Part 1
INTRODUCTORY

CHAPTER 1
INTRODUCTION

Dynamism in Law

Change is the law of nature. Everything, except of course the law of change itself, is subject to change. Law being no exception to this rule is inherently of dynamic character. But the twentieth century has witnessed ever accelerating rhythm of change; the scientific and technological developments have unleashed political, economic, social and cultural forces which are transforming the society in an increasing rate. The same trend is continuing with greater acceleration in the Twenty-first century. In view of the unprecedented speed and dynamism that are characteristic of the present age, it is very natural to inquire : can law keep pace with life?[1] This has indeed been a perennial question but it has assumed added significance in the present age due to unprecedented rhythm of change in various fields. At some quarters it is argued that "law is becoming less important and practical action more important, in shaping economic and social policy in an increasingly dynamic society and this is particularly true, internationally." [2] But as aptly answered by C. Wilfred Jenks that "all experience suggests that while economic growth, education and social attitudes have a far-reaching influence on social policy they can exercise their necessarily gradual influence effectively only if law provides a framework of recognised obligation and settled habit within which they can operate. Law cannot make men equal, but unless the equality of man is recognised by law there is little likelihood of other influences creating it in fact".[3] Further, "When justice cannot invoke the aid of the law, and of procedure effective to secure respect for the law, long and broad views on our common humanity all too readily succumb to entrenched privilege, this is no less true under new social order and in new states than in the most traditional of societies".[4] As pointed out by Prof. Edgar Bodenheimer, "Law being the cement which holds the social structure together, must intelligently link the past with the present without ignoring the pressing claims of the future." [5] The growth of law begins with the growth of society. At no specific stage of development, law can be said to have been invented and imposed *ab extra*.[6] Consequently legal orders are "pierced together slowly, in trial and error to human demands." [7] They are not produced overnight. They have their roots and backgrounds in the society. The study of international law should be directed "..... to explore how the present law has come to be, what it is, how it is involved in a process of reform and extension and intensification, in order that we may be able to assist in the building stone upon stone in storm and rain, of a transnational legal order for state and people and men".[8]

As pointed out by Roscoe Pound, "Law must be stable, and yet it cannot stand still".[9] The "central problem of law", consequently, is "to reconcile the conflicting needs of stability and change".[10] The most important function of law is to help in solving the

---

1. C. Wilfred Jenks, Social Justice in the Law of Nations, The I.L.O. Impact After Fifty Years, Oxford University Press (1970), p. 5.
2. Ibid at p. 80.
3. Ibid.
4. Ibid.
5. Jurisprudence—The Philosophy and Method of the Law. Harvard University Press, Cambridge, Massachusetts (1962), p. 218.
6. C.K. Allen, Law in the Making (1961), p. 6.
7. P.E. Corbett, Law and Society in the Relation of States, p. 287.
8. From the farewell lecture of Prof. Frederick Van Asbeck of Leiden University referred in Philip C. Jessup. "The Concept of Transnational Law. An Introduction, Vol. 3 (1964), pp. 1-2.
9. Interpretation of Legal History, Cambridge, Mass. (1923) p. 1.
10. Hardy C. Dillard, J., "Conflict and Change : The Role of Law," Proc. ASIL (April, 25-27. 1963), p. 50.

problems of the society in and for which it exists".[11] Law can perform this august function effectively only if it can reconcile the needs of change and stability.

Dynamism in International law

What is true of law in general, is also, even more particularly, true of international law. The problem of change, flexibility and adaptability is much more acute and urgent in the international field. "As a result of ... catastrophic upheaval on so many fronts in the realm of international law..... must perforce, also change. The central problem, given in the accelerating and meteoric changes occurring on so many fronts is this : Can the inertia built into the law as a social science and especially the branch of the law dealing with the relationship between sovereign nations, change quickly enough to meet the new challenges....."[12] Further, "... whether the Gutterdameruang of a nuclear holocaust can be avoided by the advent of the reign of the Rule of Law, whether this philosophy will supervene in time to save mankind from self destruction, and whether the changing norms of international law can help in the dire straits in which the world finds itself is the question, the answer of which is not readily at hand".[13]

It has been aptly remarked by Soviet authors, "International law is not static. It is constantly developing, sometimes it does not keep up with developments, other times it anticipates them and gives an early warning of tendencies in the development of international relations. Developing international law is probably more than ever replenishing collection of contractual and other documents. It is a developing philosophy of values. At major turning points in history it sometimes undergoes qualitative changes."[14] For example, on 5th June 1989, the United Nations Environment Programme (UNEP) with a view to warn the people of the increase in the temperature of the earth due to 'Green house-effect', gave the slogan of "Global Warming; Global Warning". This indeed is a very serious prblem with which the world is confronted. Due to increase in the temperature of the Earth level of the waters of the seas will increase more than a metre affecting more than half of the population of the world. At crucial or important turns of history, there are qualitative changes in international law. One such qualitative change was witnessed in June, 1992 when the Earth Summit, held at Rio de Janeiro (Brazil), undertook to save Planet Earth from Environmental crisis. It was also decided to hold a conference after five years to review the progress made during the last five years. The U.N. review conference was therefore held in 1997 wherein as many as 160 members 'participated. Yet another significant international conference, known as Kyoto Environmental Summit on Global Warming was held from 1 to 11 December, 1997. This conference fixed the targets to be achieved between 2008 and 2012. It was decided that on the basis of 1990 levels, America, European Union and Japan would reduce 7%, 8% and 6% respectively of the green house gases. The gravity of the problem can be gauged from the fact that the warnings of the scientists are proving to be correct. According to the Scientists the month of July, 1998 has been the warmest month of last 118 years and the temperature of the Planet Earth has increased by one per cent. But the trends for changes, or changes themselves for good, sometimes encounter a setback. For example, the above target was accepted by America under European pressure. America subsequently decided to abandon Kyoto Treaty in 2001 and announced in February 2002 an alternative optional plan of voluntary cutting emissions. Canada, Britain and Germany did not agree with the latest American plan and expressed their reservations.

Breaking up of the Soviet Union, Vienna Conference on Human Rights (1993) establishment of World Trade Organization (WTO) are other such important terms of history which have brought about qualitative changes.

---

11. J.L. Brierly. The Basis of obligation in International Law (Oxford 1958), p. 72.
12. Leonard M. Salter, "International Law in Transition : New Norms for Old", The International Lawyer, Vol. 7, No. 3 (July, 1973), p. 687.
13. Ibid. at p. 695.
14. Yuri Rybakov, Leonid Skotnikov, Alexander Zmeyevsky, "The Primacy of Law in Politics", Int. Affairs (May 1989), p. 57 at p. 61.

Crisis in International law

The rapid changes in different fields have brought a sense of "crisis" in international law. This "crisis" is a product of the acceleration of the process of change in the international community that is characteristic of our era.[15] And the factors responsible for this crisis include "rapid technological progress, the rise of new ideologies and systems of public order, including militant communism, decolonization, itself spurred on by the Communist challenge to the West; the appearance of many new states of widely different cultural backgrounds and levels of development; rising demands for social reform; the fear of war and growing reluctance of the more advanced states to protect their interests by coercive means; and the increase in the number and functions of international organisations".[16] In advisory opinion on Admission to Membership in the United Nations,[17] Judge Alvarez aptly remarked, "The fundamental principles of international law are passing through a serious crisis, and this necessitates its reconstruction. A new international law is developing which embodies not only this reconstruction but also some entirely new elements." [18] Scientific and technological advancements have also brought a sense of crisis in the field of international law. The increase of temperature due to 'green-house effect' leading to the depletion of ozone layer poses a very serious problem to our very survival and hence necessarily to International Law. Thus, "the present so-called "crisis" in international law was nothing more than a tension between the needs of stability and the demands of change. As regards the emergence of a large number of new countries. The new demands of the new countries did not mean or amount to any wholesale rejection of the traditional legal system but merely readjustment of the old law to the new conditions".[19] In times of rapid political, economic and technological changes, the development of law both within and among states, tends to lag behind; its content becomes unstable and uncertain, and its effectiveness is minimized. If the development processes of a legal system are inadequate, a 'crisis' of law emerges. The rapid changing world of the twentieth century and the twenty-first century is going through such a crisis. Whether or not the developmental processes it has created, and is creating, will prove adequate is one of the fundamental questions of contemporary international law." [20]

Problems of Adaptability and Change

In view of the rapid changes in different fields, many of our old ideas about international law have become inadequate or even obsolete in the light of modern requirements.[21] One of the main defects of international law, according to Brierly, has been that it has aimed to stabilize rather than to provide for the growth of international society, and to maintain existing values rather than to create new ones.[22] As compared to municipal law, international law is confronted with many difficulties and problems to keep pace with the rapidly changing times and circumstances. In the absence of a world legislative body, treaty making is the counterpart of the legislative process in the domestic field of the states. It is, therefore, more difficult to meet new situations and conditions resulting from the far-reaching scientific and technological developments, and other significant changes in the field of international law which requires the consent of different states with different traditions and ideologies. Nevertheless, international law is not static and that slowly but steadily it gathers dynamism and activity and endeavours to mend itself to the needs of the day. In order to be effective, international law or any law for that matter, must keep pace with the time, to obliterate those norms which have fallen out of date, and to baptize new principles as norms of law. As pointed out by Prof. Oliver, J.

---

15. Oliver. J. Lissitzyn. International Law Today and Tomorrow, (Oceana Publications Inc. Dobbs Ferry, Newyork, 1965), p. 102.
16. Ibid.; See also R.P. Anand, New States and International Law, (1972), p. 118.
17. I.C.J. Rep. (1948) p. 4.
18. Ibid, p. 67.
19. Asian States and the Development of Universal International Law, edited by R.P. Anand, (1972) p. XXXI.
20. Edward Collins, International Law in a Changing World, p. 424.
21. See International Law: The Collected Papers of Sir Cecil Hurst (London, Stevens, 1950), pp. 156-157.
22. J.L.A. Brierly, The Basis of Obligation in International Law, (Oxford, 1958), p. 58.

Lissitzyn, "Customary international law has at times developed with considerable speed to provide for the regulation of the new transitional needs and activities. The twentieth century has witnessed, for example, the rapid development of the doctrines of air sovereignty and the continental shelf".[23] He, however, adds, "Nevertheless, the acceleration of the process of change in the international community and detailed nature of the regulation required for many new activities render customs an inadequate instrument for the formation of legal norms in response to all the new needs and expectations.[24] Customs being thus an inadequate instrument for bringing about timely changes in international law, treaty process then remains the most effective process to effect changes. But treaty process is a cumbersome process for it obviously, invariably and inevitably depends upon the consent of states with different ideologies, traditions and interests. International treaties and conventions come into force only after they have been ratified by a prescribed number of states and the states are generally reluctant to ratify a treaty which affects or is likely to affect their rights and interests. States do not hesitate to abandon the treaty which affects their interests. The glaring example of this is the abandonment of Kyoto Treaty by America in 2001.

Thus as compared to municipal law, international law is confronted with many difficulties and problems in keeping itself abreast of the changing times and circumstances. These problems and difficulties are obviously due to the fact that international law operates in a decentralised system. Above all, the greatest problem is the concept of sovereignty.[25] But as aptly remarked by Judge Jessup, "Sovereignty in its meaning of an absolute, uncontrolled state will... is the quick sand on which the foundations of traditional international law are built..... once it is agreed that sovereignty is divisible and that it is therefore not absolute, various restrictions on and relinquishment of sovereignty may be regarded as normal and not stagmatizing. The slow but steady development of the majority rule in international organisations bears witness to the change which is taking place.[26] It is now generally recognised that sovereignty is neither absolute nor indivisible. In fact, 'Sovereignty' has a much restricted meaning today than in the eighteenth and nineteenth centuries, when with emergence of powerful highly nationalised states few limits on State's autonomy were acknowledged. At the present time, there is hardly a State which in the interests of the international community has not accepted restrictions on its liberty of action." [27]

Traditional International Law and New International Law*

The traditional international law has undergone so many changes that the international lawyers have evolved a new term, *i.e.*, 'new international law' to indicate the norms and rules that have been evolved since the Second World War. Judge Alvarez has aptly observed, "A new conception of law in general and particularly of international law, has also emerged..... The traditionally, juridically and individualist conception... is being more and more superseded by what may be termed the law of social interdependence".[28] 'The ..... new international law has already manifested itself in the Charter of the UN. The United Nations wish to promote peace positively by forming a constructive peace law. The interdependence of the nations is one of the corner stones of

---

23. International Law Today and Tomorrow, (1965), p. 105.
24. Ibid.; See also Leo Gross, "Sources of Universal International Law". Asian States and the Development of Universal International Law, Edited by R.P. Anand, (1972), p. 189 at pp. 196-197.
25. As aptly observed by Sir H. Lauterpacht, "International Law, whether codified or not, implies essentially a restriction on the sovereignty of states whose relation it governs. It is in the nature of things that states wedded to an uncompromising maintenance of their sovereignty cannot view with favour attempts at effective codification: AJIL. Vol. 49 (1955), p. 16 at p. 38; See also Q. Wright, "Toward a Universal Law for Mankind," Columbia Law Review, Vol. 63 (1963), pp. 445-6.
26. Philip C. Jessup, A Modern Law of Nations, p. 40.
27. J.G. Starke : Introduction to International Law, Tenth Edition (Butterworths, Singapur, 1989) p. 100
* See also for P.C.S. (1985) Q. 1 ; For answer see also Chapter on "Definition, Nature and Basis" and "Subjects of International Law". See also for P.C.S. (1987) Q. 1.
28. I.C.J. Rep. (1948) p. 4 at p. 67.

the new law of nations." [29] The traditional, international law was envisaged as a law governing the relations of sovereign states with each other. Prof. Oppenheim defined international law as "the name for the body of customary and conventional rules which are considered legally binding by civilized nations in their intercourse with each other".[30] This definition was given by Oppenheim in 1905 and sums up the position of classical, traditional international law that stood before the First World War. In view of the significant changes that have taken place since then this definition has become obsolete and inadequate. Later on changes were made in subsequent editions. For example, Eighth Edition of Oppenheim's book International Law was defined as "Law of Nations or International Law is the name of for the body of customary and treaty rules which are considered legally binding by States in their intercourse with each other." [31] "Indeed every important element in it can now be challenged." [32] "..... it is now generally recognised that not only states but also public international organisations have rights and duties under international law, even though they may not have all the rights and duties that states have." [33] The establishment of the League of Nations was a great landmark for this new development which culminated in the establishment of the United Nations. The international organisations have now become a common and regular feature of international life. In its advisory opinion, Reparation for Injuries Suffered in the Service of the U.N.,[34] The International Court of Justice confirmed this development by holding that the U.N. is a legal person and can bring out claims for reparation for the injuries suffered by persons (in the instant case by Count Barnodotte while serving in the Middle East) in the service of the U.N. It is, therefore, now an indisputable fact that public international organisations are also the subjects of international law. In fact, "the future of international law is one with the future of international organisation." [35] The establishment of World Trade Organisation in 1995 to regulate international trade and commerce is testimony to this fact.

Secondly, "since the Second World War international law has been enriched not only by the addition of the numerous international and supernational state organisations, but also by a new international law that has been evolved around the individual".[36] Regarding this benign development in the field of international law, Corbett has also written, "To me it has long meant that we are witnessing a transition in international legal development from a prolonged stage in which the predominant, not to say exclusive, concern was the regulation of the conduct of states as distinct entities to one in which equal attention is given to promoting the growth of a body of world law transcending states, and applicable on a footing of equality, to individuals, corporations, international organisations and states." [37] Thus the most important change that has taken place is that of addition of new subject.[38] International law has undergone significant changes in the course of time. The shift has been "from the more or less formal regulation of diplomatic relations between states to an international law of welfare." [39], Further "international law is today actively and

---

29. Dr. B.VA. Roling, International Law in an Expanded World (1960) p. 121; See also RP Anand. New States and International Law (1972), p. 113.
30. L. Oppehneim, International Law (Newyork, Longmans Green & Co., 1905) pp. 1-2.
31. L. Oppenheim, International Law, Vol. I (Peace), Eighth Edition by H. Lauterpacht, pp. 4-5.
32. Oliver J. Lissitzyn, International Law Today and Tomorrow (Dobbs Ferry, Newyork, 1965), p. 38. For a detailed criticism of Opphenheim's definition see also Chapter on "Definition, Nature and Basis of International Law".
33. See e.g. Reparation for Injuries Suffered in the Service of the U.N. Advisory Opinion, I.C.J. Rep. (1949), p. 174; D.W. Bowett, The Law of International Institutions (London, Stevens & Sons, 1963). pp. 273-310. The Holy See has long been regarded as having rights and duties under International law.
34. I.C.J. Rep. (1949) p. 174.
35. P.E. Corbett, Law and Society in the Relation of States, p. 12.
36. Dr. B.V.A. Roling, Internationl Law in an Expanded World. (Djambatan N.V. Amsterdam 1960). p. XXII: See also W. Friedmann, The Changing Structure of International Law (1964). pp. 221-249.
37. Percy E. Corbett, The Growth of World Law (Princeton, New Jersey, 1971), p. 184.
38. W. Friedmann, The Changing Structure of International Law (London Steven & Sons; 1964). p. 67.
39. W. Friedmann, "Changing Dimensions of International Law", Columbia L. Rev., Vol. 62 (1962). p. 1147 at p. 1148.

continuously concerned with such divergent and vital matters as human rights and crimes against humanity, the international control of nuclear energy, trade organisation, labour conventions, transport control or health regulation...As international law moves today on so many levels, it would be surprising indeed if the traditional principles of inter-state relations developed in previous centuries were adequate to cope with the vastly more divergent subject-matters of international law of the present day." [40]

These factors necessitated the revision of Oppenheim's definition of International Law once again. That is why, the editors of ninth edition of Oppenheim's book have defined International law in the following words :

"International law is the body of rules which are legally binding on states in their intercourse with each other. These rules are primarily those which governs the relation of states, but states are not the only subjects of International Law. International organisations and, to some extent, also individuals may be subjects of rights conferred and duties imposed by international law".[41]

Thirdly, it is now well established that international law comprises not only of customary and conventional rules but also of "general principles of law." [42] Article 38 (1) (c) of the Statute of the International Court of Justice mentions : "General Principles of law recognised by civilized states" as the third source in order in which the sources of international law are to be used by the International Court of Justice while deciding a dispute. "Article 38, paragraph 1(c) of the Statute of International Court of Justice... places on record one of the main sources of the rules of public international law. Indeed it describes the inexhaustible reservoir of legal principles from which the tribunals can enrich and develop public international law." [43]

It may be noted here that even the latest definition of International Law given in Oppenheim's book (1992) is conspicuous by its silence about the general principles. Obviously therefore, the definition of International Law given in the Ninth edition of Oppenheim's book (1992) still suffers from this deficiency.

Further, "the very conception that international law is a 'body of rules', now stands challenged as static and inadequate.[44] It is a common place that law is a process, not a body of self-executing rules." [45] A static conception of international law based merely on body of rules, derived from technically defined 'sources' will be inadequate in facing the challenges and demands in a divided and dynamic world.[46] Though law is a dynamic concept yet it has become customary to define law as a body of rules. What is true of law in general is also true of international law. Therefore it does not seem to be proper to criticise Oppenheim on this account.

Lastly, the use of the term 'civilized states' has also been subjected to severe criticism. Several decades before western countries considered only Christian states as civilized states and neither long history nor culture was considered necessary for this. Even ancient and civilized countries like India and China were not considered to be civilized. The use of epithet 'civilized' in the definition was therefore, not proper. That is why, in later editions of Oppenheim's book the word 'civilized' was removed.

It may be noted here that present international law, to some extent, is based on the Charter of the United Nations and it is developing despite the weakness of the institution. The Charter gives a place of importance to the individuals and that is why human rights are

---

40. W. Friedmann, "Some Impacts of Social Organisation on International Law." AJIL. Vol. 50 (1956), p. 475 at p. 477.
41. Oppenheim's International Law Ninth Edition (Longman Group U.K. Limited and Mrs. Tomoko Hudson, 1992, Vol. I, Edited by Sir Robert Jennings' & Sir Arthur Watts, p. 4.)
42. Oliver, J. Lissitzyn, International Law To-day and Tomorrow (1965), p. 39.
43. McNair, "The General Principles of Law Recognised by Civilized Nations," BYBIL. Vol. XXXIII (1957), p. 1 at p. 6.
44. International Law Today and Tomorrow (Newyork, 1965), p. 39.
45. M.A. Kaplan and Node B. Katzenback, The Political Foundations of International Law (Newyork and London, Johnwiley & Sons, 1961), p. 231 (and at pp. 19-29); and see, generally, the writings of My-res S. McDougal.
46. Lissitzyn Note 41, at p. 40.

developing under the present international law. In fact the development of new international law has begun after the establishment of the United Nations. The Charter is an international treaty and is based on the true legality of international law. International law in its turn derives inspiration from Charter and functions despite the weaknesses of the United Nations as an institution. There is no alternative to the United Nations and it is difficult to envisage a world without the United Nations which has become almost an Universal Organisation because as many as 189 countries have become its members. It has succeeded in preventing a world war for more than fifty years. Though in a negative sense, it is a great achievement indeed. It has made significant contributions in the social, economic and cultural fields. All this has infused new vigour and dynamism in the present international law. The United Nations has completed more than fifty years of its existence. It is now universally recognised that it has become an indispensable organisation. At present it is facing an unprecedented financial crisis which is affecting its overall performance in various fields. But there is no reason to believe that as in the past it will not be able to encounter successfully this crisis. It is in the interest of humanity as a whole that this august universal international organisation should be strengthened.

In the dynamic world of today, international law finds itself confronted with many challenges. The most formidable of these challenges are communism, terrorism emergence of large number of states, nuclear weapons, scientific and technologic revolution, depletions of ozone layer due to green-house effect etc.

Communist challenge

The Communist world is generally represented by the Soviet Union and China. It will, therefore, be relevant to consider the challenges posed by Soviet Union and Communist China and whether international law can meet these challenges. It may be noted at the outset that the Soviet theory of international law regards treaty or agreement as the only appropriate method for effecting changes and development in international law.[47] The Soviet Union considered custom, as inadequate and insignificant for the development of international law. The Soviet attitude towards international law is the product of "the combined pressure of need and Marxist doctrine." [48] The Soviet Union generally made a pragmatic approach toward international law.[49]

According to the Soviet definition, international law is "the sum total of the norms regulating relations between states in the process of their struggle and co-operation, expressing the will of the ruling classes of these states and secured by coercion exercised by states individually and collectively".[50] After the death of Stalin, the above definition was slightly modified by inclusion of a reference to "peaceful co-existence." [51] Soviet writers laid a great emphasis on 'peaceful co-existence' in relations between the sovereign states. According to the Soviet view, "the principle of peaceful co-existence should be the basis of the whole structure of contemporary international law. Only if it is based on the principle of co-existence, can the international law best promote the cause of peace and mutual understanding between States." [52] The Soviet Union claimed that the principle of peaceful co-existence finds reflected in the principle of unanimity of the permanent members of the Security Council of the United Nations when major decisions are to be taken and contended that "The majority rule cannot be applied to the relation between different social systems. Such relations are inevitably to be based on mutual

47. See K. Venkatraman, "The Role of Customary Practice in the Development of Universal International Law," Asian States and the Development of Universal International Law, Edited by R.P. Anand (1972), p. 212 at p. 215.
48. Lissitzyn, note 42, at p. 46.
49. Ibid.
50. Definition by A.Y. Vishinsky in 1948 quoted from Ibid at p. 49.
51. According to the Soviet view "Co-existence is a continuation of the struggle between the social systems, but struggle by peaceful-means, without resorting to war without interference by one state in the internal affairs of another. It is competition in peaceful endeavours. It implies reciprocal concessions and compromises". Victor P. Karpov, "Soviet Concept of Peaceful Co-Existence and its Implications for International Law". The Soviet Impact on International Law. Edited by Hans W. Baade (Newyork, 1965), p. 14 at p. 15.
52. Ibid. at p. 20.

respect for the sovereign equality of nations, peaceful negotiation, and reasonable compromise.[53] It is on the basis of this principle that the Soviet Union adamantly refused to pay its part of the expenses for the United Nations Operation in the Middle 'East and Cango. The Soviet Union adopted the same attitude in regard to the giving of compulsory jurisdiction to the International Court of Justice. It consistently refused to accept or rather confer the obligatory jurisdiction on the International Court of Justice. The obligatory jurisdiction, it was claimed, "is not only contrary to the spirit of peaceful co-existence but at same time is not adequate in the present circumstances. The most burning international issues, such as, the liquidation of colonial system or the solution of the West Berlin are political problems first of all, and cannot be solved by a court or arbitration alone.[54]

Yet another concept evolved by the Soviet writers which posed a serious challenge to the existing international law was that of the wars of "National Liberation." [55] So was the case with the concept of 'unequal treaties.' The term 'unequal treaties' has been defined as follows: "Equal treaties are concluded on the basis of the equality of the parties; unequal treaties are those which do not fulfil this elementary requirement. Unequal treaties are not legally binding; equal treaties must be strictly observed." [56] The examples of the Soviet Challenges to International Law noted above are simply illustrative and by no means exhaustive. These examples should, however, not mislead us to think that the Soviet Union has not generally followed the norms and principles of international law. "The observance by the Soviet Union of much of international law need not be a cause for surprise. It demonstrates the essential role international law still plays even in the relations between antagonistic states so long there is no all out military conflict. International relations simply cannot be maintained without a framework of mutually recognised and observed norms... considerations of reciprocity, sometimes induce the Soviet Union to bring its practice into close conformity, with that of the rest of the world.[57] Therefore the view was expressed that "The Soviet ideology is likely to be modified as a result of the joint or co-operative activities with capitalist countries such as Antarcatica and Outer Space. This will inevitably lead to the expansion of the role of international law in the relations between the two camps." [58]

By the end of the year 1991 the communist system collapsed in the Soviet Union. The concepts of Glassnost and Prestroika created such strong ways for freedom and democracy that the whole existing system collapsed. The shortage of food production and consumer goods in the Soviet Union were mainly responsible for the abrupt collapse of seventy year's system. This led to the breaking up of the Soviet Union and mad rush for emulating the western system once its staunch rival. The constitutent states of the former Soviet Union started looking towards the west for help, aid and survival. Almost all the former republics of the Soviet Union became the members of the United Nations. Even in Russia formally Communism came to an end. Other Communist countries could not also escape this strong wave of opposition to Communism. Due to internal conflicts and civil war Yugoslavia was divided into several parts. Czchoslovakia was divided into two parts as Czech and Slovak leaders agreed to split the country on 20th June, 1992, ending a 74-year-old federation of their two peoples. Even in China, the advent of capitalism is posing a great challenge to Communism. Thus the Soviet challenge to the International Law has now come to an end. Russia has now become a member of the North Atlantic Treaty Organisation (NATO) and Prime Minister of Russia has recently hinted that Russia may join WTO. As China has already become a member of WTO, Russia may soon follow the suit.

---

53. Ibid. at p. 17.
54. Victor P. Karpov. "Soviet Concept of Peaceful Co-existence and Implications for International Law". Ibid., p. 14 at p. 18. See also Richard N. Gardner, "The Soviet Union and the United Nations". Ibid p. 1 at pp. 5-6.
55. See George Ginsburgs, "Wars of National Liberation, and the Modern Law of Nations—the Soviet Thesis," Ibid, at pp. 67 to 77.
56. Adopted from Oliver J. Lissitzyn. International Law Today and Tomorrow. (Newyork, 1965), p. 53.
57. Ibid, p. 60.
58. Ibid, p. 70.

The People's Republic of China or Communist China has also challenged the accepted norms and principles of international law in many important respects. For example, Communist China has been a much more staunch supporter of the concept of 'unequal treaties'. According to a Chinese writer "Whether or not a treaty is equal does not depend upon the form and words of various treaty provisions, but depends upon the state character, economic strength, and the substance of correlation of the contracting states.'[59] Consequently, all treaties entered into by China in tne nineteenth and early twentieth centuries regarding consular jurisdiction, unilateral most favoured nation treatment, restrictive tariff regulations, territorial cessions or leases, etc. are regarded as unequal treaties. A recent example of a multilateral treaty regarded as unequal by China is Treaty on Non-Proliferation of Nuclear Weapons, 1968 on the ground that obligations among all contracting parties are not 'identical and reciprocal'. But China herself does not uniformly follow this principle. The most glaring example of this is the provision relating to veto conferred on the permanent members of the Security Council under the U.N. Charter which is nothing but an unequal.[60]

It is significant to note here that Communist China has yet not articulated a comprehensive novel theory of international law. It is, however, clear, "that the People's Republic has not overtly rejected the entire fabric of international law that had developed as of the time when communism triumphed in China in 1949. Although usually reluctant to invoke international law, the PRC has often at least given lip service to its interpretation of customary and conventional norms when non-legal techniques of persuasion and dispute resolution have proven inadequate. There have been many occasions when Peking has purported to perceive and evaluate in terms of broadly accepted international legal principles. Furthermore because reciprocity is the basis of international law, no government can long except its legal claims to be honoured unless it demonstrates a corresponding willingness to honour the similar claims of its foreign counterparts. For these reasons it is not surprising that to considerable extent the PRC's articulation of its foreign policies has taken account of, and claimed consistency with basic principles of international law." [61]

Moreover, both the Soviet Union and Communist China, have not rejected the entire fabric of international law although they have tried to modify certain accepted principles in several important respects. At one time it appeared as if the Communist challenge had shaken the very foundations of international law but subsequently it became evident that in many spheres reconciliation between the conflicting demands became necessary and on the principle of reciprocity the communist countries also were compelled to accommodate themselves by observing many norms and principles of international law. International law was never static, like all living law it was always undergoing the process of reconstruction and re-interpretation in order to mend itself to the needs of the day.

The concepts of Glasnost and Prestroika during the regime of Soviet President Gorbachev brought about the Communist Republics closer to the Western States. Directly or indirectly these concepts awakened the hitherto dormant waves of independence. For a considerable period of time the Soviet Union was facing financial and certain internal problems. The shortage of food and consumer goods added to the gravity of the situation. People started losing faith in communism and were eager to follow the open market system of capitalism. One by one all republics of Soviet Union declared their separate independence. It ultimately led to the breaking up of the Soviet Union. In the course of time almost all the republics of former Soviet Union became members of the U.N Communism was officially abolished in Russia. It was quite natural and obvious that other Communist States could not escape the influence of such epoch-making events Czecho-Slovakia was divided into two states. Yugoslavia was destined to witness greater turmoil

59. Quoted from Hungdah Chiu, "Comparison of the Nationalist and Communist Chinese Views of Unequal Treaties." China's Practice of International Law: Some Case Studies, edited by Jerome Alan Cohen (Cambridge Massachusetts. (1972), p. 239 at p. 259)

60. Ibid see pp. 260-264.

61. Ibid, pp. 12-13.

and besides losing its membership of the U.N. in 1992, it was broken up into several states. The advent of capitalism even in China started shaking the foundations of communism. Thus one of the greatest challenge to International Law came to an end. China has now become one of the members of World Trade Organisation (WTO)

Challenge of Nuclear Weapons*

One of the most serious and formidable challenges with which international law is confronted with is the challenge of nuclear weapons. Due to devastating capability of nuclear weapons the world may be said to be sitting on a volcano which may erupt any time and may engulf the whole world. According to Fenwick, atomic bomb cannot come under the recognized laws of war and its nature is such that its use can be made only by violating the existing laws.[62] The development of nuclear weapons have shown the inadequacy of the existing laws of war. Therefore, ".....whether the changing norms of international law can help in the dire straits in which the world finds itself is the question, the answer of which is not readily at hand." [63]

Since International Law is a dynamic concept and it has the capability to adopt itself to the changes that take place, it can well be hoped that International Law will successfully face this challenge. The International Nuclear Forces Treaty (INF Treaty) 1987 is a glaring example of this. Both the great powers signed this Treaty on 8th December, 1987. This Treaty prohibits nuclear missiles of the range of 300 to 3400 miles. This Treaty provides for the destruction of 2800 missiles of the medium range (*i.e.* between 300 to 3400 miles). This Treaty has been rightly hailed as a good beginning in the direction of total elimination of nuclear weapons. On 31st July, 1991, President Gorbachev of Soviet Union and President George Bush of U.S. signed a historic treaty known as Strategic Arms Reduction Treaty (START) reducing 30% of strategic nuclear arsenals. Besides this, on 3rd June, 1993, President Boris Yeltsin of Russia and President George Bush of America signed START II which aims to reduce two-thirds of nuclear arsenals within next ten years. Reference may also be made to the Treaty on Non-Proliferation of Nuclear Weapons which has been signed by a large number of countries. There are certain unequal and discriminating provisions because of which it has failed to achieve the desired objectives. While it imposes obligation on non-nuclear nations it does not impose similar obligations on nuclear powers. Nor does it provide for the destruction of existing nuclear arsenals or even the stoppage of testing new weapons by nuclear powers. Nuclear Tests by France in defiance of public opinion is a glaring example of this. That is why the need is to remove unequal and discriminating provision from the treaty and also to provide for time bound destruction of existing nuclear arsenals. The latest attempt to meet the nuclear challenge is the comprehensive Nuclear Test Ban Treaty. But this Treaty suffers from certain deficiencies and favours the nuclear power against those who do not possess or on the verge of acquiring them. Unless a Treaty guarantees the destruction of all nuclear arsenals and prohibits all nuclear tests for once and all time, it cannot achieve the desired objectives.

Scientific and Technological Revolution

Yet another formidable challenge confronting International Law is as to how to develop and adapt it in accordance with scientific and technological advancements which are taking place with an accelerated speed. The achievements in the field of means of communication and tele-communication have made it difficult rather impossible to prevent intervention by a state in the affairs and territory of other states. Consequently, the foundation of concepts such as Sovereignty and Nationality have been shaken.

Challenge posed by Depletion of Ozone Layer as a result of Green-house Effect

Depletion of ozone layer as a result of 'green-house effect' poses a very grave challenge before the whole world and hence before International Law. This challenge is

---

* P.C.S. (1966), Q. No. 1 ; See also Q. No. (e) of the same year and Q. No. 1 of P.C.S. Exam 1968.

62. C.G. Fenwick, International Law, p. 773.

63. Leonard M. Salter, note 12, at p. 695.

probably more serious than the challenge posed by nuclear weapons. Though Ozone Treaty has been entered into in 1987 to face this challenge and other measures are also being taken to solve this problem with a view to meet this challenge as well as to deal with other environmental problems, U.N. Conference on Environment and Development (UNCED) popularly known as the Earth Summit was held in Brazil from 3rd to 14th June, 1992, to face this challenge so as to save planet earth. Kyto Climatic Conference was held on December, 1997, to devise means and strategies to meet this challenge.

Emergence of a large number of new states*

The present system of International Law has been described as being a product of Western power politics and as being unsuited to the needs and aspirations of the independent States of Asia and Africa*. As pointed out by Dr. Nagendra Singh, 'the greatest impact known to history on the development of International Law has been the sudden expansion of the world family of nations from 51 members in 1946 to 126 in 1969. At present, there are as many as 185 members of the United Nations. The U.N. has thus become nearly universal. The proliferation of the new states has not only made 'Eurocentrism' in thinking about international law as anachronistic but has also brought about qualitative changes in the norms and principles of international law.[64] Most of the new states were earlier the colonies of the Western states and had been relegated to the status of 'objects' and consequently, could not contribute in the development of norms and principles of the modern international law. However, this does not mean "that the new states are political entities which emerged out of the blue." [65] As a matter of fact, many of the new states, particularly in Asia, were previously independent and did play an active role in international affairs during the sixteenth; seventeenth and eighteenth centuries but they were subsequently made colonies and after being deprived of their identity as states and were relegated to the position of 'objects of international law,[66] After having freed themselves from the clutches and yoke of the imperialist powers, these new states for the first time tested the established doctrines of traditional law in accordance with their views and practices.[67] They started with the general premises that the norms and principles of international law in the development of which they had not participated were not binding on them. While doing so they rejected some of the existing norms and principles of international law. It is, however, significant to note that the new states have not rejected the whole fabric of international law for that would have implied a denial of their own rights accorded to them under international law. Their approach has been that of the rejection of some of the norms and principles and of 'eclectic' selection of others.[68] According to Robert L. Friedheim,[69] the term "new states" is a misnomer. In his view, such states should be referred as "Dissatisfied" States. In the view of another eminent writer, Syatauw,[70] the term 'new states' is misleading. The term 'new states' should be discarded, particularly if it is taken as referring to those states that have gained their independence since World War II. Not only is the term incorrect, it is misleading and therefore detrimental to a clear understanding of the working and development of international law and international

---

* See also for P.C.S. (1966) Q. 1 ; P.C.S. (1968) Q. 1.

64. See Upendra Baxi, "Some Remarks on Eurocentrism and the Law of Nations. Asian States and the Development of Universal International Law, Edited by R.P. Anand (1972), p. 3.

65. J.J.G. Syatauw., "The Relationship between the Newness of States and their Practice of Inernational Law". Asian States and the Development of Universal International Law, Edited by R.P. Anand (1972). p 10.

66. R.P. Anand, New States and International Law, (Vikas Publications, Delhi, 1972), p. 113.

67. J.J.G. Syatauw, Some Newly Established Asian States and Development of International Law. (The Hague, Martinus Nijhoff, 1961), p. 234.

68. See J.J.G. Syatauw, "The Relationship between the Newness of States and their Practice of International Law". Asian States and the Development of Universal International Law, Edited by R.P. Anand, pp. 12-18.

69. See Robert L., Friedheim, "The Satisfied and Dissatisfied States Negotiate International Law". World Politics (October, 1965).

70. J.J.G. Syatauw, "Old and New States: A Misleading Distinction for Future International Law and International Relation"; I.J.I.L., Vol. 15, No. 2 (1975), p. 153.

relations. Many of us have used the term in our writings in the past, especially in the 1950 and the early 1960, the time of the great influx of new Asian and African States. But these so-called new states now have a history and experience of some ten, twenty or thirty years. They have come to participate fully and actively in international affairs. They have played their part in international decision-making, often bringing decisive weight to hear on the deliberations. They have provided officials for some of the highest functions in the organised international society such as the Secretary General of the U.N., an increasing number of Judges of the International Court of Justice and of the members of the International Law Commission and several mediators or members of committees of good offices." [71] Thus the term 'new states' is now "outmoded, incorrect and may therefore lead to serious misrepresentation. And this should at all cost be avoided in a field such as international law that is sufficiently hampered by misconceptions and misunderstandings." [72]

It is rather a matter of surprise, "that so much respect has been shown for the traditions of Western Europe, apart from the occasional psychopathic reactions that relate to matters of policy than of general international law.[73] In fact, "All emancipated nations are groomed in, and have an interest in the corpus of international law as developed in the preceding three centuries. No doubt they have protested against, and in some cases flouted, some of its norms and have also, with some vehemence sought reconstruction of some aspects of law so as to take their peculiar needs and expectations into account. But all their impatience and anxieties have a meaning because they acquiesce in most of the fundamentals of international law. In other words no 'new' nation has, or probably ever will, seek with anything even faintly approaching serious commitment, a total renovation..... of the salient norms of international law." [74] While making an appraisal of the established norms, principles of international law in accordance with their own views and practices and thereby stating their approval as criticism, the new states have contributed positively to the development of international law. Their contributions have been particularly significant relating to the colonial issue, self-determination, neutralism and peaceful co-existence.[75]

A brief reference may also be made here of India's position in regard to the rules and principles of international law. Like other new states, India has also sought to reject or modify some of the rules and principles of the traditional international law. India has neither accepted the whole nor has rejected the entire fabric of the traditional international law. "India, like many other new nations, has expressed dissatisfaction with some of the rules of international law as developed in the West. This, however, does not mean that India's challenge of some of the rules of international law is motivated by any desire to subvert the international legal order. Nor is India's opposition of the same kind as that of the Soviet Challenge." [76] Further, 'In fact, India's argument would seem to indicate that it is far more influenced by the Western rather than Soviet concepts of international law. This should not be surprising. However, it must not be supposed that India would agree to all the rules and principles that are identified as international law in the West. Rather, it does not challenge the doctrine of international law in the same way as the Soviets challenge it." [77] Since her emergence as new state after the attainment of independence, India has made her own contribution for the progressive development of international law. Her

---

71. Ibid. at p. 171.
72. Ibid at p. 172.
73. C.G. Fenwick, "International Law: Old and New", AJIL, 60 (1966) pp. 475, 478.
74. Upendra Baxi, "Some Remarks on Eurocentrism and the Law of Nations", Asian States and the Development of Universal International Law, Edited by R.P. Anand, (1972), p. 3 at pp. 6-7.
75. J.J.G. Syatauw, "Some newly and Established Asian States and the Development of International Law. (The Hague; Martinue Nijoft, 1961), pp. 234-239. See also S.K. Kapoor "Self-determination Under International Law and the Indian practice". Lawyer, Vol. VIII (1976), p. 167.
76. M.K. Nawaz, "International Law in the Contemporary Practice of India: Some prospectives Proc. ASIL, April, 25-27, 1963, p. 275 at p. 289.
77. Ibid at p. 282.

contribution has been particularly significant in the fields of codification of international law, colonial issue,[78] peaceful co-existence[79] and non-alignment.[80]

It is clear from the above discussion that no serious attempt has been made to devise an Afro-Asian system of International Law either as an adjunct of the existing system or as a substitute for the same nor does it seem to be feasible. The emergence of a large number of Asian-African States has made it clear that the international law which was mainly evolved by European powers to govern their relations with each other, needs reconstruction and reorientation in order to cater the needs and requirements of the majority of states. Hitherto, International Law was mainly based on the concepts of co-existence and reciprocity. From the international law of co-existence and reciprocity, international law now needs to be transformed into an "international law of co-operation."[81] The emergence of the new states has made the international society almost universal. This is evident from the fact that the U.N. has now as many as 189 members as against 51 members when it was established in 1945. International law must also, therefore, become universal in order to serve the interests of all states properly, equitably and effectively. It is generally recognised that like all living law, international law should also be "responsive to the needs of the society to which it was applied. International Law should change with the changed circumstances if it had to retain its health and vitality.[82]

The Breaking up of the Soviet Union.—International Law has been confronted with a new challenge that has manifested itself as a result of the breaking up of the Soviet Union. Hitherto the world was accustomed of having two Super Powers—U.S. and the U.S.S.R. and the Non-Alignment movement functioned as a balancing force. With the disappearance of the Soviet Union, the world has now only one Super Power *i.e.* the U.S. The domination of one Super Power may pose serious challenge to the existing international law including the law of the U.N. During the Gulf War (1991) the U.S. dominated the Security Council to such an extent that it did not allow the council to hold its meetings until its objective in war was achieved. The fear of domination by one Super Power will continue to lurk in the minds of member states until an alternative is found. That is why, developing states are now clamouring for democratisation of the organs of the U.N. including the Security Council. Though by and large the Soviet Union (now Russia) has endeavoured to reconcile itself with this revolutionary challenge that has taken place, rather befallen yet certain developments such as the eastward expansion of NATO are making the problem more complex. Russia has coped even with this disturbing problem and has now joined the NATO.

Need for universal International Law

In order to cope with the manifold changes that have taken place and are taking place with accelerating rhythm, the need is to evolve a 'Universal International Law', "a relatively new phrase which has come into vogue in the last few years probably as a result of more intensely perceived ideological division in the world, the insistence on a common set of values as a pre-condition for a viable legal order, and, more recently, the challenge to the traditional body of doctrine and precept emanating from new states in Asia and Africa."[83] As aptly remarked by Prof. Quinsy Wright, "Stability with change, solidarity with

78. See Ibid, at pp. 281-288.
79. See Nagendra Singh, India and International Law, (S. Chand & Co., New Delhi, 1969), pp. 73-86.
80. As pointed out by Dr. Nagendra Singh, "In modern times, after Independence in 1947, non-alignment and peaceful co-existence have been the watchwords of this country's foreign policy. In this direction India's contribution can best be summarised in advocacy of the concept of Panchsheel" Ibid. at p. 75: See also Nagendra Singh, "India and International Law". Edited by R.P. Anand (1972), p. 25 at pp. 37-40.
81. The term 'Co-operative international law' has been defined by W. Friedmann as describing "the growing number of international legal relationships and organisations..... concerned with the regulation of experiments in positive international collaboration. The legal and institutional problems posed by the developing and increasingly important branches of international law are essentially of a different character from those posed by traditional international law. To speak in sociological terms, a developing co-operative international law represents community aspects, rather than society aspects, in relationship between states and nations", Law in a Changing Society (1959), p. 460.
82. R.P. Anand, 'Asian States and the Development of Universal International Law, (1972), p. xiv.
83. Leo Gross, "Sources of Universal Law", Ibid. p. 189.

variety, peace with justice, international law with national independence, these difficult conciliations, it is the task of international law to effect." [84] It has already been stressed earlier that the traditional definition of international law has now become inadequate. In order to ensure dynamism in international law and to make it universal certain new concepts such as "transnational law,"[85] "Common law of mankind"[86], 'world order' and 'world law'[87] etc., have been put forward. The term 'transnational law' has been described as including "all law which regulates actions or events that transcends national frontier. Both public and private international law are included as are other rules, which do not wholly fit into such standard categories..... Transnational situations, then involve, individuals, corporations, states, organisations of states or other groups." [88] In his book, *The Common Law of Mankind,* C.W. Jenks has also contended that the traditional definition of international law is inadequate because it fails to convey that international law is a part of the Common Law of Mankind in an early stage of development. The term 'world order' has been described as follows: 'The image projected is one of human behaviour regulated by law on a world scale in as much the same way as it is not regulated within the State. The order contemplated is supranational but its subject and actors are not necessarily states alone; they may be other groupings or even individuals. World order presumes world community under law; but not necessarily a community of states; it may be a community of individuals, transcending states." [89] Corbett, however, concedes that there are formidable problems and difficulties in the establishment of world law or world order contemplated. He simply states that ".....it has gained, ground and no excessive optimism is required to regard even the present stage as at least law in the making." [90] According to Jenks, "The whole future of man depends on his success in three quests : the quest for world peace, the quest for social justice, and the quest for personal freedom. These quests cannot succeed unless we develop a common law of mankind in an organised world community." [91] The need is therefore to evolve a common law of mankind. To put it in other words, in order to become useful and effective, International Law must keep pace with the accelerated rhythm of change; it must develop faster than it has done in the last fifty years and become more universal. In his excellent paper,[92] Dr. Quincy Wright has rightly pointed out, that the foundations already exist "in the formal acceptance of the states of the purposes, principles, organs and procedure of the United Nations. The challenge is to build on these foundations so that the international system they contemplate, will supersede in practice as well as in theory and law, the inadequate system of power politics that has led to two major and many lesser wars in the twentieth century. Salvation of the world from the holocaust of nuclear war may provide necessary inducement". In South West Africa cases, Judge Tanaka has, also aptly observed : 'The unified national laws of the character of *jus gentium* and the laws of human rights which is of the character of *jus naturale* in Roman law, both constituting a part of the law of world community which may be designated as *World Law, Common Law of Mankind* (Jenks 1958), *Transnational Law,* (Jessup 1956) at the same time constitute a part of international law through the medium of Article 38 (1) (c)".[93] The traditionally, juridically, and individualistic conception of international law is being slowly but steadily, transformed

84. "The place of international law in the Contemporary Study and Practice of International Relation," Patna Law College Golden Jubilee Commemoration Volume, p. 62 at p. 76.
85. See Philip C Jessup, Transnational Law New Haven Yale University Press, (1956).
86. See C.Wilfred Jenks, The Common Law of Mankind (1958); See also Saul H. Mendlovitz, on the Creation of a Just World Order, Preferred worlds for the 1999 (The Free Press, Newyork, 1975); Richard A Falk, A Study of Future Worlds (Newyork, 1975); Rajni Kothari Foot Steps into the Future (1974).
87. See Percy E. Corbett, The Growth of World Law, (1971). See also Hedley Sull "Models of Future World Order" India Quarterly, Vol. XXXI (1975), p. 62.
88. Philip C. Jessup, Transnational Law (1956), pp. 2-3.
89. P.F. Corbett, The Growth of World Law (1971, p. 10.
90. Ibid, at p. 23.
91. C.W. Jenks, Social Justice in the Law of Nations (1970), p. vii.
92. "The Foundations for a Universal International System" in Asian States and the Development of Universal International Law (1972), p. 145 at p. 167.
93. I.C.J. Rep. (1966), p. 6 at p. 248.

into the law of social interdependence.' The most important characteristics of this law are—(a) "It is concerned not only with the delimitation of the rights of states, but also with harmonizing them; (b) in every question it takes into account all its various aspects; (c) it takes the general interest fully into account; (d) it emphasises the notion of the duties of states, not only towards each other but also towards international society; (e) it condemns the use of abuse of right; (f) it adjusts itself to the necessities of international life and evolves together with it; accordingly it is in harmony with policy; and (g) the rights conferred by strictly juridical law it adds which states possess to belong to the international organisation which is being set up.[94]Thus the new International law that is being evolved is not strictly juridical; it also takes into account political, economic, social and psychological factors.[95]

Development of International Law by International Organisations

A brief reference may also be made here to the development of international law by the organs of the international organisations. The organs of international organizations contribute to the clarification and development of international law.[96] They help to create *opinio juris* but "state practice becomes evidence of law only when the vast majority of states believe themselves to be legally bound. These organs often invoke legal principle in order to reach normative decisions. As pointed out by Rosalyn Higgins. "The collective processes in a United Nations organ help to focus attention upon the need for mutual observance of the rules. Indeed, in some cases reference to a widely accepted rule of law can serve a bridge between differing ideologies.[97] The constituent instruments of international organisations represent an advanced stage of the development of international law. They have "introduced a quasi-legislative element in the law making processes at the expense of contractual element, facilitating a quicker response to the problems of international social order." [98]

What is true of the organs of the U.N. is also, even more, true of the organs of the specialized agencies of the U.N. For example, both the World Health Organisation (WHO) and the International Civil Aviation Organization (ICAO) carry out a wide range of activities which contribute to the development of International Law. This has become possible due to the provisions of the constitutions of these specialized agencies. Under Article 21 of the Constitution of WHO, each Member has undertaken the obligation to take *action relative to the acceptance of the Conventions* (adopted by a two-thirds votes of the Health Assembly) *or agreement* within a period of 18 months after its adoption by the Health Assembly. In case a Member does not accept the convention or agreement within the said time, it is required to furnish the Director-General with a statement of the reasons for non-acceptance. Article 37 of the I.C.A.O. convention authorises the I.C.A.O. to adopt regulations[99] with a wide variety of technical matters essential to the safe and swift operation of international civil aviation. According to Article 90, an annex may be adopted by a two-thirds majority vote of the members of the Council. A regulation thus adopted comes into force three months after its submission to the member-States or within the time

---

94. Per Judge Alvarez, Admission of a State to Membership in the United Nations : I.C.J. Rep. (1948), p. 4 at p. 67.
95. Ibid.
96. See Rosalyn Higgins, "The Development of International Law by the Political Organs of the United Nations," Proc. ASIL (1965), p. 116 appearing in Edward Collins (Ed.) International Law in a Changing World, pp. 446-450.
97. Ibid. at p. 447.
98. Obed Y. Asamoah, The Legal Significance of the Declarations of General Assembly of the U.N. (1966) p. 2.
99. Regulations are the combination of 'international standards' and 'recommended practices' dealing with technical matters essential to the safe and swift, operation of international civil aviation and are designated as "Annexes" to the ICAO convention. A 'recommended practice' is one the uniform application of which is desirable in the interests of safety and efficiency of international air navigation. The members are not under obligation to obey it, on the other hand an "international standard" is recognised as necessary for the safety or regularity of international civil aviation. It is binding upon the members, I.C.A.O. International Standards and Recommended Practices Personal Licensing Annex. I (Fifth Edition), Montreal, (1962), p. 3.

specified by the Council, "unless the majority of contracting States register their disapproval with the Council." Under Article 38 of the I.C.A.O. convention, if a member finds it difficult or impracticable to comply with any of the international standards or procedures adopted by the Council, it is under the obligation to notify I.C.A.O. immediately of the differences between its own practices and the practice established by the Annex. If the member concerned fails to notify or remains silent, it will amount to approval.

As pointed out by an author,[100] "the modifications of the usual international legislative procedures adopted by the World Health Organization and the International Civil Aviation Organization have permitted these two organizations to make valuable contributions to international law. In the case of WHO the most important contribution is without doubt the International Sanitary Regulations. This document is so basic to the prevention of the 'spread of pestilential diseases and one of the few multilateral treaties of its scope without serious loopholes due to incompatible reservations, has been described by Professor Jenks as *'one of the major achievements of the international legislative process.*[101] Further, "In the case of the I.C.A.O. the major contribution is in the international standards and recommended practices and procedures which permit international air navigation to be carried on with safety, regularity and efficiency. I.C.A.O.'s enlightened procedures for modification permit the I.C.A.O. to keep up with rapid changes that are taking place in civil aviation and the same time to avoid being bogged down in many of the ordinary time-consuming activities of other international organizations."

Reference may also be made here to the unusual legislative procedure introduced by the International Labour Organization (ILO). Under the Constitution of the ILO, members have undertaken an obligation to submit conventions and recommendations adopted by the conference by a two-thirds majority for the consideration of the national authorities competent to give effect to their provisions. Once accepted, these conventions become binding upon members. The legislative procedure of the ILO, when introduced in 1919, was a radical innovation in following three respects : (1) "The whole conception of a convention being adopted by an international conference by a two-thirds majority and authenticated by the President and the Secretary-General of the conference instead of being signed by plenipotentiaries was then new." (2) "An even more radical innovation than the substitution of adoption for signature was the participation in the act of adoption of non-government delegates voting independently. This has remained a unique feature of ILO procedure. "No less radical and unprecedented an innovation was the obligation to submit conventions adopted by the International Labour Conference by a two-thirds majority for parliamentary consideration irrespective of the attitude towards the convention of the representatives of the Government concerned." [102]

A brief reference may also be made to a similar provision in the Constitution of the Universal Postal Union (UPU) which provides that those postal administrations which do not respond to a proposal put to them by the International Bureau within a period of three months, will be considered to be in agreement with the proposal. As written by Codding, Jr., "The experiences of WHO and ICAO have a high potential value. Other international agencies could possibly adopt them profitably to their own use, particularly those agencies whose activities are of a technical nature. A combination of all the special procedures of ILO, WHO, ITU and UPU in one international organization provides speculation. In any case, it is becoming increasingly obvious that some major changes are needed in the international legislative process if the international community is to be able to keep up with the amount of work that is being delegated by States to international organizations. The WHO and ICAO have, at least, made a start."

---

100. George A Codding. Jr. : "Contributions of the World Health Organization and the International Civil Aviation Organization to the Development of International Law" Proc. ASIL (1985), p. 147.

101. C. Wilfred Jenks, the Common Law of Mankind (London : Stevens & Sons, 1958) op. cit 187.

102. C. Wilfred Jenks : Social Justice in the Law of Nations—The ILO Impact After Fifty years (Hersch Lauterpacht Lectures, 1969 [Oxford University Press, 1970] at pp. 22-25.

Now the world is witnessing the third phase of the post-war development of international organisations. The first phase started immediately after 1945 when U.N. system including the International Monetary Fund (IMF) and the World Bank was established. The second phase started near about 1960 when common market, organisation of European Co-operation and Regional Development Bank etc. were established. The third phase started near about 1973 and is still continuing. In the third phase, U.N. Environment Programme, World Food Council, International Energy Agency (IEA) etc. have been established.[103] The importance of international organisations is constantly increasing and they are making significant contribution for the development of international law. In many matters they have become part and parcel of international life.

Thus this international legislative procedures established and developed by the specialized agencies are far advanced than those established and developed by the organs of the U.N. The organs of the United Nations particularly the General Assembly and the Economic and Social Council, should emulate the examples of the specialized agencies discussed above. Jenks has aptly remarked : "The future of International law, and in large measure the future of international society, depends on our succeeding in developing during next generation a whole series of new major branches of the law of which, despite immense and most encouraging progress during the last half-century only the beginnings as yet exist. Indeed, "The future belongs to International Organisations." [104] And the future of international organisation is safe so long as the United Nations is there. The United Nations has already completed more than fifty years of its successful existence. Since it has become an indispensable organisation the development of international law will go in future, rather it will gather momentum in the course of lime. Though the fiftieth anniversary of the United Nations is indeed a great achievement and deserved the wide publicity it received yet another historic event of great importance was the 50th anniversary of the International Court of Justice on 18th April 1996 which was unfortunately eclipsed by the former event.[105] So far as the development of international law is concerned, the latter event is equally, or even more significant.

Rethinking about new international law making processes[106]

In view of the revolutionary changes that have taken place in the field of international law, it has become imperative that the speed of development of international law be accelerated and the law-making processes of new international law be amended and be made in consonance with changing times and circumstances. Law-making capacity of General Assembly resolutions should be recognized and they should be used for the development of international law. New means and processes should be developed so as to make use of the advisory opinions of the International Court of Justice for the development of international law. Article 38(1) should be amended to incorporate decisions and determinations of the organs of International Organisations as a source of international law. This formal recognition will infuse dynamism in international law and will enable it to keep pace with changing times and circumstances. There is also the need of serious reconsideration over the basis of obligation in international law. The basis of obligation in international law is changing from sovereignty oriented consent to community

---

103. C. Fred Bergsten, "Interdependence and the Reform of International Institutions" Int. Orgn., Vol. 30. No. 2 (Spring 1976), p. 361.

104. E. Shibaeva. "Law of International Organizations in the System of Modern International Law", IJIL. Vol 17 (1977), p. 227 at p. 233; See also M.K. Nawaz, "Law and International Organization", IJIL Vol. (1977). p. 234.

105. See Rahmatullah Khan, "50th Anniversary of the International Court of Justice", IJIL. Vol. 36. No. 4 of 1996, p. 80.

106 For a little detailed study see paper entitled "Rethinking About New International Law Making Processes" read by the author on 2nd April, 1989 at New Delhi in the Twenty-third Annual Conference of the Indian Society of International Law.

oriented consensus.[107] Along with consent, consensus should also be recognized as a basis of obligation in international law. The concept of *Jus Cogens* should be further developed and encouraged so that international law may be developed as a super-national system binding on all states. In order to achieve the objective of progressive development of international law and its codification powers and jurisdiction of the International Law Commission should be enhanced.

Brief Review of International Law in the Second Millennium.—The Second Millennium witnessed the birth, growth and development of Public International Law as a universal force or a legal system to reckon with. The modern International Law as a definite branch of jurisprudence which we know today is said to be dating from the Sixteenth and Seventeenth centuries. Born as it were in Europe, it was determined by the modern European system. Started to serve the interests of a few European States and thus marked by Euro-centrism, in the course of time it became a branch of jurisprudence of general and then universal application. There has been vertical and horizontal expansion of International Law. Besides applying on the lands, rules of International Law apply to outer space, lakhs of kilometres outside the orbit of Earth to the thousands of metre's below the waters of the Oceans. On the other hand, from being traditional law governing the relation of sovereign states, international law expanded to embrace international organisations, non-state entities and individuals as its subjects. Indeed the establishment of the U.N. and development of human rights was probably the most remarkable things that were witnessed in the second millennium. While traditionally comprising of only customary and treaty rules, international expanded to include general principles of law recognized by civilized states, decision and determinations of judicial and arbitral tribunals and juristic works.

While there has been phenomenon expansion of international law, it was also confronted with challenges at different fronts such as those of nuclear weapons, Scientific and Technological revolution, environmental degradation and pollution population explosion etc. While some serious efforts such as those of entering into International Nuclear Forces Treaty (INF Treaty), Strategic Arms Reduction Treaty (START), Non-Proliferation Treaty (NPT) and Comprehensive Test Bond Treaty (CTBT), have been made the challenge remains still formidable and grim. So is the case with the problem of environmental pollution and degradation. Yet another anomaly that has been witnessed during the Second Millennium is the uneven development and progress of countries of the world. While a few countries European and American have prospered, a number of Asian and African countries are still struggling with shortages of food and consumer goods. The population explosion has further complicated the problem and has made the situation quite grim. Yet another serious problem confronting the International Law is the growing menace of terrorism with its different manifestations such as hijacking and taking of hostages and its linkage with illicit drug trafficking. Last but not the least, establishment of peace remains as elusive as ever. Though it is quite heartening to note that the United Nations, which was established after the Second World War, has been successful in preventing the Third World War for more than 50 years yet it cannot and must not be forgotten that absence of war does not denote peace. It is ironical that the United Nations Charter simply speaks of 'maintenance' of international peace and security and not the establishment of peace. The pre-requisites of the establishments of peace are economic, social and political justice which remain the cherished good to achieve.

Challenges before International Law in the Third Millennium.—It is desirable to keep in mind the challenges before International Law in the Third Millennium. One of the greatest challenges before International Law in the Third Millennium is the danger of a nuclear war. As noted above, despite serious efforts to meet this challenge in the Second Millennium, the situation continues to remain serious rather grim. If the nuclear war takes place, either the man may have to start again from the stone age or while

---

107. See R.P. Anand, "International Organisations and Functioning of International Law", I.J.I.L., Vol. 240, No. 1 of 1984, p. 63.

mankind may be erased from the face of earth. One of the main reasons for the lack of success in this field is the narrow national interests and ambitions and lack of mutual trust and confidence among states. Even the realization of the consequences of even a limited nuclear war have failed the countries to come together for the general benefit of the whole mankind. International Law will have to cope with this great menace. At stake is the very survival of mankind.

Yet another formidable challenge is that of environmental degradation and pollution which is no less serious than that of a nuclear war. Serious efforts have been made in the Second Millennium to solve this problem. Stockholm Conference of 1972 and Earth Summit of 1992 deserve special mention in this connection. These conferences have simply sown the seeds, shown the ways through which the problem can be solved. But the real problem is that of implementation. For example, in the Kyoto Environmental Summit on Global warming it has been decided that America, European Union and Japan will reduce the consumption of green house gases by 7%, 8% and 6% from the level of 1990 and these targets will have to be achieved in between 2008 and 2012. Only the Third Millennium will witness whether the countries named above are able to achieve these targets. Moreover many Asian and African countries including India because of their economic problems are not able to make their contributions in the reduction of consumption of green house gases. If the present and ensuing environmental problems are not solved in a near future, the Planet Earth will have to encounter a very bleak and grim future. If the present rate of warming up of the Earth continues, waters of oceans may rise by several metres, ice on the high mountains may melt, vegetation and human life may suffer because of direct ultra-violet rays of the sun, disease's like cancer may proliferate and so on.

Yet another challenge before International Law in the Third Millennium is the menace of terrorism. It is unfortunate that no serious attempt had been made till recently to tackle this problem at the international level. International Law during the Third Millennium will have to tackle this problem. In recent years it has been found that Islamic fundamentalism is at the back of terrorism all over the world. Though some countries such as Pakistan and Afghanistan have been identified as state sponsors of terrorism yet countries on account of their selfish and narrow interests have been reluctant to take action against them. It was probably due to this that even U.N. sanctions against Taliban Government of Afghanistan have failed to deter Taliban Government from shielding and giving refuge to Osama Bin Laden. It was due to this attitude that the United States of America had to pay dearly recently the attack of terrorists (Al-Quida of Osama Bin Laden) on twin towers of World Trade Centre at Newyork on 11th September, 2001, *i.e.* the very first year of the New Millennium is without any shade of doubt are the most horrible and devastating events of the history. It shook not only America, the mightiest country of the world but the whole world. It sent the chilling shock waves throughout the entire world. If America, the strongest nation of the world, can thus be the target of the terrorists no country in the entire world is safe.

America regarded it as a war against it and vowed to avenge itself. But America did not respond immediately. America first enlisted the support of its allies and other countries and even compelled Pakistan to support it in its war against terrorism. Then America waged a full-scale war against Taliban Government of Afghanistan. Due to heavy American bombings, for nearly two months the Taliban Government crumbled and collapsed. Due to the efforts of the United Nations, a new interim Government of Afghanistan has been formed. But the most disturbing thing that has happened is the escape of Osama Bin Laden and other Al-Qaida leaders, though the whereabouts of Bin Laden are not known, it is reported that a large number of Al-Qaida leaders have sought refuge in sanctuaries of Pakistan and are regrouping. This is very alarming and shows, that America's war against terrorism including the capture of Bin Laden and Al-Qaida members so as to bring to them to justice is far from complete.

Yet another serious event that manifested the menace of terrorism was the terrorist attack on Indian Parliament on 13th December, 2001. Though the attempt was failed by

the security staff of the Parliament, it shocked the conscience of whole nation and underlined the need of more and strict vigilance over all the important buildings of the country. Though it was established that the terrorists who attacked Indian Parliament belonged to Lashkar-i-Toyba (LcT), Pakistan has not only refused to hand over terrorists responsible for the attack but has adopted a defiant attitude. This also shows Pakistan's equivocaly in its war against terrorism. This also manifests that Pakistan harbours and supports terrorists. Sooner this dawns upon America, the better.

The menace of terrorism has not abated even after the decline and fall of Taliban Government of Afghanistan. This is evident from the terrorist attack on American Centre at Kolkata. Though America realises now the difference between acts and professions of General Musharraf of Pakistan, yet as a matter of policy America continues to support Pakistan. The roots of terrorism are firmly established in Pakistan. Unless and until Pakistan completely reverses its present policy, terrorism cannot be curbed in South-east asia. Fortunately, the international community seems to have awakened to the grave challenges of terrorism. For example in 1999 the United Nations adopted the International Convention for the Suppression of the Financing of Terrorism, 1999.

During the Third Millennium International Law will also have to cope with scientific and technological advances in the field of means of communication and tele-communication which are taking place with an accelerated speed.

A formidable challenge before International Law in the Third Millennium is that of economic disparity. A considerable number of Asian and African countries are still facing the problems of poverty, shortages of food and consumer goods, debt burden etc. During the Second Millennium, the concept of new-International Economic Order was evolved but despite several solemn declarations it could not make much headway due to non-cooperation of developed countries. Ultimately the forces free and open markets and capitalism triumphed. This finds its manifestation in the establishment of the World Trade Organisation (WTO). Even countries like Russia, despite their inhibitions, have been compelled to vying with other countries to get the membership of this organisation which is the brain child of countries like America. China has already become a member of W.T.O. International Law in the Third Millennium will have to cope with this formidable problem. So long as there is a wide gap and economic disparity between the rich and poor countries permanent and lasting peace cannot be secured or established.

Last but not the least, one of the most remarkable things that took place after the establishment of the United Nations was the development of the concept of Human Rights which tended to make International Law a branch of jurisprudence of universal application. While human rights jurisprudence has recorded phenomenon growth during last fifty years, it is somewhat paradoxical that violations of human rights and fundamental freedoms all over the world have not abated. The problem of their observance and implementation still remains crucial. There is no dearth of law. Monitoring and international supervision of the observance of human rights will have to be improved in the Third Millennium.

Conclusion

It is clear from the above discussion that International Law, like all living law, is not static; it gathers dynamism and activity mending itself to the needs of the day. It is quite obvious that "New times bring more varied problems, and the area of International Law is one of the area where novel concepts and new directions will have to be fashioned to cope with problems being posed under new circumstances." [108] "Every new crisis seems to add voices—voices of goodwill which ask whether that law is not already long out of today's date, also left behind by radical developments in international society." [109] It may, however, be added that every new crisis may become the harbinger of new developments

108. Leonard M. Salter, "International Law in Transition ; New norms for Old". The Int. Lawyer, Vol. 7, No. 3 (July 1973), p. 687.

109. "Force, Intervention and Neutrality in Contemporary International Law", Proc. ASIL, April, 25-27, 1963, p.147.

in international law. The genocide perpetrated in Bangladesh is a glaring example of this phenomenon. According to Thomas M. Frank and Nigel Rodley, "International Law is not static. The Bangladesh case is an example, by far the most important in our times, of the unilateral use of military force justified *inter alia*, on human rights grounds, and India succeeded. International law, as a branch of behaviourial science as well as normative philosophy, may treat this event as the harbinger of a new law that will henceforth, increasingly govern inter-State relations. Perhaps India's example by its success has already entered into the nations' conscious expectations of future conduct".[110] The apalling human tragedy and genocide perpetrated in an unprecedented scale in Bangladesh ceased to be a matter of domestic affair of Pakistan and had become international. It clearly demonstrated the utter helplessness of the international machinery for the protection of human rights.[111] It also dawned the realization to evolve norms and principles of International law to cover such situations. It would, therefore, be no excessive optimism to hope that the Bangladesh episode may be a harbinger of new law in the field of human rights. The traditional International Law has undergone enormous changes in the last fifty years. International Law has always endeavoured to cope with the changing times and circumstances. There is no reason to believe that the possibilities of future growth have been exhausted. International Law "is still growing and indeed the pace has increased enormously in the last fifty years."[112]

In the absence of a world legislative body, International Law finds itself confronted with many problems and difficulties keeping pace with the needs of the day. It is, however, heartening to note that since the inception of the United Nations Charter, the most remarkable constitutional development has been the continuous growth of the powers and functions of the General Assembly. The resolutions and declarations of the General Assembly are generally said to be recommendatory but under certain circumstances they may be more than mere recommendations and may create legal implications. Being the most representative of the U.N.'s organs, the General Assembly has great potentialities of future growth and its declarations and resolutions have great potentialities of becoming the sources of Universal International Law.[113] The International Court of Justice has also lent its support to this auspicious evolution of the law of the United Nations.[114] It is, however, not suggested that the General Assembly has become an international legislative power but that it may become if its growth continues unhampered. In the words of Judge Alvarez,[115] "the General Assembly... is the meeting place where states discuss political matters of general interest... in doing so, the Assembly is in a good position to reconcile law and politics. In short, the Assembly..... is tending to become an international legislative power. In order that it may actually become such a power, all that is needed is that governments and public opinion should give it support. Public opinion is an important factor which comes into play in the new International Law." It has been aptly pointed out, "The G.A. (*i.e.* General Assembly) resolutions constituted the "joint action" and the 'process' through which states and peoples pursued their objectives. The point is, it would be naive to ignore such *law creating* resolutions—one may legitimately go a step further to state that given the current concerns of the world community and the versimilitude of joint action being taken, law-making conventions and conferences are only tiny episodes in the drama of creation of International Law.

---

110. After Bangladesh : The Law of Humanitarian Intervention by Military Force". AJIL, Vol. 67, No. 2 (April, 1973) p. 275 at p. 303.

111. See "U.N. Prevention of Human Rights Violations : The Bangladesh Case" Int. Orgn. Vol. 27, No. 1 (Winter, 1973), p. 115; See also "Biafra, Bengal and Beyond; International Responsibility and Genocidal Conflict", AJIL Vol. 66, No. 4, (September 1972), p. 89.

112. J.E.S. Fawcett : The Law of Nations (London, 1968), p. 27.

113. See Leo Gross : "Sources of International Law", Asian States and the Development of Universal International Law, Edited by R.P. Anand (1972), p. 189 at pp. 204-209.

114. See for example Judgment of Judge Alvarez in Admissions Case, I.C.J. Rep. (1948), p. 68, Injuries Case, I.C.J. Rep. (1949), p. 182 and Certain Expenses Case, I.C.J. Rep. (1962), p. 185.

115. Reservations to the Genocide Convention, I.C.J. Rep. (1951), p. 15 at p. 49

For modern international law in the making one needs to look beyond the law-making conferences to the *law creating* conferences..... the UNCTAD, GATT, IBRD, IMF, OECD, OPEC, etc. are vigorously involved in creating this new International Law..... And International Law would cease to have any validity or relevance if it did not take cognizance of the processes through which the world community pursued its pressing concerns." [116]

For the development of International Law in the present times, following four points also deserve a special mention—(1) The development of International Law now does not depend on the will of some powerful states. (2) As compared to the years preceding the Second World War, the Communist States are now taking more active part in International Legislation. (3) Newly independent states are taking active part in the development of International Law. (4) Large number of newly independent states will greatly influence the development of International Law. This will influence specially the economic condition of individual states.[117]

International law is confronted with many difficult problems and challenges, the most formidable being the danger to our entire planet from a nuclear conflagration. International law today is involved constantly in the resolution of these difficult problems and challenges and has become a dynamic and progressive force in the world.[118]

The significance of the present International Law need not be over-emphasized. Indeed it is that indispensable body of rules regulating for its most part the relations between states, without which it would be virtually impossible for them to have steady and frequent intercourse. It is in fact an expression of the necessity of their mutual relationships. In the absence of some system of International Law, the international society of states could not enjoy the benefits of trade and commerce, of exchange of ideas, and of normal routine communication." [119]

International Law "must be continuously developed by *revision in content, expansion of scope, and improvement of the means of securing compliance,* so that it is kept in accord with the changing needs of the international community".[120] Since the present age is witnessing accelerating and meteoric changes on so many fronts, International Law must also develop much faster than it has done in the past. If at any time, the lag between the law and changes taking place in the international field widens too much, the resultant will be inevitable catastrophe. Indeed the future of mankind rests on the capability of International Law to develop and adapt itself to the changing times and circumstances.

---

116. Rahmatullah Khan, "International Law—Old and New", I.J.I.L., Vol. 15 (1975), p. 371 at p. 374; see also Rosalyn Higgins. The Development of International Law through the Political Orgnns of the United Nations (1963), p. 2; Guenter Weissberg, "United Nations Movements Towards World Law" I.C.L.Q. Vol. 24, Part 3 (July 1975), p. 460 at p. 461; see also Michel Virally, "The Sources of International Law" in Sorensen, Manual of Public International Law, p. 162.
117. Leo, J. Bouchez, "Some Reflections on the Present and Future of the Law of the Sea" in the Present State of International Law (1973), p. 143 at p. 149.
118. R.S. Pathak, "The Functioning of International Law in the International System", I.J.I.L., Vol. 24 (1984) p. 1.
119. Starke's International Law Eleventh Edition, Butterworths (September, 1994, Edited by I.A. Shearer, p. 14.
120. Edward Collins, note 20, p. 424.

CHAPTER 2

DEFINITION OF INTERNATIONAL LAW

In the view of European Scholars, modern International Law is determined by the modern European system. According to Oppenheim, International Law is "essentially a product of Christian civilization, and began gradually to grow from the second half of the Middle Ages." [1] This view is subject to criticism because there are several such principles and rules of International Law as existed in their developed form in the ancient period. Some of them are such as existed in their developed form in ancient India. The view of Oppenheim and other Western jurists that International Law owes its birth to the modern European system is not correct. International Law was in a developed state in the Ramayana and Mahabharat period.[2] The example of International Law relating to Diplomatic Agents may be cited in this connection. Thus the birth of International Law can be traced back to ancient times.[3] However, it cannot be denied that the words 'International Law' were used for the first time by eminent British jurist, Jermy Bentham in 1780.[4] Since then, these words have been used to denote the body of rules which regulate the relations among the States. Though International law can be traced to ancient Greece, Rome and India, it cannot be denied that the public International law which we know today, study and practice has come to us through Europe. It is determined by the modern European system. It will, therefore, be proper to refer it as 'modern international law.'

Definition*

I. L. Oppenheim.—Professor Oppenheim has defined International Law in the following words :

> "Law of Nations or International Law is the name for the body of customary and conventional rules which are considered legally binding by civilized States in their intercourse with each other."

This definition[5] was given by Oppenheim in 1905. Oppenheim is one of the most celebrated authors of Public International Law. A critical discussion of Oppenheim's definition is made below with a view to show and highlight the changes that have taken place in the concept and definition of Public International Law during the last to ter decades.

---

1. L. Oppenheim, International Law, Vol. 1, Eighth Edition (1970 reprint), p. 6.
2. See S.S. Dhavan, The Ramayana—International Law in the Age of Ramayan, National Herald Magazine, Jan. 28, 1973, p.1.
3. Dr. Nagendra Singh, aptly remarked: "A study of the Smrities (200 B.C. to 400 A.D.) would undoubtedly reveal that Ancient India had a highly developed system pertaining to the laws and rules of war based on considerations of humanity and chivalry. The rules of war applied even if the struggle was in the nature of a civil war which is again in conformity with the modern concept as embodied in the Geneva Conventions of 1949 and the one underlying the recognition of belligerency.... Let alone the laws of war, it was much more to in the realm of the laws of peace that India's contribution as far as universality of application is concerned came to be so well-marked and known.... Apart from the aforesaid illustrations concerning the laws of war, there are several important topics of International Law such as the right of asylum, the treatment of aliens or foreign nationals, the immunity and privileges of ambassadors etc., in respect of which India evolved rules and regulations dating back to some years before Christ." India and International Law (1969), pp. 3-4, 11 and 21. For India's contribution to the Development of International Law; see also excellent article, "India and International Law" by Nagendra Singh appearing in Asian State and Development of Universal International Law, edited by R. V. Anand, (1972), pp. 25-42.
4. See L. Oppenheim, International Law, Vol. 1, Eighth Edition, p. 94.

* See Q. No. 2 of P.C.S. Exam. 1976—For the answer of this question see the definitions of Oppenheim, Brierly, Holland, etc. and the criticism of the definition of Oppenheim. See also 'conclusion' given after the definitions. The correct definition of International Law has been given under the heading 'Conclusion' ; see this also, for Q. No. of I.A.S. Exam, (1972) ; see also for P.C.S. (1985) Q. 1 See also matter discussed under Chapter 1.

** See also for CSE (1995) Q. 5 (a).

5. See Oppenheim, International Law (Newyork, Longmans, Green & Co., 1905) pp. 1-2.

Criticism.—Professor Oppenheim's definition suffers from several serious defects. It might have been good and adequate when it was given but now it has outlived its utility and has become obsolete and inadequate.[6] "Indeed every important element in it can now be challenged." The definition of Oppenheim has been subjected to following criticism—

(i) In the first place... "it is now generally recognized that, not only "States" but public international organisations, have rights and duties under International Law, even though they may not have all the rights and duties that States have." [7] In fact, "The future of International Law is one with the future of International organisation." [8]

(ii) The use of the term 'civilized states' by Oppenheim is also severely criticized. The criterion of distinguishing so-called 'uncivilized states' was neither long history nor culture. Even though China had 5,000 years old culture, she was not included in the group of civilized states. So was the case of oriental States. In not too distant past, the Western States regarded only the 'Christian States' as 'Civilized States'. This criterion was undoubtedly wrong. At present there are as many as 193 members of the U.N. which include Christian as well as non-Christian States. That is why, in later editors of Oppenheim's book have deleted the term 'civilized states'. For example, in eighth edition of Oppenheim's book,[9] International Law has been defined in the following words :

"Law of Nations or International Law (Droit des gens, volkerrecht) is the name for the body of customary and treaty rules which are considered legally binding by States in their intercourse with each other."

(iii) Thirdly, "More controversial but no longer untenable is the view that even individuals and other private persons may have some such rights and duties." [10] Of all the changes that have taken place in the International Law since the Second World War, the most important change has been the addition of new subjects.[11] The main change that has taken place is that from the formal structure of relation of States it is moving towards the interests and welfare of citizens of member States.[12] As Jenks has rightly remarked : "contemporary International Law can no longer be reasonably presented within the framework of the classical exposition of International Law as the law governing the relations between states but must be regarded as the common law of mankind in an early stage of its development."* It is no longer possible to regard International Law as governing relations solely between States. At present, it also governs relations between States and international organisations, between States and private persons, and between International Organisations and private persons. This has been conceded even in later editions of

---

6. Oliver, J. Lissitzyn, International Law To-day and Tomorrow (Oceana Publications Inc. Dobbs Ferry, Newyork, (1965), p. 38.
7. Ibid; see also Reparation for Injuries Suffered in the Service of the U.N. Advisory opinion, I.C.J. Rep. (1949), p. 174; D.W. Bowett, The Law of International Institutions (London, Stevens & Sons, 1963), pp. 273-310, Percy E. Corbett. The Growth of World Law (Princeton, New Jersey, (1971), p. 183. See also Josef L. Kunj, "The Changing Law of Nations", A.J.I.L., Vol. 51 (1957), p. 77.
8. Percy E. Corbett, Law and Society in the Relation of States, p. 12 ; See also E. Shibaeva, "Law of International Organisations in the System of Modern International Law", I.J.I.L, Vol. 17 (1977), p. 227 at p. 233.
9. L. Oppenheim, International Law—A Treatise, Vol. I Peace, Eighth Edition, Edited by H. Lauterpacht, pp. 4-5.
10. See W. Friedmann, The Changing Structure of International Law (1964), pp. 221-249. See also Dr. B.V.A. Rolling, International Law is an Expanded World (Djambatan N.V. Amsterdam, 1960), p. xxii; see also P.E. Corbett, The Growth of World Law (1971), p. 184; C. Wilfred Jenks, Social Justice in the Law of Nations (1970), pp. 16-20.
11. Friedmann, Ibid, at p. 57.
12. C.W. Jenks, The Common Law of Mankind (1958), p. 27, See also W. Friedmann, "Changing Dimension of International Law", Columbia Law Review, Vol. 62 (1962), p. 1147 at p. 1148.

* Asked Q. No. 3 of I.A.S. Exam, (1972) ; For answer see also preceding asterisk ; see also matter discussed under the heading "Need for Universal International Law" in Chapter 1.

Oppenheim's book. For example, in eighth edition of his book following passage deserves mention : "It must be noted that although the rules of International Law are primarily those which govern the relation of states, the latter are not the only subjects of International law. International organisations and, to some extent, also individuals may be subjects of rights conferred and duties imposed by international law." [13] In this connection, the example of the advisory opinion of the International Court of Justice on *Effects of Awards of Compensation made by the U.N. Administrative Tribunals*[14] may also be cited. Besides this, 1965 Convention on Settlement of Investment Disputes between States and Nationals of other States deserves a special mention. Reference may also be made to the Universal Declaration of Human Rights, 1948, which enumerates a number of rights of the individuals and now "constitutes authoritative interpretation" of the human rights provisions of the Charter. International Covenants of Human Rights and the Optional Protocol to the Covenants on Civil and Political Rights further confirm that the individuals have become not only the subjects of International Law but can also directly claim rights and remedies provided under International Law. Individuals can send petitions to the U.N. Commission on Human Rights. Individuals can also send petitions (or make complaints) to the Human Rights' Committee established under the International Covenant on Civil and Political Rights, 1966. Above all, the Charter of the U.N. begins with the words "we the people of the United Nations." The developments since the inception of the U.N., particularly the international protection of human rights, have confirmed that these words have not crept into the Charter incidentally but were deliberately used and were pregnant with meaning. It may, therefore, be observed that the present International Law cannot be regarded as the law governing the relations between States, but must be regarded "as the common law of mankind in an early stage of its development." European Convention on Human Rights, 1950, American Convention on Human Rights, Convention on Suppression and Punishment of Apartheid, 1973, Convention on the Elimination of All Forms of Racial Discrimination, etc. also deserve a special mention in this connection.

(iv) Fourthly, "it is now widely recognised that International Law consists not only customary and conventional rules but also of 'General Principles of Law.'[15] Article 38 of the Statute of the International Court of Justice mentions 'General Principles of Law Recognised by Civilized States' as the third source in order under which the sources of International Law are to be used while deciding an international dispute. That is to say, if the Court does not find any International Treaty or International custom on a particular point under dispute, the Court may take the help of 'General Principles of Law Recognized by Civilized States'. As aptly pointed out by Lord McNair, it describes, "the inexhaustible reservoir of legal principles from which tribunals can enrich and develop public International Law." [16]

(v) Fifthly, "the very conception that international law as a "body of rules" now stands changed as static and inadequate." Further, "Like all living law, international law does not stand still but is continuously reinterpreted and reshaped in the very process of its application by authoritative decision-

---

13. Oppenheim, note 9, pp. 5-6.
14. (1954) I.C.J. Rep., p. 47.
15. Lissitzyn, Supra Note 6, p. 39.
16. McNair : "The General Principles of Law Recognised by Civilized Nations" BYBIL Vol. XXXIII (1957), p. 1 at p. 6; see also Manley O. Hudson, The Permanent Court of International Justice: 1920-1942 (Newyork, 1943), pp. 606-620; J.E.S. Fawcett : The Law of Nations (London, 1968), pp. 21-25; Vladimir Paul : "General Principles of Law in International Law", I.J.I.L., Vol. 10 (1970), p. 324.

makers, national and international." [17] International Law, or any law for that matter is a dynamic concept. Law changes with the change of time and circumstances. A law, to be living, must be flexible, adaptable and changeable. M.A. Kaplan and Nde B. Ketzenbach[18] have aptly remarked, "it is now a common place that the law is a process, not a body of self-executing rules". What is true of law, in general is also true of International Law. The changing character of International Law is a consequence of transformation of general conditions, a transformation the impact of which is equally felt in the municipal legal orders. This is good so far as it goes but it cannot be denied that it has become customary to define law as "body of rules." Therefore it is not proper to criticise Oppenheim on this account.

In view of the changing character of International Law, Oppenheim's earlier definition has now become obsolete and inadequate. Prof. Friedmann has remarked, "Both in volume and scope, the area of international institutions and agreement has greatly widened. International Law is today actively and continuously concerned with such divergent and vital matters as human rights, crimes against peace and humanity, the International control of nuclear energy, trade organisation, labour conventions, transport control or health regulations. This is not to say in all or any of these fields international law prevails, but there is no doubt today that they are its legitimate concern." [19] Further, "As International Law moves today on so many levels, it would be surprising indeed if the traditional principles of inter-State relations developed in previous centuries were adequate to cope with the vastly more divergent subject-matters of International Law of the present day.[20] It has, therefore, become necessary to redefine International Law. "The redefinition of International Law will be a continuing process, but it will be increasingly unlike the subject defined and handed down to us by previous generations." [21]

New Definition of International law in latest edition of Oppenheim's Book.—The editors of the ninth edition of Oppenheim's book, Sir Robert Jennings and Sir Arthur Watts have revised Oppenheim's definition of International law. In their words :

"International law is the body of rules which are legally binding on States in their intercourse with each other. These rules are primarily those which govern the relation of states, but States are not the only subjects of international law. International Organisations and, to some extent, also individuals may be subjects of rights conferred and duties imposed by international law." [22]

Further, "States are the principal subjects of international law ..... States are primarily, but not exclusively, the subjects of international law. To the extent that bodies other than States directly possess some rights, power and duties in international law they can be regarded as subjects of international law, possessing international personality." [23] Moreover, "Not only individuals but also certain territorial or political units other than States, to a limited extent, be directly the subject of rights and duties under international law." [24]

Thus the above concept and definition of International Law given in ninth edition of

---

17. Lissitzyn, Supra note 6, p. 39.
18. The Political Foundations of International Law. (John Wiley & Sons, 1961), p. 231; See also Myres McDougal, "International Law and Social Science, A Mild Plea in Avoidance", A.J.I.L., Vol. 66 (1972), p. 77.
19. W. Friedmann, "Some Impacts of Social Organizations on International Law", A.J.I.L., Vol. 50 (1956), p. 475 at p. 477.
20. Ibid.
21. W. Friedmann, "The Changing Dimensions of International Law", Columbia Law Review, Vol. 62 (1962), p. 1147 at p. 1165.
22. Oppenheim's International Law, Ninth Edition (Longman Group U.K. Limited and Mrs. Tomoko Hudson, 1992), Vol. I, Edited by Sir Robert Jennings and Sir Arthur Watts, p. 4.
23. Ibid, at p. 16.
24. Ibid, at p. 17.

Oppenheim's International Law is nearly similar to that given by Starke and Fenwick. However, it is still deficient in one respect because it is still conscpicuous for its silence regarding general principles of law recognized by civilized nations.

In view of the foregoing discussion and taking into consideration the present state of international law, international law may be defined "as the body of general principles and specific rules which are binding upon the members of international community in their mutual relations." [25] The term 'international community' is very appropriate for it includes States, international institutions, individuals and other non-State entities.

II. Some other Definitions.

(i) J.L. Brierly.—In the words of Brierly : "The Law of Nations or International Law may be defined as the body of rules and principles of action which are binding upon civilized States in their relations with one another." [26]

(ii) Torsten Gihl.—Professor Torsten Gihl defines International Law in the following words : "The term 'International Law' means the body of rules of law which apply within the International Community or Society of States." This definition presupposes that States constitute a society and that this society has a legal system, International Law or the law of nations. This is another way of saying that International Law exists, that there is a body of rules, having the character of rules of law, which regulate the relations of States *inter se*[27].

(iii) Hackworth.—In the words of Hackworth : "International Law consists of a body of rules governing the relations between States. It is a system of jurisprudence which, for the most part, has evolved out of the experiences and the necessities of situations that have arisen from time to time.[28]

(iv) Queen v. Keyn.—In the *Queen* v. *Keyn*,[29] Lord Coleridge, C.J., defined International Law in the following words : "The law of nations is that collection of usages which civilized States have agreed to observe in their dealings with one another."

(v) West Rand Central Gold Mining Ltd. Co. v. King.[30]—In this case the Court observed, International Law may be defined as "the form of the rules accepted by civilized States as determining their conduct towards each other and towards each other's subjects.

(vi) S.S. Lotus case.[31]—In *S.S. Lotus* case, International Law was defined in the following words : "International Law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restriction upon the independence of States cannot therefore be presumed." [32]

(vii) Philip C. Jessup.—Jessup has defined International Law in the following words : "International Law or the Law of Nations must be defined as law applicable to States in their mutual relations with States." Judge Jessup further adds, "International Law may also..... be applicable to certain inter-relationships of individuals themselves, where such inter-relationships involve matter of international concern."[33]

(viii) Gray.—According to Gray : "International Law or the Law of Nations is the name of a body of rules which according to the usual definitions regulate the conduct of states in their intercourse with each other."

---

25. Charles G. Fenwick, International Law (Third Indian Reprint, 1971), p. 31; See also conclusion given after the definitions.
26. The Law of Nations, Sixth Edition, Edited by Sir Humphrey Waldock (1963), p. 1.
27. Torsten Gihl : The Legal Character and Sources of International Law (Stockholm, (1957), p. 53).
28. Hackworth : Digest of International Law, Vol. (1940), p. 1.
29. 2 Ex. D. 63, 153, 154 (1876).
30. (1905) 2 K.B. 91.
31. (1927) P.C.I.J. Series A. No. 10.
32. Ibid, at p. 18.
33. Philip C. Jessup : A Modern Law of Nations (1948), p. 17.

(ix) Hall.—In the words of Hall : International Law consists of certain rules of conduct which modern civilized states regard as binding on them in their relations with one another with a force comparable in nature and degree to that binding the conscientious person to obey the laws of his country and which they also regard as being enforceable by appropriate means in case of infringement." [34]

(x) Kelsen* —According to Kelsen : "International Law or the Law of Nations is the name of a body of rules which—according to the usual definition—regulate the conduct of the States in their intercourse with one another." [35]

Criticism—The above definitions can also be criticised in the same way as Oppenheim's definition has been criticised. These definitions are not appropriate and do not properly represent international law as it exists today.

III. Soviet definition and approach to International Law**

According to the Soviet definition, International Law is "the total of the norms regulating relations between States in the process of their struggle and co-operation, expressing the will of the ruling classes of these States and secured by coercion exercised by States individually and collective." [36] Another eminent Russian writer defined International Law as "the totality of norms, which were developed on the basis of agreements between the States which govern their relations in the process of struggle and co-operation between them, expressing the will of the ruling classes, and are enforced in case of necessity, by the pressure applied either collectively or by individual States." [37] After the death of Stalin the above definition was slightly modified by inclusion of a reference to "peaceful co-existence". In recent years, Soviet writers have laid a great emphasis on 'peaceful co-existence' in relation between the sovereign states. According to the Soviet view, "the principles of peaceful co-existence should be the basis of the whole structure of contemporary international law. Only if it is based on the principle of co-existence can international law best promote the cause of peace and mutual understanding between States." [38] According to another eminent Soviet writer "International law can be defined as the aggregate of rules governing relations between states in the process of their conflict and co-operation designed to safeguard their peaceful co-existence, expressing the will of the ruling classes of these states and defended in case of need by coercion applied by states individually or collectively.

This definition notes the class, character and significance of International legal relations (states), the nature of the relations between them, conflict and co-operation and the method of safeguarding and implementing the rules of International Law, *i.e.* their defence individually or collectively, by the states themselves..... The purpose of present day international law is to regulate relations between states and this way strengthen world peace and security ..... Although International law, like any branch of law, has a class character and pertains to the superstructure, it cannot express the will of the ruling class of any particular state. It is the expression of the agreed will of a number of states in the form of an International agreement or custom which has grown up over a long period. The purpose of present day international Law is to promote peaceful co-existence and co-operation between all states regardless of their social systems." [39]

Criticism.—The Soviet definition emphasises struggle and co-operation between States will of the ruling classes, etc. But as pointed out by George Ginsburgs, "Indeed, whereas today the trend in most of the world moves more and more in the direction of a

---

34. International Law, Eighth Edition, p. 1.

* See also for Q. No. 1 of P.C.S. Exam, (1974) ; for Holland's views see matter discussed under the heading "wether International Law is the vanishing point of jurisprudence ?" discussed in this Chapter.

35. Hans Kelsen, Principles of International Law, p 3.

** Asked in I.A.S. Exam, (1975) Q. No. 1(c) : For answer see also "Soviet Practice" discussed under the Chapter entitled "Relationship Between International Law and Municipal Law".

36. Definition by A.Y. Vyshinsky in 1948.

37. Adopted from Kazimierz Z. Grzybowski, Public International Law, (1970), p. 17.

38. Hans W. Baade (Ed.), The Soviet Impact on International Law (1965), p. 15.

39. F.I. Kozhevnikov (Ed.), International Law, pp. 7, 8, 10 and 11.

qualified recognition that international law no longer applies to states alone, but encompasses a variety of international personalities other than states as well, including, possibly, individuals, the Soviets have today adamantly opposed most aspects of such expansion of international law. Their jurists with rare exceptions continue to cling to a very conservative conception of what constitute a subject of international law." [40] The Soviet definition is not adequate because it does not mention international organisations, individuals and non-State entities as subjects of international law. It does not also include the general principles of law recognised by civilized States. In view of the breaking up of the Soviet Union and end of Communism there, Soviet definition and concept have also undergone significant changes.

IV. Chinese Definition and approach to International Law.—According to a Chinese writer : "International Law like all other branches of law, is created in a definite stage of mankind's social development. The origin of international law is directly related to the creation of the state. International law is created as the political, economic, and the relations among states emerge." [41] In his view, only the definition of international law given by Soviet scholars (for example, by Vyshinsky given earlier), explains the question of the contents and substance of international law. This definition (*i.e.*, of Vyshinsky) is adaptable to the "international law of various historical periods including the modern one." He points out that international law possesses the following characteristics of law in general : (i) it expresses the will of the ruling class; (ii) it is the aggregate of norms adjusting definite social relations; and (iii) it is guaranteed by enforcement measures. In his view, therefore, international law is a kind of law possessing legal validity; it is not what are called self-executing norms of morality." [42]

As pointed out by Jerome Alan Cohen and Hungdah Chieu[43] : By the time the above article appeared in late 1957, the Soviet definition of international law that it recites had been supplemented by the insertion, after the words 'struggle and co-operation' of the phrase 'designed to safeguard their peaceful existence'.[44] This change followed the CPSU's promulgation in 1956 of a new policy that required scholars to recognise that the purpose of present day international law is to promote peaceful co-existence and co-operation between all states regardless of their social systems[45]..... Although the PRC (*i.e.*, People's Republic of China) began to emphasize peaceful co-existence as early as 1954 and although Chinese writer appears to have accepted the post-1956 Soviet modification of the definition of international law to include reference to peaceful co-existence, by the 1960's the Chinese and Soviet view of this slogan and its legal implications differed substantially. For example, on October 8, 1964, Wu Te-feng, then a Vice-President of the Supreme People's Court and President of the Chinese Political Science and Law Association stated : Imperialism is the basic source of war, and American imperialism, moreover, is the most ferocious and ambitious aggressor ever to exist in the history of mankind, and it is the most flagrant violator of the principles of modern international law. Naturally, democratic legal workers in various countries should engage in the thorough exposure of, and determined struggle against it. However modern revisionists nevertheless make great efforts to propagandize the carrying out of 'peaceful co-existence' with imperialism without being subject to any principle disseminating the view that contemporary international law is the law of 'peaceful co-existence' with American imperialism.[46] This development was mainly due to the conflicts between China

---

40. The Soviet Impact on International Law (1965), p. 67 : see also Jenks, The Common Law of Mankind, p. 1; McDougal Studies in World Order, p. 170; Philip C Jessup Transnational Law, p. 2.
41. Ho Wu-Shuang and Ma Chun, "A Criticism of the Reactionary Viewpoint of Ch'en Ti-Ch'ing on the Science of International Law", CEYC No. 6: 35 (1957) in Peoples China and International Law, Edited by Jerome Alan Cohen and Hungdah Chieu, Vol. I, Princeton, Jersey, (1974), p. 26.
42. Ibid at p. 27.
43. Jerome Alan Cohen and Hungdah Chien, Supra note 40, at pp. 27-28.
44. See P.I. Kozheznilkov Supra note 41, at p. 7.
45. Ibid, at p. 11.
46. Reporter of Cheng-fa-yen Chiu, "China Political Science and Law Association held Fourth General Meeting" CPYC No. 4: 28 (1964).

and Soviet Union and the latter was referred as modern revisionist. But in the 1970's even the Chinese developed relations with America, Britain and other so-called imperialist powers and hence once again a shift has come in the attitude of Chinese scholars.

The Chinese scholars criticize vehemently the definitions of international law given by Oppenheim and other Western writers. In the view of a Chinese writer,[47] these definitions cause us first to realise that Bourgeois international law is created for the so-called 'civilized states' and does not possess the spirit of democratic legislation in the international big family. In the view of Bourgeois writers, only 'Christian states' are 'civilized states' while non-Christian states, mainly oriental sates, are 'uncivilized states'. For instance, Oppenheim said that before the First World War, China, Persia, Burma, Abyssinia, and other oriental states were still 'uncivilized states'. The criterion of the Bourgeoisie for distinguishing so-called 'civilized and uncivilized' states is neither long history nor culture. Even though China has had 5,000 years of excellent culture, she was not included in the group of 'civilized states'. The exclusion of Oriental states from the exclusive club of 'civilized states' reflects exactly the needs of the aggressive interests of the imperialistic monopolistic Bourgeoisie. He added, "..... although bourgeois international law may in certain periods and under certain conditions play a role of mutual restriction among 'civilized states' it is mainly a weapon used by 'civilized states' to control and oppress what they consider to be 'uncivilized states'. The 'uncivilized states' are their preys. The Chinese people feel very deeply here. In the past, imperialism seized the right of consular jurisdiction in China on the pretext that China was 'backward in the rule of law' and 'uncivilized'. By establishing 'spheres of influence, advocating the 'open door' and 'equal opportunity for all' and even trying to partition China, imperialism treated China as a 'backward' and 'uncivilized' State which could be oppressed." [48]

In China, International law is regarded as "a legal instrument in the service of foreign policy." [49] In the words of a Chinese author, "International law, in addition to being a body of principles and norms which must be observed by every country, is also, just as any law a political instrument : whether a country is a socialist or capitalist, it will to a certain degree utilize international law in implementing its foreign policy." [50]

As regards the subjects of international law, like Soviet Union, the Chinese also do not regard International Organisation and individuals as subjects. In their view, the Bourgeois theory concerning the subjects of law is inconsistent with the principles of modern international law.[51] But this view cannot be accepted. As pointed earlier, while criticising Oppenheim's definition that individuals have now become subjects of international law and can now, although only in a few cases, claim rights directly under international law and need not always do so through the medium of State. Similarly international organisations have also become subjects of international law. They can enter into agreements or treaties. They are legal persons and may make claims for the compensation of persons suffering injuries in their service.[52] China has now taken a complete turn. It has recently joined the W.T.O.

---

47. Ying T'ao "Recognise the True Face of Bourgeois International Law from a few Basic Concepts", KCWTYC No. 143-44 (1966) in Jerome Alan Cohen and Hungdah Chiu, Supra note 43 at pp. 29-30.

48. Ibid at pp. 30-31.

49. Shiu Sung, Yii-Ta-hasin, Luying-hui, and Ts'ao K'o, "An Initial Investigation into the old Law view point in the Teaching of International Law" CHYYC No. 4 : 14 (1958) in Jerome Alan Cohen and Hungdah Chiu, Supra note 43 at p. 31.

50. Chou Fulun, "On the Nature of Modern International Law—A Discussion with Comrade Liu Hsin" CHYYC No. 3 : 55 (1958). Adopted from Ibid at pp. 31-32.

51. For Chinese Approach to International Law See also "Chinese Practice" under the chapter entitled "Relationship between International Law and Municipal Law" and "Chinese view" under the Chapter entitled "Subjects of International Law and Place of Individual under International Law".

52. See for example, Advisory opinion of the International Court of Justice, Reparation for Injuries Suffered in the Service of the U.N., I.C.J. (1949), p. 174.

V. Charles G. Fenwick.—In the words of Fenwick :

"International law may be defined in broad terms as the body of general principles and specific rules which are binding upon the members of the international community in their mutual relations".[53]

Appraisal.—Fenwick's definition is better than all the above-mentioned definitions because instead of the word 'states' he uses the words 'members of the international community' which include states, international institutions, individuals and non-state entities. He also uses the term 'general principles', His definition is very short but pregnant with meaning and takes into account the changes that have taken place after the Second World War. Indeed it is an appropriate and correct definition of international law.

VI. Whiteman.—Whiteman defines International Law in the following words : "International law is the standard of conduct, at a given time, for states and other entities subject thereto."

Evaluation.—This is a very brief but adequate definition. The words "other entities subject thereto" may include international organisations, individuals and non-State entities. The words used in the definition are apparently very simple but they are pregnant with meaning and very vast in their scope. Moreover, Whiteman has also emphasised the dynamic aspect of international law. She writes, "International law is, more or less, in a continual state of change and development. In certain of its aspects the evolution is gradual in others it is avulsive."

VII. J.G. Starke.—In the words of Starke[54] :

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

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

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

The definition of Starke is appropriate because it takes into account the changing character of international law and truly reflects the present position of international law.

Conclusion.—On the basis of the above definitions we may conclude that International law is a body of rules and principles which regulate the conduct and relations of the members of international community. The contention that States alone are subjects of international law is not only inconsistent with the changing character of international law but has become completely obsolete and inadequate. Individualistic character of international law is being replaced by the law of social inter-dependence.[55] In re *Piracy Jure Gentium,*[56] Lord Chancellor Sankey aptly remarked that international law is a "living and expanding Code." In view of the changing character and expanding scope of international law today, international institutions, some non-State entities and individuals have also become the legitimate subjects of International law. Nevertheless, it cannot be

---

53. International Law, (Third Indian Reprint, 1971) p. 31.

54. Starke's International Law, Eleventh Edition, Butterworth (September, 1994), p. 3.

55. Admission of a State to Membership in the U.N., I.C.J., Reports (1948), p. 4 at p. 67. per Judge Alvarez.

56. (1934) A.C. 586, 589.

denied that even today, as pointed out by Starke, "it is composed for its greater part of the principles and rules of conduct which States feel themselves bound to observe, and therefore do commonly observe, in their relations with each other....."[57] "Thus International law is constantly evolving body of norms that are commonly observed by the members of international community in their relations with one another. These norms confer rights and impose obligations upon States and, to a lesser extent, upon international organisations and individuals." [58] Moreover, "International law has effects on, and is effected by, the international relations, political thought and communications, as well as by the awareness of women and men in every State that they are a part of those addressed by the United Nations' Charter as being 'We, the People of the United Nations".[59]

57. See Supra note 54.
58. Edward Collins, International Law in a Changing World (1969). p. 2.
59. Martin Dixon and Robert McCorqudale, International Law (First Indian Reprnt. 1995) p. 1.

CHAPTER 3

NATURE AND BASIS OF INTERNATIONAL LAW

Before we take up different aspects of nature and basis of international law it will be desirable to discuss in detail the question whether international law is true law or not. This is necessary because the nature of international law is not the same that of national law, and a number of conceptions or even assumptions as to who is subject to the rules of international law as to the acceptance of international law (entailing rights and obligations and the enforcement of them) must be analysed before the substance of international law itself can be determined.[1] Though this question is now only of academic interest because it has been well established for once and for all times that international law is law, a discussion of this question is still important for it helps to understand the nature of international law. The observation that international law is not law was made by jurists who were trained and groomed under municipal law and jurisprudence and who sought in international law all those things which they had been seeing and were accustomed of seeing in municipal law. They were under a fallacy that there could be no system of law and jurisprudence other than municipal law and jurisprudence. They failed to realize that while state law is essentially a centralized system, international law operates in a decentralized system. The fallacious observation made by jurists such as Austin, Pufendorf, Hobbes, Holland and Jethrow Brown influenced international lawyers and writers so much so that even at present they have not been able to free themselves completely from such influence. For example, Starke has criticized Austinian concept of law and subscribes to the view that international law is law yet seems to be under some influence of the said fallacy because he goes on to remark that international law is a 'weak law'. Once it is admitted that municipal law is a centralized system while international law operates in a decentralized system, it becomes obvious that comparison of the two systems is not proper. Even if a man is so weak and thin and appears like a skeleton, he will still be called a man. When we say he is weak, we do so by comparing him with a healthy and strong person. Thus being 'weak' here is a relative concept. So is the case with international law when it is said that it is a 'weak law'. It is only by comparing it with municipal law we can say this. But it must be stressed that the comparison is not happy and proper because municipal law and international law are different for they operate under different set of circumstances. International law is as good and strong as it can be under the system and circumstances it operates. Its sanctions are as effective and potent as they can be under the decentralized systems in which they operate. As aptly remarked by Prof. Hart, international law is law because states regard it as law. Nothing need be further proved. It may be added that international law is not only law but its significance and efficacy are constantly increasing. International law deals with such matters, *inter alia,* such as nuclear weapons and environment upon which very survival of mankind depends.

Whether International Law is a law in the true sense of the term or not?*

"The new-fangled term 'international law' was invented at a time when men's minds were obsessed by theories of national sovereignty and it is not surprising therefore, that there came to be attached to it a stigma and a contempt which have never attached to the traditional 'law of nations'.[2] The controversy whether international law is a law or not

1. *See* Martin Dixon and Robert McCorqudole, International Law [Lawman (India) Pvt. Ltd., New Delhi, 1995], p. 7.

* See P.C.S. Exam., (1969), Q 6(a) ; I.A.S. (1973) Q. 4 ; I.A.S. (1961) Q. 4 ; P.C.S. (1967) Q. 1 ; P.C.S. (1982) Q. 1(b) ; P.C.S. (1984) Q. 1(b) ; P.C.S. (1995) Q. 7(a).

2. B.A. Wortley, Jurisprudence (Newyork, 1967), p. 153.

revolves on the divergent definitions of the word 'law' given by the jurists. If we subscribe to the view of Hobbes, Austin and Pufendorf that law is a command of sovereign, enforced by a superior political authority, then international law cannot be included in the category of law. On the other hand, if we subscribe to the view that the term 'law' cannot be limited to the rules enacted by superior political authority, then international law can be included in the category of law. In his paper entitled, "Is there a true International Law?" Published in 1884, eminent jurist Lawrence aptly remarked, "Everything depends upon the definition of law which we choose to adopt. The controversy is really a logomachy—a dispute about words, not things." Thus, "The largest of jurisprudential controversy, namely, that as to the word 'law' is a verbal dispute and nothing else".[3] Whether or not one wishes to attribute a legal character to the norms of international law depends largely upon the definition of law he chooses to accept."[4] Thus the jurists are divided into two main groups in regard to the legal character of the norms of international Law. We will now discuss critically the views of both the groups of jurists.

Hobbes, Pufendorf and Austin subscribe to the view that law "properly so called" is a command of the sovereign and is enforced by a superior political authority. Since law is the command of a determined superior, no law can exist where there is no supreme law-giver and no coercive enforcement agency. According to Austin, law is given by determinate superior political authority to political inferiors and is backed by a coercive enforcement agency. Thus, in the view of Austin, sanction occupies an important place in the enforcement of law. People follow law because they fear that if they do not do so, they might be compelled and even punished. According to Hobbes, man is by nature nasty, brutish and violent and fear or sanction which is inherent in law is necessary to maintain order in society. In his view, men need for their security "a common power to keep them in awe and to direct their action to the common benefit." Thus, we see that those jurists who deny the legal character of International law regard law as the command of the sovereign and having a coercive enforcement agency. In the view of these writers, the rules commonly called international law, are in fact the rules of 'positive morality'. Holland, Jeremy, Bentham and Jethro Brown, etc., are other prominent jurists who deny the legal character of international law.

In support of their view-point these jurists put forward the following arguments : (1) In municipal law, there is a determinate superior political authority which does not exists in international law. (2) As compaired to municipal law, international law lacks an effective legislative machinery. (3) International law lacks sanction which, according to the writers of this pursuasion, is an essential element of law. (4) There is no such executive power in International Law as may enforce the decisions of the International Court of Justice and ensure the observance of the provisions of the treaties. (5) International Law lacks a potent Judiciary. (6) Some writers call international law a quasi-law.[5]

The above view which denies the legal character of International law has been severely criticised by a large number of jurists. It is based on the definition of law that law is the command of the Sovereign backed by coercive enforcement agency. In other words, sanction is an essential element of law. But as pointed out by Prof. Oppenheim, "this definition is not correct. It does not cover that part of Municipal Law which is termed as unwritten or customary law. There is, in fact, no community and no State in the world which could exist with written law only".[6] Prof. H.L.A. Hart has also criticised the definition of law given by Austin. In his view, this concept "plainly approximates closer to penal statutes enacted by the Legislature of a modern State than to any other variety of law."[7] According to Prof. Oppenheim,[8] "law may be correctly defined as "a body of rules for

3. Glanville, L., Williams "Internaitonal Law and Controversy Concerning the word "Law", BYBIL. Vol XXII (1945) p. 146.
4. Edward Collins, International Law in a Changing World (1969) p. 2.
5. See for example, D.J. Lathan Brown, Public International Law, (London, Sweet and Maxwell, (1970), p. 274..
6. International Law, Vol. I, Edited by Lauterpacht (1970, Reprint), p. 7.
7. H.L.A. Hart, The Concept of Law, (Oxford, 1961), p. 24.
8. International Law, Vol. I. Eighth Edition, p. 10.

human conduct within a community which by common consent of this community shall be enforced by external power."* J.L, Brierly has also criticised Austinian concept of law. In his words : "Unless we distort the facts so as to fit them into the definition it cannot account for the existence of the English Common Law." [9] Further, "If, as Sir Frederick Pollock writes, and as probably most competent jurists would today agree, the only essential conditions for the existence of law are the existence of a political community and the recognition by its members of settled rules binding upon them in that capacity, international law seem on the whole to satisfy these conditions." [10] Thus the existence of law presupposes the existence following prerequisites : (a) a community ; (b) a body of rules ; (c) common consent of the community that (d) if necessary, for enforcement of these rules by external power. "The three requirements of this definition (*i.e.* Oppenheim's definition of law) are satisfied by international law, to a greater or lesser extent. The states of the world do together constitute a body bound together through common interests which create extensive intercourse between them, and differences in culture, economic structure, or political system, do not affect as such the existence of an international community as one of the basic factors of international law. Rules for conduct of the members of that community exist and have existed for hundred of years. Equally, there exists a common consent of the community of states that rules of international conduct shall be enforced by external power, although in the absence of a central authority for this purpose states have sometimes to take the law into their own hands by such means as self help and intervention ....." [11] It may be added that outlawing of resort to force by the United Nations and steps for international enforcement action have led to less reliance on self help.[12]

International Law is Really Law.—Most of the jurists now subscribe to the view that international law is really law. So far as the sanction or coercive force behind the law concerned, it may be said that it is not an essential element of law and even if sanction is regarded as an essential element of law there are sanctions in international law. The common law of England is its glaring example. To some extent, covenant of the League of Nations provided, and now the U.N. Charter provides for some sanctions. So far as the legislative, judicial or executive branches in the international system are concerned, "What matter is not whether the international system has legislative, judicial or executive branches corresponding to those we have become accustomed to seek in a domestic society ; what matter is whether international law is reflected in the policies of nations and in relations between nations." Further, 'The fact is, lawyers insist that nations have accepted important limitations on their sovereignty, that they have observed those norms and undertaking, that the result has been substantial order in international relations." [13]

J.G. Starke, who has also criticised the Austinian concept of law, subscribes to the view that international law is really law. In this connection, he has put forward four main arguments. In the first place, it has been established by modern historical jurisprudence that in many communities, a system of law existed and was being observed though such communities lacked a formal legislative authority. "Such law did not differ in its binding operation from the law of any state with a true legislative authority." [14] Secondly Austin's views might have been correct for his time but in view of present day international law, they are not true.[15] Customary rules of international law are diminishing and they are being replaced by law-making treaties and conventions. Law-making treaties are counterparts in the international system of the legislation in the municipal legal system. Thus International

---

* Asked in I.A.S. Exam. (1973), Q. No. 6(a).

9 The Law of Nations, Sixth Eition (1963), p. 70.

10. Ibid. at p. 71.

11. Oppenheim's International Law, Edited by Sir Robert Jennings and Sir Arthur Watts, Ninth Edition Longman Group UK Limited and Mrs. Tomoko Hudson, 1992, pp. 9-10.

12. Ibid, at p. 10.

** See also for P.C.S. (1995) Q. 7(a).

13. Louis Henkin, How Nations Behave (1968), p. 28.

14. J.G. Starke, An Introduction to International Law, Eighth Edition (1977), p. 20.

15. Ibid.

legislation has come into existence and it is now wrong to say that international system has no legislation at all. Thirdly, "the authoritative agencies responsible for the maintenance of International intercourse do not consider International law as merely a moral Code." [16] Lastly, the United Nations is based on the true legality of international law.[17]

Oppenheim regards international law as law because of the following two reasons : In the first place, international law is constantly recognised as law in practice. The Government of different States feel that they are legally as well as morally bound to follow international law.[18] Secondly, while breaking international law, States never deny its legal existence. On the contrary they recognise its existence and try to interpret international law as justifying their conduct.[19] An emerging system of sanctions for the enforcement of international law, recourse to law-making treaties and certain aspects of the activities of international organisations indicating the emergence of legislative process, recognition of certain rules having the character of *jus cogens* etc. are some of the "indications of a growing maturity in the international legal order". Indeed,"..... international law may now properly be regarded as complete system".[20] Further, "while the frequency of the violations of International Law may strain its legal force to breaking point, the formal, though often cynical, affirmation of its binding nature is not without significance."* Frequent violations do not prove that the law does not exist. Even Municipal or State law is frequently violated. But as pointed out by Oppenheim, violations of International Law are certainly frequent, especially during war. But the offenders always try to prove that their acts do not constitute a violation, and that they have a right to act as they do according to the law or at least that no rule of the Law of Nations is against their acts. It is true that frequency of violation of International Law may strian its legal force to breaking point. For example, during the Second World War rules of International Law were frequently and flagrantly violated. For some time at least, it appeared as if no law existed. But thanks to the inner vitality of the Law of Nations, within a few years, faith in the law was again revived and States again reaffirmed their faith in the rule of law. They demonstrated this by establishing the United Nations which is based upon the true legality of International Law.

Even when States violate rules of International Law, they do not deny the existence of law but try to justify their conduct and affirm the binding nature of the rules of International Law. This affirmation is significant for it lends to the strength of the law and the legal system. As pointed out by Edward Collins[21] : "International Law is created and is deemed to be legally binding by authoritative national and international decision makers because they understand that generally agreed upon rules and principles of action serve the indispensable function of providing a basis for the orderly management of international relations." Brierly has also aptly remarked : "It is both practically inconvenient and also contrary to the best juristic thought to deny its (international law) legal character." [22] Prof. H.L.A. Hart has also written : "It is clear that in the practice of States certain rules are regularly respected even at the cost of certain sacrifices ; claims are formulated by reference to them, breaches of the rules expose the offender to serious criticism and are held to justify claims for compensation and relation. These, surely, are all elements required to support the element that there exist among States rules imposing obligations upon them." [23]

---

16. Ibid.
17. Ibid at p. 21.
18. International Law, Vol. I, Eighth Edition, pp. 14-15.
19. Ibid at p. 15.
20. Oppenheim's International Law, note 11, at pp. 11-12.
    * See Q. No. 4 of I.A.S. Exam, (1961) ; C.S.E. (1979) Q. 7(a).
21. Note 3, p. 29.
22. The Law of Nations, Sixth Edition (1963), p. 69.
23. The Concept of Law (Oxford, 1961), p. 226.

The arguments of the jurists who regard International Law as really law, may be summed up as follows :

(1) The term law cannot be limited to rules of conduct enacted by a sovereign authority. Sir Henry Maine, one of chief exponents of historical school of jurisprudence, carried on research on historical jurisprudence and firmly established that in primitive society there was no sovereign political authority yet there were laws.

(2) The Austinian concept of law fails to account for the customary rules of International Law. If we accept the Austinian definition of law common law of England will lose its legal validity.

(3) Customary rules of International Law are diminishing and are being replaced by law-making treaties and conventions. To day, the bulk of International Law comprises of rules laid down by various law-making treaties, such as, Geneva and Hague Conventions. The rules laid down by these treaties are binding although they do not emanate from a sovereign political authority.

(4) When international questions arise, States do not rely upon moral arguments but rely upon treaties, precedents and opinions of specialists.

(5) States do not deny the existence of International Law. On the contrary, they intepret International Law so to justify their conduct.

(6) In some State (*e.g.* U.S.A. and U.K.), international law is treated as part of their own law. A leading case on the point is the *Paquete* v. *Habanna,*[24] wherein Justice Gray observed : "International law is a part of our law, and must be ascertained and administered by courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination."

(7) As per Statute of the International Court of Justice, the International Court of Justice has to decide disputes as are submitted to it in accordance with international law.

(8) International conferences and conventions also treat international law as law in its true sense.

(9) The United Nations is based on the true legality of international law.

(10) So far as sanction in law is concerned, international law does not completely lack it.

(11) It is true that international law is frequently violated but it does not mean that international law is not law. Even State or municipal law is violated. Frequent violations of law indicate the weakness of enforcement machinery and have nothing to do with the legality of the rules. Legality of rules and enforcement of rules of law are two different things.

(12) The decisions of the International Court of Justice are binding upon the parties to a dispute and only in respect of that dispute. The powers and jurisdiction of International Court of Justice are not equivalent to the Municipal Court but under certain conditions, its decision can be enforced. Article 94 of the U.N. Charter provides that each member of the U.N. undertakes to comply with the decision of the International Court of Justice. It further provides that if any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment.

On the basis of above arguments, it may be concluded that International law is really law. However, it has to be admitted that international law is not equivalent to municipal law. "It is obvious that international law, unlike municipal law, operates in a decentralised political system. There is no world legislature, no international policies, and

24. (1900) 175 U.S. 677 at p. 700.

no International Court with compulsory jurisdiction.'[25] Starke has expressed the view that international law is a *"weak law."* He writes : "This cumulative evidence against the position taken by Austin and his followers should not blind us to the fact that necessarily international law is *weak law.* Existing international legislative machinery, operating mainly through law-making conventions, is not comparable in efficiency to State legislative machinery."[26] But despite the weaknesses of the international legal system, the legal character of international law cannot be denied. Moreover, this weakness becomes manifest when we compare international law with Municipal Law. But this comparison is not happy and appropriate. International Law operates in a decentralized system whereas Municipal Law operates in a centralized system. International law must be judged in the context of system in which it operates. As aptly remarked by Judge Philip L. Jessup :[27] "Impotent to restrain a great nation which has no decent respect for the opinion of mankind, falling in its severest test of serving as a substitute for war, international law plods on its way, followed automatically in routine affairs, invoked, flouted, codified, flouted again but yet again invoked..... But can one say that the international law with which they deal has no reality"?* Indeed no one can deny the legal character of international law. As compared to municipal law it is definitely weak ; nevertheless it is law. As a matter of fact, as pointed out by J.L. Brierly, International Law is neither a myth on the one hand nor a penacea on the other, but just one institution among others which we can use for the building of a better international order."[28] As aptly remarked by Prof. Louis Henkin.[29] "Fortunately, international law exists and it works—not perfectly or always but well enough and often enough to make a considerable difference in the conduct of international law affairs. Although there is no one to determine and adjudge the law, there is wide agreement on the content and meaning of law and agreements, even in a divided world burgeoning with new nations." Moreover, as pointed out in the Ninth Edition of Oppenheim's International Law,[30] "Furthermore, international law may now properly be regarded as a complete system. By this is meant not that there is always a clear and specific legal rule readily applicable to every international stuation, but that every international situation is capable of being determined *as a matter of law,* either by the application of specific legal rules where they already exist, or by the application of legal rules derived by the use of known legal techniques, from other legal rules or principles." **

Last but not the least, most of the controversy about the legal character of International Law is due to the tendency of the jurists to compare it with Municipal Law. As indicated above, the comparison is not happy. Unlike Municipal Law, International Law operates in a purely decentralized system. Due to this peculiar reason, International Law is bound to be distinct from Municipal Law. International Law must be understood and appreciated in the peculiar system in which it operates. It is as good and effective as it can be under the circumstances and peculiar system under which it operates.

International Law and Municipal Law***

It has been pointed out, "Although International Law is readily distinguishable in many respects from domestic law it is nonetheless a system of law possessing certain characteristcs peculiar to itself as well as certain others common to Municipal Law."** It cannot be denied that the International legislative machinery operating mainly through law-making conventions is weak as compared to the legislative machinery of States because States enter into treaties and conventions on the basis of equality. Sovereign

---

25. Edward Collins International Law in a Changing World (1969), p. 3.
26. J.G. Starke, An Introduction to International Law, Eighth Edition (1977), p. 22.
27. See "The Reality of Internaltonal Law", Foreign Affairs, Vol. 18 (Jan. 1940), p. 214.

* Asked in I.A.S. Exam. (1978), Q. No. 1. : For the answer of this question see matter discussed under the heading "whether International Law is a law in the true sense of the term or not"?

28. Preface to The Law of Nations, Fifth Edition (1955).
29. Louis Henkin, "Does Internaltonal Law Work?" The American Review, Vol. XV, (July 1971), p. 63.
30. See Note 11 at pp. 12-13.

** See Q. No. 1 of P.C.S. Exam, (1967) ; for further elaboration of the answer see also matter discussed under the heading "International Law is Really Law".

*** See also for CSE (1993) Q. 5(b).

equality of States is the well-recognised and established principle. There is no power over and above the States. The International Executive and Judiciary are also weaker than their counterparts in the State system.

There are however, certain similarities between the two. Like State Judiciary, in the international legal system also there is a court, International Court of Justice and under Article 59 of Statute of the Court its decisions are binding upon the parties to a dispute and in respect of that dispute. More than 47 States have conferred compulsory jurisdiction upon the court. Similarly, Security Council may be said to be the Executive of the International legal system. Under Article 94 of the Charter of the U.N., if a party to the dispute before the International Court of Justice fails to implement the decision of the Court the other party may bring the matter before the Security Council and the Council may make recommendations or decide the measures to be taken to implement the decision. However, it may be noted that apart from this, Security Council's main function is to maintain or resotre international peace and security. Unlike State law, it does not possess powers to enforce law (*i.e.*, international law) as such and this is probably the greatest weakness of international law. Thus international law possesses characteristics peculiar to itself as well as certain others common to municipal law. In the words of Palmer and Perkins, "International Law is largely but not altogether concerned with relations between States, whereas municipal law controls relation between individuals and the State. The two kinds of laws are similar in their resources—chiefly custom and express agreement—with, however, substantial differences in legislative machinery. They differ altogether in their judicial processes. Both are applied by national courts, which results in complete decentralization of the judicial function in international law and effective centralization in Municipal law. What is true of the judicial function is also true of the executive function. As in tort, in domestic law, traditional international law always depended for its enforcement upon the initiative of the injured party. Most municipal laws, on the other hand, are enforced by a responsible executive unknown to international law."

Theory and Reality In International Law*

In the international legal system there is a great difference between theory and reality. That is why, Emmanuel Kant has criticized International Law by remarking : ".....this pompous law of nations which is so eloquent in books and silent in the cabinets of diplomats ?** There are those who assert that international law, in order to be worth, its salt must be based solely upon logic and principle. But international law, notwithstanding the reasoned theses of the commentators, consists, in the last analysis, of those principles upon which soverign nations can agree. Such agreement is seldom, if ever, reached without regard to the political process.[31] "Usually the international law aspects of international relations are co-mingled with political strategic, economic, geographical, social, and other elements and in consequence it may be difficult to determine the exact part played by international law. Account must be taken of these non-legal factors in analysing internaitonal incidents whch have taken place or in predicting what States will do in a given situation." [32]

One of the main reasons for the difference between theory and reality in International Law is the concept of sovereignty. Each State is sovereign and equal in the eye of law. There is no power over and above the State. Whenever the national interests of a State are affected, it resorts to the concept of sovereignty and hence its decision or action is based more on its own interests than on the rules of international law and it claims that even international law allows it to exercise its own discretion in such matter. For example, international law recognises the essentials of statehood of a State. It also recognises that certain legal consequences ensue when a State is recognised. But it

---

* See Q. No. 1(b), of I.A.S. Exam, (1975) ; and Q. No. 1(a) of I.A.S. (1975).

** Asked in I.A.S. Exam, (1963), Q. No. 1.

31. "International Law and the Political Process", 38 United States Department of State Bulletin 832 (1958).

32. "The International Law Focus in International Politics" in William W. Bishop, Jr., International Law : Cases and Materials, Second Edition (Boston : Little, Brown and Company, 1962), p. 6.

depends upon the sweet will or discretion of a State whether to recognise or withhold recognition of a politically organised community which has emerged as a State. It is the recognising State itself which decides (so far as the relations between the recognising and the recognised States are concerned) as to whether a politically organised community has in fact attained statehood and this appraisal cannot be questioned. And obviously, in many cases, decisions of the recognising State are motivated by political considerations.

At present it is generally recognized that the sovereignty of a State is neither indivisible nor unlimited. States have now agreed to the curtailment of part of their sovereignty in the interest of international community. This is true but in practice whenever the interest of a state is adversely affected it invokes the concept of sovereignty. Thus sovereign equality is one of the keystones of international legal system. Even the United Nations Charter provides that organisation is based on the principle of *sovereign equality* of all its members.[33]

Yet another example of the difference in theory and reality in International Law is the rules developed in connection with the relationship of International Law and Municipal Law. In principle most of the States recognise that customary rules of international law are part of their own domestic law but they have made this principle subject to so many exceptions that in practice whenever there is any conflict between a rule of International Law and a rule of domestic law, it is the latter which prevails over the former.[34] Relationship of law and power in international relations cannot be ignored and hence International Law, a normative order, should conform to the twin tests of meeting social needs and reflect true state of international practice among States."[35]

Distinction between Public International Law and Private International Law.*

The definition of Public International Law (or commonly known as International Law) has been discussed in detail earlier. At one time, International Law was defined as the body of rules which regulates relations among the states. One of the main distinctions then between Public and Private International Law was therefore said to be that while the former regulated relations among States, the latter regulated the relations of individuals. But in view of the expansion of the subjects of international law, old definition of Public International Law has become obsolete and inadequate. Public international law now regulates the relations among the members of International community which include individuals also.

According to Pit Cobbet, "Private International Law is the body of rules for determining questions as to selection of appropriate law, in Civil cases which present themselves for decision before the courts of one State or country, but which involve a foreign element, *i.e.*, which affect foreign persons or foreign things or transactions that had been entered into wholly or partly in a foreign country, or with reference to some foreign system of law." Thus Private International Law is that branch of International Law which decides law applicable in the issue in disputes involving more than one nations and determines the court which will have jurisdiction to decide the issue. It is more popularly termed as 'conflict of Laws'.

Main points of difference between the Public and Private International Law are following :—

(i) Public International Law, for its major part, deals with States and to a lesser extent deals with the individuals, Private International Law deals with the individuals.

---

33. This is provided in the principle of Article 2 which shows the importance of this principle in the international legal system.
34. For further elaboration see Practices of States under the Chapter "Relationship between International Law and Municipal Law".
35. See Charles De Visscher, Theory and Reality in Public Internaitonal Law (1968), p. 137.

* Asked in P.C.S. Exam. (1947), Q. No. 2(a).

(ii) Private International Law is a part of Municipal Law but so is not always the case with Public International Law. Only customary rules of International Law are considered to be part of the domestic law of a state.

(iii) Public International Law (at least rules having general application) is same for all the States whereas Private International Law may be different in different States.

(iv) Private International Law determines as to which Law will apply in a case having a foreign element. There is no such problem in the field of Public International Law. Public International Law is confronted with different type of problems whenever there is conflict between it and the internal law of a state. The problem arises as to which will prevail.

(v) Private International Law also determines the court which will have jurisdiction to decide the issue in question. In this respect also it differs from Public International Law.

(vi) According to Robert Phillimore, rights arising out of Public International Law are absolute and their breach constitutes a *causes belli* (*i.e.*, whatever involves or justifies war). This view does not seem to be correct in the presence of the provisions of Kellog-Briand Pact and the U.N. Charter which have outlawed war. But Private International Law does not at all confer absolute rights.

(vii) International Law comprises mainly of the rules recognised by States in their relation with each other and mostly arises out of International customs and treaties. On the other hand, rules of Private International Law are framed by the legislature of a State and recognised and developed by State Courts.

In some exceptional cases rules of Private International Law may become rules of Public International Law when they are incoporated in the international treaties.[36] In such a case, if a state party fails to observe the rules of private international law, proceedings may be started against it for breach of an International obligation owed to another party. Even in those cases where rules of private international law cannot themselves be considered as rules of public internaitonal law their application by State as part of its internal law may directly involve the rights and obligations of the State under public international law, for example, matter concerning the property of aliens or the extent of the jurisdiction of a State.[37] According to Palmer and Perkins[38] as distinguished from Public International Law, Private International Law' "is a branch of the law which deals entirely with the relations of persons living under different legal systems. Occasions for the application of Private International Law arise when justice requires that law of some outside jurisdiction—not necessarily a foreign State—be applied in a particular case. For example, to cite a famous English situation, when couples left England to be married in Scotland where the marriage laws were less stringent, and question arose whether the validity of the marriage should be determined by English Law or by Scottish law. The English Courts held that the laws of Scotland should apply. Frequently the nationality of a person is the issue." [39]

Is International Law a mere Positive morality ?*

In order to know whether international law is a mere positive morality, it is necessary first to know what is a rule of morality and then, what is the difference between a rule of

36. See Schwarzenbergar : A Manual of International Law, 2nd Edn., p. 2.
37. Oppenheim's International Law, note 11, at p. 7.
38. Norman D. Palmer and Howard E. Perkins' International Relations—The World Community in Transition, Third Indian Edition (1970), p. 270.
39. As stated by Prof. Edwin D. Dickinson, "there is a host of problems concerning the adjudication and regulation of matters of private right and duty which arise uniquely from the continuing movement of persons or things from one nation to another and form the increasing case with which relationships of agreement, family, property, enterprise, or the like may be consummated across national frontiers", Law and Peace (Philadelphia : University of Pennsylvania Press, 1951), p. 59 ; Adopted from Ibid.

* P.C.S. (1984) Q. 1(B) ; p.c.s. (1991) Q. 6 (B).

morality and a rule of law. As pointed out by Prof. Oppenheim : "A rule is a rule of morality if by common consent of the community it applies to conscience and to consience only : whereas, on the other hand, a rule is a rule of law, if by common consent of the community it will eventually be enforced by external power." [40] Thus a rule of morality is a rule which applies to conscience only and cannot be enforced by external power. A rule of law, on the other hand can be enforced by external power. There is now general agreement about the binding nature of international law whereas a rule of morality is not binding. International morality or ethics has been defined "as standards of 'right behaviour' that are based on personal judgments." Further : "Although attitudes about morality when widely shared, influence the development of international law, there is no recognised legal obligation to obey the norms of morality until they are accepted by authoritative decision-makers as international law." [41] Frederick Pollock has rightly observed : "If International Law were only a kind of morality, the framers of State papers concerning foreign policy would throw all their weight on moral arguments. But, as a matter of fact, this is not what they do. They appeal not to the general feeling of moral rightness, but to precedents, to treaties and to opinion of specialists."* According to Prof. H.L.A. Hart,[42] there are a number of different reasons for resisting the classificaiton of rules of international law as 'morality'. He points out the following reasons :

(1) "The first is that States often reproach each other for immoral conduct or praise themselves or others for living upto the standard of international morality. No doubt one of the virtues which States may show or fail to show is that of abiding by international law, but that does not mean that law is morality. In fact the appraisal of States conduct in terms of morality is recognizable different from the formulation of claims, demands, and the acknowledgement of rights and obligations under the rules of international law".

(2) "Claims under international law are not couched in such terms, though of course, as in municipal law, they may be joined with a moral appeal. What predominates in the arguments, often technical, which States address to each other over disputed matters of international law, are references to precedents, treaties and juristic writings, often no mention is made of mutual right or wrong good or bad." [43]

(3) "The rules of international law, like those of municipal law are often morally quite indifferent. A rule may exist because it is convenient or necessary to have some clear fixed rule about the subject with which it is concerned, but not because any moral importance is attached to the particular rules."

(4) "It is clear that in the practice of States certain rules are regularly respected even at the cost of certain sacrifices ; claims are formulated by reference to them ; breaches of the rules expose the offender to serious criticism and are held to justify claims for compensation or retaliation. These, surely, are all the elements required to support the statement there exist among States rules imposing obligations upon them." [44]

As pointed out earlier, a distinction is made between moral and legal principles and while the former apply to conscience only, the latter create obligations. For example, the International Court of Justice in *South-West Africa Cases (Second Phase)*[45] made it clear that the court "can take account of moral principles only in so far as these are given in a sufficient expression in legal form." But even the World Court cannot always ignore the role of morality and the court has time and again accepted the relationship between morality and international law. For example in the *North Sea Continental Shelf Cases*[46] the court observed : "whatever the legal reasonings of a court of justice, its decisions must by definition be just and therefore in that sense equitable. Nevertheless, when mention is

40. International Law, Vol. I, Eighth Edition, p. 8.
41. Edward Collins, International Law in a Changing World (1969), p. 3.
* Asked in I.A.S. Exam, (1966), Q. NO. 1.
42. The Concept of Law (Oxford, 1971), pp. 222-226.
43. Ibid. at p. 223.
44. Ibid. at p. 226 ; see also Frederick Pollock, Oxford Lectures (1890), p. 18.
45. I.C.J. Reports (1966) p. 34.
46. I.C.J. Reports (1966), p. 49.

made of a court dispensing justice or declaring the law, what is meant is that the decision finds its objective justification in considerations lying not outside but within rules, and in this field it is precisely a rule of law that calls for the application of equitable principles."

Whether International Law is the vanishing point of jurisprudence ?*—Holland has remarked that International Law is the vanishing point of jurisprudence. In his view, rules of international law are followed by courtesy and hence they should not be kept in the category of law. According to him, rules of international law cannot be kept into the category of law because they lack sanction which is an essential element of municipal law. Austin also subscribes to this view, Justice V.R. Krishna Iyer, formerly member, Indian Law Commission has also remarked, "It is a sad truism that International law is still the vanishing point of jurisprudence." [47] This view is not correct. It is now generally agreed that Holland's view that international law is the vanishing point of jurisprudence is not correct. A majority of international lawyers not subscribe to this view. Holland's view is based on the proposition that there are no sanctions behind internaitonal law. Although it cannot be conceded that the sanctions behind international law are much weaker than their counterparts in the municipal law, yet it cannot be successfully contended that there are no sanctions at all behind international law. For example, if there is a threat to international peace and security, under Chapter VII of the U.N. Charter the Security Council can take necessary action to maintain or restore international peace and security. Besides this, the decisions of the International Court of Justice are final and binding upon the parties to a dispute.[48] A number of other sanctions exist under different international organisations such as ILO, ICAO, WHO, UPU. As pointed out in Ninth Edition of Oppenheim's International Law,[49] "An emerging system of sanctions for the enforcement of International law is discernible.....[50]. There are also certain other indications of a growing maturity in international order." Further, "there is similarly increasing acceptance that the rules of international law are the foundation upon which the rights of States rest, and no longer merely limitation upon the rights of states rest, and no longer merely limitation upon states' rights which, in the absence of a rule of law to the contrary, are unlimited."

ICAO, WHO, UPU. etc. have similar sanction and have their own ways and means to enforce law and ensure its observance. Last but not the least, public opinion is the ultimate sanction behind international law and for that matter any law.

Thus it is wrong to say that there are no sanctions at all in international law. As remarked by R.W.M. Dias, "The principal reasons why State obey international law appear to be fear and self-interest. Fear operates through war, reprisals, restoration, pacific blockade and naval military demonstration."[51] It cannot, however, be denied that the greatest shortcoming of international law is the absence of effective machinery to carry out sanctions. It may be noted,".....just because the simple truism which hold good for individuals do not hold for States, and the factual background to international law is so different from that of municipal law, there is neither a similar necessity for sanctions (desirable though it may be that international law should be supported by them) nor a similar prospect of their safe and efficacious use that no simple deductions can be made from the necessity of organized sanctions to municipal law in its setting of physical and psychological facts, to the conclusion that without them international law. in its very different setting imposes 'no obligations' is not binding, and so not worth the title of 'law'.[52]

Holland regards international law as the vanishing point of jurisprudence because in his view, there is no Judge or arbiter to decide International disputes and that the rules of

---

* Asked in P.C.S. Exam, (1972), Q. No. 1 ; for suggestions for strengthening International Law see "Suggestions for Improving International Law" discussed in this very chapter. see also for P.C.S. (1990) Q. 6(a).

47. "Mass Expulsion As Violation of Human Rights", I.J.I.L. Vol. 13 (1973) p. 169.
48. Article 59 of the Statute of the International Court of Justice.
49. Note 10, at pp. 11-12.
50. Note 10, at p. 12.
51. R.W.M. Dias, Jurisprudence (1970), p. 404.
52. H.L.A. Hart, The Concept of Law (Oxford, 1971), at pp. 214-15.

international law are followed by States by courtesy. This view is far from truth in view of the developed and changed character of international law today. It is incorrect to say that international legal system is without a Court to decide international disputes. The establishment of the Permanent Court of International Justice under the League of Nations, has rightly been reckoned as a landmark for the development of international law because through it international legal system was provided with a judicial organ to resolve international disputes through judicial decision. The greatest proof of its utility and importance is the fact that its successor, the International Court of Justice, established under the U.N. Charter is based on the Statute of the Permanent Court of International Justice.

It is true that the decisions of the International Court of Justice are not equivalent to the Municipal Courts. Nevertheless, the decisions of the International Court of Justice possess binding force and can be enforced under certain circumstances. They are binding upon the parties to dispute and only in respect of that disputes. The provision to this effect is contained in Article 59 of the Statute of the International Court of Justice. Besides this Articles 94 of the United Nations Charter provides that each member of the U.N. undertakes to comply with the decision of the International Court of Justice in any case to which it is a party. Article 94 further provides that if any party to a case fails to perform the obligations incumbent upon it under judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment.

Thus we see that the international legal system is not only provided with a judicial organ to resolve international disputes but its decisions are binding and can be enforced under the conditions and circumstances as stated above. So far as the question of jurisdiction is concerned, Article 36 (2) of the Statute of the International Court of Justice provides that the State may confer compulsory jurisdiction upon the court in all legal disputes concerning (a) the interpretation of a treaty ; (b) any question of International Law ; (c) existence of any fact which if established would constitute a breach of an international obligation ; and (d) the nature or extent of the reparation to be made for the breach of an international obligation. A number of States (47) have conferred compulsory jurisdiction upon the Court. Thus the Court exercises compulsory jurisdiction on a large number of international disputes. Moreover leaving apart a few exceptions, decisions of the Court have been respected and implemented.

As noted above, under Chapter VII of the U.N. Charter, the Security Council possesses wide powers to declare sanctions against the States who are guilty of violation of the provisions of the U.N. Charter relating to international peace and security. U.N. action in the Gulf War (1991) is a glaring example of the fact that International Law possesses not only sanctions but that they can also be effective. By annexing Kuwait, Iraq had openly violated International law. The Security Council of the U.N. passed a resolution asking Iraq to vacate and free Kuwait. On Iraq's failure to implement the said resolution, Security Council passed political and economic sanctions against Iraq. When even these sanctions failed, Security Council permitted America and its allied nations to use force for the implementation of resolutions of Security Council. Thus America and its allied nations forced Iraq to withdraw from Kuwait. Earlier, the United Nations had taken enforcement action under Chapter VII of the Charter in several cases such as in 1948 against North Korea and in 1961 in Congo. Reference may also be made to United Nations sanctions against Libya in Lockerbie case, *i.e.* bombing of Pan American (Flight) airliner in 1988 over Lockerbie (Scotland) killing 270 persons.

Thus International Law is in fact a body of rules and principles which are considered to be binding by the members of international community in their intercourse with other. If a State violates rules of International Law, it can be enforced by an external power. In innumerable treaties States have not only accepted it to be binding but also confirm the fact that it is a law between themselves. They also accept international law by asking their officers, courts and nationals to act in accordance with obligations imposed by

international law. The legal character of international law has also been recognized in the 1970 Declaration on the Principles of International law Concerning Friendly Relation and Cooperation among States. The Seventh Principle of this Declaration says, it is the duty of every state to fulfil in good faith its obligations under the generally recognized principles and rules of international law.[53] So is the case with the Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations adopted by the General Assembly of the U.N. on 18 November, 1987.

On the basis of above discussion it may be concluded that International Law is, in fact, law and it is wrong to say that it is the vanishing point of jurisprudence.[54]

Does International Law comprise of the Rules of International Comity?

The International comity consists of "practices that are observed between States as a matter of courtesy or convenience". For example, Canada and America permit each other's nationals to enter their territory without passports, but they do not extend this privilege to other States. Their treatment regarding each other's diplomatic agents, on the other hand, is governed by the rules of International law. So is the case with India and Nepal. The rules of international comity are observed by State as a matter of courtesy or convenience whereas the rules of international law are observed by States because they are binding upon them. Edward Collins has aptly remarked : "the binding nature of International Law also distinguishes it from international comity, which consists of practices that are observed between States as a matter of courtesy or convenience."

Weaknesses of International Law

International Law is said to be a "weak law". The weaknesses of international law become evident when we compare it with Municipal law. Following are some of the weaknesses of international law :—

(1) The greatest shortcoming of international law is that it lacks an effective executive authority to enforce its rules.

(2) It lacks an effective legislative machinery.

(3) The International Court of Justice lacks compulsory jurisdiction in the true sense of the term.

(4) Due to lack of effective sanctions, rules of international law are frequently violated.

(5) The enforcement machinery of international law is very weak.

(6) A great limitation of International law is that it cannot intervene in the matters which are within the domestic jurisdiction of States.

(7) As compared to rules of State law, the rules of International Law suffer from greater uncertainty.

(8) International Law has, in many cases, failed to maintain order and peace in the world.

Despite the above mentioned weaknesses, it has to be noted, that international law is constantly developing and its scope is expanding. It is a dynamic concept for it always endeavours to adopt itself to the needs of the day.[55] Its survival and efficiency are due to its changing and adaptable character. As compared to Municipal Law, International Law works in a decentralised system. All States consider themselves independent and sovereign. It is really creditable that the rules of international law are considered binding upon the States because either through treaties or otherwise States have consented to surrender a part of their sovereignties. This is due to the facts of international politics, inter-dependence of States and the continuous growth of the concept of international or world community.

---

53. See Oppenheim's International Law, note 11, at pp. 13-14.
54. See also reasons for "International Law being really law" discussed earlier.
55. See also Josef L. Kunz, "The Changing Law of Nations", A.J.I.L. Vol. 51 (1957), p. 77.

Suggestions for Improving International Law*

(1) The International Court of Justice should be given compulsory jurisdiction, in the true sense of the term, over all international disputes.

(2) An International Criminal Court should be established to adjudicate cases relating to international crimes.

(3) International law should be properly codified.

(4) The machinery to enforce the decisions of the International Court of Justice should be strengthened.

(5) An international Police system should be established to check international crimes and to enforce the rules and principles of International law.

(6) An International Bureau of investigation and Prosecution should be established for investigation of matters relating to international crimes and the prosecution of international criminals.

(7) In order to make International Law changeable and adaptable in accordance with the changing times and circumstances, powers and the scope of the activities of the International Law Commission should be expanded.

(8) The United Nations Charter should be amended so as to authorise the U.N. to intervene in such matters within the domestic jurisdiction of the States as are of international concern or affect international community.

(9) Such activities of the U.N. should be encouraged as may develop the feelings of international brotherhood so as to ensure the encouragement of the development of International Community in the true sense of the term.

(10) Today international law regulates the conduct and relations of not only States but also international organisations and individuals. But there is a need to give impetus to the development of international law in these fields.

(11) The doctrine of judicial precedents should be applied in the field of international law. This will help to strengthen the international law.

(12) In order to stengthen the legislative machinery of international law, more law-making treaties and conventions should be made and there should be provision for their revision from time to time.

(13) The legislative activities of the General Assembly should be further encouraged.

(14) Last but not the least, there must be basic recognition of the interest which the whole international society has in the observance of its laws. Breaches of the law must no longer be considered the concern of only the State directly and primarily affected."** In view of the growing interdependence of States upon each other, the international community in the real sense of the term has now emerged. In order to strengthen international law, it should be clearly recognised by all States that the observance of the rules of international law is in their own interest and hence they should ensure that there are no breaches of the rules of international law. In case there are any breaches of international law, the international community as a whole must be concerned with it. For example, if genocide is committed in any State or there are violations of human rights, it should not only be the concern of the State directly and primarily affected but it should be the concern of international community as a whole. When genocide was committed in Bangladesh in 1971, the International community remained inactive and watched the incidents as a silent spectator, while Pakistan which was directly and primarily affected and India which was affected by the influx of millions of refugees even went to the extent of fighting a war. Had the international community taken cognizance of the situation in time, much of blood-shed and even war could have been avoided and the problem could have been satisfactorily resolved. It cannot be denied, that the concepts of Sovereignty and Domestic jurisdiction are the formidable obstacles in this basic recognition. For

---

* See Q. No. 1 of P.C.S. Exam, (1972).

** See for Q. No. 10 of I.A.S. Exam, (1983), See also criticism of Oppenheim's definition and Chapter entitled "Subjects of International Law and Place of Individual in International Law".

example, whenever when the U.S. raised the matter of alleged violation of human rights in Soviet Union (*i.e.*, its treatment of dissidents) the latter took the plea of the principle of non-interference in internal matters. Nevertheless, it may be noted that it is now generally agreed that the 'concept of absolute sovereignty' has become outdated for once a State signs an international treaty and by ratifying it agrees to abide by it, it is deemed to surrender part of its sovereignty to that extent at least. The contents of the term 'domestic jurisdiction' are also variable. Any matter which is regulated by international law cannot be said to be matter within the domestic jurisdiction of a State. With the constant expansion of international law and covering of more and more fields day by day, the domestic jurisdiction of State is lessening. For example in view of the Universal Declaration of Human Rights, International Covenant on Human Rights, etc., violations of human rights no more treated within the 'domestic jurisdiction' of a State. Thus slowly and gradually the international community is moving towards the goal of the basic recognition that breaches of international law are the concern of the international society as a whole. This is manifest from international concern of *apartheid* and other forms of racial discrimination, violation of human rights, etc. So is the case of co-operation and solidarity shown by the International community with Kuwait which led to the vacation of Iraqi aggression from Kuwait's soil. Reference may also be made to recent U.N. action in Somalia and Bosnia.

The above suggestions will make international law, to some extent, equivalent to a Municipal Law. At present, several of these suggestions may appear to be impracticable or even utopian but the growth of the feeling of internationalism and the development of international community may make some of them practicable. With the growth of internationalism and the feeling of universal brotherhood, international law will also become effective and powerful.

Sanctions in International Law.*

There is great controversy among the jurists in regard to the sanctions in international law. It has already been pointed out earlier that there are two extreme view-points in this regard. Accordingly to one view point, there are no sanctions at all behind the international law. In accordance with the second view point even if it is admitted that there are no sanctions behind the international law it can be included in the category of law because sanction is not an essential element of law. In between these two extreme views, some authors hold the view, and rightly too, that it is wrong to say that 'International law is without sanctions.'

As aptly remarked by Josef L. Kunz, "Legal sanctions constitute the reaction of the legal community against a delict. In contrast to disapproval by the members of a community as a moral sanction, legal sanction are socially organized measures in contrast to the transcendental sanctions or religious norms, they are to be applied against or without the will of person against whom they are directed ; they are finally, to be applied by physical force, if necessary." [56]

In the view of Kelsen, the distinguishing feature of law is that it is a 'coercive order' ; the rules of law be connected with a sanction. From the view point even of the legal system, force must be either a sanction or delinquency. In the international field, sanctions exist in the form of war and reprisal. The difference between the municipal law of States and international law would consist in the degree of centralization as regards the use of force ; within the State, force is monopolized by the community, but in the society of State a legitimate use of force may be made by the subjects of law, the individual States.[57] As a matter of fact, it would be wrong to say that there are no sanctions at all behind international law although it is true that as compared to municipal law the sanctions

---

* See for I.A.S. Exam, (1975) Q. No. 8 (d) ; Q. No. 1(a) of I.A.S. (1974) and Q. No. 7 of I.A.S. (1964)—for observation of Gerald Fitzmaurice, See matter discussed under the heading "Self-Defence and Self-Preservation under the Chapter entitled "Intervention".

56. "Sanctions in International Law", A.J.I.L., Vol. 54 (1960) p. 324.

57. Torsten Gihl, The Legal Character and Sources of International Law (Stockholm, 1975), p. 61 ; Kelsen, General Theory of Law and State (1946), op. cit, pp. 328 et seq.

of international law are far less effective. Starke has pointed out the following sanctions behind the international law—

(1) Under Chapter VII of the United Nations Charter, if there is threat to the international peace and security or an aggression has taken place, the Security Council can take necessary action to maintain or restore international peace and security. In this way, to some extent, the violation of international law can be checked and necessary action can be taken for maintenance of peace and security.

(2) The decisions of the International Court of Justice are binding upon the parties to the dispute. Article 94 of the United Nations also provides that if a party to the dispute does not follow the decision of the Court, the other party may approach the Security Council which can take necessary measures to ensure the implementation of the decision. However, it cannot but be admitted that the U.N. Charter does not contain any provision to maintain international law generally.

(3) Under Article 2(4) of the Charter, the members of the U.N. have undertaken that they shall respect the territorial integrity and political independence of each other and shall not use force against each other. There is only one example in the Charter wherein the members may use force. That is contained under Article 51 of the Charter which confers on the members the right of individual and collective self-defence. But even this right can be exercised only when an armed attack has taken place and is subject to overall supervision and control of the Security Council.[58]

But a pertinent question arises as to whether international law can be maintained without strong coercive mechanism? As aptly pointed out by Soviet authors,[59] "Such mechanism exist in principle, for example, the powers of the Security Council and Chapter VII of the U.N. Charter. They should, of course, be set in motion whenever necessary. However, in the longer run it is nevertheless impossible to count excessively on these mechanisms, the application of which is hampered in practice and which have so far proved to be only marginally effective." Further, "A reasonable world order, an order reflecting a balance of interests can be maintained with a minimum of coercion..... First of all, there arises in this context the matter of effective mechanisms for control over compliance with international treaties..... Another area in the efforts to strengthen law and order is the use and upgrading of the mechanisms of peaceful settlement of disputes.[60]

Thus International law is not without sanctions although these sanctions are not generally for the enforcement of international law in general. These sanctions are to maintain or restore international peace and security which is only a part of international law. As pointed out by Josef L. Kunz, "A more advanced international law must be based on the full recognition by states of the primacy of international law and enforceable sanctions both for the maintenance of peace and security and for the enforcement of international law in general by organs of international community". While welcoming the President of India to lay the Foundation stone of the building of Indian Society of International law, Judge Nagendra Singh aptly remarked, "According to our ancient concept of law the element of sanction provided by the authority of state is inherent in law itself to such an extent that without ostensible demonstration law has a halo of respect behind it and every one has to learn to ever respect it. Manu said : ..... दंड धर्म विदुतधं This is equivalent to saying that law itself has an in-built element of respect and sanction behind it and wise human beings in their own interests need not search for authority to obey law as all laws are ordained to be obeyed. The position of International Law is somewhat like Manu's concept in this respect that there is no ostensible sanction or world authority in a budding state. However, respect flowing from inherent utility is so embedded in the very concept of that branch of law that it compels obedience to the precepts and

58. For a detailed discussion on 'Self-defence'. 'Self-help' etc., See Chapter entitled "Intervention".
59. Yuri Rybakov, Leonid Skotnikov, Alexander Zmeyevsky, "The Primacy of law in Politics" Int. Affairs (May 1989) p. 57 at p. 59.
60. Ibid, at p. 59-60.

tenets of international law." [61] It cannot be denied that international community does not possess any well-organised force or machinery to enforce international law generally. Despite this, whatever sanctions there are behind international law make impact upon the States and in practice States generally follow international law. "International order, far from perfect though it has, its own sanctions, seldeom imposed by force or command but as it were, natural sanctions slow to mature and gradual in effect but made compelling by the growing interdependence of the world." [62] In fact, "there exist among States rules imposing obligations upon them." [63]

According to Starke,[64] "If the word 'sanctions' to be taken in the larger sense measures, procedures, and expedients for exerting pressures upon a State to comply with its international legal obligations, then the above mentioned provisions of the United Nations Charter are not exhaustive of the sanctions which may become operative in different areas of international law." He cites several illustrations : (i) The Constitution of ILO lays down a procedure for dealing with complaints regarding failure of a member State to secure the effective observance of an International Labour Code. (ii) Article 14 of the Convention on Narcotic Drugs, 1961, provides that if a party to the Convention fails to carry out the provisions of the convention, the International Narcotics Control Board is entitled to call for explanations and if the explanation is unsatisfactory, the Board may call the attention of other competent U.N. Organs to the position, and may even recommend a stoppage of drug imports or exports or both to and from the country or territory in default. (iii) Under Articles 54-55 of the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of other States, each contracting State is to recognise an arbitral award made pursuant to the convention as binding and is to enforce the pecuniary obligations imposed by the award as if it were a final judgment of a court in that State. (iv) Acts by a particular State in violation of international law may sometime be regarded by other States as invalid and inoperative. Reference may be made to the Advisory opinion of the World Court on the *Legal Consequences* for States of the continued presence of South Africans in *Nambia (South West Africa)*[65] wherein the court held that South Africa's presence in Nambia was illegal and that the members of the U.N. were under obligation to recognise the invalidity of South Africa's acts in respect of Nambia and should refrain from such acts as may imply acceptance of the legality of its presence in, and administration of Nambia, or lending support to these.

Numerous other sanctions exist under the constituent instruments of different international organisations such as I.C.A.O., W.H.O., I.L.O., U.P.U., I.T.U. etc. These have been briefly discussed in Chapter 1 under the heading "Development of International Law by International organisations." Dispute settlement mechanism under the WTO also deserves mention here.

It has been aptly pointed out, "An emerging system of sanctions for the enforcement of international law is discernible,.....There are also certain other indications of a growing maturity in the international legal order. These include the recognition of certain rules that have the character of *jus cogens* which ..... establishes that within the general body of rules of international law there exists superior legal rules, with which rules of a 'lower' order must be compatible." [66]

Apart from the above sanctions, other factors such as adverse public opinion, expediency, possibility of imposition of economic sanctions, fear of suspension or breaking of diplomatic relations, possibility of referring the matter or dispute to the U.N. or specialized agencies of the U.N., fear of suspension or expulsion from the Membership of

---

61. I.J.I.L. Vol. 24 (1984) pp. ix-x.
62. J.E.S. Fawcett, the Law of Nations (1961), p. 18.
63. The concept of Law (1961) p. 226 : Rahmatullah Khan has also aptly observed : "Nations obey international law not because of the fear of some brooding omnipresence in the sky threatening retribution to the recalcitrant because they feel obliged (for various reasons) to do so. And the consent of the constituent entities is continually decisive". International Law—Old and New" I.J.I.L., Vol. 15 (1975) p. 371 at p. 372.
64. Introduction to International Law, Tenth Edition (1989) pp. 28-30.
65. I.C.J. Reports (1971), 16 at pp. 54, 56.
66. Oppenheim's International law, note 11, pp. 11-12.

U.N. or other International Organisations, fear of punishment of war crimes, fear of payment of reparation etc. also operate as sanctions behind International law. Indeed the most important of these sanctions is public opinion which is the ultimate sanction behind international law, and for that matter behind any law.

Basis of International Law*

After having arrived at the conclusion that International Law is Law in the true sense of the term, it is necessary to see as to what is the true basis of international law. There are two main theories in this connection. They are : (1) Theories as to Law of Nature ; and (2) Positivism.

(1) *Theories as to Law of Nature.*—The jurists who adhere to this theory, are of the view that International Law is a part of the Law of Nature. In their view, States follow International Law, because it is a part of the Law of Nature. Explaining the view point of Natural Law Theorists, Starke has written : "..... States submitted to International Law because their relations were regulated by higher law, the 'law of nature' of which International Law was but a part." [67] In order to understand this theory, it is necessary to understand the meaning of 'Law of Nature'. In the beginning, Law of Nature was connected with religion. It was regarded as the divine law. The jurists of 16th and 17th centuries secularised the concept of Law of Nature. Much of the credit for this goes to the eminent jurist, Grotius. He expounded the secularised concept of the Law of Nature. According to him, natural law was the 'dictate of right reason'. His followers applied the law of nature as an ideal law which was founded on the nature of man as a reasonable being. International law was considered binding because it was in fact, natural law applied in special circumstances. Vattel, a famous jurist of 18th century also expressed the view that natural law was the basis of International Law. Pufendorf, Christian Thomasius, etc. are other prominent exponents of Law of nature.

Criticism.—The exponents of natural law are of the view that it is the basis of international law and has conferred binding force on international law. It may, however, be noted that each follower of the law of nature gives its different meaning. They use it as a metaphor. Different jurists give its different meaning such as, reason, justice, utility, general interest of international community, etc. Hence the meaning of law of nature is very vague and uncertain. Moreover, the main defect of this theory is that it is not based on realities and actual practices of the States.

Influence.—Despite the above criticism, the Law of Nature has greatly, influenced the growth of International Law. "Traces of 'Natural Law' theories survive today, albeit in a much less dogmatic form." [68] The ideal nature of the Natural Law has also greatly influenced the growth of international law.

(2) *Positivism.*** —Positivism is based on law positivum *i.e.* law which is in fact as contrasted with law which ought to be. According to the positivists, law enacted by appropriate legislative authority is binding. The positivists base their views on the actual practice of the States. In their view, treaties and customs are the main sources of International Law. The positivist's view was in vogue in the 18th century. Bynker-Shoek, one of the chief exponents of the Positivist School, wrote several books to popularise his views. In the view of the positivists, in the ultimate analysis, will of the States is the main source of International law. As pointed out by Starke,[69] "..... International law can in logic be reduced to a system of rules depending for their validity only on the fact that States have consented to them."*** As pointed out by Brierly, "The doctrine of positivism

---

* See for I.A.S. Exam, (1975), Q. No. 3(a) and Q. No. 1 of (1973) : P.C.S. (1977), Q. 1; P.C.S. (1990) Q. 6(a).

67. Introduction to International Law, Tenth Edition (1989) p. 22.

68. An Introduction to International Law, Eighth Ed., p. 24.

** See for I.A.S. Exam, (1974), Q. No. 3(a) ; I.A.S. (1965) Q. No. 3 and I.A.S. (1963), Q. No. 6. See also for P.C.S. (1977), Q. 1 ; C.S.E. (1981) Q. 5(a).

69. Starke supra note 68 at p. 23 ; See also Ago, "Positive Law and International Law". A.J.I.L, Vol. 51, pp. 691-733

*** Asked in I.A.S. Exam. (1969), Q. No. 1.

teaches that international law is the sum of rules by which States have consented to be bound, and that nothing can be law to which they have not consented to be bound.**** The concept of the will of State was first propounded by the German Philosopher Hegel. According to the positivists, international law is a body of rules which has been consented to by the States and accepted as binding by way of voluntary restriction or 'auto-limitation.' The Italian jurist, Anzilotti, one of the chief exponents of the Positivist School deserves a special mention. According to him, the binding force of international law is founded on a supreme principle or norm known, as *pacta sunt servanda*. In his view the basis of each rule of international law is *pacta sunt servanda* in some or the other way. The positivists admit that their view fails to explain the basis of customary international law. In their view, there is an implied consent in regard to customary rules of international law.

. *Criticism.*—The positivist theory is based mostly on the actual practices of States. But this view has been subjected to a lot of criticism. It can be criticised on the following grounds :

(1) The concept of the will of State presented by the positivists is purely metaphorical.

(2) The view of the positivists that the whole of international law is based on the consent of the State is far from truth. As pointed out by an eminent author,[70] 'custom is said to be evidence of a general practice accepted by law'. It is not required that there should be any express recognition by States in order that this practice or international custom shall be binding upon them. The extreme positivist view which seeks to base all international law on the 'consent of states' has tried to establish that the rules of international custom are based on "tacit agreements" between states. But in reality it is not possible to prove that these rules come into existence in such a way. This is shown by among other things, the fact that a new State entering the community of nations at once becomes bound by the international customary rules and it is never suggested that any of these rules would not be binding on it. It never happens that the State consent is sought or that it enters into any agreement on the matter with the already existing States. On the other hand, the new State is not bound by any international convention already in force unless it expressly adheres to it. International custom constitutes general international law, a real law, for the society of States. From this it follows that the dictum *pacta sunt servanda* cannot be the 'basic norm' of international law, it is itself a rule of international custom.

(3) In practice, it is not always necessary to show that in regard to a particular rule of general international law, the State had given their consent.

(4) There are some principles of international law which are applicable on States although States did not give their consent for them. The principle propounded under Article 2(6) provides that the organisation shall ensure that States which are not members of the U.N. act in accordance with the principles (contained in Article 2 of the Charter) so far as may be necessary, for the maintenance of international peace and security.

(5) The norm *'pacta sunt servanda'*, "has been abandoned by most theorists, since it seems incompatible with the fact that not all obligations under international law arise from *'pacta'*, however widely that term is construed, so it has been replaced by something less familiar ; the so-called rule that States should behave as they customarily have."[71]

(6) "Even apart from its lack of accord with reality the theory that international law rests on agreements is problematic in another respect. Declarations of will are, of course, in themselves pure facts which have legal effects only because some rule of law gives them such effects."[72]

---

* Asked in I.A.S. (1976), Q. No. 1 ; For further elaboration of the answer see also Chapter 1.

70. Torsten Gihl, The Legal Character and Sources of International Law (1957), at p. 75.

71. H.L.A. Hart, the Concept of Law (1961), p. 228.

72. Gihl, Supra note 70 at p. 60.

(7) According to the positivist view, treaties and customs are the only sources of international law* Grotius made distinction between the *Jus Gentium*, the customary Law of Nations (which he called *Jus Voluntarium* or Voluntary Law) and *Jus naturrae* or natural Law of Nations. He concentrated more on the natural Law and regarded voluntary law of less importance. The Grotians were somewhat between the Naturalists and the positivists. They maintained the distinction between natural and Voluntary Law of Nations but they considered positive or voluntary laws of equal importance to the natural laws. Thus, according to the Grotians, international law has originated not only from customs and treaties but also from natural law. This view, obviously, is not in conformity with the positivist view. The positivist view that treaties and customs are only sources of international law is also not in conformity with Article 38 of the Statute of International Court of Justice according to which "General Principles of Law Recognised by Civilized Nations" are also the sources of International Law. As pointed out Manley O. Hudson,[73] the provision relating to "the general principles of law recognised by civilized nation" serves a useful purpose in that it emphasizes the creative role to be played by the court. It confers such a wide freedom of choice that no fixed and definite content can be assigned to the term employed. It has widely hailed as a *refutation of the extreme positive conception of international law.*[74]

Influence and Contribution.—Despite the above-mentioned defects and criticism, a great merit of this theory is that it is based on the actual practice of the States. It emphasises that only those rules are the rules of international law which have been adopted by the States and are observed in practice. Yet another special feature of this theory is that it has encouraged realistic outlook in international law. In several cases concerning the customary rules of international law, the International Court of Justice has adopted the positivist attitude. The *Asylum* case,[75] the *Anglo-Norweglan Fisheries* case[76] and the *Rights of the U.P. Nationals in Morccco* cases,[77] deserve special mention in this connection. In the *Asylum* case, the International Court of Justice observed : "The party which relies on a custom of this kind must prove that this custom is established in such a manner that it has become binding on the other party. The Colombian Government must prove that this rule invoked by it is in accordance with a constant and uniform usage practised by States in question, and that the usage is the expression of a right appertaining to the States granting asylum and a duty incumbent on territorial States." **

True basis of International Law.—In the modern period no State can keep itself aloof from the affairs of the world. The means of transport and communication and other scientific inventions have brought the States of World closer to each other. The practices of States are, therefore, of great significance. As pointed out, the positivists have greatly encouraged the realistic outlook in international law have thus rendered a signal service. However no specific theory is capable of explaining the true basis of international law.[78] Indeed no single theory has received general agreement and sanctions. It appears as though there are as many theories as there are scholars[79] According to Sir Cecil Hurst, no State can escape from the influence of international law. He has rightly pointed out : "International law is in fact binding on States because they are

---

* Asked in I.A.S. (1960), Q. No. 3 : see also for I.A.S. (1963) Q. No. 6.

73. See The Permanent Court of International Justice, 1920-1942 (New York : The Macmillan Company, 1943), pp. 606-620 :
74. Starke has also rightly observed : "From the theoretical standpoint, the provision for applying the 'general principles' has been regarded as (sounding the death-knell of positivism, inasmuch as it explicitly rejects the broad positivist view that custom and treaties are to be considered the exclusive sources of International Law", An Introduction to 'International Law' Edition (1977), pp. 39-40.
75. I.C.J. Rep. (1950), p. 266.
76 I C.J. Rep. (1951), p. 116.
77. I.C J. Rep. (1952), p. 176.

** See also for C.S.E. (1992) Q. 5(C).

78. See Starke, An Introduction to International Law, Eighth Edition (1977) pp. 34-35.
79. *See* O. Schachter, "Towards a Theory of International Obligation" (1968) 8 Virginia JIL, 300 , 300-305.

States."[80] Thus States obey international law because they are States. States obey international law because it is in their interest to do so. "The ultimate explanation of the binding force of all law is that man, whether he is single, individual or whether he is associated with other men in a State, is constrained in so far as he is reasonable being, to believe that order and not chaos is the governing principle of the world in which he has to live." [81]

Moreover as aptly pointed out in the Ninth Edition of Oppenheim's International Law,[82] 'It is, however, in accord with practical realities to see the *basis of international law in the existence of an international community the common consent of whose members is that there shall be a body of rules of law—international law*—to govern their conduct as members of that community. *In this sense 'common consent' could be said to be the basis of international law as a legal system."* Further, "This 'common consent' cannot mean, of course, that all states must at all times expressly consent to every part of the body of rules constituting international law, for such common consent could never in practice be established.... The common consent that is meant is thus not consent to particular rules but to express or tacit consent of States to the body of rules comprising international law as a whole at any particular time." [83] Lastly, "The emergence of 'consensus' as an appropriate procedure for the adoption of many decisions at international conferences and in such bodies as the United Nations General Assembly has mitigated the consequences which would otherwise flow from rigid requirements of consent in an international community now numbering over 150 States, and has permitted the continued development of international law in accordance with the general consent of the international community.[84]

Some other theories regarding the basis of international Law

Following are some other theories regarding the basis of International Law : (1) Theory of Consent ; (2) Auto-limitation Theory ; (3) *Pacta Sunt Servanda ;* and (4) Theory of Fundamental Rights. The first three theories have been derived from positivism and the fourth has been derived from 'Theories as to Law of Nature.' We will now briefly discuss these theories one by one.

(1) *Theory of Consent.** —In the view of the supporters of this theory, consent of States is the basis of international law. States observe rules of international law because they have given their consent for it. Positivists have given much support to this view. The chief exponents of this theory are Anzilotti, Triepel, Oppenheim,[85] etc. This theory fails to explain the basis of customary international law. In the view of the supporters of this theory, States are bound to observe customary rules of international law, because they have given their implied consent for their acceptance. This theory has been subjected to severe criticism by many jurists, such as, Starke, Brierly, Kelsen, Fenwick, etc. Following are some of the points of criticism levelled against the theory :—

(i) As pointed out by Starke, in practice it is not necessary to prove that the other

---

80. Sir Cecil Hurt, International Law : The Collected Papers, p. 9.
81. J.L. Brierly, The Law of Nations, Sixth Edition (1968), p. 56.
82. See Note 11, p. 14 ; emphasis added.
83. Ibid.
84. Ibid, at pp. 15-16.
* See I.A.S. (1970), Q. No. 3 ; see also matter discussed under the heading "Positivism," see also for P.C.S. (1970), Q. No. 1; C.S.E. (1981), Q. 5(a).
85. According to Oppenheim, "If law is..... a body of rules for human conduct within a community which by common consent of the community shall be enforced through external power, the common consent is the basis of all law." International Law, Vol. 1, Eighth Edition Edited by H. Lauterpacht, p. 15 ; Oppenheim further adds, "It will be noted that 'Common consent' is sociological rather than a legal explanation of the validity of the law. In the law the question still arises : Why is consent binding? Probably the answer to that question as the validity of the first source of law cannot itself be a legal one. Its validity cannot be proved as legal proposition ; it must be assumed by reference to what has been called the initial hypothesis ....." L. Oppenheim, International Law, Vol. I, Eighth Edition (1970 Reprint), p. 6.

A-678

State or States have given their consent in regard to a specific rule of international law [86] According to Prof. Smith, all States are bound by international law, no matter whether they have given their consent or not.[87]

(ii) In regard to customary rules of international law, the basis of implied consent is far from correct. "The States are bound by general international law even against their will." [88] Professor Kelsen has cited the example of new States, which get rights and duties under international law immediately after becoming the subject of International law.

(iii) In the view of Fenwick, the theory of consent is not correct because it is against the principles and things which the States have been accepting since the beginning of international law. [89]

(iv) Theory of consent fails to explain the case of recognition of new State. The granting of recognition is the act of other States and hence it would be wrong to say by getting recognition, the recognised State has given its consent in respect of international law.[90]

(v) According to Brierly the theory of consent cannot explain the true basis of international law even if we distort facts and try to fit them in the theory.

Thus we see theory of consent cannot explain the true basis of international law and can be severely criticised. As pointed out earlier, States follow international law for the simple reason that they are States. As an ordinary person has to obey municipal law, even against his will, similarly, States are bound to follow international law. To quote Sir Cecil Hurst again, "International law is, in fact, binding on States because they are States.[91] Thus, "consent can never be the ultimate force of legal obligation".[92] However, as noted earlier 'common consent' can be said to be the basis of international law as a legal system in the sense that we "see the basis of international law in the existence of an international community the common consent of whose members is that there shall be a body of rules of law—international law—to govern their conduct as members of that community." This 'common consent' is not consent to particular rules but to the "express or tacit consent of states to the body of rules comprising international law as a whole at any particular time."

(2) *Auto limitation Theory.** —According to this theory, international law is binding upon States because they have restricted their powers through the process of auto-limitation and have agreed to abide by international law. This theory is also based on the view of the positivists. This theory lays great stress on independence and sovereignty of the States Jellinck is the chief exponent of this theory. The basis of this theory is this that each State has a will which is completely independent and free from external influences. But through the process of auto-limitation, State can restrict its powers and thereby limit its will. In short, States are not bound to follow international law because they are independent and sovereign but the States can make themselves bound by rules of international law by restricting its powers.

Criticism.—This theory has also been subjected to severe criticism by the jurists. This theory is based upon a presumption that there exists a State will in fact the will of the State is nothing but the will of the people who compose it. Besides this, auto-limitation is no limitation at all. The auto-limitation theory will imply that the State can free itself from

86. Starke, Supra note 78 at p. 29.
87. See H.A. Smith, Great Britain and the Law of Nations, Vol. I (1932), pp. 12-13.
88. Hans Kelsen, Principle of International Law, 154.
89. Charles G. Fenwick, International Law (Third Indian Reprint, (1971), p. 36.
90. According to Prof. Hart, when a new State emerges, as did Iraq in 1932, and Israel in 1948, it is bound by the general obligations of International law including, among others the rules that give binding force to treaties. Here the attempt to rest the new State's International obligations on a 'tacit' or 'inferred' consent seems wholly threadbare so is also the case of State-acquiring territory, [The concept of law (1961), p. 221.]
91. See Supra note 80.
92. C. Wilfred Jenks, Law, Freedom and Welfare, p. 85.

* Asked in I.A.S. (1962), Q. No. 1, For answer see also matter discussed earlier under the heading "Positivism".

self-imposed restriction at its will. In practice, this is not possible. Briefly, Friedmann and other jurists have severely criticised this theory. "First, these theories fail completely to explain how it is known that States 'can' only be bound by self-imposed obligations, or why this view of their sovereignty, should be accepted, in advance of any examination of the actual character of international law. Secondly, there is some incoherence in the argument designed to show that States, because of their sovereignty, can only be subject to or bound by rules which they have imposed upon themselves"[93] Prof. Hart further points out that this theory fails to explain the case of a new State. "Here the attempt to rest the new state's international law obligations on a 'tacit' or 'inferred' seems wholly threadbare. Secondly, it fails to explain the case of a State acquiring territory or undergoing some other change, which bring with it, for the first time, the incidence of obligation under rules which previously it had no opportunity either to observe or break, and to which it had no occasion to give or withhold consent." [94]

(3) *Pacta Sunt Servanda.*—In the view of Italian jurist, Anzilotti, the binding force of international law is based on the supreme fundamental norm or principle, known as *pacta sunt servanda.* This means that the agreements entered into by States will be respected and followed by them in good faith. This is a well-established and recognised custom of international law. This customary principle of international law has now been codified and finds mention is Article 26 of the Vienna Convention on the Law of Treaties, 1969. Article 2 provides that every treaty in force is binding upon the parties to it and must be performed by them in good faith. According to Anzilotti, this norm is the foundation of the binding force of international law. Like positivism, the principle of *pacta sunt servanda* is also based on the actual practice of States. It emphasises the importance of the agreement entered into by States and regards them as the basis of international law.

Criticism.—It cannot but be admitted that *pacta sunt servanda* is a very important principle of international Law ; States must respect the agreements entered into by them and follow the same in good faith. If it were not so, there would be anarchy and disorder in the international field. But to assert that the binding force of international law based only on the principle of *pacta sunt servanda* is far from truth. It fails to explain the binding force of customary rules of international law which are not based upon agreements between States. It has been rightly remarked[95] : "The realization that international customary law does not rest on agreements and that the tenet *pacta sunt servanda* is itself a rule of customary law led to new formulations of the basic norm. Kelsen himself has decided on a formula which takes into account of usage as the fact which is the origin of the rules of international law. 'States ought to behave as they have customarily behaved'." [96]

(4) *Theory of Fundamental Rights.*—* This theory is based on the naturalistic view point. According to this view-point, prior to the existence of State, man used to live in natural state and even in that state he possessed some fundamental rights, such as, independence, equality, right to self-preservation. Like man, State also possessed these fundamental rights because so far there is, no world institution over and above the States.

Criticism.—This, theory has been severely criticised by jurists. J.L. Brierly[97] has made the following criticism of the theory—

(1) According to this theory when a new State is admitted to the family of nations, it brings with it certain fundamental rights which are inherent. As a matter of fact, such rights are meaningless unless there is a legal system which confers validity on them.

(2) This theory cannot be commended because it is in favour of giving more freedom to the States and lays less emphasis on social relations and co-operation among the States.

---

93. Hart, Supra note 71, pp. 219-20 : Torsten Gihl has also remarked : ".... an (obligatiton derived from auto-limitation could never be anything but illusory", (The legal Character and Sources of International Law (1975), p. 57.
94. Supra note 71 at pp. 219-20.
95. Gihl, Supra note 70, at p. 162.
96. Kelsen, Theory of Law and State, p. 369.
* See for I.A.S. (1965), Q. No. 3.
97. See the Law of Nations, Sixth Edition (1963), pp. 50-51.

(3) Last but not the least shortcoming of this theory is that it regards certain fundamental rights, such as, independence, equality, etc, as natural rights. But as a matter of fact, these fundamental rights are as a result of historical development.

New trends regarding basis of obligation in International Law :

Since the beginning of modern international law, consent has been the basis of obligation under international law. Consent played such a predominant role that it was even extended to explain the basis of customary rules of international law. The positivists tried to establish that international customs were based on "tacit-agreements" between states. The unanimity rule was the prevailing rule for every conference and treaty. Only a party to treaty was bound by it. Though the unanimity rule still continued, the United Nations Charter introduced majority rule in all of its organs. In the course of time, General Assembly gained strength and became the most potent organ of the U.N. Though not originally envisaged, General Assembly even started legislative activities and passed a number of resolutions which were considered binding or having legal implications. Thus the fort of unanimity rule seems to be crumbling against the onslaught of majority rule in international organisations.[98] This change has necessiated a change in the theory of obligation in international law.

A unique feature of new international law is that it is found not only in law-making conferences but also in *law creating* conferences such as those of UNCTAZ, GATT, IBRD, IMB, OECD, OPEC etc. It has been aptly pointed out "the G.A. (*i.e.* General Assembly) resolutions constituted the "joint action' and the 'process' through which states and peoples persued their objectives. The point is, it would be naive to ignore such *law creating* resolutions—one may legitimately go a step further to state that given the current concerns of the world community and the versimilitude of joint action being taken, law making conventions and conferences are only tiny episodes in the drama of international law." Further, "And international law would cease to have any validity or relevance if it did not take cognizance of the processes through which the world community pursued its pressing concerns." [99]

One of the most important changes that has taken place is that many a decisions at international conferences and General Assembly of the U.N. are being adopted by 'consensus'. Though the unanimity rule has not been completely defeated, the basis of obligation in international law is changing from sovereignty oriented consent to community oriented consensus.[100] As Fawcett has remarked "we must wait on the future to see whether the requirement of consent of states in international law making can ever become independent of the treaty process and be satisfied by the vote in the General Assembly or an International conference convend by it. In the law of sea conventions at least, the treaty form has already begun to seem a grumbling appendix.[101] Further Resolution 1962 (XVII) which declared Legal Principles on outer space "may fairly claim to have furthered the progressive development of International Law called forth by Article 13(1) because it has formulated general principles of law of international conduct or authoritatively interpreted the United Nations Charter.[102] So is the case with the Resolution 2749(XXV) which declared Legal Principles governing the seabed and ocean floor and Sub-soil thereof beyond the limits of National Jurisdiction. Regarding such type of resolutions McNair has said that "while it is unsafe to generalise upon them, there is no reason or

---

98. See also C.W. Jenks "Some constitutional Problems of International Organisation, BYBIL, Vol. 22(1945) p. 11 at p. 34—
99. Rahmatullah Khan, "International Law—Old and New" I.J.I.L., Vol. 15(1975) p. 371 at p. 374. See also Rosalyn Higgins The development of International Law through the Political organs of United Nations (1963) p. 2, Guenter Weissnerg "United Nations Movements towards World Law" ICLQ, Vol. 24 Part 3 (July 1975) p. 460, 461 Michel Virally, The sources of International Law" in Sorensen Manual of Public International Law p. 162.
100. R.P. Anand, "International organisations and the functioning of International Law" I.J.I.L., Vol. 24 No. 1 (1984), p. 51 at p. 63.
101. International Law and the Uses of Outer Space p. 14.
102. Ibid at p. 13.

principle why they should not establish obligations [103] 'They are much more than a programme of desireable objectives, they are, an attempt to deduce some of the implications for International Law." [104] As regards Resolution 1962 (XVIII) before the conclusion of outer space Treaty, Prof. Jenks aptly remarked : "The authority of the Declaration of Legal Principles may be expected to grow with the passage of years. While, it is somewhat less than a treaty, it must already be regarded a rather more than a statement of custom.[105]

The International Court of Justice has also lent its support to the above-mentioned change (*i.e.* from sovereignty oriented consent to community oriented consensus) in the basis of obligation in international law. In the *case concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/U.S.)* [106] the world court aptly observed :

"Turning lastly to the proceedings of the Third United Nations Conference on the Law of the Sea and the Final result of that Conference, the chamber notes in the first place that the convention adopted at the end of the conference has not yet come into force and that a number of states do not appear inclined to ratify it. This, *however, in no way detracts from the consensus reached on large portions of the instrument, and above all, cannot invalidate the observation that certain provisions of the convention, concerning the continental shelf and the exclusive economic zone,* which may, in fact, be relevant to the present case, *were adopted without any objections.*

In the chamber's *opinion these provisions, even if in some respects they bear the mark of the compromise surrounding their adoption, may nevertheless be regarded as consonant at present with general international law on the question."* [107]

In the *case concerning the continental shelf (Libyan Arab Jamahiraya/Malta)* [108] also the International Court of Justice took the same position. The Court observed.

"It is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinion juris* of states, even though multi-lateral conventions may have an important role to play in recording and defining rules deriving from custom or indeed in developing them.

Nevertheless, it *cannot be denied that the 1982 convention is of major importance, having been adopted by an overwhelming majority of states ; hence it is clearly the duty of the Court even independently of the references made to the convention by the parties, to consider in what degree any of its relevant provisions are binding upon the Parties as a rule of customary international law."* [109]

This undoubtedly is a clear triumph of community oriented consensus [110] over sovereignty oriented consent. But the battle has not been finally won and the struggle is likely to a prolonged one. As a matter of fact, consent will continue to be a basis of obligation and there should be no objection to it. But in view of ever widening scope of international law it has become necessary to recognise the importance and utility of 'consensus' as a basis of obligation in international law. The theory of consent as the basis of obligation was developed by European states for their own interests. With the emergence of large number of states and the horizontal as well vertical expansion of international law, the traditional theory fails to cope with the interests and aspirations of international community as a whole and the changes that have taken place. It is, therefore, necessary to enunciate a dynamic and comprehensive theory of basis of obligation so that it may take into account the interests and inspirations of international community as a whole. The international lawyers and jurists can make a significant contribution in this connection.

---

103. See Ibid at p. 7.
104. C.W. Jenks, Law, Freedom and Welfare, p. 33.
105. C.W. Jenks, Space Law (Stevens, 1965) p. 185.
106. Judgement dated 12 October, 1984.
107. Ibid, para 94, emphasis added.
108. Judgement of 3 June, 1985.
109. Ibid, para 27.
110. By the consensus we mean "a general attitude in favour of a position which may not necessarily be held by all the members of the internaitonal community." Obed Y. Asamoah, The Legal significance of the Declarations of the General Assembly of the United Nations (The Hague, 1969) p. 57.

15. Influence of Natural Law*

The origin of natural law can be traced to centuries before the birth of Christ. Probably no other principle or school of law took as much time in its development as the law of Nature. Moreover as aptly remarked by Dias : "no other firmament of legal or political theory is so bejeweled with stars as that of 'Natural law' for it has engaged the attention of some of the greatest, thinkers of all ages." Credit of giving birth to natural law must go to the Greeks. After the Greeks, Romans further developed it. The early and original law of Romans was called '*Jus Civile*'. Later on, they developed another legal system called '*Jus gentium*'. It was called *'Jus gentium'* because it was thought to be the law of universal application. In the republican era of Rome *'Jus gentium'* was reinforced by natural law or '*Jus naturale*' as was commonly called. By *Jus naturale* the Romans meant, as pointed out by Brierly, 'the sum of those principles which ought to control human conduct, because founded in the very nature of man as a rational and social being"[111] The law of nature is the expression of what is just against what is merely expedient at a particular time and place ; it is what is reasonable against what is arbitrary ; what is natural against what is convenient and what is for the social good against the personal will."[112] Thus natural law was based on the rational and reasonable needs of man's nature. Most of the jurists admit that natural law greatly influenced International Law and gave it its binding force.

The writers and jurists of the middle age developed law of nature in accordance with the values and conventions of their age. In this period, natural law was linked with religion. For example, according to St. Thomas Acquinas, natural law is a part of the law of God which man seeks through his reason.

Roman Law in Europe in 16th century contributed much in the beginning in the development of modern International Law. It will be desirable here to refer briefly to the criticism of medieval conception of natural law. In this period it was believed that there existed rationality in the Universe. Besides being an exaggeration, the belief in this conception was not substantiated by the practice of the States. Secondly, according to the writers, of the medieval age, if there was a conflict between positive law and natural law, the latter would prevail. It was a very revolutionary idea and could not be accepted. Despite this criticism, it must be admitted that natural law emphasised the importance of purpose behind law. It stressed that law was not the body of meaningless rules or principles to be enforced by the Courts. In fact, law existed to achieve definite objectives.

In 18th and 19th centuries, the positivists were in vogue. The poitivism was based on the actual practice of States. It was the period of the decline of the Natural Law. The positivists denied the existence of any purpose behind the law. According to the positivists, people would be bound to obey law if it was created by appropriate legislative authority or sovereign irrespective of its being reasonable or unreasonable. They called this law, law positivum, or positive law *i.e.* the law in fact. Thus in the view of the positivists, in the conflict of the positive law and natural law, the former will prevail.

Twentieth century saw the revival of the Natural Law. Positivism was subjected to severe criticism. Once against faith in Natural law was reaffirmed. However, the conception of Natural Law underwent significant changes in this period. Basing their views on Kant and Hegel, the modern writers adopted Natural law in accordance with times and circumstances. The chief exponents of this movement were Stammler and Koheler. For example, Stammler admitted that Natural law could be adopted to the changing times and circumstances although its fundamental principles remained unchangeable. He, therefore, propounded the theory of "natural law which with a variable content." In the recent times, Prof. Fuller of America has emerged as a great exponent of natural law. He has propounded the theory of "inner morality of law". In other words, there is an inner morality of law and there is a definite purpose behind law. Law is not a body of

---

* See for Q. No. 2 of I.A.S. Exam., (1971).

111. See J.L. Brierly, The Law of Nations (1963), p. 17.

112. J.E.S. Fawcett, The Law of Nations (1968), p. 26 ; see also P.E. Corbett, The Growth of World Law (1971), pp. 177-178.

meaningless rules and does not exist for its own sake. Law exists or is created to achieve some purpose.

The concepts of Natural Law developed from time to time have greatly influenced the growth of international law. In the words of Sir Henry Maine, "the grandest function of the 'law of nature' was discharged in giving birth to modern international law." Starke has also remarked : "Traces of natural law, theories survive today albeit in a much less dogmatic form." [113] There are many traces of the influence of natural law on international law. For example, the development of human rights, system of punishment of war crimes, etc. are all due to the influence of natural law. Thus the idealist character natural law has greatly influenced the international law. It may, however, be noted that natural law kept itself aloof from the actual practice of States. This was the main defect of natural law. It was this reason that was responsible for the decline of natural law.

---

113. Introduction to International Law, Tenth Edition (1989) p. 22.

CHAPTER 4

SOURCES OF INTERNATIONAL LAW*

As pointed out by Starke, "The material sources of international law may be defined as the actual materials from which an international lawyer determines the rule applicable to a given situation."[1] "The term 'source' refers to methods or procedure by which international law is created."[2] A distinction is made between the formal sources and material sources of law. As pointed out by G. Fitzmaurice they may also be described as, respectively, as direct and indirect, as proximate or immediate and remote or ultimate. Material sources may also be described the "origins" of law while the material, historical or indirect sources represent the stuff out of which the law is made, that is to say, they go to form the content of the law, the formal, legal and direct sources consist of the acts or facts whereby this content is clothed with legal validity and obligatory force. The essence of the distinction, therefore, is between the thing which inspires the content of law, and the thing which gives that the content its binding character as law. "The former are those legal procedures and method for the creation of rules of general application which are legally binding on the addressee. The material sources provide evidence of the existence of rules which, when proved, have the status of legally binding rules of general application."[3] Further, "The sources of international law must not be confused with the basis of international law ; this, ..., is to be found in the common consent of the international community. The sources of law, on the other hand, concern the particular rules which constitute the system, and the processes by which he rules become identifiable as rules of law. The sources of the rules of law, while therefore distinct from the basis of the law, are nevertheless necessarily related to the basis of the legal system as a whole." [4] The sources of international law may be classified into five categories—

(1) International conventions;
(2) International customs ;
(3) General Principles of Law Recognized by civilized Nations ;
(4) Decisions of Judicial or Arbitral Tribunals and Juristic works ;
(5) Decisions or Determinations of the Organs of International Institutions.

The above-mentioned third source *'General Principles of Law Recognised by Civilized Nations'* was first mentioned in Article 38 of the statute of the Permanent Court of International Justice. It was retained in Article 38 of the statute of the International Court of Justice which mentions the following sources of international law : (1) International conventions ; (2) International customs; (3) General principles of law recognized by civilised nations; and (4) Judicial decisions and the teachings of most highly qualified publicists of the various countries as subsidiary means for the determination of rules of law. The above-mentioned Fifth source, *i.e.*, Decisions or determinations of the Organs of International institution does not find mention in Article 38 of the statute of the court but it has now become a well-recognized source.

---

* See for P.C.S (1971), Q. No. 1; C.S.E. (1984) Q. 5 (a), P.C.S. (1983) Q. 1 (a).

1. J.G. Starke, Introduction to International Law, Tenth Edition (Butterworth, 1989), Starke's International Law, Eleventh, Edition, Butterworths (September, 1994) p. 28.
2. Edward Collins, International Law in a Changing World (1969), p. 16.
3. Ian Brownlie, Principles of Public International Law, Second Edition (Clarendon Press Oxford, 1973), p. 1.
4. Oppenheim's International Law, Vol. I, Edited by Sir Robert Jennings and Sir Arthur Watts, Ninth Edition, Longman Group UK Limited and Mrs Tomoko Hudson, 1992, p.23.

(1) International Conventions**

In the modern period, international treaties are the most important source of international law. This is because the reason, *inter alia*, that states have found in this source a deliberate method by which to create binding international law. Article 38 of the statute of the International Court of Justice lists 'international conventions whether general or particular, establishing rules expressly recognized by the contesting States' as the first source of international law. As pointed out by Manely O. Hudson, the term *'conventions'* is used in a general and inclusive sense. It would seem to apply to any treaty, convention, protocol, or agreement, regardless of its title or form. A convention may be general, either because of the number of parties to it, or because of the character of its contents; it may be 'particular' because of the limited number of parties, or because of the limited character of its subject-matter. Whenever, an International Tribunal decides an international dispute then its first endeavour is to find out whether there is an international treaty on the point. In case there is an international treaty, the decision of the court is based upon the provisions of that treaty. According to Article 2 of the Vienna Convention on the Law of the Treaties, 1969, "A treaty is an agreement whereby two or more States establish or seek to establish relationship between them governed by international law". But this definition is narrow and does not seem to be correct. As correctly pointed out by Prof. Schwarzenberger, "Treaties are agreements between subjects of international law creating a binding obligation in international law." However, it would be wrong to say that Vienna Convention does not show its awareness to this fact for Article 3 provides that the fact that the present convention does not apply to international agreements concluded between states and other subjects of international law, or between other subjects of international law, or to international agreements not in written form, shall not affect :

(a) the legal force of such agreements ;

(b) the application to them of any of the rules set forth in the present convention to which they would be subject under international law independently of the convention ;

(c) the application of the convention to the relations of states as between themselves under international agreements as to which other subjects of international law are also parties.

International treaties may be of the two types : (A) Law-making treaties and (B) Treaty contracts :

(A) *Law-making treaties.*—The provisions of law-making treaty are directly the source of international law. The development of law-making treaties received an impetus from the middle of 19th century. The main reason for this was that in view of the changing circumstances, customs, which were hitherto the most important source of international law, were proving to be inadequate. Consequently, States regarded it necessary and expedient to enter into treaties and thereby established their relations in accordance with the changing times and circumstances. Law-making treaties may again be divided into following two types :—

(a) *Treaties enunciating rules of universal international law.*—United Nations Charter is the best example of such type of treaty.

(b) *International treaties which lay down general principles.*—These treaties are entered into by a large number of countries. 1958 Geneva Conventions on the law of the Sea and Vienna Convention on the Law of Treaties, 1969 are good examples of such type of treaties.

Law-making treaties perform the same functions in the international field as legislation does in the State field. Law-making treaties are the means through which international law can be adapted to in accordance with the changing times and

* See also for P.C.S. (1978) Q. 1. P.C.S. (1995) Q. 5(a).

circumstances and the rule of law among the States can be strengthened. Treaty process is also a useful means to develop universal international law. But an international treaty can enunciate universal principle only when it receives the support of the *essential* States.[5] For example a law-making treaty which does not receive the support of nations, such as, Russia, Britain, America, France and China, cannot effectively enunciate general or universal rules.

(B) *Treaty contracts.**—As compared to law-making treaties, treaty contracts are entered into by two or more States. The provisions of such treaties are binding on the parties to the treaty. Such treaties also help the formation of international law through the operation of the principles governing the development of customary rules. This may happen when a similar rule is incorporated in a number of treaty contracts. Beside this a treaty enter into by a few States is subsequently accepted by many other States as they enter into similar treaties. Finally, "A treaty may be of considerable *evidentiary* value as to the existence of a rule which has crystallised into law by an independent process of development." [6]

2. International customs**

International customs have been regarded as one of the prominent sources of international law for a long time. It "is the oldest and the original source, of international as well as of law in general." [7] It is only in the modern period that the importance of customs has suffered a setback. However, even today it is regarded as one of the important sources of international law. Customary rules of international law are the rules which have been developed in a long process of historical development.

Article 38(b) of the Statute of International Court of Justice recognises 'International Custom, *as evidence of general practice accepted as law*', as one of the sources of international law. In order to understand the meaning of 'custom', it is necessary to know the meaning of the word 'usage'. The words 'custom' and 'usage' are often used as synonymous. In fact, there is difference between the usage and custom, and they are not synonyms. Usage is in fact the early stage of custom. By usage we mean those habits which are often repeated by the States. As pointed out by Starke, where a custom begins, usage ends. Usage is an international habit which has yet not received the force of law. In the words of Starke, "Usage represents the twilight stage of custom, custom begins where usage ends. Usage is an international habit of action that has yet not received full legal attestation." Usages may be inconsistent and opposed to each other. But this can never be the case with the custom. When States in their international relations start behaving in a particular way in certain circumstances, it is expected that in the similar circumstances they will behave in the same way. This is called the usage. But when this usage receives the general acceptance of recognition by the States in their relations with each other, there develops a conception that such a habit or behaviour has become right as well as obligation of the States and in this way usage becomes the custom. As aptly remarked by Viner,[8] "A custom, in the intendment of law, is such usage as that obtained the force of law."***

It is not necessary that the usage should always precede a custom. It is also not necessary that a usage must always become a custom. In certain cases a usage may

---

5. Leo Gross, "Sources of Universal International Law" in Asian States and the Development of Universal International Law" (1972) p. 189 at p. 196.
* See also for I.A.S. (1959) Q. No. 4.
6. Starke, note 1, at p. 46.
** See also for C.S.E. (1980) Q. 7(a). P.C.S. (1994) Q. 5(a).
7. Oppenheim's International Law, note 4, at p. 25.
8. Adopted from Starke, note 1, at p. 41; Briefly has also written that "Custom, in its legal sense means something more than mere habit or usage; it is a usage felt by those who follow it to be obligatory one", 'The Law of Nations, Sixth Edition (1963), p. 59; see also Josef L. Kunz, The Nature of Customary International Law, A.J.I.L. Vol. 47 (1953), p. 662 at p. 667.
*** Asked in I.A.S. (1973), Q. No. 69(a).

become a custom, in certain other cases it may not become. In this connection Torsten Gihl[9] has summarised his conclusions in the following words :—

(i) In certain cases usage gives rise to international customary law, in other cases it does not. But there is no rule of international law, or indeed any rule at all, which determines when usage shall give rise to custom.

(ii) Together with usage (as a purely factual phenomenon) there are a number of other purely factual phenomenon, State interests, powers, factors, general opinion, historical events, etc., which in various combinations contribute to the creation of international custom, and custom can arise even without any usage. The coming into existence of a customary rule is an historical process which, in certain cases at least, can be demonstrated by purely historical methods, but there is no rule of law which determines when these factors shall give rise to international custom.

(iii) When a usage is combined with *opinio juris sine necessitatis*, a rule of customary law exists, and it is probably justifiable to say that a usage reflects a customary rule if it is connected with a practically universal *opinio juris*.

Thus when a general usage in international sphere, or State practice, is connected with *opinio juris et necessitatis* international customary law exists. This is a statement about a fact and as such almost a truism since a usage of this kind is a general practice accepted as law by, definition a custom. As pointed out by the International Court of Justice in *North Sea Continental Shelf Cases,*[10] for a state practice to constitute *opinio juris* not only must the acts concerned amount to a settled practice, but they must also be such, or be carried in such a way, as to be the evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief *i.e.,* the existence of a subjective element, is implicit in the very notion of the *opinio juris sine necessitatis.* The States concerned must therefore feel that they are conforming to what amounts to a legal obligation.

For deducing this subjective element, bilateral or multilateral treaties, resolutions of General Assembly of the U.N., international conferences and statements of State representative etc. may be seen.

*Generation by Treaty of Customary Rules of International Law** .—A provision of a treaty may also generate a rule of customary International Law. In *North Sea Continental Shelf* case[11] the International Court of Justice observed that provisions in treaties can generate customary law and may be, in the words of the Court; of a "norm-creating character".[12] In the view of the World Court, the 'norm-creating process' is a perfectly possible one and does from time to time occur; it constitutes indeed one of the recognised methods by which new rules of customary international law may be formed." [13] According to the Court, the first three articles of the Geneva Convention on the Continental Shelf, 1958, are of norm-creating-character.[14] But a treaty provision can generate customary international law only when the provision concerned is "of a fundamentally norm-creating character such as could be regarded as forming the basis of a general rule of law." In the present case the Court was construing Article 6 of the Convention which lays down 'equidistance' principle for demarcation of continental shelf between two coastal States. According to the Court, Article 6 was not intended to be a 'norm-creating character'. One of the reasons given by the Court was that the 'principle of equidistance' was prefaced by the words 'in the absence of agreement'. As pointed out by a writer[15] : "The World Court's

9. The Legal Character and Sources of International Law, (1957), pp. 82-83.
10. I.C.J. Rep. (1969) pp. 3, 44.
* See also for P.C.S. (1980), Q. 7 ; C.S.E. (1996) Q. 5(a).
11. I.C.J. Rep. (1979), p. 3.
12. Ibid, at p. 43.
13. Ibid, at p. 42.
14. Ibid, at pp. 40, 43. For the provisions of Articles 1, 2 and 3 see matter discussed under "continental shelf" in Chapter on "The Law of the Sea".
15. Authority D' Amato "Manifest Intent and The Generation by Treaty of Customary Rules of International Law", A.J.I.L., Vol. 64 (1970), pp. 892, 899.

decision in the *North Sea Continental Shelf* cases,[16] is a major contribution to that branch of the theory of customary international law dealing with norm creation by means of a treaty. The Court articulated a new methodology for determining which provisions in treaties can form the basis of universally binding customary law. As the spreading network of international convention becomes more fine-meshed the substantive rules of international customary law may be expected to conform more and more closely to the provision in these conventions. The World Court has implicitly recognized this process in many prior opinions, but it was not until *continental shelf* decision that the link between treaty and custom was focussed with precision..... The Court thus recognizes the fact that the conclusion of a treaty is a step of international significance taken by two or more States that would normally have constituted a component of customary law. Not only is there a definite meeting of the minds in a treaty (as we infer from an act involving two or more States that constitutes practice for the purposes of customary law); but also there is the clear articulation of a rule of law that gives the treaty a special impetus towards formulating a general rule. A great many rules of customary international law, perhaps even the majority, had their origin in treaties, and the World Court itself in several cases has used treaties for evidence of rules of law held binding upon non-parties."

Ingredients or elements of custom*

Following are the main ingredients of an international custom:—

(i) *Long Duration.*—Long duration is generally said to be an essential ingredient of a custom. This is particularly true of a custom in Municipal Law. In Municipal Law, a custom is required to be ancient and immemorial. But this is not necessary for an international custom. Article 38 of the Statute of the International Court of Justice directs the World Court to apply 'international custom, as evidence of a general practice accepted as law'. Emphasis is not given on a practice being repeated for a long duration. What is more important is the practice of States accepting the practice concerned as law. In the field of international law, customs have emerged in a short duration, for example, custom relating to sovereignty over air space and the continental shelf.

(ii) *Uniformity and consistency.*—The custom should also be uniform and consistent. In the *Asylum* case,[17] the International Court of Justice observed that the rule invoked should be 'in accordance with a constant and uniform usage practised by the States in question, and that this usage is the expression of a right appertaining to the State granting asylum and a duty incumbent on the territorial State.' This follows from Article 38 of the Statute of the Court which refers to international custom 'as evidence of a general practice accepted as law'. According to Mannley O, Hudson, "The elements necessary are the concordant and recurring action of numerous States in the domain of international relation, the conception of each case that such action was enjoined by law, and the failure of other States to challenge that conception at the time". It may, however, be noted that complete uniformity is not necessary. Nevertheless, there must be substantial uniformity.

In its judgment of 27 June 1986 in the *case concerning Military and Paramilitary Activities in and against Nicaragua*[18] while referring occasional violations of the principle of non-intervention, the International Court of Justice observed :

"It is not to be expected that in the practice of states the application of the rules in question should have been perfect, in the sense that states should have refrained, with complete consistency, from the use of force or from intervention in each other's internal affairs. The court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule. In order to deduce the existence of customary rules the court deems it sufficient that the conduct of states should in general, be consistent with such rules and that instances of state

16. (1969), I.C.J. Rep. 3 ; 63 A.J.I.L. 591 (1969); 8 Int. Legal Materials 340 (1969).

* See for I.A.S. (1961), Q. No. 5.

17. I.C.J. Rep. (1950), at pp. 276-277.

18. I.C.J. Reports 1986, p. 14.

conduct inconsistent with a given rule should generally have been treated as breaches of that rule not as indication of the recognition of a new rule." [19]

(iii) *Generality of Practice.*—Although universality of practice is not necessary, the practice should have been generally observed or repeated by numerous States.

(iv) *Opinio juris et necessitatis.*—According to Article 38 of the Statute of the International Court of Justice, international custom should be the evidence of general practice *"accepted as law"*. In the view of Brierly, "In applying the forms of evidence..... in order to establish the existence of an international custom what is sought for is general recognition among States of a certain practice *obligatory."* [20] In the *North Sea Continental Shelf* cases[21] the World Court observed, "Although the passage of only a short period of time is not necessarily, one of itself, a bar to the formation of a new rule of customary international law on the basis of what was originally a purely conventional rule an indispensable requirement would be that within the period in question, short though it might be, State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked; and should moreover have occurred in such a way as *to show a general recognition that a rule of law or legal obligation is involved*". Thus, "..... customary practice, even when it is general and consistent, is not customary law unless, *opinio juris* is present, that is to say, unless the practice is recognized as being required by international law. It is this sense of legal obligation, as distinguished from motives of fairness, convenience, or morality, that underlies customary law".[22]

Customary rules of international law have developed as a result of (1) Diplomatic relations between States; (2) Practice of international organs; (3) State laws, decisions of State courts and State military or administrative practices, and (4) Treaties between States.

It is an important matter to see as to how international custom will be applied in international law. There are two leading cases on the point :

(a) West Rand Central Gold Mining Company Ltd. v. R[23].—In this case a test regarding the general recognition of custom was laid down. The Court ruled that for a valid international custom it is necessary that it should be proved by satisfactory evidence that the custom is of such nature that it has received general consent of the States and no civilized State shall oppose it.

In *case concerning Military and Para-Military Activities in and Against Nicaragua,*[24] the World Court observed :

"If a state acts in a way *prima facie* incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then, whether or not the state's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule."

(b) Right of passage over Indian territory case [Portugal v. India].[25]—In this case the International Court of Justice pointed out that when in regard to any matter or practice, two States follow it repeatedly for a long time, it becomes a binding customary rule. The facts of this case are as follows—

> This case deals with the question relating to the right of Portugal to send its nationals and military through the Indian territory. Until 1954 Portugal possessed the right of passage through Indian territory which was in between Dadra and Nagar Haveli and Daman. The right was however subject to control and regulation

---

19. Ibid, at p. 98.
20. J.L. Brierly, The Law of Nations, Sixth Edition, p. 61; emphasis added.
21. I.C.J. Rep. (1969), p. 3 at p. 43 ; emphasis added; See also Lotus case, P.C.I..J, Series A, No. 10, p. 28.
22. *See also* case concerning Military and Para-Military Activities in and against Nicaragua. I.C.J. Reports 1986 p. 14 at pp. 108-109.
23. (1905) 2 K.B. 291. For facts of this case see Chapter on "State Succession".
24. I.C.J. Reports 1996, p. 14 at p. 98.
25. I.C.J. Rep. (1960), p. 6.

by India. In between October, 1953 and July, 1954, certain incidents took place; the relation between India and Portugal worsened and Portugal claimed that india was exercising excessive control. In July 1954, the people of Dadra (which was a Potuguese Colony) revolted against the Portuguese Government. It naturally had certain repurcussions over the border areas of Indian territory. Consequently, the Government of India suspended the right of passage of Portugal over this area. India contended that it had become necessary due to the special circumstances that had arisen. Portugal took this matter to the International Court of Justice. The International Court of Justice had to decide whether India was entitled to exercise control over the way and whether Portugal could send its military or armed forces through the passage ? The Court had also to give its verdict on the point whether India acted contrary to its obligations ? It may be noted that the claim of Portugal was based on the treaty of 1779. The International Court of Justice decided that Portugal was not entitled to send its armed forces through the way which fell within the Indian territory. The Court ruled that India did not act contrary to its obligations. The Court, however, ruled that the Treaty of 1779 was a valid treaty and Portugal was entitled to get passage through Indian territory in consequence of the provisions of the said treaty. The decision is important in so far as that the International Court of Justice ruled that if under a treaty a State gets right of passage through the territory of another State and if it continues for a long time, then it gains the force of law and thereby imposes the obligation upon he State affected to continue to give right of such passage. It may be noted here that on 31st December, 1974, a treaty was signed between India and Portugal wherein the latter recognised the full sovereignty of India over Goa, Daman and Diu, Dadra and Nagar Haveli.

As pointed out by Brownlie, this case "raised an issue of bilateral relations, the existence of a local custom in favour of Portugal in respect of territorial enclaves inland from the port of Daman (Damao). In this type of case the general law is to be varied and the proponent of the special right has to give affirmative proof of a sense of obligation on the part of the territorial sovereign *opinio juris* is here not to be presumed on the bas'is of continuous practice and the notion of *opinio juris* merges into the principle of *acquiesenco*". It may further be noted that in *Asylum* case (1950), also the International Court of Justice held that where a local or regional custom is established in such a manner it has become binding on the other party".

Situation when same principle is found in customary law and is also codified in a treaty.—This was one of the matters, *inter alia,* considered by the International Court of Justice in the *Military and Paramilitary Activities in and Against Nicaragua.*[26] In this case the court was considering the question whether United States' reservation to its acceptance of Court's jurisdiction effectively excluded disputes relating to certain multilateral treaties if claims were also based on rules of customary international law incorporated in those treaties. In the instant case the court found that this identity of content in treaty law and in customary law did not exist in the case of the rule invoked. While clarifying the position of law the world court observed :

"..... even if the customary norm and treaty norm were to have exactly the same content, this would not be a reason for he court to hold that the incorporation of the customary norm into treaty-law must deprive the customary norm of its applicability as distinct from that of treaty norm."

Further, "more generally, there are no grounds for holding that when customary international law is comprised of rules identical to those of treaty law, the latter 'supervenes' the former, so that the customary international law has no further existence of its own."

*Importance of custom as a source of International Law and Evaluation.**—There has

26 I.C.J. Rep. (1986) at p. 94.

* See for I.A.S. (1978) Q. 2. For answer see also matter discussed above regarding custom as a source of International law.

been a marked decline in the importance of customs as a source of international law in modern times. This is mainly due to the fact that the process of the development of a new custom is very slow.[27] However, in modern times also the development of new custom is possible and at times customs have developed with accelerated speed. Principles relating to sovereignty over air space and continental shelf are its glaring examples.[28] But, in view of the accelerated speed of the changes in international community, custom has now become an inadequate means for bringing about the changes and development of international law.[29] Thus, the development of a custom is very slow and as compared to it, rapid changes can be effected through treaties and conventions so as to adopt international law in accordance with the changing times and circumstances.[30] The four Geneva conventions on the Law of the Sea, 1958 and now the U.N. Convention on Law of the Sea 1982, to quote only a few examples, bear testimony to this fact.

The Soviet Union regards custom as an inadequate means for the development of international law. In one of his articles,[31] Tunkin has expressed the view that the development of custom also is based on the agreement between States. Consequently, customary rules are binding only on those States who have given their consent for them. According to the Soviet view, therefore, agreement between States is the only adequate means for the development of International Law.[32]

In *South-West Africa* case[33] Judge Tanaka observed : "briefly, the method of generation of customary international law is in the stage of transformation from being an individualistic process to bring a collectivist process. This phenomenon can be said to the adoption of the traditional creative process of international law to the reality of the growth of the organised international community. It can be characterised, considered from the sociological view point, as a transaction from a traditional custom making to international legislation by treaty." Thus in the modern times the importance of custom as a source of law has greatly reduced, with the simultaneous rise in importance of treaties and conventions, for the development of international law.

But as pointed out by Edward Collins,[34] "International organizations also contribute to the development of customary international law by providing a clear, concentrated forum for State practice. Particularly in the General Assembly of the United Nations, where more than 106 (now 185) member States are represented, the Statements and the votes of representatives on legal matters provide evidence of existing customary law, as is illustrated by the discussion on, and the adoption of, the resolution affirming the principles of the Nuremberg Charter and Judgment. Still other resolutions amount to 'an interpretation of the rules and principles which the Charter already contains and which are in consequence binding upon member States, authoritative by reason of the standing of the United Nations.[35]

3. General Principles of Law recognized by civilized states*

Para (1) (C) of Article 38 of the Statute of International Court of Justice lists *General Principles of Law Recognized by Civilised States* as the third source of international law.

27. See J.L. Brierly, Supra Note 8, p. 62.
28. Oliver, J. Lissitzyn ; International Law Today and Tomorrow (New York, 1965), p. 105.
29. Ibid.
30. Leo Gross, "Sources of Universal International Law" in Asian States and the Development of Universal International Law, Edited by R.P. Anand (1972), p. 189 at pp. 196-197.
31. See G.I. Tunkin, "Remarks on the Juridical Nature of Customary Norms of International Law", California Law Review, Vol. 49 (1961), p. 421.
32. In his words, "..... agreement between States lies at the basis of the process by which customary norms of International Law are created.
33. I.C.J. Rep. (1966), p. 6 at p. 248.
34. International Law in a Changing World (1969), at pp. 427-28.
35. Michel Virally, "The Sources of International Law", in Sorensen ; Manual of Public International Law, p. 162.

* See for I.A.S. (1966), Q. No. 3 : I.A.S. (1964), Q. No. 3 ; and I.A.S. (1972), Q. No. 1 P.C.S. (1984) Q. 1 (b) ; P.C.S. (1991) Q. 6(a).

In the modern period, it has become an important source. It "constitutes an important landmark in the history of international law inasmuch as the State Parties to the statute did expressly recognise the existence of third source of international law independent of custom or treaty."[36] This source helps international law to adapt itself in accordance with the changing times and circumstances. As pointed out by G. Von Glahn, renowned author of international law, two views are prevalent about the phrase 'general principles of law recognized by civilized nations'. According to one view the phrase includes such, general principles (such as : both sides of a dispute should be given a fair hearing and no one can sit in judgement in his own case) which are found in domestic Jurisprudence and can be applied to international legal questions. The other view regards the phrase as linked to natural law as interpreted during recent centuries in the western world. According to this view general principle of law recognised by civilized nations have emerged as a result of transformation of broad universal principles of law applicable to all the mankind into specific rules of "international. However law of nature represents at best a vague and ill-defined source of international law, the former or the first view about the general principles of law is generally prevalent today. By general principles of law recognized by civilized States we mean those principles which have been recognized by almost all the States. "Owing to 'the gaps in international law' it was felt that the competence of the Court could not be confined to making judgments according to positive international law, *i.e.* according to custom and conventions but on the other hand, it was not designed to give free rein to the law-making activity of the court and the court had to content itself with applying principles of law which could be established as common to the municipal law of all civilized nations and were therefore positive law, though not positive international law.[37] In the *Lotus* case,[38] the Permanent Court of International Justice also observed : "The Court considers that the words 'principles of international law,' as ordinarily used can only mean international law as it is applied between nations belonging to the community of States".

It may be noted here that a principle of law which is recognised by domestic law of a large number of States does not automatically become a 'principle' of international law. It becomes a principle of international law only when it is recognised as such by the World Court. Judge Lauterpacht has, therefore, rightly remarked that the main function of the 'general principles of law' has been that of a safety-valve to be kept in reserve rather than a source of frequent application. The World Court resorts to the application of this source only when in a case before it, there is neither an international convention nor a custom in respect of the dispute involved. Thus "Article 38, paragraph 1(c) of the Statute of the International Court of Justice ..... places on record one of the main sources of the rules of public international law. Indeed, it *describes the inexhaustible reservoir of legal principles* from which the tribunals can enrich and develop public international law." [39]

"By general principles of law we mean 'those rules or standards which we find repeated in much the same form in the developed systems of law, either because they have a common origin, as in Roman law, or because they express a necessary response to certain basic needs of human association. Examples are : the rule of *pacta sunt servanda*, that contracts must be kept ; the principle that reparation must be made for damage caused by fault ; the right of self defence for the individual against attack on his

36. Oppenheim's International Law, note 4, pp. 38-39.
37. Torsten Gihl, The Legal Character and Sources of International Law (Stockholm, (1957), p. 86).
38. P.C.I.J., Ser. A. No. 10, p. 16.
39. Lord McNair, "The General Principles of Law Recognized by Civilized Nations" BYBIL, Vol. XXXIII (1957), p. 1 at p. 6; See also John Hazard, "The General Principles" 52 A.J.I.L. (1958), p. 85; Wolfgang Friedmann, "The Uses of 'General Principles' in the Development of International Law', A.J.I.L. (1963), p. 279; Sir Gerald Fitzmaurice, "The Law and Procedure of the International Court of Justice 1954; 'General Principles and Sources of International Law' BYBIL, Vol. XXXV (1969), p. 193, G.G. Fitzmaurice, The Law and Procedure of the I.C.J. General Principles and Substantive Law". BYBIL, Vol. XXVII (1950), p. 1.

person or family and the community against clear and present danger ; and the principle that no man may be a judge in his own cause, and that he who has to judge must hear both the sides." [40] Further, "we must emphasise that general principles of law, as systems of law, or those derived from them, but can be traced also in Islamic law, customary laws in Africa, religious law in India, and traditional laws in China and Japan.[41] Thus, "General principles of law recognised by civilized nations are indeed ensemble of those general principles which underlie, antedate, vary from and form the model of municipal rules of law, which are same in all jurisdictions and aim at justice in every case.[42] In the view of Judge Chagla, principles of international law can be taken from the municipal law if they have received universal acceptance and are not inconsistent with any rule of international law.[43]

Res Judicata, estoppel, etc. are examples of the general principles of law recognized by civilized States. These principles are such as have received recognition by almost all the States. They have, therefore, been included as the general principles of international law. General principles of law recognized by civilized States include procedural as well as substantive principles provided that they have received general recognition of civilized States. The development of general principles of law recognized by civilized States as an important source of law has given a death-knell to the positivism.

Following are some of the important cases relating to the general principles of law recognized by civilized States :—

(a) R. v. Keyn.[44]—In this case the Court ruled that international law is based on justice, equality and conscience which has been accepted by long practice of States.

(b) United States v. Schooner.—In this case Justice Storey of United States of America ruled that International law should be based on the general principle of law recognized by civilized States. He was giving decision relating to abolition of system of slavery.

(c) In the case of diversion of water from Muese.[45]—The Permanent Court of International Justice applied *res judicata* and estoppel.

(d) Chorzow Factory (Indemnity) Case.[46]—In this case, the Permanent Court of International Justice applied the principles of *res judicata* and also held that one who violates a rule is liable to make reparation.

(e) Mavrommatis Palestine Concessions Case.[47]—In this case, the Court applied the general principle of subrogation.

(f) Case concerning the Temple of Preah Vihear.[48]—In this case, the International Court of Justice recognised and applied the principle of estoppel.

(g) Barcelona Traction case, Preliminary Obligation.[49]—In this case International Court of Justice applied the principle of estoppel.

(h) Frontier Dispute (Burkina Faso v. Mali)[49a] .—In 1983 Burkina Faso and Mali entered into an agreement to refer their Frontier Dispute to the International Court of Justice. During the agreements Mali contended that that form of equity ought to be kept in mind which is an inseparable part of the interpretation of International Law. Though

---

40. J.E.S. Fawcett, The Law of Nations, London, 1968 pp. 24-25.
41. Ibid, at p. 25; See also B. Cheng, "General Principles of law as a subject for International Codification" C.L.P. Vol. IV, 1951, p.35 at p. 37; Vladimir Paul, General Principles of Law in International Law, I.J.I.L., Vol. 10, 1970, p. 324 at pp. 347-49.
42. B. Cheng, Supra Note 41 at p. 47.
43. Right of Passage Over Indian Territory Case, I.C.J. Rep. (1957), p. 177.
44. (1876) Ex. D. 63.
45. (1937) P.C.I.J., Series A.B. Case No. 70.
46. Pub. P.C.I.J., (1928), Series A, No. 17.
47. Pub. P.C.I.J. (1964), Series A, No. 2.
48. I.C.J. Rep. (1962), p. 6.
49. I.C.J. Rep. (1964), p. 6.
49a. I.C.J. Reports (1985) p. 6.

Burkina Faso did not object to the said contention, it said that it was not clear as to what would be its practical objective in this case because in the delimitation of boundary, there is no equivalence of equity principles. The Chamber of International Court of Justice held that it can take the help of that equity which both the parties have accepted or given consent to.

The International Court have recognised as general principles : (i) good faith; (ii) responsibility ; (iii) prescription ; (iv) in the absence of any express provision to the contrary, every Court has right to determine the limits of its own jurisdiction ; (v) a party to a dispute cannot himself be an arbitrator or judge ; (vi) ***res judicata*** ; and (vii) in any judicial proceeding the Court shall give proper and equal opportunity of hearing to both parties.[50] Since these principles have been recognised and applied by the Courts many a times, B. Cheng has, and rightly too, suggested that these and such other principles should be codified.[51]

In regard to the general principles recognised by civilized nations, the Soviet view is very narrow. According to Kazimierz Grzybowski, "... in a world consisting at this time of two opposed world systems, there are no such general principles except those established by international agreement as part of international law." [52] This view does not seem to be correct because if this view is accepted, the International Court will have no right in respect of recognition of general principles. With the breaking up of Soviet Union and end of communism in Russia, cold war has ceased and hence this view has lost its importance. J.L. Brierly has rightly written that general principles of law is such a source which the Courts have referred in past also and its inclusion in Article 38 (1) (c) of the Statute of International Court of Justice shows clearly that the positivist doctrine, according to which International law is a body of rules on which the States have given consent, has been rejected.[53] "From the theoretical standpoint, the provision for applying the 'general principles' has been regarded as 'sounding the death-knell, of positivism, in as much as it explicitly rejects the broad positivist view that customs and treaties are to be considered the exclusive sources of international law." [54] Thus by recognising general principles of law recognised by civilized States, dynamism of international law and the creative function of the International Court have been ensured. Indeed, it "enables rules of law to exist which can fill the gaps or weaknesses in the law which might otherwise be left by the operation of custom and treaty, and provides a background of legal principles in the light of which custom and treaties have to be applied and as such it may operate to modify their application." [55]

4. Decisions of Judicial or Arbitral Tribunals and Juristic Works

*International Judicial Decisions.**—In the modern period International Court of Justice is the main International Judicial Tribunal. It was established as a successor of the Permanent Court of International Justice. It may, however, be noted that the decision of International Court of Justice does not create a binding general rule of international law. Article 59 of the Statute of the International Court of Justice makes it clear that the decisions of the court will have "no binding force except between the parties and in respect of that particular case". Earlier decisions of the Court are not binding on the Court itself and the Court is free to deviate from its earlier decisions. However, ordinarily the Court does not deviate from its earlier decisions and it changes its earlier decisions only in very special circumstances. Thus while in principle it does not follow the doctrine of precedent, in practice, it ordinarily follows it. So far as the advisory opinion of the International Court of Justice is concerned, it is not binding at all. But it clarifies the rule of international law on a particular point or matter. According to Article (38)(1) (d), subject to

50. B. Cheng, Supra Note 41, at pp. 40-50.
51. Ibid, at p. 53.
52. Soviet Public International Law (A.W. Sijthoff Leyden, (1970), p. 30.
53. The Law of Nations Sixth Edition (1963), p. 63.
54. Starke, note 1 at p. 35.
55. Oppenheim's International Law, note 4, at p. 40.

* See for I.A.S. (1974), Q. No. 1(b) ; C.S.E. (1982) Q. 5(a) ; C.S.E. (1993) Q. 5(a).

the provisions of Art. 59 judicial decisions are "subsidiary means for the determination of rules of law". Thus judicial decisions, unlike customs and treaties, are not direct sources of law, they are subsidiary and indirect sources of International law.

State Judicial Decisions.—State judicial decisions may become rules of international law in the following two ways :—

(a) State judicial decisions are treated as weighty precedents. In the words of Chief Justice Marshall of the Supreme Court of America, "The decisions of the court of every country show how the law of the nations in the given case is understood in that country will be considered in adopting the rule which is to prevail in that case." [56]

(b) *Decisions of the State Courts may become the customary rule of international law in the same way as customs are developed.*

Decisions of International Arbitral Tribunals.—In the view of some jurists the decisions of International Arbitral Tribunals cannot be treated as source of international law. These jurists have, rightly too, pointed out that in most of the arbitral cases, arbitrators act like mediators and diplomats rather than as judges. The *Kutch Award* (1968) bears testimony to this fact. Consequently, their decisions should be treated as source of International law. Generally the said criticism is correct. It may, however, be noted that some of the decisions of the Permanent Court of Arbitration are treated as weighty precedent and can be regarded as source of International law. Judge Lauterpacht has aptly written, "One of the reasons usually given for its (*i.e.* Permanent Court of Arbitration) inadequacy was that the awards rendered by its tribunals were not legal in form and substance; that they tend to confuse law with a dipiomatic solution aiming at pleasing both parties. It may be difficult to substantiate that charge. An analysis of the awards given by tribunals under the aegis of the Permanent Court of Arbitration, before and after the first world war, must reveal that their decisions were legal awards in form and substance." [57]

Juristic works.—Although juristic works cannot be treated as an independent source of international law, yet the view of the jurists may help in the development of law. The views of the jurists are not direct sources of international law. But they sometimes become instrumental in the development of international customs. According to Article 38 of the International Court of Justice, the works of highly qualified jurists are subsidiary means for the determination of the rules of international law. The importance of the works of the jurists has been stressed by Justice Gray in *Paquete Habana.*[58] In the words of Justice Gray, "..... Where there is no treaty and no controlling executive of legislative act or judicial decision, resort must be had to the customs and usages, of civilized nations and as evidence of these, to the works of jurists and commentators who by years of labour, research and experience have made themselves peculiarly well-acquainted with the subjects which they treat. Such works are resorted to by judicial tribunals not for the speculations of their authors concerning what the law ought to be but for trustworthy evidence of what the law really is". This case deals with seizure of fishing vessels, its cargoes and capture of sailor's during the state of blockade.

The *Paquete Habana* and the *Lola* were two fishing vessels with Spanish flags on them. In 1898, during the war between America and Spain, the warships of America blockaded the northern coast of Cuba, which was then a colony of Spain. The American warships seized these fishing vessels and in order to punish them started proceedings against them in the District Court of America. The District Court declared the fishing vessels and its cargoes as prize. The owners of the ship preferred an appeal in the Supreme Court of America against the said order. The Supreme Court of America reversed the decision of the lower court and ruled that the claimants be given the money derived from the sale of vessels, cost of the case and compensation. On the basis of the precedents and the established rules of international law, the court concluded that the fishing vessels and unarmed sailors who pursued their work honestly and peacefully,

56. Thirty Hoghsheads of Sugar, *Bentzon v. Boyle*, (1810) 3 Cranch 191 at p. 198.
57. Sir Hersch Lauterpacht, The Development of International Law by the International Court (1958), pp. 5-7.
58. (1900) 175 U.S. 677 at p.700.

could not be seized or apprehended during the state of blockade. International Law exempts such fishing vessels and their sailors from seizure during the state of blockade.

5. Decisions or determinations of the organs of International institutions*

Before the establishment of League of Nations, International Customs and International Conventions were recognized as the main source of International Law. In addition to these main sources, juristic works and decisions of judicial and arbitral tribunals were regarded as subsidiary means for the determination of rules of law. The statute of PCIJ under Art. 38 incorporated these sources and also introduced one new source namely "General principles of law recognised by civilized nations". Article 38, however, did not at all mention decisions or determinations of organs of International institution as source of law. The reason for this was quite obvious that by this time International organisations had not assumed such an important role as they have done now.

The evolution of International organisation represents a significant stage in the history and development of International law. International organisation in its wider sense, is the process of organising complexity of International relations. In a narrow sense, it is an International institution based on multilateral international agreement entered into by sovereign states, its organs having autonomy of will, having permanent organs and having distinct entity or personality separate from its total of its membership. Even before the establishment of the League of Nations, some experiments were made for development of international organisations. They can be classified into three stages. The concert of Europe, a loose association of great powers of Europe, represents the first stage and may be said to contain seeds of present Security Council. The second stage is represented by two Hague Conferences (called Hague system) which contains the seeds of present General Assembly of United Nations. Third stage is represented by the establishment of public international unions such as Universal Postal Union and International Telegraph Union (Both of these are now specialized agencies of U.N..), which contains the seeds of present International secretariat and specialized agencies. The League of Nations may be described as the first comprehensive experiment in the development of International organisation which sought to combine all the above-mentioned three different aspects of international organisation. It has been rightly remarked that League of Nations pioneered all aspects of international organisation. The U.N. has simply further developed, elaborated and perfected these systems.

After the establishment of U.N. and of course the establishment of dozens of inter-governmental organisations which were brought into relationship with the U.N. and called specialized agencies of U.N. International Organisations have become a part and parcel not only of international life but also of national life. Their impact is clearly evident on every aspect of our life. For example if there is a scarcity of foodgrains, F.A.O. comes to the rescue of nations and their people ; if there is a health problem *i.e.* spread of diseases etc. W.H.O. comes to our rescue; in respect of problems of workers and labourers, there is I.L.O. which has assumed such a significant role in this field that its conventions taken as a whole, are called International Labour Code, which is said to be generally binding on all states; there is ICAO which regulates relations of states in respect of International Civil Aviation and the Council of ICAO is competent to decide any dispute relating to obstruction to International Civil Aviation. ICAO Jurisdiction case, *India* v. *Pakistan* (1972) is a glaring example of this.

In fact after the establishment of U.N., most of the development of international law and its codification has taken place through the instrumentality of international organisations. General Assembly, one of the principal organs of U.N., has established International Law Commission which not only surveys the whole field of international law but also prepares drafts and make recommendations to these aspects to General Assembly. The General Assembly in its turn adopts its recommendations and recommends the holding of international conferences for adopting international

* See also for C.S.E. (1993) Q. 5(a).

conventions on different topics. A large number of international conventions have been adopted in this way during last three decades. The I.C.J. which has rendered signal service for development of international law is in fact a judicial organ of U.N. Art. 92 of Charter, says : "The ICJ shall be the principal judicial organ of the U.N. It shall function in accordance with the annexed statute, which is based upon the Statute of PCIJ and forms an integral part of the present charter."

In view of these strong reasons, the decisions and determination of organs are now recognised as an important source of international law. Although they do not find mention in Art. 38 of Statute of ICJ but ICJ itself has recognised it in number of cases. For example, in *Certain expenses of U.N.* the ICJ held that the expenses incurred by U.N. in Suez and Congo crisis could be apportioned among the member states of U.N. by General Assembly. It may be noted here that in both these crises, U.N. armed forces were sent under Uniting for Peace Resolution (1950). The ICJ thus, though indirectly, upheld the validity for Uniting for Peace Resolution. Similarly in *South-West Africa Cases* (1966) Judge Jessup of ICJ remarked that numerous resolutions of General Assembly condemning *apartheid* was declared an International crime by International Convention on the Suppression and Punishment of Apartheid adopted in 1973, (which came into force in 1976), the World Court had declared it as violative of international law and obviously this decision was based on resolutions of General Assembly. As pointed out in the Ninth Edition of Oppenheim's International Law,[59] "The fact that the International Court of Justice, in its numerous judgments and opinions relating to international organisations, has always been able, without remarking upon the incompleteness of Article 38, to dispose of the questions arising for decision, is a strong argument for suggesting that their activities are for the moment at least still properly regarded as coming within the scope of traditional sources of international law..... while at present this can be regarded as merely providing a different forum for giving rise to rules whose legal force derives from traditional sources of international law, there may come a time when the collective actions of the international community within the framework provided by international organisations will acquire the character of a separate source of law." In the view of Starke,[60] organs of international institutions may lead to the development of international law in the following ways :

(i) In international matter their decisions are the intermediate or final steps in the development of customary rules. For example, it was ruled by Security Council of the United Nations that if any member absent from the Security Council meeting then it will not be deemed to be a veto. This decision has helped in the development of the international custom on this point. Similarly, the Security Council can decide whether matter is procedural or important. Such decisions may help in the development of an international custom on the point.

(ii) The resolutions of the organs of international institutions may be binding on the members in regard to the internal matters of the institution.

(iii) Organs of international institution can decide the limits of their competence.

(iv) Sometimes the organs of international institution may make the interpretation of the different provisions of their constitutional instruments. This decision becomes a part of the law of international institution which in its turn becomes a part of the international law.

(v) Some organs of international institutions are empowered to give quasi-judicial decisions. European Economic Community deserves a special mention in this connection. Organs of international institutions submit some matters to the Committee of Jurists for their opinion. The opinion of the Committee of Jurists is of great significance and may help in the development of customary rule of international law.

(vi) An organ of international institution may refer a matter to the International Committees of Jurists for its opinion or for investigation of a legal problem. The opinion of such committees "bear some weight and authority."

59. See note 4, at p. 46.
60. Starke, Supra Note 1 at p. 53; see also Openheim's International Law, note 4, at pp. 47-50.

In case concerning *Military and Para-Military Activities in and against Nicaragua,*[61] the International Court of Justice relied on resolutions passed by international organisations, *inter alia,* and cited them as evidence of the existence of customary rules. Thus, as evidence of customary rule prohibiting the use or threat of force in international relations, the court cited the Declaration on Principles of International Law concerning Friendly relations and Cooperation among States in accordance with the Charter of the U.N. As evidence of customary rule of non-intervention, the court cited the said Friendly Relations Declaration, the Declaration on the Inadmissibility of Intervention. As evidence of a customary right of self-defence, the court cited the Friendly Relations Declaration and the General Assembly's definition of Aggression (1974).[62]

Reference may also be made here to the decisions of the U.N. Administrative Tribunal. In the case of *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal,*[63] the International Court of Justice held that the Tribunal was independent and truly judicial body pronouncing final judgments without appeal within the limited field of its functions and not merely an advisory or subordinate organ. Its judgments were therefore binding on the U.N. organisation and also upon the General Assembly (which established the Tribunal). In other subsequent two cases, namely, *Application for Review of Judgment No. 158 of the United Nations Administrative Tribunal and Application for Review of Judgment No. 273 of the United Nations Administrative Tribunals* also the International Court of Justice upheld the decisions of the Tribunal.

Ex aequo et bono

After enumerating the sources of International law in Article 38 (1), Article 38(2) of the World Statute qualifies Article 38(1) by providing : "This provision shall not prejudice the powers of the court to decide a case *ex aequo et bono,* if parties are agree thereto." Thus, as pointed out by Manely O Hudson, "In a case where the parties are agreed that it may decide *ex aequo et bono,* the provision in the Statute would seem to enable the courts to go outside the realm of law for reaching its decision. It relieves the courts from the necessity of deciding according to law. It makes possible a decision based upon considerations of fair dealing and good faith, which may be independent of or even contrary to the law." An International Tribunal can decide a dispute *ex aequo et bono,* and go outside the realm of law only if such power has been conferred on it by mutual agreement between the parties.[64]

Some other sources of International Law

Besides the above sources of International law, following are some of the other subsidiary sources of international law :

(1) *International Comity.*—The mutual relations of nations are based on the principle of comity. In other words, when a State behaves in a particular way with other States, the latter have also to behave in the same way. According to Prof. Oppenheim, international comity has helped in the development of international law.

(2) *State Paper.*—In the modern period almost all the civilized States have diplomatic relations with each other. They send letters to each other for mutual interests. These letters are sometimes published. A study of these letters sometime reveals that certain principles are repeatedly followed by States in their mutual intercourse. Sometimes these State Papers help in the solution of a conflict or controversy. In the famous case of *The Caroline (1841),* the note of Mr. Webster, Secretary of State of the U.S. deserves a special mention here. In his note Mr. Webster said that for intervention on the ground of self-defence, the necessity must be "instant, overwhelming leaving no choice of means and no moment for deliberation". Since then it has been recognized as a rule of international law. "Occasionally an international controversy clears up a disputed legal

61. I.C.J. Reports, 1986, p. 14.
62. *See* Michael Akehurst, *"Nicaragua* v. *United States of America"*, I.J.I.L., Vol. 27 (1987), p. 357 at pp. 358-359.
63. I.C.J. Rep. (1954) p. 47.
64. See Frontier Dispute case (*Burkina Faso* v. *Mali*), ICJ (1985) Rep. 6.

point or advances the application of principles that have before received little more than an otiose assent." [65]

(3) *State guidance for their officers.*—It is mostly seen that a number of matters of the Governments of respective States are resolved on the advice of their legal advisers. These advices are also, therefore, sometimes treated as sources of international law.

(4) *Reason.*—'Reason' has occupied a special position in all the ages. In modern period also it occupies an important place. It has performed a special role in the development of international law. Whenever there is no rule of international law to guide the court, the matter is resolved on the basis of reason.[66] By reason, we mean the judicial reason through which principles are discovered to face the new situations which are considered valid by the jurists. When there is no treaty or particular rule of international law to resolve any question, the court applies judicial reason. As pointed out by Pollock, "The law of nations is founded on justice, equity, convenience, and the *reason of the thing* and confirmed by long usage.[67]

The view of Pollock seem to be correct in view of the conditions prevalent before the second world war because then most of the rules of International Law were in the form of customs and hence the court could take the help of justice, equity, convenience and the reason of the thing to decide a dispute. The position has, however, changed after the second world war when States entered into a large number of treaties to regulate their relations in different fields. When clear provisions of law are incorporated in treaties, the scope of applying the principles of equity, justice, convenience and the reason of the thing diminishes. The importance of these principles, however, does not completely end because whenever the question of interpretation of any provision of a treaty arises or where there is some ambiguity, the court interprets it on the basis of the principles of equity, justice, convenience, and the reason of the thing. The court gets an opportunity of applying these principles particularly when there is some ambiguity about the meaning of any provision.

(5) *Equity and Justice.**—In the *Barcelona Traction case*,[68] Sir Gerald Fitzmaurice emphasized the need for a body of rules and principles of equity in the field of international law. "Equity" is used here in the sense of considerations of fairness, reasonableness, and policy often necessary for the sensible application of the more settled rules of law. Strictly, it cannot be a source of law, and yet it may be an important factor in the process of decision. Equity may play a dramatic role in supplementing the law or appear unobtrusively as a part of judicial reasoning. The principle of the 'exception' whereby existing rules are qualified to meet special cases, is a form of equity which takes on the form of judicial legislation." [69] Further, "equity, in the present context, is encompassed by Article 38(1)(c) of the statute, and not by Article 38 (2) which provides: "This provision..... shall not prejudice the power of the court to decide a case *ex aequo et bono* if the parties agree thereto". This power of decision *ex aequo et bono* involves compromise, conciliation, and legislation in a friendly settlement, whereas equity, in English sense is applied as a part of the normal judicial function." [70]

In *North Sea Continental Shelf Cases*,[71] the International Court also observed : "Whatever the legal reasoning of a court of justice, its decisions must definitely be just, and therefore in that sense equitable. Nevertheless, when mention is made of a court dispensing justice or declaring the law, what is meant is that the decision finds its objective justification in the consideration lying not outside but within the rules, and in this

65. Lawrence, Principles of International Law, Seventh Edition, p. 109.
66. In such a situation, it is the duty of jurist to resolve the dispute or conflict on the basis of reason. [See the case of the Eastern Extension, etc. Telegraph Co. Ltd., Nelson's Report, p. 75 quoted in Cory's Arbitration, p. 2261.]
67. See Pollock, Essay in the Law, p. 64.
* See for I.A.S. (1967), Q. 1 : For answer see also matter discussed above under the heading "Reason".
68. I.C.J. Rep. (1970), p. 3 at p. 5.
69. Ian Brownlie, Principles of Public International Law, Second Edition (1973), p. 26.
70. Ibid, at p. 27.
71. I.C.J. Reports, 1969, p. 3 printed at I.J.I.L., Vol. 10 (1970), pp. 67-99.

field it is precisely a rule of law that calls for the application of equitable principles. There is subsequently no question in this case of any decision *ex aequo et bono* such as would only be possible under the conditions prescribed by Article 38 paragraph 2, of the court's statute." [72]

In the modern times more attention is being given to the principles of equity and justice.[73] It has been pointed out[74] that there is some evidence of the application of the principles of equity and justice. Three such areas were demonstrated in the *North Sea Continental Shelf cases* [75] (1) The Practice of States in their International Relations; (2) International Customary Law and (3) the Administration of Justice.

The principles of equity and justice make their contribution in the international law-making[76] and in the codification and development of international law.[77] The principles of equity and justice have been referred again and again in the context of new International Economic Order and new law of the Sea. Following suggestions and conclusions given in a article[78] deserve mention here : (1) The role of equity in international law is a pervasive one, specific areas of application includes: (a) international customary law, (b) the administration of justice; (c) the settlement of disputes, judicial and non-judicial; (d) the practice of states ; (e) international diplomacy; (f) the structure and functioning of international institutions; and (g) international law-making. (2) There does not exist any universal or widespread agreement regarding the precise meaning of equity..... (3) In the international system, equity as applied to a particular case, situation or circumstance, would usually turn out to mean in effect the view of a decision maker or a consensus of decision-makers as to what is reasonable and just in the particular case, situation or circumstance. (4) A principal objective of international society is to build a more equitable and just society. Law-making should reflect this principal objective of international society and should therefore be guided by the principles of equity and justice..... (5) Governments refer to equity as a flexible general standard. Its invocation is often in general terms and the consequences of its application are not set out in detailed form..... (6) The International Law Commission and the Sixth Committee are also guided by this spirit in their codification and development of International law. However, the International Law Commission, with the support of the Sixth Committee, attempts to go one stage further and to translate this spirit into actual rules. (7) In some instances equity is resorted to where it has proved difficult to agree on a more specific or precise formulation..... Recourse to formulations couched in the language of equity can help to produce agreements and in this sense equity is an important tool of international legislation."

Indeed, "Equity as a legal concept is a direct emanation of the idea of justice." This was observed by the International Court of Justice in *Continental Shelf case* (*Thunisia/Libyen Arab Jamahuriya*) and was afifrned in *Frontier Dispute case* (*Burkina Faso* v. *Mali*)[79]

Thus although equity, and justice have not been enumerated as sources of International law in Article 38(1) of the statute of the International Court of Justice, they play an important role in the international law-making and in the codification and progressive development of international law.

---

72. Ibid, at p. 94; see also Advisory opinion in the case of Judgements of the Administrative Tribunal of the I.L.O. upon complaints against UNESCO, I.C.J. Reports 1956, at p. 100; Corfu Channel case, I.C.J. Rep. 1949, p. 249.
73. See B.G. Ramcharan, "Equity and Justice in International Law-Making". I.J.I.L. Vol. 15 (1975), p. 47; See also B. Cheng, "Justice and Equity in International Law". Current Legal Problems, Vol. 8 (1955), pp. 185-211; G. Schwarzenberger, "Equity in International Law", Year Book of World Affairs, Vol. 26 (1972), pp. 346-369.
74. See Ibid, at p. 47.
75. I.C.J. Reports 1969, p. 3.
76. Ramcharan, note 73, at p. 48.
77. Ibid, at pp. 49-55.
78. Ibid, at pp. 61-62.
79. I.C.J. (1985) Rep. 6.

Resolution and Declarations of General Assembly of the U.N. as the Source of Universal International Law.[80]—There is a great controversy in regard to the legal significance of the resolutions and declarations of the General Assembly of the United Nations. Some jurists are of the view that they are only of political significance and have no legal importance.[81] On the other hand, some jurists hold the view that under certain special circumstances they may have legal implications and some of them may even have binding effect.[82]

Ordinariiy, it may be said, as Judge Jessup[83] pointed out, that the resolutions of the General Assembly are not of true legislative character, Judge Jessup has, however, pointed out that if on a particular subject many similar resolutions are passed (as on *apartheid*), then they indicate the contemporary international standard and the court is bound to take them into consideration while giving its decision.[84] Besides this, those resolutions which are of law-making character, serve as an important link in the development of new principles of international law.[85] an Brownlie has also written that the resolutions of the General Assembly are not binding upon the members but when they are related to the general rules of international law and are passed by the majority of States, they become the evidence of the view of the States.[86]

The decisions taken by the General Assembly prove to be helpful in the development of International law. These decisions are in the form of recommendations and resolutions and some of them are never implemented yet they are helpful in the agreement between States and contribute in preparing the necessary environment for the development of the rules of International law.[87] The resolutions and declarations of the General Assembly have capacity to become the sources of Universal International law.[88] In *Reservation to Convention on Genocide,*[89] Judge Alvarez aptly remarked, "..... they (*i.e.,* resolutions of the General Assembly) have yet not acquired a binding character, but they may acquire if they receive the support of public opinion....." Further, "in short, the Assembly ..... is tending to become an international legislative power. In order that it may actually become such a power, what is needed that governments and public opinion should give it support.....". "As pointed out by Rosalyn Higgings, "Collective acts of States, repeated by and acquiesced in by sufficient numbers with sufficient frequency eventually attain the status of law." [90]

Thus we see that the resolutions and declarations may serve as important means for the development of International law. They prove to be greatly helpful in the process of treaty-making and agreements between States on various subjects. They have the capacity to become sources of Universal International law and if wisely used, they can prove to be very effective in the development of international law. In the words of Manfred Laches,[91] the then President of the International Court of Justice : "A new phenomenon in international life is the activity of this Assembly itself. I refer to your resolutions. Among the 3,000 adopted in 27 years, not a few have made history. They have become a

80. See also S.K. Kapoor, "Significance of U.N. General Assembly Resolution", II S.C.J. (1972), p. 8.
81. See J. Castaneda, Legal Effects of U.N. Resolutions (New York, N.Y., 1969), pp. 3-8.
82. See for example, D.H.N. Johnson, "The Effect of the Resolution of the General Assembly of the U.N." BYBIL, Vol. 32 (1955-56), p. 97.
83. See Judgment of Judge Jessup in South West African Cases (Second Phase), I.C.J. Rep. (1966), p. 6 at pp. 432, 441.
84. Ibid., at p. 441.
85. Leo Gross, "The United Nations and the Role of Law", Int. Orgn. (1956), p. 537 at p. 557.
86. Ian Brownlie, Principles of Public International Law, p. 11.
87. See BYBIL (1965-66), p. 201.
88. Leo Gross, "Sources of Universal International Law", Asian States and the Development of Universal International Law (1972), p. 189 at p. 209.
89. I.C.J. Rep. (1961), p. 15 at p. 59 : see also Richard A. Falk, on "the Quasi Legislative Function of the General Assembly", A.J.I.L., Vol. 60 (1966), pp. 782-791.
90. Rosalyn Higgins, The Development of International Law Through the Political Organs of United Nations (London; Oxford University Press, 1963), p. 2, ; see also Michel Virally, "The Sources of International Law" in Sorensen, Manual, of Public International Law, p. 162.
91. From his commemorative speech delivered at a special meeting of the U.N. General Assembly on 12 October, 1973, appearing in I.J.I.L., Vol. 14 (1974) p. 1 at p. 5.

stepping stone, a *stage in the political and legal process, a factor in the development of International law.*" Examples of some of the important law-making resolutions of the General Assembly, according to Brownlie, are : the resolution which affirmed the principles of international law recognized by the judgment of the Nuremberg Tribunal, the resolution on prohibition of the use of nuclear weapons for war purposes, the Declaration on the Granting of Independence to colonial countries and peoples, the Declaration on permanent Sovereignty over Natural Resources and the Declaration of Legal Principal Governing Activities of States in the Exploration and use of outer-space.[92] Declaration on principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the U.N. (1970). Declaration on Inadmissibility of Intervention (1965), Universal Declaration of Human Rights (1948), Declaration of Principles Governing the sea-bed and ocean floor and the sub-soil thereof (1970) etc. are resolutions which belong to the same category.[93] "All these declarations are not ordinary international treaties or conventions and were not subject to ratification. Nevertheless, there is a wide consensus that these declarations actually established new rules of international law binding upon old States. This is not treaty making but a new method of creating customary international law.[94] Finally, "In a rapidly changing world the United Nations has found a method albeit restricted by the rule of unanimity or quasi-unanimity, to adopt the principles of its Charter and the rules of customary international law to the changing times with an efficiency which even its most founders did not anticipate." [95]

Order of use of sources of international law

After having discussed the different sources of international law, the next important point that deserves our attention is the order in which these sources of international law are to be used. An authoritative order of the use of sources of international law is given in Article 38 of the Statute of International Court of Justice. The sources of international law have been mentioned in the said Article in the following order : (a) International Conventions, (b) Customs, (c) General principles of law recognized by civilized nations, (d) Judicial decisions and juristic opinion as subsidiary means for the determination of rules of law. The wordings of Article 38 suggest that sources are to by applied in the order in which they are mentioned and therefore treaties will take precedence over the other sources. But as pointed out by Manley O. Hudson, "Yet Article 38 did not establish a rigid hierarchy. In applying a provision in a convention, the court may have to take into account the customary law prevailing when the convention was entered into, or general principles of law, as well as judicial precedents. A distinction may also have to be drawn between the categories listed, for they are not on an equal footing while it is possible to apply conventional or a customary rule of law, it seems more proper to say that general principles of law, judicial precedents, and juristic writings have only the nature of sources from which an applicable rule may be deduced." [96]

In *Nicaragua* v. *U.S.A.*[97] the World Court by majority has taken the view that the sources of international law are not hierarchical but are necessarily complimentary and inter related.

---

92. Ian Brownlie, Principles of Public International Law (1973), p. 14.
93. See Louis B. John, "The Development of the Charter of the U.N. : The Present State" in the State of International Law and Other Essays (Kluwer—The Netherlands—1973), p. 39 at pp. 50-54.
94. Ibid at p. 52.
95. Ibid at p. 53
96. See Manely O. Hudson, The Permanent Court of International Justice, 1920-1942 : (New York : The Macmillan Company, 1943), p. 606.
97. I.C.J. (1986) Rep. 14.