



STUDY MATERIAL FOR INTRODUCTION TO INTERNATIONAL LAW- L330¹

¹This study material is for academic purposes only to be used as a lecture and study guide for students at UNILUS and not meant for publication. It contains materials from international and local renowned authors who have not been acknowledged as per strict academic standard.

*Compiled by Gift Mileji LL.B (UNZA) LL.M (Pretoria)

ACKNOWLEDGEMENTS

May i take this opportunity to thank some people who helped put the study material together. I thank my former students who took time off their busy schedules to develop this study guide and trying their best to make it student friendly. Victoria Mwamba, Sichuunga Busiku and Lihonde Jonathan, I would like to once again thank you for your efforts. All mistakes, errors and omissions in this study material remain my sole responsibility.

UNIT 1

THE NATURE AND HISTORY OF INTERNATIONAL LAW

Definition

International law (IL) may be defined as a body of rules and principles which are binding upon states in their relation with one another.² The rules which make IL law can be divided into general and particular rules.³ The rules of a particular nature emanate from the free will of the states to create them and are found in conventions or treaties. The latter set of rules making IL can be discerned from usage or what is referred to as customary practice. i.e. generally accepted as expressing principles of law and established in order to regulate the relations between states.

The significant element of IL from a strict point of view is that it is to regulate the relations between states. Now IL has evolved and included other players on the international scene. Since 1949, it has been accepted that international organizations, such as the United Nations (UN) and its specialized agencies, enjoy international legal personality. This new approach to international legal personalities at IL was made by the International Court of Justice (ICJ) in the case of Reparations for injuries suffered in the service of the UN when it said that:⁴

“...is not the same thing as saying that it is a state, which it certainly is not, or that its legal personality and rights and duties are the same as those of a state. Still less is the same

² JL Briely (*The Law of Nature* 6th Ed...) cited in John Dugard (3rd Ed.. *International Law; A South African Perspective*) (2005)1.

³J Dugard (3rd Ed *International Law; A South African Perspective*) (2005)1.

⁴ (1949) ICJ Report 174 at 179

thing as saying that it is 'a super state'...what it does mean is that it is a subject of IL and capable of possessing international rights and duties and that it has capacity to maintain its rights by bringing international claims"

This statement was made by the ICJ in its advisory opinion in response to a question whether the UN had the necessary legal personality to bring an action against Israel for the death of a UN mediator who was assassinated while on duty in Palestine. Since then, many international treaties have developed to offer IL protection to individuals. Although individuals benefit from the protection of IL and participate in its process, they cannot be described as full subjects of IL.⁵

Although entities other than states participate in the contemporary international legal order, it is important to understand that states and inter-governmental organizations are the main actors on the international plane, the only entities with true international personality and principle creators of rules of IL.⁶

HISTORICAL DEVELOPMENT OF INTERNATIONAL LAW

There are many people and groups who are associated with the historical development of IL but for the purposes of this study we shall focus on the contribution of the Greeks, the Romans and a few selected writers.

- IL is still a youthful law which is as recent as the 16th Century
- IL for a long time has been a Euro- Centric law which was influenced by Christianity which came from the East.

⁵Dugard (n 2 above) 1.

⁶I Deter De Pluis *The concept of International Law (1987)* 130.

- There was an embryo of IL concepts that developed among the Greeks and Romans.

The Greeks

- The Greeks had a system of city states i.e. Spartan (greatest state)
- They used inter communal law to unify the cities or states i.e. there were Greek rules which formed part of the inter-communal law and now find themselves to some extent in the modern IL, e.g. if one brought a message from a different state, you can reject the message but not kill the messenger. The messengers were inviolable i.e. you cannot harm or injure them
- The Greeks also came up with a rule that no city state would go to war without declaring to the other state in order to allow the others to prepare and even choose a battle ground or arena and in the evening they would de-rearrange and get the wounded and then reengage in the war the next day

The Romans

- The Romans were war like people. They were able to conquer other states or nations
- They introduced the concept of empire and believed that there was only one universal state i.e. Roman Empire
- They also believed that there was only one law, which is the Roman law and they enforced the Roman order i.e. the Roman way of doing things
- The Romans were able to distinguish between three kinds of laws, i.e. natural law, ius civile law and ius gentium law

- Natural Law being the law governs the universe and would apply everywhere in the world e.g. the rising of the sun.
- Ius Civile was the law applicable in Rome for free citizens of Rome
- Ius Gentium applied throughout the entire Roman Empire. It governed the relations between the free citizens of Rome and non- Roman citizens.
- The Romans also introduced two types of wars i.e. Bellum Justum & Bellum Injustum
- Bellum justum was the just war and Bellum Injustum was the unjust war
- If a war is just, then you have the right to engage in that war but if it was unjust, you had no right to engage on that war.

DEVELOPMENT OF INTERNATIONAL LAW BETWEEN 16TH & 17TH CENTURY

- refer to the period of Renaissance or period of enlightening from the period Europe believed in super natural powers to advance the needs of man
- people believed that it was technology and not religion which was going to develop Europe
- the expansion of ideas in the 16th and 17th Century led to the collapse of religion and the Empires and led to the establishment of secular states
- Westphalia is a critical point in history for it led to the existence of states
- The emergence of state systems and challenges by people like Martin Luther made the belief that the Pope was also a

human being and not a super natural person as earlier believed

- Secular states became sovereign states and they came up with acquisition laws of acquiring whatever land was newly discovered (acquisition of territory laws emerged)
- The secular states also came up with rules to do with the sea i.e. freedom of the sea and that you could not appropriate the sea among themselves.
- Gentilis wrote a famous book entitled "De Jure Belli" meaning 'the law of war.' It discusses the justice and injustice of waging a war and discusses warfare and Victoria wrote a book known as "De Jure Belli Hispanorum." Both books describe the modern way of conducting war
- Grotius also referred to by many writers as the father of IL turns out to be famous for he wrote a book entitled "De Jure Belli ac Pacis." He is acclaimed father of IL largely in recognition of his monumental treatise De Jure Belli ac Pacis Libris Tres.⁷
- Grotius also wrote " Mare liberum" in 1609 which means 'freedom of the Sea'
- It is from these ideas that the concepts of sovereignty, freedom of the sea came up and are applicable to-date. These are said to be European values or ideas and hence referred to as Euro centric laws.

IL from 20th Century

The geography of IL had changed in the 20th Century. The Three things which contributed to this change and still bear an influence to modern IL include:

- advancement of science and technology

⁷Dugard (n 2 above) 11.

- development of the first and second world war
- the third influence of modern IL is human rights law

IS INTERNATIONAL LAW TRUE LAW?

The debate as to whether international law is true law can be traced back to a man called John Austin. John Austin among other scholars stated that in order for international law to qualify as law it must be a command by a political superior to an inferior backed by sanctions. It was on this premise that he argued that international law is not law since at international level there exists no determined legislature capable of making national laws. He therefore concluded that International law cannot be considered true law but merely a code of rules of conduct of moral force only. However, some scholars argue that the behavior of states is sufficient evidence of the existence of international law.

Arguments in favour of international law as Law

1. There is a body of rules and principles that comprise the international legal order.
2. There is a community of more than 190 member states who have formed the international community. Although there may be serious political, economic and cultural divisions within the community it is probably more no less divided than many erogenous societies. i.e. communities' at national level.
3. Members of the international community recognize these rules as binding on them. Violations of international law exist and comparison can be made to our national laws which are sometimes broken but that does not any way preclude the fact that they exist.

4. Sometimes countries expressly treat international law as possessing the same force as ordinary law binding on its citizens.
5. States like to be seen acting in accordance with international law and legal advisors are employed to defend a state's position in international law.

THE NATURAL LAW THEORY

The natural law theory believe that law was founded on the nature of man as a reasonable being and was composed of a body of rules which dictates to human reasoning. It is stated that arising from this theory international law derives its binding force by mere application to particular circumstances relating to the law of nature. In other words, states submit to international law because they are regulated by a higher law that is the law of nature. Natural law or rather nature itself demands that the law must be obeyed.

POSITIVISTS THEORY

This theory commands popular acceptance and holds that rules of international law are in the final analysis of the same character as (positive) municipal law. International law can in logic be reduced to a system of rules depending on their validity only on the fact that a state has consented to them.

The positivists regard international law as consisting of those rules which the various states have willfully accepted. They argue that without such manifestation of consent international law would not be binding on the society of states.

The difficulty with this theory relates to rules of customary law because it is difficult to find rules of express consent to

be bound by customary law. It is however argued by proponents of this theory that belonging to the society of states necessary implies consent to the binding operation of establishing customary rules of international law.

UNIT2

SOURCES OF INTERNATIONAL LAW

Introduction

The source of law says what the law is and where it can be found. The international community has agreed to a list of sources listed in Article 38 of the statute of the ICJ for ascertaining the content of International law.

The sources of IL to be applied by the Court are described in article 38(1) of the statute of the ICJ are:

- 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;
- b) General principles of law recognized by civilized nations;
- d) Subject to the provisions of Article 59 of the statute of the ICJ 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.

Sources may be characterized as formal or material. Formal sources constitute what the law is, whereas material sources only identify where the law may be found. I.e. article 38(1) (a) - (c) on treaties, custom and general principles are formal sources. On the other hand, article 38 (1) (d) on Judicial decisions and juristic teachings are material sources.

Article 38, however, does not in itself state that it is a source of IL nor does it state that it is establishing a hierarchy of these sources. Although no provision is made for a

hierarchy of sources, in most instances treaties, which take the place of legislation in domestic sphere, are viewed as the primary source, while custom is the secondary source. The normative superiority of these two sources, both of which are founded on the consent of states, emphasizes the consensual basis of IL. Modern IL has seen important development in the hierarchy of norms. Whereas in classical IL, all norms and rules enjoyed equal ranking, today, certain norms, known as peremptory norms (jus cogens), enjoy a higher status in the normative hierarchy.

Note: Treaties have been covered widely in Unit 3 of this module

A. TREATIES

Treaties inferred in article 38 may be between two states (bilateral) or between several states (multilateral). Treaties involve a contractual obligation for the parties concerned, and thus create law for all parties agreeing to the terms contained therein. On this premise, it can be said that a bilateral treaty does not create a lesser law than does a multipartite treaty. Multipartite treaties may have a wider effect, and as such may be regarded as law making, in that not only do they have a greater number of signatories, but its provisions may become customary international Law.

In case of a dispute or any reason to find intention, treaties are the most opportune way to obtain reliable evidence of consensus of the parties. A treaty is direct proof of rights and obligations accepted by parties to the treaty. It is therefore a primary source for ascertaining the precise nature of just what the participants have agreed to do or not to do.

Regional or issue specific treaties are not intended to have universal applicability. However they are useful sources of international law when they contain rules intended to bind certain nations.

Multilateral treaties may also provide evidence of international consensus, even when they are not universally adopted. For example, the United Nations Law of the Sea treaty which entered into force in November, 1994, is the best evidence of the rights and obligations of states that have accepted it when enough states have ratified it. It is the best source for resolving maritime issues between ratifying states. Such a treaty may also bind non-parties as a matter of customary international law if it codifies the general practice of many states.

B. International Custom

These are customs which have been practiced by states for a long time and out of conviction and with a belief that if they do not follow it, there would be a consequence. Customary IL is a practice followed by concerned States because they feel legally obliged to behave in such a way.

ELEMENTS OF INTERNATIONAL CUSTOM

Custom must be distinguished from mere usage, such as behaviour which may be done out of courtesy. The elements of International custom are basically two (2);

- i) Material element (usage of practice must be general and consistent)
- ii) a psychological element (the practice must be one that is accepted as a compulsory rule i.e accepted as law "Opinio juris

sive necessitatis" meaning ' the practice must be one that is accepted as an accepted law')

Material element refers to the behaviour and practice of states whereas the psychological element is the subjective conviction held by states that the behaviour in question is compulsory and not discretionary.

What makes state practice

Once the above elements are present, a custom becomes an International Customary Law (ICL). There is no time limit on how long the customary rule should exist. The fact that a practice has been engaged in, only for a brief period of time will not in itself be a bar to the formation of a customary rule, provided the other requirements of custom are met. The virtual unimportance of time in the formation of ICL was properly stated in the North Sea Continental Shelf Case.⁵ In that case the court said that:

"Although the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law...an indispensable requirement would be that within the period in question, short though it might be, state practice...should have been both extensive and virtually uniform..."

The ICJ in the Asylum Case held that before state practice could be acknowledged as law, it had to be in accordance with a "constant and uniform usage" practiced by the state in question.⁶

There is no time limit for a rule to crystallise into a custom or customary law. The practice need not be universal. A practice can be general even if it is not universal. Article 38 (1) (b) speaks not of universal practice but of a general practice. What is more important than the number of states involved is the attitude of those states whose interests are actually affected. The number of states is less consequential than the identity of the states involved because in every activity certain states carry more weight than others. For instance, if one analysed the rules of maritime, states to depend on mostly for the law of the sea are those with a coastline and not looking at land locked countries. Further, in matters involving law of outer space the USA and Russia would be more important than other states that have not shown interest or have no capacity to explore outer space. One, therefore, does not consider the number of states involved but generally looks at the general consistent practice of certain states.

Regional Custom (The Asylum Case, ICJR 1950)

There are instances when regional custom used by a few nations may differ from international customs practiced by many other nations although both categories of custom may be binding. A clear illustration is that although diplomatic asylum was not recognized by customary practice elsewhere in the world, in the Asylum case Columbia claimed that "American International Law" required Peru to recognize Columbia's grant of asylum in the Latin American region. The court rejected the existence of either a universal or regional custom, which would have recognized such asylum to be a binding practice. The court maintained that there was too much fluctuation and discrepancy in both the practice of and the views expressed regarding

diplomatic asylum for a rule of custom to have been established. The court found that it was difficult to find "any constant and uniform usage accepted as law" from Peru's claim. The diverging practice which existed in the region demonstrated to be a hindrance for that particular practice to evolve into law.

This decision shows that the court implicitly approved the potential application of regional practices where they could be proved to exist.

Further, in the Asylum Case, case Peru alleged that the Columbian Embassy improperly granted asylum to a Peruvian national seeking to overthrow Peru's government. The ICJ explored the possibility that there might be a regional custom, as claimed by Columbia that would bind Peru to honour this custom and allow the Peruvian to leave Peru without being prosecuted.

"the party which relies on custom...must prove that this custom is established in such a manner that it has become binding on the other party and that (the claimed right of asylum)...is in accordance with a constant and uniform usage, practiced by the states in question, and that this usage is the expression of a right appertaining to the state granting asylum and a duty to the territorial state (Peru)."

Opinio Juris

A practice in itself does not establish custom. An alleged rule of customary international law has to manifest not only a material element, but a psychological element otherwise known as opinio juris. If certain rules are to evolve into law, it is necessary to distinguish rules which are regarded as legally

obligatory from those which are not. State behavior on the international scene may be prompted by reasons of courtesy, convenience or tradition rather than legal obligation.

Opinio juris was introduced as a legal formula in an attempt to distinguish legal rules from mere social usage, and it refers to the subjective belief maintained by states that a particular practice is legally required of them. A practice which is generally followed but which states feel they are legally free to disregard cannot be characterized as law. The issue of opinio juris was discussed in the Military and paramilitary Activities In and Against Nicaragua (Nicaragua V United States Case (Merits) where the ICJ stated that:

"...not only must the acts concern amount to a settled practice, but they must also be accompanied by the opinio juris..., Either the state taking such action or other states in a position to react to it must have behaved so that their conduct is evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it."

Can a state oppose the rule of International customary law (ICL)?

A state is free to oppose a rule of ICL but that opposition of the state to that rule must be from the inception of the rule, then the state will not be bound. Opposition expressed after a rule has become established will be too late to prevent the state from being bound. In the Anglo-Norwegian Fisheries case, the court held that if the particular rule in question was one of international law, it would be "inapplicable as against Norway insomuch as she has always opposed any attempt to apply it to the Norwegian coast."

What actions can constitute state practice to establish ICL
In his separate opinion in the Barcelona Traction, Light and
Power Company Case (second phase) Ammon J. stated that:

"To return to state practice as manifested within international organizations and conferences, it cannot be denied, with regard to the resolutions which emerge...that these amount to precedents contributing to formation of custom."

Summary on sources of the rules of customary law

- i. state practice. How does the state conduct itself in relation to other states?
- ii. Conduct of diplomat relations between states i.e diplomatic correspondences, statement made by international advisers etc
- iii. Treaties adopted. States who never adopted can accept the treaty
- iv. Practice of International organizations e.g UN, AU etc
- v. Domestic law and domestic decisions of tribunals

Note: For state practice to amount to a custom, it must have been "constant and uniform".

C. GENERAL PRINCIPLES OF LAW RECOGNISED BY CIVILISED NATIONS

These are principles of law that are known and recognized and already exist in municipal law of civilized nations. In the Chorzow Factory Case 11 the Permanent Court of International Justice described the principle "generally accepted in the jurisprudence of international arbitration, as well as by municipal courts" The principles are applied to certain

geographical or ideological regions. An example of a principle imported from the municipal law to the international sphere is that the principle of estoppel in the Eastern Greenland Case (1933).

In that case, the Minister of foreign affairs of Greenland had made verbal representation that they had no opposition to the claim to the land by another state. The minister then turned round and denied this representation. The Court ruled that having made the statement, he was estopped from reversing it.

General principles recognized in national law constitute a reservoir of principles which an international judge is authorized by Article 38 to apply in an international dispute, if their application appears relevant and appropriate.

In the Barcelona Traction Case (second phase) 12, the ICJ emphasized that:

"If the court were to decide the case in disregard of the relevant institutions of municipal law it would without, justification, invite serious legal difficulties. It would lose touch with reality, for there are no corresponding institutions of international law to which the court could resort ... It is to rules generally accepted by municipal legal systems ... and not to the municipal law of a particular state, that international law refers."

There is no universally agreed upon definition of the exact definition of general principles. Nonetheless, the importance of these principles is that recourse to them has prevented a case from being dropped on the grounds that international law as it

exists lacks, or is inadequate for dealing with, the particular issue raised.

D. JUDICIAL DECISIONS

Under Article 38(1) (d), judicial decisions are sources of law subject to the provisions of Article 59. Art. 59 provides that the "decision of the court has no binding force except as between the parties and in respect of that particular case." 'excoebuno' (parties could agree to what laws should apply to them) if the parties so agree, the ICJ has no problem applying the law chosen by the parties. The reason for this limitation is simply to prevent legal principles accepted by the court in a particular case from being binding on other states or in other disputes.

The ICJ, however, is not bound by its previous decisions as to the law which they apply. There is also no doctrine of 'stare decisis' on the international sphere with regard to international tribunals. But despite this absence of a doctrine of binding precedent, the ICJ has been seen to have reapplied many principles relied on in previous cases. The ICJ seems to lean towards following its previous decisions or feel the need to distinguish its own jurisprudence.

E. SCHOLARLY WRITINGS

Scholars and academicians have contributed heavily to the development of international law and their influence has been due in part to the absence of a legislative body at the international fora and on the youthfulness of the international legal system itself. The writings were very important in the earlier days of the development of IL because there was no much

of International treaties, international organizations, customs that were worldwide. Thus the authority of textbook writers was very important. But over the years the importance has diminished because of treaties and other available sources of IL. Today authors are cited for purposes of substantiating arguments because they contribute as a good source of evidence value.

F. Other sources

States are no longer the only actors at International level. Political organisations too are actors, e.g the UN and other International legal persons are also involved in creating norms. Resolutions adopted by the UN might be resolutions adopted internally by the UN and are binding on the UN itself because they concern International business. However, there are other resolutions that extend to parties that subscribe to the UN. Such resolutions are in two parts i.e they could either be binding or not binding.

Resolutions of the General Assembly i.e external resolutions are not binding and certain UN General Assembly resolutions, namely those which are "declarations of principle" although they carry no legal obligation, do have considerable moral force and cannot be dismissed as being of no legal significance. However, resolutions of the UN Security Council are binding.

Although most of the resolutions are not binding, they constitute soft law, "tertium quid." Soft law could eventually crystallise into hard law. Soft law is therefore very important and may indicate a direction a state may take regarding a particular issue.

Jus Cogens

This is a technical term given to norms of general international law which are of a peremptory force and from which no derogation may be made except by another norm of equal weight. A treaty which conflicts with such a norm is void, and should a new peremptory norm develop, any existing conflicting treaty becomes void and terminates.

The Vienna Convention on the law of treaties defines a peremptory norm as one which is "accepted and recognized by the international community of states as a whole." E.g there is no single state that will proclaim and ask for war. Therefore, the abolition of war/ use of force is a norm of jus cogens. Further, no state can claim to have a policy of how to carry out genocide and torture. The prohibition of genocide and torture is a norm of jus cogens.

UNIT 3

THE LAW OF TREATIES

Definition of a treaty

A Treaty is an international agreement entered into by two or more states or other international legal person to establish or seek to establish a relationship between parties governed by international law.

This definition has three critical elements:

i. International Agreement

ii. Entered into by two or more international legal persons intended to create a legal relationship

iii. Governed by international law

- This element brings out a distinction with international contracts i.e the purchase of rice by Zambia from China. Treaties must be distinguished from a commercial contract between a state and an alien citizen or corporation.

Definition of the terms used in treaty law

Treaties go under a variety of names, thus besides the term "Treaty" the following terms have been used, Convention, protocol, agreement, arrangement, process, verbal, statute, covenant, declaration, modus Vivendi, exchange of notes or letters, final act, or general act.

Agreement - instrument less formal than a treaty or convention normally never in head of state form. This is generally used in agreements of more limited scope and with fewer parties than the ordinary convention. It is also employed in agreements of a technical nature or administrative nature signed by representatives of government departments.

Arrangement - This term is used interchangeably with the term agreement.

Convention - This term is ordinarily reserved for a proper formal instrument of a multilateral character or law making instruments or instrument adopted by organs of international institutions e.g. ILO.

Covenant - used as synonym for treaty e.g. Covenant of the League of Nations, sometime also called a "Pact."

Declaration - denotes a treaty proper such as declaration of Paris of 1856 or recently the Joint Declaration of 19th December 1984 between UK and China on the reversion of Hong Kong to Chinese sovereignty in 1997. This term is also used to mean an informal instrument appended. A declaration can be an addition or an elaboration or interpretation of a treaty.

Exchange of notes or letters is a method whereby states subscribe to certain undertakings binding on them (especially during negotiations)

Final act is an instrument which records the winding up of proceeding of a treaty making conference

Modus Vivendi is an instrument recording an agreement of a temporary or provisional nature intended to be replaced by a more permanent arrangement. It is normally an informal agreement that does not require ratification.

Protocol - This signifies an agreement less formal than a treaty or convention which is generally never in the head of state form. This term covers instruments:

i) Subsidiary to a convention dealing with ancillary matters such as the' interpretation of particular clauses of a convention, any supplementary clauses not in the convention.

ii) A supplementary treaty concluded at a later date e.g. Protocol of 1967 to the refugee convention of 1951 or the two protocols to the ICCPR (Convention on Civil and political rights).

iii) A record of certain understandings is also sometimes called process verbal.

Process verbal - Originally denoted summary of proceedings of a diplomatic conference but is now used as a record of some agreement reached by the parties.

Statute - refers to a collection of constituent rules relating to the functioning of an international institution such as the statute of the ICJ.

TREATY MAKING PROCESS

The first thing to ascertain is the parties to the treaty. i.e. do the parties have treaty making capacity. The capacity is that of an international legal person. i.e Sovereign States and International organisations.

Treaties can be concluded in different forms. For an international organisation, the treaty can be concluded by the relevant organ through the Executive Head. In case of states, the Head of State is the primary person to conclude treaties and other international agreements. Nevertheless, governments through a minister/ senior government official can enter such agreements and this will depend mostly on the weight of the treaty in question. Mostly if it is issues of a high political

nature, the treaty is concluded by the head of state and ministerial treaties are generally of a technical nature. (Municipal law of each country provides guidance on how to conclude treaties). The form in which a treaty is made, however, does not affect its binding nature.

PRACTICE IN THE TREATY MAKING PROCESS

There are various steps in the process of treaty making. These are:

- 1) Accrediting of persons who conduct negotiations on behalf of contracting states;
- 2) Negotiation and adoption;
- 3) Authentication, signature and exchange of instruments;
- 4) Ratification;
- 5) Accession and adhesion;
- 6) Entry into force;
- 7) Registration and publication; and
- 8) Application and enforcement

Accrediting of negotiators

Once an international legal person has decided to commence negotiations with another for making a particular treaty, the first step is to appoint negotiators. These representatives must be properly accredited and equipped with the necessary authority to undertake this mandate.

In practice representatives of a state are provided with a very formal instrument given either by the head of state or minister of foreign affairs showing the extent of their authority. The credentials will show that Mr. 'X' is a plenipotentiary (legitimate representative) of the state and has FULL POWERS to

sign for the state. Such power is shown by an instrument called pleni pouvoir (Full powers)

However full powers are not necessary if.

i. according to the article 7(1)(b) of the Vienna Convention on the Law of Treaties, it appears from practice of negotiating states that their intention was to consider the person concerned as representing the sending state and to dispense with full powers.

ii. No full powers are issued for an agreement to be concluded between departments of two governments.

When it is a bilateral treaty being negotiated, the representatives exhibit their full powers when they meet to start the negotiations or sometimes an actual exchange of these documents is effected prior to the meeting for discussions.

In the case of a diplomatic conference summoned to conclude a multilateral instrument a different procedure is used. At beginning of a conference, a committee of full powers is appointed to report generally to the conference on the nature of the full powers which each representative possesses. Delegates hand their full powers to the secretary of the committee of full powers e.g. a delegate may have full powers to negotiate but not to sign and therefore such a delegate will be not be expected to act beyond their mandate of just negotiating.

Negotiation and Adoption

Negotiations involve two methods, either viva voce or by way of exchange of written instruments. Usually in bilateral treaties negotiations are conducted viva voce while in the case of multilateral treaties negotiations are mostly through diplomatic conferences.

The Vienna Convention in art. 9(2) provides that the adoption of a treaty text at an international conference is to take place by 2/3 majority of states present and voting unless by the same majority these states decide to apply a different rule. A treaty is said to have been concluded at the time it is adopted. Once adopted a treaty comes into being and only comes into effect upon ratification.

AUTHENTICATION, signature and exchange of instruments

Before ratification, a treaty has to be signed by the state parties available at the negotiation ceremony. Unless there is an agreement to dispense with signature, this process is essential because it serves to authenticate the text.

Art. 10 states that the text may be authenticated by such procedure as is laid down in the treaty itself, or as is agreed to by the negotiating states or in the absence of such agreed procedure, by signature, signature ad referendum, initialing or by incorporation in the final Act. The signature does not bind the state but simply means an attestation by the negotiators that the document is exactly what has been agreed upon. After signing, an exchange of instruments occurs for the delegates to take home for further action. i.e ratification

Ratification

A state is not bound by a treaty that it has not ratified. But if a state has signed the treaty, it is expected not to do anything that will defeat the purpose of such a treaty.

Ratification is defined in Art. 2 of the Convention to mean "the international act whereby a state establishes on the international plane its consent to be bound by a treaty".

Ratification is the final confirmation parties give a treaty concluded by their legitimate representative. It also includes the exchange of the document embodying that confirmation. The ratifying document should clearly and unmistakably refer to the treaty being ratified. Ratification does not have a retrospective effect so as to make a treaty obligatory from the time of signature.

There is no duty to ratify because power to refuse to ratify is inherent in state sovereignty. Thus at international law there is no legal or moral duty to ratify.

An instrument of ratification has no effect unless it is deposited or exchanged as the case may be. In bilateral treaties instruments of ratification are exchanged between states while in multilateral treaties exchange is not appropriate, so such treaties provide for deposit of all ratifications in a central place, for example, foreign office of place where treaty was signed or the UN secretariat.

Accession and Adhesion

When a state has not signed a treaty it can only adhere or accede to it. i.e where a state did not participate in the negotiation and adoption process of the treaty in question. Some writers make a distinction between the two:

Accession - being party to the whole treaty except reservations.

Adhesion - merely means approval of parts of the treaty.

Entry into force

Entry into force of a treaty may either be provided for in the treaty itself or the parties may agree as to when it will enter into force. It may be on signature or on exchange or deposit of ratifications, acceptance or approval by all states signatories. Multilateral treaties usually make entry into force dependant on deposit of a prescribed number of ratifications. Sometimes a precise date is fixed for entry into force irrespective of how many states have ratified.

Registration and publication

Art. 102 of the UN charter requires all treaties and international agreements entered into by UN members to "as soon as possible" be registered with the Secretary General of the UN and be published by the UN. An unregistered treaty cannot be relied upon in proceedings before the ICJ, GA or Security Council.

This however does not invalidate a treaty and does not prevent it being invoked before bodies and courts other than UN organs.

Note that:

- 1) In the interim period before registration such a treaty can be relied upon before the ICJ, the GA, and the SC subject to undertaking to register.
- 2) Failure to register as soon as possible can be cured by subsequent registration.
- 3) Can UN Secretary General refuse to register? His duties are ministerial and must register but a document that seems not to be an international treaty or agreement ought to be refused registration.

Application and Enforcement

The final stage of treaty making process is the actual incorporation, where necessary, of treaty provisions in the municipal law of the state parties and application of its provisions.

Structure of a treaty or convention

i. Preamble

Comprises of the names of the Heads of the contracting parties and their duly authorised representative. It also recites the motives for the conclusion of the treaty;

ii. Substantive clauses

After the preamble follows the principle provisions numbered in articles.

iii. Formal clauses

Contains miscellaneous provisions i.e duration, ratification, amendments, dispute clauses etc and

iv. Formal attestation or acknowledgement of signature and Signatures by the plenipotentiaries.

Validity of treaties

Articles 46-53 of the Vienna Convention

A treaty being invalid suggests a legal still birth due to the following reasons:

i. Non-compliance with municipal law requirements-

A state may not plead a breach of its constitutional provisions relating to treaty making so as to invalidate an agreement (art. 46).

ii. Error

Error may only be invoked if the error relates to a fact or situation which was assumed by that state to exist at the time when the treaty was concluded and formed an essential basis of its consent to be bound by the treaty (art 48(2)). A state which contributed by its behaviour to the error, or should have known of a possible error, cannot relieve itself subsequently of its treaty obligation art 48.

iii. Specific restrictions on authority to express the consent of a state

If the authority of a representative to express the consent of a state to be bound by a particular treaty has been made subject to a specific restriction, his omission to observe that restriction may not be invoked for invalidating the consent expressed by him unless the restriction was notified to the other negotiating states prior to his expressing such consent art 47.

iv. Fraud

Art. 49 provides that a treaty may be invalidated if a state has been induced to conclude a treaty by the fraudulent conduct of another negotiating state.

v. Corruption of a representative of a state

Art. 50 provides that a treaty may be invalidated if a state's consent to a treaty "has been procured through the corruption of its representative directly or indirectly by another negotiating state". Neither fraudulent conduct nor corruption are defined in the treaty.

vi. Coercion of a state by threat or use of force

Art 52 a treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the charter of the United Nations.

vii. Coercion of a representative of a state

Under Article 51 a treaty will have no legal effect if a state's consent is procured by the coercion of its representatives through acts or threats against them.

viii. Treaties conflicting with a peremptory norm of general international law (jus cogens)

Article 53 - a treaty which conflicts with a peremptory rule of international law or jus cogens becomes void and terminates

Note: Art. 64 - if a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.

THE PERFORMANCE OF TREATIES

1. pacta sunt servanda

Every treaty in force is binding upon the parties to it and must be performed in good faith. Articles 26

2. Treaties have no retrospective effect

It binds the state from the moment it signifies consent to the treaty unless the treaty itself has a provision for retrospective effect. Article 28

3. Territorial application

Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory. Article 29

4. Only a force majeure (act of God) can exculpate a state from a liability from a treaty

5. Third parties (states)

Treaties are not applicable to third states because of the doctrine of sovereignty of states. However, this is just a general rule because there are certain instances when third states agree to be bound. Moreover, some treaties may bind third states without their consent i.e Jus Cogens treaties - UN Charter. Exceptions to this general rule can be found in articles 35- 38 of the Vienna Convention on the Law of Treaties: which are;

A. an obligation arise for a third state from a provision of a treaty if the parties to the treaty intend the provision to be the means of establishing the obligation and the third state expressly accepts that obligation in writing,

A. a right arises for a third state from a provision of a treaty if the parties to the treaty intend the provision to accord that right either to the third state, or to a group of states to which it belongs, or to all states, and the third state assents thereto. Its assent shall be presumed so long as the country is not indicated, unless the treaty otherwise provides,

B. When an obligation has arisen for a third state as a customary rule of international law recognized as such.

INTERPRETATION OF TREATIES

There are 3 main approaches in IL to treaty interpretation:

1. The objective approach which looks at the ordinary words of the treaty
2. The subjective approach which is an interpretation in accordance with the intention of the parties to the treaty
3. The teleological approach which is an interpretation in accordance with the treaty's aims and objectives.

The Vienna Convention on the law of treaties adopts an integrated approach which reflects all the three approaches. The Convention articulates the integrated approach as a general rule of interpretation and invokes the teleological approach as an aid to interpretation in order to shed more light on the ordinary meaning of the words in a treaty. In terms of article 31 of the Vienna Convention, if particular words and phrases in a treaty are doubtful, they should be interpreted by reference to the object, purpose and context of the treaty. Context includes the text of the treaty, the preamble, annexes etc. It is permissible to look at documents that were there before the treaty was made e.g documents used prior and during the 'negotiation and adoption' process.

The modern trend in treaty making is to attach a dictionary to help in the interpretation of a treaty or including a provision which refers the interpretation to a specialised organization.

Treaty modification

A treaty is always valid at inception but it can be modified, suspended and in certain extreme cases terminated. For effective modification, a reservation may be entered or an amendment can be made to a treaty.

Reservations

A reservation is a unilateral statement, however phrased or named, made by a state, when signing, ratifying, accepting, approving or acceding to a treaty, where it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that state.

The privilege of making reservations is regarded as an incident of sovereignty and perfect equality of states. Reservations may be made even where there are no provisions in the treaty expressly permitting such. A practice has developed where a special clause in a treaty provides that no reservations would be permissible in the treaty in question or that no reservations are permissible with regard to certain important provisions or that only certain kind of reservations are permissible.

Reservations only apply in the case of multilateral treaties. In bilateral treaties a reservation by one party effectively means a new proposal which will reopen negotiations until agreed terms are reached and inserted into the final treaty text.

Article 19 provides that "a state may when signing, ratifying, accepting, approving, or acceding to a treaty formulate a reservation unless:

- The reservation is prohibited by the treaty;

- b) The treaty provides that only specified reservations, which do not
- include the reservation in question, may be made; or
- In cases not falling under sub-paragraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.

Historically, it was thought that a reservation could only be accepted if all parties to the treaty consented. Thus in the absence of unanimous agreement any reservation would be null and void.

Effect of a reservation

The ICJ in the Advisory opinion on Reservations to the Convention on Genocide 1948 case discussed the issue of reservations to treaties.

The court stated that:

- A state that has made and maintained a reservation which has been objected to by one or more of the parties to the convention but not by others, can be regarded as being a party to the convention if the reservation is compatible with the object and purpose of the convention; otherwise that state cannot be regarded as being a party to the convention.
- That if a party to the convention objects to a reservation which it considers to be incompatible with the object and purpose of the convention, it can in fact consider that the reserving state is not a party to the convention.
- That if, on the other hand, a party accepts the reservation as being compatible with the object and purpose of the

convention, it can in fact consider that the reserving state is a party to the convention.

- That an objection to a reservation made by a signatory state which has not yet ratified the convention can have legal effect indicated in (a) above only upon ratification. Until such moment it merely serves as a notice to the other states of the eventual attitude of the signatory state.

- That an objection to a reservation made by a state which is entitled to sign or accede but which has not yet done so, is without legal effect.

With regard to multilateral treaties, questions that have become more important as the size of the international community has increased are whether a reservation has to be accepted by all of the parties to be valid and if not what is the treaty relationship between a party that makes a reservation and one that objects to it.

Amendment and modification

Amendments provide state parties with an opportunity to move treaties with time. A treaty must have an amendment clause which should provide for such a procedure i.e a number of states needed to carry forward an amendment. The procedure must provide for the initiation and adoption of the amendment. After amendment, the treaty must be ratified by the member states and it would come into effect once the minimum required have ratified.

A treaty may be amended by agreement between the parties unless the treaty otherwise provides in accordance with the rule in arts. 40, and 41 i.e. proposal to amend to be notified to all parties, each one of which shall have the right to take part in formulating amendment proposal, in negotiations and conclusion of any agreement for the amendment of the treaty.

Termination of, suspension of and withdrawal from treaties (articles 54-62)

i) In accordance with the treaty or otherwise by consent - termination of a treaty or withdrawal of a party may take place in conformity with the provisions of the treaty or at any time by consent of the parties

ii) Material breach - a material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part

- Supervening impossibility of performance - a party may invoke the impossibility of performance of a treaty as ground for terminating or withdrawing from it if the impossibility results from the permanent disappearance or destruction of an object indispensable for the execution of the treaty

- Fundamental change of circumstances (*rebus sic stantibus*) "things remaining as they are - Article 62 provides that:

"Fundamental change of circumstances which was not foreseen by the parties may not be invoked as a ground for terminating or withdrawing from the treaty unless the existence of those circumstances constituted an essential basis of the consent; and the effect of the change is radically to transform the extent of obligations still to be performed under the treaty".

Rebus sic stantibus may not be invoked in respect of treaties establishing boundaries or by a state that has caused the fundamental change.

Suspension

The suspension maybe with regard to all the parties or only to a particular party. It must be in conformity with the provisions of the treaty and may take place at any time following the consent of all parties after consultation or through a conclusion of a subsequent treaty if this be the intention of the parties.

A party may withdraw from a treaty by consent of the other parties. For a party to withdraw from a treaty, it does so by a notice of termination or denunciation.

Note: The word 'state' is used to mean an international legal person i.e use includes international organisations.

UNIT FOUR

INTERNATIONAL LAW AND MUNICIPAL LAW

It is a state's perception of international law that determines the way in which international law becomes part of municipal law. In other words, states differ in the way that their municipal courts are either required or allowed to give effect to international obligations.

DIFFERENCE BETWEEN MUNICIPAL LAW AND INTERNATIONAL LAW

THEORIES ON MUNICIPAL LAW v INTERNATIONAL LAW

MONISTIC THEORY

This theory recognizes a unitary system of law and sees all law, as an integral part on the same system. Proponents of this theory believe that international law is inherently interwoven into the legal system of every nation. In the event of conflict between the two, most monists would argue that international law should prevail. Exponents of this theory maintain that international law and municipal law far from being essentially different must be regarded as manifestations of a single conception of law. Consequently monists argue that municipal courts are obliged to apply rules of international law directly without the need for any act of adoption by the courts or transformation by the legislature. For them international law is incorporated into municipal law without any act of adoption or transformation. Hence the fact that the monist position is often described as lending support to a doctrine of incorporation.

DUALISTIC THEORY

This theory rejects the monistic view and perceives international law and national law as being distinct legal

orders. Supporters of this theory express the view that international law regulates the relations of sovereign states while municipal law regulates affairs internal to the state such as, relations between state and its citizens and the relations of individual citizens vis-a-vis each other. Accordingly dualists hold that the two systems are mutually exclusive and can have no contact with and no effect on each other.

Dualists, see international law and municipal law as completely different systems of law, with the result that international law may be applied by domestic courts only if adopted by such courts or transformed into local law by legislation. Lauterpacht portrays the dualist position as follows:

'according to the dualist view, international law and municipal law differ so radically in the matter of subjects of the law, its sources and its substances, that a rule of international law can never per se become part of the law of the land. It must be made so by the express or implied authority of the state. Thus conceived, the dualist view is merely a manifestation of the traditional positivist attitude.'

While maintaining that international law is not foreign law, monists have been compelled to accept that the whole body of international law binding on a state cannot be directly applied by municipal courts. This had led to the emergence of the harmonization theory which qualifies the absolute monist position by acknowledging that in cases of conflict between international law and municipal law the judge must apply his own jurisdictional rules. This means that customary international law is to be applied directly as part of common law, but that conflicting statutory rules and acts of state may prevail over

international law. In this way harmony is achieved between international law and municipal law.

Dualism therefore does not admit that a conflict can arise between the international legal system and a municipal legal system. For this reason, the question of supremacy is not one addressed by dualists.

MUNICIPAL LAW IN INTERNATIONAL LAW

On the international scene, international law is undoubtedly supreme as is borne out by both arbitral and judicial decisions and international conventions.

In the Alabama Claims Arbitration, the arbitration tribunal concluded that neither municipal legislative provisions nor the absence of them could be pleaded as a defence for non-compliance with international obligations.

The Permanent Court of International Justice in an advisory opinion in The Exchange of Greek and Turkish population case held that:

"-a state which has contracted valid international obligations is bound to make in its legislation such modifications as may be necessary to ensure the fulfillment of the obligation undertaken".

Similarly, Article 27 of the Vienna Convention on the law of treaties stipulates that "a party may not invoke the provisions of internal law as justification for its failure to perform a treaty obligation" nor may a state under Art.46 of the same Convention, "invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its

internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest... " In short a state cannot seek to evade fulfilling an international obligation because of either the presence or absence of an internal legislative provision.

INTERNATIONAL LAW BEFORE MUNICIPAL COURTS

United Kingdom Practice

Lord Alverstone in the *West Rand Central Gold Mining Co.* Case 16 deals with international law in British courts in the following words:

It is quite true that whatever has received the common consent of civilized nations must have received the assent of our country, and that to which we have assented along with other nations in general may properly be called international law, and as such will be acknowledged and applied by our municipal tribunals when legitimate occasion arises for those tribunals to decide questions to which doctrines of international law may be relevant."

Any rule of customary international law which is inconsistent with a British statute will not be enforced in British courts.

A treaty does not become part of British domestic law unless and until it is specifically incorporated as such by a legislative measure, namely, an enabling Act. An enabling Act is required because Treaty making power is considered to be an executive function in which the legislature does not participate and its consent is not required before Britain can undertake

international obligations. An enabling Act is therefore a safeguard against the possible abuse of executive authority.

In practice, the enabling Act giving internal effect to a treaty will be passed before the treaty is ratified and the opportunity will then be taken to bring municipal law in accordance with international law.

In a practice known as Ponsonby Rule, a treaty following signature is laid for 21 days before both Houses before ratification. In the event of a conflict between a domestic statute and a treaty, the domestic legislative measure will prevail.

United States Practice

The USA adopts a similar attitude to that adopted by the United Kingdom.

However, with respect to customary international law, the USA is monistic, and in respect of treaties it is dualistic. In this respect, judicial decisions confirm that customary international law is part of USA law.

Marshall C.J. declared in the *Nercidee* case that, in the absence of an Act of Congress, the court was bound by the law of nations, which was part of the law of the land.

What is the internal status of international law in the USA?

Customary international law is accepted as federal law and its determination by the federal courts is binding on the state courts.

Under the American Constitution, The President has "power by and with the advice and consent of Senate, to make treaties, provided two thirds of the Senators present concur"¹⁸.

Unlike in Britain, the American legislature participates in treaty making. The President has power to make a treaty, but he may only ratify it after the Senate has given its advice and approval. "All treaties made or which shall be made under the authority of the US shall be the supreme law of the land".

Under Article 6 of US Constitution treaties are placed on equal footing with statutes so that in the event of a conflict between a treaty and subsequent statute, the latter prevails. However, there is a presumption that Congress does not intend to infringe international law.

Self-executing treaties are automatically part of American law and therefore no implementing legislation is required. On the other hand, non-self-executing treaties are not incorporated in domestic law until the necessary enabling legislation has been passed.

The Zambian Practice

The power to "negotiate and sign international agreements and delegate the power to do so" is vested in the President. (Article 44(2)(d) of the Constitution. For this reason, Zambia

adopts the same stance as the UK. Customary international law is regarded as part of Zambian law.

In relation to treaties, Zambia adopts a dualist approach so that treaties become part of the law upon an enabling Act being passed by parliament. See for example, the Diplomatic Immunities and privileges Act which is an Act to give effect to the Vienna Convention on Diplomatic Relations. Another example is the Bretton Woods Agreement Act, CAP. 367 which makes provision for the acceptance by Zambia of the agreements for the establishment and operation of the IMF and IBRD.

UNIT FIVE

PERSONALITY, STATEHOOD AND RECOGNITION

TOPIC ONE: PERSONALITY (SUBJECTS OF INTERNATIONAL LAW)

INTRODUCTION

The actors at the international community are distinct from those at municipal community. The principle actors on the international scene are state and international organizations and to some extent individuals. The possession of international personality means that an entity is a subject of international law and is "capable of possessing international rights and duties, and has the capacity to maintain its rights by bringing international claims."⁸[refer to Unit One for International legal persons]

Like discussed in Unit One above, states were once considered the only subjects of international law although as international law developed and expanded in scope, new entities have been admitted as "actors" on the international scene. These new actors include international organisations and to some extent individuals. The personality enjoyed by such actors, however, varies considerably. The reasoning that states were the exclusive subjects of IL was that 'the law of nations' was earlier understood 'to be based on the common consent of individual States, and not of any other actors.'

Unit one has also discussed that the scope of international legal personality has widened considerably due to the proliferation of international organizations and development of international awareness on human rights. Some writers argue that 'whilst states possess full international legal personality as

⁸ Reparations for injuries suffered in the service of the United Nations, ICJ Reports (1949) at 174

an inherent attribute of their statehood, all other entities possessing personality do so only to the extent that states allow them.' Their personality is derived via the state. The personality of states is original and that of other entities derivative.

The State as an international legal person

The attributes of a state according to Article 1 of the Montevideo Convention of 1933, on Rights and Duties of States⁹ provides the criteria of the statehood. According to the Convention, a state as a person at international law should have; a) a permanent population b) a defined territory c) government and d) capacity to enter into relations with other states. Similarly, the Arbitration Commission of the European Conference on Yugoslavia in Opinion No. 1 declared that " the State is commonly defined as a community which consists of a territory and a population subject to an organised political authority" and that "such a State is characterized by sovereignty"¹⁰

In international law, therefore, there are four qualifications which a state as a person of international law should possess. These are:

- (a) A permanent population;
- (b) A defined territory;
- (c) Government; and
- (d) Capacity to enter into relations with other states.

⁹ The 1933 convention was adopted by the seventh international conference of American states

¹⁰M.N. Shaw, International Law (6thed., Cambridge University Press, Cambridge 2008)p.198

Permanent population

States are aggregates of individuals and accordingly a permanent population is a prerequisite of statehood. The population should not be nomadic although this does not entail a static population. The absence of part of the population over a period of time does not vitiate state status.

There is no minimum population required before an entity can qualify to be called a state. It is argued that the population should consist of nationals, inhabitants and natives.

There are two types of population. i.e. homogeneous and/or heterogeneous. A homogenous population is one where a people share a common culture, language, history/heritage and a multi-national or poly-ethnic population is a heterogeneous.

Defined territory

Territory is where the permanent population live on. However, there is not a necessity of having well-established boundaries as the international Court of Justice said in the North Sea Continental Shelf cases, "... there is... no rule that the land frontiers of a state must be fully delimited and defined."¹¹The requirements of territory may be satisfied even if the entity's territorial boundaries are not precisely defined or are to some extent in dispute, for example Israel in 1948.

However, while territory is necessary, there is no prescribed minimal geographical size.

There are three things to territory i.e.

- The link between the state and territory

¹¹

- The judicial nature of territory
- And there cannot be a state population without territory
 - There can be no state without territory because the territory is a spatial area within which the state effectively and exclusively exercises its power for the accomplishment of its duties.
 - Territory as a judicial nature can be conceived as a subject or an object. If u say the territory is an subject, then the territory is a constituent part of the state i.e the very essence of the state. If you say the territory is an object, it means the territory is a mere property over which the state exercises its proprietary rights.
 - Territory circumscribes the boundary which the state operates
 - In international law, the importance of 'territory' is the 'state territory', which constitutes of the land, the airspace, internal waters and the territorial sea.

A government

Statehood must be evidenced by the establishment of an effective government i.e. one independent from any other authority and one that enjoys legislative and administrative competence. A State requires a government that functions as a political body within the law of the land. An established state's statehood is not nullified if it has no effective government for a period of time say due to a civil strife as is the case in Somalia which has had no function government since 1991.

Capacity to enter into international relations

Although this condition is an important indicator of statehood, its realization depends on how other actors on the international scene relate to a state in question. Fulfillment of this criteria depends on recognition by other states. In other words, an entity may have the capacity to enter into foreign relations, but should other states decline to enter into relations with it, the entity in question is denied the opportunity to demonstrate this capacity in practice.

INTERNATIONAL ORGANIZATIONS AS INTERNATIONAL LEGAL PERSONS

An international organization, for the purposes of international law, is an entity established by agreement and which has states as its principal members. An international organization has legal capacity under international law if it satisfies three essential elements.

i. It must be a permanent association of state members with established objectives and administrative organs.

ii. Must possess some power that is distinct from the sovereign power of its state members.

- For example, Interpol operates on an international level that allows its agents to track and arrest international fugitives. However Interpol agents cannot act without the express consent of the national policy of any state where it maintains its presence. Because of this an institution like Interpol cannot be considered as a public international organization and therefore has no international legal personality. Not all international

organizations are public, thus fail to become subject of IL.

iii. The association's powers, must be exercisable on an international level rather than solely under the national legal systems of its member states.

For an analysis of the capacity of international organizations in international law as actors see the Reparation for Injuries Suffered in the Service of the UN Case also referred to in Unit one.

INDIVIDUALS AS INTERNATIONAL LEGAL PERSONS

Individuals, unlike states have limited international legal personality, although international law currently increasingly recognizes that an individual may possess both international rights and duties. The development of the sense of awareness of human rights in the recent years has promoted the guarantee of human rights for individuals at national and international sphere. This has also increasingly contributed to the recognition that individuals may be held responsible for certain conduct affecting the development of and implementation of IL.

The Nuremberg Tribunal contributed to shade light on the earlier argument that individuals do not participate on the international scene and thus could not be held responsible for their acts. This argument was found to be false.

The Nuremberg Tribunal held that:

"Crimes against international law are committed by men, not abstract entities, and only by punishing individuals who

commit such crimes can the provisions of international law be enforced."

The decision of the Nuremberg Tribunal has contributed greatly to the inclusion of individuals to become subjects of IL. The perpetrators of international crimes have been tried and punished and victims of such crimes compensated. A number of international tribunals to try individuals for international crimes have been created and examples include the following:

i. The International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law committed in the territory of the former Yugoslavia (the ICTY); and

ii. The International Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring states between January 1, 1994 and December 31, 1994 (ICTR).

Other examples in which individuals have been prosecuted or held responsible for crimes against international law include the Pinochet case and the Lockerbie incident. Other acts which are now recognised as giving rise to individual responsibility at an international level include, inter alia, hijacking, sabotage, terrorism, drug trafficking and acts upon diplomats.

Although individuals are now beneficiaries of IL, states remain the main actors to provide for these benefits. The states put in place procedures and rules on how an individual can fully

benefit from IL. The states, thus, can use these procedures in IL to make individuals not to fully realise the benefits available on the international sphere. Some treaties provide that individuals can petition a state if their rights are violated by such a state. This, however, can be defeated by a state's reluctance to ratify such treaties especially that most of such provisions are in optional Protocols.

Another hindrance to the realisation of IL benefits for individuals is that currently individuals do not enjoy *locus standi* before the international court of justice (ICJ).

OTHER INTERNATIONAL LEGAL PERSONS

The Holy See is another example of an entity that possesses limited international personality. The Holy See has a population that is neither permanent nor indigenous, and its function is exclusively religious. It is however a party to international treaties and it has a permanent observer mission at the UN.

The Holy See is an anomaly on the international scene enjoying and exercising international personality, because other international actors are willing to enter into international relations with it.

TOPIC TWO

RECOGNITION OF STATES AND GOVERNMENTS

States as subjects of international law are not static. While some states get created, like the creation of South Sudan in July 2011, other existing ones may become extinct, for example, the dissolution of the socialist Federal Republic of Yugoslavia in 1991/92. The governments of these states are also not static. There are different governments which come to power in most states at different times. For a state to participate on the international scene there is need to be recognised by other states.

Recognition symbolises a willingness on the part of the recognizing state to enter into relations with the state that is being recognized. Recognition gives the state being recognised *locus standi* on the international *fora* and also in the national legal systems of the recognising states.

Recognition of a state is mostly influenced by a number of factors such as the policy of the recognizing state conditioned principally by the necessity of protecting its own interests, which lie in maintaining proper relations with any new state or new government that is likely to be stable and permanent. When granting or withholding recognition, states are influenced more by political, economic and other considerations than legal considerations although their acts have legal consequences. Recognition, therefore, means a willingness to deal with the new state as a member of the international community. States are therefore, under no obligation/legal duty to recognise a new state or government. It is a matter of policy in which the recognizing state has discretion and cannot be compelled to

recognise an entity. i.e. an entity cannot demand recognition as a matter of right.

There is a difference between recognition of a state and recognition of a government. Recognition of a state is the formal acknowledgement by another state that the recognized state possesses the attributes of statehood and signifies a willingness to treat the entity as a state. Recognition of a government is the formal acknowledgement by the recognized state that the regime in question is the effective government and signifies a willingness to treat that regime as such. There is a possibility for an entity to be recognized as a state, but its governmental regime not to be accorded recognition.

Recognition of a government

With regard to recognition of governments, the question of recognition does not arise when a government comes to power by constitutional means. It only arises if a government comes to power by unconstitutional means. Most scholars argue that that recognition should be withheld if the entity had come to power through a violation of international Law such as the use of force i.e. when the regime in question has come to power by unconstitutional methods like in a *coup d'etat*.

The general practice is that when a state recognises a government, it issues a declaration to that effect. In modern day practice, recognising governments do not issue open declarations but simply imply recognition by way of their conduct.

The criterion for recognition of governments is effectiveness and stability of the entity being recognised as government. Where the government regime appears effective and stable, then recognition will be accorded. In this context, "Effective" refers to the physical control of the territory seeking recognition. i.e. does the regime enjoy control over most of the state's territory and is that control likely to continue or is it temporal? Where the responses to the first two questions are in affirmative, this will entail that the control is effective. With regard to a stable government, "Stable," refers to the regime's likelihood of continuing in power.

Refusal to accord recognition to a particular governmental regime, however, does not negate its state's statehood.

For further reading on recognition of governments, refer to the practice by the United Kingdom and United States of America.

Recognition of a state

THEORIES ON RECOGNITION OF STATES

There are two theories to recognition of a state, the constitutive and the declaratory theory. The question therefore is that "is it the fact of recognition that brings about a state into existence or does recognition merely confirm an already existing state of affairs?"

THE CONSTITUTIVE THEORY

This is also known as the attributive theory. Proponents of this theory argue that it is the act of recognition which establishes or constitutes the international personality of a state. Constitutive means a state does not exist until it is recognised

by others as being a state. The act of recognition is regarded as a precondition to the entity's legal status or that it is the act of recognition which creates a state and determines the legal personality or status of a new governmental regime.

The constitutive theory however raises two problems which are still being debated in International Law. Firstly, is whether unrecognized states are free to act as they wish on the international scene unfettered by the obligations which international law imposes seeing that they are not considered as subjects of IL? And secondly what is the position at International Law for a state that is recognized by some states and not by others?

Existing states do treat unrecognized entities as having no obligations under international law. They are not free to act as they wish on the international scene. [Provide practical examples]

DECLARATORY THEORY

The Declaratory or Confirmatory theory states that a state exists if it satisfies the requisite criteria of statehood and whether or not the entity is recognised does not change anything because a state is already in existence. Recognition is just evidence of an already existing state and not a material for creating a non-existent entity.

Where a state is recognised, the recognition is retroactive i.e it goes back to the inception of the state. For example, the British accorded recognition to the post- revolution regime in

the then Soviet Union in 1921, but when recognition was granted it was backdated to 1917.

Luther Co v James Sagor & Co (1921) 1KB

The court of first instance refused to give effect to the soviet confiscation decree as the soviet regime had not been recognised by the British government. However, by the time the case was heard on appeal the British government had accorded de facto recognition to the soviet regime. "The government of this country recognised the soviet government as the government in possession of the powers of sovereignty in Russia, the acts of the government must be treated by the courts of this country with all the respect due to the acts of a duly recognised foreign sovereign state.

See also Bank of Ethiopia V National Bank of Egypt

When is an entity recognised as a state

By and large, an entity is accorded recognition if it satisfies the requirements of statehood which are:

- (a) Defined territory
- (b) A defined territory;
- (c) Government; and
- (d) Capacity to enter into relations with other states.

Recognition De Jure and De Facto

The practice of most states draws a distinction between recognition de jure and de facto. Recognition de jure means that according to the recognising state, the state or government recognised 'formally' fulfills the requirements laid down by international law for effective participation in the international community. Recognition de facto means that in the

opinion of the recognising state, there is a provisionally and temporarily state or government and with due reservation for the future, the state or government recognised fulfills the requirements to be identified as such an entity in fact (de facto). i.e. if the government was recognized as the de facto government, it implied that the government had effective control and that control appeared to be permanent, that is there was likelihood that the regime would be a permanent one. On the other hand if a government was recognized as de jure, it means that such government had met all the requirements of an effective government are firmly established as discussed above.

Representatives of states recognised de facto are not entitled to diplomatic privileges and immunities. Only the de jure recognised state can represent a state for purposes of succession or espouse the claims of a national for any international act done by the recognising state.

Haile Selassie V Cable wireless Co.

On 9th May 1936, Italy proclaimed the annexation of Ethiopia following a war of conquest. Prior to this the plaintiff through an agent had made a contract with the defendants and in 1937 he commenced proceedings to recover money due under the contract. Bennett J at first instance held that the plaintiff who was still recognised as de jure sovereign of Ethiopia by the United Kingdom had not been divested of the right to sue for the debt in spite of the fact that the British government recognised Italian government as the government de facto of virtually the whole of Ethiopia. The defendant relied inter alia on Luther v Sagor to establish the exclusive power to the de facto government. Bennett J distinguished that decision confining it to acts of the de facto government in relation to persons or

property in the territory which is recognised as governing in fact. The present case was concerned with acts in relation to persons or property in Ethiopia but with a debt an action recoverable in England. While an appeal by the defendant was pending the British government recognised the king of Italy as a de facto sovereign occurred in December 1936. Thus when the action commenced the debt which was part of public property of the state of Abyssinia vested in the king of Italy and the appeal was allowed

Implied and express recognition

Recognition may be express or implied. In the absence of an express formal declaration of recognition, the establishment of diplomatic relations between a state and the entity concerned will be taken to be recognition. Participation in a multilateral treaty with an entity does not entail its recognition by all the parties to such a treaty. It is possible for parties to be signatories to a multipartite treaty, even though one party does not recognize the other party.

Conditional Recognition

Conditional recognition means to recognise an entity as a State only when it fulfills some conditions. It was first seen in the Berlin Congress of 1878, Great Britain, France, Italy and Germany marked the recognition of Bulgaria, Serbia, Romania and Montenegro with the condition that these countries would not impose any religious disabilities on any of their subjects. It may cause some political problems but the non-observance of the condition would not invalidate the recognition since the law does not attach value to any condition unless it depends upon agreements made by the particular parties.

Collective Recognition

In 1971 the International Law Commission stated that collective recognition means that States act collectively during the process of receiving information of the situation, evaluating that information and reaching a decision, and communicating that decision. This may be seen as a result of increased corporation between the States. The idea of act collectively has been a subject of a debate since the foundation of the League of Nations and the establishment of the United Nations. However, the States preferred to keep the control of recognition in their authorised bodies. As Shaw stated "The most that could be said is that membership of the United Nations constitutes powerful evidence of statehood."

Withdrawal of Recognition

Sometimes it is possible to withdraw a granted recognition. Especially, it is easier for the de facto recognition since the position is different with the de facto recognition which includes an ambiguity for the future of the entity. If the government of the entity loses the effective control on its territory there will be no ground for recognition and it may be taken back. On the other hand de jure recognition is more difficult to withdraw because as mentioned above it is stronger than de facto recognition. De jure recognition may be the case only if the State is annexed or conquered by another State.

Effects of recognition in municipal law

1. Only a recognized state or government has *locus standi* in the UK courts and it can accordingly raise an action in the

UK courts *Gur Corporation v Trust Bank of Africa Ltd* the plaintiff Panamanian company contracted with the Republic of Ciskei to build a hospital and two schools. As the contract required, the plaintiffs obtained a guarantee from the defendant bank in favour of the Ciskei Department of Public Works to cover the costs of remedying any building defects. In these proceedings, the plaintiff sought to recover a sum paid by them to the defendants as security for the guarantee. The defendants joined the Republic of Ciskei as the third party and the Republic of Ciskei brought a counterclaim for the money paid as security. Thereupon, Steyn J. raised the preliminary question whether the Republic of Ciskei had *locus standi* to sue and be sued in the English courts. In the light of two Foreign Office certificates, Steyn J. held that it did not. The court of Appeal reversed his decision on the ground that the Ciskei Government was acting as a delegate of the *de jure* sovereign South Africa.

2. Only a recognized state or government (or its agents), may plead immunity from suit. It cannot be sued without its consent. In *Duff Development Co v Kelantan Government* The respondents pleaded sovereign immunity in an action brought by the appellant who contended that the appellant was not an independent state and by agreeing to arbitration it had waived its immunity and thus amenable to the court's jurisdiction. The court went along with the foreign office statement recognizing Kelantan as an independent state. On the waiver of immunity by the Kelantan government the court observed that even if the sovereign had agreed to submit to the jurisdiction but refuses to do so later when the question arises, that would not make him amenable to the jurisdiction of the court.

3. Only the legislative, executive or judicial acts of a recognized state or government will be given legal effect within the United Kingdom in *Luther v sagor* the court of first instance refused to give effect to a Soviet confiscation decree, as the soviet regime had not been recognized by the British Government. However, by the time the case was heard on appeal, the British Government had accorded de facto recognition to the soviet regime "the Government of this country ... recognized the soviet government as the Government in possession of the powers of sovereignty in Russia, the acts of this Government must be treated by the courts of this country with all the respect due to the accts of a duly recognized foreign sovereign state"

4. it will be entitled to possession in the recognising state of property belonging to its predecessor.

5. Recognition once granted is retroactive. It is back dated to the establishment of the entity in question it does not relate to the time recognition is accorded *Luther v Sagor* established that recognition once given, was retroactive in effect from the time that the recognized government established itself.

On the other hand the practice followed by the Anglo-American courts has established that recognition entitles a recognized entity to

1. Sue and be sued in the courts of law of the recognizing state and courts will give effect to its past and present legislative and administrative acts.

2. Claim sovereign immunity from legal action for its diplomatic representatives and public property.

3. Demand and receive possession of public property belonging to the recognized state.

The effects of non-recognition both at international level and national level is that a state cannot enter into legal relations with other states.

Test yourself: with the aid of suitable examples, explain the effect of recognition and non-recognition in municipal law and on the international scene.

UNIT SIX

STATE JURISDICTION AND SOVEREIGNTY

INTRODUCTION

Jurisdiction is an attribute of state sovereignty. A state's jurisdiction refers to the competence of the state to govern persons and property and situations by its municipal law whether criminal or civil and is clearly conceded by international law to all members of the society of states.¹² The competence that a state has embraces judicial, legislative and administrative competence. Simply put, it refers to a state's jurisdiction, power or authority to make laws, to adjudicate on them and to enforce the law. Thus, in the case *Compania Naviera Vascongado v Cristina*,¹³ Lord Macmillan explained the principle of territorial jurisdiction in the following words:

"It is an essential attribute of the sovereignty of this realm as of all sovereign independent states, that it should possess jurisdiction over all persons and things within its territorial limits and all cases, civil or criminal, arising within these limits"

By and large states have jurisdiction on persons or things actually in the territory of that state and under its sovereignty and, therefore, it can be stated that the territorial basis of jurisdiction is the normal working rule.¹⁴ As such, territory one of the attributes of statehood defines the extent of a state's jurisdiction. But, there are exceptions, for example there will be persons within a state's territory who

¹²Wallace(*International Law 6th Ed.*) p120. Starke (n 9 above) 202

¹³(1938) AC 485 at 496-7.

¹⁴Starke (n 19 above) 202.

will be immune from the jurisdiction of that state whilst there are also occasions when a state can exercise jurisdiction outside its own territory. The Permanent Court of Justice in the Lotus Case¹⁵ confirmed this:

“A state may not exercise its power in any form in the territory of another state. In this sense jurisdiction is certainly territorial; it cannot be exercised by a state outside its territorial boundaries except by virtue of a permissive rule derived from international custom or from a convention”

STATE TERRITORY

State territory in terms of international law can be defined with two elements in mind. i.e. (i.) the composition and extent of the territory (ii.) the legal nature of the authority of the state over this territory.

i. Composition and extent of the territory

There is general agreement that state territory comprises all land area, including subterranean area, waters including national rivers, lakes and territorial sea and the airspace over the land and territorial sea. The consequence as will be seen later is that the state exercises its jurisdiction on its territory (within its boundaries) which extends from the center of the earth up to the heavens.

Some writers argue that the idea of territory includes 'things' which are located outside the territory of the state and which fall within the jurisdiction of the state. These include ships on the high seas, aircraft in flight and the premises of

¹⁵ (1927) P.C.I.J. Rep. Ser.A, No.10.

diplomatic representatives abroad. But these should be considered as exceptions, reflecting the extension of the jurisdiction of the state and not as a form of expanded state territory.

Territory is thus a tangible attribute of statehood within which a state enjoys and exercises sovereignty.¹⁶ State delimitation is important to define a state's sovereignty. Territorial sovereignty may be defined as the right to exercise therein, to the exclusion of any other state, the functions of a state.

(ii.) The legal nature of the authority of the state over this territory.

The scope of a state should be territorial implying that it must only exercise jurisdiction within its territory where its interests are. Therefore there should be a sufficient link between the state and the territory in order for it to exercise its authority. However, the further concept of extra territoriality has been developed where a state can exercise jurisdiction which is not exclusively territorial.

CATEGORIES OF JURISDICTION

1. International and National Jurisdiction
2. Civil and Criminal Jurisdiction

As stated earlier jurisdiction refers to the exercise of competence (power) and this exercise of power arises in two categories. The problem arises with regard to criminal jurisdiction especially where a state is involved. The rule is

that when a national of a foreign state has been injured by another state that injury is felt by the state where the national comes from. Reference can be made to state responsibility, diplomatic protection and treatment of aliens. Civil law on the other hand, is there to provide the court with means of dealing with issues such as divorce cases, cases involving contracts between private individuals and not contemptuous matters arising between states.

International jurisdiction with reference to international competence over subjects of international law on the international plane arises through treaties that states agree to be governed by certain authority. For example, the jurisdiction of the African Court on Human and People's Rights, the jurisdiction of the International Court of Justice in cases where disputes have arisen etc. Whilst national jurisdiction is in three forms: prescriptive, enforcement and adjudicative jurisdiction. Prescriptive jurisdiction entails the ability of a state to create laws which prescribes the behaviour of the people within a state. Enforcement jurisdiction refers to a state's jurisdiction to compel and punish non-compliance through the courts and other relevant institutions and adjudicative jurisdiction refers to a state's authority to preside over matters by way of the courts and administrative tribunals.

The commentary by the Harvard Research Draft Convention on jurisdiction with respect to crime 1934 identified five general principles upon which states have jurisdiction. These are:

- (a) territorial principle;
 - 1. Subjective
 - 2. Objective

3. "Effects" Doctrine

- (b) Nationality principle
- (c) Protective (or security) principle;
- (d) Universality principle; and
- (e) Passive personality principle.

TERRITORIAL PRINCIPLE

A state may assert its jurisdiction over all criminal acts that occur within its territory and over all persons responsible for such criminal acts, whatever their nationality. Events occurring within a state's territorial boundaries and persons within that territory even though their presence is temporary are subject to the application of local law. The principle that the courts of a place where the crime is committed may exercise jurisdiction has received universal recognition.

An offence may not, however, be entirely committed within the territory of one state. A crime may be commenced in one state and consummated in another. In this case the subjective and objective principles come into play. The subjective territorial principle allows the exercise of jurisdiction in the state where a crime is commenced and completed in another state while the Objective territorial principle gives jurisdiction to the state in which the crime has been completed and has effect though commenced in another state. A classical illustration is where person stands near to the border between two countries and fires a gun and thereby injures a person on the other side, which state has jurisdiction? The answer is both. The state from which the gun was fired has jurisdiction under the subjective territorial principle, whilst the state where the injury was sustained has jurisdiction under the objective territorial principle.

Both states may claim jurisdiction and both may do so legitimately. The one which will actually exercise jurisdiction will most probably be the one which has custody of the alleged offender.

Effects Doctrine

The effects doctrine is simply an extension of the objective territorial principle. According to this doctrine states can claim jurisdiction over acts committed abroad which produce harmful effects within the territory. This was the basis upon which Turkey exercised jurisdiction in the Lotus case. The effect of collision was felt on the Turkish ship, which the court held to be assimilated to Turkish territory. Although this is a necessary extension of the territoriality principle it may lend itself to abuse as illustrated by the manner in which the United States has sought to implement its anti-trust legislation.

See: US v Aluminum Co. of America.

Woodpulp case (1989)

Ablstrong v Commission of the European Community

Gencor v Commission of the European Community

NATIONALITY PRINCIPLE

Jurisdiction exercised on this principle relates to the nationality of the offender. A state may exercise jurisdiction over any of its nationals wherever they may be and in respect of offences committed abroad. Although universally acknowledged as a basis of jurisdiction, it is utilized more extensively by civil law countries than common law countries. Common law countries restrict jurisdiction exercised on the nationality

principle to more serious offences committed under the official Secrets Act. In the case of the United States, treason, drug trafficking and crimes by or against the armed forces attract jurisdiction under this principle. In the case of Zambia, crimes prescribed in the Money Laundering Act attract jurisdiction under this principle.

PROTECTIVE (SECURITY) PRINCIPLE

On the basis of this principle, a state exercises jurisdiction in respect of offences which, although occurring abroad and committed by non-nationals, are regarded as injurious to the state's security. Although acknowledged as a justification for the exercise of jurisdiction, it remains ill defined - and undoubtedly open to abuse if "security" or "vital interests" are given a broad interpretation.

However, the justification lies in the need to protect a state from the prejudicial activities of an alien when such activities are not, for example, unlawful in the country in which they are being carried out.

Example of when a state can claim jurisdiction on this principle would be in respect of plans to overthrow its government.

This principle was invoked by Israel along the universality principle in the case against Eichman (see below).

UNIVERSALITY PRINCIPLE

This principle gives jurisdiction to a state in respect of international crimes, that is, offences which are prohibited by international law and the international community as a whole.

The idea of a universal crime over which all states could exercise jurisdiction, regardless of the alleged offender's nationality, evolved with piracy. Under customary international law, the crime of piracy has long been recognized as one over which all states could exercise jurisdiction, provided that the alleged offender was apprehended either on the high seas or within the territory of the state exercising jurisdiction. The arresting state may also legitimately punish pirates.

This rule of customary international law is reaffirmed in Article 19 of the 1958 Geneva Convention on the High seas and Article 105 of the 1982 Convention on the Law of the sea.

Piracy for purposes of international law, is essentially any illegal act of violence or depredation which is committed for private ends on the high seas.

War crimes and genocide are now widely accepted as being susceptible to universal jurisdiction.

In the Eichman case Israel successfully (at least in an Israel court) claimed jurisdiction on two cumulative grounds:

"a universal source (pertaining to the whole of mankind) which vests the right to prosecute and punish crimes of this order in every state within the family of nations; and a specific or national source, which gives the victim nation the right to try any who assault its existence."

The charter of the Nuremberg Military Tribunal, in particular Article 6, which referred to crimes against peace, violations of

the law and customs of war, and crimes against humanity and for which was to be individual responsibility, and the judgment of the tribunal are now accepted as international law.

Genocide has been widely condemned and the 1948 Convention on the Prevention and Punishment of the crime of Genocide which prohibits the commission of Genocide is now recognized as Jus cogen to which no state is allowed to derogate.

See: Pinochet case.

The 1948 Convention provides for trial to be either in the territorial state or by an international panel or tribunal, but a state which encourages, practices or fails to punish genocide would today be guilty of having contravened customary international law of fundamental nature.

Significant steps were made in the 1990s towards the creation of a permanent international criminal court with enforcement jurisdiction over individuals for a number of crimes against humanity. Simultaneously to these efforts was the establishment in 1993 and 1994 by the UN of the International Tribunal for the Prosecution of Persons responsible for Genocide and other serious violations of International Humanitarian Law in the Territory of Rwanda and Rwandan citizens Responsible for Genocide and other such violations committed in the Territory of Neighboring States between January 1, 1994 and December 31, 1994 (I.C.T.R).

Belgium has become the first country to turn the principle of universal jurisdiction into reality. On June 8, 2001, four defendants were convicted in a Belgian court of international crimes arising from the Rwandan Genocide.

PASSIVE PERSONALITY PRINCIPLE

The link between the state exercising jurisdiction and the offence is the nationality of victim. A state may exercise jurisdiction over an alien in respect of an act which has taken place outside its boundaries, but against one of its nationals. This principle is not widely accepted. However, this principle has been recognized in the Tokyo Convention on offences Aboard Aircraft and of the 1984 Convention against Torture and other cruel, inhuman or Degrading Treatment or Punishment.

Apparently, the current position of the United States is that' although the principle is not generally accepted for ordinary torts or crimes, it is increasing accepted as applied to terrorists and other organized attacks on a state's nationals by reason of their nationality, or to assassination of a state's diplomatic representative or other official.

In this regard the USA passed a law authorising the use of force against those responsible for the attacks launched against the United States on September 11, 2001. This authorised the US to exercise its rights of self-defence to protect US citizens both at home and abroad.

PROBLEMS OF JURISDICTION WITH REGARD TO AIRCRAFT

Airspace

Every state enjoys exclusive sovereignty over the airspace above its territory to a height once thought to be indeterminable. In the wake of outer-space exploration, it is now recognized that there is an upward limit to airspace, but what that limit is has not yet been established.

State sovereignty over airspace quickly became customary international law in the early part of the 21st century and was crystallized in the 1919 by the Paris Convention on the Regulation of Aerial Navigation and the 1944. The Chicago Convention, which entered into force in 1947, replaced the Paris Convention of 1919; The Chicago convention which recognized the exclusive sovereignty of all states over their airspace, regardless of whether or not they are contracting parties to the convention defines Aircraft as "aircraft used in military, customs and police services". Such aircraft requires authorization by special agreement.

The primary stipulation of the Convention is that contained in Article 6, namely that the scheduled international aircraft of a contracting state, have that state's permission and comply with any conditions of the said authorization.

International law does not give a right of innocent passage through airspace, and entry into a state's airspace requires the permission of the host state.

Modern air law is largely governed by a number of conventions adopted in Chicago in 1944. The Chicago convention on International civil Aviation, lays down the following guideline principle:

1. 'every state has complete and exclusive sovereignty' over the airspace above its land area and territorial waters
2. No aircraft on a scheduled flight, i.e. one that operates according to a published timetable, may overfly another sates' territory without special permission.

3. Aircraft not engaged in scheduled international air services may overfly or land in the territory of another state without permission, subject to the right of the state flown over to require landing, and subject further to the right of the state, for reasons of safety, to require aircraft flying over regions which are inaccessible or without adequate air navigation facilities, to follow prescribed routes or obtain special permission. If such a non-scheduled flight is engaged in the carriage of passengers, cargo, or mail for reward, the territory state may impose such conditions as it considers desirable.
4. Aircraft have the nationality of the state in which they are registered.

Two other treaties were adopted in Chicago in 1944. The International Air Services Transit Agreement, generally known as the 'Two Freedoms Agreement', grants scheduled flights of contracting states (1) the privilege to fly across the territory of another contracting state without landing and (2) the privilege to land for non-traffic purposes (for refueling and repairs).

The International Air Transport agreement or 'Five Freedoms Agreement' seeks to add a further Three freedoms for scheduled flights to those contained in the Two Freedoms' Agreement, namely; (3) the privilege to put down passengers, mail, and cargo taken on in the territory of those whose nationality the aircraft possesses; (4) the privilege to take on passengers, mail, and cargo destined for the territory of that state; and (5) the privilege to take on passengers, mail, and cargo destined for the territory of any other contracting state and

the privilege to put down passengers, mail, and cargo coming from any such territory. The Five Freedoms Agreement' has not been widely ratified and is of little importance today.

In the absence of an accepted multilateral treaty governing scheduled flights it has been left to states to enter into bilateral treaties providing for the reciprocal operation of scheduled services. Such bilateral agreements will usually designate a particular airline as the instrument of the state, and determine specific points of departure and arrival, routes, frequency of service, seating, freight carrying, and tariffs. The regulation of air traffic by bilateral agreement contrasts with the law of the sea, which is regulated by multilateral treaty. The impossibility of examining a multitude of bilateral treaties explains why general international-law treaties devote less attention to the law of the air than to the law of the sea.

Civil aviation is regulated by two international bodies. The International Civil Aviation Organization (ICAO) is United Nations specialized agency with headquarters in Montreal, which promotes technical and administrative co-operation in the field of civil aviation, including the adoption of safety standards. The International Air Transport Association (IATA) is a non-government organization comprising most of the airlines and is principally engaged in the setting of fares and tariffs.

In *Welkom Municipality v Masureik and Herman t/a Lotus Corporation*, the Supreme Court of Appeal held that despite the fact that the Chicago Convention on International Civil Aviation of 1944 had been incorporated into municipal law by s 1 of the Aviation Amendment Act 42 of 1947 (and now the Aviation Act 74 of

1962), recommendations made pursuant to the Convention by International Civil Aviation Organization (ICAO, of which South Africa is a member 'are not automatically, and without it more, invested with the status of a municipal law binding upon the citizenry of South Africa. The court added that [a]part from the fact that they are no more than recommendations, the Convention itself does not impose upon parties to it an absolute obligation to implement them. Moreover, the Aviation Act 74 of 1962 makes it clear that international aviation standards recommended by ICAO requires legislative incorporation. Consequently the court upheld an appeal against a judgment holding that the appellant, Welkom Aerodrome, was negligent by reason of its failure to comply with ICAO recommendations on the width of runways of an airport.

The Warsaw Convention for the Unification of Certain Rules relating to International Carriage by Air of 1929 and its Protocols lay down uniform rules governing the liability of the carrier where damage is sustained to passengers, baggage and goods during international carriage. Its provisions fall largely within the field of private international law and fall outside the scope of this study. The Warsaw convention and its protocols are incorporated into South Africa law by the Carriage by Air Act.

Jurisdiction over offences committed on board aircraft in flight Under Articles 17 and 18 of the Chicago Convention, an aircraft possesses the nationality of the state in which it is registered and it can only be validly registered in one state. For jurisdictional purposes, it is the state of registration which is competent to exercise jurisdiction over offences and acts committed on board.

The first international attempt to deal with the issue of offences committed on board aircraft was made by the Tokyo convention on offences and certain other Acts Committed on Board Aircraft of the 14th September 1963. The objectives of that convention included;

- To ensure that persons committing crimes aboard aircraft in flight or on the surface of high seas were not allowed to go unpunished because no country would assume jurisdiction to apprehend and punish them.
- For protection and disciplinary purposes, to give special authority and power to aircraft captain, members of crew and even passengers.

This convention excludes military, police and aircraft used for customs purposes.

In normal circumstances, the subject state would exercise jurisdiction over offences committed in its airspace. However, in most cases an over flying aircraft may not be forced to land with a result that the subjacent state is deprived of an opportunity to take action. To address this problem, the convention provided that:

(i) The country of registration of aircraft is competent to exercise jurisdiction (Article 3);

(ii) Offences committed on aircraft are for purposes of extradition to be treated as if they had occurred also in the territory of the country of registration;

(iii) The Captain of an aircraft can disembark a passenger and hand him/her over to police of a country party to the convention. ,

The issue of hijacking of aircraft is dealt with by the Hague Convention for the suppression of Unlawful seizure of Aircraft of 1970. This Convention obliges member countries to provide heavy penalties to persons hijacking aircraft". The Convention also obliges member countries to take measures to establish jurisdiction over offences of violence on aircraft "in flight." An aircraft is considered to be "in flight" from the moment when all its external doors are closed following embarkation until the moment any such door is opened for disembarkation.

The Convention applies only to offences committed on aircraft registered in the contracting state; when hijacked aircraft lands in a contracting state; and when the offence committed is on an aircraft leased without crew to a lessee who has his principal place of business in the contracting state or is a permanent resident in such a country.

The Hague Convention is supplemented by the Convention for the Suppression of Unlawful acts the Safety of Civil Aviation. This convention was to cover unlawful acts other than hijacking such as bombing of aircraft (Article 1). Since such acts could affect other aircraft other than those "in flight", the convention introduced the concept of "aircraft in service"

An aircraft is considered to be "in service" from the beginning of pre-flight preparations by the personnel or by crew for a specific flight until 24 hours after landing.

Five categories of offences are covered under this convention (Article 1). These are:

- Acts of violence against a person on board an aircraft "in flight" if that is likely to endanger the safety of the aircraft.
- Destroying or causing damage to an aircraft "in service" so as to render it incapable of flight or which is likely to endanger it "in flight".
- Placing or causing to be placed on an aircraft "in service" any device or substance which is likely to have this effect.
- Destruction or damage of air navigation facilities or interference with their operation, if any such act is likely to endanger the safety of aircraft "in flight".
- Communication of information which is known to be false thereby endangering the safety of an aircraft "in flight". This covers bomb hoaxes.

The Montreal convention is supplemented by the Protocol for the suppression of Unlawful Acts of violence at Airports serving international Civil Aviation.⁵¹ this protocol brings attacks against individuals in airports within the ambit of the convention.

This convention and protocol requires countries party to the convention to assume jurisdiction if the offence is committed in the territory of that country or against that country or on board an aircraft registered in that country. Member states also bind themselves in accordance with international law and national law to take all practical measures for purposes of preventing the offences set out in Article 1 of the Montreal Convention. State parties to the convention also pledge to cooperate with each other by communicating relevant information to each other.

Contracting parties to this convention are also required to render assistance to civil aircraft of other contracting parties which find themselves in distress in their airspace (Article 25). If the host state is not a party to the convention, there is still on humanitarian grounds, no reason for a distinction to be made between its position and that of a party to the Convention.

Distress

Customary international law recognizes that a coastal state has no jurisdiction over persons on board a foreign vessel forced to put into port in distress, and scholars have suggested that the same principle should apply to aircrafts forced to land in distress. In *Nkondo v Ministry of Police*, the court was called upon to decide whether it had jurisdiction to try a member of the ANC military wing whose flight from Mozambique to Lesotho had been forced by adverse weather condition to land in Bloemfontein. In upholding the applicability of the maritime distress rule to aircraft, smuts stated

In view of the established law in regard to the rights of ships in distress to enter a port, there appears to be no reason why aircraft in distress should not also enjoy the privilege accorded to ships in distress and it must be accepted that international law accords aircraft of one country the right, when in distress, to land on the territory of another country and that as a general such aircraft and their occupants may not be subject to penalties or unnecessary detention by the territorial sovereign for entering under such circumstances.

Smuts J was not prepared to apply this general principle to a person suspected of crimes against the security of the state in

which the aircraft was forced to land and held that Nkondo might be tried under the security laws. The executive proved to be more sensitive (probably realizing the advantages attached to such a rule for its own members) and ordered the release of Nkondo and his return to Lesotho.

Aerial intrusion

Although a state may use force against an unauthorized military aircraft in its airspace in the exercise of the right of self-defense, it is not permitted to take such action against trespassing civilian aircrafts, the shooting down by soviet jets in 1983 of a Korean Airlines aircraft (flight 007) which had strayed over military sensitive soviet airspace prompted an amendment to the Chicago convention Article 3bis, inserted in 1984, provides that, while every state , in the exercise of its sovereignty, is entitled to require the landing at some designated airport of a civil aircraft flying above its territory without authority, states must refrain from resorting to the use of weapons against civil aircraft in flight and that, in case of interception, the lives of persons on board and the safety of the aircraft must not be endangered.

Outer space

Sovereignty over the airspace of a state was accepted as extending for an unlimited distance in accordance with the private-law principle *cuius est solum eius est usque ad caelum*. However, when the first satellite-sputnik- was launched into outer space in 1957, it became clear that this principle could no longer apply. Since then a number of unanimously adopted general assembly resolution (accepted immediately as customary law) ad multilateral treaties have expounded on coherent legal regime for outer space. The most important of these is the

Treaty on the Principle Governing the Activities of States in the Exploration and Use of Outer space, Including the Moon and Other Celestial Bodies of 1967, which proclaims the following principles;

Article I

The exploration and use of outer space, including the moon and other celestial bodies, shall be carried out for the benefit and in the interests of all countries, irrespective of their degree of economic or scientific development, and shall be the province of all mankind.

Article II

Outer space, including the moon and other celestial bodies, is not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means.

Article III

States Parties to the Treaty shall carry on activities in the exploration and use of outer space, including the moon and other celestial bodies, in accordance with international law, including the Charter of the United Nations, in the interest of maintaining international peace and security and promoting international co-operation and understanding.

Article IV

States Parties to the Treaty undertake not to place in orbit around the earth any objects carrying nuclear weapons or any other kinds of weapons of mass destruction, install such weapons on celestial bodies, or station such weapons in outer space in any other manner.

Article V

States Parties to the Treaty shall regard astronauts as envoys of mankind in outer space and shall render to them all possible assistance in the event of accident, distress, or emergency landing on the territory of another State Party or on the high seas. When astronauts make such a landing, they shall be safely

and promptly returned to the State of registry of their space vehicle.

Article VI

States Parties to the Treaty shall bear international responsibility for national activities in outer space, including the moon and other celestial bodies, whether such activities are carried on by governmental agencies or by non-governmental entities, and for assuring that national activities are carried out in conformity with the provisions set forth in the present Treaty. The activities of non-governmental entities in outer space, including the moon and other celestial bodies, shall require authorization and continuing supervision by the appropriate State Party to the Treaty. When activities are carried on in outer space, including the moon and other celestial bodies, by an international organization, responsibility for compliance with this Treaty shall be borne both by the international organization and by the States Parties to the Treaty participating in such organization.

The treaty does not attempt to define the point at which the earth's atmosphere, hence airspace, ends and outer space begins.

UNIT 7

IMMUNITIES FROM NATIONAL JURISDICTIONS

A state has jurisdiction over all persons and property within its territory and over all acts that take place within its territory. In certain circumstances however it will not exercise its territorial jurisdiction. This occurs where a foreign sovereign, its property, or its agents are involved. Although such or property are not exempt from legal liability or immune from the observance of the local law, international law assertion of jurisdiction in such a case may be ascribed to international comity or to the argument that because all sovereigns are equal no one of them can be subjected to the jurisdiction of another without surrendering a fundamental right.

In *Liebowitz v Schwartz*, Nicholas J, gave his approval to both these explanations when he observed that 'the courts of the country will not by their process make a foreign state a party to legal proceedings against its will and stated that this principle was founded on grave and weighty considerations on public policy, international law and comity.

The immunity accorded to foreign sovereigns takes two forms firstly sovereign immunity which involves the immunity of a foreign state, the government of a foreign state, or a department of such a government. Secondly, diplomatic and consular immunity, which deals with the immunities and privileges granted to foreign diplomats and consuls.

Sovereign immunity

Sovereign immunity has its origin in the immunity of the person of the foreign sovereign from the jurisdiction of municipal courts. Later the personification of the sovereign was replaced by the abstraction of the state and its organs.

Until the emergence of the socialist state after the Russian revolution in 1917, neither the sovereign nor her government engaged in trade or commercial activities to any applicable degree. Consequently states were prepared to grant immunity to all acts of foreign sovereigns and their governments including those of their armed force and state owned vessels. Sovereign immunity was absolute. The advent of the socialist state and the emergence of the state owned trading corporation altered the situation. Today many states support a doctrine of restricted or qualified immunity according to which immunity from the jurisdiction of the municipal courts will be granted in respect of acts *jus imperil* (ie governmental public activities) and not in respect of acts *jure gestionis* (ie commercial activities).

The reason for this change in attitude is that a foreign government which enters into an ordinary commercial transaction with a trader must honour its obligations like other traders and if it fails to do so, it should be subject to the same laws and amenable to that same tribunals as they are. The doctrine of restricted or qualified immunity in respect of the commercial activities of states has probably acquired customary international law. This appears from the adoption by the General Assembly of the UN a convention on jurisdictional immunities of states and their property.

The principle basis for jurisdiction is territorial. A state has authority over people, things & activities within its own territory. However International law recognises that there are certain people, things & activities entitled to immunity from the enforcement of local law. Immunity is from the enforcement of local law and not from the law itself. The following are immune to municipal laws

1. Foreign states and heads of foreign states
2. Diplomats
3. Armed forces of foreign states
4. Diplomatic representatives & consuls of foreign states
5. International Organisations

Heads of state and governments are immune to criminal and civil jurisdiction of other states. There are two schools of thought that immunity is in two forms in regard to criminal jurisdiction.

1. Immunity *ratione personae*

Attaches to senior state officials, such as heads of state of government or ministers of foreign affairs acts while they are in office and protection is accorded to such a person.

2. Immunity *ratione materiae*

This attaches to acts of official functions. It comes to both former and serving heads of state. This can be seen in the case of *R v Bow Street Metropolitan Stipendiary Magistrates, Ex Parte Pinochet* [1999] 2 All ER 97 Which illustrates this principle. Pinochet overthrew the Chilean president Allende. Pinochet then became the Head of State of Chile until 1990 when he resigned.

In 1998 whilst visiting UK for medical treatment, Spain requested for the extradition of Pinochet so he could face charges of torture and conspiracy to torture. This case established that former Heads of States have limited functional immunity (*ratione materiae*) from prosecution. It also confirmed the principle that current Heads of States have complete immunity from criminal prosecution.

In the case of *Tatchell v. Mugabe* (2004) unreported An application for the arrest warrant of President Mugabe, head of state of Zimbabwe was refused. Judge Workman held that International customary law provides absolute immunity to any Head of state. However this is in relation to prosecution in national courts. Current Head of states may not have immunity from prosecution before international tribunals i.e. ICC.

This was illustrated in the Arrest warrant Case (*Democratic Republic of the Congo v Belgium*) Icj Rep 2002 p3 An international arrest warrant was issued in absentia by a Belgian Judge for Abdulaye Ndombasi of Democratic Republic of Congo (DRC). He was charged with offences amounting to grave breaches of speeches which incited racial hatred and led to murder and executions. He was however not in Belgium when the warrant was issued. The Warrant was circulated in most states including DRC. The arrest warrant was issued when Abdulaye was DRC foreign Affairs minister

DRC made an application against Belgium claiming that Belgium lacked jurisdiction in international law to issue a warrant because Abdulaye had diplomatic immunity by virtue of being a foreign Affairs minister.

The Court upheld DRC immunity claim by 13 votes to 3. It is established in International Law that diplomatic and consular agents and officers holding certain posts such as Head of States, Head of government & Minister of Foreign affairs shall enjoy immunities from jurisdiction in other states both for civil & criminal. Immunity is not granted for personal benefit but to ensure effective performance of their functions of behalf of the state.

Extraterritoriality fiction

The inviolability of the diplomatic mission led to suggestion that it was accorded a special status by the receiving state because it was an extension of the territory of the sending state that it was extraterritorial. This explanation for the inviolability of the mission is no longer accepted. Instead it is generally agreed that the inviolability of a mission is based on functional necessity; that such inviolability is necessary to enable the mission to perform its functions properly. The extraterritoriality theory was firmly repudiated by Gross in *Kopf v. Kopf* when he held that a marriage solemnized in a foreign embassy or consulate by a person (in this case the Portuguese vice-consul) who was not a recognized marriage officer under South African law was invalid. The judge accepted the view of Michael Akehurst that

'Diplomatic premises are not extraterritorial; acts occurring there are regarded as taking place on the receiving state, not on the of sending state'

Diplomatic immunities

Diplomats are granted extensive protection and immunities. Article 29 states, the person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention. The receiving state shall treat him with due respect and shall take all appropriate steps to prevent any attack on his person, freedom of dignity'.

The private residence of a diplomat enjoys the same inviolability as the mission according to Article 31.

In Zambia the law that governs immunity is CAP 20 of the laws of Zambia. The Vienna convention on diplomatic relations is an annex to Cap 20 this is to mean that it has been domesticated to become part of the national laws.

In the Zambian context what immunities are given to the diplomatic representative are in article 4 of CAP 20. The procedure for accreditation is that letters are first sent to the receiving state so they can either veto or confirm acceptance of the envoy. The receiving state is under no obligation to give reasons for such rejection. When their names are cleared the first to arrive in the receiving state is to present credentials to the president. Diplomats are accredited to the president while consulars on the other hand are accredited to the minister of foreign affairs.

Relevant provisions of the Vienna Convention on diplomatic immunities

Article 1

Defines who a diplomat is and what their exceptions are. It helps you know which person and property are inviolable.

Article 9

If a receiving state sends back or rejects a diplomatic representative it is not at war with the sending state as a country but at war with the diplomatic representative. A receiving state is under no obligation to give reasons for refusal of acceptance of such a representative or sending back of such a representative. However, reasons can be given by the state if the receiving state decides to do so.

Article 11

Concept of reciprocity

In the absence of specific agreement as to the size of the mission, the receiving State may require that the size of a mission be kept within limits considered by it to be reasonable and normal, having regard to circumstances and conditions in the receiving State and to the needs of the particular mission.

The receiving State may equally, within similar bounds and on a non-discriminatory basis, refuse to accept officials of a particular category.

Article 22(3)

The premises of the mission shall be inviolable. The agents of the receiving State may not enter them, except with the consent of the head of the mission.

Article 23

The sending State and the head of the mission shall be exempt from all national, regional or municipal dues and taxes in respect of the premises of the mission, whether owned or leased, other than such as represent payment for specific services rendered.

Article 24

Indicates that archives and documents are inviolable at any time and where ever they may be.

Article 27

A receiving state shall permit free communication without being tapped in on the port of the mission by the receiving state.

Article 27(3)

Diplomatic bag shall not be opened or detained. Bags should be properly marked and labeled indicating who the owner is.

Article 29

Which persons shall be inviolable and what steps should be taken to protect them.

Article 30

Private residence shall also enjoy the same immunity except in the case of

1. A real action relating to real and private immovable property based in the receiving state in your name except if he is holding it on behalf of the sending state and the person is immune to testify if the land is in contention.

2. An action relating to execution of a will in his personal capacity as an executor/trix except where he is doing it on behalf of the sending state. Where the ambassador is the executor he can be called to testify.

Article 31(2)

Action relating to professional or commercial activity carried on by the diplomatic representative in their capacity they will be held liable.

Article 32

Gives category of individuals who can enjoy immunity, here the immunity can be waived.

Article 32 (4)

Talks about waiver from civil and criminal proceedings. Waiver on jurisdiction and waiver on execution of the judgment.

Article 34

Which taxes a diplomat is directly exempt from indirect taxes on food products. Taxes due to personal property and the ambassador will pay for it. Charges levied for specific devices rendered. Registration costs or mortgage fees and everything else.

Article 36

Provides for exception of custom duties i.e. what they cannot pay for.

Article 37

Members of the diplomatic family household if they are not nationals they shall enjoy privileges stated. Members of technical staff, members of administrative staff and their families if not nationals and permanent residents will enjoy privileges in respect of acts performed in the course of their duty.

Note: To provide proper guidance to the client, identify the level of employees, their nationality, if family member identify how close their relationship is (family ties) what they have done, is it done in the course of their duty or private capacity. Or is it done on behalf of the mission or receiving if not they will be liable. National from that country who is a servant will be punished according to the laws of the receiving state.

Termination of diplomatic relation

They are seven ways in which diplomatic relations may be terminated

1. Recall of an envoy by his accrediting state. This is done by a letter of recall which is handed over to the receiving state.

2. By notification of the sending state to the receiving state that the envoys functions have come to an end.
3. Request by the receiving state to the sending state that the envoy be recalled due to undiplomatic actions and sometimes no reason is given at all.
4. By delivery of the passport to the sending state.
5. Notification by the receiving state to the sending state that their envoy has been declared persona non granta.
6. Fulfillment of the object and purpose of the mission by the envoy i.e. where the envoy who was sent on a specific mission has served his term.
7. Expiration of the letters of credence given for a limited period of time.

UNIT 8

THE LAW OF THE SEA

INTRODUCTION

The law of the sea is that law by which both coastal and landlocked countries regulate their relation in respect of those areas subject to the jurisdiction of coastal states and in relation to those areas of the sea and sea bed beyond national jurisdiction.

The rules governing the sea are drawn from both custom and treaty law.

The concept of "freedom of the seas developed as a limitation that restricted national attempts to unreasonably extend the range of exclusive coastal sovereignty into international waters. Such rights conflicted with the rights of all states to fish and to navigate over international trade routes.

Historically, navigation on the high seas was open to everybody as were also fisheries, but in the fifteenth and sixteenth centuries the period of great maritime discovery by European navigators, claims were laid by the powerful maritime states to the exercise of sovereignty indistinguishable from ownership, over specific portions of the open sea. For example, Portugal claimed maritime sovereignty over the whole of the Indian ocean and a very great portion of the Atlantic Ocean. Spain claimed virtually the whole of the Pacific Ocean and the Gulf of Mexico while Britain laid claim to the North Sea.

Grotius was one of the first scholars to attack these extensive claims and his objections were based primarily on two grounds:

1. No ocean can be the property of a nation because it is impossible for any nation effectively to take it into possession by occupation.

2. Nature does not give a right to anybody to appropriate things that may be used by everybody and are exhaustible in other words, the open sea is *res gentium* or *res extra commercium*.

In opposition to the principle of maritime sovereignty, the principle of the "freedom of the high seas" or "the freedom of the open seas" developed. This principle however, served only the interests of the more powerful nations. It authorized their vessels to freely fish, mine and navigate without limitation. A coastal state was precluded from interfering with a foreign vessel's activities, just three miles offshore as well as the sovereignty of the nation whose flag is sailed under. The three nautical mile rule was developed in the early 16th century. The rule was that the coastal state could dominate only such width of coastal waters as lay within the range of a cannon shot from shore batteries. The assumption was that territorial sovereignty extends as far as the power of arms can reach. In 19th century the three mile rule received widespread recognition. But by the end of the Second World War, coastal states began to extend their sovereignty beyond the traditional three mile limit. Some states claimed full sovereignty over large areas.

Less developed states watched as more developed nations entered their general maritime regions to fish and exploit the nearby oceans with technology not available to the coastal state. As more and more nations began to extract resources from the sea,

pressure mounted to compress the notion of freedom of the seas. New nations emerging from colonialism began to espouse the view that freedom of the seas served the interests of large and economically powerful nations.

The historical regime of freedom of the seas did not incorporate the interests of the new members of the international community—especially those seeking to facilitate a more equitable distribution of the ocean's resources. These pressures led to the UN sponsoring a number of conferences on the law of the sea. The first UN conference met in Geneva from 24 February to 27 April 1958. This conference adopted four Conventions:

- 1) The Convention on the territorial sea and the Contiguous zone;
- 2) The Convention on the High Seas;
- 3) The Convention on Fishing and Conservation of the Living Resources of the High Seas; and
- 4) The Convention on the Continental Shelf.

The four conventions of 1958 provided a regime for the use of, and rights to, the sea and continental shelf. Most of their provisions have been incorporated in the 1982 United Nations Convention on the law of the sea with little or no change.

THE 1982 UNITED NATIONS LAW OF THE SEA CONVENTION (UNCLOS)

This was the product of the third multilateral treaty negotiation on the law of the sea, consisting of numerous meetings from 1974 to 1982. 170 nations originally signed the treaty. One of the provisions of the treaty was that it would enter into force, one year after the sixtieth State ratified the

treaty. In 1993 Guyana became the sixtieth country to ratify the treaty and it therefore entered into force in November 1994.

This Convention codifies the law of the sea and it governs the now expanded range of sovereignty in the ocean water areas as established by the Convention these are:

- (1) Internal waters;
- (2) Territorial sea;
- (3) Contiguous zone;
- (4) Exclusive Economic Zone;
- (5) High Sea;
- (6) Continental shelf; and
- (7) Deep Sea bed

Internal Waters

Article 1(8) of UNCLOS defines Internal waters as "waters on the landward side of the baseline of the territorial sea". Here a State has the right to control its bays, rivers and other internal waters. It has exclusive sovereign jurisdiction to expel invaders; and has interest in monitoring military and commercial activities of foreign vessels.

The term baseline refers to the geographical yardstick for distinguishing internal waters from the sea. It is the point where the sea intersects with the edge of the land.

There are however two problems with the application of exclusive jurisdiction by the coastal state over its internal waters.

- (1) Problem of jurisdiction over events occurring on foreign vessels in port; and

(2) Conflicting rights over large bays containing more open sea than the typical bay.

Ports - under international law, each state has the absolute right to control the internal waters contained within its ports. Customary practice has however, developed certain limitations on this right.

1. When a foreign warship enters internal waters with permission, the port authorities do not board it - for mutual security reasons.

2. Merchant and other private vessels have the implied right to enter internal waters of another state without express permission, but they can be boarded for customs and immigration purposes.

However, UNCLOS does not cover the important jurisdictional problem where a member of a foreign crew commits a crime while in port. In such a situation either the laws of the coastal state or the laws of the state of the vessel's registration will apply. Where the crime does not affect the tranquility of the coastal state, the flag state rather than the port state usually exercises primary jurisdiction to prosecute the criminal. This arrangement facilitates smooth progress of international commerce and avoids undue interference with the movement of ships.

When a crime committed on board a ship in port of the coastal state causes a significant intrusion on the port's tranquility, the perpetrator becomes subject to prosecution by the port state. In some regions however, all crimes occurring within internal waters trigger coastal state's competence to prosecute.

Under customary practice, the flag state is competent to act if port state chooses not to prosecute.

Bays - Most bays consist of only internal waters. However, large bays present a problem of whether they only contain internal waters or whether they also contain territorial and international waters. This type of bay illustrates the tension between freedom of the seas in international waters and the need for coastal states to control activities in a strategic bay penetrating deep into its coastline. An example is when in 1986 the USA warplanes were attacked over the gulf of Sidra in Libya. Muammar Gadhafi the then President of Libya had drawn A line of death across the mouth of this gulf which is approximately 300 miles across. At its deepest indentation it extends well over 100 miles.

UNCLOS defines a bay as a well-marked indentation whose penetration constitutes more than a curvature of the coast. An indentation must be as large as, or larger than, that of a semi-circle whose diameter is a line drawn across the mouth of that indentation.

A coastal state normally exercises jurisdiction up to twelve nautical miles from its coast. In the case of a bay, if the semi-circle diameter referred to in UNCLOS is less than 24 miles between each side of the mouth of the bay, its waters consist solely of internal waters. If the diameter is more than 24 miles, the bay also contains high sea or international waters in the centre of the mouth and territorial water up to 12 miles.

Another type of bay is the historic bay. Such bays contain only internal waters as opposed to the territorial waters discussed in relation to other bays.

Such bays have their mouths wider than 24 miles limitation of the UNCLOS if over a long period of time, a state claims exclusive sovereignty over a large bay that contains one or more of the other categories of ocean waters because of a distance between its natural entrance point that is more than 24 miles.

If other states do not dispute then they acquiesce in the coastal state's treatment of the large historic bay as consisting of only internal waters.

TERRITORIAL SEA

States have always disagreed between the High seas and the territorial sea. Bold unilateral decisions were witnessed in the 15th and 16th centuries extending the range of national claims deep into what is now considered as the High Seas. Denmark and Sweden claimed large portions of the globe's northern sea. Each claimed complete sovereignty over the Baltic sea. England claimed the entire English channel and much of the North Sea. The Pope as head of the Holy See ceded most of the Atlantic and Pacific oceans to Spain and Portugal. These extravagant claims were opposed by other nations and were abandoned by the beginning of the 18th century.

The sheer inability to control such vast areas afforded credibility to the "cannon shot" theory of coastal jurisdiction. A nation could claim only the adjacent sea belt that it could actually control with its shore based military power.

Under UNCLOS, the territorial sea extends outwards, twelve nautical miles from the national coastline. The coastal State exercises sovereignty over this portion of territory, to the

same extent that it does over its land mass. Its range of sovereignty includes the airspace over the territorial sea, the seabed below, and the subsoil within this zone.

Under International Law a State must exercise its sovereignty in this strip of water. As stated in the Anglo-Norwegian Fisheries Case (England v Norway), To every State whose land territory is at any place washed by the sea, international law attaches a corresponding portion of maritime territory consisting of what the law calls territorial waters - no State can refuse them. International law imposes upon a maritime State certain obligations and confers upon it certain rights. The possession of this territory is not optional, or dependent on the will of the State but compulsory.

Baseline - The Territorial Sea begins at the baseline. Each baseline begins where the ocean's edge meets the coastline. Under article 5 of the UNCLOS, "the normal baseline for measuring the breadth of the territorial sea is the low water line along the coast as marked on large-scale charts officially recognized by the coastal State". However, under International Law, coastal baselines must follow the general direction of the coast. Unnatural land contours make it difficult to establish indisputable baselines. UNCLOS espouse the general principle that "the sea areas lying within the baselines must be sufficiently closely linked to the land domain to be subject to regime of internal waters.

The ICJ set guidelines for the recognition of baselines on erratic coasts, in the 1951 Anglo-Norwegian Fisheries Case. Facts were that when Norway announced the location of its baselines after World War II, it included a substantial portion

of what were previously international fishing areas within its internal waters. Norway has many ramparts of rocks and small islets that interrupt the natural course of its coastline. Norway drew straight baselines, conveniently encompassing the rocks and islets off its coast, rather than using the traditional method of tracking the contour of its irregular coastline. By placing its baselines at the outer edge of these rocks and islet configurations, Norway claimed a greater share of the common fishing area than Great Britain was willing to recognize. British fishermen had operated off Norway's coast (within the straight baselines) area set by Norway since the early 1900.

The ICJ set out the general rules for delimiting irregular coastlines:

- 1) Delimitation of sea areas has always been an international aspect and cannot be dependent merely upon the will of the coastal State.
- 2) It is the land that confers upon the coastal State the right to the waters off its coasts. It follows that the drawing of baselines must not depart to any appreciable extent from the general direction of the coast.
- 3) The idea of whether certain sea areas lying within baselines are sufficiently closely linked to the land must be liberally interpreted in the case of a coast, the geographical configuration of which is as irregular as that of Norway.

The majority of the judges approved the straight baseline method in these unusual circumstances because the resulting straight lines were sufficiently aligned with the general direction of the Norwegian coast.

Right of Innocent Passage

There is a right of innocent passage in the territorial sea. Article 18(1) of the UNCLOS defines passage as navigation through the territorial sea for the purpose of

- a) traversing that sea without entering internal waters, or
- b) proceeding to or from internal waters.

Under Article 19 "innocent passage" means passage that is "not prejudicial to the peace, good order, or security of the coastal state. It requires foreign vessels to ascertain and comply with the innocent passage regulations promulgated by the coastal state such as regulations relating to customs, immigration and sanitation in order to protect the coastal state's interests in its territorial waters.

An ocean liner carrying passengers entering into another country's territorial waters must comply with local tax laws affecting its cargo, passport regulations affecting its passengers.

Strait passage

Another effect of the UNCLOS expansion of the territorial sea from three to twelve nautical miles impacted a number of strategic straits or natural sea passages that connect two large maritime areas. For example the strait of Hormuz connects the Persian Gulf and the Indian Ocean, the strait of Gibraltar connects the Mediterranean Sea and the Atlantic Ocean. The relatively narrow width of these straits presents a problem. When the navigable channel of such a strait is more than 12 miles from each of the national coasts bordering on the strait, it still contains some international waters or high seas and

ships are entitled to unrestricted passage through the high sea portion of such straits.

When such a strait is less than 24 miles wide at its narrowest point, however, it contains only territorial waters. As a result of this UNCLOS addition of nine miles to the territorial sea" approximately 116 of these comparatively narrow "international straits" formerly containing High Seas - suddenly embodied only territorial seas.

Under customary law states passing through such straits would apply "innocent passage" rules. However, under UNCLOS "innocent passage" rules do not apply to such special straits. Military and commercial vessels are entitled to free transit in them, just as if those special straits still contained slices of High Seas within them.

The Bering Strait between Russia (Siberia) and the United States (Alaska) provides a useful illustration. That Strait is 19 miles at its narrowest point.

Ships pass through it when going between the Arctic and the northern Pacific oceans. Formerly, the Soviet Union claimed a 12 mile territorial sea while before 1988 the USA claimed 3 mile territorial sea. This left a four mile slice of the High Seas at the narrowest point of passage, Military and Commercial vessels could freely navigate in that four mile strip of international waters.

Now that the USA has adopted a twelve-mile Territorial Sea, there are no High Seas left in the strait. This means that all states using this stretch of waters would have been subjected to

rules of innocent passage as promulgated by the subjective determination of Russia and the USA.

Note that at its narrowest point, the Bering Strait now contains only the territorial Seas of both Russia and the USA - delimited by an equidistance principle in the middle of the navigable channel.

Under Article 38(2) of UNCLOS ships and aircraft may undertake "transit passage" through straits that now contain only territorial waters that formerly contained international waters "solely for the purpose of continuous and expeditious transit of the strait between one part of the high seas and another part of the high seas" The coastal state may not impede such transit.

Under Article 42 of UNCLOS, the coastal state may promulgate rules ensuring transit passage that establish sea-lanes and traffic separation schemes for safe navigation, as well as the prevention of pollution, fishing, and offloading of persons and commodities. However, none of these limitations should be applied in a way that impedes the right of transit through such territorial seas when they bridge two portions of the High Seas.

THE CONTIGUOUS ZONE

This zone extends from the base-line to twenty four nautical miles. Here a coastal state may also exercise limited jurisdiction.

Under Article 33(1) of UNCLOS, the activities of foreign states or their vessels in this zone are subject to the jurisdiction of the coastal state for the express purpose of enforcing "custom,

fiscal, immigration, or sanitary laws." The contiguous zone's proximity to the coastline requires a balance between international and the interests of the coastal state.

THE EXCLUSIVE ECONOMIC ZONE

This is the area beyond and adjacent to the territorial sea which shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured. (art 55 & 57 UNCLOS) The concept of the EEZ evolved with the realization that fishery resources are not inexhaustible, and that it was imperative to adopt conservation measures.

Coastal states do not have complete sovereignty over the EEZ, but only sovereign rights" for the purpose of exploring and exploiting, conserving and managing the natural resources whether living or non-living, of the seabed and subsoil and the superjacent waters" and jurisdiction with regard

- 1) to establishment and use of artificial islands, installations and structures;
- 2) marine scientific research; and
- 3) protection and prevention of the marine environment. (art 56)

The coastal state is responsible for determining both "the allowable catch of the living resources in its EEC. (art 61.1)

A coastal state is responsible for determining its capacity to harvest the living resources in its EEZ. [art. 62] The coastal state's task is to decide, in respect of the EEZ's living resources, the surplus available over its own harvesting

capacity" That surplus is to be made available to other states, either through agreements or other arrangements taking into account certain criteria, for example, the significance of living resources to the coastal state, interests of landlocked countries, and interests of those states whose nationals have habitually fished in the zone. The final say however, is with the coastal state.

Other states enjoy the right of freedom of navigation, over flight and the laying of submarine cables and pipelines provided they respect the rights and duties of the coastal state and comply with the laws and regulations of the latter. Delimitation of the EEZ between states with opposite or adjacent coasts is to be effected by agreement on the basis of international law as referred to in Art. 38 of the statute of the ICJ, in order to achieve an equitable solution.

HIGH SEAS

Often referred to as "international waters" consists of that part of the ocean not subject to the complete sovereignty of any state. The concept of freedom of the high seas applies only to that portion of the sea not included in the EEZ, territorial sea and internal waters.

The freedom of the high seas is to be enjoyed by all states and covers freedom of navigation, of fishing, to lay submarine cables and pipelines, and the freedom of over flight. These freedoms must be exercised with reasonable regard to the interests of other states.

Article 95 of UNCLOS indicates that Jurisdiction over ships on the High Seas lies with the flag state. Thus both military and

mercantile ships are immune from the jurisdiction of any other state other than the flag state.

The limitation to the freedom of navigation is that every state may seize a pirate ship or aircraft, or a ship taken by pirates and arrest the persons and seize the property. Piracy is defined as, any illegal acts of violence, detention or any act of depredation committed for private ends by the crew or passengers of a private ship or private aircraft.

THE CONTINENTAL SHELF

The continental shelf is a geographical term used to describe the gently sloping ledge covered by shallow water projecting from the shoreline of many land masses before a steep descent to the ocean waters. Continental shelves vary considerably in width; off the west coast of the USA, the shelf is less than five miles whereas the entire of the north sea is continental shelf.

Continental shelf is defined as the gently sloping platform of submerged land surrounding the continents and islands. Normally it extends to a depth of approximately 200 meters at which point the seabed falls sharply.

Under Article 76 of UNCLOS, the Continental shelf of a coastal state comprises the sea-bed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baseline from which the breadth of the territorial sea is measured.

The coastal state exercises sovereign rights for purposes of exploring and exploiting its natural resources. The coastal states -rights are exclusive in the sense that if it does not explore or exploit the continental shelf, no one may undertake these activities without the express consent of that coastal state.

The coastal state's rights in the continental shelf do not affect the status of the superjacent waters as high seas, or that of the airspace above those waters.

The delimitation of the Continental Shelf between states with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the statute of the ICI, in order to achieve an equitable solution. [art. 77]

THE DEEP SEABED

The deep seabed is rich in minerals, particularly manganese nodules. The extraction of these minerals is now thought to be scientifically feasible and therefore there has been heighten interest in the deep seabed, With this increasing interest, a number of questions have arisen. For example, to whom should the resources found there belong? Should they belong to those few countries with the technological knowhow to exploit them or should they be conserved for future use by those nations which are yet to acquire technology capable of exploiting those resources.

Article 135 of the UNCLOS makes the deep seabed a common heritage of all mankind and that no state can claim to exercise sovereignty or sovereign rights in this area. In order to ensure that activities in this part of the oceans benefit all mankind, the UNCLOS provides for the creation of an International Seabed Authority which is mandated to carry out all deep seabed exploration and exploitation of resources.

The Authority is required by the Convention to, ensure that proceeds from activities in this area are equitably shared between all states in such a manner as to foster healthy development of the world economy and balanced growth of international trade, and to promote international co-operation for the overall development of all countries, especially developing states. [art. 140 & 150]

In addition, there is a separate body called the Enterprise, which is responsible for the actual conduct of deep seabed operations for the authority.

UNIT NINE

State Responsibility

Diplomatic Protection and the Treatment of Aliens

This lecture is a summary extract whose main source J Dugard *International Law 'A South African Perspective'* (2005) 269 - 307.

When a state commits an international wrong against another state it incurs international responsibility. A state may incur liability for:

- i. International wrongful acts e.g. injury on the defendant state's national
- ii. Trans-border environmental damage

In such a case a delinquent from the violation of a treaty obligation or the violation of a general obligation owed towards all states. The law of state responsibility in international resembles the law of tort in domestic law. State responsibility refers to the circumstances in which a state would be held liable in international law.

There are two kinds of state responsibility:

- i. Breach of Treaty
 - See Chorzow case (1928)
 - It is a principle of International law that any breach of an agreement (treaty) invokes reparation by the party in breach
- ii. Breach of Contract
 - See Anglo Iranian Oil case

If there is a breach of contract between a company (International) and a state, then the company will urge its

government to espouse its claim in the international arena. This is because a company doesn't have international *locus standi*.

A state may incur responsibility directly or indirectly. It incurs responsibility directly when, acting through its organs or agents, it violates its obligations towards another state under a treaty or general international law. Indirect responsibility is when a state injures the person or property of a foreign nation and in so doing is deemed to have injured the state of nationality of the injured person itself.

Substantive rules requiring states to act in a particular way or to obtain from certain actions in their relations with other states or rules governing the treatment of the nationals of other states may be termed the 'primary rules' of state responsibility. Rules which govern the attribution of conduct to a state, the invocation of the responsibility of a state and the consequences of a wrongful act are termed the 'secondary rules' of state responsibility.

In this lecture, no attempt is made to examine the primary rules of direct state responsibility because doing so will go beyond the scope of this topic. Instead this lecture will focus on indirect state responsibility, frequently described as 'diplomatic protection' or the 'treatment of aliens', which constitutes a special regime within the field of state responsibility with its own primary and secondary rules.

Attribution of conduct to a state

'Every international wrongful act of a state entails the international responsibility of that particular state'. An internationally wrongful act occurs when conduct is attributable

to the state and constitutes a breach of international obligation of the state

It is no defence to a violation of international law that the conduct in question is permitted by the municipal law of the defendant state. As judge Lauterpacht observed in the *Norwegian loans Case*.

“National legislation... may be contrary to the international obligations of the state. The question of conformity of national legislation with international law is a matter of international law... It is not enough for a state to bring a matter under the protective umbrella of its legislation... in order to shelter it effectively from any control by international law.”

The conduct of any organ of state 'whether the organ exercises legislative, executive, judicial or any other function 'is considered an act of state.

The conduct of a person or entity not an organ of the state but empowered to exercise elements of government authority is considered an act of state. This includes parastatal entities, public corporations and other subordinate bodies.

A state is responsible for acts performed by officials within the scope their employment.

As a general principle the conduct of private persons is not attributable to a state under international law, but where there is a special relationship between the persons and the state their conduct is attributable to the state. This includes, for example ,the conduct of private individuals who though not

forming part of the army or police force of a state are employed as auxiliaries or are sent as 'volunteers' to neighboring states with instructions to carryout missions abroad. Also included in the conduct of groups which act under 'the direction or control' of the state.

The degree of control to be exercised by the state in order for conduct to be attributed to it arose in the *Nicaragua Case*¹⁷. Here the question was whether violations of international humanitarian law committed by a rebel group operating against the government of Nicaragua known as the contras might be attributed to the United States was responsible for the planning, direction and support it gave to the contras, it rejected Nicaragua's claim that all the conduct of the contras was attributable to the United States by reason of its control over them. The court stated that,

"for a conduct to legal responsibility of the united states, it would in principle have to be proved that the state had effective control of the military or paramilitary operations in the course of which the alleged violations were committed."

Consequently, only in certain individual instances were acts of the contras held to be attributable to the United States, based upon actual directions given by the United States.

The cautious approach of the international court was criticized by the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) in *prosecutor v Tadic* when it held that the International Court had set too high a threshold

¹⁷ (1986) I.C.J. Rep

for the test of control. According to the Appeal's Chamber it was sufficient, for attribution to take place, to establish

'overall control going beyond the mere financing and equipping of such forces and involving also participation in the planning and supervision of military operations'.

According to Art 9, the conduct of a group of persons may be attributed to a state if the group were in fact exercising elements of governmental authority in default of the official authorities. This principle is illustrated by *Yeager v Islamic Republic of Iran* in which the act of the Revolutionary Guards as immigration officials at Tehran airport, in immediate aftermath of the Iranian revolution, were held to be attributable to Iran on the basis that the Guards, although not actually authorized by the new government at least authorized elements of government authority in the absence of official authorities, in operations of which the new Government must have had knowledge and to which it did not specifically object.

The conduct of an insurrectional movement which becomes the new government of a state shall, in terms of art 10, be considered an act of that state under international law.

Circumstances Precluding Wrongfulness

- Consent on the part of the injured state
- Self-defence taken in conformity with the Charter
- Countermeasures in response to an illegal act
- *Force Majeure*
- Necessity
- pleading coercion

None of these circumstances can be relied on if to do so will conflict with a peremptory norm of general international law.

Legal consequences of internationally wrongful acts

In the first instance, the state responsible for an internationally wrongful act is under obligation to cease that act, if it is continuing, and to offer assurances and guarantees of non-repetition. Secondly, the responsible state is under obligation to make full reparation for the injury caused by the wrongful act. In the *Chorzow Factory Case* the permanent court of international justice declared.

'The essential principle contained in the actual notion of an illegal actis that repatriation must, so far as possible wipe out all the consequences of the illegal act and reestablish a situation which would in all probability, have existed if the act had not been committed. Restitution in kind, or, if this is not possible, payment off the sum corresponding to the value which restitution in kind would bear...'

- restitution,
- compensation
- satisfaction

Satisfaction through diplomatic means i.e. an apology from a delinquent state as opposed to restitution or compensation, consists in an acknowledgement of the breach of international law as an expression of regret.

Countermeasures

Self-help of has no place in a developed legal system but, unhappily, international law has not reached this stage of development. Although states rely less frequently on self-help measures today than in the past, international law still recognize the right of a state to resort to self-help.

Countermeasures are not to be proportionate and shall not affect

- The obligation to refrain from the threat or use of force as embodied in the charter of the united nations;
- Obligation for the protection of fundamental human rights;
- Obligation for humanitarian character prohibiting reprisals;
- Other obligations under peremptory norms
- General international law.

Moreover, a state taking countermeasures is not relieved from fulfilling its obligations:

- Under any dispute settlement procedure applicable between it and the respect State;
- To respect the inviolability of diplomatic or consular agents, premises, archives and documents

DIPLOMATIC PROTECTION

Indirect state responsibility, which is the focus of this lecture, occurs when a state injures the person or property of a foreign national within its territory. Here it incurs responsibility because of its failure to treat the foreign national according to the minimum standard of justice required for the treatment of aliens: for instance, by detaining him for unreasonable period without trial, or by confiscating his

property without compensation. The basis for responsibility in this case is that the defendant state has injured the plaintiff state by injuring its national. According to the permanent court of international justice in the *Mavrommatis Palestine Concession Case*, 'by taking up the case of one of its subjects and by resorting to diplomatic actions or international judicial proceedings on his behalf, a state is in reality asserting its own rights-its right to ensure in the person of its subjects respect for the rules of international law.

In order to succeed in such a claim the plaintiff is required to prove that:

- 1) The injured person was its national;
- 2) All local remedies have been exhausted; and
- 3) The conduct of the defendant state violates the rule of international law relating to the treatment of aliens.

Nationality of natural persons

It is for each to determine under its own law who are its nationals. There are recognized grounds for the conferment of nationality which are followed by most states. These are by birth (*jus soli*), descent (*jus sanguinis*), and naturalization, following upon the period of residence.

While it is a right of a state to prescribe rules relating to the acquisition of its own legislation, it is international law which determines whether a state is entitled to exercise diplomatic protection on behalf of a national.

In most cases nationality and the right of diplomatic protection will coincide. However, in exceptional cases, international law may refuse to recognize nationality for the purpose of

diplomatic protection. This is illustrated by the *Nottebohm Case* whose facts are that Mr Nottebohm was born a German national in 1881. He received citizenship through naturalization from Liechtenstein (plaintiff) in 1939. Prior to this date, in 1905, Nottebohm lived and performed substantial business dealings in Guatemala (defendant), and returned frequently to Germany to visit family. Once Nottebohm received his citizenship from Liechtenstein, he returned to Guatemala and Guatemalan authorities updated his nationality in the Register of Aliens. On July 17, 1941, the United States blacklisted Nottebohm and froze all his assets which were located in the United States. War broke out between the United States and Germany, and between Guatemala and Germany, on December 11, 1941. Nottebohm was arrested in Guatemala in 1943 and deported to the United States, where he was held until 1946 as an enemy alien. Once released, Nottebohm applied for readmission to Guatemala, but his application was refused. Nottebohm moved his residence to Liechtenstein (where he was a citizen), but Guatemala had already taken steps to confiscate Nottebohm's property in Liechtenstein. Guatemala succeeded in 1949. Liechtenstein instituted legal proceedings against Guatemala in the International Court of Justice (ICJ), requesting the court declare Guatemala had violated international law "in arresting, detaining, expelling and refusing to readmit Mr. Nottebohm and in seizing and retaining his property." Additionally, Liechtenstein requested the ICJ to order Guatemala to pay compensation as reparation. Guatemala defended by contesting Nottebohm's Liechtenstein nationality.

A state is not required to prove an effective or genuine link between itself and its national, along the lines suggested in

the *Nottebohm Case* as an additional factor for the exercise of diplomatic protection.

In determining the dominant and effective nationality, said the Tribunal, it would consider 'all relevant factors, including habitual residence, centre of interest, family ties, participation in public life and other evidence of attachment'.

Nationality of Corporations

A state corporation takes the nationality of the State in which it is incorporated and in whose territory it has its registered office, which means that the state of incorporation must exercise diplomatic protection on its behalf. In the *Barcelona Traction case* an attempt was made to extend the *Nottebohm principle to corporations*. Here it was argued that a company incorporated and registered in Canada with an 88 per cent Belgian shareholding had a genuine connection with Belgium which entitled it, and not Canada, to bring proceedings against Spain, arising out of injury inflicted on the company by Spain.

This argument was rejected by the international court of justice. The court distinguished the two cases on the facts, finding that, unlike *Nottebohm*, there was a close and permanent connection with Canada resulting from over fifty years of incorporation, the holding of board meetings in Canada, and the maintenance of an office in Canada. Considerations of public policy contributed to this decision. Many corporations engaged in transnational business have shareholders from several countries.

If the state of which each of its shareholders is a national is permitted to bring proceedings on behalf of its shareholder,

this would result in a multiplicity of claim arising out of injury to the same company. Clearly this is undesirable. Hence the court's insistence that the state of incorporation should exercise diplomatic protection.

This rule is absolute. The court acknowledged in obiter dicta that state of nationality of the shareholder might exercise diplomatic protection in three situations: first where the direct rights of shareholders are infringed; secondly, where the corporation has ceased to exist in its place of incorporation, and thirdly, where the state of incorporation is itself responsible for inflicting injury on the company and the foreign shareholders' sole means of protection on the international level is through their state(s) of nationality.

The third exception is where the state of incorporation itself is responsible for inflicting injury on the company and the foreign shareholders.

The discretionary nature of the diplomatic protection

A state has a right to exercise diplomatic protection on behalf of a national. It is under no duty or obligation to do so. The internal law of the state may oblige a state to extend diplomatic protection to a national, but international law imposes no such obligation. The position was clearly stated by the international court of justice in the *Barcelona Traction Case*:

'...within the limits prescribed by the international law, a state may exercise diplomatic protection by whatever means and to whatever extent it thinks fit, for it is its own right that the state is asserting. Should the natural or legal person on whose

behalf it is acting consider that their rights are not adequately protected they have no remedy in international law. All they can do is resort to municipal law, if means are available, with few of furthering their cause or obtaining redress... The state must be viewed as a sole judge to decide whether it protection will granted, to what extent it is granted, and when it will cease. It retains in this respect a discretionary power the exercise of which may be determined by considerations of a political or other nature, unrelated to the particular case'.

EXHAUSTION OF LOCAL REMEDIES

A state may not bring an international claiming respect of an injury to a national before the injured person has exhausted all local remedies. This rule was recognized by the International Court of Justice in the *Interhandel* Case as 'a well-established rule of customary international law' and by the chamber of the International Court in the *Elettronica Sricula* (ELSI) Case as an important principle of customary International law. The exhaustion of local remedies rule ensures that the state where the violation occurred should have an opportunity to redress it by its own means, within the framework of its own domestic system.

Calvo clause

Dr Calvo, an Argentine jurist, is credited with an ingenious device to obstruct diplomatic interventions by the western powers. In response to the frequent diplomatic interventions by western power in Latin America, the governments of these states inserted a clause in contracts between state and alien in which a latter agreed to confine himself to the available local remedies and to renounce diplomatic protection. The validity of the 'Calvo Clause' has been questioned by so many states,

including South Africa, on the ground that the national has no competence to renounce a right that attaches to the state and not to the national.

THE TREATMENT OF ALIENS

An individual has no right of entry to a state of which she is not a national. If she is admitted, she may be expelled; but mistreatment is not permitted in the process of expulsion. According to article 13 of the international covenant on Civil and Political Rights, a person facing expulsion is entitled to submit reasons against her expulsion and to have her case reviewed by a competent authority 'except where compelling reasons of national security otherwise require'. Moreover, according to a 1985 resolution of the general assembly, 'individual or collective expulsion of...aliens on grounds of race, color, religion, culture, descent or national or ethnic origin is prohibited'.

There is a dispute among states over the standard of treatment to be accorded to aliens. While some (mainly developing states) argue that the standard is the national one, requiring states to treat aliens as well as they treat their own nationals, others (mainly developed states) maintain that there is an international minimum standard, which accords to aliens a higher standard of treatment where the national standard fails to meet international standards. The difference is illustrated by the *Roberts Claim*.

The property Rights of Aliens-With Special Reference to Expropriation of property

A state incurs responsibility for injury to the property of an alien as well as to her person. If a state arbitrary confiscate the property of an alien without paying compensation, it is liable for violation of the international minimum standard.

SUCCESSION TO INTERNATIONAL DELICTS

There is a considerable support for the rule that a successor state is not liable for the international delicts of its predecessor. A successor state may, however, agree to accept the delictual responsibility of its predecessor.

Short summary

State Responsibility may arise from; inter alia, the following acts:

iii. Breach of Treaty

- See Chorzow case (1928)

It is a principle of International law that any breach of an agreement (treaty) invokes reparation by the party in breach

iv. Breach of Contract

- See Anglo Iranian Oil case

If there is a breach of contract between an company (International) and a state, then the company will urge its government to espouse its claim in the international arena. This is because a company doesn't have international *locus standi*.

v. Responsibility for expropriation of private foreign property

Expropriation is only justified if it is for a public purpose and in the public interest. Expropriation must not discriminate

against aliens, and where it occurs there must be compensation which must be adequate and effective.

- See Anglo Iranian Oil Co. V Banco Nazionale de Cuba
Any expropriation which is in effect confiscation or discriminatory is unlawful in international law

vi. Responsibility for Debt

The difficulty with debt arises from the question of state succession. I.e. is a new state obliged to pay the debts of its predecessor.

The Palmerstone theory suggests that if a state fails to pay its debt, the creditor nation has every right to use whatever means, including force to recover the debt.

UNIT 11

THE USE OF FORCE

INTRODUCTION

International law did not outlaw war or use of force by states before 1928. The distinction between the just and unjust war and the notion that recourse to war was permissible only when the course was just, were not accepted by states. Despite this, if only for reasons of political expediency, states did seek to justify their military actions in legal terms. In the earliest history the only distinction that existed then was a just and unjust war. A just war which was declared was considered to be legitimate and was founded on theological doctrine, following the breakdown of the church's authority, power was assumed by the sovereign nation states and the right to the use of force was recognised as an inherent right of every independent sovereign state. The right of self defence for instance was frequently invoked as a ground for military intervention in order to secure the moral high ground. The covenant of the League of Nations did not outlaw war. Instead it set up settlement procedures designed to delay recourse to war, in the hope that this would restrain states from going to war.

One of the most important developments in international law was the conclusion in 1928 of a legally binding multi-lateral treaty called the General Treaty for the Renunciation of War (also known as the *Kellogg-Briand Pact* or the *Pact of Paris*) was signed. In this treaty, adopted outside the framework of the League of Nations, states condemn recourse to war for the solution of international controversies, and renounce it as an

instrument of national policy in their relation with one another'. It was also agreed that disputes were to be settled by 'peaceful means'. The Kellogg-Brian Pact was accepted by over sixty states, including all the Great Powers of that period. The first thing that comes to mind with regards to the General Treaty is that it was adopted to:

1. Condemn the recourse of war.
2. Renounce national policy that accepted war.

More than 60 states were a party to this treaty. Overtime the General Treaty proved not to be effective but was not terminated. However, the formation of the United Nations and adoption of the United Nations Charter superseded the General Treaty.

From the General treaty Article 2(4) of the United Nations Charter is what expressly outlaws the use of force:

"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 purpose of the United Nations"

In 1986 the prohibition for the use of force was founded to be the cornerstone for the formation of the United Nations and was established as a rule of customary international law to go against the use of force as stated in the Nicaragua case.

Like the prohibition on murder in diplomatic society, the prohibition on the use of force in international society is not always observed however it is recognized by states as a fundamental principle of the contemporary international legal

order, as a norm with the status of jus cogens states that violate this norm either do so covertly or seek to justify their action under one of the exceptions to the use of force. None deny the existence of such rule.

What forms of force are prohibited

The United Nations in general prohibits the use of force as well as threat to use force and it also outlaws wars whether declared or not.

The prohibition on the use of force in Article 2(4) is limited to force used in international relations and does not concern itself with internal relations. The development of human rights and the rules of self-determination have affected the principle of this rule. Article 2(4) therefore does not provide a clear picture of the use of force that is prohibited.

To get a true picture of what is prohibited one would have to look at the practice of states and organisations like the UN. In 1970 the Declaration on the Interpretation of the United Nations Charter stated that:

“it is apparent that the rules relating to the use of force have been modified in order to promote the interest of the people struggling with self-determination and alien subrogation”

This confirmed that current state practice and political organisations should be used with regards to Article 2(4) of the UN charter.

See: Interpretation by the UN on the use of force general comment.

Economic force

There is a traditional view that Article 2(4) stops only armed force. Threat and armed force were used in the preamble of the UN Charter. Developed States argue that the use of force should be limited to armed force only whereas developing states hold that economic force should also be included in the interpretation of Article 2(4) because it can affect the political independence of a country. Force therefore does not necessarily have to refer to armed force but can be economical and /or political.

Although the argument that economic coercion is prohibited by art 2(4) is not accepted there is considerable support for the view that economic coercion violates the principle of non-intervention unless authorised by the security council acting under Chapter 7 of the UN Charter and has the same effect as armed force.

The uncertainty relating to the prohibition on economic coercion was highlighted in the Nicaragua case when the court stated that an embargo does not constitute non-intervention.

However, if the purpose of using economic coercion is to weaken a state's economy so as to destabilize the political independence of a state such an act will be considered to be inconsistent with the UN Charter in general.

Indirect force

Indirect force occurs where state A gives active support to rebels of state B such as by permitting them to establish bases in state A on its territory for attacks on state B in that way

it makes itself a party to the unlawful use of force. Encouraging the organization of rebels is discouraged or prohibited use of force by a state and was confirmed in the 1970 Declaration. In recent times the principles on the use of force have been confirmed by resolutions of the UN.

Reference: USA and Afghanistan

The United States attacked Afghanistan for its active involvement in harboring al Qaeda who where a threat to US security. The United States defended itself by claiming self defence.

On the prohibition relating to supporting people fighting for self-determination international law is not clear e.g. the court in the Nicaragua case was very careful not to give comment.

Circumstances when the use of force is authorised by the UN

1. Under the authority of the Security Council.
2. In exercise of the right to individual or collective self defence

Exceptions to the above include:

1. Self defence:

International customary law recognises the right to self defence. However, the extent to which it is applied is wide. The use of self defence can only be justified as an immediate and necessary response to a situation threatening (a) state security and (b) vital interests. Article 51 of the UN Charter recognizes the right to self defence as an inherent right if every 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. Measures taken by the members in exercise of the right to self defence shall be immediately reported to 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 defence from the above provision is allowed. When an event occurs that causes a state to resort to the use of self defence there is a requirement that such a state should report to the Security Council on measures to be undertaken.

Anticipatory self defence (two schools of thought)

Some scholars argue that self defence can only be used when there is an imminent attack on a state. Other scholars hold the view that self defence is an inherent right in every state as such a state is justified and has the right to defend itself where it fears or anticipates an attack. For example, Israel's attack on the United Arab Republic. The right to anticipatory self defence was reaffirmed in light of the September 11, 2001 attacks on the 'Twin Towers' in New York.

Legal scholars are divided as to whether art 51 allows anticipatory self-defence. One school argues that art-51 permits force to be used in self-defense if, and only if, an armed attack occurs. Another argues that the customary-law right of anticipatory self-defence is preserved by the phrase 'inherent right' in art 51, and that in the context of modern weaponry it is ridiculous to argue that the drafters of the Charter could have intended to exclude such right.

On a number of occasions states have invoked anticipatory self-defense to justify their action. Israel justified its attack on Egypt, at the start of the Six-Day war in 1967, as anticipatory self-defense on the grounds that the mobilization of Egyptian forces on the Israel border, the closure of the straits of Tiran, and the conclusion of a military pact between Egypt and Jordan provided evidence of an imminent attack.

See: Resolution 1368 and 1373 which recognize the inherent right to self-defense with regard to acts of terror.

Where a state is contemplating anticipatory self defence the defensive measure should be proportionate to the pending danger and all alternative remedies of protection must have been exhausted.

Following the acts of terrorism committed against the United States on 11th September 2001, the security council adopted resolution 1368 (12 September 2001) and 1373 (28 September 2001), in which it recognized the inherent right of self-defense of states, before proceeding to condemn the terrorist acts in question. On 7th October 2001, the United States and the United Kingdom began bombing Afghanistan on the ground that the Taliban government of that country had allowed Al-Qaeda terrorists to operate from its territory and thereby made itself a party to the unlawful use of force against the United States. This attack might be explained in terms of the traditional right of self-defense. The Taliban government had allowed Al-Qaeda terrorists to train on its territory and operate from its territory; Al-Qaeda unlawful acts might therefore be attributed to the government of Afghanistan; the government of Afghanistan refused to take action against Al-Qaeda when requested to do so by the

United States; the United States had reason to expect that further acts of terrorism would be launched against it from the Al-Qaeda operating from Afghanistan, therefore the United States and the United Kingdom was entitled to act in Self-defense against the state of Afghanistan.

Two objections may be raised to this new species of self-defense; firstly, art 51 envisages self-defense by a state against an armed attack by a state, and not a non-state actor. Secondly, this form of self-defense is at best preventative action, and at worst reprisal action. There is little substance in the first objection. Article 51 does not state that the 'armed attack' that gives rise to a right of self-defense must emanate from a state it may have been so interpreted in the pre-terrorist era, but there is nothing in art 51 to prevent the 'armed attack' from being attributed to a non-state actor. The second objection is more serious self-defense against terrorism involves punitive action against terrorist bases or the state that harbors terrorist after the act of terrorism has occurred with the intention preventing further such action.

This clearly goes beyond anticipatory self-defense which is limited to the response to an imminent threatened attack which cannot be deflected by the other means. For this reason, it is probably best to see self-defense against terrorism where it amounts to preventive action against future attacks, as permissible only with prior Security Council's approval -as happened in the case of the invasion of Afghanistan, which was preceded by Security Council resolution 1368 and 1373 approving the exercise of the right of self-defense.

Defense of Nationals

Customary international law recognizes the right of a state to use force to protect its nationals abroad. Today this right is asserted by those who take a broad view of art 51 and denied by those who see art 51 as excluding the customary-law right. This is a species of self-defense that lends itself to serious abuse, as illustrated by the numerous occasions on which the United States has invoked it as a pretext for military interventions in Latin-America states, including Granada in 1983, and Panama in 1989. On the other hand, the fact that a right may be abused should not result in its denial. That there are circumstances in which this form of intervention is justified, is illustrated by the Entebbe incident, in which Israel commandoes intervened forcibly to rescue Israeli Nationals held hostage by Palestinian terrorist in Entebbe, Uganda, after their flight from Tel Aviv to Paris had been hijacked, and Uganda authorities had failed to secure their release. On this occasion for three conditions required by customary international law for intervention were present:

- first, an eminent danger of injury to nationals
- secondly, a failure or inability on the part of the territorial sovereign (Uganda) to protect the national and
- thirdly, the measure of protection taken by Israel where confined to protecting its nationals against injury.

Humanitarian Intervention

Humanitarian intervention is distinct from protective intervention in that it involves intervention to protect another state's nationals. In this case the intervening state is not

protecting its own interests but instead is playing a more objective role. It must be noted that humanitarian intervention is open to being abused in that a state might intervene in order to promote an ulterior motive. E.g. securing some long term benefit. The use of humanitarian intervention has received considerable support for its role in the prevention of serious violations of human rights.

Collective self defence

The United Nations charter distinguishes between collective security, which is to be undertaken by the Security Council acting under Chapter VII, and collective self defence, which may be exercised by states under art 51 without United Nations authorization. From this it follows that a state may only assist an attacked state in collective self defence when the attack, in its context, also threatens the security- the self- of the assisting state. If there is no such threat to the assisting state, it is required to request the Security Council to take the necessary action under Chapter VII.

Intervention in civil strife and civil wars

(a) intervention where the rebels are not externally assisted a sovereign independent state is permitted to choose its own political system and government. Some countries exercise this choice by means of a ballot, others by means of a bullet. In either case it is an international affair, in exercise in self-determination. Other states may not interfere in this process even if it degenerates into civil war. This is confirmed by the 1970 Declaration on Principles of International Law, which obliges states not to interfere in civil strife in another state. Although past state practice appeared to recognise a rule permitting support by other states for the incumbent government

in a civil war, this rule is no longer accepted where the rebels constitute an organized movement with the political objective of replacing the government.

Difficulties arise where a state is requested by an incumbent friendly government to assist in the restoration of law and order resulting from the disturbance unconnected with the choice of government or political system. Here there is support for the view that a state may intervene at the invitation of the incumbent government.¹⁸

(b) Intervention where the rebels are externally assisted

A state may intervene to assist the incumbent government if rebels are assisted by another state and such support is sufficiently substantial to amount to an armed attack. In such a case the intervening state acts in support of the incumbent government in exercise of the right of collective self defence against foreign aggression. The post-world war II period has seen a number of interventions justified on this ground.

Wars of national liberation

Many of the prohibitive rules relating to the use of force have been relaxed and possibly amended, in wars of self-determination involving national liberation movements recognised by the United Nations as were SWAPO, ANC, PAC and PLO. Such wars are no longer viewed as purely internal civil wars, but as international wars to which the laws of war are to apply.

¹⁸ John Dugard International Law a South African Perspective Third Edition 2005

Self defence on the High Seas

A state may interfere with foreign ships on high seas in the exercise of the right of self defence. Thus a naval vessel may stop and search a foreign ship on the high seas where it has reasonable grounds for believing that it is carrying weapons to rebels in the flag state of the intercepting ship.

See UN Resolution 2627 and 2734.

UNIT 12

THE PEACEFUL SETTLEMENT OF DISPUTES

ARBITRATION AND JUDICIAL SETTLEMENT

It is a principle of international law that states shall settle their international disputes by peaceful means. This principle is reinforced by Art.33 of the UN charter and the Manila declaration on the peaceful settlement of international disputes.

A dispute can be defined as a disagreement on a point of law or fact, a conflict of legal views or of interests between two states. Disputes relate to an alleged breach of one or more legal duties. They may also relate to a question of attribution of title to territory, to maritime zones, to movables or parts of the cultural heritage of a state.

The majority of inter-state disputes are settled through direct negotiations between the parties or by third party assistance in the form of good offices, conciliation or the conduct of fact finding inquiries. Litigation in international law is very much a matter of last resort.

A. Charter of the United Nations

The Charter of the United Nations provides in its Chapter I (Purposes and principles) that the Purposes of the United Nations are:

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

removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace." (Article 1, paragraph 1).

The Charter also provides in the same Chapter that the Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with, among others, the following principle:

"All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered" (Article 2, paragraph 3). It furthermore, in Chapter VI (Pacific settlement of disputes), states that:

"The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice." (Article 33, paragraph 1)

B. Declarations and resolutions of the General Assembly

The principle of the peaceful settlement of disputes has been reaffirmed in a number of General Assembly resolutions, including resolutions 2627 (XXV) of 24 October 1970, 2734 (XXV) of 16 December 1970 and 40/9 of 8 November 1985. It is dealt with comprehensively in the Declaration on Principles of

International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations (resolution 2625 (XXV), annex), in the section entitled "The principle that States shall settle their international disputes by peaceful means in such a manner that international peace and security and justice are not endangered", as well as in the Manila Declaration on the Peaceful Settlement of International Disputes (resolution 37/10, annex), in the Declaration on the Prevention and Removal of Disputes and Situations Which May Threaten International Peace and Security and on the Role of the United Nations in this field (resolution 43/51, annex) and in the Declaration on Fact-finding by the United Nations in the Field of the Maintenance of International Peace and Security (resolution 46/59, annex).

C. Corollary and related principles

The principle of the peaceful settlement of international disputes is linked to various other principles of international law. It may be recalled in this connection that under the Declaration on Friendly Relations, the principles dealt with in the Declaration—namely, the principle that States 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; the principle that States shall settle their international disputes by peaceful means in such a manner that international peace and security and justice are not endangered; the principle concerning the duty not to intervene in matters within the domestic jurisdiction of any State, in accordance with the Charter; the duty of States to cooperate with one another in accordance with the Charter; the principle

of equal rights and self-determination of peoples; the principle of sovereign equality of States; and the principle that States shall fulfill in good faith the obligations assumed by them in accordance with the Charter-are interrelated in their interpretation and application and each principle should be construed in the context of other principles.

The Final Act of the Conference on Security and Cooperation in Europe, adopted at Helsinki on 1 August 1975, states that all the principles set forth in the Declaration on Principles Guiding Relations between Participating

States-i.e., Sovereign equality, respect for the rights inherent in sovereignty, refraining from the threat or use of force, inviolability of frontiers; territorial integrity of States, peaceful settlement of disputes; non-intervention in internal affairs, respect for human rights and fundamental freedoms, including the freedom of thought, conscience, religion or belief, equal rights and self-determination of peoples; cooperation among States, and fulfillment in good faith of obligations under international law-" are of primary significance and, accordingly, they will be equally and unreservedly applied, each of them being interpreted taking into account the others."

The links between the principle of the peaceful settlement of disputes and other specific principles of international law are highlighted both in the Friendly Relations Declaration and in the Manila Declaration, as follows:

1. Principle of non-use of force in international relations

The interrelation between this principle and the principle of the peaceful settlement of disputes is highlighted in the fourth preamble paragraph of the Manila Declaration and is also referred to in section I, paragraph 13, thereof, under which neither the existence of a dispute nor the failure of a procedure of peaceful settlement of disputes shall permit the use of force or threat of force by any of the States parties to the dispute.

The links between the principle of peaceful settlement of disputes and the principle of non-use of force are also highlighted in a number of other international instruments, including the 1945 Pact of the League of Arab States (art. 5), the 1948 American Treaty on Pacific Settlement (Pact of Bogota) (art. I), the 1947 Inter-American Treaty of Reciprocal Assistance (arts. 1 and 2) and the last paragraph of section II of the Declaration on Principles Guiding Relations between Participating States contained in the Final Act of the Conference on Security and Cooperation in Europe.

2. Principle of non-intervention in the internal or external affairs of States

The interrelation between this principle and the principle of the peaceful settlement of disputes is highlighted in the fifth preamble paragraph of the Manila Declaration.

The links between the principle of peaceful settlement of disputes and the principle of non-intervention are also highlighted in article V of the 1948 Pact of Bogota.

3. Principle of equal rights and self-determination of peoples

The links between this principle and the principle of peaceful settlement of disputes are highlighted in the Manila Declaration which (1) reaffirms in its eighth preamble paragraph the principle of equal rights and self-determination as enshrined in the Charter and referred to in the Friendly Relations Declaration and in other relevant resolutions of the General Assembly, (2) stresses in its ninth preambular paragraph the need for all States to desist from any forcible action which deprives peoples, particularly peoples under colonial and racist regimes or other forms of alien domination, of their inalienable right to self-determination, freedom and independence, (3) refers in section I, paragraph 12, to the possibility for parties to a dispute to have recourse to the procedures mentioned in the Declaration "in order to facilitate the exercise by the peoples concerned of the right to self-determination", and (4) declares in its penultimate paragraph that "nothing in the present Declaration could in any way prejudice the right to self-determination, freedom and independence, as derived from the Charter, of peoples forcibly deprived of that right and referred to in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, particularly peoples under colonial or racist regimes or other forms of alien domination, nor the right of these peoples to struggle to that end and to seek and receive support, in accordance with the principles of the Charter and in conformity with the above-mentioned Declaration".

4. Principle of the sovereign equality of States

The links between this principle and the principle of the peaceful settlement of disputes are highlighted in the fifth paragraph of the relevant section of the Friendly Relations Declaration which provides that "International disputes shall be settled on the basis of the sovereign equality of States" as well as in section I, paragraph 3, of the Manila Declaration.

5. Principles of international law concerning the sovereignty, independence and territorial integrity of States

Paragraph 4 of section I of the Manila Declaration enunciates the duty of States parties to a dispute to continue to observe in their mutual relations their obligations under the fundamental principles of international law concerning the sovereignty, independence and territorial integrity of States.

6. Good faith in international relations

The Manila Declaration enunciates in its section I, paragraph 1, the duty of States to "act in good faith", with a view to avoiding disputes among themselves likely to affect friendly relations among States. Other references to good faith are to be found in paragraph 5, under which good faith and a spirit of cooperation are to guide States in their search for an early and equitable settlement of their disputes; in paragraph 11, which provides that States shall in accordance with international law implement in good faith all the provisions of agreements concluded by them for the settlement of their disputes, in paragraph 2 of section II, under which Member States shall fulfill in good faith the obligations assumed by them in accordance with the Charter of the United Nations; and in one of

the concluding paragraphs of the Declaration, whereby the General Assembly urges all States to observe and promote in good faith the provisions of the Declaration in the peaceful settlement of their international disputes.

A provision similar to paragraph 5 of section I of the Manila Declaration is to be found in the third paragraph of section V of the Declaration on Principles Guiding Relations between Participating States contained in the Final Act of the Conference on Security and Cooperation in Europe.

7. Principles of justice and international law

The "principles of international law" are mentioned together with the principles of justice in Article 1, paragraph 1, of the Charter under which one of the purposes of the United Nations is "to bring about, by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace". The principles of international law are also mentioned jointly with the principles of justice in section I, paragraph 3, of the Manila Declaration under which "international disputes shall be settled on the basis of the sovereign equality of States and in accordance with the principle of free choice of means in conformity with obligations under the Charter of the United Nations and with the principles of justice and international law."

Paragraph 4 of section I of the Manila Declaration provides that "States parties to a dispute shall continue to observe in their mutual relations ... generally recognized principles and rules of contemporary international law."

"Justice" is referred to in Article 2, paragraph 3, of the Charter and in the first paragraph of the relevant section of the Friendly Relations Declaration, both of which provide for the settlement of international disputes "by peaceful means in such a manner that international peace and security and justice are not endangered."

8. Other corollary and related principles and rules

In its tenth preambular paragraph, the Manila Declaration singles out "respective principles and rules concerning the peaceful settlement of international disputes", "the exhaustion of local remedies whenever applicable". Article VII of the 1948 Pact of Bogoti contains a similar provision.

D. Free choice of means

The principle of free choice of means is laid down in Article 33, paragraph 1, of the Charter of the United Nations and reiterated in the fifth paragraph of the relevant section of the Friendly Relations Declaration and in section I, paragraphs 3 and 10, of the Manila Declaration. As indicated above, both the Friendly Relations Declaration and the Manila Declaration make it clear that recourse to, or acceptance of, a settlement procedure freely agreed to with regard to existing or future disputes shall not be regarded as incompatible with the sovereign equality of States. The principle of free choice of means has also found expression in a number of other international instruments, including the Pact of Bogota (art. III) and the Declaration on Principles Guiding Relations between Participating States, contained in the Final Act of the

Conference on Security and Cooperation in Europe (third para. of sect. V).

The following means are listed in Article 33 of the Charter, in the second paragraph of the relevant section of the Friendly Relations Declaration and in paragraph 5 of section I of the Manila Declaration: negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional arrangements or agencies or other peaceful means of the parties' own choice. Among those "other peaceful means", the Manila Declaration singles out good offices. Under the Friendly Relations Declaration (second paragraph of the relevant section) and the Manila Declaration (para. 5 of sect. I), it is for the parties to agree on such peaceful means as may be appropriate to the circumstances and the nature of their dispute.

MEANS OF SETTLEMENT

A. Negotiations and consultations

Referring to negotiation, the International Court of Justice remarked that "there is no need to insist upon the fundamental character of this method of settlement". It observed in this connection, as did its predecessor, the Permanent Court of International Justice that, unlike other means of settlement, negotiation which leads to "the direct and friendly settlement of ... disputes between parties" is universally accepted. Furthermore, negotiations are usually a prerequisite to resort to other means of peaceful settlement of disputes. This was recognized as far as arbitral or judicial proceedings were concerned by the Permanent Court in the following words: "Before a dispute can be made the subject of an action at law, its subject matter should have been clearly defined by diplomatic

negotiations." It should be noted that the term "diplomacy" is used in some treaties, such as the 1949 Revised General Act for the Pacific Settlement of International Disputes, as a synonym of "negotiations", as is also the phrase "through the usual diplomatic channels" as it appears, for instance, in the 1948 Charter of the Organization of American States.

1. Main characteristics

Negotiations

The Manila Declaration on the Peaceful Settlement of International Disputes highlights flexibility as one of the characteristics of direct negotiations as a means of peaceful settlement of disputes (sect. I, para. 10). Negotiation is a flexible means of peaceful settlement of disputes in several respects. It can be applied to all kinds of disputes, whether political, legal or technical. Because, unlike the other means listed in Article 33 of the Charter, it involves only the States parties to the dispute, those States can monitor all the phases of the process from its initiation to its conclusion and conduct it in the way they deem most appropriate.

Another characteristic of negotiation highlighted by the Manila Declaration is effectiveness (sect. I, para. 10). Suffice it to say in this connection that in the reality of international life, negotiation, as one of the means of peaceful settlement of disputes, is most often resorted to by States for solving contentious issues and that, while it is not always successful, it does solve the majority of disputes.

Consultations

Consultations may be considered as a variety of negotiations. While they are not mentioned in Article 33 of the Charter, they are provided for in a growing number of treaties as a means of settling disputes arising from the interpretation or application of the treaty concerned. Mention may be made in this connection of article 84 of the 1975 Convention on the Representation of States in their Relations with International Organizations of a Universal Character, which provides for the holding of consultations at the request of any of the parties, as well as of article 41 of the 1978 Convention on Succession of States in Respect of Treaties and article 42 of the 1983 Convention on the Succession of State Property, Archives and Debts, both of which provide for "a process of consultation and negotiation".

In other treaties, consultations are provided for as a preliminary phase in the process of settlement of disputes. Reference is made in this connection to article XI of the 1959 Antarctic Treaty, article 17 of the 1979 Convention on the Physical Protection of Nuclear Material and article XXV of the 1980 Convention on the Conservation of Antarctic Marine Living Resources, which provide, in case of disputes, that the States parties shall consult among themselves with a view to the settlement of the dispute by peaceful means.

Exchanges of views

Exchanges of views may also be considered as a form of consultations. They play an important role in the system established by the 1982 United Nations Convention on the Law of the Sea for the peaceful settlement of disputes arising from the interpretation and application of the Convention.

Reference is made in this connection to article 283 of the Convention, which reads as follows:

" 1. When a dispute arises between States Parties concerning the interpretation or application of this Convention, the parties to the dispute shall proceed expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means.

"2. The parties shall also proceed expeditiously to an exchange of views where a procedure for the settlement of such a dispute has been terminated without a settlement or where a settlement has been reached and the circumstances require consultation regarding the manner of implementing the settlement."

2. Initial phase

Normally, the negotiating process starts as the result of one State perceiving the existence of a dispute and inviting another State to enter into negotiations for its settlement. The start of the negotiating process is conditional upon the acceptance by the other State of such an invitation. It may occur that a State invited to enter into negotiations has valid reasons to believe that there is no dispute to negotiate and that there is, therefore, no basis for the opening of negotiations. It may also occur that a State, while agreeing to enter into negotiations, subjects the opening of negotiations to conditions unacceptable to the first State. The discretion of States with respect to the initiation of the negotiating process is, however, subject to certain limitations.

A number of treaties place on the States Parties thereto an obligation to carry out "negotiations", "consultations", or "exchanges of views" whenever a controversy arises in connection

with the treaty concerned. Examples of such treaties are the 1979 Agreement Governing the Activities of States on the Moon and Other Celestial Bodies (General Assembly resolution 34/68, annex, art. 15, para. 1), the 1975 Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character (art. 84), the 1982 United Nations Convention on the Law of the Sea (art. 283, para. 1) and the 1959 Antarctic Treaty (art. VIII, para. 2). Under some of those treaties, parties to a dispute arising from the interpretation or application of the treaty are under an obligation to start the consultation or negotiation process without delay (see art. 283, para. 1, of the United Nations Convention on the Law of the Sea; art. 15, para. 2, of the Agreement Governing the Activities of States on the Moon and Other Celestial Bodies; and art. VIII, para. 2, of the Antarctic Treaty).

Furthermore, many treaties providing for peaceful settlement procedures make resort to the third party means of settlement envisaged in the treaty conditional upon failure of negotiations. This approach is to be found in some treaties specifically concluded for the settlement of all disputes which may arise among the States parties thereto, such as for example, the 1949 Revised General Act for the Pacific Settlement of International Disputes (art. I).

This approach is also to be found in the dispute settlement clause of many multilateral treaties, such as article 4 of the 1948 Convention on the International Maritime Organization, and article VIII of the 1969 International Convention relating to Intervention on the High Seas in Cases of Oil Pollution Casualties.

It should furthermore be pointed out that the setting in motion of the negotiating process can be encouraged by international organizations. Aside from the fact that such organizations provide a meeting place where representatives of States parties to a dispute can get together and conduct formal or informal discussions with a view to settling the dispute, organs of an international organization may contribute to the opening of negotiations by addressing to the parties recommendations to that effect.

In the case of the United Nations, the General Assembly may, as is recalled in section II, paragraph 3 (a), of the Manila Declaration, "discuss any situation, regardless of origin, which it deems likely to impair the general welfare or friendly relations among nations and, subject to Article 12 of the Charter, recommend measures for its peaceful settlement". The means of settlement which the General Assembly has most frequently recommended to the parties to a dispute is negotiation. Reference is made in this respect to resolution 40/9 of 8 November 1985, in which the Assembly addressed a solemn appeal to States in conflict to proceed to the settlement of their disputes by negotiations and other peaceful means.

In addressing such recommendations to the parties, the General Assembly has often asked them to take account in their negotiations of specific elements such as the purposes and principles of the Charter; the objectives of resolution 1514 (XV) of 14 December 1960 (Declaration on the Granting of Independence to Colonial Countries and Peoples); the interests of the people concerned; the right to self-determination and independence; and the principle of national unity and territorial integrity.

In accordance with its responsibilities under the Charter of the United Nations in the area of peaceful settlement of disputes or of any situation the continuance of which is likely to endanger the maintenance of international peace and security, the Security Council has on a number of occasions adopted resolutions calling upon States to enter into negotiations.

The furtherance of negotiations between the parties to a dispute is but a limited aspect of the role which the United Nations and other international organizations play in the peaceful settlement of disputes. This role is dealt with comprehensively in chapter III of the present handbook, as far as the United Nations is concerned, and in chapter IV, as regards other international organizations.

It should finally be noted that the parties may be directed to negotiate by a judicial decision binding upon them. Reference is made in this connection to the Fisheries Jurisdiction cases, in which the International Court of Justice stated the following:

"The obligation to negotiate thus flows from the very nature of the respective rights of the Parties, to direct them to negotiate is therefore a proper exercise of the judicial function in this case. This also corresponds to the Principles and provisions of the Charter of the United Nations concerning peaceful settlement of disputes. As the Court stated in the North Sea Continental Shelf cases:

'... . this obligation merely constitutes a special application of a principle which underlies all international relations, and which is moreover recognized in Article 33 of the Charter of the United Nations as one of the methods for the peaceful

settlement of international disputes' " (LC.J Reports 1969, p. 47, para.86).

3. Conduct of the negotiating process

(a) Framework of the negotiating process

(i) Bilateral negotiations

Bilateral negotiations are traditionally conducted directly between duly appointed representatives or delegations or through written correspondence and have been greatly facilitated in modern times by the development of telecommunications and means of transportation. While the negotiators are often ministers of foreign affairs-or officials of the foreign ministries-of the parties, practice offers many instances of disputes settled by specialized negotiators. There are instances where Heads of State or Government are involved either at the initial stage of the negotiations-with the process being subsequently conducted at a lower level-or, conversely, at the concluding stage, after negotiations have been concluded at the expert level. The question of the respective ranks of the negotiators may be relevant to the extent that one side insists that the other side should be represented at the same level. There are many examples of bilateral negotiations conducted in the framework of diplomatic joint commissions, particularly for the settlement of territorial or waterway disputes.

B. Inquiry

1. Functions and relation to other peaceful means under the Charter of the United Nations. In an international dispute involving in particular a difference of opinion on points of

fact, the States concerned may agree to initiate an inquiry to investigate a disputed issue of fact, as well as other aspects of the dispute, to determine any violations of relevant treaties or other international commitments alleged by the parties and to suggest appropriate remedies and adjustments. Inquiry may also be resorted to when parties to a dispute agree on some other means of settlement (arbitration, conciliation, regional arrangements, etc.) and there arises a need for collecting all necessary information in order to ascertain or elucidate the facts giving rise to the dispute.

The function of inquiry-investigation or elucidation of a disputed issue of fact-was comprehensively dealt with in the 1899 and 1907 Hague Conventions² for the Pacific Settlement of International Disputes. Article 9 of the 1907 Convention reads as follows:

In disputes of an international nature involving neither honour nor essential interests, and arising from a difference of opinion on points of fact, the Contracting Powers deem it expedient and desirable that the parties who have not been able to come to an agreement by means of diplomacy should, as far as circumstances allow, institute an international commission of inquiry, to facilitate a solution of these disputes by elucidating the facts by means of an impartial and conscientious investigation."

Inquiry as a means of settlement of disputes has been provided for in a number of bilateral and multilateral treaties, including the Covenant of the League of Nations, the Charter of the United Nations and the constituent instruments of certain specialized agencies and other international organizations within the United Nations system, and in various instruments by

the regional bodies. Inquiry, as an impartial third-party procedure for fact-finding and investigation, may indeed contribute to a reduction of tension and the prevention of an international dispute, as distinct from facilitating the settlement of such a dispute. The possibility of fact-finding (inquiry) contributing to the prevention of an international dispute was recognized, for example, by the General Assembly in its resolution 1967 (XVIII) of 16 December 1963 on the "Question of methods of fact-finding." In the resolution, the Assembly stated its belief "that an important contribution to the peaceful settlement of disputes and to the prevention of such disputes could be made by providing for impartial fact-finding within the framework of international organizations and in bilateral and multinational conventions".

On 18 December 1967, the General Assembly adopted resolution 2329 (XXII), in which it requested the Secretary-General to prepare a register of experts in legal and other fields, whose services the States parties to a dispute might, by agreement, use for fact-finding in relation to a dispute. It also requested Member States to nominate up to five of their nationals to be included in such a register;

NEGOTIATION

Negotiation is the primary method used for attaining settlement of disputes on the international scene, since peaceful coexistence and conciliation are considered more important than the characterization of the state as guilty and another as innocent.

Obligation to enter into negotiations received judicial support in the North Sea Continental Shelf Case (ICJR 1969) when the ICJ declared that:

".... parties are under an obligation to enter into negotiations with a view to arriving at an agreement. .. "

Many international agreements also require negotiations to be conducted first before other settlement procedures may be attempted. Failure of negotiations may lead to the use of other methods involving the participation of a third party.

Good Offices

Third party (a state, group of states or an eminent individual) brings disputing parties to the negotiating table and may even suggest the general framework for producing a settlement.

Good Offices is a variant of mediation. Here a third party communicates the statements of the disputing parties to one another. It may also involve the outsider inviting the disputing parties to a settlement conference or undertaking other steps to facilitate their communication. This method is a specially useful in cases where disputing parties do not maintain diplomatic relations.

Mediation

Here a mediator attempts to reconcile the positions and claims of the parties. The Mediator is authorized to advance his or her proposal informally but nothing is binding about the mediator's role. A Mediator does not undertake an independent investigation. Proceedings are informal and private, unlike arbitration or judicial proceedings, with its formal procedures.

Conciliation

The process of settling a dispute by referring it to a commission of persons whose task is to elucidate the facts and endeavoring to bring them to an agreement. Conciliation commission makes a report containing proposals for a settlement, but not having the binding character of say a court judgment.

INQUIRY

This is conducted by someone who is not a party to the dispute who attempts to provide adversaries with an objective assessment. The primary function of a Commission of inquiry is to establish the facts pertaining to the dispute by hearing witnesses or visiting the area where breach of international law is said to have occurred.

Although the above methods have been used successfully in a number of disputes, it is only arbitration and judicial settlement that adjudication is done in accordance with legal principles and an award made which is accepted as binding on the contesting parties.

Arbitration

Has been defined as a procedure for the settlement of disputes between states by a binding award on the basis of law and as a result of an undertaking voluntarily accepted.⁷⁸

The only difference between arbitration and judicial settlement lies in the method of selecting the members of these judicial organs. In arbitration, this is done by agreement between the parties, while judicial settlement presupposes existence of a

standing tribunal with its own bench of judges and its own rules of procedure which parties to a dispute must accept.

Arbitration tribunals may consist of a single arbitrator or they may be collegiate bodies. Where the former is the case, the arbitrator is sometimes a dignitary e.g. Head of State who may delegate his responsibility to a person knowledgeable in international law.

Arbitration presupposes and depends upon the willingness of the states involved to submit to adjudication and their desire to reach settlement. A state is not required to submit a dispute to arbitration. Consent is therefore a prerequisite and can be ad hoc.

The identity of the arbitrators, formulation of the question to be submitted to the tribunal, rules of law to be applied and the time limit within which an award must be made must also be agreed by the parties. Such issues are spelt out in a special agreement known as the compromise.

If the tribunal is collegiate, it will usually be a mixed commission, that is to say, one upon which sit two or more arbitrators appointed in equal numbers by each of the parties separately plus an umpire appointed jointly by the parties or by the arbitrators.

The best known arbitral tribunal has been the Permanent Court of Arbitration established in 1900 in accordance with the 1899 Hague Convention for the pacific settlement of international disputes and later, the 1907 convention of the same name. This institution is still in existence, but it is neither a court nor

a permanent institution. It is rather a panel of some 300 persons (4 nominated by each contracting party to the 1899 and 1907 conventions).

It is from this number that states may select one or more arbitrators to constitute a tribunal for the settlement of a particular dispute. Only the bureau of the court, which acts as a registry is permanent. This so called court is essentially a machinery to call a tribunal into being. Since its inception, 28 cases have been referred to it or conducted with the cooperation of its bureau. Of these, only 4 have been decided since 1945, despite efforts to encourage the use of the court.

THE INTERNATIONAL COURT OF JUSTICE

The ICJ is the principle judicial organ of the UN. The statute of this court is essentially that of its predecessor, the Permanent Court of International Justice. The court is composed of 15 members, of whom no two judges may be of the same nationality. Judges are elected by an absolute majority at separately and, in theory, simultaneously held meetings of the Security Council and the General Assembly in accordance with the procedure outlined in Arts. 4 - 14 of the statute.

Persons eligible for election are those "of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are juris consults of recognized competence in international law" (Art. 2 of statute).

Judges are appointed for a 9 year term and may be re-elected. In order to ensure continuity elections are staggered with five

judges being elected every three years. Judges elect from among themselves the President.

A judge may only be dismissed when he or she is considered no longer fit to discharge his/her functions, and, only on the unanimous vote of the other judges.

A judge is not prevented from sitting in a case in which the state of his/her nationality is a party. However, the rules of court require a President to refrain from exercising his/her powers as President in a case involving his/her state.

JURISDICTION OF THE INTERNATIONAL COURT OF JUSTICE

The court has both jurisdiction in contentious cases as well as power to deliver advisory opinions.

Contentious cases - Only states have *locus standi* and may be parties in contentious cases before the court" This Article lays down in general terms the conditions to be fulfilled before the court can exercise jurisdiction.

Article 35 of the statute read together with Art. 93 of the charter particularizes the application of the general rule for different categories of states.

Under Art. 35 of statute of the court shall be open to state parties to the present statute.

Under Art. 93 (1) of Charter, all UN members are ipso facto parties to the statute.

Under Art. 93 (2), a state which is not a member of the UN may become a party to the statute of ICJ on conditions to be determined in each case by the General Assembly upon the recommendation of the Security Council.

It is however, a well-known fact that the fact that a state meets the above criteria does not make that state subject to the Jurisdiction of the court in a contentious case. For the court to be in a position to exercise jurisdiction in a concrete case in relation to a given state, there has to exist an element of specific consent on the part of the states concerned that it should decide that case.

It is that element of specific consent, coupled with implementation of Article 34 that constitutes jurisdiction "rationale personae" (locus standi). In short these are conditions that must be fulfilled before the court can purport to exercise jurisdiction at all.

The issue of consent by the parties is a well-established principle of international law. Reasons for establishment of this principle are plain and are well summarized by Anand R.P. in his book, Compulsory jurisdiction of the ICJ (1961) in which he points out that "when an authority designed to adjudicate exclusively between states is in question, it is plain that the source of jurisdiction can only be found in consent by the parties to resort to the tribunal. There exists no superior power capable either in fact or in law of creating a jurisdiction or imposing resort to it.

This point was first discussed by the Permanent Court of International Justice in the Eastern Carelia status case.⁸⁰In

this case the court stated that "no state can without its consent, be compelled to submit its dispute with other states either to mediation or arbitration or to any other kind of pacific settlement". Thus the jurisdiction of the court is in actual fact and in law built upon the foundation of consent.

This consent of the parties can be manifested in its extreme form in two ways.

The first system confers jurisdiction on the court by a special agreement or ad hoc agreement which is reached after the dispute has arisen. The second system confers jurisdiction in disputes that may arise in future.

The latter system can be divided into two reference in treaties, and declarations or what is conveniently but not accurately known as "compulsory jurisdiction".

Special Agreement

The court's jurisdiction based on special agreement is provided for under article 36(1) of the Statute of the ICJ which states that, "the jurisdiction of the court comprises all cases which the parties refer to it. " Historically international adjudication furnished a number of instances, of which the Alabama Claims Arbitration and the British Guiana-Venezuela Boundary Arbitration are perhaps the best examples, of cases in which the submission of a matter for adjudication has been facilitated by agreement between the parties determining the basis on which a matter was to be adjudicated. The Island of Palmas Arbitration illustrates how the arbitrator has been limited by the "compromise" to pronouncing between certain

specified possible solutions of a territorial dispute. In 1953 the International Court of Justice was requested by the parties to determine which of them had pronounced the more convincing proof" In this case, the court entirely complied with the request of the parties showing that under a prior agreement, the states parties to a dispute can seize the jurisdiction of the court.

All the above illustrations convey a notion of a special agreement between the parties to a dispute before they seek the contentions jurisdiction of the I.C.J. This shows that, as in the traditional arbitration, a form of "compromise" might be agreed upon where jurisdiction rests essentially on a special or ad hoc agreement. To this extent, Bowett correctly contends that "the jurisdiction of the court rests on the parties. As article 36 (i) states, it comprises all cases which the parties refer to it...."

The notion of a "special agreement" implies that the state is willing or gives its consent to be bound by the decision of the court. In other words, without the consent of the states concerned, no international judicial organ is competent to adjudicate upon the merits of a dispute between states. Thus, as Schwarzenegger asserts

"In the absence of consent or acquiescence, it (the sovereign state) is under no legal obligation to submit disputes with other sovereign states to procedures for the pacific settlement of international disputes or to agree to changes in the existing international status quo."

Under the statute of the International Court of Justice, the consent of the parties to the court's contentious jurisdiction can be express, tacit or inferred from the acts of the parties that is to say, there is no special form under which the consent of the state parties should be conveyed to the court. In the Corfu channel Case, 84 a letter to the court's registrar written by the Albanian Deputy Minister for Foreign Affairs' was considered to be a sufficient expression of consent by Albania. Bowett, notes that" since nothing in the statute requires consent to be given by both parties before an application to the court can be made, it is possible for a prorogated jurisdiction to exist. In such a case the court is seized with a unilateral application to which the other party pleads on the merits, without contesting the Jurisdiction. This type of consent, as was shown in the Minority Schools cases is treated as an acceptance of the jurisdiction, rather like an estoppel by conduct.

If one looks at the two above quoted cases, it will be seen that the approach as regards the Court's jurisdiction based on a special agreement has been the same in both the Permanent Court of International Justice and its successor, the International Court of Justice. In the Minority Schools case, the German government, on January 2, 1928 filed an application with the Court (P.C.I.J) asking for a judgment interpreting certain articles of the German-Polish Convention of May 15, 1922, relating to Upper Silesia. The Government had previously announced to the Council of the League of nations its intention to make this application; the matter had been before the Council, but in its resolutions of March 12, 1927, and December 8, 1927 the Council had not attempted to give a legal interpretation of the treaty provision in question. The urgency

of the matter led to prompt action. In the written proceedings on March 10, 1928 Germany filed a case and a reply, and Poland a counter - case and a rejoinder. Hearings of the German and Polish representatives were held in March 1928. Judgment was given and the court had the following to say:

"The court's jurisdiction depends on the will of the parties. The court is always competent once the latter have accepted its jurisdiction, since there is no dispute which states entitled to appear before the court cannot refer to it. Article 36 of the statute, in its first paragraph, establishes this principle. This principle only becomes in operative in those exceptional cases in which the dispute which states might desire to refer to the Court would fall within the exclusive jurisdiction reserved to some other authority."

All the above examples merely show that the Court can be seized with jurisdiction by an agreement between the parties. But as we notice from Article 36(1) of the statute of the court, there is nothing to indicate in what form such agreements should be. It is perhaps worthwhile to mention that there are three deliberate omissions from the statute and the rules of the court. First neither of those texts requires in the case of proceedings instituted by application, that the consent of the respondent state should be transmitted to the court with the application. Second, there is no provision regulating the manner in which the consent of the respondent state should be expressed. Third, there is no indication describing in as many words when proceedings should be instituted by special agreement and when by application. Thus in the *Mavronmmatis* case, Greece instituted proceedings against the United Kingdom by application by virtue

of a treaty or convention in force, namely the mandate for Palestine.

However, the application also related I part to the treaty of Lausanne which, at the time of the filling of the application, was not yet in force. To that extent the application was defective and the respondent State filed a preliminary objection to the jurisdiction of the court. Before this judgment was given, the treaty of Luasanne came into force in relation to the two litigating parties. The court recognized that this fact though extraneous to the proceedings, perfected its jurisdiction. The court recognized further that even though the application had been premature because the treaty of Lausanne had not been ratified at the time of its submission, this defect was made good by the subsequent deposit of the necessary ratifications. In the latter case on the merits the court seems to have deducted what might be termed an implied agreement when it says:

"It is not by reason of the jurisdiction conferred on 'the court under' Art. 26 of the mandate (for Palestine), but in consequence of an agreement between the parties resulting from the written proceeding, that the court has jurisdiction....."

The Mavrommatis (preliminary objection) case therefore, seems to have clearly established a principle that a formal agreement conferring jurisdiction upon the court can be made at any time up to the conclusion of the hearing.

Jurisdiction can also be conferred upon the court by an informal agreement between the parties reached by successive acts. In this instance, although the proceedings will have been

introduced by application it will be on the same footing with proceedings introduced by special agreement in which the court will have agreed to a proposition by the parties that the procedure should be that appropriate to a case introduced by application. The foundation upon which this proposition seems to be based is to Mavrommatis(merit) case and the Minority Schools case and many others. Thus for example, in the Corfu Channel case (preliminary objection), the successive acts were the application followed by a letter to the court, not being one of the formal documents of the written proceedings from the Deputy Minister of Foreign Affairs of Albania, in which the respondent state indicated that notwithstanding certain irregularities it was prepared to appear before the court in the case. The court held the contents of this letter to have perfected the jurisdiction of the court. This decision goes to show that while the consent of the parties confer jurisdiction to the court, neither the statute nor the rules of the court require or prescribe the form in which it should be expressed.

Another proposition that has arisen out of the above decision is that jurisdiction may be conferred upon the court by tacit consent of the parties - and this point was well summarized in the Haya de la Torre case where it was stated that:

"The parties have in the present case consented to the jurisdiction of the court. All the questions submitted to it have been argued by them on the merits, and no objection has been made to a decision on the merits. This conduct of the parties is sufficient to confer jurisdiction to the Court."

There are, it must be admitted certain advantages and disadvantages of this notion of special agreement. The advantage

of the court's jurisdiction being based on special agreement seems to be that, since adjudication on the basis agreed upon between parties is a possible method of securing the submission for adjudication of matters not covered by the existing compulsory jurisdiction of an international court..... When the parties would otherwise be reluctant to submit because the relevant law is too uncertain to command their confidence; such a device may have a significant contribution to make to the progress of international adjudication.

The disadvantage which arise out of the court's jurisdiction being based on special agreement is as Jenks observes, that it "eliminates in advance what the court might, if its judicial freedom in the matter remained unfettered, regard as the right decision. It is normally the duty of the court and not of the parties, to lay down the law; an agreement between the parties imposing the Court a choice between specified alternatives seems to be inconsistent with" right and duty of the court under article 38 of its statute to apply the sources of the law set forth therein. This critical approach to the Courts jurisdiction based on special agreement is also held by Hudson, who says:

"If proceedings are begun under special agreement, that instrument may set forth rules of law which the parties have agreed upon as applicable to the case, or it may provide how a particular rule of law is not to be applied"

The other criticism leveled against the court's jurisdiction based on special agreement is in relations to third parties. Generally, an agreement between the parties determining the basis on which a matter is to be adjudicated will be ineffective in relation to third parties. This general statement follows

from the, provisions of Article 59 of the Court's statute which states that a decision of the' ICJ

"has no binding force except between the parties", and article 94 of the Charter which, states that the undertaking given by the members of the UN to comply with the decision of the I.C.J applies only to cases which they are parties to. However, it should also be observed that if the court finds that the third party claims are the essence of the matter, it can dismiss the case before it on the ground that the necessary parties to a properly constituted action are not before it, in the matter suggested by Sir Arnold McNair in the Monetary Gold Case."

It might have misleadingly appeared from the above that parties seeking the Court's jurisdiction under a special agreement can enter into such as agreement whenever they feel like doing so. However, they are some limitations on the freedom of the parties. It is common sense that in circumstances where the parties are already bound, both as between themselves and towards other states, by an obligation to submit a matter for compulsory adjudication,.... they clearly cannot, in relation to other states, subtract from their existing obligation by agreeing to refer a matter for adjudication on some special basis." The question may arise in such circumstances as in multi-partite instruments to which a large number of states are parties and which might contain a compulsory jurisdiction clause. Any interpretation of such instruments would unjustifiably affect the interest of the other parties if it is done on the basis of a special agreement between a group of those states.

The second limitation seems to be that although the parties can acquiesce to the Court's jurisdiction based on special agreement in any form they cannot, however, change the procedural provisions of the statute under which the court is established. This means that when the parties have recourse to the court, any special agreement they may enter into must comply with the limits of what is permitted by the constituent instrument of the court as regards procedure. The Permanent Court of International Justice gave a clear Zones Case, that, "The Court cannot, on the proposal of the parties depart from the terms of the statute.

Reference to Treaties

It is possible for parties to come to an agreement that whenever and at such a time when a dispute arises as between them, the court should be seized with jurisdiction over such a dispute. Such kind of agreement is mainly to be found in treaties, and consequently this second part of the will be devoted to a discussion of the ICJ's jurisdiction based on reference in treaties.

The statutory basis for jurisdiction based on reference to treaties is Article 36 (1) of the statute of court which states that:

The jurisdiction of the court comprises all cases which the parties refer to it and all matters specially provided for the charter of the statute of court which states that:

"The jurisdiction of the court comprises all cases which the parties refer to it and all matters specifically provided for in the charter of the UN or in treaties or conventions in force."

The inference is that the parties to a dispute may refer any case to the court if they want a judicial decision on it, and any treaty may specifically provide for the jurisdiction of the court over any matter. In both cases, the Court's jurisdiction is the product of the consent of the parties.

The expression "treaties and conventions in force" was interpreted by the Permanent Court in the Polish Upper Silesia case as meaning treaties in force on the date of the institution of the proceedings. On this point, Rosenne, S., observed that:

"no equivalent decision appears to have been made by the present court and it is not clear that the current wording of Article 35 (2) of the statute and Article 36 of the rules of court would permit so broad an interpretation."

The usual method of conferring jurisdiction under this head is by a compromissary clause in a multilateral or bilateral treaty. The treaty, it seems, may provide for reference of a given dispute to the court or may be a treaty regulating some other topic and containing a compromissary clause or may be a general treaty of peaceful settlement of disputes. The effect of such a provision is to establish the jurisdiction of the Court, as between the parties but only to the extent specified in the compromissary clause. As Rosenne points out, "This device also had its origin in arbitration, but the permanence of the international court since 1922 has enabled it to make headway, and there are now hundreds of sets of jurisdictional obligations of this character - bilateral and multilateral in force between states.

There are, however relatively few cases decided by the court on this basis despite the great number of treaties that refer disputes to the court. The South West African case (preliminary objections) came under this heading. The proceedings in this case were instituted by Ethiopia and Liberia against the Republic of South Africa. To found the jurisdiction of the Court in the proceedings thus instituted, the applicants having regard to Article 80(1) of the charter of the United Nations relied on Article 7 of the Mandate for German South West Africa.

To this, the Republic of South West Africa filed a preliminary objection that the two applicants had no *locus standi* and that the court had "no jurisdiction to hear of adjudicate upon, the questions of law and fact raised in the applications and memorials"

South Africa contended that the court had no jurisdiction, more particularly because by reason of the dissolution of the League of Nations, the mandate for South West Africa was no longer a treaty or convention in force within the meaning of article 37 of the statute of court. What South Africa was saying, in effect is that the court could not base its jurisdiction on reference to the mandate for South West Africa because that mandate could not be regarded as a treaty in force due to the fact the League of Nations to which all the disputes that arose from the mandate were to be referred had since been dissolved.

On this first preliminary objection to the jurisdiction of the court, the court after reviewing the history of the mandate, concluded that:

"The mandate, in fact and in law, is an international agreement having the character of a treaty or convention"

The court further added that the Mandate for South West Africa like all other mandates was a special instrument having the character of a treaty or convention. After the Court found out that the Mandate for south West Africa was a treaty or convention, the next question was whether this treaty or convention was still in force. The court argued that the League of Nations in ending its own existence did not terminate the mandates but that it definitely intended to continue them by its resolution of 18th April 1946. Concluding its findings on this first preliminary objection the court observed that, "though the league of Nations and the permanent court of international justice have both ceased to exist, the obligation of the Respondent to submit to the compulsory jurisdiction of that court was effectively transferred to this court before the dissolution of the league." The court therefore, declared, after considering the two other preliminary objections that it had jurisdiction on basis of the Mandate.

Another case where a similar issue was discussed the case concerning the Northern Camercon's'" and it related to the failure of the United Kingdom to respect certain obligations directly or indirectly flowing from the Trusteeship Agreement for the territory of the Cameroons. To found the jurisdiction of the court the Cameroons relied on Article 19 of the Trusteeship agreement. The United Kingdom on the other hand put a preliminary objection that the court had no jurisdiction over the case.

The court after reviewing the history of the Trusteeship agreement refused to exercise its jurisdiction though it seems by implication that it recognized that the Trusteeship agreement gave it jurisdiction over the matter. The court cited the Nottebohm case which stated that:

"It is the act of the applicant which seizes the court but even if the court when seized finds that it has jurisdiction, the court is not compelled in every case to exercise that jurisdiction."

Another case cited was the Free Zone Case which stated that:

The court cannot as a general rule be compelled to choose between constructions (of a treaty) determined beforehand none of which may correspond to the opinion at which it Thus the court on the Cameroons case was of the opinion that though it had jurisdiction over the case on the basis of the Trusteeship Agreement, it would be inconsistent with its nature as a court to exercise that jurisdiction because the breach of the agreement over which it was asked to adjudicate and been finally consummated and it was physically impossible to undo the past. The court went on to point out that the applicant state was no longer, in a position to ask the court for more than a finding with force of re judicata, that the Trusteeship Agreement had not been respected by the Administrating power. In addition the court was of the view that the violations referred to have been finally consummated, and the Republic of Cameroon can - not ask for restitution in integrum having the effect of non-occurrence of the Union with Nigeria and non-division of the territory.

The two cases above clearly show that it is possible to seize the court with jurisdiction by reference to a treaty since a

treaty usually contains agreement or consent between two parties reached before a dispute arises to the effect that when and if a dispute arises such a dispute as between them should be referred to the Court for adjudication.

COMPULSORY JURISDICTION (OPTIONAL CLAUSE)

As it has been pointed out earlier on in the paper, the source of jurisdiction of the International Court of Justice is to be found in consent by the parties. Upon the foundation of this consent two systems of jurisdiction emerge: one system limits jurisdiction to particular disputes submitted to the tribunal by an agreement made ad hoc after the dispute has arisen or agreed in a treaty to the court certain disputes arising out of the treaty on a future date. This system has been discussed supra under the headings, special agreement and reference to treaties. The other system is whereby a number of states agree to confer jurisdiction to the instance of either party to the dispute and this system will form the basis of the discussion on the remaining part of the paper.

Anand, contends that this system is conveniently but not very accurately known as compulsory jurisdiction. Article 36 (2) of the court's statute provides for this kind of jurisdiction when it says that the parties to the statute may recognize as compulsory ipso facto and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the court in all legal disputes. It should be noted, however, that merely by being a party to the statute, a state cannot be said to have given jurisdiction to the court.

Such jurisdiction can only be founded when the disputants have submitted a dispute to the court. Thus Anand could not have been far from the truth when he says "the acceptance of the statute means nothing more than consent by a state that the court may exercise the jurisdiction which may be conferred upon it in accordance with statute." Indeed, it can be argued that a party to the statute is not bound by its acceptance of the statute to make any use of the court or submit to the court's exercise of contentious jurisdiction. For it to be bound there must be a further act of submission which may be made by an agreement to submit future disputes, or by an ad hoc copromis (special agreement) in respect of a dispute already arisen. It is upon this argument that Anand and even Kelsen contend that the jurisdiction conferred under article 36 (2) is not compulsory jurisdiction in the true sense of the word. Kelsen says, "in order to establish the true compulsory jurisdiction of the ICJ, the statute would have to provide that any member of the judicial community, party to any case whatever, is obliged to recognize the jurisdiction of the court if the other party refers the dispute to the court. But it provided only for the possibility of entering into agreement for the establishment.

Historically, this notion of the so called compulsory jurisdiction emerged with a view of extending the rule of law in the life of nations by assuring in advance of a controversy that states will permit the settlement of their disputes by the court. If the position had been different, there would have arisen, for example, an important controversy of a nature to disturb the peace and heighten the feeling of states and to expect states to reach agreement at such a point, to refer the dispute to the court would be to live in a dreamland.

The so called compulsory jurisdiction can only best be understood against the background of the development of obligatory (or compulsory) arbitration, that is to say arbitration taking place as a result of prior obligations assumed by states to arbitrate all or certain classes of disputes that might arise in future. Its history goes back to the Hague conference of 1907 when all the forty-four states present unanimously declared that: they accepted the principle of obligatory jurisdiction, and secondly, that certain disputes especially those which related to the interpretation and application of international agreements should be submitted to obligatory jurisdiction without any limitation whatever.

The creation of the permanent Court of Arbitration, opened the way for further advancement of the notion of compulsory jurisdiction. The committee of jurists charged with the creation of the Permanent Court of Arbitration in 1907 wanted the notion of a compulsory jurisdiction to be firmly established. But the Council of the League was not in agreement with the committee of Jurists and it contended that, "the jurisdiction of the court must be limited to such matters only as the parties might choose to submit to it, "because the council believed that "the matter was already determined by Article 14 of the covenant" which provide -"the court shall be competent to hear and determine any dispute of an international character which the parties thereto to submit to it." With this objection from the council of the League the question of compulsory jurisdiction fell on the way side.

Later in 1945, the San Francisco Conference deliberating on a draft charter for the United Nations, also failed to adopt the principle of general compulsory jurisdiction and it contended

itself by adopting the same old compromise of the previous statute. But at this point it was at least recognized that the ICJ had a limited compulsory jurisdiction and it was left to various states to declare their acceptance of the court's jurisdiction.

The most usual way in which the state may accept the jurisdiction of the court is by making a declaration under Article 36 (2) of the statute of the International Court of Justice which provides that:

"The states parties to the present statute may at any time declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other state accepting the same Obligation, the jurisdiction of the court in all legal disputes"

This provision which is generally, but not very accurately known as the "optional clause" was, as we have seen, introduced as a compromise between the views of the 1920 jurists and the Council of the League and was retained by the San Francisco Conference. This kind of compromise was aimed at encouraging and facilitating the making of declarations by providing a framework within which a member state might cast the limitations which it desired.

A declaration under this clause undoubtedly constitutes an international engagement binding on the state concerned in relation to any state also making a declaration under the optional clause. And despite the fact that a declaration is ' usually a unilateral act - entirely in the declaration of a state, "it results into a bilateral agreement when a dispute is

concretized by the filing of an application before the court." Assuming that one state has made a declaration, there arises another question as to the legal nature of such declarations, This issue was first' discussed by the Permanent Court of International Justice in two cases; Phosphates in Morocco (Preliminary objection) and Electricity Company of.. Sophia and Bulgaria (preliminary objection). In both the two cases, the court emphasized the reciprocal nature of the obligations resulting from the declarations made under the optional clause. Again in the International Court of justice the court declared that the consensual bond forms the foundation of the optional clause." This view of the ICJ was expressed in the Right of Passage over Indian Territory.

Here the court declared that "the contractual relation between the parties and the compulsory jurisdiction of the court resulting there from are established by the fact of the making of the declaration.' Judge chagla, pointed out in this case that the mere deposit of a declaration by a state and nothing else, brings about the consensual bond between the declarant and the state which has accepted the same obligation." But the issue of entry into force of these declarations is not as simple as judge ad hoc Chagla seems to imply.

The issue of entry into force of declarations can best be understood by first of all referring to Article 36(4) which lays down that such declaration, "shall be deposited with the Secretary General of the United Nations, who shall transmit copies thereof to the parties to the statute and to the Registrar of the court."

Declarations made by states, not parties to the statute are deposited with the Registrar of the court under the Security Council resolution of October 15. 1946.

Thus in the case of the Right of Passage over Indian Territory, the court declared that it is only by the deposit of its declaration with the Secretary General that the accepting state becomes a party to the system of the optional clause in relation to the other states. This view seems to have support in Article 102 of the Charter which says that. "no party to any such treaty or international agreement which has been registered in accordance with paragraph 1 of this article may invoke that treaty or agreement before any organ of the United Nations." It is a well-known that the declarations under the "optional clause" fall within the term treaty and since the court is an organ of the United Nations it is only natural to assume that these declarations are only valid after they have been deposited with the Secretary General.

But as argument was advanced in the Rights of Passage over Indian territory as to whether it was sufficient to deposit a declaration with the Secretary General or that sufficient time as would be reasonable to permit him to transmit copies thereof to the parties to the statute and Registrar of the court was to be allowed. In this case Portugal deposited a declaration accepting the compulsory jurisdiction of the court with the Secretary General on 19 November 1995. On December 22 Portugal filed in the court an application instituting proceedings against India about certain rights of passage over Indian territory. On December 30, the Government of India received a copy of the Portuguese declaration and this copy was officially transmitted to the government of India by the Secretary General

on January 19. 1956. The government of India contended that, as the Portuguese application was filed before the lapse of such time as is the normal course of events would have enabled the Secretary-General to compliance with Article 36(4), transmit copies of the Portuguese declaration to the other parties to the statute, the filing of the application violated the equality, mutuality and reciprocity to which India was entitled under the optional clause and under the express condition of reciprocity contained in its own declaration of 1940, "and consequently the conditions did not as yet exist to entitle Portugal to file the application.

It claimed that Article 36 required not only the deposit of the declaration of acceptance with the Secretary General but also its transmission to the other parties to the statute and that the declaration did not become effective until the latter obligation had been discharged. This Indian contention was rejected by the court which declared that the deposit of the declaration with the Secretary General is all that brings the accepting state into the system of the optional clause.

We have seen that the declaration comes into force as soon as it is deposited with the Secretary General to the united Nations; and it is now time to discuss the form in which this declaration is made.

It is recognized that no particular form is prescribed for the making of these declarations. Thus in some cases the text of declarations repeat the whole or in part the text of Article 36(2), but most declarations make reservations in some cases so many that it is doubtful whether "compulsory jurisdiction" was ever accepted. There are other declarations such as paragraph

eight of the United Kingdom's declaration which impose a condition of reciprocity - in other words the U.K declaration accepts the compulsory jurisdiction but on condition of reciprocity is provided for under article 36 (3) which says, "such declarations May be made unconditionally or on condition of reciprocity ..."

It is clear that the state which has accepted the jurisdiction of the court under article 36 (2), is only bound towards other states which have also undertaken this obligation. But is this to say that a declaring state is bound only in relation to such governments or states as have made exactly the same declarations and reservations? It must be admitted here that taken literally, the words "accepting the same obligation" might seem to imply that one state is bound to another, under the optional clause only when the obligations assumed in their respective declarations are exactly, or at least broadly the same. But such an interpretation would obviously have been highly prejudicial to the development of compulsory jurisdiction in view of the number and variety of the limitations, conditions and reservations which have in fact been inserted by many states in their declarations.

The effect of such an interpretation would have been, as Anand says, "to divide the states adhering to the optional clause into small groups whose members had made the same or similar declarations, and to make the members of each group bound inter se to accept the court's compulsory jurisdiction, but not bound to accept it at all in relation to members of any other group with declarations having somewhat different terms. With Anand's view I mind no one can doubt that, a few states having made limitations or reservation peculiar to themselves, would have

adhered to the optional clause and yet have been liable to compulsory jurisdiction at the suit of any other state, consequent' shaking the very foundation of the system. That the optional clause have such a disastrous effect was clearly not intended and consequently the "condition of reciprocity" contained in the optional clause has been interpreted in a quite different way.

The words "in relation to any other state accepting the same obligation" means as the court said in the Right of Passage over Indian Territory, that,

"as between states adhering to the optional clause each and all of them are bound by such identical obligations as may exist at any time during which the acceptance is mutually binding."

As it can be seen from the court's statement, the words have not been treated as laying down a condition that exactly, or even broadly, the same obligations of compulsory jurisdiction must have been accepted by each state. The words have rather been interpreted as required that there shall be complete reciprocity in the operation of compulsory jurisdiction under the optional clause as between two states which have accepted the obligation in different terms. This merely means that two states can be bound inter se even though their obligations are not in all respects co-extensive, but they will be bound only to the extent that they have accepted the same jurisdiction. An applicant state may therefore rely upon a responded state's declaration, but only within the limitations set by the applicant's own declaration. The Court's jurisdiction applies only to the common ground covered by the applicant's and respondent's declarations. What the whole thing amounts to is that, if state A, has

accepted jurisdiction with reservations a, b, c, it could rely not only on those reservations but also upon those made by other signatories. This means that if there is state B. which has made reservations d, e, f, it would mean in consequence that states A and B could both reciprocally rely on all of these six reservations.

The first case in which reciprocity in relation to conditions and reservations was discussed is the Phosphates in Morocco case 101 between Italy and France. The court said with reference of a difference between the French and Italian limitations in the declarations:

Nevertheless, as a consequence of the condition of reciprocity stipulated in Article 36(2) of the statute of the court, it is recognized that this limitation holds good as between the parties."

In another case - The Anglo-Iranian Oil Co. case the ICJ referring to the common ground applicable pointed out that:

"By these declarations jurisdiction is conferred on the court to the extent to which the two declarations coincide in conferring it. As the Iranian declaration is more limited in scope than the U.K. declaration, it is the Iranian declaration on which the court was to base itself. This is the common ground between them."

Again in the certain Norwegian Loans Case, the court expressly declared that

"since two unilateral declarations are involve, such jurisdiction is conferred upon the court only to the extent to which the

declarations coincide in conferring it. A comparison between the two declaration shows that the French declaration accepts the court's jurisdiction within narrower limits than the Norwegian declaration. Consequently, the common will of the parties, which is the basis of the court's jurisdiction exists within these narrower limits indicated by the French reservation."

From the pronouncements of the court in the three above cited cases, it has come to be established that the condition of reciprocity means at least two things. First, if compulsory jurisdiction under the optional clause is to apply to a particular dispute, both states must have made a declaration which comprises that dispute within its scope. Second, as a corollary, it also means that a party to a dispute whose own declaration comprises that dispute within its scope is always entitled to invoke a reservation or limitation in its opponent's declaration for the purpose of excluding the particular dispute from the application of the optional clause.

The last point one needs to discuss in relation to declarations is the question of the time limit. The authority given in Article 36 (3), that a declaration may be made "for a certain time," has been interpreted by states as giving them complete freedom in limiting the duration of their declarations. Most states have set a variety of time limits - some have made declarations for specific periods of let's say five on ten years after which they would renew them or allow them to lapse. Other states have made their declarations terminable on six or twelve months' notice to the Secretary General. Other states have combined the two forms above and have made declarations for a period of five or ten years and thereafter until notice of termination is given to the Secretary General.

The question of time limit was discussed by the ICJ in the Nottebohm case (Preliminary objection). In this case Guatemala made a declaration valid for five years from January 1947 and it was therefore due to expire in 1952. Liechtenstein's declaration was revocable on 12 months' notice. Five weeks before Guatemala's declaration was due to expire, Liechtenstein by application brought a case against Guatemala claiming damages in respect of various measures which Guatemala had taken against the person and property of Mr. Nottebohm in contravention of international law. Guatemala raised a preliminary objection that the court had no jurisdiction to hear the case against it after its declaration had expired even though the application might have been filed during the time of the currency of her declaration. The Court in answer to this preliminary objection by Guatemala, declared that, "the optional clause and the declarations of states thereunder relate to the seizing of the court with jurisdiction, not to adjudication of the suit." The court then went on to reject the preliminary objection when it observed that the declaration relates to seizing the court and once the court is seized, the subsequent expiry of the declaration cannot affect its power to adjudicate over the issue. The question of the time limit of declarations can be summed up as follows:

'The court's jurisdiction is expressed in special agreement, reference to treaties and by declaration under the optional clause.' In this regard, nothing more can be said than what the Permanent Court of International Law observed in the Rights of Minorities in Upper Silesia case. In this case it stated that:

"The Courts jurisdiction depends on the parties. The court is always competent once the latter have accepted its jurisdiction"

The question that arises from this observation, is whether once the will of the parties is expressed in a special agreement, treaty, or declaration, the court finds its jurisdiction and is compelled to exercise it. For example, in the Nottebhom case, the court stated that:

"it is the act of the applicant which seizes the court but even if the court when seized finds that it has jurisdiction the court is not compelled in every case to exercise that jurisdiction."

The logical interpretation of the above statement seems to be that, even when there is a special agreement between the parties, reference in a treaty, or declaration, the court can refuse to exercise jurisdiction on various other ground. But do these other grounds that the court takes into account in deciding whether to exercise jurisdiction or not, - constitute new basis of the court's jurisdiction extraneous to article 36 of the rest of this paper to show that the court actually has used additional tests extraneously to those found in article 36 of the statute of the court when dealing with questions of jurisdiction. The court has used four such test in its Decisions and advisory opinions, and these are sufficient interest, effectiveness, existence of a dispute, and that of international legal personality. A further question that this paper will attempt to answer is whether by looking at these extraneous conditions, the court was in effect saying it had jurisdiction but could not exercise it unless the condition are fulfilled or whether it was saying it did not have jurisdiction

until in addition to article 36 of the statute, the other conditions are also fulfilled:

An examination of the court's work, reveals that the court has refused to adjudicate if one of the following conditions have not been met - firstly, if any of the parties has no sufficient interest in the matter, secondly, when the courts' decision if given will not have any effect, thirdly if there is no dispute in issue, and lastly, if any of the parties has no legal personality.

UNIT 13

Human Rights

Today one of the principal aims of international law is the protection of the human rights of individuals against her or his own government. This is a post-world war ii development. Before 1945 the concern shown by international law for the treatment of aliens (described in the previous chapter) did not extend to the treatment of individuals by their own states. Pre-war international law provided protection to individuals, other than aliens lawfully admitted to the injuring state, in limited situations and circumstances.

Humanitarian law, which seeks to reduce the suffering of combatants and civilians in time of war, began to develop in the nineteenth century after the adoption of the Geneva Convention for the Amelioration of the condition of the wounded in Armies in the Field in 1864, and was well developed by the beginning of the 20th century. Humanitarian intervention, which permits states to intervene forcibly in states whose treatment of their own nationals shocks the conscience of mankind, was recognized by the international law as early as the seventeenth century, although in practice it was used mainly as a pretext for non-altruistic political intervention. The slave trade was abolished largely by collective international action.

The league of Nations period saw three important developments in the international protection of human rights: the mandates system established in 1919, as a sacred trust of civilization to promote the welfare for 'people not yet able to stand by themselves under the strenuous conditions of the modern world',

the international Labor Organization, created in 1919, to improve the working conditions of employees, and the minority treaties, designed to safeguard the rights of ethnic, religious, and linguistic minorities in the Balkans and Eastern Europe.

Despite these features of international law aimed at promoting the welfare of individuals, minorities, and undeveloped peoples, international law until 1945 was largely concerned with states, at that stage the only subjects of international law, and with the relations between states. The prohibition on intervention in the domestic affairs of states, enshrined in the Convention of the League of Nations, was respected as a guide principle. It was this principle which ensured that states failed to intervene in Germany before 1939 despite awareness of the atrocities committed by the Nazi regime against their own Nationals.

The enormity of the atrocities committed by the Nazi regime dramatically changed the nature of international law. This experience compelled statesmen to accept the need for a new world order in which the states was no longer free to treat its own nationals as it pleased. This new order was proclaimed by the charter of the United Nations, which recognized the promotion of Human Rights as a principle goal of the new world organization, and by the London Charter of 1945, which provided for the trial of the major Nazi war leaders.

The universal declaration of Human Rights

The Universal Declaration of Human Rights is generally agreed to be the foundation of international human rights law. Adopted in 1948, the UDHR has inspired a rich body of legally binding international human rights treaties. It continues to be an

inspiration to us all whether in addressing injustices, in times of conflicts, in societies suffering repression, and in our efforts towards achieving universal enjoyment of human rights.

It represents the universal recognition that basic rights and fundamental freedoms are inherent to all human beings, inalienable and equally applicable to everyone, and that every one of us is born free and equal in dignity and rights. Whatever our nationality, place of residence, gender, national or ethnic origin, colour, religion, language, or any other status, the international community on December 10 1948 made a commitment to upholding dignity and justice for all of us.

African Charter on Human and Peoples' Rights

The African Charter on Human and Peoples' Rights (also known as the Banjul Charter) is an [international human rights instrument](#) that is intended to promote and protect [human rights](#) and basic freedoms in the [African continent](#). Intended to promote and protect [human rights](#) and basic freedoms in the [African continent](#).

It emerged under the aegis of the [Organization of African Unity](#) (since replaced by the [African Union](#)) which, at its 1979 Assembly of Heads of State and Government, adopted a resolution calling for the creation of a committee of experts to draft a continent-wide human rights instrument, similar to those that already existed in [Europe](#) ([European Convention on Human Rights](#)) and the [Americas](#) ([American Convention on Human Rights](#)). This committee was duly set up, and it produced a draft that was unanimously approved at the OAU's 1981 Assembly. Pursuant to its Article 63 (whereby it was to "come into force three months

after the reception by the Secretary General of the instruments of ratification or adherence of a simple majority" of the OAU's member states), the African Charter on Human and Peoples' Rights came into effect on 21 October 1986- in honor of which 21 October was declared "African Human Rights Day".

Oversight and interpretation of the Charter is the task of the [African Commission on Human and Peoples' Rights](#), which was set up in 1987 and is now headquartered in [Banjul](#), [Gambia](#). A protocol to the Charter was subsequently adopted in 1998 whereby an [African Court on Human and Peoples' Rights](#) was to be created. The protocol came into effect on 25 January 2005.

In July 2004, the AU Assembly decided that the ACHP would be incorporated into the [African Court of Justice](#). In July 2005, the AU Assembly then decided that the ACHP should be operationalized despite the fact that the protocol establishing the African Court of Justice had not yet come into effect. Accordingly, the [Eighth Ordinary Session](#) of the Executive Council of the [African Union](#) meeting in Khartoum, Sudan, on 22 January 2006, elected the first judges of the [African Court on Human and Peoples' Rights](#). The relationship between the newly created Court and the Commission is yet to be determined. As of 15 June 2009, 53 countries have ratified the Charter.

Incorporation of socio-economic rights

The African Charter includes civil and political rights as well as specific economic and social rights. It has not separated socio-economic rights into a different instrument like in the European and American system. As to the Universal Declaration of Human Rights it contains a comparable catalogue

of rights. For instance, both texts recognize the right to satisfactory working conditions and to equal pay for equal (Article 15 of the ACHPR and Articles 23 & 24 of the UNDHR). Nevertheless, the African Charter is the only one to incorporate the right of equal access to public property and services.

The entrenchment of the second generation rights in the ACHPR should be regarded like a statement by African states that these rights as well as civil and political rights are indivisible and independent. In the *Preamble*, States parties have stated their conviction that civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality and that the satisfaction of these latter rights is a guarantee for the enjoyment of the formers. In such respect, this integrative African approach must be regarded as a serious argument against the objection to the justiciability of socio-economic rights grounded on their alleged difference with civil and political right. This is what makes Chidi asserting that the African Charter represents a significantly new and challenging normative framework for the implementation of economic, social and cultural rights advocates working in a position to pioneer imaginative approaches to the realization.

Duties of individual

Another feature of the ACHPR is that it breaks new ground by including individual duties. It consecrates a whole chapter to the duties of individuals, although this chapter only consists of three articles. In Ouguergouz's opinion, the concept of "individual duties" is actually not a feature of African

society alone. If this view is not wrong, however it is to be stressed that the approach adopted by the drafters of the African Charter was different. They believed that the references in extant international instruments to individual's obligations were so vague as to be meaningless. For this reason, they attempt to rectify this concern by enumerating obligations imposed upon individual.

The UDHR also mentions the duties of individual but in very general terms. At the regional level, the European system does not provides for such duties while the ACHPR does not ignore the notion of 'individual duties', but refers to it only in a single article formulated so widely that it is not easy to catch the legal content of duties prescribed. In Elias's view, the African Charter seems to express another feature of the African conception of human right, whose basis would appear to be the nature of the several of social organization in traditional Africa, in which the human person is at the center of whole raft of rights and obligations. At the time of the drafting of the Charter, the former President of Senegal, L Senghor, made a wish that, contrarily to the Europe where human rights are considered as a body of principles and rules placed in the hands of the individual, as a weapon, thus enabling him to defend himself against the group or entity representing it, the African Charter should be made in accordance with the African tradition which consists in not alienating the subordination of the individual of the community, in coexistence, in giving everyone a certain number of rights and duties.

'Claw-back' Clauses

A 'claw-back' clause, once again a distinctive feature of the African Charter, is one that permits, in normal circumstances, breach of an obligation for a specified number of reasons. The exercise of most of rights in the ACHPR is limited *ab initio* by clause of type: 'within the law', 'provided that individual abides by the law... With regard to other systems, universal as well as regional, they include derogation clauses. Derogation clauses are different from claw-back clauses in that they explicitly provide circumstances in which rights may be limited and define rights that are non-derogable and must be respected, even when derogation is permitted.

The concept of Peoples' rights

The African Charter has a much stronger focus on the subject of the rights of peoples. It has the distinction of being the only international instrument to provide a detailed exposition of rights of people.

Originality from the Institutional aspects

The enforcement machinery in the African system had long rested on a single institution which is the African commission. In that, it was similar to the universal system whose enforcement is monitoring by the UN Human Rights Committee, but it departed from the regional systems. Obviously, the system approved in 1981 by African leaders is different from the one conceived in 1998 adding the African Court on Human and People rights beside the Commission. In this respect, it joined the Inter-American system which have this couple of institutions but still depart from the European

one which suppressed the European Commission the very same year.

Strengths

1. The fact of including civil and political rights as well as socio-economic rights in a single instrument. It reveals the adherence of the African states parties to the conception that socio-economic rights are not different from civil and political rights and therefore, that they are justiciable.

2. The express prohibition in the African Charter against discrimination according to ethnic group constitutes a major step for the continent as a whole because the realization of this right will lead to greater economic opportunity for those people not of the same kinship as the head of government.

3. The enforcement machinery involving both the Commission and the Court. These institutional couples committed to promote and look after the observance of Human rights in the region are to be regarded positively if each of them plays its genuine role without interfering in the area of the other.

4. The wide jurisdiction recognized to the African Court on Human and Peoples' Rights in Article 3(1) of the Protocol to the ACHPR. The Court can rely not only on the ACPHR and the Protocol but also on any other relevant Human Rights instrument ratified by the State concerned. Comparatively to the Commission, the Jurisdiction of the Court is broadly defined. Indeed, even if it is mentioned that the Commission shall draw inspiration from various international law instruments, its main role is to watch out for the observance

of the ACHPR. A *contrario*, the extended jurisdiction of the Court relates to the subject-matter of cases, and not only to the use of the instruments as interpretative guides. This has the positive consequence of enlarging the legal basis of Human rights protection within the African region.

5. Apart from inter-state communications, article 55 of the Charter mentions other communications which can be considered by the commission on certain conditions. Although, there is no clear indication in this formulation that individual communications are allowed, the Commission at its 33rd session has established a procedure for dealing with individual communications and has considered a number of such communications and taken decisions on their merits.

Weaknesses

1. The omission of some important human right and the vagueness in the definition of certain rights protected. For instance, the Charter does not provide for the right of the accused to the aid where language is a problem and for the right to request witness. With regard to the right of "every human" being to life, the Charter does not define what should be the meaning of "human being", thereby leaving the issue of abortion to each state individual determination.

Furthermore, the enumeration of socio-economic rights is somewhat limitative. For instance, it does not mention rights such as the right to form or to join a trade union, the right to strike, the right to social security ...and even some that are included have not been given a strong contain. An

illustration can be taken from the right to work which is not formulated in a way that put upon the state the duty to provide for jobs. There is merely a reference to equitable and satisfactory conditions of work and to equal pay for equal work.

2. The proliferation of claw-back clauses which allow a state to restrict or infringe the granted right to the extent permitted by domestic law. As mentioned previously, claw-back clauses tend to be less precise than derogation clauses because the restrictions they permit are almost totally discretionary.

3. The fact that the enforcement of the Charter rights has long been informed by a philosophy of negotiation and conciliation rather than the adversarial approach associated with adjudicatory mechanisms. In this respect, the noticeable weakness is the establishment of an African commission with the duty to protect and to promote human rights in the region, but whose powers are in any case somewhat limited in terms of the Charter. There is no coercive machinery enabling the Commission to impose performance of its recommendations on the states concerned. For instance, in the *Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v. Nigeria*, recommendations made by the Commission since 2001 are yet to be implemented. Evans is of the view that failure of many States to comply with their Charter obligations and the subsequent arguably lack of reaction by the Commission can perhaps be explained by the emphasis which the Commission places upon the element of 'dialogue' within the reporting process. However, the Commission has reacted at

its 24th session through a resolution noting the absence of compliance by states parties. To remedy to this weakness, an African Court on Human and Peoples' Rights was established in a recent past under the Protocol to the ACPHR. Such ideological shift expresses the adherence of states parties to the alleged efficiency attached to a judicial adjudicatory system. Nevertheless, it is to be stressed that the benefice of having an African Court on Human Rights will largely depend on the willing of states parties to abide with its judgments that are binding.

Loopholes and escape roads

1. An absence of a clear indication on the binding or non-character of the ACHPR and then of the African Commission decisions has enable states parties often to not comply with their obligations. For instance, states parties have neglected to submit reports to the African Commission as required at Article 62.

2. The existence of claw-back clauses allowing states parties to restrict rights *ab initio*. To remedy to this weakness, the African commission, relying on articles 60 and 61 of the ACPHR, has interpreted the Claw-back clauses in a way that they may only restrict exercise of rights to the extent permitted by domestic law, provided that it is consistent with international law minimum standards.

3. The omission of some rights and the vagueness in the definition of some others has provided an escarpment corridor to states parties in the fulfilling of their obligation.

3. Resemblance and the difference between the African and the European human rights systems

Resemblances

- Both systems provide for a judicial settlement through a court.
- Both systems require the exhaustion of local remedies before the case can be admissible.
- Both systems provide for the possibility of a friendly settlement procedure.
- Both systems provide for a machinery of national report. However while the European system provides for reporting system at the request of the secretary general of the Council of Europe, the ACPHR establishes a permanent reporting system.
- Both systems provides for amicable settlement.
- Both systems provides for possibility to request advisory opinions from Courts. However, in the European system such opinions is limited on legal questions concerning the interpretation of the Convention and Protocols thereto while in the African system such opinions may be provided on any legal matter relating to the Charter and any other relevant Human rights.

Differences

- The enforcement machinery of the African system consists of the African Commission and the African Court of Human and People Rights. Under the European system, the protocol N. 11, which came into force on November 1, 1998,

replaced the European commission and the former Court of Human Rights with the actual European Court on Human Right.

- The Jurisdiction *ratione materiae* of the European Court is restricted to matters concerning the interpretation and application of the Convention and the protocols thereto while the African Court has a wider jurisdiction encompassing the interpretation and application of the Charter, the Protocol and any relevant Human Rights instrument ratified by the states concerned. Moreover, the jurisdiction *ratione personae* in the African system is wider defined than in the European system. The European Court can sit only on cases submitting by victims while the African Court, through the channel of the African Commission, can received cases submitted by non-victims.

- The European Court is composed of a number of judges equal to that of the High contracting parties and there is no restriction on the number of judges of the same nationality. In the African system the situation is unlike. It is provided that the Court consists of eleven judges and that no two judges shall be nationals of the same state.

- While the African Court has to render its judgment within ninety days of having completed its deliberations. No time-limit is required from the European Court.

- While the African system entrenches civil and political rights as well as socio-economic rights in a single, the European system provides for the protection of these rights in different instruments.

- While the European system provides for derogations clauses and precises what are the rights that may not be limited even in case of emergency, the African Charter incorporates claw-back clauses which allow a state to restrict the granted right, even in normal circumstances, by reference to its own domestic laws.

4. *Locus standi* of individuals and remedies before the African Court for Human and Peoples' Rights and the Inter-American Court

Locus standi

Under Article 5 of the African Court Protocol, only the African Commission, states parties and African inter-governmental organizations enjoy an unconditional direct standing before the African Court on Human and Peoples' Rights. As to NGOs and individuals, a combined reading of Article 5 (3) and 34(6) of the African Court Protocol shows that they cannot apply directly to the African Court, save if the matter involves a state that has made a declaration accepting the Court jurisdiction to this end. In the inter-American system, there is not such an option. It is only the Inter-American Commission and the states parties that may bring a case directly before the court, individuals are in any case oblige to submit their complaint through the Inter-American Commission. In other words, both systems are similar in that they mediate individuals' submission of cases through the Commissions, but they differ to the extend that in the African system individuals have, depending on the will of states parties, an optional road which allows them to pass by

the Commission and apply directly to the Court. So far, only Burkina Faso has made such an option available to individuals. Another aspect that deserves to be pointed out is that in both systems the jurisdiction of Courts is not limited only to victims due to the fact that Commissions can receive petitions even from non-victims and therefore submit them the Court.

Remedies

As to remedies, Article 27 of the Protocol corresponds closely with the Article 63 of the American Convention. Both articles provide for remedies that are appropriate, for the payment of fair compensation to the injured party and for the possibility to adopt provisional measures in cases of extreme gravity. Killender points out that 'though the African Court Protocol provides that its judgments are binding, there is no provision similar to the one in the American convention that provides that reparations ordered by the Inter- American Court can be enforced in national courts.

From a practical point of view, this statement would not make a very significant difference if Article 30 of the African Court Protocol Can be regarded like binding on states parties. In such case, it will be possible for the complainant in any case to initiate a process of execution of judgment against the state concerned. Apart from this, it is to be desired that the African Court follows the practice of the Inter-American Court which has usually précised the amount of compensation, instead of the African commission one which consists of only stating the right of the complainant to an adequate compensation without providing the amount.

5. Assessment of the African Commission Jurisprudence
Jurisprudence on Peoples' rights to self-determination

Article 20(1) of the ACHPR reaffirms the right of all people to the self-determination. As known, this principle originates from the United Nations. However, the relevant question that has never found the unanimity of all remains the exact meaning of the concept 'people'. While some are of the opinion that 'people' relates only to sovereign state, others support that it cannot be limited to this category only and should extend to different communities inside a state. The African Commission has already dealt with cases brought on the basis of Article 20 (1) and has mixed the both approaches of it.

For instance in the *Katangese Peoples' Congress v Zaire*, where the president of this congress tried to rely on the right to self-determination to achieve the independency that region, the Commission held that `` in the absence of concrete evidence of violations of human rights to the point that the territorial integrity of Zaire should be called to question and in the absence of evidence that the people of Katanga are denied the right to participate in government (...), Katanga is obliged to exercise variant of self-determination that is compatible with sovereignty and territorial integrity of Zaire.

As pointed out by Dresso, the finding of the Commission suggests that as long as, there is a constitutional and statutory framework that guaranteed participation of all zaireois equally, the self-determination of Katangese found

expression through exercise of the self determination of all zaireoise. According to Ouguerouz, this was a measure of extreme prudence of the African commission, which preferred to link the exercise of the right to self-determination to that of the right of the individual to participate in the government of this country. The Commission held the same position in *Constitutional Rights and Civil Liberties Organization v. Nigeria*.

It is clear from the *Katangese* and others cases that the Commission considered the peoples' right to self-determination like applying to the population of a state as a whole as well as like applying to a particular people within a state. The African Commission has not limited the concept "people" to sovereign states but it has usually combined its application with other principles in order to reach a fair and balanced decision.

In the case involving the *Ogoni* community against the state of Nigeria, the African Commission applied peoples' rights to that community. The case provides evidence that the African Commission regards peoples' rights as also providing protection to subgroup against their states. In this connection, it is to be pointed out that the people right to self-determination has also an economic dimension. It implies that every people shall exercise permanent sovereignty over their natural resources. Although the African Charter does not expressly mention the phrase "permanent sovereignty over natural resources", it provides for this right in the terms of Article 21.

It is in this context that in the *Ogoni* case, the African Commission founds that the state of Nigeria had violated the rights to free disposal of one's wealth and natural resources. The wider application of the concept ``people'' is somewhat in line with the original context in which this right arose in the region. At the beginning this right was invoked in connection with peoples under colonial and alien domination who naturally did not enjoy sovereignty. Nevertheless, despite the possibility to broadly apply the concept, the practice of the African Commission has reflected the will of this institution to remain in accordance with the practice of African states and the OUA. In this respect, the people right to self-determination can be asserted in any case, provided it is consistent with the African Union notions of sovereignty.

Jurisprudence on Socio-economic rights

Socio-economic rights have usually been dealt with by the African Commission subsequently to civil and political violations. However, there are cases where they were the main subject of complaints. In both contexts, the African Commission has in many cases found violations of these rights:

- In the *John K. Modise* case, where the complainant was rendered homeless by a denial of nationality by both Botswana and South Africa, the Commission held on the basis of Article 5 of the ACHPR that such enforced homelessness was inhuman and degrading treatment that offended human beings' dignity.

- In *Union Interafricaine des Droits de l'Homme v. Zaire*, where the Complaint was grounded, *inter alia*, on allegations of mismanagement of public finances, the failure of Zaire to

provide basic services, and shortage of medicines, the Commission held that there had been a violation of Article 16 of the ACHPR.

- In *Annette Pagnouille (on Behalf of Abdoulaye Mazou) v. Cameroon*, the Commission found a violation of Article 15 of the ACHPR guarantying the right to work because a Magistrate, Mr Mazou, had been held in prison without trial and not reinstated in his position when others condemned in similar circumstances had been.

All the following decisions and others show a real willing of the African commission to promote and protect socio-economic rights in the region. Unfortunately, despite all the violations found by the African Commission, this institution has not clearly stated through its jurisprudence its views on legal nature of these rights. In such connection, considering the approach undertaken in the ACHPR, one may contemplate the assertion that the African Commission should regard them as justiciable and not merely as 'objectives'.

The Inter-American Human Rights System

Introduction

The states of the American continents have created a regional institution, the Organization of American States (OAS), which includes several structures for protecting human rights. The [Charter of the Organization of American States](#) focuses on several areas promoting human rights: democracy, economic rights, the right to education, and equality. The Charter also establishes two main institutions designed specifically for human rights protection and promotion: the Inter-American

Commission on Human Rights and the Inter-American Court of Human Rights. It protects rights via the creation of substantive norms and maintains these standards through the petition process.

History

Regional interaction is not new to the Americas. At the beginning of the 19th century, South American freedom fighter Simón Bolívar attempted to create an association of states from the hemisphere during the 1826 Congress of Panama. Later that century, in 1890, the First International Conference of American States was held in Washington, D.C., where the International Union of American Republics and the Commercial Bureau of the American Republics were first established. The Commercial Bureau, which turned into the Pan American Union in 1910, was a predecessor of the OAS.

The 21 participants in the Ninth International American Conference signed the OAS Charter on April 30, 1948 in Bogotá (Colombia), thus transforming the Pan American Union into a new regional organization. Included in the Charter was an affirmation of the nations' commitments to common goals and respect for one another's sovereignty. Participants in the conference also signed the [American Declaration of the Rights and Duties of Man](#), which, having been signed just months earlier than the United Nation's Universal Declaration of Human Rights, became the first international document proclaiming human rights principles. The Director General of the Pan American Union, Alberto Lleras Camargo, became the first Secretary General of the OAS.

Organization of American States

The [Organization of American States](#) strives to address five general areas of focus. First, it looks to further democracy, specifically by strengthening freedom of speech, encouraging an increase in the participation of civil society in government, and eliminating corruption. Second, the OAS seeks to promote human rights, especially the areas of women's rights, children's rights, and cultural rights. Third, the Organization focuses on increasing regional and hemispheric peace and security by eliminating terrorism and de-mining the area. Fourth, the OAS concentrates on improving rule of law by strengthening the Inter-American legal development, ridding the region of illegal drug use and trafficking, and lowering regional crime levels. Last, the Organization of American States tries to strengthen the regional economy. It supports the creation of a Free Trade Area of the Americas, it looks advances in science and technology, telecommunication, tourism, sustainable development and the environment. It also looks to reduce poverty and promote education, and deal with labor issues.

All 35 countries of the Americas have ratified the [Charter of the OAS](#) and belong to the organization. The 21 original member states, who signed the OAS Charter on April 30, 1948, were: Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Cuba, the Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, the United States, Uruguay and Venezuela. The following states have joined the OAS since then: Barbados (1967); Trinidad and Tobago (1967); Jamaica (1969); Grenada (1975); Suriname

(1977); Dominica (1979); Saint Lucia (1979); Antigua and Barbuda (1981); Saint Vincent and the Grenadines (1981); The Bahamas (1982); St. Kitts and Nevis (1984); Canada (1990); Belize (1991); and Guyana (1991).

Main Bodies

The OAS Charter has been amended twice, once by the 1967 [Protocol of Buenos Aires](#) and again in the 1985 [Protocol of Cartagena de Indias](#). The Charter outlines the institutional structure of the Organization of American States. There are six main types of institutions associated with the OAS: Governing Bodies; Committees and Commissions; the General Secretariat; the Inter-American Emergency Aid Fund; Specialized Organizations; and Other Agencies. These six branches of the OAS perform distinct roles and functions for the organization.

Governing Bodies

There are three different governing bodies within the OAS. The [General Assembly](#) is the highest decision making body. It meets once a year and its membership consists of the foreign ministers of each member state.

The [Permanent Council](#) mainly addresses administrative and political issues arising within the OAS. It is headquartered in Washington, DC, and meets on a regular basis; its membership consists of one ambassador appointed per member state.

The [Inter-American Council for Integral Development](#) focuses on

promoting economic development and combating poverty.

Inter-American Committees and Commissions

There are seven main committees or commissions within the OAS. The most significant avenues for promoting and protecting human rights within the OAS fall within this type of institution. The seven bodies are: the Inter-American Committee Against Terrorism (CICTE); the Inter-American Juridical Committee; the Inter-American Commission on Human Rights; the Inter-American Court of Human Rights; the Inter-American Drug Abuse Control Commission; the Inter-American Telecommunications Commission; and the Inter-American Committee on Ports.

General Secretariat

The General Secretariat carries out programs and policies set by the General Assembly and the Councils. There are 21 sub-groups to assist the General Secretariat in this duty.

Specialized Organizations

These include: the [Pan American Health Organization](#); the Inter-American Children's Institute; the Inter-American Commission of Women; the Pan American Institute of Geography and History; the Inter-American Indigenous Institute; and the Inter-American Institute for Cooperation on Agriculture.

Other Agencies and Entities

The OAS also has an Administrative Tribunal, an Inter-American Defense Board, and a Pan American Development Foundation.

Human Rights Bodies of the Organization of American States

The two main institutions for the protection and promotion of human rights throughout the American hemisphere are the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights.

Inter-American Commission on Human Rights

The [Inter-American Commission on Human Rights](#) was the principle institution that the OAS Charter created for human rights protection and promotion. It is based in Washington, DC (USA) and is assisted by an Executive Secretary's Secretariat. It is composed of seven independent experts who are elected to four year terms by the OAS General Assembly. During its sessions, it hears from individuals and representatives from organizations on various claims of human rights abuses.

The main duty of the Commission on Human Rights is to hear and oversee petitions that have been made against a member state of the OAS claiming a human rights abuse. The human rights universally protected by the Commission, and thus eligible to be petitioned for their protection, are those found in the American Declaration of the Rights and Duties of Man. States have ratified the American Convention on Human Rights are bound by the human rights guaranteed in the Convention, which are monitored by the Commission.

The proceedings of the Commission are listed in the Commission's Statute and Regulations. In most scenarios, the proceedings are the same for petitions being filed against countries that have signed the Convention and those that have

not. The status for admissibility, the procedural stages, the fact-finding process, and the decision making are all similar, if not the same, in the two instances. One difference rests in the petition's outcome; with countries that have ratified the American Convention, the Commission is asked to find a "friendly settlement"; no such specification is made for states that have not ratified the Convention.

Any individual, group of people, or NGO who are legally recognized in at least one OAS member state may file a petition; the petition may be submitted by either the victim or a third party may do so, with or without the victim's knowledge. The criterion for an admissible petition is listed in Articles 44 through 47 of the American Convention, as well as in Articles 26 and 32 through 41 in the Commission's Regulations. In each situation, a petition must include information on the individual or individuals filing the petition, the subject matter of the petition, and the "procedural posture" of the petition.

There are two types of petitions that may be filed: either a general petition or a collective petition. A general petition is filed when a widespread form of human rights violations that is not limited to just one group of people or just one incident has occurred. A collective petition is filed when there are numerous victims of a specific incident or practice violating human rights. With both types of petitions, specific victims must be acknowledged. All petitions must include the name, nationality, profession or occupation, postal address, and signature of the person submitting the petition. An NGO must include its legal address and legal representative's

signature.

All petitions filed must include certain facts to be admissible. Petitions should state the place where the violation occurred, the date on which it happened, the names of the victims, and the names of state officials involved with the violation. All pieces of information should be as specific as possible, as the Commission does not have the economic or personal resources to always conduct thorough investigations without help from the petitioners themselves. Especially crucial to a successful petition is the inclusion of as detailed and thorough information as possible regarding the government's involvement in the human rights abuse, as the Commission is only authorized to investigate claims made against a government of an OAS member state. A government may be involved directly or indirectly, by failing to prohibit, prevent, or stop private human rights abuses. In providing this information, relevant interviews may be submitted, and can be kept confidential if need be.

Another useful inclusion to a petition is a list of the rights violated. These petitions, which may be based on either civil and political rights or social, economic, and cultural rights, may refer to OAS human rights documents, as well as human rights documents from the United Nations or other regional bodies. They may also refer to precedents set by the Inter-American Commission on Human Rights or the Inter-American Court of Human Rights.

The American Declaration and the American Convention both

stipulate situations in which the suspension of certain rights would be legitimized. Even if the rights violated in a petition qualify as derogable in distinct circumstances, it may still be a valid petition, if the government had failed to prove the rights suspension necessary, or the rights suspension was unnecessarily broad, or if the suspension was unnecessarily discriminatory, or if the suspension violated other state international agreements. Still other rights, even with the Declaration's and Convention's clauses, are held to be non-derogable, and thus no situation is justification for their suspension. These rights, if infringed, may always be petitioned.

Eligibility of a petition depends on a few further criterion. The Commission will only accept petitions where all domestic legal action has already been unsuccessfully taken; a petition must prove this to be the case. If the petitioner cannot prove this, the state's government may be asked to do so, and if the state can show that some domestic legal opportunities are still available to the petitioner, then the petitioner must demonstrate that one of four situations applies: either access to these remedies has been denied or prevented, there has been an unnecessary delay in judgment, there was a denial of adequate legal counsel, or the domestic legislation does not provide due process to protect the rights violated.

After all domestic legal action has been completed, the petition must be filed within six months of the final ruling. Extensions are granted when the state interfered with the process, and then the petition must be filed within a reasonable amount of time. If the petition is being filed by a

third party, it must be done so within a reasonable amount of time.

A petition may not be submitted that, in essence, duplicates a previous or current petition. One such petition may be submitted if the other is a general petition, or if it does not deal with the facts of the case of the new petition, or if it does not address the same victims for settlement purposes, or if the first petition was submitted by a third party unknown to the victims who are submitting a new petition.

If at any point it becomes apparent that a petition is inadmissible, the Commission informs the petitioner and closes the file. Otherwise, the Commission will examine the case. It opens a file, gives the case a number, and submits all pertinent information to the government in question's Minister of Foreign Affairs. It requests that the Minister supplies information on the facts and on domestic remedies utilized, while it alerts the petitioner that the petition is being examined. Normally, it will allow the government 90 days to respond, but it can grant an extension of up to 180 days if the government so requests and proves it necessary. Sometimes the Commission may request that information be shared sooner than 90 days for special cases; a lack of response on the part of the government may indicate it is guilty.

The government's response, if there is one, is forwarded to the petitioner, who then has thirty days to comment on the response as well as submit further material, if desired. The petitioner may ask for evidence on certain government statements or may request an oral hearing for the introduction

of witnesses. The Commission then will decide whether or not to hold the oral hearing; it is authorized but not obligated to do so. The petitioner may also request for the Commission to undertake an on-site investigation in the country in question. The Commission will only investigate for allegations of widespread human rights violations within a country, and look at individual cases then as demonstrative of a broader theme. This method is rarely undertaken for just an individual case.

The Commission, after making its decision on the petition, releases judgment on what should be done by issuing recommendations to the state concerned. In the event that the state is party to the American Convention, the Commission must attempt to formulate a friendly settlement, if possible. The Commission, following this outcome, prepares a report for each party and for the OAS Secretary General to publish.

If a friendly settlement is either not sought or reached, the Commission writes a report with the facts of the case and the Commission's conclusions, recommendations, and proposals. The state concerned and the Commission then have 3 months to decide whether or not to submit the case to the Court of Human Rights or settle the matter. Next, the Commission formally adopts an opinion and a conclusion with time limits for the government to undertake the proposed measures.

If the state is a party to the American Convention and has accepted the Court's optional jurisdiction, the Commission or the state may refer the petition to the Court of Human Rights for a new evaluation culminating in a binding judgment with

possible monetary ramifications.

States that are not parties to the Convention are not subject to the friendly settlement clause. In that situation, the Commission will undergo its fact finding and then determine the merits of the petition, adopt a final decision (usually a lengthy resolution) with recommendations and deadlines. Regulations state that the decision may be published "if the state does not adopt the measures recommended by the Commission within the deadline", yet the Commission has actually published more frequently than that. The Commission may recommend compensation to the victims, but does not have the power to officially award such compensation. The decisions of the Committee are not legally binding.

In addition to investigating cases, the Commission may, on its own initiative, investigate and issue a report on the human rights situation in any OAS member state. The Commission bases its independent studies on reports it has received from NGOs and individuals. The Commission also submits an annual report to the OAS General Assembly, with information on resolutions of particular cases, reports on human rights situation in various states, and discussions of areas needing further action to promote and protect human rights.

Inter-American Court of Human Rights

The [Inter-American Court of Human Rights](#) was established in 1978 with the entry into force of the American Convention. It hosts seven judges who are each nominated and elected for six years long terms by the parties to the American Convention; a justice may be reelected only once. The Court has its

permanent seat in San José (Costa Rica).

The Court's jurisdiction is limited. It may only hear cases where the state involved has a). ratified the American Convention on Human Rights, b). has accepted the Court's optional jurisdiction (as of 1992, only 13 of 35 nations had signed this optional jurisdiction), c). the Inter-American Commission on Human Rights has completed its investigation, and d). the case was referred to the Court either by the Commission or the state involved in the case within three months of the release of the Commission's report. An individual or a petitioner may not independently bring forth a case to be considered by the Court.

In the event that the Commission brings a case forward to the Court of Human Rights, it notifies the original petitioner. At this point, the petitioner or an attorney has the opportunity to request necessary measures, including precautions for witnesses and protections for evidence.

Proceedings are both written and oral. Initially, both a written Memorial and Counter-Memorial are submitted. They may be accompanied by a statement of how the facts will be proven and how the evidence is to be presented. In the event that there are complex legal issues involved, petitioners may request a supporting amicus curiae brief from an NGO. Normally hearings are open to the public, but the Court may decide to close them.

The Court's deliberations are always secret and confidential;

its judgments and opinions are published. If the Court rules that a right has been violated, it will order that the situation be rectified. It may award compensation to the victim for actual damage, emotional harm, and/or litigation costs, but it will not award punitive damages.

Main Human Rights Treaties and Declarations

International legal instruments take the form of a *treaty* (also called agreement, convention, protocol) which may be binding on the contracting states. When negotiations are completed, the text of a treaty is established as authentic and definitive and is "signed" to that effect by the representatives of states. There are various means by which a state expresses its consent to be bound by a treaty. The most common are ratification or accession. A new treaty is "ratified" by those states who have negotiated the instrument. A state which has not participated in the negotiations may, at a later stage, "accede" to the treaty. The treaty *enters into force* when a pre-determined number of states have ratified or acceded to the treaty.

When a state ratifies or accedes to a treaty, that state may make *reservations* to one or more articles of the treaty, unless reservations are prohibited by the treaty. Reservations may normally be withdrawn at any time. In some countries, international treaties take precedence over national law; in others, a specific law may be required to give an international treaty, although ratified or acceded to, the force of a national law. Practically all states that have ratified or acceded to an international treaty must issue decrees, amend existing laws or introduce new legislation in

order for the treaty to be fully effective on the national territory.

Declarations, on the other hand, are non-binding documents. They instead serve to proclaim a shared point of view of many nations.

The OAS has adopted several declarations and treaties relating to human rights, some being:

[American Declaration of the Rights and Duties of Man](#) (1948)

[American Convention on Human Rights](#) (1969)

[Cartagena Declaration on Refugees](#) (1984)

[Inter-American Convention to Prevent and Punish Torture](#) (1985)

[Protocol of San Salvador: Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights](#) (1988)

[Protocol to the American Convention on Human Rights to Abolish the Death Penalty](#) (1990)

[Inter-American Convention on the Forced Disappearance of Persons](#) (1994)

[Inter-American Convention on the Prevention, Punishment, and](#)

Eradication of Violence Against Women (1994)

Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities (1999)

Proposed American Declaration on the Rights of Indigenous Peoples (1997)

The European convention on human rights

The European convention for the protection of human rights and fundamental freedoms (European Convention), which was adopted by the council of Europe in 1950, came into force in 1953. Today it is an essential component of the political order of Europe with 45 members, which includes all historically 'western European' states, Turkey, and erstwhile 'Eastern European' states such as Russia, Hungary, the Czech Republic, and Slovakia. The European Convention is confined to civil and political rights. Economic, social, and cultural rights are protected in a separate convention, the European Social Charter of 1961.

The European convention and the international covenant on civil and political rights share a common source of inspiration, the Universal Declaration of Human Rights, and they consequently follow the same pattern. There is no protection of property rights in the European Convention, but this right is guaranteed in the first Protocol to the convention. The Death penalty is not outlawed in the convention, but this was done in the second protocol of 1983, which has been ratified by many states.

The convention has succeeded in extending human right to millions of Europeans, largely as a result of the effectiveness

of the methods of enforcement, through both domestic law and international machinery.

Contracting states are required to 'secure to everyone with their jurisdiction' rights contained in the convention (art.1) and to ensure that their municipal law provides 'an effective remedy' (art.13). As treaties form part of the municipal law of most of the European states without the need for an Act of legislative incorporation, the convention is part of the local law of most Europe. Consequently it is considered and enforced by the domestic courts of these countries in the first instance. Countries which follow Dualist approach to treaties have either incorporated the convention into municipal law or amended their legislation where appropriate guide in human rights cases.

The international machinery for the enforcement of the European Convention on human rights has undergone a major change. Under the original enforcement scheme, a part-time commission acted as a filtering body to decide whether application were admissible and as a mechanism to secure a friendly settlement. Its report went to the committee of Ministers of the council. Where no friendly settlement was archived, the application was referred to a part-time court to decide the case.

The new system, introduced by protocol XI of 1994, and first implemented in 1999, is a response to the increased work load imposed on part-time commission and judges. The commission is abolished and now there is only a court.