Public International Law Notes

Law (Mount Kenya University)



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PUBLIC INTERNATIONAL LAW

** ***These notes are by no means conclusive not updated due to the evolving nature of law***

** ***Students MUST attend class to fully appreciate the course content of this lesson***

Expectations

How international law is enforced?

How it affects Kenyan Legal system?

What is the relation between human rights and international law?

Does international law affect me as an individual?

A. THE NATURE OF INTERNATIONAL LAW

Definition of international law

Public International law *is that body of law which is composed of the principles and rules of conduct which states feel bound to and do observe in their relations to each other. It also includes rules of law relating to the function of international institutions or organizing their relations with each other and the states and to the individuals as well as certain rules of law relating to individuals and non-state entities in so far as the rights and duties of such individuals and non-state entities are the concern of the international communities.*

This definition covers different developments which have qualified traditional conception of International Law as purely a system of rules and principles that are applicable to interstate relations on the basis of either state practice or international multi-lateral treaties.

N/B - lately they have emerged numerous regional institutions and organizations endowed with international legal personality and are capable of entering into relations with each other and with states.

Such regional institutions and organizations are governed by regional international law rules as opposed to general rules which are of universal application.

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Further, there has been a general international movement to protect human rights and fundamental freedoms of individuals, the creation of new rules for punishment of persons who have committed international crimes, environmental management and use of the sea, super adjacent airstrips and the outer space.

Private international law/conflict of laws has little to do with Public International Law. Conflict of laws is that part of the private law of a country which deals with cases having a foreign element, that is to say, contact with some system of law other than that of the forum state.

Such a contract may exist for instance because a contract was made or has been performed in a foreign country or because a tort was committed there or because some property was situated there, the parties to a particular case or contract are non-nationals of the forum state e.g. divorce cases

Conflict of law is a necessary part of the domestic law of each country because different countries have different legal systems containing different rules while Public International Law seeks primarily to regulate relations between sovereign states amongst inter se (themselves) as well as other international law persons.

N/B **-** in other words, Public International Law is at least in theory the same everywhere while rules of conflict of laws are different from one country to another.

Historical Developments of Public International law

Contemporary system of Public International Law is normally traced back in terms of its order and structure to ***The Peace of Westphalia 1648*** which marked the end of the 30yrs war in Europe. However, it was not then that International relations started. This was because evidence was produced of beliefs of rules and procedure regarding international law dates back over 5000 years.

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From the earliest times, rules of conduct to regulate relations between independent communities in their usual were not felt necessary and emerged from usages observed by these communities in their usual relationship.

Treaties, immunities of diplomatic envoys and certain laws and usages of war existed in the Middle Ages before the dawn of Christianity e.g. in Egypt and India. Around 2100BC, a solemn treaty was signed between the rulers of Lagash and Umma, the city-states situated in the area known to historians as Mesopotamia. It was inscribed on a stone block and concerned the establishment of a defined boundary to be respected by both sides under pain of alienating a number of Sumerian gods. The next major instance was in 1400BC where the ***Egyptian Pharaoh Ramses II*** concluded a ***Treaty of Peace Alliance and Extradition*** with the King of Cheta which recognized territorial sovereignty over certain areas of each ruler and provided for the extradition of refugees and the exchange of diplomatic envoys.

The role of ancient Israel must also be noted. A universal ethical stance coupled with rules relating to warfare was handed down to other peoples and religions and the demand for justice and a fair system of law founded upon strict morality permeated the thought and conduct of subsequent generations.

For example, the Prophet Isaiah declared that sworn agreements, even where made with the enemy, must be performed. Peace and social justice were the keys to man’s existence, not power.

There were also historical cases of recourse to international arbitration and mediation on registration in ancient Greece, China and the early Islamic world.

However, the predominant approach of ancient civilizations was geographically and culturally restricted. There was no conception of an international community of states co-existing within a defined framework. The scope for any ‘international law’ of states was extremely limited and all

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that one can point to is the existence of certain ideals, such as the sanctity of treaties, which have continued to this day as important elements in society. But the notion of a universal community with its ideal of world order was not in evidence.

In the period of the Greece city states there developed some international law though regionally limited composed of customary rules which had crystallized into law from long standing usages followed/observed by these states not only among themselves, but also as between them and the neighboring states. Underlying the rules were deep religious influences characteristic of an era in which the distinctions between law, morality, justice and religion were not sharply drawn.

No sense of a world community can be traced to Greek ideology in spite of the growth of Greek colonies throughout the Mediterranean area. This was left to the able administrators of the Roman Empire.

Roman civilization before its expansion and conquest witnessed the making of treaties which Latin cities under which Latin and Romans were given rights in each other's court and premised mutual cooperation.

The Romans had a profound respect for organization and the law. The law knitted together their empire and constituted a vital source of reference for every inhabitant of the far flung domain.

Once Rome became an empire, the Romans organized their relations with foreigners on the basis of ***Jus Fetiale*** and ***Jus Gentium***.

The ***Jus Fetiale*** consisted of religious rules which governed Romans external relations and formal declarations of war which inter alia recognized the inviolability of Ambassadors and was at the origin of the distinction between just and unjust war.

On the other hand, ***Jus Gentium*** was a Roman solution to the necessity of regulating legal relations between roman citizens and foreigners as Rome

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expanded. *Jus Gentium* simplified rules to govern the relations between foreigners, and between foreigners and citizens.

A special magistrate ***Praetor Peregrinus*** was appointed in 242 BC (whose function it was to oversee all legal relationships, including bureaucratic and commercial matters, within the empire) and created law called ***Jus Gentium*** acceptable to both roman citizens and foreigners. This law was the 1st truly international law although it essentially regulated relations between private individuals. It was based on the commercial law in use in the Mediterranean trade the ***Jus Civile*** which was applicable to relations between roman citizens and was less formalistic and based on the principles of equity and good faith. The distinction between ***Jus Civile*** and ***Jus Gentium*** was erased when Roman citizenship was granted to all male inhabitants of the empire in 212 A.D. However, ***Jus Gentium*** did not disappear but became an essential part of Roman law and greatly influenced all European Legal Systems and through them Public International Law.

From Ancient Rome, international law also inherited ***the Doctrine of the Universal law of Nature*** known as ***natural law*** which was developed by the Stoic philosophers of ancient Greece and adopted by the Romans. This doctrine considered law as the product of right reason emanating from assumptions about the nature of man and society. Because natural law is the expression of right reason inherent in nature and man and discoverable by reason, it applies universally and it is unchanging and everlasting.

Reference must also be made to the growth of Islam. Its approach to International relations and law was predicated upon a state of hostility towards the non-Muslim world and the concept of unity, Dar al-Islam, as between Muslim countries. Generally speaking, humane rules of warfare were developed and the ‘peoples of the book’ (Jews and Christians) were treated better than non-believers, although in an inferior position to Muslims. Once the period of conquest was over and power was consolidated, norms governing conduct with non-muslim states began to develop. The law dealing with diplomats was founded upon notions of hospitality and safety (aman),

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while rules governing International agreements grew out of the concept of respecting promises made.

The Middle Ages were characterized by the authority of the organized Church and the comprehensive structure of power that it commanded. All Europe was of one religion, and the ecclesiastical law applied to all, notwithstanding tribal or regional affiliations. For much of the period, there were struggles between the religious authorities and the rulers of the Holy Roman Empire.

These conflicts were eventually resolved in favour of the Papacy, but the victory over secularism proved of relatively short duration. Religion and a common legacy derived from the Roman Empire were strongly unifying influences, while political and regional rivalries were not. But before a recognized system of international law could be created, social changes were essential.

Of particular importance during this era was the authority of the Holy Roman Empire and the supranational character of canon law.

In the middle ages, two sets of international law namely ***Lex Mercatoria*** (Law Merchant) and ***the Maritime Customary Law*** developed to deal with problems that transcended international boundaries. With the revival of trade in the 10th century, merchants started to travel all throughout Europe in order to sell, buy and place orders for various goods. These commercial activities required the establishment of a common legal framework.

Out of necessity, the European merchants created their own rules of conduct on fair dealing which formed ***Lex Mercatoria***. During the same time, maritime customs and usages were formed. The High seas were no man's land but with the development of ***Maritime Commerce*** it became necessary to establish some rules and standards. The rules of the high seas were based on the ***Rhodian Sea Law***, a codification undertaken under the ***Byzantine Empire*** were compiled into widely recognized collections that became accepted all through Europe. The middle ages also saw the rise of nation states that led in turn to the process of the formation of rules of

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customary international law from usages and practices followed by such states in their mutual relations.

For instance, there were the microscopic Italian states that maintained diplomatic relations with each other and with the outside world that led to the development of certain rules relating to diplomatic envoys and their inviolability.

Such commercial and maritime codes while at this stage merely expressions of national legal systems were amongst the forerunners of international law because they were created and nurtured upon a backcloth of cross national contacts and reflected the need for rules that would cover international situations.

Such rules, growing out of the early Middle Ages, constituted the seeds of international law, but before they could flourish, European thought had first to be developed by that intellectual explosion known as the Renaissance.

This complex of ideas changed the face of European society and ushered in the modern era of scientific humanistic and individualistic thought.

The collapse of the Byzantine Empire centred on Constantinople before the Turkish armies in 1453 drove many Greek scholars to seek sanctuary in Italy and enliven European's cultural life. The introduction of printing during the 15th century provided the means to disseminate knowledge, and the undermining of feudalism in the wake of economic growth and the rise of the merchant classes provided the background to the new inquiring attitudes taking shape.

Europe's developing self-confidence manifested itself in a sustained drive overseas for wealth and luxury items. By the end of the 15th century, the Arabs had been ousted from the Iberian Peninsula and the Americas reach.

The rise of the nation-states of England, France and Spain, in particular, characterized the process of the creation of territorially consolidated independent units, in theory and doctrine, as well as in fact. This led to a

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higher degree of interaction between sovereign entities and thus the need to regulate such activities in a generally acceptable fashion. The pursuit of political power and supremacy became overt and recognised, as Machiavelli's The Prince (1513) demonstrated.

The city-states of Italy struggled for supremacy and papacy too became a secular power. From these hectic struggles emerged many of the staples of modern international life; diplomacy, statesmanship, the theory of the balance of power and the idea of a community of states.

Notions such as these are immediately appreciable and one can identify various manoeuvres for political supremacy. Alliances, betrayals, manipulations of state institutions and the drive for power are not unknown to us. We recognise the roots of our society.

It was the evolution of the concept of an international community of separate, sovereign, if competing, states, that marks the beginning of what is understood by international law. The Renaissance bequeathed the prerequisites of independent, critical thought and a humanistic, secular approach to life as well as the political framework for the future. But it is the latter factor which is vital to the subsequent growth of international law. The Reformation and the European religious wars that followed emphasized this, as did the growing power of the nations. In many ways these wars marked the decline of a continental system founded on religion and the birth of a continental system founded on the supremacy of the state.

Throughout these countries the necessity was felt for a new conception of human as well as state relationships. This search was precipitated, as has been intimated, by the decline of the Church and the rise of what might be termed 'free-thinking'. The theory of international law was naturally deeply involved in this reappraisal of political life and it was tremendously influenced by the rediscovery of Greco-Roman ideas. The Renaissance stimulated a rebirth of Hellenic studies and ideas of Natural Law, in particular, became popular.

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Thus, a distinct value-system to underpin international relations was brought into being and the law of nations was heralded as part of the universal law of nature.

With the rise of the modern state and the emancipation of international relations, the doctrine of sovereignty emerged. This concept, first analysed systematically in 1576 in the *Six Livres de la Republique* by **Jean Bodin** was intended to deal with the structure of authority within the modern state. Bodin, who based his study upon his perception of the politics of Europe rather than on a theoretical discussion of absolute principles, emphasized the necessity for a sovereign power within the state that would make the laws. While such a sovereign could not be bound by the laws he himself instituted, he was subject to the laws of God and of nature.

The idea of the sovereign as supreme legislator was in the course of time transmuted into the principle which gave the state supreme power vis-à-vis other states. The state was regarded as being above the law. Such notions as these formed the intellectual basis of the line of thought known as positivism which will be discussed later.

The early theorists of international law were deeply involved with the ideas of Natural law and used them as the basis of their philosophies. Included within that complex of Natural Law principles from which they constructed their theories was the significant merging of Christian and Natural law ideas that occurred in the philosophy of St. Thomas Aquinas. He maintained that Natural law formed part of the law of God, and was the participation by rational creatures in the Eternal law. It complemented that part of the Eternal Law which had been divinely revealed. Reason declared Aquinas, was the essence of man and thus must be involved in the ordering of life according to the divine will. Natural law was the fount of moral behavior as well as of social and political institutions and it led to a theory of conditional acceptance of authority with unjust laws being unacceptable. Aquinas' views of the late thirteenth century can be regarded as basic to an understanding

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of present Catholic attitudes, but should be confused with the later interpretation of Natural Law which stressed the concepts of natural rights.

It is with such an intellectual background that Renaissance scholars approached the question of the basis and justification of a system of international law. Maine, a British historical lawyer, wrote that the birth of modern international law was the grandest function of the law of nature and while that is arguable, the point must be taken. International law began to emerge as a separate topic to be studied within itself, although derived from the principle of Natural law.

Founders of modern International Law

During the same time, a number of jurists began to consider a revolution of the communities of independent sovereign states and to write about different problems of the law of sovereign states recognizing the necessity of somebody of rules to regulate certain aspects of relations between such states.

Where there were no established customary rules, these jurists devised and fashioned working principles by reason of analogy. Not only did they draw from the principles of Roman law but also had to recourse the precedence of ancient history, theology, canon law and the semi theological concept of the law of nature.

Among these early jurists were ***Francisco de Vitoria of the Spanish school of international law (1480-1546***) (Professor of Theology at the University of Salamanca) whose treaties ***Reflectionis de Indis Noviter Inventis*** confirmed the universal validity of international law and its application in the Americas: ***The Italian school of Law representative Alberico Gentili (1552-1608)*** who conceived the law of nations as a universal and natural law applicable between independent pre states and free common wealth.

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Francisco’s lectures were preserved by his students and published posthumously. He demonstrated a remarkably progressive attitude for his time towards the Spanish conquest of the South American Indians and contrary to the views prevalent until then, maintained that the Indian peoples should be regarded as nations with their own legitimate interests. War against them could only be justified on the grounds of a just interests. War against them could only be justified on the grounds of a just cause. International law was founded on the universal law of nature and this meant that non-Europeans must be included within its ambit.

However, Vitoria by no means advocated the recognition of the Indian nations as equal to Christian states of Europe. For him, opposing the work of the missionaries in the territories was a just reason for war, and he adopted a rather extensive view as to the rights of the Spaniards in South America. Victoria was no liberal and indeed acted on behalf of the Spanish Inquisition, but his lectures did mark a step forward in the right direction.

Suarez (1548-1617), was a Jesuit and Professor of Theology and deeply immersed in medieval culture. He noted that the obligatory character of international law was based upon Natural Law, while its substance derived from the Natural Law rule of carrying out agreements entered into.

Hugo Grotius (1583-1645), a Dutch scholar considered the greatest of the early writers of international law. His treaties ***De Jure Belli ac Pacis*** which 1st appeared in ***1625*** has been acknowledged as the 1st comprehensive and systematic treatise of positivists international law. One central doctrine in Grotius treatise was the acceptance of the law of nature as an independent source of the rule of law of nations apart from customs. His work was continually relied upon as a point of reference and authority in the decisions of courts and text books and later writings of standing.

Grotius finally excised theology from international law and emphasized the irrelevance in such a study of any conception of a divine law. He remarked that the law of nature would be valid even if there were no God. A statement

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which although suitably clothed in religious protestation was extremely daring. The law of nature now reverted to being founded exclusively on reason. Justice was part of man's social make-up and thus not only useful but essential. Grotius conceived of a comprehensive system of international law and his work rapidly became a university textbook theological distinction between a just and an unjust was, a notion that was soon to disappear from treaties on international law, but which in some way underpins modern approaches to aggression, self-defence and liberation.

Besides his earlier work ***Mare Liberum (1609***) distinguished Grotius as the historic standard bearer of ***the doctrine of the freedom of the seas***. In his work, Grotius argued that it would be against a natural law to rule over the sea because no country was able to monopolize control over the ocean because of its immensity, lack of stability and lack of fixed limit. Therefore, Grotius opposed the 'closed seas' of the Portuguese that was later elucidated by the English writer John Selden and emphasized instead the principle that the nations could not appropriate to themselves the high seas. They belonged to all. It must, of course, be mentioned, parenthetically, that this theory happened to accord rather nicely with prevailing Dutch ideas as to free trade and the needs in expanding commercial empire.

However, this merely points up what must not be disregarded, namely that concepts of law as of politics and other disciplines are firmly rooted in the world of reality and reflect contemporary preoccupation. No theory cultural and social environment. To ignore this is to distort the theory itself.

Read: Malcolm N. Shaw page 21 to 35.

The evolution of international law during the two centuries after Grotius was marked by the final revolution of the modern state system in Europe a process that was greatly influenced by ***the Peace of Westphalia 1648***. The major countries of Europe had been involved in the war which started in ***1618*** as a result of the struggle between Catholic and Protestant countries

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but had soon turned out to be an all-out struggle in military and political regimony in Europe. The treaties of peace were signed in the ***Westphalia towns of Munster and Osnabruck*** but are considered in law as one single instrument. The treaties constitute a watershed in the evolution of the modern international community and legal order.

First, they recognized Protestantism at an international level and consequently legitimized the existence of states based on Calvinism and Lutheran faith. Hence forth, even from the point of view of religion, it was recognized that the state was independent of the church.

Secondly, the treaty granted the members of the Holy Roman Empire ***The Jus Foederationis,*** that is the right to enter into alliances with foreign powers and to wage war provided those alliances or wars were neither against the empire nor against public peace and the treaty.

Accordingly, a number of small countries were upgraded to members of the international communities with almost sovereign rights.

Thirdly, the treaties crystallized a political distribution of power in Europe that saw the decline in the Church and the de facto disintegration of the empire and the birth of an international order based on a multiplicity of independent states recognizing no superior powers or authority over them.

Accordingly, the treaties recognized the principles of sovereignty, territorial integrity and equality of states as independent members of an international system. (China equal to Nauru, Tuvalu, Maldives) Each country carries one vote regardless of power, population) (23% US/ 0.04% Kenya’s contribution to UN budget)

The period from the Peace of Westphalia to the congress of ***Vienna in 1815*** is considered as a period of formation of classical international law. The period witnessed the breakup of the feudal state system and the formation of society into free nation states.

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The congress of Vienna ended ***25 years*** of the Napoleonic War in Europe. It was convened by four European powers which had defeated Napoleon with the main objective of establishing a balance of powers of political forces in Europe which would ensure lasting peace and maintain a status quo in Europe by repressing political warships.

International law greatly expanded during the rest of the ***19th Century*** mainly due to the rise of powerful states in and outside Europe, the expansion of European influence overseas and modernization of the world transport, the greater destructiveness of modern warfare and influence of new inventions. All these made it urgent for international societies of states to acquire a new system of rules which would regulate in an ordered fashion conduct of international states affairs. There was remarkable development in the law of war and neutrality and great increase in adjudications in international arbitral tribunals as provided sources for rules.

Besides, states commenced to acquire the habit of negotiating of general treaties in order to regulate the affairs of mutual legal concerns. Throughout this period, international law was based on five principles namely;

i) Sovereignty
ii) Balance of powers
iii) Legitimacy of government
iv) Nationality
v) Equality

Other important developments took place in the 20th century;

- ***The Permanent Court of Arbitration (P.C.A***) was established by the Hague conferences of ***1899 and 1907***. Following WW1, the legal measure was created as an international organization designed to prevent the recurrence of armed world conflicts.
- ***Permanent Court of International Justice:*** was set up in 1921 as an authoritative ***International Judicial tribunal-***

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- ***The league and the court*** were succeeded in ***1946*** by the U.N organization and the international court of justice respectively established after WWII.
- There was also the creation of ***Permanent International Intergovernmental organizations*** whose functions are in effect with those of world government interests of peace of the world and human welfare e.g. ILO, FAO, ITU, WHO

The scope of international law was also expanded to cover not only every kind of economic and social interests affecting states but also the vast and complex areas of international concerns e.g. law of the sea, environment, nuclear energy, international crime, communications and human rights and interests affecting states. As a result, the influence of writers has tended to decline with the consequence that international law rules have been positively tailored to cater for modern developments in technology, economic exigencies and social economic and political affairs of the world.

The last century also witnessed a great number of multilateral treaties laying down rules to be observed in interstate relations as well as rules of arbitration to settle international disputes.

The I.C.J has made an important contribution to the development of international law of Jurisprudence. Similarly, the international law commission since its creation in ***1947*** by the UN General Assembly has worked on the codification and progressive development of international law thereby ensuring greater certainty and stability.

Rules of ***customary international law*** have also been codified and consequently made more prices and specific.

Customary International law *consists of rules of law derived from the consistent conduct of states acting out of belief that the law required them so to act that way. It can be discerned by a widespread repetition by states of similar international acts over time.*

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Finally, the last century also witnessed massive participation of the newly independent states of Africa, Asia and the Pacific in the International Law undertakings. From a relatively small membership of ***42 states in 1919*** when the League of Nations was created, the UN currently has a membership of ***193 states***.

These newly independent states realized that many international law rules did not fully respond to their needs and reflect their concerns and hence taken an active part in the readjustment of the old rules to the new economic and political realities.

N/B The impact of this new development is reflected in the content and scope of contemporary international law namely***, the shift from Euro centrism to Universalism thereby diminishing the Western European Supremacy over International Law.***

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Basis of obligation in Public International Law

For quite a long time there has existed the controversy as to whether or not international law is true law. Some jurists have argued that IL is positive law whereas others have maintained that IL is only a body of rules of International morality.

One theory that has enjoyed acceptance is the positivists' law that IL is not true law. ***John Austin 19th century*** is the main protagonist of this theory. Others who have questioned the legal basis are English philosophers like ***Thomas Hobbes, Jeremy Bentham*** and the German jurist ***Samuel Von Pufendorf***.

Austin argued that IL is not really law because it has no sovereign. His attitude towards IL was influenced by his theory of law in general. He defined "***laws properly so called as commands of a sovereign***." According to him a sovereign is a person who receives the habitual obedience of the members of an independent political society and who in return did not owe such obedience to any person.

Rules of international law did not qualify as rules of positive law by this test and not being commands of any sort were placed in the category of "***laws improperly so called."*** According to Austin IL was positive to IL morality only analogous to rules binding a club or a society. Austin further described IL as consisting of "***opinions or sentiments among nations generally."***

Positivism has been objected to a number of grounds

i) Modern historical jurisprudence has discounted the force of Austin's general theory of law because there is no legal system that conforms to his concept. Modern jurisprudence has shown that in many communities without a determinate sovereign legislative authority a system of law was enforced and being observed and that such law did not differ in its binding operation from the law of any state with a true legislative authority.
ii) Austin's views however right for his time are not true of the contemporary international law. in the last one century or so a great number of IL rules has come into existence as a result of law making treaties and conventions and the proportion of rules of primary IL has correspondingly diminished.

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Even if it be true that there is no determinate sovereign legislative authority in the international field the procedure for the formulation of rules of international law by means of International conferences or through existing international institutions is practically a settled and efficient as any state legislative procedure.

iii) Questions of international law are always treated as legal questions by those who conduct international business in various foreign offices or through various existing international bodies.

The agencies do not consider international law as merely a moral code. In his Oxford lectures in 1890, ***Sir Fredrick Pollock*** sums up the issue in this way namely "*if international law were only a kind of morality, the framers of state papers concerning foreign policy would draw all their strength on arguments. But as a matter of fact, this is not what they do. They appeal not to the general feeling of moral rightness, but to precedents, treaties and to opinions of specialists. They assume the existence among statesmen or publicists of a series of legal as distinguished from moral obligations in the affairs of nations.*"

Furthermore the legally binding force of international law has been severally asserted by the nations of the world in international conferences. For instance the ***UN Charter*** is both explicitly and implicitly based on the true legality of IL whereas ***Art 38 of the Statute International Court of Justice states*** that the function of the court is to decide "***in accordance with international law***" that such disputes are submitted to it.

Austin confused rules of IL proper with rules of ***Comitas Gentium (International Comity)*** the later being rules of good will and civility founded on the moral right of each state to receive courtesy from other states.

Non observance of a rule of IL may give rise to a claim by one state against others for some kind of satisfaction whether it be diplomatic in character or it takes the concrete form of indemnity or reparation.

It is otherwise for rules of International Comity i.e. it does not give rise to a legal claim).The concept of the law of nature exercised a great influence on

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the development of International Law. Several theories of the character and binding force of International Law were founded upon it. The law of nature denoted the ideal law founded on the nature of man as a reasonable being i.e. the body of rules which nature dictates to human reason. The essence and relevance then is that states submitted to international law because their regulations were regulated by the Higher law, the law of nature of which IL was attached/part.

The traces of the Natural law theories still exist today although in a much less dogmatic form. The approach kindred to that of NL underlies the current movement to bind states by International covenants to observe Human rights and fundamental freedoms and provides justification for the punishment of individuals guilty of gross violation of human rights such as war crimes and genocide.

Because of its rational and idealistic character, the concept of the development of the law of nature has had a tremendous influence on the development of IL. It has generated respect for IL and provided moral and ethical foundations.

Its main defect however, has been its aloofness from the realities of International relations shown in the lack of emphasis of the actual practice of state in their mutual relations although the majority of rules of IL originally sprung from these practice. Besides the binding force of IL can be traced back to one supreme fundamental principle or norm expressed by the principles of ***Pacta Sunt Servanda*** i.e. that agreements between states are to be respected and carried out in good faith. ***Pacta Sunt Servanda*** is an absolute postulate of the International legal system and manifests itself in all rules of IL.

Observance and Enforcement of International Law

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States have to formally accept the compulsory jurisdiction of International Courts and their courts. We do not have an international police force.
As distinguished from municipal law no one world government or effective constitutional machinery has yet been developed for the application and enforcement of International Law.
Existing judicial agencies like the ICJ are by passed more frequently than they are utilized and even these agencies cannot be regarded as the true enforcers of the law. Besides International Law does not poses the equivalent of a hierarchy of tribunals under which a case can move from lower to Higher levels appeal.

Furthermore there is no effective authority for the enforcement of decisions or award handed down from the available court and tribunals. (***Ref to Article 94* – the U.N General Assembly or the Security Council may request the I.C.J to give advisory opinion on any legal question. Other U.N organs and agencies may also request upon the U.N General Assembly authorization and advisory opinion regarding the scope of their activities**)

What then ensures that rules of International law are observed by states?

There are at least three factors that motivate compliance with International Law.

1) ***States are naturally interdependent in many ways and International Law facilitates these corporations***.

For instance states with a common interest in International communications and disease eradication. These are areas where an action on International scale is essential and hence states will obey rules of International law on these issues.

2) ***States have to co - exist with each other and a means of doing this is to define their relationships by making treaties and other consensual agreements***. At this level obedience is high and the law is

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generally effective. Besides, the concept of reciprocity plays an important role in ensuring that international stability is maintained.

3***) International Law has an important role to play in Inter-state relations by keeping the breach of rules of conduct to a minimum and thereby ensuring conflict avoidance.***

4) Another factor that plays an important part in the promotion of obedience to the rules of International law is ***world Public opinion which finds expression in world fora such as United Nations General Assembly***. The reactions in the traditional sense of states men and of peoples on global scale act as a deterrent towards the breach of rules of International Law. Unlike the municipal law systems where the machinery of enforcement is centralized in government authority, in International Law it is of necessity decentralized since the primary subjects of International Law are states. Traditionally in a decentralized order, enforcement of law is accomplished through self-help by individuals injured by the delict or illegality.

However the system established under the ***UN Charter*** and before it ***the Covenant of the League of Nations*** was designed to ensure that member states obey and respect International obligations deriving from these legal instruments.

N/B The use of force except in self defense is now illegal/outlawed. (***Article 51 and Article 2(6))***

Diplomatic protests are the traditional pacific/ peace method of preserving the integrity of international law. Such protests will commonly be coupled with demand that the wrong done be righted in an appropriate manner. Although minor violations might be corrected in such consequences of such protests, major international violations would most cases remain unaffected by the lodgment of diplomatic protests.

If disagreement about claim violations persists a variety of devices can be called into play to secure compliance with the law. These include ***mediation by a third party, reference to a commission of enquiry or conciliation, reference to an arbitral tribunal or an International Court in order to effect compliance with the law***.

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However, arbitration can be effected only if the violator of the law agrees to such settlement procedure.

Again , compliance may be secure through ***reference to and subsequent actions by a universal or regional international arrangement or international organizations such as the UN Security Council or General Assembly or the African Union, European Union or the Organizations' of American States.*** Such a reference would initially secure publicity for the alleged failure to comply with the rules of the law and possible public condemnation of the delinquent state. It might more importantly lead to the imposition of a variety of sanctions against the offending state.

Failure to achieve compliance through this method into being the imposition of sanctions such as ***boycott, embargos, reprisals and pacific blockades adopted at the behest of a regional or universal agency***.

Pacific blockades is at the demo Cuban missile crisis (***1962***)

In addition the offending state may be suspended or even expelled of membership in an International agency and thus deprived of benefits accruing from that membership as well as of the ability to vote on decisions and policies of the agencies (A. 6).

Finally the ultimate sanction of military force may be employed to secure compliance with the rules of International Law.

However the legal standing of such an action would however be clouded in view of the precise provisions of the UN Charter and the obligations assumed there-under by members of the UN. (***Cap 7 of the UN Charter***)

B. SOURCES OF PUBLIC INTERNATIONAL LAW

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Introduction

The "***phrase sources of law***" and hence sources of International Law is ambiguous because it refers to both formal sources and material sources.

A ***formal source*** refers to the legal procedures and methods for the creations of rules of general application legally binding the persons or bodies at whom they are directed.

Material sources on the other hand provide evidence of the existent of rules which when proved have the status of legally binding rules of general application. In other words a formal source is *that from which a rule of law derives its force and validity*. The material sources supply the substance of the rule to which the formal sources give the force and nature of law.

For instance a rule will be legally binding if it meets the requirement of the custom which is in itself a formal source of International Law and each substance will be indicated by state practice which is the material source of the custom.

In the context of International Law however, we cannot talk of formal sources since International Law lacks the constitutional legislative machinery akin to that of Municipal law under which statutes are binding by reason of fundamental supremacy.

N/B - *Hence the term sources of International Law refer to* ***Material sources***.

Traditionally the question of the material sources of International Law is answered by reference to ***Art 38 Para 1*** of ***the Statute of International Court of Justice.*** This provision adopted from the same article of the statute of the ***Permanent Court of International Justice*** which operated under the auspices/support of Legal Nations provides that the court whose function is to decide in accordance with international law such disputes are submitted to it shall apply

a) International conventions whether ***general or particular*** establishing rules expressly recognized by the contesting sticks.
b) International custom as ***evidence of General practice*** accepted as law.
c) The ***general principles*** of law recognized by civilized nations.

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d) Subject to the provisions of ***article 59*** judicial decisions and the teachings of the most highly qualified publicists of various nations as subsidiary means for the determination of rules of law.

Article 59 provides that the decisions of the ICJ have no binding force except between the parties and in respect within that particular case.

Article 38 para 1 does not form the equivalent of municipal law of precedent.

Article 38 para 2 the court is empowered to decide a case ***ex aequo et bono*** if the parties agree there to. The court can under this provision ignore rules which are the product of any of the above law creating agencies and substitute itself as a law creating agency depending on the agreements of the parties to the dispute before it. This is more practical.

This enables the court to avoid the pronouncement of what is technically called a **non liquet** *(Inability or impossibility to decide as no applicable rule has been found)* this has never happened in practice.

The various sources enumerated by ***Art 38 of the statute*** may be applied simultaneously and as such the order of enumeration does not constitute a hierarchical order.

Besides, the article is not exhaustive because on the one hand it envisages sources of International Law from a strictly jurisdictional perspective and on the other being a text adopted more than 80 years ago it does not take into account the evolution of International Law.

For instance acts and decisions of International organizations which have greatly contributed to the growth of International Law are not mentioned under the article.

1) TREATIES

Defn: A treaty is any international agreement entered into by two or more states or any other international law persons and governed by International law.

A distinction is normally made between law making treaties i.e. laws, treaties which lay down rules of general or universal application (***multilateral***

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treaties) and treaty contracts that is *those that are entered into between two states dealing with a particular matter between or concerning those states exclusively* (***bilateral treaties).***

Whether multilateral or bilateral, treaties is a direct source of rights and obligations for the parties and represents a source of international whose importance is ever increasing.

In the event of a dispute between the parties to the treaty terms thereof will constitute the law to be applied by the court. Treaties may impose duties to enact legislation or may offer areas of choice within which states are to apply the principles laid down therein. There may also be either confirmatory of or represent a codification of pre-existing rules of customary International Law such as the ***1961 of Vienna conventions of Diplomatic Conventions***.

States or other International Law persons are bound by treaties which have been regularly concluded and have entered into force states under the principle of ***Pacta Sunt Servanda***. Under this principle parties to treaties are *bound to observe and carry out the obligations in good faith*. This principle which is in itself a rule of customary International Law is the basis of positive International Law upon which the entire superstructure of contemporary International Law depends. The function of treaties is however limited by two factors:

1) ***Treaties bind the parties thereto only and not non-parties.*** The legal position of non-parties cannot be modified without their consent that is to say that legal rights cannot be conferred and duties imposed on 3rd parties without their consent.
2) This is provided by the principle of ***Jus Cogens***. Under this principle the states freedom to conclude treaties is limited by the fact that parties to a treaty cannot provide in derogation from the accepted principles of IL. States cannot agree under treaty to violate the ***peremptory norms*** (*can't be derogated, they are binding)*
   For instance parties to a treaty cannot agree to wage war against a 3rd party or to engage in slave trade when these are prohibited by IL.

2) CUSTOM

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Is customs a source of international law?

Until recently the rules of general International Law were all customary rules. Although most of these still exist they have been modified so as to be adopted to the changes in contemporary International relations.

The rules of customary International Law involved have a long historical process culminating their recognition by International community.

N/B ***For the custom to liberise/give rise to a binding rule it must have been practiced and accepted as obligatory by the international community***.

State practice distinguishes between ***general and regional custom***.

General customs are those customary rules that bind the International community as a whole whereas ***local or regional customs*** are those applicable to a group of states or just two states to be a relation among themselves.

If for instance members of the state of the International community are used to conducting their interstate affairs in a particular manner because they feel they are bound to do so will then this will develop into a local or regional customary law and cannot extend that practice to the international level or rest of Africa.

Elements of customary law

i) ***Duration*** (for how long must the custom be practiced)

The jurisprudence of International trade unions including the ICJ indicates that no particular duration is required for a particular practice to give rise to a rule of law provided ***the consistency and generality*** of the practice are proved. Conduct to be creative of a rule of customary law must be regular and repeated.

In ***the North Sea Continental Shelf cases***, the ICJ stated that there is no precise length of time during which the practice must exist. It is simply that it must be followed long enough to show that other requirements of a custom are satisfactory. The court stated, *" although the passage of a short period of time is not necessarily, or of itself, a bar the formation of a new rule of*

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customary IL on the basis of which what was originally purely conventional rule, and indispensable requirement will be that within the period within question short though it might be , state practice including that of states whose interest are specially affected, should have been both extensive and virtually uniform the sense of the position invoked- and should moreover have occurred in such a way as to show general recognition that a rule of law or legal obligation is invoked."

ii) Uniformity and generality

Major inconsistencies in practice will prevent the creation of a rule of customary IL. However, complete uniformity is not required and minor inconsistencies will not prevent the creation of a customary rule provided that there is a substantial uniformity. In other words for state practice to give rise to binding rules of customary IL, that practice must be uniform, consistent and general and ***must be coupled with a belief that the practice is obligatory rather than habitual.***

This is illustrated by the ***Asylum case*** which was between Colombia and Peru. After an unsuccessful rebellion in ***Peru in 1948***, a warrant was issued for the arrest on a criminal charge arising out of the rebellion of one of its leaders ***Haya de la Torre a Peruvian National***. He was granted asylum by Colombia in its Peruvian embassy in Lima. Colombia sought that Peru refused a safe conduct to allow ***Haya de la Torre*** out of the country. Colombia brought this case against Peru asking the court to rule inter alia that Colombia as the state granting asylum was competent to qualify the offence for the purposes of the said asylum. Colombia argued for such a ruling on the basis of both treaty provisions and ***"American International Law in general***." The court pronounced, "*the party which relies on a custom of this kind must prove that this custom is established in such manner that it has become binding on the other party. The Colombian Government must prove that the rule invoked by it is in accordance with a constant uniform usage practiced by the states in question, and that this usage is the expression of a right appertaining to the state granting the asylum and a duty incumbent on the territorial state --- the facts brought to*

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the knowledge of the court disclosed so much uncertainty and contradiction, so much fluctuation and discrepancy in the exercise of diplomatic asylum and in the official use expressed on different occasions; there has been so much inconsistency in the rapid succession of conventions on asylum, ratified by some states and rejected by others, and the practice has been so much influenced by considerations of political expediency in various cases, that it is not possible to discern in all these any constant and uniform usage accepted as law."

(Colombia proved that this is a duty)

The generality of the practice is an aspect which complements consistency. The practice need not be universal in that what is important is that a substantial number of states practice or apply the custom.

iii) Opinio juris et neccesitatis sive

To assume the status of customary IL the rule in question must be regarded by state as binding in Law i.e. the states must regard themselves as being under a legal obligation to follow the practice. This sense of a binding legal obligation is referred to as ***Opinio juris et neccesitatis*** and is what distinguishes rules of customary IL from rules of International Committee which are simply based upon a consistent practice of state not accompanied by any feeling of legal obligation.

Article 38 Para 1 b

The statute of ICJ refers to custom as evidence of a "***general practice accepted as law***." It must be proved that the state following a particular customary rule do so out a duty of binding legal obligation. The proponent of the custom has to establish a general practice and having done this in a field which is governed by legal categories the tribunal can be accepted to presume the existent of ***an opinion jurist.*** The distinction between International rules which create a legal obligation and those which simply permit a state to act in a certain way was illustrated by a ***Permanent Court of International Justice*** in the ***SS Lotus case between France and Turkey.*** A French steamer and a Turkish Collier collided on the High seas. As a result the Turkish collier sank and a part of its crew and passengers lost

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their lives. But the French steamer having been put into Court in turkey ***voluntarily*** the officers on the watch on board at the time of collision were arrested tried, convicted ***of involuntary man slaughter*** by the ruling authority of the flag state. France protested against the Turkish exercise of jurisdiction on the basis that this was in violation of the international law. *The question before the court was whether Turkey had the jurisdiction to try the French officers of a French Merchant ship for the collision*. France argued that Turkey had no right to institute criminal proceedings because the flag state of the vessel alone had jurisdiction over act performed on board of the vessel on the High seas. Turkey argued in response that vessels on the high seas form part of the territory of the flag state and further that the criminal legislation of a sovereign state is not bound to keep within the limits of territorial and personal jurisdiction. It therefore, asserted that in the absence of a rule to the contrary there was a permissive rule empowering it to try the officers. France however argued that there was a customary rule imposing a duty on Turkey not to try the officers because previous practice showed that, *"questions of jurisdiction in collision cases are but rarely encountered in the practice of criminal courts---in practice prosecutions only occur before the court of the state whose flag is drawn.* In rejecting the French argument the court stated*, " even if the rarity of judicial decisions to be found among the reported cases were sufficient to prove the circumstances alleged by the French government it would merely show that states, had often, in practice abstained from instituting criminal proceedings and not that they recognize themselves as being obliged to do so; for only if such abstention were based on their being conscious having a duty to abstain would it be possible to speak of an International custom. The alleged fact does not allow one to infer that states have been conscious of having such a duty."*

The court found that there was no customary rule conferring exclusive penal jurisdiction in matters of collision on the high seas on the flag state because state laws were inconsistent, decisions of municipal courts conflicted no uniform trends and would be deduced from treaties and publicists were divided in their views.

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iv) Proof of custom

In order for a rule of customary law to develop it must at some stage if possible to imply from the conducts of state that between them it is regarded as a matter of legal duty that they should act in a certain way. *Such a rule will only attain the position of a rule of general international law if a sufficient number of states accept as binding of them and if the rest of international community does not register an effective protest to the extension of the rule of the conduct of relations in which they are involved.* Where a particular state or group of states persistently object to the rule being extended to it, that state or group will not be bound by the rule unless it is a rule of ***Jus cogens***.

In that case, the objections would amount to ***violations of international law***. The standard elements of customary international law must be proved by the party ascertain of a particular rule of custom namely

1. *Uniformity of state practice*
2. *Generality of state practice*
3. *The sense that state practice is mandated or compelled by law which may thus be reduced to two primary components namely*
    - *The objective practice of state*
    - *The subjective belief motivating that practice*

Customary International law is therefore created by the fusion of an objective element that is state practice and a subjective element that is Opinion Juris.

The country claiming existence of a rule of customary International Law has the burden of proving it. This is done by various ***evidentiary procedures*** such as views and resolutions of the UN general assembly, practice of states, conventions and decisions of International Tribunals in international legal disputes.

3) GENERAL PRINCIPLES OF LAW

The statute of the ICJ allows the court to apply general principles of law recognized by "***civilized nations.***" The reference here is to the level of

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development of legal systems rather than economic or political status because all nations are now considered as civilized. The term "***peace loving"*** as stated in ***Art. 4 of the UN Charter*** is now referent. (Fred Savage)

The general principles are not a subsidiary body of doctrine to which resort may be heard when all else fails since the article does not speak of them as such although it does so with respect to judicial decisions as a means for the determine of the rules of law.

The general principles are those which are accepted by all nations in their domestic law systems such as certain principles of procedure; principle of natural justice; principles of good faith and the principle of res judicata.

Oppenheim states that the intention is to authorize the I.C.J to apply general principle of municipal jurisprudence in particular of private law in so far as they are applicable to interstate relations. In this way private law being in general more developed than International law has provided a reserve store of legal principles upon which International Law can grow.

The inclusion of this provision in the statute of the court has therefore been seen as a rejection of the positivist doctrine according to which international law consists solely of rules to which states have given their consent and as affirming naturalist doctrine whereby if there appeared to a be a gap in the rules of International Law, recourse could be had through the general principles of law namely natural law.

Schwarzenberger states that for the principles to qualify for the incorporation into International Law, it must fulfill 3 requirements namely:

i) It must be ***a general principle of law*** as distinct from a legal rule of a more limited functional scopes;
ii) It must be ***recognized by civilised/peace loving*** nations as distinct from 'barbaric or savage communities';
iii) It must be ***shared by a fair number of nations*** including the principal legal systems of the world, for example Anglo-Saxon or common law system.

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Although general principles have been validly recognized as a source of International law they are rarely applied by International Court of Justice because the jurisdiction of the court is founded on consent of the parties in the dispute before it and the court is so much cautious of this fact that even if it is empowered to decide ***ex aequo et bono*** it rarely does so. The ICJ does not have compulsory jurisdiction it has to accept voluntarily. The ICJ cannot decide without the consent of the state. They can also with draw from the case.

4) JUDICIAL DECISIONS AND WRITINGS OF PUBLICISTS

After enumerating the 3 bodies/rules so far considered, ***Article 38*** authorizes the court to apply judicial decisions and the teachings of the most highly qualified publicists as subsidiary means of the determination of rules of law.

Article 59 of the statute provides that the ICJ's decisions have no binding force except between the parties and in respect of that particular case. This article was not intended merely to repress ***the principle Res Judicata*** but to rule out a system of binding precedent. The object of the article is to prevent particular legal principles accepted by the court in a particular case from being binding on other states or in other disputes. The reason for that is because the court has no compulsory jurisdiction and States must formally accept the jurisdiction of ICJ. There is therefore no binding authority of precedent of international law and international court and tribunal decisions do not make law.

Although in theory there is the barrier to the adoption of the ***doctrine of precedent***, in practice the decisions of the ICJ are treated as having the highest authority. State parties to cases that come before the court frequently make reference decisions of various international tribunals. Even in practice, the court itself has of necessity followed previous decisions in the interest of judicial consistency and has where necessary distinguished its previous decisions from the case actually being heard.

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For instance, in the ***Reparations of Injuries Suffered In the Service of the UN case 1949 ICJ report pg 174*** the International court of justice in its advisory opinion to the U.N General Assembly relied on the previous pronouncement on the Permanent International Court of Justice to the International Labor Organization in 1926. On 17th September 1948 ***Count Bernadotte*** a Norwegian National was killed allegedly by a private gang of terrorist in the new city of Jerusalem; that part of the city was under Israeli control. Count Bernadotte was carrying out his duties as U.N mediator in Palestine.

In deciding upon the action to be taken in respect of the death, the U.N General Assembly asked the International Court of Justice for an advisory opinion on 2 questions. Namely

i) In the event of an agent of the U.N in the performance of his duties suffering injuries in circumstances involving the responsibility of a state, has the U.N as an organization have the capacity to bring an international claim against the responsible *de jure or de facto* government with a view of obtaining the reparation due in respect of damage caused to the U.N or victim or to person entitled through him?
ii) In the event of an affirmative reply how is action by the U.N to be reconciled with such rights as may be possessed by the state of which victim is a national?

In advising that the U.N had international legal personality with powers to claim reparation for damage suffered, the ICJ relied on the advice of the Permanent Court of International Justice to the effect that the International Labor Organization as a specialized agency of the UN was an International legal personality.

Case no 33 Pg 5 Norwegian Case

In relation to writings, although writings of publicists only constitute evidence of customary law, learned writings can also play a subsidiary role in development of new rules of law. For instance the contributions of writers such as ***Hugo Grotius*** and ***Gentili*** were very important to the formulation and development of International Law.

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Besides, writers of International reputation such as ***Oppenheim*** are often relied upon by legal advisors to states, tribunals and courts.
However, much as the writings or teachings of the publicists might have been useful in the earlier development of International Law, today their utility is limited because much of contemporary International Law is now conventional law (treaty law).
Besides, the writings have 2 main limitations namely:

i) ***Writers reflect certain national prejudices*** to the rules of International Law. For instance, the views of an American writer of a particular rule may be radically different from those of a Chinese or a 3rd world writer.
ii) Such ***juristic views may be the writer's views*** of what the law ought to be (***law de lege Ferenda***) rather than what the law actually is (***law de lege lata)***. There is therefore a danger of using proposals of a particular author for existing rules of International Law.

Are there any other sources of IL?
Article 20 (4)
Article 20 (5)
Article 103
Does the UN make laws which are binding?
The powers of the UN

OTHER SOURCES OF INTERNATIONAL LAW

As earlier indicated the sources of law enumerated in ***Art. 38Para 1*** of the statute of the ICJ are often regarded as comprising the sum of the traditional sources of International law. Increasingly however this approach is subject to limitation because International tribunals and courts do in the light of changes taking place in the international society look to additional sources to give them guidance on the law. These sources can in the circumstances be looked upon as additional sources of International Law.

Soft law

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1) ***Resolutions, recommendations and declarations*** of the U.N General Assembly are often resorted to not only their persuasive value on international duties and obligations but also as evidence of political consensus on various International relations disputes. The resolutions may also have very significant influence on the subsequent development of International Law and practice.

For instance, in the ***Nicaragua v USA (merits) 1986 case*** the court considered that the U.N General Assembly resolution 2625 (XXV) (session of the Gen Ass) '***the Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States*** was illustrative of customary International law. Similarly in its advisory opinion on the Legality of the threat or use of ***Nuclear Weapons (1996 ICJ pg 90***) the ICJ held that UN General Assembly resolutions can in certain circumstances provide evidence important for establishing the existence of a rule or the emergence of an ***opinion Juris***.

In this case the Gen Assembly had asked the court for an advisory opinion on the question: "*is the threat or use of Nuclear weapons in any circumstances permitted under International Law?*"

The court after a review of the relevant International legal instrument as well as the Security Councils' General Assembly resolution of the matters reached a resolution that the threat or use of nuclear weapons will generally be contrary to the rules of International Law applicable to armed conflicts and in particular the principles and rules of humanitarian law.

2) Decisions of the U.N Security Council taken in exercise of the powers conferred upon it by the charter especially under ***chapter 7*** are binding on states. This is based on the functions and powers of the security council as provided for under ***art 24 and 25*** of the U.N Charter read together with ***art 103*** which provides that ***in the event of the conflict between the obligations of the members of the UN under the charter and their obligations under any other international agreement, their obligations under the charter shall prevail.***

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3) In some instances ***unilateral declarations*** of states may give rise to binding international legal obligations. In such instances the intentions of the state making the declaration in question to be bound is crucial as will be the element of publicity or notoriety e.g. state officials including the president, minister of foreign affairs or the prime minister make declarations then they are binding to Kenya as a country.

Equally crucial will be the element of the good faith on the part of the state making declaration.

Siad Bare ending the Shifta war on Somalia by Kenya in 1981

1) The legal status of Eastern Green land case (Norway v Denmark) (1933) PCIJ rep Ser A/B No 53, the Ihlen Declaration was binding on Norway

After World War 2, Denmark sought to attain declaration for several of the allied powers to the effect that they would not object to recognize Danish sovereignty over the whole of Greenland. On July 14th 1918, the Danish Minister accredited to Norway and so Mr. Ihlen the Norwegian Minister for Foreign Affairs and told him that for the purpose of considering the claims that may be put forward by different countries, to an island called Spitzbergen at the Paris Peace Conference, Denmark would raise no objection to Norway's claim upon Spitzbergen if Norway, raised no objections to Denmark's claim over the whole of Greenland.

Mr. Ihlen replied, "that question would be considered." On July 22nd 1919 in a further conversation Mr. Ihlen made a statement to the Danish Minister to the effect that, "The Norwegian government would not make any difficulties in the settlement in this question." Denmark sought to argue that the undertaking obtained in this declaration was binding upon Norway.

By Royal Proclamation of July 10th 1931 Norway declared part of Eastern Greenland to be under Norwegian sovereignty. Denmark also claimed this territory and applied to the Permanent Court of International Justice for an order to the effect that the declaration of occupation proclaimed by the Norwegian government of July 10th 1931 and any steps taken in this regard

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by the government constituted a violation of the existing legal situation and were accordingly unlawful and invalid.
In giving judgement for Denmark as requested, the court said that, “the court considers it beyond all dispute that a reply of this nature given by the Minister for Foreign Affairs on behalf of its government in response to a request by the diplomatic representative of a foreign power in regard to a question falling within his province is binding upon the country to which the Minister belongs... it follows that as a result of the undertaking involved in the Ihlen Declaration of July 22nd 1919, Norway is under an obligation to refrain from contesting Danish sovereignty over Greenland as a whole and ... to refrain from occupying a part of Greenland.”

2) ***The Nuclear Tests Cases (Australia and New Zealand v France)***
The minister for defense goes to parliament and tells the French that they have reached a stage of atmospheric test. The President of France tell the UN gen assembly that France had reached a test

Read article AB Rubin…
Note: - Complimentary Jurisdiction – the I.C.C is not part of the U.N system – provisions for the member states to bring the I.C.C into the system.

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C. RELATIONSHIP BETWEEN INTERNATIONAL LAW AND MUNICIPAL LAW

Introduction

Article 2 (6)

Article 2 (5)

Basic international system shall be part of the Municipal Law

International Law generally governs relations between states among themselves or between states and other entities upon whom international legal personality has been conferred. It is generally concerned with the international community and its legal order.

Municipal law on the other hand is a reflection of state sovereignty and governs the relationship between individuals among themselves, and individuals and state organs. Prima facie it would therefore appear that the two are distinct parallels.

In practice however it is common to find the two systems of the law governing one and the same subject. For instance in the case of expropriation of foreign owned assets, International Law provides a standard of expropriation just like Municipal Law does and it is not uncommon to find municipal law conflicting with International Law e.g. *Gadafis expropriation of international assets in Libya without just compensation.*

Besides, as International Law expands in scope to embrace issues such as Human rights and Humanitarian issues, Environment and Refugees, there is a corresponding reduction in the areas of law that are a preserve of Municipal Law. (Presence of international conventions in the field of human rights e.g. *1966 international covenant of social economics, convention on international diversity /ozone layer*)

As a consequence there is a relationship between the two legal systems. The relationship between International Law and Municipal Law takes two main approaches which are:

1) the ***jurisprudential theoretical question*** as to whether International Law and Municipal law are two distinct systems of law or they are a part of a single universal legal order

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2) The ***practical situation*** where there exist conflict between the rules of International Law and the rules of Municipal Law before an international tribunal or a municipal court.

Jurisprudential Approach on the relationship between International Law and Municipal Law

At the jurisprudential level, the relation between International Law and Municipal Law has been cast in terms of the dualist and monist debate.

1) <u>Dualist</u>

Under the dualist doctrine International Law and Municipal Law are two independent and separate legal systems. The dualist doctrine is based on the view that International Law is a ***law applicable between sovereign states*** and that Municipal Law ***applies within a state to regulate the activities of its citizens.***

On this basis, neither legal systems has the power to create or alter the rules of the other. When Municipal Law provides that International Law applies in whole or in part within its jurisdiction, this is merely an exercise of the authority of Municipal Law an adoption or transformation of the rules of International Law.

In the case of a conflict between International Law and Municipal Law, a Municipal court would apply Municipal Law and any conflict at the international level would fall to be resolved by International Law because it is not only supreme in that field but it is in effect the only system there is.

The chief exponents of this Doctrine ***Triepel and Anzilotti*** (judge of the permanent court of IJ).

According to Triepel while the subjects of Municipal Law are individuals, the subjects of International Law are solely and exclusively states. Accordingly while Municipal Law binds individuals, International Law binds states.

Besides while the source of Municipal Law is the will of the state itself, the source of International Law is the common will of states.

On his part, ***Anzilotti*** distinguished International Law and Municipal Law according to the fundamental principles by which each system is

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conditioned. Whereas Municipal Law is conditioned by the fundamental principle or grundnorm which is to be obeyed, International Law is conditioned by the principle of ***Pacta Sunt Sevanda*** that is to say treaties between states are to be observed in good faith. Consequently, the two legal systems are so distinct that conflict between them is impossible.

2) Monist Doctrine

According to the monist doctrine, International Law and Municipal Law are both part of the same universal legal order and International Law is supreme even within the municipal sphere. The followers of this doctrine such as ***Hans Kelsen and Sir Hersch Lauterpacht*** consider a supreme universal law a more trustworthy repository of civilized value than the Municipal Law of the nation state.

According to them it does not matter whether it is the individual or state that is bound because in the final analysis the state is but a group of individuals looked at as a an entity.

According to the monists therefore any construction other than monism is bound to amount to a denial of the true legal character of International Law. In their view there cannot be any escape from the positions that the two legal systems because they are both legal systems are interrelated part of one legal structure.

When it comes to the issues of supremacy the exponents of the ***Dualist Doctrine*** hold that when there is a conflict between Municipal Law and International Law in a municipal tribunal, Municipal Law will prevail. According to them Primacy is ascribed to Municipal Law on the basis of the sovereignty of the states will.

The monists are divided and are not clear in the issue of supremacy. There are those who attribute supremacy to International Law and those who attribute supremacy to Municipal Law.

For instance, ***Hans Kelsen*** makes a structural analysis of both International Law and Municipal Law by applying his doctrine of the grundnorm and comes to the conclusion that both systems are supreme depending on the view taken.

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However, Kelsen's view has been criticized particularly on the basis that if International Law were not the supreme order then primacy would be attributed to over one hundred separate systems of Municipal Law. This would lead to International anarchy.

Besides, the thesis of ultimate primacy of Municipal Law breaks down in two cases:

1) If International Law drew its validity only from a state constitution then it would cease to be in force once the constitution on which its authority rested, disappeared. Suppose there is a ***coup de tat*** where would International Law be placed. The certainty however is that the valid operation of International Law is independent of change or abolition of constitutions or revolutions because International Law does not lose its force despite constitutional changes in states.
2) International Law binds new states entering into the International community without their consent and such consent if expressed at all is merely declaratory of the true legal position e.g. Southern Sudan

Besides, there is a duty on every state to bring not only its laws but also its constitution into harmony with International Law. State sovereignty is not absolute.

Does the supremacy of International Law rest in the law as a whole or in particular principles only?

Stag GJ is of the view that supremacy rests only in particular rules and principles. He uses the analogy of federal constitutions and concludes that just like federal units enjoy areas of autonomy not bound by the federal constitution so do the states in that they enjoy some areas of autonomy not regulated by International Law.

With respect to the application of IL within the Municipal sphere, the dualist have put forward the theory that rules of International Law cannot directly and automatically be applied within the municipal sphere of state courts.

They must first undergo a process of ***specific adoption*** by or specific incorporation into Municipal Law.

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Since, according to the dualist theory, International Law and Municipal Law constitute 2 strictly separate and structurally different systems. International Law cannot impinge upon Municipal Law unless the Municipal Law allows its constitutional machinery to be used for that purpose. International Law does not apply directly.

In the case of treaty rules the theory is that there must be a transformation of the treaty into Municipal Law, for instance, by legislation approving or implementing the treaty provisions which alone validates the extension to individuals of the rules laid down in the treaties.

This is an executive duty or authority. The executive ratifies and has to be transformed into law by the legislature so that it can be binding upon us.

Head of state

Head of Government

Min of foreign affairs

To avoid a dogmatic dispute between the dualist and the monists Sir ***Gerald Fitzmaurice*** sought to challenge their common premise that there exists a common field in which the two legal orders both simultaneously have their spheres of activity. In his lecture at the ***Hague Academy of International Law,*** in 1957 Sir Gerald considered that, *"the entire monist – dualist controversy is unreal, artificial and strictly beside the point, because it assumes something that has to exist for there to be any controversy at all – and which in fact does not exist – namely, a common field in which the two legal orders under discussion both simultaneously have the spheres of the activity."*

In what has come to be referred to as ***The Theory of Coordination,*** Sir Gerald argued that the two systems do not come into conflict as legal systems since they operate as different spheres each being supreme in its own field.

Formally therefore, International Law and Municipal Law as systems can never come into conflict. However, there may occur a conflict of obligations or an inability on the part of the state on the domestic plain to act in a manner required by International Law.

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In such cases, if nothing can be or is done to deal with the matter, it does not invalidate the local law but the state will on the International plain have committed a breach of its international law obligation for which it will be internationally responsible. *E.g. where Japan refused to contribute its soldiers forwards the war between Iraq and Kuwait stating that its Constitution said soldiers could only be used for protection of sovereignty of Japan. Held that as a member of UN is had agreed to that Japan refused and offered 13 billion instead*.

PRACTICAL APPROACH

On a practical level the controversy whether the monist or dualist or indeed Sir Gerald's theory of coordination applies is unnecessary. Indeed, International tribunals, jurists and states show a preference for practice over theory.

Where there is a conflict between rules of International Law and Municipal Law before an international tribunal it is settled law that International Law is supreme. Accordingly, a state cannot plead the provisions of its own law or deficiencies there-in, in answer to a claim against it for an alleged breach of its international law obligations. This is shown by ***The Alabama claims arbitration of 1872.***

During the American Civil war a number of ships were built in England for private buyers. The vessels were unarmed when they left England but it was generally known that they would be fitted out as worships for use by the Confederate Forces. Despite repeated protests by the US these vessels were allowed to leave English Ports and after being equipped with armament preyed successfully upon American High Seas Commerce.

During and after the war, US charged that Great Britain had violated her duties as a neutral and sought to obtain compensation for the damage done. *E.g. a war between TZ and UG and Kenya declares neutrality. Kenya cannot aid in importing arms through their port to TZ. Kenya would have breached its obligations.*

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Under the ***Treaty of Washington of May 8th 1871***, it was agreed to submit the controversy to arbitration. ***Article VI***, of the Treaty contained the following ***three rules*** agreed upon by the parties as applicable to the case and governing the arbitrators: *"a neutral government is bound –*

First *to use due diligence to prevent the fitting out, arming, or equipping, within its jurisdiction, of any vessel which it has reasonable ground to believe it is intended to cruise or to carry on war against a power with which it is at peace; and also to use like diligence to prevent the departure from its jurisdiction of any vessel intended to cruise or carry on war as above, such vessel having* been specially adapted, in *whole or in part, within such jurisdiction to war like use;*

Secondly*, not to commit or suffer either belligerent to make use of its port or waters as the base of naval corporations against the other, or for the purpose of the new or augmentation of military supplies or arms or the recruitment of men;*

Thirdly , to *exercise due diligence of its own port and waters, and as to all persons within its jurisdiction, to prevent any violation of the foregoing obligations and duties."*

GB argued inter alia that under its law as it then stood it had not been possible to prevent the sailing of vessels constructed under private contracts.

The arbitrators found however, that GB had failed by commission to fulfill the duties prescribed by the Treaty of Washington in upholding the supremacy of International Law and rejecting the British argument the arbitrators said; ***"--- the government of Her Britannic Majesty cannot justify itself for a failure in due diligence on the plea of insufficiency of the legal means of actions which it possessed.---It is plain that to satisfy the exigency of due diligence, and to escape liability, a neutral government must take care that its Municipal Law shall prohibit acts from contravening neutrality."***

Similarly, the Permanent Court of International Justice in the case of the treatment of Polish Nationals in Dun sick 1932 stated that a state could not

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adduce against another state its own constitution with a view to evading obligations incumbent upon it under international law or treaties in force.
The principle of supremacy International Law that International law prevails over municipal law before international tribunals was reaffirmed by International Court of Justice in its advisory opinion in the ***U.N Headquarters agreement case 1988 I.C.J report page 3.*** On March 2nd 1988, the U.N General Assembly asked the court to give an advisory opinion on the following question – "In light of the fact reflected in the report of the Secretary General, is the U.S as a party to the agreement between the U.N and the U.S regarding the headquarters of the U.N under an obligation to enter into arbitration in accordance with section 21 of the agreement when the Attorney General of the U.S had determined that he was required by the U.S antiterrorism act of 1987 to close the office of the P.L.O observer mission to the U.N in New York, irrespective of any obligations the U.S may have had under the agreement between the U.N and the U.S regarding the headquarters of the U.N?"
The court was unanimously of the opinion that the U.S was under an obligation to enter into arbitration for the settlement of the dispute between itself and the U.N.
In the course of its opinion, the court stated that "it would be sufficient to recall the fundamental principle of international law that international law prevails over domestic law. This principle was endorsed by judicial decision as long ago as the avitral ward of 14th Sept. 1872 in the Alabama case... and has frequently been recalled since."

The principle of primacy of International Law over Municipal Law before international tribunals applies to all aspects of a state's Municipal Law, that is, to its constitutional provisions, its ordinary legislation, and the decisions of its court.
N/B The conflict between a states ML and its International obligations does not necessarily affect the validity of that law or the Municipal claim. Accordingly a Municipal Act contrary to

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International Law may be internally recognized as valid but other states will be under no duty to recognize its external effects.
The fact that arbitrators claim arbitration does not mean that the International tribunal has struck down British law. Just because the Municipal Law is in contravention with the International Law, it does not invalidate the Municipal Law (exam question)

When a conflict arises between International Law and Municipal Law before a Municipal Tribunal what is the position?

The principle of the supremacy of International Law does not have a good ground in the Municipal Law system. International Law is not concerned with the instruments that states use to implement the international engagement. Its concern is that states effect their engagements in the manner most suited to them. The matter is normally determined by the constitutional law of the state concerned. For instance the constitutions of many states provide for the adoption of rules of International Law by incorporating or transforming them into their Municipal Law systems.

The Municipal Legal System

In the United States of America for instance, rules of customary International Law are administered as part of the law of the land and Acts of Congress are construed so as not to conflict with them although a letter clear statute will prevail over earlier rules of customary International law. In so far as treaties/conventions are concerned Article ***VI (2) of the constitution*** stipulates that, ***"all treaties made or which shall be made under the Authority of the U.S shall be part of the law of the land***.
Besides, a distinction is made between ***self executing and non self executing treaties***, the ***forme***r are those which do not in the view of American court expressly or by nature require legislation to make them

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operative within the Municipal field and that is to be determined by regard to the intention of the signatory parties and the surrounding circumstances.
If the treaty is within the terms of the constitution and it is self-executing then under the constitution it is deemed to be operative as part of the law of the U.S and will prevail also over a rule of Customary International Law.
Self-executing treaties ratified by U.S are binding on American court even if in conflict with previous American statutes provided there is no conflict with the constitution.

SALT I and II (Strategic Arms Limitation Treaty)

On the other hand treaties which are ***not self-executing*** but require legislation are not binding upon American Courts until the necessary legislation is enacted.
Besides, if the relevant treaty purports to deal with a particular subject matter in respect of which the Congress has exclusive legislative powers the treaty will be considered as prima facie non-self-executing irrespective of what the intention of the parties is claimed to be.
The U.K practice is similar to that of the U.S in so far as the rules of customary law are concerned. Under the doctrine of incorporation, rules of customary International law are automatically part of English law as long as they are not inconsistent with acts of parliament or authoritative judicial decisions.
The doctrine of incorporation is supported by a long line of authority. For instance, in the case of ***Buvot v. Barbuit (1737)***, the Lord Chancellor Talbot declared that the law of nations (International law), in its full extent was part of the law of England. The principle that British courts cannot apply International law when there is a conflict between customary International law and an Act of Parliament is illustrated in the case of ***Mortensen v. Peters (1906).*** The appellant a Danish master of a steam trawler registered in Norway was charged with and convicted of a contravention of the Sea Fisheries Act and Herring Fisheries (Scotland) Act by Otter trawling in Moray Firth at a distance of more than 3 marine miles from the nearest land. The 2 acts and a bylaw enacted by the Fisheries Board in 1892 prohibited the

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fishing method in question in the Firth. The appellant appealed arguing that only to British subjects or persons within British territory were the statutes and bylaws applicable and that the place in question, that is, the location where the alleged violation of the law had taken place was outside the territorial jurisdiction of the Crown under international law and therefore not subject to the statute and the Bylaws.

The defendant argued in reply that the terms of the statute and the bylaw were universal and that even if international law were applied the offence had been committed in British waters and that even if the Firth were not all together part of British territory for all purposes the British government was fully entitled to undertake protective measures as regard fishing in those waters.

3 issues arose for decision by the court. Namely:

1. Whether a British statute applied not only to British subjects but to other persons within British territory?
2. Whether the waters of the Firth outside the 3 miles limit of British territorial waters and hence subject to British jurisdiction?
3. Whether domestic courts were bound by a statute contriving a rule of International law?

The court unanimously ruled in the affirmative on all the 3 issues and upheld the conviction of the appellant. The court said that it didn't have to decide whether an act of the legislature was ultra vires as in contravention of generally acknowledged principles of International law because "*for us an Act of Parliament, duly passed ... and assented to by the King is supreme and we are bound to give effect to its terms... it is a trite observation that there is no such thing as a standard of International law extraneous to the domestic law of a Kingdom to which appeal may be made. International law, so far as this court is concerned is the body of doctrine regarding the International rights and duties of states which has been adopted and made part of the law of Scotland*."

Once the scope of such rules of customary law have been determined by British courts, all British courts are thereafter bound by that determination.

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Accordingly, a customary rule will be treated as incorporated into the domestic law of the U.K so far as it is not inconsistent with the rules enacted by the statute or finally declared by tribunals.

As far as treaties are concerned, the position is different. This is because in the U.K the conclusion and ratification of treaties are within the preserve of the Crown. Parliament has no part to play in this process.

If the courts should apply treaties in Municipal law, the crown would be in a position of being able to alter English law without parliamentary consent. Accordingly treaties are part of English law only if an enabling act of parliament has been passed to transform the provisions of the treaty into English law. This is illustrated by the ***International Team Council cases*** where the House of Lords confirmed the rule that English court could not examine the International Team Agreements to establish the liability or otherwise of member states of the council.

The cases concerned several actions brought by creditors against the International Team Council after it was unable to meet its dates. The council was founded by a treaty, the Sixth International Team Agreement which operated in the United Kingdom pursuant to a Headquarters Agreement although neither treaty was incorporated or transformed into the National law of the U.K. The claimants argued that the treaty provided them with a right of action against the state parties directly rather than the International Team Council. The House of Lords unanimously rejected the claimant's argument holding as per Lord Templeman: "***A treaty to which Her Majesty's Government is a party does not alter the laws of the United Kingdom. A treaty may be incorporated into and alter the laws of the United Kingdom by means of legislation. Except to the extent that a treaty becomes incorporated into the laws of the United Kingdom by statute, the courts of the United Kingdom have no power to enforce the treaty rights and the obligations at the behest of a sovereign government or at the behest of a private individual."***

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There are however, 2 exceptions to the above rule on the direct applicability of the treaty rules.

1. Under the provisions of the **1957 Treaty of Rome** which established the European Community prevails over the Municipal Laws of the member states and binds their courts. This is because community role is neither foreign nor external to the legal systems of the member states in that it forms an integral part of national laws. Community law has direct applicability, direct effects and supremacy and establishes a member state's liability for damage to individuals caused by a breach of community law for which that member state is responsible.
   Besides, decisions of the European Court of Justice, as the final interpreter of European Union Law are to be applied by the National Courts of member states.
2. The ***1950 European Convention on Human Rights*** applied directly to the U.K and the provisions thereof were applied by the U.K courts. However, in 1998 the U.K parliament enacted the ***Human rights Act*** in order to domesticate the provisions of the convention. Before then, any cases involving Human Rights issues could only be brought before the European Commission and the Court of Human Rights.

There is no effect of Res Judicata from the decision of a Municipal court so far as an International tribunal is concerned because although the subject matter may be the same the parties will not be and the issues will have a different aspect. In the Municipal court the legal person claiming is an individual or a corporation. Before an International tribunal, the claimant will be a state exercising diplomatic protection with respect to its Nation. Similarly, a decision of the International Court does not of itself create a Res Judicata for the Municipal court.

Read on Compromis – ad hoc basis to go to the I.C.J

CONCEPT OF OPPOSABILITY

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The concept of opposability which is now part of contemporary international law is of value where the relationship between international law and Municipal law is concerned.

In contentious cases, before an international tribunal one of the parties may invoke a rule, institution or regime under its own domestic law in order to oppose the other party's claim. For instance, in a claim before an international tribunal between states A and B, where A relies on some ground in support of its claim, state B may seek to invoke as against state A (that is oppose state A) some rule, institution or regime under B's domestic law in order to befit the ground of claim set up by state A.

As a general principle, if the domestic rule, institution or regime is in accordance with international law this may be opposed to state A in order to befit its ground of claim. However, if the rule, institution or regime is not in accordance with international law it may not be so opposed.

Read the North Sea Continental Shelf Cases

For instance in the ***North sea continental shelf case***, Denmark and the Netherlands sought to rely on the alleged fact that the equidistance principle had become to be regarded as a rule of customary international law, so that it would be obligatory for Germany in that way, even though ***Article 6 of the 1958 Geneva Convention on the Continental Shelf*** was not as such opposable for Germany.

The court held that the equidistance principle had not developed into a rule of customary international law because there was no evidence of opinion jurists and that as such it could not be invoked against Germany in order to befit its claim that it was not bound by the provisions of the convention.

The court concluded that the parties were under no obligation to apply either the 1958 convention which was not opposable to Germany or the equidistance method as a mandatory rule of customary law because it was not.

Fisheries Jurisdiction (Merit) btwn FRG v. Iceland

In the fisheries jurisdiction case the Federal Republic of Germany sought to have the International Court of Justice declare the unilateral extension by

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Iceland of its exclusive fisheries jurisdiction from 12 nautical miles to 50 nautical miles to have no basis in international law and therefore not to be opposable to the Federal Germany and to its fishing vessels.
Iceland had justified its action, on an alleged rule of customary international law that gave a coastal state particularly dependent on fishing for its economical livelihood, preferential rights to access to high seas fishery resources in the waters adjacent to its coast.
The court held that the unilateral extension based on Iceland domestic laws was no opposable to the federal republic of Germany and that in consequence the government of Iceland was not entitled to unilaterally exclude fishing vessels of the federal republic of Germany from the areas agreed upon earlier.
However, merely because the rule of domestic law is held to be non-opposable, it does not affect its validity in the domestic legal regime. The reason is that international law provides no procedure for invalidation within the domestic framework of a rule of municipal law.
If the position be that the rule of domestic law, held to be non-opposable is itself invalid by reference to the provisions of domestic constitutional law, then the rule is not opposable also to states other than the claimant state unless such other states have expressly waived the constitutional invalidity of the rule.

Questions

The relationship between IL and ML

- *Kenya's State practice regarding the relation between IL and ML*
- *The UK state practice regarding relationship between IL and ML*
- *Does **Article 2(6)** of Kenya's constitution turn Kenya into a monist state?*

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D. INTERNATIONAL PERSONALITY

Introduction

International Personality refers to the capacity to be a bearer of rights and duties under International Law.

To be an international legal person the entity must satisfy ***4 basic elements***.

1) The entity ***must have duties*** and hence incur responsibilities for any behaviour which is a variant with that prescribed by the international law system.
2) The entity ***must be capable of claiming the benefits of rights*** conferred by the rules of International Law. This is more than being a ***mere beneficiary*** of a right because a considerable number of rules may serve the interests of groups of individuals or entities who do not have a ***legal claim*** to the benefits conferred by the particular rules.

E.g.in the law of trusts the one who has the benefit conferred by the trust is the beneficiary but has no legal capacity to enforce that trust.

In the Law of contracts the infants have rights but do not have the capacity to enforce the contracts.

3) The entity ***must possess the capacity to enter into contractual or other legal relations*** with other legal persons recognized by that other legal system of law.
4) The entity ***must possess the capacity to enjoy some or all of the privileges and immunities*** from the jurisdiction of the municipal courts or states these being an attribute of an international legal person as distinct from one governed by Municipal Law.

Under International Law, entities which have International legal rights and duties, the capacity to defend or enforce these rights, capacity to enter into binding legal agreements and to conclude legal treaties and the capacity to enjoy privileges and immunities from national jurisdiction are described as international legal persons and constitute subjects of International Law.

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The traditional view is that the only subjects of International Law are states. They alone have unlimited International personality. This is because contemporary International Law has recognized the independent existence of a variety of International institutions and in a number of cases has imposed obligations on and granted rights to individuals so that International Organizations and other non-state entities as well as individuals enjoy a degree of International personality especially for functional purposes. Indeed, the International Court of Justice recognized the diversity of International personality in the ***Reparations case*** by stating that, ***"the subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights."***

In its advisory opinion, in the reparations case, the I.C.J stated that, ***"In the opinion of the court the UNO was intended to exercise and enjoy --- functions and rights which can only be explained on basis of the possession of a large measure of International personality and the capacity to operate upon an International claim. It is a present the supreme type of International organization and it could not carry out the intentions of its founders if it was devoid of international personality. It must be acknowledged that its members, by entrusting certain functions to it, with the attendant duties and responsibility, have clothed it with the competence required to enable those functions to be effectively discharged. Accordingly, --- the organization is an International person. That is not the same thing as saying that it is a state --- or that its legal personality and rights and duties are the same as those of a state. --- what it does mean is that it is a subject of International Law and capable of possessing International rights and duties, and that it has capacity to maintain its rights by bringing International claims."***

Juridical persons

ESTABLISHED INTERNATIONAL LEGAL PERSONS

a) Independent Sovereign States

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Independent Sovereign states remain the primary international legal persons because they occupy the central position the International legal border. They are international legal persons par excellence. Provided the conditions or legal criteria for statehood are met, the international legal personality of states cannot be doubted.

b) <u>Political Settlements</u>

Political Settlements both in bilateral and multilateral treaties have produced political entities possessing certain autonomy, fixed territory, population and some legal capacity on the International claim.

For instance under the ***1919 Treaty of Versailles*** (the one that formally ended the 1st World war) that created the ***Free City of Danzig***, the free city was organized as a state, it had its own constitution, flag and currency and was entitled to grant citizenship to the inhabitants of Danzig.

From the point of view of International Law, the Free City was neither an independent state nor subordinate to any sovereign states although the ***Permanent Court of International Justice*** recognized that the Free City had international personality and that the capacity to enter into relationships with sovereign states.

The free city of Trieste was also similarly created.

c) <u>Condominium</u>

Condominiums are ***International Legal Persons***. The creation of a condominium is done by agreement between two states under-which they exercise joint sovereignty over a certain territory and its inhabitants.

For instance, the present day ***Vanuatu*** (Previously called New Hebrides) in the South Pacific was a condominium jointly administered by France and Great Britain based on the *Treaty of October 20, 1906* and the *Protocol of August 6, 1914* until it became independent in 1980.

A further condominium of historical importance is the relationship between Great Britain and Egypt with the regard to Sudan. The basis for the arrangement was the *Agreement of January 19th 1899*. By the *Treaty of February 12th 1953* between Great Britain and Egypt the Condominium was lifted to the extent that it was left to the Sudan to choose between full

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independence and further association with Egypt. ***The condominium*** *is an association of state in the widest sense.* The territory under condominium has *no international personality of its own*. The existence of a condominium rests upon a title in International Law pursuant to which a number of states are vested with sovereignty over the territory. The ***legal title*** to the condominium binds the relevant states like Egypt and Great Britain in such a way that their sovereignty over the territory appears as a common sovereignty. The ***decisive element*** for the condominium is the common territorial sovereignty which distinguishes it from other associations of states formed to exploit of areas in common.

Belligerents /insurgents

Quite often political and military dissidence within a sovereign state results in large scale armed conflict with rebels succeeding in controlling a modicum of territory and setting up an operations structure capable of effectively wielding authority over the individuals living there. When this happens the insurrection (revolution/uprising) parties normally claims some measure of recognition as an international subject.

States have traditionally been hostile to belligerents in their territory on the grounds that they do not like the status quo to be disrupted by people who seek to topple the lawful government and possibly change the whole fabric of the state.

Consequently they prefer to treat belligerency as a domestic occurrence and the rebels as a group of common criminals.

The International community has also been reluctant to grant civil upheavals in states International legal standing in order to avoid encouraging secession and irredentist tendencies that may lead to International anarchy. (Shifta movement)

N/B (An irredentist tendency is what African states refused. African states are not international states it’s a conglomeration/mass (Berlin 1884 -85) (The Masai have no idea there is a border there is no understanding of the illegality of crossing the border) Irredentist is where there is a nation that

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seeks a greater territory borders outside its present by encompassing other communities' e.g. Somalia

However, when the civil upheavals reach such proportions that

1) The rebels ***occupy and have effective control*** of a substantial portion of national territory
2) The civil commotion has reached such ***intensity and duration*** that their exists an armed conflict of a general character and
3) The ***rebels conduct the hostilities*** in accordance with the laws and usages of war ***("Jus in Bello"***) through organized groups acting under a responsible authority then there is present the necessary basis for recognition of the emergence of a subject of International Law to which belligerent rights may be accorded.

Prescriptive jurisdiction: the right to make laws for one own states jurisdiction

Ref to Ethiopia in early 90s when Eritrea was receding, The Arab spring

It is for states i.e. both the state against which the civil strife breaks out and 3rd states to appraise the situation by granting or withholding the recognition of belligerency whether the 3 requirements have been fulfilled.

If the states against which the belligerents are fighting grants them the recognition of belligerency, that is, admits that the conflict underway is an international armed conflict or if 3rd states so recognizes it, then the rebels are automatically upgraded to International subjects entitled to all the rights and obligations deriving from the laws and usages of war (***Jus in Bello***).

Recognition internationalizes the civil strike e.g. secession of Eritrea from Ethiopia

Loss of war is a branch of international law. This is contained in 4 conventions adopted in Geneva in 1999; if one is a soldier fighting with an enemy soldier who surrenders then one has to rescue him. Soldiers at sea, u don't leave the enemy to drown u have to rescue them. Bombings are not done on civilians but only on military.

Belligerence posses a limited form of international personality which is transient (temporary as the government in power may get reinforcement) in

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character. This is because they may be quelled by the government in power and disappear or may seize power and install themselves in the place of the government or may secede (withdraw) and join another state or become a new international subject. Hence, they cannot claim rights contingent upon the permanent character of international law subjects such as seeding the territory they are in de facto control of to another international subject. Until rebels in Ethiopia formed a new state called Eritrea they did not have the capacity to transfer the territory to any other international personality and were only in de facto control.

d) Individuals

Jurists are unanimous in the opinion that individuals are the proper concern of the International Law. However many contend that individuals may not be regarded as having the legal status of international subjects because in their view, individuals are still under the conclusive control of the states.
Indeed, as a general rule individuals *locus standi* to assert violations of International Law, absent intervention by their states of nationality.
Some jurists hold that individuals are proper subjects of international law. Others while admitting that individuals are subjects of International Law qualify this by saying that such subjectivity is not possible without the intervention of their states of which the individual is a national. On the other hand other jurists have argued that the fact that because the individual as a beneficiary of the international legal rights cannot have them enforced at its instance and at his own name means that the individual is only an object of International Law.
The individual lacks the procedural capacity to espouse his or her claims before international tribunals and such claims can be entertained only at the instance of the states of which the individual is a national or in certain circumstances by the international institutions of which he is a servant/subject. (Reparations case – Count Bernadotte)

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Whichever view one holds it is noteworthy that contemporary International Law has directly imposed obligations on individuals such that states have lost the exclusive monopoly over individuals.

For instance, in the area of armed conflict rules of customary and conventional International Law provide that individuals who violate the international rules of warfare will be criminally liable for such violation regardless of their official positions as state agents.

Individuals are also criminally liable for committing crimes against humanity, genocide, aggression, terrorism and torture both in their capacity as state officials as well as in their private capacity.

As the ***International Military Tribunal at Nuremberg*** stated in its judgement in 1947, "*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.*"

On August 8, 1946, the Government of France, U.K, U.S.A and the Soviet Union acting in the interests of all the United Nations and by their representatives duly authorized thereto, signed in London an Agreement for the establishment of an International Military tribunal. The tribunal was for the trial and punishment of crimes for which there was individual responsibility namely:

1) **Crimes against Peace**, that is, planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy of the accomplishment of any of these.
2) **War crimes**, that is, violations of customs of war such as murder, ill-treatment or torture of prisoners of war, deportation of civil population of an occupied territory.
3) **Crimes against humanity**, that is, murder, extermination, and enslavement, deportation and other inhumane acts committed against any civilian population before or during the war or persecution of political, racial or religious grounds in execution of or in connection

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with any crime within the jurisdiction of the tribunal whether or not in violation of the domestic law of the country where perpetrated.

The tribunal was composed of 4 members, one appointed by each of the signatory governments. The tribunal established the guilt of the individuals concerned thereby providing a basis for international criminality of individuals.

The provisions of the Nuremberg Charter and the judgement of the tribunal are now regarded as part of international law since the U.N General Assembly in 1946 vide ***Resolution 95(1)*** ***affirmed*** the principles of the Charter and the decision of the tribunal.

Another category of individuals who are subjects of International Law are ***Pirates***. ***Article 100 of the 1992 UN Convention of the Law of the Sea*** provides *that all states shall cooperate to the fullest extent in the repression of piracy on the high seas and on any other place outside the jurisdiction of any state.*

Under Article 105 of the Convention, *any state may seize a pirate ship or aircraft or a ship taken by piracy or under the control of pirates and arrest the persons and cease the property on board.*

The courts of the states which carried out the seizure may decide upon the penalties to be imposed and may also determine the action to be taken on regard to the ships, aircraft or person subject to the rights of the 3rd parties acting in good faith.

A parallel development of the International legal status of individuals is a conferment by treaty provisions of rights upon individuals against the state of which they are nations. For instance establishment of human rights within the UN system has removed the entire concept from the domestic jurisdiction of states to the international plain thereby affording international protection to individuals whose rights may be infringed by their states.

For instance the ***1950 European Convention of Human Rights*** after proclaiming the rights and freedom to which every individual is entitled, sets up the ***European Commission of Human rights*** and ***the European***

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Court of Human Rights respectively in order to ensure observance of the engagements undertaken by the state parties of the convention.

Similarly ***The 1981 African Charter on Human and Peoples' Rights*** and the ***1998 Protocol*** there to established ***the African Commission and the African Courts of Human and Peoples' rights*** as the Guardians of the Charter.

However the problem with these and similar international legal instruments is that the substantive rights they lay down may only be exercised by individuals within the domestic legal system of each party of the states. Besides the individuals do not have direct procedural rights to petition international bodies to seek redress in the event of violation of their rights. (1966 International covenant legal/civil rights)

A notable exception however is the European convention as revised in 1998 by ***Protocol 2 of 1994.*** Prior to the entry into force of the protocol, individuals would access the European Courts of Human rights only through the commission.

The protocol abolished the commission so that there is no longer an administrative barrier between the individual and the court. Another limitation is that the rights in question are only granted by treaties with the respect to certain well defined matters such as labour relations and refugee status and only if states that are parties to these treaties accept the obligations towards individuals.

In essence, in contemporary International Law, individuals posses international legal status. They have a few obligations deriving from customary international law. In addition, they have procedural rights only towards states that have concluded treaties recently conferring such rights. Accordingly, the international legal status of individuals is unique in the sense that they have a lopsided/irregular position with the International community. As far as their obligations are concerned, they are associated with other members of the international community.

In contrast, they do not posses rights in relation to all members of that community. In order to differentiate the position of the individuals from that

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of states, it may be stated that while states have international legal personality proper, individuals possess a limited ***locus standi*** in International Law.

e) The Holy See

The international legal personality of the Pope has been recognized since medieval times. This personality was based on the Pope's both positions a Spiritual Head of the Church and as The Ruler of the Papal States.
As spiritual head of the Catholic Church, the pope occupies a distinct position.
As a ruler of the Papal state, he was as sovereign as any other monarch. This positions remained unchanged ***until 1870*** when Rome fell and Italy annexed the Papal States. The pope was deprived of his temporal sovereignty but retained the International Personality flowing from his position as spiritual head of the Catholic Church.
By an act of the Italian parliament known as ***The Law of Guarantee 1871*** the Italian state granted certain guarantees to the Pope and the Holy See. The relationship between the Holy See and 3rd state was henceforth certain although several states sent envoys to the Pope and *agreements known* as ***concordats*** continued to be concluded.
It was not until 1929 that the position of the Holy See was clarified by the ***Lateran Treaty***. Apart from regulating the status of the Catholic Church in Italy and providing for the financial compensation of the Holy See for the losses incurred in the annexation of the ***Papal State***, the ***Lateran Treaty*** also created the ***Vatican State*** thereby constituting a physical basis for the legal personality of the Holy See (the physical basis in the sense that it has its own territory). The ***Vatican State*** is the territory occupied by the Holy See. From the point of view of International Law, the Vatican state is an international legal personality being a state that maintains diplomatic relations with 3rd states and concludes both bilateral and multilateral treaties, that is, binding international legal agreements. The Vatican State

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has a military separate from the Papal States and also the Right of audience with the president.

f) International Organizations

States increasingly find it convenient to establish international machinery for the purpose of carrying out tasks of mutual interests. They therefore institute distinct centres of action for the furtherance of common goals designed to perform only those activities that states delegate to them e.g. African states established the OAU for purposes of carrying out mutual interests.
The object of the constituent instrument (like the UN charter) of such international machinery must be to create a new subject of law endowed with a certain autonomy to which the states parties entrusts the task of realizing common goals.
An international organization must satisfy at least ***3 conditions*** in order for it to qualify as an international law personality. Namely:

1) It must be a ***permanent association of states*** created to attain certain common objectives and having its own administrative organs.
2) It must ***exercise some power that is distinct from the sovereign power*** of its member states.
3) Its ***competences must be exercisable on an international level*** and not confined exclusively the national system of its member states.

The leading judicial authority on the personality of international organizations is the advisory opinion of the ICJ in the ***Reparations Case.***
It must be noted however that when states create an international organization they set it up for specific purposes and in this respect the organization's legal personality must be treated as being relative to those purposes. Consequently, the question whether an international organization posses international legal personality can only be answered by examining its functions and powers expressly conferred by or to be implied from its constituent instrument and developed in practice. In other words, unlike

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states, International Organizations have a limited competence and field of action.

As the ICJ stated in its advisory opinion on ***The Legality of the Threat or Use of Nuclear Weapons (1996) ICJ Rep 90, para 25***

"International organizations are subjects of international law which do not, unlike states, posses a general competence. International organizations are governed by the principle of specialty, that is to say, they are invested by the states which create them with powers, the limits of which are a function of the common interests whose promotion those states entrust to them."

As international legal persons, International Organizations enjoy a number of privileges and rights.

1) They have the ***right and capacity to enter into international agreements*** with members and non-member states on matters within their progress. These agreements are all ***legally binding*** effects of international treaties proper.
2) They have ***the right to enjoy immunities and privileges*** from the jurisdiction as well as execution of states courts for acts and activities performed to attain the goals laid down to their constituent instruments.
3) They have the ***right to protection for all their agents*** acting in authority of their 3rd states in their official capacity as international civil servants.
4) They have the right to bring an international claim with a view to obtaining reparation for any damage caused by member states or by 3rd states to their assets or their officials acting on their behalf.

Two Special Cases on International legal personality

There are 2 special cases that must be considered because of their international profiles. The first, is the case of national liberation movement that sprung up in the late 60s and early 70s and the second is that of non-governmental organizations and transnational corporations that are acting in various

National liberation movement

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The emergence of organized groups fighting on behalf of a whole ‘people’ against colonial powers and alien domination is a characteristic feature of the post world war 2 era especially in Africa and Asia. Along with the fight against colonialism and alien domination the groups brought in the objectives include struggles against racist regimes.

Struggles of this type were prevalent in the 1960s until the 1980s raising problems concerning the international legal status of these liberation movements of people under colonial alien or racist domination. Examples of such movements include: The South West Africa Peoples’ Organization, the African National Congress, and the Palestinian liberation organization.

With regards to such liberation movements, the situation is different from that of the traditional category of belligerence, although there has been some overlap in practice. The international legal status of national liberation movements does not rest primarily on the control of territory but rather on the international recognition of the principle of self-determination that is their struggle to free themselves from colonial domination racist oppression or alien occupation pursuant to the principles of the UN charter as expressed in the various resolutions of the UN general assembly.

Nonetheless, at least the future prospects of gaining effective control over population in even territory appears to be a central element of their recognition as subjects of the international territory or at least as lawful belligerents.

In essence, national liberation movements enjoy an unlimited national personality because they enjoy certain legal rights and carry corresponding obligations. First, they are the authority representing a ‘people’ who have a right to self-determination, a community right that is general in character to all member states of the international community.

Second, they enjoy the rights and bear the obligations deriving from the general principles on the conduct of hostilities as provided for in the 1977 Additional Protocols to the 1949 Geneva Conventions on the Laws of War.

Third, they enjoy the rights and bear obligations deriving from rules on concluding international agreements. Various national liberation movements

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have concluded arrangements on such matters as the stationing of armed forces belonging to the movements on the territory of states and granting of independence.

Fourth, they have the right to claim respect for and protection of the persons acting in their official capacity as organs of the peoples representative structure as well as their immunity from jurisdiction of state force for acts performed in that capacity.

Non-Governmental Organizations and Trans-National Organizations

Non-governmental organizations are not only visible on the international plain that also play a vital role in different areas of international concern ranging from politics, social economic arena, human rights, humanitarian relief and education, to women and the environment.

Examples include: Amnesty International, ICRC, World Conservation Communion, and Green Peace International.

The role of non-governmental organizations in the world order is basically informal in that they add addition expertise and they make international procedures more transparent. They also engage in fact finding especially in the implementation of the international norms in the area of human rights.

The relevant law governing establishment and status of NGOs is that of the state where the NGO is registered and based. Although international intergovernmental organizations may agree to grant NGOs consultative or observer status and thereby a limited international status NGOs do no thereby become subjects of international law.

Article 71 of the UN charter empowers the Economic and Social Council to make suitable arrangements of consultation with NGOs such as ICRC, MSF, and Amnesty International which are concerned with matters within the competence of the Council.

Trans-National Corporations

Although transnational corporations hold more economic and political power than some states, the states have not upgraded them to international law subjects. It is because states prefer to maintain control over them however

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difficult it is in practice to effectively regulate the global activities in the national level.

The international legal status is derivative in that it can only be conferred by states. It is states which set up international organizations, it is states which make treaties or adopt customary rules giving international rights to companies and it is only states which can make contracts with companies governed by international law.

Accordingly, some jurists argue that since international personality only when the relationships are governed by international law, where for example, a trans-national corporation is granted a concession by a state whereby the rights and duties of the transnational corporation may be judged by international law that confers functional or subjective international personality on the transnational corporation.

This measure of personality does not however, make the corporation and International law person with all the attendant rights and duties.

Texaco Overseas Petroleum Company vs. the Libyan Arab Republic

53 ILR 389 (1977)

In that case, the sole arbitrator a professor in international law Pierre Dupuy commenting on the legal status of Texaco stated that the Internationalisation of a contractual relationship between a state and foreign private party neither meant that the later was assimilated to a state nor that the contract entered into with it was a treaty.

This dispute arose out of the nationalization by Libya of foreign owned oil interests in 1973 / 1974. Oil concessions were granted by the Libyan government giving Texaco the exclusive rights to search for, extract and sell oil from Libyan territory. One of the questions that the arbitrator was to decide was whether the concession between the company and the state gave the company any rights enforceable at international law.

After finidng that the concession was an “internationalized contract”, the arbitrator commented on the status of Texaco. He said, “... stating that a contract between a state and a private person falls within the international legal order means that for the purposes of interpretation and performance of

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the contract, it should be recognized that a private person as a contracting party has specific international capacities. But, unlike a state, the private person has only a limited capacity and his quality as a subject of international law does enable him only to invoke, in the field of international law, the rights which he derives from the contract... thus the internationalization of certain contracts entered into between a state and a private person does not tend to confer upon a private person competences comparable to those of a state but only certain capacities, which enable him to act internationally in order to invoke the right which results to him from an internationalized contract. Although the 1965 Convention on the Settlement of Investment Disputes Between States and Nationals of Other States established an International Centre for the Settlement of Investment Disputes (ICSID) as a permanent mechanism under the auspicious of the world bank whereby participating states and corporations can settle any differences arising out of investment agreements this does not confer international law personality on such individuals or corporations. The centre was established to settle investment disputes by conciliation and arbitration and has jurisdiction over any legal dispute arising directly out of an investment agreement between a contracting state and a National of another contracting state which the parties to the disputes consent in writing to submit to the centre.

Note: International corporations always retain the nationality of the Company where they are registered in unless it is registered as a subsidiary in another country.

States as International Legal Persons

States are the fundamental or primary subject of International Law. This is because they are the International entities which besides controlling territory in a stable and permanent way, exercise the principle law making and executive functions propa of any legal order. States are the backbone of the International community. They possess full legal capacity, that is to say, they have the ability to be vested with rights, powers and obligations under international law.

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Were they to disappear, the present international legal order would either fall apart of change radically. The definition of a state under international law is not clear because quite often it is difficult to decide whether a particular entity is or is not a state. Briely says that a state is **an institution which men establish among themselves for the purpose of attaining certain objects the fundamental one which is the a system of order on the basis of which other objects may be carried out.**

Brownlie says that a state is **a type of legal person recognized by international law although the possession of legal personality is not in itself a sufficient mark of statehood.** However, he states that the criteria of statehood are laid down by the law because if it were not so then statehood would be subjective such that a state would be able to contract out of duties owed to another state simply by refusing to characterize the obligee as a state. He does not however state what a state is but proceeds to look at the characteristics of statehood.

Greig hazards a definition of a state. He says that a state for the general purposes of international law is **a territorial unit containing a stable population under the authority of its own government and recognized as being capable of entering into relations with other entities that have international legal personality**.

Starke also says that no exact definition of a state is possible but that in so far as modern conditions are concerned the essential characteristics of a state are well setoff. The starting point for the definition of statehood is article I of the 1933 Montimedial Convention on Rights and Duties of States which enumerates what are now widely accepted as characteristics of statehood in international law. The article provides that the states as a person of international law should possess the following qualifications:

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

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These enumerations should be noted is not exhaustive but merely a basis for further investigations because not all the qualifications are final. The criteria have been clarified and developed by international law especially by jurists who on the basis of state practice have identified further evidence that must be considered in the criteria for statehood.

Permanent Population

A state cannot exist without a population. The requirement for a 'permanent population' refers to a politically stable community. There is no prescribed legal minimum number of people making up the number of population. For instance, the Vatican City has an estimated resident population of 750; Tiny Nauru has a population of 20,000 and the Maldives Island has a population of 350,000.

The criterion of population is not affected if the population of a state is nomadic. Besides, international law does not require the population to be homogenous. The criterion of a stable community refers to a group of individuals living within a certain geographical area.

Defined Territory

A fixed territory constitutes a basic requirement for statehood. The stable political community must be in control of a certain area. The criterion of territory is connected with that of permanent population and constitutes the physical basis for the existence of a state. There is no requirement that the frontiers of the state be fully defined or undisputed either at the time it comes into being or subsequently.

For instance, the state of Israel was admitted to the U.N in 1949 although the final delimitation of its boundary had not been settled. What is important is the effective establishment of a political community within an identifiable territory.

In the case of ***Deutsche continental Gas – Gesselschaft vs***. ***Polish State (1929) 5 AD 11*** the german polish tribunal held that in order to say that a state exists and can be recognized as such it is enough that its territory has a sufficient consistency even though its boundaries have not yet been accurately been delimited. The tribunal was called upon to decide if Poland

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was comprised among the expression “German’s enemies” and this involved a determination whether Poland could have existed before 1919 treaty of Versailles came into operation. The tribunal held that recognition in article 87 of the Treaty was only declaratory of the state which was in existence before the treaty. The fact that the former sovereigns of Poland had not recognized her and the fluid nature of the polish-Russian border were held to be irrelevant to the existence. The tribunal said, “Whatever may be the importance of the delimitation of boundaries, one cannot go so far as to maintain that as long as the delimitation has not been legally effected the state in question can be considered as having any territory whatever. The practice of international law and historical precedence point to the contrary. In order to say that a state exists and can be recognized as such it is enough that the territory has sufficient consistency even though its boundaries have not been accurately been delimited and that the state actually exercises independent public authority over that territory.

Besides, international law does not require any minimum size of a territory. For instance, the Vatican occupies only 0.44 square kilometers; Nahuru in the south pacific occupies 8 square miles while the Principality of Monaco is a sovereign state forming an enclay of French territory and covering an area of 105 hectares of which 35% has been claimed from the sea. Neither does international require geographical unity of the territory. The state may consist of territorial areas but are separated and distinct from each other. What is needed is unity under a common legal system. For instance, the Republic of Kiribati is an archipelagic state comprising several islands some of which are as far as 1000 Km from the other.

Government

A government or at least some governmental control is required for qualification of an entity as a state. The existence of an effective and independent government with centralized administrative and legislative organs is generally the best evidence of a stable political community. In certain cases however, the presence of effective government alone is insufficient to support statehood. But once a government has been

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established, the absence of governmental authority does not affect the existing state's right to be considered as a state. This is because states have often survived periods of anarchy, civil war and hostile occupation. However in order for a territory which has not already achieved a status of a state to be considered as such, it must have a government of its own and not be subject to the control of another state. In other words, a puppet state is not a state in international law. In order to ascertain a degree of governmental authority one must considered in whose interest and for what legal purpose the government is effected. In other words, the territory in question must be under an independent and sovereign government and no other authority than that of international law. It must not be subordinate to the will or legal authority of another state except international law.

The form of government and its legality or legitimacy are not decisive for the criteria of a state. That belongs to the domestic affairs of states.

Capacity to enter into relations with other states

Although the new entity may have a government capable of acting on its behalf, in order for its claim to be a state to succeed the entity itself must be capable of entering into relations with other states. The capacity of an entity to enter into relations with other states derives from the control the government exercises over a given territory which in turn is based on the actual independence of that state. The state must be independent of other states' legal orders or any international agency and must be based on a title of international law.

International law identifies two elements evidencing the existence of independence. The first is that the entity exists separately within established boundaries. This emphasizes the link between territory, population, government and independence.

The second is that the entity is not subject to any other authority except international law. Accordingly if an entity has its own executive and other organs conducts its foreign relations through its own organs; has its own

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legal system and nationality law, then there is prima facie evidence of statehood. External control through political and economic blackmail directed at weaker members of international community does not affect statehood.

The legality of Origin

Some jurists argue and state practice in the recent years shows that an additional criterion should be added to those enumerated by the Modimidial convention namely the legality of origin of the state in question. A putative state which is created in violation of the general principles of international law and which exists of such violation cannot be recognized. A putative state will be illegal if it is created in violation of a prohibition of aggression and of the acquisition of territory by force, right to self determination and the prohibition of racial discrimination and apartheid.

Article 2 paragraph 4 of the UN charter which prohibits the use of force and aggression as attained the status of its dislogics. Consequently, no entity created in breach of this rule can be recognized by the international community. This is illustrated by the case of Manchukuo a puppet state created by Japan following its invasion of china and annexation of china in 1931. The league of nations refused to recognize Manchukuo.

Modern examples include the refusal by the UN to recognize the Independent Turkish Republic of Northern Cyprus since it was created as a result of the illegal Turkish military invasion of Cyprus in 1974. When new entities are created in breach of the right of self determination and the prohibition on the racial discrimination of apartheid, the international community will refuse to recognize them as states and thus deny them personality under international law even though the other criteria for statehood are satisfied. When Indonesia unilaterally declared its independence in November 11th 1965, the U.N called upon its members not to recognize the white minority racist government on the ground that the new state was created in breach of the principle of self-determination. With respect to South Africa the creation of the Bantu stands of Transkei, Ciskei, Bophutatswana and Benea without the consent of the Black population was

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condemned by the international community as the creation of puppets of the apartheid regime.

Units within a federal may be allowed by the federal constitution some autonomy including the freedom to conduct their own foreign affairs to the extent that they are allowed to do so such units are regarded as having international personality. However, such units are not thereby states but international persons ***sui generis***. Examples include: Russia and Ukraine under the former Soviet Union constitution and Zanzibar under the United Republic of Tanzania Constitution.

Statehood entails certain rights and duties. Under international law, a state has:

1. Sovereignty over its territory and general authority over its nationals.
2. Status as an international law person with the capacity to own, acquire and transfer property; to make contracts and enter into international agreement; to become a member of international organizations and to pursue and be subject to international law remedies.
3. Capacity to join other states in the making of international law either as customary law or conventional law.

Questions

- *Are National Liberations Movements, transnational corporations such as ICR or Unilever, International NGOS like Red Cross, Human rights watch international legal persons?*
- *Rd and discuss what legal criteria and entity must meet or satisfy in order for it to qualify as a state of international law*.

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LATIN WORDS

- ✓ ***Jus Fetiale*** Religious Rules which governed Roman External relations and formal declarations of which was inter alia recognized the inviolability of ambassadors and was at the origin of distinction between just and unjust war.
- ✓ ***Jus Gentium*** roman solutions to necessity of regulating legal relations of Roman citizens and foreigners as Rome expanded
- ✓ ***Jus Civile*** applicable to relations between Roman citizens and was less formalistic and based on the principles of equity and good faith
- ✓ In the middle ages, two ***sets of international law*** developed to deal with problems that transcended national boundaries
    - ***Lex Mercatoria***
    - ***Maritime Customary Law***
- ✓ ***Jus Federationis*** Rights granted to members of the Holy Roman empire to enter into alliances with foreign powers and wage war provided that alliance or war were neither against the empire or public peace
- ✓ ***Comitas Gentium (international Comity)*** rules of goodwill and civility founded on the moral right of each state to receive courtesy from other states
- ✓ Binding force of international law traced to the fundamental principle of ***Pacta Sund Servanda*** i.e. agreements' between states are to be respected. PSS manifests in itself in all rules of IL.

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E. RECOGNITION

Introduction

The international community is in a state of continuous change. New states are created, existing states disappear and territorial changes take place. Furthermore, revolutions, uprisings and coups d'états sweep aside existing governments and replace them with existing regimes. When these changes occur foreign states are faced with the choice of whether or not to recognize the new entities that emerge and the new regimes that claim competence and authority over those entities.

This is because for the entity or new regime concerned it must be recognized by other states in order to fully operate in the international plane.

The new entity or regime needs the assurance that it would be permitted to hold its place and rank in the character of an independent legal organism in the society of state e.g When Uhuru was sworn in the other presidents sent a congratulatory message to give assurance that he is the head of state.

As a principle, recognition is a mixture of politics, international law and municipal law. When granting or withholding recognition, states are more influenced by political rather than legal considerations.

Recognition is a ***discretionary function exercised unilaterally by the government of a state acknowledging the existence of another state or government or belligerent community.***

Malcolm Shaw says that, "recognition is a statement by an international legal person as to the status in international law of another real or alleged international legal person."

It is an acknowledgment of the international legal status of the entity in question. With respect to a state, recognition is the acknowledgment that the entity fulfills the criteria of statehood. On the other hand, recognition of a government is the acknowledgment that the regime in question is in effective control of a state.

N/B*:* Although recognition is not a matter governed by law but by policy, the act of recognition produces legal consequences in International Law as well as Municipal Law. (**exam**)

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ACTS OF RECOGNITION

What actions must Kenya take to manifest that it has recognized the state of Southern Sudan?

The act of recognition is not a legal act but a policy act as it is discretionary there is no legal duty but there are legal criteria that must be fulfilled for the regime that wants to be recognized.

There is no uniform type of acts of recognition. Recognition is a matter of intention and may be expressed or implied. The act or recognition may be effected expressly by a formal announcement or by a bilateral treaty of recognition or in certain cases impliedly through any act indicating an intention to effect recognition.

A formal announcement may take the form of a public statement, a congratulatory message on the attainment of independence or a simple diplomatic note delivered to the entity which is to be recognized.

Recognition may be implied from the conduct of one state towards another. However, recognition by implication must be unequivocal and clearly indicate that the recognizing state has a clear and inescapable intention to do so.

State practice shows that certain situations may amount to recognition, for instance, the conclusion of bilateral treaties and the formal exchange of diplomatic envoys. If Kenya concludes a bilateral treaty with Southern Sudan then it impliedly recognizes southern Sudan as a state.

Saharawi democratic republic Western Sahara was a Spanish colony until 1975 Spain could not manage the administration as there was a civil war in Spain. It abandoned Western Sahara. Morocco and Mauritania moved in claiming the territory was historically part of their territory. The issue ended up at the UN assembly and kept off the others. UN referred the matter to the ICC for an advisory opinion. The ICC advised that the Morocco and Mauritania to keep off to allow the Saharawi's to decide. UN established a UN committee on a referendum on the future Western Sahara. Morocco decided to export

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its citizens to WS frustrating efforts of UN Gen Assembly. The OAU admitted the Saharawi to its membership, Morocco pulled out of OAU in protest.

Recognition cannot be implied from certain other situations such as being parties to multilateral treaties or attendance at international conferences in which the unrecognized entities participate.
We have an international negotiating conference, to sign a multilateral treaty like the statute that establishes the ICC, participating in that entity does not mean Kenya has recognized that entity. What is the Distinction between bilateral and multilateral? Bilateral only happens where Kenya recognizes the state; in multilateral it does not mean Kenya recognizes the state.
An entity may also be recognized collectively. This may arise in two contexts:

1) In situations where recognition is accorded collectively by a group of states e.g. by a peace treaty as illustrated by the ***1919 Treaty of Versailles*** which recognized new states emerging after the end of WW1.
2) When an entity is admitted as a new number of the U.N.

Article 4 of the U.N Charter sets out conditions and procedure for admission.
Article 4 (1) requires that a new member ***must be peace loving***, ***must be ready to accept the obligations deriving from the charter*** and ***must be able and willing to a carry out those obligations.***
Under ***Article 4 (2)***, the absolute masters of the admission procedure are the Security Council and the General Assembly.
The Security Council will verify whether the conditions laid down in ***Art. 4 (1)*** are fulfilled by the applying entity and at the recommendation of the Security Council, the General Assembly will adopt the final decision e.g. 2011's attempt by Mahmoud Abass to get Palestine as an entity. Arab states do not recognize Israel as a state but they cannot treat Israel as a non-state as it is against the UN charter and they will be in violation of the obligation.
Constitution of UNESCO allows membership to states and non-states. It exists as an independent ILP separate and distinct from the UN.

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RECOGNITION OF GOVERNMENTS

Recognition of governments is an indication of willingness to accord the government in question all the international rights and privileges normally accorded to those governments that recognizes.

Recognition of government implicitly means recognition of state because there cannot be interstate relations with intergovernmental relations.

Recognition of governments is however different from that of states in that non recognition of government does not mean non recognition of state. We have refused to recognize the military regime in Mali. For instance, Tanzania never recognized the Idi Amin government in Uganda but never doubted Ugandans state hood. Most states do not recognize governments but recognize states. Nyerere and Iddi Amin incidence.

The granting or refusal of recognition of a government has nothing to do with the recognition of the state itself. If a foreign state refuses the recognition of a change in the form of government of an old/existing state the later does not lose its status as an international person. The state is perpetual and survives changes of its government.

Non recognition of government may mean either that

1. The government in power is not a government in terms of independence and effectiveness or
2. The foreign state is *unwilling to enter into diplomatic relations* to that government because it is undemocratic
3. The entity withholding recognition thinks that the government in *power is illegal.*

POLITICS AND FUNCTIONS OF RECOGNITION

Whereas there is no right or duty under IL for an entity or government to be recognized the political act or recognition produces legal consequences.

If an entity fulfills the criteria it cannot demand recognition from Kenya or any other state. If a government is in power and ex authority it cannot

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demand recognition. It is an act of policy. The moment Kenya decides we recognize a state it produces legal consequences.

Decision to recognize is a political decision. The question that arises however is whether the decision to grant or withhold recognition is based on political or legal factors.

From state practice it is apparent that the political act or recognition is based on legal factors.

In the first place recognition cannot be granted unless and until in the appropriate legal criteria is met.

In the case of a state there must be permanent, defined territory/borders and effective and independent government and capacity to enter into interstate relations. Recognition will be premature like in the case of Biafra in Nigeria. Biafra had not met the legal criteria of state hood.

The traditional indicia as regards to government and effectiveness with a possibility of permanence and durability so that there is no premature recognition particularly in cases of revolutionary regimes. Tenneco Arbitration

In the entire world Costa Rica is the only state without a military since 1949 and has applied all the resources in education and health. Life expectancy is about 80 and a 94 literacy rates. The Vatican has a military.

Secondly recognition is based on legal considerations since it brings about formal legal relations between the recognizing and the recognized state or government. It may give rise to the establishment of diplomatic relations or the conclusion of bilateral treaties.

However, in extreme situations of strategic or political considerations recognition may be granted or withheld on political grounds. For instance, the decision of the UN not to grant recognition to the Ian smith regime in southern Rhodesia was political based on the fact that the policy on that regime was repugnant for the purposes and principles of the UN.

There are two basic ***functions of recognition***.

1. Recognition may be employed for the purpose of *the existence of a new subject* of IL or its organs.

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2. Recognition confers on the recognized entity the right to have its territorial claims recognized, changes in the title of its claim recognized and the grant or withdrawal of nationality respected by other states.

Where a particular entity is a member of international organization it will be bound by the recognition bounded by that organization and although a non-recognizing state are not under legal duty of recognition they put themselves at risk legally if they ignore the basic obligations of state relations. E.g. Arab states and Israel

There are numerous legal and political ***grounds for non-reco***gnition. However, three are important

1. *The entity to be recognized is not independent in the sense that it is still subject to another state.*
2. *The particular entity is unstable and without the prospect of permanence*

However the instability of an entity is in the light of the drive for self-determination and independence, less of an objection to recognition than it used to be.

For instance there was a general recognition and admission to the UN of the new state of Congo kin Sasha DRC immediately upon its becoming independent of Belgium although civil strife and conflict and political division were at that time so great that only the UN intervention enabled the state to survive.

3. *Is that the entity was not established according to orderly constitution chang*e.

   There are two doctrines associated with this.

a. ***TOBAR doctrine*** advanced by Dr. Tobar of Ecuador in 1907.

Dr Tobar stated that government which had recently power risen to power through extra constitutional means should not be recognized. This doctrine was embodied in a treaty in the same year between the five Central American republics.

b. ***STIMSON doctrine*** advanced by H.L Stimson the US secretary of state in the wake of the Japanese invasion of the Chinese province of Manchuria and the establishment of Manchukuo in 1932.

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He stated that recognition should not be accorded to any situation brought about the acquisition of a territory in general or the establishment of a new state or the extinction of an existing state by a war of aggression or use of force. Pacific settlement of disputes

THE LEGAL SIGNIFICANCE OF RECOGNITION

The legal significance of recognition is mainly influenced by two theories

- The constitutive
- Declaratory

The constitutive theory

According to the constitutive theory, recognition has a constitutive effect in that a state is and becomes an ILP through recognition only and exclusive. In other words IP is held to be conferred only through recognition of the entity in question.

An entity may possess all the formal attributes and qualifications of state hood not unless the recognition is accorded to it, would not acquire international personality. This theory is related to an extreme positivists approach because if consent is posited as the major source of IL then it will be quite simple to assert that international personality can be obtained only through the consent of existing legal persons by the performance of an act constituting recognition.

Anzilotti and Kelsen are the main antagonists in this theory.

Logically however this premise is *not altogether correct for a number of reasons.*

1. New states are conferred with the rights and bear obligations under *IL,* independent of the will of other states through recognition.
2. State practice shows that recognition is primarily a political act on the part of states. Accordingly the legal status of an entity cannot be held to be independent according to the performance of such a political act.
3. State practice also shows that it might not be possible to ignore completely a non-recognized entity.

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4. It is not clear how many members of the international community must recognize the entity for it to qualify as a state.
5. The theory fails to address the issue on whether the existence of the entity as a state will be relative to only those states which extend recognition.

An entity cannot be a state vis a vis those states that extend recognition to it and the same time be a non state vis a vis those states that do not recognize it.

The declaratory theory

The 2nd theory holds that it is a declaratory act at most formal admission of existing facts. The act of recognition is not decisive of the new entities claimed to state hood because that status is conferred by IL. The status of statehood does not depend on recognition. The international legal personality of a state does not depend on its recognition as such by other states but for the operation of the law.

It is conferred by rules of international law and whether or not a state is actually recognized by another state it is still entitled to the rights and subject to the general duties of the system.

This theory has been endorsed on many occasions by international conventions, arbitral decisions and even the international court of justice.

There does however exist a qualification in this theory namely since states are free to deny or grant access to their courts recognition is constitutive with respect to those domestic courts.

If Kenya does not recognize a particular entity as a state the court of Kenya will tell an official that they do not recognize them and that they cannot grant access to the courts.

All in all the declaratory theory is favorable for the following reasons.

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1. *The constitutive theory amounts to states creating and demolishing entities and derogates from the principle of sovereign equality of states*.

Besides the competence of states is established by international law and not by the political discretion which determines the grant or withholding of recognition.

2. *It is not clear how many recognizing states will be enough in order to create a new state under the constitutive theory.*

Besides it is not clear whether the new states entity will become a state vis a vis recognizing states and not a state vis a vis non recognizing states.

3. *Judicial decisions have endorsed the declaratory theory.*

For instance, in the ***case of the Re Al-fin corporations patent***

The English courts reaffirmed the fact that recognition was not constitutive but merely declaratory

Section 24 (1) of the 1941 English patents act allowed a patentee an extension of his patent if he had suffered loss 'by reason hostilities between his majesty on any foreign state.' In this case the applicants sought an extension under ***section 24 (1)*** in respect of loss suffered during the Korean War between 1950 -1953.

The Comptroller General rejected the application partly on the ground that the Korean War did not come within ***section 24 (1)*** because North Korea not having been recognized by the UK was not a 'foreign state."

The applicants sought a ruling of the HC on this Justice Graham j said, *'…I have no hesitation in holding that the phrase 'any foreign states,' although of course it includes a foreign state which has been given foreign office recognition, is not limited there to. It must at any rate include a sufficiently defined area of territory over which a foreign government has effective control. Whether or not a state in question satisfies these conditions is a matter primarily of fact in each case…that at the relevant time North Korea as a defined territory over which a government has effective control and that his late majesty was engaged in hostilities in this state albeit his troops were under the command and formed part of the un forces fighting in the area. I hold therefore that North Korea was a foreign state within the meaning of*

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section 24 and that the applicants are entitled to proceed with the application for extension on that basis.'

4. State practice supports the declaratory theory.

States enter into official relations with recognized entities and conclude international agreements with them. Such practice is founded on the beneath that non recognized entities have international personality.

LEGAL CONSEQUENCES OF RECOGNITION IN MUNICIPAL LAW

Recognition is essentially a matter of intention and might be accomplished through several modes. The act or recognition must however give a clear invitation of an intention to

a) treat the new state as such
b) accept the new government as having authority to represent the state it purports to govern
c) Recognize in the case of belligerents that they are entitled to exercise belligerent rights.

A number of legal consequences flow from recognition within ML.

1. *Recognition has the effect of giving the recognized state or government access to the courts of the recognizing state*.

In other words, an unrecognized state or government cannot sue or be sued in the state of the non-recognizing state. Neither can its laws be recognized for the purposes of the conflicts of law. We will allow the Ugandan government to maintain a civil suit in Kenya.

This is illustrated by the case of ***Luther v Sagor***.

In June 1918 the Russian Socialist Federal Sovereign Republic passed a decree declaring all mechanical saw mills and good working establishments belonging to private or limited companies to be nationalists. In 1919, in pursuance of the decree the plaintiff's mill together with its stocks of wood was ceased on behalf of the republic. In august 1920 the representative of the Russian Commercial Delegation in London contracted with the defendants for the sale and delivery of a quantity of timber which included

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some which have been ceased from the plaintiffs. The plaintiff sought inter alia a declaration that the timber was their property and injunction restraining the defendants from selling pledging or in any way dealing with it. The defendants argued that the decree of June 1918 being the act of a sovereign government was valid to deprive the plaintiffs of their title to the timber and not been impugned not challenged. The KB division decided in favour of the plaintiff. However on appeal on the basis of certificates issued by the UK foreign office stating that the soviet government was recognized by the UK as the de facto government of Russia before the confiscation. The court of appeal confirmed the defendant's title with the wood. Lord justice Bankes stated, 'the courts of these country will not inquire into the validity of a foreign government which has been recognized by the government of this country…the government of this country having recognized the soviet government as the government really in possession of the powers of sovereignty in Russia, the act of that government must be treated by the courts of this country with all the respect due to the acts of a duly recognized foreign sovereign state.

Similarly in the case of ***The Republic of Somalia v Wood house Drake and Carey Suisse (1992) 3 WLR 734***

The QB division of the UK Supreme Court refused to allow the representative of the interim government of Somalia to bring a claim before it on the ground that it was not a recognized government on international law. In January 1991 the incumbent government of Somalia purchased a cargo of rice for delivery at the port of Mogadishu. In the period between the purchase and delivery conflict broke up in the country the government was overthrown and a provisional government established. In the meantime the cargo of rice could not be delivered at the port of destination due to the fighting. Since the cargo could not be delivered the provision of government raised an action for recovery of the price of the undelivered cargo. The ship onus issued a summons against the republic of Somalia. The court ordered the original bills of lading to be lodged with the court pending the settlements of the dispute. One of the issues the court had to consider was whether the

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provisional government had the locus standii to bring the action. The court held that on the evidence the provisional government of Somalia had not been recognized and hence had no lawful standing in the English court. Its claim to the price of the consignment was rejected.

Transporters Airos de Angola v Ronair

2. A recognized state of government enjoys sovereign immunity from suits in the court of recognized state and cannot be sued without its consent.

The plea of immunity may be raised by an authority recognized as being in de facto control even if the proceedings are brought by the de jure sovereign.

The Arantzazo Mendi 1939

3. The legislative and administrative acts of the recognized states or governments will be given effect to the recognizing states.

Sago case

4. Recognition once granted is retroactive.

It is backdated to the establishment of the authority in question and does not related to the time in which it is accorded. For instance in the Luther case the British recognition of the Soviet government was backdated to 1917 and all the legislative and administrative acts of the soviet government had to be recognized as well.

LEGAL CONSEQUENCES IN INTERNATIONAL LAW

An important legal consequence flowing from the recognition of an entity as a state or government of another state is the doctrine of ‘act of state’. The acts of a recognized state and or government are not justiciable by the court of the recognizing state. This flows from the IL concept of the sovereign equality of states.

Every sovereign state is bound to respect the independent of every other sovereign state and the courts of one state will not sit in judgment on the acts of the government of another state done within its own territory.

In other words the doctrine of act of states precludes the courts of one state from enquiring into the validity of the public act of a recognized foreign

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sovereign power within its own territory. Kenyan Supreme Court cannot sit or review on judgments of the court of UG.

This is illustrated in the case of ***Underhill v Hernandez.*** In august 1892 an army party under the defendants command took power in a Bolivar Venezuela. During the engagement, all of the local officials left and all the vacant positions were filled by the defendants who from that date and during the period of the transactions complained of was the civil and military chief of the city and district. In October, the party in revolt had achieved success generally and on October 23 1892 the government then in control of the territory was formally recognized as the legitimate government of Venezuela by the US. The plaintiff was a US citizen who had constructed a water work system for the City of Bolivar under a contract with the government and was engaged in supplying the place in water.

Sometime after the entry of Hernandez, he applied to him as the office in command for a passport to leave the city. The defendant refused his request, it was not until October 18th when a passport was given and Underhill left the country. When he got to the US he filed this action to recover damages for the detention caused by the refusal to grant the passport.

The US supreme court dismissed the action holding; 'the acts complained of were the acts of a military commander representing the authority of the revolutionary party as a government, which afterwards succeeded and was recognized by the US…the acts of the defendant were the acts of the government of Venezuela, and as such are not properly subject of adjudication in the courts of another government…every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the act of the government of another than within its own territory. Redress of grievance by reason of such acts must be obtained through the means open to the avail of by sovereign powers as between themselves.'

Kenyan who has an interest in UG…and one has suffered redress. One can only do so in the HC of Uganda. One cannot leave UG and file a claim with the HC of Kenya. When one lives to UG and comes to Kenya one can appeal

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in exercise of the right of diplomatic relations to expound this to the ICJ so that it becomes a state to state claim.

Besides, diplomatic relations as established with recognized states and governments. Although the establishment of diplomatic relations is one of the manifestations of recognition it is not a necessary consequence thereof because an entity can be recognize as a state even in the absence of diplomatic relations of a recognized state. However by acknowledging the full status of hither to in determinate communities the recognizing states make possible the regularizing of relations between them on the basis of the international law.

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G. TERRITORIAL JURISDICTION

Introduction

Concept of territory

International law is based on the concept of the state. The state in turn lies upon the foundation of sovereignty/territory which expresses internally the supremacy of the governmental institution and expressed externally as a legal person.

Sovereignty is founded upon the fact of territory. Without territory a legal person cannot be a state.

Territory is the basic characteristic of a state and the one most accepted and understood.

Territory is the foundation of a state's factual existence and the basis or the exercise of its powers.

There must be a physical area that is claimed by a state in it is territory. It must occupy the area.

The state must exercise its jurisdiction within a defined territory. Indeed the importance of territory to related concepts such as territory, integrity and jurisdiction is fundamental. Kenya must exercise its power within

For instance a change in ownership of a particular territory involves also a change in the sovereignty, legal authority governing the area.

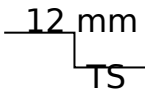
Since the rights of a sovereign state extends only to its territory, the state may and does exercise all those rights to which it is entitled as a subject of IL over its territory. Kenya can only exercise its jurisdiction in its territory. Among certain rights are the rights to make, adjudicate and enforce its ML. Kenyan laws as a general rule do not have extra territorial jurisdiction. The laws are only applicable and are binding only in Kenya.

However, other states may have concurrent jurisdiction based on extraterritorial jurisdiction principles.

The territory of a state comprises all land areas including subterranean areas, waters including national rivers, territorial sea appertaining to the land and the sea bed and subsoil of the territorial sea and the airspace over the land and the territorial sea.

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12 nautical miles of the lowest water mark.



Territorial sovereignty may be exercised over various geographical features analogous to land territory including islands, islets, rocks and reefs.
Territory may be ***terra nullius*** consisting of the same subject matter i.e. land internal waters legally susceptible or acquisition by start but not yet placed under territorial sovereignty. *Terra nullius is ownerless territory not under any state.*
The ***Res Communis*** consisting of the high seas and the outer space is not capable of being placed under any state sovereignty. (Belongs to all in general and no one in particular)
Res Communis is governed under the regime of ***the common heritage of human kind***. (Exam question)

THE ACQUISITION OF TERRITORY

Customary IL distinguishes several modes by which sovereignty can be acquired of a territory. The five modes by which territory has traditionally been said to have been acquired are

1. *Occupation*
2. *Prescription*
3. *Accretion*
4. *Cession*
5. *Annexation*

These modes are not however exclusive or exhaustive because in practice it is unlikely that any single mode would be evident in isolation.

1. Occupation

It is an original mode of acquisition whereby a state acquires sovereignty over a terra nullius whether newly discovered or abandoned by the former sovereign. Territory inhabited by tribes or people having a social and political organization cannot be of the nature of terra nullius. For instance Western Sahara

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In determining whether or not an occupation has taken place in accordance with IL, the principle of effectiveness is applied.

Territory is occupied when it is placed under effective control a relative concept varying according to the nature of the territory concerned.

In the legal status of ***Eastern Green land case***, the permanent Court of International Justice stated that for occupation to be effective as a basis of a claim to sovereignty over territory two elements must be shown to exist namely:

1) The *intention and will* to act as a sovereign (***animus possidendi***)
2) Actual *exercise or display* of authority

The requirement of the ***animus possidendi*** is important in three respects

a) The activity *must be that of the state or its authorized agent* and not that of a mere individual
b) The activity *must not be exercised by the concept of any other state.*
c) The activity taken as a whole *must have no other explanation but the assumption of pre-existing sovereignty*

In other words all the fact must evidence nothing less than a permanent intention and will to assume and manifest control over the territory.

The requirement of actual exercise or continued display of authority may be satisfied by concrete evidence of state activity consistent with sovereignty such as the taking of legislative or executive measure affecting the territory concerned fixing boundaries or concluding agreements with other states recognizing the claimant states sovereignty over the territory.

A mere act of discovery by one state without more is not sufficient to confer that title by occupation.

Such incomplete appropriation must give way to a continuous and peaceful display of authority by another state.

In ***The Island of Palmas case*** the sole arbitrator Max Huber, found that the Dutch had a better title to the island having peacefully and continuously displayed state authority over the island from at least 1700-1906 when this dispute arose thereby supplanting the Spanish claim as the sovereign.

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In 1906 a dispute arose between the US and the Nether lands concerning sovereignty over the island of palmers an island in the Philippines archipelago. The US believed The Island of Palmas to be included in the "Archipelago Known as Philippines Islands" ceded to the US at the conclusion of the Spanish American War by the 1898 Treaty of Peace between the US and Spain. The Netherlands however considered the Islands of Palmas as forming part of their territory in the East Indies actually under Dutch control. The dispute was referred to the Permanent Court of Arbitration at the Hague for settlement by a single arbitrator who was to determine whether the island s of Palmers in its entirety forms a part of the territory belonging to the USA or of the Netherlands territory."

The arbitrator held that the islands of Palmas formed in its entirety a part of the Netherlands territory because even if Spain did originally have sovereignty over the island the Dutch had administered it since the early 18th century and there was no evidence to establish any acts of display sovereignty of Spain or another power such as counter balance or annihilate manifestations of Netherlands sovereignty.

Miniquiers and Ecrehos Case (1953) (Pg 14 no 16)

Related to the issues of continuous display of authority is the question of the date at which sovereignty comes to be assessed. This critical date is the date beyond which further evidence of the exercise of sovereign authority will not be allowed. This judicial technique is important for two reasons

1) It establishes a point beyond which the parties will not be called upon to provide evidence of authority.

Particularly in the case of uninhabited or sparsely inhabited territories it would make little sense to require that the display of authority is constantly in evidence. Territory A nomadic or very few, and keep on moving up and down.

2) In the case of disputed territories, where the dispute arises in respect of the initial circumstances of acquisition rather than the display authority thereafter the critical date will be important in determining which factors are to be taken into account by the court or tribunal.

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Note the case…must rd (14 and 17)

A state may ratify an act by one of its nationals, purporting to appropriate territory on its behalf. The activities of chartered companies and corporations to which powers of acquisition and government may have been delegated by the state will also be regarded as state activity in relation to the acquisition of territory.

2. Prescription

Prescription like occupation it is based on effective control over territory but whereas occupation is acquisition of terra nullius prescription is the acquisition of title/territory which belongs to another state.

According to Ian Brownlie, the essence of prescription is the removal of defects in a putative title arising from usurpation of another's sovereignty by the consent and acquiescence by the former sovereign. There are four requirements for acquisitive prescription.

1) Possession must be exercised ***a titre de soverain (title of the sovereign)***. There must be a display of state authority and the absence of any recognition of sovereignty in another state.
2) Effective control necessary to establish title by prescription must be *accompanied by acquiescence* in the part of the former or losing sovereign. Consequently protests of other acts or statements which demonstrate a lack of acquiescence may prevent acquisition of title by prescription.
3) The *possession must be public*. If there is to be acquiescence then there must be publicity.
4) Finally the *possession must be persistent*

The effective control necessary to establish title by prescription must last for a longer period of time than the effective control which is necessary in cases of occupation.

The length of time required is a matter of fact depending on the particular case because there is no fixed period.

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3. Accretion

It occurs where new territory is added mainly through natural causes to territory already under the sovereignty of the acquiring state. No formal act or assertion of title is necessary since a state has the exclusive right of sovereignty over any additions of silting or other deposits or resulting from the formation of islands within its territorial waters.

It is immaterial whether the process of accretion has been gradual or imperceptible/unnoticable or whether it has been produced by a sudden or abrupt transfer of soil provided that this has become embedded and it is not in any event identifiable as originating from another location.

Accretion can be of significance where a state boundary follows the course of a river. River between Tanzania and Mozambique (Thalweg) Where a boundary river under goes a sudden change of course this will not change a boundary line. It will remain a centre line of the former boundary claimed.

Chamizal Arbitration (Rio Grande River)

River between Mexico and US Rio Grande What was part of Mexican soil remained its soil despite US claiming the soil.

4. Cession

This is the transfer of territory usually by treaty from one state to another, the treaty forming the legal basis of sovereignty. Kenya and Sudan have not agreed on that boundary.

The treaty is the legal basis of sovereignty. Cession rests on the principle that the right of transferring its territory is a fundamental attribute of the sovereignty of a state. It may be either gratuitous or for some consideration as for instance the sale of Alaska by Russia to the U.S in 1867 and may be voluntary or compulsory as a result of a war conducted successfully by the state to which the territory is to be ceded.

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However, ***a cession by treaty is void where the conclusion of the treaty has been procured by the threat or use of force contrary to the provisions of the UN Charter***.

For cession to be valid there must be sufficient indication of an intention to transfer of sovereignty from one state to another. The receiving state takes all sovereign rights and any limitations pertaining to the territory ceded.

Cession is an example of a **derivative title**. If there were defects in the state's title, the purported cession from the previous sovereign cannot cure the defects.

In the ***Island of Palmas case*** the U.S claimed that by the 1898 treaty it acquired title to the Island of Palmas from Spain. However, the arbitrator found that at the time of the purported transfer of the island in 1898 sovereignty over the island lay with the Netherlands and not with Spain. Spain could not therefore transfer to the U.S more rights than she actually possessed. Hence, since Spain had no title to the island in 1898 the U.S would not acquire title to the Island from Spain.

5. Annexation

This is the forcible acquisition of territory by one state at the expense of another.

In contrast to the other methods to acquire territorial sovereignty the element of force plays a decisive role in annexation.

Under traditional International Law, conquest was recognized as a means of acquiring territory even in the absence of a treaty of cession but the acquisition of territory by conquest was not lawful until hostilities have come to an end. Therefore, in the absence of a peace treaty evidence was necessary that all resistance by the enemy state and its allies had ceased so that they were no longer forces in the field to free the occupied territory from the control of the conquering state.

An annexation can only be said to have taken place when not only the territory in question has been occupied but also the intention to appropriate the territory permanently has been shown (***corpus et animus)***.

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In other words, even when a state has been completely subjugated there will be no transfer of sovereignty in the absence of an intention to annex it. For instance in 1945 the ***victorious Allies*** expressly disclaimed their intention to annex Germany although they had occupied all German territory and defeated her Axis Powers

Annexation can take place in two ways:

1) ***Unilateral declaration after the conquest*** of the territory in question and the final defeat of adversary.

If either element is missing there has been no annexation. With a declaration of annexation, a state announces its intention of acquiring the territorial sovereignty of the area in question.

2) ***By treaty under compulsion*** whereby the ceding state is either forced to sign a peace treaty after a military defeat or persuaded to agree by non-belligerent means. The legality of the territorial acquisition is to be found in the treaty itself

Whereas acquisition of territory by conquest might have been acceptable during the period where there was no legal restriction on the right of a state to wage war, contemporary International Law restricts the ability of the state to acquire territory by conquest by placing limitation to the use of force. If the use of force is illegal, then according to principle ***ex injuria jus non oritur***, legal title can never be acquired by forcible means.

The first blow to acquisition of territory by use of force was dealt by the U.S Secretary of State Stimson in January 1932 when he announced that the U.S would not recognize a Japanese invention of Manchuria which was part of China and the setting up of the puppet state of Manchukuo. The following year of the assembly of the League of Nations adopted a resolution stating that , *“* ***it is incumbent upon the members of the League of Nations no to recognize any situation, treaty or agreement which may be brought about by means contrary to the Covenant of the League of Nations or with the ‘Pact of Paris****”,* that is to say the 1928 Kellog-Briand Pact which prohibited war as a means to achieve political aims.

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Besides, a***rticle 2 (3&4) of the UN Charter*** calls upon member states to settle their "***international disputes by peaceful means***" and "***to refrain in their International relations form the threat of use of force against territorial integrity or political independence of any state***." Accordingly, not only war but also the use of force in any form is to be regarded as internationally wrongful act from which in consequence no rights may be derived.

Besides, a number of U.N Gen Assembly and Security Council resolutions emphasized this point.

For instance, in 1970 the U.N Gen Assembly adopted the Declaration of Principles of International Law concerning Friendly Relations and Corporations among State in accordance with the Charter of the UN. R***esolution 2625) (XXV)*** of October 24, 1970 in which it declared that it was a basic principle of international law that no territorial acquisition resulting from the threat of use of force shall be recognized as legal.

Following the invasion of Kuwait by Iraqi armed force on August 2, 1990 and the Iraqi government announcement of its intention to annex Kuwait in orders to establish a 'comprehensive and eternal' merger between the two states, the U.N Security Council adopted resolution 662 (1990) of Aug 9th 1990 in which it unanimously declared the purported annexation of Kuwait to be null and void and called upon states and institutions not to recognize it and to refrain from any action that might be interpreted as indirect recognition of annexation.

Further, ***article 52 of the 1969 Vienna Convention of the Law of Treaties*** state that a treaty is void if its conclusion has been procured by the threat or the use of force in violation of the principles of International Law embodied in the Charter of the U.N and hence rejects the validity of a treaty based annexation.

The modern rules prohibiting acquisition of territory by conquest are concerned only with International wars and not with internal conflicts. No breach of International Law is therefore committed when part of a state's inhabitants succeeds in setting up a new state by winning a civil war of

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cessation or if the cessation occurs with the express or implied consent of the government in power.

Acquisition of territory by newly emerged states.

The acquisition of territory by newly emerged states such as decolonized dependencies or the emancipated trust territories posses a ***sui generis case*** because under classical International Law until a new state is created there is no legal person in existence that is competent to hold title.

Jurists have suggested two basic modes

1) By ***constitutional means*** through agreement and with the former controlling administration in an orderly devolution of power.
2) Through ***non-constitutional means*** usually by force against the will of the previous sovereign.

The granting of independence according other constitution of the former power may be achieved either by agreement between the former power and the new entity or by an internal piece of legislation by the previous sovereign.

In such cases, there is devolution of sovereignty from one power to another and the title to the territory passes from the previous sovereign to the new administration in a conscious act of transference.

Different considerations arise where the new entity acquires title contrary to the wishes of the wishes of the previous territory as for instance through cessation or revolution.

The principle of self-determination may also be relevant. If the new entity conforms to the legal conditions of statehood, other states will have to make a decision as to whether or not to recognize the new states and accept the legal consequences of this new status.

The Uti Possidetis Juris Principle

The principle of *Uti Possidetis Juris* first developed among the Spanish colonies of Latin America provides that the old colonial boundaries will be

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recognized as the international borders of the newly independent ex-colonial states.

This principle was adopted by the OAU in its resolution on Border disputes of July 21 1964 which provides that ***all states would respect the colonial boundaries***.

The ***function*** of the principle is to preserve the territorial integrity of newly independent states.

The principle has been recognized and applied by the ICJ in border disputes. For instance in ***the Burkina Faso/Republic of Mali (1986) ICJ Rep. 554***, the International Court of Justice stated that the doctrine of Uti possidetis juris "***is a general principle which is logically connected with the phenomenon of obtaining of independence whenever it occurs. Its obvious purpose is to prevent the independence and stability of states being endangered by fratricidal struggles provoked by the challenging frontier following the withdrawal of the administering power****."*

Both states were formally French colonies being Upper Volta and French Sudan respectively. Prior to this case being commenced before the court, the parties had agreed that the Mediation Commission of the Organization of African Unity would establish the delimitation of the frontier between the two states a stretch of territory 300kms which was thought to be rich in mineral resources.

The mediation commission having failed to establish a mutually acceptable delimitation of the frontier, the parties submitted the disputes to a Chamber of the International Court of Justice, with a request for the Chamber to resolve their dispute on the basis inter alia of "***the principle of the intangibility of frontiers inherited from colonization***."

In its judgment the court stated that it could not disregard the principle of Uti possidetis juris whose application gives rise to the respect for intangibility of frontiers. The court emphasized that the principle is "***a firmly established principle of International law where decolonization is concerned***" and that although it was first invoked and applied in Latin America "***the***

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principle is not a special rule which pertains solely to one specific system of International Law."

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THE PRINCIPLES of JURISDICTION

Introduction

The jurisdiction of a state describes the power of the state under International Law to exercise its authority over persons, property and activities by the use of its Municipal Law.

Jurisdiction is a fundamental aspect of sovereignty and refers to the legislative, administrative and judicial powers of government. International Law distinguishes 3 different kinds of jurisdiction:

1. Jurisdiction to Prescribe (prescriptive or legislative jurisdiction)

Refers to the authority of the state to make and apply its laws to persons, properties and activities within the states.

2. Jurisdiction to adjudicate (adjudicative jurisdiction)

This refers to the authority of a state to subject particular persons, property and activities to its judicial process, that is, the competence of a court to bring parties before them and to render authoritative judgment.

3. ***Jurisdiction to enforce (administrative enforcement/ executive or prerogative jurisdiction)***

This refers to the authority of a state to use the resources of government to induce or compel compliance with its law for instance through arrest or seizure of property.

As a general rule a state's prescriptive jurisdiction is unlimited and a state may legislate any matter irrespective of where it occurs or the nationality of the persons involved.

When the Government enacts the law then the law is applicable to every person in Kenya or foreigners in Kenyan except those protected with immunity. (Exam)

However the sovereign equality of states means that one state may not exercise its enforcement jurisdiction in a concrete sense over persons or activities actually situated in another's states territory irrespective of the reach of its prescriptive jurisdiction at least not without the latter state's consent.

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For instance a person may commit an offence in Kenya and then escape to the Uganda. The Kenyan courts have jurisdiction to try that person but the Kenyan police cannot enter Ugandan territory and arrest him except under the terms of a treaty or with some other forms of consent.
If the Kenyan police did, this would be contrary to the well-established rule of International Law that one state may not perform acts of sovereignty on the territory of another state without the latter's consent.
As a coronary to these principles, a state's enforcement jurisdiction within its own territory is presumptively absolute over all persons and matters situated therein.
In practice the 3 kinds of jurisdiction are often interdependent. Jurisdiction to prescribe may be more acceptable where jurisdiction to adjudicate available. Parliament cannot legislate if the laws enacted cannot be implemented or enforced.
Jurisdiction to adjudicate may be more acceptable where the forum state also has jurisdiction to prescribe by virtue of its links to the person's interests, relations or activities involved. The HC cannot assume jurisdiction over foreigners, it can only assume adjudicative prescription if it recognizes the jurisdiction of the foreign state e.g. married couples.
Problems of jurisdiction feature quite generally in International relations and government often have to decide how far to assert the authority and when to oppose the exercise of jurisdictional authority by other states.

Prescriptive jurisdiction

State parties as evidenced by the resolution of International Conferences and the Jurisprudence of National Courts disclosed five basic principles on which extensive prescriptive jurisdiction is claimed by states. These are

1. ***The Territorial principle***
2. ***The Nationality principle***
3. ***The Protective principle***
4. ***The Passive personality principle***
5. ***The universality principle***

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The Territorial principle

It determines jurisdiction by reference to the place where the offence is committed and stems from the most essential attributes of states sovereignty namely **a distinct and delineated territory, unknown and loyal population and an independent government**.

A state must have jurisdiction to independently govern its own population in its own territory. The law of the state applies to all persons, property and activities in the territory over which it has jurisdiction unless a contrary intention appears.

For purposes of International Law and exercise of territorial jurisdiction, the territorial sea of a coastal jurisdiction/ state, a ship flying its flag, an aircraft registered in its territory and the ports of a coastal state have been assimilated to its territory. KQ is registered in Kenya and whatever happens will be governed by Kenyan law.

Under IL if there is someone who hijacks a plane which is a continuing offence and every state through whom the aircraft passes, the states have the power or jurisdiction over that hijacking.

Apart from this assimilation, state practice has extended the principle of territorial jurisdiction in order to justify action taken in cases where one or more constituent elements of an act or offence took place outside the territory of the state. International communication and transport have led to the commission of crimes in one state which were engineered or prepared in another state. Some states in whose territory such ancillary acts took place declined to prosecute or punish the offenders responsible on the ground as the acts were a principle accessory to the committed offence elsewhere, the territorial jurisdiction did not apply.

A group of students cross the border to TZ, and start organizing how they can overthrow the government of Kenya and come back to do so in Kenya. TZ has jurisdiction over the students as they committed the offence on TZ territory.

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However, a distinction was made between subjective territorial principle and objective territorial principle. The state where the act commenced has jurisdiction under the subjective territorial principle while the state where the act is completed or consummated has jurisdiction under the objective territorial principle (also sometimes called the ***effect principle*** based on the fact that the injurious effect although not the act or omission itself occurred on the territory of that state.

Examples include a man firing a gun across a frontier and killing another man in a neighboring state or a man obtaining money by false pretences by means of a letter posted in Kenya to a recipient in Nigeria. The objective territorial principles received judicial support in the ***SSLotus case*** when the majority of the Permanent Court of International Justice by assimilating the Turkish vessel to Turkish territory brought the case under the objective territorial jurisdiction.

The court held, "***the offence produced its effect on the Turkish vessel and consequently in a place assimilate to Turkish territory in which the application of Turkish criminal law cannot be challenged even in regard to offences committed there by foreigners****."*

Turkey had not acted in violation of the International Law in the arrest, trial and conviction of the French officer on watch at the time of the coalition.

The nationality principle

It determines jurisdiction by reference to a nationality or national character of the person committing the offence and it's the most fundamental principle of extra-territorial jurisdiction. Under this principle a state's laws may be applied extra-territorially to its citizens, individuals or corporations whenever they may be found. The competence of a state to prosecute and punish its nationals on the sole basis of their nationality is based upon the allegiance of which the person charged with a crime owes to the state of which he is a national.

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A person or a corporation located for doing business in a foreign country may accordingly be subject not only to the territorial jurisdiction of a foreign state but also to the jurisdiction of the state of nationality.

Nationality is an accepted basis for exercise of jurisdiction in cases where offences are committed in such places as the high seas or outer space where the territorial jurisdiction is inapplicable (res communis- no state has jurisdiction over them).

State practice distinguishes between active nationality and passive nationality principles. Under the former, jurisdiction is assumed by the state of the person against whom proceedings are taken is a national. This principle is considered by International Law to all states desiring to apply it.

Stark submits that there is indeed a correlative principle of the law of extradition that no state is bound to extradite from its territory a national guilty of an offence committed abroad. If there is a conflict of jurisdiction, one commits an offence in UK and comes back to Kenya, can be protected as a national.

Under the later Passive nationality principle, jurisdiction is assumed by the state of which the person suffering injury, that is, the victim is a national. Under this principle, a state may exercise jurisdiction over all crimes where the victim was its national irrespective of the place where the crime was committed or the nationality of the offender once the offender comes within its jurisdiction.

The justification for the exercise of jurisdiction based on this principle is that each state has a right to protect its citizens abroad and if the territorial state of the ***locus delicti*** neglects or is unable to punish the persons causing injury, the state of which the victim is a national is entitled to do so if the persons responsible comes within its power.

Troops or soldiers are not treated like ordinary citizens they enjoy state immunity.

Ministry of defense v Ndegwa (Ref to pg 16 case no 28)

Foreign diplomatic missions are not part of the Kenyan territory. They enjoy immunity under that state.

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It was partly on the basis of this principle that in the ***Cutting Case (1886) 1889 U.S Foreign Relations 757***, a court in Mexico assumed criminal jurisdiction over an American citizen for the publication of a defamatory statement against a Mexican citizen in a Texas Newspaper.
Cutting an American citizen was prosecuted in a Mexican court and convicted of libel committed in the publication of a newspaper in El Paso, Texas. The U.S protested but the Mexican government asserted the propriety of the proceedings under article 186 of the Mexican Penal Code which provided that "Penal Offences committed in a foreign country by a Mexican against Mexicans or Foreigners, or a Foreigner against Mexicans may be punished in the Republic" if they have not been tried elsewhere and if the accused is in the Republic voluntarily or as a result of extradition. The victim of the alleged libel was a Mexican national and the accused had resided in Mexico 'off and on' for 18 months. The charge against the accused was later amended to include libel committed in Mexico through the circulation in Mexico of the newspaper containing the defamatory statement.

The protective principle

Under this principle jurisdiction is determined by reference to the national interest injured by the offence. Accordingly, a state may exercise jurisdiction over foreigners who have committed acts abroad which are deemed prejudicial to the 'security' of the state concerned. The principle is justifiable on the basis of protection of a state's vital interests because the foreigner might not be committing an offence under the law of the country where he is residing and extradition may be refused especially if it encompasses political offences.
State jurisdiction is based on conduct outside its territory that threatens its security as a state or the operation of its governmental functions provided the conduct is generally recognized as a crime under International Law.
Accordingly in the ***US v Pizzaruso*** 392 US 936 (1968)
The defendant Jean Philomena Pizzaruso a citizen of Canada was convicted in the Federal Court of the Southern District of New York of the crime of

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knowingly making under oath a number of false statements in her visa application at the US Consulate in Montreal Canada thereby violating US Immigration Laws. On appeal the Court of Appeal affirmed the decision of the lower court holding, *"'the utterance by an alien of a false statement with respect to a material fact' in a visa application constitutes an affront to the very sovereignty of the US. These false statements must be said to have a deleterious/harmful influence on valid governmental interests…a violation of the immigration laws is completed at the time that the alien perjures himself in the foreign country."*

The protective principle has also been recognized as a basis for exercise of jurisdiction over aliens involved in espionage, counterfeiting of the states seal or currency, falsification of official documents and conspiracy to violate immigration or customs laws. The principle may be seen as a special application of the effect principle but it has been treated as an independent basis of jurisdiction.

Although most states use this principle there is nevertheless the danger that some states may abuse the principle if "security" or "vital interests" are given a broad interpretation. For instance if a paper published in state A criticizes State B, state B may claim jurisdiction to try the editor of the paper for sedition.

The protective principle must not be confused with diplomatic potential which refers to the right of the state to intervene diplomatically or to raise an international claim on behalf of its national against another state.

The passive personality principle

The passive personality principle is a variant of nationality principle. It determines jurisdiction by reference to the nationality of a national character of the person injured by the office. Under this principle state has jurisdiction to punish aliens for harmful acts committed abroad against its nationals. This principle is difficult to justify in theory and state practice shows that it is rarely invoked as a ground of assertion of jurisdiction on the some countries

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claiming it is contrary to International Law. However, the principle been successfully relied on in a number of cases.

For instance, in ***US v Yunis (83) AJIL 94 (1989) the US,*** the US based its jurisdiction to prosecute a Lebanese national for his alleged hijacking of a Jordanian airliner in the Middle East in part of the passive personality principle. Yunis, a Lebanese citizen and resident was charged by the US for his alleged involvement in the 1985 hijacking of a Jordanian civil aircraft in the Middle East. The only nexus of the aircraft in the US during the hijacking was the presence of a number of American nationals in the flight.

The aircraft was registered in Jordan and flew the Jordanian flag but never landed on the American soil or overflew American airspace. In September 1987, more than two years after the hijacking Yunis was lured by agents of the FBI agents into international waters off the coast of Cyprus where he was apprehended and forcibly taken to the US.

The defandant moved to dismiss the indictment on the ground that under the general principles of International Law the US court lacked subject matter and personal jurisdiction over a crime committed by a non-resident alien on foreign soil and that the U.S Federal law provided no independent basis for the exercise of such jurisdiction.

He argued that the universal and passive personality principles, the only potential basis for a certain jurisdiction over extra-territorial crimes allegedly committed by him was inapplicable in the instance case. He contended that 'neither hostage taking nor aircraft piracy are heinous crimes encompassed by the universal doctrine' and further that the US did not recognize passive personality principle as a 'legitimate source of jurisdiction.'

The court held that both the universal and passive personality principles provided an appropriate basis for jurisdiction in this case. The court stated that the International community recognizes the legitimacy of the passive personality principle and explicitly approved the principle as a basis for a certain jurisdiction over hostage takers. In asserting jurisdiction the court stated, *" not only is the US acting on behalf of the world community to punish alleged offenders of crimes that threatened the very foundations of*

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world order but the United States has its own interest in protecting its nationals."

The universality principle

The principle determines jurisdiction by reference to the custody committing the offence. Under this principle each and every state has jurisdiction to try and punish perpetrators of crimes against humanity for the international community as a whole. An offence subject to the universality principle is one which comes under the jurisdiction of all states wherever it is permitted. In as much as the offence is contrary to the interest of the international community it is treated as a ***Delicti Jure Gentium*** and all states are entitled to apprehend and punish the offenders. The power of a state to punish crimes wherever and by rules of whosoever has committed is without the requirement of information to territory, nationality or special state interest. States have granted the liberty to prosecute persons under their national laws for acts which proscribed by IL. The exercise of jurisdiction is justified by the universal condemnation of the acts and general interest in cooperation to suppress them as a matter of customary IL or multilateral international agreements.

Universal jurisdiction depends solely on the nature of the offence committed and is principally exercised by the state which has apprehended the alleged offender.

The state may prescribe and prosecute offences provided in a number of treaties on matters of general international concerns such as drug trafficking, hijacking and sabotage of aircraft, apartheid, attacks on diplomats, taking of hostages and torture besides customary international crimes such as piracy jure gentium, slavery, genocide and war crimes.

The state which prosecutes and punishes a pirate or a war criminal under its national law acts solely as the organ and agent of the international community and meets out punishment to the offender for his breach of the prohibition imposed by IL. Accordingly in ***Eichmann v AG of Israel 1962*** vol 36 ILR pg 277, the Supreme Court of Israel held that in punishing war crimes pursuant in the universality principle the state was "***acting in the***

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capacity of guardian of IL and agent for its enforcement." Adolph Eichmann a Nazi functionary of German or Austrian nationality who was concerned in the Final solution of large numbers of Jewish persons of German, polish and other nationalities prior to the 1945 defeat of Germany escaped to Argentina. There he was tracked down by Israeli secret agents by order of the then PM David Ben-Gurion ceased and abducted to Israel. He was charged under the Nazi collaborators (Punishment Law of 1950 with 15 counts of war crimes and crimes against humanity. It was alleged on his behalf that the exercise of jurisdiction by the court of Israel in respect of the crime committed outside Israel and before Israel had been created against persons who were not Israeli citizens was contrary to IL as was the prosecution consequent upon an international abduction.

The court found them guilty and his appeal was dismissed by the Supreme Court. The Supreme Court stated, '… *the crimes of which the appellant was convicted…have always borne the stance of International crimes burned by IL and entailing individual criminal liability. It is the particular universal character of these crimes that vests in each state the power to try and punish any who assisted in their commission."*

Besides piracy and war crimes states have jurisdiction to define and prescribe punishment for slavery attacks on and hijacking of aircraft and genocide. These and other International crimes have been addressed in a number of multilateral treaties that provide for unilateral jurisdiction as a manifestation of international concern.

The governing principle in these cases if ***aut punire aut dedere*** the offenders must be punished by the state on whose territory they are found or must be extradited to the state which is competent and desirous of exercising jurisdiction over them.

Enforcement jurisdiction

The IL governing the exercise of enforcement jurisdiction is based on one basic principle namely enforcement jurisdiction can be exercised in the territory of another state only with the consent of that state. The

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enforcement jurisdiction is in principle limited to the territory of the state concerned, examples or cases of consent include agreements whereby the law enforcement agents of one state may enter the territorial waters of another state to pursue and arrest vessels suspected of being engaged in elicit drugs, psychotropic substances and or piracy.
A special application of this principle is that the courts of one state will not enforce the public laws of another state such as criminal laws or taxation laws that manifest the state sovereignty over its territory.

Illegally objective custody

The exercise of jurisdiction over persons apprehended over IL poses difficult questions. There is no consensus among jurists and state practice is disparate. The forceful abduction of Eichmann in violation of Argentina territorial integrity was not a ban of the exercise of jurisdiction by the Israeli court.
The tribunal does not normally concern itself to the means by which the case is brought before it.
Unlawful arrest does not affect the court's jurisdiction to hear a case.
Accordingly a state will in the absence of protest in the other states try alleged offenders brought before its courts by irregular means. However the state whose sovereignty has been violated may initiate an international claim against the offending state. In the Eichmann case, Argentina did not however demand the return of Eichmann although it complained to the UN Security council and by adjoined communiqué issues on the 3rd August 1960 Argentina and Israel resolved *"to regard as closed incidence which arose out of the action taken by citizens of Israel, which infringed the fundamental rights of the state of Argentina."*
In the case of ***US v Alvarez-Machain*** (1992)112
The US Supreme Court held that the American court had jurisdiction to try the accused abducted from Mexico as long as the manner in which he was brought before the court in question did not violate the terms of any treaty between the states concerned.

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In 1985 a US special agent in the Drug Enforcement Administration was abducted by drug dealers in Mexico and afterwards tortured and murdered. Apart from the fact that the victim of the crime was an American citizen all the other aspects of the offence took place in Mexico. US special agent ceased Alvarez a medical doctor and Mexican citizen in Mexico and flew him to the US by private aircraft. There he was arrested and charged with having participated in the torture and killing of the US special agent. At that time the US and Mexico had an extradition agreement between them to facilitate the extradition of suspected criminals from one country to the other. The Mexican Government protested to the US government alleging that the abduction violated the terms of the extradition agreement as well as general principles of customary IL namely the tradition of principles for founding jurisdiction. At his arraignment in a District court the accused argued that he US court lacked personal jurisdiction inter alia because his abduction has been carried out without the consent of the American government as required under the treaty. He argued that the violation of the international obligation contained in that agreement by the government from conducting criminal prosecution. The district court upheld these arguments and ordered the release repatriation of the accused. The US government appealed this decision which again found in favor of the accused. In response the authorities made an appeal to the Supreme Court. The supreme held that the American court had jurisdiction to try the accused as long as the manner in which he was brought before the court in question did not violate any of the terms of any treaty in which the state was involved. The court analyzed the extradition agreement and found that since there was no express provision of abduction but only an implied one. The agreement did not bar US government from carrying out the criminal prosecution.

In contrast, in ***Ex-parte Bennett (1993) 3 ALL ER 138***. The UK house of lords held that when a defendant presence before the court had been procured by abuse of process the UK courts should decline to exercise jurisdiction unless the UK authorities participated in or procured or connived in the apprehension in violation of IL.

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Exparte Westfallen (1998) 4 all ER 210

CONFLICTS OF JURISDICTION

In practice the various principles of exercise of jurisdiction do conflict and overlap. For instance a state may on the basis of nationality principle reach its national abroad but the conducts of the nationals of that state may on the basis of the territorial principle also may be within the jurisdiction of the foreign state in which these nationals act.

Similarly, one state may have jurisdiction under subjective territorial principle and another under the objective territorial or the protective principle. In these circumstances a criminal may be tried and punished by several different countries. These overlaps lead to complex issues whose resolution depends more upon the corporation between the states involved as IL is silent on the point whether conviction or acquittal in a foreign country is a bar to a subsequent prosecution in another country.

The laws of the state involved may reach different results in a meeting prohibiting or even requiring a certain act. In some cases the resolution depends on International agreements that limit absolute assertion of jurisdiction. The case of State Corporation in resolving the overlaps is illustrated by the sample of a foreign ship which enters support voluntarily not as a consequence of distress. In such a case foreign ship owes temporary allegiance to the territorial sovereign and a case of jurisdictional overlap arises because both the flag state and the local sovereign may exercise jurisdiction in respect of conduct that violated their respective laws. As the territorial state the local sovereign is entitled to exercise jurisdiction over a foreign ship in its port, persons and goods on board the ship.

In criminal matters it is not usual for the local authorities to intervene and enforce unless their assistance is requested by or on behalf of the local representative of the flag state or those in control of the ship or a person directly concerned or unless the peace and good order of the court is or is likely to be affected.

Accordingly in ***the Wildehus case 1887 120 US***

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The US Supreme Court took the view that a murder by one crew off another of foreigners committed on board a foreign ship docked in a local port ipso facto disturbed the public peace on shore and therefore justified the exercise of jurisdiction by the local authorities.

Wildehus a Belgium national killed another Belgium national below the deck of Belgium vessel of which there were both crew members which was at the time of the killing moored to the dock in Jersey City. The police arrested Wildehus and charged him with the killing. They also held two other crew members as witnesses to the killing. The Belgium counsel applied for a writ of habeas corpus to obtain the release of Wildehus. He relied upon the treaty of March 9th 1880 between Belgium and the US Article IX whereof provided inter alia that the respective authorities would have exclusive charge of the internal order of the merchant vessels of their nation and that the local authorities would not interfere except when the disorder that had arisen was of such a nature as to disturb the tranquility and public order on shore or in the port or when a person of the country or not belonging to the crew would be concerned therein. The circuit court refused the application. On appeal to the supreme court habeas corpus was denied the court stating, "…*with crimes which from their gravity awaken public interest as soon as they become known,…enquiry is certain to be instituted at once to ascertain why and how the thing was done, and the popular excitement rises or falls as the news spread and the facts become known. It is not alone for the publicity of the act or the noise and clamor which attains it that fixes the nature of the crime but the act itself. If that is of a character to awaken public interest when it becomes known, it is a 'disorder' the nature of which is to affect the community at large and consequently to invoke the power of the local government whose people had been disturbed by what was done. The very nature of such an act is to disturb the quiet of a peaceful community, and to create, in the language of the treaty, a 'disorder' which will disturb tranquility and public order on shore or in the port' the principle which governs the whole matter is this: Disorders which disturb only the peace of the ship or those on board are to be dealt with exclusively by the sovereignty*

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of the home of the ship, but those which disturb the public peace may be suppressed, and , if need be, the offenders punished by proper authorities of the local jurisdiction."

The court concluded by stating that it must be considered by all that felonious homicide was a subject for local jurisdiction and the subject that if proper authority were proceeding with a case in a regular way the council had no right to interfere to prevent it.

While most states are fully entitled to exercise jurisdiction over foreign vessels with their internal waters they rarely do so. Indeed most states abide to the French modification that is to say most states vest on committee and reciprocity declined to exercise their jurisdiction over foreign vessels unless activities there on threaten the peace of the port or the public peace. This is the modification that was adapted by the US supreme court in its summation in of the ***Wildehus case 1887 120 US*** case. Belgium as the flag state had in the circumstances secondary jurisdiction over the vessel while in an America port.

Although the universality principle gives jurisdiction to all states in cases of areal hijacking the 1963 Tokyo Convention on Offences and Certain other acts committed on Board Aircraft as well as the 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft gives states concurrent jurisdiction to try and punish the offenders. Although the state of registration of the aircraft is competent to exercise jurisdiction over offences and acts committed on board of the aircraft it no longer exercises exclusive jurisdiction. Under Article 3 of the Tokyo Convention each contracting state is required to take such measures as may be necessary to establish its jurisdiction as the state of registration over offences committed on board of the aircraft. Under the provisions of the Hague Convention hijacking is considered as a continuing offence and any state where the aircraft lands, is entitled to exercise jurisdiction on the basis of the territoriality principle.

However, there are some international limits to the jurisdiction of states. Where two states have jurisdiction to prescribe and enforce rules of law and the rules they may prescribe require inconsistent conduct in the part of a

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person, each state is required by international law to consider in good faith moderating the exercise of its enforcement jurisdiction in the light of factors such as

a) The vital national interests of each of the state
b) The nature and extent of the hardship that inconsistent and enforcement actions may impose on the person
c) The extent to which the required conduct is to take place to the territory of the other state
d) The nationality of the person involved
e) The extent to which enforcement by action of either state can reasonably be expected to achieve compliance with the rules prescribed by that state.

The illustration of the extent to which IL limits the exercise of state jurisdiction is the ***Barcelona Traction Light and Power Company case.***
The company had been incorporated in Canada in 1911 to develop and operate and electric power system in Spain. In 1948 it was declared bankrupt by a Spanish court and its assets were ceased. At the time of the action 88% of the shares in the company were owned by Belgian nationals and so the Belgium government wrote this action against Spain in respect of the injury to its nationals who are shareholders resulting from the injury to the company or the allegation that the company was really a Belgium company.
The Spanish government raised four objections among them that the Belgium claim was inadmissible because the Belgium government lacked any dues standing to intervene or jurisdiction to exercise diplomatic protection on behalf of its nationals who were share-holders in a Canadian rather than Belgian company.
The court noted that decisive for the issue of the Belgium government jurisdiction to invoke diplomatic protection was the existent or absence of a right belonging to Belgium and recognized as such by IL.
While the court recognized that there are possible exceptions to the general principle in IL that Diplomatic protection of a company can only be given by that company's national state, it found that such exception was not present

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in the case where the secession of protection by the company's national states was not the result of any legal impingement. The court declined to lift the corporate veil to determine the existence of a link between the state and the corporation on the basis of control noting that the company had maintained its offices shares accounts board meetings and tax receipts in Canada for about 50 years and had disclosed from the outset of its incorporation that its activities were geared through business outside of Canada. Accordingly the court rejected Belgium claim upon the ground that Belgium had no locus standii to espouse before the court claims of alleged Belgium nationals who are share-holders in the company in as much as the company was incorporated in Canada and was in an international legal sense of Canadian nationality.

The reasoning relied on by the court may be explained as follows: the jurisdiction of a state to invoke diplomatic protection of its nationals or corporations abroad is based on nationality.

The individuals or corporations that the state seeks to protect must be its nationals.

It is only the bond of nationality that entitles the state to exercise diplomatic protection and to seek redress under IL for a wrong done to its nationals abroad.

In the case of a company the basic test is where the entity is incorporated and has its registered office. IL recognizes the general principle of municipal law that an infringement of the rights of a company does not involve liability towards the share-holders even if their interests are detrimentally affected by the infringement. The company is a distinct and separated legal person from the share-holders and the court will not look behind the corporate veil. A different principle might apply if the wrong were aimed at the direct right of the share-holders as such.

However the present case was not concerned to the infringement of the shareholders direct rights but with the alleged illegal measures taken by Spain against the company.

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EXTRADITION

Refers to the surrender of an individual accused or convicted of a crime by the state within whose territory he is found (the asylum state) to the forum state (requisitioning state).

There is no right to extradition apart from the treaty under international law. Similarly there is no duty to surrender an alleged fugitive to the forum state except under treaty.

The treaty may be bi lateral or multi- lateral. Most bi-lateral treaties contain a list of offences for which a fugitive may be extradited.

Multi-lateral on the other hand stipulates that the act for which extradition is sought must be a crime under both jurisdictions punishable by certain minimum penalty.

Indeed most multi-lateral treaties codify ***"the double criminality rule***" of customary IL. This rule provides that extradition is only granted in respect of a deed which is a crime according to law of asylum and requisition state.

Besides the courts of the asylum state don't have to determine whether the defendant committed a crime for which extradition is sought.

The courts merely review the evidence to determine if a prima facie case exists for which the defendant must answer at a trial in the requisitioning state.

A related principle is that of specialty i.e. a person that surrendered may be tried and punished only for the offence for which extradition had been sought and granted.

Extradition shall not take place if the prosecution of the fugitive is barred by statutory limitation in either state or where the fugitive are accused of political movement or in the course of a struggle to control the government of a state.

Most extradition treaties also exempt nationals of asylum state from extradition on basis that individuals shouldn't be withdrawn from jurisdiction

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of their own acts. Such persons must be prosecuted by states where they are nationals.

H. STATE IMMUNITY

Introduction

Under classical IL foreign states and foreign diplomatic agents have been the classical exceptions to the exercise of jurisdiction by states on basis of the territoriality principle. A state can't exercise its jurisdiction to apply its laws to these two entities. In IL state immunity is the legal rules and principles determining the conditions under which a foreign state may claim freedom from the jurisdiction of another state.

In practice, problems of state immunity arise at two different levels:

i) Immunity of a foreign state from jurisdiction of municipal courts of another state to adjudicate a claim against arising from e.g. a contract or tort

ii) The exemption of a foreign state from enforcement measures against its property especially to execute a municipal court decision.

The principle of state immunity is a of the principle IL. This has the consequence that should a state fail to apply it in an appropriate case, it will be responsible under international law.

However, the actual circumstances in which the immunity is to be granted are usually settled by the ML of each state.

States and their governments are granted immunity from the territorial jurisdiction of other states on the basis of policy consideration.

The 1st reason is found in the doctrine of sovereign equality expressed in the maxim ***Par in parem non habet imperium*** i.e. equals have no jurisdiction over one another concerned with the status of legal equality attached to independent sovereign.

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States being independent legal persons of equal standing cannot have their disputes settled in the courts of one of them.
This can only be done with the consent of the sovereign state through waiving its immunity. In this case the consent given upholds the state of equality.
The 2nd reason is that it would as a corollary offend the dignity of a sovereign state, to submit to the jurisdiction of another by having its act performed in its sovereign capacity subjected to the laws of another state. This is notwithstanding the fact that such an act by a foreign sovereign state was a breach of the ML of the forum state. State immunity is a procedural rule going to the jurisdiction of the national court; it does not go to the substantive law.

EVOLUTION OF THE DOCTRINE OF STATE IMMUNITY

Originally under customary IL the doctrine of absolute state immunity applied until the end of the 19th century covering all areas of state activities and recognizing very narrow exceptions.
For a long time most common law countries have held the rule of absolute state immunity which enable foreign states to enjoy immunity in respect of all their activities including commercial ones the doctrine of absolute state immunity was endorsed and explained by the Chief Justice Marshal in ***the Scooner Exchange vs Mc Faddon*** where the court found that the French vessel in question subject of the dispute was exempt from the US jurisdiction. Two US District Courts of Pennsylvania claiming they were entitled to possession of the vessel. They alleged that the vessel had been seized in 1810 on the high seas by persons acting on behalf of Napoleon as emperor of France and that without any French Prize Court Adjudication the vessel had now been brought to Philadelphia court. No appearance was made but the US Attorney General appeared at the instance of the US government and filed a suggestion setting forth that the vessel was a public vessel of France which had come into court in Distress and asking that the Libel be dismissed. The district court dismissed the libel, the circuit court

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reversed allowing the libel, and the US attorney appealed to the Supreme Court. But the Supreme Court in reversing the judgment of the circuit and affirming the judgment of the district court stated. *"The jurisdiction of the nation within its territory is necessary exclusive and absolute. It is susceptible of no limitation not imposed by itself…this full and absolute territorial jurisdiction being aligned to the attribute of every sovereign, and being incapable of conferring extra territorial power, would not seem to contemplate foreign sovereigns nor their sovereign rights as its objects. One sovereign being in no respect amenable to another, and being bound by obligations of the highest character not to degrade dignity of his nation, by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an expressed license or in the confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated, are reserved by implication, and will be extended to him.…This perfect equality and absolute independence of sovereign and these common interests inhaling them to mutual intercourse and an interchange of good offices with each other, have given rise to a class of cases in which every sovereign is understood to waive the exercise of a part of that complete exclusive territorial jurisdiction which has been stated to be the attribute of every nation."*

Accordingly the Supreme Court held that the Schooner exchange was exempt from the jurisdiction of the US stating that subjecting her to the laws of US would affect the power and dignity of the French sovereign.

The need for and rationale of absolute immunity began to be questioned towards the end of the 19th century when states began to engage in trade and other commercial functions not wholly reserved for state.

Why if two identical contracts were made one with a private person and another with his government the former could be sued on his contract and the later (the government) would not?

The problems became more acute with the widespread contracting for trade by in especially the communist state and their trading organizations which concluded commercial dealings with foreign individuals and companies.

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These foreign individuals and companies have no remedies under the international law if disputes arose because a foreign state or its organization could rely on the concept of sovereign immunity and claim immunity from the judicial process of the local courts. Absolute immunity seemed inappropriate, nonrealistic phenomenon in the lights of the requirements of the contemporary commercial world and notion of stability, fairness and equity of the market place.

The need to separate state actions from actions that a private person would perform became apparent. Absolute immunity had been based on status. It was enough for a potential defendant to show that it was a state or a state organization and that it was being impleaded directly or indirectly for it to be accorded immunity.

From the 1950s onwards several states began to move towards the ***restrictive or qualified doctrine of state immunity*** following the early examples of Italy and Belgium which had adopted restrictive state immunity doctrine since the turn of the century.

For instance under the auspices of the Council of Europe, European states confirmed these restrictive approach to the concept of state immunity in 1972 by adopting the European Convention on the state Immunity. The states indicated that they would no longer emphasize the ***status*** of the defendant but rather the ***nature*** of the activity or transaction in which it had been engaged.

Jane- private individual – no immunity

KQ- Private Corporation- accorded immunity

A distinction was to be made between ***acta jure imperii*** i.e. acts in public authority in respect of which there would still be impunity and ***acta jure gestionis*** i.e. commercial or private acts in respect of which no immunity would lie.

Status remained important only to put a defendant within the category of persons who potentially could claim immunity. The actual entitlement so to claim would now depend upon the activity or transaction in question. By the

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1970s several countries had adopted the restrictive approach of state immunity through both legislative and judicial actions.

For instance in the case of ***Alfred Dunhill of London Inc. v Republic of Cuba*** the US Supreme Court applied the restrictive theory of sovereign immunity as the basis for refusal to recognize the repudiation of commercial obligations of a state instrumentality as a state transaction.
Immunity was to be granted to the respect to causes of action arising out of foreign states public or governmental actions and not with respect to those arising out of its commercial or proprietary action because in the later capacities the foreign states exercise only those powers that can only be exercised by private individuals.

Facts

In 1960 the Cuban Government confiscated businesses and assets of five leading manufacturers of Havana Cigars. These companies were organized under Cuban Law and were owned by Cuban Nationals. The companies sold large quantities of cigars to foreign customers in several countries including the US where the three principle importers were the petitioner Albert Dunhill, Saus & Co, and Faber Co & Gregg Inc. The Cuban Government named Interventors to take possession and operate business of the seized Cuban concerns. The Interventors continued to ship cigars to foreign customers including those to the US. The former business owners most of whom had fled to the US brought various actions against the three American Importers for trade mark infringement and for the purchased price of any cigars that have been shipped to importers from the ceased Cuban plants and that US trademarks claimed by the foreign owners to be their property.
The Cuban interceptors and the Republic of Cuba were allowed to intervene in these actions. Both the former owners and the interventors claimed some $700,000 allegedly due from the three importers for post intervention shipment.

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As per the date of intervention the three importers owed a total of $477,600 for cigars shipped prior to intervention. The sum had however been paid to the interventors subsequent to intervention on the assumption that the interventors were entitled to collect accounts receivable on the intervened business.

Accounts however later showed that the petitioner had paid $148,600 on account of the pre intervention payments made under error. The petitioner therefore sought to set off the sum it owed for post intervention shipment against what was due and recoverable from the interventors.

The issue before the court was whether failure of the respondents to return to the petitioner balance of the sum due was an act of the government of Cuba precluding an affirmative judgment against the respondent, the court held that it was not a public act in the state of Cuba but rather a commercial act of which there was no entitlement to the state immunity.

Although the US abandoned the absolute immunity rule and adopted the qualified immunity rule in1952 it was not until 1976 that the congress enacted a Foreign Sovereign Immunity Act.

Section 1603 (d) of the SIV provides that the character of an activity shall be determined in its nature rather than by reference to its purpose.

Sec 1605 FSIV provides that a Foreign state shall not be immune from the jurisdiction of the court of US in any case in which the action is based on a commercial activity carried on in US by the foreign state or upon an act performed in the US in connection with a commercial activity in the foreign state elsewhere or upon an act outside the territory of the US in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the US.

In 1978, the UK enacted the State Immunity Act to implement the provisions of the 1972 European Convention on the State Immunity. The act adopted the restrictive approach to state immunity.

Section 1 (1) of the act provides that a foreign state is immune from the jurisdiction of the court of the UK in respect of specific circumstances provided for under the act.

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Section 3 (1) then provides that a foreign state is not immune as respect proceedings relating to

a) A commercial transaction entered into by the state or
b) An obligation of the state which by virtue of a contract (whether a commercial transaction or not) falls to be performed wholly or partly in the UK.

Section 3 (3) defines ***"commercial transaction***" as follows namely

a) Any contract for the supply of goods or services
b) Any loan or other transaction for the provision of finance and any guarantee or indemnity in respect of any such transaction or of any other financial obligation
c) Any other transaction or activity (whether of commercial, industrial, financial, professional or other similar character) into which a state enters or in which it engages otherwise than in the exercise of sovereign authority.

THE CURRENT POSITION REGARDING STATE IMMUNITY

Whereas there is a growing trend in state practice to extend restrictive immunity to foreign states the key problem is how one distinguishes from an ***actus jure imperii*** from an ***actus jure gestionis.***

It is not always self-evident into which category any specific transaction in which a state is involved falls. A contract for sale and purchase is generally regarded as a commercial transaction an ***actus jure gestionis***.

What about if it is a contract for the sale and purchase of military hardware? Is it an exercise of sovereign authority a transaction in which a private individual cannot be possibly involved? It used to be thought that assistance would be derived in this task by looking at the ***purpose*** for which a contract was being entered into.

Accordingly in the above example the answer would be given by noting that the object of the contract was a high state matter, a matter of sovereign authority. However, there has come to be a general rejection of reliance on

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the ***purpose*** as being incompatible to the requirement with focus on the ***nature*** of the transaction.

For instance, in ***The Trendtex Trading Corporation ltd, v the Central Bank of Nigeria***, LD Denning MR said that the purpose of a contract is irrelevant to its destination as attracting absolute or qualified immunity.

In 1975 the CBK of Nigeria issued a letter of credit in favour of the plaintiffs, a Swiss Co. for the price of cement to be sold by the plaintiffs to an English Co. which had secured a contract with the Nigerian Government to supply cement for the construction of an army barracks at Abuja. When under instruction from the Nigerian Government, the Central bank refused to honor the letter of credit and to pay for charges incurred by delay at the port of delivery, the plaintiffs brought an ***action in personam*** against the bank in the English HC. The bank successfully claimed state immunity. The plaintiffs appealed to the CA. It stated, "In concurrent with the other two judges in the application of the doctrine of restrictive immunity and so allowing the appeal, LD Denning said, "*If the government department goes into different market places of the world and buys goods of cement, as a commercial transaction, the government department should be subject to all the rules of the market place. The seller is not concerned with the purpose in which the purchase intends to put the goods."*

In the premises, in determining ***the distinction between actus jure imperii and actus jure gestionis*** one should refer to the nature of the state transaction of the resulting legal relationships and not to the motive or purposes of the activity of the transaction. In order to with draw its action from the sphere of ***actus jure gestionis***, a state must be able to point to some act clearly done within its sovereign authority as an ***actus jure imperii.***

Given the difficulty of making the distinction between the ***actus jure imperii*** and ***actus jure gestionis*** there is a recent trend in state practice to turn towards the taste of whether an act is one may be performed by any private person or only by a sovereign.

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The subject of state immunity has been addressed by the UN. In 2004 the UN adopted the convention on the jurisdiction immunity of states and their property which applies to the immunity of a state and its property by national courts.

Under article 5 a state enjoys immunity in respect of its self and its property from the jurisdiction of another. However under article 10 if a state engages in a commercial transaction with a foreign t national or political person and by virtue of the applicable rules to the practice international law, differences relating to the commercial jurisdiction of another state the state cannot invoke immunity from that jurisdiction in a proceeding arising out of that commercial transaction. This provision does not apply either in the case of a commercial transaction between states or if the parties to the commercial transaction are expressly agreed otherwise.

Further a state enterprise or other entity established by a state which has an independent legal personality and is capable of suing and being sued and acquiring or owning or disposing of property including property which it has been authorized by the state to operate or manage shall not be entitled to immunity if it is involved in a proceeding which relates to a commercial transaction. For purposes of the convetion a commercial transaction means

1) Any commercial contract of the sale of goods or supply of services
2) Any contract for a loan or other transaction of a financial nature including any obligation of guarantee or of indemnity, in respect of any such loan or transaction.
3) Any other contract of transaction of a commercial industrial, trading or professional nature but not including a contract of employment of persons. Articles 11-15 of the convention exclude immunity in cases concerning employment contracts, personal injury or property damage, property claims, intellectual or industrial property and participation in companies. Under the convention ships owned or operated by state for non-commercial purposes enjoy state immunity.

ACT OF STATE DOCTRINE

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Distinction between acts of states and states immunity (exam)

Closely related in the practice of some states with the principles of state immunity is the act of state doctrine. Under this doctrine, a state's legislative, judicial or executive act having force of law within that states territory are not subject to judicial enquiry by the courts of another state. In other words the act cannot be challenged in the courts of other states even if they are contrary to IL.

UG is a sovereign state under prescriptive jurisdiction, adjudicative jurisdiction and enforcement of executive jurisdiction. When in ex of its prescriptive jurisdiction and enacts a legislation and no foreign court can intervene with that act of parliament. One can only intervene if a foreign state suffers injury at the expense of implementing that law. Kenya cannot intervene at any point. The president of UG has all the authority to ensure UG enforces its law. Kenya can practice the right of diplomatic protection over her citizens of take the matter to the ICJ. If one is aggrieved one should pursue the remedies available up to the Supreme Court in UG. One cannot take laws of one country and have them reviewed with another country. These are laws pursuant within that state only. The civil procedure act on section 9 was contrary to PIL before amendment as Kenya cannot review other state laws. Agreements whether with individuals/ IC bind the states & not the government as the states is legal persons & not the governments.

The essence of a plea of acts of state doctrine is that an issue is non-justiciable i.e. the Municipal court has no competence to assert jurisdiction at all. The point here is that the substantive issue is of such a nature that it cannot be the subject of judicial proceedings before the national court. The act of state doctrine is a bar to the assumptions of jurisdiction because of the subject matter of the litigation.

The rule is founded against the principle of state sovereignty and non-interference in internal affairs of other states and the presumption being a state is better able to determine the validity of its own acts vis- a vis its own laws other than the courts of another states. In American courts the doctrine is viewed more as a matter of constitutional law rather than of IL with courts

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generally exercising judicial restraint vis-a vis the executive in the matters of foreign policy. The doctrine was first enunciated in the case of ***Underhill v Hernandez*** where the US Supreme Court refused to award damages to an American citizen for his detention by the Venezuelan armed forces on the ground that the court of one country could not sit in judgment on the act of the government of another done within its own territory. Every sovereign state was bound to respect the independence of every other sovereign state. Instead of looking to the limits of the jurisdiction of national courts as does the state of immunity doctrine, the act of state doctrine is fundamentally concerned with the prescriptive jurisdiction of foreign states.

Instead of operating as a jurisdictional principle it functions rather like a choice of law rule, the result is a courts acceptance of the legitimacy of the foreign states territorial prescriptions and tested either by international or domestic standards.

State immunity on the other hand is where a national court would have had jurisdiction over the subject matter of the dispute but is not permitted to exercise it in a particular case because one of the parties to the dispute is a foreign state or government department.

State immunity is based in the 1st instance on the ***identity*** of the litigant i.e. it is an ***issue ratione personae*** whereas act of state and hence non justifiability is based on the ***substance*** of the disputes i.e. it is an issue ***ratione materiae***.

The act of state doctrine may be derived upon by private as well as public litigants. The doctrine rests upon considerations of International Comity and expedience as well. To permit the validity of public acts of one sovereign state to be re-examined and perhaps condemned by the court of another state would very certainly imperil the amicable relations between governments and vex (irritate/annoy) the peace of nations. Despite their doctrinal differences the act of state doctrine and the rules of state immunity are functionally similar in so far as both differ to foreign sovereigns and compel claimants to appeal to foreign courts or to submit to diplomacy to protect their interests.

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However, there is no immunity from International responsibility where these exists under general or treaty under IL. In other words no plea of state immunity or acts of states can be made or entertained before an international tribunal.

I. DIPLOMATIC & CONSULAR IMMUNITY

Introduction

Foreign relations of states are conducted by state officials or agents through the institution of diplomatic envoys. Today the institution of diplomatic representation involves the establishment and maintenance of permanent missions (embassies or high commissions in most countries or as in the case of the UN and its specialized agencies permanent representations.

The difference between an embassy and High commission?

Embassies are for non-common wealth countries and High Commissions are for common wealth countries.

The law relating to diplomatic relations is now codified into diplomatic relations in the 1961 Vienna Convention on Diplomatic relations which entered into force on 24th April 1964. The convention is composed of both declaratory and constitutive provisions. The former (declaratory provisions) are those that codify pre-existing rules of customary international law which developed as a result of state practice dating back to the days of the Greek City states. To emphasize this point the preamble to the convention provides that where the convention does not cover a particular issue, result is to be heard to rules of customary IL which are as old as the school of IL system itself.

Diplomatic relations are carried out by diplomatic envoys that are sent as representatives to the receding state.

Article 14 of the convention divides these representatives into 3 classes:

1) *Ambassadors (high commissioners) or nuncios accredited to the heads of state and other heads of mission of equivalent rank.*
2) *Envoys, ministers and inter nuncios accredited to head of states.*
3) *Charge' d'affairesi accredited to ministers of foreign affairs.*

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It is for the states concerned to agree upon the class to which the heads of their respective missions shall be assigned ***(article 15***)
Although there is no difference between heads of mission by a reason to their class there is an exception as regards precedents and etiquettes. Ambassadors are considered to be personal representatives of their heads of states and for this reasons enjoy special honors. Their chief privilege is that of negotiating with heads of states personally and to that extent can at all times ask for audience from the head of states to whom they are accredited. They claim the title of ***'Excellency'*** by right.
The 2nd class ministers and envoys accredited to head of states into which also belongs the papal inter nuncios are not considered to be personal representatives of the heads of the sates. Therefore, they do not enjoy all the special honors of ambassadors have no privilege of treating the head of states personally and cannot at all times ask for audience with him and receive the title of Excellency only by courtesy and not as of rights.
The 3rd class differs chiefly in one point than the others in that they are accredited from foreign minister to foreign minister unlike the others who are accredited from head of state to head of state. They therefore do not enjoy so many honors as other diplomatic envoys.

ESTABLISHMENT OF DIPLOMATIC NATIONS

Under ***article 2*** of Vienna convention the establishment of diplomatic relations and missions depends on mutual consent of the states concerned. International law has no rules as regards qualifications of individuals whom a state can appoint as heads of diplomatic missions, states being competent to act according to discretion while some states have laws that lay down details requirement as to the knowledge and training which candidates to a permanent diplomatic post must possess.
The appointment is usually announced to the state in which the individual representative is to be accredited in official papers known as letters of credence (***Lettre de creadence***) which are remitted to the receiving states.

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These may sometimes be accompanied by documents of full powers relating to particular negotiations that the representative may be involved in.
Under ***article 4*** of the convention the receiving states may refuse to receive diplomatic envoys either

1) generally or in respect of a particular mission
2) Because a particular envoy is personally accepted.

The state need not specify the objections or even justify them. Once the receiving state gives its assent (***agre'ment***) the accrediting state then proceeds with the formal appointment.
Under ***article 9*** of the convention at any time receiving states may without obligation to explain its decision declare an envoy a persona non grata and require that he or she be recalled or his or her functions be terminated. As a rule a state appoints different individuals as heads of diplomatic missions to different states. However, a state may appoint the same person as head of its diplomatic missions in more than one state unless there is any express objection by any of the receiving states (***article 5***)
Also two or more states may accredit the same person as head of their diplomatic missions to another state unless that state rejects (***article 6)***
The recognition of governments of states is a ***conditio sine qua non*** of the establishment of diplomatic relations although the later is not necessarily a consequence of recognition.
Neither does withdrawal or non-establishment of diplomatic relations mean non recognition.
There are several states we recognize but cannot afford to have diplomatic relations with them.

FUNCTIONS OF DIPLOMATIC ENVOYS

The essence of diplomatic relations is that state A licenses state B representatives to carry out political and other functions in state As territory.
Article 3 of the Vienna convention provides for functions of diplomatic envoys. A head of a permanent diplomatic mission such as Russia represents his home states in the totality of its international relations of the receiving

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state. He is the mouth piece of the head of its state and its foreign minister for communications to be made to the receiving state.
He likes wise receives communications from the later and reports them to his home state. His task is further to ascertain by all lawful means, conditions and developments in the receiving states and report therefore to his governments.
A 3rd task is the protection in the receiving state of the interests of his home state and its nationals within the limits permitted by the IL. It is however for the laws regulations and practices of its home states and not IL to prescribe the extent of the envoys obligation to afford protection to its compatriot.
Besides these regular functions a diplomatic envoy may be charged with other and more miscellaneous functions such as the promotion of friendly relations between his own state and the receiving state and the development of economic cultural and scientific relations. The carrying out of these functions is facilitated by the concept of diplomatic immunities and privileges from the jurisdiction of the receiving states. These immunities and privileges are not rights given to diplomatic envoys by IL but by the law of the receiving states in compliance with an international right belonging to their home states. They are rights of the envoys home states rather than of the envoy himself and are granted to envoys as representatives of their states because they could not exercise their functions properly unless they enjoyed such privileges. In other words the basis of the diplomatic envoys immunities and privileges is functional. Were the diplomatic envoys liable to ordinary legal and political interference, and accordingly more or less dependent on the good will of the receiving state they might be influenced by personal consideration of safety and comfort to such a degree that would materially compromise their representation and functions. Hence, their immunities and privileges are indispensible attributes of the diplomatic functions. Indeed the preamble to the Vienna convention says that the purposes of such immunity and principle is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing states.

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POSITIONS OF DIPLOMATIC ENVOYS AND MISSIONS

There are two popular myths about diplomatic envoys and their immunities which must be de banked.

1) The diplomatic mission premises are foreign territories
2) The diplomatic envoy can incur no legal liability in the receiving state

The 1st myth is confusion between territory or property and jurisdiction over it and it is important to clarify it because it has sometimes arisen over airships and aircrafts.

The building occupied by a foreign diplomatic mission and the land on which it stands are part of the territory of the receding state, and therefore under the jurisdiction of that state although they may be the property of the sending state. However, the members of the mission and their activities in the mission premises are primarily under the control and jurisdiction for the sending states. IL avoids conflicts of jurisdiction between the sending states and the receiving states by laying down rules to cover the entire field of diplomatic relations. Accordingly, the premises of the mission are inviolable. This inviolability has two distinct aspects

i) Immunity from any form of law enforcement by the authorities of the receiving state such as entry, search requisition or even service of legal documents
ii) The special duty “to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the keys of the mission or impairment of its dignity.” (***article 22***)

The degree of the protection provided must be proportionate to the threat. Most charges of breach of duty concerned failure to prevent attack or prevent intrusion following special request from the embassy.

The inviolability of diplomatic premises was firmly held by the ICJ in the case concerning ***US diplomatic v Consular Staff in Tehran (1980 ICJ report 1993)***

On November 4th 1979 the US embassy in Teharan was ceased by several hundred Iranian students and other demonstrators who also occupied the US

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consulate in Tabriz and Shirat. They did so in protest on the admission of the deposed Shah of Iran for medical treatment. They ceased diplomats, consults and marine personnel there and held them hostage. The US diplomatic and consular staff were physically threatened and refused all communications with either US officials or relatives. The Iranian authorities took no steps to stop the students or demonstrators and to restore the embassy or consulate to US control. On November 22nd 1979, several hundred demonstrators converged on the embassy in Teharan and the Iranian did not do anything to assist the hostages. Some of the hostages were released while others were removed to an unknown location outside the premises of the embassy. The US instituted proceedings against Iran in the international court of justice alleging repeated multiple breaches of the rules of customary and treaty international law and in particular prohibition of agents of the receiving state entering diplomatic premises without consent and prohibition of arrest of diplomatic agents on their persons freedom or dignity, the obligation to allow the performance of their functions and the obligation to respect the absolute inviolability of consular archives and documents. The court held Iran to have been in breach of its international obligations to take steps to prevent the attack from taking place and although the demonstrators and occupants were held to have been in the first place without official status such as to make their conduct imputable to Iran, their status later changed so as to make them agents of the state for whose acts Iran was internationally responsible. As the principle of the inviolability of the persons of, and the premises of the diplomatic mission, the court regarded this as;' *of the very foundations of this long established regime to the evolution of which the traditions of Islam made a substantial contribution. The fundamental character of the principle of inviolability is, moreover, strongly underlined in the Article 44 and 45 of the convention 1961… even in the case of armed conflict or in the case of a breach of diplomatic relations those provisions require that both the inviolability that the members of the diplomatic mission and the premises, property and archives of the mission, must be respected by the receiving state. '*

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The status of mission premises depends on their being used for the purposes of the missions.

Where therefore the buildings cease to be used for the purposes of the mission the inviolability lapses and the receding state is bound only by the lesser obligation to "*respect and protect*" them under ***Article 45 of the convention***.

Kenya broke diplomatic relations with Libya in 1950. Libyan embassy was protected until Kenya resumed relations with Libya

This inviolability does not however make the premises foreign territory or take them out of the reach of local law for many purposes. For instance a commercial transaction in an embassy may be governed by the local law marriages may be celebrated there only if conditions laid down by the local law are made and a child born in it will unless his father has diplomatic status to acquire the local nationality.

Furthermore the mission may not abuse the hospitality of the receiving state by using the premises to breach the local law.

Accordingly under ***article 41 (3) of the convention*** the premises of the mission must not be used in any manner incompatible with the functions of the mission as laid down in the convention or by other rules of general IL and an offence against the local law committed on the premises is subject to any immunity of the offender punishable by local courts.

Besides, building developments by foreign governments in respect by diplomatic premises is subject to planning permission from the authorities of the receiving state.

The second bit is confusion between liability and immunity. Although ***article 49 of the convention*** provides that the person of the diplomatic envoy shall be inviolable, that he shall not be subject to any form of arrest or detention and that the receiving state shall treat him with due respect and take all appropriate steps to prevent any attack on his person freedom or dignity. The diplomatic envoy is not exempt from legal liability but only from court proceedings in the receiving state.

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He is not exempt from legal liability but is only exempt from the jurisdiction of our court. So he may when his diplomatic status ceases be punished or sued in respect of any criminal or civil liability that he has incurred. The presumption of the privileges he enjoys is that he acts and behaves in such a manner as harmonizes with the internal order of the receiving state whose laws and regulations is under a duty to respect. Hence in the case of a serious offence or misconduct the sending state may waive immunity in which case the diplomatic envoy is exposed to proceedings to which his acts have made him liable or the receiving state may declare him ***persona non grata*** and ask for his early departure from the country.

The only exception, to the liability of the envoy is in case of his official acts for which he can incur no liability under the local law and his immunity from any proceedings in respect of them is absolute and permanent.

The diplomatic envoys immunity is not immunity from legal liability but immunity from suit. As stated by Diplock LJ of the English court of appeal in **Epson V Smith**… "*It is elementary law that diplomatic immunity is not immunity from legal liability but immunity from suit.*"

Beneficiaries of diplomatic immunity

Who are the beneficiaries apart from diplomatic envoy?

The diplomatic agent is the chief beneficiary of diplomatic privileges and immunities. His inviolability both in peace time and between peoples at war is a rule which goes back more than three thousand years.

Wherever in the world relations grew up between separate peoples, actually or potentially hostile the duty to give special protection to the envoy that bore messages was observed and enforced by sanctions which were in origin religious.

During the 16th century the inviolability of the ambassador and his immunity from criminal jurisdiction became fully established as a basic rule of IL.

The personal inviolability of the diplomatic envoy now codified under ***article 29 of the convention*** comprises two aspects

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1) Immunity from any form of law enforcement action such as arrest, detention or compulsory processes such as searches or the taking of blood or other samples.
2) The duty to accord special protection by taking all appropriate steps to prevent any attack on his person freedom or dignity.

Under ***article 31 of the convention*** the immunity from criminal jurisdiction of a diplomatic agent has no exceptions reflecting the rule established by the doctrine and practice of IL that receding states have no right in any circumstances whatever to prosecute and punish diplomatic agents.

The only actions open to the receiving state are political in character namely to draw the facts to the attention of the head of the mission in the expectation of a reprimand by him or to ask for a waiver of immunity or withdrawal of the offender by the sending state or in serious cases to expressly declare him ***persona non grata*** and have his appointment terminated by the sending state.

Immunity from the civil and administrative jurisdiction of the receiving state is subject to three exceptions, namely;

1) A real action relating to private immovable property in the territory of the receiving state not held by the envoy on behalf of his state and for the purposes of the mission

Envoys who fall in love with the country therefore buy property, this is not held on behalf of his state or used for the commission, if a claim arises then the diplomatic envoy cannot plead immunity if a suit is filed.)

2) An action relating to succession in which the diplomatic envoy is involved as executor, administrator, heir or legatee as a private person.

A will as a private person, a suit arises on disinheritance.

3) An action relating to any professional or commercial activity exercised by the diplomatic envoy outside his official functions.

However, in the last exception it should be noted that ***article 42 of the convention*** bars a diplomatic envoy from practicing a professional or commercial activity or personal profit in the receiving state.

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Otherwise a diplomatic envoy cannot be sued nor arrested for debts incurred in the receiving state nor can his furniture, vehicles and the like. The envoy is also immune from execution except where judgment has been obtained under any of the three exceptions above and provided that execution does not infringe the inviolability of his person of residence.

Besides, a diplomatic agent is not under any legal obligation to give evidence as a witness.

Under ***article 37*** several members of a diplomatic mission are entitled to the immunities and privileges specified in the convention. However the convention does not define the members of the family. Although according to practice, the members of the family of a diplomatic envoy forming part of his household if not nationals of the receiving state are entitled to full diplomatic immunities and privileges

Members of the administrative and technical staff such as secretaries and telephone operators and members of their families forming part of their respective households enjoy full immunities and privileges with only two exceptions namely

1) Their civil immunity is limited to act performed in the course of their duties
2) Their right to duty free import is limited to the time of their first arrival in their receiving state.

Members of the service staff of the mission i.e. drivers, security guards, cooks and cleaners who are not nationals or permanent residence of the receiving state enjoy immunity only in respect of acts performed in the course of their official duties, exemption from use an taxes on their wages and exemptions from social security laws. Private servants of members of the mission who are not nationals of permanent residents of the receiving state are exempt from dues and taxes on their wages and on condition of cover elsewhere from social security laws.

In other respects they may enjoy immunity and privileges only to the extent admitted by the receiving state.

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Since under the convention classification of diplomatic staff is determined unilaterally by the sending state, in the absence of any object set of criteria a receiving state suspecting over a classification has no firm basis of protesting.

Article 38 of the convention limits diplomats who are nationals or permanent residents of the receiving state to immunity from jurisdiction and inviolability in both cases only for official acts performed in the exercise of their functions.

Junior staff and private servants who are nationals or permanent residence have no immunities or privileges. In general such staffs are not notified to the receiving state at all.

Waiver of immunities and privileges

Immunity from the jurisdiction of the local court does not mean that the holder of the immunity is above the law.

The obligations of municipal law remain binding on him but are only unenforceable because of his status.

Consequently the immunities and privileges can be waived there by changing an unenforceable obligation into an enforceable one.

The immunities and privileges are conferred in the interest of and belong to the sending state and can be waived only by that state. Hence ***article 32 of the convention*** provides that waiver of immunity may be made only by the sending states and must be express. The article recognizes that the purpose of immunity is to ensure the unhindered performance of the diplomatic envoy duties and that the immunity is therefore due to the state of which the envoy acts rather than the person or the envoy. The sending state may however delegate authority in the matter to its head of mission usually after consultation of the receiving state and may also give waivers in advance of particular proceedings.

The article also specifies that the institution of a suit by a person enjoying immunity shall amount to a "***waiver in the face of the court"*** i.e. it shall

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preclude a plea of immunity in any counter claims directly connected to the principal claim.

Whereas a waiver of immunity in a court of 1st instance also covers appeals from the judgments of that court it does not entail a waiver of immunity from enforcement of the judgment. A separate waiver is necessary before execution can be levied against the property of the envoy in order to satisfy an unpaid judgment date.

In most cases, a state which waives immunity from jurisdiction will be prepared to carry out an adverse judgment.

Duration of privileges and immunities

Customary IL relating to the commencement and termination of immunities and privileges has been codified in ***article 39 of the convention***

Immunities begin at the moment of entry by the diplomatic envoy into the territory of the receiving state en route to his post of if already present from the moment appropriate ministry in the receiving state is notified of his approval

When the appointment is terminated immunities and privileges cease to apply when the envoy leaves the receiving state or after a reasonable period even in the case of armed conflict.

Article 39 (2) of the convention provides that with respect to acts performed to the exercise of his functions as a member of the mission immunity continues to apply even after he is no longer entitled to it.

In other words immunity for official acts subsists indefinitely.

A plaintiff barred by immunity may sue a diplomat in his home state where he has jurisdiction or may lay the matter before his own government for his claim to be followed through diplomatic channels.

This article also provides for a reasonable period of continued immunity for members of the family in the case of a diplomatic envoys death on his post.

CONSULAR IMMUNITY

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Consuls are agents of a state in a foreign country concerned with the commercial interest of the sending state rather than diplomatic functions. Accordingly they are not diplomatic envoys. Consuls are concerned with international economic relations of states rather than their political relations. Although consular relations may also be tacitly established through the consent to establish diplomatic relations, the opposite case is not common i.e. consular relations are independent of diplomatic relations.

The establishment of consular relations as well as the establishment of the consular post on the territory of the receiving state takes place by mutual consent.

In particular the approval of the receiving state is necessary for the establishment of the seat of the consular post, its classification, the size of the consular staff and the consular district.

The number of consular posts depends on the consular needs of each particular state i.e. a state with a great no, of its citizens in another state may have a greater no. of consulates in that state than the later has on the territory of the former.

The consul must have the authority of the sending state (his commission) and the authorization of the receiving state referred to as ***an exequator*** in order to carry out his functions.

The functions, immunities and privileges of consular officers are regulated by the ***1963 Vienna Convention on Consular relations.*** (Exam)

Functions of the consular offices

Article 5 of the convention lists the functions of the consular offices. These include

- Protecting in the receiving state the interests of the sending states and of its nationals furthering the development of commercial, economic, cultural and scientific relations
- Issuing passports, visas and travel documents
- Helping and assisting nationals of the sending state
- Exercising rights of supervision and inspection of vessels and aircrafts the sending states (wildenhus) and extending the necessary assistants to

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such vessels and aircrafts and their crews including conducting investigations and settling disputes between the masters and crews or passengers.

- The attestation and legalization of signatures, examination of witnesses and administration of oath for the purpose of procuring evidence for the courts and other authorities of the sending state.

Under ***article 28 of the convention*** the receiving state must accord full facilities for the performance of the functions of the consular posts.
However, the receiving states reserves the rights at any time even before arrival and without reasons having to be given to declare the head of a consular post or other consular officer a ***persona non grata*** (article 23)
Although consuls do not enjoy the positions of the diplomatic envoys being appointed by foreign states and having received the exequatur they are publicly recognized by the receiving states as agents of the sending state although for a limited no. of tasks and for local purposes only.
The official position of consuls however does not involve direct interaction to the government of the receiving state.
They are appointed for local purposes only and have direct interactions with local authorities only. If they desire to approach the central government itself, they normally do so through their sending states diplomatic envoy to whom they are subordinate.
Accordingly their immunities and privileges are very limited. Although the receiving states must give consular officials' premises special protection only to consular immunities are generally recognized in customary IL namely

1) The inviolability of consular archives and premises
2) The immunity of consuls for their official act.

Articles 32 of the convention provide that consular premises are exempt from all taxes other than dues representing payments for specific services rendered and all articles to be used by the consular post are an exempt from customs duties.
Article 31 provides for the inviolability of consular premises. This inviolability includes 2 obligations:

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1) A special obligation to protect such premises by taking all appropriate means in order to prevent any act or violence against the consular premises or any disturbance of its peace or impairment or its dignity.
2) The duty not to enter the part of the premises used exclusively for the purpose of the work of the post except with the consent with the head of the consular post or of his designee or of the head of the sending state diplomatic mission.

A specific exception to this rule is provided for under ***paragraph 2*** under which the consent may be assumed in cases of emergency requiring prompt protective action.

In 1979, there was a fire in the Ghanaian mission in International house and the mission was not present to give consent to fight the fire.

The inviolability of consular premises is not therefore, not absolute as is the case of diplomatic premises.

Under the provisions of ***article 33*** consular archives and documents are inviolable at all times and wherever they may be. This inviolability is absolute even in the event of armed conflict.

Under ***article 35*** the official correspondence of the consular post is also inviolable and the post must be allowed freedom of communication for all official purposes.

Consular couriers and bags may be used in communicating with the government diplomatic mission or other consular posts of the sending posts. The consular bag must be neither opened nor retained and in the performance of his functions the consular courier must be protected by the receiving state. He enjoys personal inviolability and cannot be arrested or detained.

The convention makes a distinction between carrier consuls ***article 40-57*** and honorary consuls ***(articles 58-57)*** with more immunities and privileges being accorded to the former.

Under ***article 41*** carrier consular officers are not liable to arrest or detention pending trial except in the case of a grave crime and pursuant to a decision by the competent judicial authority.

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Otherwise the consular officers cannot be committed to prison or be liable to any other form of restriction of their personal freedom except in the execution of a judicial decision of final defect.

If any criminal proceedings are instituted against a consular officer he must appear before the competent authority and the proceedings must be conducted with respect due to him by reason of his official position and in a manner that will not unduly hamper the discharge of his consular functions. Where it is necessary to detain the officer the proceedings against him must be instituted with minimum delay.

Consuls are in principle subject to the jurisdiction of the receiving state except that they are not amenable to the jurisdiction of the judicial or administrative authorities of the receiving state in respect of acts performed in the exercise of consular functions.

These exceptions is due less to any personal immunity from jurisdiction possessed by the consular officers than to the immunity from the jurisdiction of the receiving state which the sending state has in respect of its act. However, even where consular officers have jurisdiction immunity they are under duty to respect the laws and regulations of the receiving state and not to interfere in the internal affairs of that state (***article 55***)

Under ***article 46*** consular officers are exempt from all obligations under the laws and regulations of the receiving state in regard to the registration of aliens and residence permits.

In respect of services rendered in the sending states members of the consular posts and members of their families forming part of their households are exempt from requirements for work permits imposed by the laws and regulations of the receiving state concerning employment of foreign labour. (article 47)

They are also exempt from social security provisions in force in the receiving state all dues and taxes except those specifically provided for all customs, duties and taxes, on articles for the official use on the consular post as well those for their personal use or that of members of their households. (Article 48 – 50)

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Under ***article 50(3)*** the personal baggage accompanying consular officers and members of their families forming part of their households are exempt from inspection and customs duties unless there is serious reason to believe that the baggage contains articles other than those for official or personal use or articles of import or export of which is prohibited by the laws and regulations of the receiving state or which are subject to its quarantine laws and regulations.

Article 53 of the convention provides that every member of the consular post enjoys his immunities and privileges from the moment he enters the receiving state on the way to his post or if already in its territory on entering upon his duties with the post.

Members of his family forming part of his household and of his private staff, commence the enjoyment of immunities and privileges either when he himself does or on entry into the receiving state or upon the becoming a member of the family of private staff whichever is the latter.

The article further provides, that when the functions of the members of the post have come to an end his immunities and privileges as well as those of the members of his family forming part of his household and of his private staff cease either upon his leaving the receiving state or after a reasonable time in which to do so whichever is the sooner.

Although diplomatic functions differ from and are governed by different rules from diplomatic relations ….the consent of the establishment of consular relations. However the severance of diplomatic relations shall not ***itso facto*** involve the severance of consular relations. Besides in contradistinction to a diplomatic mission the consular office does not come to an end through a change in the headship of the receiving state. Neither a new commission nor a new executor is therefore necessary when another king comes to the throne or a monarchy turns into a republic or in any like case. On their way to take up or return to or return from their posts consular personnel may have to pass through the territory of a third state. ***Article 54*** of the convention requires such transit states to grant consular officers or members of their families forming part of their households such immunities and

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privileges provided for in the convention as shall be required to facilitate their transit without hindering the transit of other members of the consular post or of members of their families forming part of their households. The 1986 convention on the Prevention and Punishment on Crimes against Internationally Protected Persons including Diplomatic Agents provides special immunities and privileges to among others sitting heads of states and government.

This is so even in cases of armed conflict. However the immunity enjoyed in respect of act performed in the exercise of official functions continues without any limitation of time.

N/B

- ✓ The two are established by mutual consent of the states concerned.
- ✓ Consular relations are at a lower level than diplomatic functions
- ✓ Consular functions are economic, social, cultural while diplomatic are political.
- ✓ A diplomatic envoy is a personal representative of the head of the sending state to the head of the receiving state and that's why when there is a change in the head of state the envoy is also changed. The envoys are personal representatives even when they are career diplomats
- ✓ A severance/change of diplomatic relations does not mean the severance/change of consular relations
- ✓ When there is a change of head of state, the heads will send their personal envoys but in the case of consular relations no new exequatur is required when the head of the state changes.

IMMUNITIES OF THE INTERNATIONAL ORGANISATIONS

Customary international law does not demand that international organizations and their personnel be exempt from the jurisdiction of states. The matter is regulated by specific treats provisions in particular treaties creating the international organization concerned or by the headquarters agreement concluded to the host state where the organization is seated. Thus the league covenant provided in article 7 that representatives of the

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members of the league and officials of the league when engaged in the business of the league were to enjoy diplomatic immunity and privileges. The UN charter provides in article 105 that the organization shall enjoy in the territory of each of its members such privileges and immunities as are necessary for the fulfillment of its purposes. The representatives of the members of the UN and the officials of the organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection to the organization. Acting under article 105(3) of the charter the UN general assembly bid 1946 adopt the General Convention on the Privileges and Imunities of on the United Nations, that provides details and privileges on the immunites enjoyed by the UN. The UN general assembly also adopted the Convention on the Privileges and Immuities on the Specialised Agencies of the United Nations. Under the provisions of section 2 of the .. convention the UN enjoys complete immunity from all legal processes. Under the provisions of section 3 and 4 the premises, assets, documents and archives are inviolable. Under the provisions of section 7 the UN is exempt from direct taxes and customs duties while under section 8 its personnel are exempt from income tax on their salaries. Under section 19 the UN secretary general and the assistant secretary’s general have diplomatic immunity. Other staff members have only limited immunities such as immunity from legal process in respect to official acts and exemption from military service (section 18). A secretary general must waive staff members immunity under the provisions of section 20 if in his opinion immunity would impede the course of justice and can be waived without prejudice to the interests of the UN. Representatives of member states attending the UN meetings are granted almost the same privileges as diplomats except that their immunity from legal process applies only to their official acts and they are immune from customs duty only in respect to their personal baggage. Apparently the purpose of immunity in the case of international organizations and their personnel is a purely functional one related to the specific task of their organization as set out in its constituent instrument and serves to secure its ability to perform them. It

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is not a reflection of sovereignty except only in the very indirect sense of also serving to protect interests of the member states of the respective organization.

STATE RESPONSIBILITY (semester exam)

Introduction

Whenever a duty established by a rule of IL has been breached by an act of commission or omission a new legal relationship comes into existence. This relation is established between the subjects of law to which the act is imputable who must make adequate reparation and the subject who has suffered damage as a result of breach. The law of state responsibility is concerned with the determination of whether there is a wrongful act for which the wrong doing state is to be held responsible, what the legal consequences are and how such as an obligation on the part of the wrong doing state to restore the previous situation of to pay compensation and how such International responsibility may be implemented as for instance through counter measures adopted by the victim state such as reprisals or restorations.

The principles of state responsibility have been the subject for the extensive consideration by the International Law Commission which at its 53rd session held in August 2001 adopted the final text of the Draft Articles Responsibility of States for Internationally Wrongful Act. The Draft Articles are divided in three parts

i) Deals with the origins of state responsibility and contains rules relating to the nature of responsibility, the circumstances in which liability can be imputed to the state and general defenses.
ii) Deals with the consequences of a state being fixed with responsibility specifically the rights of an injured state against the responsible state.
iii) Deals with implementation of state responsibility and is concerned with such matters as the resolution of disputes.

Many of the international law commission of Draft Articles represent rules of customary International law as well as rules developed through case law.

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For instance in ***the Chorzow Factory (indemnity) (Merits) Germany Poland (1928)***

The permanent court of international justice declares that it is a principle of IL and even a general conception of law that any breach of an engagement involves an obligation to make reparation and that reparation is an indispensable complement of a failure to apply a convention and that there is no necessity for this to be stated in the convention itself.

Similarly in ***the Corfu Channel Case Merits*** ICJ placed Albanians liability to Great Britain for failure to notify British Ships about mines in the Albanian waters of the Corfu channel which exploded and damaged the ships on what the court refers to as, "***Certain General and Well recognized principles***" including ***"every states obligation not to allow knowingly its territory to be used for acts contrary to the rights of other states.***

Consequently Albania was under a duty to pay compensation of the UK.

Facts of the case

On 22nd October 1946 a squadron of British Warships, the cruisers Mauritius and Leander and the destroyers Saumarez and Volage left the court of Corfu and proceeded Northwards through a channel previously swept for mines in the North Corfu Strait which formed part of Albanian Territorial waters. Outside the Bay of Saranda, the Saumarez struck a mine and was heavily damaged while towing the damages ship the Volage struck a mine and was much damaged. Following the incident, the UK mine sweepers swept the North Corfu Channel and found 22 mines.

In October, 1944 the North Corfu Channel was swept by the British Navy and no mines were found in the Channel. In January and February 1945 the channels were checked swept by the British Navy with negative results, it was in this swept channel where the minefield was found in Nov 13th 1946. The mining of the Saumarez and Volage occurred in the Albania Territorial Waters just at the place in the swept channel where the mine field was found.

By a special agreement referred to as (***compromis***) the UK and Albania referred their dispute to the ICJ to determine inter alia whether Albania was

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responsible under IL for the explosions which occurred on 22nd October 1946 in Albanian waters and for the damage and loss of life which resulted from them and whether there was any duty to pay compensation.

The ***court held*** that Albania was responsible under IL for the explosions which occurred in Albanian waters. It came to the conclusion that the laying of the mine field which caused the explosions on the 22nd October 1946 could not have been accomplished without the knowledge of the Albanian Government. Court relied on circumstantial evidence.

The Albanian Government was thus under an obligation to notify the existence of a minefield in its territorial waters and to warn the British warships as well as the international community of imminent danger to which the minefield exposed them.

The constituent elements of responsibility

Circumstances under with a state may be held responsible.

IL makes no distinction between tortious and contractual liability. The breach of a treaty or customary obligation will give rise to the same remedy usually an award of damages or a declaration. However, whether responsibility is based on the principle of strict liability on the part of the state or on the principle of fault or intention on the part of the state official concerned a state will be held internationally responsible if the following essential elements are proved.

1) *An act of commission or omission that violates an obligation established by a rule of IL in force between the state responsible for the act and the state injured thereby*.

The responsibility of the state does not require an act of malice, negligence or carelessness on the part of any individual state agent. It may for instance consist of a general defect of failure in the structure of the state or its public administration and be entirely separate from any subjective intention.

Fault on the part of the state or any of its organs is all that is required.

Accordingly in the Corfu channel case the ICJ sought to determine its responsibility by attempting to see whether there has been a violation of a

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pre-existing obligation. Conclusion on Albania's knowledge on the mine field does not….

The knowledge postulated by the court was necessary to determine, the pre-existing obligation has been violated since only a state which knows that a mine field has been located in its territorial waters would be obliged to notify other states of its existence. Albania's fault was in the form of knowledge of the existence of the minefield and not any wrongful intent or negligence.

2) *The wrongful or unlawful act must be imputable to the state as a legal person.*

Immutability has the effect of indicating that the act in question is an act of the state concerned.

The state will only bear responsibility for acts committed by its officials or organs which are delictual according to IL regardless of whether the officials or organs have acted within the limits of their competence or have exceeded those limits where they have acted as authorized officials of organs or have in so acting used powers or measures appropriate to the official character.

If one is a legislator and enacts the legislation one is not exceeding his powers but if the legislation entails a breach of International responsibility then that will be a breach.

The general rule regarding state organs and officials is in ***Article IV of the international law commissions*** of the final draft articles which provides that the conduct of any state organ shall be considered an act of that state under IL whether the organ exercises legislative, executive, and judicial or any other functions.

If a judge in Kenya makes a decision that is contrary to IL and has international implications then Kenya will be liable for consequences as a state

Under ***article 6*** of the draft articles, the conduct of an organ placed at the disposal of a state by another state shall be considered an act of the former state if that organ was acting in the exercise of governmental authority of the former state.

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For instance the conduct of the privy consul cannot be attributed to the UK but to the state at the disposal of which it has been placed.
If an appeal lies from Jamaica to the Privy Council (the UK), UK is not responsible but Jamaica is held responsible for any misconduct of the Privy Council.
Article 7 embodies a well-established customary rule that wrongful acts may be imputed to the states when its organs or officials act beyond their legal capacity but act to all appearances as competent officials of organs. It provides that the conducts of an organ of a state or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the state under IL if the organ, person or entity acts in that capacity even if it exceeds its authority or contravenes instructions. This principle was exercised in ***the home missionary society claim (US v Britain)*** where the arbitral tribunal state that it was a well-established principle of IL that no government can be held responsible for the act of the rebellious bodies of men and women committed in violation of its authority where it is itself guilty of no breach of good faith or of no negligence in suppressing insurrection. The collection of a new tax imposed by Britain on the indigenous people of Sierra Leon led a serious wide spread revolt during which missions were attached and either destroyed or damaged and some missionaries were murdered. The home missionary society and American religious body had its property destroyed and some of its personnel killed. The US alleged that in the face of a crisis the British government as the administering authority of Sierra Leon failed to take the proper steps for the maintenance of order and that the loss of life and the destruction of property were as a result of this neglect and failure of duty. The tribunal dismissed the US claim on the ground inter alia that on the facts there was no failure of duty on the part of GB.
In principle the acts of a person or group of persons not acting on behalf of the state shall not be considered as acts of the state under IL unless the person or group was exercising elements of governmental authority in the

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absence of government officials and under circumstances which justify them in assuming such authority.

However, in some cases the acts of private individuals may be accompanied by some acts or omission on the part of the state for which the state becomes liable. Such acts or omission may take one or more of six forms namely

1) Encouraging individuals to attack foreigners
2) Failing to take reasonable care to prevent the individuals when an attack is imminent
3) The obvious failure to punish the individuals concerned

Janis claims; US v Mexico 1926

Byron Everet Janis a US citizen was murdered in Mexico on July 10th 1918 by a Mexican citizen Juan Pedro Carbajal a former employee of a company doing business in Mexico and of which Janis was the superintendent. The killing took place in the view of many persons in the resident on the vicinity of the company's office. The local police was informed of Janis's death within 5 minutes of the commission of the crime and arrived at the scene soon thereafter. He delayed in assembling his policemen for half an hour and insisted that they should be mounted. The company provided the necessary animals and the posse after the lapse of more than an hour from the time of the shooting started in pursuit of Carbajal who had escaped on foot. The posse failed to apprehend him. He remained at a ranch six miles away from the place of the crime for a week and he came twice to the place during his stay at the ranch. Subsequently he moved further away about 25 miles from the place of the crime and although this information was communicated to the Mexican civil and military authorities they failed to take any steps to apprehend Carbajal. 8 years after the killing Carbajal was still not apprehended and remained unpunished for the murder of Janis. The US alleged that in the circumstances the Mexican authorities had failed to take prompt and adequate measures to apprehend punish Carbajal and that consequently

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Mexico was liable for the killing. The Mexico US General Claims Commission found for the US.

4) Failure to provide the injured foreigner with an opportunity of obtaining compensation from the wrong doers in the local court i.e. denial of justice
5) Obtaining some benefit from the individuals wrongful act, i.e. the police not repossessing stolen property of an international and returning it to the rightful owner.
6) Express ratification of the individuals' act namely expressly approving it and stating that the person was acting in the name of the state.

For instance in the US diplomatic and consular staff in ***Tehran Case*** the ICJ held that in 17th November 1979 when Ayatollah Khomeini issued a decree maintaining the occupation of the US Embassy and the detention of hostages until the US handed over the shah for trial. The acts of the private individuals were adopted by the state and thereby responsibility arose of Iran in IL.
The ILC Drafts Articles provide for two situations in which a state may be responsible for unlawful acts committed by private persons.

i) ***Under article 8*** the conduct of a person or group of persons shall be considered an act of state under IL if the person or group of persons is in fact acting on the instructions or under the direction or control of that state in carrying out the conduct.
ii) ***Under article 11*** conduct attributable to individuals shall nevertheless be considered an act of that state under IL if and to the extent that the state acknowledges and adopt the conduct in question as its own.

3) Loss or damage must have resulted from the unlawful act

In Interstate relations the concept of damage does not have an essentially material character; it could also be moral damage. Material damage is any prejudice caused to the economic or patrimonial interest of a state or its nationals whereas moral damage is any breach of a states honor or dignity. Both the material and moral damage may be taken into account when appraising the modalities and quantum of the ensuing reparation. Indeed

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state practice shows that most of the time if a state is not injured at the material or moral level by the action of another state it does not invoke international rules or state responsibility against that state.
However, it should be noted that nothing precludes states from setting up by treaty as opposed in customary law a legal regime whereby a state incurs its responsibility for the breach of an obligation towards another contracting party even if it has caused no material or moral damage but only a legal injury. This legal injury resides in the violation of the right accruing in the other contracting states in correspondence to the obligation breached.

Justifiable acts causing loss or damages

An important consideration to be taken into account on establishing the responsibility of a state is whether they are circumstances precluding wrongfulness. State practice and state law as codified in the ILCDA show that there are certain circumstances in which an act causing loss or damage may be justifiable in IL and consequently not actionable.

1) Consent

Consent to carry out activities that would otherwise be prohibited by IL renders those activities lawful. This consent must be given before or at the same time as the violation. Retrospective consent would constitute a waiver of the right to claim reparation.
However consent is not valid if it is directed to permitting activities contrary to ***jus cogens*** such as consent for the foreign armed forces to enter the territory of another state to massacre civilians or a specific ethnic group.
Consent will furthermore be vitiated by error, coercion or fraud. According to ***article 20 of the International Law Commission Draft Articles***, valid consent by a state to the commission of a given act by another state precludes the wrongfulness of that act in relation to the former state to the extent that the act remains within limits of that consent.

2) defense

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International law recognizes that certain acts which would otherwise be unlawful are when committed in exercise of the right of ***self-defense*** legitimate and do not give rise to responsibility.

The law of self-defense finds expression in ***article 51 of the UN Charter*** which provides that nothing in the charter shall impair the ***inherent right*** (by virtue of its sovereignty) of the individual or collective self-defense if an armed attack occurs against a member of the UN until the Security Council has taken measures necessary to maintain International peace and security.

Self-defense can be resorted to on the violation of the right of territorial integrity, the right for political independence, right to protection over nationals as well as some rights of an economic nature.

Self-defense must limit itself to rejecting the armed attack and must not go beyond this purpose.

State practice is not yet universally accepted but it is pre-empting.

Consequently

i) The victim of the violation must not occupy the violator state territory unless this is quickly required by the need to hold the aggressor in check and prevent the continuation of aggression by other means.
ii) Self-defense must come to an end as soon as the security council comes in and takes over the task of putting to an end of the violation
iii) Self-defense must cease as soon as its purpose i.e. to repel the armed attack has been achieved

Military action over stepping mere rejection of the aggression is neither authorized nor condoned by article 51 of the charter and general IL.

Self-defense is normally a reaction to attack by another state. What about the case of al Shabab on their attack in Kenya? Al Shabab is not supported by state of Somalia yet we attack Somalia territory.

Article 21 of the ILCDA simply provides that the wrongfulness of the act of a state is precluded if the act constitutes a lawful measure of self-defense taken in conformity with Charter of the UN.

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In the event of a breach of IL, the injured state as an individual state is legally entitled to disregard an international obligation owed to the delinquent state by taking ***counter measures***.

3) *A counter measure*

In the event of a breach of IL the injured state as an individual state is legally entitled to disregard an international obligation owed to the delinquent state by taking counter measures. A counter measure is an illegal act that is rendered lawful as a response to a prior illegal act. Counter measures must fulfill some basic conditions and in addition subject to a number of limitations.

The conditions are that

i) The injured state is not allowed to resort to taking counter measures as soon as a wrong occurs. It must first call upon the responsible state to discontinue wrongful action or to make reparation.

ii) If the secession of the wrong is not obtained or no reparation is made i.e. there is an unsatisfied demand, the injured state must endeavor to obtain through negotiations pursuant to the general obligation under the UN Charter for Peaceful Settlement of the Dispute(read article 33 UN Charter). Only when the author of the wrong doing refuses to engage in negotiations or willfully or malafide hampers the working of other means of settlement can the injured state consider in good faith that no other choice is available except countermeasures.

The taking of counter measures is subject to a no. of limitations

1) Counter measures may not involve the threat or use of force contrary to the UN Charter
2) Counter measures may not disregard International rules for the protection of human rights or the dignity and welfare of human beings in general.
3) Counter measures may not disregard implications imposed by jus cogens
4) Countermeasures may only target the state responsible for an international wrongful act and must not breach the rights of 3rd states.

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5) Counter measures must not be out of proportion with the breach by the delinquent state. In other words the counter measures must be balanced against the injury cause by the wrong doing state.

   Article 22 of the ILC Draft Articles provides that the wrongfulness of the acts of a state not in conformity to an international obligation towards another state is precluded if and to the extent that the act constitutes a counter measure against the latter state.

   Articles 49-54 provide for the conditions of and limitations to which counter measures are subject.

   Closely related to but different is the application of a sanction authorized by an international or regional organization pursuant to its statutory mandate, whereas counter measures are taken by individual states, sanctions are collective responses and are taken within an international framework. The imposition of sanctions will not give rise to the responsibility with the result and cause of damages thus the preventive enforcement actions by the UN organs of other regional organizations does not create any responsibility for the ensuing loss or damages.

4) <u>Force Majeure</u>

Force majeure will preclude the wrongfulness of an act or omission by one state in violation of its obligation owed to another. ***Article 23(1)*** ILCDA defines force majeure as the occurrence of an irresistible force or of an unforeseen event beyond the control of the state making it materially impossible in the circumstances to perform the obligation. Under Paragraph 2 force majeure does not apply if

a) The occurrence of force majeure either alone or in combination with other factors from the conduct of the state in invoking it
b) If the state has assumed the risk of that occurrence

   In state practice force majeure is generally invoked to satisfy involuntary or at least an intentional conduct and relates to the irresistible force or an unforeseen event against which the state has no remedy and which makes it "***materially impossible"*** for the state to act in conformity with its obligations.

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5) Under ***article 24 of the ICDL*** the wrongfulness of an act of a state not in conformity with the international obligation of that state is precluded if the author of the act in question has no other reasonable way in a situation of ***distress*** of saving the authors life or the other lives entrusted to the authors care.

The article provides that distress does not apply if

a) The situation of distress results either alone or in combination with other factors from the conduct of the state invoking it or
b) The act in question was likely to create comparable or greater peril

6) It is often asserted that if a state coerced by ***necessity*** to save itself from great and imminent danger which it has not itself induced and which it cannot in any other way escape takes action violating the rights of another state such action does not engage its international responsibility. The danger it is to avoid must be of such a nature as to put on jeopardy the existence of the state, its territorial or personal statute, its government or form of government or to limit or even make disappear its independence or International capacity.

Necessity is defined in ***article 25 (1)*** **of the ILC Drafts Articles** as the condition where an otherwise unlawful act is performed and such act

a) Is the only means for the state to safeguard an essential interest against a grave and imminent peril
b) Does not seriously impair an essential interest of the state or states towards which the obligation exists or of the international community as a whole.

Under Paragraph 2 necessity may not be invoked by a state as a ground for precluding wrongfulness if

a) The international obligation in question excludes the possibility of invoking necessity or
b) The state has contributed the situation of necessity

Distinction between distress and necessity is that while in distress the wrongful act is justified by the urgent necessity to save the life of the person

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performing the act or the lives of other individuals entrusted to the state necessity aims at warranting a breach of IL imposed by the need to avert a serious danger for the whole state or the population of part thereof of the state.

The nature and extent of reparation

A state discharges the responsibility incumbent on it for breach of an international obligation by making good either by reparation of injury or damage suffered. Article 34 of the ILC Draft Articles sets out the principle that a delinquent state must make full reparation for the injury caused by the commission of an internationally wrongful act. Reparation may take the form of restitution, compensation (indemnity) or satisfaction either simply or in combination, the choice of a particular form of reparation varies depending upon the content of the obligation that has been breached and the nature of the injury sustained. The basic rules on this subject were enunciated by ***the PCIJ in the chosal factory case(indemnity merit case 1958)*** involving a claim by Germany against Poland arising out of the expropriation of a factory at chosal in Poland contrary to the 1992 convention between Poland and Germany on upper Silicia . The court stated,*" it is a principle of IL that the breach of an engagement involves an obligation to make reparation in an adequate form. The essential principle contained in the actual notion of an illegal act... is that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish a situation which would in all probability have existed of that act had not been committed. Restitution in kind, or if this is not possible, payment of a sum corresponding to the value to which a restitution in kind would bare; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it- such are the principles which should serve to determine the amount of compensation due for an act contrary of international law."* Under article 39 of the draft article in determination of reparation amount must be taken in the contribution of the injury by willful

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or negligent action or omission by the injured state or any person in relation to whom it sought.

Three kinds of reparation

a) Restitution

It may take the form of legal restitution or restitution in kind or in integrum. Legal restitution consists of a declaration that an offending act of the executive or judiciary or legislature is invalid. Legal restitution can be considered as restitution in integrum or as a kind of satisfaction although it is rare in practice. Restitution in kind is the primary remedy at IL, it is designed to re-establish the situation which would have existed if the wrongful act or omission had not taken place by performance of the obligation which the state concerned failed to discharge, revocation of the unlawful act or abstention from further wrongful conduct. Restitution has been decreed by international arbitral tribunals in cases where there was an agreement between the parties either for the purposes of a particular case or generally.

Norwegian ship owners claim (Norway v US 1922)

Article 35 of the ILC Draft Articles provides that a state responsible for an internationally wrongful act is under an obligation to make restitution that is to re-establish the situation which existed before the wrongful act was committed provided and to the extent that restitution

(a) Is not materially impossible

(b) It does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation

b) Compensation or indemnity

The PCIJ stated that in the Choasal case that it is a principle of IL that the reparation of a wrong may consist of an indemnity. Indemnity is the most frequent form of reparation. This kind of reparation is measured by a pecuniary standard. The fact that indemnity pre-supposed the payment of a sum corresponding to the value which restitution in kind would bear has important effects on its extent. As a consequence of the depreciation of currencies and the delays involved in the administration so justice the value of a property confiscated may be higher at the time of the decision of the

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tribunal that at the time of the wrongful act. Since monetary compensation must as far as possible resemble compensation, the value of the property at the date when compensation is paid is the criterion. Further under this principle the injured party of the wrongful act may in appropriate cases claim for lost profits on the basis that just compensation implies a complete restitution of the status quo ante. Interest as well as loss of use of that sum during the period at which that payment continues to be withheld is payable. Article 36 of the ILC Draft Articles provides that compensation must cover any financially accessible property damage and of applicable any loss of property. Article 38 provides important clarifications with respect to interests

(1) Interests on any possible sum shall be payable if necessary in order to ensure full reparation. The interest rate and mode of calculation shall be set so as to achieve that result

(2) Interests runs from the date when the principle sums have been paid until the date when the obligation to pay is fulfilled.

International law does not accept the principle of punitive, vindictive or exemplary damages.

c) ***Satisfaction classic arbitral decision***

This is appropriate for non-material damage or moral injury to the personality state. Satisfaction differs from restitution on kind in that it cannot lead to the actual restoration of the status quo ante. Its typical purpose it to repair breaches of international obligation is cases in which such a breach does not entail any actual damage or monetary compensation is either inappropriate or insufficient. This is illustrated by the, ***I am alone case (Canada v US) 1935).*** A Canadian registered vessel was de facto owned, controlled and managed by a group of Americans engaged in smuggling liquor in the US. On march 20th 1929 the I AM ALONE was cited by the US coast guard vessel Walcott about 10.5 miles of the coast of Louisiana but within 1 hours sailing distance to shore. The Walcott hailed the I AM ALONE but she ignored the signal to stop and be examined in accordance with the 1922 US Tariff Act and the 1904 Anglo-American Act with the prevention of smuggling liquor to sea.

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Under the convention GB agreed to raise no objection to the boarding of private vessel under the British flag outside the limits of territorial waters by the US authorities in order to check liquor smuggling. The Walcott fired at the I AM ALONE but was unable to stop her as the gun jammed. The, I AM ALONE fled perused by the Walcott and a second patrol boat the Dexter which joined in the pursuit. The Dexter overhauled the I AM ALOE on March the 2nd 1929 about 200 milked off shore. The Dexter order the, I AM ALONE to heave to but she refused. The Dexter fired and the, I AM ALONE sunk as a result with all but one person on board being rescued. The resultant dispute was referred to 2 commissioners one appointed by Canada and the other but the US. The commissioners found the sinking of the I AM ALONE was unlawful but stated that since the vessel was de facto owned by US citizens no compensation ought to be paid in respect to the ship or cargo, however the commissioners considered that the US ought to formally acknowledge to the illegality of its act and apologize to the Canadian government and pay the sum of 25,000$ as material compensation for insult to the flag. In contemporary law and practice satisfaction is limited to representation to presentation of grades public apologies or other acknowledgment of wrongdoings and undertaking to punish those responsible for illegal acts and the taking of measures to prevent re-occurrence of the wrong. Article 37 of the ILC Draft Articles provides that satisfaction may be given as a remedy for an injury caused by an internationally wrongful act which cannot be made good by restitution or compensation. It may consist of an acknowledgment of breach, an expression of regret, a formal apology or another appropriate modality. Further satisfaction should not be out of proportion to the injury suffered and should not take a form in humiliating the delinquent state.

Treatment of aliens or foreigners

A distinct and separate aspect of a state's international responsibility relates to the treatment of foreign nationals by the host state. This is a controversial subject that is highlighted on the lack of consensus in the standard of

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treatment of foreign nationals. The economically developed states of Northern America and Western Europe have insisted that there is an international minimum standard for treatment that must be accorded to foreign nationals by all states irrespective of how they treat their own nationals.

The newer and developing states insist on the other hand that foreign nationals may only insist upon national treatment" i.e. treatment equal to that given by the state concerned to its own nationals. The main justification for granting foreign nationals equality of treatment under the local law is founded on territorial sovereignty in that to give the foreign national a special status would be contrary to the principles of territorial jurisdiction and equality of states and by residing in the particular state the foreign national is deemed to have submitted to both benefits and burdens incidental to residents in that state.

The national standard of treatment and the international minimum standard of treatment reflect conflicting economic and political interests.

However, whether it is the national standard of treatment or the international minimum standard that applies state practice and judicial decisions show that in order to constitute an international delinquency there by involving the responsibility of the state, the treatment of a foreign national must amount to an outrage to bad faith to willful neglect of duty or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man or woman would greatly recognize its sufficiency.

As a general rule every state is under an international obligation not to ill-treat foreign nationals present in its territory. If the state violates this obligation in any way it may incur international responsibility in the state of which the foreigner is a national.

Ill treatment of foreign nationals giving rise to international responsibility may result for instance from unlawful expropriation of foreign owned property, failure to punish individuals responsible for attack on foreign nationals or denial of justice such as a refusal to afford a foreign national a

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right to be heard or arbitrariness or unfairness in judicial proceedings in which the foreign national is a resident.

Under international law every state has the right of diplomatic protection of its nationals injured at the hands of another state. Injury to a citizen is injury to the state of which he is a national. The state has a legal interest in its citizens and in protecting this interest the state may call to account those harming its citizens.

This means that when a national suffers an injury at the hands of another state his state of nationality may take up the claims as its own.

There are 3 principles that govern claims by state for violation of the rights of their nationals by other states

1) ***Requirement of the espousal of private claims by a state.***

Under this principle a state is entitled to espouse the claims of its national against another state from which the national has been unable to obtain satisfaction through the ordinary channels. By taking up the case of its national and by resorting to diplomatic channels or presenting a claim to the international plane the state is in reality asserting its own right to ensure in the person of its national respect for the rules of international law.

Mavromattes Palestine Concessions case (Greece v U.K)

2) ***The state espousing the claim must be the state of nationality of the foreign national***

Nationality is a vital concept in this area of responsibility. The right of a state to espouse private claims is limited to intervention on behalf of its own nationals because in the absence of a special agreement it is the bond of nationality between the state and the individual which alone confers upon the state the right to exercise diplomatic protection. Where the individual is a national of two states the test that is applied is that of dominance nationality, that is the nationality or the state that the individual has a link.

3) ***Measure of reparation***

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An injured foreign national will not automatically invoke…. He must first seek redress from the state that has caused him injury he must first follow the procedure of law in that particular country and only where he has exhausted the local remedies available without avail then his national state take over.
In the ***Chorzow Case*** the PICJ held that, *"it is a principle of IL that the breach of an international engagement involves an obligation to make reparation in an adequate form".* This principle has not only been reaffirmed in subsequent international decisions but it is also reiterated under ***art 36 of the Statutes of International Court of Justice*** which gives the court jurisdiction in all legal disputes concerning inter alia *"the nature and extent of the reparation to be made of an international obligation."*
Even as a general rule where any tribunal has jurisdiction to determine a dispute it has jurisdiction also to determine the nature and measure of reparations.

Greece v U.K 1956 vol 12 international arbitral award pg.83

The local remedies rule

An injured foreign national will not automatically entitled to invoke the diplomatic protection of his state of nationality. He must first seek redress from the state which has caused him injury in accordance with that states domestic legal machinery and only when adequate redress is not forthcoming may the state of his nationality seek redress on his behalf.
Action by a state of nationality will in the first place usually take the form of reparations and negotiations through diplomatic channels. If this does not result in a satisfactory settlement the injured state may take the matter up more formally by presenting an international claim against the another states.
The rule is not relevant to complains based on a direct breach of IL which causes immediate injury to another state and in which that state is not complaining of an injury to one of its nationals. This is because states are not subject to the jurisdiction of foreign courts so that direct breaches of IL cannot be subjected to adjudication by the jurisdiction of municipal courts of the offending state.

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The foundation of the rule is the respect for the sovereignty and jurisdiction of the state competent to deal with the question of claim through its judicial organs. This respect is brought about by giving priority to the jurisdiction of the local court of the state in the case of foreigners. In order to exhaust local remedies the private claimant must have recourse to the entire system of legal protection as established by corpus of ML and must be given the opportunity to adduce before the domestic tribunals all the material evidence reasonably available to him which might be essential for the winning of his case.

There are however certain circumstances in which the rules does not apply.

1) The rule will not apply if in fact there are no available remedies which should have been pursued.
2) The rule may not be applied by reason of obstacles in the domestic law or procedure. If in the respondent state there are remedies available but if according to domestic law such remedies are incapable of affording relief or are inappropriate for the subject matter of the claim then the obligation to exhaust such remedies will be dispensed with. Similarly if it is not possible for the superior courts to reverse a decisions of the lower court because of a procedural or other rule an appeal will not be necessary and in such a case the local remedies will have been exhausted.
3) The rule cannot be applied where there is some defect in the administration of justice such as the complete subservience of the judiciary to the executive whose acts are the subject matter of the complaint or where the judicial tribunal has been appointed under a law annulling the private rights in issue in the claim.

It is for the state claiming that local remedies have not been exhausted to demonstrate that such remedies in deed exist. If they are shown to exist, it is for the proposing party to show that they were exhausted or were inappropriate for the subject matter of the claim. However, the requirement to exhaust local remedies may be dispensed with by treaty that this must be explicitly stated.

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The calvo clause

It is a stipulation in a concession contract between a foreign national and a government under which the foreigner agrees not to seek the diplomatic protection of his state of nationality and submit any matters arising from the contract in the local jurisdiction. The foreigner undertakes not to call upon his state for protection.

The object of the clause is to ensure that legal disputes arising out of the contract shall be referred as municipal court of the state granting the concession or other rights and to oust the jurisdiction of international tribunals or to prevent any appeal for diplomatic action of the national state, the individual or company enjoying the concession.

North American Dredging Co. Claim (US v Mexico)

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