INTODUCTION TO PUBLIC INTERNATIONAL LAW

Edited By

Dr. Esraa Adnan Fangary

Lecturer of law

Faculty of Law

South Valley University

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Preface

International Law is one of the finest subjects for studying, ‘as it opens up new horizons to navigate beyond the egg-shell enclosure of one’s mental faculties. It is our duty to know the law of our Country (*Ignorantia juris non. excusat!*) but it is a privilege to know the Law of Nations .States are legal persons and are subjects of International Law. It is impossible to imagine the States today, carrying on their multifarious activities across the borders, on an unprecedented scale, in a legal vacuum!

Let us then learn and endeavour to bring about World Peace and Security, Opportunity may open up to enable you to serve in a bigger capacity but until then there is no reason to get disappointed! They also serve who only stand and wait!

Esraa Adnan

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Introduction:

This book focuses on international law principles and perspectives. International law is composed of a framework of widely accepted principles upon which rules are developed and applied. The status and precise nature of these principles vary depending on the perspectives of the states, tribunals, academics, and practitioners who examine them.

This does not imply that they lack certainty or clarity; rather, it reflects the diverse nature of international law, which lacks a constitutional or parliamentary framework and is infused with international politics.

This book describes the structure and content of public international law, as well as how it operates. It explores the law critically, how it has evolved and is implemented, as well as current and future trends.

In doing so, it will occasionally look beyond the legal to consider political and other extralegal considerations that are an important component of international law. On the other hand, this book does not attempt to describe the entire international legal system in detail. As a result, there are no separate chapters on maritime law, international trade law, environmental law, humanitarian law, human rights, or international criminal law.

Rather, these above-mentioned areas of international law practice are analyzed in the context of the subject of international law under consideration. For example, Chapters 1 and 2 examine subjects of international law and the rights and obligations derived from international human rights and criminal law regimes in the context of non-state actors. Case studies and modern examples are incorporated into the discussion of a specific topic, and critical analysis and the future development of international law are highlighted. As a result, this book will provide a consistent understanding of the basics of international law, how they are practiced and applied, and – where relevant – what the future may hold.

Preliminary chapter

Legal Basis of International Law

The definition of international law

Public international law is traditionally defined as the law between sovereign nation-states, hereinafter, states, especially within the context of the laws of war, peace and security, and protection of territories.

While these concerns of international law remain paramount among states today, the classic definition of public international law has expanded to include a more diverse group of subjects and a broader scope of activities.

In addition to states as subjects of international law, other participants engaged in international law activities and its development include private entities, individuals, and international organizations.([1)

International law is primarily conceived of as a system of law that regulates the conduct of, and between, states in the exercise of their external relations with other states.

The development in the relations between states, globalized trade, rules relating to recourse to armed conflict, and the increasing role of non-state institutions in the development and indeed creation of international law, means that it is no longer possible to simply talk of the 'law of nations' as synonymous with international law.

Some have defined Public International law as a body of principles & rules commonly observed by States in their mutual relationship with each other. It; includes the law relating to States and International organizations and also International Organizations *inter se*. It also includes the rules of law relating to international institutions and individuals, and non-State entities and individuals.

[1] Henriksen, Anders. International Law. United Kingdom, Oxford University Press, 2019, p 32.

International legal personality refers to the entities or legal persons that can have rights and obligations under international law as States, International Organizations, individuals and companies in some cases .

1. States:

A State must has the following characteristics to be subject to Public International Law:

(1) a permanent population;
(2) a defined territory;
(3) a government;
(4) the capacity to enter into relations with other States.

Some writers also argue that a State must be fully independent and be recognized as a State by other States. The international legal system is a horizontal system dominated by States which are, in principle, considered sovereign and equal.

International law is predominately made and implemented by States. Only States can have sovereignty over territory. Only States can become members of the United Nations and other international organizations. Only States have access to the International Court of Justice .[1]

2. International Organizations:

International Organizations are established by States through international agreements and their powers are limited to those conferred on them in their constituent document. International organizations have a limited degree of international personality, especially vis-à-vis member states.

They can enter into international agreements and their representatives have certain privileges and immunities. The constituent document may also provide that member States area

[1] Peters, Anne. Transparency in International Law. India, Cambridge University Press, 2013, p 46.

legally bound to comply with decisions on particular matters. The powers of the United Nations are set out in the United Nations Charter of 1945.

The main political organ is the General Assembly and its authority on most matters (such as human rights and economic and social issues) is limited to discussing issues and making recommendations.[1]

The Security Council has the authority to make decisions that are binding on all member States when it is performing its primary responsibility of maintaining international peace and security. The main UN judicial organ is International Court of Justice (ICJ), which has the power to make binding decisions on questions of international law that have been referred to it by States or give advisory opinions to the U.N.

3. Nationality of individuals, companies, etc:

Individuals are generally not regarded as legal persons under public international law. Their link to State is through the concept of nationality, which may or may not require citizenship. Nationality is the status of being treated as a national of a State for particular purposes.

Each State has wide discretion to determine who is a national. The most common methods of acquiring nationality at birth are through one or both parents and/or by the place of birth. Nationality can also be acquired by adoption and naturalization.

Companies, ships, aircraft and space craft are usually considered as having the nationality of the State in whose territory they are registered.

[1] Peters, Anne. Transparency in International Law. India, Cambridge University Press, 2013, p 65.

This is important because in many circumstances. States may have international obligations to regulate the conduct of their nationals, especially if they are carrying out act activities outside their territory.

Under the principle of nationality of claims, if a national of State A is injured by State B through internationally unlawful conduct, State A may make a claim against State B on behalf of its injured national. This is known as the doctrine of diplomatic protection.

The Establishment of international law

International law reflects the establishment and subsequent modification of a world system founded almost exclusively on the notion that independent sovereign states are the only relevant actors in the international system.

The essential structure of international law was mapped out during the European Renaissance, though its origins lay deep in history and can be traced to cooperative agreements between peoples in the ancient Middle East. [1]

Among the earliest of these agreements were a treaty between the rulers of Lagash and Umma (in the area of Mesopotamia) in approximately 2100 BCE and an agreement between the Egyptian pharaoh Ramses II and Hattusilis III, the king of the Hittites, concluded in 1258 BCE.

A number of pacts were subsequently negotiated by various Middle Eastern empires. The long and rich cultural traditions of ancient Israel, the Indian subcontinent, and China were also vital in the development of international law.

[1] Henriksen, Anders. International Law. United Kingdom, Oxford University Press, 2019.

In addition, basic notions of governance, of political relations, and of the interaction of independent units provided by ancient Greek political philosophy and the relations between the Greek city-states constituted important sources for the evolution of the international legal system.[1]

Many of the concepts that today underpin the international legal order were established during the Roman Empire. The jus gentium (Latin: “law of nations”), for example, was invented by the Romans to govern the status of foreigners and the relations between foreigners and Roman citizens.

In accord with the Greek concept of natural law, which they adopted, the Romans conceived of the jus gentium as having universal application.

In the Middle Ages, the concept of natural law, infused with religious principles through the writings of the Jewish philosopher Moses Maimonides (1135–1204) and the theologian St. Thomas Aquinas (1224/25–1274), became the intellectual foundation of the new discipline of the law of nations, regarded as that part of natural law that applied to the relations between sovereign states.

After the collapse of the western Roman Empire in the 5th century CE, Europe suffered from frequent warring for nearly 500 years. Eventually, a group of nation-states emerged, and a number of supranational sets of rules were developed to govern interstate relations, including canon law, the law merchant (which governed trade), and various codes of maritime law—e.g., the 12th-century Rolls of Oléron, named for an island off the west coast of France, and the Laws of Wisby (Visby), the seat of the Hanseatic League until 1361.

[1] Craven, Matthew C. R.. Time, History and International Law. Netherlands, M. Nijhoff, 2007.

In the 15th century the arrival of Greek scholars in Europe from the collapsing Byzantine Empire and the introduction of the printing press spurred the development of scientific, humanistic, and individualist thought, while the expansion of ocean navigation by European explorers spread European norms throughout the world and broadened the intellectual and geographic horizons of western Europe.

The subsequent consolidation of European states with increasing wealth and ambitions, coupled with the growth in trade, necessitated the establishment of a set of rules to regulate their relations. [1]

In the 16th century the concept of sovereignty provided a basis for the entrenchment of power in the person of the king and was later transformed into a principle of collective sovereignty as the divine right of kings gave way constitutionally to parliamentary or representative forms of government. Sovereignty also acquired an external meaning, referring to independence within a system of competing nation-states.

The Sources of International law

Article 38(1) of the ICJ Statute authoritatively states that the sources of international law are :

a) International Conventions or treaties.

b) International Customary Law.

c) General Principles of law recognized by Civilized Nations.

d) Judicial Precedents.

[1] d'Aspremont, Jean. Formalism and the Sources of International Law: A Theory of the Ascertainment of Legal Rules. United Kingdom, OUP Oxford, 2013.

e) Juristic Writings.

f) Ex aequo et bono. (Equity & good conscience)

These sources are applied in the same order by the I.C.J. International lawyers draw a distinction between 'formal' and 'material' sources of law. Formal sources are those giving a particular norm its validity or authority – treaty, custom and general principles.[1]

a)International Treaties :

Treaties (sometimes called agreements, conventions, exchanges of notes or protocols) between States – or sometimes between States and international organizations – are one of main sources of law. [2]

Strictly speaking a treaty is not a source of law so much as a source of obligation under law. Treaties are binding only on States which become parties to them and the choice of whether or not to become party to a treaty is entirely one for the State – there is no requirement to sign up to a treaty. Why is a treaty binding on those States which have become parties to it ?

The answer is that there is a rule of customary international law – pacta sunt servanda – which requires all States to honor their treaties. That is why treaties are more accurately described as sources of obligation under law.

But many treaties are also important as authoritative statements of customary law. A treaty which is freely negotiated between a large number of States is often regarded as writing down what were previously unwritten rules of customary law.

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[1] Craven, Matthew C. R.. Time, History and International Law. Netherlands, M. Nijhoff, 2007.

[2] Henriksen, Anders. International Law. United Kingdom, Oxford University Press, 2019.

That is obviously the case where a treaty provision is intended to be codificatory of the existing law. A good example is the Vienna Convention on the Law of Treaties, 1969. Less than half the States in the world are parties to it but every court which has considered the matter has treated its main provisions as codifying customary law and has therefore treated them as applying to all States whether they are parties to the Convention or not.

In theory, where a treaty provision codifies a rule of customary law the source of law is the original practice and opinio juris – the treaty provision is merely evidence. But that overlooks the fact that writing down a rule which was previously unwritten changes that rule. (1)

From that time on, it is the written provision to which everyone will look and debates about the extent of the rule will largely revolve around the interpretation of the text rather than an analysis of the underlying practice.

Moreover, even where a treaty provision is not intended to be codificatory but rather is an innovation designed to change the rule, it can become part of customary law if it is accepted in practice. See, e.g., the *North Sea Continental Shelf* cases (1969):

> '*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 on the basis of what was originally a purely conventional rule, an indispensable requirement would be that within the period in question, short though it might be, State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked; - and should*

(1) Peters, Anne. Transparency in International Law. India, Cambridge University Press, 2013, p 62.

moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved.' (ICJ Reps, 1969, p. 43)

In reality the fact of a large number of States agreeing upon a treaty provision is itself an important piece of State practice. If those and other States subsequently apply the treaty provision – especially where they are not parties to the treaty – then it can quickly become part of customary international law.[1]

This consideration has led some writers to distinguish between "traités contrats" (contractual treaties) which are only agreements between the parties and traités lois (law-making treaties). In my view this confuses rather than assists. All treaties are contractual as between their parties. But some also have an effect on the general law.

In practice, it has been through the adoption of numerous treaties on different areas of international law (war, terrorism, diplomacy, treaty-making) that international law has undergone its most important changes in the years since 1945.

b) International Customary Law.

Customary law is not a written source. A rule of customary law, e.g., requiring States to grant immunity to a visiting Head of State, is said to have two elements.

First, there must be widespread and consistent State practice – ie States must, in general, have a practice of according immunity to a visiting Head of State.

Secondly, there has to be what is called "opinio juris", usually translated as "a belief in legal obligation; ie States must

[1] Henriksen, Anders. International Law. United Kingdom, Oxford University Press, 2019.

accord immunity because they believe they have a legal duty to do so. As the ICJ has put it-:

'Not only must the acts concerned be a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule requiring it. … The States concerned must feel that they are conforming to what amounts to a legal obligation.' (North Sea Continental Shelf cases, ICJ Reps, 1969, p. 3 at 44) .

A new rule of customary international law cannot be created unless both of these elements are present. Practice alone is not enough – see, e.g., *the Case of the SS Lotus (1927)*. Nor can a rule be created by opinio juris without actual practice – see, e.g., the Advisory Opinion on Nuclear Weapons (1996).[(1)]

But these elements require closer examination. So far as practice is concerned, this includes not just the practice of the government of a State but also of its courts and parliament. It includes what States say as well as what they do.

Also practice needs to be carefully examined for what it actually says about law. The fact that some (perhaps many) States practice torture does not mean that there is not a sufficient practice outlawing it.

To quote from the ICJ's decision in the Nicaragua case:

'In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should in general be consistent with such a rule; and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of

[(1)] Henriksen, Anders. International Law. United Kingdom, Oxford University Press, 2019.

the recognition of a new rule.' (ICJ in Nicaragua ICJ Reps, 1986, p. 3 at 98).

Regarding opinio juris, the normal definition of a belief in obligation (see, e.g., the North Sea Continental Shelf cases (1969) above) is not entirely satisfactory. First, it ignores the fact that many rules are permissive (eg regarding sovereignty over the continental shelf), for which the real opinio juris is a belief not in obligation but in right. Secondly, and more fundamentally, there is something artificial in talking of the beliefs of a State. It might be better to consider opinio juris as the assertion of a legal right or the acknowledgment of a legal obligation.[1]

Once there is sufficient practice together with opinio juris, a new rule of custom will emerge. Subject only to what is known as the "persistent objector" principle the new rule binds all States. The persistent objector principle allows a State which has persistently rejected a new rule even before it emerged as such to avoid its application.

c) General Principles of law recognized by Civilized Nations:

General principles of law recognized by civilized nations – the third source – are seldom mentioned in judgments. They are most often employed where the ICJ or another international tribunal wants to adopt a concept such as the legal personality of corporations (eg in the Barcelona Traction Co. case (1970)) which is widely accepted in national legal systems. But international law seldom adopts in its entirety a legal concept from a particular national legal system; instead the search is for a principle which in one form or another is recognized in a wide range of national legal systems.

[1] Craven, Matthew C. R.. Time, History and International Law. Netherlands, M. Nijhoff, 2007.

D) Judicial Precedents:

Article 38(1)(d) refers to judicial decisions as a subsidiary means for the determination of rules of law. In contrast to the position in common law countries, there is no doctrine of binding precedent in international law. Indeed, the Statute of the ICJ expressly provides that a decision of the Court is not binding on anyone except the partiers to the case in which that decision is given and even then only in respect of that particular case (Article 59).

Nevertheless, the ICJ refers frequently to its own past decisions and most international tribunals make use of past cases as a guide to the content of international law, so it would be a mistake to assume that "subsidiary" indicated a lack of importance.

Article 38(1)(d) does not distinguish between decisions of international and national courts. The former are generally considered the more authoritative evidence of international law on most topics (though not those which are more commonly handled by national courts, such as the law on sovereign immunity). But decisions of a State's courts are a part of the practice of that State and can therefore contribute directly to the formation of customary international law.[1]

While treaties and custom are the most important sources of international law, the others mentioned in Article 38 of the ICJ Statute of the ICJ should not be ignored.

e) Juristic Writings:

The writings of international lawyers may also be a persuasive guide to the content of international law but they are not themselves creative of law and there is a danger in taking an

[1] Peters, Anne. Transparency in International Law. India, Cambridge University Press, 2013, p. 14.

isolated passage from a book or article and assuming without more that it accurately reflects the content of international law.[1]

F) Ex aequo et bono. (Equity & good conscience):

Ex aequo et bono means a judgment based on considerations of fairness, not on considerations of existing law. Such a judgment is rendered beside or against the law (contra legem), and not within the law (intra legem). Article 38(2) of the I.C.J. Statute permits the Court to render a judgment on these grounds. The very famous ruling of the principle of Ex aequo et bono is *—CASE CONCERNING DELIMITATION OF THE MARITIME BOUNDARY IN THE GULF OF MAINE AREA‖, popularly known as Canada v. United States of America.*

The phrase "ex aequo et bono" was used in a large number of treaties, starting with the General Act of Geneva in 1928, and the arbitration treaties that followed it. Those treaties provided that, in principle, cases sent to the International Court of Justice should be decided according to article 38(1) of the Statute of the Court, namely, the four basic sources of international law. There was also article 38(2), however, which allows the Court to decide ex aequo et bono when the parties agree and, of course, some of those treaties amounted to fuch agreement. The majority of those treaties did not provide, however, for the Court to decide ex aequo et bono; they provided instead for an arbitral tribunal to deal ex aequo et bono with disputes that were not legal. [2]

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[1] Craven, Matthew C. R.. Time, History and International Law. Netherlands, M. Nijhoff, 2007.

[2] d'Aspremont, Jean. Formalism and the Sources of International Law: A Theory of the Ascertainment of Legal Rules. United Kingdom, OUP Oxford, 2013.

A Hierarchy of Norms ?

A controversial question is whether there is a hierarchy of norms in international law. Article 38 makes no reference to such a hierarchy but it is possible to discern elements of a hierarchy in certain respects. It is now generally acknowledged that a few rules of international law are of such fundamental importance that they have the status of *jus cogens*, that is peremptory norms from which no derogation is permitted. Whereas States can always agree to depart (as between themselves) from ordinary rules of customary international law, they are not free to depart from or vary a rule of *jus cogens*. Thus, a treaty which conflicts with a *jus cogens* rule is void (Vienna Convention on the Law of Treaties, 1969, Article 53) and such a rule will prevail over inconsistent rules of customary international law.

However, it is important to bear in mind that (a) there are very few rules which possess the status of *jus cogens* (e.g. the prohibitions of aggression, genocide, torture and slavery) and the criteria for achieving such status are strict – near universal acceptance not merely as a rule but as a rule from which no derogation is permitted; (b) cases of conflict are very rare and the suggestion that such a conflict exists should be carefully scrutinised (see, e.g. the rejection both by the ICJ – *Arrest Warrant case* (2002) – and the English courts – *Jones v. Saudi Arabia* (2006) – of the suggestion that the law on sovereign immunity conflicted with the prohibition of torture). [(1)]

A treaty prevails over customary law *as between the parties to the treaty* but a treaty will not affect the rights of States not party to that treaty. There is, therefore, no strict sense of hierarchy between treaty and customary law, contrary to what is sometimes alleged.

[(1)] Henriksen, Anders. International Law. United Kingdom, Oxford University Press, 2019.

Specialist areas of international law

The International Law of the Sea:

The international law of the sea Law of the sea is a body of international law governing the rights and duties of states in maritime environments. It concerns matters such as navigational rights, sea mineral claims, and coastal waters jurisdiction.

From the seventeenth century until the mid-twentieth century, the international law of the sea was dominated by the concept of 'freedom of the seas' as promoted by Grotius in his Latin text, *Mare Liberum*.

During this time, states enjoyed freedom to pursue their interests unhindered in all areas of the sea, save for the three nautical miles from a state's coastline, which remained within the control of the coastal state (otherwise known as the 'cannon shot' rule).

This absolute freedom of activity began to give way as a result of a number of factors – which included a shift in geo-political priorities, the desire to extend national claims, concerns regarding the exploitation of the seabed's resources, protection of marine environments and fish stocks, and enforcement of pollution controls, migration laws and counter-terrorism. States began to conclude various lesser treaties to regulate limited aspects of maritime activity.

The key milestone came in 1958 with the first United Nations Conference on the Law of the Sea in Geneva that aimed to produce a codification of the customary international law of the sea. It resulted in a series of multilateral treaties on the territorial sea and contiguous zone, the high seas, fishing and environmental conservation in the high seas,132 the continental

shelf, and an optional protocol concerning the compulsory settlement of disputes.[1]

However, the success of the conference was limited as states were able to pick and choose which conventions to participate in, with most ignoring the optional protocol, leaving the international law of the sea in a state of disunity. These issues remained unaddressed at the conclusion of the second United Nations Conference on the Law of the Sea, which failed to garner the necessary majority to effect any more than two minor procedural changes.

This was changed, however, by the third and final United Nations Conference on the Law of the Sea, convened with an ambitious agenda and concluded in 1982. The result was a convention encompassing a range of rights and obligations – the 1982 United Nations Convention on the Law of the Sea (UNCLOS).

Participation in the convention is 'all-or-nothing'; to opt into the convention is to accept all entailing rights and obligations. With more than 160 ratifications, the convention is arguably one of the most successful examples of customary law codification and international law-making.[2]

The UNCLOS provides for compulsory dispute resolution through the International Tribunal for the Law of the Sea (ITLOS). It prevails over the 1958 Conventions, although where a party is not an UNCLOS signatory but is a signatory to the 1958 Convention, the 1958 Convention will prevail. Where a party is not a signatory to any convention, then the UNCLOS serves only as a source of customary law in the case of a dispute.

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(1) Craven, Matthew C. R.. Time, History and International Law. Netherlands, M. Nijhoff, 2007.

(2) Taylor, Owen. International Law and Revolution. United Kingdom, Routledge, 2019.

International Trade Law Public:

International trade law addresses the rules and customs regarding trade between states. For the most part, this area of law is governed by bilateral agreements, many of which exist beneath the overarching multilateral framework formed by the World Trade Organization (WTO) (encompassing the General Agreement on Tariff s and Trade (GATT) 1947, and the GATT 1994). (1)

The WTO is based around principles of elimination of trade barriers and non-discrimination between trading states. This global approach to trade found its impetus in the ruins of the Second World War.

As the Allies set about the task of rebuilding a devastated Europe and ensuring that such wars never occurred again, it was suggested that a liberal model of free trade would eliminate economic instability, which was considered to be one of the factors that leads to regional conflict. (2)

Accordingly, the GATT 1947 was established, providing an informal framework for international trade until its replacement by the WTO in 1995. The original GATT 1947 remains operational within the WTO structure, subject to the GATT 1994 amendments.

The fundamental aim of the WTO Agreement is the establishment of trade relations with a view to raising standards of living, ensuring full employment, increasing trade, pursuing an increase in trade and effective use of resources, sustainable development and environmental protection, in a manner consistent with the needs of different states.

(1) Craven, Matthew C. R.. Time, History and International Law. Netherlands, M. Nijhoff, 2007.
(2) Henriksen, Anders. International Law. United Kingdom, Oxford University Press, 2019.

Similar to the UNCLOS, parties to the WTO Agreement are assenting to all annexed agreements. There are, however, some allowances for special agreements and measures for certain developing countries.

By far the most significant development in international trade law has been the establishment of extensive and sophisticated procedures for the settlement of disputes under the WTO, in the form of the Dispute Settlement Understanding (DSU).

The DSU has extraordinary powers to hear disputes and impose decisions that are binding on all Member States. In the first ten years since its introduction, the number of disputes heard under the DSU exceeded the combined total of disputes heard by the International Court of Justice and the Permanent Court of International Justice in 85 years. These statistics are a credit to the DSU as a powerful and compelling procedure for dispute resolution.[1]

International Environmental Law:

The issues of environmental management and transnational pollution pose unique and serious challenges to the international community.

An increased awareness of risks to the environment in recent times has prompted a spate of bilateral, regional and multilateral measures targeting a wide range of areas from terrestrial to atmospheric pollution, wildlife conservation and sustainability.

Yet, because approaches to these issues are often informed by human and social priorities, disagreements about the level of responsibility of different states and the right to

[1] Taylor, Owen. International Law and Revolution. United Kingdom, Routledge, 2019.

development, international environmental law lacks the focus and consensus seen in other areas of international law.

The lack of a commonly accepted definition of 'environment' proves the first barrier to effective international action. 'Environment' was defined in the 1972 Stockholm Declaration as 'air, water, land, flora and fauna and especially representative samples of natural ecosystems'.

It has been noted, however, that no single definition of 'environment' exists, and its meaning often changes depending on the context in which it is used.[1]

The development of environmental law is guided by a number of general principles common to other areas of international law, such as sovereignty and state responsibility. Other principles more specific to the area of environmental law include the precautionary principle, the concept of sustainable development, the polluter pays principle, common but differentiated responsibilities, and the common heritage principle. The following provides an outline of some of the key recent developments in international environmental law.

The United Nations Framework Convention on Climate Change (UNFCCC), which opened for signature in 1992 at the Earth Summit in Rio de Janeiro, aimed to achieve 'stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system'. The approach taken critically emphasizes mitigation rather than cessation of pollution emission.

Following the Earth Summit, the international community yet again convened in Kyoto in December 1997, resulting in the Kyoto Protocol. Exemplary of the differentiated responsibilities principle, developed countries agreed to reduce their aggregate

[1] Craven, Matthew C. R.. Time, History and International Law. Netherlands, M. Nijhoff, 2007.

levels of greenhouse gas emissions below 1990 levels by an average of 5.2 per cent during the period 2008 to 2012, while developing states were not bound to any particular reduction targets.[1]

Since Kyoto, numerous conferences have been held in various places including The Hague, Copenhagen and Cancun. The running theme in the development of this vein of international law is the milieu of diverging interests and priorities. Developing states assert a right to prioritize their economic development and to increase their standard of living, demanding that developed states take responsibility for their historical contribution to transnational pollution.

On the other hand, developing states are called upon to take responsibility for their projected future contributions. True cooperation will be difficult to attain at present, given the reluctance of global powers such as China and the United States to commit to binding targets. These disputes will continue to pose a major hurdle to effective international law-making in the future.

International Humanitarian Law:

IHL is a practical set of rules for the battlefield. It has its roots in ancient civilizations and religions. It is intended to be a universal and neutral body of law. IHL aims to strike a balance between legitimate military action and the humanitarian objective of reducing human suffering, particularly among civilians.

The following principles form the bedrock of the law as it applies to the conduct of hostilities:

Humanity

[1] Henriksen, Anders. International Law. United Kingdom, Oxford University Press, 2019.

Humanity forbids the infliction of suffering, injury or destruction not actually necessary for the accomplishment of legitimate military purposes.

Military Necessity

A party to an armed conflict may use only that degree and kind of force, not otherwise prohibited by IHL, that is required to achieve the legitimate purpose of the armed conflict, namely the complete or partial submission of the enemy at the earliest possible moment with the minimum expenditure of life and resources.

Distinction

The parties to the conflict must at all times distinguish between civilians and combatants. Attacks may only be directed against combatants. Attacks must never be directed against civilians.

Proportionality

It is prohibited to launch an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.

Precautions

In the conduct of military operations, constant care must be taken to spare the civilian population, civilians and civilian objects. All feasible precautions must be taken to avoid, and in any event to minimize, incidental loss of civilian life, injury to civilians and damage to civilian objects.

The Fundamental Rules of International Humanitarian Law applicable in armed conflicts may be summarised as follows.

These rules, as worded below, are not legally binding but are used to increase understanding of IHL.

1. Persons *hors de combat* (outside of combat) and those who do not take a direct part in hostilities are entitled to respect for their lives and physical and moral integrity. They shall in all circumstances be protected and treated humanely without any adverse distinction.

2. It is forbidden to kill or injure an enemy who surrenders or who is *hors de combat.*

3. The wounded and sick shall be collected and cared for by the party to the conflict which has them in power. Protection also covers medical personnel, establishments, transports and *matériel*. The **emblem of the red cross, red crescent, and red crystal** are the signs of such protection and must be respected.

4. Captured combatants and civilians under the authority of an adverse party are entitled to respect for their lives, dignity, personal rights and convictions. They shall be protected against all acts of violence and reprisals. They shall have the right to correspond with their families and to receive relief.

5. Everyone shall be entitled to benefit from fundamental judicial guarantees. No one shall be held responsible for an act he or she has not committed. No one shall be subjected to physical or mental torture, corporal punishment or cruel or degrading treatment.

6. Parties to a conflict and members of their armed forces do not have an unlimited choice of methods and means of warfare. It is prohibited to employ weapons or methods of warfare of a nature to cause unnecessary losses or excessive suffering.

7. Parties to a conflict shall at all times distinguish between the civilian population and combatants in order to spare civilian population and property. Neither the civilian population as such nor civilian persons shall be the object of attack. Attacks shall be directed solely against military objectives.

Aggression :

A crime of aggression or crime against peace is the planning, initiation, or execution of a large-scale and serious act of aggression using state military force. The definition and scope of the crime is controversial. The Rome Statute contains an exhaustive list of acts of aggression that can give rise to individual criminal responsibility, which include invasion, military occupation, annexation by the use of force, bombardment, and military blockade of ports. Aggression is generally a leadership crime that can only be committed by those with the power to shape a state's policy of aggression, rather than those who carry it out.

Aggression is one of the core crimes in international criminal law, alongside genocide, crimes against humanity, and war crimes. In 1946, the International Military Tribunal ruled that aggression was "the supreme international crime" because "it contains within itself the accumulated evil of the whole. The standard view is that aggression is a crime against the state that is attacked, but it can also be considered a crime against individuals who are killed or harmed as a result of war.

The International Criminal Court may only prosecute an act of aggression if the aggressing state has accepted its jurisdiction over the crime of aggression, or following a referral from the Security Council. Critics argue that the ICC should not prosecute aggression; a prominent criticism is that justified war is a political determination, and the involvement of a court in such a matter

could compromise its legitimacy.[96] A prosecution by the ICC is unlikely because of the narrow scope of the crime and limited jurisdiction.

The ICC's jurisdiction over aggression was activated on 17 July 2018 after a decision by two-thirds of states parties.[95] As of 17 March 2022, 43 State Parties have ratified or acceded to the amendments on the crime of aggression to the Rome Statute.

Self-defence:

Right to Self-defense is recognized as an inherent right of sovereign states in the realm of international law. Under Article 51 of the UN Charter, the member States may resort to the use of force as: i) a self-defence against an armed attack or ii) if use of force has been authorized by the Security Council. However, exercising right to self-defence comes with its own limitations.

1. ***The law on self-defence encompasses more than the right to use force in response to an* ongoing *attack.***

Article 51 preserves the right to use force in self-defence "if an armed attack occurs", until the Council has taken the necessary measures. On one view, the right is confined to circumstances in which an actual armed attack has commenced. But the view that states have a right to act in self-defence in order to avert the threat of an *imminent* attack - often referred to as 'anticipatory self-defence' - is widely, though not universally, accepted. It is unrealistic in practice to suppose that self-defence must in all cases await an actual attack.

2. ***Force may be used in self-defence only in relation to an 'armed attack' whether imminent or ongoing*.**

The ‘armed attack’ may include not only an attack against a state’s territory, but also against emanations of the state such as embassies and armed forces.

Force in self-defence may be used only when: the attack consists of the threat or use of force (not mere economic coercion, for example); when the attacker has the intention and the capability to attack; and the attack is directed from outside territory controlled by the state.

In the case of a threatened attack, there must be an actual threat of an attack against the defending state itself.

The inherent right of self-defence recognised in Article 51 of the Charter of the United Nations “if an armed attack occurs” forms an exception to the general prohibition against the use of force under Article 2(4).

3. Force may be used in self-defence only when this is* necessary *to bring an attack to an end, or to avert an imminent attack. There must be no practical alternative to the proposed use of force that is likely to be effective in ending or averting the attack.

The criterion of necessity is fundamental to the law of self-defence . Force in self-defence may be used only when it is necessary to end or avert an attack. Thus, all peaceful means of ending or averting the attack must have been exhausted or be unavailable. As such there should be no practical non-military alternative to the proposed course of action that would be likely to be effective in averting the threat or bringing an end to an attack. Necessity is a threshold, and the criterion of imminence can be seen to be an aspect of it, inasmuch as it requires that there be no time to pursue non-forcible measures with a reasonable chance of averting or stopping the attack.

Necessity is also a limit to the use of force in self-defence in that it restricts the response to the elimination of the attack and is thus linked to the criterion of proportionality. The defensive measure must be limited to what is necessary to avert the on-going attack or bring it to an end.

4. A state may use force in self-defence against a threatened attack only if that attack is 'imminent'.

There is a risk of abuse of the doctrine of anticipatory self-defence, and it needs to be applied in good faith and on the basis of sound evidence. But the criterion of imminence must be interpreted so as to take into account current kinds of threat and it must be applied having regard to the particular circumstances of each case. The criterion of imminence is closely related to the requirement of necessity.

- Force may be used only when any further delay would result in an inability by the threatened state effectively to defend against or avert the attack against it.
- In assessing the imminence of the attack, reference may be made to the gravity of the attack, the capability of the attacker, and the nature of the threat, for example if the attack is likely to come without warning.
- Force may be used only on a proper factual basis and after a good faith assessment of the facts.

5. The exercise of the right of self-defence must comply with the criterion of 'proportionality'.

The proportionality requirement has been said to mean in addition that the physical and economic consequences of the force used must not be excessive in relation to the harm expected from the attack . But because the right of self-defence does not allow the use of force to 'punish' an aggressor,

proportionality should not be thought to refer to parity between a response and the harm already suffered from an attack, as this could either turn the concept of self-defence into a justification for retributive force, or limit the use of force to less than what is necessary to repel the attack.

6. Article 51 is not confined to self-defence in response to attacks by states. The right of self-defence applies also to attacks by non-state actors.

- In such a case the attack must be large scale.
- If the right of self-defence in such a case is to be exercised in the territory of another state, it must be evident that that state is unable or unwilling to deal with the non-state actors itself, and that it is necessary to use force from outside to deal with the threat in circumstances where the consent of the territorial state cannot be obtained[1].
- Force in self-defence directed against the government of the state in which the attacker is found may be justified only in so far as it is necessary to avert or end the attack, but not otherwise.

7. The principles regarding the right of self-defence form only a part of the international regulation of the use of force.

- Measures taken in the exercise of the right of self-defence must be reported immediately to the Security Council. The Council retains the right and responsibility to authorise collective military action to deal with actual or latent threats.

[1] See note 22.

- Any military action must conform with the rules of international humanitarian law governing the conduct of hostilities.

International Human Rights Law:

International human rights law rests upon the foundation of universalism and egalitarianism and can trace its history back to the natural law philosophies of Roman Law. Its premise is that all humans are 'born free and equal in dignity and rights', and are entitled to the protection and promotion of such rights.

The human rights movement was galvanized in the wake of the atrocities of the Second World War. The modern law of international human rights was founded upon the Universal Declaration of Human Rights 1948 (UDHR). In strict terms it is a weak legal instrument and was never intended to be binding. Nevertheless the UDHR formed the platform for the promotion of such principles as the prohibition against slavery, non-discrimination and the right to life, which provided a basis for the development of other related treaties. (1)

Such treaties include the International Covenant on Civil and Political Rights, the International Covenant on Social and Cultural Rights, the Convention against Torture, the UN Convention on the Rights of the Child, the Convention on the Elimination of All Forms of Racial Discrimination and the Genocide Convention. Regional human rights treaties have followed, similar in form and function to the UN multilateral treaties. The UN also possesses the means to encourage compliance with human rights treaties at a domestic level through the Human Rights Council.

(1) d'Aspremont, Jean. Formalism and the Sources of International Law: A Theory of the Ascertainment of Legal Rules. United Kingdom, OUP Oxford, 2013.

Particular areas of international human rights law are undergoing rapid change. The concept of human rights is becoming an increasingly extraterritorial one, while the notion of state responsibility to prevent human rights abuses is gaining traction.(1)

Furthermore, human rights law is becoming increasingly merged with international humanitarian law. While the precise nature and role of international human rights law is the subject of uncertainty, it is clear that international human rights law presents a new and dynamic front for the influence of international law to effect change in human interactions; its role, function and impact on the place of the individual in international law.

International Criminal Law:

At the core of international criminal law are the concepts that individuals can be responsible for international crimes, that aggression is illegal, and the acknowledgement that international law has a role to play regarding criminality and armed conflict. International criminal law primarily deals with war crimes, genocide, crimes against humanity and possibly crimes against peace. (2)

The purpose of individual responsibility in international criminal law is to capture all of the methods and means by which an individual may contribute to the commission of a crime, or be held responsible for a crime under international law.

Generally speaking, international criminal law provides an enforcement mechanism for the obligations and prohibitions created by international humanitarian law. Enforcement is by

(1) Craven, Matthew C. R.. Time, History and International Law. Netherlands, M. Nijhoff, 2007.
(2) Peters, Anne. Transparency in International Law. India, Cambridge University Press, 2013, p 73.

way of penal sanctions and may be achieved through reliance on domestic or international mechanisms. Until the end of the Second World War, the concept of international crime was not well developed.

Piracy and slave trading were arguably the only recognized crimes against international society. Provided that the accused was apprehended on the high seas or within the territory of the prosecuting state, states had universal jurisdiction to prosecute individuals for these crimes, regardless of the nationality of the accused or where the alleged crimes were committed.

In 2002, the International Criminal Court (ICC) was created.195 The ICC is set up as a permanent court to prosecute individuals for international crimes. As of October 2010 the ICC has 114 member states, with a further 34 signatory countries that have yet to ratify the treaty. Importantly, a number of major states, including the US, China and India are not signatories to the Rome Statute. The absence of these states poses a significant problem to the legitimacy of ICC jurisdiction.

The relationship between international and domestic law:

The relationship between international law and national law is one that is

fiercely debated. At a theoretical level, there exist two dominant theories for explaining this relationship: dualism and monism .

- **Dualism :**

The dualist approach views international and national law as two separate systems that exist independently of one another. This theory is based upon the ‘assumption that

international law and municipal legal systems constitute two distinct and formally separate categories of legal orders' because they 'differ as to their sources, the relations they regulate and their legal content.'[1]

Therefore, these two systems are seen to be firmly independent from one another, as neither can claim supremacy. Where international law is incorporated into national law by the state, this is seen as an exercise of authority by the state, rather than international law imposing itself into the domestic sphere.[2]

From a practical perspective, if a national court in a dualist state is considering a case and there is a conflict between international and national law, the court (in the absence of any legislative guidance to the contrary) would apply domestic law.[3]

- **Monism:**

The monist theory asserts that there is a relationship between national and international law, with international law being supreme.

Monists argue that as law ultimately regulates the conduct of individuals, there is a commonality between international and national law which both ultimately regulate the conduct of the individual. Therefore, each system is a 'manifestation of a single conception of law.

- **An Alternative Approach:**

[1] Peters, Anne. Transparency in International Law. India, Cambridge University Press, 2013,p 104.
[2] Henriksen, Anders. International Law. United Kingdom, Oxford University Press, 2019.
[3] Craven, Matthew C. R.. Time, History and International Law. Netherlands, M. Nijhoff, 2007.

some argue that international law and national law lack a common field of operation, never operating within the same sphere, or dealing with the same subject matter. Therefore, they do not come into conflict as systems .

This formulation, at least in relation to its relevance to contemporary international law, has been criticized by scholars on the basis that this approach is ‘essentially dualist’, and has been ‘overtaken by the extensive contemporary interaction’ between international and national law.

NATIONAL LAW IN INTERNATIONAL LAW:

International Law Is Supreme in its Domain:

Breaches of international law cannot be justified by reference to a state’s own internal laws. A state cannot legitimately argue that it has behaved in a manner contrary to international law because its conduct was permissible, or even required, under its own law. [(1)]

In this way, international law, from the perspective of international courts, tribunals and arbitral bodies, is supreme. There exists much authority to support this proposition. In the Greco- Bulgarian Communities Advisory Opinion – which concerned the Greco- Bulgarian Convention created in the aftermath of the First World War to provide for the reciprocal emigration of persecuted minorities between the two states – one of the questions considered by the Court was, in the case of a conflict between the application of the Convention and the national law of one of the two signatory powers, which provision should be preferred?

[(1)] d'Aspremont, Jean. Formalism and the Sources of International Law: A Theory of the Ascertainment of Legal Rules. United Kingdom, OUP Oxford, 2013.

The Court replied by clearly articulating the supremacy of international law in its domain: It is a generally accepted principle of international law that in the relations powers who are contracting parties to a treaty, the provisions of municipal law cannot prevail over those of the treaty.

Similar statements were made in the Free Zones case, and the principle has more recently been affirmed in leading cases of the International Court of Justice. It is also reflected in Article 27 of the Vienna Convention on the Law of Treaties, which states that a party 'may not invoke the provisions of its internal law as justification for its failure to perform a treaty'. Many international law scholars also agree that this principle is established law.[1]

The Application of National Law within International Law :

As a corollary, the fact that an act may be illegal in national law does not necessarily mean it is in breach of international law .

However, this does not mean that there is no role for national law within the international sphere. Indeed, cases in which an international tribunal in dealing with matters of pertinence to international law also give rise to an examination of the internal laws of one or more states, are far from exceptional .

As Shaw notes: Expressions of the supremacy of international law over municipal law in international tribunals do not mean that the provisions of domestic legislation are either irrelevant or unnecessary .

On the contrary, the role of internal legal rules is vital to the workings of the international legal machine. There exists a growing body of academic literature supporting the approach of an enhanced recognition of national law by international courts

[1] Craven, Matthew C. R.. Time, History and International Law. Netherlands, M. Nijhoff, 2007.

and tribunals. From a practical perspective, there are a number of reasons why international courts utilize national law. If there is a dispute relating to an area where no satisfactory international law exists, and there exists a well-developed and relevant principle at the national level, the court may choose to use that principle.

The court may also use a state's law in an evidentiary sense, to determine the state's internal legal position on a disputed issue before the court. Of course, reference to the national laws of states can, given consistency and breadth of practice, give rise to a general principal of international law, or act as evidence of state practice in the determination of customary international law.

Use of National Law by International Tribunals to Resolve Disputes:

In a number of cases, issues have come before the courts for which there exists no relevant or applicable legal principle at the international level. In these circumstances, the courts have shown a willingness to borrow relevant national law concepts to apply within the international sphere.[(1)]

The authority for courts to apply national law in the international sphere is found in Article 38(1)(c) of the Statute of the Permanent Court of International Justice, which provides that 'the general principles of law recognized by civilized nations', typically being those derived from the domestic legal systems of states, may be utilized as a source of international law.

Thus, a general legal principle that exists at the national level may be imported into the international system, where it is appropriate to do so. Where there is consistency in practice, this

[(1)]d'Aspremont, Jean. Formalism and the Sources of International Law: A Theory of the Ascertainment of Legal Rules. United Kingdom, OUP Oxford, 2013.

can lead to the creation of a general principal of international law .

In the Barcelona Traction case, the Belgian government sought reparations for damage caused to Belgian nationals (who were shareholders in the Canadian company Barcelona Traction, Light & Power Co. Ltd) from the Spanish government Belgian nationals (who were shareholders in the Canadian company Barcelona Traction, Light & Power Co. Ltd) from the Spanish government who caused the damage, as the company carried out its operations in Spain.

The Court, in considering the dispute, emphasized the role played by national law: 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.

Thus the Court has, as indicated, not only to take cognizance of municipal law but also to refer to it. It is to rules generally accepted by municipal legal systems which recognize the limited company whose capital is represented by shares, and not to the municipal law of a particular State, that international law refers. In referring to such rules, the Court cannot modify, still less deform them.

INTERNATIONAL LAW IN NATIONAL LAW

In an age of increased globalization and evolving interconnectedness between people, states and institutions across borders, the role of international law within states is a developing and important one. In many states, for international rules to become operative, they must be implemented into the national law of a state .

States cannot rely upon national law to escape their international law obligations. While there also exists some support for a general principle requiring states to bring their national law in line with their international obligations, whether this principle does in fact exist at the level of customary international law is doubtful, particularly when a multitude of states clearly choose not to bring some or all of their national law in line with their international obligations.[1]

There has been a relatively modern development in this area, concerning treaty obligations and jus cogens norms that require states to take positive steps towards implementation of a whole or part of a treaty into their domestic legislation.

Examples of this include the four Geneva Conventions of 1949 concerning the victims of war. The Statutes of the International Criminal Tribunal for the former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR) require all states to cooperate with and assist requests made by these courts – an obligation which flows from their status as creations under Chapter VII of the UN Charter (which carries with it the authority of the Security Council).

The International Criminal Court (ICC) also requires all Member States to provide cooperation to the Court. A range of multilateral treaties regarding the issues of terrorism, international and transnational crime and certain human rights abuses, require states to implement legislation, as well as to prosecute or extradite persons in their jurisdiction. [2]

DIFFERENT APPROACHES TO THE IMPLEMENTATION OF INTERNATIONAL LAW IN NATIONAL LAW:

[1] Henriksen, Anders. International Law. United Kingdom, Oxford University Press, 2019.

[2] Craven, Matthew C. R.. Time, History and International Law. Netherlands, M. Nijhoff, 2007.

There are two main theories which govern how international law becomes a part of the national law of states: transformation and incorporation.

Transformation:

The principle of transformation provides that before international law can become part of a state's national law, the state must implement legislation to 'transform', or implement, the international law into national law.

Transformation is the dominant approach among states in relation to treaty law, which is generally transformed through an Act of Parliament. The content of such an Act of Parliament will normally take one of two forms. The first is a legislative Act setting out all of the relevant treaty provisions within the Act itself, which then becomes part of the domestic law. An example of this is the Australian International Criminal Court Act 2002 (Cth), which aims to 'facilitate compliance obligations' under the Rome Statute of the International Criminal Court, and sets out at length all of the relevant substantive Rome Statute provisions within the domestic Act.

The second approach involves the legislative Act simply acknowledging that the treaty is to become part of the domestic law, without setting out the treaty provisions within the Act itself, but instead annexing the treaty as a schedule. Once the treaty is transformed, it becomes a part of the state's domestic law. An example of this is the Australian Geneva Conventions Act 1957 (Cth), which does not include the provisions of the relevant Geneva Conventions within the Act, but instead attaches them as Schedules to be used in the interpretation of the Act.

Incorporation:

The doctrine of incorporation is based on the principle that, in the absence of conflicting domestic legislation, international law should automatically become part of a state's law without any need for a specific Act to be passed 'transforming' the international law into national law.

The incorporation doctrine can be described as the dominant doctrine in relation to customary international law,

although the ‘pure’ concept of incorporation is altered, and in some cases heavily modified, in the context of each individual state. The incorporation doctrine is traditionally only employed in relation to customary international law, not treaty law.

The reason for this is that generally the power to negotiate and enter into treaties is given to a state’s executive, not its legislature. This would mean that, in the absence of a transformation requirement, the executive could enter into or exit treaties, with all the obligations these actions would entail and without any input from the legislature. These treaties would then be automatically incorporated into the state’s national law, by passing the legislature almost entirely.[1]

[1] Craven, Matthew C. R.. Time, History and International Law. Netherlands, M. Nijhoff, 2007.

Chapter One

The State and Territorial Sovereignty

A-State legal definition:

A state is a political division of a body of people that occupies a territory defined by frontiers. The state is sovereign in its territory (also referred to as jurisdiction) and has the authority to enforce a system of rules over the people living inside it.[1]

B- The Creation of Statehood:

In essence, for a state to be a state, it must be sovereign and characterized by the recognized features of statehood. As the Arbitration Commission of the European Conference on Yugoslavia rather blandly put it, a state may be defined as 'a community which consists of a territory and a population subject to an organized political authority . . . such a state is characterized by sovereignty.'

While contemporary developments in this area of law have rendered opaque the circumstances in which statehood may be said to have been established (perhaps this has always been the case), the primary legal basis for establishing a legitimate title to statehood remains the four main criteria set out in Article 1 of the 1933 Montevideo Convention:

- a permanent population,
- a defined territory,
- a government; and
- the capacity to enter into relations with other states.

[1] Taylor, Owen. International Law and Revolution. United Kingdom, Routledge, 2019.

First Criterion: Permanent Population:

The first Montevideo criterion requires that the state entity exhibit a permanent population, and that this population can be defined as a 'stable community.'

As such, the population does not have to be homogeneous in nature, but it must be settled. This requirement illustrates the basic need for some form of stable human community capable of supporting the superstructure of the state. This means that the people must have the intention to inhabit a specific territory on a permanent basis. [1]

Mere occupation of a territory will not be sufficient to legally fulfill this criterion. The presence of inhabitants who are traditionally nomadic will not necessarily affect the requirement of permanence.

This point was reflected in the ICJ's Advisory Opinion on the Western Sahara where – while it was a territory sparsely populated mostly by people of a nomadic nature – it was still considered by the Court to have a permanent population, possessing the right to self-determination.

Second Criterion: Territory:

In order to satisfy the second Montevideo criterion, control must be exercised over a certain portion of territory. This criterion is a critical precondition for statehood. Exclusive control of territory remains a fundamental prerequisite for the competence and authority required by any state to administer and exercise its state functions both in fact and in law. As Cassese puts it, states have paramountcy in international law by virtue of their stable and permanent control over territory. It is not

[1] Craven, Matthew C. R.. Time, History and International Law. Netherlands, M. Nijhoff, 2007.

a requirement that the precise delimitations of this territory be defined.

The ICJ noted in the North Sea Continental Shelf cases The appurtenance of a given area, considered as an entity in no way governs the precise determination of its boundaries, any more than uncertainty as to boundaries can affect territorial rights. There is, for instance, no rule that the land frontiers of a State must be fully delimited and defined, and often in various places and for long periods they are not.[1]

For instance, Kuwaiti sovereignty was restored and recognized before its borders were finally demarcated by the UN in 1992 in accordance with its 1963 agreement with Iraq. The size or wealth of the territory is also not important .

The Vatican City is considered a sovereign state despite, 'whatever domain it may have elsewhere', occupying less than 100 acres on earth.43 Since 1990, despite their small size, Andorra, Liechtenstein, Monaco, Nauru, San Marino and Tuvalu have all joined the United Nations.[2]

What is important in relation to territory is that an exclusive right is established in that area to display state power – that is, effective government (the third Montevideo criterion). The 'obsession by states with territory' is in this sense quite understandable, as territorial sovereignty is dependent upon territorial control over a certain portion of the globe to the exclusion of any other state. During a civil war, for example, a state may lose effective control of a portion of its territory to a rebel government .

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[1] Craven, Matthew C. R.. Time, History and International Law. Netherlands, M. Nijhoff, 2007.

[2] d'Aspremont, Jean. Formalism and the Sources of International Law: A Theory of the Ascertainment of Legal Rules. United Kingdom, OUP Oxford, 2013.

Even so, while the conflict continues, and until the borders of the area under rebel control become static, the rebel group will not be able to show a sufficiently defined territory to support a claim to statehood. The ICJ, in its ruling in the Military and Paramilitary Activities in Nicaragua case, confirmed the link between a state's territorial integrity and its sovereignty .

In the case regarding South Africa's presence in Namibia, the Court was emphatic that it was the 'physical control of territory, and not sovereignty or legitimacy of title' that formed the basis for a state's liability for acts affecting other states.

Third Criterion: Government:

The third Montevideo criterion requires that a state-entity must have a central government operating as a political body within the law of the land and in effective control of the territory.

The population in question must be constituted by a coercive, relatively centralized legal order; there must exist central organs for the creation and the application of the norms of that order, especially that organ which is called government. The requirement for government is not tied to any particular form or style of government, but is instead concerned with a coherent, stable and effective political organization.[(1)]

The mere existence of a government will not be sufficient to satisfy the requirement of an effective government. To do this it must be sovereign and independent, so that within its territory it is not subject to the authority of another state.

The importance of government as a criterion for statehood in international law is best understood by appreciating the need for stability and effectiveness both within a state and in a state's international relations .

[(1)] Peters, Anne. Transparency in International Law. India, Cambridge University Press, 2013, p53.

The traditional example often referred to in relation to this is the 1920 Aaland Islands case, which concerned the claim to self-determination of a population living on a group of islands (the Aaland Islands) in the Baltic Sea. An International Committee of Jurists was entrusted by the League of Nations to give an Advisory Opinion on the legal aspects of the claim .

The case turned on whether the Islanders were under the domestic sovereignty of Finland (in which case the principle of state sovereignty would render it an internal state matter), or whether at the relevant time Finland did not possess the relevant qualities of statehood (in which case the Islanders might have a right to claim self-determination) .[1]

The 1920 report of the Committee stated: It is . . . difficult to say at what exact date the Finnish Republic, in the legal sense of the term, actually became a definitely constituted sovereign State. This certainly did not take place until a stable political organization had been created, and until the public authorities had become strong enough to assert themselves throughout the territories of the State without the assistance of foreign troops.

Fourth Criterion: Capacity to Enter into Legal Relations :

The final traditional criterion for statehood – the capacity to enter into legal relations with other states – is discrete, but in practice is often treated as being closely connected to the third requirement of effective government .

This is because the capacity to enter into relations with other states is primarily concerned with the emergent entity

(1) Craven, Matthew C. R.. Time, History and International Law. Netherlands, M. Nijhoff, 2007.

having the relevant political and legal machinery with which to engage in the complex sphere of international relations .[1]

The critical consideration attaching to this criterion is one of the capacity to act independently in international legal relations, rather than proof of action. For example, while 'states' or provinces within federated countries – such as Victoria (in Australia), Texas (in the USA) or Ontario (in Canada) – have permanent populations, defined territory and effective governments, they are not considered to be sovereign states .

This is because the capacity to act on the international plane is the preserve of federal governments of these countries, and not of their provincial governments. As Article 2 of the Montevideo Convention stipulates, 'the federal state shall constitute a sole person in the eyes of international law'. Thus, although political subdivisions within a state may meet the first three criteria, they will not meet the fourth.[2]

Of course, the fact that some provincial entities do, in fact, maintain international dealings only reinforces the vagaries of international law in this area. Examples of this include the government of Quebec, which maintains overseas delegations and has extensive dealings with foreign governments, as well as the present government of California's relations with other governments on the Pacific Rim, particularly in relation to its Renewable Energy Program.

C-Recognition of States and Governments:

Recognition is a manifestation of the will of a state whereby it expresses the legitimacy of the existence of the nascent state entity. Recognition is relevant if the legality of a

[1] Henriksen, Anders. International Law. United Kingdom, Oxford University Press, 2019.

[2] Craven, Matthew C. R.. Time, History and International Law. Netherlands, M. Nijhoff, 2007.

title or situation is doubted. In the past the term ‘recognition’ in international law has been used mainly in connection with the recognition by existing states of new states, of new heads of government of existing states, and of belligerent communities .

A satisfactory, if general, articulation of the role of recognition is as a procedure ‘whereby the governments of existing states respond to certain changes in the world community’. Indeed, recognition has frequently been sought by both new state entities seeking admission to the family of nations as well as from states that have acquired, by occupation or annexation, some new piece of territory in the belief that the grant of recognition by important states will strengthen its title over the newly acquired territory.(1)

States seek recognition from other states of a change in the international order because legal recognition has the ability to confer legitimacy and make it a subject of international law. This is because the legal status of state as a state is intimately tied to the willingness of other states to recognize and deal with it. Therefore, once the Montevideo criteria have been adequately established, appropriate recognition is the most straightforward means of achieving the required mantle of statehood.

Despite the broadly held view that recognition is purely a question of policy and not of law, in practice political and legal recognition work in unison, for unless an entity is accorded recognition as a state by a sufficiently large number of other states, it cannot participate as a state in international law.

While the formation, altered territorial status, dissolution or extinction, or changing control of states are on one view matters of fact, they are materially and invariably affected by the process by which the community of nations is prepared to recognize and accept such changes.

(1) Craven, Matthew C. R.. Time, History and International Law. Netherlands, M. Nijhoff, 2007.

As is shown by the differing responses to the Turkish Federated State of Cyprus, the dissolution of the former Yugoslavia and creation of the new states of Slovenia, Croatia and Bosnia-Herzegovina – and, more recently, Kosovo, South Ossetia and Abkhazia – the process of altering statehood is one very much dependent on whether such changes receive support and recognition, and by whom, within the international community.[1]

1-Political Recognition of Statehood:

A distinction must be made between recognition of states and recognition of governments .

The recognition of a government is no more than an acknowledgement that it is the representative organ of the state, and has the consent or at least the acquiescence of its people.

The recognition of a state, however, is the establishment of the fact that a state is a subject of international law. Recognition of a state may consist of a legal act or a political act .

This means that an act of recognition can have purely political (and thus, non-legal) consequences, or recognition can have legal consequences by establishing the fact of the existence of a state in the sense of international law. Thus, recognition can be both political and legal in nature and effect. Political recognition occurs where a recognizing state or government expresses a willingness to enter into political and other relations with the recognized state or government. A political act of recognition is ‘declaratory’ in the sense that it is an act without legal consequences.[2]

[1] Ibid.

[2] Henriksen, Anders. International Law. United Kingdom, Oxford University Press, 2019.

The declaration of willingness by a state or government to enter into political relations with the recognized state or government in itself has no legal consequences, although it may be of great importance politically to the prestige of the nascent state or government seeking to be recognized. Recognition of a new state of affairs in international relations can be established at any time regardless of the date on which, in the opinion of the state doing the recognizing, the new participant began to fulfill the Montevideo criteria. Political recognition may hinge on certain conditions being fulfilled by the new entity, such as the degree of independence or an undertaking to adhere to international law.

However, this is unimportant from a legal point of view since the declaration of willingness to enter into political and other relations with a state or government does not constitute any legal obligation in itself. Existing states are only empowered, not obligated, to perform the act of recognition.

Refusal to recognize the existence of a new state is not a violation of international law and is often used as a persuasive political tool. With existing states, a political policy of non-recognition can be employed as a sanction and deterrent for preventing breaches of the international order.

However, once a state has become a legal entity by virtue of its relations with other states, non-recognition has no legal effect on its statehood. This is illustrated in the case of the United States of America and the Islamic Republic of Iran which, since the Islamic Revolution in Iran in 1979 overthrowing the US-backed Shah Reza Pahlavi and replacing him with an overtly hostile Shi'a regime, have not conducted diplomatic relations. Further economic sanctions have been imposed recently in an attempt to dissuade Iran from its nuclear program. (1)

(1) Craven, Matthew C. R.. Time, History and International Law. Netherlands, M. Nijhoff, 2007.

On 19 March 2009, US President Barack Obama spoke directly to the Iranian people in a video saying that, 'the United States wants the Islamic Republic of Iran to take its rightful place in the community of nations. You have that right – but it comes with real responsibilities.' As Obama suggests, Iran already has a rightful place among the community of nations as a result of its fulfillment of the Montevideo criteria and by virtue of its recognition by other states.

2-De Facto and De Jure Recognition:

The significance of a de jure or de facto recognition in international law is not entirely clear. In general, it is believed that de jure recognition is final, whereas de facto recognition is only provisional and may be withdrawn. From a juristic point of view, the distinction is of little importance .[1]

In the 1970s, a number of states recognized the de facto incorporation of East Timor into Indonesia as a fait accompli. For example, believing that it was unrealistic to continue to refuse to recognize the effective control Indonesia exercised over East Timor, the Australian government stated at the time that the incorporation of East Timor into Indonesia was a reality and that the Indonesian government was the authority in effective control.

However, Australia and other states remained sceptical of the legal validity or the method of East Timor's incorporation. They also maintained that the people of East Timor continued to possess the right to self-determination. Whatever the pretext of recognition, the subsequent independence of East Timor confirms that de jure or de facto recognition of the incorporation into Indonesia was ultimately devoid of legal validity.[2]

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[1] Craven, Matthew C. R.. Time, History and International Law. Netherlands, M. Nijhoff, 2007.

[2] d'Aspremont, Jean. Formalism and the Sources of International Law: A Theory of the Ascertainment of Legal Rules. United Kingdom, OUP Oxford, 2013.

D-The principle of territorial sovereignty:

Territory is a geographical concept. It includes land and subterranean areas, rivers, lakes, reefs, rocks, islets, islands, territorial sea and airspace. Territory can be subject to one of four possible types of regime, of which territorial sovereignty is one. The other three regimes are :

- res nullius – territory that may be acquired by states but has not yet been placed under territorial sovereignty ؛
- res communis – territory not capable of being placed under state sovereignty, such as the high seas, the exclusive economic zones and outer space; and
- territory not subject to the sovereignty of any other state, but which possesses a status of its own (such as trust territories) .

Territorial sovereignty is best understood as a legal nexus, and has been defined variably as ‘the relationship between the state and the physical area it encompasses’, and ‘the framework within which the public power is exercised’.

In classical international law territorial sovereignty is thought to comprise both rights and duties. These aspects were recognized respectively by Judge Huber in the Island of Palmas case when he referred to ‘the exclusive competence of the State in regard to its own territory’, and ‘the obligation to protect within the territory the rights of other States.’

Territorial sovereignty constitutes the scope of state jurisdiction, to the end that within its territory, a state exercises its supreme, and normally exclusive, authority. When we speak of title to territory, on the other hand, we are referring to ‘the vestitive facts which the law recognizes as creating a right.’

These are the factual circumstances required for a change in the legal status in international law of some area of territory. As Salmond puts it, every right (using the word in a wide sense to include privileges, powers and immunities), involves a title or source from which it is derived. The title is the de facto antecedent, of which the right is the de jure consequent.[1]

The rules regarding acquisition of territory constitute no more than the circumstances in which a state is granted title and ipso facto acquires sovereignty (and its consequential legal rights and obligations) over that territory.

In the Burkina Faso/Republic of Mali case the ICJ recognized that the term 'title' has multiple accepted meanings, and that 'the concept of title may also, and more generally, comprehend both any evidence which may establish the existence of a right, and the actual source of that right.'

1-The Role of Territorial Sovereignty:

As already noted, territorial sovereignty serves as a fundamental characteristic of statehood, possession of which confers the necessary status to gain entry into the international community. However, territorial sovereignty also serves extralegal purposes.

As Pro. Gottman has observed: If a territory is the model compartment of space resulting from partitioning, diversification and organization, it may be described as endowed with two main functions: to serve on one hand as a shelter for security, and on the other hand as a springboard for opportunity.

Furthermore, by apportioning an area of the globe in which a group of people through their governing body has exclusivity of action, territorial sovereignty can entrench and enforce a

[1] Peters, Anne. Transparency in International Law. India, Cambridge University Press, 2013, p49.

people's sense of belonging and identity. While this traditional construct of international society may be under something of a challenge by an increasingly globalized world, it remains a quintessential aspect of international social, political and legal life.[1]

2-The Former Modes of Acquisition:

There are five classical modes of acquisition: (i) Accretion, (ii) Cession, (iii) Occupation, (iv) Prescription, and (v) Subjugation .

Some writers also include adjudication as a sixth mode of acquisition. It must also be noted that boundary treaties and boundary awards also constitute a root of title. Such treaties will typically deal with the acquisition or loss of territory by the delineation or clarification of state borders.

(i) Accretion :

Accretion, erosion and avulsion (the abandonment of a river channel and the formation of a new channel) refer to the natural geological processes that result in an increase or decrease in the territory and are relatively uncontroversial as modes of acquisition of territorial sovereignty.

For example, where the erosion of land that once comprised the territory of a state upstream results in the extension of a river bank of a state downstream, the territories of both states are correspondingly diminished or enlarged. Artificial formations such as man-made islands, embankments and so on do not enlarge a state's territory. Accordingly, no state may deliberately alter its own territory to the detriment of another state without former agreement.

(1) Peters, Anne. Transparency in International Law. India, Cambridge University Press, 2013.

(ii) Cession:[1]

Cession occurs when an owner state transfers sovereignty over territory to another state. A state may cede any part of its land territory, and by ceding all its territory it will completely merge with the other state. Rivers and the maritime belt may not be ceded on their own, as they are an inalienable appurtenance of the land. In order to effect a cession of territory, it must be intended that the owner state transfers sovereignty, and not merely governmental powers short of sovereignty. Cessions of territory are usually effected by a treaty.

Examples can be found in the cessions of Hong Kong and Kowloon by China to the United Kingdom following the Opium Wars, and the United States' purchase of Alaska from Russia in 1867 .

(iii) Occupation :

Occupation as a mode of acquisition of territory historically only occurred when a state intentionally acquired sovereignty over territory that was not subject to the sovereignty of another state. In other words, the territory in question at the time must have been uninhabited, or inhabited by persons whose community was not considered to be a state. This was the crux of the Western Sahara case, in which it was determined that territory inhabited by a people with a political or social structure is not terra nullius and thus cannot be occupied.[2]

For occupation to have successfully founded title to territory, the acquiring state first had to take possession of the territory. This required both physical possession and the requisite intent to acquire sovereignty. Secondly, an administration had to be established over the territory in the

[1] Henriksen, Anders. International Law. United Kingdom, Oxford University Press, 2019.
[2] Taylor, Owen. International Law and Revolution. United Kingdom, Routledge, 2019.

name of the acquiring state. If the acquiring state failed to establish some responsible authority which exercised governing functions within

a reasonable time after taking possession, then there was no effective occupation as no sovereignty had been exercised. Lastly, there had to be some intent to act as sovereign, an animus possidendii. It was also required that the activities of the state be referable to it and not unauthorized natural persons.

Today, it is conceivable that the acquisition of new territory through occupation is nigh impossible given that little to no terra nullius land remains on this planet. However, that is not to say that occupation is irrelevant to modern international law.

For example, for the purposes of resolving a current territorial dispute, it may be necessary to look back in time to see whether title was, in fact, validly acquired through effective occupation in the first place, for the reason of *nemo dat quod non habet* – none may pass better title than they have.

(iv) Prescription:

Although there has always been a school of thought that questioned whether acquisitive prescription even constitutes a mode of acquisition, it had generally been accepted that territory could be acquired through prescription as a matter of practice. Acquisitive prescription involved the transfer of territory to an acquiring state through open possession by continuous and undisturbed acts of sovereignty over a prolonged period of time, adverse to the original state. [1]

No concrete rules existed that set out a minimum length of time or requisite acts of sovereignty in order to have successfully acquired title by prescription. Such matters were dictated by the individual circumstances of each case.

[1] Taylor, Owen. International Law and Revolution. United Kingdom, Routledge, 2019.

It is important to note that such definitions of acquisitive prescription, as with occupation, which emphasizes the passage of time, are now outdated. What is more important is the establishment of effective control.

The best example of title founded by prescription can be found in the Island of Palmas case. In this case, Judge Huber found that even if it were accepted that, as the United States claimed, Spain had title to the island by discovery, such title did not prevail in the face of a 'continuous and peaceful display of sovereignty'. In this case it was required that there exist acts attributable only to sovereignty, and the will to act as sovereign and, furthermore, acquiescence on the part of the original sovereign .

(v) Subjugation:

Lastly, subjugation was the acquisition of territory by military force, followed by annexation. While this mode of acquisition was traditionally a predominant feature of the acquisition of territory by states and empires, the use of force for the purpose of acquisition has, for some time, been unlawful in international law.

Accordingly, the purported annexation of Kuwait by Iraq in 1990 was invalid, as it was acquired by unlawful force. The principle of inter-temporal law subjugation may still be relevant, however, in determining title in the context of the law as it stood at the time of the relevant acts. Of course, use of force is not unlawful if exercised in self-defence.

This raised the question of whether territory could have been validly acquired by annexation following the use of force in self-defence – for example, if, in response to an act of aggression, a state acted in self-defence and in doing so found it necessary to occupy part of the territory of an aggressor. The vast weight of authority, however, suggests doubt that such an annexation would ever have been valid in today's context.

E-State Jurisdiction :

Jurisdiction is a practical authority given to a legal body to deal with legal matters by implications. In Public International Law, the concept of jurisdiction has a strong link with sovereignty. Jurisdiction allows State for sovereign independence which they pass on with the global system of equal States stating the laws related to persons or activities in which they have a legal interest.

1- Territorial Jurisdiction:

It is derived from State sovereignty and constitutes several features. It is the authority of the State over persons, property and events which are primarily within its territories. State Authority has the power to prescribe, enforce and adjudicate the Rules of Law.

The territorial jurisdiction of the State extends over to its with:

1. land,
2. national airspace,
3. internal water,
4. territorial sea,
5. national aircraft,
6. national vessel,

It does not only encompass the crime committed on its territory but also the crimes that have effects within its territory. In such a case, a concurrent jurisdiction occurs. [1]

2-Criminal Jurisdiction:

Criminal jurisdiction is where the powers of the Court are described in dealing with a case where a person is accused of

[1] Henriksen, Anders. International Law. United Kingdom, Oxford University Press, 2019.

an offence. Criminal Jurisdiction is used in many laws like Constitutional Law and Public International Law.

The three distinct situations where only the accused person can file a suit are:

1. To control the relation between States, or between one State and another;
2. To control the relationship between the international Courts and Domestic Courts;
3. Only where he has committed the offence and not in any other State. Also, the law of that State should be a codified law.

3- Immunities from Jurisdiction:[(1)]

Sovereign Immunity: It refers to the legal rules and principles which determine the condition from which the State can claim the exemption of sovereign immunity from the jurisdiction of another State.

This immunity is a creation of the customary international law which is derived from the principles of independence and equality of sovereign States.

Diplomatic Immunity: The rules here are most accepted and uncontroversial rules of International Law. This helps in the maintenance and conduct of the relations between the States. Diplomatic agents enjoy immunity from the criminal jurisdiction of the receiving State.

Consular Immunity: The consular officer is like a diplomatic agent who represents the State who will be receiving State. Not granted the same degree of immunity from jurisdiction as a diplomatic agent.

(1) d'Aspremont, Jean. Formalism and the Sources of International Law: A Theory of the Ascertainment of Legal Rules. United Kingdom, OUP Oxford, 2013.

Chapter two

non-state actors in international law

By definition, the phrase ‘non-state actor’ connotes a presumption in the relationship of power within the international community. As Philip Alston has said, defining actors in terms of what they are not combines ‘impeccable purism in terms of traditional international legal analysis’ and with it comes the capacity to marginalize other actors.

This chapter focuses on the ‘other’ participants in international law – in other words, non-state actors who have, to a greater or lesser degree, rights and responsibilities as legal persons. These other subjects – international organizations, non-governmental organizations, individuals, groups, corporations and certain other anomalous entities – are, in a real sense, derivative subjects of international law.

○ *International organizations*

International (or intergovernmental) organizations are a modern phenomenon linked to the maturing of the international legal system .[(1)]

The first international organizations were established in the late nineteenth century to coordinate mainly logistical matters. For example, the Universal Postal Union (UPU) was established in 1874 to coordinate the process of international mail handling and delivery. With 191 members, the UPU is now responsible for setting worldwide rules for international mail exchanges and constitutes a forum for discussing matters affecting the industry .

The trend that started with international organizations like the UPU snowballed into a veritable ‘move to institutions’, as the international community realized the utility of permanent collective bodies in many, if not most, aspects of their international relations. Perhaps the greatest of all expressions of

[(1)] Henriksen, Anders. International Law. United Kingdom, Oxford University Press, 2019.

this tendency is the League of Nations and the United Nations (UN), set up after the First and Second World Wars respectively.

Indeed, the institutionalization of international diplomacy was a product of an 'internationalist sensibility' and was gradually extended and reinforced, emphasizing collective interests. Even the extreme polarization of the Cold War did not reverse this trend; it only made progress in certain areas, such as the creation of a permanent international criminal court, more difficult to ascertain.(1)

José Alvarez summarizes the trend as: a move from utopian aspirations to institutional accomplishment; that is, a move to replace empire with institutions that would promote the economic development of the colonized, end war through international dispute settlement, affirm human rights and other 'community' goals through discourse, advance 'democratic' governance at both the national and international levels, and codify and progressively develop . . . international rules – all by turning to the construction of proceduralist rules, mechanisms for administrative regulation, and forums for institutionalized dispute settlement.

The fall of the Soviet bloc in 1991 and the advent of increasing economic, social and political integration – the phenomenon of globalization – have accelerated the institutionalization of international society.

For example, the international legal framework on international trade is near comprehensive, as a result largely of the existence and work of organizations such as the World Trade Organization (WTO). While initially it was largely idle, the International Court of Justice (ICJ) is now extremely busy and has been complemented by an increasingly important patchwork of international courts and tribunals .

(1) Peters, Anne. Transparency in International Law. India, Cambridge University Press, 2013.

New international organizations are constantly being created or morphed so as to regulate the myriad of sui generis legal issues on the international plane .

From a legal perspective, international organizations are entities created by states as a vehicle to further their common interests. They are constituted by treaty and are usually composed of three organs :

1) a plenary assembly of all Member States ،
2) an executive organ with limited participation, and
3) a secretariat, or administrative body.

The fact that international organizations have a personality distinct from their Member States distinguishes them from these states merely acting in concert. Diplomatic conferences such as the Group of Eight (G8), institutions lacking organs such as the Commonwealth, and treaties such as the former General Agreement on Tariff s and Trade (GATT) (now superseded by the WTO) are not international organizations. International organizations are analogous to corporations in domestic law and fulfill a similar function as an efficient network of contracts harmonizing the interests of their members. Prominent international organizations include the UN, its specialized agencies such as the World Health Organization (WHO) and the International Labour Organization (ILO), and regional organizations such as the European Union (EU).[(1)]

The United Nations:

❖ Organs and functions of the United Nations:

After the Second World War claimed over 50 million lives, more than half of which were civilian, the international community resolved to found a new world order to promote a

[(1)] Henderson, Conway W.. Understanding International Law. United Kingdom, Wiley, 2010.

gentler international society. At the San Francisco Conference in 1945, the overwhelming majority of states concluded the United Nations Charter, which established the United Nations Organization.

Its stated purpose was to 'save succeeding generations from the scourge of war', to 'reaffirm faith in fundamental human rights', to 'establish conditions under which justice and respect for the obligations arising from . . . international law can be maintained' and to 'promote social progress and better standards of life.'

The UN was to be the successor organization to the League of Nations set up after the First World War and in many respects the drafters learned from the mistakes of the old order. Chapter II of the UN Charter provides for 'open' membership – 'all peace-loving states' that are willing and able to carry out the obligations under the Charter may join the Organization.[1]

The organs of the United Nations are established by Chapter III; their compositions, functions and powers are laid out in following Chapters. The principal organs are: ● the General Assembly; ● the Security Council; ● the Economic and Social Council; ● the Trusteeship Council; ● the International Court of Justice; and ● the Secretariat .

Subsidiary organs may be established when deemed necessary, as was the case when the Security Council controversially created the International Criminal Tribunal for the former Yugoslavia (ICTY) through SC Resolution 827 (1993), to try the major war criminals in the violent break-up of the former Yugoslavia. The UN Human Rights Council (UNHRC, formerly the UN Commission on Human Rights (UNCHR) is a subsidiary organ of the General Assembly.

[1] Peters, Anne. Transparency in International Law. India, Cambridge University Press, 2013.

1-The General Assembly:

The General Assembly is the plenary body of the UN, consisting of representatives of all Members. It is the forum par excellence for international debate, producing non-binding recommendations (by way of resolutions) to Members or the Security Council. Resolutions on specified 'important' matters, such as the maintenance of international peace and security, are determined by a two-thirds majority, in contrast to a simple majority vote required for other matters.(1)

Given the virtually universal membership of the United Nations, resolutions adopted by large majorities of the General Assembly may amount to very strong *opinio juris* as an element of customary international law .

General Assembly resolutions have had a great influence on the development of customary law, so much so that the ICJ has at times engaged in the dubious practice of basing its findings on customary law entirely on such resolutions. The General Assembly may initiate studies for, among other things, 'promoting international co-operation' and 'encouraging the progressive development of international law and its codification.'

In accordance with this power, the General Assembly created the International Law Commission (ILC) in 1947, a permanent body of independent experts tasked with promoting the codification and progressive development of international law. The opinions of this knowledgeable body are highly persuasive in the interpretation of international law in numerous fora. The General Assembly also controls the apportionment among Members of the Organization's expenses.

(1) Peters, Anne. Transparency in International Law. India, Cambridge University Press, 2013.

2- The Security Council :

The Security Council is the executive arm of the UN Organization. The real power of the new world order is embodied by the endowment of the Security Council with primary responsibility for the maintenance of international peace and security. In addition to powers for overseeing the peaceful settlement of disputes, the Security Council can take enforcement action against threats to the peace, breaches of the peace and acts of aggression. Enforcement can consist of sanctions falling short of armed force, such as economic sanctions or the severance of diplomatic relations. However, where such sanctions prove inadequate, the Security Council may deploy armed forces supplied by its Members, to forcibly maintain or restore international peace and security. This power is the centerpiece of an international order based around the prevention of global war.

Article 2(4) of the UN Charter establishes the now customary law prohibition against the use of force other than in individual or collective self-defence. The UN has deployed ‘peacekeepers’ in areas such as Kosovo (UN Interim Administration Mission in Kosovo (UNMIK), as well as forces more properly termed ‘peacemakers’ in enforcement actions, such as the intervention in the Congo during the Katanga secession crisis of the 1960s (UN Operation in the Congo (ONUC).[(1)]

At times the UN has put itself in an untenable position by deploying UN peacekeepers on the ground without extending their mandate to include the use of force other than in self-defence. This occurred most infamously during the Rwandan genocide in 1994, where the UN peacekeeping force (UNAMIR)

[(1)] d'Aspremont, Jean. Formalism and the Sources of International Law: A Theory of the Ascertainment of Legal Rules. United Kingdom, OUP Oxford, 2013.

was not authorized, nor provided with adequate resources, to do anything more than evacuate Westerners and watch while hundreds of thousands of Tutsis were massacred. In 1995, the UN failed to prevent the Srebrenica genocide in Bosnia under similar circumstances.

These tragic incidents represent a clear failure of political will at the international level; the states with the means to intervene were not prepared to do so. The circumstances in which the Security Council has been prepared to take adequate – or any – measures has sometimes led to mission confusion (or 'creep') as well as allegations of selectivity, based on the geopolitical interests of the permanent five members of the Council and their allies.(1)

The UN has also set up interim administrations and otherwise offered its services after other states have unilaterally and without UN authorization deployed force, ostensibly justified by humanitarian intervention (as with the NATO bombing of Serbia)or pre-emptive self-defence (as with the invasion of Iraq by the Coalition of the Willing).

The role of UN peacekeepers and their responsibilities under the laws on the use of force are very complex issues and the subject of much debate. Various factors may hamper their performance on the ground: resourcing and mandate confusion, rapidly changing circumstances on the ground and the fact that the UN's role is in considerable part subject to global power politics.

The UN administration in Kosovo, UNMIK, even engaged in 'state building', providing Kosovo with the means necessary to function as an independent state and thus facilitating its declaration of independence from Serbia on 20 February 2008.

(1) Henderson, Conway W.. Understanding International Law. United Kingdom, Wiley, 2010.

Another example of the enormous power open to the Security Council's authority to take measures to maintain and restore international peace and security is the creation of entire derivative international organizations, such as the war crimes tribunals for the former Yugoslavia and Rwanda – binding all states to cooperate with the exercise by these courts of their mandates and costing the international community over 200 million US dollars each year.(1)

Members of the UN undertake to implement the decisions of the Security Council, which includes providing troops for peacekeeping or enforcement missions. Although the Security Council is composed of 15 Members, only five (China, France, Russia, the United Kingdom and the United States of America) are permanent members that have the power of veto over all non-procedural decisions. In practice, the stipulation that the veto does not apply to procedural decisions is not absolute, as a preliminary decision on whether a decision is procedural is considered itself to be non-procedural.

The power of veto entrenches the hegemony of the permanent members by effectively preventing action contrary to their interests. The veto must, however, be actually cast; an abstention will not constitute a veto, as the USSR discovered after its abstention from certain resolutions in 1950 – recommending that Members assist South Korea during the Korean War – proved to be ineffective in paralyzing the Security Council.

3-The Economic and Social Council :

Economic and social cooperation is a major aspect of the UN's work, as the Charter considers this necessary for peaceful and friendly relations between nations.

(1) Peters, Anne. Transparency in International Law. India, Cambridge University Press, 2013.

The task of promoting solutions for international economic, social, health, and related problems, and universal respect for human rights is bestowed specifically on the Economic and Social Council (ECOSOC).Composed of 54 Members, ECOSOC may initiate studies and reports, make recommendations, draft conventions and convene international conferences on these issues.

One of ECOSOC's primary functions is to coordinate the activities of the UN 'specialized agencies that have been 'brought into relationship' with the UN. This means that organizations that become specialized agencies of the UN shed their previous international personality and come under the umbrella of the international personality of the UN; however, they retain much of their previous autonomy. The specialized agencies include the International Labor Organization (ILO), the World Health Organization (WHO), the World Bank, the International Monetary Fund (IMF) and the United Nations Children's Fund (UNICEF) .[(1)]

A current example of work produced by ECOSOC with the aid of many of these specialized agencies is the Millennium Development Goals Report issued on 23 June 2010.

The Report details the progress taken towards ending world poverty as well as providing information on other issues such as fighting the spread of AIDS and ensuring universal access to clean water. Through this Report and similar activities, ECOSOC conducts a leadership role in monitoring and coordinating advances in economic and social development .

4- The Trusteeship Council :

The Trusteeship Council was established to oversee the trusteeship system, whereby former colonies (mainly of defeated

(1) Henderson, Conway W.. Understanding International Law. United Kingdom, Wiley, 2010.

states) were administered by trustee states with a view to maintaining domestic peace and fostering the conditions for the trust territories' eventual independence. Trustee states would conclude individual agreements for this purpose. The principal objectives of the trusteeship system were, among other things, to further international peace and security by ensuring that former colonies would not fall into chaos and to promote the political, economic, social, and educational advancement of the inhabitants of the trust territories, and their progressive development towards self-government or independence.

The trusteeship system had replaced the system of mandates under the League of Nations. Although the trusteeship system was suspended in 1994 when the last trust territory, Palau, attained independence, it has historically been a potent mechanism for promoting the efficient transition of former colonies to independence.

5-The International Court of Justice:

The International Court of Justice (ICJ), commonly known as the 'World Court', is the principal judicial organ of the UN. Its functions and powers are primarily determined by the ICJ Statute annexed to the UN Charter. The ICJ has the power to determine cases referred to it by states that are parties to a dispute, or on the initiative of a state if the other state party has made a declaration that the jurisdiction of the Court is compulsory. Advisory Opinions on legal questions can be requested by the General Assembly and other organs and specialized agencies of the UN arising within the scope of their activities. The bench is composed of 15 judges, representing the main forms of civilization and the principal legal systems of the world.[1]

[1] d'Aspremont, Jean. Formalism and the Sources of International Law: A Theory of the Ascertainment of Legal Rules. United Kingdom, OUP Oxford, 2013.

The ICJ is the successor to the Permanent Court of International Justice (PCIJ). Operating from 1920 until the breakdown of the League of Nations system with the outbreak of the Second World War in 1939, the PCIJ was highly respected, no state daring to refuse implementation of its decisions. The PCIJ was itself the result of a process that began at the Hague Peace Conferences of 1899 and 1907, where voices extolling the desirability of a truly international court succeeded in persuading states to establish the Permanent Court of Arbitration.

The PCIJ was the next logical step, made all the more imperative by the League of Nations' goal of preventing the recurrence of the First World War. The ICJ Statute borrowed heavily from the PCIJ Statute, including replicating almost verbatim its Article 38(1) which sets out the now universally accepted sources of international law.[1]

However, the ICJ, especially in its earlier years, was not as successful as the PCIJ. The denial of standing by the ICJ to Liberia and Ethiopia in the South West Africa cases60 to review whether South Africa was fulfilling its obligations under the mandate for South-West Africa (now Namibia), sparked a furor in the UN General Assembly by the majority of states as being based on a Western conception of world order. This led to a protracted period where defendants would refuse to appear before Nicaragua – the World Court regained a general level of confidence within the international community.

The Court has been criticized as being of limited legal utility. It has sometimes let its judicial function be superseded by political considerations, as its (non) opinion in the Nuclear Weapons case indicates. Also, its judgments at times lack the rigour and poise appropriate to a Court of its stature, as

[1] Henderson, Conway W.. Understanding International Law. United Kingdom, Wiley, 2010.

evidenced by the slackening of its judicial method in relation to the discovery of customary international law and its over-reliance on its own prior decisions.

However, the Court has rendered many important decisions and its rulings have, since the Court's revival in the late 1980s, been largely implemented and enforced, although the United States' veto of a draft General Assembly resolution insisting on 'full compliance with the Nicaragua judgment is a disappointing exception. That said, any assessment of the performance of the World Court must take into consideration the horizontal system of international law, which is not easily susceptible to enforcement by judicial pronouncements.[1]

6-The Secretariat :

The final principal organ is the Secretariat, the administrative staff of the Organization. Its chief administrative officer and the UN's most prominent figure is the Secretary-General. The Secretariat is loyal only to the Organization and may not receive instructions from any external government or authority, or act inconsistently with its position as a body of international officials. Article 101(3) of the UN Charter states: [T]he paramount consideration in the employment of staff and in the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence and integrity .

This provision was the basis from which the ICJ considered that the General Assembly had implied power to create the UN Administrative Tribunal, which functions as an employment law court for the Secretariat.

[1] Taylor, Owen. International Law and Revolution. United Kingdom, Routledge, 2019.

- ***Non-governmental organizations***

Non-governmental organizations (NGOs) are entities created under national law, with voluntary, private membership, to pursue a particular cause that may transcend national boundaries. Familiar examples include Human Rights Watch, Amnesty International, the International Committee of the Red Cross (ICRC), and the International Campaign to Ban Landmines (ICBL) .

NGOs possess little if any international personality and often appear as a mere afterthought in studies of international law. In reality, they can have a profound impact on the practice and development of international law. The ICBL, a conglomeration of NGOs, is a Nobel Peace Prize Co-Laureate for its efforts in pushing for the drafting of the Ottawa Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction 1997 .

The ICRC has worked since 1863 to develop the law and practice of international humanitarian law and, unusually for an NGO, has been granted a mandate under the Geneva Conventions and their Additional Protocols for the protection of war victims and the amelioration of the effects of armed conflict.[1]

Indeed, the ICRC and the International Federation of Red Cross and Red Crescent Societies can be said to possess rights commonly granted to international organizations, such as headquarters and agreements concluded with states providing for privileges and immunities. In fact, the work of the ICRC is considered so important that the ICTY Trial Chamber has held that there exists a customary international law norm that ICRC

[1] Henderson, Conway W.. Understanding International Law. United Kingdom, Wiley, 2010.

employees are immune from testifying about what they witnessed during their employment. [1]

The structure of the Red Cross and Red Crescent Movement also points to the unique nature of this organization: the membership of the International Conference of the Red Cross and Red Crescent, its 'supreme deliberative body', is drawn from the National Societies of the Red Cross/Red Crescent, the ICRC, the Federation and the States Parties to the Geneva Conventions.

Nevertheless, what differentiates the Conference from the deliberative body of an international organization is that the Movement's Fundamental Principles stipulate its political independence as a private organization.

NGOs have been instrumental in the drafting process of the new International Criminal Court (ICC).They also have a powerful influence on the development and content of international law in the nascent area of climate change law. A group of NGOs, including Greenpeace and the World Wildlife Foundation, presented 'A Copenhagen Climate Treaty: Version 1.0' at the Copenhagen Climate Conference of 2009, amounting to a proposal for an amended Kyoto Protocol and a new Copenhagen Protocol by members of the NGO community.

Although the Conference ultimately terminated without significant agreement between states, it exemplifies how NGOs with resources and determination can play an influential role on the world stage. Indeed, it is not only at international summits that NGOs can apply pressure to governments – even when state representatives return home from an international summit they will be confronted by intensive, and often highly effective, lobbying by NGOs in the domestic sphere.

[1] d'Aspremont, Jean. Formalism and the Sources of International Law: A Theory of the Ascertainment of Legal Rules. United Kingdom, OUP Oxford, 2013.

The oft-held misconception that NGOs are a relatively new phenomenon is belied by the longevity of the ICRC and early work of other private organizations pursuing international ends. In 1905, the Convention creating the International Institute of Agriculture (an international organization later superseded by the Food and Agriculture Organization) was the the Institut de Droit International and the International Law Association, pre-eminent NGOs dedicated to the development of international law, suggested that states should conclude a convention to grant legal personality to NGOs.(1) The modern foundations for the institutionalized participation of NGOs were laid when Article 71 was included in the UN Charter :

The Economic and Social Council may make suitable arrangements for consultation with non-governmental organizations which are concerned with matters within its competence. Such arrangements may be made with international organizations and, where appropriate, with national organizations after consultation with the Member of the United Nations concerned .

There are currently over 3000 NGOs in consultative status with ECOSOC that regularly advocate for particular causes by bringing a diverse and progressive voice to debates. NGOs also possess consultative status in other international organizations, such as the International Labour Organization, in which governments and representatives of employers and workers are equal participants. They are also permitted to make submissions on an ad hoc basis at international conferences .(2)

Certain controls are in place to ensure that NGOs meet minimum standards: for instance, ECOSOC requires that, for an NGO to be granted consultative status, it must ‘be of recognized

(1) Peters, Anne. Transparency in International Law. India, Cambridge University Press, 2013.
(2) Taylor, Owen. International Law and Revolution. United Kingdom, Routledge, 2019.

standing within the particular field of its competence or of a representative character'. From 1997, NGOs have also briefed representatives to the UN Security Council and, from 2004, have made direct submissions.

- **Individuals:**

The fact that states are empowered to develop international law as its primary participants, does not exclude the presence of other powerful forces on the international playing field. Indeed, if international organizations and other collectivities can develop a significant presence, then why not also those stakeholders for whom all laws are created and enforced – individuals?

Indeed, such consciousness has grown out of the post-Second World War United Nations model. The increased international personality of individuals in the second half of the twentieth century has seen something of a rupturing of the state-centric conception that has endured since the Peace of Westphalia.

Even so, despite very significant developments in the rights (and obligations) of individuals as subjects and subject to international law, their participation remains very much dependent on the will of states. International law remains state-created law and what has been created can also be taken away.

This section will explore just how significant the individual in international law has become and in what ways these developments reflect the future of the international legal system.[1]

[1] Henderson, Conway W.. Understanding International Law. United Kingdom, Wiley, 2010.

A-International Duties of Individuals:

It has long been recognized that an individual caught engaging in piracy is punishable in the national courts of any state. This was the first international crime, in the sense that states had recognized extraterritorial jurisdiction under international law to try private individuals for committing robbery on the high seas.

By definition, piracy could only be committed by private individuals and their capture and trial was an established exception to the freedom of the high seas, where no state could perform acts of sovereignty over foreign ships. Slavery and violations of the laws and customs of war also entailed the extraterritorial application of national law, although today punishment is based on what has sometimes been referred to as "universal jurisdiction" – that is, a state is under an obligation to prosecute or extradite an individual who has committed these most heinous of international crimes.

Hans Kelsen points out that, although it is an organ of the state that is bringing the pirate, the slave trafficker or war criminal to justice, the sanction is also being applied in the execution of a norm of international law. In this way, individuals possess international duties and are thus cognizable under international law, even as long ago as the eighteenth and nineteenth centuries.

B-Individual criminal responsibility:

The purpose of individual responsibility in international criminal law is to capture all of the methods and means by which an individual may contribute to the commission of a crime, or be held responsible for a crime under international law. It is interesting that the idea of the individual’s responsibility (duty) developed within the international law system before any

structured protection of his or her human rights was to appear after the Second World War.[1]

One of the earlier and normatively important examples of the international community's consciousness of the responsibility of individuals for atrocity came in 1915, in the form of a joint declaration issued by the French, British and Russian governments, condemning the massive and widespread deportation and extermination of over one million Christian Armenians by the Ottoman government: In view of these new crimes of Turkey against humanity and civilization, the Allied governments announce publicly to the Sublime Porte that they will hold personally responsible for these crimes all members of the Ottoman Government and those of their agents who are implicated in such massacres.

Largely failed attempts at holding individuals criminally responsible after the First World War were followed by the Nuremberg, Tokyo and other post-Second World War tribunals that, along with national trials held by Allied countries, tried many thousands of war criminals stretching over decades.

Developments in international criminal law slowed during the Cold War and early plans for a code of crimes against the peace and security of mankind and an international criminal court were, for a long time, unattainable. In 1993 the ICTY was established, under the Security Council's Chapter VII powers to maintain international peace and security, to try persons who had committed serious violations of international humanitarian law in the territory of the former Yugoslavia.

In 1998, the international community (but with the notable absence of Security Council members, the USA, China and Russia) finally concluded the Rome Statute of the International

[1] Peters, Anne. Transparency in International Law. India, Cambridge University Press, 2013.

Criminal Court (ICC), establishing the world's first permanent international criminal tribunal.[1]

Sitting in The Hague, the ICC is tasked with delivering international justice in respect of the 'most serious crimes of concern to the international community as a whole': genocide, crimes against humanity, war crimes and (possibly) aggression.

Finally, a number of 'hybrid' or 'internationalized' criminal tribunals have been established to apply a mixture of international and domestic law, the benches of which reflect this hybridity:

- the Special Court for Sierra Leone – to try war crimes and crimes against humanity committed since 1996;
- the Extraordinary Chambers in the Courts of Cambodia – to try senior leaders of the Khmer Rouge for genocide, war crimes and crimes against humanity and Cambodian criminal law, committed during 1975–79;
- the Special Tribunal for Lebanon – to prosecute those responsible for the assassination in 2005 of Rafi k Hariri, President of Lebanon; and
- the Special Panels of the Dili District Court – created by the UN Transitional Administration in East Timor (UNTAET) to try crimes such as murder, rape and torture perpetrated during 1999.

The idea of individual criminal responsibility for the core international crimes (war crimes, crimes against humanity and genocide) is now indisputably accepted in international law.[1]

[1] d'Aspremont, Jean. Formalism and the Sources of International Law: A Theory of the Ascertainment of Legal Rules. United Kingdom, OUP Oxford, 2013.

C-International Rights of Individuals:

International Rights of Individuals While the duties of individuals under international law have developed considerably in some areas in recent years, so too have certain rights. However, despite the extraordinary growth of instruments and customary law, particularly in the area of international human rights, the character of such rights and the capacity of individuals to exercise them vis-à-vis states remains attenuated. The traditional reticence to acknowledge that international law can bestow rights on individuals was expressed in the 1928 PCIJ decision in the Danzig Railway Officials case.

This early case involved consideration of the terms of a treaty between Germany and Poland providing for pecuniary claims to be made against the Polish Railways Administration by railway officials who had passed from German to Polish service. Although the Court confirmed that a treaty could provide for claims under the domestic law of the parties, a treaty, 'being an international agreement, cannot as such create direct rights and obligations for private individuals'.

International law has since moved beyond this extreme state-centric interpretation of treaties that on their face confer individual rights. The LaGrand case involved Germany's claim before the ICJ against the United States for an alleged breach of Article 36(1) of the Vienna Convention on Consular Relations. Germany claimed that the United States had denied a German national his rights under this sub-paragraph and had executed him despite provisional measures of protection ordered by the ICJ.

In finding the United States in breach, the Court observed that Article 36, paragraph 1, creates individual rights, which, by

(1) Taylor, Owen. International Law and Revolution. United Kingdom, Routledge, 2019.

virtue of Article 1 of the Optional Protocol, may be invoked in this Court by the national state of the detained person. These rights were violated in the present case.[1]

According to the Court, the debate is no longer about whether a norm of international law can confer individual rights, but whether the correct interpretation of a particular norm compels this conclusion.

As the LaGrand case implies, however, the fact that an individual has rights under international law does not necessarily mean that he or she has the capacity to enforce those rights.142 Indeed, under the ICJ Statute, only states may bring claims before the ICJ. Some hold the view that a right without a remedy is no right at all.

However, besides being contrary to modern jurisprudence, this view would be destabilizing in a decentralized system like international law, where enforcement normally occurs through voluntary compliance rather than through what nineteenth-century positivists called an ‘effective sanction’.

To deny recognition of the individual’s substantive right would hamstring the later development of an individual enforcement mechanism. Historically, the fear of a slippery slope leading to the enforcement of human rights is what caused oppressive regimes, such as the former Soviet Union, to oppose the development of human rights jurisprudence, especially in its early years.

As a prominent Soviet jurist explained in 1990: The reserved attitude of the Soviet Union in the past towards control mechanisms in the area of human rights protection, the neurotic reaction to the slightest criticism . . . was not only the result of

[1] d'Aspremont, Jean. Formalism and the Sources of International Law: A Theory of the Ascertainment of Legal Rules. United Kingdom, OUP Oxford, 2013.

ideological dogmatism but also testified to the fact that in the area of human rights there are things to hide in our country.[1]

○ Corporations:

Although transnational or multinational corporations (those operating across state boundaries) have had precursors dating back at least to the Hanseatic League of trading cities in the late Middle Ages, it is in the past half-century that private corporations have started to play an enormously influential role in world affairs.

They were the major drivers of the phenomenon of 'globalization, whereby the planet is becoming increasingly interconnected economically and socially. The economic power of many multinational corporations has come to eclipse that of some smaller states. This ability to make a significant difference to the economies of developing states means that economic power often entails political power – that is, sufficient leverage to effect political change.

However, the practical importance of corporations in world affairs has not been matched by a commensurate articulation of international rights and duties. Although there is much scholarly debate around the desirability of enlisting corporations in the service of international law to promote and protect global public goods, such as human rights and the environment, corporations remain mostly unregulated on the international scene.

Furthermore, they are, by definition, primarily self-interested – with any apparent altruism reflecting more a marketing objective than anything like a raison d'être. In this important way, corporations are quite different from international organizations and other non-state actors. The international personality of corporations derives from two sources.

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[1] Taylor, Owen. International Law and Revolution. United Kingdom, Routledge, 2019.

First, states have concluded treaties among themselves, such as the ICSID Convention, which gives corporations the ability to bring claims in international fora, in this case, the International Centre for Settlement of Investment Disputes.

Secondly, corporations have been ever active in protecting their overseas interests by concluding long-term concession contracts with foreign governments for the construction and exploitation of mines, oil wells and other resources.[1]

These are a fusion of treaty and domestic commercial contracts, in that they may be subject to international law. Whether international law is applicable depends on the intention of the parties to the international commercial contract – that is whether 'for the purposes of interpretation and performance of the contract, it should be recognized that a private contracting party has specific international capacities'.

Multinational corporations have promised to adhere to certain codes of conduct, such as the UN Global Compact of 26 July 2000, through which corporations undertake, among other things, to support and respect human rights and take a precautionary approach to environmental challenges. These codes are not binding and may be freely revoked by the corporations that have accepted them. They are more in the nature of 'soft law'.

Although corporations do not as yet possess significant international duties, the devastating Deepwater Horizon oil spill of 2010, which flowed for three months and caused untold damage to the Gulf of Mexico and the human economy dependent on it, is likely to strengthen the argument that corporations should be made more internationally accountable.

[1]Henderson, Conway W.. Understanding International Law. United Kingdom, Wiley, 2010.

Similarly, recent years have seen the rise of the privatized military industry, where states increasingly turn to a market of mercenaries supplied by private military companies. Although little used since the Napoleonic Wars, mercenaries are making a comeback, with potentially destabilizing consequences to regional and international public order. The few, and often poorly ratified, international conventions prohibiting mercenary use define 'mercenaries' too narrowly to be of much practical use against modern private military firms.

Not being accountable under international law as legal persons means private military companies can potentially commit abuses without fear of being hurt other than via their hip pockets. A recent example is the fatal shooting of seventeen Iraqis by Blackwater (now Xe Services) operatives in 2007.

There is also a need to regulate the flipside to mercenary use: the protection of the interests of mercenaries themselves, as indicated by the beating, killing and subsequent public burning of four Blackwater employees in March 2004 by Fallujah insurgents.

Of course, if corporations undertake international law obligations, this may signal another shift in the state-centric conception of international law, in the sense that other subjects within the milieu of international law will play a role in the application and possibly the development of international human rights in practical and important global contexts.

- **Other non-state actors:**

Some significant 'others' in international law include insurgents, terrorists and national liberation movements. These

groups have challenged and continue to challenge the statist legal order of international law. [1]

Since liberation movements like the Palestinian Liberation Organization have gained prominence in the international community, participating in the United Nations and other international fora, complexities as to their ultimate status and effect on the international legal order have arisen, and persist. Terrorism after 11 September 2001 has changed the international political and legal landscape, spawning Security Council Resolutions, radical national legislative activity and war.

Even so, the international community has been unable to agree on a definition of what terrorism in international law might be. There are also some atypical subjects of international law.

The Sovereign Order of Malta is an entity that has controlled no territory since the British occupation of Malta, yet maintains diplomatic relations with over 93 states. In confirming the continuing international personality of this mainly humanitarian entity, the Italian Court of Cassation stated: 'The modern theory of the subjects of international law recognizes a number of collective units whose composition is independent of the nationality of their constituent members and whose scope transcends by virtue of their universal character the territorial confines of any single State.'

[1] d'Aspremont, Jean. Formalism and the Sources of International Law: A Theory of the Ascertainment of Legal Rules. United Kingdom, OUP Oxford, 2013.

Chapter three

International Responsibility

A member of the International Law Commission (ILC) recently remarked: ‘Responsibility is the corollary of international law, the best proof of its existence and the most credible measure of its effectiveness’.[1]

Every legal system allocates responsibility. Norms, or "secondary rules", operate to hold a person accountable for contravening a ‘primary’ legal obligation. For example, a primary rule in domestic law might be the obligation not to interfere with another person’s property. Whether the interference is attributable to a particular person and, if so, what remedies the victim can seek are determined by the secondary rules. State responsibility for internationally wrongful acts follows the same logic.

Secondary rules in international law are no different from primary rules in that they must be shown to derive from a treaty, custom or general principles. As the term suggests, however, secondary rules are the rights and obligations that apply after a primary rule has been violated .

The leading source in this area is the International Law Commission’s Articles on Responsibility of States for Internationally Wrongful Acts (2001) (‘ILC Articles’ or ‘Articles’).4 The Articles have undergone a long gestation period and they exert a powerful influence on the development of the law.[2]

- **The Definition Of International Responsibility**

Responsibility is the duty to respond in case of violation of the law, each legal order has rules on what should happen in case the law is violated. From this point of view, responsibility is

[1] Henderson, Conway W.. Understanding International Law. United Kingdom, Wiley, 2010.
[2] Peters, Anne. Transparency in International Law. India, Cambridge University Press, 2013.

a cardinal function of law, it is another way of determining the binding nature of a legal rule.

The Permanent Court of International Justice in the Chorzów case, stipulates that it is a principle of international law or even a general conception of law that any breach of an undertaking entails an obligation to make reparation.

The term "primary rule" refers to all the substantive rules of international law, all the rules that may be violated. In the event that one of these primary rules is violated, a system of secondary rules emerges that tells us what the consequences of this violation are.[1]

In the perception of State responsibility, there is a mass of primary rules applicable at a given time between the subjects of international law and there is a secondary level applicable only if one of the primary rules is violated.

It is a relative rule, because there is a primary rule not to enter the territory of another State without its consent, at the secondary level there is a duty to repair the harm caused; if the State does not repair the harm caused, it violates the rule that it must repair the harm caused, then this rule becomes a primary rule so that at that time a secondary rule would again emerge.

What is a primary and secondary rule is a reason for perception, the primary rule has been violated, the secondary rule decides what should follow, the intermediate level is a relative level.

The second remark is that international responsibility is a modern branch, international law only fully developed it in the 20th century, formerly international law did not really need

[1] d'Aspremont, Jean. Formalism and the Sources of International Law: A Theory of the Ascertainment of Legal Rules. United Kingdom, OUP Oxford, 2013.

international responsibility because classical international law considered that any problem that might arise between States, or even other entities on compliance with these rules, should be liquidated either by a transaction, i. e. an agreement, or if an agreement is not possible by force or peace or possibly war.

In modern 20th century law, centered on peace and the regulation of legal systems, the branch of liability has been greatly developed.This development took place through two belts: The first is that of international practice, where jurisprudence has played an important role, it was first of all a right of chancellery and the practice of jurisprudence; arbitrations since the end of the 19th century have very often had as their object the violation of the law.[1]

There was a rich practice between the chancery and the jurisprudence that clarifies this right of liability. There is another belt through which the rule has grown which is through a codification work passed through multiple hands of the International Law Commission.

In 1955 work on State Responsibility began in the period up to 2001; the result is recorded in the Articles on State Responsibility for Internationally Wrongful Acts adopted in 2001 by the International Law Commission and endorsed by the United Nations General Assembly in resolution 4659 of 2001.

- **The Conditions Of International Responsibility**

Article 1 of the International Law Commission's articles on the Responsibility of States for internationally wrongful acts is a provision of the highest quality in terms of its precision and litany**, it provides for any internationally wrongful act of the State incurring its international responsibility.**

[1] Taylor, Owen. International Law and Revolution. United Kingdom, Routledge, 2019.

This statement contains two cumulative conditions, but also two negative conditions, two elements that might have been expected to be found in Article 1, but which are not included in it.

The positively required elements are of two kinds:

1-first of all, there must be an internationally wrongful act: violation of an international norm.(1)

2-the wrongful act must be committed by a State: any internationally wrongful act of a State entails its responsibility.

We must consider that any wrongful act is the act of a State through attribution rules; natural persons act on behalf of the State and we must determine when this is the case and then we talk about the attributions of acts from the person to the State.

As for the elements missing in Article 1:

1-Fault: is fault required with the intention of the State? negligence? Article 1, reflecting international custom, responds in the negative; it is not necessary to provide for negligence, intent or anything on the part of States, it is sufficient if there is a violation. States have an obligation to each other to respect the rules, not to commit wrongful acts and not to do so intentionally.

2-Damage/prejudice: it is not necessary to prove a specific damage, it is not necessary to prove any specific damage, the violation of the rule is sufficient, depending on the type of damage the duty to compensate will be transferred to other modalities.

(1) Henderson, Conway W.. Understanding International Law. United Kingdom, Wiley, 2010.

- **International wrongful acts:**

An important principle grounded in sovereign equality is that every internationally wrongful act of a state entails the international responsibility of that state (Article 1 of the Articles).

An internationally wrongful act is defined in Article 2 as an action or omission that

1- is attributable to the state, and

2-constitutes a breach of an international obligation of the state. There is no requirement that damage be caused to another state. The Articles also reaffirm the now generally accepted principle of objective responsibility .

For example, in the *Caire case* the question arose as to whether Mexico was responsible for the actions of Mexican soldiers who shot a French national after trying to extort money from him .

In finding Mexico responsible, the French–Mexican Claims Commission applied the principle of objective responsibility, defining it as 'the responsibility for the acts of the officials or organs of a state, which may devolve upon it even in the absence of any "fault" of its own.'[(1)]

In its Commentary, the ILC considers that fault may form part of the primary obligation, but there is no general (secondary) rule to that effect. Article 3 of the Articles further provides that the characterization of an act as internationally wrongful is not affected by its characterization in internal law. This reflects the basic principle that a state may not legislate away its international obligations or plead insufficiency of its internal law.

(1) Pahuja, Sundhya. Events: The Force of International Law. United Kingdom, Taylor & Francis, 2010.

1-THE RULES OF ATTRIBUTION:

A state is internationally responsible if a breach of a primary obligation is attributed it. Attribution, or imputing an act to a state, is thus a necessary prerequisite for responsibility to accrue to that state .

A- State Organs :

The conduct of any state organ shall be considered an act of the state, whether the organ exercises legislative, executive, judicial or any other function, whatever position it holds in the organization of the state, and whatever its character as an organ of the central government or of a territorial unit of the state (Article 4 of the Articles).[1]

An organ includes any person or entity which has that status in accordance with the internal law of the state, although this definition is not exhaustive. An international court will consider all the circumstances to determine whether a person not classified as an organ under internal law is, in truth, part of the state apparatus. The fact that an organ of an autonomous government in a federation commits the wrongful act does not absolve the state of responsibility.

An example of breach by the judiciary is where it commits a denial of justice in relation to a foreign national. Further, a breach by the legislature may occur if it fails to honour the state's treaty commitment to pass certain legislation. In the absence of a specific commitment, legislation must typically be acted upon for state responsibility to arise. However, in Prosecutor v Furundžija, the ICTY stated:

[1] Taylor, Owen. International Law and Revolution. United Kingdom, Routledge, 2019.

In the case of torture, the mere fact of keeping in force or passing legislation contrary to the international prohibition of torture generates international State responsibility. The value of freedom from torture is so great that it becomes imperative to preclude any national legislative act authorizing or condoning torture.

Whether legislation gives rise to state responsibility will therefore depend upon the object and purpose of the primary rule in question.(1)

B- Governmental Authority :

Actions of persons who are not state organs will be attributed to the state if they are empowered to exercise elements of governmental authority and they act in that capacity in the particular instance.

Two elements must be satisfied: that the power exercised is of a governmental nature, and that the entity was empowered to exercise it .

As to the former, international case law suggests that two enquiries again are relevant.

The first enquiry is whether there is a high level of government control of the entity. In the case of a company, a rebuttable presumption of governmental authority arises where the state controls the voting power of the company.

The second enquiry is whether the functions being exercised are ‘typically’ or ‘essentially’ state functions.

In Oil Field of Texas, Inc. v Iran, the Iran-United States Claims Tribunal had to decide whether the National Iranian Oil

(1) Pahuja, Sundhya. Events: The Force of International Law. United Kingdom, Taylor & Francis, 2010.

Company (NIOC) was exercising governmental functions in the context of breaches by an associated company of agreements with an American company for the lease of petroleum exploration and drilling equipment. The Tribunal found NIOC's breaches attributable to Iran as Iran was the company's sole shareholder and NIOC was established in order to exercise the ownership right of the Iranian nation in the oil and gas resources.(1)

The second element is that the entity was 'empowered by law' to exercise those functions. This requirement shields the state from responsibility where it has not appointed the entity to the functions it is purportedly exercising. Acts of an organ or an entity empowered to exercise governmental authority that exceed their authority or contravene their instructions will still be considered an act of the state if the entity acts in the capacity of a state entity.

A fine distinction is, however, drawn as to when an entity acts in a governmental or private capacity. A person may still act in a governmental capacity if acting within the apparent limits of his or her functions.

Thus, in the *Caire case*, Mexico could not escape responsibility for the actions of uniformed Mexican police officers who extorted and shot a French national, even though they were acting in excess of their authority under Mexican law. The Commission held that the officers 'acted at least to all appearances as competent officials or organs.'

Conversely, the 2011 incident involving allegations of sexual assault by the then leader of the International Monetary Fund would have occurred in an exclusively private setting and thus would not be attributable to that international organization. Exceptionally, in the context of international humanitarian law,

(1) Henderson, Conway W.. Understanding International Law. United Kingdom, Wiley, 2010.

acts of members of the armed forces during an armed conflict are always attributable to the state, even though they may not have been acting in that capacity. (1)

Article 9 of the Articles restates the rare situation where a person or group of persons is in fact exercising governmental authority in the absence or default of the official authorities and in circumstances that call for its exercise. This has relevance to failed states or the situation immediately after a successful revolution.(2)

C-Instructions, Direction or Control :

The conduct of a person or group of persons who are neither an organ of the state nor an entity vested with governmental authority may still be attributed to the state where they are in fact acting on the instructions, or under the direction or control of, the state . This restates what under customary international law are two distinct elements:

(1) persons acting on the instructions of the state; or

(2) under the direction or control of the state.

The leading ICJ decision is the Nicaragua case, in which Nicaragua alleged that the United States had violated the prohibition against the use of force by mining Nicaraguan waters and providing vital assistance to an insurrectional movement against the Nicaraguan government. Although the mine laying was clearly attributable to the United States as acts of state organs (that state's armed forces), the ICJ found that breaches of international humanitarian law by the rebel contras were not attributable. First, despite finding that the United States largely

(1) Pahuja, Sundhya. Events: The Force of International Law. United Kingdom, Taylor & Francis, 2010.
(2) Taylor, Owen. International Law and Revolution. United Kingdom, Routledge, 2019.

financed, trained, equipped, armed and organized the contras, the Court found that the contras were not in fact organs of the United States or acting under the instructions of the United States.

The Court then considered direction and control. What would have to be proved is that the United States had 'effective control' of the military and paramilitary operations 'in the course of which the alleged violations occurred' and that it 'directed and enforced' those violations.

D-Adoption and Insurrection Movements :

Another avenue of attribution is where a state acknowledges and adopts conduct as its own (Article 11 of the Articles). In the Tehran Hostages case, Iranian militants seized the United States Embassy in Tehran and held the consular and diplomatic staff hostage. The Iranian government's failure to protect the United States mission, and its passive acceptance of the situation after the attack, violated diplomatic law.(1)

It was only after the Iranian government eventually publicly adopted the militants' activities as official policy that this 'translated continuing occupation of the Embassy and detention of the hostages into acts of that State', as the militants 'had now become agents of the Iranian State for whose acts the State itself was internationally responsible.'

It should be noted that mere support or endorsement will not suffice – the conduct must be adopted as the state's own. The situation of insurrection movements is more complicated. The conduct of rebels, for example in destroying alien property, is not attributed to the state if the state is not negligent in suppressing the rebellion. This amounts to a kind of force majeure.

(1) Peters, Anne. Transparency in International Law. India, Cambridge University Press, 2013.

However, if the insurrection is successful and the group eventually becomes the government of the state (or a new breakaway state), actions of members of that group carried out in that capacity during the insurrection will be attributed to the state.[1]

E-Derived Responsibility:

conduct will be attributed to a state where it 'aids or assists' another state in the commission of an internationally wrongful act and where the former knew of the circumstances of the internationally wrongful act.

The physical element of 'aid or assist' is broad and would include conduct that makes it materially easier for another state to commit a wrongful act. The mental element of 'knowledge' is, however, narrow and often difficult to prove. What is required is knowledge of the 'specific intent' of the other state.

For example, a state must not supply arms to another state where the supplying state knows that the receiving state will use them to commit acts of aggression.

Less common is the scenario where one state "directs and controls" another state in the commission of an internationally wrongful act. This may occur, for instance, during the belligerent occupation.[2]

Here, the dominant state is responsible not because it has the power to direct and control, but because of direction and control actually exercised, with knowledge of the circumstances of the wrongful act . Similarly, a state is responsible where it

[1] Pahuja, Sundhya. Events: The Force of International Law. United Kingdom, Taylor & Francis, 2010.
[2] Peters, Anne. Transparency in International Law. India, Cambridge University Press, 2013.

coerces another state to commit a wrongful act, with knowledge of the circumstances of the wrongful act.

Coercion amounts to force majeure for the coerced state as a result of the use of force, severe economic pressure or other measures forcing the coerced state to commit the wrongful act.

F-Lex Specialis :

These general rules of attribution can be displaced by lex specialis. Lex specialis, in legal theory and practice, is a doctrine relating to the interpretation of laws and can apply in both domestic and international law contexts. The doctrine states that if two laws govern the same factual situation, a law governing a specific subject matter (lex specialis) overrides a law governing only general matters (lex generalis).

Currently, a very topical issue is whether a new norm of customary lex specialis has emerged that engages state responsibility for ‘harboring’ or ‘supporting’ terrorists.

The attitude of the international community has become extremely assertive, culminating in a series of unanimous General Assembly and Security Council resolutions following the 11 September 2001 attacks on the United States, condemning those who provide "active or passive" support to terrorists. Of course, one of the major stumbling blocks to such a categorization is the fact that the international community has still, after decades of negotiation, failed to agree on a definition of terrorism that excludes (legitimate) freedom fighters.[1]

(1) Taylor, Owen. International Law and Revolution. United Kingdom, Routledge, 2019.

- ***CIRCUMSTANCES PRECLU DING WRONGFULNESS***

Chapter V of Part 1 of the Articles sets out general rules for circumstances that preclude responsibility for what would otherwise be an internationally wrongful act. There is some doctrinal dispute about whether the circumstances precluding wrongfulness are primary or secondary rules, although their status as generally applicable rules is settled.

The circumstances precluding wrongfulness are, by their nature, temporary – when the circumstance ceases to operate, the obligation to perform the primary rule is restored. Article 26 states that nothing in Chapter V precludes the wrongfulness of an act that is not in conformity with a jus cogens norm. This carefully worded savings clause avoids the doctrinal anomaly presented by the fact that a state can consent to the use of force by, for example, allowing another state to station troops on its territory.

1- Consent

Valid consent by a state to the commission of an act by another state precludes the wrongfulness of that act in relation to the former state to the extent that the act remains within the limits of that consent (Article 20). Consent can be express or implied .[(1)]

The Russian Indemnity case concerned a claim by Russia against Turkey for interest on a long-standing indemnity. The Permanent Court of Arbitration held: In the relations between the Imperial Russian Government and [Turkey], Russia, therefore, renounced its right to interest, since its Embassy repeatedly accepted without discussion or reservation and mentioned again and again in its own diplomatic correspondence the amount of

(1) Henderson, Conway W.. Understanding International Law. United Kingdom, Wiley, 2010.

the balance of the indemnity as identical with the amount of the balance of the principal.

Consent should emanate from authorities competent to give such consent under the internal law of the state, although ostensible authority might suffice in an appropriate case .

The Savarkar arbitration illustrates the flexibility of this rule. The case concerned the transportation of a prisoner by ship to British India where he was to face trial. While the ship was docked in Marseilles harbour, the prisoner escaped and swam ashore, where he was seized by a French gendarme who, with the assistance of members of the British crew, brought the fugitive back. The Permanent Court of Arbitration held that French sovereignty had not been violated, as all parties had acted in good faith and the British officials were entitled to regard the behaviour of the gendarme as valid consent to their actions in the circumstances.

2- Self-defence:

The wrongfulness of an act of a state is precluded if the act constitutes a lawful measure of self-defence taken in conformity with the UN Charter (Article 21) .

3- Force majeure :

Force majeure applies when an act is carried out in response to the occurrence of irresistible force or of an unforeseen event, beyond the control of the state, making it materially impossible in the circumstances to perform the obligation.

A state cannot invoke force majeure if the situation was caused, either alone or in combination with other factors, by the

conduct of the state or if it has assumed the risk (Article 23 of the Articles).[1]

Force majeure can arise from purely natural causes, such as bad weather forcing the diversion of an aircraft onto another state's territory, or from human causes outside the state's control, such as the conduct of insurrection movements.

Similar to the cognate concept of supervening impossibility of performance in the law of treaties, the fact that performance is rendered more difficult – because of an economic crisis, for example – does not excuse non-performance.

4-**Distress** :

The wrongfulness of an act of a state is precluded if the author of the act has no other reasonable way, in a situation of distress, of saving the author's life or the lives of those entrusted to the author's care.[2]

Distress cannot be invoked if the situation is caused, either alone or in combination with other factors, by the conduct of the invoking state, or if the act is likely to create a comparable or greater peril (Article 24).

It is sufficient that the author reasonably believed that the danger existed. In the Rainbow Warrior incident, two French agents had destroyed a ship in the port of Auckland. By treaty, France agreed to make the prisoners serve out their sentences on the island of Hao. However, before their sentences had expired, France repatriated them to their homeland in contravention of its undertakings to New Zealand.

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[1] Henderson, Conway W.. Understanding International Law. United Kingdom, Wiley, 2010.

[2] Peters, Anne. Transparency in International Law. India, Cambridge University Press, 2013.

The Permanent Court of Arbitration accepted France's argument of distress in relation to one of the agents, who had to be repatriated to receive treatment for a serious medical condition that could threaten his life. The Court held that France had demonstrated an "extreme urgency involving medical or other considerations of an elementary nature". By requiring a threat to life, the ILC deliberately departed from the arbitral body's formulation in the Rainbow Warrior case that distress had to be tightly circumscribed to avoid abuse. It thus remains unclear whether distress is available for situations falling short of a threat to life.

5- **Necessity** :

Necessity is an exceptional excuse for non-performance. Necessity cannot be invoked unless it is the only means to safeguard an essential interest of the state against a grave and imminent peril, and it does not impair an essential interest of the state towards which the obligation exists, or of the international community as a whole.[1]

It is only interests of similar gravity to the preservation of the natural environment, economic survival, or the subsistence of the population that would be 'essential'. For example, when the Liberian supertanker Torrey Canyon ran onto submerged rocks, Britain was justified in bombing the ship to burn up the oil that would otherwise have threatened the British coastline. What is 'essential' and whether a 'grave and imminent peril' existed is judged objectively, rather than from the subjective intent of the invoking state, and breaching the primary obligation must be the only means of preventing that peril. Furthermore, necessity may not be invoked if the primary rule excludes the possibility of its invocation, even if implicitly.

[1] Pahuja, Sundhya. Events: The Force of International Law. United Kingdom, Taylor & Francis, 2010.

For example, in the Israeli Wall case, the ICJ held that the course chosen by Israel for the wall was "necessary to obtain its security objectives". However, in doing so Israel would be ‘gravely infringing’ international human rights and humanitarian law, and those infringements "cannot be justified by military exigencies or by the requirements of national security or public order".

Necessity cannot be invoked if the state has contributed to the situation of necessity. In the Hungarian Dams case, necessity was closed to Hungary as it had ‘helped to bring about any situation of necessity. However, on the point of ‘grave and imminent peril’, Hungarian Damsconsidered that a peril appearing in the long term might be ‘imminent’ if its occurrence was nevertheless inevitable.

- **Consequences of breaching international law**

Once it is established that an international obligation has been breached and that the breach is attributable to a state that cannot avail itself of any circumstances precluding wrongfulness, new secondary obligations descend upon that state to make good the injury caused to the injured state or the international community as a whole.[1]

1-Cessation :

The obligation of cessation is crucial to the international rule of law and the underlying principle of pacta sunt servanda (agreements must be kept) .

As a wrongful act does not affect the state’s continued duty to perform the obligation, a state is under a duty to cease its act, if it is continuing (Article 30(a) of the Articles). In practice, cessation is often the primary remedy sought. In some cases,

[1] Peters, Anne. Transparency in International Law. India, Cambridge University Press, 2013.

cessation can be indistinguishable from restitution, especially where the wrongful conduct is an omission, such as the obligation on Iran to free the hostages in the Tehran Hostages case. Cessation was inapplicable in Rainbow Warrior as the violated treaty obligation was no longer in force.

2- Assurances and Guarantees of Non-repetition:

A state is also under an obligation to offer appropriate assurances and guarantees of non-repetition if the circumstances so require (Article 30(b).[1] In LaGrand, the ICJ found the United States to be in breach of diplomatic law in its failure to inform two condemned German prisoners of their right to communicate with the German consulate. The Court considered that the apology by the United States did not suffice in the circumstances.[2]

The Court noted that the United States' commitment to implement a 'vast and detailed program' to ensure future compliance was met with 'Germany's request for a general assurance of non-repetition.'

As to specific assurances, the ICJ intimated that if the United States again breached the rule to the detriment of German nationals, and if the individuals concerned were subjected to prolonged detention or sentenced to severe penalties, 'it would be incumbent upon the United States to allow the review and reconsideration of the conviction and sentence.'

The circumstances in which a state should offer guarantees or assurances are exceptional, and the area is still developing. The rule is likely to apply only if there is a real risk that a serious breach causing substantial injury to another state

[1] Henderson, Conway W.. Understanding International Law. United Kingdom, Wiley, 2010.
[2] Pahuja, Sundhya. Events: The Force of International Law. United Kingdom, Taylor & Francis, 2010.

may be repeated. The choice of means of compliance will usually be left to the discretion of the responsible state.

3-Reparations:

In Chorzów Factory, the Permanent Court of International Justice ordered Poland to pay reparations to Germany for wrongfully appropriating land owned by German companies in Polish Upper Silesia. Under the treaty, Poland could only apply state, and not private, property in payment of German war reparations. The following statement is canonical:‘ Reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.’

This is reflected in Article 31 of the Articles, which provides for an obligation of full reparation for the injury caused by the internationally wrongful act .

The concept of ‘injury’ is broad and includes any damage, material or moral. Insults to a state and pain and suffering are the main examples of ‘moral’ damage.

In the I’m Alone case, the US-Canadian Claims Commission held that the sinking of a Canadian registered private vessel by the United States did not cause any material damage to Canada as it was owned and operated by American citizens. Nevertheless, the act caused moral damage to Canada, for which the Commission recommended that the United States apologize and pay $25,000 compensation. The Articles only partly elaborate on the principle of causation .[(1)]

The Commentary takes the view that questions of ‘directness’ and ‘remoteness of damage’ are too flexible to be reduced to a ‘single verbal formula’. However, under the

(1) Henderson, Conway W.. Understanding International Law. United Kingdom, Wiley, 2010.

mitigation rule in Article 39, an account shall be taken of the contribution to the injury by the willful or negligent conduct of the injured state or person (for example, a national) in relation to whom the injured state seeks reparation .

The Articles do not address the situation where the injury is partly caused by a lawful act of a third party or questions of contribution as between two responsible states. The way in which these general principles apply in international law is largely unexplored. Reparation takes the form of, singly or in combination, restitution, compensation, and satisfaction.[1]

4- Restitution:

Article 35 of the Articles restates the orthodoxy that restitution is the primary remedy for injury caused by an internationally wrongful act. Restitution can take the form of restoration of territory, persons or property or reversal of a juridical act .

For example, in the Temple of *Preah Vihear case*, the ICJ required Thailand to withdraw its detachment of armed forces and restore any objects it removed from a Cambodian temple. In the Arrest Warrant case, Belgium was obliged to cancel an arrest warrant in breach of state immunity .

Restitution is not available to the extent that it is materially impossible (for example, if the appropriated property has been destroyed or sold to a third party), or if it involves a burden out of all proportion to the benefit being sought from restitution, especially if compensation would be a sufficient remedy .[2]

[1] Peters, Anne. Transparency in International Law. India, Cambridge University Press, 2013.

[2] Taylor, Owen. International Law and Revolution. United Kingdom, Routledge, 2019.

These limitations mean that in some areas, such as trade or investment, restitution is rarely ordered. Despite these reservations, retaining restitution as a primary remedy is justified to discourage rich states from paying for illegally obtained advantages that cannot be so obtained by poorer states.

5- Compensation :

To the extent that damage is not made good by restitution, the responsible state must pay compensation for any financially assessable damage, including loss of profits (Article 36 of the Articles).

A common and flexible remedy, compensation usually comprises the "fair market value" of property (appropriately valued), an award of lost profits if not too speculative, and incidental expenses incurred. For personal injury to a national, compensation lies for medical expenses, loss of earnings, and moral damage. These statements are very general and the measure of damages very much depends on the primary obligation breached and the circumstances of the case. Equitable considerations and proportionality also play a role.

The flexibility of compensation is demonstrated by the jurisprudence on nationalizations. Where a state expropriates the property of a foreign national, there is no general customary rule of ‘prompt, adequate and effective’ compensation (the so-called ‘Hull formula’), as developing states have long considered that expropriation during non-discriminatory large scale nationalizations for a public purpose do not oblige states to pay full compensation. Appropriate compensation must take into account the state’s right to permanent sovereignty over its resources.

6-Satisfaction :

The third remedy is satisfaction (Article 37 of the Articles). Satisfaction may consist of an acknowledgment of the breach, a formal apology or another appropriate modality, such as an inquiry into the causes of an incident or the prosecution of individuals.

Assurances and guarantees of non-repetition may also have the effect of producing satisfaction. Sometimes the ICJ has considered that its condemnation of the responsible state is adequate satisfaction. Satisfaction may not be out of proportion to the injury or be humiliating.

Importantly, satisfaction may not amount to punitive damages, a remedy of deterrence not known to international law.(1)

(1) Henderson, Conway W.. Understanding International Law. United Kingdom, Wiley, 2010.

Chapter four

International Disputes

Disputes are inextricably linked to international relations. Increasingly these disputes are no longer just primarily between states but also between states and other parties like international organizations and other non-state actors, and between these actors mutually.(1)

In this context, the Charter of the United Nations (UN) plays a major role, in particular, regarding disputes between states**.**

Article 2(3) of the UN Charter States that all Member States have to settle their international disputes by peaceful means in such a manner that international peace and security, and justice are not endangered.

This view was again confirmed in 1982 in a resolution (Res. 37/10) of the UN General Assembly, the so-called Manila Declaration on the Peaceful Settlement of International Disputes.

The expression "dispute" cannot be precisely defined. In a wide sense, it may mean "a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons." In order to establish whether a dispute exists, it must be shown the claim of one party is opposed by the other. However, whether there exists an international dispute is a matter for objective determination.(2)

The phrase “questions of a legal nature” is employed in the Conventions for the Pacific Settlement of International Disputes of 1899 and 1907, as well as in the Statute of the Permanent Court of International Justice, to denote disputes considered especially suited for arbitration, i.e. peacefully and judicially solved.

(1) Pahuja, Sundhya. Events: The Force of International Law. United Kingdom, Taylor & Francis, 2010.
(2) Peters, Anne. Transparency in International Law. India, Cambridge University Press, 2013.

Not all disputes may be adjudicated by a judicial body. Some of them cannot be settled by a mere application of law; they have a “political” character, and they should be dealt with by a “political” character, and they should be dealt with by a political organ. Only if their character is “legal” are they suitable for court's decision.

Most cases involve both political and legal elements. If both parties rely, in their assertions, on international law, the dispute is clearly a legal or justiciable one.If one of them challenges some rule of law as unjust and seeks to protect its interests which find no support in the positive legal system, the dispute has a purely political character.

Thus, in most cases, the classification of a dispute will depend on the qualification given to it by the parties. In many cases, however, it will be difficult to characterize the dispute.

The importance of deciding that whether a dispute is a "political" or a "legal" one can be understood from the statement made by Roosevelt, while commenting on the treaties of arbitration negotiated in 1911 by the United States with Great Britain and France:

“It would be not merely foolish but wicked for us as a Nation to agree to arbitrate any dispute that affects our vital interest or our independence or our honor; because such an agreement would amount on our part to a covenant to abandon our duty, to an agreement to surrender the rights of the American people about unknown times in the future".[(1)]

Such an agreement would be wicked if kept, and yet to break it –as it undoubtedly would be broken if the occasion arose-would be only less shameful than keeping it……. Of course the same reasons which make it impossible to agree to

(1) Henderson, Conway W.. Understanding International Law. United Kingdom, Wiley, 2010.

arbitrate questions that involve our vital interest, independence, or honor, apply to any proposal to submit to others the question whether or not a given dispute of such a kind is "justiciable", or does or does not involve such questions and therefore should or should not be arbitrated.

Such generalizations are of slight value, however, in the absence of authoritative tests and criteria to enable us to classify a given controversy under its appropriate heading. They thus lead only to fresh discussion and contention.(1)

We may resort to generalizations and say that certain matters, such as the moral right of a people to a separate political existence, or the protection of the economic and commercial interests of a nation, are of a political character.So likewise we may reserve questions of national policy like the Monroe Doctrine and questions of domestic jurisdiction like immigration, as being primarily political and non-legal in their nature.

We may say that questions to which no accepted principles of international law apply *areipso facto* unsuited for legal settlement.

The distinction between legal and political disputes is important because, in International law, the procedure for the settlement of disputes has been laid down for only legal disputes. In the case concerning Border and Trans-border Armed Action(Nicaragua v. Honduras), the Court stated that the Court is only concerned with cases involving with cases involving a legal dispute, in the sense of a dispute capable of being settled by the application of principles and rules of International law.

Para 2 of Article 36 of the Statute of International Court of Justice uses the term „legal disputes‟ in relation to the

(1) Taylor, Owen. International Law and Revolution. United Kingdom, Routledge, 2019.

compulsory jurisdiction of the Court. It is so because, perhaps, the judicial procedure provided by the Court may not be suitable for political disputes.

If in any legal dispute, political aspects are present, the Court as a judicial organ will be competent to deal with a legal question only, and cannot concern itself with the political motivation, as observed by the ICJ in an advisory opinion given in Legality of the Threat or Use of Nuclear Weapons case.[1]

However, when there is a dispute between two states on the question as to whether a particular dispute is or is not a legal dispute, the dispute is settled by the decision of the Court in accordance with Article 36, para6 of the Statute which says that in the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court.

A-Amicable Means :

As the UN Charter does not prescribe in which way or by what means disputes need to be resolved, the parties are free to choose their dispute settlement mechanism. In the framework of international peace and security Article 33 of the UN Charter provides a number of alternatives to choose from in resolving disputes, e.g., negotiation, inquiry, mediation, conciliation, arbitration and judicial settlement.

Notwithstanding the free choice of means, the Manila Declaration underlines the legal obligation of parties to find a peaceful solution to their dispute and refrain from action that might aggravate the situation. The methods and procedure of dispute settlement for states also largely apply to non-state actors.

[1] Henderson, Conway W.. Understanding International Law. United Kingdom, Wiley, 2010.

The Charter under article 33, Para 1 enumerates a number of peaceful means for the settlement of disputes.It says that 'the parties to any dispute…shall…..seek a solution by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.'[(1)]

The expression "other peaceful means of their own choice" denotes that the various means stipulated in the above Article are not exhaustive.

The Draft Declaration of the Rights and Duties of States under Article 8 provided that every state has the duty to settle its disputes with other States by peaceful means in such a manner that international peace and security, and justice are not endangered. Presently, the duty of a State to settle the dispute peacefully has become the customary rule of International Law and has gained the status of customary law, as ICJ declared this in the case concerning Military and Para Military activities in and against Nicaragua.

The peaceful means may be further divided broadly into two categories:

1-Extra-Judicial Modes of Settlement (Diplomatic or Political means)

2-Judicial settlement

In the following section, both of two categories will be discussed:

(1) Pahuja, Sundhya. Events: The Force of International Law. United Kingdom, Taylor & Francis, 2010.

1-Extra-Judicial Modes of Settlement :

❖ Negotiation:

When the disputant states settle their disputes themselves by discussion or by adjusting their differences, the procedure is called negotiation. Negotiation may be carried on either by the Heads of the States or by their accredited representatives or by diplomatic agents.

It also includes correspondence between the disputant states. Negotiation is the simplest form of settling the disputes .It helps the disputant parties to bring about the needed change by mutual consent.

The success of negotiation as a means to settle disputes depends largely upon the degree of acceptability of claims of one party by the other, the restraint, tact and the spirit of accommodation with which the negotiations are conducted.(1)

However, negotiation has certain weaknesses. On many occasions, it becomes difficult for the disputant parties to ascertain the precise and correct facts which have given rise to a dispute. Further, in those cases where the negotiations are carried on by big State on the one hand, and by the small State. On the other hand, when the parties are unequal, it is likely that the small Power may be subjected to the will of the other.

The possibility of imposing influence by the big Power over its counterpart is greater in negotiation. There are many instances where negotiation has been used to solve the dispute.

Like, in 1976, India and Pakistan settled their outstanding differences in the Simla Conference. Similarly, in 1974, India and Sri Lanka settled their boundary disputes by negotiation. In

(1) Henderson, Conway W.. Understanding International Law. United Kingdom, Wiley, 2010.

1977, the Farraka Barrage Issue was also settled through negotiation between India and Bangladesh.

The success of the negotiation as a dispute resolution is reflected in a dispute between Iran and US. The facts involved were that an Iranian Airliner was shot down on July 3, 1988, by a missile fired from an American cruiser (USS Vincennes) that killed 290 people.

The USA termed the incident as accidental. But Iran filed the claim including compensation before ICJ, to which the US objected. But before the starting of oral proceedings, the Agents of the two Parties jointly informed the Court their governments have entered into negotiations that may lead to a full and final settlement of the case.[1]

On February 22, 1996, the governments jointly entered into an agreement through negotiation, finally settling the dispute. The ICJ was informed of this and case was dropped from their then. According to the settlement, the US agreed to pay 131.8 Dollars to Iran as settlement of Iranian claims including compensation to the people killed in the incident. This shows how a big power can also bow down to a small power if good tactics are used during negotiation, and it reveals the true power of negotiation.

The United Nations General Assembly after having realized the importance of negotiation, also issued guidelines, its resolution dated December 8, 1998. (General Assembly Resolution 53/101)

❖ Good Offices:

When the parties are not inclined to settle their dispute by negotiation, or when they fail to settle their dispute by

[1] Peters, Anne. Transparency in International Law. India, Cambridge University Press, 2013.

negotiation, they may take the assistance of a third party in resolving their differences. The third party may be appointed by the parties themselves or by the Security Council. The third party may be a state or an individual –usually an eminent citizen of a third state (whether in a private capacity or by virtue of high political office in that State).

For instance, McNaughton in 1949, Dixon in 1950, Graham in 1951 and Jarring in 1957 were appointed by the Security Council as the United Nations representatives to settle the Kashmir dispute between India and Pakistan.(1)

The General Assembly of the United Nations may also do so under article 14 of the Charter. However, the third party is not under any legal obligation to accept the appointment. Apart from the appointment, the third party may make an offer to the disputant States for providing its services in settling the dispute.

The offer so made should not be regarded as an act of interference by a third party. The offer so made may be rejected by the parties, like, India, in 1951, rejected the offer of Austrian Prime Minister, Robert Menzie, who was given the responsibility to solve the Kashmir issue. Much depends on the person or the parties involved in the dispute and the person making an offer. It is to be noted that the views expressed by the third party acquire „exclusively the character of advice and never have binding force.

When the third party arranges a meeting of the disputant parties so that they may settle the dispute by negotiation, or wherein he acts in such a way so that a peaceful solution may be reached, the act is called good offices.

The main function of the third party, offering its good offices, is to bring the parties together when they have failed to

(1) Henderson, Conway W.. Understanding International Law. United Kingdom, Wiley, 2010.

negotiate or where negotiations have earlier failed. The third party neither participates in the meeting nor gives its suggestions to the parties in this case (contrary to mediation).

Once the parties have been brought together for the purpose of working out a solution of their controversies, the State or person rendering good offices has no further duties.

For Example, Wilson, the Prime Minister of the United Kingdom lent his good offices to India and Pakistan which resulted in the parties to reach an agreement to refer the Kutch issue to an Arbitral Tribunal. Also, The security council rendered its good offices in the dispute between the Netherlands Government and the Republic of Indonesia in 1947.

❖ Mediation:[1]

Similar to the earlier case, in this method also the dispute is referred to the third party. In this case, the third party participates in the discussion along with the disputant States, and also gives its own suggestions in resolving the dispute, in contradistinction to the good offices.

The mediator, i.e. the third party, is required to be neutral and impartial. He must necessarily meet with them and enter into discussions. He should encourage compromise than advice adherence to the legal principles. If this course is adopted, the mediator is likely to succeed in resolving the dispute. The mediator may even sign the treaty/settlement reached by the countries.

Sometimes initial good offices get turned into mediation ultimately. For instance, Roosevelt, began in 1905, by merely extending his good offices to bring Japan and Russia together at Portsmouth to try to reach an agreement for a settlement of the

[1] Pahuja, Sundhya. Events: The Force of International Law. United Kingdom, Taylor & Francis, 2010.

conflicting interest at stake in the war. At a later point, he has led to interest himself in the terms of the settlement, and in the final event, he practically decided the terms of the settlement, thereby turning himself into a mediator.

Mediation of Soviet Premier Kosygin in the dispute between India and Pakistan which resulted in the conclusion of **Tashkent Agreement in 1966** is an example of mediation.

❖ Conciliation:[1]

When a dispute is referred to a commission or a committee to investigate the basis of the dispute and to make a report containing proposals for settlement after finding out the facts, the process is known as conciliation. Thus conciliation is the process of settling a dispute where the endeavors are made to bring the disputant parties to an agreement and to make a report containing his proposals for a settlement.

It is important to note that the proposals of the commission are not binding on the States because of it not being a judgment of any Court or a Tribunal. This aspect differs it from arbitration too, as in the arbitration the award is binding on the parties. Conciliation commission may be either permanent or*ad hoc.*

The General Assembly under Articles 10 and 14 and the Security Council under Article 24 may appoint a Commission to conciliate a dispute. The Assembly in 1949 adopted resolutions which recommended for the establishment of a panel of persons suitable for selection by parties for the commission of inquiry or conciliation, but the response of the states was not encouraging in this regard.

Hence, at present, the procedure of conciliation is when the treaties provide it as a means to settle the dispute. Belgo-

(1) Taylor, Owen. International Law and Revolution. United Kingdom, Routledge, 2019.

Danish Conciliation Commission of 1952, is one instance of appointment of conciliation commission for the settlement of the dispute.

❖ Inquiry:

When a commission is appointed, consisting of impartial investigators, for ascertaining the facts of the disputes, the process is called an inquiry. The function of the commission is confined not only to the ascertainment of the fact.

However, it is done from the judicial point of view, and it also clarifies the question of law or a mixed question of law and facts. It differs from conciliation in the sense, that in the latter suggestions are also given primarily, but in the former, only the ascertainment of facts is done.

Dogger Bank Incident was the first case wherein the procedure of inquiry was invoked, but after the first world war, states preferred conciliation over the commission of inquiry.

In 1967, the General Assembly established a United Nations Register of Experts for fact-finding wherein names of persons are mentioned whose services could be used by the states in accordance with the agreement for fact-finding in relation to a dispute.[(1)]

By United Nations General Assembly:

Although the Assembly has not been empowered to settle the disputes by any specific means, it may discuss a dispute under Article 11 para 2 and may make recommendations to the disputant parties under Article 14 of the Charter for the measures which they may take for the peaceful adjustment of

[(1)]Pahuja, Sundhya. Events: The Force of International Law. United Kingdom, Taylor & Francis, 2010.

any situation, which it deems would likely to impair the general welfare of friendly relations among nations.

Recommendations may be made by the Assembly after a discussion which may take place when the matter is brought before it by any member of the United Nations, or by the Security Council, or by a non-member of the United Nations. Thus, the Assembly has a „general" power for the peaceful settlement of disputes.

By United Nations Security Council:

Under Article 24 para1 of the United Nations Charter, maintenance of International Peace and Security is the responsibility of Security Council. Charter provides various modes by which the council settles the dispute which is likely to endanger international peace and security. Security Council can take following Actions to settle disputes.[1]

(i) Investigation of the disputes.

(ii) Recommendation for appropriate procedure or methods of adjustment.

(iii) Recommendation for the terms of the settlement.

2-Extra-Judicial Settlement:

When a dispute is settled by the international tribunal in accordance with the rules of International law, the process is called judicial settlement. The expression international tribunal is relevant. A tribunal may acquire international character because of its organization and jurisdiction.

[1] Taylor, Owen. International Law and Revolution. United Kingdom, Routledge, 2019.

At present, the International Court of Justice is the most important international tribunal . However, it is not the only judicial tribunal to settle the disputes.

The judicial settlement also includes the activities of many *ad hoc* tribunals of a semi-permanent character, including the UN Tribunal for Libya, etc. However, International tribunal is different from the municipal tribunal, and also from a regional Judicial Tribunal (The Court of Justice of the European Communities).

At present, Arbitration and the settlement of disputes by the International Court of Justice are the important modes of the settlement of disputes.[1]

- **Arbitration:**

Arbitration has been defined by the International Law Commission 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.

Thus, when a dispute is submitted by the parties to a body of persons or to a tribunal for their legal decision, the process for the settlement of a dispute is called arbitration. In the case concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain (***Qatar v. Bahrain***), the ICJ defined arbitration as the settlement of differences between the States by judges of their own choice, and on the basis of respect for the law.

Before a dispute is referred to the arbitration, consent of both the parties is required. That consent may be entrapped in a special agreement called compromise.

[1] Pahuja, Sundhya. Events: The Force of International Law. United Kingdom, Taylor & Francis, 2010.

Individuals constituting the arbitration commission or tribunal are called arbitrators. They are appointed by the disputant parties themselves. The composition of the arbitral tribunal is based on the principle that the arbitrators are chosen by the parties to the dispute, either by agreement between them or by a procedure laid down in the arbitration agreement.

Nowadays, the tribunal has three or five members, as a rule. If parties fail to make the appointment, it can be made by the President of ICJ or by the Secretary General of UN.

The treaties of arbitration usually law the law and procedure which shall be applied by the arbitrators. Normally, general rules of International Law are applied by them but they may specify any other law in the compromise.

The award of the arbitration is binding to the parties unless it is vitiated by fraud, bribery, coercion, etc. The award settles the dispute finally since recourse to the tribunal implies an undertaking to submit to the award.

The Katch dispute between India and Pakistan was solved by referring it to an arbitral tribunal. The award passed was accepted by India.[1]

- **International Court of Justice (ICJ):**

The court differs from arbitration on many grounds.

Firstly, that it is a permanent court and is governed by a statute.

Secondly, the judges are not appointed by the parties, unlike arbitrators.

[1] d'Aspremont, Jean. Formalism and the Sources of International Law: A Theory of the Ascertainment of Legal Rules. United Kingdom, OUP Oxford, 2013.

Thirdly, Court being a permanent court performs a number of functions which arbitrations do not perform, like receiving documents for filing and recording.

Fourthly, the court performs all these functions. Fourthly, the court is open to all states. While all members of UN are *ipso facto* are parties to the Court, non-members of the United Nations may also become a party to it after fulfillment of some conditions.

Fifthly, the court applies rules under Article 38 of the statute, unlike arbitration, where parties determine rules of law to be applied on the dispute.

Compulsive or Coercive Means

Compulsive or coercive means for the settlement for the settlement of disputes are non-peaceful methods. Such measures involve a pressure or force on a State to settle the dispute. However, the use of compulsive measures does not mean the use of armed forces in all the cases. Normally, they include the measures which are just predecessor to war, or short of war.[1]

- **Retorsion:**

Retorsion is the technical term for retaliation. It is based, to some extent, on the principle of tit for tat. When an act is done by a State similar to that done earlier by another state, it is called Retorsion.

The purpose of Retorsion is to take retaliation. The acts which are done by a State in Retorsion are not illegal. In other words, they are permitted under International Law. However, it is

[1] Pahuja, Sundhya. Events: The Force of International Law. United Kingdom, Taylor & Francis, 2010.

an unfriendly act and in given circumstances, it may be an effective tool of law enforcement.

This is acknowledged in practice when international conventions sometimes provide for the employment of an unfriendly act as a reaction to the breach of obligation. The cases where Retorsion are employed as a means to settle the disputes may be numerous.

For instance, if the citizens of a State are given unfair treatment in another State through rigorous passport regulations, the former may also make similar rigorous rules in respect of the citizens of the latter State.

One of the cases of the Retorsion took place in December 1992, when two Pakistani High Commission officials were declared *persona non grata* by India, Pakistan also expelled three Indian officials and declared them *persona non grata.* The action of Pakistan can be termed as Retorsion.

- **Reprisals:**

The term reprisals includes the employment of any coercive measures by a State for the purpose of securing redress. Thus, the main purpose of the reprisals is to compel the delinquent State to discontinue the wrongdoing, or to pursue it, or both.

If a dispute has arisen due to an unjustified or illegal act of a State, the other state may take any coercive measure against that State to settle the dispute. Formerly, Reprisals were restricted only to the seizure of the property or persons, but later, it included other methods as well such as bombardments, the occupation of territories of a State, seizure of ships, freezing of assets of its citizens and taking any kind of property belonging to it.

Thus, it may be applied not only to the state but against the citizens of that State as well.

While a state is at liberty to take action of reprisal, but it has to meet some lawful conditions laid down in ***Naulilaa Incident*** case.

After the creation of the United Nations, the principles of non-use of force and of peaceful settlement of disputes have generally become a part of *jus cogens ,*and therefore the use of force in reprisals has been prohibited (Article 2 para4 of the Charter). Also, article 33 of Geneva Convention forbids reprisals against persons protected therein.[(1)]

Actions taken in reprisals are illegal and are taken exceptionally, by a State for the purpose of obtaining justice. In reprisals, a State takes law into its own hands.

Embargo:

The term Embargo is of Spanish origin. Ordinarily, it means detention, but in International Law, it has the technical meaning of detention of ships in port. Hyde defines embargo as the detention within the national domain of ships or other property otherwise likely to find their way to foreign territory.

The embargo may be applied by a State in respect of its own vessels or to the vessels of other States. When a state confines the operation of the embargo to its own vessels, it is known as a civil or pacific embargo. Such an operation is initiated in accordance with an order issued by State authorities in order to limit or interrupt or terminate its trade and economic

[(1)]Pahuja, Sundhya. Events: The Force of International Law. United Kingdom, Taylor & Francis, 2010.

relations with another state. The purpose is to exert financial or economic pressure on the other state.[1]

When ships of other states are detained which as committed a breach of an Internal Law, the embargo is said to be „hostile". The purpose of such an embargo is to compel another state to settle the dispute. Such an embargo is a form of reprisals.

Embargo at present may be applied by a State, individually, or collectively, under the Authority of the United Nations. If an embargo is applied by a state, it should not endanger international peace and security. If it does so, it would become illegal. The collective embargo may be applied under the authority of the Security Council against a delinquent State.

Pacific Blockade:

When the coast of a state is blocked by another state for the purpose of preventing ingress or egress of vessels of all nations by the use of warships and other means in order to exercise economic and political pressure on that State, the act is called blockade.

When applied during peacetime, it is known as pacific blockade. The essential requirements are that the blockade should be declared and notified; the blockade must be effective.

As to the validity of the pacific blockade, in international law, there was a difference of opinion among jurists, but after the creation of the United Nations, application of pacific blockade has become illegal in view of the fact that it threatens peace and security. It violates para (c) of Article 3 of Resolution adopted by

[1] d'Aspremont, Jean. Formalism and the Sources of International Law: A Theory of the Ascertainment of Legal Rules. United Kingdom, OUP Oxford, 2013.

the General Assembly which laid down the Definition of Aggression.

Collective blockades, when applied under the authority of Security Council are not illegal. It was applied against Iraq in 1990.

- **Intervention:**

It is another compulsive means of settling disputes between states, short of war. According to Professor Oppenheim, it is the dictatorial interference by a State in the affairs of another State for the purpose of maintaining or altering the actual condition of things. Professor Winfield has classified intervention in three categories, i.e. Internal, External and Punitive Intervention.

B-The Use or Threat of Force:

The prohibition on the use of force underpins the United Nations system. In the aftermath of the Second World War, the drafters of the UN Charter sought to restrict the use of force to very limited circumstances, and exclude any right to take unprovoked and aggressive action against a foreign state.

Brownlie describes the rationale for the prohibition on the use of force under the UN system: The security scheme based upon the primary role of the Security Council is not an abstract scheme but reflects the international consensus that individual States, or a group of States, cannot resort to force (for purposes other than self defence) except with the express authorization of the United Nations.

References

1. Aspremont, Jean d'. Concepts for International Law: Contributions to Disciplinary Thought. United Kingdom, Edward Elgar Publishing Limited, 2011.
2. Henriksen, Anders. International Law. United Kingdom, Oxford University Press, 2019.
3. Henderson, Conway W.. Understanding International Law. United Kingdom, Wiley, 2010.
4. Craven, Matthew C. R.. Time, History and International Law. Netherlands, M. Nijhoff, 2007.
5. Peters, Anne. Transparency in International Law. India, Cambridge University Press, 2013.
6. Koskenniemi, Martti. International Law Aspects of the European Union. Netherlands, Kluwer Law International, 1998.
7. Taylor, Owen. International Law and Revolution. United Kingdom, Routledge, 2019.
8. Michaelsen, Christopher, and Hayashi, Mika. International Law in the New Age of Globalization. Netherlands, Brill, 2013.
9. d'Aspremont, Jean. Formalism and the Sources of International Law: A Theory of the Ascertainment of Legal Rules. United Kingdom, OUP Oxford, 2013.
10. Pahuja, Sundhya. Events: The Force of International Law. United Kingdom, Taylor & Francis, 2010.
11. Manuel Jiménez Fonseca, Martti Koskenniemi, Walter Rech, International Law and Empire: Historical Explorations. United Kingdom, OUP Oxford, 2016.
12. Klabbers, Jan. International Law. United Kingdom, Cambridge University Press, 2020.
13. Cali, Başak. The Authority of International Law: Obedience, Respect, and Rebuttal. United Kingdom, Oxford University Press, 2015.
14. Roberts, Anthea. Is International Law International?. United Kingdom, Oxford University Press, 2017.
15. Bianchi, Andrea. International Law Theories: An Inquiry Into Different Ways of Thinking. Spain, Oxford University Press, 2016.

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