KLE LAW ACADEMY BELAGAVI

(Constituent Colleges: KLE Society's Law College, Bengaluru, Gurusiddappa Kotambri Law College, Hubballi, S.A. Manvi Law College, Gadag, KLE Society's B.V. Bellad Law College, Belagavi, KLE Law College, Chikodi, and KLE College of Law, Kalamboli, Navi Mumbai)

STUDY MATERIAL

for

PUBLIC INTERNATIONAL LAW

Prepared as per the syllabus prescribed by Karnataka State Law University (KSLU), Hubballi

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About the Study material

This Study material on Public International law is a compilation of resources on the basis of the Karnataka State Law University syllabus. Notes are extracted from the following sources-

1. Text book Prescribed by University –'*Starke's Public International Law, by S.H. Shearer, Eleventh edition, International student's edition'*
2. 'International Law by Malcolm N. Shaw, Sixth Edition, Cambridge University Press, Cambridge, UK, 2008,
3. International Law A Treatise by L. Oppenheim, Volume 1 Peace, Second Edition, Longmans, Green And Co. London 1912
4. Official websites of World Trade Organization, United Nations Organization and International Labour Organization

The Students can refer to the above books for further reading. The E Book of International Law A treatise by L. Oppenheim Volume 1 is available at http://www.gutenberg.org/ebooks/41046. The soft copy (pdf file format) of the Book – International law by Malcolm N. Shaw, Sixth Edition is available at the below mentioned link http://euglobe.ru/wp-content/uploads/2017/01/Malcolm-N.-Shaw.-International-Law-6th-edition-2008.pdf

Note:

Students can have access to video lectures on different topics of Unit III and IV of Public International law delivered by the compiler of this study material. Some of the links of the video lecture on different topics of Public International Law are given in the annexure to this study material. Before 30th June 2020 Video lectures on all the topics Unit IV and V of Karnataka State Law University syllabus are going to be uploaded to the you tube channel the link of which is shared in the annexure.

SYLLABUS

COURSE-I: PUBLIC INTERNATIONAL LAW

Objectives:

The course includes the study of general principles of international law including law of Peace. Third world concerns in respect of security and development and the role of U.N. and International Agencies in structuring solutions in the context of changing balance of powers are also to be appreciated.

Course contents:

UNIT-I

Nature, definition, origin and basis of International Law; Sources of International Law; Relationship between Municipal and International Law; Subjects of International Law.

UNIT- II

States as subjects of International Law: States in general; Recognition; State territorial sovereignty.

UNIT –III

State Jurisdiction: Law of the sea; State Responsibility; Succession to rights and Obligations.

UNIT – IV

State and Individual - Extradition, Asylum and Nationality; the agents of international business; diplomatic envoys, consuls and other representatives; the law and practice as to treaties.

UNIT – V

The United Nations Organization - Principal organs and their functions; World Trade Organization- Main features; International Labour Organization.

Key topics on Public international Law

UNIT I

1. Origin and development of International Law.
2. Difference between Municipal law and International Law
3. Definition of international law. Theories regarding basis of international law
4. Weakness of International Law
5. Sources of International Law.
6. Operation of International Law within the British municipal Sphere.
7. .Monistic theory.
8. "Dualistic Theory".
9. "International Custom".
10. Theories relating to relationship between international law and municipal law
11. Juristic Works as sources of International Law.
12. Is International Law a True Law?
13. States are the only subjects of International Law- Critically analysis
14. Duties and rights of states are only the duties and rights of men who compose them- An analysis
15. Extent to which individuals and international organizations are subjects of international law.
16. Decisions of International Institution as a source of International Law.

UNIT II

17. Definition of State. Essential elements of the State.
18. "Condominium State"
19. Different kinds of state.
20. Microstates and condominium.
21. Modes of acquiring and loss of territory under International Law.
22. Meaning of recognition
23. Critical analysis of various Theories of recognition.

24. Legal effects of recognition of new state.
25. Distinction between '*Dejure*' and '*Defacto* '-Analysis with decided cases
26. Modes of acquisition and loss of territorial sovereignty
27. Withdrawal of recognition
28. Meaning of intervention.
29. Different types of intervention
30. Implied recognition

UNIT III

31. Meaning of territorial jurisdiction of the state
32. Principles governing the territorial jurisdiction.
33. State jurisdiction according to personal and protective Principles.
34. Definition of State succession
35. Rights and duties arising out of State Succession.
36. Kinds of state succession
37. Consequences of state succession in respect of Treaty rights and obligations Contractual rights and obligations
38. "The Continental Shelf"
39. A state exercises its jurisdiction over property, person, acts and events occurring within its territory- Analysis of the rule and its exception
40. Jurisdiction of maritime state over coastal waters
41. Privileges and immunities of diplomatic envoys
42. Contiguous zone
43. Jurisdiction of maritime state over coastal waters
44. Territorial sea and Continental Shelf
45. Exclusive economic zone
46. Principle involved in the 'Lotus Case'
47. Freedom of High Seas
48. Meaning of High Sea. Freedoms available to a state on the high sea
49. Inter-oceanic canals, special treaty rules applicable to regulate their administration
50. Maritime belt
51. Responsibility of a state for international delinquencies

52. Expropriation of foreign private property
53. Calvo clause

UNIT IV

54. Modes of acquiring and loss of Nationality
55. Meaning of extradition? Conditions for extradition
56. Classification of International Treaties
57. Importance of treaty in international law
58. Steps in the conclusion of an international treaty
59. Meaning of nationality. International importance of Nationality
60. Interpretation of treaties
61. Meaning of asylum. Different types of Asylum
62. Consuls
63. Definition of the term "Treaty"
64. Stages of concluding Treaty
65. Termination of treaties
66. Double Nationality
67. Extradition, Laws governing extradition
68. Classification of treaties
69. Statelessness

UNIT V

70. Purposes and principles of United Nations Organization (U.N.O.)
71. Powers and functions of the General Assembly of the United Nations
72. Composition and functions of General Assembly
73. Dispute settlement mechanism of World Trade Organization (W.T.O.)
74. Suspension of members from United Nations Organization (U.N.O.)
75. Objectives of International Labour Organization. (I.L.O.)
76. Composition and voting procedure of Security Council
77. "The Economic and Social Council"
78. 'Laws applied by International Court of Justice' to settle disputes
79. International court of justice
80. International labour organization

81. Compulsory Jurisdiction of the International Court of Justice
82. Secretary General
83. Composition and Jurisdiction of International Court of Justice
84. Secretariat
85. Main features of World Trade Organization

Origin and development of International Law

Definitions of International Law –

Traditional Definitions of International Law

International Law regulates the relations between or among states. States and only states are subjects of International Law

Exponents: Oppenheim, J.L. Brierly and Hackworth

Oppenheim's Definition:

"*Law of Nations or International Law is "the name for the body of customary and treaty rules which are considered legally binding by civilized states in their inter Course with each other"*

Key components in this definition are (a) It is a body of rules governing the relations between states; (b) States regard these rules as binding on them in their relation with one another. and (c) those rules are derived from customs and treaties.

Criticism of Oppenheim's definition:

Not only states but also international organization is subjects of international law

P.E.Corbett: "The future of International law is one with the future of International Organizations. Individuals and other private persons have rights and duties in International Law. Not only customary and conventional International Law but it also includes general principles of Law.

Modern Definitions of International Law

International Law not only regulates the relations between states but also deals with International organizations, individuals and non – state entities.

Definition of J.G.Starke

" International Law may be defined as that body of law which is composed for its greater part of the principles and rules of conduct which states feel themselves bound to observe, and therefore, do commonly observe in their relations with each other, and which includes also;

(a) The rules of law relating to the functioning of international institutions or organizations, their relations with each other, and their relations with states and individuals; and

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

Reasons for emergence of new definition includes, eestablishment of a large number of permanent international institutions or organisations, protection of human rights and fundamental freedoms and creation of new rules for the punishment of persons committing international crime

Nature of International Law (Theories of basis of International Law)

There are two views as to the nature of International Law. The first view is that ***'International Law is not a true law.'*** The chief exponents of this view are John Austin, Hobbes, Holland, Pufendorf, and Bentham. The second view is that *'International law is a true law.'* And the chief exponents of this view are from Natural school of Law.

'International Law is not a true law.'

Austin's Views -

According to Austin, Law is a Command of Sovereign given by political superior to political inferiors. International law is not true law, but a code of rules of conduct of moral force only. Law in strict sense is the result of edicts issuing from a determinate sovereign legislative authority this authority is politically superior if rules are not issued by a sovereign authority or if there is no sovereign authority then rules are not legal rules. Such rules are moral or ethical rules only, therefore international law is not a true law but positive international morality. International laws are opinions or sentiments current among nations generally.

'International law is a true law.'

The chief exponents of the second view that International law is a true law are Luis Henkin and Sir, Henry Maine:

According to Luis Henkin generally all the nations observe the principles of International Law and their obligations. According to him Objective of any law ands its implementation is most important and not the means and methods.

Sir Henry Maine considers that in primitive societies there was no sovereign political authority yet there were laws. Austin's concept of law denied customary rules of international law, the status of law. Treaty and conventions are like legislation of international law. States do not deny the existence of international law. Some states like U.K. and USA treat International

Law as part of their laws. International law does not completely lack sanctions. Decisions of International Court of Justice are binding upon parties to the dispute

Influence of Natural law theory on the nature of International Law

It has significant influence on international Law. Several characters and binding force of international law is founded on the theories of law of nature Important contentions of this theory are that ideal law founded on the nature of man as a reasonable being, the body of rules which nature dictates to human reasons is law. States submitted to international law because their relations were regulated by the higher law that is law of nature. International law is a part of the law of nature. Natural law contains those principles which natural law dictates to states. It is no less binding upon them than it is upon individuals because, states are composed of men, their policies are determined by men and these men are subject to the natural law

Theory of Positivism on the basis of International Law

International laws have same characters as Municipal law. International laws are issued from the will of the state. International law can be reduced to a system of rules depending for their validity only on the fact that states have consented to them. For positivists state is a metaphysical reality. It has a value and significance and this significance makes the state to have will of its own and this will is considered as the sovereign authority. International law consists of those rules which. Various state-wills have accepted by a voluntary self restriction. Without such manifestation of such consent, the international law would not be binding on the society of states. Thus international law is a branch of state law, an external public law. Only for this reason they are binding on the state. Consent for the state may be express or implied(tacit).

Views of Aanzilotti

Binding force of international law can be traced back to one supreme, fundamental principle or norm i.e. **'The agreements between states are to be respected.'** this principle is known as '***pacta sunt servanda.'*** Every legal order consists of a complex of norms. They derive their obligatory character from a fundamental norm to which they relate to. *Pacta* ***sunt servanda*** is the supreme norm.

Origin and development of international Law

History of modern system of international law is only of the last four hundred years. It grew from the usages and practices of modern European states in their intercourse and communications. Writings of jurists of sixteenth century, seventeenth and eighteenth centuries had a profound impact on the modern international law. Fundamental tenets of modern international law are national and territorial sovereignty, perfect equality and independence of states. They are based on the modern European state system. This system influenced the newly emerged non-European states.

History of early international law

Rules of conduct to regulate relations between nations emerged from the usages in the period of antiquity. Treaties and immunities of ambassadors, and are found before the dawn of Christianity in ancient Egypt and India. There were historical cases of recourse to arbitration and mediation and in ancient China and Early Islamic world. In Greek city states there were inter-municipal laws composed of customary rules which crystallised into law from long-standing usages followed by city states. They are connected with need for prior declaration of war, enslavement of prisoners of war etc. There were deep religious influences and there were no distinctions made between law, morality, justice and religion. During Rome's dominance, distinction was made between legal rules and religious aspects. This Roman law was later revived later in Europe

Instructions: *For detailed discussion on the origin and development of International law, students can refer to the Text book 'Starke's Public International Law, by S.H. Shearer, Eleventh edition, International student's edition, from Page no.7 to Page no.16*

Sources of International Law

Introduction:

Sources of international law are the materials and processes out of which the rules and principles regulating the international personalities are developed. According to Lawrence and Oppenheim there is only one source of International law and that is the consent of nation. Brierly considers customs and reasons as the main sources of international law.

Article 38(1) of the statute of the International Court of Justice is widely recognized as the most authoritative statement as to the sources of International law. On the basis of Article 38 of ICJ Statute five distinct sources can be identified. They are International conventions/treaties, International customs, General principles of law, Judicial decisions and writings of the publicists and Reason and equity.

International Conventions or Treaties:

It is the first and Important Source of International law. There is no Legislative organ in the field of International Law, comparable to legislatures within the State, the enactments of which could bind all the States. The Contracting Parties may, however, establish an international organization by means of the treaty with authority to bind them by its resolutions or may even lay down rules for their mutual conduct. In this sense, multilateral treaties are a feeble approach to International Character. Treaties can be divided into law Making Treaties and treaty Contracts

Law making Treaty-

Law making treaties are those treaties which are entered into by a large number of States. These are the direct source of International Law. These treaties are binding. Law making treaties may be divided into i) treaty giving the rule of Universal International Law. ii) Treaty giving general principles.(i) Treaty giving the rule of Universal International Law - These treaties are signed by a majority of the State. For Example United Nation Charter. (ii) Treaty giving general principles - These treaties are entered into and signed by a large number of countries giving

thereby general principles of International Like. Geneva Convention on Law of sea and Vienna Convention on Diplomatic Relations, 1961 are examples of such a treaty.

Treaty Contract:

These are the treaties which are entered into by two or more States. The provisions of such treaties are binding only on the parties to the treaty. Such type of treaties is also the source of International Law because they help in the development of customary rules of International Law.

It is criticized that the classification of treaties are misleading because they both create binding rules. In conventions numbers of State, parties are involved. Majority of state abides by the obligation and agreed voluntarily. Treaties create rules and principles of International Law. The basis is the common consent of the States. There is no law making authority in the international sphere. The role played by convention in the absence of such Law making Authority is significance. The International convention goes one step ahead of customary rules. Treaty stipulations override rules of International customary law which are incompatible with them. This proposition received approbation in the case of S.S Wimbledon 1923, where the Permanent Court of International Justice held that treaty law takes priority over international Customary Law. Conventional and customary rules of International Law are not the only source of International Law, but they fill the gap in absence of law making authority.

Customs:

Custom is the older and original Source of International Law. It is as such Second Important source of International Law. International Law Custom may mean a kind of qualified practice, by the existence of a corresponding legal obligation to act according to this practice, hence by the existence of the corresponding rule of International law. The customs are evolved through the practices of and usages of the nation and their recognition by the community of nations. Customary rules are those rules which are practiced by most of the States by way of habit for a pretty long time.

International custom has developed by spontaneous practice and reflects a deeply felt community of law. Its rules are regarded as possessing density and stability and it is the repository of the general or common law of the nations.

The general Principles of Law:

The General Principles of law are based on moral Principles and law of nature; it has relation with the State Practice. The statute of the International Court of Justice authorizes the Court to apply the general principles of law recognized by civilized nations in addition to international conventions and custom, which are the two main sources of International law. It makes national legal systems as a source of law for the creation of International Law.

The special arbitral tribunal between Germany and Portugal also applied the general principles of law in the Maziua and Naulilaa case where the arbitrators observed that in the absence of rules of International law applicable to the facts in dispute, they were of the opinion that it was their duty to fill the gap by principles of equity fully taking into account the spirit of International Law, which is applied by way of analogy and its evolution.

D) Judicial Decision:

According to Article 38 of the Statute of the International Court of Justice, Judicial Decisions are subsidiary sources of International Law. They are not the automatic sources of law. Judicial Decisions by International Court of Justice, Permanent Court of Justice, International Arbitral Tribunal and Municipal Courts are subsidiary sources of International Law.

Article 59 of the Statute of the International Court of Justice expressly provides that the decisions of the court have no binding force except between the parties and in respect of that particular case. This means that the judicial decisions are binding only on the disputed States. Under the provisions of this Article, the Court is specifically required not to apply precedent or doctrine of stare decisis in its decisions. Decisions of International Court of Justice are to have only persuasive value. The content of earlier decisions has some element of law and it is clarified, impartially, as certainly carried by International Court of Justice. How it contributes in the development of International Law? Its repeated application is relied upon. Later on, it does not remain only persuasive and it does convert into rules of International Law.

Text writers, Juristic Works and Commentators –

It is referred and relied on by International Court of Justice which author is quoted in which decision. The opinion of jurist is also regarded as sources of international law but they are subsidiary means for the determination of rules of international law. While deciding the case, if the Court does not find any treaty or judicial decision or legislative act or any established custom, the Court may take the help of opinion of jurist as subsidiary means for the determination of rules of International law. Although juristic works are not independent sources of law, sometimes juristic opinion leads to the formation of International law. It throws light on the rules of International law and their writing makes it easier to frame a particular rule. The value of juristic writings carries more weight particularly in those fields of international law where treaty or customary rules do not exist. The Writings of Ayala, Gentilis Grotius, Vattel, Kent Zouche, etc have tended to transform the transitory state of usages into custom and represented a strong element to consolidate the customary law.

Equity

Equity is used in the sense of consideration of fairness, reasonableness and policy often necessary of the sensible application of the more settled rule of law. Though equity cannot be the direct source of International Law, It is of great importance in those fields where rules are not readily available.

Some jurists say that, it is not the formal source of law but it is a a subsidiary source of law. Equity principles originate from culture and interest of state concerned, equity principles vary from State to State. Equity in international law is uncertain. It is subjective, and to bring objectively to the principles of equity as a principle of natural law are considered. The Concept of Equity has been referred to in several cases.

Decision or determinations of the organs of International Institutions –

In the modern age the decisions or determination of the organs of international Institutions are also treated as sources of International Law. In the view of constant change in the forms and content of the International Law, International organizations have also become a subject of International law. The decisions and determination of the organs of such institution are

also, therefore, regarded as the sources of International Law because they help in the development of customary rules of international law.

Theories of relationship between international law and municipal law

Theories as to Relationship between International Law and Municipal Law can be broadly classified in to two kinds known as Dualistic Theory and Monist theory

Dualism & Monism: Dualists see International Law and Municipal Law as distinct and separate – arising from different sources, governing different areas and relationships, and different in substance. According to Dualists, international law is inferior to and weaker than, domestic law. If international law ever becomes part of domestic law, that can only be because domestic law, has chosen to incorporate it. Monists on the other hand contend that there is only one system of law, of which international and domestic laws are no more than two aspects. They justify this by claiming that both of them govern sets of individuals (States being seen for this as collection of individuals) both are binding, and both are manifestations of a single concept of law. Hence international law is superior and stronger, as it represents the system's highest rules – jurisdiction on a domestic level being only delegated to states, which cannot avoid being bound to apply international law at the domestic level. So, if domestic law anywhere conflicts with international law that is the State's fault, and will not excuse the State's obligations.

Viewed on the international plane, the dispute between these two schools of thought is indeed academic. "Formally international and domestic law as systems can never come into conflict. What may occur is something strictly different, namely a conflict of obligations or an inability for a state on the domestic plane to act in the manner required by international law". It is well settled that international law will apply to a state regardless of its domestic law and that a state cannot in the international forum plead its own domestic law, or even its domestic constitution, as an excuse for breaches of its international obligations.

Viewed on the domestic plane, however, the dispute is not merely an academic one, for the two schools of thought lead to very different results. Whether international law forms part of domestic law is a question, which in practice, is decided either by the Constitution or a Statute or by the domestic Courts of each State.

Monists say that it will always form such a part; dualists, that it will form part only if the domestic law has expressly as impliedly incorporated it. In fact, many States expressly accept

international law as part of their domestic law, leaving academicians to debate whether the acceptance was necessary or superfluous. But others do not.

Where international law becomes incorporated in a State's domestic law without the need for specific legislation, those parts of it, which are sufficiently explicit to be enforceable by the domestic courts, are known as 'self executing.

Some States provide by their Constitutions that certain provisions of international law shall be self-executing. For example, the Constitution of the U.S.A., provides that international treaties are part of the law of the land.5 Other countries have gone even further by not only making international law self executing, but assigning to it a rank in the domestic hierarchy superior to all prior and subsequent legislation. Examples of this are France and Germany. But there are other States that do not accept any international law as self-executing, or so accept it in part. For example United Kingdom (U.K.). Where International Law and Domestic Law coincide, there is of course no problem. But if they differ – either because international law imposes an obligation on a State which is not reflected in its domestic law, or because obligations imposed by international law and domestic law respectively conflict with each other in a particular case – a domestic court will generally have to apply the following rules.

(1) Where the domestic legal system is founded on a dualists view, and the obligation under international law has not become self-executing under a standing provision of the domestic law or been expressly re-enacted in that law, the court must follow the domestic law and ignore the international law. (In U.K. where the legal system is entirely dualist and there are no provision for self-execution), U. K. courts are not entitled to take into account provision of international treaties if the legislature has not expressly enabled them as part of domestic law though U.K. is bound by treaty provision.

(2) In any other case, the court must have regard both to international law and to domestic law. If there proves to be a conflict between them, the court must follow any rules of domestic law that prescribe which of them is to prevail.

(3)If there are no such rules, it will probably be because the domestic legal system is founded on the monistic view, and so international law will prevail.

Unfortunately, however, existing legal theories concerning such application of international rights tend to belittle both the judicial agency and the desirability of judicial participation in implementing even relatively uncontroversial international rights at domestic levels. The existing pattern of marginalization of domestic enforcement of International Human Rights Law is deeply rooted in a naive exploration of the theory of relationship between domestic law and international law. The monist's theory rightly contemplates International Law and Domestic Law as just two manifestations of one singular concept, "Law". As such the judiciary in a monist country is ideally in a position to directly apply international human rights norms. By contrast, unincorporated international human rights treaties are considered as only having 'persuasive' and not 'binding' authority for judiciaries of dualist tradition, although as regards customary international law most dualist court follow, if more theoretically than practically, a notionally monist tradition of recognizing customary international human rights as directly applicable part of national laws.

The traditional divide between 'binding' and 'persuasive authority' of international human rights norms simply holds the possibility that a judge may if he/she so wishes, draw on those norms to inform his/her decisional reasoning. The approach does not focus on the obligations that a state assumes by becoming a party to an international convention, or under higher, general international principle; nor does it articulate to refer, at the minimum, to those international legal sources of state obligations. In short the existing dualist model, tends to weaken both the normative and ethical regime of international human rights law as a whole.

Thus, the dualist model seems to put limits of legal positivism. But, if one concedes to the view that, apart from state obligations, there are also values and ethical force in international human rights, one would be able to pursue a more effective approach to the dualism. Mayo Moran aptly questioned the dominance of the "world of legal judgment" by the traditional "binding sources" model of international rules.

While supporting the persuasive stance regarding non-binding international law, they critique that the courts current approach does not properly distinguish between 'binding' and 'persuasive' authorities of international rights law and urge for judicial obligations to interpret

binding international law (e.g. customary) more actively. Moran describes the approach of courts in this regard (treating International Law as persuasive) as one of 'Judicial quasi-obligation'. It appears that dualist model courts treat International Human Rights Law as not 'rights generating' but only helps in articulating rights based on domestic regime of law. Such an approach is suicidal one considering the legal foundation upon which International Human Rights Law exists.

Theories as to Application of International Law within Municipal Sphere

For conceptual clarity on relations ship between municipal law and international law, it is pertinent to discuss the theories as to Application of International Law within the Municipal sphere**.**

Specific Adoption, Specific Incorporation or Transformation Theory: The Dualist considers that the rules of International Law cannot directly be applied within the municipal sphere by State Courts. In order to be so applied such rules must undergo a process of specific adoption or specific incorporation into municipal law. According to Dualist Theory International Law and Municipal Law cannot impinge upon state law unless Municipal Law allows its constitutional machinery to be used for that purpose as they are two separate and structurally different systems. Dualists argue that, in the case of treaty rules, there must be transformation of the treaty into state law. They further claim that such transformation of treaty into state law should not merely a formal but a substantive requirement, and that alone validates the extension to individuals of the rules laid down in treaties.

These theories rest on the supposed consensual character of International Law as contrasted with the non-consensual nature of state law. According to this theory, there is a difference between Treaties which are of the nature of promises, and Municipal statutes which are of the nature of commands and that the transformation of International Treaties to the Municipal sphere is formally and substantively indispensable. However, this argument is criticized by saying that the distinction between promise and command is relevant to form and procedure but not to the true legal character of these instruments.

Delegation Theory: The 'Delegation Theory' which is put forward by the critics of the transformation theory maintain that the Constitution Rules of International Law delegated to each state Constitution, the right to determine when the provisions of a treaty or a convention is to come into force and the manner in which they are to be embodied in State law. Further, the supporters of Delegation theory contend that the procedure and methods to be adopted for this purpose by the state are a continuation of the process begun with the conclusion of the treaty or convention. They argue that, there is no transformation, no fresh creation of rules of municipal law, but merely a prolongation of one single act of creation and the constitutional requirements

of state law are thus merely part of a unitary mechanism for the creation of law While the monist/dualist debate continues to shape academic discourse and judicial decisions, it is unsatisfactory in many respects.

State Practice on the Domestic Application of International Law:

Domestic use of international human rights treaties has been a subject of debate in almost all countries. This is mainly because of the effect of common law that had great bearing on the jurisprudence of several countries since they were once colonies of British Empire and even after liberation, common law still continue to influence the jurisprudence of these countries. However, in recent years there is a sharp departure from dualist approach and most national courts are tending towards monist view on the subject. A brief overview of domestic application of international human rights law in states other than India will offer comparative analysis of domestic use of international human rights treaties. Further it will also help understand the prevailing trend and interpretative techniques that are adopted to incorporate international human rights laws in to the domestic jurisprudence.

Practice of United States of America

Application of International Treaty Rules in U.S.A:

Unlike India, the treaty making power and the status of international law in U.S. is clearly provided under the U.S. Constitution. Article II Section 2 of the Constitution of U.S.A. provides that; “the President shall have power, by and with the advise and consent of the Senate, to make treaties, provided two-thirds of senators present concur….” The President initiates and conducts negotiations of the treaties and after signing them, places them before Senate for its “Advice and Consent”

A distinction is made in the U.S.A. between treaties and agreements. Treaties are required by the Constitution to be submitted before the Senate for approval/ratification. Whereas the agreements (known as executive agreements), are entered into and signed by the President in exercise of his executive power. The types of agreements so contemplated are those relating to foreign relations and military matters that do not affect the rights and obligations of the citizens.

However, in the case of trade agreements, such agreements are subject to ratification by both Houses but only by a simple majority.

England: Practice

The domestic application of international law in England draws a distinction between i) customary rules of international law; ii) treaty rules.

Customary Rules of International Law: According to the 18th Century "Blackstonian" Doctrine, generally known as incorporation doctrine, customary international law was deemed automatically to be part of the common law. **Treaty Rules:** The application of treaty rules in England is primarily conditioned by the constitutional principles governing the relations between the executive (crown) and Parliament. The negotiation, signature and ratification of treaties are matters belonging to the prerogative powers of the crown.

Current Practice: The modern practice in England is of submitting treaties to Parliament for ratification. This is because of a statement made on 1st April 1924 by Mr. Ponson the Under Secretary of State for Foreign affairs in Parliament of the intention of the new Government to lay on the table of both House of Parliament every treaty, when signed, for a period of twenty one days, after which the treaty will be ratified and published and circulated in the Treaty Series. The object of this practice is to secure publicity for treaties and to afford opportunity for their discussion in Parliament if desired. It apparently does not apply to those kinds of treaties, usually of minor or technical importance, which do not require ratification. It appears that practice only applies to treaties that are made subject to ratification. Thus, domestic application of international human rights law in England reflects dualist approach in the sense that international human rights treaties do not form part of the corpus juris of England unless Parliament enacts a law incorporating the treaty provisions in to the English law. That means all Multilateral Treaties including human rights are non-self executing treaties and in that context English practice of domestic application of international treaties is completely different from U.S. where treaties are regarded as supreme law of the land. However customary international law is regarded as part and parcel of the law of land in both England and U.S.

Subjects of International Law

Introduction

Some questions that are relevant to the study of international law include who can create international law? Who has rights, duties, and powers under international law? (or international legal personality); and who is regulated (governed), directly or indirectly, by international law?

> *Dixon – "A subject of international law is a body or entity recognized or accepted as being capable, or as in fact being capable, of possessing and exercising international law rights and duties"*

The terms "subjects of international law" refers to entities endowed with legal personality, capable of exercising certain rights and duties on their own account under the international legal system.

According to Starke, the term "Subject of international law" means; an incumbent of rights and duties under international law; The holder of procedural privileges of prosecuting a claim before an international tribunal; and The possessor of interests for which provision is made by international law

Oppenheim says that an international person is one who possesses legal personality in international law meaning one who is subject of international law so as to enjoy rights, duties or powers established in international law. It also gives the capacity to act on the international plane either directly or indirectly through the state.

Theories regarding subjects of International Law

1. Realist Theory (States alone are subjects of International Law)

According to the orthodox positivist doctrine, states are the only subjects of international law. According to Prof. Oppenheim, "the law of nations is primarily a law of international conduct of states and not of their citizens". If individuals have any right then it can be claimed only through the states. The Jurists of this school believes that the states are the subjects of international law, while individuals are the objects of international law.

Criticism of Realist Theory

It is silent on the rights of the individuals and the international offences for which individuals may be punished. In *Reparation for injuries suffered in the services of the UN* case, the ICJ held "that the UN has the capacity to bring an international claim against the State for obtaining reparation when an agent of UN suffers injury."

2. Fictional Theory (Individuals alone are subjects of International Law)

In this theory, Jurists believe that Individuals are the only subjects of international law as states do not have soul or capacity to form an autonomous will. Prof. Kelson opined that the laws ultimately apply to the individuals and are for the individuals alone. As per this theory, the welfare of an individual is the ultimate goal of international law.

Criticism of Fictional Theory

The primary concern of International law is the rights and duties of the states. Individuals possess many rights under international law but their capacity to enforce these rights is limited. In most of the cases, a state files the claims for the rights of the citizens. In Mavrommatis Palestine Concession case (1934), the PCIJ observed that "It is an elementary principle of international law that a state is entitled to protect its subjects".

3. Functional Theory (States, Individuals and some non-state entities are subjects of International law)

The jurists with a moderate view criticize both of the above theories. These Jurists believe that States, Individuals and certain non-state entities are subjects of international law. Now, Individuals got right even against the states. An example of this is the European Convention on Human Rights in 1950. Under International Covenants on Human rights 1966, it is held that individuals can claim rights directly under international law. In some cases, Non-state actors like Colonies and Protectorate states are treated as subjects of international law.

International Organizations as subjects of International Law

The advent of international organizations in the 20th Century is having immense significance. There are different types of International organizations, some are Global like the United Nations and others are regional like the African Union

Individuals as subjects of International Law

Modern states practices have accepted in a limited way that Individuals have international legal personality. This position of the individual is not equivalent to the states; still, individuals have got legal personality due to many reasons. Individuals have got various rights at International law, which gives them the confidence to be a part of it. The Universal Declaration of Human rights, 1948, gives various rights to individuals at an international forum.

Conclusion

Today in modern times, states are not the only subjects on international law. They are still the main subjects but in changing character of international law, international organizations, individuals and certain non-state entities got the status of subjects in International Law. Now Individuals can enforce their rights in certain capacity against the states. Though, there is a wide gap which exists between the rights of the states and individuals at the other end.

State and Elements of State

A State stands identified with its four essential elements:

1. Population:

State is a community of persons. It is a human political institution. Without a population there can be no State. Population can be more or less, but it has to be there. There are States with very small populations like Switzerland, Canada, and there are States like China, India and others, with very large populations.

The people living in the State are the citizens of the State. They enjoy rights and freedom as citizens as well as perform several duties towards the State. When citizens of another State are living in the territory of the State, they are called aliens. All the persons, citizens as well as aliens, who are living in the territory of the State are duty bound to obey the state laws and policies. The State exercises supreme authority over them through its government.

There is no definite limit for the size of population essential for a State. However, it is recognized that the population should be neither too large nor very small. It has to be within a reasonable limit. It should be determined on the basis of the size of the territory of the State, the available resources, the standard of living expected and needs of defense, production of goods and supplies. India has a very large and fast growing population and there is every need to check population growth. It is essential for enhancing the ability of India to register a high level of sustainable development.

2. Territory:

Territory is the second essential element of the State. State is a territorial unit. Definite territory is its essential component. A State cannot exist in the air or at sea. It is essentially a territorial State. The size of the territory of a State can be big or small; nevertheless it has to be a definite, well-marked portion of territory.

States like Russia, Canada, U.S.A., India, China, Brazil and some others are large sized states whereas Nepal, Bhutan, Sri Lanka, Maldives, Switzerland, Togo, Brandi and many others are States with small territories. The whole territory of the state is under the sovereignty or

supreme power of the State. All persons, organizations, associations, institutions and places located within its territory are under the sovereign jurisdiction of the State.

Further, it must be noted that the territory of the state includes not only the land but also, rivers, lakes, canals inland seas if any, a portion of coastal sea—territorial waters or maritime belt, continental shelf, mountains, hills and all other land features along with the air space above the territory.

The territory of the state can also include some islands located in the sea. For example Andaman & Nicobar and Daman and Diu are parts of India. State exercises sovereignty over all parts of its territory. Ships of the State are its floating parts and Aero-planes are its flying parts. Even a States can lease out its territory to another State e.g. India has given on lease the Teen Bigha corridor to Bangladesh.

3. Government (Politically organized)

Government is the organization or machinery or agency or magistracy of the State which makes, implements, enforces and adjudicates the laws of the state. Government is the third essential element of the State. The state exercises its sovereign power through its government.
This sometimes creates the impression that there is no difference between the State and Government. However it must be clearly noted that government is just one element of the State. It is the agent or the working agency of the State. Sovereignty belongs to the State; the government only uses it on behalf of the State.

Organs of political organization:

(1) Legislature—which formulates the will of State i.e. performs law-making functions;
(2) Executive— enforces and implements the laws i.e. performs the law-application functions; and
(3) Judiciary—which applies the laws to specific cases and settles the disputes i.e. performs adjudication functions.

Government as a whole is the instrument through which the sovereign power of the State gets used.

In ancient times, the King used to perform all functions of the government and all powers of governance stood centralized in his hands. Gradually, however, the powers of King got

decentralized and these came to be exercised by these three organs of the government: Legislature, Executive and Judiciary.

Each of these three organs of the government carries out its assigned functions. Independence of Judiciary is also a settled rule. The relationship between the Legislature and Executive is defined by law and it corresponds to the adopted form of government. In a Parliamentary form of government, like the one which is working in India and Britain, the legislature and executive are closely related and the latter is collectively responsible before the former.

In the Presidential form, as is in operation in the U.S.A., the legislature and executive are two independent and separate organs with stable and fixed tenures, and the executive is not responsible to legislature. It is directly responsible to the people.

Government is an essential element of State. However it keeps on changing after regular intervals. Further, Government can be of any form—Monarchy or Aristocracy or Dictatorship or Democracy. It can be either Parliamentary or Presidential or both. It can be Unitary or Federal or of mixture of these two in its organisation and working. In contemporary times every civilized State has a democratic representative, responsible transparent and accountable government.

4. Sovereignty:

Sovereignty is the most exclusive element of State. State alone posses sovereignty. Without sovereignty no state can exit. Some institutions can have the first three elements (Population Territory and Government) but not sovereignty.

State has the exclusive title and prerogative to exercise supreme power over all its people and territory. In fact, Sovereignty is the basis on which the State regulates all aspects of the life of the people living in its territory.

Sovereignty has two dimensions:

Internal Sovereignty and External Sovereignty.

(i) Internal Sovereignty:

It means the power of the State to order and regulate the activities of all the people, groups and institutions which are at work within its territory. All these institutions always act in accordance with the laws of the State. The State can punish them for every violation of any of its laws.

(ii) External Sovereignty:

It means complete independence of the State from external control. It also means the full freedom of the State to participate in the activities of the community of nations. Each state has the sovereign power to formulate and act on the basis of its independent foreign policy.

We can define external sovereignty of the State as its sovereign equality with every other state. State voluntarily accepts rules of international law. These cannot be forced upon the State. India is free to sign or not to sign any treaty with any other state. No state can force it to do so.

No State can really become a State without sovereignty. India became a State in 1947 when it got independence and sovereignty. After her independence, India got the power to exercise both internal and external Sovereignty. Sovereignty permanently, exclusively and absolutely belongs to the State. End of sovereignty means end of the State. That is why sovereignty is accepted as the exclusive property and hallmark of the State.

These are the four essential elements of a State. A State comes to be a state only when it has all these elements. Out of these four elements, Sovereignty stands accepted as the most important and exclusive element of the State.

No other organization or institution can claim sovereignty. An institution can have population, territory and government but not sovereignty. Andhra Pradesh, Tamil Nadu, Orissa, Punjab, Sikkim, in fact all states of the Indian Union have their populations, territories and governments.

These are also loosely called states. Yet these are not really states. These are integral parts of the Indian State. Sovereignty belongs to India. Sikkim was a state before it joined India in 1975. Now it is one of the 28 states of India. UNO is not a state and so is the case of the Commonwealth of Nations, because these do not possess sovereignty. SAARC is not a state. It is only a regional association of sovereign states of South Asia.

India, China, U.S.A., U.K., France, Germany, Japan, Australia, Egypt, South Africa, Brazil, Argentina and others such countries are States because each of these possesses all the four essential elements of state. The presence of all these four elements alone vests a State with real statehood.

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Kinds of State

- **Federal states and confederations**
- **Protected and vassal states and protectorates**
- **Condominium**
- **Trust territories**
- **Neutralised states**

Federal states and confederations

Mainly characterized by a constitutional division of sovereign competences between the federal or central authority on the one hand and the authorities of the federated entities on the other hand.

Confederations

Confederations are voluntary associations of independent states. Reasons for voluntary association may be to secure some common purpose and agree to certain limitations on their freedom of action and establish some joint machinery of consultation or deliberation. It lacks effective executive authority and also lacks viable central governments. Member states typically retain their separate military establishments and separate diplomatic representation members are generally accorded equal status right of secession from the confederation. It is first step toward the establishment of a national state, usually as a federal union.

Illustration: Federal union of modern Switzerland - From confederation of the Swiss canton and the federal constitution of the United States – From The government of the Articles of Confederation. Confederations have also replaced more centralized arrangements.
Illustrations: The British Commonwealth

Protectorate sates

It is a relation between two States. It happens that a weak State surrenders itself by treaty into the protection of a strong and mighty State Surrendering state transfers the management of all its more important international affairs to the protecting State. Through such treaty an international union is called into existence between the two States this relation between the protected and protecting states is called protectorate. The protecting State is internationally the superior of the protected State; The protected state loses its full sovereignty and is henceforth

only a half-Sovereign State. Generally speaking, protectorate may called *a kind of international guardianship***.**

Neutralised state

A neutralized State is a State whose independence and integrity are for all the future guaranteed by an international convention of the Powers. Such State binds itself never to take up arms against any other State except for defense against attack. They never to enter into such international obligations as could indirectly drag them into war.

Condominium state

In terms of international law, condominium refers to territory that is governed by multiple sovereign powers who have formally agreed to share duties without necessarily dividing the area into national zones.

Regarding international law, "condominium" refers to territory that is governed by multiple sovereign powers who have formally agreed to share duties without necessarily dividing the area into national zones. Despite the recognition of a condominium as a theoretical possibility, the idea has been rare in practice. Complications often arise in regards to maintaining mutual collaboration between countries. If the mutual understanding fails, the situation then most likely becomes untenable. The recording for the term condominium in English dates back to 1714.

Examples of Current Condominia

Throughout history, many condominia have been established in different places throughout the world. Germany, Austria, and Switzerland consider themselves as holders of a triple condominium over Lake Constance's main part. However, there exists no international treaty that establishes where the three countries have their borders around Lake Constance. Germany and Luxembourg hold a condominium over the Moselle River together with its tributaries and the Our and Sauer. The condominium also includes the tip of an island that is located near Schengen, 15 river islands of different sizes and bridges. The condominium between the two countries was established through a treaty in 1816. The Brock District which is located in Bosnia and Herzegovina holds a condominium between Republika Srpska and the Federation of Bosnia and Herzegovina. Honduras, Nicaragua and El Salvador hold a tridominium over

regions of the Gulf of Fonseca together with the territorial sea beyond its mouth. Pheasant Island, which is also known as Conference Island, is located in the River Bidassoa and forms a condominium which was established in 1659, through the Treaty of the Pyrenees.

Examples of Proposed Condominia

Following years of dispute, the Danish and Canadian governments came close to declaring Hans Island a condominium. However, another alternative was proposed which involved dividing the island in half, but negotiations still continued. There has been a hypothetical condominium proposed between Palestine over Jerusalem. However, the condominium was to be within the Palestinian independence framework. During a proposal for the Partition of Belgium, Wallonia and Flanders held a condominium over Brussels. There are plenty of other proposed condominia that are yet to be confirmed.

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Mode of acquisition and loss of territorial sovereignty

Introduction:

The state has four essentials namely population, territory, government and sovereignty. Territory is one of the four elements which a state should possess in order to be an international person. The state must have a fixed territory the territory of the state includes not only land within its jurisdiction, but also the natural resources. Lakes, rivers and the marginal sea. The air space above the land is also part of the territory. The state jurisdiction is exercised by the state over persons and property within a particular territory.

Definition:

Oppenheim: "State territory is that definite portion of the surface of the globe which is subjected to the sovereignty of the state."

Modes of acquiring territory:

Following are modes of acquiring territory.

Occupation:

Occupation in international law means an act of appropriation by a state over a territory which does not belong to any other state

Starke's views:

"In order to ascertain whether a state has occupied a particular territory, regard should be given to the effectiveness of the control over the territory concerned. Essentials elements for effective control are that, there is direct evidence of possession and an exhibition of actual authority.

Prescription:

If a state exercises control over a territory continuously for a long time without any interruption and possess it defacto, the concerned territory becomes part of that state. This mode is known as prescription international law does not fix any certain time so as to a title by prescription. However length of time required for prescription is a matter which should be decided by international court of justice or tribunal where the case is brought for adjudication.

Conditions:

A state may acquire some territory by prescription only when the following conditions are fulfilled. Occupying state has not accepted the sovereignty of any other state over the said

territory. Possession should be peaceful. There should be no interruption. Possession should be for a definite period not less than 20 years.

Accretion:

If a new territory is added, mainly through natural causes to existing territory that is already under sovereign of acquiring state it is accretion. Form of accretion can be natural or artificial.

Cession:

Cession is the transfer of sovereignty over a definite territory by one state to another state. Forms of Cession can also be voluntary or under compulsion.

Annexation:

It is the acquisition of the territory of an enemy through the military force in time of war. U. S Charter on Annexation: This mode has been greatly affected by UN charter by Art. 2(4) under which member state cannot acquire territories by annexation.

Adjudication:

Adjudication is also mode of acquiring territory. it occurs where a conference of the victorious powers at the end of a war assigns territory to a particular state for the sake of settlement of peace.

Modes of losing territory:

Cession:

The acquisition of territory by one state is loss to the other. the act of cession may be in the nature of gift, sale, exchange or lease.

Operation of nature:

A state may lose territory by operation of nature for e. g. by earthquake, a coast of the sea a Island may altogether disappear.

Subjugation:

As a state may acquire territory through annexation, the other state may lose it through subjugation.

Revolt: When a new state takes birth in consequences of revolution or revolt it would be loss of territory by revolt.

Renunciation:

Renunciation is a mode of losing territory by renunciation. it is the very opposite of the occupation which requires both possession and intention.

Independence to a Colony:

Granting of independence to a colony is also a mode of losing imperialist state grants independence to the areas under its control.

Recognition of state

Recognition of state under the International Legal System can be defined as "*the formal acknowledgement or acceptance of a new state as an international personality by the existing States of the International community*". It is the acknowledgement by the existing state that, a political entity has the characteristics of statehood.

Essentials for recognition as a state:

Under the International Law, Article 1 of the Montevideo Conference, 1933 defines the state as a person and lays down following essentials that an entity should possess in order to acquire recognition as a state:

1. It should have a **permanent population**.
2. A **definite territory** should be controlled by it.
3. There should be a **government** of that particular territory.
4. That entity should have the **capacity to enter into relations with other states**.

Legal Effects of such recognition

When a state acquires recognition, it gains certain rights, obligations and immunities such as.

1. It acquires the capacity to enter into diplomatic relations with other states.
2. It acquires the capacity to enter into treaties with other states.
3. The state is able to enjoy the rights and privileges of international statehood.
4. The state can undergo state succession.
5. With the recognition of state comes the right to sue and to be sued.
6. The state can become a member of the United Nations organisation.

Theories of recognition

The recognition of a new entity as a sovereign state is based on two main theories:

Constitutive Theory

Declaratory Theory

Constitutive Theory

The main exponents related to this theory are **Oppenheim, Hegal and Anziloti**.

According to this theory, **for a State** to be considered as an **international person**, its recognition by the existing states as a sovereign required. This theory is of the view that only after recognition a State gets the status of an **International Person** and becomes a subject to

International Law. So, even if an entity possesses all the characteristics of a state, it does not get the status of an international person unless recognized by the existing States.

This theory does not mean that a State does not exist unless recognized, but according to this theory, a state only gets the exclusive rights and obligations and becomes a subject to International Law after its recognition by other existing States.

Criticism of the theory

This theory has been criticized by several jurists. Few of the criticisms of this theory are:

- This theory is criticized because unless a state is recognized by other existing states, rights, duties and obligations of statehood community under International Law is not applicable to it.
- This theory also leads to confusion when a new state is acknowledged and recognised by some of the existing states and not recognized by other states.

2. Declaratory Theory

The main exponents of the Declaratory Theory of Statehood are **Wigner, Hall, Fisher and Brierly.** According to this theory, any new state is independent of the consent by existing states. This theory has been laid down under Article 3 of the Montevideo Conference of 1933. This theory states that the existence of a new state does not depend on being recognised by the existing state. Even before recognition by other states, the new state has the right to defend its integrity and independence under International law.

The followers of theory consider the process of recognition as merely a formal acknowledgement of statehood by other states.

Criticism of the theory

The declaratory **theory of statehood** has also been criticized. This theory has been criticized on the ground that this theory alone cannot be applicable for recognition of a state. When a state having essential characteristics comes into existence as a state, it can exercise **international rights and obligations** and here comes the application of declaratory theory, but when other states acknowledge its existence and the state gets the legal rights of recognition, the consecutive theory comes into play.

Modes of Recognition

There are two modes of recognition of State:

1. De facto Recognition
2. De Jure Recognition

1. De facto Recognition

De facto recognition is a provisional recognition of statehood. It is a primary step to de jure recognition. It is a temporary and factual recognition as a state, and it can either be conditional or without any condition.

This mode recognition is granted when a new state holds a sufficient territory and control over a particular territory, but the other existing states consider that it does not have enough stability or any other unsetting issues. So, we can consider it as a test of control for newly formed states. De facto recognition is a process of acknowledging a new state by a non-committal act.
The state having de facto recognition is not eligible for being a member of the United Nations. e.g., Israel, Taiwan, Bangladesh.

2. De jure Recognition

De jure recognition is the recognition of a new state by the existing state when they consider that the new state fulfils all the essential characteristics of a state. The de jure recognition can be granted either with or without granting de facto recognition. This mode of recognition is granted when the newly formed state acquires permanent stability and statehood The De jure mode of recognition grants the permanent status of a newborn state as a sovereign state.

In the case of **Luther v. Sagar,** it was held in this case that for the purpose of giving effect to the internal acts of the recognized authority there is no distinction between de facto and de jure

Example of de facto and de jure recognition:

- One of the examples of de facto and de jure recognition is the recognition of the Soviet Union was established in 1917. It was de facto recognised by the government of UK in 1921 but it was not given de jure recognition until 1924.
- Bangladesh was established in March 1971. India and Bhutan recognised it just after 9 months of establishment but the United States gave it legal recognition after nearly 1 year in April 1972.

The distinction between De Facto and De Jure Recognition

S.No.	De facto Recognition	De jure Recognition
1.	De facto recognition is a provisional and factual recognition.	De jure recognition is legal recognition.
2.	De facto recognition is granted when there is the fulfilment of the essential conditions of statehood.	De jure recognition is granted when the state fulfils all the essential condition of states along with sufficient control and permanency.
3.	De facto recognition is a primary step towards grant of de jure recognition.	De jure recognition can be granted either with or without grant of de facto recognition.
4.	De facto recognition can either be conditional or non-conditional.	De jure recognition is a final and non-conditional recognition
5.	De facto recognition is revocable in nature.	De jure recognition is non-revocable.
6.	The states recognised under this mode have only a few rights and obligations against other states.	The state recognised under this mode have the absolute right and obligations against other states.
7.	The state with de facto cannot undergo state succession.	The state with de jure recognition can under state succession.
8.	The state with de facto recognition cannot enjoy	The state with de jure recognition enjoys full

	full diplomatic immunities.	diplomatic immunities.

Forms of Recognition

When a newly formed state is recognized, its declaration can be made in two forms:

1. Expressed Recognition
2. Implied Recognition

1. Expressed Recognition

When an existing state recognizes a **new state** expressly through official declaration or notification, it is considered to be the expressed form of recognition. Express recognition can be made through any express or formal means such as sending or publishing declaration or statement to the opposite party. When a state is recognized by expressed ways, it is a **de jure** recognition unless provided otherwise by the recognizing state in the declaration.

2. Implied Recognition

When the existing state recognizes a newly formed state through any implied act, then it is considered as an implied recognition. **Implied recognition** can be granted through any implied means by which a current state treats the newly formed state as an international person. The implied credit not granted through any official notification or declaration. The recognition through implied means varies from case to case.

Conditional recognition

The recognition of state with which certain conditions are attached in order to obtain its status as a sovereign state is conditional recognition. The conditions attached vary from state to state such as religious freedom, the rule of law, democracy, human rights etc. The recognition of any state is already associated with the essential conditions to be fulfilled for the status of a sovereign state but when addition condition is attached it is conditional recognition.

Criticism

Many jurists criticize conditional recognition. The conditional recognition is criticized on the ground that recognition is a legal procedure, and no additional conditions should be attached with it other than the conditions recognized by law. Another reason for criticism is that the recognized state if it does not fulfill the condition attached for its recognition, recognition is not extinguished and it should still be valid.

Withdrawal of Recognition

Withdrawal of De facto recognition

Under international law when a state having **de facto recognition** fails to fulfill the essential conditions of statehood, its recognition can be withdrawn. The recognition can be withdrawn by the recognizing state through declaration or through communicating with the authorities of the recognized states. The withdrawal can also be done by issuing a public statement.

2. Withdrawal of De Jure recognition

Withdrawal of **de jure recognition** is a very debatable issue under the **International Law.** Withdrawal of de jure recognition is a very exceptional event. If strictly interpreted, the de jure recognition can be withdrawn.

Even though the process of recognition is a political act, de jure recognition is of legal nature. Jurists who consider de jure recognition as a political act considers it revocable. Such revocation of de jure recognized states can be withdrawn only when a state loses the essential characteristics of statehood or any other exceptional circumstances. This type of revocation can be done expressly by the recognizing state by issuing a public statement.

Recognition of government

For any statehood, the government is an important element. When a state is formed, its government changes from time to time. When the government changes as an ordinary course of political action, the recognition of government by the existing state is not required but when the government changes due to any revolution, then its recognition by the **existing state** is required. For recognizing the new government established out of revolution, the existing states need to consider that:

1. The new government has **sufficient control** over the territory and its people or not.
2. The new government is **willing to fulfill the international duties** and obligations or not.

When the existing states are satisfied that the new government resulting out of the revolution is capable of fulfilling the conditions as mentioned above, then the new government can be recognized by the existing states.

State Jurisdiction

Definition

State jurisdiction is the capacity of a State under International Law to prescribe the rules of law, enforce the prescribed rules of law and to adjudicate. State Jurisdiction, also means that a state court has the right to make a legally binding decision that affects the parties involved in the case. It is derived from State sovereignty and constitutes its vital and central feature. It is the authority of a State over persons, property and events which are primarily within its territories.

Scope and Extent of State Jurisdiction

State jurisdiction may extend beyond its territory over persons and things which have a national link. There are grounds or principles upon which the State can assert its jurisdiction within and beyond its boundaries. Nevertheless, there are certain persons, property and events within a State territory which are immune from its jurisdiction.

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

Legislative jurisdiction

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

Although legislation is primarily enforceable within a state territory, it may extend beyond its territory in certain circumstances. International Law, for example, accepts that a State may levy taxes against persons not within its territory as long as there is a real link between the State and the proposed taxpayer, whether it is nationality or domicile.The legislative supremacy of a State within its territory is well established in International Law. However, this supremacy may be challenged in cases where a State adopts laws that are contrary to the rules of International Law. In such cases, a State will be liable for breach of International Law. A State may also be liable for breach of International Law if it abuses its rights to legislate for its nationals abroad.

Executive Jurisdiction

It is the capacity of a State to act and to enforce its laws within its territory. Generally, since States are independent of each other and possess territorial sovereignty, they have no authority to carry out their functions on foreign territory. No state has the authority to infringe the territorial sovereignty of another State. In this sense, a State cannot enforce its laws upon foreign territory without the consent of the host State; otherwise it will be liable for breach of International Law.

Judicial Jurisdiction

It is the capacity of the courts of a State to try legal cases. A State has an exclusive authority to create courts and assign their jurisdiction, and to lay down the procedures to be followed. However, in doing so, it cannot by any means alter the way in which foreign courts operate.

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

Principles of Jurisdiction

Generally, the exercise of civil jurisdiction by courts of a State has been claimed upon far wider grounds than has been the case in criminal matters. As far as criminal jurisdiction is concerned, the grounds or principles of jurisdiction mostly invoked by States are as follows.

The Territorial Principle

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

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

Although jurisdiction is primarily and predominantly territorial, it is not exclusive. A State is free to confer upon other States the right to exercise certain jurisdiction within its national territory. States are free to arrange the right of each one to exercise certain jurisdiction within each national territory. The most significant recent examples of such arrangements are:

The 1991 France-United Kingdom Protocol Concerning Frontier Control and Policing, under which the frontier control laws and regulations of each State are applicable and may be enforced by its officers in the control zones of the other;

The 1994 Israel-Jordan Peace Treaty, under which the Israeli criminal laws are applicable to Israeli nationals and the activities involving only them in the specified areas under Jordan's sovereignty, and measures can be taken in the areas by Israel to enforce such laws.

The Nationality Principle

The nationality principle implies that a State jurisdiction extends to its nationals and actions they take beyond its territory. It is based upon the notion that the link between the State and its nationals is a personal one independent of location.Criminal jurisdiction based on the nationality principle is universally accepted. While civil law countries make extensive use of it, the Common Law countries use it with respect to major crimes such as murder and treason.The Common Law countries, however, do not challenge the extensive use of this principle by other countries.

A State may prosecute its nationals for crimes committed anywhere in the world; the ground of this jurisdiction is known as active nationality principle. Also, it may claim jurisdiction for crimes committed by aliens against their nationals abroad; the ground of this jurisdiction is known as passive national principle.

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

The Protective Principle

The protective principle implies that a State may exercise jurisdiction over an alien who commits an act outside its territory, which is deemed prejudicial to its security and interests. It is universally accepted, although there are uncertainties as to its practical extent, particularly as regard to the acts which may come within its domain. It is justified on the basis of protection of State's vital interests, particularly when the alien commits an offence prejudicial to the State, which is not punishable under the law of the country where he resides and extradition is refused. Although the protective principle is used as a secondary basis for jurisdiction and in a narrower sense than the territorial or the nationality principle, it can easily be abused, particularly in order to undermine the jurisdiction of other States.

In practice however, this principle is applied in those cases where the acts of the person which take place abroad constitute crimes against the sovereignty of the State, such as plots to overthrow a government, treason, espionage, forging a currency, economic crimes and breaking immigration laws and regulations.

This principle is often used in treaties providing for multiple jurisdictional grounds with regard to specific crimes, such as the 1979 Hostage Convention and the 1970 Hague Aircraft Hijacking Convention.

Passive personality principle

This is a situation where the accused will be prosecuted in the country of the nationality of the victim.

The Universality Principle

The universality principle, in its broad sense, implies that a State can claim jurisdiction over certain crimes committed by any person anywhere in the world, without any required connection to territory, nationality or special State interest.

Before the Second World War, such universal jurisdiction has been considered as contrary to International Law by the Common Law countries, except for acts regarded as crimes in all countries, and crimes against international community as a whole such as piracy and slave trade.

After the Second World War, universal jurisdiction has been universally recognized over certain acts considered as international crimes. International crimes are those committed against the international community as a whole or in violation of International Law and punishable under it, such as war crimes, crimes against peace and crimes against Humanity. In recent years, crimes such as Hijacking of aircraft, violation of human rights and terrorism, have been added to the list of international crimes currently, under the universality principle, each State and every State has jurisdiction over any of the international crimes committed by anyone anywhere.

United States of America v Noriega

General Manuel Noriega on February 14th 1988 was indicted on twelve counts of engaging in a criminal enterprise in violation of U.S racketeering and drug laws. The indictment alleged that Noriega participated in an international conspiracy to import cocaine and materials used in producing cocaine in and out of the United States. He was also alleged to have protected shipments of cocaine from Columbia through Panama to the U.S. All these activities were allegedly taken for Noriega's own profit.

Noriega asserted that the case against him should be dismissed because:

a) The District court of Florida lacked jurisdiction

b) Sovereign immunity precluded the exercise of jurisdiction

c) He was captured and brought before the court as a result of an illegal military invasion

d) A violation of international treaties had occurred.

The court found that it had extra-territorial jurisdiction as such jurisdiction was upheld in the past over foreigners who conspired or intended to import narcotics into the United States. The crimes that Noriega was charged with were intended to have extra-territorial effects as such the court's **Jurisdiction was Reasonable.**

Jurisdiction was also justified under the protective principle which permits the exercise of jurisdiction over acts that threaten the existence of a state and have potentially deleterious effects in the state. The alleged importation certain pounds of cocaine would have harmful effects.

As for the question of immunity, recent international practices have drawn a distinction between private and public acts entitled to immunity. As with states, immunity is extended to public officials for acts executed in their official capacity. Since the acts carried out by Noriega were for his personal gain, he was not entitled to immunity. The head of state immunity applies where one is recognized as the head of state by the immunizing state. In Noriega's case it was evident that he was not recognized as the head of state by the Panamian constitution or by the United States.

Limits in the Exercise of Jurisdiction. (Exemption from state jurisdiction)

Customary international law has provided that a state should not exercise its jurisdiction in certain case where exercising jurisdiction would be unreasonable. Such reasonability is based on certain factors, i.e. link of the activity to the regulating state, foreseeable effects in the state and the extent to which the regulations is consistent with the practice of the international system.

Immunity of the Sovereign

Immunity of the sovereign under international law is the immunity a foreign state enjoys from the jurisdiction of the forum. The rationale for this immunity is the need not to degrade the dignity of the foreign nation, its organs and representative and to leave them unconstrained in pursuing their mission.

This immunity can operate in two ways:

i. As a bar to jurisdiction.
The jurisdiction of the forum is barred; the state of the forum would exercise jurisdiction but for the immunity.
ii. By making the subject matter non-justifiable or inadmissible.
The state of the forum has no jurisdiction; the jurisdiction never existed. In Buck V. A.-G the Court of Appeal refused to declare whether or not the Constitution of Sierra Leone as created by Order in Council of independence was valid. The reason given was the non-existent of jurisdiction, a corollary of sovereign immunity.

Immunity is based on two principles:

a. Par in parem non habet jurisdictionem: legal persons of equal standing cannot have disputes settled in the courts of one of them. This principle brings out the element of pleading immunity by reason of the status of the defendant, that is, immunity ationе personae

b. Non-intervention in the internal affairs of other states. The nature of the subject matter will lead a municipal court to hold that it has no jurisdiction. This immunity affects essential competence of the local courts in relation to the subject matter, that is, immunity *ratione*

materiae.

The Extent of Sovereign Immunity

State activity in the commercial sector has led courts such as those in Belgium and Italy to differentiate between acts of government (jure imperii) and acts of a commercial nature (jure gestionis). Immunity is availed with respect to the former but not the latter. This is the doctrine of restrictive immunity.

There are several ways in which this doctrine finds application. These are:
i. As has been stated by differentiating between jure imperii and jure gestionis.

The municipal court will make the distinction based on whether there is a key transaction which has been accomplished by way of a private law relationship for example a contract. This criterion without further input is unsatisfactory when applied to a contract of employment where the employee has been recruited to perform particular functions in the exercise of governmental authority. Applying this criterion it would mean that this contract of employment is jure gestionis.

ii. By municipal legislation

Under this method, immunity is provided as a general rule and further provision is made for exceptions. This method has been adopted by United Kingdom.

iii. By treaty

This has been done through the United Nations Convention on Jurisdictional Immunities of States and their Property, 2004. This treaty has been ratified by 32 states as at 28/10/2013. Kenya is not a signatory to this treaty. This convention generally denies a foreign state the right to invoke immunity with respect to commercial transactions, contracts of employment, pecuniary compensation for personal injuries and damage to property. It however provides for exceptions, one of them being by agreement. Article 11 (1) provides that unless otherwise agreed between the states concerned, a state cannot invoke immunity from the jurisdiction before a court of another state which is otherwise competent in a proceeding which relates to a contract of employment between the state and an individual for work performed or to be performed, in whole or in part, in the territory of that other State. Paragraph 2 of this Article details the exceptions to paragraph 1. For instance, Paragraph 1 does not apply where the employee has been recruited to perform particular functions in the exercise of governmental authority.

iv. By waiver.

Immunity can be waived expressly or by conduct. Examples of waivers include prior contract, through a treaty, diplomatic communication, and actual submission to the proceedings of the local court.

The fact that a state has waived its immunity from the jurisdiction of the forum does not necessarily mean that that state has waived its immunity to execution. This position is reflected in Article 19 of United Nations Convention on Jurisdictional Immunities of States and their Property, 2004. Under this Article property used or intended to be used by the state for government non-commercial purposes cannot be attached. Article 21 gives the categories of properties that cannot be subject to execution. One of the categories is a bank account used or intended to be used in the performance of the functions of the diplomatic mission of the state or its consular posts.

Diplomatic Immunity

Introduction

Diplomacy comprises of any means by which states establish or maintain mutual relations, communicate with each other or carry out political or legal transactions. It involves the exchange of permanent diplomatic missions between sates such that both the receiving and the sending state have representatives.

Rationale of privileges and immunities

The essence of diplomatic relations is to allow the exercise by the sending government, of state functions, on the territory of receiving state by license of the latter. The explanation for this, though not supported by the legal position, was that the diplomatic premises were "exterritorial", that is, they acquired the territorial jurisdiction of the sending state. However the legal position is that the diplomat acts as an agent of a sovereign state which in this case is the sending state.

Inviolability of Missions

a. Premises

The mission premises including the surrounding land benefit from the immunity of the sending state and hence are protected from any external interference. Article 22 of the Vienna convention states that: the premises of the mission shall be inviolable. The agents of the receiving state may not enter them, except with the consent of the head of mission. The receiving state is under a special duty to protect the premises. The premises, furnishings and other property are immune from search, requisition, attachment or execution.

b. Archives, documents and official correspondence

The archives and documents of the mission, at any time and wherever they may be, are inviolable including the official correspondence. The Vienna Convention also provides that the diplomatic bag shall not be opened or detained at any time. However the situation is different in the U.K where, due to abuse of the diplomatic bag through the sale of drugs, scanning of the bags is done on specific occasions when there are strong grounds of suspicion but ONLY in the presence of a member of the diplomatic mission.

Inviolability Of Diplomatic Agents

This is provided for in article 29 which states: "The person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention. The receiving State shall treat him with due respect and shall take all appropriate steps to prevent any attack on his person, freedom or dignity."

The same inviolability of the diplomatic agent applies to the private residence of the agent and all his papers, correspondence and his property. There is however an exception to the inviolability of the property as provided in article 31(3).In the case concerning United States diplomatic and consular staff in Tehran the Iran government was universally condemned when it held members of the United States embassy in Tehran as hostages from 1979 to 1981, following the admission of the deposed Shah of Iran into the United States for medical treatment. In finding that the government of Iran had violated its obligations under international law, in its judgment, the International Court of Justice stressed on the principles of laws embodied in the Vienna convention "the obligations of the Iranian government here in question is not merely contractual…but also obligations under general international law. In that case the government of Iran was held responsible for failing to prevent or for subsequently approving, the actions of militants in invading the United States mission in Tehran and holding the diplomatic and consular personnel as hostages.

Personal Immunities from Local Jurisdiction

Introduction

Diplomatic agents enjoy immunity from the jurisdiction of the local courts and not an exemption from substantive law. However the immunity can be waived allowing the application of the local law. The persons enjoying the privileges and immunity are however under a duty to respect the laws and regulations of the receiving state. In the application of immunity from local jurisdiction, every state has a standard procedure which establishes the qualification for immunity to be conclusive prove to the local courts.

Persons entitled to enjoy diplomatic immunity

a. Members of the family of a diplomatic agent if they are not nationals of the receiving state.
b. Members of the administrative and technical staff of the mission together with their families if they are not national or permanent residents of the receiving state. However, the immunity from civil and administrative jurisdiction of the receiving state
shall not extend to acts performed outside the course of their duties.
c. Members of the service staff who are not nationals or permanent residents of the receiving state but only in respect of the acts performed in the course of their official duties.

d. Private servants of members of the mission who are not nationals of or permanent residents in the receiving State are exempted from dues and taxes on the emoluments they receive by reason of their employment. They may enjoy the privileges and immunities only to the extent admitted by the receiving state.

Immunity from criminal jurisdiction

Article 31(1) provides that a diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving state. Immunity from civil and administrative jurisdiction. A

diplomatic agent is immune from the civil and administrative jurisdiction of the receiving state except in the case of:

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

C. Waiver

The sending state may waive the immunity from jurisdiction; however, the waiver must be express and not implied.

D. Immunity from jurisdiction for official acts

In regard to acts by the diplomatic agent which are in line with his official duties, the immunity is permanent since it is that of the sending state. However in respect to private acts immunity ceases when the agent leaves his post.

Other immunities

Exemption from all duties and taxes but with exceptions e.g. indirect taxes incorporated in the prices of goods and services. Immunities from, custom duties, public service, military obligations, social security provisions and giving evidence as witnesses.

Duration of Privileges and Immunities

This is covered under section 39 which provides:

Every person entitled to privileges and immunities shall enjoy them from the moment he enters the territory of the receiving State on proceeding to take up his post or, if already in its territory, from the moment when his appointment is notified to the Ministry for Foreign Affairs or such other ministry as may be agreed.

When the functions of a person enjoying privileges and immunities have come to an end, such privileges and immunities shall normally cease at the moment when he leaves the country, or on expiry of a reasonable period in which to do so, but shall subsist until that time, even in case of armed conflict. However, with respect to acts performed by such a person in the exercise of his functions as a member of the mission, immunity shall continue to subsist

.

Termination of the mission may occur through the recall of the diplomatic mission, outbreak of War Between the States concerned, Extinction of one of the states concerned.

Consular Relations

A consul is defined as an official appointed by a government to reside in a foreign country herein the host and represent his or her government's commercial interests and assist in the welfare of its citizens in that host country. Their functions are varied and include the protection of the sending states and its nationals, development of economic, cultural relations, issuing of passports among other functions .The current term consul began use in the 18th century and is based upon law rather than the general usage. There is a special treaty known as theVienna Convention on Consular Relations of 1963

A consul must have the authority of sending state and authorization of receiving state which must give consular officials and premises special protection

Consular Immunity Analysis

Introduction

The premise of consular immunity is enshrined in the Vienna Convention on Consular Relations of 1963 (VCCR). Consular immunity is a principle in international law that shields consuls from legal action or prosecution in their host country. Consular immunity basically offers protections similar to diplomatic immunity, but the herein said protections are not as extensive, given the functional differences between consuls and diplomats. Together with the Vienna Convention on Diplomatic Relations (VCDR), VCCR forms the core of international diplomatic and consular law. The two treaties codified most modern consular and diplomatic practices including the famous immunity principle under discussion here. Unlike diplomats there may be many consul offices set up in one host country. There are two types of consuls: career consuls and honorary consuls

Consuls: are professional salaried diplomats that are posted by the government of their native countries in host countries. They further enjoy immunity honorary consuls: they don't make a living as diplomats. They usually live and work and pay taxes in the host country that they operate on a voluntary/not salaried basis until their appointment is revoked. In some cases they might not be citizens or origin of that country

The Concept of Consular Immunity

The essence of immunity is very important and core to the functions of the consuls since it provides a workable environment for the consuls without the interruption by the host states in the discharge of their duties. However host states have the power to declare a consul or a diplomat persona non grata ('an unwelcome person') of which now the home country has to replace him or her with another consul or diplomat. This is the most serious form of censure a state can apply to foreign consuls and diplomats who are otherwise protected by consular and diplomatic immunity from arrest and normal prosecutions.

The immunity is provided according to the consular officer's rank in a consular post and according to the need for immunity in performing their duties. Consular officers are not however

accorded absolute immunity from a host country's criminal jurisdiction; they may be tried for certain local crimes upon action by a local court and are immune from local jurisdiction only in cases directly relating to consular functions.

Consuls serve in consulates hence have special protections and privileges in the places they are posted. However, they have a lower level of criminal and civil immunity than that of diplomatic officers. They are only immune to as far as acts performed as part of their official duties are concerned. The various such consular immunities given to the consular officials among the career consuls include, (a) Criminal and civil suit immunities, (b) Exemption from tax, work permit social security, custom duties and inspection (c) Immunity from arrests by the law enforcement agencies (d) Exempted from all public services including military obligations.

Further the premises of consular are not inviolable from entry by agents of the receiving state in respect to acts performed in the exercise of consular functions. However the premises are to receive protection and security from the host country.

Princess Zizianoff v Khan & Bigelow

In 1926, a Princess Zizianoff, originally of Russia, sued Consul Bigelow for defamation of character in a French court. Mr. Bigelow was an American official working for the American Consulate General in Paris and in charge of passports and visas. After turning down the Princess for a visa to enter the United States, he shared his rationale for the visa denial with the press, including the accusation that Princess Zizianoff was an international spy. Bigelow, along with persons associated with the Paris office of the Boston Sunday Post, was successfully sued by the Princess in 1927 at the bar of the Conventional Tribunal of the Seine. On Bigelow's appeal, the case made its way to the Court of Appeal of Paris in 1928. The court ruled that the 1853 Consular Convention did not protect him from what the court called a "private act," providing negative information about the Princess to the public via the public press. The question for the court was whether Bigelow's action fell outside the purview of his official duties, and it ruled that his action did so. Undoubtedly, the 1963 Consular Convention would not protect a consular officer performing an injurious private act.

Situations of Impunity versus Immunity

There have been recent actions by consuls and diplomats that have cast the spotlight on the meaning and role of 'immunity'. This has involved consular officers and diplomats who use immunity as a 'Get out of jail free' card after murders, drug trafficking and sexual crimes. The concept has been dragged through many more mud of evils including;

(a) Drug trafficking

(b) Sexual crimes

(c) Murders

(d) Reckless and dangerous driving

(e) Human slavery

(f) Firearm trafficking

The consuls involved have left trails of unpaid bills and sexual crimes which have become the most common results of the abuse of the concept of consular impunity. The increased public cries for more monitoring and usage of the concept to prevent abuse have led to Mr. Joshua Muravchik, a UN critic of the American Enterprise Institute comment concerning this increasingly alarming abuse of the concept. Immunity, he says, 'Invites abuse. And sure enough, the invitation has been accepted' In almost every continent, the countries in one way or the other experienced the mixture of impunity and immunity. An example in the USA, consular are accused of getting tax-exempt real estate's as part of the immunity they get from the host state only for some unscrupulous consuls to use the property to turn a profit.

Reckless and drunk driving and drug trafficking have been too common of the diplomats and the consular officers. The culprits always don't end up facing suits since they are often let go because of the protection by the consular immunity.

Law of Sea

Introduction

The seas have historically performed two important functions: first, as a medium of communication, and secondly as a vast reservoir of resources, both living and non-living. Both of these functions have stimulated the development of legal rules. The fundamental principle governing the law of the sea is that 'the land dominates the sea' so that the land territorial situation constitutes the starting point for the determination of the maritime rights of a coastal state.

A series of conferences have been held, which led to the four 1958 Conventions on the Law of the Sea and then to the 1982 Convention on the Law of the Sea.5 The 1958 Convention on the High Seas was stated in its preamble to be 'generally declaratory of established principles of international law', while the other three 1958 instruments can be generally accepted as containing both reiterations of existing rules and new rules. The pressures leading to the Law of the Sea Conference, which lasted between 1974 and 1982 and involved a very wide range of states and international organizations, included a variety of economic, political and strategic factors. Many Third World states wished to develop the exclusive economic zone idea, by which coastal states would have extensive rights over a 200-mile zone beyond the territorial sea, and were keen to establish international control over the deep seabed, so as to prevent the technologically advanced states from being able to extract minerals from this vital and vast source freely and without political constraint.

Western states were desirous of protecting their navigation routes by opposing any weakening of the freedom of passage through international straits particularly, and wished to protect their economic interests through free exploitation of the resources of the high seas and the deep seabed. Other states and groups of states sought protection of their particular interests. Examples here would include the landlocked and geographically disadvantaged states, archipelagic states and coastal states. The effect of this kaleidoscopic range of interests was very marked and led to the 'package deal' concept of the final draft. According to this approach, for example, the Third World accepted passage through straits and enhanced continental shelf rights beyond the 200-mile limit from the coasts in return for the internationalization of deep sea mining.

The territorial sea

Internal waters

Internal waters are deemed to be such parts of the seas as are not either the high seas or relevant zones or the territorial sea, and are accordingly classed as appertaining to the land territory of the coastal state. Internal waters, whether harbors, lakes or rivers, are such waters as are to be found on the landward side of the baselines from which the width of the territorial and other zones is measured,13 and are assimilated with the territory of the state. They differ from the territorial sea primarily in that there does not exist any right of innocent passage from which the shipping of other states may benefit. There is an exception to this rule where the straight baselines enclose as internal waters what had been territorial waters. In general, a coastal state may exercise its jurisdiction over foreign ships within its internal waters to enforce its laws, although the judicial authorities of the flag state (i.e. the state whose flag the particular ship flies) may also act where crimes have occurred on board ship. This concurrent jurisdiction may be seen in two cases.

A merchant ship in a foreign port or in foreign internal waters is automatically subject to the local jurisdiction (unless there is an express agreement to the contrary), although where purely disciplinarian issues related to the ship's crew are involved, which do not concern the maintenance of peace within the territory of the coastal state, then such matters would by courtesy be left to the authorities of the flag state to regulate. Although some writers have pointed to theoretical differences between the common law and French approaches, in practice the same fundamental proposition applies.

However, a completely different situation operates where the foreign vessel involved is a warship. In such cases, the authorization of the captain or of the flag state is necessary before the coastal state may exercise its jurisdiction over the ship and its crew. This is due to the status of the warship as a direct arm of the sovereign of the flag state.

Baselines

The width of the territorial sea is defined from the low-water mark around the coasts of the state. This is the traditional principle under customary international law and was reiterated in article 3 of the Geneva Convention on the Territorial Sea and the Contiguous Zone in 1958 and

article 5 of the 1982 Convention, and the low-water line along the coast is defined 'as marked on large-scale charts officially recognized by the coastal state'. In the majority of cases, it will not be very difficult to locate the low water line which is to act as the baseline for measuring the width of the territorial sea.

By virtue of the 1958 Convention on the Territorial Sea and the 1982 Law of the Sea Convention, the low-water line of a low-tide elevation may now be used as a baseline for measuring the breadth of the territorial sea if it is situated wholly or partly within the the territorial sea measured from the mainland or an island. However, a low-tide elevation wholly situated beyond the territorial sea will generate no territorial sea of its own. When a low-tide elevation is situated in the overlapping area of the territorial sea of two states, both are in principle entitled to use this as part of the relevant low-water line in measuring their respective territorial sea. However, the International Court has taken the view that low-tide elevations may not be regarded as part of the territory of the state concerned and thus cannot be fully assimilated with islands. A low-tide elevation with a lighthouse or similar installation built upon it may be used for the purpose of drawing a straight baseline. Sometimes, however, the geography of the state's coasts will be such as to cause certain problems: for instance, where the coastline is deeply indented or there are numerous islands running parallel to the coasts, or where there exist bays cutting into the coastlines. Special rules have evolved to deal with this issue, which is of importance to coastal states, particularly where foreign vessels regularly fish close to the limits of the territorial sea. A more rational method of drawing baselines might have the effect of enclosing larger areas of the sea within the state's internal waters, and thus extend the boundaries of the territorial sea further than the traditional method might envisage.

The width of the territorial sea

There has historically been considerable disagreement as to how far the territorial sea may extend from the baselines. Originally, the 'cannon shot' rule defined the width required in terms of the range of shore-based artillery, but at the turn of the nineteenth century, this was transmuted into the 3-mile rule. This was especially supported by the United States and the United Kingdom, and any detraction had to be justified by virtue of historic rights and general acquiescence as, for example, the Scandinavian claim to 4 miles. However, the issue was much confused by the claims of many coastal states to exercise certain jurisdictional rights for particular purposes: for example, fisheries, customs and immigration controls. It was not until

after the First World War that a clear distinction was made between claims to enlarge the width of the territorial sea and claims over particular zones.

The 3-mile rule has been discarded as a rule of general application to be superseded by contending assertions. The 1958 Geneva Convention on the Territorial Sea did not include an article on the subject because of disagreements among the states, while the 1960 Geneva Conference failed to accept a United States–Canadian proposal for a 6-mile territorial sea coupled with an exclusive fisheries zone for a further 6 miles by only one vote. Article 3 of the 1982 Convention, however, notes that all states have the right to establish the breadth of the territorial sea up to a limit not exceeding 12 nautical miles from the baselines. This clearly accords with the evolving practice of states.78 The UK adopted a 12-mile limit in the Territorial Sea Act 1987, for instance, as did the US by virtue of Proclamation No. 5928 in December 1988.

The Juridical Nature of the Territorial Sea

The territorial sea appertains to the territorial sovereignty of the coastal state and thus belongs to it automatically. There have been a number of theories as to the precise legal character of the territorial sea of the coastal state, ranging from treating the territorial sea as part of the *res communis*, but subject to certain rights exercisable by the coastal state, to regarding the territorial sea as part of the coastal state's territorial domain subject to a right of innocent passage by foreign vessels.82 Nevertheless, it cannot be disputed that the coastal state enjoys sovereign rights over its maritime belt and extensive jurisdictional control, having regard to the relevant rules of international law. The fundamental restriction upon the sovereignty of the coastal state is the right of other nations to innocent passage through the territorial sea, and this distinguishes the territorial sea from the internal waters of the state, which are fully within the unrestricted jurisdiction of the coastal nation. Articles 1 and 2 of the Convention on the Territorial Sea, 1958 provide that the coastal state's sovereignty extends over its territorial sea and to the airspace and seabed and subsoil thereof, subject to the provisions of the Convention and of international law. The territorial sea forms an undeniable part of the land territory to which it is bound, so that a cession of land will automatically include any band of territorial waters. The coastal state may, if it so desires, exclude foreign nationals and vessels from fishing within its territorial sea and (subject to agreements to the contrary) from coastal trading (known as sabotage), and reserve these activities for its own citizens. Similarly the coastal state has extensive powers of control relating to, amongst others, security and customs matters. It should be noted, however, that how

far a state chooses to exercise the jurisdiction and sovereignty to which it may lay claim under the principles of international law will depend upon the terms of its own municipal legislation, and some states will not wish to take advantage of the full extent of the powers permitted them within the international legal system.

The right of innocent passage

The right of foreign merchant ships (as distinct from warships) to pass unhindered through the territorial sea of a coast has long been an accepted principle in customary international law, the sovereignty of the coast state notwithstanding. However, the precise extent of the doctrine is blurred and open to contrary interpretation, particularly with respect to the requirement that the passage must be 'innocent'. Article 17 of the 1982 Convention lays down the following principle: 'ships of all states, whether coastal or land-locked, enjoy the right of innocent passage through the territorial sea'. The doctrine was elaborated in article 14 of the Convention on the Territorial Sea, 1958, which emphasized that the coastal state must not hamper innocent passage and must publicise any dangers to navigation in the territorial sea of which it is aware. Passage is defined as navigation through the territorial sea for the purpose of crossing that sea without Entering internal waters or of proceeding to or from that sea without entering internal waters or of proceeding to or from internal waters. It may include temporary stoppages, but only if they are incidental to ordinary navigation or necessitated by distress or *force majeure.*

The coastal state may not impose charges for such passage unless they are in payment for specific services,88 and ships engaged in passage are required to comply with the coastal state's regulations covering, for example, navigation in so far as they are consistent with international law. Passage ceases to be innocent under article 14(4) of the 1958 Convention where it is 'prejudicial to the peace, good order or security of the coastal state' and in the case of foreign fishing vessels when they do not observe such laws and regulations as the coastal state may make and publish to prevent these ships from fishing in the territorial sea. In addition, submarines must navigate on the surface and show their flag. Where passage is not innocent, the coastal state may take steps to prevent it in its territorial sea and, where ships are proceeding to internal waters, it may act to forestall any breach of the conditions to which admission of such ships to internal waters is subject.

Coastal states have the power temporarily to suspend innocent passage of foreign vessels where it is essential for security reasons, provided such suspension has been published and provided it does not cover international straits. Article 19(2) of the 1982 Convention has developed the notion of innocent passage contained in article 14(4) of the 1958 Convention by the provision of examples of prejudicial passage such as the threat or use of force; weapons practice; spying; propaganda; breach of customs, fiscal, immigration or sanitary regulations; willful and serious pollution; fishing; researcher survey activities and interference with coastal communications or other facilities.

Article 21(1) of the 1982 Convention, which expressly provided that the coastal state could adopt laws and regulations concerning innocent passage with regard to:

(a) The safety of navigation and the regulation of maritime traffic;

(b) The protection of navigational aids and facilities and other facilities or installations;

(c) The protection of cables and pipelines;

(d) The conservation of the living resources of the sea;

(e) The prevention of infringement of the fisheries laws and regulations of the coastal state;

(f) The preservation of the environment of the coastal state and the prevention, reduction and control of pollution thereof;

(g) Marine scientific research and hydrographic surveys;

(h) The prevention of infringement of the customs, fiscal, immigration or sanitary laws and regulations of the coastal state.

Jurisdiction over foreign ships

Where foreign ships are in passage through the territorial sea, the coastal state may only exercise its criminal jurisdiction as regards the arrest of any person or the investigation of any matter connected with a crime committed on board ship in defined situations. if the ship is passing through the territorial sea having left the internal waters of the coastal state, then the coastal state may act in any manner prescribed by its laws as regards arrest or investigation on board ship and is not restricted by the terms of article 27(1).

Under article 28 of the 1982 Convention, the coastal state should not stop or divert a foreign ship passing through its territorial sea for the purpose of exercising civil jurisdiction in relation to a person on board ship, nor levy execution against or arrest the ship, unless obligations are involved which were assumed by the ship itself in the course of, or for the purpose of, its voyage through waters of the coastal state, or unless the ship is passing through the territorial sea on its way from internal waters. The above rules do not, however, prejudice the right of a state to levy execution against or to arrest, for the purpose of any civil proceedings, a foreign ship lying in the territorial sea or passing through the territorial sea after leaving internal waters.

Warships and other government ships operated for non-commercial purposes are immune from the jurisdiction of the coastal state, although they may be required to leave the territorial sea immediately for breach of rules governing passage and the flag state will bear international responsibility in cases of loss or damage suffered as a result.

The contiguous zone

Historically some states have claimed to exercise certain rights over particular zones of the high seas. This has involved some diminution of the principle of the freedom of the high seas as the jurisdiction of the coastal state has been extended into areas of the high seas contiguous to the territorial sea, albeit for defined purposes only. Such restricted jurisdiction zones have been established or asserted for a number of reasons: for instance, to prevent infringement of customs, immigration or sanitary laws of the coastal state, or to conserve fishing stocks in a particular area, or to enable the coastal state to have exclusive or principal rights to the resources of the proclaimed zone.

In each case they enable the coastal state to protect what it regards as its vital or important interests without having to extend the boundaries of its territorial sea further into the high seas. It is thus a compromise between the interests of the coastal state and the interests of other maritime nations seeking to maintain the status of the high seas, and it marks a balance of competing claims. The extension of rights beyond the territorial sea has, however, been seen not only in the context of preventing the infringement of particular domestic laws, but also increasingly as a method of maintaining and developing the economic interests of the coastal state regarding maritime resources.

Contiguous zones were clearly differentiated from claims to full sovereignty as parts of the territorial sea, by being referred to as part of the high seas over which the coastal state may exercise particular rights. Unlike the territorial sea, which is automatically attached to the land territory of the state, contiguous zones have to be specifically claimed.

While sanitary and immigration laws are relatively recent additions to the rights enforceable over zones of the high seas and may be regarded as stemming by analogy from customs regulations, in practice they are really only justifiable since the 1958 Convention. On the other hand, customs zones have a long history and are recognized in customary international law as well. Many states, including the UK and the USA, have enacted legislation to enforce customs regulations over many years, outside their territorial waters and within certain areas, in order to suppress smuggling which appeared to thrive when faced only with territorial limits of 3 or 4 miles.118 Contiguous zones, however, were limited to a maximum of 12 miles from the baselines from which the territorial sea is measured. So if the coastal state already claimed a territorial sea of 12 miles, the question of contiguous zones would not arise

The Exclusive Economic Zone

This zone has developed out of earlier, more tentative claims, particularly relating to fishing zones, and as a result of developments in the negotiating processes leading to the 1982 Convention. It marks a compromise between those states seeking a 200-mile territorial sea and those wishing a more restricted system of coastal state power.

One of the major reasons for the call for a 200-mile exclusive economic zone has been the controversy over fishing zones. The 1958 Geneva Convention on the Territorial Sea did not reach agreement on the creation of fishing zones and article 24 of the Convention does not give exclusive fishing rights in the contiguous zone. However, increasing numbers of states have claimed fishing zones of widely varying widths. The European Fisheries Convention, 1964, which was implemented in the UK by the Fishing Limits Act 1964, provided that the coastal state has the exclusive right to fish and exclusive jurisdiction in matters of fisheries in a 6-mile belt from the baseline of the territorial sea; while within the belt between 6 and 12 miles from the baseline, other parties to the Convention have the right to fish, provided they had habitually fished in that belt between January 1953 and December 1962. This was an attempt to reconcile the interests of the coastal state with those of other states who could prove customary fishing operations in the relevant area. In view of the practice of many states in accepting at one time or another a 12-mile exclusive fishing zone, either for themselves or for some other states, it seems clear that there has already emerged an international rule to that effect. Indeed, the International Court in the *Fisheries Jurisdiction* cases stated that the concept of the fishing zone, the area in which a state may claim exclusive jurisdiction independently of its territorial sea for this purpose had crystallized as customary law in recent years and especially since the 1960 Geneva Conference, and that 'the extension of that fishing zone up to a twelve mile limit from the baselines appears now to be generally accepted'. That much is clear, but the question was whether international law recognized such a zone in excess of 12 miles.

UN Conference and the 1982 Convention. Article 55 of the 1982 Convention provides that the exclusive economic zone is an area beyond and adjacent to the territorial sea, subject to the specific legal regime established under the Convention. in the exclusive economic zone, the coastal state has jurisdiction to apply customs laws and regulations in respect of artificial islands, installations and structures.

Continental Shelf

The continental shelf is a geological expression referring to the ledges that project fromthe continental landmass into the seas and which are covered with only a relatively shallow layer of water (some 150–200 metres) and which eventually fall away into the ocean depths. The vital fact about the continental shelves is that they are rich in oil and gas resources and quite often are host to extensive fishing grounds.

Definition

Article 76(1) of the 1982 Convention provides as to the outer limit of the continental shelf that: The continental shelf of a coastal state comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of continental margin does not extend up to that distance.

The rights and duties of the coastal state

The coastal state may exercise 'sovereign rights' over the continental shelf for the purposes of exploring it and exploiting its natural resources under article 77 of the 1982 Convention. Such rights are exclusive in that no other state may undertake such activities without the express consent of the coastal state. These sovereign rights (and thus not territorial title as such since the Convention does not talk in terms of 'sovereignty') do not depend upon occupation or express proclamation.161 The Truman concept of resources, which referred only to mineral resources, has been extended to include organisms belonging to the sedentary species

The High seas

The notion of the open seas and the concomitant freedom of the high seas became popular during the eighteenth century. The essence of the freedom of the high seas is that no state may acquire sovereignty over parts of them. This is the general rule, but it is subject to the operation of the doctrines of recognition, acquiescence and prescription, where, by long usage

accepted by other nations, certain areas of the high seas bounding on the territorial waters of coastal states may be rendered subject to that state's sovereignty.

The high seas were defined in Article 1 of the Geneva Convention on the High Seas, 1958 as all parts of the sea that were not included in the territorial sea or in the internal waters of a state and includes all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a state, or in the archipelagic waters of an archipelagic state.

Article 87 of the 1982 Convention provides that the high seas are open to all states and that the freedom of the high seas is exercised under the conditions laid down in the Convention and by other rules of international law. It includes *inter alia* the freedoms of navigation, over flight, the laying of submarine cables and pipelines,292 the construction of artificial islands and other installations permitted under international law,293 fishing, and the conduct of scientific research.294 Such freedoms are to be exercised with due regard for the interests of other states in their exercise of the freedom of the high seas, and also with due regard for the rights under the Convention regarding activities in the International Seabed Area

State Succession

Introduction

Political entities are not immutable. They are subject to change. New states appear and old states disappear.1 Federations, mergers, dissolutions and secessions take place. International law has to incorporate such events into its general framework with the minimum of disruption and instability. Such changes have come to the fore since the end of the Second World War and the establishment of over 100 new, independent countries. Art 2(1) (b) of the Vienna Convention on the succession of States in respect of treaties in 1978 defines the term **State succession** as 'the replacement of one State by another in the responsibility for the international relations of territory.

Circumstances of State Succession

State succession can arise in a number of defined circumstances, which mirror the ways in which political sovereignty may be acquired. They are:

Decolonization of all or part of an existing territorial unit: This refers to situations where the nation partially or completely overcomes itself from the holding of a superior nation.

The dismemberment of an existing State: This refers to a situation when the territory of the Predecessor State becomes the territory of two or more new States who take over it.

Secession: This refers to a situation where a part of the State decides to withdraw from the existing State.

Annexation: This refers to a situation where a State takes possession of another State.

Merger: This refers to the fusion of two or more free States into a single free State.

Types of State Succession

In each of these cases, a once-recognized entity disappears in whole or in part to be succeeded by some other authority, thus precipitating problems of transmission of rights and obligations. There are two types of State succession and they are discussed below:

Universal Succession

This is also referred to as Total Succession. When the entire identity of the parent State is destroyed and the old territory takes up the identity of the successor State, it is known as Universal Succession. This can happen in cases of:

- Merger
- Annexation
- Subjugation

In certain cases of universal succession, the old State gets divided into multiple States. The dissolution of Czechoslovakia is an example of universal succession. The new States of the Czech Republic and Slovakia are both successor States.

Partial Succession

Partial Succession occurs when a part of the territory of the State gets severed from the parent State. This severed part now becomes an independent State. This can occur when there is a civil war or a liberalization war.

Theories of State Succession

Universal Succession Theory

This is the oldest theory of succession propounded by Grotius, using the Roman analogy of succession on the death of any natural person. According to this theory, the rights and duties of the old State i.e., the predecessor State pass on to the new State i.e., the successor State upon succession without any exceptions and modifications.

In fact, there are two justifications behind this theory.

1. First that the State and the Sovereign gain all their power from God and a mere change in Government shouldn't cause any change in the powers.

2. Second, it is permanent and nothing can cause it to secede.

The application of this theory can be seen in cases of fusion in the 20th century. The fusion of Syria and Egypt, Somali Land and Somalia, Tanganyika and Zanzibar are examples of this. However, this theory failed to get any attention from the majority of States from the world and has also been criticized by scholars from the world due to its Roman law analogy, a poor distinction between succession and internal change in governments, etc.

Popular Continuity Theory

The Popular Continuity Theory can be described as another version of the Universal Succession theory that was propounded by Fiore and Fradier following the unification of the German and Italian nationals. According to this theory, the State has a

- **Political personality:** It basically refers to the rights and obligations of the State towards the government.
- **Social personality**: lt basically refers to the territory and the population of the State.

Hence, upon succession, the political personality gets changed whereas the social personality remains intact. So, a State succession would not alter the rights and duties of the populace. However, this theory has not found its application in any country outside Europe and also has been criticized on the grounds that it functioned according to the municipal laws i.e, the local laws, which is why it was difficult to understand the effect of State succession using this theory.

Organic Substitution Theory

According to this theory, the rights and duties of the State continue even after succession by another State. Von Gierke had published a paper in 1882 regarding The execution of rights and obligations of a social body after its dissolution. It was from here that Max Huber derived his organic substitution theory. Huber drew the analogy that the problem of State succession was similar to that of dissolution of a social institution.

The factual element of the people and the territory have an organic bond i.e., the bond between the people and elements of State and upon succession by a new sovereign, the organic bond remains intact and only the juridical element changes. It offers a new explanation to the continuity of rights and duties i.e., the substitution of a successor State in the personality of its predecessor State. But, just like the other theories, this theory too has had no practical application and has been criticized for the same.

Self Abnegation Theory

This theory was propounded in 1900 by Jellinek and is another version of the universal theory of continuity. According to Jellinek, the successor State agrees to observe the rules of international law and performs the obligations towards other States created under them.

Although, this theory considers that the performance of the international obligation, is merely 'moral duty' of the successor State, but at the same time it gives the right to the other States, to insist upon the successor State to perform the existing obligation. If the successor State refuses to accept, the other States may even withhold its recognition or make the recognition conditional upon the acceptance of the predecessor's commitment towards them.

Clean Slate Theory

This theory was developed during the mid-19th and early 20th centuries. After World War II, the jurists of the Soviet Nations started emphasizing on the right of self-determination and on giving complete freedom to the States to maintain their international relations. According to this theory, the Successor State doesn't absorb the personality of the Predecessor State in its political and economic interests. Upon succession, the new State is completely free of the obligations of the Predecessor State. The Successor State does not exercise its jurisdiction over the territory by virtue of a transfer of power from its predecessor but it has acquired the possibility of expanding its own sovereignty.

Communist Theory

According to the Communist Theory of State Succession, a successor State is burdened by the economic and political commitments of the predecessor. Thus, this comes as something completely contrary to the Negative Theory of State Succession and unlike the Negative Theory, it doesn't free the successor State from the obligations of the predecessor State.

The Successor State is bound to adhere to the commitments of the predecessor State. Political commitments involve peace, war and territorial treaties and agreements while economic commitments include any amount of money borrowed or lent. All these have to be fulfilled by the new State.

Rights and Duties arising out of State Succession

The laws regarding State succession are still in a very nascent stage and keep evolving with the changing times. As seen above, along with the territorial and power transfers, there are transfers with regard to duties too. This section gives a brief idea about the transfer and non-transfer of political as well as non-political rights and duties.

Political Rights and Duties

No succession takes place with regard to political rights and duties of the States. The peace treaties or the treaties of neutrality entered into by the previous State aren't binding on the new State. But the only exception here is in case of human rights treaties since it would be desirable for the new State to adhere to such terms. Other than this, the new State would have to enter into new political treaties of its own.

Rights of Natives or Local Rights

Unlike the political rights and duties, the local rights of the people do not secede with the succession of the States. These rights refer to the rights such as property rights, land rights or rights relating to railways, roads, water etc. In cases like these, the succeeding States are bound by the duties, obligations and rights of the extinct State.

Fiscal Debts (State or Public Debts)

These refer to the financial obligations or debts of the Predecessor State. The Successor State is bound to pay back the debts of the Predecessor State. This is because if the new State is enjoying the benefits of the loans, it becomes a moral obligation as well to pay back the money. Next, if there is a split in the State then the entire debt amount gets divided between the predecessor and Successor State in accordance with the territory and population of each. **Effect of State Succession on Treaties** The law on State succession with regard to treaties has for a long time been dominated by two principles in general: One is the alleged principle of universal succession and the other is the ***tabula rasa*** **approach** i.e., clean State doctrine not granting State succession to treaties.

While the former principal keeps in mind, the interests of third States regarding upholding or not upholding treaties, the latter favours a rather strict understanding of sovereignty i.e., functions only according to the interests of the successor and predecessor State. Neither of the two principles can, however, offer a practical solution for various scenarios where State succession takes place. Accordingly, under customary international law more nuanced solutions have been developed in the past or, at the least, are in the process of being formed.

The Vienna Convention on State Succession provides that:

In case of the border treaties, no such significant changes would be observed and the treaties would pass to the successor State. This is done keeping in mind the greater interests of the

International Community. Similarly, other forms of local treaties related to land, territory, etc. would also pass on to the Successor State upon succession. Treaties relating to Human Rights are passed on to the successors with all their rights, duties and obligations. In the case of treaties relating to peace or neutrality, no succession takes place.

State Responsibility

Introduction

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

Unlike national laws, wherein different rules often apply according to the source of the obligation breached (e.g., contract law, tort law, criminal law), international law does not concern itself with the source of the obligation that is breached; in principle (and unless otherwise specifically provided) the same rules apply to the breach of an obligation whether the source of the obligation is a treaty, customary international law, a unilateral declaration, or the judgment of an international court.

In August 2001 the International Law Commission completed its Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA), a project on which it had been working for more than forty years. The aim of the articles is to codify the generally applicable rules of State responsibility.

It should be noted that the ARSIWA are envisaged as laying down general rules that apply in default of any more specific rule applicable to the obligation in question. In some cases, special rules may apply to an obligation (either as a result of the formulation of the rule itself, or because the obligation in question forms part of a special regime); for instance, it is possible that a particular obligation may be subject to a special rule requiring fault or damage before there is held to be a breach, or it may be that the category of States entitled to react is wider than the default position under the ARSIWA. This is the principle of lex specialis (to the extent that

special rules are applicable and inconsistent with the rules contained in the ARSIWA, the special rules will prevail and displace the more general rules).

The Elements of State Responsibility

The starting point of the articles is that "every internationally wrongful act of a State entails the international responsibility of that State" . The act or omission of a State will qualify as an "internationally wrongful act" if two conditions are met. First, the act or omission must constitute a breach of an international obligation, or, as the articles put it, must be "not in conformity with what is required" by the international obligation. This implies that the obligation in question must be binding on the State at the time of the conduct, which is said to constitute a breach. Second, the act or omission must be "attributable" to the State.

The general rule is that a State is not responsible for the acts of private individuals. The State is of course an abstract entity, unable to accomplish any physical act itself. Just as in domestic law corporations act through their officers and agents, so in international law the State normally acts through its organs and officials.

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

Second, the rules of attribution cover situations in which individuals, not otherwise State organs, are exercising "elements of governmental authority" at the time that they act.

Third, acts of private individuals are attributable to the State if those individuals are acting on the instructions of the State, or under its effective direction or control.

Fourth, in exceptional circumstances in which there is an absence or default of governmental authority, the acts of private individuals may be attributable to the State if those individuals, in effect, step into the breach and perform necessary governmental functions.

With regard to certain obligations, a State may incur responsibility even though actions have been carried out by private individuals, because the essence of the obligation was to ensure that a given result occurred. For instance, if a foreign embassy is overrun by a mob, or harm is done to diplomatic staff by private individuals, as occurred with the U.S. embassy in Tehran during the Iranian revolution of 1979 to 1980, a State may incur responsibility, even if those individuals act on their own initiative. Equally, under Article V of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, the obligation of a State to punish those responsible for genocide earlier on related to genocide may be breached in instances in which a State fails to punish any person responsible for the genocide, "whether they are constitutionally responsible rulers, public officials, or private individuals." There is probably a similar rule in general international law in relation to crimes against humanity. In both cases, the basis of responsibility here is not the attribution to the State of the acts of the individuals; it is the failure by the State as an entity to comply with the obligations of prevention and prosecution incumbent on it.

A somewhat anomalous instance of attribution is that covered by Article 10. As was noted above, in the normal course of events, a State is not responsible for the acts of private individuals; a fortiori, it is not responsible for the acts of insurrectional movements, because, by definition, an insurrectional group acts in opposition to the established state structures and its organization is distinct from the government of the State to which it is opposed. However, Article 10(1) provides that "the conduct of an insurrectional movement which becomes the new government of a State shall be considered an act of that State under international law." Article 10(2) provides for a similar rule with respect to an insurrectional movement that succeeds in establishing a new State within the territory of a pre-existing State. The effect of the rule is to attribute retrospectively the conduct of the movement in question to the State. In the case of a successful insurrectional movement, the acts of the movement are attributed to the State as if the movement had been the government at the time of its acts, even though, if the insurrection had failed, no attribution would be possible. In the case of the establishment of a new State, the effect

is even more drastic because acts are attributed to the State retrospectively to a time when it did not yet definitively exist.

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

Certain circumstances may serve to preclude the wrongfulness of a breach of international law by a State, in much the same way that defenses and excuses work in national criminal law. In international law these are termed circumstances precluding wrongfulness. For instance, the consent of the state to which the obligation was owed will prevent the breach being wrongful, as will, under certain restrictively defined conditions, force majeure, distress, and necessity. Finally, a State taking countermeasures (defined as the nonperformance of an obligation in response to a prior wrongful act of another State, in order to induce that State to comply with its obligations) may mean that what would otherwise be a breach of an international obligation is not in fact wrongful. However, quite apart from the strict procedural conditions with which the taking of countermeasures is hedged, it should be noted that certain obligations may not be the object of countermeasures. Among these are the obligation to refrain from the threat or use of force, obligations for the protection of fundamental human rights, obligations of a humanitarian character prohibiting reprisals under peremptory norms of general international law (jus cogens). This last limitation in fact applies generally to circumstances precluding wrongfulness: it is never possible to plead that a breach of a peremptory norm was justified.

The Content of International Responsibility

Upon the commission of an internationally wrongful act, new legal obligations come into existence for the State responsible for that act. First, that State is under an obligation to make full reparation for the injury caused by the internationally wrongful act. Reparation may take one of three forms: restitution, compensation, or satisfaction (or some combination of them). Traditionally, restitution has played the primary role, although in instances in which restitution is materially impossible, the injured State may have to content itself with compensation or satisfaction. Second, the responsible State is under an obligation to conclude the internationally

wrongful act if it is continuing, and in an appropriate case, may be required to make assurances and guarantees of non-repetition.

The Articles mark a decisive step away from the traditional bilateralism of international law and toward what has been called "community interest" in the provisions dealing with the States that are entitled to react to the breach of an internationally wrongful act. Traditionally, only the State that was directly injured, or in some way "targeted," by the breach of an international obligation could demand reparation. In addition, although any state could take unfriendly measures that did not constitute the breach of an international obligation owed to the State at which they were directed, the taking of countermeasures was commonly understood as being limited to these "injured States."

The first major move away from the strict bilateralism of international law was the judgment of the International Court of Justice in the Barcelona Traction, Light and Power Company Limited (Belgium v. Spain) case. In that case, the court stated:

Essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection.

Nationality

Introduction

The concept of nationality is important since it determines the benefits to which person may be entitled and the obligation such as conscription which they must perform. The problem is that there is no coherent accepted definition of nationality in international law and only confliction description under the different municipal laws of states, not only that but the rights and duties attendant upon nationality vary from state to state.

By the virtue of nationality, a person becomes entitled to a series of rights ranging from obtaining a valid passport enabling travel abroad to being able to vote, and nationals are also entitled to the protection of their state and to various benefits prescribed under international law.

A case which illustrates the point on one of the many incidences of nationality is that of Nottebohm. The International Court of Justice (ICJ) has dealt with Nottebohm cases which have some relevance to the question of the nationality of ships.

Nottebohm case concerned the question of whether Liechtenstein could exercise diplomatic Protection on behalf of one of its nationals, Mr. Nottebohm, in respect of certain acts committed by Guatemala against him which were alleged to be breaches of international law.

In brief Nottebohm had been born in Germany in 1881. He possessed German nationality, but from1905 had spent much of his life in Guatemala which he had made the headquarters of his business activities. He obtained Liechtenstein nationality through naturalization in 1939. His connections with that country were slight, being limited to a few visits to a brother who lived there. At the outset the Court made it clear that it was not concerned with the law of nationality in general, but only with the question of whether Liechtenstein could exercise diplomatic protection in respect of Nottebohm vis à vis Guatemala.

The Court noted that while under international law it was up to each State to lay down rules governing the grant of its nationality, a State could not claim that, The rules it has thus laid down are entitled to recognition by another state unless it has acted in conformity with this general aim of making the legal bond of nationality accord with the individual's genuine

connection with the State which assumes the defense of its citizens by means of protection as against other States.

The Court said in this case that nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties.The Court found on the facts that there was insufficient connection between Nottebohm and Liechtenstein for the latter to be able to exercise diplomatic protection on Nottebohm's behalf vis a vis Guatemala.

Modes of acquisition and loss of Nationality

1) Introduction:

Nationality is the medium through which an Individual can enjoy the benefits from International Law. A State exercises jurisdiction over its nationals, traveling or residing aboard, they remain under its personal supremacy. International Law permits the exercise of such jurisdiction and sets the limits within which it can be exercised. The term Nationality signifies the legal tie between Individuals and the States.

2) Definitions of Nationality:

Charles G. Fenwick – Nationality may be defined as a bond which unites a person to a given State, which constitutes his membership in the particular State, which gives them a claim to the protection of that state and which subjects him to the obligations created by the laws of that State.

J.G Starke – Nationality may be defined as the legal status of membership of the collectivity of individuals whose acts, decisions and policy are vouchsafed through the legal concept of the State representing those individuals.

3) Nationality and Citizenship:

Nationality and Citizenship are often considered to be synonymous with each other. But the term nationality differs from citizenship. Nationality has reference to the jural relationship which may arise from consideration under International Law. On the other hand, citizenship has reference to the jural relationship under municipal law. In other words, nationality determines the

civil rights of a person, natural or artificial, particularly with reference to the International law, whereas citizenship is intimately connected with civil rights under the municipal law. Hence all citizens are nationals of a particular state, but al nationals may not be citizens of the State. In other words, citizens are those persons who have full political rights as distinguished from nationals, who may enjoy full political rights and are still domiciled in that country.

4) Modes of Acquiring Citizenship:

According to Oppenheim there are five modes of acquiring of Nationality are as follows

1) By Birth - The first and the most important mode of acquiring nationality is by birth. Nationality is conferred to a person by many States on the basis of birth. All those persons take birth within territorial limit of a State acquire the nationality of the State. This principle is called jus soli. United States, U.K and many other States of Latin American follow the principle of jus soli. Section 3 of the Indian Citizenship Act 1955 had provided nationality on the basis of birth.

2) By Naturalization - The second mode of acquiring a Nationality is by naturalization. A person requires nationality at birth. However, his nationality may later on change. When the nationality of a person changes subsequently, and he acquires the nationality of some other State, the process of acquisition is known as naturalization. A person may acquire nationality through naturalization in different ways. There are six ways which are as follows -

(1) through marriage. Example wife assuming her husband's nationality.

(2) Legitimation,

(3) Option.

(4) Acquisition of domicile,

(5) Appointment as Government official

(6) Grant on the application of the state. Adoption of the child by parents who are nationals of the other States also entitled the children to acquire the nationality of his parents. Section 6 of Indian Citizenship Act 1955 provides that a person make acquire citizenship by naturalization upon fulfillment of certain conditions.

3) By Resumption – The third mode of acquiring Nationality is by resumption. Sometimes a person may lose his nationality because of certain reasons. Subsequently, He may resume, recover his original nationality after fulfilling certain conditions. Section 20 of the Citizenship rules 1956 provides a procedure for restoration of nationality.

4) By Subjugation – The fourth mode of acquiring nationality is subjugation. Section 7 of the Indian Citizenship Act 1955 Lays down that if any territory becomes a part of India those persons from such territory shall automatically become Citizen of India.

5) By Cession – The fifth mode of acquiring Nationality is Cession. When a part of the territory of a state is ceded to another State. All Nationals of the former acquires the nationality of the latter State.

6) By Option – The Sixth mode of acquiring Nationality is by Option. When a state is proportioned into two or more States, the nationals of the former state have an option to become the nationals of any of the successor States. The same principle applies in the case of exchange of territory.

7) By Registration – A person may acquire the nationality of a State through Registration. The process of registration may be different from one State to another depending upon the laws of that State. It takes place when a person becomes the subject of a state to which he was before an alien.

Following are the modes of loss of Nationality

According to Oppenheim, there are five Modes of losing Nationality are as follows:

1) By Release: Some States, such as Germany., Law provides that the citizens may lose the nationality by release. In the loss of nationality by release it is necessary to submit an application for the same. If the Application is accepted, the person concerned is released from the nationality of the State concerned.

2) Deprivation: Certain States have framed some municipal laws the breach of which by its nationals results in the deprivation of their nationality. Under the American laws, service in the armed forces of a foreign State also results in deprivation of citizenship.

3) Expiration: In certain States, on account of legislation citizenship expires due to long stay abroad. A naturalist American citizen loses his nationality by having s continuance residence for three years in the territory of a foreign state of which he was formerly a national or in which the place of his birth is situated.

4) Renunciation: A person may also renounce his nationality. The need for renunciation arises when a person acquires the nationality of more than one State. In such a condition he has to make a choice as to of which country he will remain national .Finally, he has to renounce the nationality of one State. In the case of double nationality of children, the municipal laws of certain States like Great Britain give them a right on coming of age to declare whether they wish to cease to be citizens of one State. The British nationality Act of 1948 permits such a child to make a declaration of the renunciation of citizenship of the United Kingdom, but the registration of such a declaration may be withheld by the Secretary of State if made during any war in which the United kingdom be engaged.

5) Substitution: Some States provide for the substitution of nationality. According to this principle, a person may get nationality of a state in place of the nationality of another State. This is called nationality by substitution whereby he loses nationality of state and acquires the nationality of another State. The British nationality Act 1948 does not automatically entail loss of British nationality on the naturalization of a British subject in a Foreign State. The United States nationality Act of 1952, however, entails loss of American nationality on the voluntary naturalization of an American National in a foreign country. In certain States, law provides that if the national of that State without seeking permission of the government obtains employment in another State, then he may be deprived of his nationality.

Statelessness

Definition, Types and Causes

Art 1 of the Convention relating to the Status of Stateless Persons, 1954 defines a stateless person as one "who is not considered as a national by any State under the operation of its law." This definition is helpfully concise and to the point, but at the same time is also very limited and somewhat legalistic, referring to a specific group of people known as de jure stateless, not encompassing the de facto stateless persons who have a nationality but don't enjoy the protection of any Government. It has been thought useful to approach the notion of statelessness in its broader sense, to denote all those people who lack what has become known as an 'effective nationality', and who are consequently unable to enjoy the rights that are associated with nationality. In fact, in 1949, the UN expanded the definition of statelessness to include de facto stateless persons, or those who, "having left the country of which they were nationals, no longer enjoy the protection and assistance of their national authorities, either because these authorities refuse to grant them assistance and protection, or because they themselves renounce the assistance and protection of the countries of which they are nationals."

While considering the causes for statelessness, it is important to make a distinction between statelessness which is original or absolute and that which is relative or subsequent because different factors underlie both these types of statelessness. Original statelessness, from its very definition can arise either due to faulty administrative practices, the failure or refusal of a state to ensure the registration of births or because of conflicts in the nationality laws of different countries, particularly when one adheres to the principle of jus sanguinis (nationality on the basis of descent) and the other adheres to the principle of jus soli (nationality on the basis of the place of birth). States have the exclusive power to make laws concerning nationality and, by definition, all States try to enumerate which persons have nationality and which persons do not. Although it is the fundamental right of every child to acquire a nationality, strict adherence to jus sanguinis, or nationality based upon descent can be a cause for statelessness. Jus sanguinis, when applied without modifications based on residency or other factors, confers on children the status of their parents. This may mean that statelessness is inherited, passed from generation to generation, regardless of place of birth, residency, or other factors reflecting the genuine effective link. Another possible situation wherein statelessness may arise is when a child is born

in a strictly jus sanguinis country whose parents are nationals of a State adhering to the jus soli principle.

However, States do not make this determination in precisely the same way or in consultation with other States. Hence, instances continue to arise in which individuals not granted nationality by any State are leading to the phenomenon of statelessness. These are all cases of individual statelessness which generally arise from a lack of coordination of national legislation with regard to the basic principles governing acquisition and loss of nationality or the laws relating to marriage. Marriage may also be a cause of statelessness, where the nationality law of one State imposes loss of nationality upon marriage to an alien, with no provision for automatic acquisition of the alien's nationality in his country, upon marriage.

In all such cases statelessness is generally involuntary for the individual concerned. Yet statelessness may also occur voluntarily, e.g., the legislation of a given state may allow for unilateral renunciation of its nationality or may entitle an individual to a release without having regard to his future nationality. This provides the transition for looking into the next category of statelessness i.e., relative or subsequent statelessness for all cases of voluntary statelessness are necessarily subsequent. However, all subsequent or relative statelessness need not be voluntary and most of it generally arises due to conflicts between or within States, transfer of territory or as a consequence of legislative or executive action prompted by political tensions, varying ethnic and racial notions of national identity and social or economic challenges.

Under most of the above circumstances, a mass of people are rendered statelessness. Mass statelessness may result due to territorial changes encouraging the Predecessor State to denationalize the populations concerned, even though the Successor State may not be willing to confer its own nationality, sometimes even expelling parts of the population concerned or through a State's legislative or executive action. Instances of the latter kind may be found in the Soviet decree of mass denationalization of December 15, 1921, or in the national-socialist legislation to deprive German Jews of their nationality, or the Czechoslovak legislation to denationalize persons of German origin. Governments may also amend their nationality laws and denationalize whole sections of society in order to punish or marginalize them or to facilitate their exclusion from the state's territory.

Instances of the former kind could be said to have occurred due to the emergence of newly independent States after World War I as well as due to the process of decolonization or disintegration of a federal polity leaving thousands or even millions of people stateless or with a disputed claim to nationality. The dissolution of multinational or multiethnic federal states and the formation of new political entities and the statelessness arising there from is associated more with developed regions, especially the ex-Communist Bloc, where States are undergoing an "unmixing of peoples," bringing with it levels of insecurity and uncertain citizenship status to substantial numbers of people.

A third factor responsible for mass statelessness is 'war', leading to forced displacement and loss of nationality by a large number of people. Such persons might by virtue of belonging to a particular racial, ethnic or religious group be subject to negative State action of expulsion or deprivation of nationality. Statelessness in such kinds of situation is inevitable and of the most shocking kind for it deprives a vast section of the human population of its inherent right to nationality, in violation of its basic human rights without any reason or logic, reflecting clear callousness and gross discrimination by the State concerned.

It can be seen that whereas some cases of statelessness arise as oversights or conflicts in legal approaches, there are others which are the result of discrimination or deliberate denial of human rights. It is these deliberate attempts at rendering people stateless that generally cause mass statelessness and are the most problematic for not only is the impact which is felt, the maximum, it is also discriminatory, being deliberately targeted towards a particular ethnic, racial or religious minority.

While considering the various options available for eliminating or at least reducing the problem of statelessness, it is often debated whether nationality questions fall within the exclusive domain of each State, touching on the sensitive area of State sovereignty or can be the subject of regulation by international norms and standards. In 1923, the Permanent Court of International Justice decided that in the absence of treaty obligations, each State has the right to decide who its nationals are. The court exercised its general obligation to presume that the sovereign nation state is not limited unless there is specific evidence of its express or implied consent. Major twentieth-century problems of statelessness, dual nationality and refugees developed because of this principle. At the Sixth (Legal) Committee of the General Assembly,

while some delegates opined that the draft Convention on the Reduction of Future Statelessness and another on the Elimination of Future Statelessness prepared by the International Law Commission of the United Nations encroached on the domestic jurisdiction of States which alone were competent to regulate questions of nationality, several other delegates seemed to think that though nationality questions fall within the domestic jurisdiction of each State, stateless is a problem which transcended national boundaries and hence it was plausible to enter into a Convention whereby States could voluntarily enter into international obligations in this field, entailing amendment of their national legislation to resolve problems of conflict with corresponding nationality legislation in other countries. In the context of contemporary developments, the broad powers enjoyed by the States in the area of conferral and regulation of nationality cannot be deemed to be within their sole jurisdiction and are circumscribed by the obligation to ensure the full protection of human rights.

Difficulties for Stateless Persons

The consequences of the lack of 'effective nationality' are the most worrisome and adverse for the stateless person, the reason being that nationality is the principal link between an individual and international law, a bond establishing mutual rights and duties between them. It is a fundamental element of human security and apart from providing people with a sense of belonging and identity; it entitles the individual to the protection of the state and provides a legal basis for the exercise of many civil and political rights.

Stateless persons have often been referred to as "anomalies", falling outside legal and social constructs. This legal vacuum created by lack of nationality, in the social context, translates into a lack of secure identity, belonging, and sense of place. Frequently, stateless persons cannot work, own property, access education or health care, public services, travel, register births, marriages or deaths, participate in the political process, seek national protection or have access to the judicial system. Positive developments concerning the rights of resident non-nationals are not always applied to stateless persons, in particular to those who cannot establish a legal status in any country. In other words, organization of the entire legal, social and economic life of the individual residing in a foreign country depends upon his possession of a nationality and the lack, loss or deprivation of it can lead to adverse consequences for the individual.

The major impact felt by stateless persons due to absence of the crucial link of nationality is that such a person cannot claim the benefits arising from international law for it implies lack of the possibility of diplomatic protection or of international claims being presented in respect of harm suffered by him at the hands of another State. In situations of statelessness , an individual is considered to be a mere object of international law for whom no subject of international law is internationally responsible – thus, being a notable twentieth-century contribution to the category of res nullius. This, in effect places him in an abnormal and inferior position which reduces his social value and destroys his own self-confidence.

Whereas, earlier, a stateless person could lead a more or less normal existence, without his legal disability causing him any serious difficulties, since the First World War, in Europe, the situation has completely changed. With the re-establishment of the passport and visa system, the increased control over foreigners and the regulations governing all aspects of social life, a stateless person finds himself in constant contact with the authorities, thereby making him conscious of his handicapped status.

International Legal Regime Governing Statelessness

It is clear that in cases of statelessness, the inherent right to a nationality as outlined in the Universal Declaration of Human Rights, 1948 has been rendered void. The challenge essentially is in determining which nationality a person may have a right to. The aspiration of Article 15 was given concrete form by way of two international instruments concerning statelessness, the 1954 Convention relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness. These Conventions form a part of the legal regime governing statelessness.

The Convention Relating To the Status of Stateless Persons, 1954

The 1954 Convention relating to the Status of Stateless Persons is the primary international instrument adapted to date, to regulate and improve the legal status of stateless persons. It contains provisions regarding stateless persons' rights and obligations pertaining to their legal status in the country of residence. The primary aim is to set out the legal framework to ensure that a minimum standard of protection is available to persons who are stateless but who cannot demonstrate a well-founded fear of persecution and who are not, therefore, covered by the 1951 Convention relating to the Status of Refugees or its Protocol. In other words, the 1954

Convention outlines a legal framework for international protection in cases where national protection is not available. While the Convention does serve the purpose of providing a legal status and extending basic entitlements to the ‘stateless’, in practice, all it amounts to is a certain limited degree of protection, even so in the area of diplomatic protection and does nothing to solve the very problem of statelessness as such. The Convention places the State Parties under no absolute obligation to naturalize a recognized stateless person.

Extradition

Introduction

Definition of Extradition

According to Starke-The term extradition denotes the process whereby under the treaty or upon a basis of reciprocity one state surrenders to another state at its request a person accused or convicted of a criminal offence committed against the laws of the requesting state, such requesting state is competent to try the alleged offender. According to Grotius-It is the duty of each state to punish the criminals or to return them to the states where they have committed the crime

Purpose of Extradition

The purpose of extradition is to prevent crimes and to punish the criminals who have escaped from their punishment and started to reside in another country. As we know it would be easier for the country to punish the offender where he had committed the offence and it would be easy to gather evidence against him for that particular offence even if the country is unable to punish him due to technicalities of law or lack of jurisdiction then he can be taken back to home country through the process of extradition. Thus the object of the process of extradition is to prevent and reduce the crimes in the international field. Thus the role of extradition is to prevent crimes and punish criminals as it is the interest of all countries to punish the criminals and prevent the crimes because the country in which a person of criminal character resides, it is in the interest of such country to ensure extradition of such a person but it also depends on bilateral treaty and upon the principle of reciprocity but where there is no treaty or agreement then the country can request the other country where the offender is residing to extradite the fugitive or offender and it is in the interest of security and law and order of such country to extradite the accused.

In view of the increasing crimes in the international field in recent years, the importance and prevalence of the extradition have increased. In recent years, the provisions relating to extradition find mention in international treaties. The universal recognition of human rights has enhanced the prevalence and importance of extradition. International cooperation is most

essential in cases of extradition because there is hardly a country which has an extradition treaty with all the other countries of the world.

Kinds of Asylum

A) Territorial Asylum; and

B) Extra-territorial Asylum

A) Territorial Asylum:

Territorial Asylum is granted by a State on its Territory, it is called Territorial Asylum. The right to grant asylum by a State to a person on its own territory flows from the fact that every State exercises territorial sovereignty over all persons, on its territory to anyone. The grant of territorial assylum therefore depends upon the discretion of a State which is not under a legal obligation to grant asylum to fugitive, as no precise rules as to grant of territorial asylum. General Assembly calls upon the International Law Commission in 1959 to undertake the codification of the principles and rules of international law relating to right of asylum. On 14th December 1967 General Assembly adopted Declaration of Territorial Asylum through the adoption of resolution. The declaration consists of a Preamble and four Articles dealing with the principles relating to the grant of refusal of asylum. This Declaration provides that the right to seek and enjoy asylum may not be invoked by any person with respect to whom there are serious reasons for considering that he has committed a crime against peace, a war crimes and crimes against humanity. Article 4 of the this Declaration provides that the State granting asylum shall not permit persons who have received asylum to engage in the activities contrary to the purpose and principles of United Nations. From the above provisions of the declaration it is clear that State does not have absolute right to grant asylum. The grant of asylum is a part of which cannot be exercised in respect of International crimes including genocides.

Extra-territorial Asylum - Active protection is given outside the territory not belonging to the state granting it. Thus if Asylum is granted by a State at places outside its own territory, it is called extra-territorial Asylum'. It usually describes to those cases in which a State refuses to surrender a person demanding who is not upon its own physical territory but is upon one of its public ships lying in foreign territorial borders or upon its diplomatic premises within foreign territories. Thus Asylum is given at legation, consular premises and warships are the instances of extra-territorial asylum.

1. Diplomatic Asylum / Asylum in Legation: Since granting extra-territorial Asylum or diplomatic Asylum involves a derogation from the sovereignty of the State, International law ordinarily does not recognize a right to grant asylum in the premises of legation. But **asylum may be granted in the legation premises in the following exceptional cases.**

1) Individual is physically in danger from violence.
2) Where there is well established and binding local custom.
3) When there is a special treaty between territorial State and the state of Legation concerned.

2. The above principle also applies in the case of Grant of asylum in consular premises.

3. Asylum in the premises of international institution -

Though International Law does not recognize any rule regarding the grant of asylum in the premises of International institution, however, temporary Asylum may be granted in case of danger of imminent violation.

4. Asylum in Warship - There are conflicting views to grant of asylum in warship, but it is argued that Asylum may be granted to political offenders.

As far as a asylum Warship is concerned, it may be granted on the ground of humanity, in cases if extreme danger to the individual seeking it. Thus , right to grant asylum on Warship may be granted in the same way in the case of Legation and also subject to the operation of the same conditions.

5. Asylum in Merchant Vessels - Since merchant vessels do not enjoy immunity from local jurisdiction, they are not competent to Grant asylum to local offenders. Thus, if a person after committing a crime on shore seeks asylum on board a foreign merchant ship he may be asserted by the local police, either before the ship leaves the port or when it comes into another port of the same State. There is, therefore a rule that asylum is not granted on merchant vessels. However, State may grant asylum if they conclude a treaty to this effect.

6.Asylum in the premises of international Institutions : Whether a person taking refuge in the premises of an international institution or organization would be granted asylum is a question which cannot be given with certainty in the absence of any rule in this regard and also because of lack of practice. However, a right to grant temporary refuge in an extreme case of danger from mob cannot be ruled out.

Thus, in Extra-territorial or diplomatic Asylum, Asylum can be granted in exceptional cases and it is necessary to establish legal basis in each particular case.

Law of treaties

Introduction

States transact a vast amount of work by using the device of the treaty, in circumstances which underline the paucity of international law procedures when compared with the many ways in which a person within a state's internal order may set up binding rights and obligations. For instance, wars will be terminated, disputes settled, territory acquired, special interests determined, alliances established and international organizations created, all by means of treaties. No simpler method of reflecting the agreed objectives of states really exists and the international convention has to suffice both for straightforward bilateral agreements and complicated multilateral expressions of opinions. Thus, the concept of the treaty and how it operates becomes of paramount importance to the evolution of international law.

The fundamental principle of treaty law is undoubtedly the proposition that treaties are binding upon the parties to them and must be performed in good faith, this rule is termed *pacta sunt servanda* and is arguably the oldest principle of international law. It was reaffirmed in article 26 of the 1969 Convention,8 and underlies every international agreement for, in the absence of a certain minimum belief that states will perform their treaty obligations in good faith, there is no reason for countries to enter into such obligations with each other.

The term 'treaty' itself is the one most used in the context of international agreements but there are a variety of names which can be, and sometimes are, used to express the same concept, such as protocol, act, charter, covenant, pact and concordat. They each refer to the same basic activity and the use of one term rather than another often signifies little more than a desire for variety of expression.

There are no specific requirements of form in international law for the existence of a treaty, although it is essential that the parties intend to create legal relations as between themselves by means of their agreement. This is logical since many agreements between states are merely statements of commonly held principles or objectives and are not intended to establish binding obligations.

The making of treaties

Formalities

Treaties may be made or concluded by the parties in virtually any manner they wish. There is no prescribed form or procedure, and how a treaty is formulated and by whom it is actually signed will depend upon the intention and agreement of the states concerned. Treaties may be drafted as between states, or governments, or heads of states, or governmental departments, whichever appears the most expedient. For instance, many of the most important treaties are concluded as between heads of state, and many of the more mundane agreements are expressed to be as between government departments, such as minor trading arrangements.

Where precisely in the domestic constitutional establishment the power to make treaties is to be found depends upon each country's municipal regulations and varies from state to state. In the United Kingdom, the treaty-making power is within the prerogative of the Crown, whereas in the United States it resides with the President 'with the advice and consent of the Senate' and the concurrence of two-thirds of the Senators.

International law leaves such matters to domestic law. Nevertheless, there are certain rules that apply in the formation of international conventions. In international law, states have the capacity to make agreements, but since states are not identifiable human persons, particular principles have evolved to ensure that persons representing states indeed have the power so to do for the purpose of concluding the treaty in question. Such persons must produce what is termed 'full powers' according to article 7 of the Convention, before being accepted as capable of representing their countries. 'Full powers' refers to documents certifying status from the competent authorities of the state in question. This provision provides security to the other parties to the treaty that they are making agreements with persons competent to do so. However, certain persons do not need to produce such full powers, by virtue of their position and functions. This exception refers to heads of state and government, and foreign ministers for the purpose of performing all acts relating to the conclusion of the treaty; heads of diplomatic missions for the purpose of adopting the text of the treaty between their country and the country to which they are accredited; and representatives accredited to international conferences or organizations for the purpose of adopting the text of the treaty in that particular conference or organization.

Consent

Once a treaty has been drafted and agreed by authorized representatives, a number of stages are then necessary before it becomes a binding legal obligation upon the parties involved. The text of the agreement drawn up by the negotiators of the parties has to be adopted and article 9 provides that adoption in international conferences takes place by the vote of two-thirds of the states present and voting, unless by the same majority it is decided to apply a different rule.

This procedure follows basically the practices recognized in the United Nations General Assembly and carried out in the majority of contemporary conferences. An increasing number of conventions are now adopted and opened for signature by means of UN General Assembly resolutions, such as the 1966 International Covenants on Human Rights and the 1984Convention against Torture, using normal Assembly voting procedures. Another significant point is the tendency in recent conferences to operate by way of consensus so that there would be no voting until all efforts to reach agreement by consensus have been exhausted. In cases other than international conferences, adoption will take place by the consent of all the states involved in drawing up the text of the agreement.

A state may regard itself as having given its consent to the text of the treaty by signature in defined circumstances noted by article 12, that is, where the treaty provides that signature shall have that effect, or where it is otherwise established that the negotiating states were agreed that signature should have that effect, or where the intention of the state to give that effect to the signature appears from the full powers of its representative or was expressed during the negotiations. Although consent by ratification is probably the most popular of the methods adopted in practice, consent by signature does retain some significance, especially in light of the fact that to insist upon ratification in each case before a treaty becomes binding is likely to burden the administrative machinery of government and result in long delays. Accordingly, provision is made for consent to be expressed by signature. This would be appropriate for the more routine and less politicized of treaties.

Consent by exchange of instruments

Article 13 provides that the consent of states to be bound by a treaty constituted by instruments exchanged between them may be expressed by that exchange when the instruments declare that their exchange shall have that effect or it is otherwise established that those states had agreed that the exchange of instruments should have that effect.

Consent by ratification

The device of ratification by the competent authorities of the state is historically well established and was originally devised to ensure that the representative did not exceed his powers or instructions with regard to the making of a particular agreement. Although ratification (or approval) was originally a function of the sovereign, it has in modern times been made subject to constitutional control.

Consent by accession

This is the normal method by which a state becomes a party to a treaty it has not signed either because the treaty provides that signature is limited to certain states, and it is not such a state, or because a particular deadline for signature has passed. Article 15 notes that consent by accession is possible where the treaty so provides or the negotiating states were agreed or subsequently agree that consent by accession could occur in the case of the state in question. Important multilateral treaties often declare that states or, in certain situations, other specific entities may accede to the treaty at a later date that is after the date after which it is possible to signify acceptance by signature

Reservations to treaties

A reservation is defined in article 2 of the Convention as:
A unilateral statement, however phrased or named, made by a state, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that state.

Stages of formation of treaties

There is no specific form for the conclusion of treaties. An oral agreement between the representatives of the States charged with the task of conducting negotiations and empowered to bind their respective countries is sufficient to have a binding effect if it is the intention of the representative to conclude a legally binding transaction. The enormous importance of the issue involved in such agreements however necessities the compliance of formal requirements and reducing the agreements into a document.

Various Stages of formation of the treaties:

According to Starke the various Stages of formation of the treaties are as follows –

1) Accrediting of Representatives:

Each of the State Conducting negotiation appoints a representative or plenipotentiary for this purpose. He is provided with an instrument given by the Minister for Foreign Affairs showing his authority to conduct such negotiations, which is known as the full power.

2) Negotiation

It is a bilateral process, sometimes multilateral. There are proposals as to negotiation. In our commercial transaction, there is a bargain there are proposals and counter proposals. Ultimately leading towards the concluded Contract. In respect of two or more States, so as to have the discussion with Pleni Potentials. These negotiations are depended upon the terms of credentials and powers of the representatives. In practices, before signing the text after negotiation the delegates obtain fresh instruction to sign the treaties with or without Reservation. If the proposal is accepted, then it is said to be a draft treaty. In draft treaties, the Conclusion of discussions is put together in the precise statement and reduced into writing the commonly agreed terms in various proposals. It is a premature stage of the final draft.

3) Signature

When the final draft of a treaty is drawn up, the instrument is ready for signature. The signature is affixed at a formal closing session. A treaty generally comes into force on signature by plenipotentiaries of the Contracting States unless the States desire to subject it to ratification. Treaties and conventions are generally always sealed.

4) Ratification

It is an act of adopting an international treaty by the parties thereto. In other words, ratification implies the confirmation of the treaty entered into by the representatives of the different states. States may be bound by the treaties only when they have given their consent. There are number of ways in which a State may express its consent to a treaty. It may be given either by signature, exchange of instruments, ratification or accession.

When there are no full powers, conferred on the representatives when the parties are representatives in absence of Pleni Potentials then such treaties are negotiated by the representatives by their signature subject to ratification. When they have limited power then treaty can be reserved for ratification by the state Pleni Potentials. It is the basic term stipulated in the credentials itself. Thus, ratification is a sort of confirmation by Pleni Potentials or Head of the states. The Head of State may ratify the Treaty contract made by their representative on their behalf. Pleni Potentials may ratify or refuse the treaty contract, but generally, ratification is the rule and refusal is an exception.

Ratification of a Treaty may withhold on the following grounds

i) If the representative or plenipotentiary has exceeded his powers;

i) If any deceit as to matters of fact has been practiced upon him

ii) If the performance of treaty obligations becomes impossible

iv) If there has not been *consensus ad idem* (meeting of mind) e.g. there has not been agreed as to the same thing

5) Accession and Adhesion

A third state can become a party to an already existing treaty, by means of accession. Accession and Adhesion is a consequential part of the treaty. Accession is a process when a non-party state joins the already concluded treaties. They are not the original members of such treaty. Adhesion is a process when a non-party State accepts the terms and conditions of the already concluded treaty.

6) Entry into force:

There can be a specific provision in a treaty as to the effective date or date of application of the treaty. It can be by signing process or by ratification. If the treaties are signed by the Plenipotentiary then it will come into force. Multilateral treaties come into operation on the deposit of a prescribed member of ratifications and accessions.

7) Registration and Publication:

After the treaty has been so ratified, it has to be registered at the headquarters of the international organization. According to Article 18 of the Covenant of the League, every treaty or international engagement should be registered with the Secretariat of the League and published by it as soon as possible. No such treaty or international engagement was binding on any state until it was so registered. This means that in case of any dispute, the treaty could not be relied upon if it was not registered. To the same effect are the provisions in the United Nations Charter. Article 102 of the Charter reads:

Every treaty and every international agreement entered into by any Member of the United Nations after the present Charter comes into force shall as soon as possible be registered with the Secretariat and published by it. No party to any such treaty or international agreement which has not been registered in accordance with the provisions of paragraph 1 of this Article may invoke that treaty or agreement before any organ of the United Nations.

8) Incorporation of treaty into State Law:

Incorporation of the treaty into State Law: The final stage of the treaty is actual incorporation in the multiple law of the Contracting State where such incorporation is necessary in order to assume a binding character.

Conclusion: A treaty is an agreement or contract entered between two or more States whereby they undertake to carry out obligations imposed on each of them. there are eight Stages in the formation of treaties.

United Nation

Introduction

The United Nations was established following the conclusion of the Second World War and in the light of Allied planning and intentions expressed during that conflict. The purposes of the UN are set out in article 1 of the Charter as follows:

1. To maintain international peace and security, and to that end, to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;

2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;

3. To achieve international co-operation in solving international problems of an economic, social, cultural or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; and

4. To be a centre for harmonizing the actions of nations in the attainment of these common ends.

While the purposes are clearly wide-ranging, they do provide a useful guide to the comprehensiveness of its concerns. The question of priorities as between the various issues noted is constantly subject to controversy and change, but this only reflects the continuing pressures and altering political balances within the organization. In particular, the emphasis upon decolonization, self-determination and apartheid mirrored the growth in UN membership and the dismantling of the colonial empires, while increasing concern with economic and developmental issues is now very apparent and clearly reflects the adverse economic conditions in various parts of the world.

The Charter of the United Nations is not only the multilateral treaty which created the organization and outlined the rights and obligations of those states signing it, it is also the constitution of the UN, laying down its functions and prescribing its limitations.3 Foremost amongst these is the recognition of the sovereignty and independence of the member states.

Under article 2(7) of the Charter, the UN may not intervene in matters essentially within the domestic jurisdiction of any state (unless enforcement measures under Chapter VII are to be

applied). This provision has inspired many debates in the UN, and it came to be accepted that colonial issues were not to be regarded as falling within the article 2(7) restriction.

Other changes have also occurred, demonstrating that the concept of domestic jurisdiction is not immutable but a principle of international law delineating international and domestic spheres of operations. As a principle of international law it is susceptible of change through international law and is not dependent upon the unilateral determination of individual states. In addition to the domestic jurisdiction provision, article 2 also lays down a variety of other principles in accordance with which both the UN and the member states are obliged to act. These include the assertion that the UN is based upon the sovereign equality of states and the principles of fulfillment in good faith of the obligations contained in the Charter, the peaceful settlement of disputes and the prohibition on the use of force.

It is also provided that member states must assist the organization in its activities taken in accordance with the Charter and must refrain from assisting states against which the UN is taking preventive or enforcement action. The UN has six principal organs, these being the Security Council, General Assembly, Economic and Social Council, Trusteeship Council, Secretariat and International Court of Justice

Security Council

The Council was intended to operate as an efficient executive organ of limited membership, functioning continuously. It was given primary responsibility for the maintenance of international peace and security. The Security Council consists of fifteen members, five of them being permanent members (USA, UK, Russia, China and France). These permanent members, chosen on the basis of power politics in 1945, have the veto. Under article 27 of the Charter, on all but procedural matters, decisions of the Council must be made by an affirmative vote of nine members, including the concurring votes of the permanent members. A negative vote by any of the permanent members is therefore sufficient to veto any resolution of the Council, save with regard to procedural questions, where nine affirmative votes are all that is required. The veto was written into the Charter in view of the exigencies of power. The USSR, in particular, would not have been willing to accept the UN as it was envisaged without the establishment of the veto to protect it from the Western bias of the Council and General Assembly at that time. In practice, the veto was exercised by the Soviet Union on a considerable number of occasions, and by the USA less frequently, and by the other members fairly rarely. In more recent years, the exercise of the veto by the US has increased.

The question of how one distinguishes between procedural and non-procedural matters has been a highly controversial one. In the statement of the Sponsoring Powers at San Francisco, it was declared that the issue of whether or not a matter was procedural was itself subject to the veto. This ‘double-veto’ constitutes a formidable barrier. Subsequent practice has interpreted the phrase ‘concurring votes of the permanent members’ in article 27 in such a way as to permit abstentions. Accordingly, permanent members may abstain with regard to a resolution of the Security Council without being deemed to have exercised their veto against it.

The Council has currently three permanent committees, being a Committee of Experts on Rules of Procedure, a Committee on Admission of New Members and a Committee on Council meeting away from Headquarters. There are also a number of ad hoc committees, such as the Governing Council of the United Nations Compensation Commission established by Security Council resolution 692 (1991), the Counter-Terrorism Committee and the Committee established by resolution 1540 (2004), which obliges states *inter alia* to refrain from supporting by any means non-state actors from developing, acquiring, manufacturing, possessing, transporting, transferring or using nuclear, chemical or biological weapons and their delivery systems. There are also a number of sanctions committees covering particular states under sanction as well as the committee established under resolution 1267 (1999) concerning persons and bodies associated with Al-Qaida and the Taliban. Further subsidiary bodies include the Peace building Commission, the UN Compensation Commission and the International Criminal Tribunals for the Former Yugoslavia and for Rwanda.

The Security Council acts on behalf of the members of the organization as a whole in performing its functions, and its decisions (but not its recommendations) are binding upon all

member states. Its powers are concentrated in two particular categories, the peaceful settlement of disputes and the adoption of enforcement measures. By these means, the Council conducts its primary task, the maintenance of international peace and security. However, the Council also has a variety of other functions. In the case of trusteeship territories, for example, designated strategic areas fall within the authority of the Security Council rather than the General Assembly, while the admission, suspension and expulsion of member states is carried out by the General Assembly upon the recommendation of the Council. Amendments to the UN Charter require the ratification of all the permanent members of the Council (as well as adoption by a two-thirds vote of the Assembly and ratification by two-thirds of UN members). The judges of the International Court are elected by the Assembly and Council.

The General Assembly

The General Assembly is the parliamentary body of the UN organization and consists of representatives of all the member states, of which there are currently 192.

Membership of the UN, as provided by article 4 of the Charter, is open to: all other peace-loving states which accept the obligations contained in the present Charter and, in the judgment of the organization, are able and willing to carry out these obligations and is effected by a decision of the General Assembly upon the recommendation of the Security Council. Other changes in membership may take place.

Membership of the UN may be suspended under article 5 of the Charter by the General Assembly, upon the recommendation of the Security Council, where the member state concerned is the object of preventive or enforcement action by the Security Council. Article 6 allows for expulsion of a member by the General Assembly, upon the recommendation of the Security Council, where the member state has persistently violated the Principles contained in the Charter.

Voting in the Assembly is governed by article 18, which stipulates that each member has one vote only, despite widespread disparities in populations and resources between states, and that decisions on 'important questions', including the admission of new members and recommendations relating to international peace and security, are to be made by a two-thirds majority of members present and voting.

Except for certain internal matters, such as the budget, the Assembly cannot bind its members. It is not a legislature in that sense, and its resolutions are purely recommendatory. Such resolutions, of course, may be binding if they reflect rules of customary international law and they are significant as instances of state practice that may lead to the formation of a new customary rule, but Assembly resolutions in themselves cannot establish binding legal obligations for member states. The Assembly is essentially a debating chamber, a forum for the exchange of ideas and the discussion of a wide-ranging category of problems. It meets in annual sessions, but special sessions may be called by the Secretary-General at the request of the Security Council or a majority of UN members. Emergency special sessions may also be called by virtue of the Uniting for Peace machinery. Ten such sessions have been convened, covering situations ranging from various aspects of the Middle East situation in 1956, 1958, 1967, 1980 and 1982 and a rolling session commencing in 1997, to Afghanistan in 1980 and Namibia in 1981.

The Assembly has established a variety of organs covering a wide range of topics and activities. It has six main committees that cover respectively disarmament and international security; economic and financial; social, humanitarian and cultural; special political and decolonization; administrative and budgetary; and legal matters.35 In addition, there is a procedural General Committee dealing with agenda issues and a Credentials Committee. There are also two Standing Committees dealing with inter-sessional administrative and budgetary

questions and contributions, and a number of subsidiaries, ad hoc and other bodies dealing with relevant topics, including the International Law Commission, the UN Commission on International Trade Law, the UN Institute for Training and Research, the Council for Namibia and the UN Relief and Works Agency. The Human Rights Council, established in 2006, is elected by and reports to the Assembly.

Economic and Social Council

Much of the work of the United Nations in the economic and social spheres of activity is performed by the Economic and Social Council (ECOSOC). It can discuss a wide range of matters, but its powers are restricted and its recommendations are not binding upon UN member states. It consists of fifty-four members elected by the Assembly for three-year terms with staggered elections, and each member has one vote.39 The Council may, by article 62, initiate or make studies upon a range of issues and make recommendations to the General Assembly, the members of the UN and to the relevant specialized agencies. It may prepare draft conventions for submission to the Assembly and call international conferences. The Council has created a variety of subsidiary organs, ranging from nine functional commissions,40 to five regional commissions41 and a number of standing committees and expert bodies.42 The Council also runs a variety of programmes including the Environment Programme and the Drug Control Programme, and has established a number of other bodies such as the Office of the UN High Commissioner for Refugees and the UN Conference on Trade and Development. Its most prominent function has been in establishing a wide range of economic, social and human rights bodies

The Trusteeship Council

The Trusteeship Council was established in order to supervise the trust territories created after the end of the SecondWorldWar.45 Such territories were to consist of mandated territories, areas detached from enemy states as a result of the Second World War and other territories voluntarily placed under the trusteeship system by the administering authority (of which there have been none).46 The only former mandated territory which was not placed under the new system or granted independence was South West Africa.47With the independence ofPalau, the last remaining trust territory, on 1October 1994, the Council suspended operation on 1November that year The Secretariat of the UN49 consists of the Secretary-General and his staff, and constitutes virtually an international civil service. The staff are appointed by article 101 upon the basis of efficiency, competence and integrity, ‘due regard’ being paid ‘to the importance of recruiting the staff on as wide a geographical basis as possible’. All member states have undertaken, under article 100, to respect the exclusively international character of the responsibilities of the Secretary-General and his staff

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Under article 97, the Secretary-General is appointed by the General Assembly upon the unanimous recommendation of the Security Council and constitutes the chief administrative officer of the UN. He (or she) must accordingly be a personage acceptable to all the permanent members and this, in the light of effectiveness, is vital. Much depends upon the actual personality and outlook of the particular office holder, and the role played by the Secretary-General in international affairs has tended to vary according to the character of the person concerned. An especially energetic part was performed by Dr Hammarskjold in the late 1950s and very early 1960s until his untimely death in the Congo,50 but since that time a rather lower profile has been maintained by the occupants of that position.

Apart from various administrative functions,51 the essence of the Secretary-General's authority is contained in article 99 of the Charter, which empowers him to bring to the attention of the Security Council any matter which he feels may strengthen the maintenance of international peace and security, although this power has not often been used. In practice, the role of Secretary-General has extended beyond the various provisions of the Charter. In particular, the Secretary-General has an important role in exercising good offices in order to resolve or contain international crises additionally; the Secretary-General is in an important position to mark or possibly to influence developments.

In many disputes, the functions assigned to the Secretary-General by the other organs of the United Nations have enabled him to increase the influence of the organization. One remarkable example of this occurred in the Congo crisis of 1960 and the subsequent Council resolution authorizing the Secretary-General in very wide-ranging terms to take action.

Another instance of the capacity of the Secretary-General to take action was the decision of 1967 to withdraw the UN peacekeeping force in the Middle East, thus removing an important psychological barrier to war, and provoking a certain amount of criticism.

International Court of Justice

(Extracts from the Official website of International Court of Justice)

The sixth principal organ of the UN is the International Court of Justice, established in 1946 as the successor to the Permanent Court of International Justice.

General Overview

Established in 1945 by the **Charter of the United Nations**, the International Court of Justice (ICJ) is the principal judicial organ of the United Nations. The **Statute of the International Court of Justice**, creating the court and outlining its responsibilities, is annexed to the U.N. Charter. The ICJ's primary role is to settle legal disputes submitted to it by member states and to give advisory opinions on legal questions referred to it by the United Nations and other specialized agencies.

The ICJ has **15 judges** elected for nine year nonrenewable terms in office. The ICJ has two distinct types of jurisdiction: **contentious jurisdiction** and **advisory jurisdiction**.

Basis of the Court's jurisdiction

The jurisdiction of the Court in contentious proceedings is based on the consent of the States to which it is open. The form in which this consent is expressed determines the manner in which a case may be brought before the Court.

(a) ***Special agreement***

Article 36, paragraph 1, of the Statute provides that the jurisdiction of the Court comprises all cases which the parties refer to it. Such cases normally come before the Court by notification to the Registry of an agreement known as a *special agreement*, concluded by the parties specially for this purpose. The subject of the dispute and the parties must be indicated (Statute, Art. 40, para. 1; Rules, Art. 39).

(b) ***Matters provided for in treaties and conventions***

Article 36, paragraph 1, of the Statute also provides that the jurisdiction of the Court comprises all matters specially provided for in treaties and conventions in force. Such matters are normally brought before the Court by means of a written *application instituting proceedings*; this is a unilateral document which must indicate the subject of the dispute and the parties (Statute, Art. 40, Para. 1) and, as far as possible, specify the provision on which the applicant founds the jurisdiction of the Court (Rules, Art. 38).

A list of treaties and conventions governing the jurisdiction of the International Court of Justice in contentious cases is given in the "Treaties" section.

To these instruments must be added other treaties and conventions concluded earlier and conferring jurisdiction upon the Permanent Court of International Justice, for Article 37 of the Statute of the International Court of Justice stipulates that whenever a treaty or convention in force provides for reference of a matter to a tribunal to have been instituted by the League of Nations, or to the Permanent Court of International Justice, the matter shall, as between the parties to the Statute, be referred to the International Court of Justice. In 1932, in its *Collection of Texts governing the Jurisdiction of the Court* (*P.C.I.J., Series D, No. 6,* fourth edition) and subsequently in Chapter X of its *Annual Reports (P.C.I.J., Series E, Nos. 8-16)* the Permanent Court reproduced the relevant provisions of the instruments governing its jurisdiction. By virtue of the article referred to above, some of these provisions now govern the jurisdiction of the International Court of Justice.

(c) *Compulsory jurisdiction in legal disputes*

The Statute provides that a State may recognize as compulsory, in relation to any other State accepting the same obligation, the jurisdiction of the Court in legal disputes. Such cases are brought before the Court by means of written applications. The nature of legal disputes in relation to which such compulsory jurisdiction may be recognized are listed in Article 36, paragraphs 2-5, of the Statute, which read as follows:

"2. The States parties to the present Statute may at any time declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:

(a) the interpretation of a treaty;

(b) any question of international law;

(c) the existence of any fact which, if established, would constitute a breach of an international obligation;

(d) the nature or extent of the reparation to be made for the breach of an international obligation.

3. The declarations referred to above may be made unconditionally or on condition of reciprocity on the part of several or certain States, or for a certain time.

4. Such declarations shall be deposited with the Secretary-General of the United Nations, who shall transmit copies thereof to the parties to the Statute and to the Registrar of the Court.

5. Declarations made under Article 36 of the Statute of the Permanent Court of International Justice and which are still in force shall be deemed, as between the parties to the present Statute, to be acceptances of the compulsory jurisdiction of the International Court of Justice for the period which they still have to run and in accordance with their terms."

The texts of these declarations can be found under the heading 'Declarations Recognizing the Jurisdiction of the Court as Compulsory".

(d) ***Forum prorogatum***

If a State has not recognized the jurisdiction of the Court at the time when an application instituting proceedings is filed against it, that State has the possibility of subsequently accepting such jurisdiction to enable the Court to entertain the case: the Court thus has jurisdiction as of the date of acceptance under the *forum prorogatum* rule.

(e) ***The Court itself decides any questions concerning its jurisdiction***

Article 36, paragraph 6, of the Statute provides 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. Article 79 of the Rules lays down the arrangements for filing preliminary objections[4].

(f) ***Interpretation of a judgment***

Article 60 of the Statute provides that in the event of dispute as to the meaning or scope of a judgment, the Court shall construe it upon the request of any party. The request for interpretation may be made either by means of a special agreement between the parties or of an application by one or more of the parties (Rules, Art. 98)[5].

(g) ***Revision of a judgment***

An application for revision of a judgment may be made only when it is based upon the discovery of some fact of such a nature as to be a decisive factor, which fact was, when the judgment was given, unknown to the Court and also to the party claiming revision, always provided that such party's ignorance was not due to negligence (Statute, Art. 61, para. 1). A request for revision is made by means of an application (Rules, Art. 99).

Contentious Jurisdiction

In the exercise of its jurisdiction in contentious cases, the International Court of Justice settles disputes of a legal nature that are submitted to it by States in accordance with international law. An international legal dispute can be defined as a disagreement on a question of law or fact, a conflict, or a clash of legal views or interests. Only States may apply to and appear before the

International Court of Justice. International organizations, other authorities and private individuals are not entitled to institute proceedings before the Court.

Article 35 of the Statute defines the conditions under which States may access the Court. While the first paragraph of that article states that the Court is open to States parties to the Statute, the second is intended to regulate access to the Court by States which are not parties to the Statute. The conditions under which such States may access the Court are determined by the Security Council, subject to the special provisions contained in treaties in force at the date of the entry into force of the Statute, with the proviso that under no circumstances shall such conditions place the parties in a position of inequality before the Court.

The Court can only deal with a dispute when the States concerned have recognized its jurisdiction. No State can therefore be a party to proceedings before the Court unless it has in some manner or other consented thereto.

States entitled to appear before the Court

Article 35, paragraph 1, of the Statute provides that the Court shall be open to the States parties to the Statute, and Article 93, paragraph 1, of the Charter of the United Nations provides that all Members of the United Nations are *ipso facto* parties to the Statute. Currently 193 States are members of the United Nations

Declarations recognizing the jurisdiction of the Court as compulsory

The States parties to the Statute of the Court may "at any time declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the Court" (Art. 36, para. 2, of the Statute).

Each State which has recognized the compulsory jurisdiction of the Court has in principle the right to bring any one or more other States, which have accepted the same obligation, before the Court, by filing an application instituting proceedings with the Court. Conversely, it undertakes to appear before the Court should proceedings be instituted against it by one or more other such States.

The declarations recognizing the jurisdiction of the Court as compulsory take the form of a unilateral act of the State concerned and are deposited with the Secretary-General of the United Nations.

Advisory Jurisdiction

Since States alone are entitled to appear before the Court, public (governmental) international organizations cannot be parties to a case before it. However, a special procedure, the advisory procedure, is available to such organizations and to them alone. This procedure is available to five United Nations organs, fifteen specialized agencies and one related organization.

Though based on contentious proceedings, advisory proceedings have distinctive features resulting from the special nature and purpose of the advisory function.

Advisory proceedings begin with the filing of a written request for an advisory opinion addressed to the Registrar by the United Nations Secretary-General or the director or secretary-general of the entity requesting the opinion. In urgent cases the Court may take all appropriate measures to speed up the proceedings. To assemble all the necessary information about the question submitted to it, the Court is empowered to hold written and oral proceedings.

A few days after the request has been filed, the Court draws up a list of the States and international organizations that are likely to be able to furnish information on the question before the Court. Usually, the States listed are the member States of the organization requesting the opinion, while sometimes the other States to which the Court is open in contentious proceedings are also included. As a rule, organizations and States authorized to participate in the proceedings may submit written statements, followed, if the Court considers it necessary, by written comments on other's statements. These written statements are generally made available to the public at the beginning of the oral proceedings, if the Court considers that such proceedings should take place.

Contrary to judgments, and except in rare cases where it is expressly provided that they shall have binding force (for example, as in the Convention on the Privileges and Immunities of the United Nations, the Convention on the Privileges and Immunities of the Specialized Agencies of the United Nations, and the Headquarters Agreement between the United Nations and the United States of America), the Court's advisory opinions are not binding. The requesting organ, agency or organization remains free to decide, as it sees fit, what effect to give to these opinions.

Despite having no binding force, the Court's advisory opinions nevertheless carry great legal weight and moral authority. They are often an instrument of preventive diplomacy and help

to keep the peace. In their own way, advisory opinions also contribute to the clarification and development of international law and thereby to the strengthening of peaceful relations between States.

Organs and agencies authorized to request advisory opinions

In accordance with Article 96, paragraph 1, of the Charter of the United Nations "[t]he General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question".

Article 96, paragraph 2, of the Charter provides that "[o]ther organs of the United Nations and specialized agencies, which may at any time be so authorized by the General Assembly, may also request advisory opinions of the Court on legal questions arising within the scope of their activities".

World trade Organization

Introduction:

The establishment of the World Trade Organization (WTO) as the successor to, the GATT on 1 January 1995 under the Marrakesh Agreement places the global trading system on a firm constitutional footing with the evolution of international economic legislation resulted through the Uruguay Round of GATT negotiations. Uruguay Round of trade negations paved the way for liberalization of international trade with the fundamental shift from the negotiation approach to the institutional framework envisaged through transition from GATT to WTO Agreement.

The GATT 1947 and the WTO co-existed for the transitional period of one year in 1994. In January 1995, however, the WTO completely replaced the GATT. The membership of the WTO increased from 77 in 1995 to 127 by the end of 1996.

Features of the WTO

The agreements under the WTO are permanent and binding to the member countries

The WTO dispute settlement system is based not on dilatory but automatic mechanism. It is also quicker and binding on the members. As such, the WTO is a powerful body. The WTO's approach is rule- based and time-bound. It covers trade in goods as well as services. The WTO made the international Intellectual property rights regime more focused through trade-related aspects of intellectual property rights and several other issues of agreements

Structure of the WTO

The Ministerial Conference (MC) is at the top of the structural organization of the WTO. It is the supreme governing body which takes ultimate decisions on all matters. It is constituted by representatives of (usually, Ministers of Trade) all the member countries.

The General Council (GC) is composed of the representatives of all the members. It is the real engine of the WTO which acts on behalf of the MC. It also acts as the Dispute Settlement Body as well as the Trade Policy Review Body.

There are three councils, viz.: the Council for Trade in Services and the Council for Trade-Related Aspects of Intellectual Property Rights (TRIPS) operating under the GC. These councils with their subsidiary bodies carry out their specific responsibilities

Further, there are three committees, viz., the Committee on Trade and Development (CTD), the Committee on Balance of Payments Restrictions (CBOPR), and the Committee on Budget, Finance and Administration (CF A) which execute the functions assigned to them by e WTO Agreement and the GC

The major functions of the WTO

1. To lay-down a substantive code of conduct aiming at reducing trade barriers including tariffs and eliminating discrimination in international trade relations.

2. To provide the institutional framework for the administration of the substantive code which encompasses a spectrum of norms governing the conduct of member countries in the arena of global trade?

3. To provide an integrated structure of the administration, thus, to facilitate the implementation, administration and fulfillment of the objectives of the WTO Agreement and other Multilateral Trade Agreements.

4. To ensure the implementation of the substantive code.

5. To act as a forum for the negotiation of further trade liberalization.

6. To cooperate with the IMF and WB and its associates for establishing a coherence in trade policy-making.

7. To settle the trade-related disputes

Dispute settlement mechanism under WTO (Extracts from the official website of WTO)

Dispute settlement is the central pillar of the multilateral trading system, and the WTO's unique contribution to the stability of the global economy. Without a means of settling disputes, the rules-based system would be less effective because the rules could not be enforced. The WTO's procedure underscores the rule of law, and it makes the trading system more secure and predictable. The system is based on clearly-defined rules, with timetables for completing a case. First rulings are made by a panel and endorsed (or rejected) by the WTO's full membership. Appeals based on points of law are possible.

However, the point is not to pass judgment. The priority is to settle disputes, through consultations if possible. By January 2008, only about 136 of the nearly 369 cases had reached the full panel process. Most of the rest have either been notified as settled "out of court" or remain in a prolonged consultation phase — some since 1995.

Principles: equitable, fast, effective, mutually acceptable

Disputes in the WTO are essentially about broken promises. WTO members have agreed that if they believe fellow-members are violating trade rules, they will use the multilateral system of settling disputes instead of taking action unilaterally. That means abiding by the agreed procedures, and respecting judgments.

A dispute arises when one country adopts a trade policy measure or takes some action that one or more fellow-WTO members considers to be breaking the WTO agreements, or to be a failure to live up to obligations. A third group of countries can declare that they have an interest in the case and enjoy some rights.

A procedure for settling disputes existed under the old GATT, but it had no fixed timetables, rulings were easier to block, and many cases dragged on for a long time inconclusively. The Uruguay Round agreement introduced a more structured process with more clearly defined stages in the procedure. It introduced greater discipline for the length of time a case should take to be settled, with flexible deadlines set in various stages of the procedure. The agreement emphasizes that prompt settlement is essential if the WTO is to function effectively. It sets out in considerable detail the procedures and the timetable to be followed in resolving disputes. If a case runs its full course to a first ruling, it should not normally take more than about one year — 15 months if the case is appealed. The agreed time limits are flexible, and if the case is considered urgent (e.g. if perishable goods are involved), it is accelerated as much as possible.

The Uruguay Round agreement also made it impossible for the country losing a case to block the adoption of the ruling. Under the previous GATT procedure, rulings could only be adopted by consensus, meaning that a single objection could block the ruling. Now, rulings are automatically adopted unless there is a consensus to reject a ruling — any country wanting to block a ruling has to persuade all other WTO members (including its adversary in the case) to share its view.

Although much of the procedure does resemble a court or tribunal, the preferred solution is for the countries concerned to discuss their problems and settle the dispute by themselves. The first stage is therefore consultations between the governments concerned, and even when the case has progressed to other stages, consultation and mediation are still always possible.

How are disputes settled?

Settling disputes is the responsibility of the Dispute Settlement Body (the General Council in another guise), which consists of all WTO members. The Dispute Settlement Body has the sole authority to establish “panels” of experts to consider the case, and to accept or reject the panels’ findings or the results of an appeal. It monitors the implementation of the rulings and recommendations, and has the power to authorize retaliation when a country does not comply with a ruling.

First stage: consultation (up to 60 days). Before taking any other actions the countries in dispute have to talk to each other to see if they can settle their differences by themselves. If that fails, they can also ask the WTO director-general to mediate or try to help in any other way.

Second stage: the panel (up to 45 days for a panel to be appointed, plus 6 months for the panel to conclude). If consultations fail, the complaining country can ask for a panel to be appointed. The country "in the dock" can block the creation of a panel once, but when the Dispute Settlement Body meets for a second time, the appointment can no longer be blocked (unless there is a consensus against appointing the panel).

Officially, the panel is helping the Dispute Settlement Body make rulings or recommendations. But because the panel's report can only be rejected by consensus in the Dispute Settlement Body, its conclusions are difficult to overturn. The panel's findings have to be based on the agreements cited.

The panel's final report should normally be given to the parties to the dispute within six months. In cases of urgency, including those concerning perishable goods, the deadline is shortened to three months.

The agreement describes in some detail how the panels are to work. The main stages are:

Before the first hearing: each side in the dispute presents its case in writing to the panel.

First hearing: the case for the complaining country and defence: the complaining country (or countries), the responding country, and those that have announced they have an interest in the dispute, make their case at the panel's first hearing.

Rebuttals: the countries involved submit written rebuttals and present oral arguments at the panel's second meeting.

Experts: if one side raises scientific or other technical matters, the panel may consult experts or appoint an expert review group to prepare an advisory report.

First draft: the panel submits the descriptive (factual and argument) sections of its report to the two sides, giving them two weeks to comment. This report does not include findings and conclusions.

Interim report: The panel then submits an interim report, including its findings and conclusions, to the two sides, giving them one week to ask for a review.

Review: The period of review must not exceed two weeks. During that time, the panel may hold additional meetings with the two sides.

Final report: A final report is submitted to the two sides and three weeks later, it is circulated to all WTO members. If the panel decides that the disputed trade measure does break a WTO agreement or an obligation, it recommends that the measure be made to conform with WTO rules. The panel may suggest how this could be done.

The report becomes a ruling: The report becomes the Dispute Settlement Body's ruling or recommendation within 60 days unless a consensus rejects it. Both sides can appeal the report (and in some cases both sides do).

Appeals

Either side can appeal a panel's ruling. Sometimes both sides do so. Appeals have to be based on points of law such as legal interpretation — they cannot reexamine existing evidence or examine new issues. Each appeal is heard by three members of a permanent seven-member Appellate Body set up by the Dispute Settlement Body and broadly representing the range of WTO membership. Members of the Appellate Body have four-year terms. They have to be individuals with recognized standing in the field of law and international trade, not affiliated with any government. The appeal can uphold, modify or reverse the panel's legal findings and conclusions. Normally appeals should not last more than 60 days, with an absolute maximum of 90 days. The Dispute Settlement Body has to accept or reject the appeals report within 30 days — and rejection is only possible by consensus.

International Labour Organization

It was created in 1919, as part of the Treaty that ended World War I, to reflect the belief that universal and lasting peace can be accomplished only if it is based on social justice. The Constitution of the ILO was drafted in early 1919 by the Labour Commission, chaired by Samuel Gompers, head of the American Federation of Labour (AFL) in the United States. It was composed of representatives from nine countries: Belgium, Cuba, Czechoslovakia, France, Italy, Japan, Poland, the United Kingdom and the United States.

The process resulted in a tripartite organization, the only one of its kind, bringing together representatives of governments, employers and workers in its executive bodies.

The driving forces for the ILO's creation arose from security, humanitarian, political and economic considerations. The founders of the ILO recognized the importance of social justice in securing peace, against a background of the exploitation of workers in the industrializing nations of that time. There was also increasing understanding of the world's economic interdependence and the need for cooperation to obtain similarity of working conditions in countries competing for markets.

Reflecting these ideas, the Preamble of the ILO Constitution states:

Whereas universal and lasting peace can be established only if it is based upon social justice;

And whereas conditions of labour exist involving such injustice, hardship and privation to large numbers of people as to produce unrest so great that the peace and harmony of the world are imperilled; and an improvement of those conditions is urgently required;

Whereas also the failure of any nation to adopt humane conditions of labour is an obstacle in the way of other nations which desire to improve the conditions in their own countries.

The areas of improvement listed in the Preamble remain relevant today, including the regulation of working time and labour supply, the prevention of unemployment and the provision of an adequate living wage, social protection of workers, children, young persons and women. The Preamble also recognizes a number of key principles, for example equal remuneration for work of equal value and freedom of association, and highlights, among others, the importance of vocational and technical education.

In 1946, the ILO became a specialized agency of the newly formed United Nations. Since 1919. The ILO has maintained and developed a system of International Labour Standards which are aimed at promoting opportunities for men and women to obtain decent and productive work in conditions of freedom, equity, security and dignity. In today’s globalised economy, international labour standards are an essential component in the international framework for ensuring that the growth of the global economy provides benefits to all. The ILO was set up in

Geneva in 1920, the passion which drove the organization was quickly brought down as certain governments felt that there were too many conventions, the publications were too critical and the budgets very high. At present there are 188 conventions and a similar number of recommendations out of which eight are considered as ‘Core’, which make up ILO’s Core Labour standards.

Important conventions under the ILO are

Freedom of Association and the effective recognition of the right to collective bargaining
The elimination of all forms of Forced and Compulsory labour
The effective abolition of child labour
The elimination of discrimination in respect of employment and occupation

These conventions are international treaties, subject to ratification by ILO member countries. Though these conventions are legally binding on ratifying countries, the recommendations are non-binding as they only supplement the conventions by providing additional clarification and guidance for national policy and action. When a country ratifies an ILO convention it agrees to give its effect in law and also apply its provisions in practice, the nation further agrees to give supervisory powers to ILO in order to govern these measures adopted. However, even if the ILO notices that a country has not met the standard required by a convention, ILO does not possess any mechanism to force any government to change its law or practice. In 1998, the ILO produced the declaration of Fundamental Principles and right at work. The member states agreed that they should all respect, promote and realize ILO’s core labour standards regardless of whether they follow and adopt the other conventions.

Annexure

Link of video lectures on public international law, on topics from Unit III and IV of Karnataka State Law University syllabus.

https://www.youtube.com/watch?v=on4s78iBmJw&list=PL4S7YWpovLurGfrdyHOlDW0ilCJKomGsT&index=26
https://www.youtube.com/watch?v=SLqK1ueDcRA&list=PL4S7YWpovLurGfrdyHOlDW0ilCJKomGsT&index=28
https://www.youtube.com/watch?v=JXllRuA65AY&list=PL4S7YWpovLurGfrdyHOlDW0ilCJKomGsT&index=30
https://www.youtube.com/watch?v=qSHGraY6Z0Y&list=PL4S7YWpovLurGfrdyHOlDW0ilCJKomGsT&index=32
https://www.youtube.com/watch?v=_6kEigpC5u0&list=PL4S7YWpovLurGfrdyHOlDW0ilCJKomGsT&index=36
https://www.youtube.com/watch?v=Y8iGkyLMHvI&list=PL4S7YWpovLurGfrdyHOlDW0ilCJKomGsT&index=38
https://www.youtube.com/watch?v=xCoJg0vWaWA&list=PL4S7YWpovLurGfrdyHOlDW0ilCJKomGsT&index=40
https://www.youtube.com/watch?v=6GFbJB1eSSw&list=PL4S7YWpovLurGfrdyHOlDW0ilCJKomGsT&index=43
https://www.youtube.com/watch?v=FS8ywhfdi5I&list=PL4S7YWpovLurGfrdyHOlDW0ilCJKomGsT&index=44
https://www.youtube.com/watch?v=_ufDkF6-zyg&list=PL4S7YWpovLurGfrdyHOlDW0ilCJKomGsT&index=46
https://www.youtube.com/watch?v=e0Ba8QFeDpg&list=PL4S7YWpovLurGfrdyHOlDW0ilCJKomGsT&index=48
https://www.youtube.com/watch?v=HIRx_5soCP8&list=PL4S7YWpovLurGfrdyHOlDW0ilCJKomGsT&index=50
https://www.youtube.com/watch?v=MVblyclLg4U&list=PL4S7YWpovLurGfrdyHOlDW0ilCJKomGsT&index=54
https://www.youtube.com/watch?v=--mO-ULvGBY&list=PL4S7YWpovLurGfrdyHOlDW0ilCJKomGsT&index=56

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A Brief overview of leading cases in Public International Law

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Alabama Claims Arbitration (1872)

Topic – Judicial decisions as sources of International Law

Introduction

In addition to the Permanent Court and the International Court of Justice, the phrase 'judicial decisions' also encompasses international arbitral awards and the rulings of national courts. They may differ from the international courts in some ways; many of their decisions have been extremely significant in the development of international law. This can be seen in the existence and number of the Reports of International Arbitral Awards published since 1948 by the United Nations. One such case includes the Alabama claims arbitration. It was due to a dispute between USA and UK. It arose during U.S. Civil War. It was an important precedent for solving serious international disputes through arbitration.

Facts of the case

Despite U.K. declared neutrality with regard to the US Civil War, it had not prevented British ports from being used to outfit ships in the Confederate Navy (the South) during the course of that war. The most notorious example was the Confederate ship known as the "Alabama" which was believed to have sunk over 60 Union ships before it was finally sunk

During the Civil War, the Confederacy contracted with private ship builders in Liverpool England to refurbish ships for combat. The *Alabama* was one such ship. Although the British Foreign Enlistment Act of 1819 had forbidden the construction of foreign warships, the American Confederacy was still able to evade the letter of the law and purchase a number of cruisers from Britain. Confederate cruisers destroyed or captured more than 250 American merchant ships and caused the conversion of 700 more to foreign flags. By the end of the war, the U.S. Merchant Marine had lost half of its ships.

The Alabama Claims were brought against Great Britain by the United States for the damage caused by several Confederate warships, including the *Alabama* and the *Florida*. Recognizing that the affair might be used against Great Britain in some future conflict British

Foreign Minister, the Earl of Clarendon, met with American ambassador Reverdy Johnson, and determined to submit the claims to arbitration.

The arbitrators awarded the United States $15.5 million for the losses caused by the Confederate vessels.

Anglo Norwegian Fisheries Case

Topic – Custom as a source of international law

Principle- Some degree of uniformity amongst state practices was essential before a custom could come into existence

Facts of the case

Due to the complaints from the King of Denmark and of Norway, at the beginning of the seventeenth century, British fishermen refrained from fishing in Norwegian coastal waters for a long period, from 1616-1618 until 1906.

In 1906 a few British fishing vessels appeared off the coasts of Eastern Finnmark. From 1908 onwards they returned in greater numbers. These were trawlers equipped with improved and powerful gear. The local population became perturbed, and measures were taken by the Norwegian Government with a view to specifying the limits within which fishing was prohibited to foreigners. The first incident occurred in 1911 when a British trawler was seized and condemned for having violated these measures. Negotiations ensued between the two Governments. These were interrupted by the war in 1914.

From 1922 onwards incidents recurred. Further conversations were initiated in 1924. In 1932, British trawlers, extending the range of their activities, appeared in the sectors off the Norwegian coast west of the North Cape, and the number of warnings and arrests increased. On July 27th, 1933, the United Kingdom Government sent a memorandum to the Norwegian Government complaining that in delimiting the territorial sea the Norwegian authorities had made use of unjustifiable base-lines.

On July 12th, 1935, a Norwegian Royal Decree was enacted delimiting the Norwegian fisheries zone north of 66 degrees 28.8' North latitude. A number of British trawlers were arrested and condemned. It was then that the United Kingdom Government raised this dispute.

The United Kingdom, in its arguments against the Norwegian method of measuring the breadth of the territorial sea, referred to an alleged rule of custom whereby a straight line may be

drawn across bays of less than ten miles from one projection to the other, which could then be regarded as the baseline for the measurement of the territorial sea.

Decisions

The Court dismissed the argument of Great Britain by pointing out that the actual practice of states did not justify the creation of any such custom. In other words, there had been insufficient uniformity of behaviour.

{The Judgment delivered by the Court in this case ended a long controversy between the United Kingdom and Norway which had aroused considerable interest in other maritime States. In 1935 Norway enacted a decree by which it reserved certain fishing grounds situated off its northern coast for the exclusive use of its own fishermen. The question at issue was whether this decree, which laid down a method for drawing the baselines from which the width of the Norwegian territorial waters had to be calculated, was valid international law. This question was rendered particularly delicate by the intricacies of the Norwegian coastal zone, with its many fjords, bays, islands, islets and reefs. The United Kingdom contended, *inter alia*, that some of the baselines fixed by the decree did not accord with the general direction of the coast and were not drawn in a reasonable manner. In its Judgment of 18 December 1951, the Court found that, contrary to the submissions of the United Kingdom, neither the method nor the actual baselines stipulated by the 1935 Decree were contrary to international law.- https://www.icj-cij.org/en/case/5 }

Colombian- Peruvian Asylum Case

Source –(https://www.icj-cij.org/en/case/7)

Brief summary - The granting of diplomatic asylum in the Colombian Embassy at Lima, on 3 January 1949, to a Peruvian national, Victor Raúl Haya de la Torre, a political leader accused of having instigated a military rebellion, was the subject of a dispute between Peru and Colombia which the Parties agreed to submit to the Court. The Pan-American Havana Convention on

Asylum (1928) laid down that, subject to certain conditions, asylum could be granted in a foreign embassy to a political refugee who was a national of the territorial State. The question in dispute was whether Colombia, as the State granting the asylum, was entitled unilaterally to "qualify" the offence committed by the refugee in a manner binding on the territorial State — that is, to decide whether it was a political offence or a common crime. Furthermore, the Court was asked to decide whether the territorial State was bound to afford the necessary guarantees to enable the refugee to leave the country in safety. In its Judgment of 20 November 1950, the Court answered both these questions in the negative, but at the same time it specified that Peru had not proved that Mr. Haya de la Torre was a common criminal. Lastly, it found in favour of a counter-claim submitted by Peru that Mr. Haya de la Torre had been granted asylum in violation of the Havana Convention.

Chung chi Cheung V R

Topic - Exemption from territorial jurisdiction of state, extent of immunity to foreign armed public ship, waiver of immunity from territorial jurisdiction

Facts of the case

The appellant C, a British subject, who was cabin boy on board a Chinese Maritime Customs cruiser – a foreign armed public ship – killed by shooting the captain of the vessel, also a British subject in the service of the Chinese Government, while the vessel was in the territorial waters of Hong Kong. C was arrested in Hong Kong and, with extradition proceedings instituted by the Chinese authorities having failed on the ground that the appellant was a British national, C was rearrested and charged with murder before the British court. He was ultimately convicted and sentenced to death, the acting chief officer and three of the crew of the Chinese cruiser having given evidence for the prosecution at the trial. C brought an appeal, alleging that the local British Court had no jurisdiction to try him.

Issues involved

1. Whether, in the particular circumstances of the case, the jurisdiction of the British Court had been validly exercised;

2. Whether the crew of a foreign public ship enjoys immunity from prosecution by virtue of such vessels being an extension of the territory to which they belong;

3. Whether, in any event, immunity from prosecution had been waived by the Chinese Government.

Decision

A public armed ship in foreign territorial waters is not to be treated as a part of the territory of its own nation. The immunities which are generally accorded to a foreign armed public ship and its crew do not depend upon an objective extra-territoriality but rather upon an implication of domestic law, and flow from a waiver by a sovereign state of its full territorial jurisdiction. These immunities are therefore conditional and can themselves be waived by the home nation. As the Chinese government did not register a diplomatic request for the surrender of the appellant after the failure of the extradition proceedings, and as members of their service were subsequently granted permission to give evidence before the British Court in aid of the prosecution, the jurisdiction of the British Court had been validly exercised.

Corfu Channel Case

(Source - https://www.icj-cij.org/en/case/1)

This dispute gave rise to three Judgments by the Court. It arose out of the explosions of mines by which some British warships suffered damage while passing through the Corfu Channel in 1946, in a part of the Albanian waters which had been previously swept. The ships were severely damaged and members of the crew were killed. The United Kingdom seised the Court of the dispute by an Application filed on 22 May 1947 and accused Albania of having laid or allowed a third State to lay the mines after mine-clearing operations had been carried out by the Allied naval authorities. The case had previously been brought before the United Nations and, in consequence of a recommendation by the Security Council, had been referred to the Court.

In a first Judgment, rendered on 25 March 1948, the Court dealt with the question of its jurisdiction and the admissibility of the Application, which Albania had raised. The Court

found, *inter alia*, that a communication dated 2 July 1947, addressed to it by the Government of Albania, constituted a voluntary acceptance of its jurisdiction. It recalled on that occasion that the consent of the parties to the exercise of its jurisdiction was not subject to any particular conditions of form and stated that, at that juncture, it could not hold to be irregular a proceeding not precluded by any provision in those texts.

A second Judgment, rendered on 9 April 1949, related to the merits of the dispute. The Court found that Albania was responsible under international law for the explosions that had taken place in Albanian waters and for the damage and loss of life which had ensued. It did not accept the view that Albania had itself laid the mines or the purported connivance of Albania with a mine-laying operation carried out by the Yugoslav Navy at the request of Albania. On the other hand, it held that the mines could not have been laid without the knowledge of the Albanian Government. On that occasion, it indicated in particular that the exclusive control exercised by a State within its frontiers might make it impossible to furnish direct proof of facts incurring its international responsibility. The State which is the victim must, in that case, be allowed a more liberal recourse to inferences of fact and circumstantial evidence; such indirect evidence must be regarded as of especial weight when based on a series of facts, linked together and leading logically to a single conclusion. Albania, for its part, had submitted a counter-claim against the United Kingdom. It accused the latter of having violated Albanian sovereignty by sending warships into Albanian territorial waters and of carrying out minesweeping operations in Albanian waters after the explosions. The Court did not accept the first of these complaints but found that the United Kingdom had exercised the right of innocent passage through international straits. On the other hand, it found that the minesweeping had violated Albanian sovereignty, because it had been carried out against the will of the Albanian Government. In particular, it did not accept the notion of "self-help" asserted by the United Kingdom to justify its intervention.

In a third Judgment, rendered on 15 December 1949, the Court assessed the amount of reparation owed to the United Kingdom and ordered Albania to pay £844,000.

Cutting Case

Topic: Passive personality principle

Passive Personality principle has been developed mostly through cases around the world rather than any specific codified set of rules. Under this principle, a state may claim jurisdiction to try an individual for offences committed abroad which have affected or will affect nationals of the state.

The leading case in this principle is the Cutting's Case 1886. This case is concerned with the publication in Texas of a statement defamatory of a Mexican by an American citizen. Cutting was arrested while in Mexico and convicted of the offence (a crime under Mexican law) with Mexico maintaining its right to jurisdiction upon the basis of the passive personality principle. The United States strongly protested against this, but there was an inconclusive end to the incident, the charges being withdrawn by the injured party

I'm alone case

Source-(https://www.ckadvocates.co.ke/2014/06/24/summary-of-i-am-alone-case-conflic-of-laws/#:~:text=The%20%27I%20am%20Alone%20case,was%20illegal%20to%20smuggle%20alcohol.)

The 'I am Alone case' involved a British ship of Canadian registry controlled and managed by United States citizens that was sunk. It was alleged that the ship was used in smuggling alcoholic liquor into the United States. At that time, it was illegal to smuggle alcohol. It was ordered to stop for inspection at a point outside the U.S territorial waters but declined. This led to a pursuit of the ship by a vessel, Wolcott and after two days of pursuit it was joined by the coast guard vessel, Dexter, which eventually sunk the 'I'm Alone'. This resulted to death of one person and the rest of the crew was rescued.

The above actions led to diplomatic row between the US and Canada. Canada claimed that sinking the ship was illegal and not justified according to the "Convention between The United States Of America and Great Britain to Aid in The Prevention of The Smuggling of Intoxicating Liquors into the United States". The dispute between the paryies was subsequently submitted to a commission prescribed then by article 4 of that convention.

While the U.S claimed that their actions were justified pursuant to the Anglo-American Convention signed by the US and Britain and Britain could raise no objection since it was within the one hour steaming zone designated by the convention; Canada contended that the convention did not confer any right of hot pursuit even within the conventional limit.

The major point of contention in this case was the location of the 'I am alone' ship was when it was boarded by Wolcott. The Canadian government reiterated that at that time I am Alone was already out of the conventional limits, while US on the other hand argued that the ship was nearer to its shore and within the conventional limits. Canada further protested that since 'I'm Alone' was outside the three nautical mile limit of US territorial waters there was no right to pursue the ship beyond the conventional limit and that the act of sinking it by Dexter occurred after the ship had left the conventional limits. The matter was referred for adjudication by the parties to a commission comprising of Canadian and US citizens.

The state parties to the dispute cited various provisions in their tripartite agreement and which they used to justify their claims. While Britain claimed ships registered in any of the three countries were free to navigate across the three territories without any hindrance. USA claimed that the movement of such ships would be illegal if they were suspected of ferrying drugs and psychotropic substances. Canada acknowledged the argument made by the USA but it contended that according to the convention, the rights of pursuit conferred by the convention could not be exercised at a greater distance from the coast of the USA. Therefore Canada's position was that USA did not have the right to hot pursuit.

A decision was made by the tribunal which constituted of adjudicators from the three countries. The tribunal's verdict was that the sinking of the ship was illegal and USA was directed to pay damages of $50,666.

In making the decision, the court balanced several questions of law and fact. One of them was that the ship was found to have been procured for illegal purposes. This had to be balanced against the fact on whether it was unlawful to sink the ship. Another issue was the ownership of the ship. The reason is that although it had been registered in Canada, it was claimed that it was owned by American citizens. USA cited a provision in the convention which was to the effect of

absolving the pursuing ship from any loss (even sinking) that is incurred during a hot pursuit. However, it is agreeable that this was actually intentional sinking by the pursuing ship.

The 'I am alone' case is a landmark case on the Law of the sea and it has contributed positively in the development of this field of law. It explicitly set out the parameters of hot pursuit and to what extent a state may pursue a ship that has violated its laws. The decision in this case later influenced inclusion of hot pursuit in various conventions on the Law of the sea. A clear illustration of this is the incorporation of hot pursuit in Article 111 of the 1982 United Nations Convention on the Law of the Sea (UNCLOS).

One of the most contentious aspects as manifested in the case was on reasonable force. What amounts to reasonable force? This issue is one that has not been resolved. Canada had one major concern during these proceedings. Its contention was whether sinking the ship the only option left for the USA. Why did they not arrest it? In a rejoinder to this the respondent state said that from a military perspective the option to sink the ship.

With the great developments in the Law of the Sea, the right to hot pursuit is highly appreciated. However, this right is subject to reservations. The first is that the pursuing country must pay due regard to the equality of states principle that is contained in Article 2(4) of the UN Charter. Also, the ship may only pursue the foreign ship to a distance of 12 nautical miles from its territory. It is also required that the pursuit may only be continued outside the territorial sea or the contiguous zone if it has been continuous and not interrupted. An order to stop must have been given to the vessel before being pursued and it has defied. Another condition is that the pursuit may only be exercised by warships, military aircraft or ships or aircraft clearly marked as being on governmental service, that is, marine police officers. Finally, once the ship enters its territorial waters or those of another state, the pursuit must stop. This is aimed at observing the principle of territorial sovereignty. However, foreign states may be allowed to conduct hot pursuit through territorial waters if certain conditions are met, for example, when the hot pursuit continues uninterrupted.

Nicaragua v united States (1984) ICJ 169

Source: (https://www.icj-cij.org/en/case/70)

On 9 April 1984 Nicaragua filed an Application instituting proceedings against the United States of America, together with a request for the indication of provisional measures concerning a dispute relating to responsibility for military and paramilitary activities in and against Nicaragua. On 10 May 1984 the Court made an Order indicating provisional measures. One of these measures required the United States immediately to cease and refrain from any action restricting access to Nicaraguan ports, and, in particular, the laying of mines. The Court also indicated that the right to sovereignty and to political independence possessed by Nicaragua, like any other State, should be fully respected and should not be jeopardized by activities contrary to the principle prohibiting the threat or use of force and to the principle of non-intervention in matters within the domestic jurisdiction of a State. The Court also decided in the aforementioned Order that the proceedings would first be addressed to the questions of the jurisdiction of the Court and of the admissibility of the Nicaraguan Application. Just before the closure of the written proceedings in this phase, El Salvador filed a declaration of intervention in the case under Article 63 of the Statute, requesting permission to claim that the Court lacked jurisdiction to entertain Nicaragua's Application. In its Order dated 4 October 1984, the Court decided that El Salvador's declaration of intervention was inadmissible inasmuch as it related to the jurisdictional phase of the proceedings.

After hearing argument from both Parties in the course of public hearings held from 8 to 18 October 1984, on 26 November 1984 the Court delivered a Judgment stating that it possessed jurisdiction to deal with the case and that Nicaragua's Application was admissible. In particular, it held that the Nicaraguan declaration of 1929 was valid and that Nicaragua was therefore entitled to invoke the United States declaration of 1946 as a basis of the Court's jurisdiction (Article 36, paragraphs 2 and 5, of the Statute). The subsequent proceedings took place in the absence of the United States, which announced on 18 January 1985 that it "intends not to participate in any further proceedings in connection with this case". From 12 to 20 September 1985, the Court heard oral argument by Nicaragua and the testimony of the five witnesses it had called. On 27 June 1986, the Court delivered its Judgment on the merits. The findings included a

rejection of the justification of collective self-defence advanced by the United States concerning the military or paramilitary activities in or against Nicaragua, and a statement that the United States had violated the obligations imposed by customary international law not to intervene in the affairs of another State, not to use force against another State, not to infringe the sovereignty of another State, and not to interrupt peaceful maritime commerce. The Court also found that the United States had violated certain obligations arising from a bilateral Treaty of Friendship, Commerce and Navigation of 1956, and that it had committed acts such to deprive that treaty of its object and purpose.

It decided that the United States was under a duty immediately to cease and to refrain from all acts constituting breaches of its legal obligations, and that it must make reparation for all injury caused to Nicaragua by the breaches of obligations under customary international law and the 1956 Treaty, the amount of that reparation to be fixed in subsequent proceedings if the Parties were unable to reach agreement. The Court subsequently fixed, by an Order, time-limits for the filing of written pleadings by the Parties on the matter of the form and amount of reparation, and the Memorial of Nicaragua was filed on 29 March 1988, while the United States maintained its refusal to take part in the case. In September 1991, Nicaragua informed the Court, *inter alia*, that it did not wish to continue the proceedings. The United States told the Court that it welcomed the discontinuance and, by an Order of the President dated 26 September 1991, the case was removed from the Court's List.

North Sea Continental shelf Cases (1968) ICJ 1

(Source: https://ruwanthikagunaratne.wordpress.com/2014/02/28/north-sea-continental-shelf-cases-summary/)

Facts of the case

Netherlands and Denmark had drawn partial boundary lines based on the equidistance principle. An agreement on further prolongation of the boundary proved difficult because Denmark and Netherlands wanted this prolongation to take place based on the equidistance principle. Germany was of the view that, together, these two boundaries would produce an inequitable result for her. Germany stated that due to its concave coastline, such a line would

result in her losing out on her share of the continental shelf based on proportionality to the length of its North Sea coastline.

The Court had to decide the principles and rules of international law applicable to this delimitation. In doing so, the Court had to decide if the principles espoused by the parties were binding on the parties either through treaty law or customary international law.

Issues:

Is Germany under a legal obligation to accept the equidistance-special circumstances principle, contained in Article 6 of the Geneva Convention on the Continental Shelf of 1958, either as a customary international law rule or on the basis of the Geneva Convention?

The case involved the delimitation of the continental shelf areas in the North Sea between Germany and Denmark and Germany and Netherlands beyond the partial boundaries previously agreed upon by these States. The parties requested the Court to decide the principles and rules of international law that are applicable to the above delimitation because the parties disagreed on the applicable principles or rules of delimitation.

Netherlands and Denmark relied on the principle of equidistance (the method of determining the boundaries in such a way that every point in the boundary is equidistant from the nearest points of the baselines from which the breath of the territorial sea of each State is measured). Germany sought to get a decision in favor of the notion that the delimitation of the relevant continental shelf was governed by the principle that each coastal state is entitled to a just and equitable share (hereinafter called just and equitable principle/method). Contrary to Denmark and Netherlands, Germany argued that the principle of equidistance was neither a mandatory rule in delimitation of the continental shelf nor a rule of customary international law that was binding on Germany.

The Court was not asked to delimit because the parties had already agreed to delimit the continental shelf as between their countries, by agreement, after the determination of the Court on the applicable principles.

Decision

The use of the equidistance method had not crystallized into customary law and the method was not obligatory for the delimitation of the areas in the North Sea related to the present proceedings.

Paquete Habana the 175 US 677 (1900)

Facts of the case –

The United States imposed a blockade of Cuba and declared war against Spain. While they were out to sea, fishing along the coast of Cuba and near Yucatan, two Spanish vessels engaged in fishing off the coast of Cuba were captured by blockading squadrons. Until stopped by the blockading squadron, the fishing vessels had no knowledge of the existence of the war, or of any blockade. They had no arms or ammunition on board, and made no attempt to run the blockade after they knew of its existence, nor any resistance at the time of the capture. When the vessels returned with their catches of fresh fish, they were seized and a libel of condemnation of each vessel as a prize of war was filed against the vessel in court. The district court entered a final decree of condemnation and public sale at auction. Claimants appealed.

Issues - Was it proper for the court to issue a decree of condemnation and auction the fishing vessels?

Principles evolved:

International law is part of American law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.

Decision:

The Supreme Court ruled that, under the law of nations, in each case the capture was unlawful and without probable cause. It was a rule of international law that, coast fishing vessels, pursuing their vocation of catching and bringing in fresh fish, were exempt, with their cargoes and crews, from capture as prize of war. Although not reduced to treaty or statutory law, courts were obligated to take notice of and give effect to that rule. Thus, the decrees condemning the vessels were reversed and, in each case, it was ordered that the proceeds of the sales of each vessel and cargo be restored to the respective claimant, with compensatory damages and costs. The Court also noted that it had appellate jurisdiction over the controversy without regard to the amount in dispute and without certification from the district court, as required by prior statutory law.

Savarkar Case

The case concerned the escape of a British-Indian subject, Mr. Vinayak Damodar Savarkar, who was detained aboard a British commercial vessel harbored at Marseille while en route to India where he was to be tried for the abetment of murder. Mr. Savarkar swam ashore but was chased by crew and arrested by a brigadier of the French maritime gendarmerie. Acting under the mistaken belief that the escapee was a member of the crew, the brigadier brought him on board and turned him over to British agents. The next morning the ship left Marseille with Mr. Savarkar on board.

The French government did not approve of the manner in which Mr. Savarkar had been returned to British custody and demanded his restitution to France, on the grounds that his delivery to British authorities amounts to a defective extradition. The British government contended that, according to the arrangements made for the security of the prisoner while the ship was in port, the French authorities had been obliged to prevent his escape.

The two governments agreed to submit their dispute to arbitration. The Tribunal found that all those agents who had taken part in the incident had demonstrated good faith. The Tribunal concluded that despite the irregularity committed in the arrest of Mr. Savarkar, such

irregularity did not result in any obligation on the British government to restore Mr. Savarkar to the French government.

Scotia case

Topic: Customary law

Facts of the case:

A dispute arose between the United States ship Berkshire and the British steamer Scotia. The Berkshire was struck by the Scotia because of the Berkshire's failure to display coloured lights according to customary law of the sea.

Issues:

Was the vessel Berkshire in violation of customary international law in failing to display the same colored lights as those used by other countries?

Decisions:

The Court held that British navigational procedures established by an Act of Parliament formed the basis of the relevant international custom since other states had legislated in virtually identical terms. Accordingly, the American vessel, in not displaying the correct lights, was at fault.

Reasoning given by Supreme Court of USA

"Undoubtedly, no single nation can change the law of the sea. That law is of universal obligation, and no law of one or two nations can create obligations for the world. Like all the laws of the nations, it rests upon the common consent of civilized communities. It is of force not because it is prescribed by any superior power, but because it is generally accepted as a rule of conduct .Whatever may have been its origin, whether in the usages of navigation or in regulations of maritime states, or both, it has become the law of the sea only by consistent acceptance and use of those nations who may be said to constitute the commercial world….. "

When we find such rules of navigations mentioned in British law and accepted as into the national laws of more than 30 of the principal commercial states of the world, including almost

all of which have any shipping on the Atlantic Ocean, we are required to regard them as part at least, the laws of the sea which were in effect during this collision.

This is not giving laws of any nation's authority outside of their national sovereignty. It is not treating them as general maritime laws, but it is recognition of the historical fact that by common consent of mankind, these rules have been given as a general obligation.

Lotus Case:

Facts of the case:

A collision occurred shortly before midnight on the 2nd of August 1926 between the French (P) mail steamer Lotus and the Turkish (D) collier Boz-Kourt. The French mail steamer was captained by a French citizen by the name Demons while the Turkish collier Boz-Kourt was captained by Hassan Bey. The Turks lost eight men after their ship cut into two and sank as a result of the collision.

Although the Lotus did all it could do within its power to help the ship wrecked persons, it continued on its course to Constantinople, where it arrived on August 3. On the 5th of August, Lieutenant Demons was asked by the Turkish authority to go ashore to give evidence. After Demons was examined, he was placed under arrest without informing the French Consul-General and Hassan Bey. Demons were convicted by the Turkish courts for negligence conduct in allowing the accident to occur.

This basis was contended by Demons on the ground that the court lacked jurisdiction over him. With this, both countries agreed to submit to the Permanent Court of International Justice, the question of whether the exercise of Turkish criminal jurisdiction over Demons for an incident that occurred on the high seas contravened international law.

Issues:

Does a rule of international law which prohibits a state from exercising criminal jurisdiction over a foreign national who commits acts outside of the state's national jurisdiction exists?

Decision:

A rule of international law, which prohibits a state from exercising criminal jurisdiction over a foreign national who commits acts outside of the state's national jurisdiction, does not exist. Failing the existence of a permissive rule to the contrary is the first and foremost restriction imposed by international law on a state and it may not exercise its power in any form in the territory of another state.

This does not imply that international law prohibits a state from exercising jurisdiction in its own territory, in respect of any case that relates to acts that have taken place abroad which it cannot rely on some permissive rule of international law. In this situation, it is impossible to hold that there is a rule of international law that prohibits Turkey from prosecuting Demons because he was aboard a French ship. This stems from the fact that the effects of the alleged offense occurred on a Turkish vessel. Hence, both states here may exercise concurrent jurisdiction over this matter because there is no rule of international law in regards to collision cases to the effect that criminal proceedings are exclusively within the jurisdiction of the state whose flag is flown.