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UNIT-1

INTRODUCTION

A) Nature and Development of International Law

According to Bentham's classic definition, international law is a collection of rules governing relations between states. It is a mark of how far international law has evolved that International law, also called public international law or law of nations, the body of legal rules, norms, and standards that apply between sovereign states and other entities that are legally recognized as international actors. The term was coined by the English philosopher Jeremy Bentham (1748–1832).

According to Bentham's classic definition, international law is a collection of rules governing this original definition omits individuals and international organizations—two of the most dynamic and vital elements of modern international law. Furthermore, it is no longer accurate to view international law as simply a collection of rules; rather, it is a rapidly developing complex of rules and influential—though not directly binding—principles, practices, and assertions coupled with increasingly sophisticated structures and processes. In its broadest sense, international law provides normative guidelines as well as methods, mechanisms, and a common conceptual language to international actors—i.e., primarily sovereign states but also increasingly international organizations and some individuals. The range of subjects and actors directly concerned with international law has widened considerably, moving beyond the classical questions of war, peace, and diplomacy to include human rights, economic and trade issues, space law, and international organizations. Although international law is a legal order and not an ethical one, it has been influenced significantly by ethical principles and concerns, particularly in the sphere of human rights.

International law is distinct from international comity, which comprises legally nonbinding practices adopted by states for reasons of courtesy (e.g., the saluting of the flags of foreign warships at sea). In addition, the study of international law, or public international law, is distinguished from the field of conflict of laws, or private international law, which is concerned with the rules of municipal law—as international lawyers term the domestic law of states—of different countries where foreign elements are involved.

International law is an independent system of law existing outside the legal orders of particular states. It differs from domestic legal systems in a number of respects. For example, although the United Nations (UN) General Assembly, which consists of representatives of some 190 countries, has the outward appearances of a legislature, it has no power to issue binding laws. Rather, its resolutions serve only as recommendations—except in specific cases and for certain purposes within the UN system, such as determining the UN budget, admitting new members of the UN, and, with the involvement of the Security Council, electing new judges to the International Court of Justice (ICJ). Also, there is no system of courts with comprehensive jurisdiction in international law. The ICJ's jurisdiction in contentious cases is founded upon the consent of the particular states involved. There is no international police force or comprehensive system of law enforcement, and there also is no supreme executive

authority. The UN Security Council may authorize the use of force to compel states to comply with its decisions, but only in specific and limited circumstances; essentially, there must be a prior act of aggression or the threat of such an act. Moreover, any such enforcement action can be vetoed by any of the council's five permanent members (China, France, Russia, the United Kingdom, and the United States). Because there is no standing UN military, the forces involved must be assembled from member states on an ad hoc basis.

International law is a distinctive part of the general structure of international relations. In contemplating responses to a particular international situation, states usually consider relevant international laws. Although considerable attention is invariably focused on violations of international law, states generally are careful to ensure that their actions conform to the rules and principles of international law, because acting otherwise would be regarded negatively by the international community. The rules of international law are rarely enforced by military means or even by the use of economic sanctions. Instead, the system is sustained by reciprocity or a sense of enlightened self-interest. States that breach international rules suffer a decline in credibility that may prejudice them in future relations with other states. Thus, a violation of a treaty by one state to its advantage may induce other states to breach other treaties and thereby cause harm to the original violator. Furthermore, it is generally realized that consistent rule violations would jeopardize the value that the system brings to the community of states, international organizations, and other actors. This value consists in the certainty, predictability, and sense of common purpose in international affairs that derives from the existence of a set of rules accepted by all international actors. International law also provides a framework and a set of procedures for international interaction, as well as a common set of concepts for understanding it.

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Definition of terms

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EVOLUTION OF INTERNATIONAL LAW

There was little scope for an international law in the period of ancient and medieval empires, and its modern beginnings coincide, therefore, with the rise of national states after the Middle Ages. Rules of maritime intercourse and rules respecting diplomatic agents (see diplomatic service) soon came into existence. At the beginning of the 17th cent., the great multitude of small independent states, which were finding international lawlessness intolerable, prepared the way for the favorable reception given to the *De jure belli ac pacis* [concerning the law of war and peace] (1625) of Hugo Grotius, the first comprehensive formulation of international law. Though not formally accepted by any nation, his opinions and observations were afterward regularly consulted, and they often served as a basis for reaching agreement in international disputes. The most significant principle he enunciated was the notion of sovereignty and legal equality of all states. Other important writers on international law were Cornelius van Bynkershoek, Georg F. von Martens, Christian von Wolff, and Emerich Vattel.

Historical development

International law reflects the establishment and subsequent modification of a world system founded almost exclusively on the notion that independent sovereign states are the only relevant actors in the international system. The essential structure of international law was mapped out during the European Renaissance, though its origins lay deep in history and can be traced to cooperative agreements between peoples in the ancient Middle East. Among the earliest of these agreements were a treaty between the rulers of Lagash and Umma (in the area of Mesopotamia) in approximately 2100 bce and an agreement between the Egyptian pharaoh Ramses II and Hattusilis III, the king of the Hittites, concluded in 1258 bce. A number of pacts were subsequently negotiated by various Middle Eastern empires. The long and rich cultural traditions of ancient Israel, the Indian subcontinent, and China were also vital in the development of international law. In addition, basic notions of governance, of political relations, and of the interaction of independent units provided by ancient Greek political philosophy and the relations between the Greek city-states constituted important sources for the evolution of the international legal system.



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Many of the concepts that today underpin the international legal order were established during the Roman Empire. The *jus gentium* (Latin: “law of nations”), for example, was invented by the Romans to govern the status of foreigners and the relations between foreigners and Roman citizens. In accord with the Greek concept of natural law, which they adopted, the Romans conceived of the *jus gentium* as having universal application. In the Middle Ages, the concept of natural law, infused with religious principles through the writings of the Jewish philosopher Moses Maimonides (1135–1204) and the theologian St. Thomas Aquinas (1224/25–1274), became the intellectual foundation of the new discipline of the law of nations, regarded as that part of natural law that applied to the relations between sovereign states. (Byers (2001)

After the collapse of the western Roman Empire in the 5th century ce, Europe suffered from frequent warring for nearly 500 years. Eventually, a group of nation-states emerged, and a number of supranational sets of rules were developed to govern interstate relations, including canon law, the law merchant (which governed trade), and various codes of maritime law—e.g., the 12th-century Rolls of Oléron, named for an island off the west coast of France, and the Laws of Wisby (Visby), the seat of the Hanseatic League until 1361. In the 15th century the arrival of Greek scholars in Europe from the collapsing Byzantine Empire and the introduction of the printing press spurred the development of scientific, humanistic, and individualist thought, while the expansion of ocean navigation by European explorers spread European norms throughout the world and broadened the intellectual and geographic horizons of western Europe. The subsequent consolidation of European states with increasing wealth and ambitions, coupled with the growth in trade, necessitated the establishment of a set of rules to regulate their relations. In the 16th century the concept of sovereignty provided a basis for the entrenchment of power in the person of the king and was later transformed into a principle of collective sovereignty as the divine right of kings gave way constitutionally to parliamentary or representative forms of government. Sovereignty also acquired an external meaning, referring to independence within a system of competing nation-states. (Shaw, 2014)

Early writers who dealt with questions of governance and relations between nations included the Italian lawyers Bartolo da Sassoferrato (1313/14–1357), regarded as the founder of the modern study of private international law, and Baldo degli Ubaldi (1327–1400), a famed teacher, papal adviser, and authority on Roman and feudal law. The essence of the new approach, however, can be more directly traced to the philosophers of the Spanish Golden Age of the 16th and 17th centuries. Both Francisco de Vitoria (1486–1546), who was particularly concerned with the treatment of the indigenous peoples of South America by the conquering Spanish forces, and Francisco Suárez (1548–1617) emphasized that international law was founded upon the law of nature. In 1598 Italian jurist Alberico Gentili (1552–1608), considered the originator of the secular school of thought in international law, published *De jure belli libri tres* (1598; Three Books on the Law of War), which contained a comprehensive discussion of the laws of war and treaties. Gentili’s work initiated a transformation of the law of nature from a theological concept



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to a concept of secular philosophy founded on reason. The Dutch jurist Hugo Grotius (1583–1645) has influenced the development of the field to an extent unequalled by any other theorist, though his reputation as the father of international law has perhaps been exaggerated. Grotius excised theology from international law and organized it into a comprehensive system, especially in *De Jure Belli ac Pacis* (1625; *On the Law of War and Peace*). Grotius emphasized the freedom of the high seas, a notion that rapidly gained acceptance among the northern European powers that were embarking upon extensive missions of exploration and colonization around the world. (Shaw, 2014)

The scholars who followed Grotius can be grouped into two schools, the naturalists and the positivists. The former camp included the German jurist Samuel von Pufendorf (1632–94), who stressed the supremacy of the law of nature. In contrast, positivist writers, such as Richard Zouche (1590–1661) in England and Cornelis van Bynkershoek (1673–1743) in the Netherlands, emphasized the actual practice of contemporary states over concepts derived from biblical sources, Greek thought, or Roman law. These new writings also focused greater attention on the law of peace and the conduct of interstate relations than on the law of war, as the focus of international law shifted away from the conditions necessary to justify the resort to force in order to deal with increasingly sophisticated interstate relations in areas such as the law of the sea and commercial treaties. The positivist school made use of the new scientific method and was in that respect consistent with the empiricist and inductive approach to philosophy that was then gaining acceptance in Europe. Elements of both positivism and natural law appear in the works of the German philosopher Christian Wolff (1679–1754) and the Swiss jurist Emerich de Vattel (1714–67), both of whom attempted to develop an approach that avoided the extremes of each school. During the 18th century, the naturalist school was gradually eclipsed by the positivist tradition, though, at the same time, the concept of natural rights which played a prominent role in the American and French revolutions was becoming a vital element in international politics. In international law, however, the concept of natural rights had only marginal significance until the 20th century.

Positivism's influence peaked during the expansionist and industrial 19th century, when the notion of state sovereignty was buttressed by the ideas of exclusive domestic jurisdiction and nonintervention in the affairs of other states ideas that had been spread throughout the world by the European imperial powers. In the 20th century, however, positivism's dominance in international law was undermined by the impact of two world wars, the resulting growth of international organizations e.g., the League of Nations, founded in 1919, and the UN, founded in 1945 and the increasing importance of human rights. Having become geographically international through the colonial expansion of the European powers, international law became truly international in the first decades after World War II, when decolonization resulted in the establishment of scores of newly independent states. The varying political and economic interests and needs of these states, along with their diverse cultural backgrounds, infused the



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hitherto European-dominated principles and practices of international law with new influences. (Shaw, 2014)

The development of international law both its rules and its institutions is inevitably shaped by international political events. From the end of World War II until the 1990s, most events that threatened international peace and security were connected to the Cold War between the Soviet Union and its allies and the U.S.-led Western alliance. The UN Security Council was unable to function as intended, because resolutions proposed by one side were likely to be vetoed by the other. The bipolar system of alliances prompted the development of regional organizations e.g., the Warsaw Pact organized by the Soviet Union and the North Atlantic Treaty Organization (NATO) established by the United States and encouraged the proliferation of conflicts on the peripheries of the two blocs, including in Korea, Vietnam, and Berlin. Furthermore, the development of norms for protecting human rights proceeded unevenly, slowed by sharp ideological divisions.

The Cold War also gave rise to the coalescence of a group of nonaligned and often newly decolonized states, the so-called “Third World,” whose support was eagerly sought by both the United States and the Soviet Union. The developing world’s increased prominence focused attention upon the interests of those states, particularly as they related to decolonization, racial discrimination, and economic aid. It also fostered greater universalism in international politics and international law. The ICJ’s statute, for example, declared that the organization of the court must reflect the main forms of civilization and the principal legal systems of the world. Similarly, an informal agreement among members of the UN requires that nonpermanent seats on the Security Council be apportioned to ensure equitable regional representation; 5 of the 10 seats have regularly gone to Africa or Asia, two to Latin America, and the remainder to Europe or other states. Other UN organs are structured in a similar fashion.

The collapse of the Soviet Union and the end of the Cold War in the early 1990s increased political cooperation between the United States and Russia and their allies across the Northern Hemisphere, but tensions also increased between states of the north and those of the south, especially on issues such as trade, human rights, and the law of the sea. Technology and globalization—the rapidly escalating growth in the international movement in goods, services, currency, information, and persons—also became significant forces, spurring international cooperation and somewhat reducing the ideological barriers that divided the world, though globalization also led to increasing trade tensions between allies such as the United States and the European Union (EU).

Since the 1980s, globalization has increased the number and sphere of influence of international and regional organizations and required the expansion of international law to cover the rights and obligations of these actors. Because of its complexity and the sheer number of actors it affects, new international law is now frequently created through processes that require near-universal

consensus. In the area of the environment, for example, bilateral negotiations have been supplemented and in some cases replaced by multilateral ones, transmuting the process of individual state consent into community acceptance. Various environmental agreements and the Law of the Sea treaty (1982) have been negotiated through this consensus-building process. International law as a system is complex. Although in principle it is "horizontal," in the sense of being founded upon the concept of the equality of states one of the basic principles of international law in reality some states continue to be more important than others in creating and maintaining international law. (Shaw, 2014)

From World War I(Development)

The growth of international law came largely through treaties concluded among states accepted as members of the "family of nations," which first included the states of Western Europe, then the states of the New World, and, finally, the states of Asia and other parts of the world. The United States contributed much to the laws of neutrality and aided in securing recognition of the doctrine of freedom of the seas (see seas, freedom of the). The provisions of international law were ignored in the Napoleonic period, but the Congress of Vienna (see Vienna, Congress of) reestablished and added much, particularly in respect to international rivers and the classification and treatment of diplomatic agents. The Declaration of Paris (see Paris, Declaration of) abolished privateering, drew up rules of contraband, and stipulated rules of blockade. The Geneva Convention (1864) provided for more humane treatment of the wounded. The last quarter of the 19th century saw many international conventions concerning prisoners of war, communication, collision and salvage at sea, protection of migrating bird and sea life, and suppression of prostitution. Resort to arbitration of disputes became more frequent. The lawmaking conventions of the Hague Conferences represent the chief development of international law before World War I. The Declaration of London (see London, Declaration of) contained a convention of prize law, which, although not ratified, is usually followed. At the Pan-American Congresses, many lawmaking agreements affecting the Western Hemisphere have been signed.

Effect of the World Wars

In World War I, no strong nations remained on the sidelines to give effective backing to international law, and the concept of third party arbitration was again endangered; many of the standing provisions of international law were violated. New modes of warfare presented new problems in the laws of war, but attempts after the war to effect disarmament and to prohibit certain types of weapons (see war, laws of) failed, as the outbreak and course of World War II showed. The end of hostilities in 1945 saw the world again faced with grave international problems, including rectification of boundaries, care of refugees, and administration of the territory of the defeated enemy (see trusteeship, territorial). The inadequacy of the League of Nations and of such idealistic renunciations of war as the Kellogg-Briand Pact led to the formation of the United Nations as a body capable of compelling obedience to international law and maintaining peace. After World War II, a notable advance in international law was the

definition and punishment of war crimes. Attempts at a general codification of international law, however, proceeded slowly under the International Law Commission established in 1947 by the United Nations.

B) Subjects of International Law

- 1. State**
- 2. International organizations**
- 3. Non State entities**
- 4. Special case entities**
- 5. Individual**
- 6. Minorities**

A subject of International Law is a person (entity) who possesses international legal personality, i.e., capable of possessing international rights and obligations and having the capacity to take certain types of action on the international level. Traditionally, States have been the only subjects or persons of International Law. However, with the establishment of international organizations, it has become necessary that a sort of international legal personality be granted to these entities. Thus, international organizations become subjects or persons of International Law. Beside States and international organizations, non-States entities such as members of federal States, belligerents, insurgents, national liberation movements, and international territories are granted a sort of international legal personality. Special international status was granted to the Holy See and the Vatican City, and the Sovereign Order of Malta. Moreover, individuals, ethnic minorities, and indigenous peoples are considered, in certain circumstances, subjects of International Law. These persons and subjects of International Law are discussed in the following.

1. States

States are the original and major subjects of International Law. Their legal personalities derive from the very nature and structure of the international system. All States, by virtue of the principle of sovereign equality, enjoy the same degree of international legal personality.

International Law is primarily concerned with the rights, duties and interests of States. Normally the rules of conducts that International Law prescribes are rules which States are to observe.

Since a State is the primary concern of International Law, it is necessary to study it in a separate chapter. Thus, the next chapter of this book is devoted to the study of a State as a subject of International Law.

2. International Organizations

An international organization is an association of States, established by a treaty between two or more States. Its functions transcend national boundaries. It is for certain purposes a subject of International Law.

The appearance of international organizations from the early part of the Nineteenth Century raises a critical question of their status in the International Law. International organizations are generally considered to be subjects of International Law, as are States, even though their international legal personality is limited to possessing specific rights and duties. Their status is determined by conventions among States and, therefore, the recognition of the international personality of an international organization is limited to signatory States of the convention creating such an organization.

International organizations include universal all purposes organizations, universal functional organizations, and regional organizations. Generally, the treaty creating a public international organization indicates its nature, purposes and powers. The international legal personality of an international organization is, therefore, limited to the rights, duties, purposes and powers laid down in the treaty creating it. The international legal personality of the United Nations, for example, is derived from the United Nations Charter, the Headquarters Agreement between the United Nations and the United States of America of 1947, and the 1946 Convention on the Principles and Immunities of the United Nations. The attribution of an international legal personality involves the capacity to perform legal acts, to have rights and duties and to enter into relations on the international level. Actually, the legal capacity of the United Nations was a question brought before the International Court of Justice. In its advisory opinion in the *Reparation for Injuries Case* of 1949, the Court held that the United Nations was an international person, although not a State, and therefore not having the same rights and duties as a State. The United Nations had an international personality; its functions and powers were so important that the Organization could not carry them out unless it had some degree of international personality. The United Nations can perform legal acts such as entering into agreements with member States and with other international organizations, concluding contracts and bringing claims before a court. Such capacity to perform legal acts is a prerequisite of international legal personality.

In reality, international organizations have exercised their legal capacity in a great variety of ways. They have concluded treaties, created military forces, convened international conferences, and brought claims against States.

3. Non-State Entities

There are certain entities, although they are not regarded as independent States, they are granted a degree of personality, a definite and limited special type of personality, under International Law. Such entities have certain rights and duties under International Law. They can participate in international conferences and enter into treaty relation



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However, the rights and duties of these entities in International Law are not the same as those of the States. They have a sort of international personality. The capacity of each of them is more limited than an independent State has since it is limited to the purpose it is existed for and the powers or functions it can perform. These entities fall into the following categories:

(a) Members of composed States or federal States: The federal State has itself, of course, an international legal personality, but the controversial question is whether the component units of the federation have the personality on the international plane. Actually, the international personality of such units and its extent can only be determined in the light of the constitution of the State and State practice. The constitution of a federation may grant a component unit a special international personality; however such personality will not be operative on the international plane without being recognized as such by other States. State practice has granted international personality to certain component units of the federation. For instance, the Soviet Republics of Byelorussia and the Ukraine were admitted as members of the United Nations in 1945 and to that extent possessed international personality. Moreover, these two Republics were members of a number of international organizations and parties to a number of treaties.

(b) Insurgents and Belligerents: Insurgents are individuals who participate in an insurrection (rebellion) against their government. Belligerents are a body of insurgents who by reason of their temporary organized government are regarded as lawful combatants conducting lawful hostilities, provided they observe the laws of war. For a long time, International Law has recognized that insurgents and belligerents may in certain circumstances, primarily dependent upon the *de facto* administration of specific territory, be international subjects having certain rights and duties under International Law, and may in due course be recognized as *de facto* governments. They can enter into valid arrangements on the international plane with States, international organizations, and other belligerents and insurgents. They are bound by the rules of International Law with respect to the conduct of hostilities.

(c) National liberation movements: In the course of anti-colonial actions sponsored by the United Nations and regional organizations, these organizations and the member States have conferred international legal status upon certain national liberation movements. In 1974, the General Assembly recognized the international legal status to the Angolan, Mozambican, Palestinian, and Rhodesian movements (which had been recognized as such by the Organization of African Unity (OAU) or the Arab League), and accorded them observer status in its meetings, in meetings of various organs of the United Nations, in meetings of the United Nations specialized agencies, and in conferences convened under the auspices of the United Nations. The Security Council of the United Nations permitted the Palestine Liberation Organization (PLO) to participate in its debates with the same rights of participation as conferred upon a member State not a member of the Security Council.

International practice has accorded the political entities recognized as national liberation movements a number of legal rights and duties. The most significant of these rights and duties

are the capacity to conclude binding international agreements with other international legal persons, the capacity to participate in the proceedings of the United Nations, and the rights and obligations of International Humanitarian Law.

(d) International territories: The term “International territory” refers to territories placed under a variety of international legal regimes including those administered by the United Nations under the trusteeship system or special arrangements. The Charter of the United Nations established the trusteeship system, replacing the mandate system established by the League of Nations, to enable the United Nations itself or a State to administer certain territories pending independence. The United Nations is also able to administer territories in specific circumstances. In several instances, The United Nations placed certain territories under its transitional administration for a variety of purposes, such as the preparation for independence, the administration of an election, the adoption of a new constitution, the implementation of a peace settlement, and the performance of other civil functions. Examples of such instances are Cambodia (1992-1993), Bosnia and Herzegovina (1995), and East Timor (1999-2002).

The territories (trust territories) placed under the trusteeship system have been accorded special status under International Law. Their inhabitants have been granted the rights for advancement, progressive development, and self-government or independence. Actually, all these territories have attained independence as separate States, or have joined other independent States. The territories placed by the United Nations under special systems, except Cambodia which has been already an independent State, have been also accorded special status under International Law for the purpose of assisting them in attaining their independence

4. Special case entities

There are two special case entities accorded a special unique status under International Law; they are the Sovereign Order of Malta, and the Holy See and the Vatican City.

(a) **The Sovereign Order of Malta:** The Sovereign Order of Malta was established during the Crusades as a military and medical association. It ruled Rhodes from 1309 to 1522. It was entrusted to rule Malta by the treaty with King Charles V of England in 1530. It lost its rule of Malta in 1798. In 1834 the Order established its headquarters in Rome as a humanitarian organization. The Order already had international personality at the time of its taking control of Malta and even when it had to leave the island it continued to exchange diplomatic legations with most European States. Today, the Order maintains diplomatic relations with over forty States.

(b) **The Holy See and the Vatican City:** The Holy See, which is sometimes used interchangeably with the Vatican City, is the international legal person of the Roman Catholic Church, with its physical location at the Vatican City in Rome and its sovereign the Pope. It is not a State in the normal sense of the word. It is a unique person of International law because it combines the feature of the personality of the Holy See as a religious entity with its territorial base in the Vatican City. Apart of some one thousand Church functionaries, it has no permanent population

of its own. Its sovereign territory consists of only about one hundred acres granted it by Italy in the 1929 Lateran Treaty. Nevertheless, the status of the Holy See as an international person is accepted by a number of States. Its personality approximates to a State in functions. The Holy See exchanges diplomatic representatives with other States, enters into bilateral treaties (called concordats), and is a party to many multilateral treaties.

5. Individuals

The ultimate concern for the human being has always been the essence of International Law. This concern was apparent in the Natural Law origin of the classical International Law. The growth of the positivist theories of law, particularly in the Nineteenth Century, obscured this concern for the human being and emphasized the centrality and even the exclusivity of the State in International Law.

In the Twentieth Century, International Law became again concerned with individuals. In 1907, the Hague Conventions initiated the concern in view of prisoners of war and the wounded. During the Second World War, the trend of International Law had been towards attaching direct responsibility to individuals for crimes committed against the peace and security. The Charter of London of 1943 issued by the Allied Powers established the individual responsibility for committing war crimes, crimes against humanities and crimes against peace. On this basis, after the Second World War, the German leaders were brought to trial before the Nuremberg International Tribunal (1945-1946) where their guilt was established. The Charter of the Nuremberg International Tribunal of 1945 provided specifically for individual responsibility for crimes against peace, war crimes and crimes against humanity. The Nuremberg International Tribunal pointed out that "international law imposes duties and liabilities upon individuals as well as upon states" and this was because "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". The principles of the Charter of the Nuremberg Tribunal and the decisions of this tribunal were affirmed by the General Assembly of the United Nations in 1946, thus making them to be part of the International Law. The Assembly also, in 1946, stated that genocide was a crime under International Law bearing individual responsibility; and this was reaffirmed in the Genocide Convention of 1948.

Individual responsibility was also confirmed with regard to grave breaches of the Four Geneva Conventions of 1949 and the Additional Protocols I and II of 1977, which deal with armed conflicts (International Humanitarian Law). On this basis, two specific international war crimes tribunals were established, one for the former Yugoslavia in 1993 and one for Rwanda in 1994, to prosecute persons responsible for the serious violations of International Humanitarian Law committed in the territory of each of these countries.

The events in the former Yugoslavia and Rwanda impelled the renewal of the international concern for the establishment of a permanent international criminal court, which had long been

under consideration. In 1998, the Rome Statute of the International Criminal Court was adopted at the United Nations Diplomatic Conference. The Statute provides that the jurisdiction of the Court is limited to “the most serious crimes of concern of the international community as a whole”, which are the crime of genocide, crimes against humanity, war crimes and the crime of aggression, and that “ A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute.”

In addition, after the Second World War, International law became also concerned with individuals in the field of human rights and the fundamental freedoms. The Charter of the United Nations started this trend in 1945 by calling upon member states to observe human rights and fundamental freedoms for individuals and peoples. Since then, several conventions have been concluded to define human rights and fundamental freedoms which individuals and peoples are entitled to and to ensure their respect and protection. Among these conventions are the International Covenant on Civil and Political Rights of 1966, and the International Covenant on Economic, Social and Cultural Rights of 1966.

Although, individuals as a general rule lack standing to assert violations of the above treaties in the absence of the protest by the State of nationality, a wide range of other treaties have enabled individuals to have direct access to international courts and tribunals. Examples of such treaties are the European Convention on Human Rights of 1950, the American Convention on Human Rights of 1969, the International Convention on the Elimination of All forms of Racial Discrimination of 1966, and the Optional Protocol to the International Covenant on Civil and Political Rights of 1966.

In conclusion, we can say that Contemporary International Law has recaptured the concern for individuals, and individuals have become recognized as participants and subjects of this law. This has occurred primarily through the evolution of Human Rights Law and Humanitarian Law coming together with the evolution of the Traditional International Law. Individuals have a sort of legal personality under International Law; they are granted certain rights and subjected to certain obligations directly under International Law. International Law is applicable to relations of States with individuals and to certain interrelations of individuals themselves where such relations involve matters of international concern.

6. Minorities

The concern of International Law, in the Twentieth Century, for individuals was accompanied by another concern for minorities. The problem of protecting national minorities in Europe confronted the League of Nations after the First World War. The League assumed its responsibilities in the field of treaty-based protection of minorities in Europe, in social matters, such as health and fair labor standards. After the Second World War certain rights were granted to the individual members of ethnic, linguistic and cultural minorities; they were granted the right to have their identity and language respected by the State as part of the process of the

development of human rights in general. The rise of ethno-nationalism after the collapse of the Soviet Union in 1991 brought back the status of ethnic minorities and other groups in International Law to be an important issue concerning the international community. Various efforts have been made on the global and regional level to improve the legal protection of minorities. On the Global level, there is “the United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities of 1992”. On the regional level, there are “the European Charter for Regional or Minority Languages” adopted by “the Council of Europe” in 1992, “the Framework Convention for the Protection of National Minorities” adopted by “the Council of Europe” in 1995 and the creation of “the High Commission for National Minorities” belonging to “the Conference on Security and Cooperation in Europe”.

Despite all these efforts that aimed to grant specific rights to minorities, the question remains, what legal status should be accorded to minorities in International Law? Do minorities have international legal personality?

There is no clear answer to these questions. Actually, the problem of minorities is very complicated because it involves political and legal dimensions related to the meaning and legal consequences of the principle of self-determination that may lead to loss of the concerned State part of its territory and its control over part of its population and to the possible outside intervention in its domestic affairs. For this reason, it is no accident that in the development of International Law since the Second World War, the rights of minorities have been conceived as a category of human rights which are to be exercised by the individual belonging to a minority, rather than as group rights attributed to a collective entity as such.

7. Indigenous Peoples

In recent years, a special issue related to a category of the so-called “indigenous peoples” has been raised. Examples of indigenous peoples are the Aborigines in Australia, the American Indians, the Eskimos and the Maori in New Zealand. Despite the attempts by the United Nations to recognize group rights to indigenous peoples, it is still regarded as a specific category of minorities with special needs and having a particular relationship to their traditional territory.

In conclusion, we can say that minorities and indigenous peoples are not subjects of International Law in any meaningful sense of the term and that they have not achieved an international legal personality. They may receive guarantees of certain levels of treatment under international treaties, but it does not follow that they as such have legal personality. International Law does not attribute rights to minorities and indigenous peoples as an entity, but rather to individual members of them.

C) Relationship between International law and Municipal Law



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International Law is the law which governs the Relations of sovereign independent States inter se Municipal law or State law or national law is the law of a State or a country and in that respect is opposed to International Law which consists of rules which civilized States consider as binding upon them in their mutual relations. Kelsen observes that national law regulates the behavior of individuals International law the behavior of States or as it is put whereas national law is concerned with the international relations the so called domestic affairs of the State. International Law is concerned with the external relations of the State its foreign affairs.

Legislature and court systems are different on the international and municipal levels. Where the municipal level uses a legislature to help enforce and test the laws, the international court system relies on a series of treaties without a legislature which, in essence, makes all countries equal.

Enforcement is a major difference between municipal and international law. The municipal courts have a law enforcement arm which helps require those it determines to follow the rules, and if they do not they are required to attend court. The international court system has no enforcement and must rely on the cooperation of other countries for enforcement.

There is a divergence of opinion on the question as to whether International Law and Municipal Law on the various national laws can be said to form a unity being manifestations of a single conception of law or whether International Law constitutes an independent system of law essentially different from the Municipal Law. The former theory is called monistic and the latter dualistic.

Monistic Theory: Monists assume that the internal and international legal systems form a unity. Both national legal rules and international rules that a state has accepted, for example by way of a treaty, determine whether actions are legal or illegal. In most monist states, a distinction between international law in the form of treaties, and other international law, e.g. jus cogens is made. International law does not need to be translated into national law. The act of ratifying the international law immediately incorporates the law into national law. International law can be directly applied by a national judge, and can be directly invoked by citizens, just as if it were national law. A judge can declare a national rule invalid if it contradicts international rules because, in some states, the latter have priority. In other states, like in Germany, treaties have the same effect as legislation, and by the principle of lex posterior, only take precedence over national legislation enacted prior to their ratification. In its most pure form, monism dictates that national law that contradicts international law is null and void, even if it predates international law, and even if it is the constitution. It maintains that the subject of the two systems of law namely, International Law and Municipal Law are essentially one in as much as the former regulates the conduct of States, while the latter of individuals. According to this view law is essentially a command binding upon the subjects of the law independent of their will which is one case is the States and in the other individuals. According to it International Law and

Municipal Law are two phases of one and the same thing. The former although directly addressed to the States as corporate bodies is as well applicable to individuals for States are only groups.

Dualistic theory: Dualists emphasize the difference between national and international law, and require the translation of the latter into the former. Without this translation, international law does not exist as law. International law has to be national law as well, or it is no law at all. If a state accepts a treaty but does not adapt its national law in order to conform to the treaty or does not create a national law explicitly incorporating the treaty, then it violates international law. But one cannot claim that the treaty has become part of national law. Citizens cannot rely on it and judges cannot apply it. National laws that contradict it remain in force. According to dualists, national judges never apply international law, only international law that has been translated into national law. According to the dualist view the systems of International Law and Municipal Law are separate and self contained to the extent to which rules of the one are not expressly or tacitly received into the other system. In the first place they differ as regards their sources. The sources of Municipal Law are customs grown up within the boundaries of the State concerned and statutes enacted therein while the sources of International Law are customs grown up within the Family of Nations and law making treaties concluded by its members. In the second place Municipal Laws regulates relations between the individuals under the sway of a State or between the individuals and the State while International Law regulates relations between the member States of the Family of Nations. Lastly there is a difference with regard to the substance of the law in as much as Municipal Law is a law of the sovereign over individuals while International Law is a law between sovereign State which is arrived at an agreement among them.

Transformation Theory: According to this theory it is the transformation of the treaty into national legislation which alone validates the extension to individuals of the rules set out in international agreements. The transformation is not merely a formal but a substantial requirement. International Law according to this theory cannot find place in the national or Municipal Law unless the latter allows its machinery to be used for that purpose.

This theory is fallacious in several respects. In the first place its premise that International Law and Municipal Law are two distinct systems is incorrect. In the second place the second premise that International Law binds States only whereas municipal law applies to individuals is also incorrect for International Law is the sum of the rules which have been accepted by civilized states as determining their conduct towards each other and towards each others subjects. In the third place the theory regards the transformation of treaties into national law for their enforcement. This is not true in all cases for the practice of transforming treaties into national legislation is not uniform in all the countries. And this is certainly not true in the case of law making treaties.

Delegation Theory: According to this theory there is the delegation of a right to every State to decide for itself when the provisions of a treaty or convention are to come into effect and in what manner they are to be incorporated in the law of the land or municipal law. There is no need of transformation of a treaty into national law but the act is merely an extension of one single act. The delegation theory is incomplete for it does not satisfactorily meet the main argument of the transformation theory.

It is settled by the leading English and American decisions that International Law forms part of the municipal law of those countries. The United States has unambiguously applied the doctrine that International Law is part of the law of the land. All international conventions ratified by the USA and such customary International Law as has received the assent of the United States are binding upon American Courts even if they may be contrary to the statutory provisions. There is a presumption in cases of conflict that the United States Congress did not intend to overrule international law in India.

In India, SC has held in several cases such as Vishakha vs State of Rajasthan, Randhir vs Union of India, Unnikrishnan vs State of Karnataka, that domestic laws of India, including the constitution are not to be read as derogatory to International law. An effort must be made to read the domestic law as being in harmony with the international law in case of any ambiguity. At the same time, the constitution is still the supreme law of the land and in case of any directly conflict the constitution will prevail.

D) Codification of International Law

It means the process of reducing the whole body of law into code in the form of enacted law. The task of codifying International Law, if it is to mean anything, must be primarily one of bringing about an agreed body of rules already covered by customary or conventional agreement of states.

History of Codification:

It dated back to the end of 18th century when the idea of codification of international law was conceived by Bentham. Jeremy Bentham was a British philosopher, social reformer and Jurist. Before him, an unsuccessful attempt was made by the French Convention to draw up a declaration of the Rights of Nations, 1792.

- ❖ **Declaration of Paris:** The Declaration of Paris occupies a place of significance in the development of codification of International Law. The declaration was signed by France, Britain, Austria, Russia, Turkey, Prussia, Sardinia after the end of Crimean war in 1856.

(Crime an war was a conflict in which Russia lost to an alliance of France, Britain, the Ottoman Empire, and the Piedmont Sardinia (the kingdom of Sardinia).

This declaration laid down the principles relating to:

- a) Abolition of Privateering
- b) Non-capture of neutral goods except illegal imports of war under enemy flags
- c) Blockade to be obligatory must be effective
- d) Except smuggled goods of war, enemy goods cannot be captured under neutral flags.

UNIT 2

SOURCES OF INTERNATIONAL LAW

Introduction

Article 38(1) of the statutes of ICJ provides a reflection of the sources of international law, though not accurate and Article 38 did not expressly mention 'sources' but it is usually invoked as sources of international law. Sources of international law can be characterized as 'formal' and 'material' sources, though the characterization is not by hierarchy but for clarification, therefore, Article 38(1)(a-c), that is, conventions or treaties, custom and general principles are formal sources whereas Article 38(1)(d) that is, judicial decisions and juristic teachings are 'material sources'. Formal sources confer upon rules an 'obligatory character', while material sources comprise the 'actual content of the rules' This essay will consider the accuracy of the sources and other law making means

Article 38 (1) International Conventions

Article 38 (1) of the Statute of the International Court of Justice is generally recognized as a definitive statement of the sources of international law. It requires the Court to apply, among other things,

- (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.

International conventions can also be referred to as bilateral and multilateral treaties, that is, UN charter, as well as other conventions and covenants thereafter. Treaty is as 'an international agreement concluded between states in written form and governed by international law whether embodied in a single instruments or in two or more related instruments and whether in particular designation'.

Treaties are governed by some rules under international law; First, Treaties are voluntary in the sense that states cannot be bound by agreement without its consent. States are bound only if they are parties to a treaty, though there are exceptions to this, i.e, delimitation of territorial boundaries bind all states, they are 'ergo omnes'(against the whole world) Secondly, agreement and consent is by ratification of states, signature, and expression of consent to be bound and states are bound only by reason of their consents Thirdly ,when parties consent to treaties that codified existing customary law, two things happen; The states that are parties to the treaty are bound in the normal way and states that are not parties to the treaty originally are bound by the treaty because they are 'rooted in customary law' and states that are not parties to a treaty that codified existing customary law into code of conduct to order state future activities will still be bound by the treaty .This indicates that customary law can become treaty and vice versa if there is no sufficient ratification for such treaty, even after ratification, they can still overtake each other in term of superseding preferences no matter which one is older. The fourth rule is that treaties must be deposited at the secretariat of UN and published if ratified by states pursuant to Article 80 of Vienna convention on the law of treaties and Article 102 of the UN charter; whereas, unregistered treaty remain binding between parties but it may not be invoked before court of Justice or any of the UN organs. Treaty is a means of creating obligations and binding law for states and when state violates the treaty, it has violated the law.

Is Treaty therefore a law or obligation? The question whether treaty create law or impose obligation generates debate streamlined between 'contract treaties' and 'law making treaties', that is, whether treaties are contracts that impose obligation or 'law making' leading to international law. In consideration of treaty as a contract, Lord Templeman in *Maclaine Watson v Dept. of Trade and Industry* said a 'treaty is a contract between the governments of two or more sovereign states'. Treaty is a product of negotiations between 'legal equals' which has contractual obligation between consenting parties. The rule that proposes obedience to treaties and make them binding is embedded in customary international law and this is expressed in the maxim '*pacta sunt servanda*'. The only law in this view is customary international law but all 'specific detailed' in the treaty obligation are not law but 'legal obligation'. On the other hand, considering treaty as a source of law is plausible, trying to refer treaties as source of obligation is like concealing the important role they assuage in international law. States coming together to ratify a treaty is outright means of creating law. A state has created law for itself the moment it ratifies the treaty and therefore legally bound. If it violates the law, it has violated international law.

The two legal effects are interwoven, the classification into 'obligation' and 'legal' are similar in operation. if a state consent to treaty, the state is bound by the treaty either called 'obligation' or 'law' The distinction is therefore theoretical for the purpose of finding answer to the binding nature of international law. A treaty of contract otherwise known as 'bilateral treaty' may cease when the purpose for which it was entered had been achieved or terminated. A 'Law making treaty' or 'multilateral treaty', may be planned for enduring future purpose that will lead to an important customary law like law of the sea convention of 1982 which was made general for all

states. It has been argued that treaties are binding on non-parties if they have customary law origin. In North Sea Continental Shelf case, ICJ ruled that for such to be binding, 'it would in the first place be necessary that the provision concerned should at all events potentially, be of a fundamentally norm creating character such as could be regarded as forming the basis of a general rule of law'.

The second procedure laid down by ICJ is that the provision in question 'should have been adopted in the practice of a sufficiently widespread and representative number of state including those that are not parties to the treaty'. The third requirement is that *opinio juris* which form the basis of legal character of state practice be satisfied. *Opinio juris* and state Practice are elements of customary law. The sources are complementary and interrelated

but not necessarily hierarchical in the order of Article 38. This seems to be the view of the court in Nicaragua v USA and Danube Dam case where it was held that 'some of the rules laid down in the Vienna Convention on the law of Treaties might be considered as a codification of existing contemporary law'. Dixon and Mc Corquodale said 'the court confirmed that in general, the law applicable to a treaty is the law in force when the treaty itself comes into operation, even if customary law has developed further since then'. However, the court did not recognize that the 'treaty itself might permit evolving customary rule to be relevant to its operation, this seems to be an attempt to introduce a coherency to the law irrespective of the source of any particular obligation'. Treaties can be invalid on many grounds *inter alia*, if it is in conflict with *jus cogen*. Treaty can as well be withdrawn, terminated, suspended and reserved. The other formal source is custom:

Article 38 (1) B- International Custom:

The important elements here are state practice, the tenacity and acceptance of such practice as law, also known as '*opinio juris*.' Customary law may not be as 'visible' as treaty. 'it represents the essential basis upon which modern human rights is grounded'. Custom is regarded as a form of 'tacit agreement', the behavior of states to each other in an acceptable way leads to tacit accent to the acceptable behavior. The problem of this view is that if agreement kicks it on, absence of agreement can kick it off. Customary law emanates as law from practice of states. Dixon refers to it as the 'foundation stones of the modern law of nations' and this was backed up in the Gulf of Maine case that custom is the ideal right size for the general principles and always on ground to fill the vacuum any time obligation and law of treaties are not gaining global acceptance. Can customary law change? Customary law can change on the principle of 'apprehension' and 'acquiescence' but that does not mean customary law is not a strong rule of law, the process of customary law continuously is a good omen to international law because it can meet up with the timely needs of international law as the world and law develop, though, it may have its own disadvantages of more relaxed and slow formation process, it lacks certainty and visibility unlike treaty. it has advantage as regards to its variety of wide scopes in similarities with state activities. Treaty has advantage where custom has disadvantage, they are like twin pillars ready to work together in other to strengthen the sources of international law. Hugh said, 'the way things have always been done becomes the way things must be done rules, international law does not deviate from the pattern discernible in municipal legal systems'.

State practice as one of the elements of customary law, it is a continuous and constant state practice of international acts over a period of time, Governmental actions, rule

makings and execution of policies, governmental declaration and pronouncement, administrative procedures and policies within states constitute good links and sources of state practice. In *Assylum case (Colombia v Peru)*, to form customary law, it must be 'in accordance with a constant and uniform usage practised by states in question'. This was stated in Fisheries case (United Kingdom V Norway). The 'uniformity' and 'consistency' test is 'general practice' and not a 'universal practice' and 'practice of most influential and powerful states would carry the greatest weight', deducing from the above, it doesn't mean all states participation in the practice. 'Once a practice is established as forming part of customary International law', all states are bound including states and the new states that failed to contribute to the practice initially. Nevertheless, we can not rule out the 'opt out' possibility for the 'persistent objectors' at the formative stage of the law, as Thirlway put it, 'an attractive option' which will disallow the imposition of specific rule by the majority over the minority., it has been deeply criticized in international law, as a result of this, the practice is as stated earlier, states are bound as a general rule either as 'objectors' or not.

Consistency of state practice as another element is significant to the alteration of an existing custom. In Lotus case, the court said customs must be 'constant and uniform'. It must not be 'totally uniform and constant'; it must at least be significantly constant state practice to become customary international law. Also, it is well stated in Anglo-Norwegian Fisheries case that the consistency required may vary in degree based on circumstance.

Generality of Practice as another element in customary law is about the knowledge of the Custom, to significant number of states. It is a general adoption of practice by state, in North Sea Continental Shelf Cases, it may be difficult to determine the number of state to participate in international law before a general practice can become law because it is not about majority of votes cast, the degree depends on the various subject matters.

Opinio juris is the second element broadly considered necessary for the formation of customary international law with state practice, Opinio juris which constitute 'subjective element'(verbal act) while state practice is the 'objective element'(behavioral act) and this was well articulated by Kammerhofer in his article that verbal act can form a practice with their content forming 'expression of the subjective element', a statement of an act and that 'subjective element may be dominant factor in the behavioral act itself'. Dixon however holds that 'state practice must be accompanied by a belief that the practice is obligatory, the belief in the obligatory nature of the practice is called the opinio juris' but ICJ on several occasion refer to opinio juris as having equal footing with 'state practice' in Continental shelf case (Libyan Arab Jamahinya V Malta) and legality of Nuclear Weapons Advisory Opinion .Also in Lotus case ,opinio juris was seen as essential element of customary international law and this was affirmed in North Sea Continental Shelf Cases but the judges however held that opinio juris cannot be implied from repeated activities, this made the proof of opinio juris difficult but the dissenting judges in the case realized the difficulty when they held otherwise in their minority judgement, its proof however depends on the subject matter, thus attainment of rule to jus cogen status required strong evidence of opinio juris apart from the fact of consistence state practice. In Nicaragua case where state practice and opinio juris was alluded to arrive at a conclusion that use of force had attained the status of customary rule of jus cogen before the advent of UN charter of 1945. The time element and duration of customary law varies.

The comparison of treaty with customary law is important because they are the two major sources of international law, the Nicaragua case mentioned briefly above affirmed the complementary relationship between treaty and international custom. It also shows that treaty may codify International custom and treaty may also revert to international custom if the treaty is abandoned by states. They are interrelated though there may be conflict where the interrelated part tends toward different obligations; ICJ may resolve the conflict depending on the stronger obligation. In the Nicaragua case, customary law will not cease to bind because it has been codified by treaty. Parties to treaty will be bound by it and the non-parties will be bound by custom. if treaty falls away, customary law will take over but where there is conflict, if treaty is latter than custom, it will prevail, this is based on common principle of law and more so that treaty is a deliberate 'act of law creation' where custom is latter than treaty, the treaty will still prevail on parties.

Article 38 (1) (C)-General Principle Of Law:

This is unclear and controversial area of the source. Positivist earlier rejected this principle because it did not conform to state will and consent like treaty and custom, but they latter accepted it; provided it is accepted as part of state legal order. 'The general principles of law recognised by civilized nations' as a source tend towards exclusion of uncivilized nations. Naturalist believes it tends to incorporate natural law into international law, they believe law exist before any law whether treaty or custom, this differs from positive law. It is apparently conspicuous that paragraph 1(c) added nothing to the sources which treaty and custom had taken care of and due to this ICJ barely invoke it, it gradually went into oblivion and remain dormant until it appeared that new areas of international law had gap and the rule was revitalized and applied to area like international criminal law and international administrative law, recourse can be made to the general principle of law common to all 'major legal systems of members of the community of nations', if treaty and custom had been exhausted with gap, that is, estoppels, equity, and so on. Judge McNair in the 'International Status of South West Africa Case said that national law can be a pointer to the type of rules that might be of assistance in international law like 'the concept of limited liability' in Barcelona Traction case. Whether procedural, administrative, or substantive rules, they can be imported to international law, it however need no treaty or custom for its validation. it is well settled that concepts have 'pre-existing legal validity'. This principle tend more to dualistic doctrine.

Principle of equity is applicable to international Tribunals that is general principles of equity and fairness within the scope of paragraph 1(c). it applies in decisions according to law and not by abstractness outside law like **ex aequo et bono** in Article 38(2), example of equitable principle applied are acquiescence and estoppels in River Meuse case. Paragraph 1(c) may include 'general principles of International law' which are similar to principle in National legal system. In general, treaty and custom growth and intensity have reduced the weight of general principle of law as the source of international law.

Article 38 (1) (D) Judicial Decisions:

Article 38(1) d 'shall apply subject to the provisions of Article 59, Judicial decisions...' and Article 59 of the ICJ statutes states that the court decisions have 'no binding force except between the parties and in respect of that particular case'. Judicial decisions are material area of

Sources of law. Though, there may be no stare decisis as stated in Article 59, recourse can still be made by court to its past decisions res judicata and advisory opinion to substantiate current case as authoritative evidence of legal position, for example, in Nauru case, the principle of Nicaragua case were relied upon to reach the majority decisions. Also, judicial decisions constitute much of the source of 'international maritime law' and 'it is clear that the ICJ pays great regard to both the actual decisions it has reached in previous cases and to the law it has declared therein'. It is submitted that ICJ participates in law making process and technical impediment on this is more in theory than in practice. Court participates in law making process through case law, judges' rule and advisory opinion in breaking new area of international law. Dixon confirmed this by saying 'The attempt to protect state sovereignty by limiting the functions of the ICJ and ICC to one of simple adjudication rather than law creation largely has failed'. Antonio also said 'ICJ has gone so far as, in fact, to set new international rule in spite of its aforementioned lack of formal power to do so' Writing of Publicists which paragraph 1 (d) refers to as 'subsidiary means'. Arbitral tribunals and national courts consult writing of publicist while international court make little use of 'doctrine' but where the writing of publicist is productive is the draft article, reports and secretariat memorandum produced by the International Law Commission and Resolution of the Institute of International Law Commission and that of the Institute of International Law. Nowadays the opinion of writers has become less important since states now express themselves well through organs of UN and most importantly that writers are subjective in their writings due to opinionated reasons.

SECURITY COUNCIL RESOLUTION

A United Nations Security Council resolution is a UN resolution adopted by the fifteen members of the Security Council; the UN body charged with "primary responsibility for the maintenance of international peace and security".

The UN Charter specifies (in Article 27) that a draft resolution on non-procedural matters is adopted if nine or more of the fifteen Council members vote for the resolution, and if it is not voted by any of the five permanent members. Draft resolutions on "procedural matters" can be adopted on the basis of an affirmative vote by any nine Council members.

The five permanent members are the People's Republic of China (which replaced the Republic of China in 1971), France, Russia (which replaced the defunct Soviet Union in 1991), the United Kingdom, and the United States.^[1]

Terms and functions mentioned in the UN Charter

The term "resolution" does not appear in the text of the United Nations Charter. It contains numerous formulations, such as "decision" or "recommendation", which imply the adoption of resolutions which do not specify the method to be used.

The UN Charter is a multilateral treaty. It is the constitutional document that distributes powers and functions among the various UN organs. It authorizes the Security Council to take action on behalf of the members, and to make decisions and recommendations. The Charter mentions neither binding nor non-binding resolutions. The International Court of Justice (ICJ) advisory opinion in the 1949 "Reparations" case indicated that the United Nations Organization had both

explicit and implied powers. The Court cited Articles 104 and 2(5) of the Charter, and noted that the members had granted the Organization the necessary legal authority to exercise its functions and fulfill its purposes as specified *or implied* in the Charter, and that they had agreed to give the United Nations every assistance in any action taken in accordance with the Charter.

Article 25 of the Charter says that "The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter". The *Repertory of Practice of United Nations Organs*, a UN legal publication, says that during the United Nations Conference on International Organization which met in San Francisco in 1945, attempts to limit obligations of Members under Article 25 of the Charter to those decisions taken by the Council in the exercise of its specific powers under Chapters VI, VII and VIII of the Charter failed. It was stated at the time that those obligations also flowed from the authority conferred on the Council under Article 24(1) to act on the behalf of the members while exercising its responsibility for the maintenance of international peace and security. Article 24, interpreted in this sense, becomes a source of authority which can be drawn upon to meet situations which are not covered by the more detailed provisions in the succeeding articles. The Repertory on Article 24 says: "The question whether Article 24 confers general powers on the Security Council ceased to be a subject of discussion following the advisory opinion of the International Court of Justice rendered on 21 June 1971 in connection with the question of Namibia (ICJ Reports, 1971, page 16)".

In exercising its powers the Security Council seldom bothers to cite the particular article or articles of the UN Charter that its decisions are based upon. In cases where none are mentioned, a constitutional interpretation is required. This sometimes presents ambiguities as to what amounts to a decision as opposed to a recommendation, and also the relevance and interpretation of the phrase "in accordance with the present Charter".

Resolutions by the Security Council are legally binding. If the council cannot reach consensus or a passing vote on a resolution, they may choose to produce a non-binding presidential statement instead of a Resolution. These are adopted by consensus. They are meant to apply political pressure — a warning that the Council is paying attention and further action may follow.

Press statements typically accompany both resolutions and presidential statements, carrying the text of the document adopted by the body and also some explanatory text. They may also be released independently, after a significant meeting.

GENERAL ASSEMBLY RESOLUTIONS

A United Nations General Assembly Resolution is voted on by all member states of the United Nations in the General Assembly.

General Assembly resolutions usually require a simple majority (50 percent of all votes plus one) to pass. However, if the General Assembly determines that the issue is an "important question" by a simple majority vote, then a two-thirds majority is required; "important questions" are those that deal significantly with maintenance of international peace and security, admission of new members to the United Nations, suspension of the rights and privileges of membership, expulsion of members, operation of the trusteeship system, or budgetary questions.

Although General Assembly resolutions are generally non-binding towards member states, internal resolutions may be binding on the operation of the General Assembly itself, for example with regard to budgetary and procedural matters.

General Assembly Resolutions

- **1946**
 - Resolution 1: Established the United Nations Atomic Energy Commission (UNAEC) "to deal with the problems raised by the discovery of atomic energy" and tasked to "make specific proposals... for the elimination from national armaments of atomic weapons and of all other major weapons adaptable to mass destruction", among other issues regarding nuclear technology.
 - **1947**
 - Resolution 177: International Law Commission was directed to "formulate the principles of international law recognized in the Charter of the Nuremberg Tribunal and in the judgment of the Tribunal." This resulted in the creation of the Nuremberg Principles.
 - Resolution 181: The 1947 UNGA 'Partition resolution' regarding the British Mandate of Palestine.
- **1948**
 - Resolution 194: Recommends the "Right of return" for Palestinian refugees and for Jewish refugees.
 - Resolution 217: Universal Declaration of Human Rights
 - Resolution 260: Convention on the Prevention and Punishment of the Crime of Genocide.
- **1949**
 - Resolution 273: *Admits the State of Israel to membership in the United Nations.*
 - Resolution 289: On the Question of the disposal of the former Italian colonies: recommending that Libya should be independent not later than January 1, 1952^[1]
- **1950**
 - Resolution 377 A: The "Uniting for Peace" Resolution
- **1951**
 - Resolution 498: calling on the People's Republic of China to cease all hostilities on the Korean peninsula... its armed forces continue their invasion of Korea and their large-scale attacks upon United Nations forces there...has itself engaged in aggression in Korea^{[2][3][4]}
 - Resolution 500: Recommend general trade embargo against People's Republic of China and North Korea for their aggression in Korea^[4]
- **1952**
 - Resolution 505: Threats to the political independence and territorial integrity of China (Republic of China) and to the peace of the Far East, resulting from Soviet violations of the Sino-Soviet Treaty of Friendship and Alliance of 14 August 1945 and from Soviet violations of the Charter of the United Nations
- **1955**

- Resolution 977(X): Establishing the United Nations Memorial Cemetery in Busan, South Korea for United Nations Command casualties of the Korean War.^[5]
- **1960**
 - Resolution 1514: *Declaration on the granting of independence to colonial countries and peoples.*
 - Resolution 1541: United Nations definition of what a colony is, and what self-determination is. *Principles which should guide Members in determining whether or not an obligation exists to transmit the information called for under Article 73 e of the Charter.*
- **1961**
 - Resolution 1631: *Admission of Mauritania to membership in the United Nations.*
- **1962**
 - Resolution 1761: *Recommended sanctions against South Africa in response to the government's policy of apartheid.*
- **1963**
 - Resolution 1962: One of the earliest resolutions governing Outer space.
 - Resolution 1991: Amended the UN Charter, enlarging the Security Council to fifteen members.
- **1971**
 - Resolution 2758: *Expelled the Republic of China and replaced it with the People's Republic of China. It also recognized the PRC as the sole legal authority of China. (See China and the United Nations)*
- **1972**
 - Resolution 3010: Adopted to make the year 1975 International Women's Year.
- **1973**
 - Resolution 3068: International Convention on the Suppression and Punishment of the Crime of Apartheid adopted and opened for signature, and ratification by Resolution 3068, 30 November 1973, and entered into force on 18 July 1976.
- **1974**
 - Resolution 3275: Adopted 1975, International Women's Year, as a period of intensified action with regards to equal rights and recognition of women.
 - Resolution 3314: Defined aggression.
- **1975**
 - Resolution 3379: *Zionism is a form of racism and racial discrimination*; revoked by Resolution 46/86.
 - Resolution 3520: Adopted the World Plan of Action and related resolutions from the International Women's Year Conference.
- **1976**
 - Resolution 31/72: Adopted the 1977 Environmental Modification Convention
 - Resolution 31/136: Adopted the period from 1976 to 1985 as the United Nations Decade for Women: Equality, Development and Peace.
- **1978**

- Resolution 33/75: Urges the Security Council, especially its permanent members, to take all necessary measures for insuring UN decisions on the maintenance of international peace and security. United States and Israel were the only no vote.
- **1979**
 - Resolution 34/37: Deplored Moroccan occupation of Western Sahara and urged to terminate it.
- **1981**
 - United Nations General Assembly Resolution 36/3: Admission of Belize to membership in the United Nations.^[6]
- **1989**
 - Resolution 44/34: The UN Mercenary Convention
- **1991**
 - Resolution 46/86: revoked Resolution 3379.
- **1993**
 - Resolution 47/121: condemned ethnic cleansing of the Bosnian Muslims by the Bosnian Serbs as genocide, (fourteen years later the International Court of Justice ruled in the Bosnian Genocide Case of 2007, that ethnic cleansing was not enough in itself to be genocide, but that there must also be intent to kill a substantial part of the targeted group by the perpetrators).
 - Resolution 48/114: Emergency international assistance to refugees and displaced persons in Azerbaijan.
- **2000**
 - Resolution 55/56: Introduced a process to certify the origin of rough diamonds from sources that are conflict-free
- **2006**
 - Resolution 60/285: The situation in the occupied territories of Azerbaijan.
 - Resolution 61/106: Adopted the Convention on the Rights of Persons with Disabilities.^[7]
- **2007**
 - Resolution 61/295: Establishes the Declaration on the Rights of Indigenous Peoples.
 - Resolution 61/255: Condemned without any reservation any denial of the Holocaust^[8]
 - Resolution 62/149: Called for a universal moratorium on Capital Punishment with a view to total abolition, and in the meantime, respect for the rights of those on death row. Calls on states which have abolished the death penalty not to reintroduce it.
 - Resolution 62/167: Expressed serious concern about human rights in North Korea.^[9]
- **2008**
 - Resolution 62/63: Criminal Accountability of UN Officials and Experts on Mission.
 - Resolution 62/243: The situation in Nagorno-Karabakh.
- **2012**

- Resolution 67/19: Recognising the State of Palestine as a non-member observer state.
- **2014**
- Resolution 68/262: Territorial integrity of Ukraine.
- **2015**
- Resolution 69/292 - Development of an international legally-binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction.^[10]
- **2016**
- Resolution 70/1 - The promotion, protection and enjoyment of human rights on the Internet.

UNIT-3: Recognition, Extradition and the Law of the Sea

A. Recognition

A.1) Theories of Recognition

A.2) Declaratory And Constitutive Theories Of State

A.3) Declaratory And Constitutive Theories Of State Recognition In International Law

Introduction

In international law, the two most common schools of thought for the creation of statehood are the constitutive and declaratory theories of state creation. The constitutive theory was the standard nineteenth-century model of statehood, and the declaratory theory was developed in the twentieth century to address shortcomings of the constitutive theory. In the constitutive theory, a state exists exclusively via recognition by other states. The theory splits on whether this recognition requires "diplomatic recognition" or merely "recognition of existence". No other state grants Sea land official recognition, but it has been argued by Bates that negotiations carried out by Germany constituted "recognition of existence". In the declaratory theory of statehood, an entity becomes a state as soon as it meets the minimal criteria for statehood. Therefore recognition by other states is purely "declaratory". Neither theory of recognition satisfactorily explains modern practice. The declaratory theory assumes that territorial entities can readily, by virtue of their mere existence, be classified as having one particular legal status: it thus, in a way, confuses 'fact' with 'law'. For, even if effectiveness is the dominant principle, it must nonetheless be a legal principle. A State is not a fact in the sense that a chair is a fact; it is a fact in the sense in which it may be said a treaty is a fact: that is, a legal status attaching to a certain state of affairs by virtue of certain rules or practices. And the declaratory theorist's equation of fact with law also obscures the possibility that the creation of States might be regulated by rules predicated on other fundamental principles—a possibility that, as we shall see, now exists as a matter of international law. On the other hand, the constitutive theory, although it draws attention to the need for cognition, or identification, of the subjects of international law, and leaves open the possibility of taking into account relevant legal principles not based on 'fact', incorrectly identifies that cognition with diplomatic recognition, and fails to consider the possibility that identification of new subjects may be achieved in accordance with general rules or principles rather than on an ad hoc, discretionary basis.

Background

Recognition constitutes acceptance of a particular situation by the recognising state both in terms of the relevant factual criteria and in terms of the consequential legal repercussions, so that, for example, recognition of an entity as the government of a state implies not merely that this government is deemed to have satisfied the required considerations, but also that the recognising state will deal with the government as the governing authority of the state and accept the usual legal consequences of such status in terms of privileges and immunities within the domestic legal order. Under-Secretary of State for Foreign Affairs in 1970 held that the test employed was whether or not the new government enjoyed: 'with a reasonable prospect of permanence, the obedience of the mass of the population ... effective control of much of the greater part of the territory concerned'. There is ample authority for the proposition that there is no difference for the present purposes between a recognition of a State de facto as opposed to de jure. The non-belligerent State which recognizes two Governments, one de jure and one de facto, will not allow them to transfer their quarrels to the area of the jurisdiction of its municipal Courts. As in *Carl Zeiss Stiftung v Rayner and Keeler Ltd (No 2)* [1967] 1 AC 853 HL Lord Reid, while referring to the case of *Luther v Sagor*, held: 'But the present case is essentially different.

The German Democratic Republic was set up by the USSR and it derived its authority and status from the Government of the USSR. So the only question could be whether or not it was set up as a sovereign state. ... If the Democratic Republic did not become a sovereign state at its inception,

there is no suggestion that it has at any subsequent time attempted to deprive the USSR of rights which were not granted to it at its inception. ... we must regard the acts of the German Democratic Republic, its government organs and officers as acts done with the consent of the Government of the USSR as the government entitled to exercise governing authority. (Brownlie, Ian, 2003 85-101) It appears to me to be impossible for any de jure sovereign governing authority to disclaim responsibility for acts done by subordinate bodies which it has set up and which have not attempted to usurp its sovereignty. So, in my opinion, the courts of this country cannot treat as nullities acts done by or on behalf of the German Democratic Republic. ... [were they to do so] the result would be far-reaching.' Lord Wilberforce: '... In the United States some glimmerings can be found for the idea that non-recognition cannot be pressed to its ultimate logical limit, and that where private rights, or acts of everyday occurrence, or perfunctory acts of administration are concerned the courts may, in the interests of justice and common sense, where no consideration of public policy to the contrary has to prevail, give recognition to the actual facts or realities found to exist in the territory in question.' *Gur Corporation v Trust Bank of Africa Ltd [1987] QB 599* [Sir John Donaldson MR held: 'We ... know the constitutional history of the territory of the Ciskei, ... and we can take judicial notice of the fact that the Republic of South Africa is a sovereign state, ... and that it was entitled to exercise sovereignty over the territory of the Ciskei until the passing of the Status of Ciskei Act 1981. ... the certified fact that "Her Majesty's Government has made representation to the South African Government in relation to certain matters occurring in Ciskei and other of the Homelands to which South Africa has purported to grant independence" gives rise to a clear inference that Her Majesty's Government regards the Republic of South Africa as continuing to be entitled to exercise sovereign authority over the territory.

The Government of the Republic of Ciskei has locus standi in the courts of this country as being a subordinate body set up by the Republic of South Africa to act on its behalf.' Fundamentally the question is whether international law is itself, in one of its most important aspects, a coherent or complete system of According to predominant nineteenth-century doctrine there were no rules determining what were 'States' for the purposes of international law; the matter was within the discretion of existing recognized States." Recognition (1) The early view of recognition Although the early writers occasionally dealt with problems of recognition, it had no separate place in the law of nations before the middle of the eighteenth century. The reason for this was clear: sovereignty; in its origin merely the location of supreme power within a particular territorial unit (suprema potestas), necessarily came from within and did not require the recognition of other States or princes. As Pufendorf stated: 'just as a king owes his sovereignty and majesty to no one outside his realm, so he need not obtain the consent and approval of other kings or states, before he may carry himself like a king and be regarded as such... [it would entail an injury for the sovereignty of such a king to be called in question by a foreigner.]' (Harris, D.J., 1998 144-189)

The doubtful point was whether recognition by the parent State of a new State formed by revolution from it was necessary, and that doubt related to the obligation of loyalty to a superior, which, it was thought, might require release: the problem bore no relation to constitutive theory in general. The position of recognition towards the end of the eighteenth century was as stated by Alexandrowicz: 'In the absence of any precise and formulated theory, recognition had not found a separate place in the works of the classic writers whether of the naturalist or early positivist period. When recognition did begin to attract more detailed consideration, about the middle of

the eighteenth century, it was in the context of recognition of monarchs, especially elective monarchs: that is, in the context of recognition of governments. leaders that they are, or should be, free to recognize or not to recognize on grounds of their own choosing.

If this is the case, the international status and rights of whole peoples and territories will seem to depend on arbitrary decisions and political contingencies. (1) Recognition: the great debate Before examining State practice on the matter, it is necessary to refer again to the underlying conflict over the nature of recognition. A further effect of nineteenth-century practice has been to focus attention more or less exclusively on the act of recognition itself, and its legal effects, rather than on the problem of the elaboration of rules determining the status, competence and so on of the various territorial governmental units. To some extent this was inevitable, as long as the constitutive position retained its influence, for a corollary of that position was that there could be no such rules. Examination of the constitutive theory is, therefore, first of all necessary. Legal and Political Dimensions of Recognition Policy: Constitutive, Declaratory, and Syncretistic Theories of State Creation Recognition is defined as, "The free act by which one or more States acknowledge the existence on a definite territory of a human society politically organized, independent of any other existing State, and capable of observing the obligations of international law, and by which they manifest therefore their intention to consider it a member of the international Community. In its first opinion, handed down on November 29th 1991, the EC Arbitration Commission (ECAC) clearly stipulated that its own approach to recognition was to be guided by the notion that the "existence or disappearance of a State is a question of fact; that the effects of recognition by other States is purely declaratory." This "declaratory" interpretation of recognition must be examined more closely given the fact that the EC's own recognition policy effectively went a long way towards creating such "facts" by redefining the terms of statehood.

The way in which narrow political, economic, and strategic interests served to structure the recognition process casts doubt on the legitimacy of the EC's recognition process as a precedent guiding public international law in the future (especially in terms of its contravention of UN policy towards Yugoslavia at the time, which emphasized an arms embargo, the unity of the State, mediation, and the avoidance of any unilateral moves that may destabilize the situation by both internal and external actors involved in the crisis). Constitutive Theories According to Thomas Grant, this theory is in tune with the 19th century conception of international law as *ius gentium voluntarium*, which essentially posits that international law is nothing more than the voluntary and consensual behavior of states within the international system. Thus according to constitutive theory, recognition and by extension statehood are, both in theory and in practice, the sovereign prerogative of those states that are already recognized within the international system. If recognition is constitutive of statehood then, critics have asked, what exactly is the status of an entity that meets the objective criteria of statehood but that goes unrecognized by the international community (Do any laws regulate the relations between the state in question and those that do not recognize its legitimacy (consider Israel/Palestine)? Such serious conceptual and practical difficulties with constitutive theories of recognition have given rise to alternative interpretations of such acts. Traditionally two theories of recognition were developed: constitutive and declaratory. The constitutive theory perceives recognition as "a necessary act before the recognized entity can enjoy an international personality," while the declaratory theory perceives it as "merely" a political act recognizing a preexisting state of affairs." In regard to the

constitutive theory of recognition, the question of "whether or not an entity has become a state depends on the actions [i.e., recognitions] of existing states.

However, the situation in which one state may be recognized by some states, but not by others, is an evident problem and thus a great deficiency of the constitutive theory. In the absence of a central international authority for granting of recognition, this would mean that such an entity at the same time has and does not have an international personality. Most writers have adopted a view that recognition is declaratory. This means that a "state may exist without being recognized, and if it does exist, in fact, then whether or not it has been formally recognized by other states, it has a right to be treated by them as a state. According to this view, when recognition actually follows, other states merely recognize a preexisting situation. However, this answer is not entirely satisfactory, as it is not evident why the act of recognition is still important. Indeed: It is only by recognition that the new state acquires the status of a sovereign state under international law in its relations with the third states recognising it as such. If it were to acquire this legal status before and independently of recognition by the existing states ... this legal consequence under international law would occur automatically and could no longer be prevented by withholding recognition of the entity as a state.

Declaratory Theories Declaratory theory emerged as a reaction to the unprincipled implications and conceptual difficulties inherent in a strictly constitutive approach to recognition. Declaratory theory argues instead that statehood is independent of recognition; that the act of recognition by other states in the international system is purely declaratory. In terms of international public law, therefore, it argues that a state becomes a subject of international law the moment it meets the conditions of statehood notwithstanding its recognition by the international community. Such an evolution of recognition theory was inspired by attempts to ensure that international law would be universal in application to all entities that meet the objective criteria of statehood within the system by insulating the objective achievement of statehood, from the subjective criteria of recognition. In light of these motivations, it is natural that a key component of declaratory theory is the establishment of objective criteria for statehood. However, as skeptics like Grant have argued, this interpretation of recognition also runs into problems for two important reasons.

First of all, the Montevideo criteria of statehood are rather minimal in scope and even then substantial controversy surrounds their application and interpretation. Suggestions for raising the bar for statehood and infusing the concept with additional normative criteria along these lines have in recent years included a widening range of requirements. These include the suggestions -- which have drawn varying degrees of support in terms of international law -- that a new state be: self-determining; democratic; established through peaceful means, legally, and by a negotiated settlement; independent; an observer of minority rights; be willing and able to observe international law; and "effective" with respect to the governance of the populations it contains. Grant argues that current projects for the elaboration of "Montevideo Plus" criteria for statehood are -- while legitimately attempting to infuse statehood with considerations that better reflect changing normative standards (such as the right to self-determination and independence for colonial peoples and those suffering alien occupation) -- inherently suspect in that they again reinsert ambiguity into the processes of establishing and confirming the juridical personality of states within the current system.

A.2) Defacto and Dejure Recognition

De-facto recognition.

It is extended where a govt. has not acquired sufficient stability. It is provisional (temporary or conditional) recognition. It is not legal recognition. However, it is recognition in principle. Three conditions for giving de-facto recognition. (i) permanence (ii) the govt. commands popular support (iii) the govt. fulfills international obligations.

De-Jure Recognition.

It is legal recognition. It means that the govt. recognized formally fulfills the requirement laid down by International law. De-jure recognition is complete and full and normal relations can be maintained.

De-facto recognition of a state is a step towards de-jure recognition. Normally the existing states extend de-facto recognition to the new states or govts. It is after a long lapse of time when they find that there is stability in it that they grant de-jure recognition. Such practice is common among the states. The essential feature of de-facto recognition is that it is provisional and liable to be withdrawn.

A.3) Forms of Recognition

There are following two forms for the declaration of recognition.

1. Express Recognition.
2. Implied Recognition.

- **Express Recognition:** – The declaration or notification by an existing state which purports the intention to recognize a newly born state, the recognition is said to be express recognition. In other words, when a formal and express declaration or statement is made and published or sent to the opposite party, the recognition is said to be express recognition.
- **Implied Recognition:** – When the existing state shows its intention of recognition of a newly born state by some acts, the recognition is said to be implied recognition. In other words, in case of implied recognition no formal statement or declaration is to be made, rather the intention of recognition is to be collected by the acts or transactions of the existing state. So, if such acts purport intention of recognition, it is said to be implied recognition.

Conditional Recognition: – The grant of recognition by an existing state to a newly born state stipulated on fulfillment some conditions in addition to the requirements of statehood is said to be conditional recognition. As for as, the recognition is concerned it is itself conditioned with the fulfillment of the essentials of statehood, that is to say, the new state must occupy some territory, has some population, government and sovereignty. If these requirements have been complied

with by the new state, then that should be recognized by existing states. But as for as, the recognition is concerned it is usually based on some political considerations. So, in the pursuance of these considerations the existing states sometimes declare recognition but stipulated with certain other conditions for the recognized state to be fulfilled.

A.4) Withdrawal of Recognition

Withdrawal of recognition may be explained as under:

1. **Withdrawal of de facto Recognition:** – Withdrawal of de facto recognition is possible under international law only on the ground that if the recognized state has been failed to fulfill the pre requisite condition for statehood. In such a case the recognizing state may withdraw from the recognition by communicating a declaration to the authorities of recognized stated or by a public statement.
2. **Withdrawal of de jure Recognition:** – There are different views about the withdrawal of de jure recognition. But according to the strict letters of international law and by the virtue of some conventions in this behalf, it is evident that the withdrawal of de jure recognition is not valid in any case. Though recognition is a political act but de jure but it by nature and status it is a legal oriented. But some jurists think that de jure recognition may be withdrawn, because it is a political act. But in fact it is not so. Only those de jure recognitions may be withdrawn where a state subsequently loses any essential of statehood. In such a case the state withdrawing from recognition shall send his express intention to the concerned authority issue a public statement to that extent.

B.Extradition and Asylum

Extradition is the act by one jurisdiction of delivering a person who has been accused of committing a crime in another jurisdiction or has been convicted of a crime in that other jurisdiction into the custody of a law enforcement agency of that other jurisdiction. It is a cooperative law enforcement process between the two jurisdictions and depends on the arrangements made between them. Besides the legal aspects of the process, extradition also involves the physical transfer of custody of the person being extradited to the legal authority of the requesting jurisdiction.

Through the extradition process, one sovereign jurisdiction typically makes a formal request to another sovereign jurisdiction ("the requested state"). If the fugitive is found within the territory of the requested state, then the requested state may arrest the fugitive and subject him or her to its extradition process. The extradition procedures to which the fugitive will be subjected are dependent on the law and practice of the requested state

Between countries, extradition is normally regulated by treaties. Where extradition is compelled by laws, such as among sub-national jurisdictions, the concept may be known more generally as rendition. It is an ancient mechanism, dating back to at least the 13th century BC, when an Egyptian Pharaoh, Ramesses II, negotiated an extradition treaty with Hittite King, Hattusili III.

B.1) State Jurisdiction

Definition

State jurisdiction is the capacity of a State under International Law to prescribe the rules of law, enforce the prescribed rules of law and to adjudicate.

State Jurisdiction, also means that a state court has the right to make a legally binding decision that affects the parties involved in the case.

It is derived from State sovereignty and constitutes its vital and central feature. It is the authority of a State over persons, property and events which are primarily within its territories.

SCOPE & EXTENT OF STATE JURISDICTION

State jurisdiction may extend beyond its territory over persons and things which have a national link. There are grounds or principles upon which the State can assert its jurisdiction within and beyond its boundaries.

Nevertheless, there are certain persons, property and events within a State territory which are immune from its jurisdiction.

Types of State Jurisdiction

It is of three types: legislative jurisdiction, executive jurisdiction and judicial jurisdiction.

Legislative jurisdiction

Legislative jurisdiction is the capacity of a State to prescribe rules of law. A State has the supremacy to make binding laws within its territory. It has legislative exclusivity in many areas. This supremacy is entrusted to constitutionally recognized organs.

Although legislation is primarily enforceable within a state territory, it may extend beyond its territory in certain circumstances. International Law, for example, accepts that a State may levy taxes against persons not within its territory as long as there is a real link between the State and the proposed taxpayer, whether it is nationality or domicile.

The legislative supremacy of a State within its territory is well established in International Law. However, this supremacy may be challenged in cases where a State adopts laws that are contrary to the rules of International Law. In such cases, a State will be liable for breach of International Law. A State may also be liable for breach of International Law if it abuses its rights to legislate for its nationals abroad.

Executive Jurisdiction

It is the capacity of a State to act and to enforce its laws within its territory. Generally, since States are independent of each other and possess territorial sovereignty, they have no authority to

carry out their functions on foreign territory. No state has the authority to infringe the territorial sovereignty of another State. In this sense, a State cannot enforce its laws upon foreign territory without the consent of the host State; otherwise it will be liable for breach of International Law.

Judicial Jurisdiction

It is the capacity of the courts of a State to try legal cases. A State has an exclusive authority to create courts and assign their jurisdiction, and to lay down the procedures to be followed.

However, in doing so, it cannot by any means alter the way in which foreign courts operate.

There are a number of principles upon which the courts of a State can claim jurisdiction. In civil matters, the principles range from the mere presence of the defendant in the territory of a State to the nationality and domicile principles. In criminal matters, they range from territorial principle to universality principle.

Principles of Jurisdiction

Generally, the exercise of civil jurisdiction by courts of a State has been claimed upon far wider grounds than has been the case in criminal matters.

As far as criminal jurisdiction is concerned, the grounds or principles of jurisdiction mostly invoked by States are as follows.

The Territorial Principle

This principle is derived from the concept of State sovereignty. It means that a State has the primary jurisdiction over all events taking place in its territory regardless of the nationality of the person responsible. It is the dominant ground of jurisdiction in International Law. All other State must respect the supremacy of the State over its territory, and consequently must not interfere in its internal affairs or in its territorial jurisdiction.

The territorial jurisdiction of State extends over its land, its national airspace, its internal water, its territorial sea, its national aircrafts, and its national vessels. It encompasses not only crimes committed on its territory but also crimes that have effects within its territory. In such a case a concurrent jurisdiction occurs, a subjective territorial jurisdiction may be exercised by the State in whose territory the crime was committed, and an objective territorial jurisdiction may be exercised by the State in whose territory the crime had its effect.

Although jurisdiction is primarily and predominantly territorial, it is not exclusive. A State is free to confer upon other States the right to exercise certain jurisdiction within its national territory.

States are free to arrange the right of each one to exercise certain jurisdiction within each national territory. The most significant recent examples of such arrangements are:

- The 1991 France-United Kingdom Protocol Concerning Frontier Control and Policing, under which the frontier control laws and regulations of each State are applicable and may be enforced by its officers in the control zones of the other;
- The 1994 Israel-Jordan Peace Treaty, under which the Israeli criminal laws are applicable to Israeli nationals and the activities involving only them in the specified areas under Jordan's sovereignty, and measures can be taken in the areas by Israel to enforce such laws.

The Nationality Principle

The nationality principle implies that a State jurisdiction extends to its nationals and actions they

take beyond its territory. It is based upon the notion that the link between the State and its nationals is a personal one independent of location.

Criminal jurisdiction based on the nationality principle is universally accepted. While civil law countries make extensive use of it, the Common Law countries use it with respect to major crimes such as murder and treason. The Common Law countries, however, do not challenge the extensive use of this principle by other countries.

a) A State may prosecute its nationals for crimes committed anywhere in the world; the ground of this jurisdiction is known as active nationality principle.

b) Also, it may claim jurisdiction for crimes committed by aliens against their nationals abroad; the ground of this jurisdiction is known as passive national principle.

This last principle has been viewed as much weaker than the territorial or active nationality principle as a basis for jurisdiction. It has been considered as a secondary basis for jurisdiction, and a matter of considerable controversy among States. However, in recent years this principle has come to be much acceptable by the international community in the sphere of terrorist and other internationally condemned crimes.

B.2) Customary Law Basis

Customary international law is an aspect of international law involving the principle of custom. Along with general principles of law and treaties, custom is considered by the International Court of Justice, jurists, the United Nations, and its member states to be among the primary sources of international law.

Many governments accept in principle the existence of customary international law, although there are differing opinions as to what rules are contained in it.

Recognition of customary international law

The International Court of Justice Statute defines customary international law in Article 38(1)(b) as "evidence of a general practice accepted as law." This is generally determined through two factors: the general practice of states and what states have accepted as law.

There are several different kinds of customary international laws recognized by states. Some customary international laws rise to the level of *jus cogens* through acceptance by the international community as non-derogable rights, while other customary international law may simply be followed by a small group of states. States are typically bound by customary international law regardless of whether the states have codified these laws domestically or through treaties.

Jus cogens

See jus cogens.

A peremptory norm (also called *jus cogens*, Latin for "compelling law") 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. These norms rooted from Natural Law principles, and any laws conflicting with it should be considered null and void. Examples

include various international crimes; a state which carries out or permits slavery, torture, genocide, war of aggression, or crimes against humanity is always violating customary international law.

Jus cogens and customary international law are not interchangeable. All *jus cogens* are customary international law through their adoption by states, but not all customary international laws rise to the level of peremptory norms. States can deviate from customary international law by enacting treaties and conflicting laws, but *jus cogens* are non-derogable.

Codification of international customary law

Some international customary laws have been codified through treaties and domestic laws, while others are recognized only as customary law.

The laws of war, also known as *jus in bello*, were long a matter of customary law before they were codified in the Hague Conventions of 1899 and 1907, Geneva Conventions, and other treaties. However, these conventions do not purport to govern all legal matters that may arise during war. Instead, Article 1(2) of Additional Protocol I dictates that customary international law governs legal matters concerning armed conflict not covered by other agreements.

Silence as consent

Generally, sovereign nations must consent in order to be bound by a particular treaty or legal norm. However, international customary laws are norms that have become pervasive enough internationally that countries need not consent in order to be bound. In these cases, all that is needed is that the state has not objected to the law. However, states that object to customary international law before these laws may not be bound by them unless these laws are deemed to be *jus cogens*. However, in a dispute with any nation that has not affirmed the "silence implies consent" principle, any invocation of the "silence implies consent" principle involves an appeal to custom, such that if that nation does not espouse the broader premise of acknowledging the existence of customary international law, such an appeal will depend on circular reasoning ("customary international law is binding because silence implies consent, and silence implies consent because the fact that silence implies consent is one aspect of customary international law").

Consent and International Customary Law

It is commonly said that the international community is 'anarchical', in that there is no layer of higher government with absolute power to treat states like citizens. This is in a way unsurprising, since most states could (if pressed) rely solely on themselves for survival. States are thus in a position, unlike individual humans, to refuse the benefits and reciprocal responsibilities of participating in a community under law.

In recognition of this reality, it has long been a tenet of international law that a state must expressly consent to a rule (by, for example, signing a treaty) before it can be legally bound by the rule. Customary international law not only upsets this idea of consent, it does it by stealth.

The International Court of Justice

The Statute of the International Court of Justice acknowledges the existence of customary international law in Article 38(1)(b), incorporated into the United Nations Charter by Article 92: "The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply...international custom, as evidence of a general practice accepted as law."

Customary international law " consists of rules of law derived from the consistent conduct of States acting out of the belief that the law required them to act that way."^[10] It follows that customary international law can be discerned by a "widespread repetition by States of similar international acts over time (State practice); Acts must occur out of sense of obligation (*opinio juris*); Acts must be taken by a significant number of States and not be rejected by a significant number of States." A marker of customary international law is consensus among states exhibited both by widespread conduct and a discernible sense of obligation.

The two essential elements of customary international law are state practice and *opinio juris*, as confirmed by the International Court of Justice in the *Legality of the Threat or Use of Nuclear Weapons*.

In relation to the psychological element that is *opinio juris*, the International Court of Justice further held in *North Sea Continental Shelf*, that "not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it... The States concerned must therefore feel that they are conforming to what amounts to a legal obligation.". The Court emphasised the need to prove a "sense of legal duty" as distinct from "acts motivated by considerations of courtesy, convenience or tradition". This was subsequently confirmed in *Nicaragua v. United States of America*.

Bilateral versus multilateral customary international law

The recognition of different customary laws can range from simple bilateral recognition of customary laws to worldwide multilateral recognition. Regional customs can become customary international law in their respective regions, but do not become customary international law for nations outside the region. The existence of bilateral customary law was recognized by the International Court of Justice in the *Right of Passage Over Indian Territory* case between Portugal and India, in which the court found "no reason why long continued practice between the two states accepted by them as regulating their relations should not form the basis of mutual rights and obligations between the two states."

Other customary international laws

Other examples accepted or claimed as customary international law include the principle of non-refoulement and immunity of visiting foreign heads of state. United Nations Security Council in 1993 adopted Geneva conventions as customary international law because since the time being it has transformed itself into customary international law. If any treaty or law has been called as customary international law then parties which have not ratified said treaty will be bound to observe its provisions in good faith.

B.3) Treaty Law

A **treaty** is an agreement under international law entered into by actors in international law, namely sovereign states and international organizations. A treaty may also be known as an **(international) agreement, protocol, covenant, convention, pact, or exchange of letters**, among other terms. Regardless of terminology, all of these forms of agreements are, under international law, equally considered treaties and the rules are the same.

Treaties can be loosely compared to contracts: both are means of willing parties assuming obligations among themselves, and a party to either that fails to live up to their obligations can be held liable under international law.

Modern usage

A treaty is an official, express written agreement that states use to legally bind themselves.^[3] A treaty is the official document which expresses that agreement in words; and it is also the objective outcome of a ceremonial occasion which acknowledges the parties and their defined relationships.

Modern form

Since the late 19th century, most treaties have followed a fairly consistent format. A treaty typically begins with a preamble describing the High Contracting Parties and their shared objectives in executing the treaty, as well as summarizing any underlying events (such as the aftermath of a war in the case of a peace treaty). Modern preambles are sometimes structured as a single very long sentence formatted into multiple paragraphs for readability, in which each of the paragraphs begins with a gerund (desiring, recognizing, having, and so on).

The High Contracting Parties; referred to as either the official title of the head of state (but not including the personal name), e.g. *His Majesty The King of X* or *His Excellency The President of Y*, or alternatively in the form of "*Government of Z*"; are enumerated, and along with the full names and titles of their plenipotentiary representatives, and a boilerplate clause about how their representatives have communicated (or exchanged) their full powers (i.e., the official documents appointing them to act on behalf of their respective high contracting party) and found them in good or proper form. However, under the Vienna Convention on the Law of Treaties if the representative is the head of state, head of government or minister of foreign affairs, no special document is needed, as holding such high office is sufficient.

The end of the preamble and the start of the actual agreement is often signaled by the words "have agreed as follows."

After the preamble comes numbered articles, which contain the substance of the parties' actual agreement. Each article heading usually encompasses a paragraph. A long treaty may further group articles under chapter headings.

Modern treaties, regardless of subject matter, usually contain articles governing where the final authentic copies of the treaty will be deposited and how any subsequent disputes as to their interpretation will be peacefully resolved.

The end of a treaty, the eschatocol (or closing protocol), is often signaled by a clause like "in witness whereof" or "in faith whereof," the parties have affixed their signatures, followed by the words "DONE at," then the site(s) of the treaty's execution and the date(s) of its execution. The date is typically written in its most formal, longest possible form. For example, the Charter of the United Nations was "DONE at the city of San Francisco the twenty-sixth day of June, one thousand nine hundred and forty-five." If the treaty is executed in multiple copies in different languages, that fact is always noted, and is followed by a stipulation that the versions in different languages are equally authentic.

The signatures of the parties' representatives follow at the very end. When the text of a treaty is later reprinted, such as in a collection of treaties currently in effect, an editor will often append the dates on which the respective parties ratified the treaty and on which it came into effect for each party.

Bilateral and multilateral treaties

Bilateral treaties are concluded between two states or entities. It is possible, however, for a bilateral treaty to have more than two parties; consider for instance the bilateral treaties between Switzerland and the European Union (EU) following the Swiss rejection of the European Economic Area agreement. Each of these treaties has seventeen parties. These however are still bilateral, not multilateral, treaties. The parties are divided into two groups, the Swiss ("on the one part") and the EU and its member states ("on the other part"). The treaty establishes rights and obligations between the Swiss and the EU and the member states severally—it does not establish any rights and obligations amongst the EU and its member states.

A multilateral treaty is concluded among several countries. The agreement establishes rights and obligations between each party and every other party. Multilateral treaties are often regional. Treaties of "mutual guarantee" are international compacts, e.g., the Treaty of Locarno which guarantees each signatory against attack from another.

Adding and amending treaty obligations

Reservations

Reservations are essentially caveats to a state's acceptance of a treaty. Reservations are unilateral statements purporting to exclude or to modify the legal obligation and its effects on the reserving state. These must be included at the time of signing or ratification, i.e. "a party cannot add a reservation after it has already joined a treaty".

Originally, international law was unaccepting of treaty reservations, rejecting them unless all parties to the treaty accepted the same reservations. However, in the interest of encouraging the largest number of states to join treaties, a more permissive rule regarding reservations has emerged. While some treaties still expressly forbid any reservations, they are now generally permitted to the extent that they are not inconsistent with the goals and purposes of the treaty.

When a state limits its treaty obligations through reservations, other states party to that treaty have the option to accept those reservations, object to them, or object and oppose them. If the state accepts them (or fails to act at all), both the reserving state and the accepting state are relieved of the reserved legal obligation as concerns their legal obligations to each other (accepting the reservation does not change the accepting state's legal obligations as concerns other parties to the treaty). If the state opposes, the parts of the treaty affected by the reservation drop out completely and no longer create any legal obligations on the reserving and accepting state, again only as concerns each other. Finally, if the state objects and opposes, there are no legal obligations under that treaty between those two state parties whatsoever. The objecting and opposing state essentially refuses to acknowledge the reserving state is a party to the treaty at all.

Amendments

There are three ways an existing treaty can be amended. First, formal amendment requires State parties to the treaty to go through the ratification process all over again. The re-negotiation of treaty provisions can be long and protracted, and often some parties to the original treaty will not become parties to the amended treaty. When determining the legal obligations of states, one party to the original treaty and one a party to the amended treaty, the states will only be bound by the terms they both agreed upon. Treaties can also be amended informally by the treaty executive council when the changes are only procedural, technical change in customary international law can also amend a treaty, where state behavior evinces a new interpretation of the legal obligations under the treaty. Minor corrections to a treaty may be adopted by a *procès-verbal*; but a *procès-verbal* is generally reserved for changes to rectify obvious errors in the text adopted, i.e. where the text adopted does not correctly reflect the intention of the parties adopting it.

Protocols

In international law and international relations, a **protocol** is generally a treaty or international agreement that supplements a previous treaty or international agreement. A protocol can amend the previous treaty, or add additional provisions. Parties to the earlier agreement are not required to adopt the protocol. Sometimes this is made clearer by calling it an "optional protocol", especially where many parties to the first agreement do not support the protocol.

Some examples: the United Nations Framework Convention on Climate Change (UNFCCC) established a framework for the development of binding greenhouse gas emission limits, while the Kyoto Protocol contained the specific provisions and regulations later agreed upon.

Execution and implementation

Treaties may be seen as 'self-executing', in that merely becoming a party puts the treaty and all of its obligations in action. Other treaties may be non-self-executing and require 'implementing legislation'—a change in the domestic law of a state party that will direct or enable it to fulfill treaty obligations. An example of a treaty requiring such legislation would be one mandating local prosecution by a party for particular crimes.

The division between the two is often not clear and is often politicized in disagreements within a government over a treaty, since a non-self-executing treaty cannot be acted on without the proper change in domestic law. If a treaty requires implementing legislation, a state may be in default of its obligations by the failure of its legislature to pass the necessary domestic laws.

Interpretation

The language of treaties, like that of any law or contract, must be interpreted when the wording does not seem clear or it is not immediately apparent how it should be applied in a perhaps unforeseen circumstance. The Vienna Convention states that treaties are to be interpreted "in good faith" according to the "ordinary meaning given to the terms of the treaty in their context and in the light of its object and purpose." International legal experts also often invoke the 'principle of maximum effectiveness,' which interprets treaty language as having the fullest force and effect possible to establish obligations between the parties.

No one party to a treaty can impose its particular interpretation of the treaty upon the other parties. Consent may be implied, however, if the other parties fail to explicitly disavow that initially unilateral interpretation, particularly if that state has acted upon its view of the treaty without complaint. Consent by all parties to the treaty to a particular interpretation has the legal effect of adding another clause to the treaty – this is commonly called an 'authentic interpretation'.

International tribunals and arbiters are often called upon to resolve substantial disputes over treaty interpretations. To establish the meaning in context, these judicial bodies may review the preparatory work from the negotiation and drafting of the treaty as well as the final, signed treaty itself.

Consequences of terminology

One significant part of treaty making is that signing a treaty implies recognition that the other side is a sovereign state and that the agreement being considered is enforceable under international law. Hence, nations can be very careful about terming an agreement to be a treaty. For example, within the United States, agreements between states are compacts and agreements between states and the federal government or between agencies of the government are memoranda of understanding.

Another situation can occur when one party wishes to create an obligation under international law, but the other party does not. This factor has been at work with respect to discussions between North Korea and the United States over security guarantees and nuclear proliferation.

The terminology can also be confusing because a treaty may and usually is named something other than a treaty, such as a convention, protocol, or simply agreement. Conversely some legal documents such as the Treaty of Waitangi are internationally considered to be documents under domestic law.

Ending treaty obligations

Withdrawal

Treaties are not necessarily permanently binding upon the signatory parties. As obligations in international law are traditionally viewed as arising only from the consent of states, many treaties expressly allow a state to withdraw as long as it follows certain procedures of notification. For example, the Single Convention on Narcotic Drugs provides that the treaty will terminate if, as a result of **denunciations**, the number of parties falls below 40. Many treaties expressly forbid withdrawal. Article 56 of the Vienna Convention on the Law of Treaties provides that where a

treaty is silent over whether or not it can be denounced there is a rebuttable presumption that it cannot be unilaterally denounced unless:

- it can be shown that the parties intended to admit the possibility, or
- a right of withdrawal can be inferred from the terms of the treaty.

The possibility of withdrawal depends on the terms of the treaty and its *travaux preparatoire*. It has, for example, been held that it is not possible to withdraw from the International Covenant on Civil and Political Rights. When North Korea declared its intention to do this the Secretary-General of the United Nations, acting as registrar, said that original signatories of the ICCPR had not overlooked the possibility of explicitly providing for withdrawal, but rather had deliberately intended not to provide for it. Consequently, withdrawal was not possible.

In practice, because of sovereignty, any state can purport to withdraw from any treaty at any time, and cease to abide by its terms. The question of whether this is lawful can be regarded as the success or failure to anticipate community acquiescence or enforcement, that is, how other states will react; for instance, another state might impose sanctions or go to war over a treaty violation.

If a state party's withdrawal is successful, its obligations under that treaty are considered terminated, and withdrawal by one party from a bilateral treaty of course terminates the treaty. When a state withdraws from a multi-lateral treaty, that treaty will still otherwise remain in force among the other parties, unless, of course, otherwise should or could be interpreted as agreed upon between the remaining states parties to the treaty

Suspension and termination

If a party has materially violated or breached its treaty obligations, the other parties may invoke this breach as grounds for temporarily suspending their obligations to that party under the treaty. A material breach may also be invoked as grounds for permanently terminating the treaty itself.

A treaty breach does not automatically suspend or terminate treaty relations, however. It depends on how the other parties regard the breach and how they resolve to respond to it. Sometimes treaties will provide for the seriousness of a breach to be determined by a tribunal or other independent arbiter. An advantage of such an arbiter is that it prevents a party from prematurely and perhaps wrongfully suspending or terminating its own obligations due to another's alleged material breach.

Treaties sometimes include provisions for self-termination, meaning that the treaty is automatically terminated if certain defined conditions are met. Some treaties are intended by the parties to be only temporarily binding and are set to expire on a given date. Other treaties may self-terminate if the treaty is meant to exist only under certain conditions.

A party may claim that a treaty should be terminated, even absent an express provision, if there has been a fundamental change in circumstances. Such a change is sufficient if unforeseen, if it undermined the "essential basis" of consent by a party, if it radically transforms the extent of obligations between the parties, and if the obligations are still to be performed. A party cannot base this claim on change brought about by its own breach of the treaty. This claim also cannot be used to invalidate treaties that established or redrew political boundaries.

Invalid treaties

There are several reasons an otherwise valid and agreed upon treaty may be rejected as a binding international agreement, most of which involve problems created at the formation of the treaty. For example, the serial Japan-Korea treaties of 1905, 1907 and 1910 were protested; and they were confirmed as "already null and void" in the 1965 Treaty on Basic Relations between Japan and the Republic of Korea.

Ultra vires treaties

A party's consent to a treaty is invalid if it had been given by an agent or body without power to do so under that state's domestic laws. States are reluctant to inquire into the internal affairs and processes of other states, and so a "manifest violation" is required such that it would be "objectively evident to any State dealing with the matter". A strong presumption exists internationally that a head of state has acted within his proper authority. It seems that no treaty has ever actually been invalidated on this provision.

Consent is also invalid if it is given by a representative who ignored restrictions he is subject to by his sovereign during the negotiations, if the other parties to the treaty were notified of those restrictions prior to his signing.

According to the preamble in The Law of Treaties, treaties are a source of international law. If an act or lack thereof is condemned under international law, the act will not assume international legality even if approved by internal law. This means that in case of a conflict with domestic law, international law will always prevail.

Misunderstanding, fraud, corruption, coercion

Articles 46–53 of the Vienna Convention on the Law of Treaties set out the only ways that treaties can be invalidated—considered unenforceable and void under international law. A treaty will be invalidated due to either the circumstances by which a state party joined the treaty, or due to the content of the treaty itself. Invalidation is separate from withdrawal, suspension, or termination (addressed above), which all involve an alteration in the consent of the parties of a previously valid treaty rather than the invalidation of that consent in the first place.

A state's consent may be invalidated if there was an erroneous understanding of a fact or situation at the time of conclusion, which formed the "essential basis" of the state's consent. Consent will not be invalidated if the misunderstanding was due to the state's own conduct, or if the truth should have been evident.

Consent will also be invalidated if it was induced by the fraudulent conduct of another party, or by the direct or indirect "corruption" of its representative by another party to the treaty. Coercion of either a representative, or the state itself through the threat or use of force, if used to obtain the consent of that state to a treaty, will invalidate that consent.

Contrary to peremptory norms

A treaty is null and void if it is in violation of a peremptory norm. These norms, unlike other principles of customary law, are recognized as permitting no violations and so cannot be altered through treaty obligations. These are limited to such universally accepted prohibitions as those against the aggressive use of force, genocide and other crimes against humanity, piracy,

hostilities directed at civilian population, racial discrimination and apartheid, slavery and torture, meaning that no state can legally assume an obligation to commit or permit such acts.

Role of the United Nations

The United Nations Charter states that treaties must be registered with the UN to be invoked before it or enforced in its judiciary organ, the International Court of Justice. This was done to prevent the proliferation of secret treaties that occurred in the 19th and 20th century. Section 103 of the Charter also states that its members' obligations under it outweigh any competing obligations under other treaties.

After their adoption, treaties as well as their amendments have to follow the official legal procedures of the United Nations, as applied by the Office of Legal Affairs, including signature, ratification and entry into force.

In function and effectiveness, the UN has been compared to the pre-Constitutional United States Federal government by some giving a comparison between modern treaty law and the historical Articles of Confederation.

Relation between national law and treaties by country

Australian law

The constitution of Australia allows the executive government to enter into treaties, however the practice is for treaties to be tabled in both houses of parliament at least 15 days before signing. Treaties are considered a source of Australian law, however do sometimes require an act of parliament to be passed depending on their nature. Treaties are administered and maintained by the Department of Foreign Affairs and Trade who advise "The general position under Australian law is that treaties which Australia has joined, apart from those terminating a state of war, are not directly and automatically incorporated into Australian law. Signature and ratification do not, of themselves, make treaties operate domestically. In the absence of legislation, treaties cannot impose obligations on individuals nor create rights in domestic law. Nevertheless, international law, including treaty law, is a legitimate and important influence on the development of the common law and may be used in the interpretation of statutes."^[17] Treaties can be implemented through executive action, and often existing laws are sufficient to ensure a treaty is honoured.

Australian treaties generally fall under the following categories: extradition, postal agreements & money orders, trade, and International conventions.

Brazilian law

The Brazilian federal constitution states that the power to enter into treaties is vested in the president and that such treaties must be approved by Congress (articles 84, clause VIII, and 49, clause D). In practice, this has been interpreted as meaning that the executive branch is free to negotiate and sign a treaty, but its ratification by the president is contingent upon the prior approval of Congress. Additionally, the Federal Supreme Court has ruled that, following ratification and entry into force, a treaty must be incorporated into domestic law by means of a presidential decree published in the federal register in order to be valid in Brazil and applicable by the Brazilian authorities.

The Federal Supreme Court has established that treaties are subject to constitutional review and enjoy the same hierarchical position as ordinary legislation (*leis ordinárias*, or "ordinary laws", in Portuguese). A more recent ruling by the Supreme Court in 2008 has altered that scheme somewhat, by stating that treaties containing human rights provisions enjoy a status above that of ordinary legislation, though they remain beneath the constitution itself. Additionally, as per the 45th amendment to the constitution, human rights treaties which are approved by Congress by means of a special procedure enjoy the same hierarchical position as a constitutional amendment. The hierarchical position of treaties in relation to domestic legislation is of relevance to the discussion on whether (and how) the latter can abrogate the former and vice versa.

The Brazilian federal constitution does not have a supremacy clause with the same effects as the one on the U.S. constitution, a fact that is of interest to the discussion on the relation between treaties and state legislation.

United States

In the United States, the term "treaty" has a different, more restricted legal sense than exists in international law. United States law distinguishes what it calls "treaties" from "executive agreements", i. e. either "congressional-executive agreements" or "sole executive agreements". All these classes are equally treaties under international law; they are distinct only from the perspective of internal American law. The distinctions are primarily concerning their method of approval. Whereas treaties require advice and consent by two-thirds of the Senators present, sole executive agreements may be executed by the President acting alone. Some treaties grant the President the authority to fill in the gaps with executive agreements, rather than additional treaties or protocols. And finally, congressional-executive agreements require majority approval by both the House and the Senate, either before or after the treaty is signed by the President.

Currently, international agreements are executed by executive agreement rather than treaties at a rate of 10:1. Despite the relative ease of executive agreements, the President still often chooses to pursue the formal treaty process over an executive agreement in order to gain congressional support on matters that require the Congress to pass implementing legislation or appropriate funds, and those agreements that impose long-term, complex legal obligations on the United States. For example, the deal by the United States, Iran and other countries^[clarification needed] is not a Treaty.

See the article on the Bricker Amendment for history of the relationship between treaty powers and Constitutional provisions.

The Supreme Court ruled in the *Head Money Cases* that "treaties" do not have a privileged position over Acts of Congress and can be repealed or modified (for the purposes of U.S. law) by any subsequent Act of Congress, just like with any other regular law. The Supreme Court also ruled in *Reid v. Covert* that any treaty provision that conflicts with the Constitution are null and void under U.S. law.

Indian law

In India, the legislation subjects are divided into 3 lists -Union List, State List and Concurrent List . In the normal legislation process, the subjects in Union list can only be legislated upon by central legislative body called Parliament of India, for subjects in state list only respective state legislature can legislate. While for Concurrent subjects, both center and state can make laws. But

to implement international treaties, Parliament can legislate on any subject overriding the general division of subject lists.

Treaties and indigenous people

Treaties formed an important part of European colonization and, in many parts of the world, Europeans attempted to legitimize their sovereignty by signing treaties with indigenous peoples. In most cases these treaties were in extremely disadvantageous terms to the native people, who often did not appreciate the implications of what they were signing.

In some rare cases, such as with Ethiopia and Qing Dynasty China, the local governments were able to use the treaties to at least mitigate the impact of European colonization. This involved learning the intricacies of European diplomatic customs and then using the treaties to prevent a power from overstepping their agreement or by playing different powers against each other.

In other cases, such as New Zealand and Canada, treaties allowed native peoples to maintain a minimum amount of autonomy. In the case of indigenous Australians, unlike with the Māori of New Zealand, no treaty was ever entered into with the indigenous peoples entitling the Europeans to land ownership, under the doctrine of *terra nullius* (later overturned by *Mabo v Queensland*, establishing the concept of native title well after colonization was already a *fait accompli*). Such treaties between colonizers and indigenous peoples are an important part of political discourse in the late 20th and early 21st century, the treaties being discussed have international standing as has been stated in a treaty study by the UN.

Prior to 1871, the government of the United States regularly entered into treaties with Native Americans but the Indian Appropriations Act of March 3, 1871 a rider (25 U.S.C. § 71) attached that effectively ended the President's treaty making by providing that no Indian nation or tribe shall be acknowledged as an independent nation, tribe, or power with whom the United States may contract by treaty. The federal government continued to provide similar contractual relations with the Indian tribes after 1871 by agreements, statutes, and executive orders.

LAW OF THE SEA

C.1) Territorial sea

The Territorial Sea is an area extending from internal waters to the seaward side. The coastal state enjoys its sovereignty over the area subject to the right of the ships of other states to engage in innocent passage. According to the 1958 Convention, the breadth of territorial sea has not been stated how far from the baseline it is measured, but it could be inferred from the breadth of the contiguous zone which was established in article 24, paragraph 2 that the territorial sea can not exceed 12 nautical miles from the baseline. It means that the territorial sea and contiguous zone under this convention are the same area. However, article 3 of 1982 United Nations Convention clearly defined, every state has the rights to establish the breadth of its territorial sea up to the limit not exceeding 12 nautical miles, measured from baseline determined in accordance with the convention, and the outer limit of the territorial sea is the line every point of which is at the distance from the nearest point of the baseline equal to the breadth of the territorial sea.

According to article 12 of the 1982 United Nations Convention, the territorial sea can be extended beyond 12 nautical miles. Roadsteads, which are normally used for the loading and unloading and anchoring of ships and would otherwise be situated wholly or partly outside the outer limit of the territorial sea, are included in territorial sea. The territorial sea could, nevertheless, be less than 12 nautical miles in the situation of the two states have opposite or adjacent coasts. The article 15 of 1982 United Nations Convention provided that, where the coasts of the two states are opposite or adjacent to each other, neither of the two states is entitled, failing agreement between them to the contrary to extend its territorial sea beyond the meridian line every point of which is equidistant from the nearest points on the baseline from which the breadth of the territorial sea is measured. Moreover, states sometimes do not have their territorial sea in case the low water line is wholly situated at a distance exceeding the breadth of the territorial sea from the mainland or an island. In practical, this provision has not applied to any coastal states. All coastal states have their territorial sea. The said provision, however, where it is necessary by reason of historic title or other special circumstances to delimit the territorial seas of the two states in a way which is at variance therewith.

The Convention requires the coastal states to adopt laws and regulations which comply with the international rules in the purpose of ensuring the innocent passage of foreign vessels, with respect the followings:

- Safety of navigation;
- The protection of navigation and facilities
- The regulation the maritime traffic;
- The protection of cable and pipeline;
- The conservation of living resource
- The prevention of infringement of fisheries law and regulation of coastal state;
- The maritime scientific research and hydrographic survey;
- The prevention of infringement of the customs, fiscal, immigration, or sanitary law.

In addition, having regard the safety of navigation, the coastal states may establish sea lands and traffic separation schemes in its territorial sea to ensure the safety of navigation especially, tankers, nuclear power ship and ships caring nuclear or other inherently dangerous or noxious substances or materials (article 22 of 1982 United Nations Convention). Besides the above necessity, the coastal states have their rights to prevent passage in which engage in the any of the following activities as stated in article 19 of 1982 United Nations Convention:

- any threat or use of force against the sovereignty, territorial integrity of political independence of the coastal state or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations;
- any exercise or practice with weapons of any kind;
- any act of propaganda aimed at affecting the defense or security of the coastal state;

- the launching, landing or taking on board of any aircraft;
 - the launching, landing or taking on board of any military device.
 - the loading or unloading of any commodity, currency or person contrary to the customs, fiscal, immigration or sanitary laws and regulations of the coastal state;
 - any act of willful and serious pollution contrary to this convention;
 - any fishing activities;
 - the carrying out of research or survey activities
 - any act aimed at interfering with any systems of communication or any other facilities or installations of the coastal state;
 - any other activity not having a direct bearing on passage.
- The article 27 and 28 of 1982 United Nations Convention also provides the coastal states with criminal and civil jurisdiction on board a foreign ship in cases:
- the sequences of the crime extend to the coastal states;
 - there are request for assistance from Master of the ship or from a diplomatic agent of the flag state or consular officer of the flag state;
 - suppression of illicit traffic in narcotic drugs or psychotropic substances;
 - foreign ship lying in the territorial sea or passing through the territorial sea after leaving internal water.

Relating to the warship which does not comply with law and regulations of the coastal state concerning the passage through the territorial sea and disregard any compliance therewith which is made of it, the coastal state may require that warship to leave the territorial sea immediately (article 30 of 1982 Convention). The case of innocent passage of warship through the territory of the coastal state has been discussed during the establishment of international convention on Law of the sea but there was not consensus. The maritime power claimed innocent passage for warships, whereas the others, particular the developing ones, emphasized that the importance of their coastal security necessitated imposing conditions on the passage of warships through its territorial sea. The differences caused the Convention on Law of the Sea has no provision on allowing or denying warships a rights of innocent passage. As practice, some coastal states require the warships to give prior notification for innocent passage of warships through their territorial sea. For example, China and Vietnam require foreign vessels for military use to obtain prior permission before they transit through the Chinese territorial sea¹⁷. The requirement of China was stipulated in Law on Maritime Traffic Safety, entered into force in January 1984, which reads “..No military vessels of foreign nationality may enter the territorial sea of People’s republic of China without being authorized by the Government thereof”

C.2) Contiguous Zone:

In accordance with 1982 United Nations Convention on law of the sea, the coastal states have the rights to establish their contiguous zone which is adjacent to the territorial sea. The article 33 of 1982 Convention provides that the contiguous zone may not extend beyond 24 nautical miles from baseline from which the territorial sea is measured. The establishment of contiguous zone aimed at preventing violation of laws and regulations within its territory. The article 33 paragraphs 1 of the 1982 Convention states that in contiguous zone, the coastal state may exercise the control necessary to:

- a Prevent infringement of its customs, fiscal, immigration, or sanitary laws and regulations within its territory or territorial sea;
- b Punish infringement of the above laws and regulations committed within its territory or territorial sea.

Based on the spirit of the above article, a coastal state has its rights in a contiguous zone to defend its interests by stopping foreign ship supposed to be an offender in order to search, inspect or punish the offenders against its laws and regulations. In addition, in case the suspect foreign ships have intention to evade the responsibility and leave the contiguous zone, the coastal state has the rights to pursuit beyond the limit of contiguous zone. The article 111 of 1982 Convention stipulated that pursuit must be commenced when the foreign ship or one of its boats is within the internal water, territorial sea or contiguous zone of the pursuing states, and may be only be continued outside the territorial sea or contiguous zone if the pursuit has not been interrupted.

In the establishment of the contiguous zone, the coastal state has to take into account the fact of the sea areas, which are, in some case, bordered, by two or more states whose breadth does not exceed twice the breadth of the territorial sea. The Strait of Malacca, for example, used for international navigation is less than 24 nautical miles wide. In this case the bordering states have to undertake their agreement in the delimitation of maritime boundary and to cooperate in the establishment of international sea route pass.

C.3) Continental Shelf:

The concept of the establishment of the continental shelf in the international law of the sea is a result of the activities of exploitation natural resources in the seabed of the developed countries. For the purpose of preventing the danger of the division of the continental shelf, the International Law Commission was tasked to prepare the draft in the purpose of controlling such exploration and exploitation. As a result of the work of Commission and the discussion at the conference, the Convention on the Continental Shelf was adopted in 1958 in Geneva and get into force in 1964. The coastal states are given the sovereign rights to explore and exploit the natural resources of the seabed and subsoil in the submarine area adjacent to the mainland or islands, but outside the area of territorial sea, to a depth of 200 meters, or beyond that limit, to a point where the exploitation of such resource become impossible.

In accordance with the 1958 Convention, the outer limit of the continental shelf is not defined precisely. It depends on the rate of scientific and technological progress in the exploitation of resource in seabed and ocean floor. The definition of continental shelf in the convention is far from adequate. As Gutteridge noted :

"The definition is bound to result in uncertainty; and may lead to disputes between states in cases where the same continental shelf is adjacent to the territories of opposite or adjacent states, or, at the least to difficulties in fixing by agreement the boundaries of such shelves. Moreover, exploitability is a subjective criterion. It may well be asked, as it was asked at the conference, how is to be determined that a particular submarine area beyond the depth of 200 meters admits of exploitation".

At the third United Nations Convention on the Law of the Sea, the long discussion of the opposite positions on delimitation of the outer limits of the continental shelf came closer together through the a reasonable compromise which was proposed that the coastal state have the rights to extend its jurisdiction over the continental shelf beyond the exclusive economic zone on the condition that parts of the benefits derive from the exploitation of mineral resources beyond the 200 nautical miles be shared with the international community.

According to the article 76 (1) of 1982 United Nations Convention, the continental shelf of a coastal state comprises the seabed and subsoil thereof extending beyond its territorial sea throughout the natural prolongation of its land territory up to the outer edge of the continental margin or to a distance of 200 nautical miles from the baseline from which the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance.

Where the outer edge of the continental shelf margin extends beyond 200 nautical miles from baseline, the outer boundary of its shelf is to be delimited by the coastal state by either of the outermost fixed points at each of which the thickness of sedimentary rock is at least 1 percent of the shortest distance from such point to the foot of the continental slope, or the fixed point not more than 60 nautical miles from foot of the continental slope, and to define these points by coordinate of longitude and latitude. However, according to the article 76(5), if the underwater edge extends more than 200 nautical miles from coastline the outer limit may not exceed 350 nautical miles from baselines of territorial water or 100 nautical miles from 2,500 meters isobaths (line connecting depth of 2,500 meters). On the submarine ridge, other than submarine elevation that are natural components of the continental margin, such as its plateau, rise, caps, blank and spurs, only 350 miles applies (article 76).

The information on the limits of the continental shelf where it extends beyond 200 nautical miles is to be submitted to the Commission on the Limits of Continental Shelf composed of experts in geology, geophysics and hydrographic, which is formed by coastal state to the convention. The Commission may issue recommendation to coastal state on the delimitation of the outer boundary of continental shelf, and the limits established by a state on the basis of these recommendations shall be final and binding. Any exploitation of non-living resources of the continental shelf beyond 200 nautical miles from the baseline is subject to make payment or contribution in kind through the Authority in order to distribute them, on a basis of equitable sharing criteria, to the State Parties to this Convention (article 82). However, the action of the Commission shall not prejudice matters relating to the delimitation of boundaries between the States with opposite or adjacent coasts. The Commission must, therefore, avoid dealing with submissions that may prejudice matters relating to the delimitation of boundaries between States. In accordance with the rule of procedure of the Commission, there are some clauses dealing with disputes that may arise in connection with the establishment of outer limits of the continental shelf, such as in case where a land or maritime dispute exists, the Commission shall not examine and qualify a submission made by any of the states concerned in the dispute. However, the



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Commission may examine one or more submission in the areas under dispute with prior consent given by all States that are parties to such a dispute.

To date, there are four states have submitted their claim of outer continental shelf to the Commission. Those countries are Russia, Brazil, Australia, and Iceland. Of those four submissions, only Russia's has been subject to a full review by the Commission. The others are currently undergoing review by the subcommissions of the Commission²⁴.

Under the 1982 Convention, the coastal state exercises sovereign rights over the continental shelf in the exploration and exploitation of its natural resources. The coastal state has exclusive rights in the sense that the other states may not explore or exploit in the continental shelf unless there is express consent of the coastal state. In addition, the rights of coastal state over the continental shelf does not depend on occupation, effective or notional, or any express proclamation (article 77). However, this provision indicates that the exercise of rights of the coastal state over the continental shelf shall not infringe on freedom of navigation, or on other rights and freedom of foreign states.

As for the rights to lay submarine cables and pipelines of the other states, the coastal states are entitled the rights to establish conditions for cables and pipelines entering its territory or territorial sea, or its jurisdiction over the construction of those cables and pipelines (article 79). The Convention acknowledges that, in case this conditions or regulations are not respected, the coastal state may refuse to allow the laying underwater cables and pipelines. The Convention allows the coastal state to process exclusive rights to permit and regulate all types of drilling on its continental shelf, and to take some measures to prevent, reduce and control marine pollution (article 81). The dumping on the continental shelf of wastes or debris of destroyed ships, aircrafts or others structures is possible with the consent of the coastal state. So, the laws and regulations of the coastal state limit the exercises of rights of the other states on the continental shelf.

Besides the above precise limitation of and the increase the rights of the coastal state over the continental shelf, the convention contains articles on the settlement of disputes over the delimitation of continental shelf between states with opposite or adjacent coastlines. The article 83 provides that the limitation of the continental shelf between states with opposite or adjacent coastlines shall be effected by a agreement on the basis of international law as referred to the article 38 of the statute of International Court of Justice, in order to achieve an equitable solution. In case there is no agreement can be reached within a reasonable period of time, the states concerned to resort to the procedures provides for in Part XV of this convention.

C.4) Exclusive Economic Zone:

The concept of the Exclusive Economic Zone is the most important pillars of the United Nations Convention on the Law of the Sea. The Convention contains the articles on legal regime of the Exclusive Economic Zone; the limitation of the Zone, the sovereign rights of the coastal state to manage the zone in good faith; the regard for the economic interests of the third states; regulations of the certain activities in the zone, such as marine scientific research, protection and preservation of the marine environment, and the establishment and use of artificial islands; freedom of navigation and over flight; the freedom to lay submarine cables and pipelines; military and strategic use of zone; and the means of settlement of disputes.

In accordance with the article 57 of 1982 Convention on law of the sea, the Exclusive Economic Zone is an area adjacent to the territorial sea and it shall not extend beyond 200 nautical miles from baseline where the territorial sea is measured. The Convention gives the coastal states the sovereign rights over natural resources and control of resources related to activities in the zone, and preserve for the other states the freedom of navigation, over flight and the laying submarine cables and pipelines. The coastal state has sovereign rights for the purpose of exploring and exploiting, conserving and managing the living resources of the exclusive economic zone (article 56). Moreover, the coastal state has exclusive right to construct and to authorize and regulate the construction, operation and use of artificial islands, installation and structures; and has jurisdiction over such artificial islands, installation and structures.

The coastal state has broad regulatory and management power to conserve and utilize the living resources on the Exclusive Economic Zone. With respect to the conservation, the coastal state has to design some measures to ensure that the populations of harvested species are maintained or restored at a levels which can produce the maximum sustainable yield as qualified by relevant environmental and economic factors (article 61). With regard the utilization, the coastal state has the obligation to promote the objective of optimum utilization of the living resources. The coastal state is obliged to determine its capacity to harvest the living resources. If the coastal state does not have capacity to harvest the entire allowable catch, it could, by agreement, give access to the other states to the surplus of the allowable catch (article 62).

The land locked states and geographically disadvantaged states are given the rights to participate, on an equitable basis, in the exploration of an appropriate part of surplus of the living resources in conformity with the regulations and management laws designed by the coastal state. They also have the rights to overflight, lay submarines cables and pipelines and other internationally lawful uses of the seas on the zone (article 58).

The convention also has articles on the conservation of the Stocks such as, straddling stocks, Anadromous stocks, catadromous species, sedentary species, and highly migratory species. With respect to the marine mammals, the coastal states and other organizations have the rights to prohibit, limit, or regulate the exploitation of this species more strictly. In exercising its sovereign rights and in ensuring the sustainable conservation of living resources, the coastal state is empowered to take some measures of law enforcement such as boarding, inspection, arrest and judicial proceedings over the foreign fishing vessels (article 73).

As the other zones, Convention on the Law of the Sea establishes the articles on the delimitation of the Exclusive Economic Zone between the states with opposite or adjacent coastlines. According to the article 74, the delimitation of the Exclusive Economic Zone between the states with opposite or adjacent coastlines shall be effected by agreement on the basis of international law. In case there is no agreement, the states concerned could follow the procedure provided in Part XV. With regard the fisheries disputes concerning the interpretation and application of the convention, the states concerned are to be settled by a binding form of disputes settlements (article 273).

C.5) High Sea:

High Seas are the seawater beyond the limit of the national jurisdictions and excluded from the state sovereignty. It is not included in the territorial sea, contiguous zone, exclusive economic zone, and archipelagic water. The high sea is open to all states, whether coastal or land locked states and is an area reserved for peaceful purpose. All states have freedom to conduct all types of activities with due regard for the interests of the other states. Moreover, all states have duty to conserve and manage the living resources in the zone, and to combat and prevent the international transnational crimes at sea. In accordance with article 87 of the 1982 United Nations Convention, the freedom of the high seas consists of:

- (1) Freedom of navigation;
- (2) Freedom of overflight;
- (3) Freedom to lay submarine cables and pipelines;
- (4) Freedom to construct artificial islands and other installations permitted under international law;
- (5) Freedom of fishing; and
- (6) Freedom of scientific research.

The freedom of navigation is the most important for all merchant and naval vessels. They have the rights to sail ships flying their flag in the high sea and participate in navigation by granting its nationality to vessels which are registered in their territory and which fly their flag. Warships in accordance with this Convention have on the high seas completely immunity from jurisdiction of any state other than the flag state. At the meantime, the Convention requires the flag state to exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag (article 94). In doing so, every state shall take some measures, which conform with generally accepted international regulations and practice, to ensure the international order or safety at sea, such as maintain the registration of ship; construction, equipment and seaworthiness of ships; manning of ships, labor conditions and the training of crews; the use of signals, the maintenance of communications and the prevention of collisions.

Furthermore, the Convention calls for the cooperation of all states for the purpose of conservation and management the living resources. The states have to take some measures to manage the resources such as, the establishment of sub regional or regional fisheries organizations, provide information on the fishing statistic, the effect of harvested species. In addition, the states have duty to cooperate in combating against piracy, trafficking in illegal narcotic drugs or psychotropic substances, and also against the unauthorized broadcasting from the high sea (article 99, 100, 108 and 109).

UNIT-4: Contemporary International Issues

4.1) Prohibition of the use of force

The provisions in the UN Charter relating to the prohibition on the use of force by States in their relations with each other has been discussed under this topic. One of the primary goals of the UN, according to Article 1(1) of the UN Charter, is to maintain international peace and security. In order to achieve this aim, Article 2(4) contains a prohibition on the use of force. A system of collective sanctions against any offending State that resorts to the use of force protects this prohibition. These sanctions are found in Articles 39-51 of the UN Charter.

4.2) Exceptions to the prohibitions

PROVISIONS RELATING TO THE USE OF FORCE: THE PROHIBITION AND THE EXCEPTIONS

Article 1(1) of the UN Charter says that one of the purposes of the Charter is to:

To **maintain international peace and security**, and to that end: to take effective collective measures for the prevention and removal of

- (1) threats to the peace, and for the
- (2) suppression of acts of aggression or
- (3) other breaches of the peace, and to bring about by peaceful means. adjustment or settlement of international disputes or situations which might lead to a breach of the peace

In order to maintain international peace and security and to prevent future wars:

- (1) Article 2(3) places an obligation on member States to settle their disputes peacefully.

All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.

- (2) **Article 2(4)** prohibits member States from using force in their international relations.

All Members shall refrain in their international relations from the **threat** or **use of force** against the **territorial integrity** or **political independence** of any state, or in **any other manner inconsistent with the Purposes of the United Nations**.

- In *Nicaragua v USA*, ICJ held that the prohibition on the use of force is covered by treaty law (that is the UN Charter), by customary international law and the prohibition was a *Jus Cogens* norm.
- In the 1970 *Declaration on Principles of International Law concerning Friendly Relations* there is: (1) a general prohibition on the threat or use of force, (2) duty to refrain from “organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or **acquiescing** in organized activities within its territory” when these acts involve the threat or use of force against another State. *What are the other provisions in the 1970 Declaration that*

(1) prohibit States from using force?

(2) prohibit States from assisting others to use force against another State?

(3) defines what is “use of force”?

(4) prohibits interference in the domestic affairs of another State?

(3) The prohibition is safeguarded by a system of collective sanctions against any offending State that uses force. This is found in Articles 39-51 of the UN Charter.

3.1. Articles 39, 40 and 41 operate to offer sanctions against a member State that has threaten or used force in a way that it amounts to a threat to or breach of peace or an act of aggression. Article 39 says:

The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.

Article 41 allows the Security Council to impose sanctions (trade and economic sanctions, arms embargoes):

The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

3.2. Article 42 gives the Security Council the power to authorize the use necessary force to maintain international peace and security. Because the Security Council does not have a military force of its own, the Security Council authorizes member States to use force.

The Security Council] may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security.

3.3. Article 51 provides for a member State to use force in self defense when there is an armed attack against that State

Nothing in the present Charter shall impair the inherent right of **individual or collective self-defence if an armed attack** occurs against a Member of the United Nations, **until the Security Council has taken measures** necessary to maintain international peace and security...

As discussed, the only exceptions to the prohibition on the use of force in the UN Charter are found in Articles 42 and 51 of the UN Charter (provisions in Article 53(1) and 107 are not relevant and we will not discuss them). In addition to this, States have invoked customary international law of self defense and humanitarian intervention (for example in the 11 day NATO bombing of Kosovo) and implicit authorization under SC Resolutions (for example, NATO bombing of Kosovo and US invasion of Iraq) as a justification to use force against another State.

The use of force has been a long standing phenomenon in international relations and has been considered to be directly linked to the sovereignty of states-the limitless power wielded by states to use all possible means to guard and protect their interests. However, the longer period that war has been associated with sovereignty of state, the more the issue has turned into a legal institution by itself. This paper looks at the prohibited and permissible use of force in International Relations. Developed social awareness has expanded the limits (and even led) to the right to resort to war. This indeed has abolished the use of force or any form of threats in relation among nations, this has become a rule of law in international criminal law-its violation comes with criminal responsibility in the eyes of the international community. However, there are certain situations in which it is allowed to use force such as for self defense purposes, humanitarian intervention, and preemptive power inter alia.

In the international community, force has featured as at high levels of decentralization i.e. force has been used for different purposes-it has been applied to previous intervention and to punish for noncompliance according to demand. War is the hardcore form of force and is used to grab territories or to completely suppress states. Reprisals are also considered as violence in international relations. Kelsen, war has been considered to be permissible due to existence of sovereignty among the states.

Prohibition to use of force and threats

The United Nations Charter in article 2(4) controls the use of force by member states. The UN Charter states that;

"All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations."

This law has been ratified by all the members and is protected by the United Nations Charter 1945 to prohibit the use of force by states. This was the time when Louise Doswald-Beck was the secretary general of the International Commission of Jurists . Most scholars have interpreted

Article 2(4) to be banning the use of force as in "territorial integrity or political independence of states"; the most commonly held opinion is that the above factors are only to reinforce Article 2(4)-which encompasses general prohibitions with exceptions outlined in the Charter such as self-defense and those in Chapter VII by the United Nations security council. The general principle is to ban the use of armed forces except in cases where; there is collective action-pursued to maintain or even enforce peace (Articles 24, 25, and Chapter VII) ; and Article 51 which states that, "Nothing in the present Charter shall impair the inherent right to individual or collective self-defense if an armed attack occurs against a state." In addition, other cited reasons that permit the use of force include humanitarian intervention, though this is still controversial, reprisals, and states' protection of their nationals in other states.

The United Nations Charter and the International Military Tribunal Statute have been created with regard to international law. These laws were created by the UN member states in order to protect succeeding generations from scourges of war. Members resorted that the use of armed forces was not allowed, save in the interest of all. The UN Charter even though premising on the past is open to future amendments since the definition of the word 'war' has changed (and will change) over time . One may quickly note that the word 'war' is not mentioned in the Charter only "force" is mentioned together with "enforcement measures". In addition, total prohibition of use of force is not indicated since an exemption is given, "in the interest of all". Somewhat different is the Article 2, paragraph 4, reads:

"All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."

It is quite clear that the use of force is certainly prohibited in the view of territorial integrity and independence of member states including armed forces intervention. Thus, it is certain that the United Nations does not condone any form of reprisals, this is completely out of its purpose. The use of the term 'force' clearly indicates that the traditional perception on war and the modern definition are prohibited . On that note, one can confidently argue that the United Nations Charter has surpassed previous international Acts that prohibited the use of force. Traditionally, war has been the gravest form of force. However, the view of war as an institution that permitted the attainment of state's interests. The Charter only speaks of the use of force as legal or illegal, it does not recognize just and unjust wars, the former is a rule while the latter is an exemption.

In the eyes of most scholars, the term 'force' is quickly interpreted as 'armed force'. This is a rejection of other types of force such as political and even economic. Sharmasanasconvilly argues that, the different forms of force which can be used by states are prohibited as outlined in Article 2, paragraph 4 of the UN Charter. The armed forces disturb territorial integrity; however, political independence is affected in various ways

The major development in international law is the prohibition of use of threat together with the use of force itself, "threat or danger from aggression" is prohibited by the League of Nations Council (Article 10). Thus the prohibition of threat was aimed at ""preventing and eliminating threats to peace and suppression of aggression or other breaches of peace" (Article 1, paragraph 1" . The prohibition to use of force has been sealed by the prohibition to use threat.

Collective action



The UN Security Council is mandated to identify the existence of, and even take action to curb, any threat to peace and security among the members' states. However, this power has not been used as expected since other measures such as the use of sanctions are taken short of the traditional armed forces by some of its members. The time that the UN used force was in 1950 to 'force' North Korea to withdraw from South Korea. Initially it had been envisaged by the creators of the UN Charter that the organisation would have its own forces. However, much of the command of these forces has been from the United States. The UN Security Council for also authorized the use of armed forces in 1960 during the Iraq's invasion of Kuwait. During this time, the Council passed Resolution 678 which requested all members to support a forceful operation in collaboration with Kuwait to ensure Iraqi's withdrawal from Kuwait. This very resolution was never revoked until 2003, when the Council passed Resolution 1441 which authorized Iraq's invasion due to its non-compliance with the manufacture of atomic weapons-a threat to global peace and security. The UN also authorized the use of force in countries like Sierra Leone, Yugoslavia and currently Somalia.

Self defense

This is provided for in article 51. The inherent right to individual or collective self-defense in case of an armed attack allowed until the UN Security Council has intervened. The steps taken by members in the exercise of self-defense must be reported to the Security Council and must not in any way affect the mandate of the Council under the current Charter. The article states that,

“Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security”.

The right to self defense is still provided for in the customary international law, as seen in the International Court of Justice (ICJ), the best example is the Nicaragua Case . Article 51 preserves the right to self defense and outlines the procedures to be followed in case of an armed attack. It has also been observed that, an irregular forceful attack can prompt the use of force as in the case of 9/11 attacks where the Security Council allowed the US to use force against the terrorists.

Pre-emptive force

The use of self defense is limited under the international customary law. The permissibility of the use of force in cases of self defense is hinged on the interpretation of Article 51. There is no right to pre-emptive self defense when an armed attack has occurred, a state does not have to wait for an armed attack to actually occur to use force. Thus, a distinction has to be drawn between, “preventive”, “anticipatory”, and “interventionary” self defense. The ICJ has not ruled out the use of pre-emptive armed force to intervene in the case of an imminent armed attack. However, opinio juris and practice widely suggest that states have no right to preventive self-defense. This can be explained well by the Caroline's case.

Protection of nationals

Various states have asserted the controversial claim to protect their nationals abroad. This can be observed by the UK in Suez (1956), the Israelis in Entebbe-Uganda (1976), and the US force in the Dominican Republic (1965), Panama (1989), and Grenada (1983). The use of force has in some cases been linked with other political reasons beside the protection of nationals. For example, the intervention of the US in Grenada in 1983 was widely linked to the US opposition to the rising socialism in the government of Grenada. The danger posed to the US nationals in this case was not imminent and this led to strong condemnation from the United Nations General Assembly. The examples above (except for the Mossad intervention in Entebbe (1976)), the protection of nationals has been used as a veil to cover other political agendas.

Humanitarian intervention

In modern times where terrorism has really increased, several countries are beginning to advocate for the right of humanitarian intervention without the UN's Security Council. After the Kosovo's crisis in 1999, countries like the UK cited the importance of the use of military force to avert such catastrophes in the future. When NATO flexed its military muscle in Yugoslavia, it had not acquired the UN Security Council's permission. On the contrary this action was not condemned since the intervention was necessary on humanitarian grounds. Many states oppose such unauthorized intervention on legal grounds while others cite practicality—stronger nations (military wise) could misuse or overuse such powers.

4.3) Responsibility to Protect (R2P)

Responsibility to Protect (R2P) is not a legal concept; it creates no legal change as it is embedded within the existing international law order. R2P is 'best understood as a reaffirmation and codification of already existing norms' and as a political concept having political effects. This is not criticism of R2P, but is instead its greatest strength. It allows R2P to command wider support from the international community, especially from states suspicious of changes to the fundamentals of international law.

R2P has 'significantly changed the grammar of political discourse with regard to the prevention and reaction to human rights violations' shifting political discourse away from justifying interventions to stop atrocities, to questioning why there has been no intervention. This gives legitimacy to intervention for humanitarian purposes through the UN and making it harder for UNSC members to justify veto use.

However, R2P currently faces serious challenges to its political influence, which it must overcome. First is the perception that it does entail changes to international law, particularly regarding the prohibition of the use of force found in Article 2(4) of the UN Charter. This essay will demonstrate clearly that these fears are unfounded. Second is the damage that failures in the application of R2P have done to the concept, focusing on lack of action in Darfur and Syria, and R2P's use in Libya.

The essay will end with suggestions on how R2P should overcome these issues. It should not advocate and push for military action outside of the UN framework; this would be unrealistic and fatally damage R2P. Instead there must be a focus on developing R2P further, reacting and responding to the lessons of Libya and Syria in order that it can realise its full potential.

Responsibility to Protect

R2P has experienced a rapid growth, moving from mere 'passionate prose' in the ICISS report in 2001 to quickly becoming a 'mainstay of international public policy debates'. This support has shown resilience in the face of a backtracking from influential states a few months after the World Summit, as well as an attempt from avowed opponents of the concept to destroy it. As well as the significant support shown by states, the response from civil society has been encouraging and instrumental to this success; NGOs from all over the world have joined together to support and develop R2P, creating the influential International Coalition for the Responsibility to Protect. Due to these factors R2P can be seen as one of the most 'most dramatic' developments in international affairs and consequently there are 'not many ideas that have the potential to matter more for good, not only in theory but in practice'.

The reason for R2P's rapid adoption is that it provides a satisfying response to Annan's challenge to reconcile sovereignty and the need for action to prevent atrocities. Overall it achieves this by moving away from the language of a right to humanitarian intervention which dominated the debates surrounding the Kosovo intervention to focus on the 'perspective of the victims of human rights violations'

R2P expresses a responsibility to protect populations from atrocities as an inherent part of state sovereignty. Building on this the Canadian Permanent Representative at the World Summit persuasively argued that R2P strengthens, not weakens, state sovereignty. This is because outside non-military intervention will help states to discharge the responsibilities which sovereignty entail. From this, a state's failure to prevent atrocities does not fall under the 'domaine réservé that excludes interferences from outside'; should a state fail to exercise their sovereignty in this way the responsibility falls to the rest of the international community. This aspect is clearly influenced by the failure over Rwanda.

The international community's responsibility to protect is to be achieved through primarily non-military means, such as developing a better 'early warning capacity', using 'appropriate diplomatic, humanitarian and other peaceful means' to protect populations with a focus on vulnerable states 'which are under stress' to prevent crises from breaking out and to help them 'build capacity to protect their populations'. This approach is more effective than military methods; they are 'easier to initiate and sustain' and avoid the huge risks, costs, and destruction which military action brings. This effectiveness was demonstrated in the response to post-election violence in Kenya. Diplomatic efforts helped prevent the violence from escalating, described by Annan as 'a successful example of R2P at work', notwithstanding the lack of military intervention.

Furthermore this focus fits in with the Third World Approach to International Law, described by Anghie and Chimni, which looks at international law from the perspective of those in the Third World, aiming to develop it 'from a language of oppression to a language of emancipation'. R2P achieves this by focusing on the plight of those suffering and entails 'taking Third World

development seriously', potentially leading to significant transfers of 'wealth, expertise and opportunity' from affluent to developing nations in order to build their preventative capacity.

If R2P were too heavily linked with military intervention it would be a 'clear barrier to consensus' due to fears that humanitarian justifications would be abused by large and powerful nations, as was the concern with Kosovo. There is less concern of this happening theoretically with R2P's primary focus being on non-military preventative measures; military intervention is a complete last resort. Furthermore a well understood focus on non-military methods should avoid the complicated and controversial questions about the legality of the use of force, which will be analysed in detail below. All this together renders R2P more acceptable to the wider international community, and is the reason why R2P has been heralded as causing a 'significant conceptual shift'.

Legal Status

Due to this conceptual shift R2P is seen by some as resulting in a change to international law. Feinstein argues that R2P 'redefines sovereignty' from being inviolable and absolute as it was for 350 years, to entail 'rights as well as responsibilities'. Thus R2P is characterised as an 'emerging norm' of customary international law, which with acceptance is changing the international legal order.

This is not the case. Bellamy draws on Hobbes to show that this conception of sovereignty is not novel; Hobbes asserted that if the state could no longer perform the function it was given power to do, then it does not qualify as sovereign and is not owed obedience. This is remarkably similar to the idea that failure to protect a population is a failure in the exercise of sovereignty. Furthermore this conception of limited sovereignty is seen throughout international law. In the Island of Palmas case it was noted that 'territorial sovereignty... has a corollary duty' which was to respect the sovereignty of other states. Even the largely permissive 'Lotus Principle' makes it clear that sovereignty is not absolute; states have the right to only do anything which is not prohibited by international law.

Sovereignty's duties were extended towards the protection of populations in the UN Charter with Articles 1(3) and 55 including important statements regarding human rights protections, which Annan argues shows that the Charter was not 'a licence for governments to trample on human rights and human dignity'. Moreover, R2P as expressed at the World Summit applies to genocide, ethnic cleansing, war crimes and crimes against humanity, all of which are prohibited by international law and are *ius cogens* norms from which no derogation is permitted. Therefore it is possible to say that states have the existing duty and responsibility to respect them, regardless of R2P.

Some writers contend that R2P creates a new legal duty on the wider international community to respond to atrocities. Thus Peters writes that R2P has contributed to the evolution of a 'legal obligation' on the UNSC to intervene for humanitarian purposes, and Bannon writes that a 'clearly acknowledged duty' to protect foreign populations was expressed at the World Summit.

This is a misunderstanding and misrepresentation of what was decided at the World Summit. Firstly with regards to military intervention should peaceful means fail, states merely proclaimed that they are 'prepared' to take action on a 'case-by-case' basis. This tentative language points

towards 'a voluntary, rather than a mandatory engagement'. This analysis is supported by the fact that the draft wording for this section stating 'we recognise our shared responsibility to take collective action' was rejected, showing that states wanted to avoid assuming an obligation.

Secondly even the vocabulary of a responsibility lacks the 'specific normative content' that would entail that R2P is an obligation; a mere responsibility does not legally create a corresponding duty. Furthermore, as Stahn points out, if R2P were an obligation adopted by states at the World Summit, surely there would be corresponding legal sanctions for noncompliance, yet there are none.

Thus it can be clearly seen that R2P is not a legal concept which creates corresponding legal duties. R2P's formulations of sovereignty and responsibility expressed are a 'rhetorical trick' used cleverly to shift emphasis away from the intervention of the international community, to the plight of those suffering. This way R2P is far more acceptable to a diverse and divided international community, with smaller states concerned about abusive interventions, and with larger states concerned that an obligation to intervene would remove discretion from decision making.

The Prohibition of the Use of Force

The use of force is prohibited in international law by Article 2(4) of the UN Charter and is referred to as being of 'fundamental or cardinal importance' and at the 'cornerstone' of the UN Charter. Given the ostensible strength of the prohibition, Zifcak states that 'it is apparent that the express terms of the Charter do not readily embrace humanitarian intervention'. There are two exceptions to this prohibition in the Charter. Article 51 permits force used in self-defence under certain conditions, and most significantly for R2P, Chapter VII allows the UNSC to authorise force in response to a threat to the peace. This is where R2P fits in; it was made clear at the World Summit that under R2P authorisation for the use of force will be made 'through the Security Council, in accordance with the Charter, including Chapter VII'.

Contrary to Oxford's assertion, there is ample existing legal authority under Chapter VII for the UNSC to authorise the use of force in response to an atrocity, by classifying it as a threat to the peace. Some, like Damrosch, contend that no authority can be found in the UN Charter to authorise the use of force as a response to internal conflict and atrocities which do not pose a 'transboundary threat to peace and security'. However this is inaccurate; what constitutes a threat to the peace was 'designed to be subjectively determined' by the UNSC for it is an 'open textured' concept. Records from both the Dumbarton Oaks and San Francisco conferences corroborate with this analysis.

Therefore one cannot say that there is no authority for a particular definition of peace and security used by the UNSC; quite simply threats to the peace 'are what the UNSC says they are'. Furthermore in many situations the UNSC has deemed an internal conflict a threat to the peace under Chapter VII before the development of R2P, such as in Somalia, Rwanda, Haiti and East Timor. Therefore use of force as envisaged under R2P 'would fit securely under Article 42' and consequently R2P does not do anything to change these existing competencies of the UNSC under Chapter VII.

The Security Council and the Use of Force

Right to protect does 'not entail revolutionary changes within the existing legal framework' of international law. This is seen by some as a R2P's major flaw. Being part of the existing international legal framework means that any authorisation of coercive military and non-military measures under Chapter VII of the UN Charter, and so the most drastic tools in the R2P armoury, are subject to the veto power of the permanent five UNSC members.

There were suggestions in the ICISS Report and High-Level Panel Report that the permanent five should refrain from using the veto in face of a large scale atrocity, but this was not taken up at the world summit. Consequently the continuing threat of the veto means that the UNSC risks 'policy paralysis' due to the risk of the veto being misused for ulterior political purposes, leading to a highly selective application of R2P which ultimately discredits its utility.

This sadly has been the case with both Darfur and Syria. In 2003 fighting broke out in Darfur between anti-government groups and the Sudanese government, which reacted by using local militias (known as the Janjaweed) and large scale aerial bombings of the area; both sides committed atrocities against civilians. The result has been over 200,000 deaths and the displacement of some 2 million people, around one third of the Sudanese population.

The response of the international community is widely held to have been a 'conspicuous' and 'abject' failure. Although the crisis broke out before the 2005 World Summit, and the UNSC had taken measures from 2005 onwards such as targeted sanctions and an ICC referral, these measures were 'slowly implemented and have proven insufficient to protect vulnerable populations'. It was not until 2007, with the consent of Sudan, that a major UN peacekeeping force was implemented. This slowness and ineffectiveness was caused by the SC members' 'geopolitical concerns', such as China's investments in Sudanese oil, the USA's counter terrorism assistance from Sudan and Russia's lucrative arms contracts. These factors prevented these states from pushing for and allowing swift and meaningful action.

The UNSC's response to the violence in Syria has been even more disappointing. Syrian civilians 'have borne the brunt' of this violence with allegations of targeting aerial bombings and artillery attacks on civilian areas, bringing 'immeasurable destruction and human suffering, leading to an estimated death toll of 60,000, with a further 4 million 'in desperate need'. Despite the clear need for the application of R2P in this situation China and Russia have exercised their veto over three separate resolutions designed to address the crisis. These vetoes are suspected again to be fuelled by geopolitical concerns, such as Russian arms interests and the strategic Tartus naval base. This situation is made more complicated by Russia and China's reluctance to consent to coercive action after the Libyan intervention, which they feel was taken too far by NATO. This will be discussed below.

These case studies show that R2P 'cannot guarantee' action, states can still perpetrate atrocities with impunity. Therefore the placement of R2P's reliance on the existing legal framework including Chapter VII could be a fatal flaw. Although its legal status is uncontroversial for it requires no change in international law, it will not achieve its goal of protecting civilians from atrocities if it fails in its practical application.

For this reason some advocate the use of force outside of the auspices of the UNSC. Bannon argues that R2P as expressed at the World Summit actually 'strengthens the legal justification' for this type of unilateral and regional action should the UNSC fail to act. This assertion is baseless; it was made clear at the World Summit that R2P will operate within the existing framework of Chapter VII for the most coercive actions. To hold otherwise is a rewriting of what was actually decided and the intentions of those states.

Williams et al make a more sensitive suggestion; while accepting that R2P at present does not advocate the use of force outside of the UNSC, they submit that it is a 'crucial component' which R2P should incorporate. In their view this is the 'most appropriate way to develop' R2P in order to ensure that failures such as Darfur and Syria are not repeated. This will be achieved through a tightly prescribed use of force outside the UNSC should it fail to act; for example it would have to be low intensity force, authorised by a regional organisation at the request of opposition groups.

Legal change of this sort may be possible, despite the prohibition of the use of force in Article 2(4). One method is through a wider interpretation of this Article. Reisman argues that the precise wording of Article 2(4) allows for the use of force so long as it does not violate 'the territorial integrity or political independence of any state' and is consistent with the purposes of the UN. In his view 'humanitarian intervention seeks neither a territorial change nor a challenge to the political independence of the state involved' and is fully consistent with the most fundamental purposes of the UN. He summarises by stating that it is a 'distortion' to argue that Article 2(4) precludes humanitarian uses of force.

Schachter dismisses this argument as it 'demands an Orwellian construction' of the terms political independence and territorial integrity. This appears to be backed up by the ICJ in the Corfu Channel Case. The United Kingdom argued that its minesweeping in Albanian waters 'threatened neither the territorial integrity nor the political independence of Albania'; however the Court held that this violated Albanian sovereignty. Later the ICJ in Nicaragua construed this as a blanket rejection of intervention. If a mere minesweeping mission violates sovereignty in this way so surely must humanitarian intervention.

Most significantly, a look at the UN Charter's travaux préparatoires shows this particular interpretation is inaccurate. The phrase 'against the territorial integrity or political independence of any state' was added at the request of smaller states to emphasise protection from the use of force, not to create an exception. From this the words 'in any other manner inconsistent with the Purposes of the United Nations' are supplementary to the prohibition of the use of force to give it a holistic coverage.

However, it is possible that this interpretation of Article 2(4) could change in the future. Legal realists argue that the drafters' intentions have no inherent authority; 'legal status depends... on the attitude of the contemporary international community towards it'. This is very similar to, and will be considered with, the idea that customary international law can modify a treaty's provisions. Chesterman points to one example where the UN Charter has been modified by subsequent practice and interpretation. Article 27(3) states that UNSC decisions must receive 'the concurring votes of the permanent members'. However it has become practice to consider a measure passed without all votes concurring should permanent members abstain. This

interpretation or change to Article 27(3) was affirmed by the ICJ in the Namibia advisory opinion; however it remains unclear whether this was a modification by customary international law, or a new interpretation.

Both lead to the same outcome, thus Williams et al's preferred form of R2P incorporating the use of force outside the UNSC to protect populations could develop by either reinterpreting Article 2(4), or through customary international law. For a practice to become customary international law two criteria must be fulfilled; the actions concerned must 'amount to a settled practice', and 'the states concerned must... feel that they are conforming to what amounts to a legal obligation'. This is a high threshold to reach, which would be very difficult and consequently unrealistic to achieve, for 'the threshold of requisite practice' would be high to modify Article 2(4) in this way, especially given its fundamental importance. Thus it would 'require overwhelming support by the international community' to bring about any customary change to the use of force.

These same problems exist for the possibility of custom allowing humanitarian intervention outside of the UNSC to exist side by side with Article 2(4), which is possible. There is nowhere near the requisite level of consensus for this in the international community. Previous attempts to develop a less stringent application of Article 2(4) have been vociferously rejected; the reaction to NATO's unauthorised intervention in Kosovo demonstrates this perfectly. NATO and its members relied on a mixture of the legal arguments explained above and moral arguments relating to the human rights abuses in Kosovo to justify their intervention. Others, however, saw it as a 'gross violation of the Charter'.

Shortly after the intervention supporting states distanced themselves from its potential legal implications. The USA and Germany claimed that Kosovo was not to be viewed as a precedent for future intervention, and Slovenia and Canada welcomed the UNSC resuming its legitimate role over the situation after passing Resolution 1244. Most opposition to such a customary rule comes from the small and medium sized states which are crucial to R2P's global acceptance, concerned that it 'would be bound to be abused, especially by the big and strong, and to pose a threat, especially to the small and weak'.

Thus the force unauthorised by the UNSC is an incredibly divisive and controversial issue, which has little chance of acquiring the required support to become custom. If R2P were to incorporate Williams et al's suggestion of force outside of the UNSC it would damage R2P's credibility and acceptance for states would associate R2P with the Kosovo intervention and the legitimate concerns they had over the potential abuse of such an ability.

With these concerns in mind the ICISS' task when developing R2P 'was not to find alternatives to the Security Council, but to make the Security Council work better'. This is a key part to its promising international support which is crucial to its effectiveness as a political concept; the more support it has the greater its political influence. This political influence manifests itself practically by generating 'compliance pull', which 'pulls actors toward larger and more effective commitments to protecting civilians', and by creating greater political legitimacy (not legal authority) for R2P influenced measures under Chapter VII. These practical effects will be lost if R2P loses its global support base. R2P must be pragmatic in what it can achieve, while

maintaining the necessary support for it to have a practical effect lest it becomes nothing more than an idealistic theory.

This might lead to a slow and incremental development of R2P which may seem disappointing given the need for urgent action in Syria. However, the steady development of human rights norms since World War II, which now 'play a transformative role in international policy', shows how powerful this incremental process can be. For this reason Luck writes that these experiences of the past 'remain relevant, reminding us of the value of both optimism and patience.'

Libya, Syria and the Future

This process of incremental development is at risk due to R2P's application in Libya, and lack thereof for Syria. When the UNSC, in the spirit of R2P, authorised states to take 'all necessary measures' to protect civilians in Libya, it was not a unique legal development, the authority for the UNSC to use force for civilian protection under Chapter VII is well established as shown above. It was however a significant political development, as it was achieved due to R2P's influence. It also appeared to mark a departure from the apathy and inaction which characterised the responses to Rwanda and Darfur. This is even more significant as parallels can be seen between Libya and Rwanda; Gaddafi urged his supporters to attack the opposition 'cockroaches', a very similar incitement to violence to that seen in Rwanda.

These positives were short lived due to NATO's implementation of the resolution. Force under the resolution was only authorised for the purposes of protecting civilians; NATO acted ultra vires as their actions were 'less about protecting the population and more about regime change'. NATO deliberately sided with the Libyan rebels and TNC, using its airpower to overthrow Gaddafi. This was despite the resolution reaffirming Libya's 'sovereignty, independence, territorial integrity and national unity' and the 5 abstaining states voicing their concern that military force of this kind could be abused for ulterior purposes.

This perceived abuse of the UNSC resolution in Libya led to a strong backlash from China, South Africa and Brazil, all of whose support is crucial to R2P's legitimacy. South Africa's representative explained that NATO's actions 'will undermine the gains made in [R2P]' This prediction was accurate. When the Syria crisis broke out the UNSC failed to act decisively as it did for Libya, NATO's abuse of the Libya resolution made Russia and China, as well as the Arab league and other prominent emerging states sceptical about any further action under R2P, despite the violence being perhaps worse.

R2P is facing two significant problems at present which affect both sceptical and enthusiastic supporters, hampering its continued support and development. Important emerging states are concerned that R2P, even if authorised through the UNSC, will be used for ulterior purposes. At the same time, due to the UNSC's failure to act in Syria R2P could be viewed as having no practical utility, leading to the paradoxical situation where R2P is simultaneously attacked for going both too far and not far enough.

Even though R2P is not to blame for NATO's abuse of the resolution, R2P needs to develop in light of these criticisms in order to continue its growing political influence. This can be best



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achieved, not by advocating a controversial legal change such as in Williams et al's proposal, but with a more modest political suggestion. R2P should incorporate threshold criteria to guide the use of force as in the ICISS and High Level Panel Reports; seriousness of threat, proper purpose, last resort, proportionality and balance of consequences. While R2P's primary focus should be on preventative and capacity building mechanisms, not using military force, it must respond to the international community's concerns which revolve around the use of force.

These criteria would benefit both enthusiastic and cautious supporters of R2P, addressing both the problems emerging from the Libya and Syria experiences. They will focus and guide the UNSC's decision making; making it 'more responsive to the security needs of civilians' and giving less influence to geopolitical concerns, thereby maximising the possibility of UNSC consensus. Criteria will also make it harder for R2P to be abused, for any decision made by the UNSC will have a significantly higher legitimacy in the eyes of the international community, having been made according to transparent and relevant guidelines. This is not a perfect suggestion; the UNSC could still fail to act since these are only political criteria to guide the UNSC's assessment of a crisis. However it is a pragmatic solution to ensure R2P continues to grow and have a political influence.

Prohibited And Permissible Use Of Force In International Relations

The use of force has been a long standing phenomenon in international relations and has been considered to be directly linked to the sovereignty of states-the limitless power wielded by states to use all possible means to guard and protect their interests. However, the longer period that war has been associated with sovereignty of state, the more the issue has turned into a legal institution by itself. This paper looks at the prohibited and permissible use of force in International Relations. Developed social awareness has expanded the limits (and even led) to the right to resort to war. This indeed has abolished the use of force or any form of threats in relation among nations, this has become a rule of law in international criminal law-its violation comes with criminal responsibility in the eyes of the international community. However, there are certain situations in which it is allowed to use force such as for self defense purposes, humanitarian intervention, and preemptive power inter alia.

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