

PUBLIC INTERNATIONAL LAW

**M. S. RAMA RAO B.Sc., M.A., M.L.
Class-room live lectures edited, enlarged
and updated**

PUBLIC INTERNATIONAL LAW

[PEACE]

Textual & Reference Books

Oppenheim

International Law Vo.I Peace

Starke

Introduction to International Law

Fen-wick

International Law

Green

International Law through Cases

Freidman

The Changing Structure of international Law

Brierly

Law of Nations

Schwarzenberger

Manual of International Law

Nussbaum

A Concise history of the Law of Nations

Lauterpacht

Annual Digest & Report of Public
International Law Cases

Harris.

Cases and Materials on International Law

INTRODUCTION

International Law' is one of the finest subjects for studying, 'as it opens up new horizons to navigate beyond the egg-shell enclosure of one's mental faculties. It is our duty to know the law of our Country {Ignorantia juris non excusat!) but it is a privilege to know the Law of Nations. States are legal persons and are subjects of International Law. It is impossible to imagine the States today, carrying on their multifarious activities across the borders, on an unprecedented scale, in a legal vacuum! That ipso facto must justify the existence of a large number of principles and rules governing the conduct of the States. In recent years the proliferation of International Institutions, has given a new dimension to the Law of Nations. Moreover, there is so much of International activity that hundreds of conferences and meetings are held round the year, speaking volumes to the fact, that International Law is in operation.

In recent years a countless number of Conventions and treaties have been concluded so much so the corpus of the Law of Nations has grown in its magnitude. Much credit goes to the "International Law Commission" which has toiled in chiseling & trimming to draft form the norms of International Law scattered in various forms often obscure and indefinite.

The basic principles of the subject should be carefully studied with a broad-outlook, to understand the significance; Cases and Materials should be adroitly selected. Specialization should be attempted later.

World Peace is the cherished objective of all Nations. International Law is a means to reach that.

The sounding prophetic words' of Isaiah **"States shall beat their swords into ploughshares and their spears into pruning hooks; Nation shall not lift sword against nation neither shall they learn war anymore,"** became the roots of pacifism and has grown over the centuries into the concept of World Peace.

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

...MSR

PUBLIC INTERNATIONAL LAW

1. International law as law (legal basis.)
2. Sources.
- 3.. Relationship between International Law & Municipal Law.
4. Codification,
4. History & development of the Law of Nations-Schools of Law- Positivists, Naturalists & Grotians.. Contributions of Grotius, Gentili & others.
6. Recognition-Theories-Practice-De facto-De jure-Monroe doctrine-' Stimson's doctrine of non -recognition.
6. States-Personality-Vassal States, Neutralised State-Succession-Equality of States.
7. Self-Preservation- \Intervention: dictatorial and pure & simple.
8. State Responsibility for International delinquency.
10. Territory: (i) Modes of acquiring Territory (ii) Servitudes (iii) Rivers (iv) Canals (v) Aerial Navigation.
- 1 i. Open Sea-Freedom of the open sea-Jurisdiction-Fisheries, Maritime Belt, Contiguous zone. Economic zone, Continental Shelf- Piracy jure gentium,
12. Individuals-Nationality- Double Nationality-Statelessness-Asylum-Aliens- Extradition & Non-Extradition of political criminals-Human Rights-
12. Legation-Head of State-Right of legation, Appointment, powers privileges and immunities of Ambassadors-Consuls-their appointment & functions-
12. Treaties-Parties-Objects-Ratification-Reservation-Termination of Treaties- Rebus sic stantibus-Interpretation of treaties.

QUESTIONS BANK

"International Law is no Law at all' Discuss, Or "International Law is at the vanishing point of Jurisprudence" Discuss.

2. Discuss the various sources of law with particular reference to their primacy under the Statute of the I.C.J .Ref to leading cases.
3. "International Law' is part of the law of the land' - Discuss. Refer to the leading cases & to the British & U.S .practice.
4. State the importance of codification and the steps taken to codify International Law. Assess the contributions of the International Law Commission.
5. "States only are the subjects of International Law' Discuss.
6. (1) What is Recognition? What are the theories?
What are the consequences of Recognition?

(2) Distinguish between De facto & De Jure Recognition.
7. (1) Distinguish Dictatorial intervention from Intervention Pure and simple.
When is a State empowered to Intervene in the affairs of another State.

(2) Define Self Preservation. Is it allowed under the U.N. Charter? Explain with illustrations how on grounds of necessity a State may resort to self-defence measures.
8. 'The Grotians stand midway between the Positivists and the Naturalists'.
Explain with reference to the Schools of International Law.
9. (!) Write an essay on the Freedom of the Open Sea.

(2) Discuss the concept of 'Continental Shelf with reference to recent developments.
10. How are Ambassadors classified? What are their functions? Explain the privileges & Immunities of the Ambassadors.
11. What is the rationale for ratification of treaties? What is the effect of reservation to treaties? Refer to the LCI's Advisory opinion on Reservation to Genocide Convention 1951.

12. How are treaties terminated? Discuss **Rebus Sic Stantibus**.
13. What is International Delinquency? Discuss how far a State is liable for International Delinquencies'
14. State and explain the consequences that flow as a result of State Succession.
15. Discuss the concept of Human Rights and Fundamental Freedoms & trace the steps taken so far.
16. Discuss 'Occupation' and 'Prescription' as two modes of acquiring territory by a State.
17. Discuss piracy as an International Crime.
18. 'The Legal equality of States, has four important consequences' Discuss
19. Discuss the concept of Non-extradition of Political Criminals Refer to decided cases.
20. Write Short Notes on:
 1. Maritime Belt 2. Economic Zone. 3. Hijacking. 4. Diplomatic Asylum.
 5. Cobotage. 6. International Canals. 7. Consuls. 8. Monroe doctrine. 9. Stimson's doctrine of non-recognition. 10. Double Nationality and Statelessness. 11. Neutralised State. 12. Outer Space. 13. International Servitude 14. Calvo Clause 15. Drago Doctrine.
21. State the facts & the decision in:
 1. Corfu Channel Case. 2. Nottenbohm's Case. 3. Asylum Case and Haya de la tarre Case. 4. Eichmann Case. 5-Savarkar's Case. 6.The Lotus Case. 7.Mighell V.Sultan.of Jahore. 8. Palmas Island Case. 9.Piracy jure Gentium. 10. Franconia Case. 11.West Rand Gold Mining Co .V.R. 12. Anglo-Norwegian Fisheries Case. 13. Barcelona Traction Case. 14. The I am Alone. 15.Chung Chi Cheung V the King. 16. Lawless Case. 17. North Atlantic Coast Fisheries Case. 18. North Sea Continental Shelf Cases.

CONTENTS (International Law)

Chapters	Pages	Chapters	Pages
1. Legal Basis of International law	7	10. Treaties Steps	41
2. Sources	9	Reservation	
3. International Law V. Mun.Law	13	.Termination	
4. Codification	16	11. Equality	45
5. States as Subjects	18	12 Schools	46
6. Recongnition	20	13. Nationality	48
1. Recognition	1	15 Nationality	50
2. De facto, De Jure		Double	
7. Intervention	23	Statelessness	
1. Intervention		15. Human Rights	52
2. Self-Preservation		16. Territory	54
8. Open Sea	26.	17. Additional	
1. Freedom	,	Topics	57
2. Territorial Waters		1. Hijacking	
3. Contiguous Zone		2. Hugo Grotius	
4. EEZ		3. Monroe'Doctr	
5. Continental Shelf		4. Neutralised'St	
Piracy			
9. Ambassadors	36		
1. Institution			
2. Privileges, Immunities			

CHAPTER 1

Legal Basis of International Law

i) Definition : International Law is defined as a body of principles & rules commonly observed by States in their mutual relationship with each other. It includes the law relating to States & International organisations and also International Organisations inter se. It also includes the rules of law relating to international institutions and individuals, and non-State entities and individuals.

ii) Though there are theories on the legal basis of International Law, the Austinian theory has received wide attention. Austin opined that International Law was not law at all and called it a 'Positive International Morality' and hence it had only moral force. He called it a set of opinions or sentiments current among nations generally and "laws improperly so called". Hobbes, Pufendorf, Bentham and Holland were of the same view. Holland said that it was at the vanishing point of jurisprudence.

Austin defined law as a 'body of rules, set and enforced by a sovereign political authority. Hence when the rules do not come from the sovereign, they would not be legal, but moral. Basing on this positive law concept Austin declared International Law as a code of morality. .

iii) Reply to Austin by Oppenheim : This definition is inadequate and incorrect because there is no reference to unwritten law (custom) as courts understand and apply them. Customary rules or rules of morality are founded on conscience. Hence, law must be defined to include the unwritten law. Neither the law making sovereign authority nor the court is essential for a law to exist. In the primitive community that was the position. In the modern State, the common consent of the people is expressed through the legislature (Parliament). But, there are unwritten laws as well.

*

iv) Wider Definition : Law may therefore, -be defined 'as a body of rules in a community framed by common consent, and enforced by an external power'. This definition answers the State-made law and the customary law. Hence, in a State, the Parliament (representatives of the Community) is the law making body and that law is enforced by the

Community called the State. A custom is made by the community and is enforced by the community itself (Courts recognise them as a source of law). Hence, this definition is wider. Applying this definition if we are to justify that International Law is 'Law', we must prove the existence of : (a) An International community, (b) A body of International Rules and (c) A system of enforcement (sanction),

a) International Community : The States together form an International Community. There are common interests in the field of science and technology. There is a 'world net-work of communications through telegraphic, telephonic connections and radios. There are Inter-State connections by railways, airways and ship navigation. Further, there is cultural co-operation and common interests on education etc., Establishment of Organisations like the United Nations and the Specialised Agencies, Regional Agencies etc., speak volumes to the fact that there is a World Community.

b) Body of International Rules : Treaties & International customs are the main sources of International law. Austin's views however right for his time, are not true of present day International Law; International customs are being formulated into treaties & conventions. There is great volume of international legislation :

Eg. : Declaration of Paris 1856, Hague Conventions of 1899 & 1907, Peace Treaty 1919, Treaty for Renunciation of War 1929, the U.N. Charter 1945, various conventions of the Law of the Sea Conference 1958, Vienna Conventions on Diplomatic Relations etc.,

There are also a large number of International Customary Rules, evolved from diplomatic relations and correspondence from the practice of international Organizations & State Practices, etc : These are formulated into treaties & conventions. The International Law Commission is playing its major role in this process. Thus, there is no legal vacuum, but a body of international law in operation.

Enforcement : States resort to : 1; Self-help.

2. Intervention-pure & simple.

3. Pacific Settlement under the U.N. Charter-; Also to Collective Security Measures of the Security Council.

4. Punishment of Offenders: e.g. : War Criminals. There are also

rules of 'International. Community' based on goodwill, courtesy & reciprocity & Austin is correct when his 'code of international morality'

refers to them. But, those are different from International legislation noted above.

5. Political questions may be resolved through the General Assembly or the Security Council. Judicial questions may be decided by the International Court of Justice. There is a frequent resort to Arbitration as well.

Hence, for enforcement there is the sanction (or force) of the International Community.

Conclusion: As all the three elements are present, International! law is evidently law. Of course, the frequent violations of International Law, show the weakness of the sanction of International Law. But, as Oppenheim, rightly concludes, 'Compared to Municipal Law, it is a weak law, but a weak law is still a law.'

CHAPTER 2

SOURCES Sources of

International Law.

i) Meaning : 'Source', according to Oppenheim, means the ultimate origin from which the law originates. When we see a river and desire to know its source, we must go up the river until we reach a particular point where the water is oozing out naturally from the soil. That is the source of the river. Similarly, in order to find out the source of the principles of International Law we must track back to a particular point. That is the source.

ii) The Statute of the I.C.J. in Art. 38, has enumerated the following sources of International Law on the basis of primacy

before the court:

- a) International Conventions or treaties.
- b) International Customary Law.
- c) General Principles of law recognised by 'Civilised Nations.
- d) Judicial Precedents.
- e) Juristic Writings.
- f) Ex aequo et bono. (Equity & good conscience)

These are to be applied in the same order by the I.C.J.

a) International Treaties :

There is primacy for this source at the International Court of Justice. Treaties are of two kinds :

- (i) Law-making and (ii) Treaty-contract.

Eg.: Pact of Paris 1956; Hague conventions of 1899 & 1907, Peace Treaty 1919, Treaty for the Renunciation of War, 1929, Geneva Convention relating to Prisoners of War 1929. Conventions of the Law of the Sea Conference 1958 are examples.

- (ii) Treaty-contracts -are non-law making in nature.

International Custom:

This is the original source of International law. It manifests in (i) Diplomatic Correspondence of States, (ii) Practice of International Organisations (iii) State Court's decisions, (iv) State Practice & Administrative actions etc.

Origin : Custom has its-origin in a usage.,If the usage is continuous, uniform and followed for a number of years it becomes a custom. Usage is the twilight zone of custom. But. two conditions must be satisfied :

(i) **Corpus test** : A material fact of the actual observance of a line of conduct by the States. This must be shown as a fact.

(ii) **Animus test** : There must be an intention to follow the custom. It reaches a stage of approval '**opinio juris sive necessitatis**' (Jurists' opinion as of necessity). Then, the principle (usage) becomes an International Custom. This is the process of the consummation of an usage into an International custom.

In the **Lotus Case**, the Court (P.C.I.J.) held that the opinio juris must be drawn from all the circumstances, & not merely from the facts on hand. In the *Right of Passage case* (Portugal Vs. India), the I.C.J. held that a particular practice between two States only may give rise to binding customary law. It held that Portugal had a right of passage for civilians but not for military officials.

In the **Paquete Hebana Case** the Court (U.S. Supreme Court) held that looking to all the facts & circumstances, there was uniform practice of giving 'immunity to small fishing vessels from belligerent action in times of war. This was recognised as an International Customary Law.

In the **Asylum case**

there was a rebellion in Lima (Capital of Peru), and the rebel-leader Haya de la tarre, sought asylum in the Columbian embassy, which it granted considering him as a political refugee. The Peruvian Govt. contested this before the I.C.J. The Colombian Govt. relied on International custom., but in vain. As the custom of granting diplomatic asylum was not established, the court held that the grant of asylum was without legal authority. The Peruvian Govt. claimed for handing over of the rebel, from Colombian Embassy. The I.C.J. held in Haya de la Tarre's case, that this decision was that Colombian Govt. had no right to give asylum. It did not mean that he should be handed over to Peru ! (He was safely taken to Colombia).

c) **General principles of law recognised by Civilized Nations**

This is the third source of International Law according to the Statute of the I.C.J. (Art. 38). If there is no International Treaty or International Custom, the court applies this source. One of the essential duties of the Court is to decide the case and not to plead its inability or helplessness on the ground that the law is silent or obscure. Hence, it may evolve a process to arrive at a general principle by taking into consideration the Municipal laws of the major countries of the World. A principle which is common in these countries may be raised to International level. As Lord Phillimore points out these are principles which are common in all Countries or jurisprudences like the principles of Res Judicata, Subrogation etc. Hence, if the Court finds that a rule has been accepted generally as a fundamental rule of justice by most Nations in their Municipal Law, it may be declared as a rule of International Law.

(i) *In Administrative Tribunal Case* (I.C.J.) the court held that 'res judicata' was a well-established & generally accepted rule. It applied 'res judicata'. (According to this, a judgment given by a competent court, bars any suit by the parties on the same issue).

(ii) In the *Eastern Greenland Case* the court applied the doctrine of Estoppel and held that the Norway Govt. had accepted references to Danish Sovereignty over Eastern Greenland, 85 thus had estopped itself from questioning the Sovereignty of Danish

Govt.

(iii) In the *Temple of Preah Vihear Case* the I.C.J. held that Thailand was precluded by her conduct from questioning Cambodia's sovereignty over the Temple.

(iv) In the *Mavrommatis Palestine Concessions Case* the P.C.I.J. applied the doctrine of Subrogation.

Comments : It is stated that the recognition of 'General Principles' as a source of law *would sound the deathknell of positivism*. This statement is overdrawn, Positivists believe in the common consent of the States as the basis of International Law. Naturalists believe in the superiority of natural law only. Hence, these two are opposite schools. The; above comment is a reference to this and believes that the recognition of 'General Principles' based on Natural law ended the positivists theory. But, this is not so. The I.C.J. applies Treaties & Customs and only in their absence, resorts to the 'General Principles of Law recognised by Civilised Nations/ Hence, priority is given to positive law.

d) judicial Precedents:

The decisions of the I.C.J., the P.C.I.J., the International Arbitration Tribunals and the National Supreme Courts form the fourth source of International Law. This is followed by the Courts not only as a source, but also as the best evidence available to show the existence of rules of International Law referred to in those decisions, e.g.. (i) I.C.J.. decisions. *The Fisheries Case* (drawing of straight base- line to determine the territorial waters), the *Reparations* case declaring the U.N. as successor to the League of Nations & that U.N. is an International Person have laid down new principles of International law.

ii) P.C.I.J. : Palmas Island Case

iii) International court of Arbitration : Savarkar's case, Pious Fund case, North Atlantic Coast Fisheries case etc.

iv) State Courts : Franconia case, Scotia case, Paqueta Habana case etc.

e) Juristic Writings :

This is the source, next to the precedents. The I.C.J. may refer to the teachings of the most highly qualified; publicists of the various nations. In the 16th & 17th Centuries, writers on International law held a pre-eminent position as this system of law was in its slow ebb of

development. Even today in areas where the law is uncertain the classics of the jurists are referred to by the State's before the I.C.J. and Arbitration Tribunals in support of their arguments. The judges pay regard to the juristic writings as they are persuasive in nature.

The classical works of Gentili, Hugo Grotius, Zouche, Pufendorf, Bynkershoek, Moser, Van Martens, Vattel, etc., are relied upon. References are made to Oppenheim's treatises, and Lauterpacht's writings, and to the texts of the International Law Commission.

f) **Ex aequo et bono**

This is the final source. This means equity & good conscience. This saves the situation of helplessness of the Court. One of the fundamentals of the judiciary is to solve the dispute on hand and not plead its helplessness or non-availability of any definite law. In such a case, as a last resort, the court relies on its own concept of equity and good conscience & decides the case on hand, if the parties agree e.g., The P.C.I.J in the *Diversion of water from the River Meuse* case said 'He who seeks equity must do equity'. Hence, one party by non-performance, cannot take advantage of a similar non-performance by the other party.

In the *Rann of Kutch Arbitration* (India V. Pakistan), both parties relied on equity as part of International law, in deciding the boundary dispute between the two parties the Tribunal found the two deep inlets of Nagar Parkar as part of Pakistan, on grounds of equity.

In the *Continental Shelf Cases* and in the *Barcelona Traction Case*, the I.C.J has applied equitable principles to solve the disputes.

CHAPTER 3

International Law Vs. Municipal Law

i) **Introduction :**

Two aspects are to be noted in the relationship between Municipal Law & International Law. One is the theoretical question whether both laws are part of a Universal legal order, or, are two different systems. The other is the conflict between them in the Municipal courts as to the primacy of Municipal Law over International Law, or vice versa.

ii) Two Schools:

The two schools are the **Dualistic** & the **Monistic** schools:

Monistic School : According to Anzilotti and Triepel, International Law & Municipal Law are two separate & distinct systems of law-one is the antipode of the other. The reasons are :

Sources : Municipal law has Acts of Parliament and local custom as sources of law, whereas International law has treaties and International customs as primary sources. Thus they are different. **Secondly** : Individuals are subjects in Municipal law, whereas the States are subjects in International law. **Thirdly** : Under Municipal law the State has its sway over the individuals, whereas International law is between or among Sovereign States.

Dualistic School : Dualists school has been opposed by the Monistic school (also called Vienna School) which holds the following views : (founder Kelsen).

Firstly : Ultimately it is the conduct of the individual that is regulated in both the systems of Municipal & International law.

Secondly : Law is a command on the subjects (Individuals or States) independently of their will.

Thirdly : Both the systems are the manifestations of a single, conception of law. Two branches of the same tree.

From the above schools it is evident that International law and Municipal law are separate according to the Dualists but one and the same according to the Monists.

iii) Practice of States : In U.K.: Primary Rule :

International Customs : According to Blackstone, *Customary International Law is part of the law of the land*. The British Courts follow this rule but subject to two conditions ;

1. That such a rule should not be against any British Statute.
2. That once the Court decides, it is followed thereafter.

The Blackstone's Theory was confirmed by judicial determinations (Dolder V. Hunting field, Nevello V. Toogood etc.).

Leading cases : 1.. **R. V. Keyn (Franconia Case) 1876**

Franconia, a German ship, collided with a British vessel within the British Maritime Belt. The British Vessel sank and one person -died. The British Court convicted the master of the German ship for manslaughter. Question arose about the jurisdiction of the Court as the incident had happened within the British territorial waters. The House of Lords, held that the English Court wa, bound by Municipal Law and Municipal Law had not provided for the Jurisdiction hence no jurisdiction.

This was neutralized by the Parliament which passed the Territorial Jurisdiction Act 1878 by extending the jurisdiction.

2. West Rand Gold Mining Co .V. King 1905.

This was a Company working a gold mine in South Africa. The Govt. officials seized gold belonging to the Company & according to law, they were to pay compensation or return the same. South Africa was defeated by the British, and, the gold was brought to England. Thereupon, the Company sued the English Govt. for return of the gold or for compensation.

The Crown made a Declaration which stated that the British Govt. as a successor would not respect the commitments of the South African Govt.

The Court held that the Company was not entitled to the gold or for compensation, as the Crown Declaration was Municipal Law. binding on Municipal Courts

Hence, municipal Law prevailed.

3) Chung Chi Cheung V. King (Privy Council).

C was a cabin boy on board a Chinese vessel. 'When the Vessel was in Hongkong Territorial Waters, he shot & killed the Captain. & another person. C was duly committed. But. the question was whether the Court of Hongkong (a British ' Colony then) had jurisdiction to try the case. The Privy Council held that the Court had jurisdiction. The conviction was affirmed.

Rules of Interpretation . The rules emerge from British practice . *
A rule of construction that the Parliament did not intend-to deviate from international law. This is a presumption.

ii) A rule of evidence according to which courts take notice of International law.

b) Treaties : Negotiation, signature ratification are matters, belonging to the prerogatives of the Crown. But legislation is necessary, if treaties

are :-

1. Affecting the rights of subjects (citizens).
2. Modifying a statute. *
3. Vesting additional powers on the Crown.
4. Imposing financial burden.

Legislation is also necessary, if there is a provision for cession of the territory.

Hence in case of treaties, incorporation is necessary, otherwise, Municipal law will prevail.

Practice of States : In U.S.A.

i) International Custom : The procedure is the same as in U.K.

ii) International Treaties : The practice is different- as the U.S. Constitution in Art. 6(2) provides that **treaties are The Supreme – Law of the land'**. There is a clear distinction between self executing and non-self executing treaties. Self executing treaties operate without legislation. In case of non- self- executing treaties. they will be operative only after legislation,

INDIA : Art. 51, of Directive Principles of State policy, provides for **respect for International Law'**. This provision is a reference to the State Policy only. Broadly speaking the practice of U.K. is followed in India, (Beruberi Union Case).

CHAPTER 4

• CODIFICATION

Codification

To provide definite laws to the International Courts. National Courts. and Tribunals and to stimulate the willingness of States to submit International disputes, codification gained momentum. The idea of

codification first came from Bentham. The declaration of rights of Nations--of 1792 of France was the first attempt. Abbe Gregorie drafted 21 articles for this purpose. However, the convention was not a success.

The first successful attempt was made at the First Hague Conference convened by Emperor Nicholas II of Russia in 1899, This showed the possibility of codification. The conference .codified inter alia :

- i) Pacific settlement of disputes : and ii) Law and custom of war on land.

The second Hague Conference of 1907 passed 13 conventions. They relate to Maritime Navigation, rules of war. Neutrality and opening of Hostilities, etc.,

A parallel development in the 'field was the peace Treaty of 1919. It provided for the League of Nations and the ILO and PCIJ. The League provided for an International Law Commission consisting of 15 .Jurists. Subjects which were **ripe for codification** were selected by them. Codification relating to nationality, territorial waters, privileges and immunities of Ambassadors etc., were successfully made.

The convention declared the **renunciation of war as an instrument of National Policy (1929).**

. The codification of International Law conference met in 1930 provided for conflict of Nationality laws; and Statelessness. etc.

Under the United Nations, the International Law Commission is charged with the duty of codification and progressive development of International law. There are now 34, members. Since 1948, the International Law Commission has conducted its deliberations and submitted its drafts.

Codification has been made on many main topics .e.g., Privileges and Immunities of Ambassadors. & of consuls and treaty law, etc. ,The Commission has endeavored to give clear expression where there is a common measure of agreement or uniform practice.

Codification has been viewed as systemization & codification of principles agreed upon and (ii) agreement on hitherto divergent issues and practices..

Codification exposed the States to dangers of unanimity Rule. It also showed that certain States did not like to commit in writing what they were actually practicing.

Further, uniformity in opinion was not available and lengthy preparations and discussions were inevitable. The earlier Conferences could not, possibly achieve much:

The international Law Commission under the U.N. is almost free from the dangers stated above. Its work is commendable and laudable

Progressive development means the preparation of draft convention on subjects which are not yet regulated or developed- Much work is done by the International Law Commission, e.g. Geneva conventions on the-Law of the Sea 1958. Vienna Convention on Diplomatic Relations 1961, Vienna Convention on the law of Treaties 1969 etc.,

The modern trend is, towards the speedier method of international law making process: i.e. Treaties bi and multilateral This is called **international legislation**. The role of these law making treaties is considerable. The contributions of International court of Arbitration, P.Q.I.J. & I.C.J. are of great significance Apart from these, the part played by International.Law.Commission.. in formulating treaty-drafts, in respect of volume & area covered, are phenomenal. The processes in codification & progressive development of International law are confirming .on and have become part of law making in the field' of. International law.

CHAPTER 5

STATES AS SUBJECTS

Ch 5. **Subjects of International Law.**

Primarily, International Law is concerned with the rights duties and interests of States. As'International law 'is between or among the States, some jurists hold the view. **that 'only the State* are the subjects of International law'**.

Subjects of International Law meajjis : .1. Incumbent of International rights and duties :

2. Possessor of procedural privileges of suing in International Courts and Tribunals :

3. Possessor of interests under International law.

4. Capacity to enter into treaties & International obligations.

EXCEPTIONS :

i) Though it. is the conduct of the state that is regulated by international law, in the ultimate analysis it is the conduct of the individuals that is regulated. As Westlake opines 'The rights & duties of the States are ultimately the rights and duties of-men. that compose them. Hence, though the States are normal subjects, they may endow the individuals with the International rights & duties and to that extent make them subjects of International law.

ii) Pirates who commit Piracy Jure Gentium on the high seas are liable to punishment under International law. To that extent they are the subjects of International law,, but some jurists call them as objects.

iii) Slaves : International convention has provides for the abolition of slavery. The convention also provides for the rights of the,slaves. They enjoy these rights as subjects of International law.

iv) Belligerents : are subject to International rights and duties in respect of war. Hence, they are subjects of International law. e.g. Geneva Conventions on the Prisoners of war apply to them..

v) Individuals : May be allowed to appear before the International tribunals, like ICJ. In Danzig officials case, the ICJ. has opined that individuals may be conferred with certain rights by States.

vi) War Criminals : The Nirenberg and Tokyo trials after II World War showed that individuals could be tried for International crimes like crimes against peace, crimes against humanity and crimes under the law of War.

Eichmann's Trial fortifies the above position. The Nuremberg- Trial rightly stated that crimes against International law are committed by men not by abstract entities (States) and only by punishing individuals who commit crimes, can the provisions of International, law be enforced.

vii) Genocide Convention : This provides for punishment of those who commit genocide, the punishment may be awarded by National or International courts.

viii) European Commission for Human Rights has been empowered to investigate and to report on violation of human rights by the Member States. The *Lawless case* decided by the European Court of Human Rights is an example.

ix) **United Nations** : The I. C. J. in the *Reparations case* held that the United Nations is an International person. It is also 'declared as the subject of International law, capable of International rights and obligations.

x) The Specialised Agencies like I.L.O., U.P.U., are International persons and hence the subjects of International law as per their Constitutions.

xi) Regional Arrangements : Like the NATO., SEATO., etc. are also endowed with International personality. Hence they are also subjects of International law in a limited w iv.

These factors evidently prove that apart from Sovereign States, there are others which are also the subjects though '.in a limited sense. It is no doubt true that States are mainly the subjects, as the capacity to follow International obligations, is on them primarily.

CHAPTER 6

RECOGNITION Ch. 6-1 Recognition.

i) Definition :

It is the free act by which one or more States acknowledge the existence of a politically organised independent sovereign community capable of observing International obligations.

The recognition is for the membership of the 'Family of Nations'. Until 1857, there was an European family of Nations but in 1857, Turkey was admitted to it and since then, it is no longer an exclusive European family of Nations. Today - recognition is with reference to this family of Nations. (This is different from the membership to the United Nations.) **Theories :**

There are two theories :i) The Constitutive? theory and ii) The Declaratory theory According to the Constitutive theory, the act of recognition alone creates statehood, whereas according to the Declaratory theory, State exists prior to , and, independent of recognition. The act of recognition is merely a formal acknowledgment of. an established situation. Hence, a new State becomes a member of the family of Nations ipso facto by rising into existence and recognition supplies only the necessary evidence of this fact.

According to the Montevideo Convention 1933, the essentials of statehood are : a permanent population, definite territory, and established Go'Vt., and full capacity to enter into International relations with other States. Sometimes a definite territory is not always essential as is evident from State practice during World War II. Hence, if these essentials are present, there is Statehood according to declaratoy theory whereas according to Constitutive theory, such a community should be recognised by other States.

Constitutive theory has its own supporters: There are two aspects, (a) According to the traditional constitutive theory recognition is a political act pure & simple and therefore an act of policy, (b) Lauterpacht differs from this. He opines that each State has a duty towards the International community to recognise a new State which fulfils the legal requirements of Statehood or other necessary qualifications. This is a quasi- judicial authority. This duty is similar to the duty under the Charter of United Nations for admission to the U.N. under Art. 4 Extaneous political considerations, should not be taken into consideration. But it is difficult to accept Lauterpacht's views. If according to him, it is a legal duty to recognise, what is the sanction behind this duty? Further, the actions of State in recognising is yet uncontrolled by Independent rules. Even the Declaration of Rights & Duties of' States 1949, does not prescribe such a duty. It is the traditional theory that is largely in vogue, as .a matter of vital policy. Oppenheirn supports this theory.

a) International State practice has recognised Declaratory theory. However, recognition is with-held for political reasons, b) There is retro-active effect of recognition dating back to the actual rising into existence of the State, c) The

courts, in respect of treaties, take into consideration not the date of operation but the date of coming into existence of the State.

In Luthor V Sagor : P company had owned a quantity of wood in Russia, but it was nationalized by Russia which it took over in 1919, under a order. This wood when sold by the Govt was bought by D company from the new USSR Govt. P claimed

that the decree was not applicable as U.K. had not recognised USSR Govt. in 1919. U.K. recognised in 1921. The English Court held that the Crown's recognition of Soviet regime in 1921 was retroactive dating back to the time of Soviet regime seizing power in 1917 and hence, its seizure of timber was recognised as legal.

Hence, ipso facto by raising into existence, the new community becomes a member of the family of Nations & recognition is only an acceptance of this fact.

Podesta Costa's theory :

His opinion that recognition is Facultative and not obligatory is more in accord with State practice. When recognition is granted by States, they make it certain that the new State to be recognised had the requisite legal qualifications. Only to this degree, the act of recognition is a duty.

Consequences of recognition:-

Recognition confers a 'status' under international law & municipal law. The recognised state gets certain rights, powers and privileges, as a consequence thereof. In the absence of recognition, there would be certain disabilities to the unrecognised state. For example, it cannot sue in the municipal courts of the state which has not recognised it, similarly, its representatives cannot get privileges & immunities, etc. Recognition cures these & other disabilities.

i) The new State acquires the capacity to enter into relations with recognised State and conclude treaties with them. The new State gets the right to send & receive Ambassadors. (Active & Passive Legation), These ambassadors are entitled to privileges & immunities in these States,

Past treaties revive" and come into force automatically. The new State gets the right to sue in the recognising States.

iii) It acquires for itself and for its property immunity from the jurisdiction of the recognising States.

iv) If it is a new successor State which is recognised, it becomes entitled to demand and to receive possession of its predecessor's property situated in the recognising States.

v) Recognition is retro-active and hence the courts of the recognising States are not to question the legality of the acts (past & future) of the New State.

This means the recognising States, become subject to certain obligations ;

similarly, the new state also becomes subjects to certain obligations. Thus, it gets the benefits & burdens according to International Law.

Ch. 6.3 De facto & De jure.'

De facto is purely provisional or temporary. But de jure is final and binding.

De facto can be withdrawn if the existing circumstances show that the new community is no longer holding the power and status. But, de jure recognition is permanent and cannot be withdrawn.

iii) De facto deals with factual status, whereas de jure deals with the juridical status.

vi) De facto is generally granted looking to the developments as regards insurgents capacity and establishment. De jure is given if the granting State, is fully satisfied about the International capacity of the insurgent state.

The recognising State grants recognition de jure, when the recognised state has fulfilled the requirements for statehood and has the capacity to follow International obligations ; However, it may grant de facto recognition when there is only actual fulfillment of these requirements and hence may be temporary & provisional This does not mean that de facto should be given first & then de jure. In the estimation of recognising state, the recognised state has the capacity to follow international obligations either de facto or de jure. This is the policy of the State.

1. U.K. granted de facto recognition to Soviet Govt. in 1921, but gave de jure in 1924.

2. U.K. granted de facto recognition to Italian conquest of Abyssinia in 1936, but gave de jure in 1938.

3. The -Franco Govt. in Spain was given de facto recognition in 1936, but de jure was granted in 1938.

Leading Cases : (1) Luthor V Sagor (Refer Ch. 6.2)

(2) **Haile Selassie V Cable & Wireless Ltd.** C & W Defendant company, owed monies to Emperor Haile Selassie of

Ethiopia. In 1935, Italy invaded Ethiopia .& took it over. The United .Kingdom recognised **de facto** this Italian Govt. But, the Emperor Haile Selassie, Plaintiff, was the **de jure** sovereign of Ethiopia. Subsequently, de jure recognition was given to King of Italy; when the case was pending in the Court.

Held, de jure recognition of King of Italy dates back to date of taking over. Hence, plaintiff claim for recovery of money failed

(3) Arantzazu rrandi's case: during Spanish Civil War (1936-38) insurgents had occupied a portion of territory and it was recognised de facto by U. K. Here, Arantzazu rrandi was a ship registered in insurgent territory. Held, the ship was entitled to immunity as U.K. had given de facto recognition.

CHAPTER 7

I

INTERVENTION

Ch. 7-1 Intervention.

It is of two kinds : i) Dictatorial Intervention &
, ii) Intervention pure & simple.

'Intervention is dictatorial if it is done by a State in the affairs of another State for the purpose of maintaining or altering the actual condition of things. This is forbidden by International Law.

But intervention pure and simple, like using Good offices. Negotiation, mediation, conciliation are not forbidden. In 1826 at the instance of Portugal, U.K sent British troops to Portugal to suppress the revolution engineered by Don Dugal,

Intervention as a right can take place in the following circumstances:

1. A State holding a protectorate has a right to intervene in all external affairs concerning the protected state.

2. When the external affairs of a State are also the affairs of another, the latter may intervene when the former acts unilaterally. Russia & the defeated Turkey concluded the peace. U. K. protested as it was inconsistent with treaty of Paris of 1856 and in the convention of London 1871, Russia agreed to meet & the Congress of Berlin met and resolved.

A state restricted by treaty in the external independence or territorial supremacy, must comply with the provisions of the treaty. On failure, the other party may intervene as of right. In 1926, USA, intervened in Cuba, for the purpose of establishing order. This was in accordance with the treaty of Havana.

3. If a State violates universally recognised customary International

law or a provision of law making treaty, other States may intervene by right, e.g. If any State does not act which affects the interests of merchant vessels on the High Seas, the concerned State may intervene, to protect them.

4. A State 'which has guaranteed another State particular form of Govt. or particular Dynasty may intervene in case of a change thereof.

5. A State may intervene to protect its citizens who are resident abroad intervention may be to protect the interests of the property, person or honour. U.S. intervened in Panama City to protect Americans.

6. Collective intervention under U.N .is a recognised intervention. The Security Council in t;he 'interest of maintaining Internationa! peace, has intervened in Korea and Congo,

7. There are other' interventions which are not interventions by right, but are nevertheless **not prohibited**.

a) Intervention in the interests of self-preservation, and

b) Intervention in the interests of balance of- power which is now being replaced by collective intervention of the Security Council of the U.N.

c) **Humanitarian intervention** : When State resorts to cruelties, atrocities & persecutions of its own nationals, in such a way as to deny their fundamental freedoms and 'U shock the conscience of mankind'. in the interest of humanity at large, intervention is permissible. U.K., U.S.S.R, and France intervened in the struggle between Greece and Turkey, where many atrocities were committed.

Ch. 7-2 Self Preservation

Meaning :

States, as a rule are under a mutual duty to respect the personality of each other, and also not to violate each other's territories. However, acts committed in self-preservation are not prohibited by the Law of Nations.

Self-preservation is considered as the first Law of Nature and every State has a right to the integrity of its personality, and according to Vattel, it may do whatever was necessary to preserve it. In later years it became clear that acts done were legal & valid if they were for 'necessity'. Necessity must be 'instant, overwhelming leaving no choice of means and no moment for deliberation.' When a body of armed invaders are making preparations to invade the territory of a State, the State cannot resort to self-defence measures, if there is time to resort to the authorities where the invaders are presently making preparations, But, if the appeal is fruitless or if there is danger in delaying, the State is

justified in invading and disarming the invaders.

In the 19th century, the concept of 'Balance of Power' had its influence. According to it, as **Vattel** said, no arrangement should be allowed which would allow an absolute mastery and domination over others. The **Congress of Vienna** re-arranged the map of Europe. This is now replaced by the Collective Security measures of the United Nations.

ii) Self defence & Charter :

Art. 51 of the Charter, has recognised self defence as a right of the States. It says that every State has an inherent right of individual (or collective) self-defence, if there is an armed attack against a Member and the measures taken must be reported to the U.N. This right may be continued until the Security Council resorts to the taking of Collective Security measures to maintain International Peace & Security.

Instances of- Self-defence :

a) The Danish Fleet Case :

There was a secret clause in the Peace Treaty of Tilsit 1807. Under it, Denmark could be forced to wage war against U.K. and France could seize the Danish Fleet of Denmark. War broke out between U.K. and France. There was danger to U.K. as, under the treaty if Danish Fleet was given to France, France would easily attack U.K. Hence, the U.K. Govt. requested the Denmark Govt. to deliver up the fleet to U.K. & promised to return after the War. Denmark refused. U.K. shelled Copenhagen and seized the Danish Fleet on grounds to self defence.

b) Amelia Island Case :

A band of Buccaneers had seized Amelia Island, under the command of the adventurer Me Gregor. The Commercial vessels between Spain and U.S.A. were preyed upon. Spain was incapable of and unwilling to drive out the Buccaneers. President Munro sent a war-vessel which destroyed the establishment of the pirates. This was on grounds of self defence.

c) The Caroline Case :

There was a rebellion in Canada in 1837. The rebels chartered the vessel 'Caroline' to carry ammunition from the U.S. port (Schlossar) to Canadian Port '(Navy Island). U.K. considered this as an imminent danger. It sent British forces, which seized Caroline set her on fire & sent her adrift down the Niagara Falls. The United States strongly protested against the violation of its territorial supremacy by U.K. apologised.

d) The Mexico Expedition :

The U.S. to protect the American citizens and their property in Mexico,

despatched troops in 1916-1919 war. This was founded on necessity.

e) Japanese Invasion of Manchuria :

There was a dispute between Japan and China. Japan invaded Manchuria on grounds of self-defence. The League of Nations condemned Japanese aggression, as there was no necessity.

f) French Fleet at Oran in 1940 :

U.K. wanted that French ships at Oran should not fall a prey to Germans. France refused to allow U.K. to have Oran fleet. U.K. attacked and sank the fleet, on grounds of necessity.

*

CHAPTER 8

Open Sea

Ch. 8-1. Freedom of the Open Sea.

i) History & development :-.

A conviction had grown in the beginning of the 15th Century that States could extend their sovereignty over certain parts of the Open Sea. In 1493, the Pope Alexander VI, divided the New World into two halves one to the Portuguese & the other to Spaniards. Inspired by this, Spain claimed a major portion in Pacific & the Gulf of Mexico and Portugal claimed sovereignty over the whole of the Indian Ocean. Great Britain had claimed the North Sea, the Narrow Seas, & the Atlantic.

These claims were not merely formal. Many ceremonials were in vogue. To fish in North Sea, the party was to take out Licenses from the U.K. & when in 1636 the Dutch attempted to fish, it was compelled to pay penalty. When Phillip II of Spain was coming to England to marry Queen Mary, the British Admiral fired at his ship in 'British Sea' as he did not lower his flag, in honour of the English Flag !

In 1580, the Spanish Ambassador in England, **Mendoza**, lodged a complaint with Queen Elizabeth, against Drake, who had made a successful journey to the Pacific. Elizabeth declared that vessels of all nations could navigate on the Pacific Ocean since, the sea and the air were common to all. This was the germ, out of which grew the freedom of the Open Sea.

In 1609 Grotius wrote his 'Mare Liberum' (12th Chapter of De Jure Belli ac Pacis) commending the **freedom of the Open Sea**. John Selden attacked Grotius and wrote his 'Mare clousum' commending the **closed seas** concept, but this failed .

In later years the concept of the freedom of seas became a Universally recognised rule in international law.

ii) Open Sea :

Open Sea is the coherent body of salt-water all over the Globe (with the exception of the maritime belt, the territorial Straits, gulfs and bays of the sea) but no part of it is an object of the law of Nations. Freedom of the Open Sea, means that the Open Sea is not and never can be, under the sovereignty of any State. It means that there is absolute freedom of navigation for all Nations whether merchantmen or war-ships.

iii) Rationale :

The Rationale for Open Sea according to Grotius are :

a) It could not be occupied effectively by any State.

b) It is **Res extra Commercium** like light & air and can be used by everybody & is **inexhaustible** :

c) The modern reason is that the **Open Sea is an International highway & hence should not be under the sway of any State (Oppenheim).**

iv) Law & Order :

Freedom of the Open Sea does not mean anarchy and lawlessness. On the contrary, over the centuries, International customary law has grown providing for legal order on the High Seas.

a) Vessels flying the Maritime flag are subject to protection, and unauthorised use of flags is punishable. A ship without a flag may be seized by any State.

b) Every State may punish as a matter of right, piracy jure Gentium,

c) 'Floating Island' theory provided that each Vessel was subject to the exclusive jurisdiction of the flag State over persons and goods.

d) Fisheries, in the Open Sea was free & open to all.

e) Various provisions were made by States in their Municipal laws prescribing qualifications. Seaworthiness Certificate, Registration, Muster Roll, Log Book, Bill of lading, Charter party etc. 'P' my rules developed relating to Signalling (Washington Conference 1889), collisions (Brussels Convention), Blockade and contraband, search & seizure 'hot pursuit', and abuse of flag.

f) The I.M.C.O., as a specialised agency was established in 1945 specially to establish standards & to guarantee Maritime safety & efficiency in navigation. This has done much commendable job through its Assembly, Council & the Maritime Safety Committee.

v) **Law of the Sea Conference 1958** : (Geneva). Much of the law relating

to the Sea is codified under the Geneva Convention on the High Seas 1958, Geneva a convention on Fishing & conservation of the Living Resources on the High Seas 1960.

Every State has a right to sail ships under its flag (Art. 4). Ships engaged in piracy or slave trade may be seized by any State etc.

vi) Recent Developments :

a) Moscow Nuclear Treaty 1963 has imposed a ban on nuclear tests in the territorial waters & on the High- Seas (Art. 1).

b) Certain duties have been imposed on States in respect of Pollution, e.g.: Prevention of Pollution from ships convention 1973, and Maritime Pollution Prevention 1972.

f) **Law of the Sea Treaty 1982** has made detailed provisions on the use of sea, the continental shelf, EEZ & contiguous zone.

Ch. 8-2. Territorial Waters.

i) **Origin :**

This is the traditional Canon-Shot or the Maritime Belt Rule. The Origin of this can be traced to **Bynkershoeck** (an ardent follower of Hugo Grotius). In 1702 he published his work 'Essay on Sovereignty over the Sea', in which he commended that the Maritime State could dominate only such width of the Maritime waters as lay within the range of a Canon-Shot from the shore batteries. He was the first jurist to enunciate this in terms of **Canon Shot**. In later years, the range was fixed at the instance of a military expert of those days called **Galiani**. He stated that the maximum range for the Canon Shot was 3 miles from the shore.

ii) **Width :**

The 3 miles-limit became commonly accepted by the States and the Courts in the 19th Century, the U.K. & U.S.A. taking the lead. But, in the 20th Century a number of States claimed a wider width extending upto 12 miles !

a) The Hague Codification Conference 1930, opposed the traditional concept of 3 miles. It was a 'idol dethroned and not restored'. Hence, no agreement could be reached.

b) In Geneva Conference on the Law of the Sea 1958, the U.S. & the U.K. did not agree on a 12 mile limit, though they were prepared to accept a 6 mile limit. The opposition for a 12 mile limit was based on Security : (i) Submarines may travel undetected through the territorial waters of Neutral States and create problems during war. (ii) There was also the view that with 12 miles the available area of the Sea for free navigation, free fisheries & free over flight by aircraft etc. would be diminished.

The net result was, though 3 miles was accepted universally, the disagreement was with the range between 3 to 12 miles.

c) The Third U.N. Conference on the Law of the Sea, gave a decent burial to the 3 mile limit. The weight of State practice is in favour of a 12 mile-limit, but this is to be made with multilateral treaties among States.

iii) Measurement :

Although this has not created much difficulty, the base-line method adopted by the Court (I.C.J.) 1951, has been widely accepted.

Anglo Norwegian Fisheries Case : U.K. Vs Norway. The facts were : Certain claims were made by the Norwegian Govt. creating an exclusive fisheries zone for itself.- It followed the straight, baseline method selecting some 48 points to measure the breadth of the territorial waters. This was upheld by the Court. This was accepted by the convention on Territorial Waters & Contiguous Zone, (1958). (However, where the baseline method is not possible the low waterline method may be followed).

iv) Jurisdiction •:

The 'Territorial Waters' is an area over which the maritime State has exclusive sovereign rights. Sometimes jurisdiction is extended. The leading case - **Lotus Case** decided by P.C.I.J in 1927. A French, Steamer, the LOTUS, collided with a Turkish Vessel on the high seas due to gross negligence of officer of Lotus. The Turkish vessel sank, and 8 Turkish nationals died. Turkey based its claim on the ground that the¹ negligence on board Lotus, had its effect on Turkish vessel & hence, on a portion of Turkish territory. Held, Turkey was entitled to succeed.

a) The Maritime State has exclusive fishery rights and also it may reserve its right of cabotage (to navigate between two ports of the Maritime State itself)

b) The Maritime State has sovereignty over the surface, the subsoil, and" the superincumbent air space (1958 convention).

c) There is a customary rule of International law of allowing 'innocent passage' through the territorial waters. (Recognised & defined by the 1958 convention).

d) The Maritime State has exclusive jurisdiction- Civil, Administrative, Sanitation, Custom and Criminal. However, in respect of foreign vessels passing through territorial water the jurisdiction is limited as per the convention of 1958.

The leading case is the **Corfu Channel case 1949**.

Facts were: Mines had been laid within the territorial belt of Albania during October 1946. British Vessel passing through the belt, struck the mine on 22nd Oct. 46 & was damaged. Subsequently, the British Govt. on, 13th

November_Conducted the mine sweeping operations. It sued Albania for damages, contending that Albania was responsible or had knowledge about the mines.

The I.C.J. held (i) Albania was liable &

(ii) U.K. has violated Albania's sovereignty, as she has' **swept the mines without Albania's permission.**

e) **Right to 'hot pursuit'**, (to-chase and seize a vessel that has iolated the Maritime laws of a State) is recognised.

But, this ends when the vessel enters the territorial waters of any other State.

' **Leading Case 'The I am alone' (Canada V.U.S.).**

'I am alone', a British vessel (Regd. in Canada) was suspected of smuggling liquor within 10 miles off U.S. coast (L'ouisiana) "Wolcot" & later another vessel Dexter set out to seize her & hence made a hot chase.

Both were able to reach at a distance of 200- miles off the coast. They gave warning, but later fired at. The men on deck died & it was sunk.

Commissioners were appointed to decide

(i) the right of hot pursuit (ii) Whether sinking was justified.

Held, U.S. had the right of hot pursuit & could use reasonable force to bring to port the suspected vessel.

But sinking in this case was not reasonable force, and hence illegal. The 1924 Convention between U.K. & U.S. discussed and as International Law does not recognise use of unreasonable force .

U.S. was guilty & 25,000 dollars were awarded as compensation to the families of persons who died.

Ch, 8-3.-The Contiguous Zone.

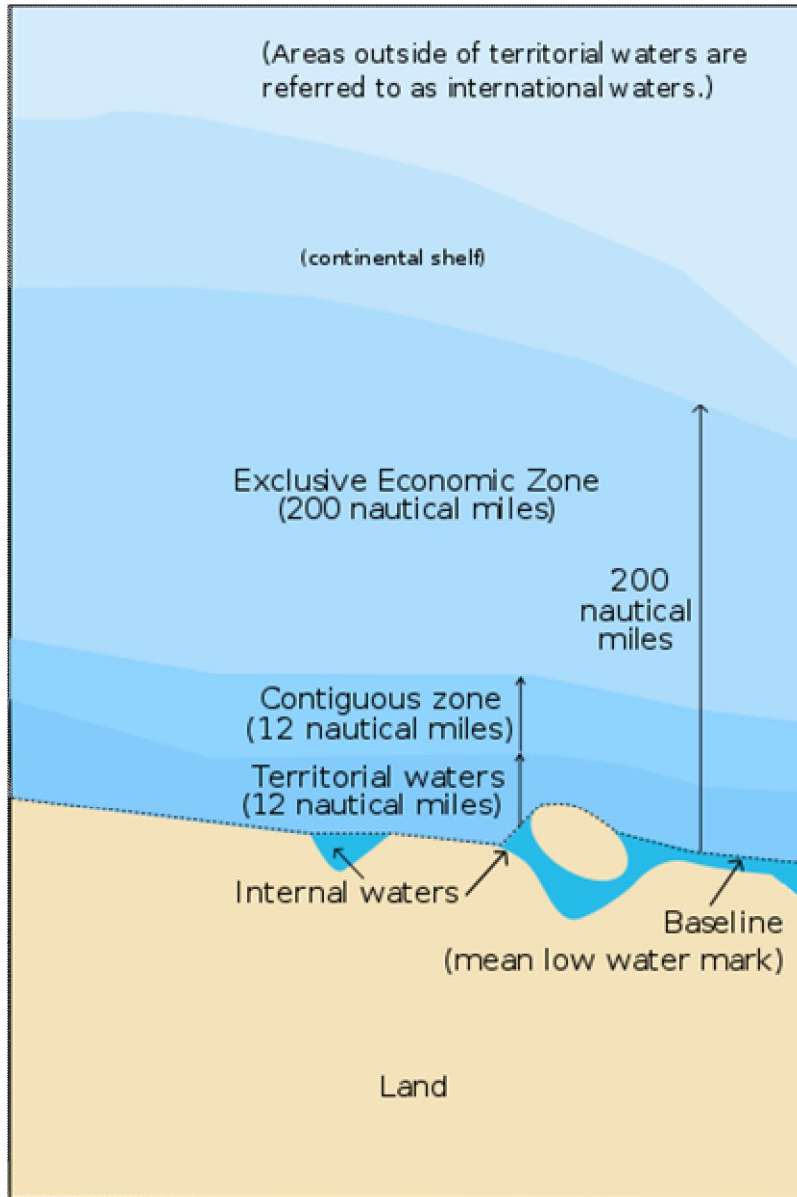
i) Traditional Concept :

This is the area over the Sea, beyond the 3 mile limit but extending upto 12 miles from the Sea Shore. The measurement is to be made in the same manner as in Territorial Waters. (Fisheries Case). The littoral State may claim exclusive fishing rights within this zone and has no

jurisdiction over the waters or the airspace above it

. ii) **Recent Trends :**

The United Nations Conference on the Law of the Sea. (UNCLOS) 1973-76 launched an ambitious programme to codify the entire law relating to Sea. A number of these UNCLOS. sessions have been held so far. The latest is the 1982 Law of the Seas Treaty



The territorial waters, Contiguous Zone , Exclusive Economic Zone and the Continental Shelf are shown here for reference

Though the concept of contiguous zone" is retained, the UNCLOS. sessions have accepted the Exclusive Economic Zone (EEZ.). This has its roots in exclusive fishing zone concept & the doctrine of continental shelf. If combines & develops the two. Some States have laid claim upto a distance of 200 miles from the sea-shore. (There is much disagreement for this regime). The EEZ is the subject of the maritime State for the purpose of exploring & exploiting, conserving & managing the natural resources of the bed & the superjacent waters. This includes fisheries. Some States have already proceeded on these lines to claim over EEZ.

This has many problems yet to be resolved (a) The relation of EEZ to the high seas, (b) The precise rights & their extent in the zone, (c) The problem of land-locked areas who have no such natural resources & advantages.

Fisheries Jurisdiction Case (U.K.V. Iceland) 1974 (I.C.J.). The court recognised the preferential rights of Iceland for fisheries in the fishery zone, in view of its economic resources depending on fisheries. Iceland had first extended to 50 miles. Later it extended to 200 miles. The latest position is that United Nations conference on the Law of the Sea UNCLOS 1985 has recognised upto 200 nautical miles, from the baseline.

This 200-mile limit is not arbitrary. It is based on the fact that the most lucrative fishing grounds lie within 200 nautical miles from the coast. It has the richest fish food pastures.

Within the EEZ, maritime State has no sovereignty, but has the right of exploring, exploiting & conserving the resources of the Sea UNCLOS 1985 has provided detailed provisions in this regard.

Ch. 8-5. **The Continental Shelf.**

i) Origin and development :

The Origin of this concept may be traced to the proclamation made by President Truman of the United States in 1945. By 1945 it had become technically possible to drill for oil & for other resources in the sea-bed, and, the Truman Declaration gave legal status to it. It stated that the littoral States had jurisdiction over the natural resources of the

subsoil and the sea bed of the 'continental shelf and that the exploitation by that State was just & reasonable. Other Nations followed suit and made similar declarations.

ii) **Definition:** Refer diagram

The Geneva Convention on the Continental Shelf 1958, defined Continental Shelf as the area adjacent to the coast, outside territorial sea, to a depth of 200 metres (or-to beyond that to a depth where exploitation is possible).

The Coastal State according to the convention exercises exclusive rights of exploring & exploiting the natural resources, including the living organism and the non-living mineral resources. The Coastal State has only limited rights and has no sovereignty over the continental shelf. Further, it has no rights over the waters or the airspace above the shelf.

In the *North Sea Continental Shelf Cases* [Federal Republic of Germany Vs. Denmark & the Netherlands (1969)], the question of

delimiting North Sea Shelf areas was discussed. The Court held that there was no general customary International Law, in existence. Regarding the Division of a Common Continental Shelf, the court held that such a delimitation must be under a treaty & that the *arrangements for division must be based on 'equitable principles.'* The court also expressed the view that even a joint exploitation of the Shelf by the concerned States could be made.

ii Developments:

Since the Geneva 1958 settlement, there were fast developments in the field of Continental Shelf : ,

a) New Technology had developed to exploit oil & gas in Ocean depths.

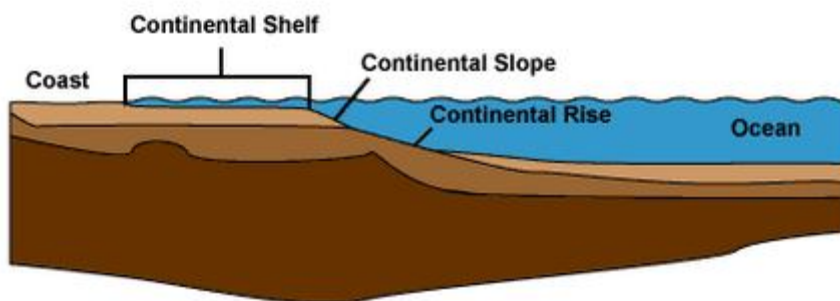
b) New States were financially and technologically at a disadvantage and became gravly concerned over the monopoly by some powerful States.

c) 1967, the .Maltese Govt. initiated a plan to declare that the sea-bed resources beyond continental shelf 'was a common heritage of mankind', & must ! e developed in the interests of all States.

The fear was the possible arms-race in the sea- bed beyond the Continental Shelf area.

Such a declaration was made by the United Nations in 1970. It also appointed a 84 member committee on the peaceful uses of that sea bed-area beyond the **Continental Shelf**.

The stretch of the continental shelf is as in diagram.



d) The U.N. during 1973-76 held five sessions on the Law of the sea &

made 5 conventions.

iv) Developments : **The Law of the Sea Treaty, 1982 is very comprehensive with 303 Articles and is the lengthiest treaty . U S has not ratified even in 2011.**

There is much controversy among the Nations, and the United Nations in its various conferences could not make any headway. On the contrary, the U.S. & other States, including India have defined in their municipal laws : Territorial waters upto 12 miles, contiguous zone upto 24 miles, & Continental Shelf upto 200 miles, from the sea shore.

Gh, 8-6 **Piracy Jure Gentium.**

i) **Definition** : Piracy is defined as every unauthorised act Of violence, against persons or goods committed on the Open Sea, by a private vessels against another vessel, or by the mutinous crew or, passengers against their own vessel.

Geneva Convention of 1958 on the Law of the sea, has codified the law relating to Piracy.- It has given , an extensive definition and Articles 100 to 107, deal with scope, jurisdiction & suppression of Piracy,

A pirate is considered as an outlaw, a '**Hostis Humani Generis**'. The pirate loses the protection of his home State. Piracy is an International crime. Generally, it is a private vessel that can commit piracy. (Art, 16 of the convention on the High Seas).

'Motive'- It is not necessary that the pirate should have the intent to plunder (Animus furandi). It was decided in the leading case, 'In re piracy jure getium' that actual robbery was not an essential element . Even frustrated attempt was declared as piratical in nature.

Hence, 'the motive may be other than making profit e.g., Revenge.

ii) If the crew or the passengers revolt on the open sea and convert the vessel and her goods to their own use,, they are guilty of piracy. If the crew resort to murdering the master because of his cruelty, it is not piracy but only murder. If the purpose is to convert the ship and the goods to their own use ,it would be piracy,

iii) If a person stops a vessel for taking a rich passenger off the vessel with -a view to get high ransom, or if a person stops a vessel to kill certain persons on board the ship, the act is piratical.

iv) The crew is guilty of piracy when they force the master through intimidation or force to steer the vessel to other place than its destination.

v) Cases : (1) Case of **.in re re piracy jure Gentium ;**

In 1931, two Chinese junks pursued & fired at a Chinese Vessel. During the chase the attackers were captured by the English ship which brought them to Hong

Kong & tried for murder. There was no actual robbery. The Privy Council held that 'actual robbery'¹ was not essential for piracy. They were held guilty of piracy.

The court also referred to The Magellan "Pirates Case where it had been held that robbery was not essential.

(2) **In Ambrose** Light Case, the U.S. Supreme Court held that an armed vessel without State authority was a pirate even though no act of robbery is committed.

(3) Hauscar's Case :

There was a rebellion in Peru. The insurgents put Huascar, an ironclad vessel, stopped British steamers, took coal from them without paying for "it and forcibly took two officials. It was decided that the act was piracy.

(4) **Santa Maria Incident** (1961) : Political opponents on board a Portuguese vessel, seized it. It was taken to Brazil. Brazil gave Aylum to them. Vessel later returned to Portugal. Are they, pirates ? Perhaps, not.

vi) **Jurisdiction** : National courts have jurisdiction to punish pirates. As piracy is an International crime any maritime State has,, by customary International Law, the right to punish. The vessels of any Nation may attack and seize them on the High Seas and. bring for trial and punishment. The punishment may be capital. The ship and the cargo may'be returned to the real owner.

Recent developments Since 1990 . the number of pirate attacks has increased . The International Maritime Bureau (IMB),says in 2003 there were 445 reported attacks against ships . Somali pirates in December 2011 released an Italian-owned Aframax oil tanker after receiving an \$11.5m payment.

Recently, The Savina Caylyn was seized in February 2011. Pirates have hijacked a Greek-owned [oil](#) tanker carrying 135,000 tonnes of crude oil in the Arabian Sea, : 1 Britain and other EU countries are considering air strikes on logistical hubs

The United Nations Convention on the Law of the Sea (UNCLOS). , is the key international legal instruments governing **sovereign rights at** sea and the use of the maritime environment. With few exceptions, all other littoral states have accepted UNCLOS.

The U.S. has not ratified this even in2011.

CHAPTER - 9

AMBASSADORS

Ch. 9-1. Institution of Legation : Ambassadors.. i) History t

The institution of Legation started first and religious Ambassadors were sent to start with. Later for political purposes Ambassadors were

The institution of Legation started first and religious Ambassadors were sent to start with. Later for political purposes Ambassadors were

sent on a temporary basis. Eg.: to conclude peace; Permanent legation was initiated by Venice. It sent permanent Ambassadors to France, Switzerland, Germany etc. in the 15th century. It then became an established institution. All sovereign States are having permanent offices called diplomatic enclaves. Legation is a sovereign attribute of the State. Ambassadors position is not based on representation is omni -modae which means representation with **all powers like the Sovereign or Crown**. His authority is limited.

ii) Appointment:

Ambassadors are appointed by one Head of State, to another Head of State. Before appointment, States consult the receiving State, as to whether the individual is persona grata or non-grata, (Person acceptable or not). A letter of exequature is given to Ambassadors which states his appointment, authority and powers.

iii) Functions:

a) Negotiation, (b) Observation, (c) Reporting (d) Miscellaneous.

a) Negotiation :

He is the mouth-piece and the representative of his State. He can negotiate on behalf of the State, collect the view-points, and enter into treaty conclude peace etc.

b) Observation :

He must come in contact with State Officials, V.I.P.s., business magnates etc. He should attend social and other gatherings. He must work with a 'serpent's ear and eagle's eye'. He must collect all relevant information relating to the State.

c) Reporting:

Reporting to his Country of all information gathered by him,

is his

i essential duty. He must keep his country informed of all political and other developments taking place in the receiving State.

d) Miscellaneous :

i
He must keep in touch with his people who are residing in the receiving State. He must protect their interests. , He officiates in marriages, keeps records of births and deaths etc,

iv) **Classes of Ambassadors :**

The classification was made at the Congress of Vienna in 1815, in which the order of merit was placed as the criterion for classification. Special honours are due to each class.

- a) Ambassadors.
- b) Plenipotentiaries.
- c) Ministers Resident.
- d) Charge de affaires.

The Ambassador is entitled to be addressed as 'Your Excellency'. The Plenipotentiary may, by courtesy, be called 'Your Excellency'. Minister resident are not addressed like that.

Charge de affaires are sent by one foreign office to another foreign office. He is never addressed as your Excellency.

v) **Privileges and Immunities of Ambassadors :** Privileges and immunities are special rights of Ambassadors built on reciprocal basis through International custom and treaties.

The very fact that Ambassadors are saddled with multifarious functions and responsibilities shows that in effect, they must have certain privileges and immunities, for the due discharge of their functions & responsibilities. The objective, is to provide an independent & free atmosphere to discharge their functions effectively, with dignity & honour.

Codification : The Vienna Convention on Diplomatic Relations 1961 has codified the customary law relating to* Ambassadors and of their privileges & immunities.

a) **Exterritoriality:**

Under the legal fiction even though physically an Ambassador and his diplomatic enclave are inside the receiving State, they are considered to be legally outside the territory of the receiving State. Ambassador is beyond the jurisdiction of local authority.

The police have no jurisdiction over the diplomatic enclave. Similarly civil and criminal courts have no jurisdiction. On the contrary, the receiving state is under a duty to protect the person of the Ambassador and of his retinue.

Further, the building, records, his equipment, should also be protected against any possible strike and invasion, civil disturbance etc. Further, the local

administrative authorities have no jurisdiction over the enclave. Postal bags are to be protected. They are not to be tampered.

h) Immunity from Criminal Jurisdiction':

An Ambassador is beyond the jurisdiction of the Criminal Courts in receiving State. The Portuguese Ambassador Mendoza, had attempted to dethrone Queen Elizabeth in 1584 in England. Gentili, a great jurist was consulted. He declared that Ambassadors were immune & that they should not be arrested, or tried or punished at all. Thereupon, the Queen requested Mandoza, 'His Excellency', to leave the country. **De Boss**, an Ambassador in England attempted against the life of Cromwell. He was asked to leave the Country within 24 hours. L'Auhespine attempted against the life of Queen Elizabeth. He was warned.

c) Immunity from Civil Jurisdiction :

He is immune from the jurisdiction of the Civil Courts. He is not liable for tortious and contractual liabilities.

d) Immunity from Administrative Tribunals :

He is outside the jurisdiction. Tribunals have no powers over them.

e) Immunity from Taxes :

He is free from the income tax and all other local taxes of the receiving State. He may of course pay fee or charges for services done (current, water, sewage etc.).

f) Rights of Subpoena :

This means, he is' privileged and cannot be called to a court as a witness. Summonses should not be issued to him..

g) Right of Chapel [religious practices] within the enclave. :

h) Right of Waiver

Ambassador may waive his 'right and submit to the jurisdiction of the Court in cases he thinks fit.

i) Right of self jurisdiction :

He has jurisdiction over all the persons" inside the enclave, within **certain** limits.

iv) Classes of Ambassadors :

The classification was made at the .Congress of Vienna in 1815, in which the order of merit was placed as the criterion for classification. Special honours are due to each class.

- e) Ambassadors.
- f) Plenipotentiaries.
- g) Ministers Resident.
- h) Charge de affaires.

The Ambassador is entitled to be addressed as 'Your Excellency'. The Plenipotentiary may, by courtesy, be called 'Your Excellency'. Minister resident are not addressed like that.

Charge de affaires are sent by one foreign office to another foreign office. He is never addressed as your Excellency.

v) **Privileges and Immunities of Ambassadors** :Privileges and immunities are special rights of Ambassadors built on reciprocal basis through International custom and treaties. The very fact that Ambassadors are saddled with multifarious functions and responsibilities shows that in effect, they must have certain privileges and immunities, for the due discharge of their functions & responsibilities. The objective, is to provide an independent & free atmosphere to discharge their functions effectively, with dignity & honour.

Codification : The Vienna Convention on Diplomatic Relations 1961 has codified the customary law relating to* Ambassadors and of their privileges & immunities.

a) **Exterritoriality:**

Under the legal fiction even though physically an Ambassador and his diplomatic enclave are inside the receiving State, they are considered to be legally outside the territory of the receiving State. Ambassador is beyond the jurisdiction of local authority. The police have no jurisdiction over the diplomatic enclave. Similarly civil and criminal courts have no jurisdiction. On the contrary, the receiving state is under a duty to protect the person of the Ambassador and of his retinue. Further, the building, records, his equipment, should also be protected against any possible strike and invasion, civil disturbance etc. Further, the local administrative authorities have no jurisdiction over the enclave. Postal bags are to be protected. They are not to be tampered.

h) **Immunity from Criminal Jurisdiction':**

An Ambassador is beyond the jurisdiction of the Criminal Courts in receiving State. The Portuguese Ambassador Mendoza, had attempted to dethrone Queen Elizabeth in 1584 in England. Gentili, a great jurist was consulted. He declared that Ambassadors were immune & that they should not be arrested, or tried or punished at all. Thereupon,

the Queen requested Mandoza, 'His Excellency', to leave the country. **De Boss**, an Ambassador in England attempted against the life of Cromwell. He was asked to leave the Country within 24 hours. L'Auhespine attempted against the life of Queen Elizabeth. He was warned.

c) Immunity from Civil Jurisdiction :

He is immune from the jurisdiction of the Civil Courts. He is not liable for tortious and contractual liabilities.

d) Immunity from Administrative Tribunals :

He is outside the jurisdiction. Tribunals have no powers over them.

e) Immunity from Taxes :

He is free from the income tax and all other local taxes of the receiving State. He may of course pay fee or charges for services done (current, water, sewage etc.).

f) Rights of Subpoena :

This means, he is' privileged and cannot be called to a court as a witness. Summonses should not be issued to him..

g) Right of Chapel [religious practices] within the enclave. :

h) Right of Waiver

Ambassador may waive his 'right and submit to the jurisdiction of the Court in cases he thinks fit.

i) Right of self jurisdiction :

He has jurisdiction over all the persons" inside the enclave, within **certain** limits.

CHAPTER 10

TREATIES Ch. 10.1 Steps in Treaty

making :

i) Treaty defined :

The Vienna Convention on the Law of Treaties 1969 codified the law relating to the Treaties, which was hitherto mostly in the customary form.' This is the authoritative text on Treaty law.

A treaty is defined (Art. 2), as an agreement whereby two or more States, establish or seek to establish a relationship between themselves governed by International Law. The object of the treaty is to impose obligations on the States parties to it.

ii) Steps in Treaty-making :

- a) Appointment of Representatives or delegates
- b) Negotiation
- c) Draft and final draft
- d) Signature & exchange of instrument
- e) Ratification
- f) Reservation to Treaties
- g) Registration.

iii) Effect of Signature :

The conclusion of a treaty or convention is marked by the State-parties subscribing their signatures. The effect of such signature depends on whether the treaty is subject to ratification or not.

a) If subject to ratification, signature means that the parties have agreed to the text and are willing to refer it to their States for ratification.

b) If not subject to ratification, the general opinion is that the treaty is binding from the date of signature.

iv) Ratification :

It is the approval by the Head of State or the Govt. of the signature appended to by their delegates. It is defined as an International act whereby a State establishes on the International plane its

consent to be bound by a treaty. (Art. 2: Vienna Convention); Whether ratification is necessary for a treaty or not depends on the intentions of the parties.

v) Rationale:

The rationale (or reason) for ratification are :

a) State as a Sovereign must have the opportunity of examining and reviewing the treaties signed by their delegates.

b) State may withdraw from the treaty if it so desires.

c) The duration between signature & ratification is an opportunity to the State to follow the constitutional processes for ratification.

d) The democratic principle is that the Govt. should refer to its people in Parliament or elsewhere.

e) The acts of omissions can be corrected by the State. Excesses may be checked. Omission may be supplied.

Ch. 10.2 a) Reservation to Treaties':

A reservation is defined by the Vienna convention as an unilateral statement made by a State when signing, ratifying, accepting approving or acceding to a treaty, the State thereby desires to modify legal effects of certain provisions of the treaty in their - application to that State.

e.g. : Reservation stipulating exemption from certain sections or modification of certain provisions, or interpretation of certain provisions.

The privilege of making reservation is considered as an incident of sovereignty.

b) Reservations to the Genocide Convention ;

The United State made certain reservations to the Genocide convention. The question was whether in a multilateral treaty such a reservation could be made. The I.C.J. held : (advisory opinion).

a) That if the reservation affects the very basis or vitals of the treaty the other States may treat the reserving State as not a party at all.

b) If it does not so affect hut is compatible with the objectives &

principles of the treaty, then the other States may consider the reserving State as a party to the treaty.

In the Vienna convention, the test of compatibility was adopted.

c) Consequences :

The complications caused by the reservations can be avoided.

a) by making a provision in the treaty that no reservations are allowed and

b) by providing for reservation of some clauses stated in the treaty itself.

Ch. .10.3 Termination of Treaties.

Modes :

International law recognises the termination of treaties by operation of law or by act of parties.

a) By mutual agreement

b) By efflux of time, [when the period is fixed by the parties.]

c) By achieving the objectives or the purposes of the treaty.

d) Impossibility due to permanent destruction of the subject of treaty.

e) By Novatio ; [substituting a new treaty].

f) Another mode of termination is under *clausula rebus sic stantibus*

Rebus Sic stantibus

The sanctity and the binding force of International law is expressed by **Anzilotti** in the expression '*Pacta sunt servanda*' (sanctity behind treaty). The *clausula Rebus Sic Stantibus* is more or less an antithesis[opposite] of the. Above concept. The clause provides that a State is freed from its treaty-obligations by reason of an essential change of circumstances under which the treaty was concluded

ii) Origin :

The principle may be traced to the **Canon Law** (Church Law).

The Roman Jurists applied it in their jus civile, for contracts. **It was Gentili who introduced it into International Law,**

iii) Juristic Opinions :

Grotius Opined that a change of circumstances did not affect a promise unless it was most patently clear that the original circumstances were part of the consideration of the Contract. Hence, a party could, repudiate.

Bynkershoeck rejected the unilateral repudiation of a treaty.

To Vattel, a change in those circumstances which were essential to the treaty, created to the State an opportunity to repudiate;

HEFFTER" and BLUNTSCHLI, rocked in the cradle of Nationalism of the 19th century stated that if the treaty conflicted with the rights and Welfare of the people, the State might violate the treaty.

Trieske went a step further and said that if the treaty is different from the actual political conditions, it may request the other parly to cancel the treaty. On refusal, it may declare war to find out and prove the existence of change of circumstances.

Hautefeuille said that a treaty, which surrenders it's land or national right was not obligatory.

Bonfils said that -the very cause which gave birth to the treaty when comes to an end, the treaty gets dissolved.

To **Fiore**, treaties which hamper the free development of the State activity were null and void.

To **Oppenheim** self-preservation and development of the Nation were grounds to denounce treaty obligations.

The **Internationa! "Law Commission** in Art. 62 of the Vienna Convention on the Law of Treaties stated that a fundamental change on **grounds of equity & justice'** would be a reason to repudiate a treaty. But it provides exception to boundary treaties, treaties imposing International obligations etc, and hence these cannot be repudiated.

iv) State Practice :

a) Russian Action, 1870 :

Treaty of Paris 1856 provided for the 'Neutralisation of Black Sea.' It restricted Russia from having troops there. Russia repudiated this and claimed that it was no longer bound by it for the following reasons : (1) There was combination of Danubian Principalities. There was use of iron-clad vessels in war. Russia was rebuked by the Conference of

London, but it was condoned.

b) Peace Treaty 1919':

This was repudiated by Germany. Germany was condemned by the States, but was condoned. i

e) Straits Convention of 1923 :

The German violation of this, was condoned-by States.

v) Case La\;v;

There is not a single instance wherein the Clausula has been applied. In the Serbians and Brazilian's claims case, the International Court of Justice heard on the doctrine, but did not apply it.

Hence, the Clausula is not in vogue but a State may desperately resort to it to justify its action.

CHAPTER 11

EQUALITY OF STATES

Ch. 11. Equality of States.

a) Concept :

The origin of the doctrine of equality of States may be traced to Jus 'Naturale (Natural Law). According to it ; 'A dwarf is as much a man, as a giant is.' This concept is extended to the relationship "between str^'-s, by the Naturalists who hold that all States are equal in the eye of law. In fact, equality is the quality that is derived from State's International Personality.

According to this doctrine, all States are equal in law, irrespective of the size, population, economic or military power, degree of civilisation wealth, social patterns & other qualities.

b) Consequences :

There are four important consequences, that flow from the concept i) Every State has a **right to vote and to one vote only**.

ii) **Legally, the vote of the weakest and the smallest State is as weighty as the vote of the largest & the powerful State;**

Hi) The third consequence is 'Par in parern, npn habet irnperium' (No State can claim jurisdiction over another). Hence, although the States can sue in Foreign Country they cannot be sued unless they submit. Eg. : A suit in rem against a vessel in possession of a Foreign State is entertained. However, there is the Sovereign immunity of States, and hence, a Foreign State cannot, be sued.

iv) Courts of one State do not question the validity or legality of the official acts of another Sovereign State.

Legal equality should not be confused with political equality. Politically, they are not equal. Great powers always enjoy a priority of actions.

In the United Nations, there is equality in the General Assembly. Each member has only one Vote. In the Security Council, the permanent big five - U.S.A. U.K., U.S.S.R., France & China (enjoy the Veto Power. Art. 27 of the U.N. -Charter). All substantial questions require the consent of all the permanent members. A Permanent member may exercise 'Double Veto' and stampede the progress. The enforcement measure for breach of the peace and acts of aggression may be strained by the Veto Power.'

Subject to this, equality is a practical concept and a concomitant aspect of State personality.

CHAPTER 12

, ' EXTRADITION

Ch. 12 i) Definition & Scope :

Extradition is a process by which an accused is reconducted back to the place Where he is alleged to have committed an offence. The person should be tried only for the offence for which he has been extradited.

It is based on the principles that evidence is freely available in the State where the offence is committed, and that a criminal should

msrlawbooks PUB INT LAW

not go unpunished.

ii) Conditions :

a) **Double criminality test** : The act must be an offence in both the sending and the receiving States. (Jacob Factor's Case and Eislars Case).

b) **Principle of Specialty** : The requesting State is under a duty not to punish the fugitive for any offence -other than for which he was extradited.

c) **Extraditable crime** : The act must be one which is extraditable according to the treaty of extradition between the parties, e.g.: Murder, cheating etc.

Exception : i) Political crimes, ii) Military crimes e.g. desertipn. iii) Religious offences are non-extraditable.

d) The persons must be extraditable. States refuse to surrender its nationals who have taken refuge in their own Countries.

Ch. 12.2. Non-extradition of political criminals.

One major exception to extradition is that there would be -no extradition for political criminals, religious & military offenders. These are called as non-extraditable offences.

The concept of non-extradition can be traced to the French Revolution. Persons accused of political crimes could have been extradited prior to the French Revolution. Even Grotius had commended the extradition of political criminals. Many other writers had also- written on similar lines.

In 1815 the Govt. of Gibraltar surrendered political criminals to 'Spain. This gave rise to great indignation among the States.

In 1833 Austria, "France and Russia concluded the treaty & defined certain offences. In the same year, Belgium enacted an extradition law incorporating the non-extradition, rule. In. 1867, other.States followed suit.

.. Attempts were made to define 'political crimes'. High treason,

'lege Majeste' and relative political crimes were broadly classified as crimes which are not extraditable.

The Russian project, of 1881 attempted at "defining lege majeste Clauses. A Conference was convened, but it failed to reach any conclusion.. The Swiss law of 1892 related to extradition of persons who were accused of offence having more complexities in crimes. In 1934 an attempt was made under the League for a convention to extradite persons accused of acts of political terrorism. 23 State participated. This was not ratified.

Cases : (i) In 1857 **Jacquin Brothers** in France attempted at a-railway explosion, to murder Napoleon III & escaped to Belgium. Belgium refused to extradite them. *

ii) **Savarkar's. Case** : Savarkar, an Indian and a British subject, was being transported from U.K. to India for the purpose of his trial on a charge of high treason and murder. -He escaped when the vessel was at Marseilles. France.- But he was caught by a French policeman who in mistaken execution of his duty, handed him over to the Captain of the ship without extradition proceedings. French Govt. demanded U.K. to send him back. U.K did not comply with this demand. This matter went to the Permanent Court of Arbitration at the- Hague. It decided in favour of U.K. in holding, that there were no rules of International law imposing in such circumstances, any obligation on a State which has in its custody a prisoner, to restore him because of a mistake committed by the foreign agent who delivered him up to that power. France failed. Savarkar could not get the benefit.

hi) **Asylum Cases** : Hay a de la Tarre was given Asylum as a political refugee by the Columbian Embassy in Peru. There was no provision to surrender him to the Peruvian Govt. the I.C.'J. held. He was protected.

iv) **In re castioni**, the court refused extradition to the political refugee who had in a revolution shot and killed a member of the Govt. in. Ticinio.

v) **Kolsynski's Case** : K & others had political opinions against Poland for-which they could not be punished. They forced the ship (English) to go to England but were arrested in England. It was held that they were political refugees & hence not to be extradited to Poland.

vi) Recent cases : Re Nielsen (1984); U.S. v Mccaffery

(1984) Belgium Govt. v Post Lethwaite (1987)

CHAPTER 13

SCHOOLS

Ch. 13 Schools of International Law.

It is said "Grotians stand midway between Positivists & Naturalists"

The three schools are : Positivist's School. Naturalist's School and Grotian's School.

Positivists': England is the cradle of positivism. The most impressive & historically prominent among positivists is Bynkershoeck the founder of this school.

The main line of approach of the positivists is that rules of International "**Law are, in the final analysis, the same as positive municipal law, because' of the 'Will' or the common consent of the States to follow them. The State is a meta-physical entity and hence it has a 'Will'.**

The States have accepted International Law by auto limitation, without this consent rules of International law are not binding. In respect of International Custom, this school holds the, view, that there is tacit consent and hence are binding.

Zouche : Opined that outside positive law there was no
l International
a
w
.

Moser : He deliberately ignored the Law of Nature & declared the omnipotence of positive Law of Nations,

Martens : The rules of International Law were, to him, positive rules & to ascertain these the special relationship between Nations must be noted.

Zorn : To him International Law was a branch of Municipal law & on that ground binding. Treipel, holds the same view.

Anzilotti : is the outstanding positivist of recent years. He traced the binding force of International law to 'Pacta Suut Servandar.

Naturalists:

This school is diametrically opposed to positivists school. Briefly stated it holds the view that Natural law is the basis of law and so of International Law. It does not recognise treaties & customs as based on consent but says that they are part of Natural Law. Natural Law means the law of reason.

Pufendorf : is the **founder and the Champion** of this school of thought. He opined that there was no law among Nations, except the Law of nature. He is not a denier of International Law. To him Natural law is a legal order superimposed on men & Nations by a higher power.

Equality among Nations is a concept derived from Law of Nature. 'A dwarf is as much a man as' a giant is' he argues. Vattel strongly supported the Law of Nature and claimed that as States are composed of men & as the policies are determined by men these men are subject to the Law of nature. Zouche, opined that customary Law of Nations was purely founded on Natural Law.

Influence : The Law of Nature has had a tremendous beneficent influence on the development of International Law. Some of the covenants like (i) the covenant on Economic, Social & Cultural rights and (ii) Covenant on Civil & Political rights (1966) Universal Declaration of Human Rights 1948 etc. have their origin in the Law of Nature.

Grotians :

It is said that Grotians stand -midway between Positivists

and , Naturalists.

Grotius started with the Law of Nature and selected such rules which were eternal and unchangeable having their origin in the Natural Law. Certain principles of conduct accepted by the States in the form of treaties & customs were voluntary Law of Nations. His-'method of secularisation with his brilliant expositions mainly based on jus naturale and coordinating that with voluntary law of Nations, placed him at the highest pedestal as the Father of the Law of Nations. His followers Zouche "and Vattel commended the writings of Grotius: besides contributing heavily to the Law of Nations.

CHAPTER 14

NATIONALITY

Ch. 14.1 Nationality. i) Definition :

'Nationality is the **principal link** between the Individual and the benefits of International Law' (Oppenheim). In practical terms it is a continuing legal relationship between the Sovereign State and its citizens. The basis of his Nationality is his allegiance and membership of the Sovereign State. It gives him the political status as a 'National' of his State. It is the Municipal Law of each State that determines who are its .Nationals. Hence Nationality Law is made by the States themselves. This .is not the concern of International Law.

ii) Importance:

a) The right to diplomatic protection abroad is an essential attribute of Nationality of the individual. Every State has a right to protect its Nationals 85 property abroad. (Calvin's Case)

b) Enemy status is determined during war, on the basis of Nationality.

c) A State may refuse to extradite its own Nationals.

iii) Acquisition :

a) jus soli-place of birth.

b) Jus Sanguinis (Parentage)

c) By Naturalization or

d) Registration.

e) By acquisition of territory by a State and conferring Nationality on the inhabitants thereof.

Each State has provided in its Nationality Law the procedure to acquire Nationality. According to the I.C.J. there must be a 'genuine link' between the individual and the State.

The leading case is **Nottebohm's Case** : decided by the **I.C.J.** The question was whether Nottebohm was a National of Liechtenstein ? If so he could get protection of his property in Guatemala. The I.C.J. held that there must be a 'genuine link', between the individual & the State. Nottebohm a German, was resident in Guatemala. He acquired the Nationality of Liechtenstein (without observing the requirements of residence etc.) and took oath of allegiance. In 1943, his property in Guatemala was taken over under War measures. Nottebohm was refused admission to Guatemala. Hence, he went to Liechtenstein which instituted proceedings against Guatemala, to give protection to the property of Nottebohm in Guatemala.

The I.C.J. held that there must be a 'genuine link' between Nottebohm & Liechtenstein, but, there was no such link. Hence, it rejected Liechtenstein's claim.

Ch. 14.2 Double Nationality :

As the Nationality laws of different States are different, conflicts may arise. Hence, in a State where both Jus Soli and Jus Sanguinis are recognised, a child born there may acquire two nationalities. A child born of German Parents in India, acquires Indian Nationality by birth and German Nationality by parentage. Similarly, a woman marrying a person of another State may acquire Double Nationality.

The Hague Convention of 1930, on the conflict of Nationality Laws provided for treating a person who had double nationality as

one who has only one Nationality.

The U.N. has made provisions relating to the mitigation of the artificial link. Married woman may retain their pre- marriage nationality.

Ch. 14.3 Statelessness :

This is a peculiar condition recognised by both the municipal law and International law. The Universal Declaration of Human Rights provided that everyone has a right to Nationality, and that no one should be arbitrarily deprived of his Nationality. Statelessness may arise by :-

1, Change of sovereignty over territory or

2. Denationalisation by States. The consequences are grave.

There

will be a great hardship and insecurity to the Stateless person as there

will be no State to protect him and of his interests. International Law

has provided for certain remedies :-Imposing duties on States to regard Nationality as acquired.

a) Making States oblige in not passing denationalisation laws.

b) Granting of Nationality by Liberal-minded States.

c) Reliefs provided for in the Geneva Convention 1954.

d) International Refugee Organisation has to a large extent solved this problem.

CHAPTER 15

HUMAN RIGHTS

Ch 15 Human Rights & Fundamental Freedoms.

i) Introduction :

One of the foremost developments, of the Post-Second World War is *the* recognition of the Human rights and the Fundamental freedoms on a Global scale. Perhaps, the Nazi persecutions between 1933-45, gave an impetus to establish the respect for human rights as the corner stone of the present day World movement.

ii) Instruments & Declarations:-

a) The U.N. Charter 1945 : In the preamble it affirmed faith in the fundamental human rights, and in Art. 2. it declared the objective of promoting fundamental freedoms. *The* General Assembly and : the ECOSOC, may take steps to promote these freedoms. These are not binding, but are only recommendatory.

b) The Paris Peace Treaty (1947) with Italy, Rumania, Bulgaria, Hungary and Finland. These were general pledges but only enunciations.

c) Universal Declaration of Human Rights 1948 adopted by the General Assembly.

Various Human rights have been declared. This is a 'pathfinding' instrument. The purpose of the Declaration, is limited. It provides for a generally acceptable catalogue of man's rights. There is of course no enforcement machinery.

d) The European Convention for the Protection of Human Rights

and Fundamental Freedoms 1950, This applies to the 'Member of the Council of Europe, This is a step more effective than the Universal Declaration of 1948.

i) It imposed binding provisions. ii) It defined the various rights.

iii) It provided for" European Commission for Human Rights to investigate and to ,report on violations,

iv) It provided for a European Court for Human rights. This became operative, from 1958. This Court has as many judges as there are Member-States. Their tenure is 9 years. Appeals or references fire made from the member-States to this court.

The Leading Cases are :

1. **Lawless Case** : The court held that the detention of Lawless for over 5 months, by Ireland was violative of the European convention.

, 2 . In **Wemhoff Case** from West Germany, W was arrested and detained for breach of trust. There was delay in conducting the trial. The European Court held that in the light, of the circumstances the delay was not unreasonable.

3. **Neumeister Case** : An Austrian was arrested for tax evasion in 1961. He was brought 'to trial in Austria in 1964. The case had not been decided even in 1968,

The European Court held that there was unreasonable r delay & hence, there was violation of the European Convention;

4. **Golder Case-**: (United Kingdom) :- In this case, the prison authorities refused permission to the prisoner Golder to consult his solicitor. The European Court held that this was violative of = the European Convention.

e).- Covenant on Economic, Social & Cultural Rights arid Covenant on. Civil SB Political rights 1966. Both were adopted by the General' Assembly. The annual report of the progress made under these two Covenants is reviewed by the ECOSOC of the United Nations.

f) There are a score of other covenants made in recent years some of them are regional and others global.

Inter-American Convention on Human Rights 1969 and the

Inter-American Court of Human Rights. These are similar to the European Commission and Court.

Similarly the Helsinki Declaration of 1975 with over 30 States, pledges respect to human rights and freedoms.

All these endeavors show the remarkable progress made in this vital area of the development of human personality, which is a movement of significance par excellence.

CHAPTER 16

TERRITORY

Ch. 16 Acquisition of Territory.

i) Definition:

Territorial Sovereignty is one of the attributes of the International personality of the State. 'Sovereignty in regard to a territory mean the right to exercise therein the functions of the State, to the exclusion of others. The functions of the State, are the State activities on an adequate scale as per the I.C.J. in Western Sahara Case. (1975)

ii) Modes of Acquiring Territory :

There are five traditional modes of acquiring territorial sovereignty.

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

iii) Occupation :

It is the oldest and the original mode of acquisition of territory, by a State. A territory which belongs to no 'State' (terra nullius) or a newly discovered , territory or abandoned area may be the object of occupation.

Two conditions must be satisfied :

(1) 'The animus' or the intention of acquiring sovereignty over the territory and

(2) 'The Corpus', adequate display of sovereignty over the territory taken under its sway.

(1) The **animus or intention** is to be inferred from all the facts and circumstances. There must be a permanent intention. Hence, mere discovery is not enough. Huber J. in *Palmas Island Case* held that mere discovery gave inchoate (incomplete) title. In this case, there was a dispute over the Palmas -Island. Spain had originally discovered it. and, the United States had succeeded to it. But, according to the historical evidence the Netherlands had for a very long time exercised sovereign activities. Huber J. held that Spain by 'mere' discovery got incomplete title, and as such its successor the U.S. also got incomplete title. Hence, the court found in favour of the Netherlands.

(2) The Second is the **Corpus test**. : There must be an actual display of State activity to constitute effective occupation. ^g. flying of the National flag, collection of taxes & tolls, exercise of administrative control, application of legislative Acts, rules or executive measures, etc. the act may be manifest or symbolic. In remote areas elaborate 'control' is not required,

a) **The Eastern Greenland Case** (P.C.I.J) the dispute was between Norway & Denmark. Denmark was able to establish its actual display of sovereignty and also its animus. Denmark succeeded.

..b) **In Minqu'icrs. & Ecrehos Case** (I.G.J) U.K. and France claimed- there "two eyelets. U.K. was able to show the evidence of its actual sovereign activity with the intention thereof. U.K. succeeded.

c) **In Western Sahara Case** (I.C.J.) the court held that the territory was not a terra nullius at the time of Spanish occupation. It found that the two tests were not established by Morocco or Mauritania, the claimants. Hence, it advised that the General Assembly of the U.N. may apply its principle of decolonisation and self-determination of Western Sahara.

CHAPTER 17

ADDITIONAL TOPICS

Gft. 17.1. Hijacking.

i) The increase in the volume of air-traffic brought in its wake a grave menace to the safety of civil aviation in the form of 'Hijacking'. by 1960, there were sufficient number of Hijacking incidents .& terrorist activities, to call for some International action.

Two conventions were made :

a) **Tokyo Convention of 1963.**

b) **Hague Convention of 1970.**

to deal with Hijackers and to punish them.

ii) Definition : The Hague Convention 1970 defined the offence of Hijacking :-

A person is guilty of the 'Offence', if he, when on board an aircraft in flight, unlawfully seizes or controls that aircraft (or attempts thereof) with the use of force or threat. An accomplice is also liable.

iii) Hijacking Acts : Many States have made Hijacking Acts and prescribed severe punishments. The jurisdiction is 'Universality' and hence any State may catch him. The States may not allow extradition of Hijackers guilty of 'political offences'.

Incidents :

1) The most daring Hijacking was done at -Dawson Field in 1970 at Jordon, with 400 passengers & crew. The Hijackers succeeded •in getting the Palestinian arab guerrillas held at London released.

2) Entebbe raid is another example.

In recent years many incidents have been reported. However, the two conventions are adequate to meet such situations with the active cooperation of the Member-States.

Ch. 17.2 **Hugo Grotius**

i) As **Father of the Law of Nations**

Hugo Grotius a Dutch Scholar, jurist and diplomat is rightly called as the 'Father of the Law of Nations'. His treatise 'De jure belli ac pads' (The law of war & .peace) is a masterpiece. This is the first comprehensive framework of the modern science of International Law.

•ii) Biography

He was born at Delft in Holland in 1583. He was a precocious child with marvelous gifts & talents. He started studying law when he was 11 years and took the Doctor of Laws at Orleans in Erance when he was fifteen years of age ! He was a lawyer for some years, but took to politics & became involved in political and religious quarrels for which he was arrested and sent to prison for life. In ,1621, he escaped and entered Sweden and became an Ambassador. He died in 1645,

iii) His Contributions :

a) He started from the Law of Nature as the law of 'reason'. His brilliant scientific analysis of the Law of Nations is broad based -on the Law of Nature but he gave the due place to the voluntary Law 'of Nations (Positivists theory).

b) His treatise **De jure belli-ac pacis** dealt with a number of doctrines: : The Freedom of the Open Seas (Mare liberem), 'Just and unjust Wars'. 'Qualified Neutrality' 'the- rights and freedoms of individuals' etc. He also stressed the importance of 'Periodical Conference & meetings' of States.

c) No doubt Grotius had drawn heavily from his predecessor Gentili and others, but no one can deny that Grotius was the formost thinkers in the field of the Law of Nations. He left a deep impression on his successors.

d) his writings are often referred to by International Arbitral Tribunals and the International Court of Justice.

His contributions to International law are so valuable in magnitude and application that he richly deserves the title **the Father of the Law of Nations.**

Ch. 17.3 **Monroe doctrine. (1823)**

i) History :

Russia, which was in possession of Alaska (later this was sold to the U.S.) claimed the Pacific Coast. The Spanish Colonies in South America had become independent Republics. Spain to get back these Colonies, attempted to intervene with the assistance of Russia, Prussia & Austria (Trip!e alliance). President Monroe of the United States saw the American interests being deeply affected, declared in a Message to the Congress in 1823 :

a) American continent would no longer be a subject for future colonisation by a European power.

b) America has not interfered so far and has no desire, in future to interfere in European colonies & dependencies.

c) Any attempt, by European powers to extend their system to any portion of the American Continent would be regarded as dangerous to the peace & safety of the United States.

This prevented any interference by Spain or the Triple alliance, ii)

Development :

a) Though this was more political than legal, it had its impacts in the years to come. The League, recognized the regional security arrangements made by the U.S., on the basis of this doctrine. These were later called as 'regional arrangements under the U.N. Charter.'

b) **Cuban Operation** : The selective blockade of Cuba in 1952, by the U.S. to remove root & branch the Missile installation by the U.S.S.R. in Cuba, is an extension of this doctrine.

Ch. 17.4 Neutralised State.

Switzerland is an example.

It is a State whose independence & political & territorial integrity "are guaranteed permanently by a collective agreement of great powers subject to the conditions that are imposed therein. The neutralised State should not wage war with other States except in self defence ; Further it should not enter into alliances, pacts etc., which may affect its impartiality.

The object is to protect small States & to safeguard the interests of 'Buffer' States which lie between two big powers. **Switzerland's** status as a neutralised state remains a fundamental principle in Inte

THE END

