



PUBLIC INTERNATIONAL LAW NOTES- MADZIWA EDWARD

INTRODUCTORY TOPICS

The term "international law" was first used by the English philosopher Jeremy Bentham in 1780 in his treatise entitled *"Introduction to the Principles of Morals and Legislation"*. Since about 1840, this term replaced the older terminology "law of nations" which can be traced back to the Roman concept of "*ius gentium*".

International Law is divided into two branches: Private International Law (conflict of laws as it is called in the countries of the Common Law System), and Public International Law (usually just termed International Law). Private International Law deals with those cases, within a particular legal system, in which foreign elements involve, raising questions as to the application of foreign law or the role of foreign courts. Public International Law deals, in general, with the external relations of States. It is this latter branch of International Law is the subject of this present book.

What is Public International Law? How is it originated and developed? What is the aim it is trying to achieve?

The answers to all these raised questions are dealt with in the following sections.

I. Definition of Public International Law

Until the Second World War, legal scholars found no difficulty in defining "Public International Law", in one formation or another, as the law that governs the relations between States. This traditional definition is a reflection of the prevailing doctrine of the nineteenth century and the first half of the twentieth century considering that only states could be persons (subjects) of Public International Law, in the sense of enjoying international legal personality, i.e., being capable of possessing international rights and duties.

However, since the mid-twentieth century, the traditional definition has become controversial due to both the expansion of the scope of the Public International Law into new areas and the emergence of new actors, beside states, on the international scene, such as international organizations, multinational corporations, individuals and groups,

including minorities and indigenous peoples. Some of these actors have acquired international legal personality, or, at least, certain rights under International Law.

In the light of this development, the traditional definition has become incomprehensive description of this law, and the change of the definition of the Public International Law has become inevitable. Public International Law has been defined as a body of legal rules which regulates or governs relations between international persons (subjects). This contemporary definition of Public International Law goes beyond the traditional one which defines this law as a body of rules governing relations between states.

Thus, the contemporary Public International Law consists of the following:

- (a) Legal rules of conduct which states feel themselves bound to observe in their relations with each other's;
- (b) Legal rules related to the functioning of international organizations, their relations with each other and their relations with States and individuals; and
- (c) Legal rules related to individuals and non-state entities as far as the rights and duties of these subjects are the concern of the international community.

Public International Law now covers vast and complex areas of international concern, including traditional topics, such as the State, peace and security, the laws of war, the laws of treaties, the law of the sea, the law of diplomatic and consular relations, as well as new topics, such as international organizations, economy and development, air law and outer space activities, communications, the environment, and last but not least, human rights.

The rules of Public International Law are **general** and **universal** in their nature, and are legally binding on all the persons of International Law. These rules must be distinguished from what is called international comity and what is known as international morality. A **comity** is a friendly gesture or courtesy exercised by one State toward another without constituting a legal obligation; an example of a comity is the flag salute at the sea. A **comity helps** in promoting and maintaining friendly relations among States. While not a legal rule, a comity can be widely observed and can evolve into a customary international rule or be codified as a law; an example of an international comity which was codified as a law is the exemption from customs duties of personal articles used by diplomats (codified in the Vienna Convention on Diplomatic Relations of 1961).

Rules of International Law may meet at certain points with **principles of international morality** since they cannot be divorced from their moral values. However, the former rules are legal in their contents and forms, while the principles of morality are part of the discipline of ethics which is not legally binding.

II. Origin and Development of Public International Law

The foundations of Public International Law as it is understood today lie firmly in the development of political relations between the Western European States some 400 years ago. However, certain basic concepts of this Law can be traced back thousands of years ago, in relations between ancient political entities, such as of the Near East, Greece and Persia.

The **structure and development** of Public International Law is connected with the **era of sovereign national** States dealing with each other as **independent entities**. In this sense, therefore, the history of this Law can be regarded as beginning in the 16th Century with the emergence of independent nation-states from the ruins of the medieval Holy Roman Empire which was based on the claims to universal authority of the Pope as the spiritual, and the Emperor as the temporal, head of Christian nations of Europe. As this Empire disintegrated, a growing number of independent and equal States filled the gap.

The Emergence of independent and equal States subject to no temporal superior authority led to new political theories. The most prominent among these theories was the **theory of Sovereignty**. This theory was explicitly formulated by Jean Bodin (1530-1596) in

his treatise entitled *Six Livres de Republique* (Six Books on the Republic) of 1576. According to Bodin, in every State there exists in an individual monarch a power called sovereignty (*majestas*). Sovereignty is a Republic absolute and perpetual power. It is absolute because it is indivisible; however, it is not without any limits. While such a sovereign is not bound by the laws himself instituted, he remains bound by the divine law, the law of nature, and the law of nations. Sovereignty is perpetual because it does not disappear with its holder (the sovereign). The concept of sovereign as supreme legislator, as formulated by Bodin, was in the course of time evolved into the principle which gave the State supreme power vis-à-vis other States.

The coexistence of independent sovereign States led to the development of the system of interstate relations. The need for rules regulating the intercourse between the newly emerging States in Europe stimulated these States to draw mainly upon the Roman Law and the Canon Law (the Law of Roman-Catholic Church) for the sources of such rules. The significance of the Roman Law and the Canon Law contribution to "the law of nations" lies not only in the development of a modern system of interstate legal relations, but also in the development of many principles of general equity and "natural law" some of which are similar to certain general principles of law recognized by civilized nations.

In the few centuries that preceded the Thirty Years War (1618-1648), the intensification of international trade, and the improvements in navigation and military techniques, and the discovery of many distant lands by the European States stimulated further development of international practices and the emergence of new conceptions of the law of nations. The intensification of trade led to the conclusion of many commercial treaties and the emergence of new practices and principles related to the law of merchant and the maritime law. Notably, the growth of international trade had from the 8th Century onwards led to the development of international law of merchant and, in particular, to various compilations of maritime law which gained increasing international recognition. The international customs and principles related to the law of merchant and maritime constituted part of the practices and principles of "the law of nations."

The discovery and subjugation of distant lands and peoples by European States produced numerous conflicting claims of sovereignty, jurisdiction, rights of trade and rights of navigation as well as problems of relations. All these developments urged the Europeans to resort to the Roman Law for helpful norms or analogies, and consequently led to new practices and principles.

By the 17th Century, the growing complexity of international principles, customs and treaties had given rise to their compilation and to the development of further rules governing the conduct of States in time of war and peace. The most important treatise, dealing with States' relations in time of war and peace, of this period was "*De Jure Belli Ac Pacis*" (On the Law of War and Peace), published in 1625 by the Dutch jurist and diplomat Hugo Grotius (1583-1645). Hugo Grotius is recognized as the "Father of International Law", and his treatise is generally regarded as providing the foundation of the Public International Law.

Beside Grotius, there are many jurists who contributed extensively to "the law of nations" during the 17th and the 18th centuries. Among these jurists are Francisco de Vitoria (1480-1546), Suarez (1548-1617), Alberico Gentili (1552-1608), Samuel von Pufendorf (1632-1694), Richard Zouche (1590-1660), Johann Jakob Moser (1701-1785), Christian Wolff (1676-1754), and Emerich de Vattel (1714-1769).

The International Law (the law of nations) further expanded in the 19th Century. This expansion was due to major events such as the expansion of the European empires, the rise of powerful States both within and outside Europe, the spread of the thought of democracy and nationalism, the Industrial Revolution, the modernization of world transport, and the influence of new inventions. All these events urged the international community to develop the International Law in order to accommodate such events. Consequently, International Law as a law regulating diplomatic and commercial relations

between States, and **the conduct of war**, multiplied and intensified during the 19th Century.

The establishment of the League of Nations in 1919, following the First World War, and the establishment of the United Nations in 1945, following the Second World War, represented two significant turning points in the development of the International Law. The development was characterized by a new departure in the evolution of this Law. International Law began its evolution from being primarily a system of regulating relations between States towards becoming also a system of international cooperation.

The **League of Nations** was the first international organization established primarily for the **purpose of maintaining international peace and security**. The establishment of the International Labour Organization (ILO), affiliated with the League of Nations, in 1919 signalled the end of an era in which International Law was, with few exceptions, confined to the regulation of relations between States. The ILO was the first permanent international organization concerned with the improvement of labour conditions and social welfare at the international level. In 1921, the **Permanent Court of International Justice** (PCIJ) was established as **the first permanent international judicial organ** with an international judicial jurisdiction.

The establishment of the United Nations in 1945 led to a **progressive development of International Law**. During the post-United Nations' era, the development of International Law has been influenced by two major events effected the international community. The **first major** event has been the **expansion** in the membership of the **international community**. New States, mostly representing non-western civilization, have joined the club of family of nations, which was previously exclusively limited to States belonging to Western Civilization. The concerns and priorities of these States have been different from those of other States; they have been occupied with the development of their political, economic and social systems. The **second** major event has been the massive expansion of international organizations for cooperation. Numerous specialized agencies of the United Nations and other international organizations, universal as well as regional, have been established. This event has confirmed the evolution International Law from its traditional nature to its contemporary nature of being a system of organized collective efforts for cooperation.

Since the establishment of the United Nations, a great number of international treaties covering all aspects of international affairs have been concluded. Law-making treaties have been contributing extensively to the rapid development of Public International Law. They have led to many important new developments in Public International Law, and greatly increased both its scope. Apart of the law-making treaties, international courts, the present International Court of Justice (ICJ), its forerunner the Permanent Court of International Justice (PCIJ), and others, have been also contributing to the development of Public International Law. Moreover, the International Law Commission created in 1947, the organs of the **United Nations** and its **specialized agencies** have been playing a significant role in developing and expanding Public International Law.

In conclusion, Public International Law has evolved from being primarily a law of coexistence, which characterized it from its **birth in the early 16th** century to the mid-20th century, to a law of international organization and cooperation. Moreover, the most important characteristic of Contemporary Public International Law is the steady expansion of its scope through the inclusion of new subject matters formerly outside its sphere, and the inclusion of new participants and subjects such as international organizations and individuals.

III. Aims of Public International Law

The **initial aim** of Public International Law has been to create an **orderly system of international relations**. However, the **modern developments** of this law **have added** another aim to it. Since the beginning of the Twentieth Century, there has been an evidence of a tendency to **bring justice** into the international community through **ensuring justice** in the relations of **States** and securing justice for **peoples** and **individuals**.

The establishments of the Permanent Court of International Justice in 1921 and the International Court of Justice in 1945 have been a clear evidence of such a new aim of the Public International Law. The use of the term “justice” in the name of these international courts where disputes among States are decided and where advisory opinions are given according to Public International Law is evidence that justice has become the concern of this law, and has become one of its aims and purposes.

To ensure and **secure justice**, and above all, to bring order to the **international relations** are the primary aims of the contemporary Public International Law. This law, which regulates relations between international persons, aims to create a system of order and justice for the international community. In the absence of such a system, it will be impossible for the international persons to have steady and continuous relations, and to enjoy the benefits of such relations.

SOURCES OF PUBLIC INTERNATIONAL LAW

The term “sources of Public International Law” is used to mean two things: first, the actual materials determining the rules applicable to a given international situation (the material sources), and second, the legal methods creating rules of general application (the formal sources). However, because it is difficult to maintain this distinction, the two meanings are used interchangeably.

Article 38 of the Statute of the International Court of Justice (ICJ) states the following:

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
 - a- international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
 - b- international custom, as evidence of a general practice accepted as law;
 - c- the general principles of law recognized by civilized nations;
 - d- subject to the provisions of Article 59, judicial decisions and teaching of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.
2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.

This Article lists the traditional sources of Public International Law, the actual legal materials that the ICJ has to apply to international disputes. According to this Article, these sources are of two types: the primary sources that are represented by the international conventions, international custom and general principles of law; and the subsidiary sources that are represented by the decisions of courts and the opinions of legal scholars. Moreover, this Article lists “*ex aequo et bono*” (equity) as an alternative source of Public International Law applied by the Court if the parties agree thereto. However, in addition to these traditional sources, there are contemporary sources, such as the acts of the international organizations.

Thus, the sources of the contemporary Public International Law can be classified into seven:

- 1- International customs;
- 2- Treaties;
- 3- General principles of law;
- 4- Judicial decisions;
- 5- Opinions of legal scholars;
- 6- *Ex aequo et bono* (Equity);

7- Acts of international organizations.

In the following sections, these sources are discussed.

International Customs

Article 38 of the Statute of the ICJ refers to an international custom as evidence of a general practice accepted as law. This definition comprises of two elements: a **general practice** and its **acceptance as law**. These two elements are necessary for the formation of customary international law. The first element, the behavioural or objective element, requires a recurring consistent action or lack of action by States, which is indicated by such activities as official statements or **conducts, legislative or administrative action, court decisions and diplomatic behaviours or correspondence**. The second element (the **psychological or subjective element**) entails the conviction that in similar case such a practice is required or permitted by international law. In this sense, international customs may be defined as practices or usages which have been observed by a large number of States over a lengthy period of time and considered by them to be legally obligatory, i.e., being a law.

Notably, the terms “custom” and “usage” are often used interchangeably. Strictly speaking, there is a clear technical distinction between the two. Usage is an international habit of action that has not received full attestation and does not reflect a legal obligation; an example of a usage is the salute at sea. Usages may be conflicting; custom must be unified and consistent. A usage to become a customary rule of law, it must fulfil **two conditions: acceptance or recognition** by a large number of States and **repetition** over a lengthy period of time. A custom has a definite obligation attached to it. Failure to follow custom results in State responsibility, and consequently entails the possibility of punishment (sanction) or of retaliation against that State.

International custom, as Article 38 indicates, is one of the primary sources of International Law which the ICJ shall apply. In fact, international customs constituted the bulk of the rules of International Law. Historically, custom had played a great role in the formation of the rules of International Law. However, since the beginning of the Twentieth Century, this role has been decreased in favour of the law-making treaties.

Treaties

The term “treaty” is used as a generic term embracing all kinds of international agreements which are known by a variety of different names such as, conventions, pacts, general acts, charters, statutes, declarations, covenants, protocol, as well as, the name agreements itself. A treaty may be **defined as an international agreement concluded between States in written form and governed by International Law**.

Article 38 of the Statute of ICJ indicates that international conventions (treaties), whether **general or particular**, establishing rules expressly recognized by the contesting states should be applied by the Court to the disputes submitted to it. Although this Article divided treaties into **two kinds, general treaties and particular treaties**; it is only the first kind, the general treaties or the so called the **law-making treaties**, which intended to have a universal and general application, constitute a primary source of International Law.

The **particular treaties** or the so called **treaty-contracts** are **not directly** a source of International Law since their application is limited only to the contracting parties which are two or small number of States, and they deal with **limited affairs**. This kind of treaties **does not** create new rules of Public International Law, but at best, only new rules of particular or regional application. However, as a substantial number of States accept and recognize such new rules formulated in this kind of treaties as obligatory, these rules will become part of the Public International Law. Examples of such treaties are bilateral treaties on commercial, and friendship relations.

The **law-making treaties** constitute a **primary source** of International Law. Since the middle of the Nineteenth Century, there has been an astonishing development of law-making treaties. The rapid expansion of this kind of treaties has been due to the

inadequacy of customs in meeting the urgent demands arose from the changes which have been transforming the whole structure of international life. Law-making treaties have been concluded to regulate almost every aspect concerning the international community. Examples of important treaties are: the Charter of the United Nations, the four Geneva Conventions of 1949, the Vienna Convention on Diplomatic Relations of 1961, the International Covenant on Civil and Political Rights of 1966 and the Convention on the Law of the Sea of 1982.

In contrast with the process of creating law through custom, treaties are a more modern, more deliberate and speedy method. They are of growing importance in International Law. Their role in the formation of new rules of International Law increases day after day. Today, the law-making treaties are considered the most important primary source of Public International Law.

General Principles of Law

Article 38 of the Statute of the ICJ refers to “the general principles of law recognized by civilized nations” (all nations are now considered as civilized) as a primary source of International Law. This source is listed the third after international conventions and international customs. The Court shall apply the general principles of law in cases where treaties and customs provide no rules to be applied.

Notably, there is no agreement on what the term “general principles of law” means. Some say it means general principles of international law; others say it means general principles of national law. Actually, there is no reason why it should not mean both; the greater expansion in the meaning of this term, the greater chance of finding rules to fill the gaps in treaty law and customary law. Indeed, international tribunals had applied general principles of law in both senses for many years before the Permanent Court of International Justice was established in 1920.

Nevertheless, there are various opinions as to the origin of the general principles of law. Some regard them as being originated from the Natural Law which underlies the system of International Law and constitutes the criteria for testing the validity of the positive rules. Others regard them as stemmed from the national legal systems (Positive Law) and have been transplanted to the international level by recognition.

Whatever the meaning of the term “general principles of law” and the origin of these principles, these principles are considered to be at the foundation of any legal system, including International Law. Actually, there is an agreement that the general principles of law do constitute a separate source of International Law. Examples of general principles of law are the principles of consent, equality, administration of justice, good faith, reciprocity, forbidding abuse of right and *res judicata*.

Judicial Decisions

Article 38 of the Statute of the ICJ directs the Court to apply judicial decisions as subsidiary means for the determination of rules of law. This direction is made subject to the provisions of Article 59, which states that “the decision of the Court has no binding force except between the parties and in respect of that particular case.” The provision of Article 59 of the Statute of the ICJ is understood to mean that the Court is not obliged to follow previous decisions. So while, as Article 59 ascertained, the doctrine of precedent as it is known in the Common Law, whereby the decisions of certain courts must be followed by other courts, does not exist in International Law, it is still that the decisions of the international courts (PCIJ and ICJ) are quoted as authoritative decisions, and international courts have always strived to follow their previous decisions to insert certainty and uniformity within their judicial process, or at least, they have had to take previous decisions into account.

The judge of the ICJ sometimes does a little more than merely determine a law; he may establish a law. This has occurred in many instances: the *Anglo-Norwegian Fisheries* case of 1951, which stated the criteria for the recognition of baseline from

which to measure the territorial sea; and the *Reparations* case of 1949, which established the legal personality of international organizations.

The PCIJ, during its existence, gave a large number of decisions and advisory opinions on matters of international concern, thereby developing International Law. The ICJ, the successor of the PCIJ, has been doing the same.

As the term “judicial decisions” referred to by Article 38 also encompasses decisions (awards) of international arbitral courts (tribunals) and the decisions of national courts, these decisions have been playing a role in the development of International Law.

There have been many international arbitral tribunals, such as the Permanent Court of Arbitration and the various mixed-claimed tribunals, including the British-American Mixed Claims Tribunal and the Iran-US claims Tribunal. Although these tribunals differ from the international courts in some ways, many of their decisions have been extremely significant in the development of International Law.

The **decisions of national** courts of various nations have played a role the development of International Law, particularly the international customary law. These Decisions help to form international customs. They show what the national courts have accepted as international law and how the International Law, in the given case, is understood in that country. Examples of such rules of law developed by, or derived from the uniform decisions of national courts are certain rules of **extradition law**, the rules related to State recognition, and the **rules of diplomatic immunity**.

One may finally say that judicial decisions, whether international or national, have played an important part in the development of International Law. The international customary law has largely developed from **case to case**, and a large number of cases have been submitted to international as well as national courts of various nations.

Writings of legal scholars

Article 38 of the Statute of the ICJ includes as a subsidiary means for the determination of rules of law, “the teachings of the most qualified publicists of the various nations”. The term “teachings of publicists” means “writings”, “opinions” or “works” of legal scholars, jurists or writers.

This Article emphasizes the evidentiary value of writings of the legal scholars. The primary function of these writings is to provide reliable evidence of the law. Writers on International Law cannot **make the law**; their works are to **elucidate** and **ascertain** the **principles** and **rules** of International Law. To be binding, the rules and principles must have received the consent, whether express or implied of States, who are to be bound by it.

Historically, the writers on International Law such as Gentili, Grotius, Pufendorf and Vattel were a primary factor in the evolution of the modern International Law; they were the supreme legal authorities of the Sixteenth to Eighteenth Centuries. They determined the scope, form and content of International Law. However, the importance of legal writings began to decline as a result of the emphasis on the state sovereignty; treaties and customs assumed the dominant position in the exposition and development of International Law.

Nevertheless, like judicial decisions, the opinions of legal scholars can provide evidence of the existence of customary law and can help in developing new rules of law.

The opinions of legal scholars are used widely. Arbitral tribunals and national courts make extensive use of the writings of jurists. However, the International Court of Justice makes little use of jurisprudence, and judgments contain few references; this is, primarily, because of the willingness of the Court to avoid a somewhat undesirable selection of citations. However, many references to writers are found in the pleadings before the Court.

Ex aequo et bono (Equity)

Article 38 of the Statute of the ICJ lists *ex aequo et bono* as an alternative basis for a decision by the Court in place of the normally employed legal rules. The Court can decide a case submitted to it *ex aequo et bono* (in justice and fairness) only if the parties agree thereto. *Ex aequo et bono* is somewhat analogous to but not exactly the same as the Common Law concept of equity. It is broader than equity and gives the Court greater power than the latter. It allows the Court to decide a case on considerations other than legal rules, or even in contrary to these rules, if it sensed that justice can be served thereby. Thus the term "*ex aequo et bono*" means "justice and fairness" or "equity".

Neither the International Court of Justice nor its predecessor, the Permanent Court of International Justice, has been called upon to decide a case *ex aequo et bono*, although principles of equity have been applied by these courts in some cases. The ICJ in the *North Sea Continental cases* (1969) directed the delimitation between the parties (West Germany, Holland and Denmark) "in accordance with equitable principles". The PCIJ in the *Diversion of Water from the Meuse River* case (1937) applied principles of equity after considering them as part of the International Law which it should apply. Moreover, international arbitral tribunals have resorted to the principles of equity in several cases.

Despite the application of the principle of equity by international courts, the existence of "equity" as a separate and distinct source of law is highly controversial. Some regard equity as a source of International Law, and apply it as distinguished from law; however, they often appeal to natural law in order to strengthen their arguments. Thus to them the three terms "equity", "justice" and "natural law" tend to merge into one another. During the Sixteenth and Seventeenth Centuries natural law was a major source of International Law. In the Nineteenth and Twentieth Centuries arbitrators have often been authorized to apply justice and equity as well as International Law; such authorization were more common before 1920 than they are today.

Other scholars do not recognize equity as a separate and distinct source of law; they regard the principles of equity as part of the general principles of law that are common to all national legal systems.

Whatever the position may be, it is doubtful whether equity form a source of international law. It cannot be assumed that a judge uses equity as a source of law every time he describes a rule as equitable or just. Strictly, "equity" cannot be a source of law; yet it may play an important role in supplementing the law or may appear as a part of judicial reasoning. A judge or arbitrator can always use equity to interpret or fill gaps in the law, even when he has not been expressly authorized to do so. But he may not give a decision *ex aequo et bono* unless he has been expressly authorized to do so.

Acts of International Organizations

The growth of international organizations since the First World War has been accompanied by suggestions that the acts of these organizations should be recognized as a source of International Law. The question involved hereto is whether the decisions of the organs of these organizations can be regarded as a separate source of International Law.

Decisions of the organs of international organizations may be binding or non-binding. An organ may be authorized to take decisions which are binding on member states; only these binding decisions are regarded as a source of the International Law. The only clear example of binding decisions is the resolutions which the Security Council of the United Nations are authorized to take under Chapter Seven (VII) of the Charter of the United Nations dealing with actions related to threats to the peace, breaches of the peace, and acts of aggression.

However, there is a controversy concerns the non-binding decisions of the organs of the international organizations. Since almost all the organs of the international organizations are composed of representatives of member states and their acts are merely the acts of the states represented in these organs, they would probably

constitute an evidence of customary law because they reflect the views of the state voting for them. The obvious examples of such type of acts are the resolutions and declarations of the General Assembly of the United Nations. When the vast majority of States, in the General Assembly, consistently vote for resolutions and declarations on a certain topic, a State practice will be established and a binding rule of customary International Law will emerge. Thus, these resolutions and declarations will constitute an evidence of the existence of customary International Law. Examples of such resolutions and declarations regarded as examples of State Practice which have led to binding rules of customary International Law are: "the Resolution on Prohibition of the Use of Nuclear Weapons for War Purposes", "the Declaration on Granting of Independence to Colonial Countries and Peoples", "the Declaration on Permanent Sovereignty over Natural Resources" and "the Declaration of Legal Principles Governing Activities of States in the Exploration and Use of Outer Space".

Resolutions and declarations of the General Assembly may also provide a basis for the progressive development of the International Law and the speedy adaptation of customary law to the conditions of modern life. Moreover, in some instances, a resolution or declaration may have direct legal effects as an authoritative interpretation and application of the principles stated in the Charter of the United Nations.

THE RELATIONSHIP BETWEEN MUNICIPAL LAW AND INTERNATIONAL LAW

Public International Law and national law (municipal law as known in the Common Law Countries) are two legal systems. National law governs the domestic (internal) relations between the official authorities of a State and between these authorities and individuals as well as the relations between individuals themselves. Public International Law governs primarily the relations between States.

With the rise and extension of Public International Law, a question begins to arise as to the relationship between the national law of the States and the Public International Law. This question gives rise to many practical problems. What is the status of the rules of Public International Law before a national court? What is the status of the rules of national law before an international court? Which rule does prevail in a case of conflict between the two laws? How do rules of Public International Law take effect in the internal law of a State?

The answers to the above questions are presented in the following sections: section one deals with the theories dealing with the relations between International Law and national law; section two deals with the attitude of International Law to national law; and section three deals with the attitude of various national laws to International Law.

The Theories Dealing with the Relations Between International Law and National Law

There are two major theories on the relationship between Public International Law and national law. The first is the dualist theory. The second is the monist theory

The dualist theory considers that International law and national law are two separate legal systems which exist independently of each other. Each of these two systems regulates different subject matters, function on different levels, and each is dominant in its sphere. Public International Law primarily regulates the conduct of sovereign States. National law regulates the conduct of persons within a sovereign State. On this view, neither legal system has the power to create or alter rules of the other. When national law provides that International Law be applied in whole or in part within the jurisdiction, this is merely an exercise of the authority of national law in the adoption or transformation of the rules of International Law into its legal system. The national law has a supremacy over the International Law; in the case of a conflict between International Law and national law, a national court would apply national law.

The monist theory, which upholds the unity of all law, regards International Law and national law as forming part of the same legal system (order). It argues that both laws are based upon the same premise, that of regulating the conduct and the welfare of

individuals. However, it asserts the supremacy of International Law over national law even within the national sphere; in the case of a **conflict between the two laws, International Law is supreme.**

It is notable that the position taken by each of these two theories is a reflection of its ideological background. The **dualist** theory adheres to **positivism**, while the **monist** theory follows **natural** law thinking and liberal ideas of a world society.

Facing these two basic theories, a **third approach** is introduced. This approach is somewhat a **modification of the dualist** theory. It attempts to establish a recognized theoretical view tied to reality. While it asserts that the two laws are of two distinct legal systems, it denies that a common field of operation exists as between International Law and national law by which one system is superior or inferior to the other. Each law is supreme in its own sphere (field). Just as one cannot talk in terms of the supremacy of one national law over another, but only of two distinct legal systems each operating within its own field, so International Law and national law should be treated in the same way. Each law exists within a different juridical order.

Because the above opposing theories, in reality, do not adequately reflect actual State practice, the scholars in each side have forced to modify their original positions in many respects, bringing them closer to each other, without, however, producing a conclusive answer on the true relationship between International Law and national law. This fact has led some legal scholars to pay less attention to these theoretical views and to prefer a more empirical approach seeking practical solutions in a given case. The method of solving a problem does not probe deeply into theoretical considerations, but aims at being practical and in accord with the majority of States practice and international judicial decisions. On this view, it is more useful for us to leave the theoretical controversy aside and direct our attention to the attitude of International Law to national law and the attitude of the various national laws to International Law; these are what are discussed in the following two sections.

The Attitude of International Law to National Law

International Law, in the international sphere, has a supremacy over national law. However, this principle does not mean that national law is irrelevant or unnecessary. International Law does not ignore national law. National law has been used as evidence of international custom or general principles of law, which are both sources of International Law. Moreover, International Law leaves certain questions to be decided by national law. Examples of these questions are those related to the spheres of competence claimed by States as regards State territory, territorial sea, jurisdiction, and nationality of individuals and legal persons, or those related to obligations to protect human rights and the treatment of civilians during belligerent occupation. Thus, the international court may have to examine national law related to these questions in order to decide whether particular acts are in breach of obligations under International Law, particularly, treaties or customary law.

A great number of treaties contain provisions referring directly to internal law or employing concepts which by implication are to be understood in the context of a particular national law. Many treaties refer to "nationals" of the contracting parties, and the presumption is that the term means persons having that status under the internal law of one of the parties.

The international courts, including the International Court of Justice and its predecessor, have regarded national law as a fact that the parties may provide by means of evidence and not to be taken by the court *ex officio*. Moreover in examining national law the courts have in principle regarded as binding the interpretation by national courts of their own laws.

The Attitude of National Laws to International Law

The attitude of national law to International Law is not that easy to summarize as the attitude of International Law to national law. This is because the laws of different States

vary greatly in this respect. However, States are, of course, under a general obligation to act in conformity with the rules of International Law; otherwise, they will be responsible for the violations of such rules, whether committed by their legislative, executive or judicial authority. Further, States are obliged to bring national law into conformity with their obligations under International Law; for example, treaties may require a national legislation to be promulgated by the States parties. Nevertheless, International Law leaves to States the method of achieving this result. States are free to decide how to include their international obligations into their national law and to determine which legal status these have internally. In practice, on this issue there is no uniformity in the different national legal systems. However, the prevailing position appears to be dualist, regarding International Law and national law as different systems requiring the incorporation (adoption, transformation and reception are other concepts used) of the international rules on the national level.

Actually, the most important issues of the attitude of national legal systems to International Law concern the status of international customary law and international treaties. On these issues, the attitude of various national legal systems varies.

The survey of the attitudes adopted by various countries of the Common Law and Civil Law traditions leads to the following conclusions. The first of these is that most countries accept the operation of customary rules within their own jurisdictions, providing there is no conflict with existing laws, i.e., if there is a conflict, national law is supreme; some countries allow International Law to prevail over national law at all time. The second conclusion is that as regards treaties, in some countries, certain treaties operate internally by themselves (self-executing) while others require undergoing a process of internal legislation. Some countries allow treaties to supersede all national laws (ordinary laws and the constitution), whether made earlier or later than the treaty, while others allow treaties to supersede only ordinary laws and only that made earlier than the treaty. Others adopt opposite positions.

SUBJECTS OF INTERNATIONAL LAW

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

States

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

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

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

International Organizations

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

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

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

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

Non-State Entities

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

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

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

possessed international personality. Moreover, these two Republics were members of a number of international organizations and parties to a number of treaties.

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

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

International practice has accorded the political entities recognized as national liberation movements a number of legal rights and duties. The most significant of these rights and duties are the capacity to conclude binding international agreements with other international legal persons, the capacity to participate in the proceedings of the United Nations, and the rights and obligations of International Humanitarian Law.

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

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

Special case entities

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

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

(b) **The Holy See and the Vatican City:** The Holy See, which is sometimes used interchangeably with the Vatican City, is the international legal person of the Roman Catholic Church, with its physical location at the Vatican City in Rome and its sovereign the Pope. It is not a State in the normal sense of the word. It is a unique person of International law because it combines the feature of the personality of the Holy See as a religious entity with its territorial base in the Vatican City. Apart of some one thousand Church functionaries, it has no permanent population of its own. Its sovereign territory consists of only about one hundred acres granted it by Italy in the 1929 Lateran Treaty. Nevertheless, the status of the Holy See as an international person is accepted by a number of States. Its personality approximates to a State in functions. The Holy See exchanges diplomatic representatives with other States, enters into bilateral treaties (called concordats), and is a party to many multilateral treaties.

5. Individuals

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

In the Twentieth Century, International Law became again concerned with individuals. In 1907, the Hague Conventions initiated the concern in view of prisoners of war and the wounded. During the Second World War, the trend of International Law had been towards attaching direct responsibility to individuals for crimes committed against the peace and security. The Charter of London of 1943 issued by the Allied Powers established the individual responsibility for committing war crimes, crimes against humanities and crimes against peace. On this basis, after the Second World War, the German leaders were brought to trial before the Nuremberg International Tribunal (1945-1946) where their guilt was established. The Charter of the Nuremberg International Tribunal of 1945 provided specifically for individual responsibility for crimes against peace, war crimes and crimes against humanity. The Nuremberg International Tribunal pointed out that "international law imposes duties and liabilities upon individuals as well as upon states" and this was because "crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced". The principles of the Charter of the Nuremberg Tribunal and the decisions of this tribunal were affirmed by the General Assembly of the United Nations in 1946, thus making them to be part of the International Law. The Assembly also, in 1946, stated that genocide was a crime under International Law bearing individual responsibility; and this was reaffirmed in the Genocide Convention of 1948.

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

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

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

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

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

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

6. Minorities

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

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

Despite all these efforts that aimed to grant specific rights to minorities, the question

remains, what legal status should be accorded to minorities in International Law? Do minorities have international legal personality?

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

7. Indigenous Peoples

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

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

RECOGNITION

International community is a living entity in the sense that it is changeable. The identity and number of States are by no means fixed and invariable. History produces many changes. Old States disappear or unite with other States to form a new State, or disintegrate and split into several new States. Former colonies attain statehood. Even in the case of existing State, a revolution or unconstitutional event may occur and the status of new government becomes a matter of concern to other States, which formerly had relations with the displaced government. These instances raise several problems for the international community. The most important problem is the question of recognition of the new State or the new government. Each State has to decide whether to recognize the new State or the new government.

Recognition involves legal consequences both internally and internationally. If an entity is recognized as a State, it will be entitled to rights and subjected to duties that would not be relevant otherwise, and it will enjoy privileges and immunities of a foreign State, before the national courts, which would not be allowed to other entities.

What is recognition? Why and how is it granted? What are the types and forms of recognition? What are the legal consequences generated from recognition?

The answers to all these questions are dealt with in the following sections.

Definition and Nature of Recognition

Recognition is a discretionary unilateral act exercised by the government of a State officially acknowledging the existence of another State or government or belligerency. It is one of the most difficult subjects of International Law. It is a complicating mixture of politics and laws both national and international. It is difficult mainly for the following three reasons.

(1) Recognition is, as the practice of States shows, much more a question of politics than of law. The act of the recognizing State is conditioned principally by the necessity of protecting its own national interests, which lie in maintaining proper relations with the

new State or the new government. However, there is an irresistible tendency of the recognizing State to use legal principles as a convenient camouflage for political decisions. For this reason, recognition is considered to be a political act with legal consequences.

(2) In form and in substance, recognition remains primarily a unilateral diplomatic act on the part of the recognizing State. No collective procedure for granting recognition based on established legal principles has yet been evolved by the international community.

(3) There are several distinct categories of recognition. There are the recognition of a new State, a new government and belligerency. In addition there are *de jure*, *de facto*, conditional, implied and express recognition. Although the same principles may be applicable to some of these types, it is still that each of them is subject to different legal principles and entails different legal consequences.

Basically, there are two theories as to the nature, functions and effects of recognition, the constitutive theory and the declaratory theory. The constitutive theory considers that the act of recognition by other States creates a new State and grants it the international legal personality. This implies that the new State is established as an international person by virtue of the will and consent of already existing States. In case of a new government, it is the recognition that grants it the status at the international level.

The Constitutive theory is opposed by the declaratory theory. According to the declaratory theory, recognition has no legal effects; statehood or the status of a new government exists as such prior to and independently of recognition. The existence of a State or a new government is a question of pure fact. The act of recognition is merely a formal acknowledgement of established facts. When an entity satisfies the requirements of a State objectively, it is a State with all international rights and duties, and other States must treat it as such.

Historically, the constitutive theory has its merits. During the Nineteenth Century, International Law was regarded as applying mainly between States with European civilization. Other countries were admitted as States to this community only if they were recognized by those member States. Even today, recognition can sometimes have a constitutive effect, although State practice is not always consistent. When the establishment of a new State or government is in violation of International Law, this State or government is often regarded as having no legal existence until it is recognized.

However, the prevailing view today is that recognition is declaratory and does not create a State. This view was laid down in the Montevideo Convention on the Rights and Duties of States of 1933. Article 3 of this Convention provides that "The political existence of the state is independent of recognition by the other states. Even before recognition the state has the right to defend its integrity and independence".

Actually, the two theories are of little assistance in explaining recognition or determining the status of non-recognized entities in practice. In addition, the practical differences between these two theories are not significant. Under the declaratory theory, the decision whether an entity satisfies the criteria of statehood is left to other States, and the granting formal recognition to another State, which is a unilateral act, is left to the political discretion of States. On the other hand, the significance of the constitutive theory has diminished because of the obligation imposed on States to treat an entity that satisfies the criteria of statehood as a state. Moreover, the States practice regarding recognition shows that States follow a middle position between these two theories.

Types and Forms of Recognition

There are several distinct categories of recognition. There are recognition of a new State, recognition of a new government and recognition of belligerency. In addition there are different entities to be recognized. Recognition itself may take different forms.

Recognition may be *de jure* or *de facto*. Recognition may be express or implied. It may be conditional.

(A) Recognition of a State and of a Government

When a new State comes into existence, other States are confronted with the question whether or not to recognize it. Recognition implies a willingness of the recognizing State to deal with the new state as a member of the international community. To grant recognition to a new entity, the entity must satisfy the basic requirements of statehood, which have been discussed in the previous chapter. The first example of State recognition in the history of nations was the recognition in 1648 by Spain of the United Netherlands.

Recognition of a State defines its membership in the world community, and consequently supports its claim as an international person. It allows the recognized State to exercise the rights and duties of a State under International Law. Recognition of a new State automatically involves recognition of its government, although the latter may be recognized only *de facto*.

Recognition of a new government is quite different from the recognition of a new State, although in principle most of the considerations whether legal or political apply equally to both types of recognition. As far as a State is concerned, the satisfaction of basic requirements of statehood is examined by the recognizing State before granting its recognition to the new State. Recognition of a new government requires its satisfaction of certain conditions such as effectiveness and independence. Notably, the existence of an effective and independent government is the essence of statehood. By recognizing a government, the recognizing State accepts to deal with this government as the governing authority of the State and grant it the legal consequences of such status in terms of privileges and immunities within its domestic legal system. In both these types of recognition, we should not forget the great role played by political considerations in the decision whether or not to grant recognition.

The granting or refusal of recognition of a government has no effect on the recognition of a State itself. Recognition of a State affects its legal personality, whether creating or acknowledging it, while recognition of a government affects its status as the governing authority, not the State. A subsequent government may not be recognized, even though the recognition of a State is permanent as regard to its existence and its status as a legal person under International Law. If the government of a State is changed in accordance to constitutional processes, no problem of recognition arises as long as the new government is firmly in power and secures stability in the country. In this case, recognition by other States is purely a matter of formality. The problem of recognition of a new government arises in cases when changes occur as a result of an unconstitutional practice or a revolution. The recognition of the revolutionary government is a serious problem and the decision thereon is made with great care. On this matter, no definite legal principles are established and the practice of States is inconsistent and confused. However, certain rules have been recognized to cover recognition of illegal changes in government. Such rules imply the acceptance of the realities of the transfer of power and suggest that once a new government effectively controls the country and that this seemed likely to continue, recognition should not be withheld.

(B) Recognition of Belligerency

Belligerency exists when a portion of the State's territory and population is under the *de facto* control of insurgents seeking either to establish a separate State or to overthrow the existing government. To be recognized as belligerents, the insurgents must have a political organization able to exercise such control and maintain some degree of popular support, and conduct themselves according to the laws of war. Accordingly, recognition of belligerency is a formal acknowledgement by third-party States of the existence of a state of war between the State's central government and a portion of that State. This implies that the recognizing State recognizes that a revolt within another State has attained such a magnitude as to constitute in fact a state of war, entitling the revolutionists or insurgents to the benefit, and imposing upon them the obligations, of

the laws of war. Two conditions should exist before a third-party State grant belligerent recognition, the insurgency has progressed to a state of general war and the effects of this war have gone beyond the borders of the State to affect other States. By this recognition, the insurrectionary movement is elevated to the status of a quasi-international person having certain rights and duties under International Law. This sort of international personality is both non-permanent and particular. It is non-permanent, because the insurrection may fail. It is particular, because it exists only for the recognizing States.

Recognition of belligerency was accorded during most of civil wars of the Nineteenth Century, such as the revolts of the Spanish-American colonies and the American Civil War, and during most of the wars of independence of the Twentieth Century.

To grant recognition of belligerency, the recognizing State is always dictated by the primary motive, which is to protect and promote its national interests. The recognizing State may intend either to get the status of neutrality between the belligerent parties or to support the legitimacy of the insurrection.

(C) De Jure and De Facto Recognition

The practice of States draws a distinction between *de jure* and *de facto* recognition. This distinction usually arises in the case of governments since States can normally be recognized only *de jure*, although there have been few cases of recognizing States *de facto*. For example, Indonesia was recognized *de facto* by several States while it was fighting for independence against Netherlands during 1945-1949.

De jure recognition means that according to the recognizing State the recognized State or government fulfils the requirements laid down by International Law. *De facto* recognition means that in the opinion of the recognizing State, with all due reservations for the future, the recognized State or government provisionally and temporarily fulfils the above requirements in fact. As such, *de facto* recognition is provisional and temporary and could be withdrawn at any future date, although it is usually followed by *de jure* recognition. Notably, the terms *de jure* and *de facto* describe the government, not the act of recognition. Choosing the type of recognition to be granted, the recognizing State is always occupied by political realities and considerations as well as its national interests.

De facto recognition of a government implies that there is a doubt as to the permanence and viability of the concerned government. *De facto* recognition involves a hesitant position by the recognizing State, an attitude of wait and see, which is usually followed by *de jure* recognition when the recognizing State accepts that the effective control exerted by the government in question is permanent and firmly established and there is no legal basis for withholding the *de jure* recognition.

De facto recognition may be a preface stage to the *de jure* recognition, particularly in cases of governments coming into power by unconstitutional processes. In such a case, *de facto* recognition is a non-committal act whereby the recognizing State acknowledges that there is a *de facto* government possessing in fact the powers of sovereignty, but such possession may be illegal, unstable or non-permanent. At a later stage when the need for reservations no longer exists because the permanence of the *de facto* government is completely assured, *de jure* recognition is formally granted. For example, United Kingdom recognized the Soviet government first *de facto* in 1921 and later *de jure* in 1924. During the Spanish Civil War (1936-1939), United Kingdom granted recognition to the two rival parties, *de jure* recognition to the Republican government and *de facto* recognition to General Franco's government that gradually took over the country and its recognition turned into *de jure*. During 1988-1991, most States recognized the two rival governments in Lebanon *de facto* until the ending of the insurrection led by General Aoun, and then the government of Salim Al Huss was accorded *de jure* recognition.

When recognition is granted by an express statement, it should always be regarded as *de jure* recognition, unless the recognizing State provides otherwise. When

recognition is implied, there will often be uncertainty as to the intention of the recognizing State whether granting *de jure* or *de facto* recognition.

Choosing the type of recognition to be granted, the recognizing State is occupied mostly with political realities and considerations as well as own national interests, and to a lesser degree with legal considerations. A statement that a government is recognized as *de facto* may, on one hand, involve a purely political judgment, involving either a reluctant or cautious acceptance of an effective government, lawfully established according to International Law, or an unwarranted acceptance of it as a *de jure* government. It may, on the other hand, be intended to be or to include a legal determination of the existence of an effective government, but with reservations as to its viability and permanence. It may, of course, happen that the legal and political considerations for caution coincide. The distinction between these two types of recognition is insubstantial, since it is a question of intention, not of a legal matter. However, it is considered that *de jure* recognition is irrevocable while *de facto* recognition can be withdrawn. Actually, in the political sense recognition of either type can always be withdrawn, while in the legal sense it cannot be unless a change of circumstances warrants such withdrawal.

Whatever the basis for the distinction between *de jure* and *de facto* recognition, the effects of the two types are mostly the same. Nevertheless, there are certain important differences between these two types, which are:

- (a) Only the *de jure* recognized State or government can claim to receive property locally situated in the territory of the recognizing State.
- (b) Only the *de jure* recognized State or government can represent the old State for the purposes of State succession or with regard of espousing any claim of its national for injury done by the recognizing State in breach of International Law.
- (c) The representatives of the *de facto* recognized state or government may not be entitled to full diplomatic immunities and privileges.

Whatever the type of recognition, once given may in certain circumstances be withdrawn. Actually, this is more easily done with regard to *de facto* recognition than to *de jure* recognition, because of the nature of the former one, which is temporary. *De facto* recognition is intended to be a preliminary acceptance of political realities and may be withdrawn in accordance with a change in political conditions. When a *de facto* government loses its effective control over the country, the reason for recognition disappears and it may be withdrawn. *De jure* recognition, on the other hand, because it is intended to be generally a definitive act, it is more difficult to be withdrawn. When a government recognized *de jure* is overthrown, a new situation arises and the question of recognizing a new government will have to be faced. In such instance, the withdrawal of recognition of the overthrown government is assumed; it does not have to be expressed. Withdrawal of recognition of one government without recognizing a successor is a possibility. This approach, for example, was adopted by the United Kingdom and France with regard to Colombia in 1979.

Withdrawal of recognition remains possible in other circumstances. The loss of one of the required criteria of statehood will result in the withdrawal of recognition of a State. Recognition of belligerency will naturally terminate with the end of the state of belligerency.

Because recognition is essentially a political act, no matter how circumscribed or conditioned by the law, a State has a discretionary power to determine whether a particular situation justifies a withdrawal of recognition and to take such action if it serves its national interests.

Notably, we must not confuse the withdrawal of recognition with the rupture in the diplomatic relations. In the practice of States, the usual method of expressing disapproval with the actions of other governments is to break diplomatic relations, since

this method does not entail the legal consequences and the problems that the withdrawal of recognition would produce.

(D) Express and Implied Recognition

Recognition is essentially a matter of intention. It is founded upon the will and intention of a State. It may be express or implied. The mode by which recognition is accomplished is of no special significance. It is essential, however, that the act constituting recognition must give a clear indication of the intention either to deal with the new State as such, or to accept the new government as the effective government of the State and to maintain relation with it, or to recognize in case of insurgents that they are entitled to belligerent rights.

Express recognition indicates the acknowledgment of the recognized State by a formal declaration. In the practice of States, this formal declaration may happen by either a formal announcement of recognition, a personal message from the head of a State or the minister of foreign affairs, a diplomatic note, or a treaty of recognition.

Recognition needs not to be express. It may be implied in certain circumstances. There are circumstances in which it may be possible to declare that in acting in a certain manner, one State does by implication recognize another State or government. However, because of this possibility, States may make an express declaration to the effect that a particular action involving another State is by no means to be regarded as inferring any recognition. This position, for example, was maintained by Arab States with regard to Israel.

Implied recognition is recognition of a State or a government through actions other than official declarations or actions intended to grant recognition. The required actions for implied recognition must be unequivocal, leaving no doubt of the intention of the State performing them to recognize the State or government and to deal with it as such. There is a variety of actions undertaken by a State in regard to an unrecognized State or government. Some actions are conclusively regarded implying recognition, while others are not. Included in the first category are the official congratulatory statements upon independence, the formal establishment of diplomatic relations and the conclusion of a bilateral treaty. The actions that do not conclusively imply recognition are the participation in multilateral treaty, the membership in international institutions, the common participation in international conference, the maintenance of informal and unofficial contacts, the initiation of negotiations with an unrecognized state, and the making of claims against an unrecognized State.

(E) Conditional Recognition

The political character of recognition is manifested in what is termed conditional recognition. Sometimes States are recognized subject to certain conditions, generally the fulfilment of certain obligations. Examples of such conditions are: the respect and the guarantee of the rights of ethnics, national groups and minorities; the respect of religious freedoms; and the respect of the rule of law, democracy and human rights.

The failure to fulfil the obligations does not annul the recognition, as once given it cannot be withdrawn. The status obtained by the recognized State from the act of recognition cannot be withdrawn. The recognized State will be guilty of a breach of International Law, and this will allow the recognizing State to sever diplomatic relations as a form of sanction. However, the conditional recognition of a State or government in process of emerging is probably revocable.

Legal Effects of Recognition

Although recognition is essentially a political act, it is one that entails important legal consequences. Recognition involves legal effects both in the international level and in the domestic level. If an entity is recognized as a State, it will be entitled to rights and subjected to duties that would not be relevant otherwise, and it will enjoy privileges and immunities of a foreign State before the national courts of other States, which would not be allowed to other entities.

What are the effects of recognition? Are there effects for non-recognition? The Answers to these two questions are dealt with in the following sub-sections.

(A) International effects of recognition

Apart of all the theoretical arguments involving the constitutive and declaratory theories, it is accepted that recognition of a State or government is a legal acknowledgement of factual situations. Recognition entails the recognized State the enjoyment of rights and the subjecting to duties prescribed in International Law for States (these rights and duties are discussed in the previous chapter).

Recognition of a State by another State does not lead to any obligation to establish diplomatic relations or any other specific links between them. Nor does the termination of diplomatic relations automatically lead to withdrawal of recognition. These remain a matter of political discretion.

It should not be assumed that non-recognition of a State or government would deprive that entity rights and duties under International law. It is well established in International Law that the political existence of a State is independent of recognition by other States, and thus an unrecognized State must be deemed subject to the rules of International Law. Unrecognized State is entitled to enjoy certain rights and be subject to many duties. It has the rights to defend its integrity and independence, to provide for its conservation and prosperity and consequently to organize itself as it sees fit. The exercise of these rights by unrecognized State has no other limitation than the exercise of the rights of other States according to International Law. Moreover, unrecognized State is subject to most of the rules of International Law, such as those related to the law of wars, and is bound by its agreements.

Non-recognition, with its consequent absence of diplomatic relations, may affect the unrecognized State in asserting its rights against unrecognized States, or before their national courts. However, non-recognition will not affect the existence of such rights, nor its duties, under International Law.

(B) Internal Effects of Recognition

Recognition entails the recognized State the rights to enjoy privileges and immunities of a foreign State before the national courts, which would not be allowed to other entities. However, because recognition is essentially a political act reserved to the executive branch of government, the judiciary branch must accept the discretion of the executive branch and give effect to its decisions. The national courts can only accept and enforce the legal consequences that flow from the act of recognition. They can accept the rights of a foreign government to sue, to be granted immunities or to claim other rights of a governmental nature. They can give effect to the legislative and executive acts of the recognized State. In the case of non-recognition, national courts will not accept such rights. In this context, recognition is constitutive, because the act of recognition itself creates the legal effects within the domestic jurisdiction of a State.

STATE TERRITORY AND SOVEREIGNTY

As stated in a previous chapter dealing with a State, a territory is one of the fundamental elements of statehood. Without a territory, an entity cannot be a State. The notion that a State occupies a definite portion of the earth within which it exercises, subject to the limitations of International Law, its exclusive authority to the exclusion of other States lies at the basis of International Law. The exercise of such a supreme authority by a State over its own territory is known in International Law as "territorial sovereignty".

Notably, the concept "territorial sovereignty" is confused with the concept "jurisdiction". Some have used the two concepts interchangeably. However, there is a distinction between the two concepts. Territorial sovereignty signifies ownership and possession of a territory, which entitles a State to exercise its authority and jurisdiction over the territory. Jurisdiction justifies competence to affect peoples, properties and

events within a territory.

Because “territorial sovereignty” and “jurisdiction” are two legal concepts connected to territory and can only be understood in relation to territory, therefore, in the following two sections “territorial sovereignty” and modes of acquiring territory are dealt with. While “jurisdiction” will be the subject of the next chapter.

Territorial Sovereignty

Sovereignty in regard to a territory is known as territorial sovereignty. Territorial Sovereignty is the right of a State to exercise over its own territory, to the exclusion of any other States, the functions of a State. It has a positive and a negative aspect. The first aspect relates to the exclusivity of the right of the State with regard to its own territory, while the second aspect refers to the obligation to protect the rights of other States.

A State exercises its territorial sovereignty within its boundary. Boundary is an imaginary line that delineates the territorial limit of a State. Boundaries are of three dimensions. They include the State land and the maritime domain of its internal waters and territorial sea, the airspace and its subsoil. They are either natural topographical, having physical distinguishable features such as mountains, rivers or lakes, or imaginary and artificial such as lines of attitude and longitude, surveyor lines or posts. Both types have equal legal effects and usually based upon treaties or historical title.

The sovereignty of a coastal State extends, beyond its boundaries, over its contiguous zone, over its continental shelf and over its exclusive economic zone. Moreover, the sovereignty of State whether coastal or land-locked extends over its national vessels. The sovereignty of a State extends also to its national aircrafts.

The right to territorial sovereignty enables a State to exercise the fullest measures of sovereignty powers over its land territory, large measures over its territorial waters and air space, and smaller measures over its continental shelf and adjacent area. In addition, it enables a State to exercise sovereignty over vessels and aircrafts that fly its flag or carry its nationality, which are treated as its territory.

Corollary to the rights generated from territorial sovereignty, there are duties imposed upon a State. These duties involve the obligation to protect within its territory the rights of other States, together with the rights that each State may claim for its nationals in foreign territory.

Many treaties and conventions have been concluded to regulate State sovereignty over land, sea, airspace and outer space. Over airspace and outer space, there are the 1944 Convention on International Civil Aviation (the Chicago Convention), the 1963 Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and under Water, and the 1967 Treaty on Principles Governing the Activities in the Exploration and Use of Outer Space including the Moon and Other Celestial Bodies (the Outer Space Treaty).

Over the sea, there is the 1982 Convention on the Law of the Sea, which replaced the 1956 Conventions related to the Territorial Sea and the Contiguous Zone, the High Seas, the Continental Shelf, and Fishing and Conservation of living Resources of the High Seas. In Addition, there is the 1959 Antarctica Treaty.

Since the rights generated from the concept of territorial sovereignty can only be exercised in relation to a territory, it is necessary to know how a territory can be acquired.

Acquisition of Territory

The international rules related to territorial sovereignty are rooted in the Roman Law provisions governing ownership and possession. In addition, the classification of the different modes of acquiring territory is a direct descendant of the Roman rules dealing

with property.

Territory is the space within which the State exercises sovereign authority. Title to territory is acquired either through the claim of land not previously owned (*terra nullius*) or through the transfer of title from one State to another. Title acquired in the first category is called original title, while in the second category is called derivative title. Modes of original acquisition of territory include occupation, prescription and accretion. Derivative modes include cession (voluntary or forcible), and conquest and annexation. All these modes are dealt with in the following.

(1) Occupation

Occupation is an original mode of acquisition by a State of a title to a territory. It implies the establishment of sovereignty over a territory not under the authority of any other State (*terra nullius*) whether newly discovered or abandoned by the State formerly in control (unlikely to occur).

For the title acquired through occupation to be final and valid under International Law, the presence and control of a State over the concerned territory must be effective. Effectiveness requires on the part of the Claimant State two elements: an intention or will to act as sovereign, and the adequate exercise of sovereignty. Intention may be inferred from all the facts, although sometimes it may be formally expressed in official notifications to other States. Adequate exercise of sovereignty must be peaceful, real, and continuous. This element of physical assumption may be manifested by an explicit or symbolic act by legislative or administrative measures affecting the claimed territory, or by treaties with other States recognizing the sovereignty of the Claimant State over the particular territory or demarcating boundaries.

Occupation was often preceded by discovery that is the realization of the existence of a particular piece of land. In the early period of European discovery, in the Fifteenth and Sixteenth Centuries, the mere realization or sighting was sufficient to constitute title to territory. As time passed, something more was required and this took the form of symbolic act of taking possession, whether by raising of flags or by formal declarations. By the Eighteenth Century, the effective control came to be required together with discovery to constitute title to territory.

(2) Prescription

Prescription is a mode of establishing title to territory which is subject to the sovereignty of another State (not *terra nullius*) through peaceful exercise of *de facto* sovereignty over a long period of time. It is the legitimization of a doubtful title by the passage of time and the presumed acquiescence of the former sovereignty. It differs from occupation. It relates to territory which has previously been under the sovereignty of another State. However, both modes are similar since they require evidence of sovereignty acts by a State over a period of time.

A title by prescription to be valid under International Law, it is required that the length of time must be adequate, and the public and peaceful exercise of *de facto* sovereignty must be continuous. The Possession of Claimant State must be public, in the sense that all interested States can be made aware of it. It must be peaceful and uninterrupted in the sense that the former sovereign must consent to the new sovereign. Such consent may be express or implied from all the relevant circumstances. This means that protests of whatever means by the former sovereign may completely block any claim of prescription.

As the requirement of adequate length of time for possession is concerned, there is no consensus on this regard. Thus, the adequacy of the length of period would be decided on a case by case basis. All the circumstances of the case, including the nature of the territory and the absence or presence of any competing claims will be taken into consideration.

(3) Accretion

Accretion is a geographical process by which new land is formed mainly through natural causes and becomes attached to existing land. Examples of such a process are the creation of islands in a river mouth, the drying up or the change in the course of a boundary river, or the emerging of island after the eruption of an under-sea volcano. When the new land comes into being within the territory of a State, it forms part of its territory, and this causes no problem. However, in case of a drying or shifting of a boundary river, the general rule of International Law is that if the change is gradual and slight, the boundary may be shifted, but if the change is violent and excessive, the boundary stays at the same point along the original riverbed.

Where a new territory is added, mainly through natural causes, to territory already under the sovereignty of the acquiring State, the acquisition and title to this territory need no formal act or assertion on part of the acquiring State.

(4) Cession

Cession of territory is a transfer of sovereignty from one sovereign to another. Its basis lies in the intention of the concerned parties to transfer sovereignty over the territory in question, and it rests on the principle that the right of transferring its territory is a fundamental attribute of the sovereignty of a State. It occurs by means of an agreement between the ceding and the acquiring States. The cession may comprise a portion of the territory of the ceding State or the totality of its territory. In the latter case, the ceding State disappears and merges into the acquiring State.

Cession of territory may be voluntary as a result of a purchase, an exchange, a gift, a voluntary merger, or any other voluntary manner, or it may be made under compulsion as a result of a war or any use of force against the ceding State. History provides a great number of examples of cession. Examples of voluntary cession are the United States' purchase of Alaska from Russia in 1867, the exchange of a portion of Bessarabia by Romania to Russia in exchange for Dobrudja in 1878, the France's gift of Venice to Italy in 1866, and the voluntary merger of the Republic of Texas into the United States in 1795. Examples of cession as a result of a war are the cession to Germany by France of the region of Alsace- Lorraine in 1871, and the merger of Korea into Japan in 1910.

(5) Conquest and Annexation

Conquest is an act of defeating an opponent State and occupying all or part of its territory. Annexation is the extension of sovereignty over a territory by its inclusion into the State. Under traditional International Law, conquest did not of itself constitute a basis of title to the land. It was merely a military occupation. If followed by a formal annexation of the conquered territory, then it was called subjugation and could be considered a valid derivative title to territory. Accordingly, conquest followed by annexation constituted a mode to transfer the title of the conquered territory to the conqueror. Like compulsory cession, conquest followed by annexation would transfer territory by compulsion, but unlike cession, it involved no agreement between the concerned parties.

While the acquisition of territory through conquest followed by annexation was an accepted mode of acquiring title to territory under traditional International Law, it is no longer legal at modern times. The acquisition of territory through the use of force is outlawed by paragraph 4 of article 2 of the Charter of the United Nations, which obliged the member States to refrain from the use of force against the territorial integrity or political independence of any State. This same principle is reaffirmed in the 1970 General Assembly "Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations". This Declaration adds that the territory of a State shall not be the object of acquisition by another State resulting from the threat or use of force, and that no territorial acquisition resulting from such act shall be recognized as legal.

Although today conquest is not a legal mode of acquiring title to territory, it does give the victor certain rights under International Law as regards the occupied territory, such as rights of belligerent occupation. The territory remains the legal possession of the

ousted sovereign because sovereignty does not pass by conquest to the occupying State, although it may pass in certain cases where the legal status of the territory occupied is in dispute prior to the conquest.

At present times, acquisition of territory following a war would require further international action in addition to internal legislation to annex. Such further international action would be either a treaty of cession by the former sovereign or international recognition.

Modern examples of annexation following conquest are Israel's annexation of the Golan Heights and the East Jerusalem, and Iraq's annexation of Kuwait in 1990. In case of the Iraqi annexation, the Security Council adopted the resolution 662 of 1990 declaring that this annexation "has no legal validity and is considered null and void", and called upon all States not to recognize this annexation and to refrain from actions which might be interpreted as indirect recognition.

Corresponding the modes of acquiring territory, there are modes of losing it. Territory may be lost by express declaration or conduct such as a treaty of cession or acceptance of cession, by conquest, by erosion or natural geographic activities, by prescription or by abandonment.

STATE RESPONSIBILITY

State responsibility is one of the fundamental principles of International Law. It arises out of the international legal system and the principles of State sovereignty and equality of States. It implies that if a State commits an internationally wrongful (unlawful) act against another State, it will be internationally responsible for reparation.

The subject of State responsibility has been the most difficult question of the codification work of the International Law Commission (ILC). The ILC has been working extensively on this subject. In 1975, the ILC initiated its work on the draft articles concerning State responsibility. The Articles on the State Responsibility was finally adopted by the ILC on August 9, 2001. The General Assembly adopted the resolution 83/56 of December 12, 2001, taking note of "the International Law Commission's Articles on the State Responsibility" and recommending it to the member States of the United Nations. The ILC Articles, in addition to the State practice and the decisions of international tribunals (the case law) on the subject, constitute the international law of State responsibility.

The law of State responsibility is concerned with the nature of the State responsibility, the legal consequences resulted from, and the implementation of such responsibility.

Section 1: The Basis and Nature of State Responsibility

State responsibility is founded on three basic elements. The first element is the existence of an international legal obligation in force between the concerned States. The second is the occurrence of a wrongful act or the omission of an act in violation of such an obligation, which is imputable to the State. The third is that loss or damage has resulted from such wrongful act or omission. These three elements are the requirements of establishing the responsibility of the State, which have been made in a number of leading international legal cases and reiterated by the ILC "Articles". The "Articles" provides that every internationally wrongful act (a delict) of a State entails responsibility. It defines internationally wrongful act as a conduct consisting of an action or omission attributable to the State under International Law and constitutes a breach of an international obligation of the State. A breach of an international obligation is defined as an act which is not in conformity with what is required of the State by that obligation, regardless of its origin or character.

Responsibility is the necessary corollary of a right. All rights of an international character involve international responsibility.

International Law does not distinguish between contractual (conventional) and tortious responsibility. International responsibility relates both to breaches of treaty and to other breaches of legal duty. Any violation by a State of any obligation of whatever origin or character gives rise to State responsibility and consequently to the duty of reparation. Reparation therefore is the indispensable complement of a failure of a State to apply any of its obligations.

State responsibility only arises when the act or omission which constitutes a breach of legal obligation is imputable (attributable) to a State. It may be founded on "fault" or "no fault" concept.

Notably, it is important to mention here that a State is responsible for wrongful acts which constitute international delicts, not international crimes. Because of the controversy concerning State responsibility for international crimes, the ILC Articles does not mention international crimes. However, the ILC Draft Articles made a distinction between international crimes and international delicts. The Draft Articles provided that an international wrongful act resulting from the breach of an international obligation which was essential for the protection of fundamental interests of the international community and which was recognized as a crime by that community constituted an international crime; examples of such international crimes were aggression, colonial domination, slavery, genocide, apartheid and massive pollution of the atmosphere. All other international wrongful acts constituted international delicts.

While it is apparent that a State is responsible for international delicts, it is not clear that it is responsible for international crimes. The question of State criminal responsibility has been highly controversial. Some have argued that the concept is of no legal value and cannot be justified. Others have argued that since 1945 the attitude towards certain crimes committed by State has altered so as to bring them within the scope of International Law. They have pointed to three specific changes that have occurred since 1945 to justify States responsibility for international crimes. The first change has been the development of the concept of peremptory norms of International Law (*jus cogens*) as a set of principles from which no derogation is allowed. The second change is the establishment of individual criminal responsibility directly under International Law. Finally, the Charter of the United Nations and its provisions concerning the enforcement action which may be taken against a State in case of committing a threat to or breaches of the peace or act of aggression. In the light of these changes, the ILC, in its Draft Articles, adopted the approach of including international crimes by States within the scope of International Law. However, because of the controversy concerning this question, the ILC omitted any mention of international crimes of States in its Articles as finally approved. The "Articles" provides that States are under a duty to co-operate to bring an end, through lawful means, any serious breach by a State of an obligation arising under a peremptory norm of International law and not to recognize as lawful any such situation.

A. The Question of "Imputability"

A State is responsible (liable) only for its own acts or omissions. A State is identified with its "government" which includes the executive, the legislature and the judiciary, and includes central authorities as well as local authorities.

It is established by the case law that a State is liable for the conducts of any of its organs. This established rule is reiterated by the ILC "Articles". The ILC "Articles" provides that the conduct of any State organ (including any person or entity) having that status under the internal law of that State, whether that organ belongs to the constituent, legislative, executive, judicial or other authority, whether its functions are of an international or an internal character, and whether it holds a superior or a subordinate position in the organization of the State, shall be considered as an act of the State concerned under International Law, provided that organ was acting in that

capacity in the case in question. The conduct of an organ of a territorial governmental entity within a State shall also be considered as an act of that State under International law, provided that organ was acting in that capacity in the case in question. The conduct of an organ of an entity which is not part of the formal structure of the State or the territorial governmental entity, but which is empowered by the internal law of that state to exercise elements of governmental authorities, shall also be considered as an act of the State under International Law, provided that organ was acting in that capacity in the case in question.

It is also established that a State is liable for the acts of its officials if those acts are imputable (attributable) to the State. This rule depends on the link that exists between the State and the person or persons committing the wrongful act or omission. The State as a moral legal entity, in reality acts through authorized officials. It is not liable under International Law for all acts of its officials; it is liable only for acts of its officials that are imputable to it. Imputability is a legal notion which assimilates the acts or omissions of the State officials to the State itself and which renders the State liable for damages to persons or properties resulting from such acts.

The question of "imputability", however, creates problems when officials exceed or disobey their instructions. Because the evading of liability by a State in such a case will be unjust, it is established that a State is liable for the acts of its officials, even when they exceed or disobey their instructions, if those officials are acting with "apparent authority" or if they are abusing "powers" or "facilities" placed at their disposal by the State. The ILC "Articles" reiterates such a rule by providing that the conduct of any organ of a State, having acted in that capacity, shall be considered as an act of the State under International Law even if such organ exceeded its competence according to internal law or disobeyed instructions concerning its authority.

With regard of wrongful acts committed by private persons, in principle, a State is not responsible for such acts. However, it is established by case law and reaffirmed by the ILC Articles that a State is responsible for acts of private persons if those persons are acting on behalf of that state, on its instructions, under its control, or exercising elements of governmental authority in the absence of governmental officials and under circumstances which justify them in assuming such authority. It is also responsible for acts of private persons if such acts are accompanied by some act or omission on part of the State, for which it is liable. Such act or omission by the State may take one of the following forms: encouraging the person to perform such act, failing to take reasonable care to prevent the person from performing such act, failure to punish the person, obtaining some benefit from the act of the person, or express ratification of the person's act.

With regard of actions of rioters or rebels causing loss or damage to a foreign State or its nationals, the general principle is that the State is not liable for such actions if it has acted in good faith and without negligence. However, in such a case, the State is under a duty to show due diligence. Nevertheless, when the rebellion movement succeeds in establishing the new government of a State or 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; this rule is reaffirmed by the ILC Articles.

B. The Question of "Fault"

There are two theories used as foundations for State responsibility: the "risk" theory and the "fault" theory. The "risk" theory is based upon the principle of objective responsibility which maintains that the liability of the State is strict. Once a wrongful act causing damage has been committed by a State official or organ, that State will be responsible under International Law to the injured State irrespective of its intention. In contrast, the "fault" theory is based upon the principle of subjective responsibility which requires the establishment of an element of intention, fault or negligence on the part of the State official or organ before rendering the State liable for any damage.

There is no agreement in the International Law on the question of the basis of State

responsibility. The relevant cases and the opinions of legal scholars are divided on this question. However, the majority of cases and opinions tend towards the “risk” theory of responsibility.

Section 2: Legal Consequences of State Responsibility

A State is responsible for its international wrongful act. This responsibility entails certain legal consequences on that State. The first consequence is the cessation of the wrongful act, and the second is the reparation.

A. Cessation of the Wrongful Act

The first legal consequence of State responsibility under International law is that the wrongdoing State is obliged to cease the wrongful act, if it is continuing, and to offer appropriate assurances and guarantees on non-repetition.

B. Reparation

The second legal consequence resulting from State responsibility for international wrongful act is that the wrongdoing state is under a duty to remedy its acts. The injured State is entitled for full reparation in form of restitution in kind, compensation and satisfaction, either singly or in combination. The wrongdoing State cannot employ its internal law to avoid providing full reparation.

Restitution in kind means that the wrongdoing State has to re-establish the situation that existed before the committing of the wrongful act. It can be provided if it is not materially impossible, not involving breach of an obligation arising from a peremptory norm of general International Law, not involving a burden out of all proportion to the benefit which the injured State would gain from obtaining restitution in kind instead of compensation, or not seriously jeopardize the political independence or economic stability of the wrongdoing state.

If restitution in kind is not available, compensation for the damage caused must be paid. Monetary compensation covers any financially assessable damage suffered by the injured state, and may include interest, and may include, in certain circumstances, loss of profits. It may be paid for both material and non-material (moral) damage.

Satisfaction is the third form of reparation. It is a remedy which is appropriate in cases of moral damage and non-monetary compensation. It may take the forms of an official apology, a nominal damage, the punishment of the guilty officials or the acknowledgement of the wrongful character of an act.

Section 3: The Implementation of State Responsibility

A State is entitled to invoke the responsibility of another State if the obligation breached is owed to it individually or to a group of States, including it, or to the international community as a whole. A State other than an injured State may invoke the responsibility of another State if either the obligation is owed to a group of States including it, and is established for the protection of a collective interest of the group, or the obligation breached is owed to the international community as a whole. In such cases, a State may demand the cessation of the wrongful act, assurances and guarantees of non-repetition, satisfaction, as well as reparation. These doctrines are reaffirmed in the ILC Articles.

Where several States are injured by the same wrongful act, each State may separately invoke responsibility. Where several states are responsible, the responsibility of each may be invoked.

However, responsibility cannot be invoked if the injured State has validly waived the claim, or it has caused, by reason of its conducts, in the lapse of the claim. Any waiver needs to be explicit and clear.

An injured State may seek to settle its claim peacefully through any of the peaceful

means, or it may take countermeasures against the wrongdoing State. In a case of an injury affecting its national, the State may provide him with diplomatic protection.

A State may present an international claim against the wrongdoing State before an international tribunal. However, a State has to establish its qualifications for bringing the claim and the validity of the claim itself before the merits of the claim can be addressed. Where a claim is brought before an international tribunal, objections may be raised against its admissibility. The first is an objection to the jurisdiction of the tribunal; if successful, it will stop all proceedings in the case. Other objections are the nationality of the claimant, the non-exhaustion of local remedies, and the undue delay in presenting the claim.

A. Diplomatic Protection and Nationality of Claims

The doctrine of state responsibility with regard to injuries to nationals is based upon the attribution to one State of the wrongful act or the omission and the capacity of the other State to adopt the claim of its injured national. Nationality is the link between the individual and his State as regards particular benefits and obligations. It is also the link between the individual and the benefits of International law. Although International Law is now tending to grant certain rights to individuals apart of the intervention of the State, the basic rule remains that in a State-oriented world, it is only through the State the individual may obtain the full range of benefits available under International Law, and nationality is the key.

Although a State is under a duty to protect its nationals, it is not under a duty to provide them with diplomatic protection. A State may provide diplomatic protection to its nationals. Diplomatic protection consists of resorting to diplomatic action or other means of peaceful settlement by a State adopting in its own rights the cause of its nationals in respect of an injury to any of its national arising from an internationally wrongful act of another State. Such diplomatic protection is not a right of the national concerned, but a right of the State which may or may not choose to exercise.

The diplomatic protection is the result of the historical reluctance to permit individuals the right in International Law to bring claims against foreign States, for reasons related to the principles of state sovereignty and non-intervention in domestic affairs of a State. The exercise of diplomatic protection is not regarded as intervention contrary to International Law. A State may take up the claim of its national against another state before an international tribunal. Once a State does this, the claim then becomes that of the state, not of the injured individuals. Thus, the State may waive its claim, but the individual cannot.

In International law, the normal and important function of nationality is to establish the legal interest of a State when its national suffers injury or loss caused by another State. The subject matter of the claim is the individual and his property, and the claim is that of the State. If the plaintiff State cannot establish the nationality of the claim, the claim will be inadmissible because of the absence of the legal interest of the claimant. The "nationality of the claim" principle is well established in customary International Law. However, there are certain exceptions to the principle of the nationality of the claim. Examples of such exceptions are the right of protection of an alien seaman on a ship flying the flag of the protecting State, an alien in the service of the armed forces of a claimant State, and stateless person or refugee who at the dates of the injury and presentation of the claim is lawfully and habitually resident in that state.

The nationality must exist at the date of the injury, and should continue until at least the date of the formal presentation of the claim. Where an individual possesses dual or multiple nationalities, any State of which he is a national may adopt his claim against a third State. Where a case involves more than one State of nationality, the State with which he has the more effective connection may adopt his claim against the other State. As far as a moral legal person (such as a corporation) is concerned, there must be some tangible link between it and the State adopting its claim.

B. The Exhaustion of Local Remedies

It is established in the customary International Law that before international proceedings are instituted or claims or representations made, the remedies provided by the local State should have been exhausted. This rule implies that an injured individual must exhaust remedies in the courts of the defendant State before an international claim can be brought on his behalf. It is a rule which is justified by political and practical considerations, not by any logical necessity deriving from the International Law. Among the political and practical considerations suggested to justify such rule are the avoidance of resorting to diplomatic protection in small and insignificant claims, and the greater suitability and convenience of local courts as forums for claims of individuals. This rule is reaffirmed in the ILC Articles which provides that the responsibility of a State may not be invoked if the claim is one to which the rule of exhaustion of local remedies applies and any available and effective local remedy has not been exhausted.

The exhaustion of local remedies rule does not apply where one State has been guilty of a direct breach of International Law causing direct injury to another State. It applies to cases of diplomatic protection where a State claims injury to its nationals, and when effective remedies are available in the wrongdoing State. A claim will not be admissible in the International Law unless the natural or legal foreign person concerned has exhausted the legal effective remedies available to him locally in the defendant State.

C. Unreasonable Delay and Improper Activities of the Injured National

A claim by a State against another State will not be admissible if it is presented after an unreasonable delay by the claimant State. It may be inadmissible if the injured national has suffered injury as a result of his improper activities. However, in such a case, the injury suffered by the national must be roughly proportional to his improper activities.

D. Resorting to counter-measures

An injured State may seek to settle its claim peacefully through any of the peaceful means, or it may take countermeasures against the wrongdoing State. Countermeasures are acts of retaliation which are traditionally known as "reprisal". They may be in a form non-compliance of the injured State with its legal obligations towards the wrongdoing State, or unilateral coercive actions taken by the injured State against the wrongdoing State. Such measures are a type of self-help utilized in order to induce the wrongdoing State to discontinue its wrongful act and to provide reparation.

Today, there are certain legal limits to countermeasures. The most important limit is the prohibition of the armed retaliations because of the general prohibition of the use of force provided in Article 2(4) of the Charter of the United Nations. Countermeasures have to be proportional to the wrongful act. They must not violate basic human rights or the peremptory norms of International Law.

State Jurisdiction

State jurisdiction is the capacity of a State under International Law to prescribe and enforce the rules of law. It is derived from the State sovereignty and constitutes its vital and central feature. It is the authority of a State over persons, property and events which are primarily within its territories (its land, its national airspace, and its internal and territorial water). This authority involves the powers to prescribe the rules of law, to enforce the prescribed rules of law and to adjudicate. The powers related to State jurisdiction raise the question regarding the types and forms of State Jurisdiction.

State jurisdiction may extend beyond its territory over persons and things which have

a national link. This extension raises the question regarding the grounds or the principles upon which the State can assert its jurisdiction within and beyond its boundaries.

Nevertheless, there are certain persons, property and events within a State territory which are immune from its jurisdiction. This limitation to a State jurisdiction raises a question regarding the immunity from jurisdiction.

The answers to the above raised questions are dealt with in the following sections.

Section 1: Types of State Jurisdiction

State jurisdiction implies the competence to prescribe rules of law, the jurisdiction to enforce the prescribed rules of law and the jurisdiction to adjudicate. Accordingly, it is of three types: legislative jurisdiction, executive jurisdiction and judicial jurisdiction.

1) Legislative Jurisdiction

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

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

The question of how far a court will enforce foreign legislation is a matter within the field of Private International Law (conflict of laws). It is common practice of States that a State enforces civil laws of another State, but it is rare to enforce the penal or taxes laws of another State.

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

(2) Executive Jurisdiction

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

(3) Judicial Jurisdiction

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

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

Section 2: Principles of Jurisdiction

Generally, the exercise of civil jurisdiction by courts of a State has been claimed upon far wider grounds than has been the case in criminal matters. The consequent reaction by other State with this regard has been much mild. This is partly because public opinion is far more vigorous where a person is tried in foreign territory for criminal offences than if a person is involved in a civil case. In addition, International Law does not impose any restrictions on the jurisdiction of courts in civil matters.

In Common Law countries such as the United States and United Kingdom, the usual ground for jurisdiction in civil cases is the service of a writ upon the defendant within the country, even if the presence of the defendant is temporary and incidental. In Civil Law countries, the usual ground for jurisdiction is the habitual residence of the defendant in the country. In some countries such as Netherlands, Denmark and Sweden, generally courts assert their jurisdiction if the defendant possesses assets in the country; however, in matrimonial cases the commonly accepted ground for jurisdiction is the domicile or residence of the plaintiff.

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

1) The Territorial Principle

The territorial principle is derived from the concept of State sovereignty. It means that a State has the primary jurisdiction over all events taking place in its territory regardless of the nationality of the person responsible. It is the dominant ground of jurisdiction in International Law. All other State must respect the supremacy of the State over its territory, and consequently must not interfere neither in its internal affairs nor in its territorial jurisdiction.

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

Although jurisdiction is primarily and predominantly territorial, it is not exclusive. A State is free to confer upon other States the right to exercise certain jurisdiction within its national territory. States are free to arrange the right of each one to exercise certain jurisdiction within each national territory. The most significant recent examples of such arrangements are: the 1991 France-United Kingdom Protocol Concerning Frontier Control and Policing, under which the frontier control laws and regulations of each State are applicable and may be enforced by its officers in the control zones of the other; the 1994 Israel-Jordan Peace Treaty, under which the Israeli criminal laws are applicable to the Israeli nationals and the activities involving only them in the specified areas under Jordan's sovereignty, and measures can be taken in the areas by Israel to enforce such laws.

(2) The Nationality Principle

The nationality principle implies that a State jurisdiction extends to its nationals and actions they take beyond its territory. It is based upon the notion that the link between the State and its nationals is personal one independent of location.

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

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

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

3) The Protective principle

The protective principle implies that a State may exercise jurisdiction over an alien who commits an act outside its territory, which is deemed prejudicial to its security and interests. It is universally accepted, although there are uncertainties as to its practical extent, particularly as regard to the acts which may come within its domain. It is justified on the basis of protection of State's vital interests, particularly when the alien commits an offence prejudicial to the State, which is not punishable under the law of the country where he resides and extradition is refused.

Although the protective principle is used as a secondary basis for jurisdiction and in a narrower sense than the territorial or the nationality principle, it can easily be abused, particularly in order to undermine the jurisdiction of other States. In practice however, this principle is applied in those cases where the acts of the person which take place abroad constitute crimes against the sovereignty of the State, such as plots to overthrow a government, treason, espionage, forging a currency, economic crimes and breaking immigration laws and regulations. This principle is often used in treaties providing for multiple jurisdictional grounds with regard to specific crimes, such as the 1979 Hostage Convention and the 1970 Hague Aircraft Hijacking Convention.

(4) The Universality Principle

The universality principle, in its broad sense, implies that a State can claim jurisdiction over certain crimes committed by any person anywhere in the world, without any required connection to territory, nationality or special State interest. Before the Second World War, such universal jurisdiction has been considered as contrary to International Law by the Common Law countries, except for acts regarded as crimes in all countries, and crimes against the international community as a whole such as piracy and slave trade.

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

Today under the universality principle, each State and every State has jurisdiction over any of the international crimes committed by anyone anywhere.

Section 3: Immunity from Jurisdiction

The concept of jurisdiction is derived from the concept of sovereignty, and is connected with the principles of equality and non-interference in domestic affairs of other States. The grounds for jurisdiction are related to the duty of a State under International Law to respect the territorial integrity and political independence of other States. Immunity from jurisdiction is grounded on this duty, and constitutes derogation from the host State jurisdiction.

Under International Law, immunity from jurisdiction is granted to certain persons, namely States (sovereigns) and their diplomatic and consular representatives, and international organizations.

(1) Sovereign Immunity

In International Law, sovereign immunity refers to the legal rules and principles

determining the conditions under which a State may claim exemption from the jurisdiction of another State. Sovereign immunity is a creation of customary International Law and derives from the principles of independence and equality of sovereign States; since States are independent and legally equal, no State may exercise jurisdiction over another State without its consent. It is a limitation imposed by International Law upon the sovereignty of a State.

Although rules of sovereign immunity form part of customary International Law, today they are incorporated either in international treaties, such as the 1972 European Convention on State Immunity, or in national statutes of certain States, such as the 1976 U.S Foreign Sovereign Immunities Act and the 1978 U.K State Immunities Act.

Historically, the head of a State (a sovereign) was associated with the State. Originally, both of them enjoyed under customary International Law absolute immunity, in all areas of their activities, from the jurisdiction of another State. While the head of a State continues today to enjoy such absolute immunity, even for his private activities, a State nowadays enjoys only qualified (restrictive) immunity. Under the qualified immunity, a State enjoys immunity only in respect of its governmental acts (acts *jure imperii*), not in respect of its commercial acts (acts *jure gestionis*).

In practice, sovereign immunity arises on two levels. The first level concerns the immunity of a State from the jurisdiction of courts of another State; courts of a State cannot adjudicate a claim against a foreign State. The second level concerns the immunity of a State from the execution of enforcement measures undertaken by courts of another State.

Sovereign immunity covers the head of a State as well as the State itself, its government, its departments, and its agencies. It embraces the acts of these entities, their property and assets. This immunity may, however, be voluntarily waived by a State. A State may waive its immunity from jurisdiction and consequently submits itself to the jurisdiction of a foreign court. However, such submission (waiver of jurisdictional immunity), although gives the court of a State the competence to adjudicate and enter a judgment against a foreign State, it does not authorize the execution of the court's decision against such State. In case of execution, another waiver is needed, namely a waiver of immunity from execution. Waiver must be express; however, implied waiver is accepted if indicated by the circumstances.

(2) Diplomatic Immunity

The rules of diplomatic immunity are the most accepted and uncontroversial rules of International Law. They are essential for the maintenance and efficient conduct of relations between States. Prior to the 1961 Vienna Convention on Diplomatic Relations, diplomatic law, especially privileges and immunities were based upon custom as well as contained in bilateral treaties and national statutes. Nowadays, most of the modern law of diplomatic immunity is contained in the 1961 Vienna Convention on Diplomatic Relations which both codified existing customary law and established others.

Under this convention, "a diplomatic agent" (the head of the mission and any member of the diplomatic staff of the mission) enjoys complete immunity from the criminal jurisdiction of the receiving State; also, he enjoys immunity from its civil and administrative jurisdiction, except in the case of real action relates to private immovable property situated within the receiving State, action related to succession matters in which he is involved as a private person, and action related to professional or commercial activity, in the receiving State, outside his official functions. No measures of execution may be forced upon him, except in the above mentioned cases. He cannot be obliged to give evidence as a witness. His person is inviolable. He cannot be arrested or detained. All appropriate steps should be taken by the receiving State to protect him and prevent any attack on his person, freedom and dignity. He is exempt from all dues and taxes, except in certain cases. The premises of the mission and the private residence of a diplomatic agent as well as their archives, documents, papers, official correspondence and other property are inviolable.

A diplomatic agent enjoys immunity from the moment he enters the territory of the receiving State on proceeding to take up his post or, if already in its territory, from the moment when his appointment is notified to the Ministry for Foreign Affairs. He also enjoys such immunity when passes through or is in the territory of a third State on proceeding to take up or to return to his post, or when returning to his own country.

The immunity granted to a diplomatic agent is immunity from the jurisdiction of the receiving State and not from liability. He is not immune from the jurisdiction of the sending State. Moreover, he can be sued in the receiving state after a reasonable time elapses from the ending of his mission.

The immunity of a diplomatic agent from jurisdiction of the receiving State may be waived by the sending State. The waiver must be express. However, such waiver of immunity from jurisdiction does not imply waiver of immunity in respect of the execution of a judgment; in such case, a separate waiver is required. Immunity may also be waived by the diplomatic agent himself, by submitting voluntarily to the jurisdiction of the court of the receiving State.

Members of the family of a diplomatic agent, if they are not nationals of the receiving State, likewise enjoy the same immunity from jurisdiction. The same immunity, with certain exceptions, is enjoyed by members of the administrative and technical staff of the mission, together with members of their families forming part of their respective households, if they are not nationals or permanent residents of the receiving State. Members of the service staff who are not nationals or permanent residents of the receiving State enjoy immunity only in respect of acts performed in the course of their official duties.

(3) Consular Immunity

A consular officer, like a diplomatic agent, represents his State in the receiving State. However, unlike a diplomatic agent, he is not concerned with political relations between the two States, but with a variety of administrative functions, such as issuing visas and passports, looking after the commercial interests of his State, and assisting the nationals of his State in distress. Thus, he is not granted the same degree of immunity from jurisdiction as a diplomatic agent.

Notably nowadays, many States combine its diplomatic and consular services. Thus, a person who acts simultaneously as a diplomat and consul enjoys diplomatic immunity.

Under the 1963 Vienna Convention on the Consular Relations, a consular officer (the head of the consular post and any person entrusted to exercise consular functions) is immune from an arrest or detention pending trial, except in the case of a grave crime and pursuant to a decision by the competent judicial authority. He is immune from imprisonment or any other restriction on his personal freedom save in execution of a final judicial decision. If criminal proceedings are instituted against him, he must appear before the competent authorities. The proceedings must be conducted in a manner that respects his official position and does not hamper the exercise of consular functions, and with the minimum delay.

A consular officer is immune from the jurisdiction of the judicial or administrative authorities of the receiving State only in respect of acts performed in the exercise of consular functions. He is exempt from all dues and taxes, except in certain cases. In addition, the consular premises, archives and documents are inviolable.

A consular officer enjoys the immunities from the moment he enters the territory of the receiving State on proceeding to take up his post or, if already in its territory, from the moment when he enters on his duties. The same immunities are enjoyed by members of the family of the consular officer from the date which he enjoys his immunities.

The immunities of a consular officer may be waived by the sending State. The waiver must be express. However, the waiver of immunity from jurisdiction for the purposes of

civil or administrative proceedings does not imply waiver of immunity from the execution of a judicial decisions; in such case, a separate waiver is required. Immunity may also be waived by the consular officer himself, by submitting voluntarily to the jurisdiction of the court of the receiving State.

(4) Immunities of International Organizations

It is uncertain which immunities and to what extent international organizations enjoy under customary International Law; the position of this law is far from clear. Actually, immunities are granted to international organizations by treaties, or by headquarters agreements concluded with the host State where the organization is seated.

The purpose of immunity granted to international organizations is purely functional. Immunity is regarded as functionally necessary for the fulfilment of their objectives. It is not a reflection of sovereignty, as it is in case of a State, except only indirectly when aiming to protect the interests of the member States of the organization.

Probably the most important example of treaties providing immunities to international organizations is the 1946 General Conventions on the Privileges and Immunities of the United Nations, which sets out the immunities of the United Nations and its personnel. The United Nations enjoys complete immunity from all legal process. Its premises, assets, archives and documents are inviolable. It is exempt from direct taxes and customs duties. Its staff is exempt from income tax on their salaries.

The U.N Secretary General and the Assistant Secretaries General enjoy diplomatic immunity. Other staff members enjoy limited immunities, such as immunity from legal process in respect of their official acts.

Representatives of member States attending the United Nations meetings are granted almost the same immunities as diplomats, except their immunity from legal process applies only to their official acts.

An example of treaties providing immunities to representatives of States in international organizations is the 1975 Vienna Convention on the Representatives of States in their Relations with International Organizations of a Universal Character. This treaty applies to representatives of States in any international organizations of a universal character, irrespective of whether or not there are diplomatic relations between the sending State and the host States.

Under this treaty, the representatives of States in universal international organizations enjoy similar immunities to those provided in the 1961 Vienna Convention on Diplomatic Relations. They enjoy immunity from criminal jurisdiction, and immunity from civil and administrative jurisdiction in all cases, save for certain exceptions. The mission premises, archives, documents and correspondence are inviolable.

The Law of Treaties

A treaty is a written international agreement concluded between States or other persons of International Law and governed by International Law, whether embodied in a single instrument or in two or more related instruments and whatever its particular

The Use of Force English, the term "treaty" is used as a generic term embracing all kinds of international agreements in written form. In addition to the term "treaty", many other terms are used, each as accorded to the particular agreement. *Charte*, *covenant*, *treaty*, *convention*, *declaration*, *general act*, *protocol*, *statute*, *as well as the term* "agreement" itself. Whatever the appellation of the agreement, it does not affect its validity under international law.

Therefore, this chapter is devoted to deal with the rules governing the resort to force; while the next chapter entitled "International Humanitarian Law" is devoted to deal with the rules governing the actual conduct of force.

Since the law of force has been found throughout the history. Treaties have been the major legal instruments for regulating relations between States. States concluded treaties governing the resort to force from a central element with international law. These rules together with other principles such as territorial sovereignty, independence and equality of States provide the framework for the international law order. While a domestic system prescribes the monopoly on the use of force by a State through its governmental institutions, in order to enable the State to preserve its authority and maintain law and order within its territory, the international law defines treaties as "an international agreement entered into by States between States in written form and governed by international law, whatever its particular designation."

It further provides that it "does not apply to international agreements concluded between States and other subjects of international law or between other subjects of international law, or to international agreements not in written form." These provisions exclude agreements between States which are governed by other than international law, agreements between States and international organizations, or between international organizations, and oral agreements.

The reason for the exclusion of these types of international agreements is to avoid the complication and complexity of the law if they are included by a single convention with written agreements between States. States, the rules governing them either in a formal aspect or by the rules governing force between States with a written declaration, special convention applicable to agreements between states and international organizations, or between international organizations, or for various reasons and causes with no clear distinction between States and international organizations, limitation and control. The distinction between "just war" and "unjust war" (entered into a treaty) arose as a consequence of the Christianization of the Roman Empire and the abandonment by Christians of the doctrine of just war.

The following section is devoted to the rules applicable to the written agreements between States as provided in the 1969 Vienna Convention on the Law of Treaty. However, the rules provided in this Convention are not clearly used; Augustine (354-430) defined the just war as a war fought in order to punish wrongs and restore the peaceful status quo, nothing further. Aggression was unjust. The resort to force should be strictly controlled. St. Thomas Aquinas in the Thirteenth Century went a further step in the definition of just war by declaring that war could be justified provided it was waged by sovereign authority, it was accompanied by just cause, the punishment of wrongs, and it was supported by the right intentions on the part of the belligerents.

However, the 1969 Convention on the Law of Treaty provides general rules applicable to the conclusion of treaties, rules regarding the capacity and the competent persons to conclude treaties, the adoption and authentication of the text of treaties, and the adoption of these writers took a different approach on this question in the light of the rise of the modern nation-states and eventually modified the doctrine of just war. The doctrine became linked with the sovereignty of States, and it was approached in the light of the modern Convention States, State possessing capacity to conclude treaties. Since States are represented by persons, the Convention provides rules to ensure that persons representing States have the power to adopt or authenticate the text of a treaty, or to express the consent of the State bound by a treaty. Such persons must produce what is known as "full powers". "Full powers" refers to the document issued by the competent authority of the concerned State certifying that the persons represent it. This requirement is necessary to ensure the States parties to the treaty that they are dealing with the competent persons. However, there are certain persons who need not to

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