCTION

International dispute means in a very broad sense, a misunderstanding, an opposition between two or more states that have reached the stage in which the parties have formed claims or counter-claims, and which constitute an element of disruption of relations between them. International disputes can be born not only between states, but also between them and international organizations or only between international organizations.

The Permanent Court of International Justice: *"a disagreement on a matter of law or fact, a contradiction, an opposition of legal or interest-based theses."* The UN Charter, in Article 34, establishes, in this respect, the right of the Security Council to *"investigate any dispute or situation that could lead to international friction or could give rise to a dispute in order to determine whether the extension of the dispute or the situation could endanger international peacekeeping and security".*

2. LEGAL AND POLITICAL DISPUTES

One of the most commonly used definitions characterizes 'political' or non justiciable disputes as the cases that involve the vital national interests of the disputants. The resolutions of such disputes between nations would inevitably impinge upon the sovereignty of the states.[238] Accordingly, legal questions refer to the disagreements which 'do not involve the life and future fate of nations, no matter in whose favor a judicial judgment may be rendered' The Statute of the International Court of Justice.[239] Art. 36 defines an international legal dispute as a 'disagreement on a question of law or fact, a conflict, a clash of legal views or of interests' drawing such distinction between legal and political questions is particularly difficult for international tribunals is that all the disagreements between sovereign states essentially arise from the desire to protect their vital national interests.

Even the cases concerning the territorial and maritime boundary disputes such as the delimitation of the continental shelf between Nicaragua and Colombia in 2001, albeit highly

[238]K. Oellers-Frahm and N. W¨uhler, *Dispute Settlement in Public International Law,* New York, 1984, pp. 92

[239] Ibid, p.96

technical, would inevitably involve the clash of political interests and the long-term hostility between the two parties. Hence, if the term 'political' is defined as the cases in which the national interests of the state parties are threatened, none of the contentious cases on the World Court's docket would be considered justiciable[240]

3. EXTRA-JUDICIAL PACIFIC MEANS

Article 2 of the Charter lays out the principles under which the UN and its members are required to pursue the aims of Article 1. Article 2 (3) states that 'all members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered. Article 33 (1) catalogs various methods to be employed by states to settle disputes pacifically:

The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.

3.1. NEGOTIATION

Negotiation is a simple diplomatic means and one of the oldest and most used in the peaceful settlement of disputes between states. This means does not suppose the intervention of a third party. The primordial role currently played by diplomatic talks lies in the fact that they offer, due to their direct nature and the direct contract between the parties involved, additional possibilities of identifying convergent points of view, allowing the overtaking with patience, tact, understanding of all obstacles or difficulties, as well as agreeing solutions acceptable for all interested parties.[241] Acceptance and use of this means do not automatically resolve the dispute. Solutions can be diverse, such as waiving claims, accepting them, engaging in a compromise, essential to meeting the commitments made by the parties at the end of the negotiations. If the dispute is not settled, the parties will have the obligation to resort to other means of settlement, but only by peaceful means.

[240] Ibid, p.111

[241] Ibid, p.132

3.2. GOOD OFFICES

These consist of the action taken by states parties to a dispute by a third - state or international organization - on their own initiative or at the request of the parties, in order to persuade disputed states to resolve disputes through diplomatic negotiations. The good offices are characterized by the fact that the one who offers them does not participate in the negotiations between the states in question, and its office ceases as soon as the litigants have begun negotiations. Although they are optional, good offices are means to boost and conclude negotiations.[242] Their features and functions are similar to those of the negotiations, enrolling them in the same category of diplomatic, informal and non-judicial methods. In terms of purpose, the good offices only seek to start or resume negotiations, they end when the parties sit at the negotiating table

3.3. MEDIATION

In solving the dispute, mediation means active participation of the third party in the negotiations, "can offer advice and proposals to resolve the conflict", the negotiator's action ends only after a final result has been reached. Mediation is about conducting negotiations, the substance of the dispute, to reach a peaceful and convenient solution for the third parties. Mediation was defined as *"the action of a third party, an international organization or even a recognized personality, aiming at creating the necessary atmosphere for the negotiation between the parties to the dispute and the direct provision of the services of the third party for finding solutions favourable to the parties".*[243]

3.4. INQUIRY OR FACT-FINDING

Two parties to a dispute may initiate a commission of inquiry or fact-finding to establish the basic information about the case, to see if the claimed infraction was indeed committed, to ascertain what obligations or treaties may have been violated, and to suggest remedies or actions to be undertaken by the parties. These findings and recommendations are not legally binding, and

[242] J. G. Merrills, *International Dispute Settlement*, 4th edn, Cambridge, 2005, and Merrills, 'The Mosaic of International Dispute Settlement Procedures: Complementary or Contradictory?', 54 NILR, 2007, p. 361

[243] Ibid, p.132

the parties ultimately decide what action to take.[244] A commission of inquiry may usefully be employed in parallel with other methods of dispute resolution—for instance, negotiation, mediation, or conciliation—as factual clarity is an important factor in any dispute resolution strategy.

In 1991, the General Assembly adopted resolution 46/59, which contains detailed rules for fact-finding by organs of the UN, and the UN Legal Office manual explains in detail the process and phases of inquiry. Notably, such commissions precede the UN, and originated in The Hague Conventions for the Pacific Settlement of International Disputes of 1899 and 1907.

3.5. ARBITRATION

The most concrete achievement of the 1899 Hague Peace Conference was the establishment of the Permanent Court of Arbitration (PCA), located in the Peace Palace in The Hague. Arbitration represents a 'qualitative leap' over the other measures, as it necessitates the settlement of the dispute in accordance with existing international legal standards. Parties agree to submit disputes to arbitration, and thereby commit to respect in good faith the outcome, which is binding.[245] The PCA, which is always accessible, has competence in all arbitration cases submitted to it by agreement of the parties involved. The PCA provides a list of arbitrators, appointed by states parties to the Hague Convention, from which parties submitting a dispute to arbitration can choose.

3.6. CONCILIATION

Conciliation combines fact-finding and mediation. A conciliation commission functions not only to engage in enquiry to set out clearly the facts of the case—but also to act as a mediator, to propose solutions mutually acceptable to the disputing parties.[246] Such commissions may be permanent, or temporarily established by parties to a particular dispute. The commission's proposals are not binding, but each party has the option of declaring unilaterally that it will adopt

[244] Ibid, p.136

[245] J. Collier and V. Lowe, *The Settlement of Disputes in International Law*, Cambridge, 1999

[246] Ibid, p.43

the recommendations. Several international treaties feature provisions for the systematic referral of disputes for compulsory conciliation.[247]

The 1969 Vienna Convention on the Law of Treaties articulated a procedure for the submission by states of requests to the UN Secretary-General for the initiation of conciliation. On 11 December 1995, the General Assembly adopted resolution 50/50, containing the UN Model Rules for the Conciliation of Disputes between States, which substantiates and clarifies conciliation procedures.

4. COERCIVE OR COMPULSIVE MEASURES

4.1. RETORTION

Generally the retortion method used by the state is a legal but deliberately an unfriendly act with a retaliatory or coercive purpose. When a state behaves in a discourteous manner with another state, the latter has right to retaliate under the international law. But in doing so only the measures allowed under law are permitted.[248] Consequently, the general mechanisms applied in retaliations are – recall of diplomats, rupture of diplomatic ties, declaring diplomatic staff as non-persona grata (undesirable person), economic sanctions etc. Action under retortion can be taken both in terms of kind and direct or explicit nature. A common form of Retortion consists in retaliatory increase in tariff rates against states which discriminate against the product of a particular nation.[249] That is why it is called retaliation in kind.

But sometimes when a state acts in reply to legal but discourteous, unfriendly, unfair on inequitable act with an act of similar type, then retortion is not limited to retaliation in kind. However, the use of retortion is limited by some provisions of the UN Charter. Most important among them is the provision under article 2(3) of the charter which prevents the use of retortion if it endangers the international peace and security and justice in the global order. As a result, even if it is permitted in some cases then also it should not be in contravention to the possibility of creation of dangers to peace and security in the international system.

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[247] Ibid, p.48

[248] Ibid, p.55

[249]United Nations, *Handbook on the Peaceful Settlement of Disputes Between States*, New York, 1992

1.2. REPRISAL

It is another type of coercive method used by the states involving generally all kinds of forceful measures. It is related to the methods adopted by states for securing redress from another state by taking retaliatory measures. In earlier times, the term has been restricted to the seizure of property and persons, but in contemporary times it connotes coercive measures adopted by one state against another for the purpose of settling some disputes brought about by the latter's illegal or unjustified conduct.[250] Practice of International law has evolved the following principles on the basis of which this concept can operate

(a) Reprisal is only justified, if at all, where the state against which it is directed has been guilty of conduct in the nature of an international delinquency.

(b) Reprisal would not be justified if the delinquent state had not been previously requested to give satisfaction for the wrong done, or if the measures of reprisals were 'excessive' proportionally in relation to the injury suffered.

(c) Reprisals are only justified if their purpose is to bring about a satisfactory settlement of a dispute.

(d) Reprisals should not be resorted to unless and until negotiations for the purpose of securing redress from the delinquent state fail.

At the outset it must be clear that retaliatory acts between belligerent states in the course of war are a different matter from reprisals, although they are also termed 'reprisals'. Therefore reprisals have always been a controversial matter.[251] However, the basic distinction between reprisals and retortion is that the former consist of acts which would generally otherwise be quite illegal, whereas the latter consists of retaliatory conduct to which no legal objection can be taken. Though, it is agreed that reprisals are based on the use of violent means short of war, yet on the basis of use of means, these can be divided into four categories: (a) Positive; (b) Negative; (c) Special; and (d) General.

[250] Ibid, p.76

[251] Ibid, p.81

Positive reprisals are based on the use of primitive laws for retaliation, i.e. law of 'an eye for eye'. Negative reprisals are conducted by not using the violent means, rather the methods like non-payment of debts or non-obligation of treaties are applied. Special reprisals are based on the methods used during the middle ages.[252] They are resorted to for the indemnification of private individuals for injuries and losses inflicted on them by subjects of other nations. General reprisals take place when an aggrieved state performs warlike operations without the intention of making war.[253]

Thus, the above-mentioned different types of reprisals are permitted by the orthodox view of International law where either denial of justice is involved or a situation of international delinquency exists. To operationalise reprisals numerous strategies can be adopted depending upon the situations and context of the problems. Generally adopted methods to implement reprisals are: (i) boycott of goods; (ii) an embargo; (iii) a naval demonstrations; and (iv) bombardment.[254]

But the use of these methods is not without any limitations. Both the provisions of UN Charter as well as the practice of international system placed the following restrictions on the working of this concept:

(i) Under Article 2(3) of the UN Charter, the member states are restrained to settle their disputes by peaceful means in such a way as not to 'endanger' international peace and security.

(ii) Under Article 2(4) of the UN Charter, the member states are to refrain 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 UN.

(iii) In practice, the UNSC in 1964, by a majority, condemned reprisals as being 'incompatible with the purposes and principles of the UN'.

[252] Ibid, p.86

[253] Ibid, p.91

[254] Ibid, p.94

(iv) On 24 October 1970, the UN General Assembly, while adopting the 'Declaration on Principles of International Law concerning Friendly Relations and Cooperation Among States' declared that: 'States have a duty to refrain from acts of reprisal involving the use of force.'

Even the uses of force under 'self defence' (Article 51) and for 'collective action' (Article 33) are limited in terms of: 'consisted in the threat or the exercise of military force against another state in such a way as to prejudice its territorial integrity or political independence would presumably be illegal'; and, the non-use of peaceful means prior to resort to force would be considered illegal. Thus, reprisals are justified if other state has committed an international crime or violated any international law. It is justified only if its objectives are justified and satisfactory to settle international disputes.

1.3. EMBARGO

It is another type of coercive method used by the states to retaliate the action of belligerent state. If a state violates international law or commits some international crime, then the affected nation uses the tactics of embargo. Through this strategy, the nation tries to prohibit the shipment of all goods or certain goods to a particular country or a group of countries. However, this obstruction of ships can be done only in the area of territorial waters. It is because beyond this jurisdiction high seas has been considered as an area for the use of humanity at large.[255] This can be imposed both by unofficial or official manner, i.e. this may be initiated by private groups or public sentiments or by governments. Similarly it can be utilised in both partial and full manner.

Thus, in a limited sense, the restriction of economic and like activities by the state against any other state can create problems for the nations which violate international law. However, this kind of restrictions cannot be utilized beyond the sovereign jurisdiction area of the state applying embargo.

[255]B. S. Murty, 'Settlement of Disputes' in *Manual of Public International Law* (ed. M. Sørensen), London, 1968, p. 673

1.4. PACIFIC BLOCKADE

In the time of war, the blockade of a belligerent state's ports is a very common naval operation. The pacific blockade, however, is a measure employed in times of peace. It is generally designed to coerce the state whose ports are blockaded into complying with a request for satisfaction by the blockading state.[256] Therefore, while applying this 'ingress' and 'egress' of the ports of the states, are blockaded so that ships of other states may not reach those ports. Simultaneously it is also ensured that ships of blockaded state may not go out of the ports.[257] Therefore, this strategy is used by the state to compel the other side to settle disputes. Here it must also be clarified that while operationalizing it, the blockading state has no right to seize ships of third states which endeavor to break a pacific blockade.

Consequently, it follows that the third states are not duly bound to respect such a blockade. The strategy of pacific blockade is not without limitations. Article 2(3) of the UN Charter prohibits any such action under pacific blockade if it endangers international peace and security. However, under Article 42 of the UN Charter, it is justified as a collective measure taken under chapter VII of the UN Charter. Besides, it is advantageous in two more ways; (i) it is far less violent means of action than war; and (ii) it is also more elastic as compared to other such methods. But its utility as unilateral measures has been disapproved by the UN. Hence, in present times it has become an obsolete method.

1.5. INTERVENTION

It is another compulsive measure used by the states for the resolution of conflict. It can be both diplomatic and military-oriented in its application. In principle, there are some provisions of the UN Charter which prohibit the use of intervention. As under Article 2(4), the unilateral use of force or threat thereof by states in their international relations is prohibited. Similarly, under Article 2(7), the UN is not allowed to intervene in the domestic affairs of the states. Even some resolutions passed by the United Nations, from time to time, do not allow the UN to intervene in the matters of states. However, this does not mean that intervention is ruled out for all purposes.

[256] Ibid, p.693

[257] Ibid, p.700

Practically speaking, it is allowed both individually and collectively on the basis of the following two major principles:

(i) Principle of Self Defence: Under this principle, intervention is allowed by an individual state against the other state.

The right to self-defence is provided under Article 51 of the UN Charter but with numerous limitations. The limitations like – allowed only in case of arms attack; through UN system; review by security council; threatening international peace and security; not-available against non-UN members etc. restricts its operation in a very limited manner.

(ii) Principle of Collective Measures: Besides individualist manner, it is also allowed as collective activity under the UN system.

In the name of collective intervention it is permitted on humanitarian ground on the basis of Articles 1, 55 and 56, because the violation of human rights provides legal obligation upon the members in respect of human

MODULE12 INTERNATIONAL INSTITUTIONS

1. HISTORICAL ORIGINS OF INTERNATIONAL INSTITUTIONS

The process of international organization had its origins in the nineteenth century, largely in Europe. Innovations associated with the rise of industrialism and the introduction of new methods of transport and communication stimulated the creation of special-purpose agencies, usually called public international unions, designed to facilitate the collaboration of governments in dealing with economic, social, and technical problems. Notable among these were the International Telegraphic Union (1865) and the Universal Postal Union (1874), which survived to become specialized agencies of the United Nations system (the former under the title International Telecommunication Union) after World War II.[258] In the political field, an effort to institutionalize the dominant role of the great powers of Europe was undertaken at the Congress of Vienna in 1815.[259]

While the resultant Concert of Europe did not assume the character of a standing political organization, the same pattern functioned until World War I as the framework for a system of occasional great-power conferences which lent some substance to the idea that the European family of states constituted an organized entity. This concept was broadened by the Hague Conferences of 1899 and 1907, which admitted small states as well as great powers, and extra-European as well as European states, to participation in collective political deliberations.[260] Near the end of the nineteenth century, the establishment of the Pan American Union and the initiation of a series of inter-American conferences reinforced the Monroe Doctrine and Simón Bolívar's pronouncements by giving institutional expression to the idea that the states of the Western Hemisphere constituted a distinct subgroup within the larger multi-state system.[261]

These nineteenth-century beginnings provided, in large measure, the basis for the phenomenal development of international organization since World War I. Certain distinctions which emerged during this period—between political and non-political agencies, between the

[258]Bowett's Law of International Institutions (eds. P. Sands and P. Klein), 5th edn, London, 2001

[259] Ibid, p.22

[260] Ibid, p.28

[261] Ibid, p.38

status of great powers and that of small states, between regional and geographically undefined organizations—were to prove significant in the later course of international organization. Basic patterns of institutional structure and procedure were evolved.[262]

The trend toward broadening the conception of international organization to include entities beyond the confines of the European state system was initiated. Most importantly, the dual motivations of international institution building—(a) the urge to promote coordinated responses by states to the problems of peaceful intercourse in an era of growing economic, social, and technical interdependence, and(b)the recognition of the necessity for moderating conflict in the political and military spheres became operative in this period.[263]

The establishment of the League of Nations and its affiliate, the International Labour Organisation, at the end of World War I represented the first attempt to combine into one general organization the disparate elements of organizational development which had emerged during the previous century.[264] The League was the first general international organization in several senses: (a) it pulled together the threads of the great-power council, the general conference of statesmen, and the technically oriented international bureau; (b) it was a multipurpose organization, although its primary focus was onthe political and security problems of war and peace; and (c) it was, in principle, a world-wide institution, even though it retained much of the nineteenth-century emphasis upon the centrality of Europe in international affairs.[265]

After World War-II, the League was superseded by the United Nations, a general organization which derived its major features from the nineteenth-century heritage and the lessons of experience, both positive and negative, provided by the League. The United Nations was conceived as the central component of a varied and decentralized system of international institutions that would include both autonomous specialized agencies, following the pattern first set by the public international unions, and such regional organizations as existed or might be created by limited groups of states.[266] The organizational design formulated in the United

[262] Ibid, p.44

[263] Ibid, p.48

[264]The United Nations and a JustWorld Order (eds. R. A. Falk, S. S. Kim and S. H.Mendlovitz), Boulder, 1991

[265] Ibid, p.54

[266] Ibid, p.65

Nations Charter called for the active coordination of the work of the specialized agencies by the central institution, primarily through the agency of its Economic and Social Council, and the utilization and control of regional agencies, largely through the Security Council.[267]

In actuality, the organizational system of the post-World War II era has involved the operation of approximately a dozen specialized agencies, many of them newly created, and coordinated with varying degrees of effectiveness by the United Nations.[268] The post-1945 system has also involved the proliferation of regional organizations of every sort, most of them functioning quite independently, without any genuine tie to the central organization. The term "United Nations system" may, therefore, properly be used to refer to the United Nations and the specialized agencies, but it does not embrace the considerable number of regional organizations which have developed independently.[269]

The total network of international institutions also comprises more than one hundred intergovernmental agencies outside the scope of the United Nations system, dealing with a vast range of problems and providing variety of mechanisms for the conduct of relations among states.[270] These are supplemented by approximately 1,500 non govern-mental organizations which promote international consultation and activity in specialized fields at the unofficial level (Yearbook of International Organizations 1962-1963).[271]

2. LEAGUE OF NATIONS- AN OVER VIEW

The League of Nations was established at the end of World War I as an international peacekeeping organization. Although US President Woodrow Wilson was an enthusiastic proponent of the League, the United States did not officially join the League of Nations due to opposition from isolationists in Congress.[272]

The League of Nations effectively resolved some international conflicts but failed to prevent the outbreak of the Second World War. World War I was the most destructive conflict in

[267] Ibid, p.77

[268]The Charter of the United Nations (ed. B. Simma), 2nd edn, Oxford, 2002;

[269] Ibid, p.65

[270] Ibid, p.67

[271] Ibid, p.72

[272] Ibid, p.77

human history, fought in brutal trench warfare conditions and claiming millions of casualties on all sides. The industrial and technological sophistication of weapons created a deadly efficiency of mass slaughter. The nature of the war was thus one of attrition, with each side attempting to wear the other down through a prolonged series of small-scale attacks that frequently resulted in stalemate.[273]

In the immediate aftermath of the war, American and European leaders gathered in Paris to debate and implement far-reaching changes to the pattern of international relations. The League of Nations was seen as the epitome of a new world order based on mutual co-operation and the peaceful resolution of international conflicts.

The establishment of the League of Nations

The Treaty of Versailles was negotiated at the Paris Peace Conference of 1919, and included a covenant establishing the League of Nations, which convened its first council meeting on January 16, 1920. The League was composed of a General Assembly, which included delegations from all member states, a permanent secretariat that oversaw administrative functions, and an Executive Council, the membership of which was restricted to the great powers.[274]

The Council consisted of four permanent members (Great Britain, France, Japan, and Italy) and four non-permanent members. At its largest, the League of Nations was comprised of 58 member-states. The Soviet Union joined in 1934 but was expelled in 1939 for invading Finland.[275]

Members of the League of Nations were required to respect the territorial integrity and sovereignty of all other nation-states and to disavow the use or threat of military force as a means of resolving international conflicts. The League sought to peacefully resolve territorial disputes between members and was in some cases highly effective. For instance, in 1926 the League negotiated a peaceful outcome to the conflict between Iraq and Turkey over the province of Mosul, and in the early 1930s successfully mediated a resolution to the border dispute between

[273] Ibid, p.82

[274] Ibid, p.85

[275] Ibid, p.89

Colombia and Peru.[276] However, the League ultimately failed to prevent the outbreak of the Second World War, and has therefore been viewed by historians as a largely weak, ineffective, and essentially powerless organization.[277] Not only did the League lack effective enforcement mechanisms, but many countries refused to join and were therefore not bound to respect the rules and obligations of membership.

3. UNITED NATIONS- PURPOSES AND PRINCIPLES

The 20th century was a witness to two devastating world wars. The League of Nations often called the child of war was established immediately after the First World War. The main objective of the League of Nations was to establish peace and security in the world. The League of Nations was partially successful and partially failed to achieve its objective. It is evident from the fact that the Second World War was ample proof of the utter failure of the League of Nations to establish peace in the world.

The Second World War forced the states in the world to bear the effects of the war and to establish an international organisation, which would help in the peaceful settlement of disputes, and to ensure that peace and security could be established in the world. Subsequently, the then great nations of the world signed the San Francisco Conference on January 26, 1945, whereby the United Nations Charter was adopted and signed by 51 nations of the world, and it came into force on October 21, 1945, which is today celebrated as the United Nations Day.[278]

PURPOSES OF UNITED NATIONS

The purposes of the United Nations are enshrined in Article 1 of the Charter. According to Article 1, following are the purposes of the United Nations:

1) **To maintain international peace and security**

The most important responsibility of the United Nations is to maintain international peace and security. After having expressed their determination in the preamble *"to save succeeding generations from thescourge of war"* it was but natural and appropriate for the framers of the United Nations Charter to consider "Maintenance of International peace and security" as the first and foremost purpose of the United Nations. Article (1) provides that one of the purposes of the United Nations is to maintain international peace and security and to that end: *"totake effective*

[276]S. Chesterman, T. M. Franck and D. M. Malone, Law and Practice of the United Nations, Oxford, 2008

[277] Ibid, p.24

[278] Ibid, p.28

collective measures for the prevention and removal of threats to the peaceand further suppression of acts of aggression or other breaches of peace, and to bring aboutpeaceful means, and in conformity with the principles of justice and international law,adjustment or settlement of international dispute or situation which may lead to breach ofthe peace."

2) **To develop friendly relations among nations:**

The second purpose of the United Nations is to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of people to take other appropriate measures to strengthen universal peace.

3) **International cooperation in solving international problems of economic, social and humanitarian character**

The third purpose of the United Nations is to achieveinternational cooperation in solving international problems of economic, social, culturalor humanitarian character and in promoting and encouraging respect for human rightsand fundamental freedoms for all without distinction as to race, sex, language or religion.

4) **To make the United Nations a centre for the attainment of the above, and ends**:

The last purpose of the United Nations is to make it a centre for harmonising the actions in the attainment of those common ends.

PRINCIPLES OF THE UNITED NATIONS

Article 2 of the United Nations charter provides that the organization and its members, in pursuit of the purposes enshrined in article 1, shall act in accordance with the following principles:

1) **Principle of sovereign equality of all its members**:

The first principle of the United Nations is that the organization is based on the principle of sovereign equality of all its members. According to this principle, all the members of the United Nations are equal in the eyes of law irrespective of the size and strength.

2) **Principle of fulfilling obligations in good faith:**

The second principle of the United Nations is that all members, in order to ensure to all of them, the rights and benefits resulting from the membership, shall fulfil in good faith the obligations assumed by them

in accordance with the present Charter.

3) **Peaceful settlement of international disputes:**

All members shall settle their international disputes by peaceful means in such a manner that international peace and security and justice are not endangered.

4) **Principle of non-intervention**: 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 any other manner inconsistent with the purposes of the United Nations.

5) **Principle of assistance to UNO:**

The next principle is that all members shall give the United Nations every assistance in any common action it takes in accordance with the present Charter, and shall refrain from giving assistance to any state against which the United Nations in taking preventive or enforcement action.

6) **Principle of maintenance of international peace and security:**

The UN shall ensure that States which are not members of the United Nations act in accordance with these principles so far as may be necessary, for maintenance of international peace and security.

7) **Non-intervention in domestic matters of state**:

The last principle of the United Nations states that nothing contained in the present Charter shall authorise the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the members to submit such matters to settlement under the present Charter.

Membership

According to the Charter of the United Nations, there may be two types of members:

(i) Original members, and

(ii) States which may be admitted to the United Nations in accordance with provisions of Article 4 of the Charter.

As regards the original members, Article 3 of the Charter provides that the original members of the United Nations shall be states which, having participated in the United Nations Conference on international organisation at San Francisco, having previously signed the Declaration of the United Nations on January 1, 1942 signed the present Charter and ratified it in accordance with Article 110. As regards admission of the members of the United Nations, Article 4 provides that states may be admitted to the United Nations on the affirmative

recommendations of the Security Council and by the election of the General Assembly by two-thirds majority.[279]

Since the admission of states to the United Nations is an important matter affirmative votes of nine members of the Security Council including five permanent members are necessary. Moreover, Article 4 provides the five requirements or conditions for the state to become a member of the United Nations. They are: (1) It must be a State; (2) It must be peace loving; (3) It must accept the obligations of the Charter; (4) It must be willing to carry out the obligations; (5) It must be able to carry out these obligations.[280]

Expulsion of a Member from the United Nations

The provision regarding the expulsion of a member from United Nations is contained in Article 6 of the Charter. It provides that a member of the United Nations, which had persistently violated the principles contained in the present Charter, may be expelled from the organization by the General Assembly upon the recommendations of the Security Council.[281]

Suspension of Members

The provision relating to the suspension of a member is found in Article 5 of the Charter. Article 5 provides that member of the United Nations against which preventive or enforcement action has been taken by the Security Council may be suspended from the exercise of the rights and privileges of membership by the General Assembly, upon the recommendations of the Security Council.[282] It further provides that the exercise of these rights and privileges may be restored by the Security Council.

4. STRUCTURE POWERS AND FUNCTIONS OF PRINCIPLE ORGANS OF THE UNITED NATIONS

Following are the six principal organs of the United Nations:

4.1. GENERAL ASSEMBLY

It is one of the principal organs and policymaking body of the United Nations. The General Assembly consists of all the members of the United Nations. Each member may have not more than five representatives in the General Assembly. At present, the General

[279] Ibid, p.32

[280] Ibid, p.38

[281] Ibid, p.42

[282] Ibid, p.45

Assembly comprises of 192 members.[283] Each member of the General Assembly has one vote. Decisions on important questions are made by a two-thirds majority of the members present and voting. Such questions include matters relating to maintenance of international peace and security; the election of non-permanent members of the Security Council; the election of the members of the Economic and Social Council and Trusteeship Council; the admission of new members of the United Nations; the suspension of the rights and privileges of membership; the expulsion of members; questions relating to the operation of the trusteeship system; and budgetary questions. Questions on other matters, including the determination of additional categories of questions to be decided by a two thirds majority, shall be made by a majority of members present and voting.[284] Professor Leonard has classified the powers and functions of the General Assembly under five headings, they are as follows: *firstly,* Deliberative functions; s*econdly,* Supervisory functions; *thirdly,* Financial functions; fourthly, Elective functions; and *lastly,* Constituent functions.[285]

The resolutions passed by the General Assembly are not binding upon the states in the international community. The General Assembly can deliberate on any matter within the scope of the United Nations Charter. However, when the Security Council is considering any matter the General Assembly will not interfere in the matter. Where the Security Council fails to maintain peace and security then the General Assembly shall assume the responsibility of maintaining peace and security under a resolution known as Uniting for Peace Resolution passed by it in the year 1950.[286]

4.2. SECURITY COUNCIL

The Dumbarton Oaks proposals emphasized the establishment of an executive organ, whose membership might be limited and whichcould be entrusted with the primary responsibility of the maintenance of International Peace and Security. In San Francisco Conference, it was finally decided to establish suchan organ in the form of the Security Council. In accordance with the provisions of Articleof the United Nations Charter, the Security Council is one of the principal organs of theUnited Nations. It

[283] Ibid, p.55

[284]B. Conforti, The Law and Practice of the United Nations, 2nd edn, The Hague, 2000;

[285] Ibid, p.76

[286] Ibid, p.79

comprises of 15 members, five permanent members and 10 non-permanentmembers. China, Russia, America, France and Britain are the permanentmembers of the Security Council.[287] Before the amendment even without exercising Veto,the permanent members could prevent the Security Council from taking action on anymatter because the Security Council then consisted of 11 members and action onordinary or non-substantial matters required seven affirmative votes. If one permanentmember voted against the proposal, Security Council could not take any decision on it.

But, this is no more possible because now the Security Council consists of 15 members fivepermanent and 10 non-permanent members and in cases of all non-substantial orprocedural matters nine affirmative votes are required. Thus, on a non-substantialmatter, the Security Council can take a decision on the basis of affirmative votes of non-permanent members. 10 non-permanent members are elected by the General Assemblyfor a period of two years. [288] The primary responsibility of maintaining international peace and security in theworld is that of the Security Council. In the discharge of this responsibility, the SecurityCouncil is empowered to take enforcement action against states, which regularly violatethe principles of the United Nations Charter and the general rules of international law.[289]

The enforcement action includes: *firstly* warning, *secondly* economic sanctions, and*thirdly* use of force by land, air and sea. The resolutions passed by the Security Councilare considered as a potential source of international law. They are binding upon thestates in the international community.[290]

4.3. ECONOMIC AND SOCIAL COUNCIL (ECOSOC)

The Economic and Social Council consists of 54 members who are elected by the General Assembly, one third of its members are elected each year by the General Assembly for a term of three years. Prior to 31st August, 1965, the economic and social Council consisted of 18 members.

[287] Ibid, p.85

[288] Ibid, p.88

[289] Ibid, p.98

[290] Ibid, p.112

This number increased to 27 by an amendment of the Charter in 1963, which came into force in 1965. Subsequent amendment to Article 61, which entered into force on 24th September, 1973, further increased the membership of the Council from 27 to 54. Since the membership of the UN has now increased to 192, a plea can be made for further increase in the membership of the Economic and Social Council to make it more representative.[291]

Each member of the Economic and Social Council is entitled to have only one representative in the Council. At present India is one of the members of the Council. Each member of the Economic and Social Council is entitled to have one vote. The additions of the Economic and Social Council are made by a majority of members present and voting.

4.4. TRUSTEESHIP COUNCIL

As provided under Article 86 of the Charter, Trusteeship Council consists of the following members of the United Nations: (a) Those members who are administering trust Territories; (b) The permanent members of the Security Council as are not administering trust Territories; (c) As many other members elected for three years term by the General Assembly is really necessary to ensure that the total number of members of the Trusteeship Council is equally divided between those members of the United Nations which administered trust Territories and those which did not. At present, trusteeship Council members are the United States as an administering authority and China, France, the Russian Federation and United Kingdom serve as permanent members of the Security Council. Each member of the trusteeship Council has one vote. The decisions of the Trusteeship Council are made by a majority of the members present and voting. That is to say, no member possesses veto power in the Trusteeship Council.[292]

4.5. SECRETARIAT

The Secretariat is one of the principal organs of the United Nations. The Secretariat comprises of a secretary general and such staff as the organization may require. The Secretary General is appointed by the General Assembly upon the

[291]R. Higgins, The Development of International Law Through the Political Organs of the United Nations, Oxford, 1963

[292] Ibid, p.62

recommendations of the Security Council. He is designated as "The Chief Administrative Officer of the Organisation". He is thus not only the chief administrative officer of the Secretariat, but of the whole organisation. It is his duty to present a report on the overall functioning of the United Nations Organization in the annual session of the General Assembly.[293] From the practice of the United Nations Organization, it can be seen that the Secretary General is appointed normally from a smaller and neutral state

5. INTERNATIONAL COURT OF JUSTICE

5.1. HISTORICAL EVOLUTION

The International Court of Justice is based upon a statute known as the statute of International Court of Justice. The statute of International Court of Justice originally belonged to the Permanent Court of International Justice which was established as the principal judicial organ of the League of Nations. Therefore, it is aptly stated that the International Court of Justice has stepped into the shoes of the Permanent Court of International Justice.[294]

According to Article 7 of the United Nations Charter International Court of Justice is one of the principal organs of the United Nations. It is the principal judicial organ of the United Nations Organization and is based upon a statute which is an integral part of the United Nations Charter. The World Court is the first truly permanent judicial international institution and it is served by an efficient registry.[295] All members of the United Nations organization are ipso facto the members of the Statute of the International Court of Justice. Any State, which is not a member of the United Nations organization may also become a party to the Statute of the International Court of Justice on the recommendations of the Security Council and on the conditions laid down by the General Assembly.

5.2. COMPOSITION OF THE COURT

The International Court of Justice consists of 15 judges who are elected regardless of their nationality from among persons of high moral character and who possess the required qualifications in their respective countries, by the General Assembly and the Security Council

[293] Ibid, p.22

[294]S. Rosenne, The Law and Practice of the International Court, 1920–2005, 4th edn, Leiden, 4 vols., 2006

[295] Ibid, p.43

separately. These judges are elected for a term of nine years and can also be re-elected after the expiry of their term.[296]

All the decisions of the court are taken on the basis of the majority of the judges. The president of the court is empowered to give a casting vote in case of a tie. It has become a well founded practice that five judges are from the five permanent members of the Security Council.[297] The court is constituted in such a way that Latin America, Europe, Africa and Asia are represented in it so as to represent the main forms of civilization and the principal legal systems of the world.[298] The permanent seat of the court is in Hague. Although all the judges may sit and decide a case but the required quorum for the court to take decisions shall be nine judges.

5.3. TYPES OF JURISDICTION OF THE COURT

Since there is no universal authority over the states in the international community, an international tribunal cannot exercise any kind of jurisdiction over the sovereign states without the states giving their consent.[299] The jurisdiction of the International Court of Justice is also on similar lines. This principle of consensual jurisdiction of the court can be noticed in many of the decisions rendered by the court, for instance, in the **Corfu Channel Case(United Kingdom v. Albania)[300],** The court has held that the consent of the parties confers jurisdiction on the court.

Doctrine of Forum Prorogatum

The principle of forum prorogatum means jurisdiction can be conferred upon an existing tribunal not otherwise competent by the litigants during the proceedings, it is also known as prorogated jurisdiction and is found in the Roman Legal System. The principle of prorogated jurisdiction crept into many modern systems of law which developed from the Roman legal system. In the realm of international law the doctrine of forum prorogatum is the result of the pronouncements of both the Permanent Court of International Justice and the International Court of Justice.[301]

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[296] Ibid, p.52

[297] M. S. M. Amr, The Role of the International Court of Justice as thePrincipal Judicial Organ of theUnitedNations,TheHague, 2003

[298] Ibid, p.58

[299] Ibid, p.62

[300]ICJ Rep 1948, pages 15, 27.

[301]Fifty Years of the International Court of Justice (eds. A. V. Lowe and M. Fitzmaurice), Cambridge, 1996

The doctrine of forum prorogatum lays emphasis on the fact that acceptance of unilateral summons to appear before the court confers jurisdiction on the court. If the respondent state, either expressly or by implication from conduct submits to the court's jurisdiction, the court is irrevocably seized of the case. The International Court of Justice adopted the doctrine of forum prorogatum in the Corfu Channel Case.

KINDS OF JURISDICTION

The International Court of Justice basically exercises two kinds of jurisdiction i.e. contentious jurisdiction and advisory jurisdiction. Contentious jurisdiction again is of two kinds namely voluntary jurisdiction and compulsory or optional jurisdiction.

Voluntary jurisdiction of the court applies to cases which are voluntarily referred to the court by the parties to the dispute as well as cases brought before the court by one of the parties and the other party impliedly or expressly accepts the jurisdiction of the court. Article 36(1) of the statute of the court lays down that voluntary jurisdiction is *"The jurisdiction of the court comprises all cases which the parties refer to it and all the matters specially provided for in the Charter of the United Nations or in treaties and conventions in force"*.

Compulsory jurisdiction or which is popularly known as optional clause on the other hand is contained in Article 36(2) of the statute which provides that states parties to the statute may confer compulsory jurisdiction on the court by making such a declaration in respect of any other state which also accepts similar obligations. This can be done without any special agreement and a state party to the statute may confer compulsory jurisdiction on the court in matters relating to

1. *Firstly,* interpretation of a treaty;
2. Any question of international law; and
3. *Thirdly,* the existence of any fact if established would constitute a breach of international obligations and
4. The nature and extent of the reparation to be made for the breach of an international obligation.

The clause gives option to the states to make their respective declarations for accepting the jurisdiction of the court. Where such a declaration is once made by a state, the jurisdiction of the court becomes compulsory in relation to other states accepting the same obligation. The significance of the optional clause is the fact that it provides a means of accepting compulsory

jurisdiction generally for all legal disputes and as against any state undertaking the same obligations.

Interim Measures: The statute of the International Court of Justice lays down that under Article 41 the court shall have the power to indicate if it considers that circumstances so require, any provisional measure which has to be taken to protect the rights of both the parties. When a case is pending before the court should not allow injustice by further delaying the final judgement and leaving the legal interests involved in the case entirely at the mercy of unavoidable circumstances.

Therefore the instrument of interim measures of protection originated for the purpose of ensuring interim justice pending the final judgement. The court grants interim relief only when there is every possibility of injury being caused to the rights of the parties which cannot be compensated and the ultimate goal of such an interim measure is to protect and secure the rights of the parties.

Transferred Jurisdiction: The International Court of Justice exercises another type of jurisdiction known as transferred jurisdiction. Article 36(5) of the statute of International Court of Justice states "Declaration made under Article 36 of the statute of the Permanent Court of International Justice and which are still in force shall be deemed, as between the parties to the present statute, to be acceptance of the compulsory jurisdiction of the International Court of Justice for the period which they still have to run and in accordance with their terms". For instance if X and Y states conferred jurisdiction upon the Permanent Court of International Justice for a period of 15 years and the Permanent Court of International Justice was dissolved after expiry of 10 years, then the present court would exercise jurisdiction for the remaining period of 5 years.

Revisional Jurisdiction: Article 61 of the statute of International Court of Justice lays down the conditions for the acceptance of an application for revision. The conditions are as follows:

1. An application for revision of a judgement may be made only when it is based upon the discovery of some fact of such a nature as to be a decisive factor, which fact was, when the judgement was given, unknown to the court and also to the party claiming revision always provided that such ignorance was not due to negligence.

2. The proceedings for the revision shall be opened by a judgement of the court expressly recording the existence of a new fact, recognizing that it has such a character as to lay the case open to revision and declaring the application admissible on this ground.

3. The court may require previous compliance with the terms of the judgement before it admits proceedings in revision.

4. The application for revision must be made at least within six months of the discovery of the new fact.

5. No application for revision may be made after a lapse of ten years from the date of the judgement.

According to Article 62 of the statute, the court has the power to allow a state to intervene in a dispute to which it is not a party. It provides as follows:

1. Should a state consider that it has an interest of a legal nature which may be effected by the decision in the case, it may submit a request to the court to be permitted to intervene.

2. It shall be for the court to decide upon this request.

In the case of **Case Concerning Continental Shelf (Tunisia Vs Libya)[302],** the dispute was between Tunisia and Libya relating to the delimitation oftheir continental shelf. While the court was considering the above case, another stateMalta submitted a request to the court to permit it to intervene in the above dispute.Malta wanted the court to take into consideration its own interest in the continental shelfwhile fixing the limits of the continental shelves of states of Tunisia and Libya. The courtallowed Malta to intervene.

Advisory Jurisdiction

Apart from the jurisdictions mentioned above the court also exercises advisory jurisdiction. According to this jurisdiction an advisory opinion under Article 96(1) of the statute is given by the court when the General Assembly or Security council request for such an opinion on any legal question. Other organs of the United Nations and the specialized agencies can also seek advisory opinion from the court subject to the approval by the General Assembly in respect of legal questions arising within the scope of their activities.

Further if the General Assembly wants to seek advisory opinion from the court then under Article 18(2) of the charter two thirds majority is required. Similarly if the Security Council wants to seek advisory opinion from the court under Article 27(3) of the charter, then

[302]ICJ Rep, 1982, page 49

affirmative votes of nine members including the votes of the five permanent members are required. The advisory opinion of the International Court of Justice is different from the judgement of the International Court of Justice because firstly, advisory opinion is not legally binding upon the requesting party, secondly advisory opinion does not give rise to *Res Judicata*, thirdly, there are no parties to the proceedings strictly speaking. On the other hand the contentious jurisdiction of the International Court of Justice contains all the three elements mentioned above. Therefore an advisory opinion is a weak legal statement when compared to the judgment of the court.

5.4. LAW APPLIED BY THE COURT

According to Article 38 of the Statute of the International Court of Justice, the Court shall decide the dispute submitted to it in accordance with international law and shall use the sources of international law in the following order:

International Conventions: Whenever a dispute is referred to the International Court of Justice by the States, the first endeavor on the part of the court would be to see whether there is any convention or treaty signed by the states in the international community and which would provide a solution to the dispute before it. In the event of such a treaty existing, the court would decide only in accordance with that treaty or convention. In the absence of a treaty or convention the court would fall upon the second source i.e. International Custom.

International Custom: This originally was the primary source of international law has been pushed down to the second place. Custom is usage or practice employed by the states in resolving their disputes. We have,

General principles of law recognized by civilized nations: It comprises of those legal principles which are common to and recognized as such by the principal legal systems in the world. Principles such as *Res Judicata*, Estoppel, Subrogation, Double Jeopardy and Principles of Natural Justice.

Juristic works: There are the published research works of highly qualified and eminent persons in the field of law as a subsidiary means for determining the rules of international law subject to the provisions of Article 59 of the statute of International Court of Justice. Article 38 of the statute of International Court of Justice also empowers the world court to decide cases in accordance with principle of ***ex aequo et bono*** if the parties agree thereto. The purpose of this

clause is to allow the court to apply principles of equity, if necessary in modification or even derogation of the law.

5.5. BINDING NATURE OF JUDGMENT

Judgments delivered by the Court (or by one of its Chambers) in disputes between States are binding upon the parties concerned. Article 94 of the United Nations Charter provides that "each Member of the United Nations undertakes to comply with the decision of the Court in any case to which it is a party".[303]

Judgments are final and without appeal. If there is a dispute about the meaning or scope of a judgment, the only possibility is for one of the parties to make a request to the Court for an interpretation. In the event of the discovery of a fact hitherto unknown to the Court which might be a decisive factor, either party may apply for revision of the judgment.[304]

As regards advisory opinions, it is usually for the United Nations organs and specialized agencies requesting them to give effect to them or not, by whichever means they see fit.

6. LEGAL STATUS OF INTERNATIONAL ORGANIZATIONS

In the realm of International Law States are the primary subjects, according to traditional international law whereas, modern International Law has incorporated international organizations, international institutions and also certain other non-state entities such as, the Vatican City, even individuals today are considered as subjects of international law. With the end of the Second World War and the establishment of the United Nations Organization, the statesmen of the world at that point of time felt that the States in the international community should enter into treaties and agreements in order to lend support to the United National Organization in the maintenance of international peace and security. Therefore, a large number of international organizations such as, ILO and EU, had come into existence.[305]

[303]Bowett's Law of International Institutions (eds. P. Sands and P. Klein), 5th edn, London, 2001

[304] Ibid, p.76

[305] Ibid, p.82

Bibliography and References

1) Robert Jennings and Arthur Watts (eds.), Oppenheim's *International Law* [Vol. I – Peace] (9th ed., 1996)

2) I. Brownlie, *Principles of Public International Law* (7th ed., 2008)

3) I.A. Shearer, Starke's *International Law* (1st Indian ed., 2007)

4) D.J. Harris, *Cases and Materials on International Law* (7th ed., 2010)

5) Malcolm N. Shaw, *International Law* (7th ed., 2015)

6) J.G. Strake: Introduction to International Law, (latest Edition)

7) D.w. Bowetts: Law of International Instittuions (6th edn) 2011, (sweet and Maxwell)

8) S.K. Verma: An introduction to Public International Law (Prentice Hall 1998)

9) Gurdip Singh, *International Law* (2nd ed., 2011)

10) V.K. Ahuja, Public International Law (Lexis Nexus 2016)

11) Shilpa Jain: Introduction to Public International Law (EBC 2016)

12) T.S.N. Sastry, State Succession in Indian context (Dominant 2004) Chapters 1 & 2

13) Shilpa Jain : Introduction to International Law (2016) Eastern Book Company

14) Visit the Web Site of Dr tsnsastry.weebly.com for research papers on some of the areas.