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Short notes on Public International Law & International Organizations

Chapter One: - The Nature, Sources & Development of International Law

1.1. Definition of International Law

Though definitions of International law vary, most characterize it as 'customs, norms, principles, rules and other legal relations among states and other international personalities that establish binding obligations or the body of rules which bind states and other agents of world politics with one another. Primarily, International law is the system of law developed by states which governs the relationships between states at either a multilateral, regional or bilateral level. To that end, international law has traditionally been considered 'state-centric' in that it is dominated by states which both make international law and are the predominant objects of that law. The modern system of international law is often identified as having begun to develop at the time of the Treaty of Westphalia in 1648, though there is evidence of its gradual emergence prior to that time.

1.2. Nature and Scope of International law

Law is that element which binds the members of the community together in their adherence to recognized values and standards. It is both permissive in allowing individuals to establish their own legal relations with rights and duties, as in the creation of contracts, and coercive, as it punishes those who infringe its regulations. Law consists of a series of rules regulating behavior, and reflecting, to some extent, the ideas and preoccupations of the society within which it functions. And so it is with what is termed international law, with the important difference that the principal subjects of international law are nation-states, not individual citizens. There are many contrasts between the law within a country (municipal law) and the law that operates outside and between states, international organizations and, in certain cases, individuals. International law itself is divided into conflict of laws (or private international law as it is sometimes called) and public international law (usually just termed international law). The former deals with those cases, *within* particular legal systems, in which foreign elements obtrude, raising questions as to the application of foreign law or the role of foreign courts.

For example, if two Englishmen make a contract in France to sell goods situated in Paris, an English court would apply French law as regards the validity of that contract. By contrast, public international law is not simply an adjunct of a legal order, but a separate system altogether.

Public international law covers relations between states in all their myriad forms, from war to satellites, and regulates the operations of the many international institutions. It may be universal or general, in which case the stipulated rules bind all the states (or practically all depending upon the nature of the rule), or regional, whereby a group of states linked geographically or ideologically may recognize special rules applying only to them, for example, the practice of diplomatic asylum that has developed to its greatest extent in Latin America. The rules of international law must be distinguished from what is called international comity, or practices such as saluting the flags of foreign warships at sea, which are implemented solely through courtesy and are not regarded as legally binding. Similarly, the mistake of confusing international law with international morality must be avoided. While they may meet at certain points, the former discipline is a legal one both as regards its content and its form, while the concept of international morality is a branch of ethics. This does not mean, however, that international law can be divorced from its values.

1.3. Historical Development and Sources of International Law

Historical Development

The foundations of international law (or the law of nations) as it is understood today lie firmly in the development of Western culture and political organization. The growth of European notions of sovereignty and the independent nation-state required an acceptable method whereby inter-state relations could be conducted in accordance with commonly accepted standards of behavior, and international law filled the gap. But although the law of nations took root and flowered with the sophistication of Renaissance Europe, the seeds of this particular hybrid plant are of far older lineage. They reach far back into history.

While the modern international system can be traced back some 400 years, certain of the basic concepts of international law can be discerned in political relationships thousands of years ago. Around 2100 BC, for instance, a solemn treaty was signed between the rulers of Lagash and Umma, the city-states situated in the area known to historians as Mesopotamia. It was inscribed on a stone block and concerned the establishment of a defined boundary to be respected by both sides under pain of alienating a number of Sumerian gods. The next major instance known of an important, binding, international treaty is that concluded over 1,000 years later between RamesesII of Egypt and the king of the Hittites for the establishment of eternal peace and

brotherhood. Other points covered in that agreement signed, it would seem, at Kadesh, north of Damascus, included respect for each other's territorial integrity, the termination of a state of aggression and the setting up of a form of defensive alliance. Since that date many agreements between the rival Middle Eastern powers were concluded, usually aimed at embodying in a ritual form a state of subservience between the parties or attempting to create a political alliance to contain the influence of an over-powerful empire.

The role of ancient Israel must also be noted. Universal ethical stances coupled with rules relating to warfare were handed down to other peoples and religions and the demand for justice and a fair system of law founded upon strict morality permeated the thought and conduct of subsequent generations. For example, the Prophet Isaiah declared that sworn agreements, even where made with the enemy, must be performed. Peace and social justice were the keys to man's existence, not power.

After much neglect, there is now more consideration of the cultures and standards that evolved, before the birth of Christ, in the Far East, in the Indian and Chinese civilizations. Many of the Hindu rules displayed a growing sense of morality and generosity and the Chinese Empire devoted much thought to harmonious relations between its constituent parts. Regulations controlling violence and the behavior of varying factions with regard to innocent civilians were introduced and ethical values instilled in the education of the ruling classes. In times of Chinese dominance, a regional tributary-states system operated which fragmented somewhat in times of weakness, but this remained culturally alive for many centuries. However, the predominant approach of ancient civilizations was geographically and culturally restricted. There was no conception of an international community of states co-existing within a defined framework. The scope for any 'international law' of states was extremely limited and all that one can point to is the existence of certain ideals, such as the sanctity of treaties, which have continued to this day as important elements in society. But the notion of a universal community with its ideal of world order was not in evidence.

The era of classical Greece, from about the sixth century BC and onwards for a couple of hundred years, has, one must note, been of overwhelming significance for European thought. Its critical and rational turn of mind, its constant questioning and analysis of man and nature and its love of argument and debate were spread throughout Europe and the Mediterranean world by the

Roman Empire which adopted Hellenic culture wholesale, and penetrated Western consciousness with the Renaissance. However, Greek awareness was limited to their own competitive city-states and colonies. Those of different origin were barbarians not deemed worthy of association. The value of Greece in a study of international law lies partly in the philosophical, scientific and political analyses bequeathed to mankind and partly in the fascinating state of inter-relationship built up within the Hellenistic world. Numerous treaties linked the city-states together in a network of commercial and political associations. Rights were often granted to the citizens of the states in each other's territories and rules regarding the sanctity and protection of diplomatic envoys developed. Certain practices were essential before the declaration of war, and the horrors of war were somewhat ameliorated by the exercise, for example, of religious customs regarding sanctuaries. But no overall moral approach similar to those emerging from Jewish and Hindu thought, particularly, evolved. No sense of a world community can be traced to Greek ideology in spite of the growth of Greek colonies throughout the Mediterranean area. This was left to the able administrators of the Roman Empire.

The Romans had a profound respect for organization and the law. The law knitted together their empire and constituted a vital source of reference for every inhabitant of the far-flung domain. The early Roman law (the *jus civile)* applied only to Roman citizens. It was formalistic and hard and reflected the status of a small, unsophisticated society rooted in the soil. It was totally unable to provide a relevant background for an expanding, developing nation. This need was served by the creation and progressive augmentation of the *jus gentium*. This provided simplified rules to govern the relations between foreigners, and between foreigners and citizens. The instrument through which this particular system evolved was the official known as the *Praetor Peregrinus*, whose function it was to oversee all legal relationships, including bureaucratic and commercial matters, within the empire.

The progressive rules of the *jus gentium* gradually overrode the narrow *jus civile* until the latter system ceased to exist. Thus, the *jus gentium* became the common law of the Roman Empire and was deemed to be of universal application. It is this all-embracing factor which so strongly distinguishes the Roman from the Greek experience, although, of course, there was no question of the acceptance of other nations on a basis of equality and the *jus gentium* remained a 'national law' for the Roman Empire. One of the most influential of Greek concepts taken up by the

Romans was the idea of Natural Law. This was formulated by the Stoic philosophers of the third century BC and their theory was that it constituted a body of rules of universal relevance. Such rules were rational and logical, and because the ideas and precepts of the 'law of nature' were rooted in human intelligence, it followed that such rules could not be restricted to any nation or any group but were of worldwide relevance. This element of universality is basic to modern doctrines of international law and the Stoic elevation of human powers of logical deduction to the supreme pinnacle of 'discovering' the law foreshadows the rational philosophies of the West. In addition to being a fundamental concept in legal theory, Natural Law is vital to an understanding of international law, as well as being an indispensable precursor to contemporary concern with human rights.

Contemporary development of international law

International law has witnessed significant growth and expansion since the adoption of the UN Charter as states have increasingly sought to regulate their affairs through an ever widening web of multilateral, regional and bilateral treaties which have addressed an expanding array of topics. This growth has been partly driven by the significance attached to international law by the UN Charter, and the prominence given to it through the establishment of the ICJ. The UN has also been directly responsible for the making of new international law, whether through international treaties arising from UN sponsored conferences, or through the adoption by the UN Security Council of resolutions which are binding on UN member states. Other UN affiliated organs and institutions which have promoted the development of new international laws include the Food and Agricultural Organization (FAO), International Labor Organization (ILO) and International Maritime Organization (IMO). As new international issues have arisen, the response of the international community at both the multilateral and bilateral level has often been to seek to develop new international laws. Therefore, since 1945 there has been a significant growth in new international law addressing maritime boundaries, telecommunications, regulation of outer space, international health, transnational crime and terrorism. This has resulted in a significant expansion in the number of international treaties that states are parties to, thereby increasing the extent of their international legal obligations.

However, while international law has steadily developed post 1945, the level of implementation, compliance and enforcement has remained variable. This has raised two significant issues. The

first is that international law is lacking in strong enforcement mechanisms, a point emphasized by realists. Unlike national legal systems, there is no 'international police force'. The UN Security Council certainly plays an important role in monitoring the actions of so-called 'rogue states', but unless there has been an egregious breach of international law such as the territorial invasion by one state of another, the Council's ability to apply and enforce international law is circumscribed. The second issue is that international law often relies upon strong national legal systems for local enforcement. This is especially the case with international human rights law. As there are many different national legal systems there is considerable scope for variable interpretation and implementation of international law.

Sources of International Law

National legal systems have recognizable sources for their laws. Predominantly, these include the statutes, acts, decrees and proclamations made by a parliament, legislature or the executive (e.g. president or presidential council). In addition, the decisions of the courts and tribunals within national legal systems have a great deal of significance, not only for those parties whose disputes are adjudged by those courts, but for the legal system itself due to the precedent created by those decisions. In developed legal systems, where there is a hierarchy of courts at a local, regional, or provincial level, there is often an appellate structure which allows for appeals from lower to higher level courts. The decisions of appellate courts (e.g. Supreme Court, High Court, House of Lords) are binding upon lower courts in national legal systems.

International law does not mirror national legal systems in this regard; it has a distinctive set of recognized sources which are outlined in Article 38(1) of the ICJ Statute *(The Court … shall apply: A. international conventions …; B. international custom …; C. the general principles of law recognized by civilized nations; D. … judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of the rules of law)*. Although Article 38(1) strictly only identifies the sources of international law to which the ICJ can refer in its decisions, it is also widely accepted as identifying the sources of international law more generally to which all states in the international community would look.

The sources can be divided into two groupings as follows;

Major sources:

- Treaties

- ❖ Customary international law
- ❖ General principles of law,

And as subsidiary sources:

- ➢ Judicial decisions
- ➢ Teachings of the most highly qualified publicists.

Major sources:

Treaties

Treaties are one of the most significant sources of international law and are an integral part of the conduct of international relations. During the UN era treaties have grown considerably in their importance and number. A treaty is defined by the Vienna Convention on the Law of Treaties (1969) as: *an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.*

An instrument which does not meet these criteria is therefore not a treaty and does not create any legally binding obligations between states. Examples would include 'Declarations' issued following a meeting of world leaders at the G8, G20 or regional organizations such as the EU, APEC or ASEAN. While these documents are written, and often outline agreed positions and commitments, they are not intended to be legally binding and therefore fall short of treaty status. As treaties must be in a written form, an oral treaty is not recognized by international law. While a treaty must be in writing, there is no requirement as to the language in which the treaty is written, and this will often depend upon the official language of each state party to the treaty. Multilateral treaties negotiated under the auspicious of the UN are also written in the six official UN languages (Arabic, Chinese, English, French, Russian and Spanish).

Treaties are entered into between states which are recognized as such for the purposes of international law and international relations. The only exception to this rule applies in the case of recognized international organizations. The constituent units of federal states cannot, therefore, enter into a treaty. Agreements entered into between New York State and the province of Ontario would not be legally binding under international law. The requirement that the treaty be

governed by international law goes to the actual intention of the parties, and is an important point of distinction between a legally binding international instrument and a pure political declaration.

'Treaty' is a generic term and not a required title for a legally binding international instrument between states. Other titles given to treaties - *Convention*: a multilateral treaty commonly adopted at UN conferences; e.g. United Nations Framework Convention on Climate Change…*Protocol*: an additional treaty that amends or expands the operation of a Convention; e.g. Kyoto Protocol to the United Nations Framework Convention on Climate Change…*Statute*: a multilateral treaty outlining the mechanisms and procedures of an international court; e.g. Rome Statute of the International Criminal Court… *Charter*: a multilateral treaty outlining the constitutional framework of an international organization; e.g. Charter of the Organization of American States…*Agreement*: a bilateral or regional treaty; e.g. Australia-US Free Trade Agreement.

A treaty may comprise more than one international instrument, and amending or supplementary instruments – often referred to as 'protocols' – will also need to be read alongside the treaty. Treaties are a preferred source for the development of new international law because of the flexibility associated with their negotiation. They can be adopted by states at a multi lateral level, by a regional international organization or by a collective of states interested in a regional issue, or by two states bilaterally. Once negotiated at a diplomatic gathering, a treaty will often be available for signature by states. However, it is now rare for a treaty to enter into force as a result of signature alone, and the formal act of ratification is most commonly required before a treaty will eventually enter into force. Each treaty will have its own particular formula before it enters into force.

For multilateral treaties there will be a designated number of states which need to become a party before the treaty enters into force. For bilateral treaties, both of the relevant states need to have ratified prior to entry into force. Some multilateral treaties allow states to lodge written 'reservations', which effectively modify the extent of the legal obligation under the terms of the treaty. In turn, other states which reject the legitimacy of a reservation may seek to lodge an objection to a reservation the consequence of which is that the treaty relationship between the reserving and objecting state will be adjusted. Some treaties also permit the making of 'declarations', which permit a state to indicate its particular interpretation of certain provisions in

the treaty. The effect of a declaration is that it places other states on notice as to how one state will interpret particular provisions of the treaty.

The importance of treaties is that once they enter into force the principle of '*pacta sunt servanda'* (treaties must be observed) applies, which means they are legally binding as a solemn undertaking between the states and are to be applied in good faith. As Scott (2004b: 213) has observed 'a treaty is meant to mean just what it says and States are supposed to comply with the obligations they have assumed'. In this respect a treaty is equivalent to a contract between two private parties. It is a legal instrument from which consequences will flow, and if a dispute arises between the parties then certain mechanisms may be available between the parties to resolve their differences. In order to discourage the existence of secret treaties, Article 102 of the UN Charter requires states to register their treaties with the UN Secretariat as soon as the treaty enters into force. A treaty which has not been registered in this manner may not be relied upon before a UN organ, which includes the ICJ.

Customary international law

The longest standing and continuously dominant source of international law has been customary international law. Though it is now losing some of its previous influence because of the growth of treaties during the UN era, custom remains of considerable importance; it and treaties comprise the two predominant sources of contemporary international law. Customary international law is based upon the practice of states and relies upon a consistency in that practice by individual states, combined with equivalent practice by states around the world. As outlined by the ICJ in the 1969 North Sea Continental Shelf case, customary international law requires state practice combined with *opinion juris* – which is a belief by a state that it is under a legal obligation to act in a certain manner. Unlike treaties, which rely upon a written document, custom relies the actions of states, which can be identified through statements and declarations of presidents, prime ministers or ministers, or the acts of state organs such as the military, or border and customs officials. Single, one-off actions are insufficient to establish state practice.

There is also a need for consistency in state practice among states from around the world which are representative of differing regions and political, legal and cultural systems. The actions of Western states are not on their own, therefore, capable of creating new customary international law with respect to terrorism, for example. Nevertheless, the ICJ has accepted that in certain

instances ‘regional custom’ may be created. The significance of customary international law is that it is binding upon all members of the international community once it has been established. Therefore, unlike treaties which are only binding upon the treaty parties, custom is capable of having universal application to all states, even newly emerging states such as East Timor or Kosovo. The only exception to this rule applies in the case of a ‘persistent objector’ – that is, a state which continually objects to the development of a new rule of customary international law. To do so, however, the state must be vigilant in its protest against the development of the new rule. Custom is also capable of rapid evolution as a result of developments in state practice. Depending on its text, a unanimous UN General Assembly resolution may be an example of ‘instant custom’.

General principles of law

The third principal source of international law referred to in Article 38(1) of the ICJ Statute is general principles of law recognized by the legal systems of states. This source utilizes the common legal principles which are found across all legal systems throughout the world, irrespective of whether the national legal system is based upon a common law, civil law, or an Islamic law system. The principle of equity is an example of such a general principle drawn from national law which applies in international law and is of significance in maritime boundary delimitations.

Subsidiary sources

Judicial decisions and teachings of publicists

Article 38(1) effectively creates a two-tiered system of sources when it identifies two ‘subsidiary means’ for determining the rules of international law. The first is judicial decisions, which principally encompasses the judgments of international courts and tribunals such as the ICJ, ICC, ITLOS and European Court of Human Rights. It would also extend to relevant decisions of national courts, when those courts are adjudging matters of international law such as the interpretation of a treaty which has significance at the national law level. The second of these sources is the writings of ‘the most highly qualified publicists’ which includes academic writings of eminent international law professors, retired international judges, and current or former diplomats with acknowledged international law expertise. However, as these are only subsidiary

sources, they can only be legitimately referred to when the other sources prove to be inadequate. Nevertheless, as the jurisprudence of the ICJ continues to grow there has, perhaps inevitably, been a reliance upon its decisions as evidence of what the international law is in certain particular areas.

1.4. International Law and Municipal Law

The role of the state in the modern world is a complex one. According to legal theory, each state is sovereign and equal. In reality, with the phenomenal growth in communications and consciousness, and with the constant reminder of global rivalries, not even the most powerful of states can be entirely sovereign. Interdependence and the close-knit character of contemporary international commercial and political society ensures that virtually any action of a state could well have profound repercussions upon the system as a whole and the decisions under consideration by other states. This has led to an increasing interpenetration of international law and domestic law across a number of fields, such as human rights, environmental and international investment law, where at the least the same topic is subject to regulation at both the domestic and the international level (and indeed the regional level in the case of the European Union). With the rise and extension of international law, questions begin to arise paralleling the role played by the state within the international system and concerned with the relationship between the internal legal order of a particular country and the rules and principles governing the international community as a whole. Municipal law governs the domestic aspects of government and deals with issues between individuals, and between individuals and the administrative apparatus, while international law focuses primarily upon the relations between states.

That is now, however, an overly simplistic assertion. There are many instances where problems can emerge and lead to difficulties between the two systems. In a case before a municipal court a rule of international law may be brought forward as a defense to a charge, as for example in R v. Jones, where the defense of seeking to prevent a greater crime (essentially of international law) was claimed with regard to the alleged offence of criminal damage (in English law), or where a vessel is being prosecuted for being in what, in domestic law, is regarded as territorial waters but in international law would be treated as part of the high seas. Further, there are cases where the same situation comes before both national and international courts, which may refer to each other's decisions in a complex process of interaction. For example, the failure of the US to allow

imprisoned foreign nationals access to consular assistance in violation of the Vienna Convention on Consular Relations, 1963 was the subject of case-law before the International Court of Justice, the Inter-American Court of Human Rights and US courts, while there is a growing tendency for domestic courts to be used to address violations of international law.

The theories

Positivism stresses the overwhelming importance of the state and tends to regard international law as founded upon the consent of states. It is actual practice, illustrated by custom and by treaty that formulates the role of international law, and not formalistic structures, theoretical deductions or moral stipulations. Accordingly, when positivists such as Triepel and Strupp consider the relationship of international law to municipal law, they do so upon the basis of the supremacy of the state, and the existence of wide differences between the two functioning orders. This theory, known as dualism, stresses that the rules of the systems of international law and municipal law exist separately and cannot purport to have an effect on, or overrule, the other.

This is because of the fundamentally different nature of inter-state and intra-state relations and the different legal structure employed on the one hand by the state and on the other hand as between states. Where municipal legislation permits the exercise of international law rules, this is on sufferance as it were and is an example of the supreme authority of the state within its own domestic jurisdiction, rather than of any influence maintained by international law within the internal sphere. Those writers who disagree with this theory and who adopt the monist approach tend to fall into two distinct categories: those who, like Lauterpacht, uphold a strong ethical position with a deep concern for human rights, and others, like Kelsen, who maintain a monist position on formalistic logical grounds. The monists are united in accepting a unitary view of law as a whole and are opposed to the strict division posited by the positivists.

The ‘naturalist’ strand represented in England by Lauterpacht’s works sees the primary function of all law as concerned with the well-being of individuals, and advocates the supremacy of international law as the best method available of attaining this. It is an approach characterized by deep suspicion of an international system based upon the sovereignty and absolute independence of states, and illuminated by faith in the capacity of the rules of international law to imbue the international order with a sense of moral purpose and justice founded upon respect for human rights and the welfare of individuals. The method by which Kelsen elucidates his theory of

monism is markedly different and utilizes the philosophy of Kant as its basis. Law is regarded as constituting an order which lays down patterns of behavior that ought to be followed, coupled with provision for sanctions which are employed once an illegal act or course of conduct has occurred or been embarked upon. Since the same definition appertains within both the internal sphere and the international sphere, a logical unity is forged, and because states owe their legal relationship to one another to the rules of international law, such as the one positing equality, since states cannot be equal before the law without a rule to that effect, it follows that international law is superior to or more basic than municipal law.

Reference has already been made to Kelsen's hierarchical system whereby the legality of a particular rule is affirmed once it conforms to an anterior rule. This process of referring back to previous or higher rules ends with the so-called basic norm of the legal order. However, this basic norm is basic only in a relative sense, since the legal character of states, such as their jurisdiction, sovereignty and equality, is fixed by international law. Thus, Kelsen emphasizes the unity of the entire legal order upon the basis of the predominance of international law by declaring that it is the basic norm of the international legal order which is the ultimate reason of validity of the national legal orders too.

A third approach, being somewhat a modification of the dualist position and formulated by Fitzmaurice and Rousseau amongst others, attempts to establish a recognized theoretical framework tied to reality. This approach begins by denying that any common field of operation exists as between international law and municipal law by which one system is superior or inferior to the other. Each order is supreme in its own sphere, much as French law and English law are in France and England. Just one cannot talk in terms of the supremacy of French law over English law, but only of two distinct legal systems each operating within its own field, so it is possible to treat international law and municipal law in the same way. They are both the legal element contained within the domestic and international systems respectively, and they exist within different juridical orders.

What may, and often does, happen is what is termed a conflict of obligations, that is the state within its own domestic sphere does not act in accordance with its obligations as laid down by international law. In such a case, the domestic position is unaffected (and is not overruled by the contrary rule of international law) but rather the state as it operates internationally has broken a

rule of international law and the remedy will lie in the international field, whether by means of diplomatic protest or judicial action.

This method of solving the problem does not delve deeply into theoretical considerations, but aims at being practical and in accord with the majority of state practice and international judicial decisions. In fact, the increasing scope of international law has prompted most states to accept something of an intermediate position, where the rules of international law are seen as part of a distinct system, but capable of being applied internally depending on circumstance, while domestic courts are increasingly being obliged to interpret rules of international law.

1.5. Subjects of International Law

One of the distinguishing characteristics of contemporary international law has been the wide range of participants. These include states, international organizations, regional organisations, non-governmental organisations, public companies, private companies and individuals. To these may be added groups engaging in international terrorism. Not all such entities will constitute legal persons, although they may act with some degree of influence upon the international plane. International personality is participation plus some form of community acceptance. The latter element will be dependent up on many different factors, including the type of personality under question. It may be manifested in many forms and may in certain cases be inferred from practice. It will also reflect a need. Particular branches of international law here are playing a crucial role. Human rights law, the law relating to armed conflicts and international economic law are especially important in generating and reflecting increased participation and personality in international law.

Subjects of International law are:

States

Despite the increasing range of actors and participants in the international legal system, states remain by far the most important legal persons and despite the rise of globalization and all that this entails, states retain their attraction as the primary focus for the social activity of humankind and thus for international law.

International organisations

International organisations have played a crucial role in the sphere of international personality. Since the nineteenth century a growing number of such organisations have appeared and thus raised the issue of internationallegal personality. In principle it is now well established that international organisations may indeed possess objective international legal personality. Whether that will be so in any particular instance will depend upon the particular circumstances of that case. Whether an organisation possesses personality in international law will hinge upon its constitutional status, its actual powers and practice. Significant factors in this context will include the capacity to enter into relations with states and other organisations and conclude treaties with them, and the status it has been given under municipal law. Such elements are known in international law as the indicia of personality.

Individuals

Modern practice does demonstrate that individuals have become increasingly recognized as participants and subjects of international law. This has occurred primarily but not exclusively through human rights law.

Chapter Two: - Recognition, State Jurisdiction & Responsibility under International Law

2.1. Recognition

International society is not an unchanging entity, but is subject to the ebb and flow of political life. New states are created and old units fall away. New governments come into being within states in a manner contrary to declared constitutions whether or not accompanied by force. Insurgencies occur and belligerent administrations are established in areas of territory hitherto controlled by the legitimate government. Each of these events creates new facts and the question that recognition is concerned with revolves around the extent to which legal effects should flow from such occurrences. Each state will have to decide whether or not to recognise the particular eventuality and the kind of legal entity it should be accepted as. Recognition involves consequences both on the international plane and within municipal law. If an entity is recognized as a state in, for example, the United Kingdom, it will entail the consideration of rights and duties that would not otherwise be relevant.

There are privileges permitted to a foreign state before the municipal courts that would not be allowed to other institutions or persons. It is stating the obvious to point to the very strong political influences that bear upon this topic. In more cases than not the decision whether or not to recognise will depend more upon political considerations than exclusively legal factors. Recognition is not merely applying the relevant legal consequences to a factual situation, for sometimes a state will not want such consequences to follow, either internationally or domestically. To give one example, the United States refused for many years to recognise either the People's Republic of China or North Korea, not because it did not accept the obvious fact that these authorities exercised effective control over their respective territories, but rather because it did not wish the legal effects of recognition to come into operation. It is purely a political judgment, although it has been clothed in legal terminology.

In addition, there are a variety of options open as to what an entity may be recognized as. Such an entity may, for example, be recognized as a full sovereign state, or as the effective authority within a specific area or as a subordinate authority to another state. Recognition is a statement by an international legal person as to the status in international law of another real or alleged international legal person or of the validity of a particular factual situation. Once recognition has occurred, the new situation is deemed opposable to the recognizing state, which is the pertinent

legal consequences will flow. As such, recognition constitutes participation in the international legal process generally while also being important within the context of bilateral relations and, of course, domestically.

Recognition of states: there are basically two theories as to the nature of recognition. The constitutive theory maintains that it is the act of recognition by other states that creates a new state and endows it with legal personality and not the process by which it actually obtained independence. Thus, new states are established in the international community as fully fledged subjects of international law by virtue of the will and consent of already existing states. The disadvantage of this approach is that an unrecognized 'state' may not be subject to the obligations imposed by international law and may accordingly be free from such restraints as, for instance, the prohibition on aggression. A further complication would arise if a 'state' were recognized by some but not other states. Could one talk then of, for example, partial personality?

The second theory, the declaratory theory, adopts the opposite approach and is a little more in accord with practical realities. It maintains that recognition is merely an acceptance by states of an already existing situation. A new state will acquire capacity in international law not by virtue of the consent of others but by virtue of a particular factual situation. It will be legally constituted by its own efforts and circumstances and will not have to await the procedure of recognition by other states. This doctrine owes a lot to traditional positivist thought on the supremacy of the state and the concomitant weakness or non-existence of any central guidance in the international community.

For the constitutive theorist, the heart of the matter is that fundamentally an unrecognized 'state' can have no rights or obligations in international law. The opposite stance is adopted by the declaratory approach that emphasizes the factual situation and minimizes the power of states to confer legal personality. Actual practice leads to a middle position between these two perceptions.

The act of recognition by one state of another indicates that the former regards the latter as having conformed to the basic requirements of international law as to the creation of a state. Of course, recognition is highly political and is given in a number of cases for purely political reasons.

2.2. State Jurisdiction and Immunity

State Jurisdiction: Jurisdiction concerns the power of the state under international law to regulate or otherwise impact upon people, property and circumstances and reflects the basic principles of state sovereignty, equality of states and non-interference in domestic affairs. Jurisdiction is a vital and indeed central feature of state sovereignty, for it is an exercise of authority which may alter or create or terminate legal relationships and obligations. It may be achieved by means of legislative, executive or judicial action.

In each case, the recognized authorities of the state as determined by the legal system of that state perform certain functions permitted them which affect the life around them in various ways. In the UK, Parliament passes binding statutes, the courts make binding decisions and the administrative machinery of government has the power and jurisdiction (or legal authority) to enforce the rules of law. It is particularly necessary to distinguish between the capacity to make law, whether by legislative or executive or judicial action (prescriptive jurisdiction or the jurisdiction to prescribe) and the capacity to ensure compliance with such law whether by executive action or through the courts (enforcement jurisdiction or the jurisdiction to enforce). Jurisdiction, although primarily territorial, may be based on other grounds, for example nationality, while enforcement is restricted by territorial factors.

To give an instance, if a man kills somebody in Britain and then manages to reach the Netherlands, the British courts have jurisdiction to try him, but they cannot enforce it by sending officers to the Netherlands to apprehend him. They must apply to the Dutch authorities for his arrest and dispatch to Britain. If, on the other hand, the murderer remains in Britain then he may be arrested and tried there, even if it becomes apparent that he is a German national. Thus, while prescriptive jurisdiction (or the competence to make law) may be exercised as regards events happening within the territorial limits irrespective of whether or not the actors are nationals, and may be founded on nationality as in the case of a British subject suspected of murder committed abroad who may be tried for the offence in the UK(if he is found in the UK, of course), enforcement jurisdiction is another matter entirely and is essentially restricted to the presence of the suspect in the territorial limits.

However, there are circumstances in which it may be possible to apprehend a suspected murderer, but the jurisdictional basis is lacking. For example, if a Frenchman has committed a

murder in Germany he cannot be tried for it in Britain, notwithstanding his presence in the country, although, of course, both France and Germany may apply for his extradition and return to their respective countries from Britain.

Thus, while jurisdiction is closely linked with territory it is not exclusively so tied. Many states have jurisdiction to try offences that have taken place outside their territory, and in addition certain persons, property and situations are immune from the territorial jurisdiction in spite of being situated or taking place there. Diplomats, for example, have extensive immunity from the laws of the country in which they are working and various sovereign acts by states may not be questioned or overturned in the courts of a foreign country.

The whole question of jurisdiction is complex, not least because of the relevance also of constitutional issues and conflict of laws rules. International law tries to set down rules dealing with the limits of a state's exercise of governmental functions while conflict of laws (or private international law) will attempt to regulate in a case involving a foreign element whether the particular country has jurisdiction to determine the question, and secondly, if it has, then the rules of which country will be applied in resolving the dispute.

The grounds for the exercise of jurisdiction are not identical in the cases of international law and conflict of laws rules. In the latter case, specific subjects may well be regulated in terms of domicile or residence (for instance as regards the recognition of foreign marriages or divorces) but such grounds would not found jurisdiction where international law matters were concerned. Although it is by no means impossible or in all cases difficult to keep apart the categories of international law and conflict of laws, nevertheless the often different definitions of jurisdiction involved are a confusing factor.

One should also be aware of the existence of disputes as to jurisdictional competence within the area of constitutional matters. These problems arise in federal court structures, as in the United States, where conflicts as to the extent of authority of particular courts may arise. While the relative exercise of powers by the legislative, executive and judicial organs of government is a matter for the municipal legal and political system, the extraterritorial application of jurisdiction will depend upon the rules of international law, and in this chapter we shall examine briefly the most important of these rules.

Immunities from jurisdiction: The concept of jurisdiction revolves around the principles of state sovereignty, equality and non-interference. Domestic jurisdiction as a notion attempts to define an area in which the actions of the organs of government and administration are supreme, free from international legal principles and interference. Indeed, most of the grounds for jurisdiction can be related to the requirement under international law to respect the territorial integrity and political independence of other states. Immunity from jurisdiction, whether as regards the state itself or as regards its diplomatic representatives, is grounded in this requirement. Although constituting derogation from the host state's jurisdiction, in that, for example, the UK cannot exercise jurisdiction over foreign ambassadors within its territory, it is to be construed nevertheless as an essential part of the recognition of the sovereignty of foreign states, as well as an aspect of the legal equality of all states.

"Sovereign immunity": Sovereignty until comparatively recently was regarded as appertaining to a particular individual in a state and not as an abstract manifestation of the existence and power of the state. The sovereign was a definable person, to whom allegiance was due. As an integral part of this mystique, the sovereign could not be made subject to the judicial processes of his country. Accordingly, it was only fitting that he could not be sued in foreign courts. The idea of the personal sovereign would undoubtedly have been undermined had courts been able to exercise jurisdiction over foreign sovereigns. This personalization was gradually replaced by the abstract concept of state sovereignty, but the basic mystique remained. In addition, the independence and equality of states made it philosophically as well as practically difficult to permit municipal courts of one country to manifest their power over foreign sovereign states, without their consent. Until recently, the international law relating to sovereign (or state) immunity relied virtually exclusively upon domestic case-law and latterly legislation, although the European Convention on State Immunity, 1972 was a notable exception. However, in 2004 the UN adopted the Convention on Jurisdictional Immunities of States and Their Property.

In some classical terms, the relationship between territorial jurisdiction and sovereign immunity was entailed and depicted that the jurisdiction of a state within its own territory was exclusive and absolute, but it did not encompass foreign sovereigns. Sovereign immunity is closely related to two other legal doctrines, non justiciability and act of state. Reference has been made earlier to the interaction between the various principles, but it is worth noting here that the concepts of

non-justiciability and act of state posit an area of international activity of states that is simply beyond the competence of the domestic tribunal in its assertion of jurisdiction, for example, that the courts would not adjudicate upon the transactions of foreign sovereign states. On the other hand, the principle of jurisdictional immunity asserts that in particular situations a court is prevented from exercising the jurisdiction that it possesses. Thus, immunity from jurisdiction does not mean exemption from the legal system of the territorial state in question. The two concepts are distinct. In International Association of Machinists & Aerospace Workers v. OPEC, it was declared that the two concepts were similar in that they reflect the need to respect the sovereignty of foreign states, but that they differed in that the former went to the jurisdiction of the court and was a principle of international law, whereas the latter constituted a prudential doctrine of domestic law having internal constitutional roots.

Accordingly, the question of sovereign immunity is a procedural one and one to be taken as a preliminary issue, logically preceding the issue of act of state. In practice, however, the distinction is not always so evident and arguments presented before the court founded both upon non-justiciability and sovereign immunity are to be expected. It is also an interesting point to consider the extent to which the demise of the absolute immunity approach has affected the doctrine of non-justiciability.

As far as the act of state doctrine is concerned in particular in this context, some disquiet has been expressed by courts that the application of that principle may in certain circumstances have the effect of reintroducing the absolute theory of sovereign immunity. In Letelier v. Republic of Chile, for example, Chile argued that even if its officials had ordered the assassination of Letelier in the US, such acts could not be the subject of discussion in the US courts as the orders had been given in Chile. This was not accepted by the Court since to do otherwise would mean emasculating the Foreign Sovereign Immunities Act by permitting a state to bring back the absolute immunity approach 'under the guise of the act of state doctrine'. In somewhat different circumstances, Kerr LJ signaled his concern in Maclaine Watson v. The International Tin Council that the doctrine of non-justiciability might be utilized to bypass the absence of sovereign immunity with regard to a state's commercial activities.

Of course, once a court has determined that the relevant sovereign immunity legislation permits it to hear the case; it may still face the act of state argument. Such legislation implementing the

restrictive immunity approach does not supplant the doctrine of act of state or non-justiciability, although by accepting that the situation is such that immunity does not apply the scope for the non-justiciability plea is clearly much reduced.

The absolute immunity approach: The relatively uncomplicated role of the sovereign and of government in the eighteenth and nineteenth centuries logically gave rise to the concept of absolute immunity, whereby the sovereign was completely immune from foreign jurisdiction in all cases regardless of circumstances. However, the unparalleled growth in the activities of the state, especially with regard to commercial matters, has led to problems and in most countries to a modification of the above rule. The number of governmental agencies and public corporations, nationalized industries and other state organs created a reaction against the concept of absolute immunity, partly because it would enable state enterprises to have an advantage over private companies. Accordingly, many states began to adhere to the doctrine of restrictive immunity, under which immunity was available as regards governmental activity, but not where the state was engaging in commercial activity. Governmental acts with regard to which immunity would be granted are termed acts *jure imperii*, while those relating to private or trade activity are termed acts *jure gestionis.*

The restrictive approach: A number of states in fact started adopting the restrictive approach to immunity, permitting the exercise of jurisdiction over non-sovereign acts, at a relatively early stage. The Supreme Court of Austria in 1950, in a comprehensive survey of practice, concluded that in the light of the increased activity of states in the commercial field the classic doctrine of absolute immunity had lost its meaning and was no longer a rule of international law.*"Sovereign and non-sovereign acts"*; with the acceptance of the restrictive theory, it becomes crucial to analyze the distinction between those acts that will benefit from immunity and those that will not.

Whether the activity in question fell within one of the categories of strictly political or public acts, it needs labeling …Viz. internal administrative acts, legislative acts, act concerning the armed forces or diplomatic activity and public loans. Article 5of the UN Convention on Jurisdictional Immunities of States and Their Property, 2004 notes that: *A state enjoys immunity in respect of itself and its property, from the jurisdiction of the courts of another state subject to the provisions of the present Convention.* In such circumstances, the way in which the 'state' is

defined for sovereign immunity purposes becomes important. Article 2(1) b of the Convention declares that 'state' means: (i) the state and its various organs of government; (ii) constituent units of a federal state or political subdivisions of the state, which are entitled to perform acts in the exercise of sovereign authority, and are acting in that capacity; (iii) agencies or instrumentalities of the state or other entities, to the extent that they are entitled to perform and are actually performing acts in the exercise of sovereign authority of the state; and (iv) representatives of the state acting in that capacity.

With the adoption of the restrictive theory of immunity, the appropriate test becomes whether the activity in question is of itself sovereign (jure imperii) or non-sovereign (jure gestionis). In determining this, the predominant approach has been to focus upon the nature of the transaction rather than its purpose. However, it should be noted that article 2(2) of the Convention provides that: *In determining whether a contract or transaction is a 'commercial transaction' . . . reference should be made primarily to the nature of the contract or transaction, but its purpose should also be taken into account if the parties to the contract or transaction have so agreed, or if, in the practice of the state of the forum, that purpose is relevant to determining the non-commercial character of the contract or transaction.*

The reason for the modified 'nature' test was in order to provide an adequate safeguard and protection for developing countries, particularly as they attempt to promote national economic development. The ILC Commentary notes that a two-stage approach is posited, to be applied successively. First, reference should be made primarily to the nature of the contract or transaction and, if it is established that it is non-commercial or governmental in nature, no further enquiry would be needed. If, however, the contract or transaction appeared to be commercial, then reference to its purpose should be made in order to determine whether the contract or transaction was truly sovereign or not.

States should be given an opportunity to maintain that in their practice a particular contract or transaction should be treated as non-commercial since its purpose is clearly public and supported by reasons of state. Examples given include the procurement of medicaments to fight a spreading epidemic, and food supplies. This approach, a modification of earlier drafts, is not uncontroversial and some care is required. It would, for example, be unhelpful if the purpose criterion were to be adopted in a manner which would permit it to be used to effect a

considerable retreat from the restrictive immunity approach. This is not to say, however, that no consideration whatsoever of the purpose of the transaction in question should be undertaken.

"Diplomatic law": Rules regulating the various aspects of diplomatic relations constitute one of the earliest expressions of international law. Whenever in history there has been a group of independent states co-existing, special customs have developed on how the ambassadors and other special representatives of other states were to be treated. Diplomacy as a method of communication between various parties, including negotiations between recognized agents, is an ancient institution and international legal provisions governing its manifestations are the result of centuries of state practice. The special privileges and immunities related to diplomatic personnel of various kinds grew up partly as a consequence of sovereign immunity and the independence and equality of states, and partly as an essential requirement of an international system. States must negotiate and consult with each other and with international organisations and in order to do so need diplomatic staffs. Since these persons represent their states in various ways, they thus benefit from the legal principle of state sovereignty. This is also an issue of practical convenience.

Diplomatic relations have traditionally been conducted through the medium of ambassadors and their staffs, but with the growth of trade and commercial intercourse the office of consul was established and expanded. The development of speedy communications stimulated the creation of special missions designed to be sent to particular areas for specific purposes, often with the head of state or government in charge. To some extent, however, the establishment of telephone, telegraph, telex and fax services has lessened the importance of the traditional diplomatic personnel by strengthening the centralizing process. Nevertheless, diplomats and consuls do retain some useful functions in the collection of information and pursuit of friendly relations, as well as providing a permanent presence in foreign states, with all that that implies for commercial and economic activities. The field of diplomatic immunities is one of the most accepted and uncontroversial of international law topics, as it is in the interest of all states ultimately to preserve an even tenor of diplomatic relations, although not all states act in accordance with this.

The Vienna Convention on Diplomatic Relations, 1961*:* This treaty, which came into force in 1964, emphasizes the functional necessity of diplomatic privileges and immunities for the

efficient conduct of international relations as well as pointing to the character of the diplomatic mission as representing its state. It both codified existing laws and established others. Questions not expressly regulated by the Convention continue to be governed by the rules of customary international law. The International Court has recently emphasized that the Convention continues to apply notwithstanding the existence of a state of armed conflict between the states concerned. There is no right as such under international law to diplomatic relations, and they exist by virtue of mutual consent. If one state does not wish to enter into diplomatic relations, it is not legally compelled so to do.

Accordingly, the Convention specifies in article 4 that the sending state must ensure that the consent (or agr´ement) of the receiving state has been given for the proposed head of its mission, and reasons for any refusal of consent do not have to be given. Similarly, by article 9 the receiving state may at any time declare any member of the diplomatic mission persona non grata without having to explain its decision, and thus obtain the removal of that person. However, the principle of consent as the basis of diplomatic relations may be affected by other rules of international law.

For example, the Security Council in resolution 748 (1992), which imposed sanctions upon Libya, decided that 'all states shall: (a) significantly reduce the number and level of the staff at Libyan diplomatic missions and consular posts and restrict or control the movement within their territory of all such staff who remain. . . '. The main functions of a diplomatic mission are specified in article 3 and revolve around the representation and protection of the interests and nationals of the sending state, as well as the promotion of information and friendly relations. Article 41(1) also emphasizes the duty of all persons enjoying privileges and immunities to respect the laws and regulations of the receiving state and the duty not to interfere in the internal affairs of that state.

Article 13 provides that the head of the mission is deemed to have taken up his functions in the receiving state upon presentation of credentials. Heads of mission are divided into three classes by article 14, viz. ambassadors or nuncios accredited to heads of state and other heads of mission of equivalent rank; envoys, ministers and internuncios accredited to heads of state; and charg´esd'affaires accredited to ministers of foreign affairs. It is customary for a named individual to be in charge of a diplomatic mission. When, in 1979, Libya designated its

embassies as 'People's Bureaux' to be run by revolutionary committees, the UK insisted upon and obtained the nomination of a named person as the head of the mission.

The inviolability of the premises of the mission: In order to facilitate the operations of normal diplomatic activities, article22 of the Convention specifically declares that the premises of the missionaire inviolable and that agent of the receiving state are not to enter them without the consent of the mission.

The diplomatic bag: Article 27 provides that the receiving state shall permit and protect free communication on behalf of the mission for all official purposes. Such official communication is inviolable and may include the use of diplomatic couriers and messages in code and in cipher, although the consent of the receiving state is required for a wireless transmitter. Article 27(3) and (4) deals with the diplomatic bag, and provides that it shall not be opened or detained and that the packages constituting the diplomatic bag 'must bear visible external marks of their character and may contain only diplomatic documents or articles intended for official use'. The need for a balance in this area is manifest. On the one hand, missions require a confidential means of communication, while on the other the need to guard against abuse is clear. Article 27, however, lays the emphasis upon the former. This is provided that article 27(4) is complied with.

Diplomatic immunities – property: Under article 22 of the Vienna Convention, the premises of the missionaire inviolable and, together with their furnishings and other property thereon and the means of transport, are immune from search, requisition, attachment or execution. By article 23, a general exception from taxation in respect of the mission premises is posited.

Diplomatic immunities – personal: The person of a diplomatic agent is inviolable under article 29 of the Vienna Convention and he/she may not be detained or arrested. This principle is the most fundamental rule of diplomatic law and is the oldest established rule of diplomatic law. In resolution 53/97 of January 1999, for example, the UN General Assembly strongly condemned acts of violence against diplomatic and consular missions and representatives, while the Security Council issued a presidential statement, condemning the murder of nine Iranian diplomats in Afghanistan. States recognize that the protection of diplomats is a mutual interest founded on functional requirements and reciprocity. The receiving state is under an obligation to 'take all appropriate steps' to prevent any attack on the person, freedom or dignity of diplomatic agents.

After a period of kidnappings of diplomats, the UN Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents was adopted in 1973. This provides that states parties must make attacks upon such persons a crime in internal law with appropriate penalties and take such measures as may be necessary to establish jurisdiction over these crimes. States parties are obliged to extradite or prosecute offenders. However, in exceptional cases, a diplomat may be arrested or detained on the basis of self-defense or in the interests of protecting human life.

Waiver of immunity: By article 32 of the 1961 Vienna Convention, the sending state may waive the immunity from jurisdiction of diplomatic agents and others possess immunity under the Convention. Such waiver must be express. Where a person with immunity initiates proceedings, he cannot claim immunity in respect of any counter-claim directly connected with the principal claim. Waiver of immunity from jurisdiction in respect of civil or administrative proceedings is not to be taken to imply waiver from immunity in respect of the execution of the judgment, for which a separate waiver is necessary. In general, waiver of immunity has been unusual, especially in criminal cases. In a memorandum entitled Department of State Guidance for Law Enforcement Officers With Regard to Personal Rights and Immunities of Foreign Diplomatic and Consular Personnel the point is made that waiver of immunity does not 'belong' to the individual concerned, but is for the benefit of the sending state. While waiver of immunity in the face of criminal charges is not common, 'it is routinely sought and occasionally granted'.

[Consular privileges and immunities: the Vienna Convention on Consular Relations, 1963]: Consuls represent their state in many administrative ways, for instance, by issuing visas and passports and generally promoting the commercial interests of their state. They have a particular role in assisting nationals in distress with regard to, for example, finding lawyers, visiting prisons and contacting local authorities, but they are unable to intervene in the judicial process or internal affairs of the receiving state or give legal advice or investigate a crime. They are based not only in the capitals of receiving states, but also in the more important provincial cities. However, their political functions are few and they are accordingly not permitted the same degree of immunity from jurisdiction as diplomatic agents. Consuls must possess a commission from the sending state and the authorization (exequatur) of a receiving state. They are entitled to the same exemption from taxes and customs duties as diplomats.

Article 31 emphasizes that consular premises are inviolable and may not be entered by the authorities of the receiving state without consent. Like diplomatic premises, they must be protected against intrusion or impairment of dignity, and similar immunities exist with regard to archives and documents and exemptions from taxes. Article 35 provides for freedom of communication, emphasizing the inviolability of the official correspondence of the consular post and establishing that the consular bag should be neither opened nor detained. However, in contrast to the situation with regard to the diplomatic bag, where the authorities of the receiving state have serious reason to believe that the bag contains other than official correspondence, documents or articles, they may request that the bag be opened and, if this is refused, the bag shall be returned to its place of origin.

[The Convention on Special Missions, 1969]: In many cases, states will send out special or ad hoc missions to particular countries to deal with some defined issue in addition to relying upon the permanent staffs of the diplomatic and consular missions. In such circumstances, these missions, whether purely technical or politically important, may rely on certain immunities which are basically derived from the Vienna Conventions by analogy with appropriate modifications. By article 8, the sending state must let the host state know of the size and composition of the mission, while according to article 17 the mission must be sited in a place agreed by the states concerned or in the Foreign Ministry of the receiving state. By article 31 members of special missions have no immunity with respect to claims arising from an accident caused by a vehicle, used outside the official functions of the person involved, and by article 27 only such freedom of movement and travel as is necessary for the performance of the functions of the special mission is permitted.

However, it was clear that there was a customary rule of international law which provided that an ad hoc envoy, charged with a special political mission by the sending state, may be granted immunity by individual agreement with the host state for that mission and its associated status and that therefore such envoys could be placed on a par with members of the permanent missions of states. The concept of immunity protected not the diplomat as a person, but rather the mission to be carried out by that person on behalf of the sending state.

[The Vienna Convention on the Representation of States in their Relations with International Organisations of a Universal Character, 1975]: This treaty applies with respect to the representation of states in any international organisation of a universal character, irrespective of whetheror not there are diplomatic relations between the sending and the host states. There are many similarities between this Convention and the 1961 Vienna Convention. By article 30, for example, diplomatic staff enjoy complete immunity from criminal jurisdiction, and immunity from civil and administrative jurisdiction in all cases, save for the same exceptions noted in article 31 of the 1961 Convention. Administrative, technical and service staff are in the same position as under the latter treaty (article 36). The mission premises are inviolable and exempt from taxation by the host state, while its archives, documents and correspondence are equally inviolable. The Convention has received an unenthusiastic welcome, primarily because of the high level of immunities it provides for on the basis of a controversial analogy with diplomatic agents of missions. The range of immunities contrasts with the general situation under existing conventions such as the Convention on the Privileges and Immunities of the United Nations, 1946.

[The immunities of international organisations]: As far as customary rules are concerned, the position is far from clear and it is usually dealt with by means of a treaty, providing such immunities to the international institution sited on the territory of the host state as are regarded as functionally necessary for the fulfillment of its objectives. Probably the most important example is theGeneral Convention on the Privileges and Immunities of the United Nations of 1946, which sets out the immunities of the United Nations and its personnel and emphasizes the inviolability of its premises, archives and documents.

2.3. State Responsibility

State responsibility is a fundamental principle of international law, arising out of the nature of the international legal system and the doctrines of state sovereignty and equality of states. It provides that whenever one state commits an internationally unlawful act against another state, international responsibility is established between the two. A breach of an international obligation gives rise to a requirement for reparation. Accordingly, the focus is upon principles concerned with second-order issues, in other words the procedural and other consequences flowing from a breach of a substantive rule of international law. This has led to a number of

issues concerning the relationship between the rules of state responsibility and those relating to other areas of international law.

The nature of state responsibility*:* The essential characteristics of responsibility hinge upon certain basic factors: first, the existence of an international legal obligation in force as between two particular states; secondly, that there has occurred an act or omission which violates that obligation and which is imputable to the state responsible, and finally, that loss or damage has resulted from the unlawful act or omission.

The question of fault: There are contending theories as to whether responsibility of the state for unlawful acts or omissions is strict or whether it is necessary to show some fault or intention on the part of the officials concerned. The principle of objective responsibility (the so-called 'risk' theory) maintains that the liability of the state is strict. Once an unlawful act has taken place, which has caused injury and which has been committed by an agent of the state, that state will be responsible in international law to the state suffering the damage irrespective of good or bad faith. To be contrasted with this approach is the subjective responsibility concept (the 'fault' theory) which emphasizes that an element of intentional (dolus) or negligent (culpa) conduct on the part of the person concerned is necessary before his state can be rendered liable for any injury caused.

Imputability: Imposing upon the state absolute liability wherever an official is involved encourages that state to exercise greater control over its various departments and representatives. It also stimulates moves towards complying with objective standards of conduct in international relations. State responsibility covers many fields. It includes unlawful acts or omissions directly committed by the state and directly affecting other states: for instance, the breach of a treaty, the violation of the territory of another state, or damage to state property. The doctrine depends on the link that exists between the state and the person or persons actually committing the unlawful act or omission. The state as an abstract legal entity cannot, of course, in reality 'act' itself. It can only do so through authorized officials and representatives. The state is not responsible under international law for all acts performed by its nationals. Since the state is responsible only for acts of its servants that are imputable or attributable to it, it becomes necessary to examine the concept of imputability (also termed attribution). Imputability is the legal fiction which

assimilates the actions or omissions of state officials to the state itself and which renders the state liable for damage resulting to the property or person of an alien.

Ultra vires acts: An unlawful act may be imputed to the state even where it was beyond the legal capacity of the official involved, providing that the officials have acted at least to all appearances as competent officials or organs or they must have used powers or methods appropriate to their official capacity.

'State control and responsibility': Article 8 of the ILC Articles provides that the conduct of a person or group of persons shall be considered as an act of state under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that state in carrying out the conduct. The first proposition is uncontroversial, but difficulties have arisen in seeking to define the necessary direction or control required for the second proposition. The Commentary to the article emphasizes that, 'Such conduct will be attributable to the state only if it directed or controlled the specific operation and the conduct complained of was an integral part of the operation. Article 9 of the ILC Articles provides that the conduct of a person or a group of persons shall be considered as an act of the state under international law if the person or group was in fact exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority.

'Mob, violence, insurrections and civil wars': Where the governmental authorities have acted in good faith and without negligence, the general principle is one of non-liability for the actions of rioters or rebels causing loss or damage. The state, however, is under a duty to show due diligence. Quite what is meant by this is difficult to quantify and more easily defined in the negative. It should also be noted that special provisions apply to diplomatic and consular personnel. Article 10 of the ILC Articles provides that where an insurrectional movement is successful either in becoming the new government of a state or in establishing a new state in part of the territory of the pre-existing state, it will be held responsible for its activities prior to its assumption of authority.

'Circumstances precluding wrongfulness': Where a state consents to an act by another state which would otherwise constitute an unlawful act, wrongfulness is precluded provided that the act is within the limits of the consent given. The most common example of this kind of situation

is where troops from one state are sent to another at the request of the latter. Wrongfulness is also precluded where the act constitutes a lawful measure of self-defense taken in conformity with the Charter of the UN. This would also cover force used in self-defense as defined in the customary right as well as under article 51 of the Charter, since that article refers in terms to the 'inherent right' of individual and collective self-defense. Further, the ILC Commentary makes it clear that the fact that an act is taken in self-defense does not necessarily mean that all wrongfulness is precluded, since the principles relating to human rights and humanitarian law have to be respected. The International Court, in particular, noted in its advisory opinion in the Legality of the Threat or Use of Nuclear Weapons that, 'Respect for the environment is one of the elements that go to assessing whether an action is in conformity with the principles of necessity and proportionality' and thus in accordance with the right to self-defense.

'Invocation of state responsibility': Article 42 of the ILC Articles stipulates that a state is entitled as an injured state to invoke the responsibility of another state if the obligation breached is owed to that state individually or to a group of states, including that state or the international community as a whole, and the breach of the obligation specially affects that state or is of such a character as radically to change the position of all the other states to which the obligation is owed with respect to the further performance of the obligation. Responsibility may not be invoked if the injured state has validly waived the claim or is to be considered as having, by reason of its conduct, validly acquiesced in the lapse of the claim. Any waiver would need to be clear and unequivocal, while the question of acquiescence would have to be judged carefully in the light of the particular circumstances. Where several states are injured by the same wrongful act, each state may separately invoke responsibility, and where several states are responsible, the responsibility of each may be invoked.

'The consequences of internationally wrongful acts': A) Cessation-The state responsible for the internationally wrongful act is under an obligation to cease that act, if it is continuing, and to offer appropriate assurances and guarantees of non-repetition if circumstances so require. B)Reparation-The basic principle with regard to reparation, or the remedying of a breach of an international obligation for which the state concerned is responsible, where the Permanent Court of International Justice emphasized that, *The essential principle contained in the actual notion of an illegal act is that reparation must, as far as possible, wipe out all the consequences of the*

illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.

'Serious breaches of peremptory norms (jus cogens)': One of the major debates taking place with regard to state responsibility concerns the question of international crimes. A distinction was drawn in article 19 of the ILC Draft Articles 1996 between international crimes and international delicts within the context of internationally unlawful acts. It was provided that an internationally wrongful act which results from the breach by a state of an international obligation so essential for the protection of fundamental interests of the international community that its breach was recognized as a crime by that community as a whole constitutes an international crime. All other internationally wrongful acts were termed international delicts. Examples of such international crimes provided were aggression, the establishment or maintenance by force of colonial domination, slavery, genocide, apartheid and massive pollution of the atmosphere or of the seas. However, the question as to whetherstates can be criminally responsible has been highly controversial. Some have argued that the concept is of no legal value and cannot be justified in principle, not least because the problem of exacting penal sanctions from states, while in principle possible, could only be creative of instability.

Others argued that, particularly since 1945, the attitude towards certain crimes by states has altered so as to bring them within the realm of international law. The Rapporteur in his commentary to draft article 19 pointed to three specific changes since 1945 in this context to justify its inclusion: first, the development of the concept of *jus cogens*as a set of principles from which no derogation is permitted; secondly, the rise of individual criminal responsibility directly under international law; and thirdly, the UN Charter and its provision for enforcement action against a state in the event of threats to or breaches of the peace or acts of aggression. However, the ILC changed its approach in the light of the controversial nature of the suggestion and the Articles as finally approved in 2001 omit any mention of international crimes of states, but rather seek to focus upon the particular consequences flowing from a breach of obligations *erga omnes* and of peremptory norms (*jus cogens*). Article 41 provides that states are under a duty to co-operate to bring to an end, through lawful means, any serious breach197 by a state of an obligation arising under a peremptory norm of international law198 and not to recognise as lawful any such situation.

'Diplomatic protection and nationality of claims': The doctrine of state responsibility with regard to injuries to nationals rests upon twin pillars, the attribution to one state of the unlawful acts and omissions of its officials and its organs (legislative, judicial and executive) and the capacity of the other state to adopt the claim of the injured party. Indeed article 44 of the ILC Articles provides that the responsibility of a state may not be invoked if the claim is not brought in accordance with any applicable rule relating to nationality of claims. Nationality is the link between the individual and his or her state as regards particularbenefits andobligations. It is also the vital link between theindividual and the benefits of international law. Although international law is now moving to a stage whereby individuals may acquire rights free from the interposition of the state, the basic proposition remains that in a state-oriented world system, it is only through the medium of the state that the individual may obtain the full range of benefits available under international law, and nationality is the key.

Chapter Three: - State Succession and Law of Treaties

3.1. State Succession

Political entities are not immutable. They are subject to change. New states appear and old states disappear. 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. Difficulties may result from the change in the political sovereignty over a particular territorial entity for the purposes of international law and the world community. For instance, how far is a new state bound by the treaties and contracts entered into by the previous sovereign of the territory? Does nationality automatically devolve upon the inhabitants to replace that of the predecessor? What happens to the public property of the previous sovereign, and to what extent is the new authority liable for the debts of the old?

State succession in international law cannot be confused with succession in municipal law and the transmission of property and so forth to the relevant heir. Other interests and concerns are involved and the principles of state sovereignty, equality of states and non-interference prevent a universal succession principle similar to domestic law from being adopted. Despite attempts to assimilate Roman law views regarding the continuity of the legal personality in the estate which falls by inheritance, this approach could not be sustained in the light of state interests and practice. The opposing doctrine, which basically denied any transmission of rights, obligations and property interests between the predecessor and successor sovereigns, arose in the heyday of positivism in the nineteenth century. It manifested itself again with the rise of the decolonization process in the form of the ‘clean slate’ principle, under which new states acquired sovereignty free from encumbrances created by the predecessor sovereign.

The issue of state succession can arise in a number of defined circumstances, which mirror the ways in which political sovereignty may be acquired by, for example, decolonization of all or part of an existing territorial unit, dismemberment of an existing state, secession, annexation and merger. 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. However, the question of state succession does not infringe upon the normal rights

and duties of states under international law. These exist by virtue of the fundamental principles of international law and as a consequence of sovereignty and not as a result of transference from the previous sovereign. The issue of state succession should also be distinguished from questions of succession of governments, particularly revolutionary succession, and consequential patterns of recognition and responsibility.

The issue of state succession in international law is particularly complex. Many of the rules have developed in specific response to particular political changes and such changes have not always been treated in a consistent manner by the international community. The international aspects of succession are governed through the rules of customary international law. There are two relevant Conventions, the Vienna Convention on Succession of States in Respect of Treaties, 1978, which entered into force in 1996, and the Vienna Convention on Succession of States in Respect of State Property, Archives and Debts, 1983, which is not yet in force. However, many of the provisions contained in these Conventions reflect existing international law.

State succession itself may be briefly defined as the replacement of one state by another in the responsibility for the international relations of territory. However, this formulation conceals a host of problems since there is a complex range of situations that stretches from continuity of statehood through succession to non-succession. State succession is essentially an umbrella term for a phenomenon occurring upon a factual change in sovereign authority over a particular territory. In many circumstances it is unclear as to which rights and duties will flow from one authority to the other and upon which precise basis. Much will depend upon the circumstances of the particular case, for example whether what has occurred is a merger of two states to form a new state; the absorption of one state into another, continuing state; a cession of territory from one state to another; secession of part of a state to form a new state; the dissolution or dismemberment of a state to form two or more states, or the establishment of a new state as a result of decolonization. The role of recognition and acquiescence in this process is especially important.

The relevant date of succession is the date at which the successor state replaces the predecessor state in the responsibility for the international relations of the territory to which the succession relates. This is invariably the date of independence. However, problems may arise where successive dates of independence arise with regard to a state that is slowly disintegrating, such as

Yugoslavia. The Yugoslav Arbitration Commission noted that the date of succession was a question of fact to be assessed in the light of all the relevant circumstances.

Continuity and succession: Questions relating to continuity and succession may be particularly difficult. Where a new entity emerges; one has to decide whether it is a totally separate creature from its predecessor, or whether it is a continuation of it in a slightly different form. For example, it seems to be accepted that India is the same legal entity as British India and Pakistan is a totally new state. Yugoslavia was generally regarded as the successor state to Serbia, and Israel as a completely different being from British mandated Palestine. Cession or secession of territory from an existing state will not affect the continuity of the latter state, even though its territorial dimensions and population have been diminished. Pakistan after the independence of Bangladesh is a good example of this. In such a case, the existing state remains in being, complete with the rights and duties incumbent up on it, save for those specifically tied to the ceded or seceded territory. Where, however, a state is dismembered so that all of its territory falls within the territory of two or more states, these rights and duties will be allocated as between the successor states. In deciding whether continuity or succession has occurred with regard to one of the parties to the process, one has to consider the classical criteria of the creation of statehood, together with assertions as to status made by the parties directly concerned and the attitudes adopted by third states and international organisations.

Succession to treaties: The importance of treaties within the international legal system requires no repetition. They constitute the means by which a variety of legal obligations are imposed or rights conferred upon states in a wide range of matters from the significant to the mundane. Treaties are founded up on the pre-existing and indispensable norm of *pacta sunt servanda* or the acceptance of treaty commitments as binding. Treaties may fall within the following categories: multilateral treaties, including the specific category of treaties concerning international human rights; treaties concerned with territorial definition and regimes; bilateral treaties; and treaties that are treated as ‘political’ in the circumstances.

The rules concerning succession to treaties are those of customary international law together with the Vienna Convention on Succession of States in Respect of Treaties, 1978, which came into force in 1996 and which applies with regard to a succession taking place after that date. As far as devolution agreements are concerned, article 8 of the Convention provides that such

agreements of themselves cannot affect third states and this reaffirms an accepted principle, while article 9, dealing with unilateral declarations, emphasizes that such a declaration by the successor state alone cannot of itself affect the rights and obligations of the state and third states. In other words, it would appear, the consent of the other parties to the treaties in question or an agreement with the predecessor state with regard to bilateral issues is required.

Categories of treaties: territorial, political and other treaties: Treaties may for succession purposes be generally divided into three categories. The **first** relates to territorially grounded treaties, under which rights or obligations are imposed directly upon identifiable territorial units. The prime example of these agreements are relating to territorial definition. In the first Report on Succession of States and Governments in Respect of Treaties in 1968, declared that 'the weight both of opinion and practice seems clearly to be in favor of the view that boundaries established by treaties remain untouched by the mere fact of a succession. State practice in favor of the continuance in force of boundaries established by treaty appears to be such as to justify the conclusion that a general rule of international law exists to that effect and in principle the territory devolves up on the Successor State on the basis of the pre-existing boundaries.

For reasons relating to the maintenance of international stability, this approach has been clearly supported by state practice. The Latin American concept of *utipossidetisjuris*, whereby the administrative divisions of the former Spanish empire were to constitute the boundaries of the newly independent states in South America in the first third of the nineteenth century was the first internationally accepted expression of this approach. It was echoed in US practice and explicitly laid down in resolution 16 of the meeting of Heads of State and Government of the Organisation of African Unity in 1964, by which all member states pledged themselves to respect colonial borders. The principle of succession to colonial borders was underlined by the International Court in the Burkina Faso/Mali case. The extension of the principle of *utipossidetis* from decolonization to the creation of new states out of existing independent states is supported by international practice, taking effect as the transformation of administrative boundaries into international boundaries generally.

Of course, much will depend upon the particular situation, including the claims of the states concerned and the attitude adopted by third states and international organisations, particularly the United Nations. This principle regarding the continuity of borders in the absence of consent to

the contrary is reinforced by other principles of international law, such as the provision enshrined in article 62(2) of the Vienna Convention on the Law of Treaties, which stipulates that a fundamental change in circumstances may not be invoked as a ground for terminating or withdrawing from a treaty that establishes a boundary. In addition, article 11 of the Vienna Convention on Succession to Treaties, although in terminology which is cautious and negative, specifies that

A succession of States does not as such affect:

(a) A boundary established by treaty; or

(b) Obligations and rights established by a treaty and relating to the regime of a boundary.

The International Court dealt with succession to boundary treaties generally in the Libya/Chad case, where it was declared that 'once agreed, the boundary stands, for any other approach would vitiate the fundamental principle of the stability of boundaries, the importance of which has been repeatedly emphasized by the Court'. More particularly, the Court emphasized that 'a boundary established by treaty thus achieves a permanence which the treaty itself does not necessarily enjoy.

The treaty can cease to be in force without in any way affecting the continuance of the boundary . . . when a boundary has been the subject of agreement, the continued existence of that boundary is not dependent upon the continuing life of the treaty under which the boundary is agreed.' It is particularly important to underline that the succession takes place, therefore, not as such to the boundary treaty but rather to the boundary as established by the treaty. The Tribunal in the Eritrea/Yemen case emphasized that boundary and territorial treaties made between two parties constituted a special category of treaties representing a 'legal reality which necessarily impinges upon third states, because they have effect *ergaomnes*'.

Territorially grounded treaties extend somewhat beyond the establishment of boundaries into the more controversial area of agreements creating other territorial regimes, such agreements being termed 'localized' or 'real' or 'dispositive'. Examples of such arrangements might include demilitarized zones, rights of transit, port facilities and other servitudes generally. Despite some reservations by members of the International Law Commission and governments, article 12 of the Vienna Convention provides that a succession of states does not as such affect obligations or

rights relating to the use of any territory or to restrictions upon its use established by a treaty for the benefit of any foreign state, group of states or all states and considered as attaching to the territory in question.

The **second** category relates to Political or 'personal' treaties establish rights or obligations deemed to be particularly linked to the regime in power in the territory in question and to its political orientation. Examples of such treaties would include treaties of alliance or friendship or neutrality. Such treaties do not bind successor states for they are seen as exceptionally closely tied to the nature of the state which has ceased to exist. However, it is not at all clear what the outer limits are to the concept of political treaties and difficulties over definitional problems do exist.

Thirdly, apart from the categories of territorial and political treaties, where succession rules in general are clear, other treaties cannot be so easily defined or categorized for succession purposes and must be analyzed separately.

*[Succession to treaties generally]:*Practice seems to suggest 'a tendency' or 'a general inclination' to succession to 'some categories of multilateral treaties' or to 'certain multilateral conventions'. However, this 'modern-classical' approach is difficult to sustain as a general rule of comprehensive applicability. One simply has to examine particular factual situations, take note of the claims made by the relevant states and mark the reactions of third states. In the case of bilateral treaties, the starting-point is from a rather different perspective. In such cases, the importance of the individual contractual party is more evident, since only two states are involved and the treaty is thus more clearly reciprocal in nature. Accordingly, the presumption is one of non-succession, depending upon all the particular circumstances of the case. Practice with regard to the US, Panama, Belgium and Finland supports the 'clean slate' approach.

Absorption and merger: Where one state is absorbed by another and no new state is created (such as the 1990 accession to the Federal Republic of Germany of the Lander of the German Democratic Republic), the former becomes extinct whereas the latter simply continues albeit in an enlarged form. The basic situation is that the treaties of the former, certainly in so far as they may be deemed 'political', die with the state concerned, although territorial treaties defining the boundaries of the entity absorbed will continue to define such boundaries. Other treaties are also likely to be regarded as at an end. However, treaties of the absorbing state continue and will

extend to the territory of the extinguished state. These principles are, of course, subject to contrary intention expressed by the parties in question. For example, in the case of German unification, article 11 coupled with Annex I of the Unification Treaty, 1990 excluded from the extension of treaties of the Federal Republic of Germany to the territory of the former German Democratic Republic a series of treaties dealing primarily with NATO matters.

Article 31(1) of the Vienna Convention on Succession to Treaties provides that where two or more states unite and form one successor state, treaties continue in force unless the successor state and the other state party or states parties otherwise agree or it appears that this would be incompatible with the object and purpose of the treaty or would radically change the conditions for its operation. Article 31(2) provides that such treaties would apply only in respect of the part of the territory of the successor state in respect of which the treaty was in force at the date of the succession of states. This is so unless the successor state makes a notification that the multilateral treaty in question shall apply in respect of its entire territory or, if the multilateral treaty in question is one in which by virtue either of its terms or by reason of the limited number of participants and its object and purpose the participation of any other state must be considered as requiring the consent of all the parties, the successor state and the other states parties otherwise agree. This general principle would apply also in the case of a bilateral treaty, unless the successor state and the other state party otherwise agree.

While these provisions bear some logic with regard to the situation where two states unite to form a new third state, they do not really take into account the special circumstances of unification where one state simply takes over another state in circumstances where the latter is extinguished. In these situations, the model provided by German unification appears to be fully consistent with international law and of value as a precedent.

Cession of territory from one state to another: When part of the territory of one state becomes part of the territory of another state, the general rule is that the treaties of the former cease to apply to the territory while the treaties of the latter extend to the territory. Article 15 of the Vienna Convention on Succession of States to Treaties, dealing with this ‘moving-frontiers’ rule, provides for this, with the proviso that where it appears from the treaty concerned or is otherwise established that the application of the treaty to the territory would be incompatible with the

object and purpose of the treaty or would radically change the condition for its operation, this extension should not happen. This is basically consistent with state practice.

Secession from an existing state to form a new state or states: The factual situations out of which a separation or dismemberment takes place are many and varied. They range from a break-up of a previously created entity into its previous constituent elements, as in the 1961 dissolution of the United Arab Republic into the pre-1958 states of Egypt and Syria or the dissolution of the Federation of Mali, to the complete fragmenting of a state into a variety of successors not being co-terminus with previous territorial units, such as the demise of Austria-Hungary in 1919. Where there is a separation or secession from an independent state which continues, in order to create a new state, the former continues as a state, albeit territorially reduced, with its international rights and obligations intact. With regard to the seceding territory itself, the leading view appears to be that the newly created state will commence international life free from the treaty rights and obligations applicable to its former sovereign. Reasons for this include the important point that it is difficult to maintain as a rule of general application that states that have not signed particular treaties are bound by them.

'Newly independent states': The post-Second World War period saw the dismantling of the overseas European empires. Based on international legal terms upon the principle of self-determination, which was founded upon a distinction between such territories and the metropolitan authority, decolonization produced a number of changes in the international legal system. The Vienna Convention on Succession to Treaties sought to establish a special category relating to decolonized territories. These were termed 'newly independent states' and defined in article 2(1) of as successor states 'the territory of which immediately before the date of the succession of states was a dependent territory for the international relations of which the predecessor state was responsible'. Article 16 laid down the general rule that such states were not bound to maintain in force or to become a party to any treaty by reason only of the fact that the treaty had been in force regarding the territory in question at the date of succession. This approach was deemed to build upon the traditional 'clean slate' principle applying to new states created out of existing states, such as the United States and the Spanish American Republics when they had obtained independence. This was also consistent with the view taken by the UN Secretariat in 1947 when discussing Pakistan's position in relation to the organisation, where it

was noted that 'the territory which breaks off, Pakistan, will be a new state; it will not have the treaty rights and obligations of the old state'.

Dissolution of states: Where an existing state comes to an end as an international person and is replaced by two or more other states, it is accepted that political treaties will not continue but that territorially grounded treaties will continue to attach to the territories in question now subject to new sovereign arrangements. The situation with regard to other treaties is more uncertain. State practice concerning dissolution has centered to all intents and purposes upon the dismemberment of 'unions of state', that is the ending of what had originally been a union of two international persons. Examples would include Colombia in 1829–31; Norway/Sweden in 1905; the United Arab Republic in 1960; the Mali Federation in 1960; the Federation of Rhodesia and Nyasaland in 1963129 and the Czech and Slovak Federal Republic in 1992.It is difficult to deduce clear rules of state succession from these episodes since much depended upon the expressed intentions of the states concerned. Perhaps a presumption in favor of continuity of treaties with regard to each component part may be suggested, but this is subject to expressed intention to the contrary.

International human rights treaties: A territorial treaty binds successor states by virtue of attaching to the territory itself and establishing a particular regime that transcends the treaty. Can it be maintained that international human rights treaties are analogous and thus 'attach' to the inhabitants concerned within the territory of the predecessor state and thus continue to bind successor states? There is no doubt that human rights treaties constitute a rather specific category of treaties. They establish that obligations are owed directly to individuals and often provide for direct access for individuals to international mechanisms. The very nature of international human rights treaties varies somewhat from that of traditional international agreements.

Where a state party to human rights treaties either disintegrates completely or from which another state or states are created, and the classical rules of succession were followed, there is a danger that this might result in a situation where people formerly protected by such treaties are deprived of such protection as a consequence or by-product of state succession. Accordingly, the question of continued application of human rights treaties within the territory of a predecessor state irrespective of a succession is clearly under consideration. Whether such a principle has been clearly established is at the present moment unclear. However, with regard to those human

rights which are established as a matter of customary international law, the new state will be bound by these as such.

Succession with respect to matters other than treaties: Membership of international organizations Succession to membership of international organizations will proceed (depending upon the terms of the organization's constitution) according to whether a new state is formed or an old state continues in a slightly different form. In the case of the partition of British India in 1947, India was considered by the UN General Assembly as a continuation of the previous entity, while Pakistan was regarded as a new state, which had then to apply for admission to the organization. Upon the merger of Egypt and Syria in 1958 to form the United Arab Republic, the latter was treated as a single member of the United Nations, while upon the dissolution of the merger in 1961; Syria simply resumed its separate membership of the organization. In the case of the merger of North and South Yemen in1990, the new state simply replaced the predecessor states as a member of the relevant international organizations. Where the predecessor state is dissolved and new states are created, such states will have to apply anew for membership to international organizations. For example, the new states of the Czech Republic and Slovakia were admitted as new members of the UN on 19 January 1993.The sixth (Legal) Committee of the General Assembly considered the situation of new states being formed through division of a member state and the membership problem and produced the following principles:

1. That, as a general rule, it is in conformity with legal principles to presume that a state which is a member of the Organization of the United Nations does not cease to be a member simply because its Constitution or frontier has been subjected to changes, and that the extinction of the state as a legal personality recognized in the international order must be shown before its rights and obligations can be considered thereby to have ceased to exist.

2. That when a new state is created, whatever may be the territory and the populations which it comprises and whether or not they formed part of a state member of the United Nations, it cannot under the system of the Charter claim the status of a member of the United Nations unless it has been formally admitted as such in conformity with the provisions of the Charter.

3. Beyond that, each case must be judged according to its merits.

On the other hand, the Vienna Convention on Succession to State Property, Archives and Debts, etc. 1983 is not currently in force, although most of its provisions (apart from those concerning 'newly independent states') are reflective of custom. The primary rule with regard to the allocation of assets (including archives) and debts in succession situations is that the relevant parties should settle such issues by agreement. Virtually all of the rules that are formulated, for example in the Vienna Convention, 1983, are deemed to operate only where such agreement has not taken place.

3.2. The Law of Treaties

Compared with municipal law the various methods by which rights and duties may be created in international law are relatively unsophisticated. Within a state, legal interests may be established by contracts between two or more persons, or by agreements under seal, or under the developed system for transferring property, or indeed by virtue of legislation or judicial decisions. International law is more limited as far as the mechanisms for the creation of new rules are concerned. Custom relies upon a measure of state practice supported by *opinion juris* and is usually, although not invariably, an evolving and timely process. Treaties, on the other hand, are a more direct and formal method of international law creation.

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 organisations 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.

A treaty is basically an agreement between parties on the international scene. Although treaties may be concluded, or made, between states and international organisations, they are primarily concerned with relations between states. An International Convention on the Law of Treaties was signed in 1969 and came into force in 1980,while a Convention on Treaties between States and International Organisations was signed in 1986. The emphasis, however, will be on the

appropriate rules which have emerged as between states. The 1969 Vienna Convention on the Law of Treaties partly reflects customary law and constitutes the basic framework for any discussion of the nature and characteristics of treaties. Certain provisions of theConventionmay be regarded as reflective of customary international law, such as the rules on interpretation, material breach and fundamental change of circumstances. Others may not be so regarded, and constitute principles binding only upon state parties.

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 *pactasuntservanda* and is arguably the oldest principle of international law. It was reaffirmed in article 26 of the 1969 Convention, 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. A treaty is defined, for the purposes of the Convention, in article 2 as: *an international agreement concluded between states in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.*

In addition to excluding agreements involving international organisations, the Convention does not cover agreements between states which are to be governed by municipal law, such as a large number of commercial accords. This does not mean that such arrangements cannot be characterized as international agreements, or that they are invalid, merely that they are not within the purview of the 1969 Convention. Indeed, article 3 stresses that international agreements between states and other subjects of international law or between two or more subjects of international law, or oral agreements, do not lose their validity by being excluded from the framework of the Convention.

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. For instance, a declaration by a number of states in support of a particular political aim may in many cases be without legal (though not political) significance, as the states may regard it as a policy matter and not as setting up juridical relations between themselves. To see whether a particular agreement is intended to create legal relations, all the facts of the situation have to be examined carefully. Examples of non-binding international agreements would include the Final Act of the Conference on Security and Co-operation in Europe, 1975. The International Court regarded a mandate agreement as having the character of a treaty, while in the Anglo-Iranian Oil Co. case doubts were expressed about whether a concession agreement between a private company and a state constituted an international agreement in the sense of a treaty. Optional declarations with regard to the compulsory jurisdiction of the International Court itself under article 36(2) of the Statute of the Court have been regarded as treaty provisions, while declarations made by way of unilateral acts concerning legal or factual situations may have the effect of creating legal obligations. In the latter instance, of course, a treaty as such is not involved.

Where the parties to an agreement do not intend to create legal relations or binding obligations or rights thereby under international law, the agreement will not be a treaty, although, of course, its political effect may still be considerable. Of particular interest are memoranda of understanding, which are not as such legally binding, but may be of legal consequence. In fact a large role is played in the normal course of interstate dealings by informal non-treaty instruments precisely because they are intended to be non-binding and are thus flexible, confidential and relatively speedy in comparison with treaties. They may be amended with ease and without delay and may be terminated by reasonable notice (subject to provision to the contrary). It is this intention not to create a binding arrangement governed by international law which marks the difference between treaties and informal international instruments.

The International Court addressed this issue in the Qatar v. Bahrain case, with regard to Minutes dated 25 December 1990 signed by the parties and Saudi Arabia. The Court emphasized that whether an agreement constituted a binding agreement would depend upon ‘all its actual terms’ and the circumstances in which it had been drawn up, and in the situation involved in the case,

the Minutes were to be construed as an international agreement creating rights and obligations for the parties since on the facts they enumerated the commitments to which the parties had consented. In addition, a treaty may contain a variety of provisions, not all of which constitute legal obligations. The 1969 Convention also concerns treaties which are the constituent instruments of international organisations, such as the United Nations Charter, and internal treaties adopted within international organisations.

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 organisations for the purpose of adopting the text of the treaty in that particular conference or organisation. The International Court noted in the preliminary objections to jurisdiction phase of the Genocide Convention (Bosnia v. Serbia) case that, 'According to international law, there is no doubt that every head of state is presumed to be able to act on behalf of the state in its international relations.' Sinclair notes that UK practice distinguishes between 'general full powers' held by the Secretary of State for Foreign and Commonwealth Affairs, Ministers of State and Parliamentary Under-Secretaries in the Foreign and Commonwealth Office and UK Permanent Representatives to the UN, European Communities and General Agreement on Tariffs and Trade, which enable any treaty to be negotiated and signed, and 'special full powers' granted to a particular person to negotiate and sign a specific treaty.

Any act relating to the making of a treaty by a person not authorized as required will be without any legal effect, unless the state involved afterwards confirms the act. One example of this kind of situation arose in 1951 with regard to a convention relating to the naming of cheeses. It was signed by a delegate on behalf of both Sweden and Norway, but it appeared that he had authority only from Norway. However, the agreement was subsequently ratified by both parties and entered into effect.

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.

The consent of the states parties to the treaty in question is a vital factor, since states may (in the absence of a rule being also one of customary law)be bound only by their consent. Treaties are in this sense contracts between states and if they do not receive the consent of the various states, their provisions will not be binding upon them. There are, however, a number of ways in which a state may express its consent to an international agreement. It may be signaled, according to article 11, by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession. In addition, it may be accomplished by any other means, if so agreed.

Consent by signature: 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. The act of signature is usually a formal affair. Often in the more important treaties, the head of state will formally add his signature in an elaborate ceremony. In multilateral conventions, a special closing session will be held at which authorized representatives will sign the treaty. However, where the convention is subject to acceptance, approval or ratification, signature will in principle be a formality and will mean no more than that state representatives have agreed upon an acceptable text, which will be forwarded to their particular governments for the necessary decision asto acceptance or rejection. However, signature has additional meaning in that in such cases and pending ratification, acceptance or

approval, a state must refrain from acts which would defeat the object and purpose of the treaty until such time as its intentions with regard to the treaty have been made clear.

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. The advantages of waiting until a state ratifies a treaty before it becomes a binding document are basically twofold, internal and external. In the latter case, the delay between signature and ratification may often be advantageous in allowing extra time for consideration, once the negotiating process has been completed. But it is the internal aspects that are the most important, for they reflect the change in political atmosphere that has occurred in the last 150 years and has led to a much greater participation by a state's population in public affairs. By providing for ratification, the feelings of public opinion have an opportunity to be expressed with the possibility that a strong negative reaction may result in the state deciding not to ratify the treaty under consideration.

The rules relating to ratification vary from country to country. In the United Kingdom, although the power of ratification comes within the prerogative of the Crown, it has become accepted that treaties involving any change in municipal law, or adding to the financial burdens of the government or having an impact upon the private rights of British subjects will be first submitted to Parliament and subsequently ratified. There is, in fact, a procedure known as the Ponson by Rule which provides that all treaties subject to ratification are laid before Parliament at least twenty-one days before the actual ratification takes place. Different considerations apply in the case of the United States. However, the question of how a state effects ratification is a matter for internal law alone and outside international law.

Article 14 of the 1969 Vienna Convention notes that ratification will express a state's consent to be bound by a treaty where the treaty so provides; it is otherwise established that the negotiating states were agreed that ratification should be required; the representative of the state has signed the treaty subject to ratification or the intention of the state to sign the treaty subject to ratification appears from the full powers of its representative or was expressed during negotiations. Within this framework, there is a controversy as to which treaties need to be ratified. Some writers maintain that ratification is only necessary if it is clearly contemplated by the parties to the treaty, and this approach has been adopted by the United Kingdom. On the other hand, it has been suggested that ratification should be required unless the treaty clearly reveals a contrary intention. The United States, in general, will dispense with ratification only in the case of executive agreements. Ratification in the case of bilateral treaties is usually accomplished by exchanging the requisite instruments, but in the case of multilateral treaties the usual procedure is for one party to collect the ratifications of all states, keeping all parties informed of the situation. It is becoming more accepted that in such instances, the Secretary-General of the United Nations will act as the depositary for ratifications. In some cases, signatures to treaties may be declared subject to 'acceptance' or 'approval'. The terms, as noted in articles 11 and 14(2), are very similar to ratification and similar provisions apply. Such variation in terminology is not of any real significance and only refers to a somewhat simpler form of ratification.

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, which 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. Where a state is satisfied with most of the terms of a treaty, but is unhappy about particular provisions, it may, in certain circumstances, wish to refuse to accept or be bound by such provisions, while consenting to the rest of the agreement. By the device of excluding certain provisions, states may agree to be bound by a treaty which otherwise they might reject entirely. This may have beneficial results in the cases of multilateral conventions, by inducing as many states as possible to adhere to the proposed treaty. To some extent it is a means of encouraging harmony amongst states of widely differing social, economic and political systems, by concentrating upon agreed, basic issues and accepting disagreement on certain other matters.

The capacity of a state to make reservations to an international treaty illustrates the principle of sovereignty of states, whereby a state may refuse its consent to particular provisions so that they do not become binding upon it. On the other hand, of course, to permit a treaty to become honeycombed with reservations by a series of countries could well jeopardize the whole exercise. It could seriously dislocate the whole purpose of the agreement and lead to some complicated inter-relationships amongst states. This problem does not arise in the case of bilateral treaties, since a reservation by one party to a proposed term of the agreement would necessitate a renegotiation. An agreement between two parties cannot exist where one party refuses to accept some of the provisions of the treaty. This is not the case with respect to multilateral treaties, and here it is possible for individual states to dissent from particular provisions, by announcing their intention either to omit them altogether, or understand them in a certain way. Accordingly, the effect of a reservation is simply to exclude the treaty provision to which the reservation has been made from the terms of the treaty in force between the parties.

Reservations must be distinguished from other statements made with regard to a treaty that are not intended to have the legal effect of a reservation, such as understandings, political statements or interpretative declarations. In the latter instance, no binding consequence is intended with regard to the treaty in question. What is involved is a political manifestation for primarily internal effect that is not binding upon the other parties. A distinction has been drawn between ‘mere’ interpretative declarations and ‘qualified’ interpretative declarations, with the latter category capable in certain circumstances of constituting reservations. Another way of describing this is to draw a distinction between ‘simple interpretative declarations’ and ‘conditional

interpretative declarations'. The latter is described in the ILC Guide to Practice as referring to a situation where the state subjects its consent to be bound by the treaty to a specific interpretation of the treaty, or specific provisions of it.

In order to determine whether a unilateral statement made constitutes a reservation or an interpretative declaration, the statement will have to be interpreted in good faith in accordance with the ordinary meaning to be given to its terms and within the context of the treaty in question. The intention of the state making the statement at that time will also need to be considered. In the special case of a bilateral treaty, an interpretative declaration made by one party which is accepted by the other party will constitute an authoritative interpretation of that treaty.

The general rule that became established was that reservations could only be made with the consent of all the other states involved in the process. This was to preserve as much unity of approach as possible to ensure the success of an international agreement and to minimize deviations from the text of the treaty. This reflected the contractual view of the nature of a treaty, and the League of Nations supported this concept. The effect of this was that a state wishing to make a reservation had to obtain the consent of all the other parties to the treaty. If this was not possible, that state could either become a party to the original treaty (minus the reservation, of course) or not become a party at all. However, this restrictive approach to reservations was not accepted by the International Court of Justice in the Reservations to the Genocide Convention case. This was an advisory opinion by the Court, requested by the General Assembly after some states had made reservations to the 1948GenocideConvention, which contained no clause permitting such reservations, and a number of objections were made.

The Court held that: *a state which has made and maintained a reservation which has been objected to by one or more parties to the Convention but not by others, can be regarded as being a party to the Convention if the reservation is compatible with the object and purpose of the Convention.* Compatibility, in the Court's opinion, could be decided by states individually since it was noted that: *if a party to the Convention objects to a reservation which it consider sincompatible with the object and purpose of the Convention, it can . . . consider that the reserving state is not a party to the Convention.*

The Court did emphasize the principle of the integrity of a convention, but pointed to a variety of special circumstances with regard to the Genocide Convention in question, which called for a more flexible interpretation of the principle. These circumstances included the universal character of the UN under whose auspices the Convention had been concluded; the extensive participation envisaged under the Convention; the fact that the Convention had been the product of a series of majority votes; the fact that the principles underlying the Convention were general principles already binding upon states; that the Convention was clearly intended by the UN and the parties to be definitely universal in scope and that it had been adopted for a purely humanitarian purpose so that state parties did not have interests of their own but a common interest. All these factors militated for a flexible approach in this case. The Court's approach, although having some potential disadvantages, was in keeping with the move to increase the acceptability and scope of treaties and with the trend in international organisations away from the unanimity rule in decision-making and towards majority voting. The 1969 Convention on the Law of Treaties accepted the Court's views.

Entry into force of treaties: Basically treaties will become operative when and how the negotiating states decide, but in the absence of any provision or agreement regarding this, a treaty will enter into force as soon as consent to be bound by the treaty has been established for all the negotiating states. In many cases, treaties will specify that they will come into effect upon a certain date or after a determined period following the last ratification. It is usual where multilateral conventions are involved to provide for entry into force upon ratification by a fixed number of states, since otherwise large multilateral treaties may be prejudiced. The Geneva Convention on the High Seas, 1958, for example, provides for entry into force on the thirtieth day following the deposit of the twenty-second instrument of ratification with the United Nations Secretary-General, while the Convention on the Law of Treaties, 1969 itself came into effect thirty days after the deposit of the thirty-fifth ratification and the Rome Statute for the International Criminal Court required sixty ratifications. Of course, even though the necessary number of ratifications has been received for the treaty to come in to operation, only those states that have actually ratified the treaty will be bound. It will not bind those that have merely signed it, unless of course, signature is in the particular circumstances regarded as sufficient to express the consent of the state to be bound.

Article 80 of the 1969 Convention (following article 102 of the United Nations Charter) provides that after their entry into force, treaties should be transmitted to the United Nations Secretariat for registration and publication. These provisions are intended to end the practice of secret treaties, which was regarded as contributing to the outbreak of the First World War, as well as enabling the United Nations Treaty Series, which contains all registered treaties, to be as comprehensive as possible.

The application of treaties: Once treaties enter into force, a number of questions can arise as to the way in which they apply in particular situations. In the absence of contrary intention, the treaty will not operate retroactively so that its provisions will not bind a party as regards any facts, acts or situations prior to that state's acceptance of the treaty. Unless a different intention appears from the treaty or is otherwise established, article 29 provides that a treaty is binding upon each party in respect of its entire territory. This is the general rule, but it is possible for a state to stipulate that an international agreement will apply only to part of its territory. In the past, so-called 'colonial application clauses' were included in some treaties by the European colonial powers, which declared whether or not the terms of the particular agreement would extend to the various colonies.

With regard to the problem of successive treaties on the same subject matter, article 30 provides that:*1. Subject to article 103 of the Charter of the United Nations, the rights and obligations of states parties to successive treaties relating to the same subject-matter shall be determined in accordance with the following paragraphs.2. When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.4. When the parties to the later treaty do not include all the parties to the earlier one:(a) as between states parties to both treaties the same rule applies as in paragraph 3;(b) as between a state party to both treaties and a state party to only one of the treaties, the treaty to which both states are parties governs their mutual rights and obligations.5. Paragraph 4 is without prejudice to article 41, or to any question of the termination or suspension of the operation of a treaty under article 60118 or to any question of responsibility which may arise for a state from*

the conclusion or application of a treaty, the provisions of which are incompatible with its obligations towards another state under another treaty.

The problem raised by successive treaties is becoming a serious one with the growth in the number of states and the increasing number of treaties entered into, and the added complication of enhanced activity at the regional level. The rules laid down in article 30 provide a general guide and in many cases the problem will be resolved by the parties themselves expressly.

Third states: A point of considerable interest with regard to the creation of binding rules of law for the international community centers on the application and effects of treaties upon third states, i.e. states, which are not parties to the treaty in question. The general rule is that international agreements bind only the parties to them. The reasons for this rule can be found in the fundamental principles of the sovereignty and independence of states, which posit that states must consent to rules before they can be bound by them. This, of course, is a general proposition and is not necessarily true in all cases. However, it does remain as a basic line of approach in international law. Article 34 of the Convention echoes the general rule in specifying that 'a treaty does not create either obligations or rights for a third state without its consent'.

It is quite clear that a treaty cannot impose obligations upon third states and this was emphasized by the International Law Commission during its deliberations prior to the Vienna Conferences and Convention. There is, however, one major exception to this and that is where the provisions of the treaty in question have entered into customary law. In such a case, all states would be bound, regardless of whether they had been parties to the original treaty or not. One example of this would be the laws relating to warfare adopted by the Hague Conventions earlier this century and now regarded as part of customary international law. This point arises with regard to article 2(6) of the United Nations Charter which states that: *the organisation shall ensure that states which are not members of the United Nations act in accordance with these principles so far as may be necessary for the maintenance of international peace and security.*

It is sometimes maintained that this provision creates binding obligations rather than being merely a statement of attitude with regard to non-members of the United Nations. This may be the correct approach since the principles enumerated in article 2 of the Charter can be regarded as part of customary international law, and in view of the fact that an agreement may legitimately provide for enforcement sanctions to be implemented against a state guilty of aggression. Article

75 of the Convention provides: *the provisions of the Convention are without prejudice to any obligation in relation to a treaty which may arise for an aggressor state in consequence of measures taken in conformity with the Charter of the United Nations with reference to that state's aggression*.

Article 35 notes that an obligation may arise for a third state from a term of a treaty if the parties to the treaty so intend and if the third state expressly accepts that obligation in writing. As far as rights allocated to third states by a treaty are concerned, the matter is a little different. The Permanent Court of International Justice declared in the Free Zones case that: *the question of the existence of a right acquired under an instrument drawn between other states is . . . one to be decided in each particular case: it must be ascertained whether the states which have stipulated in favor of a third state meant to create for that state an actual right which the latter has accepted as such.*

Article 36 of the Vienna Convention provides that: *a right arises for a third state from a provision of a treaty if the parties to the treaty intend the provision to accord that right either to the third state, or to a group of states to which it belongs, or to all states, and the third state as sent thereto. Its assent shall be presumed so long as the contrary is not indicated, unless the treaty otherwise provides.*

Further, particular kinds of treaties may create obligations or rights *erga omnes* and in such cases, all states would presumptively be bound by them and would also benefit. Examples might include multilateral treaties establishing a particular territorial regime, such as the Suez and Kiel Canals or the Black Sea Straits. In the Wimbledon case, the Permanent Court noted that 'an international waterway . . . for the benefit of all nations of the world' had been established. In other words, for an obligation to be imposed by a treaty upon a third state, the express agreement of that state in writing is required, whereas in the case of benefits granted to third states, their assent is presumed in the absence of contrary intention. This is because the general tenor of customary international law has leaned in favor of the validity of rights granted to third states, but against that of obligations imposed upon them, in the light of basic principles relating to state sovereignty, equality and non-interference.

The amendment and modification of treaties: Although the two processes of amending and modifying international agreements share a common aim in that they both involve the revision of

treaties, they are separate activities and may be accomplished in different manners. Amendments refer to the formal alteration of treaty provisions, affecting all the parties to the particular agreement, while modifications relate to variations of certain treaty terms as between particular parties only. Where it is deemed desirable, a treaty may be amended by agreement between the parties, but in such a case all the formalities as to the conclusion and coming into effect of treaties as described so far in this chapter will have to be observed except in so far as the treaty may otherwise provide. It is understandable that as conditions change, the need may arise to alter some of the provisions stipulated in the international agreement in question. There is nothing unusual in this and it is a normal facet of international relations. The fact that such alterations must be effected with the same formalities that attended the original formation of the treaty is only logical since legal rights and obligations may be involved and any variation of them involves considerations of state sovereignty and consent which necessitate careful interpretation and attention. It is possible, however, for oral or tacit agreement to amend, providing it is unambiguous and clearly evidenced. Many multilateral treaties lay down specific conditions as regards amendment. For example, the United Nations Charter in article 108 provides that amendments will come into force for all member states upon adoption and ratification by two-thirds of the members of the organisation, including all the permanent members of the Security Council.

Problems can occur where, in the absence of specific amendment processes, some of the parties oppose the amendments proposed by others. Article 40 of the Vienna Convention specifies the procedure to be adopted in amending multilateral treaties, in the absence of contrary provisions in the treaty itself. Any proposed amendment has to be notified to all contracting states, each one of which is entitled to participate in the decision as to action to be taken and in the negotiation and conclusion of any agreements. Every state which has the right to be a party to the treaty possesses also the right to become a party to the amendment, but such amendments will not bind any state which is a party to the original agreement and which does not become a party to the amended agreement, subject to any provisions to the contrary in the treaty itself. The situation can become a little more complex where a state becomes a party to the treaty after the amendments have come into effect. That state will be a party to the amended agreement, except as regards parties to the treaty that are not bound by the amendments. In this case the state will be considered as a party to the unamend treaty in relation to those states.

Two or more parties to a multilateral treaty may decide to change that agreement as between themselves in certain ways, quite irrespective of any amendment by all the parties. This technique, known as modification, is possible provided it has not been prohibited by the treaty in question and provided it does not affect the rights or obligations of the other parties. Modification, however, is not possible where the provision it is intended to alter is one 'derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole'. A treaty may also be modified by the terms of another later agreement or by the establishment subsequently of a rule of *jus cogens*.

Treaty interpretation: One of the enduring problems facing courts and tribunals and lawyers, both in the municipal and international law spheres, relates to the question of interpretation. Accordingly, rules and techniques have been put forward to aid judicial bodies in resolving such problems. As far as international law is concerned, there are three basic approaches to treaty interpretation. The first centers on the actual text of the agreement and emphasizes the analysis of the words used. The second looks to the intention of the parties adopting the agreement as the solution to ambiguous provisions and can be termed the subjective approach in contradistinction to the objective approach of the previous school. The third approach adopts a wider perspective than the other two and emphasizes the object and purpose of the treaty as the most important backcloth against which the meaning of any particular treaty provision should be measured. This teleological school of thought has the effect of underlining the role of the judge or arbitrator, since he will be called upon to define the object and purpose of the treaty, and it has been criticized for encouraging judicial law-making. Nevertheless, any true interpretation of a treaty in international law will have to take into account all aspects of the agreement, from the words employed to the intention of the parties and the aims of the particular document. It is not possible to exclude completely any one of these components.

Invalidity, termination and suspension of the operation of treaties: General provisions: Article 42 states that the validity and continuance in force of a treaty may only be questioned on the basis of the provisions in the Vienna Convention. Article 44 provides that a state may only withdraw from or suspend the operation of a treaty in respect of the treaty as a whole and not particular parts of it, unless the treaty otherwise stipulates or the parties otherwise agree. If the appropriate ground for invalidating, terminating, withdrawing from or suspending the operation

of a treaty relates solely to particular clauses, it may only be invoked in relation to those clauses where:*(a) the said clauses are separable from the remainder of the treaty with regard to their application;(b) it appears from the treaty or is otherwise established that acceptance of those clauses was not an essential basis of consent of the other party or parties to be bound by the treaty as a whole; and(c) continued performance of the remainder of the treaty would not be unjust.* Thus the Convention adopts a cautious approach to the general issue of separability of treaty provisions in this context.

Article 45 in essence provides that a ground for invalidity, termination, withdrawal or suspension may no longer be invoked by the state where, after becoming aware of the facts, it expressly agreed that the treaty is valid or remains in force or by reason of its conduct may be deemed to have acquiesced in the validity of the treaty or its continuance in force.

Invalidity of treaties/ Municipal law: A state cannot plead a breach of its constitutional provisions as to the making of treaties as a valid excuse for condemning an agreement. There has been for some years disagreement amongst international lawyers as to whether the failure to abide by a domestic legal limitation by, for example, a head of state in entering into a treaty, will result in rendering the agreement invalid or not. The Convention took the view that in general it would not, but that it could in certain circumstances. Article 46(1) provides that: *state may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.*

Violation will be regarded as manifest if it would be 'objectively evident' to any state conducting itself in the matter in accordance with normal practice, and in good faith. For example, where the representative of the state has had his authority to consent on behalf of the state made subject to a specific restriction which is ignored, the state will still be bound by that consent save where the other negotiating states were aware of the restriction placed upon his authority to consent prior to the expression of that consent. This particular provision applies as regards a person authorized to represent a state and such persons are defined in article 7 to include heads of state and government and foreign ministers in addition to persons possessing full powers.

Error: Unlike the role of mistake in municipal laws of contract, the scope in international law of error as invalidating a state's consent is rather limited. In view of the character of states and the multiplicity of persons actually dealing with the negotiation and conclusion of treaties, errors are not very likely to happen, whether they be unilateral or mutual. Article 48 declares that a state may only invoke an error in a treaty as invalidating its consent to be bound by the treaty, if the error relates to a fact or situation which was assumed by that state to exist at the time when the treaty was concluded and formed an essential basis of its consent to be bound by the treaty. But if the state knew or ought to have known of the error, or if it contributed to that error, then it cannot afterwards free itself from the obligation of observing the treaty by pointing to that error.

Fraud and corruption: Where a state consents to be bound by a treaty as a result of the fraudulent conduct of another negotiating state, that state may under article 49 invoke the fraud as invalidating its consent to be bound. Where a negotiating state directly or indirectly corrupts the representative of another state in order to obtain the consent of the latter to the treaty, which corruption may under article 50 be invoked as invalidating the consent to be bound.

Coercion: Of more importance than error, fraud or corruption in the law of treaties Is the issue of coercion as invalidating consent. Where consent has been obtained by coercing the representative of a state, whether by acts or threats directed against him, it shall, according to article 51 of the Convention, be without any legal effect. The problem of consent obtained by the application of coercion against the state itself is a slightly different one. Prior to the League of Nations, it was clear that international law did not provide for the invalidation of treaties on the grounds of the use or threat of force by one party against the other and this was a consequence of the lack of rules in customary law prohibiting recourse to war. With the signing of the Covenant of the League in 1919, and the Kellogg–Briand Pact in 1928 forbidding the resort to war to resolve international disputes, a new approach began to be taken with regard to the illegality of the use of force in international relations. With the elucidation of the Nuremberg principles and the coming in to effect of the Charter of the United Nations after the Second World War, it became clear that international law condemned coercive activities by states.

Article 2(4) of the United Nations Charter provides that: *[a]ll members shall refrain in their international relations from the threat or use of force against the territorial integrity or political*

independence of any state, or in any other measure inconsistent with the purposes of the United Nations. It followed that treaties based on coercion of a state should be regarded as invalid.

Accordingly, article 52 of the Convention provides that '[a] treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations'. This article was the subject of much debate in the Vienna Conference preceding the adoption of the Convention. Communist and certain Third World countries argued that coercion comprised not only the threat or use of force but also economic and political pressures. The International Law Commission did not take a firm stand on the issue, but noted that the precise scope of the acts covered by the definition should be left to be determined in practice by interpretation of the relevant Charter provisions. The Vienna Conference, however, issued a Declaration on the Prohibition of Military, Political or Economic Coercion in the Conclusion of Treaties, which condemned the exercise of such coercion to procure the formation of a treaty. These points were not included in the Convention itself, which leaves one to conclude that the application of political or economic pressure to secure the consent of a state to a treaty may not be contrary to international law, but clearly a lot will depend upon the relevant circumstances.

In international relations, the variety of influences which may be brought to bear by a powerful state against a weaker one to induce it to adopt a particular line of policy is wide-ranging and may cover not only coercive threats but also subtle expressions of displeasure. The precise nuances of any particular situation will depend on a number of factors, and it will be misleading to suggest that all forms of pressure are as such violations of international law.

Jus cogens: Article 53 of the Convention provides that*: [a] treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted, and which can be modified only by a subsequent norm of general international law having the same character.*

Article 64 declares that '[i]f a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates'. As noted in chapter 3,194 the concept of *jus cogens*, of fundamental and entrenched rules of international

law, is well established in doctrine now, but controversial as to content and method of creation. The insertion of articles dealing with *jus cogens* in the 1969 Convention underlines the basic principles with regard to treaties.

Consequences of invalidity: Article 69 provides that an invalid treaty is void and without legal force. f acts have nevertheless been performed in reliance on such a treaty, each party may require any other party to establish as far as possible in their mutual relations the position that would have existed if the acts had not been performed. Acts performed in good faith before the invalidity was invoked are not rendered unlawful by reason only of the invalidity of the treaty.

Where a treaty is void under article 53, article 71 provides that the parties are to eliminate as far as possible the consequences of any act performed in reliance on any provision which conflicts with *jus cogens* and bring their mutual relations into conformity with the peremptory norm. Where a treaty terminates under article 64, the parties are released from any obligation further to perform the treaty, but this does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination, provided that the rights, obligations or situations may be maintained thereafter in conformity with the new peremptory norm.

The termination of treaties: There are a number of methods available by which treaties may be terminated or suspended. ***Termination by treaty provision or consent:*** A treaty may be terminated or suspended in accordance with a specific provision in that treaty, or otherwise at any time by consent of all the parties after consultation. Where, however, a treaty contains no provision regarding termination and does not provide for denunciation or withdrawal specifically, a state may only denounce or withdraw from that treaty where the parties intended to admit such a possibility or where the right may be implied by the nature of the treaty. A treaty may, of course, come to an end if its purposes and objects have been fulfilled or if it is clear from its provisions that it is limited in time and the requisite period has elapsed. Where all the parties to a treaty later conclude another agreement relating to the same subject matter, the earlier treaty will be regarded as terminated where it appears that the matter is to be governed by the later agreement or where the provisions of the later treaty are so incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time.

Material breach: There are two approaches to be considered. First, if one state violates an important provision in an agreement, it is not unnatural for the other states concerned to regard that agreement was ended by it. It is in effect a reprisal or countermeasure, a rather unsubtle but effective means of ensuring the enforcement of a treaty. The fact that an agreement may be terminated where it is breached by one party may act as a discouragement to any party that might contemplate a breach of one provision but would be unwilling to forgo the benefits prescribed in others. On the other hand, to render treaties revocable because one party has acted contrary to what might very well be only a minor provision in the agreement taken as a whole, would be to place the states participating in a treaty in rather a vulnerable position. There is a need for flexibility as well as certainty in such situations. Customary law supports the view that something more than a mere breach itself of a term in an agreement would be necessary to give the other party or parties the right to abrogate that agreement.

The relevant provision of the Vienna Convention is contained in article 60, which codifies existing customary law. Article 60(3) declares that a material breach of a treaty consists in either a repudiation of the treaty not permitted by the Vienna Convention or the violation of a provision essential to the accomplishment of the object or purpose of the treaty. Where such a breach occurs in a bilateral treaty, then under article 60(1) the innocent party may invoke that breach as a ground for terminating the treaty or suspending its operation in whole or in part. There is a rather different situation in the case of a multilateral treaty since a number of innocent parties are involved that might not wish the treaty to be denounced by one of them because of a breach by another state.

To cover such situations, article 60(2) prescribes that a material breach of a multilateral treaty by one of the parties entitles:*(a) the other parties by unanimous agreement to suspend the operation ofthe treaty in whole or in part or to terminate it either: (i) in the relations between themselves and the defaulting state, or (ii) as between all the parties; (b) a party specially affected by the breach to invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting state; (c) any party other than the defaulting state to invoke the breach as a ground for suspending the operation of the treaty in whole or in part with respect to itself if the treaty is of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of*

its obligations under the treaty. It is interesting to note that the provisions of article 60 regarding the definition and consequences of a material breach do not apply, by article 60(5), to provisions relating to the 'protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties'. This is because objective and absolute principles are involved and not just reciprocal rights and duties.

Supervening impossibility of performance: Article 61 of the Convention is intended to cover such situations as the submergence of an island, or the drying up of a river where the consequence of such events is to render the performance of the treaty impossible. Where the carrying out of the terms of the agreement becomes impossible because of the 'permanent disappearance or destruction of an object indispensable for the execution of the treaty', a party may validly terminate or withdraw from it. However, where the impossibility is only temporary, it may be invoked solely to suspend the operation of the treaty. Impossibility cannot be used in this way where it arises from the breach by the party attempting to terminate or suspend the agreement of a treaty or other international obligation owed to any other party to the treaty.

Fundamental change of circumstances: The doctrine of *rebus sic stantibus* is a principle in customary international law providing that where there has been a fundamental change of circumstances since an agreement was concluded, a party to that agreement may withdraw from or terminate it. It is justified by the fact that some treaties may remain in force for long periods of time, during which fundamental changes might have occurred. Such changes might encourage one of the parties to adopt drastic measures in the face of a general refusal to accept an alteration in the terms of the treaty. However, this doctrine has been criticized on the grounds that, having regard to the absence of any system for compulsory jurisdiction in the international order, it could operate asa disrupting influence upon the binding force of obligations undertaken by states. It might be used to justify withdrawal from treaties on rather tenuous grounds.

Article 62 of the Vienna Convention, which the International Court of Justice regarded in many respects as a codification of existing customary law, declares that: *1. A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless: (a) the existence of those circumstances*

constituted an essential basis of the consent of the parties to be bound by the treaty; and (b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty. 2. A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty: (a) if the treaty establishes a boundary; or (b) if the fundamental change is the result of a breach by the party invoking it either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty. The article also notes that instead of terminating or withdrawing from a treaty in the above circumstances, a party might suspend the operation of the treaty.

Consequences of the termination or suspension of a treaty Article 70 provides that: *1. Unless the treaty otherwise provides or the parties otherwise agree, the termination of a treaty under its provisions or in accordance with the present Convention:(a) releases the parties from any obligation further to perform the treaty;(b) does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination.2. If a state denounces or withdraws from a multilateral treaty, paragraph1 applies in the relations between that state and each of the other parties to the treaty from the date when such denunciation or withdrawal takes effect.* Article 72 provides that: *1. Unless the treaty otherwise provides or the parties otherwise agree, the suspension of the operation of a treaty under its provisions or in accordance with the present Convention:(a) releases the parties between which the operation of the treaty is suspended from the obligation to perform he treaty in their mutual relations during the period of the suspension;(b) does not otherwise affect the legal relations between the parties established by the treaty.2. During the period of the suspension the parties shall refrain from acts tending to obstruct the resumption of the operation of the treaty.*

Dispute settlement: Article 66 provides that if a dispute has not been resolved within twelve months by the means specified in article 33 of the UN Charter then further procedures will be followed. If the dispute concerns article 53 or 64 (*jus cogens*), any one of the parties may by a written application submit it to the International Court of Justice for a decision unless the parties by common consent agree to submit the dispute to arbitration. If the dispute concerns other issues in the Convention, any one of the parties may by request to the UN Secretary-General set in motion the conciliation procedure laid down in the Annex to the Convention.

Treaties between states and international organisations: The International Law Commission completed Draft Articles on the Law of Treaties between States and International Organisations or between International Organisations in 1982 and the Vienna Convention on the Law of Treaties between States and International Organisations was adopted in 1986. Its provisions closely follow the provisions of the 1969 Vienna Convention mutatis mutandis. However, article 73 of the 1986 Convention notes that 'as between states parties to the Vienna Convention on the Law of Treaties of 1969, the relations of those states under a treaty between two or more states and one or more international organisations shall be governed by that Convention'. Whether this provision affirming the superiority of the 1969 Convention for states will in practice prejudice the interests of international organisations is an open question. In any event, there is no doubt that the strong wish of the Conference adopting the 1986 Convention was for uniformity, despite arguments that the position of international organisations in certain areas of treaty law was difficult to assimilate to that of states.

Special concern in the International Law Commission focused on the effects that a treaty concluded by an international organisation has upon the member states of the organisation. Article 36 b is of the ILC Draft231 provided that: *Obligations and rights arise for states members of an international organization from the provisions of a treaty to which that organization is a party when the parties to the treaty intend those provisions to be the means of establishing such obligations and according such rights and have defined their conditions and effects in the treaty or have otherwise agreed thereon, and if:(a) the states members of the organization, by virtue of the constituent instrument of that organization or otherwise, have unanimously agreed to be bound by the said provisions of the treaty; and(b) the assent of the states members of the organization to be bound by the relevant provisions of the treaty has been duly brought to the knowledge eof the negotiating states and negotiating organizations.*

Such a situation would arise, for example, in the case of a customs union, which was an international organisation, normally concluding tariff agreements to which its members are not parties. Such agreements would be of little value if they were not to be immediately binding on member states.

Chapter Four: - Human Rights and Humanitarian Law

4.1. Human Rights Law

Ideological approaches to human rights in international law: The view adopted by the Western world with regard to international human rights law in general terms has tended to emphasize the basic civil and political rights of individuals, that is to say those rights that take the form of claims limiting the power of government over the governed. Such rights would include due process, freedom of expression, assembly and religion, and political participation in the process of government. The consent of the governed is seen as crucial in this process. The approach of the Soviet Union was to note the importance of basic rights and freedoms for international peace and security, but to emphasize the role of the state. Indeed, the source of human rights principles was seen as the state. Tunkin wrote that the content of the principle of respect for human rights in international law may be expressed in three propositions:*(1) all states have a duty to respect the fundamental rights and freedoms of all persons within their territories; (2) states have a duty not to permit discrimination by reason of sex, race, religion or language, and (3) states have a duty to promote universal respect for human rights and to co-operate with each other to achieve this objective.*

In other words, the focus was not upon the individual (as in Western conceptions of human rights) but solely upon the state. Human rights were not directly regulated by international law and individuals were not subjects of international law. Indeed, human rights were implemented by the state and matters basically and crucially within the domestic affairs of the state. As Tunkin emphasized, 'conventions on human rights do not grant rights directly to individuals'. Having stressed the central function of the state, the point was also made that the context of the international human rights obligations themselves was defined solely by the state in the light of the socio-economic advancement of that state. Accordingly, the nature and context of those rights would vary from state to state, depending upon the social system of the state in question. It was the particular socio-economic system of a state that would determine the concrete expression of an international human rights provision. In other words, the Soviet Union was able and willing to enter into many international agreements on human rights, on the basis that only a state obligation was incurred, with no direct link to the individual, and that such an obligation was one that the country might interpret in the light of its own socio-economic system. The supremacy or

centrality of the state was the key in this approach. As far as the different kinds of human rights were concerned, the Soviet approach was to stress those dealing with economic and social matters and thus to minimize the importance of the traditional civil and political rights. However, a new approach to the question of international human rights began to emerge by the end of the 1980s, reflecting the changes taking place politically. In particular, the USSR began to take a different approach with regard to human rights treaties.

The general approach of the Third World states has combined elements of both the previous perceptions. Concern with the equality and sovereignty of states, together with a recognition of the importance of social and economic rights, has characterized the Third World view. Such countries, in fact constituting a wide range of nations with differing interests and needs, and at different stages of development, have been much influenced by decolonization and the struggle to obtain it and by the phenomenon of apartheid in South Africa. In addition, economic problems have played a large role in focusing their attention upon general developmental issues.

Accordingly, the traditional civil and political rights have tended to lose their priority in the concerns of Third World states. Of particular interest is the tension between the universalism of human rights and the relativism of cultural traditions. This has led to arguments by some adherents of the latter tendency that human rights can only be approached within the context of particular cultural or religious traditions, thus criticizing the view that human rights are universal or transcultural. The danger, of course, is that states violating human rights that they have accepted by becoming parties to human rights treaties, as well as being bound by relevant customary international law, might seek to justify their actions by pleading cultural differences.

The development of international human rights law: In the nineteenth century, the positivist doctrines of state sovereignty and domestic jurisdiction reigned supreme. Virtually all matters that today would be classified as human rights issues were at that stage universally regarded as within the internal sphere of national jurisdiction. The major exceptions to this were related to piracy *jure gentium* and slavery. In the latter case a number of treaties were entered into to bring about its abolition. Concern also with the treatment of sick and wounded soldiers and with prisoners of war developed as from 1864 in terms of international instruments, while states were required to observe certain minimum standards in the treatment of aliens. In addition, certain agreements of a general welfare nature were beginning to be adopted by the turn of the century.

The nineteenth century also appeared to accept a right of humanitarian intervention, although its range and extent were unclear. An important change occurred with the establishment of the League of Nations in 1919. Article 22 of the Covenant of the League set up the mandates system for peoples in ex-enemy colonies 'not yet able to stand by themselves in the strenuous conditions of the modern world'. The mandatory power was obliged to guarantee freedom of conscience and religion and a Permanent Mandates Commission was created to examine the reports the mandatory authorities had undertaken to make.

The arrangement was termed 'a sacred trust of civilization'. Article 23 of the Covenant provided for just treatment of the native populations of the territories in question. The 1919 peace agreements with Eastern European and Balkan states included provisions relating to the protection of minorities, providing essentially for equality of treatment and opportunities for collective activity. These provisions were supervised by the League of Nations, to whom there was a right of petition. Part XIII of the Treaty of Versailles provided for the creation of the International Labor Organisation, among the purposes of which were the promotion of better standards of working conditions and support for the right of association. The impact of the Second World War upon the development of human rights law was immense as the horrors of the war and the need for an adequate international system to maintain international peace and protect human rights became apparent to all.

In addition, the rise of non-governmental organisations, particularly in the sphere of human rights, has had an immense effect. While the post-Second World War world witnessed the rise of intergovernmental committees and organs and courts to deal with human rights violations, whether by public debate, states' reports, comments, inter-state or individual petition procedures, recent years have seen the interposition of domestic amnesty laws and this has given rise to the question of the acceptability of impunity. Further developments have included the establishments of truth and reconciliation commissions and various other alternative justice systems such as the Rwandan *Gaccaca* court system, while the extent to which participants in the international legal system apart from states have become involved both in the process of formulating and seeking the implementation of human rights and in being the subjects of human rights concern and regulation is marked.

4.2. Humanitarian Law

International humanitarian law: In addition to prescribing laws governing resort to force (*jus ad bellum*), international law also seeks to regulate the conduct of hostilities (*jus inbello*). These principles cover, for example, the treatment of prisoners of war, civilians in occupied territory, sick and wounded personnel, prohibited methods of warfare and human rights in situations of conflict. This subject was originally termed the laws of war and then the laws of armed conflict. More recently, it has been called international humanitarian law. Although international humanitarian law is primarily derived from a number of international conventions, some of these represent in whole or in part rules of customary international law, and it is possible to say that a number of customary international law principles exist over and above conventional rules, although international humanitarian law is one of the most highly codified parts of international law. Reliance upon relevant customary international law rules is particularly important where one or more of the states involved in a particular conflict is not a party to a pertinent convention. A good example of this relates to the work of the Eritrea–Ethiopia Claims Commission, which noted that since Eritrea did not become a party to the four Geneva Conventions of 1949 until 14 August 2000, the applicable law before that date for relevant claims was customary international humanitarian law.

On the other hand, treaty provisions that cannot be said to be part of customary international law will bind only those states that are parties to them. This is particularly important with regard to some provisions deemed controversial by some states contained in Additional Protocols I and II to the Geneva Conventions, 1949. One additional factor that has emerged recently has been the growing convergence between international humanitarian law and international human rights law. This is discussed below.

Development: The law in this area developed from the middle of the nineteenth century. In 1864, as a result of the pioneering work of Henry Dunant, who had been appalled by the brutality of the battle of Solferino five years earlier, the Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field was adopted. This brief instrument was revised in 1906. In 1868 the Declaration of St Petersburg prohibited the use of small explosive or incendiary projectiles. The laws of war were codified at the Hague Conferences of 1899 and 1907.

A series of conventions were adopted at these conferences concerning land and naval warfare, which still form the basis of the existing rules. It was emphasized that belligerents remained subject to the law of nations and the use of force against undefended villages and towns was forbidden. It defined those entitled to belligerent status and dealt with the measures to be taken as regards occupied territory. There were also provisions concerning the rights and duties of neutral states and persons in case of war, and an emphatic prohibition on the employment of 'arms, projectiles or material calculated to cause unnecessary suffering'. However, there were inadequate means to implement and enforce such rules with the result that much appeared to depend on reciprocal behavior, public opinion and the exigencies of morale. A number of conventions in the inter-war period dealt with rules concerning the wounded and sick in armies in the field and prisoners of war. Such agreements were replaced by the Four Geneva 'Red Cross' Conventions of 1949 which dealt respectively with the amelioration of the condition of the wounded and sick in armed forces in the field, the amelioration of the condition of wounded, sick and shipwrecked members of the armed forces at sea, the treatment of prisoners of war and the protection of civilian persons in time of war. The Fourth Convention was an innovation and a significant attempt to protect civilians who, as a result of armed hostilities or occupation, were in the power of a state of which they were not nationals.

The foundation of the Geneva Conventions system is the principle that persons not actively engaged in warfare should be treated humanely. A number of practices ranging from the taking of hostages to torture, illegal executions and reprisals against persons protected by the Conventions are prohibited, while a series of provisions relate to more detailed points, such as the standard of care of prisoners of war and the prohibition of deportations and indiscriminate destruction of property in occupied territory. In 1977, two Additional Protocols to the 1949 Conventions were adopted. These built upon and developed the earlier Conventions. While many provisions may be seen as reflecting customary law, others do not and thus cannot constitute obligations upon states that are not parties to either or both of the Protocols. Protocol III was adopted in 2005 and introduced a third emblem to the two previously recognized ones (the Red Cross and the Red Crescent) in the form of a red diamond within which either a Red Cross or Red Crescent, or another emblem which has been in effective use by a High Contracting Party and was the subject of a communication to the other High Contracting Parties and the International Committee of the Red Cross through the depositary prior to the adoption of this

Protocol, may be inserted. This allows in particular for the use of the Israeli Red Magen David (Shield of David) symbol.

The International Court of Justice has noted that the 'Law of the Hague', dealing primarily with inter-state rules governing the use of force or the 'laws and customs of war' as they were traditionally termed, and the 'Law of Geneva', concerning the protection of persons from the effects of armed conflicts, 'have become so closely interrelated that they are considered to have gradually formed one single complex system, known today as international humanitarian law'.

The scope of protection under international humanitarian law: The rules of international humanitarian law seek to extend protection to a wide range of persons, but the basic distinction drawn has been between combatants and those who are not involved in actual hostilities. Common article 2 of the Geneva Conventions provides that the Conventions 'shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties even if the state of war is not recognized by them . . . [and] to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance'. The rules contained in these Conventions cannot be renounced by those intended to benefit from them, thus precluding the possibility that the power which has control over them may seek to influence the persons concerned to agree to a mitigation of protection.

The wounded and sick: The First Geneva Convention concerns the Wounded and Sick on Land and emphasizes that member of the armed forces and organized militias, including those accompanying them where duly authorized, 'shall be respected and protected in all circumstances'. They are to be treated humanely by the party to the conflict into whose power they have fallen on a non-discriminatory basis and any attempts upon their lives or violence to their person is strictly prohibited. Torture or biological experimentation is forbidden, nor are such persons to be willfully left without medical assistance and care. The wounded and sick of a belligerent who fall in to enemy hands are also to be treated as prisoners of war. Further, the parties to a conflict shall take all possible measures to protect the wounded and sick and ensure their adequate care and to 'search for the dead and prevent their being despoiled'. The parties to the conflict are to record as soon as possible the details of any wounded, sick or dead persons of the adversary party and to transmit them to the other side through particular means. This

Convention also includes provisions as to medical units and establishments, noting in particular that these should not be attacked, and deals with the recognized emblems (i.e. the Red Cross, the Red Crescent and, after Protocol III, the Red Diamond).

The Second Geneva Convention concerns the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea and is very similar to the First Convention, for instance in its provisions that members of the armed forces and organized militias, including those accompanying them where duly authorized, and who are sick, wounded or shipwrecked are to be treated humanely and cared for on a non-discriminatory basis, and that attempts upon their lives and violence and torture are prohibited. The Convention also provides that hospital ships may in no circumstances be attacked or captured but respected and protected. The provisions in these Conventions were reaffirmed in and supplemented by Protocol I, 1977, Parts I and II. Article 1(4), for example, supplements common article 2 contained in the Conventions and provides that the Protocol is to apply in armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes as enshrined in the UN Charter and the Declaration on Principles of International Law, 1970.

Prisoners of war: The Third Geneva Convention of 1949 is concerned with prisoners of war, and consists of a comprehensive code centered upon the requirement of humane treatment in all circumstances. The definition of prisoners of war in article 4, however, is of particular importance since it has been regarded as the elaboration of combatant status. It covers members of the armed forces of a party to the conflict (as well as members of militias and other volunteer corps forming part of such armed force) and members of other militias and volunteer corps, including those of organized resistance movements, belonging to a party to the conflict providing the following conditions are fulfilled: (a) being commanded by a person responsible for his subordinates; (b) having a fixed distinctive sign recognizable at a distance;(c) carrying arms openly; (d) conducting operations in accordance with the laws and customs of war. This article reflected the experience of the Second World War, although the extent to which resistance personnel were covered was constrained by the need to comply with the four conditions. Since 1949, the use of guerrillas spread to the Third World and the decolonization experience. Accordingly, pressures grew to expand the definition of combatants entitled to prisoner of war status to such persons, who as practice demonstrated rarely complied with the four conditions.

States facing guerrilla action, whether the colonial powers or others such as Israel, objected. Articles 43 and 44 of Protocol I, 1977, provide that combatants are members of the armed forces of a party to an international armed conflict. Such armed forces consist of all organized armed units under an effective command structure which enforces compliance with the rules of international law applicable in armed conflict. Article 44(3) further notes that combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack. When an armed combatant cannot so distinguish himself, the status of combatant may be retained provided that arms are carried openly during each military engagement and during such time as the combatant is visible to the adversary while engaged in a military deployment preceding the launching of an attack. This formulation is clearly controversial and was the subject of many declarations in the vote at the conference producing the draft.

Article 5 also provides that where there is any doubt as to the status of any person committing a belligerent act and falling into the hands of the enemy, 'such person shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal'. This formulation was changed somewhat in article 45 of Protocol I. This provides that a person who takes part in hostilities and falls into the power of an adverse party 'shall be presumed to be a prisoner of war and therefore shall be protected by the Third Convention'. The term 'unlawful combatant', therefore, refers to a person who fails the tests laid down in articles 43 and 44, after due determination of status, and who would not be entitled to the status of prisoner of war under international humanitarian law. Such a person, who would thus be a civilian, would be protected by the basic humanitarian guarantees laid down in articles 45(3) and 75 of Protocol I and by the general principles of international human rights law in terms of his/her treatment upon capture. However, since such a person would not have the status of a prisoner of war, he would not benefit from the protections afforded by such status and would thus be liable to prosecution under the normal criminal law.

The framework of obligations covering prisoners of war is founded upon 'the requirement of treatment of POWs as human beings', while 'At the core of the Convention regime are legal obligations to keep POWs alive and in good health.' Article 13 provides that prisoners of war must at all times be humanely treated and must at all times be protected, particularly against acts

of violence or intimidation and against 'insults and public curiosity'. This means that displaying prisoners of war on television in a humiliating fashion confessing to 'crimes' or criticizing their own government must be regarded as a breach of the Convention. Measures of reprisal against prisoners of war are prohibited. Article 14 provides that prisoners of war are entitled in all circumstances to respect for their persons and their honor.

Prisoners of war are bound only to divulge their name, date of birth, rank and serial number. Article 17 provides that 'no physical or mental torture, nor any other form of coercion, may be inflicted . . . to secure from them information of any kind whatever. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to unpleasant or disadvantageous treatment of any kind.' Once captured, prisoners of war are to be evacuated as soon as possible to camps situated in an area far enough from the combat zone for them to be out of danger, while article 23 stipulates that 'no prisoner of war may at any time be sent to, or detained in, areas where he may be exposed to the fire of the combat zone, nor may his presence be used to render certain points or areas immune from military operations'. Prisoners of war are subject to the laws and orders of the state detaining them. They may be punished for disciplinary offences and tried for offences committed before capture, for example for war crimes. They may also be tried for offences committed before capture against the law of the state holding them. Other provisions of this Convention deal with medical treatment, religious activities, discipline, labor and relations with the exterior. Article 118 provides that prisoners of war shall be released and repatriated without delay after the cessation of hostilities. The Convention on prisoners of war applies only to international armed conflicts, but article 3 (which is common to the four Conventions) provides that as a minimum 'persons . . . including members of armed forces, who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely'.

Protection of civilians and occupation: The Fourth Geneva Convention is concerned with the protection of civilians in time of war and builds upon the Hague Regulations (attached to Hague Convention IV on the Law and Customs of War on Land, 1907). This Geneva Convention, which marked an extension to the pre-1949 rules, is limited under article 4 to those persons, 'who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a party to the conflict or occupying power of which they are not

nationals'. The Convention comes into operation immediately upon the outbreak of hostilities or the start of an occupation and ends at the general close of military operations. Under article 50(1) of Protocol I, 1977, a civilian is defined as any person not a combatant, and in cases of doubt a person is to be considered a civilian. The Fourth Convention provides a highly developed set of rules for the protection of such civilians, including the right to respect for person, honor, convictions and religious practices and the prohibition of torture and other cruel, inhuman or degrading treatment, hostage-taking and reprisals. The wounded and sick are the object of particular protection and respect and there are various judicial guarantees as to due process.

The protection of civilians in occupied territories is covered in section III of Part III of the Fourth Geneva Convention, but what precisely occupied territory is may be open to dispute. Article 42 of the Hague Regulations provides that territory is to be considered as occupied 'when it is actually placed under the authority of the hostile army' and that the occupation only extends to the territory 'where such authority has been established and can be exercised', while article 2(2) of the Convention provides that it is to apply to all cases of partial or total occupation 'of the territory of a High Contracting Party, even if the said occupation meets with no resistance'. The International Court in the Democratic Republic of the Congo v. Uganda case noted that in order to determine whether a state whose forces are present on the territory of another state is an occupying power, one must examine whether there is sufficient evidence to demonstrate that the said authority was in fact established and exercised by the intervening state in the areas in question. The Court understood this to mean in practice in that case that Ugandan forces in the Congo were stationed there in particular areas and that they had substituted their own authority for that of the Congolese government.

The military occupation of enemy territory is termed 'belligerent occupation' and international law establishes a legal framework concerning the legal relations of occupier and occupied. There are two key conditions for the establishment of an occupation in this sense, first, that the former government is no longer capable of publicly exercising its authority in the area in question and, secondly, that the occupying power is in a position to substitute its own authority for that of the former government. An occupation will cease as soon as the occupying power is forced out or evacuates the area. Article 43 of the Hague Regulations provides the essential framework of the law of occupation. It notes that, 'The authority of the legitimate power having in fact passed into

the hands of the occupant, the latter shall take all the measures in his power to restore and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.' This establishes several key elements. First, only 'authority' and not sovereignty passes to the occupier. The former government retains sovereignty and may be deprived of it only with its consent. Secondly, the basis of authority of the occupier lies in effective control. Thirdly, the occupier has both the obligation and the right to maintain public order in the occupied territory. Fourthly, the existing laws of the territory must be preserved as far as possible.

The situation with regard to the West Bank of Jordan (sometimes known as Judaea and Samaria), for example, demonstrates the problems that may arise. Israel has argued that since the West Bank has never been recognized internationally as Jordanian territory, it cannot therefore be regarded as its territory to which the Convention would apply. In other words, to recognise that the Convention applies formally would be tantamount to recognition of Jordanian sovereignty over the disputed land. However, the International Court has stated that the Convention 'is applicable in any occupied territory in the event of an armed conflict arising between two or more High Contracting Parties' so that with regard to the Israel/Palestine territories question, 'the Convention is applicable in the Palestinian territories which before the conflict lay to the east of the Green Line [i.e. the 1949 armistice line] and which, during that conflict, were occupied by Israel, there being no need for any enquiry into the precise legal status of those territories'. The Eritrea–Ethiopia Claims Commission has pointed out that 'these protections [provided by international humanitarian law] should not be cast into doubt because the belligerents dispute the status of territory . . . respecting international protections in such situations does not prejudice the status of the territory'. Further, the Commission emphasized that 'neither text [the Hague Regulations and the Fourth Geneva Convention] suggests that only territory the title of which is clear and uncontested can be occupied territory'.

Article 47 provides that persons protected under the Convention cannot be deprived in any case or in any manner whatsoever of the benefits contained in the Convention by any change introduced as a result of the occupation nor by any agreement between the authorities of the occupied territory and the occupying power nor by any annexation by the latter of the whole or part of the occupied territory. Article 49 prohibits 'individual or mass forcible transfers' as well

as deportations of protected persons from the occupied territory regardless of motive, while the occupying power 'shall not deport or transfer parts of its own civilian population into the territory it occupies'. Other provisions refer to the prohibition of forced work or conscription of protected persons, and the prohibition of the destruction of real or personal property except where rendered absolutely necessary by military operations, and of any alteration of the status of public or judicial officials. The occupying power also has the responsibility to ensure that the local population has adequate food and medical supplies and, if not, to facilitate relief schemes. Article 70 provides that protected persons shall not be arrested, prosecuted or convicted for acts committed or opinions expressed before the occupation, apart from breaches of the laws of war.

In addition to the traditional rules of humanitarian law, international human rights law is now seen as in principle applicable to occupation situations. The International Court interpreted article 43 of the Hague Regulations to include 'the duty to secure respect for the applicable rules of international human rights law and international humanitarian law, to protect the inhabitants of the occupied territory against acts of violence, and not to tolerate such violence by any third state'. Further, the Court has stated that the protection offered by human rights conventions does not cease in case of armed conflict, unless there has been a relevant derogation permitted by the convention in question. The Court has also emphasized that any human rights treaties apply to the conduct of states parties where the state is exercising jurisdiction on foreign territory and that in such cases the matter will fall to be determined by the applicable *lex specialis*, which is international humanitarian law.

In Democratic Republic of Congo v. Uganda the Court reaffirmed that 'international human rights instruments are applicable "in respect of acts done by a state in the exercise of its jurisdiction outside its own territory", particularly in occupied territories'. It was concluded that Uganda was internationally responsible for various violations of international human rights law and international humanitarian law, including those committed by virtue of failing to comply with its obligations as an occupying power. As part of this general approach, the Court has noted that the principle of self-determination applies to the Palestinian people, and that the construction by Israel of a separation barrier (sometimes termed a wall or a fence) between its territory and the occupied West Bank was unlawful to the extent that it was situated within the occupied territories.

Further, although an occupying power can plead military exigencies and the requirements of national security or public order in the framework of the international law of occupation, the route of the wall could not be so justified. The Israeli Supreme Court in a judgment rendered shortly before the International Court's advisory opinion emphasized that the authority of a military commander to order the construction of each segment of the separation barrier could not be founded upon political as distinct from military considerations and that the barrier could not be motivated by annexation wishes nor in order to draw a political border. Such military authority was inherently temporary since belligerent occupation was inherently temporary. In a further case, decided one year after the International Court's advisory opinion, the Israeli Supreme Court referred to the balance to be drawn between the legitimate security needs of the state, its military forces and of persons present in the occupied area in question on the one hand, and the human rights of the local population derived from international humanitarian law on the other. The Court also proceeded on the assumption that the international conventions on human rights applied in the area. In addressing the question as to how to achieve what was termed the 'delicate balance' between military necessity and humanitarian considerations, the Court referred to the application of general principles of law, one of these being the principle of proportionality.

This principle was based on three sub-tests, the first being a call for a fit between goal and means, the second calling for the application of the least harmful means in such a situation, and the third being that the damage caused to an individual by the means employed must be of appropriate proportion to the benefit stemming from it. Each segment of the route of the barrier had to be assessed in the light of the impact upon the Palestinian residents and whether any impingement was proportional.

In relation to the application of international human rights treaties outside the territory of the state concerned, the UK Manual of the Law of Armed Conflict concluded that: 'Where the occupying power is a party to the European Convention on Human Rights the standards of that Convention may, depending on the circumstances, be applicable in the occupied territories.' Moving further beyond the traditional and passive approach with regard to the law of occupation, the Security Council adopted resolution 1483 (2003) after the coalition military action against Iraq, reaffirming the position of the UK and US as occupying powers in Iraq under international law but placing upon them (and the Coalition Provisional Authority, which included other states)

a range of other powers and responsibilities over and above the international law relating to occupation. These included the obligation 'to promote the welfare of the Iraqi people through the effective administration of the territory, including . . . the creation of conditions in which the Iraqi people can freely determine their own political future' and the relevance of the establishment of an internationally recognized, representative government of Iraq. In addition, a Special Representative for Iraq was appointed, whose functions included the promotion of human rights.

The conduct of hostilities: International law, in addition to seeking to protect victims of armed conflicts, also tries to constrain the conduct of military operations in a humanitarian fashion. In analyzing the rules contained in the 'Law of the Hague', it is important to bear in mind the delicate balance to be maintained between military necessity and humanitarian considerations. A principle of long standing, if not always honored in practice, is the requirement to protect civilians against the effects of hostilities. As far as the civilian population is concerned during hostilities, the basic rule (sometimes termed the principle of distinction) formulated in article 48 of Protocol I is that the parties to the conflict must at all times distinguish between such population and combatants and between civilian and military objectives and must direct their operations only against military objectives.

Military objectives are limited in article 52(2) to 'those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage'. There is thus a principle of proportionality to be considered. Judge Higgins, for example, in referring to this principle, noted that 'even a legitimate target may not be attacked if the collateral civilian casualties would be disproportionate to the specific military gain from the attack'. Issues have arisen particularly with regard to so-called 'dual use' objects such as bridges, roads and power stations, and care must be taken to interpret these so that such objects are not indiscriminately attacked on the one hand, while ensuring that, on the other, such objects or facilities are not used by opposing military forces in an attempt to secure immunity from attack, with the inevitable result that civilians may be endangered. Much will depend upon whether the military circumstances are such that they fall within the definition provided in article 52(2). This will require a balancing of military need and civilian endangerment.

Article 51 provides that the civilian population as such, as well as individual civilians, 'shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.' Additionally, indiscriminate attacks are prohibited. Article 57 provides that in the conduct of military operations, 'constant care shall be taken to spare the civilian population, civilians and civilian objects'.

Although reprisals involving the use of force are now prohibited in international law (unless they can be brought within the framework of self-defense), belligerent reprisals during an armed conflict may in certain circumstances be legitimate. Their purpose is to ensure the termination of the prior unlawful act which precipitated the reprisal and a return to legality. They must be proportionate to the prior illegal act. Modern law, however, has restricted their application. Reprisals against prisoners of war are prohibited by article 13 of the Third Geneva Convention, while article 52 of Protocol I provides that civilian objects are not to be the object of attack or of reprisals. Civilian objects are all objects which are not military objectives as defined in article 52(2). Cultural objects and places of worship are also protected, as are objects deemed indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies, and irrigation works, so long as they are not used as sustenance solely for the armed forces or in direct support of military action. Attacks are also prohibited against works or installations containing dangerous forces, namely dams, dykes and nuclear generating stations.

The right of the parties to an armed conflict to choose methods of warfare is not unconstrained. The preamble of the St Petersburg Declaration of 1868, banning explosives or inflammatory projectiles below 400 grammes in weight, emphasizes that the 'only legitimate object which states should endeavor to accomplish during war is to weaken the military forces of the enemy', while article 48 of Protocol I provides that a distinction must at all times be drawn between civilians and combatants. Article 22 of the Hague Regulations points out that the 'right of belligerents to adopt means of injuring the enemy is not unlimited', while article 23(e) stipulates that it is especially prohibited to 'employ arms, projectiles or material calculated to cause unnecessary suffering'. Quite how one may define such weapons is rather controversial and can only be determined in the light of actual state practice. The balance between military necessity and humanitarian considerations is relevant here. The International Court in its Advisory

Opinion on the Legality of the Threat or Use of Nuclear Weapons summarized the situation in the following authoritative way: *The cardinal principles contained in the texts constituting the fabric of humanitarian law are the following. The first is aimed at the protection of the civilian population and civilian objects and establishes the distinction between combatants and non-combatants; states must never make civilians the object of attack and must consequently never use weapons that are incapable of distinguishing between civilian and military targets. According to the second principle, it is prohibited to cause unnecessary suffering to combatants; it is accordingly prohibited to use weapons causing them such harm or uselessly aggravating their suffering. In application of that second principle, states do not have unlimited freedom of choice of means in the weapons they use.*

The Court emphasized that the fundamental rules flowing from these principles bound all states, whether or not they had ratified The Hague and Geneva Conventions, since they constituted 'intransgressible principles of international customary law'. At the heart of such rules and principles lies the 'overriding consideration of humanity'. Whether the actual possession or threat or use of nuclear weapons would be regarded as illegal in international law has been a highly controversial question, although there is no doubt that such weapons fall within the general application of international humanitarian law. The International Court has emphasized that, in examining the legality of any particular situation, the principles regulating the resort to force, including the right to self-defense, need to be coupled with the requirement to consider also the norms governing the means and methods of warfare itself. Accordingly, the types of weapons used and the way in which they are used are also part of the legal equation in analyzing the legitimacy of any use of force in international law.

The Court analyzed state practice and concluded that nuclear weapons were not prohibited either specifically or by express provision. Nor were they prohibited by analogy with poisoned gases prohibited under the Second Hague Declaration of 1899, article 23(a) of The Hague Regulations of 1907 and the Geneva Protocol of 1925. Nor were they prohibited by the series of treaties concerning the acquisition, manufacture, deployment and testing of nuclear weapons and the treaties concerning the ban on such weapons in certain areas of the world. Nor were nuclear weapons prohibited as a consequence of a series of General Assembly resolutions, which taken together fell short of establishing the necessary *opinion juris* for the creation of a new rule to that

effect. In so far as the principles of international humanitarian law were concerned, the Court, beyond noting their applicability, could reach no conclusion.

The Court felt unable to determine whether the principle of neutrality or the principles of international humanitarian law or indeed the norm of self-defense prohibited the threat or use of nuclear weapons. This rather weak conclusion, however, should be seen in the context of continuing efforts to ban all nuclear weapons testing, the increasing number of treaties prohibiting such weapons in specific geographical areas and the commitment given in 1995 by the five declared nuclear weapons states not to use such weapons against non-nuclear weapons states that are parties to the Nuclear Non-Proliferation Treaty. Nevertheless, it does seem clear that the possession of nuclear weapons and their use in extremis and in strict accordance with the criteria governing the right to self-defense are not prohibited under international law.

A number of specific bans on particular weapons have been imposed. Examples would include small projectiles under the St Petersburg formula of 1868, dum-dum bullets under the Hague Declaration of 1899 and asphyxiating and deleterious gases under The Hague Declaration of 1899 and the 1925 Geneva Protocol.118 Under the 1980 Conventional Weapons Treaty, Protocol I, 1980, it is prohibited to use weapons that cannot be detected by X-rays, while Protocol II, 1980 (minimally amended in 1996), prohibits the use of mines and booby-traps against civilians, Protocol III, 1980, the use of incendiary devices against civilians or against military objectives located within a concentration of civilians where the attack is by air-delivered incendiary weapons, Protocol IV, 1995, the use of blinding laser weapons and Protocol V, 2003, concerns the explosive remnants of war. In 1997, the Ottawa Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction was adopted.

Article 35(3) of Additional Protocol I to the 1949 Conventions provides that it is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment. Article 55 further states that care is to be taken in warfare to protect the natural environment against such damage, which may prejudice the health or survival of the population, while noting also that attacks against the natural environment by way of reprisals are prohibited. The Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques,1977 prohibits

such activities having widespread, long-lasting or severe effects as the means of destruction, damage or injury to any other state party.

Armed conflicts: international and internal- The rules of international humanitarian law apply to armed conflicts. Accordingly, no formal declaration of war is required in order for the Conventions to apply. The concept of 'armed conflict' is not defined in the Conventions or Protocols, although it has been noted that 'any difference arising between states and leading to the intervention of members of the armed forces is an armed conflict' and 'an armed conflict exists whenever there is a resort to armed force between states or protracted armed violence between governmental authorities and organized armed groups within a state' A distinction has historically been drawn between international and non-international armed conflicts, founded upon the difference between inter-state relations, which was the proper focus for international law, and intra-state matters which traditionally fell within the domestic jurisdiction of states and were thus in principle impervious to international legal regulation. However, this difference has been breaking down in recent decades. In the sphere of humanitarian law, this can be seen in the gradual application of such rules to internal armed conflicts. The notion of an armed conflict itself was raised before the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia in its decision on jurisdictional issues in the Tadi´c case. It was claimed that no armed conflict as such existed in the Former Yugoslavia with respect to the circumstances of the instant case since the concept of armed conflict covered only the precise time and place of actual hostilities and the events alleged before the Tribunal did not take place during hostilities.

The Appeals Chamber of the Tribunal correctly refused to accept a narrow geographical and temporal definition of armed conflicts, whether international or internal. It was stated that: *International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring states or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place.*

This definition arose in the specific context of the Former Yugoslavia, where it was unclear whether an international or a non-international armed conflict or some kind of mixture of the two

was involved. This was important to clarify since it would have had an effect upon the relevant applicable law. The Security Council did not as such classify the nature of the conflict, simply condemning widespread violations of international humanitarian law, including mass forcible expulsion and deportation of civilians, imprisonment and abuse of civilians and deliberate attacks upon non-combatants, and calling for the cessation. The Appeals Chamber concluded that 'the conflicts in the former Yugoslavia have both internal and international aspects'. Since such conflicts could be classified differently according to time and place, a particularly complex situation was created. However, many of the difficulties that this would have created were mitigated by an acceptance of the evolving application of humanitarian law to internal armed conflicts. This development has arisen partly because of the increasing frequency of internal conflicts and partly because of the increasing brutality in their conduct. The growing interdependence of states in the modern world makes it more and more difficult for third states and international organisations to ignore civil conflicts, especially in view of the scope and insistence of modern communications, while the evolution of international human rights law has contributed to the end of the belief and norm that whatever occurs within other states is the concern of no other state or person. Accordingly, the international community is now more willing to demand the application of international humanitarian law to internal conflicts.

In the Tadi´c case, the Appeals Chamber (in considering jurisdictional issues) concluded that article 3 of its Statute, which gave it jurisdiction over 'violations of the laws or customs of war', provided it with such jurisdiction 'regardless of whether they occurred within an internal or an international armed conflict'. In its decision, the Appeals Chamber noted that, *it is indisputable that an armed conflict is international if it takes place between two or more States. In addition, in case of aninternal armed conflict breaking out on the territory of a State, it may become international (or, depending upon the circumstances, be international in character alongside an internal armed conflict) if (i) another State intervenes in that conflict through its troops, or alternatively if (ii) some of the participants in the internal armed conflict act on behalf of that other State.*

The Appeals Chamber concluded that until 19May 1992 with the open involvement of the Federal Yugoslav Army, the conflict in Bosnia had been international, but the question arose as to the situation when this army was withdrawn at that date. The Chamber examined the legal

criteria for establishing when, in an armed conflict which is prima facie internal, armed forces may be regarded as acting on behalf of a foreign power thus turning the conflict into an international one. The Chamber examined article 4 of the Third Geneva Convention which defines prisoner of war status and noted that states have in practice accepted that belligerents may use paramilitary units and other irregulars in the conduct of hostilities only on the condition that those belligerents are prepared to take responsibility for any infringements committed by such forces. In order for irregulars to qualify as lawful combatants, control over them by a party to an international armed conflict was required and thus a relationship of dependence and allegiance. Accordingly, the term 'belonging to a party to the conflict' used in article 4 implicitly refers to a test of control.

In order to determine the meaning of 'control', the decision of the International Court in the Nicaragua case was examined and rejected, the Appeals Chamber preferring a rather weaker test, concluding that in order to attribute the acts of a military or paramilitary group to a state, it must be proved that the state wields overall control over the group, not only by equipping and financing the group, but also by coordinating or helping in the general planning of its military activity. However, it was not necessary that, in addition, the state should also issue, either to the head or to members of the group, instructions for the commission of specific acts contrary to international law.

Accordingly, the line between international and internal armed conflicts may be drawn at the point at which it can be shown that a foreign state is either directly intervening within a civil conflict or exercising 'overall control' over a group that is fighting in that conflict. The Appeals Chamber in the Kunarac case discussed the issue of the meaning of armed conflict where the fighting is sporadic and does not extend to all of the territory of the state concerned. The Chamber held that the laws of war would apply in the whole territory of the warring states or, in the case of internal armed conflicts, the whole territory under the control of a party to the conflict, whether or not actual combat takes place there, and continued to apply until a general conclusion of peace or, in the case of internal armed conflicts, a peaceful settlement is achieved. A violation of the laws or customs of war may therefore occur at a time when and in a place where no fighting is actually taking place.

Non-international armed conflict: Although the 1949 Geneva Conventions were concerned with international armed conflicts, common article 3 did provide in cases of non-international armed conflicts occurring in the territory of one of the parties a series of minimum guarantees for protecting those not taking an active part in hostilities, including the sick and wounded. Precisely where this article applied was difficult to define in all cases. Non-international armed conflicts could, it may be argued, range from full-scale civil wars to relatively minor disturbances. This poses problems for the state in question which may not appreciate the political implications of the application of the Geneva Conventions, and the lack of the reciprocity element due to the absence of another state adds to the problems of enforcement.

Common article 3 lists the following as the minimum safeguards: *1. Persons taking no active part in hostilities to be treated humanely without any adverse distinction based on race, color, religion or faith, sex, birth or wealth. To this end the following are prohibited: a) violence to life and person, in particular murder, cruel treatment and torture; b) hostage-taking; c) outrages upon human dignity, in particular humiliating and degrading treatment; d) the passing of sentences and the carrying out of executions in the absence of due process.2. The wounded and the sick are to be cared for.*

Common article 3 was developed by Protocol II, 1977, which applies by virtue of article 1 to all non-international armed conflicts which take place in the territory of a state party between its armed forces and dissident armed forces. The latter have to be under responsible command and exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and actually implement Protocol II. It does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, not being armed conflicts. The Protocol lists a series of fundamental guarantees and other provisions calling for the protection of non-combatants. In particular, one may note the prohibitions on violence to the life, health and physical and mental well-being of persons, including torture; collective punishment; hostage-taking; acts of terrorism; outrages upon personal dignity, including rape and enforced prostitution; and pillage. Further provisions cover the protection of children; the protection of civilians, including the prohibition of attacks on works or installations containing dangerous forces that might cause severe losses

among civilians; the treatment of civilians, including their displacement; and the treatment of prisoners and detainees, and the wounded and sick.

The Appeals Chamber in its decision on jurisdiction in the Tadi´c case noted that international legal rules had developed to regulate internal armed conflict for a number of reasons, including the frequency of civil wars, the increasing cruelty of internal armed conflicts, the large-scale nature of civil strife making third-party involvement more likely and the growth of international human rights law. Thus the distinction between inter-state and civil wars was losing its value so far as human beings were concerned. Indeed, one of the major themes of international humanitarian law has been the growing move towards the rules of human rights law and vice versa. There is a common foundation in the principle of respect for human dignity.

The principles governing internal armed conflicts in humanitarian law are becoming more extensive, while the principles of international human rights law are also rapidly evolving, particularly with regard to the fundamental non-derogable rights which cannot be breached even in times of public emergency. This area of overlap was recognized in 1970 in General Assembly resolution 2675 (XXV) which emphasized that fundamental human rights 'continue to apply fully in situations of armed conflict', while the European Commission on Human Rights in the Cyprus v. Turkey (First and Second Applications) case declared that in belligerent operations a state was bound to respect not only the humanitarian law laid down in the Geneva Conventions but also fundamental human rights.

The Inter-American Commission of Human Rights in the La Tablada case against Argentina noted that the most difficult aspect of common article 3 related to its application at the blurred line at the lower end separating it from especially violent internal disturbances. It was in situations of internal armed conflict that international humanitarian law and international human rights law 'most converge and reinforce each other', so that, for example, common article 3 and article 4 of the Inter- American Convention on Human Rights both protected the right to life and prohibited arbitrary execution. However, there are difficulties in resorting simply to human rights law when issues of the right to life arise in combat situations. Accordingly, 'the Commission must necessarily look to and apply definitional standards and relevant rules of humanitarian law as sources of authoritative guidance in its resolution' of such issues. The Commission returned to the issue in Coard v. USA and noted that there was 'an integral linkage between the law of

human rights and the humanitarian law because they share a "common nucleus of non derogable rights and a common purpose of protecting human life and dignity", and there may be a substantial overlap in the application of these bodies of law'.

However, in addition to the overlap between internal armed conflict principles and those of human rights law in situations where the level of domestic violence has reached a degree of intensity and continuity, there exists an area of civil conflict which is not covered by humanitarian law since it falls below the necessary threshold of common article 3 and Protocol II. Moves have been underway to bridge the gap between this and the application of international human rights law. The International Committee of the Red Cross has been considering the elaboration of a new declaration on internal strife. In addition, a Declaration of Minimum Humanitarian Standards was adopted by a group of experts in 1990. This Declaration emphasizes the prohibition of violence to the life, health and physical and mental well-being of persons, including murder, torture and rape; collective punishment; hostage-taking; practicing, permitting or tolerating the involuntary disappearance of individuals; pillage; deliberate deprivation of access to necessary food, drinking water and medicine, and threats or incitement to commit any of these acts. In addition, the Declaration provides inter alia that persons deprived of their liberty should be held in recognized places of detention (article 4); that acts or threats of violence to spread terror are prohibited (article 6); that all human beings have the inherent right to life (article 8); that children are to be protected so that, for example, children under fifteen years of age should not be permitted to join armed groups or forces (article 10); that the wounded and sick should be cared for (article 12) and medical, religious and other humanitarian personnel should be protected and assisted (article 14).

Enforcement of humanitarian law: Parties to the 1949 Geneva Conventions and to Protocol I, 1977, undertake to respect and to ensure respect for the instrument in question, and to disseminate knowledge of the principles contained therein. A variety of enforcement methods also exist, although the use of reprisals has been prohibited. One of the means of implementation is the concept of the Protecting Power, appointed to look after the interests of nationals of one party to a conflict under the control of the other, whether as prisoners of war or occupied civilians. Sweden and Switzerland performed this role during the Second World War. Such a Power must ensure that compliance with the relevant provisions has been effected and that the

system acts as a form of guarantee for the protected person as well as a channel of communication for him with the state of which he is a national. The drawback of this system is its dependence upon the consent of the parties involved. Not only must the Protecting Power be prepared to act in that capacity, but both the state of which the protected person is a national and the state holding such persons must give their consent for the system to operate. Since the role is so central to the enforcement and working of humanitarian law, it is a disadvantage for it to be subject to state sovereignty and consent. It only requires the holding state to refuse its cooperation for this structure of implementation to be greatly weakened, leaving only reliance upon voluntary operations. This has occurred on a number of occasions, for example the Chinese refusal to consent to the appointment of a Protecting Power with regard to its conflict with India in 1962, and the Indian refusal, of 1971 and subsequently, with regard to Pakistani prisoners of war in its charge. Protocol I also provides for an International Fact-Finding Commission for competence to inquire in to grave breaches of the Geneva Conventions and that Protocol or other serious violations, and to facilitate through its good offices the 'restoration of an attitude of respect' for these instruments. The parties to a conflict may themselves, of course, establish an ad hoc inquiry into alleged violations of humanitarian law.

It is, of course, also the case that breaches of international law in this field may constitute war crimes or crimes against humanity or even genocide for which universal jurisdiction is provided. Article 6 of the Charter of the Nuremberg Tribunal, 1945, for example, includes as war crimes for which there is to be individual responsibility the murder, ill-treatment or deportation to slave labor of the civilian population of an occupied territory; the ill-treatment of prisoners of war; the killing of hostages and the wanton destruction of cities, towns and villages.

A great deal of valuable work in the sphere of humanitarian law has been accomplished by the International Red Cross. This indispensable organisation consists of the International Committee of the Red Cross (ICRC), over 100 national Red Cross (or Red Crescent) societies with a League coordinating their activities, and conferences of all these elements every four years. The ICRC is the most active body and has a wide-ranging series of functions to perform, including working for the application of the Geneva Conventions and acting in natural and man-made disasters. It has operated in a large number of states, visiting prisoners of war and otherwise functioning to ensure the implementation of humanitarian law. It operates in both international and internal

armed conflict situations. One of the largest operations it has undertaken since 1948 related to the Nigerian civil war, and in that conflict nearly twenty of its personnel were killed on duty. The ICRC has since been deeply involved in the Yugoslav situation and indeed, in 1992, contrary to its usual confidentiality approach, it felt impelled to speak out publicly against the grave breaches of humanitarian law taking place. The organisation has also been involved in Somalia (where its activities included visiting detainees held by the UN forces), Rwanda, Afghanistan, Sri Lanka and in Iraq. Due to circumstances, the ICRC must act with tact and discretion and in many cases states refuse their co-operation. It performed a valuable function in the exchange of prisoners after the 1967 and 1973 Middle East wars, although for several years Israel did not accept the ICRC role regarding the Arab territories it occupied.

Conclusion: The ICRC formulated the following principles as a guide to the relevant legal rules:*1. Persons hors de combat and those who do not take a direct part in hostilities are entitled to respect for their lives and physical and moral integrity. They shall in all circumstances be protected and treated humanely without any adverse distinctions.*

2. It is forbidden to kill or injure an enemy who surrenders or who is horsde combat.

3. The wounded and sick shall be collected and cared for by the party to the conflict which has them in its power. Protection also covers medical personnel, establishments, transports and mat´eriel. The emblem of the Red Cross (Red Crescent, red lion and sun) is the sign of such protection and must be respected.

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

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

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

7. Parties to a conflict shall at all times distinguish between the civilian population and combatants in order to spare civilian population and property. Neither the civilian populations

as such nor civilian persons shall be the object for attack. Attacks shall be directed solely against military objectives.

In addition, the ICRC has published the following statement with regard to non-international armed conflicts:

A. General Rules

1. The obligation to distinguish between combatants and civilians is a general rule applicable in non-international armed conflicts. It prohibits indiscriminate attacks.

2. The prohibition of attacks against the civilian population as such or against individual civilians is a general rule applicable in non-international armed conflicts. Acts of violence intended primarily to spread terror among the civilian population are also prohibited.

3. The prohibition of superfluous injury or unnecessary suffering is a general rule applicable in non-international armed conflicts. It prohibits, in particular, the use of means of warfare which uselessly aggravate the sufferings of disabled men or render their death inevitable.

4. The prohibition to kill, injure or capture an adversary by resort to perfidy is a general rule applicable in non-international armed conflicts; in a non-international armed conflict, acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or obliged to accord protection under the rules of international law applicable in non-international armed conflicts, with intent to betray that confidence, shall constitute perfidy.

5. The obligation to respect and protect medical and religious personnel and medical units and transports in the conduct of military operations is a general rule applicable in non-international armed conflicts.

6. The general rule prohibiting attacks against the civilian population implies, as a corollary, the prohibition of attacks on dwellings and other installations which are used only by the civilian population.

7. The general rule prohibiting attacks against the civilian population implies, as a corollary, the prohibition to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population.

8. The general rule to distinguish between combatants and civilians and the prohibition of attack against the civilian population as such or against individual civilians implies, in order to be effective, that all feasible precautions have to be taken to avoid injury, loss or damage to the civilian population.

Chapter Five: - International Organizations

5.1. Evolution, Functions and Membership

5.1.1. Definition and Evolution

A Working Definition: The Yearbook of International Organizations lists eight criteria for inclusion under the rubric of international organization. They can be summarized:

- The aims must be genuinely international with the intention to cover at least three states.
- Membership must be individual or collective participation, with full voting rights, from at least three states and must be open to any individual or entity appropriately qualified ion the organization's area of operations. Voting must be so that no one national group can control the organization.
- The constitution must provide for a formal structure giving members the right periodically to elect governing bodies and officers. Provision should be made for continuity of operation with a permanent headquarters.
- Officers should not all be of the same nationality for more than a given period.
- There should be a substantial contribution to the budget from at least three states and there should be no attempt to make profits for distribution to members.
- Those with an organic relationship with other organizations must show it can exist independently and elect its own officials.
- Evidence of current activities must be available.
- There are some negative criteria: size, politics, ideology, fields of activity, geographical location of headquarters, nomenclature are irrelevant in deciding whether a set-up is an international organization or not.

Some scholars distinguish intergovernmental organizations by three criteria:

- The organization must consist of at least two qualified members of the international system….and should have been created by a formal instrument of agreement between the governments of national states. Bilateral international organizations are included on the grounds that they are still international organizations and because otherwise certain multilateral organizations would have to be excluded for the periods when their membership was reduced to two.

- The organization must hold more or less regular plenary sessions at intervals not greater than once a decade.
- The organization should have a permanent secretariat with a permanent headquarters arrangement and which performs ongoing tasks.

Other scholars list eleven essential features of 19thC intergovernmental institutions. These are the basic characteristics and the procedures of early international organizations which have become commonplace features of modern international institutions. Other writers have produced less exhaustive though more precise criteria for international organizations. Thus, their common characteristics include:

- A permanent organization to carry on continuing set of functions
- Voluntary membership of eligible parties
- A basic instrument stating goals, structure, and methods of operation
- A broadly representative organ, and
- A permanent secretariat to carry on continuous administration, research and information functions.

Evolution:It was in 19thc that important prerequisites were satisfied in sufficient measure and in proper combination to bring about the birth of modern international organization. The 19thc contributed a broadening concept of the nature and subject matter of international relations, an evolving sense of the need for joint decisions and actions by states, a growing number of the potential usefulness of international machinery and an increasingly clear awareness of the problems of achieving effective international organizations.

The major stream of development whose rise may be traced to the 19th c (up to the First World War) is the system of multilateral, high-level, political conferences that include consecutively the Concert of Europe, the Hague system, and the Public International Unions.The multistate system can be traced back to the earlier breakup of the unity of medieval European Christendom, and historical reference may be made to such significant landmarks in its development at the Peace of Westphalia in 1648 and the Treaty of Utrecht in 1713.The first modern international organization experiment is the League of Nations that began its sessions in January 1919. The end of Second World War ushered in the era of the establishment of United Nations on April 25, 1945.

5.1.2. Functions of and Membership

Functions of international organizations:

1. Articulation and Aggregation: International organizations can perform the task of interest articulation and aggregation in international affairs just as national associations of like-minded people do within a national political system. Within a sovereign state a national union of miners brings together all those working in the coal-mining industry in order to voice their demands on the employers – better wage and working conditions- and on the political system- a more advanced welfare state, better retirement arrangements, compensation for coal-related illness- and to aggregate the interest of each individual miner, each pit, each region, each skill or job into a national voice. Sometimes groups may disagree with what is being said on their behalf by the national organization, and if this disenchantment is consistent enough they may dissociate themselves from the national leadership and form their own association.

Within a national political system the authoritative allocation of values – the decisions as to who gets what, when and how- is nominally conducted by a central government- the government-with a number of institutions available through which these decisions may be affected by, say, trade unions, employers' associations etc. The international system is not so structured: it lacks a central body to allocate values, let alone resources. Quite clearly, this doesn't stop values, and resources, being allocated and this process is not totally one of state imposing their values (whatever economic or political or even religious and cultural) on others and seizing resources for themselves. Much of this allocation is still done by agreements, however reluctantly, and this is usually preceded by a process of discussion, and negotiation. International organization, being one of the institutionalized forms of contact between the active participants in the international system, is forums for such discussion and negotiation.

Like the institutions of government on a national level, they provide groups having common interests with a focus of activity. International organizations in fact operate in three ways in this context: they can be instruments for interest articulation and aggregation (rather like the national union of mineworkers in the national example), or they can be forums in which those interests are articulated, or they can articulate interests separate from those of members.

2. Norms: International organizations have made a considerable contribution as instruments, forums and actors to the normative activities of the international political system. Some of the

INGOs in the 19th c were concerned with establishing world-wide certain values that were already accepted in the more economically- advanced West European and North American states- the rejection of Slavery (the Anti-Slavery Society), control of the effects of war (the International Committee of the Red Cross). The establishment of norms in international relations has now become a complex process to which a wide range of IGOs as well as INGOs contribute.

In the field of economic affairs, international organizations have helped established norms of behavior. Again the UN and its associated agencies have played a leading role in both encouraging and reflecting the setting of standards for the functioning of the world economy. After the experience of the interwar depression, it was not surprising that the Bretton Woods meeting of 1944 set up institutions which stressed the universality of the economic system and the need to utilize the globe's resources. With the coming to independence of former colonial countries since 1947, emphasis has shifted towards the development of these new states and their right to control their own resources.

In the field of international security, standards are also accepted which have been the work of the UNO and other international organizations. Thus, some writers divides the normative activities of international organizations in such areas into five categories: refining principles against the use of force, delegitimizing Western colonialism, pronouncing on specific situations, urging disarmament and arms control, exhorting states to arm.

3. Recruitment: International organizations can have an important function in the recruitment of participants in the international political system. The fact that IGOs consist almost exclusively of representatives of sovereign states gives a further incentives to non-self-governing territories to achieve their independence. This allows them to represent their own interests in a range of IGOs and brings those organizations closer to universality of membership.

INGOs have increasingly recruited new participants to the international political system. By gathering together groups and individual for a particular purpose, whether supportring world government, promoting trade union activities, furthering commercial interests or spreading religious beliefs, they have mobilized what must be regarded as the fastest growing and widest based group of participants in the current international political system. They have brought into the old 19th c state centered system new actors. They provide the underpinning for a more close-knit international system and for the intergovernmental organizations.

4. Socialization: Socialization is carried out within the nation state by a number of agencies. Its aim is to instill in the individual loyalty to the system within which he or she is living and to gain acceptance of that and its institutions. As there is no world government, the forces of socialization at an international level can be expected to be weaker than those within the state. The process of socialization works at two levels internationally. Agents of socialization may work across frontiers affecting directly individuals and groups in a number of countries. Global Corporation according to some is the most powerful agent for the internationalization of human society and agents of change, socially, economically and culturally.

Secondly, the process of socialization can take place between states acting at the international level and between their representatives. In other words, over a period of time states' governments can become socialized to act in a certain way that is acceptable to the rest of the international community or to adopt a certain common value system.

The organizations contribute by encouraging members to act in a cooperative way and in particular not to undermine the norms that they share with other members: the stress is on establishing dependable and enduring patterns of behavior.

5.Rulemaking:The function of rulemaking in international organization is more obvious than that of socialization. Unlike the domestic political system, the international system has no central formal rule making institution such as a government or a parliament.

Paul Tharp (1971) lists the traditional 'Confederal' principles on which most international organizations have based their rule making:

- The rules are formulated by unanimous or near-unanimous consensus of members
- Members have the practical option of leaving an organization and ending their assent to the existing rules
- Even within the bounds of membership, a state can assert the right to interpret unilaterally rules to which it has consented
- The 'executive-bureaucratic' structure of the organization has little or no power to formulate (and implement) rules
- Delegates to the organizations' rule making bodies are instructed by their governments and don't act as independent representatives

- The international organization has no direct relationship with private citizens of the member states.

6. Rule application: In the domestic political system rule application is undertaken mostly by government agencies- and in extreme by police, militia, or armed forces. In the international political system, rule application is left mainly to sovereign states as there is no central world authority with agents to undertake the task. Under certain circumstances international organizations take on aspects of applying generally accepted rules. However, what is lacking in international rule application is a means of enforcement when pleading, persuasion and pressure to fail.

7. Rule Adjudication: Within the state rule adjudication is normally carried out by the judiciary-law courts, arbitration panels, tribunal and so forth. The process is closely associated with that of rulemaking as courts can by their judgments develop or interpret the law in such a way that new standards are set. However, the prime aim is to pronounce on existing law and the judicial institutions are normally not involved in the political process of law making. The process of rule adjudication at the international level lacks the extensive institutions and compulsory nature of that at nation state level. As with rule making there is a great deal of rule adjudication that arises from the existence of international organizations-that associated with their internal running- but a more important function is played by certain institutions whose task it is to adjudicate between the competing claims of states. The most noticeable of these institutions are the International Court of Justice (ICJ).

8. Information: International organizations also perform certain activities within the international political system which are useful but are not directly involved in the conversion function of the system or in its maintenance and adaptation. They are invaluable in communication and information. The more traditional approach towards transmitting ideas and messages in the system was through national governments with the help of their diplomatic services. The growth in international organizations together with the increased and easier use of the media of communications has meant that sovereign states can no longer pretend to be dominant in the exchange of international information. The creation of a global organization such as the UN and its associated agencies has produced a forum for governments.

9. Operations: Finally, international organizations undertake a number of operational functions much in the same way as governments. These may be banking (International Bank for

Reconstruction and Development), providing aid (UN agencies), and helping refugees (UN High Commission for Refugees). These activities are ones not covered by other headings such as rule application and may include the UN peace observation corps. The INGOs also make a contribution- especially in the aid areas with such a well-known names as the International Red Cross.

Membership:

The existence of international organizations is closely associated with that of the sovereign state but that membership of some international organizations is not necessarily drawn from sovereign states or their governmental representatives. The first distinction between the kinds of international organizations is those which are interstate or intergovernmental (IGO) and those whose membership is non-governmental (INGO). A further category could be made of international organizations with mixed membership.

Intergovernmental (IGO)areorganizations that are made up of primarily of sovereign states (referred to as member states). Examples include the United Nations, European Union, and the World Trade Organization. On the other hand, a private organization has a membership of individuals or groups and is an international nongovernmental organization. Included are organizations that originate for reasons other than politics and may include international non-profit organizations. Examples include the Coca-Cola Company and Toyota.

The traditional notion of international organizations being established between governments is based on the sovereign state view of international relations which contains three important elements: that, with few exceptions, only sovereign states are the subjects of international law; that sovereign states are constitutionally self-contained and international law cannot interfere with the domestic jurisdiction of their governments. This doctrine has important consequences for international organizations. However, international organizations often contain members that are not states or governmental representatives but are drawn from groups, associations, organizations or individuals from within the state. These are non-governmental actors on the international stage and their activities give rise to transnational interactions.

Transnational interactions are defined as the movement of tangible or intangible items across state boundaries when at least one actor is not an agent of a government or an international organization. Hence, four major types of global interaction, namely communications,

transportation, finance, and travel. When such relationships between more than one participants become institutionalized by agreement into a formal, continuous structure in order to pursue the common interests of the participants, one of which is not an agent of government or an international organization, then a transnational organization (TNO) has been established.

In contrast to an intergovernmental organization (IGO), a TNO must have a non-state actor for at least one of its members. Three sorts of TNOs are commonly identified in the literature:

1. The genuine INGO which is an organization with only non-governmental members. Such organizations bring together the representatives of like-minded groups from more than two countries and examples are the International Olympic Committee, the World Council of Churches, and the Salvation Army.

2. The hybrid INGO which has some governmental and some non-governmental representation. If such a hybrid organization has been established by a treaty or convention between governments, it should be counted as an IGO, an example being the ILO which has trade union and management (i.e. non-governmental) membership as well as governmental representatives. However, some INGOs have a mixed membership and are not the result of a purely intergovernmental agreement. An example is the International Council of Scientific Unions which draws its membership from international scientific unions, scientific academics, national research councils, associations of institutions and governments.

3. The Trans governmental organization (TGO) which results from relations between governmental actors that are not controlled by the central foreign policy organs of their governments. Such relationships are fairly common if the term ‘governmental actors’ is widely define to include anyone engaged in the governmental process of a country- in the legislature, judiciary, or executive, at the local governmental level or as part of a regional government. An example is the International Union of Local Authorities (IULA) which brings together the local government authorities of the European Community, the International Council for the Exploration of the Sea (ICES).

5.1.3. Powers, Privileges and Responsibilities of InternationalOrganizations

International organisations are unlike states that possess a general competenceas subjects of international law. They are governed by the principleof specialty, so that, as the International

Court has noted, 'they are invested by the states which create them with powers, the limits of which are a function of the common interests whose promotion those states entrust to them'. Such powers may be expressly laid down in the constituentinstruments or may arise subsidiarily as implied powers, being those deemed necessary for fulfilment of the functions of the particular organisation.

The test of validity for such powers has been variously expressed. The International Court noted in the Reparation case that:*[u]nder international law the organization must be deemed to have those powers which, though not expressly provided in the charter, are conferred upon it by necessary implication as being essential to the performance of its duties.*

In the Effect of Awards of Compensation Made by the UN Administrative Tribunal case, the Court held that the General Assembly could validly establish an administrative tribunal in the absence of an express power since the capacity to do this arose 'by necessary intendment' out of the Charter, while in theCertain Expenses of the UN case, the Court declared that 'when the organisation takes action which warrants the assertion that it was appropriate for the fulfilment of one of the stated purposes of the United Nations, the presumption is that such action is not ultra vires the organisation'. The tests posited therefore have ranged from powers arising by 'necessary implication as being essential to the performance' of constitutionally laid down duties, to those arising 'by necessary intendment' out of the constituent instrument, to those deemed 'appropriate for the fulfilment' of constitutionally authorized purposes of the organisation.

There are clearly variations of emphasis in such formulations. Nevertheless, although the functional test is determinative, it operates within the framework of those powers expressly conferred by the constitution of the organisation. Thus any attempt to infer a power that was inconsistent with an express power would fail, although there is clearly an area of ambiguity here. In the Legality of the Use by a State of Nuclear Weapons case, the Court noted that the World Health Organisation had under article 2 of its Constitution adopted in 1946 the competence 'to deal with the effects on health of the use of nuclear weapons, or any other hazardous activity, and to take preventive measures aimed at protecting the health of populations in the event of such weapons being used or such activities engaged in'. However, the Court concluded that the question asked ofit related not to the effects of the use of nuclear weapons on

health, but to the legality of the use of such weapons in view of their health and environmental effects. Whatever those effects might be, the competence of the WHO to deal with them was not dependent upon the legality of the acts that caused them. Accordingly, the Court concluded that in the light of the constitution of the WHO as properly interpreted, the organisation had not been granted the competence to address the legality of the use of nuclear weapons and that therefore the competence to request an advisory opinion did not exist since the question posed was not one that could be considered as arising 'within the scope of . . . activities' of theWHO as required by article 96(2) of the UN Charter.

So far as the International Court itself is concerned, it has held that it possesses 'an inherent jurisdiction enabling it to take such action as may be required, on the one hand to ensure that the exercise of its jurisdiction over the merits, if and when established, shall not be frustrated, and on the other, to provide for the orderly settlement of allmatters in dispute, to ensure the observance of the "inherent limitations on the exercise of the judicial function" of the Court, and to "maintain its judicial character"'. Of great importance is the question of the capacity of international organisations to conclude international treaties. This will primarilydepend upon the constituent instrument, since the existence of legal personality is on its own probably insufficient to ground the competence to enter into international agreements.

Article 6 of the Vienna Convention on the Law of Treaties between States and International Organisations, 1986 provides that '[t]he capacity of an international organisation to conclude treaties is governed by the rules of that organisation'. This is a wider formulation than reliance solely upon the constituent instrument and permits recourse to issues of implied powers, interpretation and subsequent practice. It was noted in the commentary of the International Law Commission that the phrase 'the rules of the organisation' meant, in addition to the constituent instruments, relevant decisions and resolutions and the established practice of the organisation. Accordingly, demonstration of treaty-making capacity will revolve around the competences of the organisation as demonstrated in each particular case by reference to the constituent instruments, evidenced implied powers and subsequent practice.

International organizations play the following three major roles:

1. Instrumental 2. Arena 3. Actor

1. Instrumental roles of international organizations: The most usual image of the role of international organizations is that of an instrumental being used by its members for particular ends. This is particularly true to IGOs where the members are sovereign states with power to limit independent action by international organizations. The basic fictitious notion about inter-governmental organizations is that they are something more than their component parts above the national states. International organizations are however nothing else than instruments for the policies of individual governments. They are means for the diplomacy of a number of the disparate and sovereign national states. An intergovernmental organization is set up; it implies nothing more than that between the states a limited agreement is has been reached up on an institutional form for multilateral conduct of state activity in a certain field. It becomes important for the pursuance of national policies precisely to the extent that such a multilateral coordination is the real and continuous aim of national governments.

The above notion of international organizations is supported by empirical findings of a data based on a study of IGO which show that IGOs are instruments for gaining foreign policy objectives. The instrumental view relegates IGOs to the role of convenient tools for use by their member states. INGOs in an analogous position would merely reflect the requirements of various trade unions business organizations political parties, or church groups that were members. The consequence for the international organization are that it is likely to become fought over by the most powerful members eager to utilize it and thus its chances of independent action are limited. The UN in its first eight years of existence is often characterized as being an instrument of United States' diplomacy. The US government could count on a majority consisting of west European, old commonwealth and Latin American states in the general assembly (thirty four out of the original fifty one members).It also could count on a majority in the Security Council only attenuated by the soviet veto and a secretary general with a clear pro-western sympathies.

During this period the United States used the United Nations to pillory the USSR over its activities in Eastern Europe; to help to prevent Soviet incursions in northern Iran as a midwife to the birth of two new states of Indonesia and Israel against Dutch and Arab protests respectively. Likewise it used the united nations to establish multilateral force led by the united states to fight on behalf of South Korea against North Korea and communist china; to extend the term of the secretary general Trygvie Lie against Soviet oppositions; to exclude the new communist

government in Peking from taking the china seat and to have the government condemned as an aggressor over the Korean war. From the Soviet standpoint the veto power is an essential but regrettably limited and inclusive instrument of defense against western utilization of the organization for anti-communist purposes.

As well as these limitations experienced by the United States during the early periods of the United Nations existence, it soon became clear that the organization could not be used indefinitely as an appendage to the united states foreign policy machinery. The political shape of the world was changing with the emergence of the Soviet Union as a nuclear power and of the Third World nonaligned movement. Membership of the UN changed and by the mid 1950 the USA had lost its automatic majority in the general assembly.

An organization cannot continue to be an instrument of policy of one dominant member when the membership is as varied as that of the UN. Whiles a large majority was satisfied with US activities in the UN (as in the case from 1945 to 1953) then the US could use this organization as cold war implement. This role of the UN could no longer be sustained once the membership of the general assembly and the nature of the cold war began to change. The USSR until the mid-1960s defended its interest at the UN and began to take a more active approach. The third world countries started to use the UN as an instrument for implementing their foreign policies. Through the machinery of the United Nations and other international organizations regularized multinational negotiations are added as a new tool for politicians, a new instrument for governments and a new technique of diplomacy.

The use of international organizations as adjacent to their member's policies affects their constitution and developments. The possibility of IGOs developing their own decision making powers become a fictitious notion. A classic example of this is the economic commission for Europe of which Myrdal was executive secretary, an organization which only had modest institution because of member states' unwillingness to lose control over their economic autonomy. Cooperative arrangements on specific research, coordination of national policies, multilateral agreements and limited delegated power were accepted as nothing more than a set of mutual promises of coordinated and synchronized national policy action. These limitations are reflected in the powers of the secretariat and in the decision making mechanisms. The way that decisions are taken in many international organizations can also demonstrate their use for the

purpose of national policies. The constitution of many international organizations, except the UN do not allow for decisions to be taken that may bind members that have voted against them.

Organization with a more limited membership often has decisions making mechanisms which reflect their being at the service of the membership. The unanimity principle is the best assurance for a member that its interest will not be traduced by the decisions of the organizations. A vote at every stage of complicated process of decision making would soon paralyze the institution if complete unanimity is needed at all times. To describe international organizations as functioning as instruments of their membership don't mean that each and every decision must be explicable in terms of serving the interests of each and every member. An instrument demonstrate its purpose if it shows its utility over a period of time to those that have brought it into service. Their satisfaction should not be jaded when another makes use of the instrument, provided it is not turned into a weapon against them.

2. Arena: A second image of the role of international organizations is that of their being arenas or forums within which actions take place. In this case, the organizations provide meeting places for members to come together to discuss, argue, co-operate or disagree. Arenas in themselves are neutral- they can be used for a play, a circus or a fight. For instance, as an arena and a stake, UN has been useful to each of the competing groups eager to get not only a forum for their views but also diplomatic reinforcement for their policies, in the Cold War as well as the wars for decolonization. More traditionally, international organizations have provided their members with the opportunity of advancing their own view points and suggestions in a more open and public forum than that provided by bilateral diplomacy. In its role as a forum, the UN General Assembly was fulfilling a requirement often thought of international organizations.

3. Actor: The third role attribute to international organizations in the international system is that of independent actor. The crucial word here is 'independent'. If it means that international organizations- or at least some of them- can act on the world scene without being significantly affected by outside forces, then very few, if any, fulfill that criterion. Neither do many 'independent' sovereign states. If it is used to mean autonomous that the organization's responses are not predicated, even from the most thorough knowledge of the environment and it possesses a stable and coherent decision making machinery within its boundaries, then a number of international organization clearly fit this description. Some writers considered that there was

even ample evidence to show that a number of non-state entities, including international organizations, were able to affect the course of world events. When this happens, these entities become actors in the international arena and competitors of the nation-state. Their ability to operate as international or transactional actors may be traced to the fact that men identify themselves and their interests with corporate bodies other than nation-states.

Moreover, the actor capacity of an international institution depends on the resolutions, recommendations, or orders emanating from its organs' compelling some or all member governments to act differently from the way in which they would otherwise act. This leads according to some that an international organization is most clearly an actor when it is most distinctly an 'it', an entity distinguishable from its member states. Thus, the oft-asserted contentions that the 'UN should do something' or that 'OPEC has petroleum prices' show the popular form of attributing an organization with the flesh and bones of an existence somewhat apart from that of its membership. Clearly all organizations are dependent for their existent on their membership. However, many international organizations have institutional frameworks that allow them to achieve more than would be the case if their members acted separately or only co-operated on an ad hoc basis. It can be claimed that this shows up these organizations as instruments, being used by members to attain their requirements on the international scene.

Estimating the degree of independent actor capacity of IGOs in the international system presents problem. As these organizations are established by intergovernmental agreement can they have a role separate from that willed by their membership? Can they be anything more than instruments of or forums for those member states? It can be justifiably claimed that certain international organizations, by the sovereign will of their founders have been given a separate capacity to act on the international scene and that this is reflected in their institutions. The International Court of Justice is the case in point (ICJ). The structure of ICJ prevents any interference in its work by the signatories to its articles.

5.1.4. Dissolution of international organizations

The constitutions of some international organisations contain express provisions with regard to dissolution. Article VI(5) of the Articles of Agreement of the International Bank for Reconstruction and Development(the World Bank), for example, provides for dissolution by a voteof the majority of Governors exercising a majority of total voting, and detailed provisions

aremade for consequential matters. Payment of creditors and claims, for instance,will have precedence over asset distribution, while the distribution of assets will take place on a proportional basis to shareholding. Different organisations with such express provisions take different positions with regard to the type of majority required for dissolution. In the case of the European Bank for Reconstruction and Development, for example, a majority of two-thirds of the members and three-quarters of the total voting power is required. A simple majority vote is sufficient in the case of the International Monetary Fund, and a majority of member states coupled with amajority of votes is necessary in the case of the International Bank for Reconstruction and Development. Where an organisation has been established for a limited period, the constitution will invariably provide for dissolution upon the expiry of that period. Where there are no specific provisions concerning dissolution,it is likely that an organisation may be dissolved by the decision of its highest representative body.

The League of Nations, for example, was dissolved by a decision taken by the Assembly without the need for individual assent by each member and a similar process was adopted with regard to other organisations. It is unclear whether unanimity is needed or whether the degree of majority required under the constitution of the particular organisation for the determination of important questions would suffice. The actual process of liquidating the assets and dealing with the liabilities of dissolved organisations is invariably laid down by the organisation itself, either in the constitutional documents or by special measures adopted on dissolution.

5.2. Global Organizations

5.2.1. League of Nations

1. The Establishment of the League of Nations: It is useful to consider the 19th c as the era of preparation for international organization, and, for this purpose, to treat 1815, the year of the Congress of Vienna, and 1914, the year of the outbreak of World War I, as its chronological boundaries. The establishment of the League of Nations was an event of fundamental importance, worthy of being considered a decisive forward step in that evolutionary process. To change the figure, 19th c institutions provided the ancestry, but the League of Nations provided the parentage, of international organization as we know it today.

1.1. Sources of the League of Nations: The immediate origins of the League of Nations are to be found in the development of both private and public schemes, during the War of 1914-1918, particular in the United States and Great Britain, and in the negotiations which took place at Paris as a part of the diplomatic enterprise of bringing the war to a formal conclusion. The actual formulation of the Covenant of the League of Nations was the work of a special committee established by the Paris Peace Conference, which began its sessions in January 1919. The committee consisted of representatives of the five great powers- Britain, France, the United States, Italy and Japan- and of at first five, then nine, of the smaller states. W. Wilson, the then president of USA, served as a chairman, and the great powers effectively dominated the proceedings.

The creation of the League of Nations may be regarded as the rationalization, focalization, and consolidation of the previous organizational developments. The League was a composite of the institutional descendants of the 19th c agencies; it pulled together the separate lines of development into a coherent system. Although it never fully achieved the comprehensive control of international cooperative activities, the League did serve generally to convert organizations into organs of an organization. It provided what has been variously referred to as a hub or a roof element, giving the modern world its first taste of international centralization. The league was also the product of 19th c beginnings in the sense that it picked up the ideas, adopted the assumption, and reacted to the awareness which had been emerged in that earlier period. It was a more mature response to the recognition of the need for, and the challenge of the possibilities of, international organization.

The League was based on reaction against, as some writers preferred to say, 'the blind vagrant way in which the various publics blundered into hostilities in 1914." The concept of Accidental War underlay the system of prudent precautions which was outlined in the Covenant, providing guarantees that peoples and governments should have and utilize opportunities for cooling off, facing facts, and reaching decent settlements in any future crises. The League's dedication to the provision of safeguards against accidental and unnecessary war was illustrative of what is perhaps a general tendency for international organizations to exhibit a retrospective mentality. In short, World War I influenced the creation of the League by stimulating efforts of the victorious powers to do in peacetime the things that should have been done before the war, in

order to prevent it, and to continue doing the things which they had found it possible to do during the war, in order to win it.

Another cluster of factors affecting the formulations of the Covenant inhered in general political situation existing in the 19th c. International organizations are never simply the products of creative planning and institutional evolution; they find their sources deep in the context of national interests and the power configuration of the international setting out of which they arise. Understanding of the nature of the League erected at the Paris Peace Conference requires analysis of the determinative political realities of the time. A primary feature of the situation was the existence of a victorious military coalition. The international atmosphere was, as some writers contend, 'still reeking with the fumes of war and still more or less dominated by the military spirit'. The psychology of the war has emerged into the mood of victory, and more than a trace of vindictiveness appeared in the proceedings at Paris. This pints to a persistent dilemma of international organization: great organizational enterprises are dependent upon great wars to demonstrate their urgent necessity and to stimulate recognition of their feasibility, yet postwar periods are more inauspicious times for such undertakings, in the sense that they tend to be dominated by a temper of hatred, suspicious, and arrogant nationalism which bodes ill for the establishment of just foundations for a new world order.

In 1919, the triumphant Allies desired to harvest the fruits of victory, to keep the spoils which they had gained, to establish and uphold a new status quo reflecting the shift in power relations which military events had produced, and to maintain their coalition to keep Germany in a posture of defeat. In these terms, the functions envisaged for the League was not so much to keep peace, but to keep specific peace- to legitimize and stabilize a particular world settlement based upon victory. A second determinative fact was the dominant position of the Principal Allied and Associated Powers; the world seemed to be the oyster of the great powers. The basic reality was not simply that Germany had been defeated, but that the great powers had done the jobs. Having won the war, they had the power, prestige, and the inclination to determine the shape of the new regime.

The League was also a product of ideological climate of the time. Its sources included not only the heritage of the past institutional inventions and the political realities of the present, but also the aspirations for the future which were embodied in current thinking. Like great phenomena of

human society, the establishment of the League derived from a combination of facts and ideas, circumstances and purposes, objective conditions and subjective conceptions. The new system reflected the philosophical assumptions and normative ideals which characterized the contemporary approach to international relations. These factors were not dominant but they were important.

The scheme for a League of Nations adopted at Paris was, in ideological terms, an expression on the international level of 19th c liberalism. It represented not so much a new set of ideas as a new area of expression for old ideas. While it was not a 'pure' ideological product, the Covenant was predominantly liberal in tone. This meant, first of all, that the League was intimately related to the assumptions and values of democratic theory. Wilson, following the thesis laid down more than a hundred years earlier by Immanuel Kant, believed that world peace could be established by a compact among democratically governed nations. This Kantian-Wilsonian position rested upon the assumption that democracies, in contrast to autocracies, are inherently peaceful; only a nation whose government was its servant and not its master could be trusted to preserve the peace of the world. This version of political liberalism called for external, as well as internal, democracy. The League relied upon the beneficent impact of public opinion upon international relations. This new era was to be characterized by open diplomacy, the publication of treaties, the investigation and dissemination of the facts concerning international disputes, and the use of the League forum to submit grave issues to the moral consciousness of free people. Wilson envisaged the League as the 'court of public opinion' in which the 'conscience of the world' could render its verdict, 'the general judgment of the world as to what is right.'

Thus, the League rested upon two assumptions: that the age of democracy had arrived, providing a sufficient number of soundly democratic states to unite in an organization for maintaining world peace; and that the democratic method of arriving at agreements by civilized discussion rather than coercive dictation could be applied to the relations of democratic states as well as to those of individuals. The influence of the 19th c liberalism was evident, secondly, in the emphasis upon national self-determination which characterized Wilson's thinking about the organization of peace. This doctrine, so revolutionary in its implications, was not by any means absolutely dominant at the Peace Conference and it received no formal expression in the words of the Covenant, but it was nevertheless a major tenet of the Wilsonian faith. The doctrine of

national self-determination, according Wilson, is based on the idea that the nation is the natural and proper unit of world politics, and that the only sound and moral basis for international order is a settlement which enables peoples to achieve autonomous existence within a system dedicated to the preservation of independence and sovereignty of nations. In the League philosophy, the realization of the ideals of democracy and self-determination was regarded as the essential means for minimizing the element of conflict in international relations.

This theoretical scheme was a logical projection of liberal political thought. This liberal ideal called for a government of law, in which Might should not make Right but should be tamed and subordinated to collective conceptions of right embodied in rules of law. The league represents an attempt to realize this ideal in international relations-to establish the principle that force should be used in accordance with and in support of a legal order designed to make justice and peace prevail in the world. In short, all the basic concepts of 19th c liberalism- democracy, nationalism, natural harmony, law, limited government, rationalism, discussion, consent-made their imprint upon the Covenant of the League of Nations.

1.2. The nature of the League: The international organization which derived from the institutional developments of the 19th c, the First World War, the resultant political situation, and the prevalent political climate was not intended to be a revolutionary organization. Its founders approved the basic principles of the traditional multistate system; they accepted the independent sovereign states as the basic entity, the great powers as the predominant participants, and Europe as the central core of the world political system. They felt no sense of failure of inadequacy when they created a League which did not represent a fundamental alteration of the old system, since they regarded that system as basically sound and workable.

Despite this essentially conservative attitude a sense of pioneering, of exhilarating adventurousness, accompanied the founding of the League. This enterprise reflected an ambiguity of purpose, a combination of politicians' reaction to victory and desire to nail it down, with peoples' reaction to war and desire to build a durable peace. However, there was a general enthusiasm about the modernization of the international system which had been affected. For the first time, a conscious effort had been made to create a systematic structural pattern for the organization of international relations; the multistate system had been equipped with a central institutional instrument of unprecedented utility. The retention of the traditional foundational

principles was less striking than the introduction of what might be decisive developments in the conduct of international relations; organized consultations, publicized diplomacy, institutionalized pacific settlement, codified outlines of basic principles of international law and morality, collectivized security. International law was to be imbued with higher normative standards and international diplomacy to be provided with greatly improved methods. The era of legally unrestricted right to resort to war, neutral indifference to aggressive use of force, rival alliance and competitive armaments, and cynical manipulation of power relationships was past. In the new era, war anywhere would be everybody's business, discussion at the bar of world public opinion would supersede Machiavellian browbeating tactics, and the security of nations would be a matter of collective responsibility.

1.3. The League's Activities: If the institution of the league were fashioned by the immediate experience of wartime co-operation rather than by 17thc writers, the activities pressed by members through these institutions were also more determined by memories of 1914-18 than by abstract concepts.

During the 1920's the League provided a useful but modest addition to international diplomacy. Regular annual meetings between states' representatives allowed the discussion of threats to peace and security and a more long term consideration of questions of disarmament, guarantees of frontiers and the evolution of the League system. The Council – voicing the concern of the French and British governments- was able to dampen conflict between Greece and Bulgaria in 1925 and also solved the Turkish-Iraq dispute over Mosul. The League was by no means the method used by states to place their relations with each other on a more peaceful and organized basis: Sweden and Finland used mediation to solve their dispute over the Aaland islands in the 1920; the Locarno Treaty guaranteed French-Belgium-German frontiers thus allowing Germany to become a League member in 1926; the Kellogg-Briand Pact allowed both League and non-League members to renounce war as an instrument of national policy; and by the end of the decade the Preparatory Commission for Disarmament which included US and Soviet delegates had started work.

On the economic and social side the League provided valuable coordination for efforts that had previously been disparate and also provided machinery through which problems could be studied and eventually tackled on a cross-national basis. Refugees from Russia and Turkey were aided;

protection of minorities was placed on a regular international footing. The importance of cooperation on economic questions had become accepted after the experience of the Depression and by 1939 the Bruce Report recommended that the League Assembly strengthen its economic program and establish a Central Committee for Economic and Social Questions to this end.

However, in the end the system created in 1919 was not allowed to prevent the Second World War in 1939. Rather than organization helping to achieve collective security, disarmament, the peaceful settlement of disputes and respect for international law, the League eventually became an empty shell abandoned by countries unwilling to involve from themselves outside their domain or give teeth to the League's Covenant. The United States' failure to join the League undermined its claim to universality and its hopes of taking effective action in areas outside Europe- in Manchuria, Ethiopia and Latin America. French policy was aimed at securing their country against future German attack, by a system of alliances if need be, and France attempted to make the League more of a collective security organization which would serve its own interests in Europe. British leaders in the interwar period showed themselves unwilling either within the League or outside it to commit themselves to the automatic defense of other countries: the logic of the alliance and of collective security.

A more serious threat came from those governments who were unsatisfied with the Versailles settlement: Originally the Soviet Union, the Mussolini's Italy and finally Nazi Germany and Imperial Japan in the 1930s. These revisionist powers all had a deep-seated dislike of the post 1919 status quo which, in the case of Germany, Italy and Japan led them to reject the institutions of the existing international system- treaties, diplomacy, international law, the international economic order and international organizations such as the League. In the case of the Soviet Union, the distaste for the European bourgeoisie diplomacies and their associated forms of international relations became attenuated over time by the need to secure the Soviet motherland from outside attack even if this means membership of the League or alliances with non-socialist states. The whole League system can be seen as a crucial link which brought together the strands of pre-1914 international organizations and wartime co-operation into a more centralized and systematic form on a global scale, thus providing a stepping stone towards the more enduring United Nations.

5.2.2. United Nations

1. The origin of the United Nations (UN): UN replaces the League of Nation, which was formed at 1919 after W.W I. The League was unsuccessful to prevent the outbreak of W.W II. UN initiated by President Franklin Delano Roosevelt of the United States and PM Winston Churchill of Britain. Therefore, after W.WII- 50 countries met at San Francisco and signed the United Charter. UN officially existed in 24, Oct 1945. United Nations (UN), international organization of countries created to promote world peace and cooperation. The UN was founded after World War II ended in 1945. Its mission is to maintain world peace, develop good relations between countries, promote cooperation in solving the world's problems, and encourage respect for human rights.

The UN is an organization of countries that agree to cooperate with one another. It brings together countries that are rich and poor, large and small, and have different social and political systems. Member nations pledge to settle their disputes peacefully, to refrain from using force or the threat of force against other countries, and to refuse help to any country that opposes UN actions. The UN is the result of a long history of efforts to promote international cooperation. In the late 18th century, German philosopher Immanuel Kant proposed a federation or "league" of the world's nations. Kant believed that such a federation would allow countries to unite and punish any nation that committed an act of aggression. This type of union by nations to protect each other against an aggressor is sometimes referred to as collective security. Kant also felt that the federation would protect the rights of small nations that often become pawns in power struggles between larger countries.

Despite this failure, the idea of a league did not die. The first commitment to create a new organization came in 1941, when U.S. president Franklin D. Roosevelt and British Prime Minister Winston Churchill announced the Atlantic Charter, in which they pledged to work toward a more effective system to keep world peace and promote cooperation. In 1942 representatives of the Allies—the World War II coalition of 26 nations fighting against Germany and Japan—signed a Declaration by United Nations accepting the principles of the Atlantic Charter. The declaration included the first formal use of the term United Nations, a name coined by President Roosevelt. A year later, four of the Allies—the United States, the United Kingdom, the Soviet Union, and China—agreed to establish a general international organization.

2. Principal organs of the United Nations (UN): The UN Charter established six distinct bodies that serve different functions: (1) the General Assembly, (2) the Security Council, (3) the Secretariat, (4) the Economic and Social Council, (5) the International Court of Justice, and (6) the Trusteeship Council.

2.1. General Assembly

The General Assembly is made up of all member countries, each with one vote. It undertakes all major discussions and decisions about UN actions. It is like a global town hall, providing a powerful medium for countries to put forward their ideas and debate issues. The Assembly can discuss and make recommendations on any issue covered by the UN Charter. However, the recommendations are not binding and the Assembly has no authority to enforce them. Members decide routine matters with a simple majority vote. Important decisions require a two-thirds majority. Established in 1945 under the Charter of the United Nations, the General Assembly occupies a central position as the chief deliberative, policymaking and representative organ of the United Nations. Comprising all 192 Members of the United Nations, it provides a unique forum for multilateral discussion of the full spectrum of international issues covered by the Charter.

The General Assembly meets annually in regular sessions that generally run from mid-September to mid-December. Recently the General Assembly has been meeting year round. It also convenes for special sessions every few years on specific topics, such as economic cooperation or disarmament. In addition, the Assembly can meet in emergency session to deal with an immediate threat to international peace. At the beginning of each regular session, Assembly members elect a president to preside over the assembly. The Assembly sessions, like most UN deliberations, are simultaneously translated into many languages so that delegates from around the world can understand any speaker.

The General Assembly has the power to admit new members to the UN. It approves the budget for UN programs and operations. The Assembly can establish agencies and programs to carry out its recommendations. It elects members to serve on certain agencies and programs, and it coordinates those programs through various committees.In general, according to the Charter of the United Nations, the General Assembly may:

-Consider and make recommendations on the general principles of cooperation for maintaining international peace and security, including disarmament;

-Discuss any question relating to international peace and security and, except where a dispute or situation is currently being discussed by the Security Council, make recommendations on it;

-Discuss, with the same exception, and make recommendations on any questions within the scope of the Charter or affecting the powers and functions of any organ of the United Nations;

-Initiate studies and make recommendations to promote international political cooperation, the development and codification of international law, the realization of human rights and fundamental freedoms, and international collaboration in the economic, social, humanitarian, cultural, educational and health fields;

-Make recommendations for the peaceful settlement of any situation that might impair friendly relations among nations;

-Receive and consider reports from the Security Council and other United Nations organs;

-Consider and approve the United Nations budget and establish the financial assessments of Member States;

-Elect the non-permanent members of the Security Council and the members of other United Nations councils and organs and, on the recommendation of the Security Council, appoint the Secretary-General.

Resolution on peace and security, admission of new members and budgetary matter requires two-third majority. Resolution on other matters requires only simple majority. Though consisting of all member states, the decision of the General Assembly is not binding on any one, unlike the Security Council. In a nutshell, the most comprehensive and important function of the General assembly is its power to discuss and recommend. Two significant limitations restrict an otherwise indeterminate list of matters that may be of concern to the General Assembly. The first limitation is the provision in Article 12 of the Charter that specifies that the General Assembly may discuss but may make no recommendation on “any dispute or situation” that is currently under consideration by the Security Council. The second limitation involves the fundamental nature of international organization at this stage of development. Since states are reluctant to

surrender sovereign power to international agencies, the General Assembly's authority is limited to recommendations that are not binding on member states.

2.2. Security Council

The Security Council is the most powerful body in the United Nations. It is responsible for maintaining international peace and for restoring peace when conflicts arise. Its decisions are binding on all UN members and have the force of international law. The Security Council has the power to define what is a threat to security, to determine?How the UN should respond?And to enforce its decisions by ordering UN members to take certain actions. For example, the council may impose economic sanctions, such as halting trade with a country it considers an aggressor. The council convenes any time there is a threat to peace. A representative from each member country who sits on the council must be available at all times so that the council can meet at a moment's notice. The Security Council also frequently meets at the request of a UN member-often a nation with a grievance about another nation's actions.

The Security Council has 15 members, 5 of which hold permanent seats. The General Assembly elects the other 10 members for rotating two-year terms. The 5 permanent members—the United States, the United Kingdom, France, Russia (formerly the Soviet Union), and China—have the most power. These nations were the winning powers at the end of World War II in 1945, and they still represent the bulk of the world's military might. Passing of a resolution on procedural matters requires the support of nine members out of the 15. If a resolution is on substantive matters, the passing requires the support of nine members including all the five permanent members. However, any one of the permanent members can veto an important decision. This authority is known as the veto right of the great powers. As a result, the council is effective only when its permanent members can reach a consensus. This created problems during the Cold War, the post-1945 struggle between the United States and Soviet Union that ended when the Soviet Union dissolved in 1991. During that time, the council was frequently deadlocked because the United States and Soviet Union could not agree. Beginning in the 1990s, increased cooperation between the United States and Russia enabled the council to become more effective.

The council has a variety of ways it can try to resolve conflicts between countries. Usually the council's first step is to encourage the countries to settle their disagreements without violence. The council can mediate a dispute or recommend guidelines for a settlement. It can send

peacekeeping troops into a distressed area. If war breaks out, the council can call for a ceasefire. It can enforce its decisions by imposing economic sanctions on a country, or by authorizing joint military action.

In recent years, there has been growing controversy over which countries should have permanent seats on the council. Some nations believe that other countries beside the original five should be included. For example, Japan and Germany are powerful countries that pay large membership dues and make substantial contributions to the UN, yet they do not have permanent seats. There is no easy solution to this problem. Adding more permanent members creates its own set of complications, including how to decide which countries get a seat and which do not. For example, if Germany joined, three of the permanent members would be European, giving that region an unfair advantage. Several proposals for addressing this problem have been considered, including adding Germany and Japan as permanent members, waiving the veto power of the permanent members, and limiting Council membership to one year. Thus far, none of the proposals have been adopted, partly because the present structure works well for the five permanent members and they can veto any changes to it.

All in all, the functions and powers of the Security Council are:

1. To maintain international peace and security in accordance with the principles and purposes of the United Nations.

2. To investigate and dispute or situation which might lead to international friction.

3. To recommend methods of adjusting such disputes or the terms of settlement.

4. To formulate plans for the establishment of a system to regulate armaments.

5. To determine the existence of a threat to the peace or act of aggression and to recommend what action should be taken.

6. To call on member states to apply economic sanctions and other measures not involving the use of force in order to prevent or stop aggression.

7. To take military action against an aggressor.

8. To recommend admission of new members and the term on which states may become parties to the Statute of the international Court of Justice.

9. To exercise the trusteeship functions of the United Nations in "strategic areas".

10. To recommend to the General Assembly the appointment of the Secretary-General and, together with the Assembly, to elect the Judges of the International Court.

2.3. The Economic and Social Council (ECOSOC)

The Economic and Social Council is established with the noble purpose of promoting higher standards of living, find solution to solve problems in economy and social and Promote Universal respect for human rights and fundamental freedom of all.

The Economic and Social Council (ECOSOC) works under the authority of the General Assembly to coordinate the economic and social work of the UN. ECOSOC has 54 member countries elected by the General Assembly for three-year terms, 18 being elected each year for a three-year term to replace 18 members whose three-year term has expired. Voting in the council is by simple majority, each member has one vote. ECOSOC coordinates studies and recommends actions on international topics such as medicine, education, economics, and social needs. It promotes higher living standards, full employment, respect for human rights, and economic and social progress. The council oversees the work of a large number of UN programs and agencies.

ECOSOC operates mainly through various standing committees, functional commissions, and regional commissions. There are regional commissions that look at how the UN's programs in a particular region are working together. There are functional commissions that deal with topics such as population growth, narcotics trafficking, human rights, and the status of women. Other committees work on topics relevant to several UN programs, such as crime prevention, public finance, natural resources, science and technology, and geographical names.

ECOSOC coordinates the work of many specialized agencies that provide a variety of social, economic, and related services. The agencies operate independently but work with other programs in the UN. Those agencies include the World Health Organization (WHO), the World Bank, the International Monetary Fund; the United Nations Educational, Scientific and Cultural Organization (UNESCO), the International Labor Organization (ILO), and the Food and

Agriculture Organization (FAO). ECOSOC also works closely with the private sector and with more than 2,000 nongovernmental organizations.

The functions and powers of the Economic and Social Council are:

1. To serve as the central forum for the discussion of international economic and social issues of a global or interdisciplinary nature and the formulation of policy recommendations on those issues addressed to member states and to the UNs system as a whole.

2. To make or initiate studies and reports and make recommendations on international economic, social, cultural, educational, health and related matters.

3. To promote respect for, and observance of, human rights and fundamental freedoms for all.

4. To call international conferences and prepare draft conventions for submission to the General Assembly on matters falling within its competence.

5. To negotiate agreements with the specialized agencies defining their relationship with the United Nations.

6. To coordinate the activities of the specialized agencies by means of consultations with and recommendations to them, and by means of recommendations to the General Assembly and the Members of the United Nations

7. To perform services, approved by the Assembly, for members of the UNs and, upon request, for the specialized agencies

8. To consult with non-governmental organizations concerned, on matters with which the Council deals.

2.4. The Trusteeship Council

The Trusteeship Council was established to oversee the transition of a handful of colonies to independence. The last of those colonies, the Palau Islands, gained independence in 1994, making the Trusteeship Council obsolete. Its tasks is supervising the administration of trust territories to ensure those non-independent countries is well administered.

2.5. The International Court of Justice (ICJ)

The International Court of Justice, also known as the World Court, is the judicial arm of the UN. It is located in The Hague, Netherlands. The court hears cases brought by nations against each other. It has 15 judges, elected by the Security Council and the General Assembly. A country is not required to participate in the court's proceedings, but if it agrees to participate, it must abide by the court's decisions.

2.5.1. The World Court—Composition and Functions

The international court of justice is the principal judicial organ of the United Nations.

The Court is open to all states which are parties to its statute, and automatically includes all members of the UN. A state which is not a member of the UN may become a party to the statute on conditions determined in each case by the General Assembly upon recommendations of the Security Council.

2.5.2. Jurisdiction

The jurisdiction of the Court covers all questions which states refer to it, and all matters provided for in the United Nations Charter or in treaties or conventions in force. States may bind themselves in advance to accept the jurisdiction of the Court in special cases, either by signing a treaty or convention which provides for referral to the Court or by making a special declaration to that effect. Such declarations accepting compulsory jurisdiction may exclude certain classes of cases.

In accordance with Article 38 of its statute, the Court, in deciding disputes submitted to it, applies:

1. International conventions establishing rules recognized by the contesting states
2. International custom as evidence of a general practice accepted as law
3. The general principles of law recognized by nations
4. Judicial decisions and the teachings of the most qualified publicists of the various nations, as a subsidiary means for determining the rules of law.

2.5.3. Membership

The Court consists of 15 Judges elected by the General Assembly and the Security Council, voting independently. They are chosen on the basis of nationality, and care is taken to ensure that the principal legal systems of the world are represented in the Court. No two judges can be nationals of the same state. The judges serve for a term of nine years and may be reelected. They cannot engage in any other occupation during their term of office.The Court normally sits in plenary session, but it may also form smaller units called chambers if the parties so request. Judgments given by chambers are considered as rendered by the full Court.

2.6. The Secretariat

The Secretariat is the executive branch of the United Nations. It oversees the administration of the UN's programs and policies and carries out day-to-day operations. This branch is headed by the secretary general, who acts as the UN's spokesperson.

One purpose of the Secretariat is to develop an international civil service of diplomats and bureaucrats whose loyalties are not tied to any one country. The staff answers only to the United Nations and takes an oath not to obey any outside authority. The UN Charter calls on its members to respect the independence and international character of the staff. However, the UN has had mixed success following through on this ideal. The secretary general is generally seen as an independent diplomat. But member nations still compete to place their citizens in control of staffs that administer important UN programs.

The secretary general is formally chosen by the General Assembly. But the secretary general must first be nominated by the Security Council and win the consent of all five of its permanent members. The secretary general serves a five-year term, which may be renewed. The Security Council can nominate a candidate from any country, but it is an unwritten tradition that the position rotates geographically, with a secretary general chosen from a new region after every two terms. In 1997 the General Assembly created the post of deputy secretary general to assist in the management of the Secretariat. The secretary general appoints the deputy secretary general.

The secretary general, like the rest of the UN staff, is supposed to be independent. In reality, the secretary general must rely on member countries, especially the five permanent Security Council members, to get anything done. As a result, the secretary general often struggles with the Security Council over what direction the UN should take. Since the Security Council chooses the secretary general, there is a limit on how independent the position can be.