NATIONAL OPEN UNIVERSITY OF NIGERIA

COURSE CODE :LAW 512

COURSE TITLE:PUBLIC INTERNATIONAL LAW II

COURSE GUIDE

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Adapted from	External Programme University of London
Adapted by	Miss Omotayo Tekaron Obayemi National Open University of Nigeria
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Introduction

This Course Guide is intended to help you study public international law. Public international law was once almost entirely concerned with the regulation of the relations between nations. Particularly since the Second World War, however, it has become increasingly concerned with the rights and obligations of individuals beyond the jurisdiction of the state within which they live. But because it is public international law we will not be concerned with matters of private international law. Thus international commercial disputes and international disputes between individuals will be beyond our focus unless a state or its government is an interested party. For the sake of convenience "international law" will be used as an abbreviation for public international law in this Course Guide.

Each unit of this Course Guide will isolate a topic within international law and will indicate to you its most significant features, will provide a brief overview of the relevant law, and will direct you to essential reading with suggestions for further reading. Obviously all the topics interrelate, and links will be suggested to other units. Within each Module you will find exercises and activities which will enable you to monitor your progress and gain confidence in your comprehension. In addition each unit contains Self Assessment Exercises and appropriate answers.

The most attractive feature of studying international law is that it is always topical. It is relevant to all of the major international events of the day whether they be concerned with the international use of force; the activities of such international organisations as the United Nations,

the World Bank or the International Monetary Fund; conflict in the Middle East or elsewhere; the international alleviation of poverty and illness; the regulation of the exploitation of the seabed (including the extraction of oil); global warming; or the possession and use of nuclear weapons. Clearly not all these topics can be considered in this course, but those that make an appearance would have been chosen because they should enable you to understand and explore the possibilities and limitations of international law in resolving (or pre-empting) disputes which may arise. The units will make suggestions concerning the relevance of the topics to contemporary issues.

Course Aims

The aim of this course is to provide an understanding of the role and function of international law.

Course Objectives

At the end of this course, you should be able to:

(i) Explain the issue of self-determination and territory in international law;
(ii) Discuss the peaceful settlement of disputes in international law;
(iii) Discuss the use of force in international law;
(iv) Explain human rights in international law;
(v) Show the relationship between international law and power.

Working through this Course

To complete this course, you are advised to read the study units, read recommended books and other materials provided by NOUN. Each unit contains Self Assessment Exercises, and at points in the course you are required to submit assignments for assessment purposes. At the end of the course, there is a final examination. The course should take you about 20 weeks to complete. You will find all the components of the course listed below. You need to allocate your time to each unit in order to complete the course successfully and on time.

Course Materials

The major components of the course are:

- The Course Guide
- Study units
- Textbooks

- The Assignment File
- The Presentation Schedule

Study Units

There is no one way to study international law. There is however considerable consensus about the topics that are central for an understanding of international law. A plethora of modem textbooks has appeared recently and as a generalisation they may be divided between those that are rule focused and those which are context focused. The former seem to regard international law as a "pure" subject in the sense that it is seemingly sensible to study the rules in isolation from events. For various reasons this approach is rejected in this course guide, primarily because it is a very dull way of learning. It also has the effect of disguising the politics which always underlie international law. You will be required to read material which will always emphasise this aspect. Much of the information you will be given is about events to which international law is applicable, rather than simply about the rules themselves.

We deal with this course in 17 study units divided into 4 Modules as follows:

Module 1

Unit 1	The Concept of Self-determination in International Law
Unit 2	The United Nations Charter, Self-determination and Decolonisation
Unit 3	Self-determination after the Cold War
Unit 4	Ethnic Nationals in Nigeria and the Right to Self-determination
Unit 5	States, Territory and Recognition

Module 2

Unit 1	The Peaceful Settlement of Disputes in International Law
Unit 2	The Contentious Jurisdiction of the ICJ Exemplified by *Nicaragua V. USA*
Unit 3	The Advisory Jurisdiction of the ICJ and International Arbitration

Module 3

Unit 1	Use of Force in International Law
Unit 2	The Charter of the United Nations
Unit 3	Self-defence in International Law

Unit 4 Humanitarian Intervention

Module 4

Unit 1 Human Rights in International Law
Unit 2 The International Bill of Human Rights
Unit 3 Principal International Human Rights Treaties
Unit 4 International Law in a Unipolar World
Unit 5 The Case of Israel and International Law

Each study unit consists of one week's work and includes specific objectives, directions for study, reading material and Self Assessment Exercises (SAEs). Together with Tutor Marked Assignments, these exercises will assist you in achieving the stated learning objectives of the individual units and of the course.

This Course Guide takes you through the international law course in a structured and systematic way. Each unit covers a particular topic or group of topics. The order is loosely based upon the three primary textbooks listed below, but because we are also concerned with contemporary issues in international law there is no total correlation.

Textbooks and References

Certain books have been recommended in the course. You should read them where you are so directed.

Primary Textbooks

Dixon, M. (2005). *Textbook on International Law* (5th ed.). Oxford: Oxford University Press [ISBN 0199260729].

Cassese, A. (2005). *International Law* (2nd ed.). Oxford: Oxford University Press [ISBN 0199259399].

Kaczorowska, A. (2005). *Public International Law*.(3rd ed).London: Old Bailey Press [ISBN 1858366070].

These texts will be referred to in an abbreviated form, for example: 1. Dixon, Chapter 2: "The sources of International Law", pp.xx-xx.

These books are very different in their approach but are complementary in their content. The most "legal" is Kaczorowska and the Course Guide usually relies on you to have read at least this. It is very "user-friendly" and clear with a lot of interesting contexts". Dixon often raises academic questions in a helpful and comprehensible form. Cassese is the least orthodox, but in its own terms very interesting with an approach that

might be described as "continental". His categories and themes do not always fit easily with more orthodox approaches but he is a stimulating author.

Supplementary Texts

Evans, M. (2003). *International Law.* Oxford: Oxford University Press [ISBN 0199251142].

Cassese, A. (1986). *International Law in a Divided World.* Oxford: Clarendon [ISBN 0198761945].

Brownlie, I. (2003). *Principles of Public International Law* (6th ed.). Oxford: Oxford University Press [ISBN 0199260710].

Van Dervort, T. (1998). *International Law and Organization.* Thousand Oaks, CA: Sage [ISBN 0761901892].

Shearer, I. (1994). *Starke's International Law* (11thed.) (New Edition Expected Soon). London: Butterworths [ISBN 0406016232].

Documents

Evans, M. (2005). *Blackstone 5 International Law Documents* (7th ed.). Oxford: Oxford University Press [ISBN 0199283125].

Reports and Journals

There are large numbers of these but you should occasionally consult (if possible) any of the following:

- *European Journal of International Law* (EJIL)
- *International and Comparative Law Quarterly* (ICLQ)
- *American Journal of International Law* (AJIL).

Electronic Resources

A vast amount of international law material is available on the web. A very useful portal is LAWLINKS which is organised by the University of Kent Law Librarian. It is to be found at: http://library.kent.ac.uk/library/lawlinks/

Useful web sites

United Nations Homepage - http://www.un.org

International Law Commission (ILC) -

http://www.un.org/law/ilc/index.htm

International Court of Justice (ICJ) - http://wwwicj-cij.org

European Union (EU) - http://www.europa.eu.int/index-en.htm

The African Union (AU) - http://www.africa-union.org

International Court of Justice (ICJ) - http://www.icj-cij.org
For current declarations of states recognising the compulsory jurisdiction of the ICJ, see UN Treaties Collection (http://www.untreaty.un.org), Multilateral Treaties, Chapter 1 (4).

International Criminal Court - http://www.icc-cpi.int/home.html
Amnesty International - http://www.amnesty.org

University of Minnesota Human Rights Library is at:
-http://wwwl.umn.edu/humanrts/

A fantastic human rights website which includes the full text of treaties, UN docs, regional docs, US docs, asylum/refugee docs, etc.

For Africa, see the joint project of Minnesota and Makerere University at - http://wwwl.umn.edu/humanrts/africa/index.html.

Assessment

There are two aspects of the assessment of this course; the Tutor-Marked Assignments and a written examination. In doing these assignments, you are expected to apply knowledge must have acquired from the Course. The assignments must be submitted to your tutor for formal assessment in accordance with the deadlines stated in the presentation schedule and the assignment file. The work you submit to your tutor for assessment will count for 30% of your total score.

Tutor-Marked Assignment

There is a Tutor-Marked Assignment at the end of every unit. You are required to attempt all the assignments. You will be assessed on all of them but the best 3 performances will be used for assessment. The assignments carry 10% each.

When you have completed each assignment, send it together with a (Tutor Marked Assignment) form, to your tutor. Make sure that each assignment reaches your tutor on or before the deadline. If for any reason you cannot complete your work on time, contact your tutor

before the assignment is due to discuss the possibility of an extension.

Extensions will not be granted after the due date unless under exceptional circumstances.

Final Examination and Grading

The duration of the final examination for LAW 512 – Public International Law II is three hours and will carry 70% of the total course grade. The examination will consist of questions, which reflect the kinds of Self Assessment Exercises and the Tutor- Marked Assignment you have previously encountered. All aspects of the course will be assessed. You should use the time between completing the last unit, and taking the examination to revise the entire course. You may find it useful to review your Self Assessment Exercises and Tutor-Marked Assignments before the examination.

Course Marking Scheme

The following table lays out how the actual course marking is broken down.

Assessment	**Marks**
Assignments 1-4 (the best three of all the assignments submitted)	Four assignments, marked out of 10% Totaling 30%
Final examination	70% of overall course score
Total	100% of course score

Course Overview /Presentation Schedule

Unit	**Title of Work**	**Week's Activity**	**Assessment (End of Unit)**
	Course Guide	1	
	Module 1		
1	The Concept of Self-Determination in International Law	1	Assignment 1
2	The United Nations Charter, Self-Determination and Decolonisation	1	Assignment 2
3	Self-Determination after the Cold War	1	Assignment 3
4	Ethnic Nationals in Nigeria and the Right to Self Determination	1	Assignment 4
5	States, Territory and Recognition	1	Assignment 5
	Module 2		

1	The Peaceful Settlement of Disputes in International Law	1	Assignment 6
2	The Contentious Jurisdiction of The Icj Exemplified by *Nicaragua V. USA*	1	Assignment 7
3	The Advisory Jurisdiction of the ICJ and International Arbitration	1	Assignment 8
	Module 3		
1	Use of Force in International Law	1	Assignment 9
2	The Charter of the United Nations	1	Assignment 10
3	Self-Defence in International Law	1	Assignment 11
4	Humanitarian Intervention	1	Assignment 12
	Module 4		
1	Human Rights in International Law	1	Assignment 13
2	The International Bill of Human Rights	1	Assignment 14
3	Principal International Human Rights Treaties	1	Assignment 15
4	International Law in a Unipolar World	1	Assignment 16
5	The Case of Israel and International Law		Assignment 17
	Revision	**1**	
	Examination	**1**	
	Total	**20**	

Self-defen
Humanita

How to Get the Most from this Course

In distance learning, the study units replace the lecturer. The advantage is that you can read and work through the study materials at your pace, and at a time and place that suits you best. Think of it as reading the lecture instead of listening to a lecturer. Just as a lecturer might give you in-class exercise, your study units provide exercises for you to do at appropriate times.

You should begin your studies with this Course Guide. The sequence of units has been carefully chosen and you will find it easiest to follow the order provided and reading the recommended textbook pages for each unit as you proceed. The course should develop both in a linear way and in a spiral way in that all the units are interrelated even if the relationship is initially difficult to perceive. Frequently in the subsequent units you will find references to units you have already completed and some you have yet to reach. This is inevitable because of the nature of international law. Although the course is divided into modules, they are not truly discrete and everything affects, and is affected by, the other

modules.

Each of the study units follows the same format. The first item is an introduction to the subject matter of the unit and how a particular unit is integrated with other units and the course as a whole. Next is a set of learning objectives. These objectives let you know what you should be able to do by the time you have completed the unit. You should use these objectives to guide your study. When you have finished the unit, you should go back and check whether you have achieved the objectives. If you make a habit of doing this, you will significantly improve your chances of passing the course.

Self Assessment Exercises are interspersed throughout the units. Working through these tests will help you to achieve the objectives of the unit and prepare you for the assignments and the examination. You should do each Self Assessment Exercise as you come to it in the study unit. There will be examples given in the study units. Work through these when you have come to them.

Facilitators/Tutors and Tutorials

There are 15 hours of tutorials provided in support of this course. You will be notified of the dates, times and location of these tutorials, together with the name and phone number of your tutor, as soon as you are allocated a tutorial group.

Your tutor will mark and comment on your assignments, keep a close watch on your progress, and on any difficulties you might encounter and provide assistance to you during the course. You must send your Tutor Marked Assignments to your tutor well before the due date. They will be marked by your tutor and returned to you as soon as possible.

Do not hesitate to contact your tutor by telephone or e-mail if you need help. Contact your tutor if:

1. You do not understand any part of the study units or the assigned readings;
2. You have difficulty with the self assessment exercises;
3. You have a question or a problem with an assignment, with your tutor's comments on an assignment or with the grading of an assignment.

You should try your best to attend the tutorials. This is the only chance to have face-to-face contact with your tutor and ask questions which are answered instantly. You can raise any problem you encounter in the course of your study. To gain the maximum benefit from course

tutorials, prepare a question list before attending them. You will gain a lot from participating actively.

Summary

While the course is intended to provide an understanding of the role and function of international law, several themes permeate the entire content.

We wish you success with the Course and hope that you will find it both interesting and useful.

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MODULE 1

UNIT 1 THE CONCEPT OF SELF-DETERMINATION IN INTERNATIONAL LAW

CONTENTS

1.0 INTRODUCTION

In this module you are required to think about the relationship between people and territory as understood in international law. For most of us, most of the time, the concept of identity as a national of a state is common sense and unproblematic. We simply know and accept that we are Pakistani, Singaporean Chinese, Nigerian or whatever.

Particularly in Europe few people question their national identity even if they recognise that they are, in addition to being French, Polish or whatever, European by residence, regardless of ethnicity. Obviously in theory and in some cases in fact, individuals may have more than one national identity, but what is significant for us is that for most inhabitants of most long established states, the link between identity and state, captured in nationality, is unproblematic. This is not necessarily so in every part of the world. Within Europe the fact that territory, especially at the margins or borders, has belonged to different states at different times over the last century indicates that an easy identification of an individual with a state, as opposed to identification with territory, is not always simply common sense.

Beyond Europe in much of the world within existing states, the "natural" identification of person with state often has no great history. Decolonisation brought with it state independence, but of course almost invariably within the pre-existing colonial borders. It was the state that achieved independence rather than the state's inhabitants - an important fact that we will explore later. It is sufficient here to observe that in such states it is not unusual for persons to regard the fact of their nationality as much less significant than ethnic, religious or tribal allegiance.

2.0 OBJECTIVES

At the end of this unit, you should be able to:

- trace the development of the concept of self-determination as a principle of limited application
- explain the tension between sovereignty and self-determination.

3.0 MAIN CONTENT

3.1 Before the Creation of the United Nations

It is difficult now to imagine a time when the ordinary population was regarded as of no consequence when it came to determining the state to which the territory they inhabited should belong. Yet for much of history this was overwhelmingly the case. The disposition of territorial sovereignty was within the exclusive power of those (or he) who ruled it - often royalty but always aristocrats in the widest sense. Often the sovereignty of territory was disposed of after, or as the result of, war in which territory was conquered, and this was indeed the most common method by which territory was acquired. The wishes of the inhabitants of such territory, even if known, were simply ignored as being utterly irrelevant. These "rules" of territorial acquisition (and accepted as rules in international law) were simply extended to facilitate and legitimate colonisation. States with sufficient power, or by agreement, asserted title over what became colonial possessions and this ownership came to be recognised both in law and in fact by other independent states. Such was the state of international law.

But the seeds of the concept of self-determination were sown even in the earliest days of colonisation, particularly through the medium of the French Revolution as well as the American War of Independence with the latter asserting that rulers were effectively legitimated by the "consent of the governed". Such developments had their origins in renewed interest in the classical heritage and "Athenian democracy", the writings of political philosophers and a heritage (at least in the UK) of a limited role for parliament. All of these militated towards concern for the role of the populace - or part of it - in government.

That few thought in terms of this consideration extending to colonised peoples reflected a European attitude to race that remained largely unchallenged until the twentieth century, notwithstanding the abolition of slavery. Such an attitude was well expressed in the Treaty of Berlin of 1885, a treaty concerned with the allocation of rights and responsibilities of the European powers (and King Leopold II of Belgium) in Central Africa. Article VI stated:

All the powers exercising sovereign rights or influence in the aforesaid territories bind themselves to watch over the preservation of the native tribes, and to care for the improvement of the conditions of their moral and material well-being, and to help in suppressing slavery, and especially the slave trade. They shall, without distinction of creed or nation, protect and favour all religious, scientific or charitable institutions and undertakings created and organised for the above stated ends, or which aim at instructing the natives and bringing home to them the blessings of civilisation.

Patronising and hypocritical though such sentiments seem today, paving as they did the way for the famous “3 Cs” -commerce, Christianity and civilisation - they yet, as Pakenham points out, provided a commitment of sorts not to be forgotten by humanitarians.

More immediately the idea of self-determination did play a part in the creation of European nation states in the nineteenth century, and in the First World War it fell to President Wilson of the US to extol its virtues. (In fact it seems that initially his purpose for doing so was, at least in the understanding of his allies, to score propaganda points against an enemy that contained within its empires many disparate minority peoples who wished for self-government. This was thought to be true especially of the Ottoman Empire and the Austro-Hungarian Empire. Within the latter there were, apart from Germans and Hungarians, Poles, Croats, Bosnians, Serbians, Italians, Czechs, Ruthenes, Slovenes, Slovaks and Romanians. Overall, 15 different languages were spoken in the Austro-Hungarian empire.)

In January 1918 in Wilson's address to Congress - the famous Fourteen Points Address -his fifth point stated the need for:

A free, open-minded, and absolutely impartial adjustment of all colonial claims, based upon a strict observance of the principle that in determining all such questions of sovereignty the interests of the populations concerned must have equal weight with the equitable claims of the government whose title is to be determined.

This is significant for two reasons. Firstly, the colonial claims he spoke of did not include the colonies of the victorious allies, and secondly, the principle of self-determination is obviously not absolute but merely one factor of importance.

The conclusion of the First World War brought no right of self-determination to colonial peoples and while the maps of Europe and the Middle East were redrawn there was no great consultation with inhabitants. Rather than provide plebiscites or even consultation with such people generally, the Treaty of Versailles only prescribed this process for those living in disputed areas. In other cases minorities were to be protected through "minority treaties" where states were required to enter into agreements to guard and protect minority rights - a process of limited effect.

Colonial peoples were not granted any right of self-determination, but those that were in what were defined as colonies of the defeated states were brought within the "mandate system" whereby territories that were not self-governing were allocated to the victorious powers. This, it was stated, was to provide "tutelage" so that such territories might "advance" to a stage where independence was appropriate.

Article 22 of the League of Nations Covenant stated:

To those colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of the states which formerly governed them and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world, there should be applied the principle that the well-being and development of such peoples form a sacred trust of civilisation and that securities for the performance of this trust should be embodied in this Covenant.

The best method of giving practical effect to this principle is that the tutelage of such peoples should be entrusted to advanced nations who by reason of their resources, their experience or their geographical position can best undertake this responsibility, and who are willing to accept it, and that this tutelage should be exercised by them as Mandatories on behalf of the League.

The character of the mandate must differ according to the stage of the development of the people, the geographical situation of the territory, its economic conditions and other similar circumstances.

Certain communities formerly belonging to the Turkish Empire have reached a stage of development where their existence as independent nations can be provisionally recognised subject to the rendering of

administrative advice and assistance by a Mandatory until such time as they are able to stand alone. The wishes of these communities must be a principal consideration in the selection of the Mandatory.

Other peoples, especially those of Central Africa, are at such a stage that the Mandatory must be responsible for the administration of the territory under conditions which will guarantee freedom of conscience and religion, subject only to the maintenance of public order and morals, the prohibition of abuses such as the slave trade, the arms traffic and the liquor traffic, and the prevention of the establishment of fortifications or military and naval bases and of military training of the natives for other than police purposes and the defence of territory, and will also secure equal opportunities for the trade and commerce of other Members of the League.

There are territories, such as South-West Africa and certain of the South Pacific Islands, which, owing to the sparseness of their population, or their small size, or their remoteness from the centres of civilisation, or their geographical contiguity to the territory of the Mandatory, and other circumstances, can be best administered under the laws of the Mandatory as integral portions of its territory, subject to the safeguards above mentioned in the interests of the indigenous population.

In every case of mandate, the Mandatory shall render to the Council an annual report in reference to the territory committed to its charge.

The degree of authority, control, or administration to be exercised by the Mandatory shall, if not previously agreed upon by the Members of the League, be explicitly defined in each case by the Council.

A permanent Commission shall be constituted to receive and examine the annual reports of the Mandatories and to advise the Council on all matters relating to the observance of the mandates.

There were three categories of mandate. The first was for those considered almost ready for independence, all of which did achieve self-government between 1932 and 1947. Such states, with boundaries redrawn without plebiscite, primarily by France and the UK, included Syria and Lebanon (both under French mandate), and Iraq, Trans-Jordan and Palestine (under British mandate). The second category covered German colonies in central Africa. These were considered to be further from possible independence and were allocated to the UK, France or Belgium.

The third category, consisting of territories thought by the Council of the League of Nations to be incapable of independence and self-government in the foreseeable future, included the former German colonies of South West Africa, mandated to South Africa, and Pacific and other colonies in the Southern hemisphere mandated to Japan, Australia and New Zealand. With the exception of South West Africa (now Namibia), all mandated territories of the second and third categories became 'trust territories' under the Charter of the United Nations.

The mandates were important because they provided, probably inadvertently, the basis for the subsequent movement towards decolonisation. If independence was to be the goal for mandated territories it was difficult to argue that it should not also be the goal for colonies of the victors of the First World War.

3.1.1 The Aaland Islands Case

In the aftermath of the creation of the League of Nations a case arose that has continued contemporary significance. It concerned the sovereignty of the Aaland Islands. These islands occupy a site in the Gulf of Bothnia in the Baltic Sea, between Finland and Sweden. There is one main island and an archipelago of over 6,000 small islands and skerries (small rocky islands usually too small for habitation). Ninety per cent of the population, which is only 27,000, lives on the main island. The population is overwhelmingly Swedish speaking.

The recent history of the islands is that in 1809 they were ceded by Sweden to Russia and they became a part of the semi-autonomous Grand Duchy of Finland. In 1832 the Russians began to fortify the islands but these fortifications were destroyed by the British and French in 1854 as part of the campaign relating to the Crimean War. In the Finnish Civil War of 1918 Swedish troops briefly intervened as a peacekeeping force but were quickly replaced by German troops on behalf of the Finnish “White” government. The inhabitants of the islands wished for the islands to be returned to Swedish sovereignty. Indeed in a petition it was said that more than 95 per cent of the adult population supported this change. Finland resisted such a cession but did offer autonomy. The dispute was referred to the Council of the League of Nations for resolution. In essence the question was whether in such circumstances the wishes of the inhabitants of a territory overcame the territorial rights of the sovereign state of which it was a part.

The Swedish government responded to the decision of the Council by stating that in supporting the cause of the people of the Aaland Islands before Europe and the League of Nations, Sweden was not influenced by the desire to increase her territory. She only wished to support noble

and just aspirations and to defend the right of an absolutely homogenous island population to reunite itself to its mother-country, from which it had been detached by force, but to which it is still united by the ties of a common origin, a common history, and a common national spirit. This population has declared to the whole world its unanimous wish not to be bound to a country to which it had been joined by force of arms alone.

The Swedish government had hoped that an institution established to assist in the realisation of right in international relationships would have favoured a solution of the Aaland question in conformity with the principle of self-determination, since, although not recognised as a part of international law, it has received so wide an application in the formation of the New Europe.

The decision itself stated unequivocally as follows:

1. The sovereignty of the Aaland Islands is recognised to belong to Finland.

2. Nevertheless, the interests of the world, the future of cordial elations between Finland and Sweden, the prosperity and happiness of the Islands themselves cannot be ensured unless (a) certain further guarantees are given for the protection of the Islanders; and unless (b) arrangements are concluded for the non- fortification and neutralisation of the Archipelago.

3. The new guarantees to be inserted in the autonomy law should specially aim at the preservation of the Swedish language in the schools, at the maintenance of the landed property in the hands of the Islanders, at the restriction, within reasonable limits, of the exercise of the franchise by newcomers, and at ensuring the appointment of a Governor who will possess the confidence of the population.

4. The Council has requested that the guarantees will be more likely to achieve their purpose, if they are discussed and agreed to by the Representatives of Finland with those of Sweden, if necessary with the assistance of the Council of the League of Nations, and, in accordance with the Council's desire, the two parties have decided to seek out an agreement. Should their efforts fail, the Council would itself fix the guarantees which, in its opinion, should be inserted, by means of an amendment, in the autonomy law of May, 7th, 1920. In any case, the Council of the League of Nations will see to the enforcement of these guarantees.

In effect, then, the Council of the League elevated existing territorial sovereignty above the wishes of a people even where their physical location and ethnic and linguistic identity were undeniably distinct. Sovereignty originally acquired by force remained sacrosanct. (It is however important to observe that through the good will of the Finnish and Swedish governments the guarantees provided for the autonomous rights of the population have been maintained in an unexceptionable manner.) The decision has been accepted as being of relevance in all contemporary cases attempted or projected secession.

3.1.2 Decolonisation and the Indian Sub-Continent

One other development before the UN Charter concerning self-determination should be remembered. Although the Indian sub-continent did not achieve independence until 1947, its struggle to that end was well-established in the 1930s. This movement enjoyed overwhelming support on the sub-continent and not inconsiderable support in the colonial power, the UK. Independence and self-government was the inevitable end and it is clear that the wishes of the people were irresistible.

What is important for the development of self-determination in this example is that it showed that if a people had sufficient power and unity, a colonial state would have no alternative but to grant what was demanded. Here it was less the exercise of a right than an exercise of power that developed into a right after the creation of the UN. Indeed, it might be argued that the concept of self-determination simply channeled the results of the struggle towards independence.

SELF ASSESSMENT EXERCISE

Can it be argued that the process of self-determination was inadvertently initiated with the mandate system of the League of Nations? (See *Feedback at the end of this unit)*.

4.0 CONCLUSION

The early history of the principle of self-determination is important because it illustrates an accidental historical process. On the one hand the development was not planned nor its significance understood by those responsible for it, but on the other hand it did reflect a change in the power relations in international relations brought about particularly by the First World War. Even so, it should be noted that the international community placed great significance upon sovereignty and there was no suggestion that where sovereignty was settled the wishes of a people or peoples might be able to change this.

5.0 SUMMARY

We have considered the concept of self-determination in international law before the creation of the United Nations. You should now be able to trace the development of the idea of self-determination as a principle of limited application and recognise the tension between sovereignty and self-determination.

ANSWER TO SELF ASSESSMENT EXERCISE

It is difficult to imagine that those who devised the mandate system that was directed towards self-government (even if in the unforeseeable future) foresaw that decolonisation would be an inevitable result. Indeed the colonies of the victorious allies of the First World War were explicitly excluded at this time from international concern. Nevertheless once the principle of progress towards self-government was accepted for some states it was difficult to argue that it should not apply to all.

Perhaps the attempts of European colonial powers to exclude their colonies from UN scrutiny suggested how coercive this argument had become. It should not be forgotten, however, that most of the impetus for independence came from the colonies themselves and not simply in UN discussion. Regardless of whether it was accepted that decolonisation was a right, many colonies would have achieved independence by force.

6.0 TUTOR-MARKED ASSIGNMENT

Why do you think that the Council of the League of Nations decided to ignore the wishes of the inhabitants of the Aaland Islands? Were they right to do so?

7.0 REFERENCES/FURTHER READINGS

Cassese, Chapter 3: *The Fundamental Principles Governing International Relations'* pp.60-68.

Dixon, Chapter 6: *Jurisdiction and Sovereignty*, pp.153-55.

Kaczorowska, Chapter 14: *Self-determination of Peoples*, pp.333-40.

Pakenham, T. (1991). *The Scramble for Africa.* London: Weidenfeld & Nicolson, p.254.

UNIT 2 THE UNITED NATIONS CHARTER, SELF-DETERMINATION AND DECOLONISATION

CONTENTS

1.0 INTRODUCTION

The draft of the UN Charter did not contain any suggestion that the recognised principle of self-determination would ever be conceived of as a right, let alone a human right, and certainly not as a peremptory norm of international law. Nevertheless to some extent this development was foreshadowed by the Atlantic Charter of 1941 when Roosevelt and Churchill stated the reasons why the Second World War was being fought. The second and third principles stated:

Second, they desire to see no territorial changes that do not accord with the freely expressed wishes of the peoples concerned.

Third, they respect the right of all peoples to choose the form of government under which they will live; and they wish to see sovereign rights and self government restored to those who have been forcibly deprived of them.

Within the Charter the principle of self-determination received acknowledgement, but not as a legal right. Its first mention is as a principle in Article 1 (2) where it is stated that one of the purposes of the UN is 'to develop friendly relations among nations based on the respect for the principle of equal rights and self-determination of peoples'. There is a similarly oblique reference in Article 55, while Chapter XII which concerns trusteeship territories explicitly requires that action be taken by those states charged with administering trustee territories to promote the welfare of the native inhabitants and to steer them towards self-government. (The trusteeship territories included those previously

mandated but not yet independent - except South West Africa - together with dependent territories previously held by the defeated states of the Second World War. All territories in this system had either achieved independence or had chosen otherwise by 1995. South West Africa remained under mandate and became independent in 1990.)

From the earliest days of the UN two issues preoccupied firstly the non-aligned states and secondly newly independent states. These were decolonisation and the apartheid regimes. Much energy was directed at ensuring that these two issues remained at the forefront of all UN concerns. Indeed the reason for the very long delay (18 years) between the Universal Declaration of Human Rights and the signing of the International Covenants of Human Rights of 1966 arose from what was seen as persistence to that end on the part of non-aligned and newly independent states, and "bloody-mindedness" by the developed UN states.

2.0 OBJECTIVES

At the end of this unit, you should be able to:

- explain the significance of the UN Charter in the change from self-determination as a principle to self-determination as a human right
- identify the limitations to this right created by the principle of *uti possidetis.*

3.0 MAIN CONTENT

3.1 The Process of Decolonisation

While Chapter XII of the Charter dealt with the mandated territories and territories detached from the states defeated in the Second World War, Chapter XI was concerned with other non-self-governing territories which remained outside of the trusteeship system. Chapter XI is entitled "Declaration Regarding Non-Self-Governing Territories" and was intended to provide for colonial matters. As Cassese points out, this was a provision in which the contribution of small and medium-sized countries was important (Cassese, p.319). Article 73 provided as follows:

Members of the United Nations which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government recognise the principle that the interests of the inhabitants of these territories are paramount, and accept as a sacred trust the obligation to promote to the utmost, within the system of international peace and security established by the present

Charter, the well-being of the inhabitants of these territories, and, to this end:

a. to ensure, with due respect for the culture of the peoples concerned, their political, economic, social, and educational advancement, their just treatment, and their protection against abuses;

b. to develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions, according to the particular circumstances of each territory and its peoples and their varying stages of advancement;

c. to further international peace and security;

d. to promote constructive measures of development, to encourage research, and to co-operate with one another and, when and where appropriate, with specialised international bodies with a view to the practical achievement of the social, economic, and scientific purposes set forth in this Article; and

e. to transmit regularly to the Secretary-General for information purposes, subject to such limitation as security and constitutional considerations may require, statistical and other information of a technical nature relating to economic, social, and educational conditions in the territories for which they are respectively responsible other than those territories to which Chapters XI and XII apply.

While the requirements placed upon colonial powers were scarcely onerous, the very fact that they moved towards accountability of such states to the international community lent a substantial impetus to decolonisation. Cassese explains the reasons for this impetus (pp.328-29). The crucial factors were the liberation movements in colonies and the support they derived from non-aligned and newly independent states within the UN.

At the Bandung Conference of 1955, 29 African and Asian countries met (with China, India and Indonesia playing a prominent role) and agreed to resist colonialism. This conference led to the formation of the "Non-Aligned Movement" in 1961, which was also dedicated to decolonisation. The other factors - the support of the "Second World" (that is, the USSR and its allies) for decolonisation, the economic and social cost to colonial states, the waning support of the USA for European colonial empires and the rise to power of European

parties that favoured decolonisation - were important, but less so. Article 73, as drafted, certainly played its part.

But while decolonisation was one of the great triumphs for the United Nations with the process being largely complete by 1975, self-determination brought a number of substantial problems, to which we will turn shortly. First it is necessary to consider the role of the UN in this remarkable process.

Even the light obligations imposed by Article 73 were regarded as unacceptable by some colonial states and they attempted through a variety of rationalisations to avoid the reporting obligation. Portugal and Spain claimed that they were without colonies because their 'overseas territories' were in fact an integral part of the European state itself (thus Mozambique and Angola were argued to be a part of Portugal!). France argued that as its overseas territories were a part of the French Union they too were beyond the scope of Article 73, and the UK said that the article did not apply to territories that had local autonomy. Really the question was whether the power to define territories as colonies was to lie with the colonial powers themselves or with an external body.

By 1960, the newly independent and non-aligned states were in the majority in the UN General Assembly and promoted a Declaration on the Granting of Independence to Colonial Countries and Peoples that was passed as Resolution 1514 by a vote of 89 in favour and none against. There were, however, nine significant abstentions including the US, the UK, Portugal, Spain and Belgium. This Resolution, together with the subsequent Resolution 1541, greatly altered and advanced the cause of decolonisation.

Resolution 1514 provided

1. The subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and co-operation.

2. All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

3. Inadequacy of political, economic, social or educational preparedness should never serve as a pretext for delaying independence.

4. All armed action or repressive measures of all kinds directed against dependent peoples shall cease in order to enable them to exercise peacefully and freely their right to complete independence and the integrity of their national territory shall be respected.

5. Immediate steps shall be taken, in Trust and Non-Self-Governing Territories or all other territories which have not yet attained independence, to transfer all powers to the peoples of those territories, without any conditions or reservations, in accordance with their freely expressed will and desire, without any distinction as to race, creed or colour, in order to enable them to enjoy complete independence and freedom.

6. Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations.

7. All States shall observe faithfully and strictly the provisions of the Charter of the United Nations, the Universal Declaration of Human Rights and the present Declaration on the basis of equality, non-interference in the internal affairs of all States, and respect for the sovereign rights of all peoples and their territorial integrity.

Thus it called for immediate decolonisation, regardless of the colonial power's view of “readiness” or “maturity”. At the same time it reinforced the view discussed below that territorial integrity implied that self-determination would be exercised within colonial borders. Resolution 1541 complemented this by providing that acts of self-determination must be exercised by the people to whom it applied, by free and fair elections by which they might choose either to constitute themselves as a sovereign independent state, or to associate freely with an independent state, or to integrate with an already existing state.

Other important developments in the United Nations were to be found in the finally signed two International Covenants on Human Rights of 1966 which had a common first Article, namely:

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realisation of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

The significance of these common provisions in the Covenants intended to give legal effect to the UDHR cannot be over-emphasised. Not only is a right of political self-determination asserted but it is asserted as a human right. Of equal importance to the right of political self-determination is that of economic self-determination.

One other development is also crucial. As we observed earlier, the preoccupations of the newly independent states and the Non-Aligned Movement lay not only with decolonisation but with states in which apartheid was accepted. The latter situation was encompassed by a determination by the General Assembly that those living under racist regimes or those living in occupied territories (especially but not exclusively Palestinians) also had a right to self-determination even where they were in an established state such as South Africa.

While all these developments increased the rate of decolonisation and kept international attention focused upon the topic, they were not unproblematic in their results. Three features presenting problems must be considered - the operation of the principle of *uti possiidetis,* the methods by which the wishes of people claiming the right of self-determination were to be ascertained and guaranteed, and finally the operation of a proclaimed right of economic self-determination.

3.2 The Principle of *uti possidetis*

This principle, derived from Roman law and meaning (as Cassese says at p.83) “you will have sovereignty over those territories you possess as of law”, has now been adapted and absorbed from the principles upon which Latin American states obtained independence in the early nineteenth century. Independence was acquired within the frontiers of the pre-existing colonial territory and these could not be altered unilaterally but only in agreement with adjacent states. Following the Second World War it was quickly accepted both by the colonial powers and by colonies seeking independence that this was an appropriate general principle and in turn this was accepted both by the Organisation of African Unity and by the ICJ (in the *Frontier Dispute Case (Burkina Faso* V. *Mali)* [1986] ICJ Rep 554).

No doubt this seemed sensible in the interests of stability. It has, however, had a great number of unfortunate consequences, many of which continue to plague African states in particular. The most cursory glance at a political map of contemporary Africa will reveal the number of boundaries that often extended in a straight line for hundreds of kilometers. Such boundaries were drawn by colonial drafters without reference either to the physical features of the territory being bounded, or to the people and their ethnicity who might live either side of the line. In fact straight African borders indicate that when they were drawn there was total ignorance of topography, geography or inhabitants (or, usually, all three) on the part of the drafters.

Not surprisingly, then, many African borders unintentionally contain disparate ethnic groups or, probably more seriously, cut through tribal territories, dividing people from their kith and kin and imposing different nationalities on them. The result of the first, the containing of disparate people, led to substantial secessionist problems, most acutely in Biafra's attempt to secede from Nigeria, from 1967-70, and Katanga's attempt to secede from the Congo after its independence from Belgian rule. In fairness to those who rejected such secession it should be said that both of the above examples concerned the richest parts of ex-colonial states attempting to secede, and both movements were supported by states that hoped to profit.

The result of the application of *uti possidetis* has been a series of frontier disputes coming before the ICJ in which we see the rather unedifying spectacle of the disputes being resolved in a way thought to conform with colonial intention and evidenced by the earliest colonial maps or treaties. Many contemporary disputes in Africa, both internal and external, have their origins in colonial frontier drawing. Examples range from the civil strife within Ivory Coast to the frontier dispute between Eritrea and Ethiopia.

Thus the effect of *uti possidetis* has greatly constrained the proclaimed right of self-determination. Although value judgments may be inappropriate, some have argued that while the concept of decolonisation and self-determination was progressive, the consequent constraints of *uti possidetis* were distinctly conservative and prevented many peoples from breaking free from the colonial borders that had been imposed upon them. Certainly many minority peoples in African states have continued to experience subjugation. At the same time it remains obvious that statehood can never be equated with ethnic homogeneity. Arguably almost all states contain diverse ethnic groups and what is important is the access such people have to government participation and transparency.

3.3 Methods of Self-Determination and Consequences

Once the reality of decolonisation had been conceded by the colonial power there were still two issues to be resolved. The first was the means by which the future of the decolonised territory was to be resolved, and the second was to be the role of the colonial power in defining the terms under which self-government was granted.

As to the first, in retrospect it seems obvious that some act expressing the will of the people being decolonised should have been sought. Usually this was the case and plebiscites were often the means by which this was determined. Within African states receiving independence this was unproblematic. There was little doubt that the overwhelming majority of inhabitants would, and did, prefer domestic rule to that of colonial masters. There the question was rather about the constitutions with which such states were to be provided rather than determining wishes. This was not always the case, and on occasion events occurred that was difficult to reconcile with the spirit of decolonisation, and indeed its reality. Two examples indicate once more the significance of power in any analysis of international law.

The first example is that of Goa, an enclave on the West Coast of the Indian sub-continent. Goa was a thriving Portuguese colony for some 450 years. Portugal was arguably in breach of its UN obligations in not taking steps to ascertain the wishes of the people of the colony. In 1961 India entered and annexed Goan territory which it claimed was an integral part of “Mother India”. This being the case it refused a referendum and the *de facto* result was accepted by the UN, a draft resolution condemning the annexation having been vetoed by the USSR.

The second example concerns what was once West New Guinea, a Dutch colony from 1883. It was the western half of the second largest island in the world, the other half of which became independent Papua New Guinea in 1975. When in 1949 the independent state of Indonesia was formed from the Dutch colonies known as the Dutch East Indies, West New Guinea was retained by Holland with a view to preparation for independence. Indonesia, under President Sukarno, and with the support of the Non-Aligned Movement in which he was influential, laid claim to all former Dutch territory. It had already successfully incorporated the Molucca Islands, although the Dutch decolonisation agreement had provided for the possibility of Moluccan secession - a fact subsequently ignored by the United Nations.

Sukarno's claim to West New Guinea was no more attractive or reasonable than Dutch colonial occupation. There was no natural link between West New Guinea and Indonesia and the claim can be seen as

an attempt at late colonisation. Nevertheless, after armed confrontation by Indonesia in 1962, the Dutch entered negotiations which led to the transfer of the territory and its sovereignty to UNTEA (the United Nations Temporary Executive Authority) for six years, after which period it was to determine the people's preference between independence and Indonesian integration. Almost immediately Indonesia began to direct events and finally, in 1969, a referendum of 1,205 delegates was organised in a vote that was neither representative, free, nor fair. This vote in favour of integration into Indonesia was accepted by the United Nations, to its shame and notwithstanding misgivings, and the territory was unhappily transferred to Indonesia in November 1969. Needless to say, the change in sovereignty has brought no happiness to the ordinary people of West New Guinea (known now as Irian Jaya) and opposition to the regime continues.

What should be understood, therefore, is that although self-determination is portrayed as always beneficial to those enjoying the right, this is not necessarily inevitable, unless the process is carried out in the manner supposedly intended.

As to the role of the colonial power in defining subsequent constitutional arrangements, we turn to two other examples: Burma (Myanmar) and Indonesia. (More detailed information is to be found in an article by Karen Parker entitled “Understanding self- determination: the basics”, at http://www.webcom.com/hrin/parker/selfdet.html).

Both are examples of attempts by departing colonial powers to leave a constitutional legacy in the form of a written constitution intended to constrain the sovereignty of newly independent states. This was a typical process but the two chosen examples were early ones that foreshadowed the impossibility of the task, even if well meant. Burma gained independence from Great Britain in 1948 with a constitution that had been drafted in 1947. This provided for a parliamentary democracy and also, in recognition of the different peoples within Burma, provided for states within Burma for each of the Karen, Kachin and Shan people. Although the parliamentary democracy was to be unitary, Article 201 provided that any of the above groups would have a right to secede after 10 years of constitutional rule. As you might know, within that 10 year period the majority Burmese seized power and unilaterally removed the right to secession even though it had been thought that it had been effectively entrenched.

Two points should be noted. Firstly, although constitutions usually continue to operate “beyond the grave” (obviously the US constitution is an example of this), where a constitution is left as an imposed colonial legacy it is likely that its prestige will be greatly diminished. Secondly,

the effect of constitutional changes by the newly independent state might be (as happened in Burma) to extinguish the very "self-determination rights" of minority peoples, supposedly achieved through decolonisation.

Indonesia too was formed from many different peoples in what had previously been the Dutch East Indies. The Dutch used many soldiers from the Moluccan islands in the struggle against decolonisation. In 1949 there was a Round Table Conference between the Netherlands, the Javanese (leaders of the Indonesian independence movement) and the United Nations, which agreed upon a de-colonisation instrument. It too included the possibility of "opt-outs" providing for plebiscites for territories not wishing to be a part of the 'United States of Indonesia'. Plebiscites were never permitted and when the Moluccan leadership declared independence in 1950, the islands were invaded by Indonesian forces. The matter was taken up by the United Nations Commission for Indonesia but the UN did nothing and the Commission ceased to exist five years later - no doubt reflecting the wishes of both newly independent states and those of the Second World who were more concerned with decolonisation than true self-determination.

There are also parallels to be discovered in African decolonisation and state constitutions.

3.3.1 Economic Self-Determination

As is clear from Article 1 of the International Covenants on Human Rights, there was recognition that political self-determination in itself was insufficient. Thus there was an insistence that independent states should have the right to control both their economies and their resources without external interference. What was claimed was both the right to nationalise property within the new state regardless of ownership and title, and the right to economic development on equitable terms. (At this time it was not expressed in such terms but was implicit in the request of many independent but disadvantaged countries for financial and technical assistance.)

Cassese (pp.507-08) observes how from the 1960s newly independent states perceived the damage done to their economies by the terms under which they traded. Industrial prices rose persistently while primary produce and raw materials, the major exports of decolonised states, remained at or fell below the prices achieved at independence. Although nationalisation of foreign property remained an option, the reality of the consequences detracted from the attractiveness of this option, and to make matters worse, developed states took the view that the corollary of the right to nationalise was the obligation to pay "fair" compensation.

Efforts by the newly independent states to achieve a New International Economic Order through a General Assembly resolution in 1974 were successful in a resolution but had little real effect.

Attempts to redress the wealth disparity between North and South made little progress in spite of having the concept of "the common heritage of mankind" adopted within a Law of the Sea Convention in 1982 (discussed later), and in spite of achieving a UN General Assembly Declaration recognising a "human right to development". All these attempts to argue for economic redress for the debilitating effects of colonialism by way of fair trade and development, while very successful in obtaining widespread UN support, achieved very little in real terms. Indeed it is possible to argue that while self-determination brought political control, at least to parts of the indigenous population, one of its major effects was to remove the administrative burden and cost of colonialism from the colonial states and to place it directly upon ex-colonies.

Such a generalisation demands discussion and thought beyond the cope of this course, and it would be unfortunate to conclude this unit on a negative note. The fact is that many states decolonised since 1945 have made much greater strides towards economic independence and prosperity than they could have expected had their colonial status continued. Few would now maintain that a system whereby territory and peoples are administered by foreign nationals with whom sovereignty resides is anything other than acceptable and immoral. That colonialism was for so long accepted as unproblematic by European empires seems, in retrospect, almost unbelievable. This has been the great achievement of decolonisation.

SELF ASSESSMENT EXERCISE

Can one provide general answers to why decolonisation and self-determination achieved less than might have been hoped or expected? In your view does responsibility lie with developed or underdeveloped states? (See *Feedback at the end of this unit)*.

4.0 CONCLUSION

This unit has been concerned with the change in the principle of self-determination that existed at the time of (and in) the UN Charter to a "human right of self-determination" in the 1966 International Covenants on Human Rights. The argument is that rapid decolonisation was both remarkable and generally in the interests of indigenous inhabitants. Nevertheless it is important to recognise the limitations of the right and the fact that some people got as little from "decolonisation" as they had from colonial administration. This stems in part from the application of

the principle of *uti possidetis,* and in part from the factual lack of economic self-determination which impeded economic development.

5.0 SUMMARY

We considered the United Nations Charter on self-determination and decolonisation. You should now be able to explain the significance of the UN Charter in the change from self-determination as a principle to self-determination as a human right and recognise the limitations to the right created by the principle of *uti possidetis.*

ANSWER TO SELF ASSESSMENT EXERCISE

While general answers can be given, it should be added that each act of decolonisation and self-determination was unique with different histories and relationships with the colonial power. The self-determination and independence of Asian colonies was also significantly different from that of African colonies. Similarly the difference in the consequences of self-determination and independence for each new state was marked.

Nevertheless, at least for African states it is possible to say that they often came to independence within colonial boundaries which were inappropriate for settled statehood. It can also be asserted that often the colonial powers had done less than they might to educate the indigenous population for self-government. In addition, very often colonial investments continued to pay dividends to the colonial shareholders and the right of economic self-determination was difficult to achieve. A further general problem lay in the world trading regime, which tended to operate against the interests of producers of primary resources. Lastly, less help was provided to counter the under-development that arose from colonisation than could have been expected, in spite of the efforts made through international law.

6.0 TUTOR MARKED ASSIGNMENT

1. Why were attempts through the UN to assert rights to development and fair trading conditions never successful, except in the passage of the resolutions themselves?
2. Is it conceivable that a right of secession could ever have been a part of a right to self-determination?

7.0 REFERENCES/FURTHER READINGS

Cassese, Chapter 16: *The Role of the United Nations*, pp.328-29.

Kaczorowska, Chapter 14: *Self-determination of Peoples*, pp.340-52.

UNIT 3 SELF-DETERMINATION AFTER THE COLD WAR

CONTENTS

1.0 INTRODUCTION

By the end of the Cold War in 1990 most people thought that the concept of self-determination had almost fulfilled its purpose. This was because it had been accepted as being of relevance only to colonial or occupied peoples and there were few of these left. One obvious remaining problem was that presented by the Palestinian situation, particularly after the war of 1967 in which Israel captured and continued to occupy the West Bank and Gaza.

Many resolutions were passed by the UN recognising the right of Palestinian self-determination, but unwavering support by the US for whatever position the Israeli government adopted in order to resist, left the Palestinians frustrated and the Israelis building more and more settlements in the occupied lands. Israel has remained intransigent notwithstanding international pressure and, as we have seen, has continued to defy an ICJ decision, with the construction of a "security fence" largely built in the occupied land. Regrettably, this is one right of self-determination that still remains to be exercised.

2.0 OBJECTIVES

At the end of this unit, you should be able to:

- explain the contribution of the right of self-determination to the process of decolonisation
- identify the limitations of the right to self-determination in any claim for secession
- explain the significance of the end of the Cold War and the disintegration of the Soviet Union for the concept of self-determination
- explain the fact that secession will usually only be accepted when it has become an accomplished fact.

3.0 MAIN CONTENT

As we have seen above, any right of self-determination was subordinate to the principle of the territorial integrity of a state, and hence there was no right of secession. Academic writers suggested that where secession was sought this would only be arguable where those wishing to secede were deprived of their civic rights within the state in which they existed. A right of internal self-determination meant that all peoples within a state should have equal rights of access to the means of government, but not a right to their own government. In some ways this emphasis upon territorial integrity was understandable. The feeling was that if distinct ethnic groups, religious groups or language groups were to be able to argue for independence, the resulting fragmentation of states would have no end. It was also recognised that if secession was tolerated, most secessions would themselves lead to the creation of a new minority within the seceding state.

Nevertheless the events at the end of the Cold War forced a reconsideration of the place of self-determination. The disintegration of the Soviet Union into 15 independent states was a remarkable event. That it was accomplished with so little violence was nothing short of astounding. The disintegration brought about not only new institutions of government but agreement about the division of both the Soviet Union's assets and its debts. Again the principle of *uti possidetis* was applied, with the new states appearing within their erstwhile federal frontiers. Eleven of the states that replaced the Soviet Union remained in loose alliance with Russia, in a Commonwealth of Independent States (CIS), while the Baltic states, Latvia, Estonia and Lithuania, together with Georgia, rejected such links.

Immediately following the break up of the Soviet Union, came the disintegration of Yugoslavia. It is notable that at least in the early stages of the crisis international emphasis was upon the territorial integrity of Yugoslavia and there was no assertion of a right to secession. It is still widely argued that the recognition of the independent states of Croatia and Slovenia occurred only when the disintegration was an accomplished fact. (While there can be no right to secession, sufficient power to assert the fact of secession may suffice for recognition! This is discussed further below.)

The contemporary dilemma concerns the status of Kosovo. Intervention by NATO, unsanctioned by the UN Security Council, had prevented Serbian forces from asserting authority over what Serbia regarded as Serbian territory. On Sunday 17 February 2008, Kosovo declared independence from Serbia amidst celebrations and protests.

In Nigeria, the issue of self-determination cannot be undermined, especially with the on-going crises in the Niger/Delta region of the country where the oil producing States are clamouring for independence (self rule), due to long years of neglect by the Federal Government. This would be discussed in detail in the next unit. Also bear in mind that the issue of self determination of the then Eastern Region of Nigeria led to the Nigerian Civil War in 1967.

3.1 Contemporary Rules on Secession

While there have been many secessionist movements since the Cold War they tend to be diverse in their nature, cause and hopes. They range from attempts by Tamils to create an independent state in Sri Lanka to Somalis attempting to create a state of Somaliland, from attempts by those in Western Sahara to achieve independence to Chechnyans fighting for independence from Russia, from Quebecois wishing to separate from Canada to the Scottish National Party seeking independence from the United Kingdom. When considering any of these cases it is useful to refer to the conclusions reached by the Canadian Supreme Court when it was asked by the Federal Government to consider the legitimacy of any Quebecois declaration of independence if it was successful in obtaining a positive vote for independence in a referendum. (When the question was asked there had already been two such referenda, in 1980 and 1995, and although independence was rejected, the second vote was very close with a majority of only 1 per cent.) The Supreme Court decision is available in full at http://scc.lexum.umontreal.ca/en/1998/1998rcs2-217.html.

The most important point it makes is consistent with the Aaland Islands decision of 1923. The Supreme Court had been asked to consider both whether such a declaration of independence would be legal under the Canadian Constitution and whether it would be consistent with international law. The Court's answer was that such unilateral secession was not consistent with either, and emphasised that territorial integrity prevails over any right of external self-determination. Effectively it stated that where rights of internal self-determination were protected so that the "government represents the whole of the people or peoples resident within its territory, on a basis of equality and without discrimination, and respects the principles of self-determination in its own internal arrangements, [it] is entitled to the protection under international law of its territorial integrity". In other words, as we have seen above, a right of external self-determination can exist only where a people or peoples are denied equal access to the machinery of government and civil rights.

Of course in some ways Quebec is a unique situation. It is not a case where a territory at the extremity of the state is seeking to detach itself. The geographical position of Quebec in the centre of Canada means that were it to achieve independence the implications for the remainder of Canada would be severe. In addition, as with the Aaland Islanders, not only were the inhabitants not discriminated against but their language and culture received real protection.

The contemporary position is accurately stated (though with a caveat (which we shall add at the end) in the summary of legal advice given by Professor James Crawford of Cambridge University in answer to a request from the Canadian Department of Justice in 1997. These were his conclusions:

(a) In international practice there is no recognition of a unilateral right to secede based on a majority vote of the population of a sub-division or territory, whether or not that population constitutes one or more "peoples" in the ordinary sense of the word. In international law, self-determination for peoples or groups within an independent state is achieved by participation in the political system of the state, on the basis of respect for its territorial integrity.

(b) Even where there is a strong and sustained call for independence (measured, for example, by referenda results showing substantial support for independence), it is a matter for the government of the state concerned to consider how to respond. It is not required to concede independence in such a case, but may take into account the national interest and the interests of all those concerned.

(c) Even in the context of separate colonial territories, unilateral secession was the exception. Self-determination was in the first instance a matter for the colonial government to implement; only if it was blocked by that government did the United Nations support unilateral secession. Outside the colonial context, the United Nations is extremely reluctant to admit a seceding entity to membership against the wishes of the government of the state from which it has purported to secede. There is no case since 1945 where it has done so. Where the parent state agrees to allow a territory to separate and become independent, the terms on which separation is agreed between the parties concerned will be respected, and if independence is achieved under such an agreement, rapid admission to the United Nations will follow. But where the government of the state concerned has maintained

its opposition to unilateral secession, such secession has attracted virtually no international support or recognition.

(d) This pattern is reflected in the so-called "safeguard" clause in the United Nations General Assembly Resolution 2625 (XXV), the Friendly Relations Declaration of 1970. In accordance with this clause, a state whose government represents the whole people on a basis of equality complies with the principle of self-determination in respect of its entire people and is entitled to the protection of its territorial integrity. The people of such a state exercise the right of self-determination through their equal participation in its system of government. [A copy in full of the advice is to be found at http://canada2.justice.gc.ca/en/news/nr/1997/factum/craw .html]

In spite of these conclusions it is possible to infer from the first and fourth sections that a right of external self-determination might exist where a people or peoples enjoy no participation in the political system and/or are subject to discrimination. Such examples could arguably be found in Chechnya or Tibet. But these two examples make a different but familiar point. No secession will ever be permitted from a strong state regardless of the political conditions obtaining.

Finally, notwithstanding Professor Crawford's conclusions, the example of Eritrea's independence should be mentioned. At the end of the Second World War Eritrea became a trust territory administered by the UK. In 1952 control was transferred to Ethiopia by the UN where it retained full autonomy until annexed by Ethiopia in 1962. It remained an Ethiopian province with UN acquiescence until a prolonged war of resistance, and independence was finally gained in 1993 with the downfall of the Ethiopian dictator, Mengistu. An Eritrean plebiscite under the supervision of the UN was held, as a result of which independence was declared and the new state was recognised by Ethiopia. What this example demonstrates is that where a territory is physically able to insist upon its demands for secession, the de *facto* position will gain recognition. The state from which secession has taken place will have no realistic alternative to acceptance and recognition.

SELF ASSESSMENT EXERCISE

Is the idea of a human right to self-determination of any continuing relevance after decolonisation? Should it be? (See *Feedback at the end of this unit*).

4.0 CONCLUSION

Two factors affected the use of the concept of self-determination at the end of the Cold War. The first was the disintegration of the Soviet Union and the reasonably amicable creation of new independent states. New limitations on the concept of territorial integrity became necessary upon the subsequent dissolution of Yugoslavia - though in both cases the principle of *uti possidetis* was applied. The fact of the disintegration could not be denied.

The second factor was that because self-determination had been confined to decolonisation and this process was almost complete, the concept required a new definition if it was to have any continuing relevance. This has been achieved, at least theoretically, by distinguishing a right of internal self-determination from a right of external self-determination. As always in international law, the question of power is central in any purported exercise of self-determination. This is nowhere better illustrated than in the Palestinian people's frustrated but acknowledged right to self-determination.

5.0 SUMMARY

We have considered the issue of self-determination after the Cold War. You should now be able to:

1. explain the contribution of the right of self-determination to the process of decolonisation;
2. identify the limitations of the right to self-determination in any claim for secession;
3. explain the significance of the end of the Cold War and the disintegration of the Soviet Union for the concept of self-determination;
3. explain the fact that secession will usually only be accepted when it has become an accomplished fact.

ANSWER TO SELF ASSESSMENT EXERCISE

There were always problems associated with declaring the right to self-determination a human right. It was difficult to know who the holders of the right were and it was hard to define who was obliged to grant the right. What could not be doubted was the purpose of including the right in the Covenants. This was to stress the centrality of the cause of decolonisation to the majority of UN members.

With the completion of the process of decolonisation, however, and with general acceptance that secession was unrelated to a right to self-determination, the proclaimed human right seems to be redundant.

The exception to this assertion, however, is probably to be found in the unfulfilled claim to economic self-determination. Attempts continue to be made to assert this and related claims (particularly the right to development) as *human* rights, no doubt for reasons of rhetoric.

6.0 TUTOR-MARKED ASSIGNMENT

1. Summarise Crawford's conclusions concerning the contemporary meaning of self-determination. Are they adequate and sufficient?
2. Has the continued use of the principle of *uti possidetis* proved helpful in the creation of new states since the Cold War?

7.0 REFERENCES/FURTHER READINGS

Cassese, Chapter 16: *The role of the United Nations*, pp.328-29.

Kaczorowska, Chapter 14: *Self-determination of Peoples*, pp.352-65.

UNIT 4 ETHNIC NATIONALS IN NIGERIA AND THE RIGHT TO SELF DETERMINATION

CONTENTS

1.0 INTRODUCTION

It is not in doubt that Nigeria is a unilateral colonial creation. It was created not for the good of Nigerian people but to ease colonial administration and financial management of a vast and disparate territory.

Tekena Tamuno puts it succinctly - "The amalgamation of Northern and Southern Nigeria was basically a major political means of solving a serious economic problem. Its main weakness however, lay in the British government's failure to consult the wishes of the people in a matter of such great political and economic significance between 1898 and 1914."

Different peoples were thus brought into forced cohabitation. Since the forced creation of Nigeria in 1914, Nigeria has grappled with the problems of different peoples living in one society and trying to build one nation. With that queer geographical engineering, a multi-nation state whose binding matrix was colonial violence was born with a forced draft case; a cascade of ethnic and national inequities was erected.

2.0 OBJECTIVES

At the end of this unit, you should be able to:

- define self-determination
- explain the origin, characteristics and functions of self-determination
- relate self-determination to Nigeria especially the agitation of the Niger Deltans for resource control and limited autonomy over the conduct of their affairs.

3.0 MAIN CONTENT

3.1 The Nigerian State and the Different Major Ethnic Groups

The country has more than 250 ethnic groups. Some of these groups have peculiar customs, tradition and languages. The groups inhabit different zones of the nation. The distribution of ethnic groups in the country has been partly influenced by geography. Areas that could support life were well occupied, while people avoided environments that were hostile.

For instance, there was a large concentration of small groups in Central Nigeria. Several of these groups enjoyed a large measure of political autonomy. This concentration and political patterns have been attributed to the rugged topography, hostility of more powerful neighbours and rampant slave trade.

Today, Central Nigeria is noted as an area of sparse population. Other similar areas are the North East, especially around the Chad and to some extent the Niger Delta. The country now has three major clusters of dense population:

1. The Igbo area in the Southeast with an average population density of over 150 persons per kilometer;
2. The Yoruba land in the Southwest with a density of over 140 persons per kilometer; and
3. Kano with an average density of 100 persons per kilometer.

These are some of the major groups of people who live in the different geographical zones in the country.

3.2 Geographical Distribution of Ethnic Nationals

The Central Zone

This area covers the Niger Delta, Lagos and the Creeks. The coastal people include the Yoruba in the creeks and lagoons; and the Kalabari, Okrika, Ijaw, Nembe, Bonny, Itsekiri, Urhobo, Oron, Ogba, Ogoni, Andoni, Isoko, Benin.

The Forest Zone

This is the area of tall trees and dense undergrowth. Among the groups in this zone are the Edo, Ibibio, Igbo and Yoruba.

The Savanna Zone

This is a region of open woodland and tall grasses. It covers the large plains that extend from the Sahara Desert in the north, to the tropical forest in the south. The Savanna zone is inhabited by the Kanuri of Lake Chad, who speak Nilo Sahara language, the Hausa speaking people, the Fulani, the Jukun, Nupe, Igala, Tiv, Angas, Idoma, Kataf, Kaje, Jaba, Birom, Gwari, Beriberi, Shuwa, Chamba, Egbirra, Bede, Bole kanakuru.

3.3 The Concept of Self-Determination

Self-determination is defined as the determination of one's act or state by oneself without external compulsion. The right of a people to decide its future political status (as with respect to form of government or independence) or its actions in so deciding by plebiscite.

The right to self-determination is a third generation right which is the collective or group rights. These are rather recent rights that emerged in the later 1960 and 1970 and were predominantly supported by the newly independent and developing states. Although this right has since been recognised as a legal right in international law, its enforcement remains a topical issue today more than ever in the light of recent events around the world especially in the Balkams. The right to self-determination has become a peremptory norm of international law.

3.4 The Degree of Self-Determination

There are different degrees of self-determination. Independence is not the only outcome of self-determination. Some ethnic, racial or minority groups who are concentrated in a part of a country could demand independence. Some others demand for limited self-rule within existing borders with links to the Federal government. Others demand just a right to greater participation in the political, social and economic processes of their countries not self government as such.
As a result of non-recognition of a legal right to secede, the international

community has invented autonomy. This allows groups of people to have a degree of autonomy within borders and is viewed as a middle ground between the principle of territorial integrity and the chaos of universal self-determination within a federal state. An autonomy scheme for a geographically concentrated ethnic minority may grant that minority modest self-government and retain vital powers for the central government internal self-determination through autonomy schemes may blunt a minority's demand for external self-determination.

The international community is more likely to support a degree of autonomy as they have in Kosovo than full independence, which could lead to more instability and conflict. The success of autonomy depends on a pre-existing ethnic accommodation and civic faith in the rule of law, democratic set-up, all of which are rare in the countries where ethnic minority and violence occur.

SELF ASSESSMENT EXERCISE 1

Describe the concept of self-determination.

3.5 Ethnicity, Self-Determination: The Nigerian Experience

Nigeria, being a nation of hundreds of ethnic groups or nationalities and having been under military dictatorship for most of her post-independence years, has had a fair share of attempts by ethnic minorities to assert a right to self-determination. Apart from Col. Odumegwu Ojukwu's failed Biafra attempt in 1967 at asserting a right to self-determination, there was the Isaac Adaka Boro led attempt in the Niger Delta which was quickly repressed by the Nigerian government.

There was also, the Kenule Saro-wiwa led Movement for the Survival of Ogoni People (MOSSOP), which led to the hanging of Ken Saro-wiwa and eight other Ogoni activists by the Nigerian government on November 10, 1994.

Recently, there has been a resurgence of nascent struggle for self-determination by the Ijaws in the Niger Delta, the Yorubas of the Southwest, the Igbos of the Southeast, the Middlebelt region and the Arewa group representing the northern states of Nigeria. These groups do not seek full autonomy or a right to secede. They have used a popular Nigerian phrase --"being marginalised over the years"-- and feel that they ought to have a greater participation in national affairs.

The case of the Ijaws and Ogonis has more to do with neglect by the

Federal Government. They assert a right to more participation and representation in government and economic development of the region as the crude oil that oils the machinery of the Nigerian Government is mostly located under their soil or off their shores with the attendant environmental degradation.

This is a classical reason why ethnic groups or minorities seek self-determination as the more these groups feel alienated and removed from the main stream of socio-political and economic processes of the nation, the more they seek to assert their right to self-determination.

In present day Nigeria, what we are witnessing in the Niger Delta region is a situation in which ethnic militias have resorted to kidnapping expatriates, children and reputable politicians in the region to press home their point. The agitation has assumed a dangerous dimension where sophisticated weapons are employed to confront security agents.

It is a man-made disaster of epic proportions. All around Nigeria, trenches are being dug and positions are hardened. There are frightening memoranda and manuals for disintegration flying all over the place. Nigeria is witnessing the worst form of political violence and the country is passing through the most difficult period.

Indeed, questions are being asked openly and constantly on the feasibility and desirability of Nigeria as a nation as presently constituted. The response of some of the different ethnic groups can be found in the memoranda below.

Ogoni Bill of Rights

The Ogoni (Babble, Gokanna, Ken Khana, Nyo Khana and Tai) numbering about 500,000 people, being a separate and distinct ethnic nationality within the Federal Republic of Nigeria. On 2nd of October 1990 addressed an "Ogoni Bill of Rights" to the then President of the Federal Republic of Nigeria, General Ibrahim Babangida and members of the Armed Forces Ruling Council.

The Ogoni Bill of Rights states thus;

"Now therefore while re-affirming our wish to remain a part of the Federal Republic of Nigeria, we make demands upon the Republic as follows: That the Ogoni people be granted political autonomy to participate in the affairs of the Republic as a distinct and separate unit of whatever name called, provided that this autonomy guarantees the following –

i) Political control of Ogoni affairs by Ogoni people.

ii) The right to control and use of a fair proportion of Ogoni economic resources for Ogoni development.
iii) Adequate and direct representation as of right in all Nigeria's national institutions.
iv) The use and development of Ogoni languages in Ogoni territory.
v) The full development of Ogoni culture.
vi) The right of religious freedom.
vii) The right to protect Ogoni environment and ecology from further degradation".

The Kaiama Declaration

The Kaiama declaration is the article of faith of the Ijaw nation to the government of the Federal Republic of Nigeria. The resolution of the 19th December, 1998 of All Ijaw Conference held in Kaiama, Bayelsa State Nigeria, states as follows:

We the humble youth of Ijawland hereby make the following resolutions to be known as the Kaiama Declaration –

(a) We agree to remain within Nigeria but to demand and work for self-government and resource control for Ijaw people. The conference approved that the best way for Nigeria is a Federation of ethnic nationalities. The Federation should be run on the basis of equality and social justice.
(b) All land and natural resources (including mineral resources) within the Ijaw territory belong to Ijaw community and are the basis of our survival.
(c) We cease to recognise all undemocratic decrees that rob our people/communities of the right to ownership and control of our lives and resources, which were enacted without our participation and consent. These include the Land Use Decree, Petroleum Resources Decree, etc.

This Kaiama Declaration of the Ijaw people has been the basis of agitation for resource control; the struggle has taken many dimensions and it is still the basis of agitation till present day within the Nigeria Federation.

The Yoruba Agenda

The focus of the Yoruba nation of the Southwestern part of Nigeria and as aptly articulated by their leader, Senator Abraham Adesanya, is an unflagging commitment to the earnest restructuring of the Nigeria polity with a view to ensuring that each of the federating units enjoy ample right to self-determination. That is to say each federating unit not only

has access to but also has total control over its God-given endowments – human, mineral and material resources.

For the Yorubas, the Yoruba problem of unity has never been more urgent since the June 12 election of Moshood Abiola presidential election that was annulled by the Federal government in 1993. They have been the bull of physical and psychological attack from the Nigerian State.

Since the days of Chief Obafemi Awolowo, they have insisted on a balanced federation that gives the regions greater autonomy. While calling on a vigorous type of federalism, they can say all that came was an initial deformed federalism and lately a full-scale unitary government.

The Igbo Agenda

The Ohaneze Ndigbo, the Igbo mainstream socio-cultural and political movement captured the condition of the Igbos thus; "It is not just marginalisation, neither is it only alienation or mere deprivation. It is simply exclusion." Perhaps it is a measure of some recrudescence of their faith in Nigeria that they even bother to complain.

The Agenda of the Igbos for a united Nigeria is as follows:

A united Nigeria that has a 6 regional structure as the basis of a new federation, rotational presidency, a derivation-based revenue allocation formula and redefined citizenship rights.

The intellectual and theoretical grounding for the demands are quite robust. They involve the idea of a "functional federation of nationalities" to include 6 zones (3 zones each for the major and minor ethnic groups).

The preference for large zones is recognition that the creation of states rather than expanded federalism has actually strengthened the momentum towards unitarism. In response to the aggravation, unitarism and the subversion of federalism, the zones will become the new federal units completely at liberty to create and manage as many states as the component nationalities of each zone / region desires.

When power changed hands on May 29, 1999 from military to civilian government, it was more than a return to democracy. There was a fundamental power shift from the North to the South which totally altered the geo-political equation in Nigeria. The coming on board of the Arewa Consultative Forum underscores the Northern part of the country's interest in finding a common platform where Northern interest could be articulated and protected.

The Arewa Consultative Forum is an amorphous assembly comprising retired military generals, former leaders, heads of states, traditional rulers, politicians and businessmen of the Northern extraction. It is also interesting to note that many of the 19 Northern states have adopted the Sharia legal system in their various states in defiance of the provisions of the Nigerian Constitution. The Sharia legal crusade is a danger sign post which is a clear pointer to the principle of self-determination.

The Nigeria federation is today based on the most challenging test of survival. The minorities do not believe in their place within the federation. None of the federating partners today sees the other as a next brother on a collective journey of destiny.

Elsewhere, the Niger Delta resistance youths have plunged the area in unwholesome violence. The creeks, waterways and even the cities have been made unsafe by a sudden explosion of ethnic-based militia groups who kill, take hostages, sack villages and vandalise oil installations.

The philosophy of violence expressed in different tenors by the various ethnic groups appears to have gained currency all over the country. Hitherto bottled-up frustration, grievance and fear are being generously oftentimes recklessly vented.

SELF ASSESSMENT EXERCISE 2

Define the term “Resource Control”.

3.6 Self-Determination in Nigeria and the Minority National Question

The minority and the national question are as old as the Nigerian nation state. The insecurity felt by the minority communities across the country has merged with ethnic claims and agitation to now constitute what is popularly referred to as the national question.

Essentially, the national question refers to how to structure the Nigerian Federation to acknowledge and guarantee identity and national rights within the context of a true democratic framework.

The persistent mismanagement of the national question as well as apparent insensitivity even trivialisation of the issue by the custodians of state power has created a fertile ground for ethnic entrepreneurs, local warlords and political opportunists that have only further complicated matters. While the minority question was prominent in both the Southern and Northern Protectorates, the amalgamation of both protectorates in 1914, largely for administrative convenience only widened the field for minority and ethnic agitation and conflicts. Of

course several Nigerian leaders are on record as to their regrets and belly aching over the amalgamation.

One founding father once described Nigeria as "a mere geographical expression" while another felt that the amalgamation of the Northern and Southern Protectorates in 1914 to create the territory of Nigeria was "a mistake". They have however never answered the question as to why they continue to fail to address the national question.

The emergence of hundreds of environmental ethnic minority successimist groups, regionalists, human rights and pro-democracy groups around the national question shows that it has defied all the superficial and opportunistic responses by various central governments since independence.

SELF ASSESSMENT EXERCISE 3

1. Briefly explain the fear of the minority groups within the Federation of Nigeria.
2. How can the problems of the minority groups in Nigeria be solved?

4.0 CONCLUSION

We are in the 21st century and the right to self determination of people is still as relevant as it was 60 years ago. Although it began as the right of colonial or occupied people only; the right to self-determination has continually reinvented itself and it is now the right of oppressed people everywhere.

Self-determination is a continuing process and will endure as long as certain ethnic groups do not feel that they are part of the machinery of government by which decision affecting them are made and implemented. So long will claims to a right to self-determination, be it external or internal continue.

If the nature of government in a nation is more responsive than it is and the level of participation of all groups in the country is higher, there would be less need to assert the right to self-determination by any of the constituent groups. A good example of this is Quebec region of Canada where a 1997 referendum on whether to secede was defeated due to the democratic and representative system of government where the rights of the Quebecois are truly protected.

The reverse is the case in Africa where governments are always violently opposed to any assertion of a right to self-determination. The

ethnic nature of the Nigerian society is a real one, it cannot be wished away. Those who try to do so at least in public, only have to turn to the example of the Soviet Union, Yugoslavia and Romania to disabuse their minds.

5.0 SUMMARY

The feeling is that 49 years after political independence, the majority of the ethnic groups, especially the minority groups are frustrated about the structure of the nation. This development of feelings of frustration could be monitored through the memoranda or Bill of Rights of the different ethnic groups in Nigeria, served on the Federal Government about how they want to control their own affairs.

A thorough study of the Constitutions and the Bill of Rights or Charters of Demands of the different groups do not advocate a breakup of Nigeria. But they want maximum control over the affairs of their territories.

6.0 TUTOR-MARKED ASSIGNMENT

1. Explain the term "self-determination".
2. The Ogoni Bill of Rights or Charter of Demand is meant to break up the Nigerian nation. Discuss.
3. Compare the nature of the demands of the Ijaw nation, the Ogoni people on the Nigerian nation and the independence of Nigeria from the British in 1960. Any similarity?

4. (i) What is resource control?
   (ii) Discuss resource control in relation to the demand of the Ijaw people.

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UNIT 5 STATES, TERRITORY AND RECOGNITION

CONTENTS

1.0 INTRODUCTION

The discussion of the right of self-determination has so far left unconsidered two major areas of international law that are crucial for a full understanding of territory and international law. The first relates to the principle of *uti possidetis* and answers the question as to how a state either upon creation or later may acquire or dispose of territory. The second looks at the topic of recognition of a state's claim to territory and its importance. We shall also consider the issue of territorial and other rights over the sea and its bed.

2.0 OBJECTIVES

At the end of this unit, you should be able to:

- explain the relevance of recognition to state identity
- explain the means by which sovereign territory may be gained or disposed of
- outline the changes in the law relating to the exploitation of the sea and the sea bed since the Second World War
- discuss the debates concerning newly created rights over the sea and sea bed.

3.0 MAIN CONTENT

3.1 State Acquisition or Disposal of Territory in International Law

Until the formulation of the UN Charter, this was a complex topic with abstruse rules. A world in which territory was won by conquest, or the planting of a flag, or international agreement of European colonial

powers, or indeed by purchase regardless of the wishes of inhabitants, or simply by occupying territory previously uninhabited, at least by "civilized" people, called for rules of an elaborate nature. Those that existed were based initially upon Roman law. On occasions they remain relevant even post-Charter, as for instance when frontier disputes exist between decolonised states leading to uncertainty as to where the borders are to which *uti possidetis* applies, or should have applied upon independence. These cases are, however, so rare that it is enough for you to be aware that such questions might arise and to know that most international law texts spend a disproportionate amount of time discussing law that is largely irrelevant to the twenty-first century.

Article 2(4) of the UN Charter States

All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

Having recalled this provision, the ICJ, in *Legal Consequences of the Construction of a Wall* in *the Occupied Palestinian Territories* - an advisory judgment in 2004, stated in para 87 as follows:

On 24 October 1970, the General Assembly adopted resolution 2625 (XXV), entitled 'Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States' (hereinafter 'resolution 2625 (XXV)'), in which it emphasised that "No territorial acquisition resulting from the threat or use of force shall be recognised as legal." As the Court stated in its Judgment in the case concerning Military and Paramilitary Activities in and against Nicaragua *(Nicaragua* V. *United States of America),* the principles as to the use of force incorporated in the Charter reflect customary international law (see I.C.J. Reports 1986, pp. 98-101, paragraphs 187-190); the same is true of its corollary entailing the illegality of territorial acquisition resulting from the threat or use of force.

This unequivocal statement contains the law of territorial transfer in the present day. Transfer can only be legitimate if it comes with the agreement of the sovereign parties to the deal. Such a conclusion has manifest consequences for the future of Israeli settlements in the Occupied Territories. Only Israel and the United States have argued that "facts on the ground" might replace international law. It is also relevant to remember that Israel's purported annexation of the Golan Heights and all of Jerusalem has received no external support (or recognition - see below).

Nevertheless, it should be noted in passing that challenges to colonial acquisition of title continue in the claims of indigenous peoples in such countries as Canada, New Zealand, Australia and the USA.

3.2 Recognition in International Law

Because the world of states is not one which is irrevocably settled, new states and new configurations of old states have been a constant feature of international relations. Thus apart from decolonisation, we have seen the creation of new independent states arising from the dissolution of the Soviet Union and the former Yugoslavia, and we have seen the amicable division of what was Czechoslovakia into the Czech Republic and Slovakia. Such changes in statehood necessitate a response from other states taking cognisance of the new realities. It is here that recognition is important.

Recognition by one state of another state implies that the recognising state is willing to enter into relations with the entity that is being recognised. The recognition may be of either a state or the government of a state. Where it is the state that is being recognised, recognition implies that the recognising state accepts that the recognised state has the attributes of a state and will be treated as such. The recognition of a government formally acknowledges that the recognising state accepts that the recognised regime is the effective government and will be treated on that basis. In addition the recognition may be express, as for instance by a formal announcement, or it may be by implication through an act which of itself implies recognition *unequivocally,* particularly by entering a bilateral treaty.

Very often the recognition will be collective, as when a state is newly admitted to membership of the UN under the procedure set out in Article 4 of the Charter. Once a state has been admitted to the UN it becomes subject to, and benefits from, sovereign equality (Article 2(1)). Indeed it was the fact of Kuwait's membership of the UN that made Iraq's purported annexation before the first Gulf War subject to almost unanimous condemnation.

There is also an academic debate as to whether recognition is “declaratory’ or “constitutive”. In other words, does recognition simply recognise an existing reality or is it the act(s) of recognition that creates the reality of statehood? The Montevideo Convention on the Rights and Duties of States stated the generally accepted criteria for statehood as requiring (a) a permanent population, (b) a defined territory, (c) a government and (d) capacity to enter into relations with other states; it went on in Article 3 to add, 'The political existence of a state is independent of recognition by the other states'. This is clearly an acceptance of the declaratory thesis but it is equally clearly largely

obsolete. Those who argue that recognition is more than this point firstly to Article 4 of the UN Charter, which provides for admission only to those states willing to accept the Charter obligations. They are able to reinforce this position by considering the events leading to the recognition of states formed from the dissolving Soviet Union and the Former Yugoslav Republic. Here the EC had determined that recognition was to be granted only upon important specified conditions. To this end the foreign ministers of the member states of the EC adopted the following "Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union" in 1991:

In compliance with the European Council's request, ministers have assessed developments in Eastern Europe and the Soviet Union with a view to elaborating an approach regarding relations with new states.

In this connection they set out the following guidelines:

The Community and its Member States confirm their attachment to the principles of the Helsinki Final Act and the Charter of Paris, in particular the principle of self-determination. They affirm their readiness to recognise, subject to the normal standards of international practice and the political realities in each case, those new States which, following the historic changes in the region, have constituted themselves on a democratic basis, have accepted the appropriate international obligations and have committed themselves in good faith to a peaceful process and to negotiations.

Therefore, they adopt a common position on the process of recognition of these new states, which requires:

1. respect for the provisions of the Charter of the United Nations and the commitments subscribed to in the Final Act of Helsinki and in the Charter of Paris, especially with regard to the rule of law, democracy and human rights;
2. guarantees for the rights of ethnic and national groups and minorities in accordance with the commitments subscribed to in the framework of the Commission on Security and Co-operation in Europe;
3. respect for the inviolability of all frontiers which can only be changed by peaceful means and by common agreement;
4. acceptance of all relevant commitments with regard to disarmament and nuclear non-proliferation as well as to security and regional stability;
5. commitment to settle by agreement, including where appropriate by recourse to arbitration, all questions concerning state succession and regional disputes.

The Community and its member states will not recognise entities which are the result of aggression. They take account of the effects of recognition on neighbouring states.

Thus the position would seem to be that states are not under an obligation to recognise a state merely because of a political reality. East Germany was not recognised as a state by the West unti11973 and the "Turkish Republic of Northern Cyprus" received recognition only from Turkey.

Finally, you will probably not be surprised to learn that there remains one anomalous territory, that of Palestine. A State of Palestine was proclaimed in November 1988, establishing it in the land of Palestine with a capital at Jerusalem (Al-Quds Ash-Sharif), though of course it is difficult to reconcile with the Montevideo criteria for statehood. Nevertheless the State has been recognised by almost half of the nations of the world and all of the Arab League. Obviously such recognition is a politically motivated action reflecting the frustration of many states at the Middle Eastern impasse.

SELF ASSESSMENT EXERCISE 1

Explain the debate about whether recognition is declaratory or constitutive. Is the debate significant? (See *Feedback at the end of this unit*).

3.3 Territorial and Other Rights over the Sea and its Bed

So far in discussing self-determination and the acquisition and disposal of territory we have confined ourselves to a consideration of land. Until well into the twentieth century this would have been sufficient. Whereas territorial rights over land were highly developed, questions of ownership of and rights over the sea and its bed remained largely unasked. This was for a number of important reasons. The first concerned the rights of passage of ships. So important was merchant shipping that all powerful nations had an interest in protecting the rights of ships to the freedom of the seas.

The only real limitation layover the territorial sea where it was generally accepted that states could claim three nautical miles from the coastline as part of national territory. Because of this status the state enjoyed full sovereignty over the territorial sea, the airspace above it, the seabed and all that lay below it. Even then, however, the sovereignty was subject to the right of innocent passage that lay with all foreign merchant shipping and warships. "Innocent passage" meant that the right could be exercised if passage was not prejudicial "to the peace, good order or security of the coastal state". While the right has sometimes been

contested, usually the power of states in whose interests the rule operates has been sufficient to ensure innocent passage.

The 1982 Convention on the Law of the Sea determined that coastal states should be able to claim up to 12 nautical miles of territorial sea (one nautical mile is 1.852 kilometres, or 1.508 land miles). This development was very much a part of the process by which property rights were being asserted over what had previously been available to all. Typically, property claims are made over resources that have scarcity value. As long as the sea was seen as primarily a route for shipping and a place for fishing, with enough fish for all, there was no need to make property claims. By the end of the Second World War coastal states had come to realise that the seabed and what lay below it could be extraordinarily valuable. Then followed a "property grab", unseen since the scramble for colonies. It began with President Truman's Proclamation of September 1945 which stated:

Having concern for the urgency of conserving and prudently utilising its natural resources, the Government of the United States regards the natural resources of the subsoil and sea bed of the continental shelf beneath the high seas but contiguous to the coasts of the United States as appertaining to the United States, subject to its jurisdiction and control. In cases where the continental shelf extends to the shores of another State, or is shared with an adjacent State, the boundary shall be determined by the United States and the State concerned in accordance with equitable principles. The character as high seas of the waters above the continental shelf and the right to their free and unimpeded navigation are in no way thus affected.

Very quickly customary international law followed the proclamation, to the great benefit of all coastal states fortunate enough to have a continental shelf. In turn the Geneva Convention on the Continental Shelf (1958) (and the later 1982 Convention on the Law of the Sea) regularised the position and as a result states are able to claim up to 200 nautical miles of continental shelf, not as sovereign territory but as territory that the coastal state has an exclusive right to explore and exploit. Such rights do not affect the status of the high seas nor the air space above the continental shelf.

Initially coastal states without significant continental shelf appeared to be prejudiced by that fact in that the ability to exploit the sea was not initially extended in the same way. This disadvantage was corrected with the creation of an "exclusive economic zone" (EEZ). The 1982 Convention defined this EEZ as "an area beyond and adjacent to the territorial sea' which was not to extend beyond 200 nautical miles. Again sovereignty is limited - in this case to rights "for the purpose of

exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the seabed and subsoil and the superjacent waters". Most importantly, even if there is no continental shelf the rights include the right to regulate fishing within the EEZ.

What will be apparent, then, is that within 30 years of the UN Charter the law of the sea had undergone an immense change to the considerable benefit of most coastal states (not all, because some that had been involved in distance fishing found their rights restricted). Particularly through off-shore oil exploitation many coastal states had title to resources to which a claim was recognised only in the second half of the twentieth century. Land locked states received no such benefit of course, and it was this that persuaded many of the delegations at the Law of the Sea conferences to attempt to distribute at least the proceeds of the exploitation of the deep seabed in a way dictated more by need than luck. While this was the view of developing states who argued that the benefits of deep sea exploitation should be recognised as "the common heritage of mankind", the developed states (not altogether coincidentally the states with the ability to exploit the deep seabed) argued merely for regulation and licensing.

The 1982 Convention provided that all deep seabed exploration should be carried out and controlled by an "International Sea Bed Authority". Cassese explains the subsequent events (p.92-94). Whereas the Convention paved the way for the deep seabed to be used "in the interest of mankind", this was firmly rejected by industrialised countries, and the Convention did not enter into force until 1994 when considerable concessions were made to the perspective of the developed countries.

SELF ASSESSMENT EXERCISE 2

"The whole development of the law of the sea was thus dictated by State sovereignty, nationalism, and a laissez-faire attitude. In the scramble for economic, scientific or military control over the new resources, almost all new notions were inspired by self interest and geared to competition". (Cassese, p.82.)

Does this quotation accurately reflect developments concerning the law of the sea after the Second World War? (See *Feedback at the end of this unit*).

4.0 CONCLUSION

Changes in the law of the sea over the last 60 years have been dramatic. This has been to the great advantage of many coastal states and to no real advantage to others. To a large extent the size of the benefit has corresponded to the length of coastline, although some states have found

their continental shelf to be much richer in natural resources than others. Attempts to distribute these "windfall" profits more equitably proved significantly unsuccessful. This was the case despite attempts to secure the benefits of the deep sea bed for distribution in accordance with need.

5.0 SUMMARY

We have considered how sovereign territory may be acquired or disposed of. Since the UN Charter, acquisition or disposal is only possible by agreement. Even prolonged occupation will no longer suffice and purported annexation is unlawful. When considering the role of recognition in international law it was necessary first to explain the effect of recognition and how it is granted either of a state or a government. It was also important to understand that de *facto* situations cannot compel recognition and that it is not uncommon for a recognising state to impose conditions before recognition.

ANSWER TO SELF ASSESSMENT EXERCISE 1

The significance of recognition is that it is an indication of the recognising states' willingness to treat the recognised state as a state. The academic question is whether without such recognition a state may be said to exist notwithstanding. The answer is probably a qualified "Yes". It is not uncommon for states to be recognised by only a limited number of states. Taiwan, for instance, is recognised by only 23 generally very small states and does not exist as an independent state in the eyes of most states or in the view of the United Nations. The correct position is probably that unrecognised entities do not exist as states for those who withhold recognition, but do for those who do. Reference should also be made to the distinction between recognition de *facto,* and recognition de *jure.*

ANSWER TO SELF ASSESSMENT EXERCISE 2

This requires consideration of the changes to the law of the sea since the Second World War. It seems to be demonstrably true whether one thinks of the territorial sea, the continental shelf, the EEZ or even the deep sea bed. Those states with coastlines have been legitimated in their acquisition of new property rights.

Attempts to distribute such property rights more equitably have largely been defeated. It is important to be able to explain the essence of the new regime and to show how little it has in common with the concept of "the common heritage of mankind". Altruism in the division of the spoils is conspicuous only by its absence.

6.0 TUTOR-MARKED ASSIGNMENT

Define and distinguish among the following:

1. The territorial sea
2. Internal waters
3. The contiguous zone
4. The exclusive economic zone
5. The continental shelf
6. The high seas
7. The international seabed.

7.0 REFERENCES/FURTHER READINGS

Kaczorowska, Chapter 5: *Recognition*, pp.73-94, pp.98-120.

Cassese, Chapter 4: *States as the Primary Subjects of International Law,* pp.73-80.

Dixon, Chapter 5: *Personality, Statehood and Recognition*, pp.117-30.

Dixon, Chapter 8: *The Law of the Sea*, pp.195-224.

Cassese, Chapter 5: *The Spatial Dimension of State Activities*, pp.81-94.

MODULE 2

UNIT 1 THE PEACEFUL SETTLEMENT OF DISPUTES IN INTERNATIONAL LAW

CONTENTS

1.0 INTRODUCTION

The Charter of the United Nations places considerable emphasis upon the obligation of member states to avoid conflict and to settle disputes through peaceful means. Article 1(1) states that it is a purpose of the UN to:

"bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace"

while Article 2(2) places an obligation upon members to:

"settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered."

Every member of the United Nations is of course a party to this Charter and is bound by it. The means of the pacific settlement of disputes is the subject of Chapter VI of the Charter. Such means include, under Article 33, "negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice".

You should notice immediately that the means suggested for resolving disputes, while they are all obviously lawful, are not all, strictly speaking, legal means as we defined them. Negotiation, enquiry, mediation and conciliation, while they do have definitions in international law, seem to lack the quality of legal means. This, as suggested in LAW 511, requires some "translation" from the social and political world to a legal frame in which legal issues are isolated and answered. For this reason in this Module, we will primarily be concerned with judicial resolution, especially through the ICJ, and to a lesser extent with arbitration.

The Module will begin with a discussion of the legal method and international dispute resolution, and will then proceed to a rather critical analysis of the International Court. It will consider the history of the Court, its composition and statute, and some cases will exemplify the points made.

Nevertheless, for the sake of completeness, mention is required of the non-legal methods. These are well explained in Dixon but summarised here. Negotiation is obviously the means by which most international disputes are resolved. This is usually, but not necessarily, diplomatic and face to face, and any agreement will have the status intended by the parties. It will be legally binding if this is what the parties intend. Mediation and good offices involve a third party or third parties. "Good offices" from a third party precede negotiation, and mediation is a third party attempting to mediate, or be an intermediary between disputing parties. A commission of inquiry is usually a preliminary means by which facts may be impartially found in order to provide the basis for a resolution to the dispute.

2.0 OBJECTIVES

At the end of this unit, you should be able to:

- discuss the significance of the emphasis placed by the international community upon the peaceful settlement of disputes
- explain the means enumerated in Article 33 of the UN Charter for the peaceful settlement of disputes
- explain why some means of settlement can be categorised as legal methods and some not
- discuss the ICJ in its form and structure
- describe the legal method of the Court
- formulate criticisms of both the Court and its methods.

3.0 MAIN CONTENT

3.1 Legal Method and International Dispute Resolution

It was observed in LAW 511 that international law is a phenomenon without compulsory jurisdiction in the event of disagreement or dispute. This is in spite of the fact that compulsory and binding jurisdiction was perceived as desirable by many writers for most of the twentieth century. Many argue that an international court with the ability to hand down authoritative judgments which would finally decide the rights and wrongs of issues which threaten world peace, and also with the moral or physical standing to ensure compliance, would contribute directly to the United Nations objective of maintaining international peace and security. Often, it is argued, legal dispute resolution is the only alternative to the resolution of the dispute by force, often meaning war.

There have historically been many efforts to persuade states that their interests lay in accepting this compulsory jurisdiction and the obligation to give effect to judgments even when inconvenient or worse. In retrospect this attempted persuasion seems to have been doomed to failure.

The assumptions of those who advocated the acceptance of compulsory jurisdiction were over-optimistic for two central reasons. The first lie in the distinction between politics and law, and the second (which is related) is concerned with the belief in the objectivity of law and its ability to provide justice.

These reasons may be exemplified through discussion of the significance of two decisions of the International Court of Justice. The first concerns the USA and its "relations" with the government of Nicaragua; the second, the advisory opinion given by the Court in 1996 after considering whether the threat or use of nuclear weapons is, in any circumstances, permitted under international law. Both cases illustrate the advantages, and also the pitfalls of putting international problems into legal form.

3.1.1 The History and Structure of the ICJ

The ICJ is the judicial organ of the United Nations and was the successor to the Permanent Court of International Justice (PCIJ), which was established in the aftermath of the First World War in 1921. There were however some significant differences between the two which indicate changing attitudes to adjudication in international law. As Judge Bedjaoui observed when he was President of the ICJ, the PCIJ was more of a precursor than a predecessor. This, he explained, was because of one striking difference between the Courts.

Whereas the PCIJ, not an organ of the League of Nations, "aimed essentially to do no more than establish peace in order to preserve the status quo', the ICJ was an integral part of the United Nations with the framers of the UN Charter directing their efforts towards the establishment "of an entirely new international society - a society consistently moving towards progress; a society more just, more egalitarian, more wont to show solidarity, more universal; a society all of whose members were to engage in an active and collective endeavour to usher in a full and lasting peace".

Thus he suggests that the ICJ was to be fully integrated into the concerns and purposes of the United Nations Organisation.

While both Courts were given the authority to give final judgments, neither was given the power to create new international law. Decisions of the Courts do not, at least technically, create precedents as they would if they were given in domestic common law jurisdictions, although their importance will in fact extend beyond the instant case. The impetus for the creation of both Courts came from the reasonable sentiment that the use of force to settle disputes should be avoided as a matter of both policy and choice. As Judge Weeramantry often observed while a judge of the ICJ, there was a recognition that all major international disputes are finally concluded by negotiations and adjudication, and this in itself suggests that it is advantageous to have the negotiations and adjudication before, rather than after, the use of force.

The creation of both Courts was stimulated by senseless and revolting carnage and the reaction thereto. The Statute of each Court provided that states could at any time declare that they recognised the jurisdiction of the Court as compulsory *ipso facto* in relation to any other state accepting the same obligation, in all legal disputes concerning a wide range of topics. In such a case it is provided that if the dispute is of a legal character and concerns the interpretation of a treaty; any question of international law; the existence of any fact which, if established, would constitute a breach of an international obligation; or the nature or extent of reparation to be made for the breach of an international obligation, then the Court's jurisdiction becomes compulsory (Article 36(2) of the Statute of the Court). Most disputes between states would come within at least one of these provisions.

3.1.2 Criticisms of the ICJ

For various important reasons this acceptance of compulsory jurisdiction has not proved popular and hence the role of the ICJ in world affairs remains limited, although not inconsequential. Why should this be? A first answer lies in the composition and structure of the Court itself. The Statute of the Court provides that appointed judges are to be qualified for the highest judicial offices in their own state, or that they should be jurisconsults of recognised competence in international law (Article 2).

There are 15 judges from 15 different states, elected by the UN General Assembly and the Security Council, and they sit as independent judges for nine year terms. The intricate voting procedure elaborated in Articles 3-12 ensures that each elected candidate has received majority support in both the General Assembly and the Security Council.

It is provided also that at every election (these are staggered) the electors are to “bear in mind not only that the persons to be elected should individually possess the qualifications required, but also in the body as a whole the representation of the main forms of civilisation and of the principal legal systems of the world should be assured”. Perhaps the use of 'the main forms of civilisation” might not give great confidence to the poorest states and the suspicion is always that “civilisation” is equated with power and wealth, rather than culture. It is not without significance that the two working languages of the ICJ are English and French.

It is certainly true that the composition of the ICJ has remained contentious, with the view often being expressed that the Court was dominated by the North and by the powerful states in particular. There has recently been increased diversity in the judges chosen but this has certainly not met all of the objections. The problems lie rather deeper and lead to inherent contradictions. Such diversity as there is comes from a system which has evolved *de facto.* In this system, probably not incorrectly labelled as a “gentlemen's agreement”, there is a regional distribution of judges with three from Africa, three from Asia, two from Latin America, two from Eastern Europe, and five from Western Europe and other countries. Within that regional distribution there is a 'convention' which ensures that a judge from each of the states which hold permanent membership of the UN Security Council will be elected.

Only one female judge has been elected in the history of both the PCIJ and the ICJ (Judge Rosalyn Higgins). Just as significant is the difficulty in actually achieving the diversity apparently envisaged.

Although the judges sit as independent it is obvious that candidates will only be selected if they have shown a significant commitment to the

structure, form and methodology of international law as it is. Neither rebels nor iconoclasts will conceivably be elected no matter what state they come from or with what support. Thus it may be argued that notwithstanding the diversity of states from which judges come, the ICJ will continue to reflect a very Western perception of the way in which courts should operate and the sort of legal perspective that is brought to bear. Furthermore, although the judges are nationals of 15 states, overwhelmingly they have received at least some part of their legal education in the USA, the United Kingdom or France.

This homogeneity of judicial identification is reinforced by the status, salary and privileges which are a part of their appointments. With the status of eminent people of ambassadorial rank, constantly reinforced by procedures which emphasise their exalted positions, their diversity tends to evaporate. This of course is only significant if it is accepted, as has been argued, that the international law way of proceeding is in fact not objective or neutral but imbued with the ideological perceptions of the West.

SELF ASSESSMENT EXERCISE 1

What criticisms may be made of the form and structure of the International Court of Justice? Do you agree with them? (See *Feedback at the end of this unit*).

SELF ASSESSMENT EXERCISE 2

1. How are judges for the ICJ chosen?
2. How do you think they should be chosen?

3.2 The Limited Use Historically Made of the ICJ

The fact that there are concerns over the structure and composition of the Court only partly explains the reluctance of states to grant jurisdiction. More fundamental is the very real apprehension about the usefulness of litigation and adjudication as a method of dispute resolution. By its very nature a legal case may be won by either party, and it is obvious, if usually unobserved, that no party if given a choice would choose to litigate unless that party believed it had a very real chance of success. Indeed even then it might well choose negotiation and mediation rather than the risk of adjudication.

It was observed last semester that the legal method of resolving disputes brings other problems as well. In the selection of the “legally relevant”, many social facts of significance to the parties or their constituents may

simply be ignored, bringing political danger to governments. And because of the adversarial method of the ICJ this in itself often has the effect of aggravating disputes rather than mitigating them.

Finally there is the well founded fear that the application of international law will generally preserve the status quo rather than promoting change which might arguably be desirable. (One alleged example of this concerned the legality of the NATO intervention in Kosovo. When the government of Yugoslavia attempted to have the legality of the intervention considered by the ICJ, the UK government refused to allow the case to be heard as they were entitled to do. One reason advanced for the refusal to accept was that the law relating to humanitarian intervention was still developing and to allow the ICJ to determine the existing position might set back this development).

It is seldom forgotten that international law governed the colonial world just as "objectively" as it now governs a world of independent states. Considering the cost and the time involved in litigation, if the outcome is unpredictable, usually only those states unlikely to prevail in other forums will be prepared to chance all before the ICJ.

Two significant qualifications to this critique must however be addressed and allowed. The first is that while the disadvantages of the legal method of dispute resolution are clear, so too are the advantages. In structuring a dispute in terms of questions of international law, while much of the political reality and context may be lost, the advantage is that a question is formulated that is answerable. At least the dispute **as formulated by law** may be resolved. A sometimes quoted example suggests that there are disputes in which both parties welcome any solution because of the intransigence of the argument. In the words of Nagendra Singh, a judge at the ICJ from 1973 until his death in 1988:

The successful resolution of the border dispute between Burkino Faso and Mali in the 1986 *Frontier Dispute Case* illustrates the utility of judicial decision as a means of settlement in territorial disputes. The case was submitted to a Chamber of the ICJ pursuant to a special agreement concluded by the parties in 1983. In December 1985 while written submissions were being prepared, hostilities broke out in the disputed area. A ceasefire was agreed, and the Chamber by an order of 10 January 1986 directed the continued observance of the ceasefire, the withdrawal of troops within twenty days, and the avoidance of actions tending to aggravate the dispute or prejudice its eventual resolution. The case proceeded, and in its judgement of 22 December 1986 the Chamber determined the overall course of the frontier line. The Presidents of Burkino Faso and Mali publicly welcomed the judgement and indicated their intention to comply with it.

Thus the legal method may be useful where resolution plus authority is in the interests of all parties, and it may also be appropriate in disputes between friendly states prepared to accept outside jurisdiction, as in several cases concerning the law of the sea.

The second qualification to the critique is that the record of the ICJ (such as it is, given that until recently very few cases had been referred to it) does not suggest that it has been less than independent. Its activities with regard to South West Africa (now Namibia) in 1966 did cause international concern, particularly in the non-Western world, when it held that it enjoyed no jurisdiction to determine whether South Africa was in violation of its mandate from the League of Nations in maintaining a system of apartheid within the territory. Certainly many African and Asian states regarded this decision as unacceptable and doubt was cast upon both the credibility of the Court and its ability to move easily into a post-colonial era.

Some of the lost ground was recovered when in 1971, in an advisory opinion given at the request of the Security Council dealing with some aspects of the status of Namibia in international law, the Court upheld the obligation of states to give effect to a Security Council Resolution declaring the continued presence of the South African authorities to be unlawful. Sound though this may have seemed, its merit was greatly diminished by South Africa's continuation of occupation until 1990. The ability to ignore an advisory opinion and to flout the ruling did little to increase the standing of the Court in the eyes of those consistently offended both by apartheid and by the Western friends of the South Africa government.

Overall, however, it is difficult to assess and appraise the Court because it is obviously constrained by the cases referred to it. But the fact that there have been so few must obviously represent either a distrust of legal method and international law as a suitable dispute resolution method or a sense that law is not relevant to political disputes.

Such suspicion and scepticism can only have been increased by the effects of the ruling of the ICJ in the case between Nicaragua and the United States. For many reasons, this is one of the most significant cases to have been heard by the ICJ. But as will be seen, it is at least as significant for what it failed to achieve as for what it decided. And parenthetically it is not unimportant in assessing this case to observe the difficulty of discovering the facts which gave rise to this case, both in British international law textbooks and even in collections of cases and materials. While there are myriad references to the law applied in that case, the factual reality of the aggression of the United States against

Nicaragua is made to appear quite peripheral. There are few better examples of how "pure" international law can be with the legal being severed from the political context.

4.0 CONCLUSION

Arguably the scope for judicial resolution of international disputes is limited. This is because judicial resolution will seldom resolve political issues. The structure and form of the ICJ can, anyway, be seen as reflecting Western perspectives on judicial resolution and although the Court is drawn from many states this remains the case.

5.0 SUMMARY

We have looked at the legal method and international dispute resolution and the limited use historically made of the ICJ. You should now be able to:

(i) Explain the significance of the emphasis placed by the international community upon the peaceful settlement of disputes;
(ii) Explain the means enumerated in Article 33 of the UN Charter for the peaceful settlement of disputes;
(iii) Explain why some means of settlement can be categorised as legal methods and some not;
(iv) Explain the ICJ in its form and structure;
(v) Describe the legal method of the Court; and
(vi) Formulate criticisms of both the Court and its methods.

ANSWER TO SELF ASSESSMENT EXERCISE 1

This requires a description and consideration of the form and structure of the ICJ. It is open to criticism because its history suggests that it is a male dominated institution in which the judges are selected in a way which predisposes a particular legal ideology. In spite of the emphasis upon internationalism it can be argued that the Court remains imbued with European legal thinking (though not everyone would see this as a defect). The geographical distribution of judges is also questionable, especially the factual reservation of places for each permanent member of the Security Council. The exodus from the Court of two members whose minority views disagreed significantly with the majority in the *Threat or Use of Nuclear Weapons Case* is also important. Finally, because of the opacity of the process by which judges are actually chosen it is difficult to feel confident in the process.

6.0 TUTOR-MARKED ASSIGNMENT

Discuss the history and structure of the ICJ.

7.0 REFERENCES/FURTHER READINGS

Cassese, Chapter 14: *Promoting Compliance with the Law and Preventing or Promoting Disputes*, pp.278-95.

Dixon, Chapter 10: *The Peaceful Settlement of Disputes*, pp.259-88.

Kaczorowska, Chapter 15: *Peaceful Settlement of Disputes between States*, pp.366-409.

UNIT 2 THE CONTENTIOUS JURISDICTION OF THE ICJ EXEMPLIFIED BY *NICARAGUA* V. *USA*

CONTENTS

1.0 INTRODUCTION

In this Unit, we consider the contentious jurisdiction of the ICJ as exemplified by the case of *Nicaragua* Vs. *USA*.

2.0 OBJECTIVE

At the end of this unit, you should be able to:

- explainthe role of the ICJ in contentious cases, and give examples of how it is limited by political realities.

3.0 MAIN CONTENT

3.1 Nicaragua V. USA

Nicaragua brought its action against the United States making some of the gravest allegations known to international law. The history of the antagonism between these two states had begun its latest chapter very shortly after the Nicaraguan Sandinistas overthrew General Somoza, the dictator of Nicaragua from 1967 to 1979. Somoza, even when judged by the low standards of military dictators, excelled in both human rights abuse and avarice. The kindest thing US President Johnson had reportedly been able to say of him was, “He may be a son of a bitch, but he's our son of a bitch”.

Almost any overthrow would have been an improvement, but in fact the Sandinistas arrived with policies of land reform, public health care and education. These were policies calculated at once to appeal to the populace and to appall the government of the United States of America, which not only feared for the security of foreign investment in Nicaragua but was seemingly apprehensive about another “threat of a good example” to other Central and South American dictatorships and their populations. It is not an exaggeration to assert that the policy of the USA towards Nicaragua was directed at making the humanitarian goals pursued by the Sandinistas impossible to attain. Not only did the USA train, arm and pay for the “Contras” (in the main, remnants from Somoza's oppressive army who, when he was still in power, had

indulged in every form of torture and human rights abuse directed at the peasants who were thought to support the Sandinistas) who were determined to make reform impossible; it was also found by the ICJ to have mined Nicaraguan harbours, attacked oil installations, ports and shipping and even permitted the distribution of a manual on guerrilla warfare techniques which the Court found to be contrary to "general principles of humanitarian law".

The United States argued vehemently that the ICJ was not the appropriate forum within which to consider its 'differences' with Nicaragua. Because the strife between the countries was political, and in so far as this was alleged to threaten international peace and security, this was, it was argued, a matter not for the ICJ but rather for the Security Council of the United Nations which is charged under Article 24 of the UN Charter with "... primary responsibility for the maintenance of peace and security...".

This argument did have its merits. There was clearly a threat to international peace and security and in other circumstances the Security Council would have been the obvious main forum. In this situation, however, the argument was disingenuous because as long as the matter was within the Security Council the United States would be able, if necessary, to exercise its veto to prevent any action which might constrain its political goals (for example, the destruction of the Sandinista government of Nicaragua).

When the US government decided to withdraw from further proceedings in the ICJ it made a public statement explaining its position. This pronouncement declared that the continuing proceedings constituted a "misuse of the Court for political purposes...the Court lacks jurisdiction and competence over such a case".

Why, then, did the ICJ feel able to consider the problem notwithstanding the Security Council involvement? The ICJ is declared in the Charter of the United Nations to be the principal judicial organ of the UN and according to the Statute of the ICJ was given jurisdiction over all cases referred to it by state parties. Once the Court found that the United States had, under Article 36(2) of the Court's Statute, accepted the compulsory jurisdiction of the Court (as, it was held, had Nicaragua) it was scarcely open to it to suggest that the appropriate forum for dispute resolution lay elsewhere. Given that the allegations were of grave breaches of international law, the ICJ could not plausibly have declined jurisdiction within the terms of its own Statute.

The position of the United States, had it not been so utterly untenable, would have bordered on the ludicrous. Initially its position was to vehemently dispute the jurisdiction of the ICJ, claiming that its qualified acceptance of Article 36(2) of the Court's Statute was not matched by

Nicaragua's qualified acceptance (a position rejected by the Court). When this argument did not prevail the United States simply announced that it would no longer recognise the compulsory jurisdiction of the Court, with immediate effect, and so withdrew. Such an act was patently in breach of treaty obligations voluntarily entered into. It was also a devastating and cynical act by the world's most powerful nation and betrayed the long held position of the United States which had favoured compulsory jurisdiction. No one more clearly highlights just what the United States' reaction to the action begun by Nicaragua meant than D.P. Moynihan in his book *on the law of nations*. This is an impressive source because Moynihan, a sometime Senator from New York, had also been both Professor of Government at Harvard, and US Ambassador to the United Nations.

Moynihan uses two quotations to show how the thinking of the United States had changed. He quotes President Eisenhower in 1959 stating that "the time has come for mankind to make the role of law in international affairs as normal as it is now in domestic affairs..." and supporting global acceptance of ICJ compulsory jurisdiction, adding that it would be far "better to lose a point now and then in an international tribunal and gain a world in which everyone lives at peace under the rule of law". He then adds a quotation from then Vice-President Richard Nixon where he observed that the United States "should be prepared to show the world by our example that the rule of law, even in the most trying circumstances, is the one system which all free men of good will must support".

One final quotation from Moynihan is relevant because of its poignant accuracy (and continuing pertinence). He quotes Professor Louis Henkin of Columbia University as summarising the inferable position of the United States government towards international law at this time as follows:

The United States appears to have adopted the view that under international law a state may use force in and against another country for the following reasons:

- to overthrow the government of that country in order to protect lives there
- to counter intervention there by another state and carry the attack to the territory of the intervening state
- to overthrow the government of that country on the ground that it is helping to undermine another friendly government in reprisal for that

country's suspected responsibility for terrorist activities in the hope of deterring such acts in the future

- to overthrow a communist (or pro-communist) government or to prevent a communist (or pro-communist) government from assuming power, even if it was properly elected or emerged as a result of internal forces.

To its credit, the ICJ ruled against the USA in 1986, notwithstanding the refusal of that state to appear. The ICJ refused to decline jurisdiction as the USA had hoped. Undoubtedly the judgment is highly significant for international law and international lawyers. Typically a book of cases and materials in international law will have some seven excerpts from the Merits judgment considering the sources of international law, the relationship between custom and treaty, *jus cogens,* sovereignty over air space, state responsibility and private persons, the use of force, and self-defence.

The benefits to the state of Nicaragua were rather less than those to international lawyers and writers. While at least some of the latter observe in passing that the United States rejected the decision of the Court and refused to accept its ruling, few actively considered the aftermath. Yet this is surely crucially important both for the Nicaraguan citizens and for other states contemplating adjudication of international issues through the World Court. Supposedly one great merit of the ICJ and the rule of law is that in legal proceedings states are equal before the law. In this case of exceptionally high visibility the United States showed itself able to ignore the Court with impunity, and even avoid Security Council condemnation for the clearest breach of treaty obligation. Article 94 of the Charter of the United Nations is unequivocal:

(1) Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party.

(2) If any party to a case fails to perform the obligations incumbent upon it under a judgement 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 judgement.

Yet the aftermath seems to be seen by most international law writers as a matter for political, rather than legal, commentators.

Although Noam Chomsky's writing (beyond the field of linguistics) is sometimes more emotive than "dispassionate" academic audiences are used to, his comments about the decision of the ICJ seem justified:

The World Court condemnation of the United States evoked further tantrums. Washington's threats finally compelled Nicaragua to withdraw the claims for reparation awarded by the Court, after a US-Nicaragua agreement "aimed at enhancing economic, commercial and technical development to the maximum extent possible", Nicaragua's agent informed the Court. The withdrawal of just claims having been achieved by force, Washington moved to abrogate the agreement, suspending the trickle of aid with demands of increasing depravity and gall. In September 1993, the Senate voted 94-4 to ban any aid if Nicaragua fails to return or give adequate compensation (as determined by Washington) for properties of US citizens seized when Somoza fell-assets of US participants in the crushing of the beasts of burden by the tyrant who had long been a US favourite.

(From Chomsky, N. *World orders, old and new.*)

Even before these developments, Nicaragua had clearly found itself with a Pyrrhic victory (or worse). After the rejection by the USA of the decision in 1986, Nicaragua had referred the matter to the Security Council pursuant to Article 94(2) of the Charter. Here the United States vetoed a resolution calling on all states to observe international law! In the General Assembly a call for compliance with the ICJ ruling was passed by 94-3 with only Israel and EI Salvador supporting the USA and a year later passed a resolution calling for "full and immediate compliance" with the ICJ decision, with only the USA and Israel voting against.

As will be well known, US policy towards Nicaragua finally bore fruit, with the electorate ultimately persuaded that the realities of the world meant that an acceptance of American hegemony was preferable to the level of suffering which resistance brought. Predictably, health care has declined, infant mortality has risen, and disparities in wealth continue to increase. The ICJ case is a continuing reminder that legal victory is illusory unless there is both consent and co-operation from the disappointed party, or the international community is willing and able to insist upon compliance.

What conclusions may be drawn regarding the significance of this case in an understanding of international law? The first repeats that while legal method allows for the de-politicisation of a dispute, the price paid might be that the legal decision will not be seen as a real resolution to the problem. Secondly, it has become clear through the writings of

textbooks that for lawyers the judgment of the Court is an end in itself. The decision is significantly more important than the illusory nature of the relief granted and the aggression directed towards Nicaragua. Thirdly, it may be seen that the ability of the law to resolve disputes in favour of the powerless is always dependent upon the acquiescence of the powerful. This does have implications for the rule of law in the international arena.

Interestingly, in Moynihan's wonderfully indignant book, *On the law of nations,* his indignation is not directed at the foreign policy of the USA but rather at its inability to achieve - or to attempt to achieve - goals in a manner which is consistent (or at least arguably consistent) with international law. It is not the attempt to remove the Sandinistas from power with which he disagrees, but the patent illegality of the methods used in that attempt. Like Richard Nixon he clearly believes that international law is an important weapon in the armoury of a powerful nation, particularly where the use of force is impractical or undesirable. That the USA had usefully used the ICJ in seeking the return of the US diplomatic and consular staff being held hostage in Iran in violation of several international treaties seems to add weight to his views.

In the *Case Concerning US Diplomatic and Consular Staff in Iran (USA* V. *Iran)* [1979] ICJ Reports 7, the US had, within two weeks of applying to the ICJ, received a provisional order establishing that the rights of the USA had been violated and that the government of Iran should restore the embassy to the USA and release the hostages. Although not immediately complied with, there is no doubt that the final decision had put the USA itself in a position, pursuant to Article 94 of the Charter, to refer the matter to the Security Council. Moynihan's view that had the Security Council not then taken action, the United States itself would have been entitled to, is certainly arguably correct. (Here of course there was no fear of a veto.)

SELF ASSESSMENT EXERCISE

What is the significance of the decision of *Nicaragua* V. *USA* for international law?
(See *Feedback at the end of this unit*).

4.0 CONCLUSION

In some ways, using *Nicaragua* V. *USA* to exemplify the use of the ICJ in contentious cases might be argued to be misleading. This was, after all, one of the few cases where the Court's ruling had been rejected with impunity and without direct sanction. But the advantages of its use

outweigh the disadvantages. It highlights both the possibilities and the limitations of the judicial method of international dispute resolution.

What pertinent generalisations may one then make about the ICJ?
The first is that because of the nature of sovereignty and the reality of power, the legal method of adjudication is inherently unlikely to be effective unless the parties have agreed to this form of settlement. As we have seen, they are only rarely likely to do so.

The acceptance of compulsory jurisdiction, accepted by fewer than 50 states, and then very often with significant reservations, has not proved successful, and with states which had accepted compulsory jurisdiction feeling able to withdraw acceptance when decisions of which they disapproved were made (as in the case of the USA and France), it is unlikely to increase. Theoretically at least, this should be bad news for states with little power. For them the great advantage of legal adjudication should have been that in translating international agreements into legal argument, the reality of the physical disparities in power between the disputants should have been irrelevant. This indeed was what happened in *Nicaragua* V. *USA,* but although the power was irrelevant in the adjudication, it was critical in the inability to give effect to the decision. This fact, together with the very Western jurisprudence and methodology of the Court, makes it unlikely that poor states will find the justice they think they deserve in the United Nations judicial organ.

5.0 SUMMARY

Adjudication in contentious cases before the ICJ is not always successful. To be so the parties must not only accept the jurisdiction of the Court but be ready to accept an adverse decision. These requirements are highlighted in *Nicaragua* V. *USA,* where not only did one party refuse to accept the jurisdiction of the Court but it also had sufficient power to be able to resist the judgment. This suggests that particular features are necessary for effective adjudication.

ANSWER TO SELF ASSESSMENT EXERCISE

Nicaragua V. *USA* highlights and exemplifies several features of international judicial adjudication. It is important for its discussion of reciprocity in the terms in which the ICJ's compulsory jurisdiction is accepted. It is important in its discussion of the relationship between customary international law and treaty law.

Most importantly it considers the meaning of the prohibition on the threat or use of force in international law, the inherent right of self-defence and the principle of non-intervention. Unfortunately, just as importantly it demonstrates the limitations of judicial power in the face of an intransigent and powerful state. This in turn emphasises the need for state consent if judgments are to be effective.

6.0 TUTOR-MARKED ASSIGNMENT

1. Explain the US argument in *Nicaragua* V. *USA* about whether or not the Court enjoyed jurisdiction in this case. In particular, did the arguments have any arguable merit?
2. Does the ICJ decision in *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* V. *Uganda)* reinforce or modify the decision in *Nicaragua* V. *USA?*

7.0 REFERENCES/FURTHER READINGS

Kaczorowska, Chapter 15: *Peaceful Settlement of Disputes between States*, pp.382-40 1.

Moynihan, D.P. (1990). *On the Law of Nations.*Cambridge, Mass: Harvard University Press. [ISBN 0674635760].

Chomsky, N. (1994). *World Orders, Old and New.* London: Pluto Press. [ISBN 0745313205].

Cases: *Nicaragua* V. *United States (Jurisdiction)* [1984] ICJ Reports 392; *Nicaragua* V. *United States (Merits)[1986]* ICJ Reports 14; *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* V. *Uganda* ICJ, 19 December 2005 http://www.icj-cij.org/icjwww/idocket/ico/ico_judgments/ico_judgment_20051219.pdf

UNIT 3 THE ADVISORY JURISDICTION OF THE ICJ

CONTENTS

1.0 INTRODUCTION

We shall look at the advisory jurisdiction of the ICJ, exemplified by the *Legality of the Threat* or *Use of Nuclear Weapons Case* and the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory Case.* We shall also look at international arbitration.

2.0 OBJECTIVES

At the end of this unit, you should be able to:

- explain the role and scope of the ICJ's advisory jurisdiction
- explain the possibilities and limitations of arbitration in international dispute resolution
- give an account of the advantages and disadvantages of arbitration as opposed to judicial settlement.

3.0 MAIN CONTENT

3.1 Legality of the Threat or Use of Nuclear Weapons Case

The second case to be used to illustrate points concerning the ICJ is concerned with the legality of the threat or use of nuclear weapons in which judgment was given in 1996. This was an advisory opinion given pursuant to Article 65 of the Statute of the ICJ which allows authorised bodies of the United Nations (primarily the Security Council and the General Assembly, but also other organs of the UN if authorised by the General Assembly) to request an opinion on any legal question. In this case both the World Health Organisation (WHO) and the General

Assembly had separately asked questions concerning the legality of the threat or use of nuclear weapons. The question posed by the WHO was asked particularly at the behest of Pacific state members and was framed as follows:

In view of the health and environmental effects, would the use of nuclear weapons by a State in war or other armed conflict be a breach of its obligations under international law including the WHO Constitution?

The majority of the 14 judges of the ICJ decided, for reasons that will be addressed shortly, that the WHO did not have competence to seek such an advisory opinion.

The General Assembly question was asked in a resolution of 1994. It simply asked:

Is the threat or use of nuclear weapons in any circumstances permitted under international law?

The majority of the Court was prepared to entertain this question. No doubt readers of a legal training will already have begun to ask questions of the "So what?" kind. That is, they will be asking what the practical consequences of the Court's decision would be, whatever was decided. If the Court was to answer in the negative, was it really conceivable that states possessing nuclear weapons such as Israel or Pakistan, let alone the major nuclear powers, would surrender their nuclear weapons for destruction, accepting that they could neither be used nor threatened to be used? Accepting the improbable nature of this outcome, what if anything was to be gained by a legal answer to a legal question which was so isolated from political reality?

The answer to this is to be found in the impressive submission of the Pacific states brought together in a book entitled: *The case against the bomb* (Clark, R.S. (ed.), Newark, NJ: Rutgers University School of Law, 1996 [ISBN 0965557804]). One reason for formulating the WHO question was that some of the Pacific states are members of the WHO but not the United Nations - a position dictated by financial considerations and expenditure constraints. The small Pacific states feel themselves extremely vulnerable to things nuclear. Not only has much of the testing of nuclear weapons by the USA, France and the UK taken place in the Pacific, but also many of the smallest states, because of their size and limited elevation above sea-level, are sensitive to environmental change in a way that larger states are not.

Within the Court there were some judges, particularly Judge Oda from Japan, who seemed to feel that the question posed was really an attempt to force the court to become a vehicle by which a political point could be made. This view was arguable. It is correct in that it recognised that a decision in favour of illegality could not, of itself, alter the "defence" policies of those states with nuclear capability; but it is wrong to imagine that such a decision would either "open the floodgates" to innumerable questions or, more importantly, be inconsequential. Its effect would be to reinforce with law the arguments of those who wanted the inherent immorality and inhumanity of weapons of immense mass destruction to be recognised and acted upon.

This is yet again an example of the legal method of translation. All those involved in the case knew that what was being argued in fact, though not in law, was whether the possession and potential use of nuclear weapons could be justified - but not justified in law, or not only law but also in reality. Here was a political question *par excellence;* political in the sense of being imbued with policy. Debates on this policy have been prolonged and bitter both between states with and without nuclear weapons and within states with and without nuclear weapons. Movements for compulsory nuclear disarmament have a history which begins almost with the first nuclear explosion. Their success has, however, been limited by their inability to gain democratic mandate for disarmament.

Given that every member of the Court was aware of this reality, it is not surprising that some felt discomfited with the problem's presentation as a legal one. Nor is it surprising that the decision of the Court was neither unanimous nor consistent. The refusal of the majority to accept the WHO question for opinion must be seen in this light. Significantly too, in the advisory opinion that was given, views were very different. Generalised to the greatest possible extent it may be put in the words of Professor R.S. Clark (Counsel for Samoa in the case), when he says of the ICJ opinion:

While the opinion strongly reflects the argument made on behalf of the Pacific coalition, what those States would have liked was a statement that the use or threat of use of nuclear weapons is illegal per se (illegal in itself), any time any place.

Three of the 14 judges - Judges Weeramantry (Sri Lanka), Koroma (Sierra Leone), and Shahabuddeen (Guyana) - said exactly that. Seven more - Judges Bedjaoui (Algeria, the President of the Court), Ranjeva (Madagascar), Herczegh (Hungary), Ski (China), Fleischhauer (Germany), Vereshchetin (Russia) and Ferrari Bravo (Italy) - said that it would "generally" be contrary to the laws of war to use or threaten to

use nuclear weapons. These judges were not sure, however, whether such a use "would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake". Four judges - Judges Schwebel (United States), Oda (Japan), Guillaume (France) and Higgins (United Kingdom) - disagreed with both of these positions. While they conceded that a threat or use of nuclear weapons could be made only when it was compatible with the requirements of international law applicable to armed conflict, they believed that each individual case has to be considered against the relevant standards and that no general rule is possible.

It is difficult not to infer, except in the cases of the judges from Sri Lanka, Sierra Leone and Guyana, that the judges were not entirely happy with what they had been called upon to answer. The result was a cynical reception by at least some observers. The title of Professor Vaughan Lowe's note in one legal journal *(ICLQ)* sums up much of the response: "Shock decision: nuclear weapons mayor may not be illegal". The Court must also have been unhappy with the way in which it divided, as, although there is no complete correlation, the division does not seem to reflect the independence of the 15 judges. Rather, but not exactly, the differences reflect the different attitudes of states with no nuclear capability and no prospect of it or even the "protection" of a nuclear power's umbrella, at one extreme; and states with nuclear capability or concerned with the protection it supposedly offers at the other. It may not be entirely coincidental that two of the judges (Judge Weeramantry and Judge Shahabuddeen) most adamantly in favour of the law clearly declaring the illegality of the threat or use of nuclear weapons were exceptionally not re-elected to the Court.

3.2 Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory

To further exemplify the process of advisory opinions we will briefly consider the recent case in which the General Assembly called upon the ICJ, in a resolution of 8 December 2003, "to urgently render an advisory opinion on the legal consequences arising from the construction of the wall being built by Israel, in the occupied Palestinian territories, including in and around East Jerusalem, considering the rules and principles of international law". The resolution arose from the decision by the Israeli government to construct what they claimed was a defensive wall which would enable them to protect themselves from violence coming into Israel from the occupied West Bank. The intended wall did not however follow the "Green Line" which was the Israeli boundary before the conquests of 1967. Rather it cut, sometimes deeply, into the occupied land and also cut off some Palestinians from access to

their land. As was made clear in Module 1, the acquisition of title to territory by force or conquest is clearly not allowed in international law. (Since the United Nations Charter this has been unarguable.)

Not surprisingly the Court was robust in its opinion. Only the American Judge Buergenthal voted against all of the conclusions of the otherwise generally unanimous Court. However, he did so not because he considered the wall lawful but because he was of the opinion that the Court should have declined jurisdiction unless it could take into account all of the evidence relating to what he referred to as “Israel's legitimate right of self-defence”. In the view of most commentators such a consideration would have been relevant only if the wall being constructed followed the Green Line scrupulously. Further, consideration would in any case have been impossible as Israel elected not to appear before the Court to provide evidence to support its contentions. (As this was an advisory opinion Israel was within its rights to choose this course of action.) In fact, of those states making submissions to the Court, 22 did argue that the political nature of the case suggested that the ICJ was an inappropriate forum. The Court was not persuaded.

The Court's decision was that the construction of the wall being built by Israel, the occupying power in the Occupied Palestinian Territory, was contrary to international law; that Israel was under an obligation to terminate its breaches of international law and to cease construction immediately; that Israel had an obligation to make reparation for all damage caused; that all States are under an obligation not to recognise the illegal situation and have an obligation, while respecting the UN Charter, to ensure compliance by Israel with international humanitarian law as embodied in the Fourth Geneva Convention; and that the UN should consider what further action is required to bring the illegal situation arising from the construction of the wall to an end.

The reasoning of the Court was in three parts. The first considered whether the request for opinion should be accepted, the second considered the legality of the construction of the wall, and the third considered the legal consequences of the breaches found. On the first point the Court found it proper to give an opinion as it had been legitimately requested by the General Assembly after the US had vetoed a Security Council resolution concerning the construction of the wall. Further it said that here it was not exercising its advisory jurisdiction in a way which effectively adjudicated upon a dispute between Israel and Palestine. The question was wider and of importance to the United Nations as a whole. The Court also rejected the contention of some states that its opinion could impede a political, negotiated settlement to

the conflict and found no compelling reason precluding it from giving the requested opinion.

The Court had little difficulty in concluding that the construction of the wall was contrary to international law. Indeed it seemed to contravene every rule of international law that the Court considered. Further, it held that Israel could not rely on either a right of self-defence or a state of necessity in order to preclude the wrongfulness of the construction of the wall.

The question of legal consequences was more interesting. The Court observed that its opinion now allowed the General Assembly and the United Nations generally to use it as it wished - that is, it could be used as authority for General Assembly conclusions consistent with it. As we saw above, however, it did suggest that the consequences placed an obligation on Israel to cease the building of the wall and to make reparation. The obligation for other states was to not recognise the illegal situation and not to provide any aid or assistance in maintaining the illegal situation. In addition they should seek compliance with the Fourth Geneva Convention. The UN, it was said, should give further consideration to action intended to bring to an end the illegal situation resulting from the construction of the wall. Israel immediately denounced the opinion and indicated that it intended to ignore it.

There has seldom been such an adamant and explicit advisory opinion. It was of course a moral victory for those opposed to Israeli action, but was it more? Shortly after the judgment the General Assembly voted overwhelmingly to demand that Israel accept the opinion and cease work on the wall and do as the Court had suggested international law required. The resolution was passed by 150 states in favour, 10 abstentions and 6 against. Those against were Australia, the Federated States of Micronesia, Israel, the Marshall Islands, Tuvalu and the United States. On 10 July 2005, the Israeli cabinet approved the construction of the wall in Jerusalem and stated that the entire wall was to be completed as intended with only minor modification as required by the Israeli Court.

Politically it would be unrealistic to have expected an ICJ advisory opinion to have resolved the dispute between the Palestinians and Israel. Nevertheless the strength of feeling both from the Court and from the General Assembly might have been expected to give Israel pause for thought. So far there is no indication that it has done so. An authoritative statement of international law has been ignored by those who were able to ignore it. And while advisory opinions may on occasion provide a political forum for political points to be made and they may reinforce

moral positions, in time their efficacy is crucially limited in the face of resistance from rich and powerful states.

SELF ASSESSMENT EXERCISE 1

What arguments may be made for the use of the advisory jurisdiction of the ICJ? What are the consequences, theoretical and real, that flow from such a decision? (See *Feedback at the end of this unit*).

SELF ASSESSMENT EXERCISE 2

Is there any point in giving decisions without direct consequence?

3.3 International Arbitration

Essential Reading

Kaczorowska, Chapter 15: *Peaceful Settlement of Disputes between States*, pp.366-76.

Dixon, Chapter 10: *The Peaceful Settlement of Disputes*, pp.264-67.

Cassese, Chapter 14: *Promoting Compliance with Law and Preventing or Settling Disputes*, pp.281-88.

International arbitration has been defined by the International Law Commission as "a procedure for the settlement of disputes between States by a binding award on the basis of law and as a result of an undertaking voluntarily accepted". You will notice that this definition of arbitration in international law is significantly narrower than the common meaning of arbitration. The crucial difference between judicial settlement and arbitration lies in the role played by the parties to the dispute and the degree of control they can exercise over the process. Arbitration allows the parties to select the tribunal, whereas parties have no control over the composition of a judicial body. In addition, in arbitration the parties may decide the law to be applied while the applicable law in the International Court is always the principles of international law.

The modern history of arbitration began with procedures established in 1794 under the Jay Treaty between the United States and United Kingdom for the settlement of bilateral disputes. This provided for the creation of mixed Commissions, to which each state nominated an equal number of members with an umpire. In 1871 in an innovatory move, arbitration took place concerned to determine breaches of neutrality by Britain during the American Civil War. What was novel was that not

only were there British and American nominees but there were also three independent nominees from other states (Brazil, Switzerland and Italy). Following the 1899 Convention on the Pacific Settlement of International Disputes an institution known as the Permanent Court of Arbitration was created (actually, as international lawyers like to observe, neither permanent, nor a court) whose organisation and composition was modified in 1907. The Permanent Court of Arbitration is still in existence. Relying as does the ICJ upon the consent of the states that use it, it actually has some features often preferred to the International Court of Justice.

Each of the contracting parties is entitled to nominate up to four persons to be members of the PCA panel (there are more than 300 nominated from some 90 states). Any of these may be selected by the parties for any particular dispute. Once the parties to a dispute have agreed to arbitration they must agree a compromise. In essence this is an instrument that contains the agreement to arbitrate and will specify agreements as to the form the arbitration is to take. Thus it will name the selected arbitrators, define the questions the tribunal is to address, define the law and procedure that is to be applied, and state the period within which the award is to be made. Model rules exist as a basis for the drafting of the compromise.

Arbitration awards are usually binding and final except in the event of some substantial procedural error, or manifest error of fact. Should an appeal be possible and successful, the result will be to render the award of the tribunal null and void.

Although the use of arbitration is not extensive (there seem to be a much larger number of members of the Permanent Court of Arbitration available to arbitrate than the number of disputes submitted for arbitration) it is clear that it does have a place. Arbitration is possible in some disputes between a state and an individual. Thus the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 1965 makes conciliation and arbitration possible (with consent) between contracting parties and companies of the nationality of another contracting party. And perhaps the best known arbitral settlement of private claims of nationals has been the Iran-United States Claims Tribunal.

A perusal of the current and recent claims at the Permanent Court seems to imply that in disputes between states, those most likely to be arbitrated are disputes between states generally otherwise enjoying close relations. There is also a close relationship between the ICJ and the PCA which is more than physical (both having homes in The Hague) and

almost half the judges of the ICJ are also among the more than 300 members of the PCA available as arbitrators.

4.0 CONCLUSION

International arbitration under the Permanent Court of Arbitration is "quasi-judicial" but provides parties who have consented to arbitration with significant control over the selection of arbitrators and over the procedure and law to be applied. While there are nevertheless fewer cases than might be anticipated, this is again because of the shortcomings of a process where parties must undertake to accept a result which is uncertain.

5.0 SUMMARY

The advisory jurisdiction of the ICJ has often given rise to cases in which political considerations made the isolation of legal issues difficult. Nevertheless the Court has determined that a mixed question of law and fact does amount to a legal question. And as Dixon observes (p. 288) the Court is not concerned with "the motives for a request, even if these are political". This does however affect the effect of the decision.

ANSWER TO SELF ASSESSMENT EXERCISE 1

No doubt when the Charter and the Statute of the International Court were drafted it was envisaged that it would be important, particularly for the institutions of the United Nations, to be able to obtain legal opinions that would clarify legal questions that might arise as to the scope of their duties and obligations. This was also true with regard to the scope of the rights, duties and obligations of states given to them in the Charter. Such a narrow interpretation of legal questions that might arise did not survive for long.

It became clear that such purely legal questions, as for instance were addressed in the *Certain Expenses Case,* were much less common than legal questions with obvious political overtones and implications. But the Court has held that the mere fact that there are political aspects to the question asked does not mean that it should not be answered. Even if the effects of such judgments are less than the Court might hope, it has to be remembered that advisory opinions are not binding but do carry considerable influence. It may be argued that even if this is the extent of the effect of a decision, it is of relevance to the body requesting the opinion. Even in the *Palestinian Wall Case* the effect has been that no one seriously argues that Israel's wall building is anything other than illegal. In the longer term this may prove to be important.

6.0 TUTOR-MARKED ASSIGNMENT

Define and explain the means contemplated for the peaceful settlement of international disputes in Chapter VI of the Charter of the United Nations.

7.0 REFERENCES/FURTHER READINGS

Legality of the Threat or Use of Nuclear Weapons [1996] ICJ Reports 66.

Palestinian Wall Advisory Opinion [2004] ICJ Reports. See: http://www.icj-cij.org/icjwww/idocket/imwp/imwpframe.htm

Kaczorowska, Chapter 15: *Peaceful Settlement of Disputes between States.* pp.401-06.

Dixon, Chapter 10: *The Peaceful Settlement of Disputes*, pp.285-88.

Articles 65-68 of the Statute of the International Court of Justice.

MODULE 3

UNIT 1 USE OF FORCE IN INTERNATIONAL LAW

CONTENTS

1.0 INTRODUCTION

In default of the resolution of disputes by peaceful means discussed in the previous Module, states may well resort to force. In international law no topic is more important than the control of this use of force by states. Whereas in the context of domestic law governments have a monopoly over the legitimate use of force, in international law sovereign equality and the lack of a supra-national government provides no such legitimacy. Further, in so far as international law has sought to govern the use of force by states it has no power in the form of military forces to assert its authority. International law requires the consent and co-operation of states in its attempts to curb and constrain violence with an international dimension.

This Module will begin with a brief analysis of the (restricted) role of international law before the creation of the United Nations. This history illustrates the problems in both defining 'force' and its use, and also in creating rules for many different sorts of situation where the question of the use of force requires consideration. While there are two separate matters for regulation - firstly the use of force as in recourse to war,

usually described as *jus ad bellum* (the justification for going to war), and secondly the regulation of the sort of force permitted, usually covered by the term *jus in bello* (the law of war that includes rules concerning the conduct of war and the protection of war victims) - there are also many distinct situations requiring different rules.

Thus, in considering the constraints on the use of force we must first identify the category to which the force is related. Does the matter concern intervention in a civil war? Does it concern the provision of help, military or otherwise, in such a situation? Does it concern an act of aggression or an act of self-defence? Is it concerned with the legitimacy of forcible intervention to save nationals or to prevent crimes against humanity or even genocide? Is it concerned with the question of when a state may legitimately come to the assistance of one side in an existing war? Is it claimed to be a legitimate response to an act or acts of terrorism, or could it be legitimate action in an attempt to pre-empt such conduct? Is it a reprisal for acts committed by another state?

On each and all of these matters international law has been developing rules but obviously some are clearer than others and some remain contentious.

2.0 OBJECTIVES

At the end of this unit, you should be able to:

- describe the development of international law concerned with the use of force before the UN Charter
- distinguish between *jus ad bellum* and *jus in bello*.

3.0 MAIN CONTENT

3.1 The Use of Force in International Law before the Creation of the United Nations

3.1.1 Use of Force in International Law before the First World War

In a book published by the United States Council on Foreign Relations entitled *Right* V. *Might* the Foreword begins:

Man's readiness to settle differences by force of arms has been a feature of society since prehistory. Man's attempt to place rational bounds on the use of force, emerging from his revulsion against the scourge of war, is almost as old. This struggle to impose “rationality on reality” was a central feature of the Enlightenment and the “Age of Reason” in the

eighteenth century.

While this is undoubtedly true, the fact is that a right to wage war remained unconstrained until after the First World War. One might have thought that the Treaty of Westphalia, bringing as it did the concept of sovereign equality, might have at least implicitly affected this position. How, after all, could sovereignty be equal if the powerful states were entitled to wage war on the powerless? Such inconsistency was at the very heart of the Westphalian system however and the idea that international law could constrain the prerogative of sovereign states to wage war would have been unimaginable.

Endemic European wars were an enduring feature of the seventeenth, eighteenth and nineteenth centuries, waged both within and without Europe. Conquest was the means by which territory was acquired and colonies won. But the ferocity of battle came to be greatly enhanced by the development of ever more fearful weaponry and the beginnings of the "weapons of mass destruction". The ability to kill and maim enemies and civilians alike progressed in a remarkable way. The revulsion at the result of this "progress" led to the founding of the International Red Cross in 1863. Nevertheless, while many armies remained essentially mercenary (and where not, the overwhelming percentage of casualties remained impoverished recruits) there was little impetus to develop rules as to when war might be waged.

A further separate development was important. As Oppenheim observes, whereas in the Middle Ages "war was a contention between the whole populations of the belligerent States... [and] in time of war every subject of one belligerent, whether an armed and fighting individual or not, whether man or woman, adult or infant, could be killed or enslaved by the other belligerent at will", by the twentieth century war had become almost invariably "a contention of States **through their armed forces".** This led to an increase in awareness that private subjects of belligerent states, not involved in the "contention", could reasonably expect some protection.

International law responded with states developing customary international laws not as to when war might or might not be waged but concerning how it might be waged and, to a lesser extent, against whom it might be waged. These were ultimately codified in treaties beginning only in the second half of the nineteenth century. The first of these was the 1856 Paris Declaration on maritime war, and it was followed by the 1864 Geneva Convention on wounded and sick and the St. Petersburg Declaration of 1868 concerned with explosive projectiles.

In 1874, at the instigation of Russia, an international conference was held in Brussels which adopted an International Declaration Concerning the Laws and Customs of War. While a lack of ratifications meant that it never entered into force, it was important as a precursor to the crucial Hague "First International Peace Conference" of 1899, and the "Second International Peace Conference" of 1907. These Conferences, again held at the invitation of the Russian Government, adopted numerous international instruments codifying (and sometimes adding to) international law.

The 1907 Conference alone adopted 13 conventions and a declaration. Because these Conventions primarily codified the existing customary international law relating to warfare they were, when this was the case, binding on all states. Prominence was also given here to the so-called "Martens Clause" which appeared in the Preamble in 1899. While the origin of this clause is disputed, what it did was to assert that where law was not yet sufficiently complete, the parties nevertheless wished to declare that in cases outside those covered by the declarations and regulations, populations and belligerents remained under the protection of international laws "as they result from usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience".

This clause was later to be reformulated in the 1949 Geneva Conventions, where it is stated that "in cases not covered by [the Geneva Conventions and Protocols] or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from dictates of public conscience".

3.1.2 Efforts of the League of Nations

Thus before the First World War serious attempts had been made to control the form of warfare, but attempts to control recourse to war received serious consideration only after the War. Initially this was through the creation of the League of Nations and then with the negotiation and adoption of the General Treaty for the Renunciation of War, 1928, also known as the Kellogg-Briand Pact, and also the Pact of Paris.

The Covenant of the League of Nations of 1919 did not purport to abolish war but it did attempt firstly to provide a permanent forum where states could negotiate and discuss differences rather than resorting to war; and secondly it placed limitations upon the use of force. Member states agreed that where they had serious disputes with

one or more other states they would submit the dispute to arbitration or judicial settlement or inquiry by the Council of the League. There was to be no resort to war until three months after the completion of such a process.

Thus the League's aim was to provide time for reflection before recourse to war - a cooling off period for the disagreeing states. Members also undertook not to go to war with another member who complied with either an arbitral award, a judicial decision or a unanimous report from the Council. Finally they agreed to "respect and preserve as against external aggression, the territorial integrity and political independence of all Members of the League".

One further innovation of the Covenant is to be found in Article 16 which is not unrelated to the development of the later Chapter VII of the United Nations Charter. Article 16 provides for collective security for League members and the first paragraph states:

Should any member of the League resort to war in disregard of its covenants under Articles 12, 13 or 15, it shall *ipso facto* be deemed to have committed an act of war against all other Members of the League, which hereby undertake immediately to subject it to the severance of all trade or financial relations, the prohibition of all intercourse between their nationals and the nationals of the covenant-breaking State, and the prevention of all financial, commercial or personal intercourse between the nationals of the covenant-breaking State and the nationals of any other State, whether a Member of the League or not.

Of course the League's attempts even to limit recourse to war were scarcely successful. Unfortunately members of the League proved unwilling to sanction a state acting in defiance of the Covenant. Other paragraphs of Article 16 had empowered the League to take such decisions and also to use military sanctions. The provisions were never effective and even economic sanctions were irregularly applied, with the Assembly of the League voting in 1921 to make such economic sanctions optional for each member rather than compulsory.

3.1.3 General Treaty for the Renunciation of War, 1928 (the Kellogg-Briand Pact)

Whereas the Covenant of the League of Nations had sought to limit recourse to war, the Kellogg-Briand Pact sought to reject it. Originally created at the behest of the French Foreign Minister, Aristide Briand, who wanted it as a bilateral treaty with the United States, this optimistic document became multilateral and after an original 15 states signed when it was concluded, 63 were parties by 1939, including Germany,

Japan and Italy. This in itself hints at its effectiveness. It was inspired by a liberal internationalist view that war could be prevented and abolished with a combination of enlightened diplomacy and collective solidarity. War was renounced as an instrument of national policy. It was accepted by the US Senate by 85-1 (though admittedly with the qualifications that it neither affected the US right of self-defence, nor yet committed the US to action to enforce the Treaty). The Treaty has but two brief substantive articles. Article 1 states:

The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it, as an instrument of national policy in their relations with one another.

Article 2 provides:

The High Contracting Parties agree that the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them, shall never be sought except by pacific means.

Although the Pact has been superseded by the UN Charter, it does remain in force. The reason for its substantial failure is significant. It remained a Pact without enforcement provisions and it was violated frequently. Its importance, however, was twofold. Firstly, this was the first treaty to suggest that recourse to war could be a breach of international law. Secondly, it was used as an important legal base for the prosecution in Nuremberg of those held responsible for starting the Second World War. In the Nuremberg judgment, in considering the Pact it was stated as follows:

The question is, what was the legal effect of this pact? The nations who signed the pact or adhered to it unconditionally condemned recourse to war for the future as an instrument of policy, and expressly renounced it. After the signing of the pact, any nation resorting to war as an instrument of national policy breaks the pact. In the opinion of the Tribunal, the solemn renunciation of war as an instrument of national policy necessarily involves the proposition that such a war is illegal in international law; and those who plan and wage such a war, with its inevitable and terrible consequences, are committing a crime in so doing. War for the solution of international controversies undertaken as an instrument of national policy certainly includes a war of aggression and such a war is therefore outlawed by the pact. As Mr Henry L. Stimson, then Secretary of State of the United States said in 1932:

“War between nations was renounced by the signatories of the Kellogg-

Briand Treaty. This means that it has become throughout practically the entire world...an illegal thing. Hereafter, when engaged in armed conflict, either one or both of them must be termed violators of this general treaty law... We denounce them as law- breakers."

SELF ASSESSMENT EXERCISE

Consider the significance of the Hague Peace Conferences and their outcome.

4.0 CONCLUSION

Before the First World War serious attempts had been made to control the form of warfare, but attempts to control recourse to war received serious consideration only after the War.

5.0 SUMMARY

We have considered the use of force in international law before the creation of the United Nations. You should now be able to describe the development of international law concerned with the use of force before the UN Charter and distinguish between *jus ad bellum* and *jus in bello.*

ANSWER TO SELF ASSESSMENT EXERCISE

The Hague Peace Conferences have remained of significance after more than one hundred years. The Conventions that were produced at the Conferences moved towards defining the rules that belligerents must follow in the course of hostilities. They were also concerned with the pacific settlement of international disputes and with limiting the acceptable methods of warfare. Thus, for instance, they prohibit the use of projectiles that disperse asphyxiating gas, and bullets that expand or flatten easily. In addition the Conferences formulated the so-called Martens clause, which is also to be found in a slightly different form in the Geneva Conventions. This provision lays down the principle that in cases not covered specifically by the Conventions there is nevertheless an underlying principle of international law to the effect that during and after hostilities actions will only be lawful if they are in accord with the principles of humanity and "the dictates of public conscience".

The Hague Conventions either initially reflected, or have since come to be a part of, customary international law.

6.0 TUTOR-MARKED ASSIGNMENT

Explain the reasons for the ineffectiveness of the League of Nations in the preservation of peace.

7.0 REFERENCES/FURTHER READINGS

Dixon, Chapter 11: *The Use of Force*, pp.289-92. 0

Cassese, Chapter 15: *Enforcement,* pp.296-301.

Kaczorowska, Chapter 16: *The Use of Force*, pp.410-16.

Henkin, L. Might V. Right (Washington, DC: Council on Foreign Relations, 1989).

UNIT 2 THE CHARTER OF THE UNITED NATIONS

CONTENTS

1.0 INTRODUCTION

The conclusion of the Second World War gave rise to a renewed determination to use international law to prevent war, and, where it had begun, to terminate it. The opening of the Preamble to the UN Charter states the determination "to save succeeding generations from the scourge of war", and the first purpose in Article 1(1) is:

To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;

While Article 2(3) commits UN member states to settle their international disputes by peaceful means in order to ensure that international peace and security, and justice, are not endangered. Article 2(4) commits members to refrain in their international relations from the threat or use of force "against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations". All of these provisions need to be read together with General Assembly Resolutions and Declarations that have sought to interpret them.

2.0 OBJECTIVES

At the end of this unit, you should be able to:

- explain the significance of the UN Charter in restricting the use of force in international law
- identify the exceptions to the proscription of the use of force in the UN Charter
- explain the effect of General Assembly resolutions purporting to interpret the Charter.

3.0 MAIN CONTENT

3.1 The Significance of the UN Charter in Restricting the Use of Force in International Law

A first point to be noted is that it was held in *Nicaragua* V. *USA (Merits)* by the ICJ that Article 2(4) states the customary rule of international law and is therefore now applicable to all states. Its effect is to prohibit all measures of force other than those permitted by the Charter. These exceptions are:

(i) Self defence (Article 51)
(ii) Collective self-defence (also under Article 51)
(iii) Measures taken pursuant to Chapter VII of the Charter as authorised by the Security Council.

The 1970 General Assembly Resolution 2625 - Declaration of Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations - is important in the interpretation of Article 2(4). While it is of course only a Resolution, it is nevertheless regarded as expressing the consensus of member states regarding the way in which Article 2(4) is to be interpreted. This Resolution identifies the following duties:

Every state has the duty to refrain in its international relations from the threat or use of force against territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations. Such a threat or use of force constitutes a violation of international law and the Charter of the United Nations and shall never be employed as a means of settling international issues.

A war of aggression constitutes a crime against the peace, for which there is responsibility under international law. In accordance with the purposes and principles of the United Nations, States have the duty to refrain from propaganda for wars of aggression.
Every State has the duty to refrain from the threat or use of force to violate the existing international boundaries of another State or as a means of solving international disputes, including territorial disputes and problems concerning frontiers of States.

Every State likewise has the duty to refrain from the threat or use of force to violate international lines of demarcation, such as armistice lines, established by or pursuant to an international agreement to which it is a party or which it is otherwise bound to respect. Nothing in the foregoing shall be construed as prejudicing the positions of the parties concerned with regard to the status and effects of such lines under their special regimes or as affecting their temporary character.

States have a duty to refrain from acts of reprisal involving the use of force. Every State has the duty to refrain from any forcible action which deprives peoples referred to in the elaboration of the principle of equal rights and self-determination of their right to self-determination and freedom and independence.

Every State has the duty to refrain from organising or encouraging the organisation of irregular forces or armed bands, including mercenaries, for incursion into the territory of another State. Every State has the duty to refrain from organising, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organised activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force.

Obviously Article 2 (4) goes beyond proscribing war, referring as it does to the “threat or use of force”. “Force” however is undefined and opinions differ as to the interpretation it should be given. Clearly both political force and economic force could be interpreted as coming within Article 2(4). Not surprisingly, those states with the capability of exercising economic or political force (or coercion, to use one possible interpretation of 'force') have resisted such an interpretation, while those lacking such capability (primarily smaller and developing states) did not want 'force' confined to “armed force”.

General Assembly Resolution 2625 does, in its interpretation of Article 2(7) (the duty not to interfere in matters within the domestic jurisdiction of any state) proscribe “economic, political or any other type of measures to coerce another State in order to obtain from it the

subordination of the exercise of its sovereign rights [or] to secure from it advantages of any kind". But it has been held in the case of *Nicaragua* V. *USA (Merits)* that economic sanctions by the US against Nicaragua did not constitute a breach of the customary law principle of non-intervention. The generally held view (and one consistent with the interests of the powerful) is that Article 2(4) cannot encompass situations beyond armed force.

Another General Assembly Resolution relevant to the interpretation of Article 2(4) is GA Resolution 3314 of 1974 - Resolution on the Definition of Aggression. This defines aggression as follows: "Aggression is the use of armed force by a state against the sovereignty, territorial integrity or political independence of another state, or in any manner inconsistent with the Charter of the United Nations." It goes on to state that first use of armed force against Article 2(4) is deemed to be *prima facie* evidence of an act of aggression.

Acts identified as aggression include an invasion or armed attack; any annexation of territory; bombardment by the armed forces of a state against the territory of another state; an attack by the armed forces of a state on the land, sea or air force, marine and air fleets of another state; and the sending, by or on behalf of a state, of armed bands, groups, irregulars or mercenaries who carry out acts of armed force against another state "of such gravity as to amount to acts defined as aggression". The Declaration also significantly states that "no consideration of whatever nature, whether political, economic, military or otherwise, may serve as a justification for aggression". The proposed defined acts of aggression were explicitly claimed not to be exhaustive and the task of determining the existence of any act of aggression remains with the Security Council under Article 39 of Chapter VII of the UN Charter.

This, then, is the framework provided by the United Nations for the elimination of the use of force in international relations. The fact that provision was made for exceptions makes clear that this was not simply a utopian document. The Charter's drafters recognised that situations contravening these provisions would arise and that it was necessary also to provide for lawful and legitimate responses where breaches did occur. If the unit has been rather arid so far it is necessarily so because of the need to appreciate the dramatic aims of the Charter in proscribing war and yet the very real difficulties of achieving these goals. But I hope that as you have done the reading concerning international law and the use of force, you will have been trying to apply what is said to any or all of the cases of international strife we see about us, and to consider its relevance.

SELF ASSESSMENT EXERCISE 1

Should the Charter of the United Nations be seen as providing a dramatic change in the international law concerning the use of force, or merely as a logical development from what had gone before? (See *Feedback at the end of this unit*).

SELF ASSESSMENT EXERCISE 2

Why does Dixon suggest that Article 2(4) is open to interpretation?

3.2 Chapter VII of the UN Charter

Essential Reading

Dixon, Chapter 11: *The Use of Force*, pp.295-98.

Cassese, Chapter 18: *Unilateral Resort to Force by States*, pp.354-56.

Kaczorowska, Chapter 17: *Collective Security*, pp.451-63.

What should now be clear is that at the formation of the United Nations the intention was that this body would have the role of ensuring international peace and security. Both the prohibition on the threat and use of force (Article 2(4)) and the prohibition on intervention in matters essentially within domestic jurisdiction (Article 2(7)) were intended to do so. Those who drafted the Charter, however, recognised that these provisions in themselves would be insufficient to prevent or halt international strife and thus placed the responsibility to make these provisions effective in the hands of the Security Council.

The Security Council is defined and created by Chapter V of the Charter. This not only defines membership, both permanent and elected, and confers the power of veto on permanent members, but, crucially, gives the Security Council 'primary responsibility for the maintenance of international peace and security' (Article 24). Article 25 obliges all members to accept and carry out Security Council decisions. Its powers with regard to threats to the peace, breaches of the peace and acts of aggression are to be found in Chapter VII of the Charter.

Chapter VII gives the Security Council the power to determine the existence of any threat to the peace, breach of the peace, or act of aggression and it is then empowered, upon such a determination, to make recommendations, or decide what measures shall be taken to maintain or restore international peace and security. It is important to realise that this power “to determine” is unfettered.

Once the Security Council has so determined there is no possibility of review by any judicial or other body. While some writers have argued that the position should be otherwise, being of the view that the power of the Security Council should be constrained in order to ensure that there is some objective evidence for such a determination, this does not seem to be a plausible interpretation of the power given to it. The measures available to the Council under Chapter VII to achieve its goals range from the imposition of economic sanctions to authorising the use of military force against states not complying with its decisions.

Because of the power of veto and the Cold War, the Security Council's Chapter VII powers were largely unused until 1990. The two occasions on which the powers were used were wholly exceptional. The first was when after conflict between North and South Korea the Security Council "recommended" that the member states of the UN give such assistance to South Korea "as may be necessary to repel the armed attack [by North Korea] and to restore international peace and security in the area". This, then, was a recommendation rather than an authorisation and furthermore it was passed in the absence of the one Security Council permanent member who would have exercised the veto (the Soviet Union). (The Soviet Union was absent because it was boycotting the Security Council in protest at the Chinese seat in the General Assembly and the Security Council being held by the nationalist Chinese, of Taiwan, rather than the communist government of mainland China.)

Although Article 27 provides that decisions on such matters shall include 'the concurring votes of the permanent members', it seems now to be accepted that abstention for whatever reason is not to be equated with a veto. The second exceptional case concerned the attempt by Ian Smith's government of Rhodesia to claim independence with a white minority government in 1965. Here the Security Council deemed the resulting situation a "usurpation of power by a racist settler minority" and in a later resolution deemed imminent supply of oil to Rhodesia a "threat to the peace" and called upon the UK "to prevent by the use of force if necessary, the arrival of vessels reasonably believed to be carrying oil destined for Southern Rhodesia". Later the Security Council imposed mandatory economic sanctions.

The end of the Cold War brought hope to many that a new era had dawned in which the Security Council might at last perform the role allocated to it in 1945. This has proved over-optimistic for significant reasons. The first is structural. It had been intended under Article 43 that all member states would, "in order to contribute to the maintenance of international peace and security, undertake to make available to the Security Council...armed forces, assistance, and facilities..." In fact the

intentions of Articles 43-47 were never fulfilled and while action has been sanctioned by the Security Council it has always been entirely under the control of the participating states. Not surprisingly it has often proved difficult to gain the agreement of all permanent members when the action is to be under the control not of the UN but designated coalitions of members. It should be added, however, that even if this had not been the case there is little evidence to suggest that the international community is sufficiently united for the UN to have been more effective.

That notwithstanding, Chapter VII has been used more widely since the Cold War and in 1990 the Security Council authorised member states to use "all necessary means" to restore international peace and security in the Gulf by forcing Iraq to withdraw from Kuwait, the result of which was to return sovereignty to that occupied state. Other Resolutions have authorised particular states or sometimes organisations of states (such as the Organisation of American States) to use all necessary means to achieve particular ends. The two principle provisions under which the Security Council takes enforcement decisions are Article 41 (enforcement not involving the use of armed force) and Article 42 (providing for enforcement with the use of armed force).

Article 41

Article 41 provides:

The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

The Cold War had prevented much use of this provision, although it had been used against Rhodesia in 1965 and South Africa in 1977. Its effect when used against Rhodesia was limited by the refusal of Portugal, then a colonial power with control over Mozambique and Angola, and South Africa to support UN sanctions. Against South Africa the operative Resolution 418 called for an arms embargo but there was little enthusiasm among powerful states for monitoring to ensure implementation. Wider sanctions have always been controversial, partly because many state governments were cynical about their effect, partly because many were unwilling to give up trade, and partly because many states thought that the effect of sanctions most directly affected the poorest citizens of the sanctioned state. The recent exposure of the

corruption and graft that accompanied the sanctions against Iraq after its expulsion from Kuwait will have strengthened the arguments of those opposed to sanctions in principle. Nevertheless between 1990 and January 2005 sanctions had been imposed on 16 occasions and subsequently lifted in nine.

Article 42

Article 42 provides:

Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.

This provision has never, strictly speaking, been applied. While the Resolution concerning Korea in 1950 was, as has been said, a "recommendation", when it came to authorising the use of force against Iraq in 1990 Article 42 was not referred to (leaving some cynics to speak of action under Article forty one and a half). This was because of the lack of structure under Articles 43-47 forcing the Security Council to authorise a state, a group of states or a regional organisation to use armed force to restore international peace and order. This has had the effect of passing the control of such exercises of force away from the United Nations Organisation to other states or bodies. This was not envisaged in the Charter but the authority to act in this way is arguably implicit within Chapter VII.

4.0 CONCLUSION

Chapter VII of the UN Charter was intended to allocate power and responsibility to the Security Council both to determine the existence of any threat to peace, and to decide what forcible or other measures should be taken to resolve the situation. The results have been less successful than anticipated, partly because of deep divisions among the veto states in the Council, and partly because of the failure ever to provide the UN with its own military forces, as had been envisaged. Nevertheless it remains arguable that any use of force, except for reasons of self-defence, remains unlawful unless sanctioned by the Security Council.

5.0 SUMMARY

Perhaps the most important theme of the United Nations Charter lies in the preservation of peace and the proscription of war. The Charter reflects the reaction to a Second World War in less than 40 years and a determination that international law had a role to play in avoiding a third. The position reached is related to the General Treaty for the Renunciation of War, 1928 but such is the membership of the UN accepting its Charter provisions that there can be no doubt that it represents customary law too. As interpreted in General Assembly Resolutions there can be no justification for instigating war. The exceptions to the proscription are limited and temporary.

ANSWER TO SELF ASSESSMENT EXERCISE 1

The Charter of the United Nations is arguably both a logical development of international law concerning the use of force and also a dramatic change and development. Its proscription of force in international relations follows upon the League of Nations' emphasis upon pacific settlement and more directly still from the Kellogg-Briand Pact of 1928 which had renounced war as an instrument of foreign policy. Nevertheless in proscribing reprisals, for instance, and in limiting even the right of self-defence to what is necessary until the Security Council may be briefed, the Charter is a radical departure from earlier law.

6.0 TUTOR-MARKED ASSIGNMENT

Why is it of importance that Article 2(4) be seen as customary international law?

7.0 REFERENCES/FURTHER READINGS

Dixon, Chapter 11: *The Use of Force*, pp.292-309.

Cassese, Chapter 3: *The Fundamental Principles Governing International Relations*, pp.55-57.

Kaczorowska, Chapter 16: *The Use of Force*, pp.416-19.

UNIT 3 SELF-DEFENCE IN INTERNATIONAL LAW

CONTENTS

1.0 INTRODUCTION

We will consider the issue of self-defence in international law. We will also consider self-defence and terrorism in international law.

2.0 OBJECTIVES

At the end of this unit, you should be able to:

- explain the literal meaning of Article 51 and its constraints upon the inherent right of self-defence of the UN Charter in restricting the use of force in international law
- explain why reprisals, apparently clearly unlawful, are often carried out without condemnation
- outline the debate concerning the scope of Article 51 in response to terrorist acts
- explain why powerful states favour an expansive interpretation of Article 51.

3.0 MAIN CONTENT

3.1 Self-Defence under Article 51

Essential Reading

Dixon, Chapter 11: *The Use of Force*, pp.295-98.

Cassese, Chapter 18: *Unilateral Resort to Force by States*, pp.354-56.

Kaczorowska, Chapter 16: *The Use of Force*, pp.419-40.
Case Concerning Oil Platforms: Islamic Republic of Iran V. *USA* ICJ (2003).
The other main exception to the UN Charter's proscription of the use of force is concerned with self-defence and is to be found in Article 51. It states:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

A number of points need to be made. Firstly and quite obviously, historically as long as recourse to war was not inconsistent with international law, there was no need for any right of self-defence. It was no more and no less lawful than the act that provoked it. Having said that, it is equally clear that the principles of this 'inherent right' were in fact laid down in an era when war remained lawful. The identification of the rights and limitations of self-defence first appeared in a rather oblique way after an incident concerning the destruction of a steamboat - the *Caroline* - in 1837.

The *Caroline* was a US boat that was being used by US private militia to provide aid to rebels (against the British) in Upper Canada. While the boat was docked in New York State the British set the boat on fire and then sent it over the Niagara Falls. Two were killed and two taken prisoner. In response to a US protest the British said that the act was one of “necessary self-defence”. The dispute was resolved in 1842 when Daniel Webster, the then US Secretary of State, accepted that self-defence should be restricted to “cases in which the necessity of that self-defence is instant, overwhelming, leaving no choice of means, and no moment of deliberation”.

Of course this was a peculiar case because property belonging to citizens of a third entity (the US) was destroyed in that third state in order to prevent interference by those citizens in a rebellion in a second entity (Upper Canada) against a first (Great Britain). Nevertheless these principles of necessity and proportionality have come to be accepted as

appropriate criteria with which to judge the lawfulness of a claimed act of self-defence. Even so, Article 51 exists within the Charter, the intention of which was essentially to acquire a monopoly over the use of force in international relations.

Thus although a right of self-defence is recognised as "inherent", it is a right that was expected to exist only until such time as the Security Council was able to take the measures necessary to maintain (or restore) international peace and security. Such is the theory, but the failure to create the structures that would have enabled the Security Council to play this role, together with political disagreements, have meant that the exercise of self- defence is less brief than the Charter contemplated.

Armed Attack and Entebbe Airport

Unfortunately Article 51 fails either to define "armed attack" or to specify whether the attack must be upon the territory of the state under attack. What, for instance, of the situation where it is the nationals of a state who are being attacked beyond its borders? This situation arose in 1976 when an Air France aircraft with 251 passengers on board was hijacked by pro-Palestinians and taken to Entebbe in Uganda.

The hijackers released the majority of the passengers but continued to hold some 60, most of whom were Israeli citizens. The Ugandan Government (under Idi Amin) did little to bring the hijacking to an end and shortly before a deadline set by the hijackers an Israeli commando raid took place. Commandos arrived unannounced at Entebbe where they stormed the hijacked craft, released the passengers and killed the hijackers (and some 45 Ugandan soldiers) before returning with the passengers to Israel. Did international law permit such a rescue?

Israel claimed that Article 51 permitted it to use force in such circumstances in order to protect its citizens abroad if the state in which they found themselves was either unable or unwilling to protect them. International opinion was divided (less along the lines of international law than of individual states' attitude to Israel) but since then it has become at least implicitly accepted that in such circumstances, if a state has sufficient power to rescue its citizens, then if the intervention does not exceed what is a proportionate response it will not be regarded as inconsistent with Article 51. But it is clear once more that the ability to exercise such a right belongs only to powerful states. It is equally clear that claims of such a right are obviously open to abuse (as for instance when the US invaded Grenada in 1983 supposedly to rescue its nationals, or when it intervened in Panama in 1989 - certainly in neither case was the primary objective of the US actions the rescue of nationals).

It is probably correct to conclude that intervention to rescue nationals will not be contrary to Article 2(4) only if:

1. the threat to nationals is real and imminent
2. the state where they are being held is unwilling or unable to protect them
3. the sole purpose of the intervention is rescue
4. the response is proportionate in the sense that more lives may be expected to be saved than lost.

Delayed Response and Reprisals

On occasions the justification of self-defence has been used when the response to the original offensive act is nevertheless delayed. At first sight this might seem clearly contrary to Article 51, since it would seem that if there is time for reflection there is time to refer the matter to the Security Council. The advantage of treating the matter as within Article 51, rather than referring it to the Security Council, is that no Security Council action (such as a Resolution) will be required, and if the right of self-defence is being exercised, only a Security Council Resolution will suffice to order a halt to the act of defence.

Two examples are instructive. The Argentinean invasion of the Falkland Islands/Malvinas in 1982 led to no immediate response. This was because of the time required to assemble and dispatch a substantial naval force and the time required to reach the South Atlantic once the force had been assembled. It could have been argued that this delayed "act of self-defence" should have been replaced by putting the matter in the hands of the Security Council, but for transparent political reasons this course of action was rejected. This was probably inevitable given the inability of the United Nations and the Security Council to fulfill the intentions of the drafters of the Charter. Had the matter been referred to the Council, a Resolution empowering action would have been most unlikely -a veto would have prevented it.

The second example arose from the attempted assassination of former President George H. W. Bush in 1993 when a car bomb was discovered in Kuwait. Some two months later the US launched a substantial cruise missile attack against Iraqi Military Intelligence Headquarters in Baghdad, causing death and destruction. Although this appeared to be much more like an act of reprisal in retaliation for an attributed act, the US argued that it was a response permitted under Article 51. The delay in the act of self-defence arose; it was claimed, because of the need to obtain proof of Iraqi involvement.

This position received considerable support from within the Security Council but the international community was deeply divided at such a unilateral use of force without Security Council authorisation.

Reprisals are generally considered to have been outlawed by the United Nations Charter, but they do still occur. Because they are unlawful, very often in the past they have been cloaked in the hopeful garb of self-defence, although this stance seems to be changing. Certainly Israel is currently much less likely to bother attempting self-defence justifications and is content to accept the fact of reprisal. When in 1969, in response to the action of Palestinian guerrillas in destroying an El AI aircraft in Athens, Israeli commandos destroyed 13 civil aircraft valued at more than $40 million in Beirut, the Israeli Chief of Staff simply said that the objective was to make clear "to the other side that the price they must pay for terrorist activities can be very high". Notwithstanding Security Council condemnation for Israel's "premeditated military action in violation of its obligation under the Charter", no further price was exacted, despite a call for compensation.

Thus to conclude this section it is essential to recognise the limits of the right to self-defence and to recognise that theory does not necessarily coincide with reality. The theory is that self-defence is limited to a necessary and immediate (and proportionate) response until such time as the matter can be considered by the Security Council. The reality is that if states have sufficient power or support it is possible either to put forward the justification of self-defence even where it is strictly inappropriate or, more simply, to accept explicitly that an act is one of reprisal in the knowledge that Security Council condemnation is highly improbable.

3.2 Collective Self-Defence

As you will have realised, Article 51 contemplates collective self-defence, by which is meant the right of each state to use force in order to defend another state. Such collective self-defence is most common where there are alliances formed with the intention of mutual protection. In the Cold War, the Warsaw Pact and the North Atlantic Treaty Organisation were the most prominent of these, but they were certainly not unique. Under Article 5 of the North Atlantic Treaty it is provided that the Contracting Parties:

agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defence recognised by Article 51 of the Charter of the United Nations, will assist

the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area.
Because Article 51 applies, the same obligation to report to the Security Council exists and the requirement of an armed attack remains. (The use of force in Kosovo is considered under "humanitarian intervention" later.)

As to the right of states to make regional arrangements, Article 52 of the UN Charter states:

1. Nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action, provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations.

2. The Members of the United Nations entering into such arrangements or constituting such agencies shall make every effort to achieve pacific settlement of local disputes through such regional arrangements or by such regional agencies before referring them to the Security Council.

Again, given Article 51, the actions of such regional arrangements must either be an act of collective self-defence or an action consistent with the purposes and principles of the UN. Most importantly, the power of the Security Council remains superior to any regional arrangement.

3.3 Pre-Emptive Self-Defence

Because Article 51 refers to the situation where "an armed attack occurs", this might seem to confine the right of self-defence to a response to an attack that has happened. This has been the view of most commentators since the creation of the Charter. The "inherent right" seems so confined by the ordinary meaning of the words of Article 51. For this reason, states have seldom attempted to justify any use of force as an act of pre-emptive self-defence, and when Israel did so in its bombing of the Osirak nuclear reactor in Iraq in 1981 its action was condemned unanimously by the UN Security Council as illegal. Even the US supported this Resolution.

Nevertheless it might be thought unreasonable that states should have no right to take action from some threatened attacks. It has been suggested that the Caroline principle might be called into play, recognising a right

of pre-emptive self-defence only where the need for self-defence is "instant, overwhelming, leaving no choice of means and no moment of deliberation" and where the response is proportionate to this imminent threat.

Any attempt to define such a right is, however, fraught with difficulty. Because it has such potential for abuse, and often by states in unstable relationships (India and Pakistan, Israel and Iran/Syria, or North and South Korea) and with powerful, even nuclear weaponry, its use must be heavily circumscribed. Most states accept this and of course few states have the armed forces to make such pre-emptive strikes anyway. But recently, and particularly since the events of the terrorist attacks upon the US in 2001, the United States has asserted new rights of "pre-emptive self- defence". We shall return to this point in Module 4, but the position taken by the Bush administration is spelt out in a document - The National Security Strategy of the United States of America - published under the presidential seal in September 2002. Although many would query some of the assertions, what is said does represent the US view. It is startling. On page 15 it states:

For centuries, international law recognised that nations need not suffer an attack before they can lawfully take action to defend themselves against forces that present an imminent danger of attack. Legal scholars and international jurists often conditioned the legitimacy of pre-emption on the existence of an imminent threat – most often a visible mobilisation of armies, navies and air forces preparing to attack.

We must adapt the concept of imminent threat to the capabilities and objectives of today's adversaries. Rogue states and terrorists do not seek to attack us using conventional means. They know such attacks would fail. Instead, they rely on acts of terrorism and, potentially, the use of weapons of mass destruction - weapons that can be easily concealed and delivered covertly and without warning.

The targets of these attacks are our military forces and our civilian population, in direct violation of one of the principal norms of the law of warfare. As was demonstrated by the losses on September 11, 2001, mass civilian casualties is the specific objective of terrorists and these losses would be exponentially more severe if terrorists acquired and used weapons of mass destruction.

The United States has long maintained the option of pre-emptive actions to counter a sufficient threat to our national security. The greater the threat, the greater is the risk of inaction - and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy's attack. To

forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act pre-emptively.

The United States will not use force in all cases to pre-empt emerging threats, nor should nations use pre-emption as a pretext for aggression. Yet in an age where the enemies of civilisation openly and actively seek the world's most destructive technologies, the United States cannot remain idle while dangers gather.

Significantly, the US used this position as one justification for its unauthorised invasion of Iraq in 2003. More significantly, its major allies chose to justify their part only by a reading of Security Council resolutions. Yet again this is a situation where the power of the US enables it to assert a position in international law not shared by other states and certainly rejected by the United Nations.

SELF ASSESSMENT EXERCISE 1

What is the evidence for the view that reprisals are once more permissible under international law?

3.4 Self-Defence and Terrorism in International Law

Essential Reading

Dixon, Chapter 11: *The Use of Force*, pp.301-04.

Cassese, Chapter 18: *Unilateral Resort to Force by States*, pp.449-50, pp.463-81.

Kaczorowska, Chapter 16: *The Use of Force*, pp.432-37.

The 11 September 2001 act of Al-Qaida against the United States which killed almost 3,000 people was of course not the first major act of terrorism. But it was seminal in the effect that it had upon international law. Until that date the typical response to acts of national or international terrorism was to interpret the conduct as that of individuals and thus as acts of a criminal nature. This recognised that while different states might support different acts of terrorism, it would be rare indeed that acts of terror could be attributed to such a state. As we will see shortly, however, that position was not absolute, nor were responses to terrorism uniform.

International law has had considerable difficulty in providing a definition of terrorism. Some thought such a definition unnecessary as any act of so-called terrorism was better defined depending upon the

circumstances. An act of terrorism might be murder, arson, causing explosions or whatever, each giving rise to charges of recognised crimes. There were also some state representatives who were unwilling to define terrorism in a way that condemned the "freedom fighter" - those concerned with pursuing a legitimate goal of self-determination - as well as the religious fanatic or politically disaffected.

In Cassese's words (p.449), "Third World countries staunchly clung to their view that this notion [terrorism] could not cover acts of violence perpetrated by the so-called freedom fighters, that is individuals and groups struggling for the realisation of self-determination". (In fact more recently it has been the 56 members of the Organisation of the Islamic Conference who have continued to insist that the armed struggle "for liberation and self-determination" be excluded from a definition of terrorism because of their empathy with the Palestinian cause.) Nevertheless it was recognised that acts of terrorism seemed to be more than simple, if terrible, crimes under other names. In 1994 in GA Resolution 49/60 passed by consensus, there was an attached Declaration which, in paragraph 3 referred to terrorism as:

Criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstance unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or any other nature that may be invoked to justify them.

And there have been other attempts at definitions, both earlier and later. In an unadopted League of Nations Convention of 1937 terrorism was defined as:

All criminal acts directed against a State and intended or calculated to create a state of terror in the minds of particular persons or a group of persons or the general public.

General Assembly Resolution 51/210 of 1999 (Measures to eliminate international terrorism) read as follows: The GA

1. Strongly condemns all acts, methods and practices of terrorism as criminal and unjustifiable, wherever and by whomsoever committed;

2. Reiterates that criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstance unjustifiable, whatever the considerations of a political,

philosophical, ideological, racial, ethnic, religious or other nature that may be invoked to justify them.

Finally it is worth quoting a comparatively short legal definition proposed by A.P. Schmid in 1998:
Terrorism is an anxiety-inspiring method of repeated violent action, employed by (semi-) clandestine individual, group or state actors, for idiosyncratic, criminal or political reasons, whereby - in contrast to assassination - the direct targets of violence are not the main targets. The immediate human victims of violence are generally chosen randomly (targets of opportunity) or selectively (representative or symbolic targets) from a target population, and serve as message generators. Threat-and violence-based communication processes between terrorist (organization), (imperiled) victims, and main targets are used to manipulate the main target (audience(s)), turning it into a target of terror, a target of demands, or a target of attention, depending on whether intimidation, coercion, or propaganda is primarily sought.

The need for a definition of this kind arises from the legal consequences of acts of terrorism. If acts fulfill the criteria, they will be regarded as international crimes. But of most importance here is the question of when acts of terrorism might give rise to the use of force in international law and whether that use of force is to be regarded as lawful. You will no doubt quickly realise that an assertion of a right of international self-defence in relation to a terrorist attack does not dispose of the question of legality. The claim was often made particularly by the United States, Israel and South Africa (when under the apartheid regime).

Israel used this justification when invading the Lebanon in 1982, arguing that the invasion was an act of self-defence in response to terrorist attacks, and again when attacking the PLO headquarters in Tunis and killing 60 people in 1985 after the murder of three Israeli citizens on a yacht in Larnaca harbour in Cyprus supposedly by a Palestinian task force. In 1986 a terrorist bomb exploded in a West Berlin nightclub frequented by US service people. Two Americans were killed and there were many injuries.

Ten days later the United States bombed Tripoli in Libya, claiming to have information that Libya was the source of the Berlin terrorist act. Fifteen people were killed. The then US Secretary of State George Shultz asserted that this action was within Article 51 but there was little international support for his argument. Both Israel and the US have insisted that this right of self-defence even covers attacks upon states not directly involved in the terror, as for instance Tunisia in 1985.

The prelude to 11 September may be seen in the bombing of United States embassies in Nairobi and Dar es Salaam in August 1998. Twelve Americans were killed but more than 200 non-Americans also lost their lives while thousands were injured. The response clearly illustrates the importance of power in determining action appropriate to the terror attack. While the governments of Kenya and Tanzania whose innocent citizens had suffered so grievously were incapable of mounting a response by way of self-defence (had that been available to them, as it almost certainly would have been if the identity of the bombers could be ascertained), the US concluded that responsibility lay with Osama bin Laden and Al-Qaida. Some two weeks later it launched 79 cruise missiles at what it claimed were terrorist training camps in Afghanistan and against a factory in Sudan. As in Israel's attack in Tunis the claim was that Article 51 justified a self-defence response even against the territory of a state where the attack had been mounted by a group not identified with the state under attack itself.

Michael Byers, in his book *War law* (2005) points out with regard to this action that in an attempt to defuse any international reaction, President Clinton had taken the precaution of communicating with close allies (the UK, France and Germany) to advice of his plans for these strikes. Protest was therefore generally muted. Byers suggests that at least until the second Bush administration, "Whenever the US government wishes to act in a manner that is inconsistent with existing international law, its lawyers regularly and actively seek to change the law. They do so by provoking and steering changing patterns of state practice and *opinio juris,* with a view to incrementally modifying customary rules and accepted interpretations of treaties such as the UN Charter".

He goes on to suggest that this is the best explanation of the course of action adopted by the US after the 11 September attacks. This is because other more obviously legitimate courses of action were available to the US rather than the position adopted. The US chose to base the justification for its subsequent attack on Afghanistan purely upon the right of self-defence. Most obviously it would have been possible to obtain a Security Council resolution, probably in almost any terms the US requested. The undesirability of this course of action however lay in the fact that it would recognise the authority of the Security Council over US action. As we will discuss in the final Module, this would not have been acceptable to the Bush administration.

How much better, therefore, to justify the response as an act of self-defence. Although this was against the Taliban, then in control of most of Afghanistan, this course of action was made more acceptable by the refusal of the Taliban to co-operate with the US in apprehending and handing over those thought to be responsible.

It is Byers' argument that this extended meaning given to "self-defence" is capable of claims of further extension. Thus perhaps (although this is highly contentious and will be considered in the next Module) it might be extended even to justify "targeted assassinations" as carried out by Israel against those it considers to be involved in violence against its citizens.

To conclude this Unit, it may be seen that the precise scope of Article 51 in defining permissible responses to terrorist attacks is unclear. Two final points need to be remembered. The first is that any "right" of self-defence will always also depends upon the means to respond, whether directly or through powerful friends. Secondly, terrorism is almost always a manifestation of an asymmetric struggle between irregular and often ill-equipped forces on the one side and a state with access to armed forces and weapons on the other. While this makes no comment about the "rightness" of any irregular terrorist action, it might give rise to the view that simply to label one side of a struggle as "terrorists", as for instance with Palestinians or Chechnyans or Tamil Tigers, while exonerating the other of terrorism because of its governmental legitimacy is excessively simplistic. Indeed some of the most repressive states have been enthusiastic about the so-called war against terror, precisely because it can be used to justify additional repression and a refusal to negotiate in response to important demands. What can be stated with some certainty, however, is that Article 51 is being used to justify responses never contemplated by the drafters of the Charter.

SELF ASSESSMENT EXERCISE 2

Should acts of terrorism ever justify the use of force as defined in Article 51 of the UN Charter? (See *Feedback at the end of this unit*).

4.0 CONCLUSION

Self-defence in international law was intended in the Charter to be a restricted justification for the use of force. It was intended to legitimate forceful resistance to armed attack until such time as the Security Council could be notified so that it might resolve the conflict. Unfortunately the Security Council has never had the power required to play its assigned role. Now it is not unusual for states to define their own understanding of self-defence and effectively to challenge the Security Council to condemn them. Powerful states or states with powerful allies have not been constrained as intended.

5.0 SUMMARY

We have considered the issue of self-defence in international law. You should now be able to:

(i) Explain the literal meaning of Article 51 and its constraints upon the inherent right of self-defence of the UN Charter in restricting the use of force in international law;
(ii) Explain why reprisals, apparently clearly unlawful, are often carried out without condemnation;
(iii) Outline the debate concerning the scope of Article 51 in response to terrorist acts;
(iv) Explain why powerful states favour an expansive interpretation of Article 51.

ANSWER TO SELF ASSESSMENT EXERCISE 2

A first point to be made here is that when Article 51 was drafted it did not contemplate the rise in acts of international terror that might seem to demand a military rather than police response. Consequently to be appropriate it requires a generous interpretation. This it received when the Security Council reacted to the terrorist attack upon the US World Trade Center in 2001. The Resolution passed the following day (Resolution 1368) explicitly observed the "inherent right of individual or collective self-defence in accordance with the Charter", thus arguably implicitly accepting that the right extended to such acts. The US did not in fact claim a right of self-defence when planning its attack upon the Taliban regime in Afghanistan, until the Taliban had effectively refused to co-operate in the bringing to justice of the perpetrators, organisers and sponsors of the attack. Although there seems little doubt that the US would respond in the future to any terrorist attack where any government is believed to have been complicit, arguably such a response in terms of self-defence will be limited to situations where state responsibility may reasonably be attributed.

One further problem arises. The US in particular (but also Israel) has made it clear that it interprets Article 51 as justifying pre-emptive strikes against those who are believed to be in the process of organising, planning or preparing such attacks. It is doubtful that many such situations would or could amount to an "armed attack" within the meaning of Article 51. Few states would accept this interpretation.

6.0 TUTOR-MARKED ASSIGNMENT

"While the requirements of self-defence for a justification of the use of force are theoretically clear it seems all too apparent that this defence is used by states with sufficient power to assert a right to use force for other reasons - even if those reasons seem incompatible with the Charter." Discuss.

7.0 REFERENCES/FURTHER READINGS

Schmid, A.P. "Terrorism and Human Rights, a Perspective from the UN" *in Terrorism and Political Violence*, 1-2, 17, 2005.

Byers, M. (2005). *War Law*. London: Atlantic Books.

UNIT 4 HUMANITARIAN INTERVENTION

CONTENTS

1.0 INTRODUCTION

When NATO intervened in Kosovo in 1999 for "humanitarian reasons", the legality of the operation remained debatable. Similarly the actions of the United States and United Kingdom after establishing "no-fly zones" through Security Council Resolution 688 in 1991, in carrying out air strikes against Iraq in 1998 and 2001 are controversial. Even more obviously controversial in international law has been the invasion and occupation of both Afghanistan and later Iraq by the United States and its few allies.

We have already seen in this Module how international law seems generally to permit the use of force by a state to rescue its citizens who are being improperly held in the territory of another state, though of course the usual qualifications relating to necessity and proportionality, not to mention ability, apply. The question of humanitarian intervention is related to this proposition, but differs in that questions of the need for one state to intervene in the affairs of another state for humanitarian reasons are unlikely to concern the safety of the intervening state's nationals. Discussion as to when, if ever, one or more states are entitled to forcibly intervene in the affairs of another is often coloured by the rather mixed history of such interventions. In particular the intervention in Somalia in 1992, which was authorised by the Security Council, is widely accepted to have been a fiasco, and the non-intervention in Rwanda in 1994 where some 800,000 were massacred is widely portrayed as utterly shameful. Opinion is still divided over the NATO

intervention in Kosovo in 1999, conducted by an alliance of states but without Security Council authorisation. Even the way in which humanitarian intervention is described is controversial, ranging from 'forcible intervention' to a “responsibility to protect”.

Within the debate over such intervention opinions range all the way from those who consider that “humanitarian intervention” is always necessarily wrong, to those who argue that it should be extended much further to enable regime change to be effected where a government is ruling without a democratic mandate. Those of the former opinion point out both that only some states are ever vulnerable to humanitarian intervention and that the numbers of such situations that have brought long-term improvements are few and far between; while those of the latter have suggested that it is a lack of democracy in states that is largely responsible for international instability.

2.0 OBJECTIVES

At the end of this unit, you should be able to:

- explain the debate about the law relating to humanitarian intervention
- discuss the significance of the debate concerning the right of humanitarian intervention without Security Council authorisation
- explain the basis and effect of rules constraining the sort of force permissible (when it is permissible).

3.0 MAIN CONTENT

3.1 Distinguishing Humanitarian Intervention

It is important at the outset to distinguish humanitarian intervention that is pursuant to a Security Council Resolution from other interventions. Although some authors are unhappy with the situation, the position in international law is as follows: where, as in Somalia, Haiti or East Timor, intervention complies with a specific Security Council Resolution, it is to be regarded as legitimate (if not necessarily wise). The reservation held by some commentators is that in fact these situations should not have been held to be threats to the peace and the Security Council was wrong in declaring them to be so. But as we have observed, there is no body with the power to review Security Council Resolutions and the concept of *ultra vires* is not relevant. Thus the contentious question in international law concerns the situation where a state or a number of states wish to intervene militarily in order to save or

protect either nationals of the state where intervention is contemplated or nationals of states other than those contemplating intervention.

At first sight the legal position appears to be clear. It seems that the "Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty" adopted in 1965 by the General Assembly (and restated in a further declaration in 1981), and intended to interpret Article 2(7) of the UN Charter should govern the position. Article 1 provides:

No state has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other state. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the state or against its political economic and cultural elements, are condemned.

The demonstrated strength of international feeling on this subject is probably why there was so little evidence of a developing law permitting international humanitarian intervention until the 1999 intervention in Kosovo. Indeed it is important to see that in each case before then, the intervening state defended its actions not in terms of any right to humanitarian intervention but as an act of self-defence. While this is no doubt partly due to the determination to intervene before seeking Security Council consideration as discussed in the last unit, the refusal to attempt to rely upon any justification of humanitarian intervention has had the effect of negating any evidence of changing *opinio juris.* Thus when each of the cases usually put forward to suggest a history of humanitarian intervention is examined, it seems to do no such thing. Three cases typically quoted are:

1. India's intervention in what was then East Pakistan (now Bangladesh) in 1971 after widespread atrocities carried out by the army of West Pakistan
2. Vietnam's invasion of Kampuchea (now Cambodia) in 1978 where the Kampuchean army had been responsible for the murder of hundreds of thousands of its own citizens
3. Tanzania's 1979 invasion of Uganda overthrowing the regime of Idi Amin, which was also responsible for the humanitarian outrages and murders of so many Ugandans.

Not only did each invading state rely upon self-defence, but none suggested that humanitarian motives were of any influence. The removal of tyrants, tyrannical regimes or marauding armies was never argued as justification, nor yet did such a happy result receive approval in those terms. Vietnam was roundly criticised for its use of force against the

territorial integrity and political independence of Kampuchea even as the atrocities of the Pol Pot government were condemned.

In fact before the intervention by NATO in Kosovo there had been only one occasion when a state had been prepared to justify such actions as a response to a humanitarian crisis. When the UK deployed forces along with the US, Italy, Holland and France in Northern Iraq after the first Gulf War of 1991, in order to provide safe havens for the Kurdish people under attack from Saddam Hussein, it was the British Foreign Office that stated, "We believe that international intervention without the invitation of the country concerned can be justified in cases of extreme humanitarian need". Significantly, it was not suggested that the justification amounted to "legal" justification. Such a proposition would seem immediately incompatible with Article 2(4) of the UN Charter.

How then should the intervention in Kosovo be characterised?
Could it, and did it, represent a change in international law? Brief facts are relevant.

When the Constitution of Yugoslavia was drafted in 1945, Kosovo was included as an autonomous region. It was inhabited by people who were divided by their religion and to some extent by their ethnicity. Some 90 per cent of the population (of 2.2 million) by the 1990s were Muslim and ethnically Albanian. The remaining 10 per cent were Serbs who were Orthodox Christians. Many of the religious and national sites most revered by the Serbs are to be found in Kosovo and there were tensions between the two groups.

Significantly Kosovo was the poorest part of Yugoslavia and the Serbs had had little success in persuading ethnic Serbs to live there. A major reason for the election of Slobodan Milosevic as President in 1989 was his promise to promote Serbian interests in Kosovo. After his election he immediately withdrew Kosovo's autonomous status and this led to increasing tension and violence between the two communities. While opinions differ, the evidence seems to prove that Serbian aggression was provoking defensive action which in turn provoked more Serb violence with allegations of "ethnic cleansing" and other atrocities, including both murder and rape.

In fact it is difficult to obtain clear evidence of exactly what was done to either community by the other but the Security Council was concerned by the violence and in 1998 imposed a mandatory arms embargo. A series of resolutions followed. Resolution 1199 of September 1998, expressly referring to the authority of Chapter VII, determined that the situation in Kosovo was one that was a threat to peace and security in the region.

Nevertheless it was clear that no Resolution could be obtained that would expressly authorise the use of force because Russia would exercise its veto. Under threat from NATO for failing to comply with Resolution 1199's demand for the cessation of hostilities and a return to negotiations, the Serbian dominated Federal Republic of Yugoslavia (FRY) eventually agreed to comply. Resolution 1203 followed in October 1998, again under Chapter VII, endorsing the two agreements made by the FRY to comply with Security Council Resolutions and to accept a verification mission from the Organisation for Security and Co-operation in Europe (OSCE), and also an agreement with NATO creating an air verification mission.

That notwithstanding, the violence escalated, NATO resumed its threats and after the failure of talks aimed at resolving the Kosovan problem held in Rambouillet near Paris, NATO began its campaign of aerial bombardment against FRY targets on 23 March 1999, which lasted until the withdrawal of Serbian forces after an agreement of 9 June 1999. The agreement was notified to the UN and the Security Council passed Resolution 1244 endorsing both the ending of hostilities and the plan for the restoration of peace.

This action by the states of NATO caused immense concern to international lawyers. Few argued (or could argue) that the action came within the rules of the UN Charter, yet many felt that the correct moral decision to intervene had been taken. Some suggested that although it was not legal, the intervention was justifiable and justified by subsequent international reaction. In particular the attempt by Russia and Belarus to have the NATO bombing declared illegal was rejected by the Security Council with a large majority and the General Assembly did not condemn NATO's actions.

What is once more usefully illustrated here is the difference between international law and international morality. The fact is that international humanitarian intervention is legal only if consistent with the UN Charter. But the question of legality does not finally dispose of the matter, though many might think it should. International law is a major factor in determining a course of action but other facts might outweigh illegality in the eyes of statesmen and diplomats, particularly where egregious breaches of humanitarian law are claimed to exist. Here we can also observe the different weight of veto. The knowledge that Russia would prevent any resolution (with or without support from China) empowering forcible intervention did not amount to a threat of war if the authority of the Charter was ignored. The use by the USA of the veto to prevent the condemnation of Israel under Chapter VII is altogether more

powerful. Even where the USA is alone in the Security Council no other party or parties would challenge that veto.

SELF ASSESSMENT EXERCISE 1

Do you agree that the intervention by NATO in Kosovo without Security Council authorisation strikes at the heart of international law, or should it be seen merely as one of the rare situations in which the use of power for the common good should be accepted as illegal but moral? (See *Feedback at the end of this unit*).

3.2 Rules Constraining the Sort of Force Permissible

Essential Reading

Cassese, Chapter 19: *The protection of Human Rights*, pp.399-434.

Kaczorowska, Chapter 18: *International Humanitarian Law*, pp. 474-520.

As we observed at the beginning of this Module, historically international law was more concerned with the rules of warfare, that is how wars are to be fought, than with the question of when, if ever, it was permissible to go to war. In a further development because wars between states became less common whereas civil strife increased, rules relating to the use of force came to be concerned with armed conflict rather than confined to war. Because this question of international humanitarian law will also receive mention in the next module on human rights, this unit will be brief.

As we have also said, the rules of international humanitarian law are to be found primarily in the four Geneva Conventions of 1949, and The Hague Conventions of 1899 and 1907. The two sources are concerned with different dimensions of the rules of armed conflict. The Hague Conventions are primarily concerned with the methods and means of warfare and limiting (though not to a very great extent) the sorts of "acceptable" weapons. The Geneva Conventions have as their central concern the protection of persons who are not participating in the armed conflict or who have ceased to do so, whether because of injury or surrender. It is sometimes said that "Hague law" encompasses the laws of war or the law of armed conflict, whereas "Geneva law" is concerned with humanitarian law.

Underlying all of the rules are firstly the principle of humanity and secondly that of the protection of non-combatants and civilians. As it suggests, the principle of humanity is intended to ensure that individuals

are treated humanely in all circumstances. Although “humane warfare” might seem an oxymoron, it is not. In essence it means that any violence not justified by 'military necessity' is prohibited by the law of armed conflict. In particular if violence or destruction is unnecessary, disproportionate, indiscriminate or intended to spread terror it will not meet the criteria of lawful armed conflict. Similarly, particular kinds of weapons are unlawful in their use. Both chemical and biological weapons are incompatible with international law while the use of nuclear weapons remains apparently unprohibited, at least in some imaginary scenarios, according to the ICJ. Conventional weapons may be unlawful if those weapons are disproportionately inhumane (such as “dum-dum” bullets, designed to expand upon impact, or, arguably, anti-personnel land mines).

The four Geneva Conventions were drafted after the Second World War, but they drew upon earlier international law developments. The first Geneva Convention is the Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field and this was the natural successor to the Geneva Convention of 1864 which had a similar name. The second Convention developed the first to provide similar protection for those concerned with maritime warfare, that is those wounded, sick or injured at sea or shipwrecked. The third concerned prisoners of war and was based upon the Prisoners of War Convention of 1929, while the fourth was the Geneva Convention Relative to the Protection of Civilians in Time of War. This in turn was developed from the draft Tokyo Convention of 1934. In excess of 180 states are party to these Conventions, which are therefore unarguably customary international law for any state which is not a party.

Supplementing the Geneva Conventions are two Protocols of 1977, each with more than 150 parties. These provide enhanced protection for, in the first Protocol, victims of international armed conflicts, and in the second, victims of non-international armed conflicts.

It is probably accurate to state that until the aftermath of the US-led invasion of Iraq in 2003, no international lawyer considered that the Geneva Conventions were other than binding on all parties to any conflict. It was surprising, therefore, to hear some lawyers representing the Bush administration suggesting that as neither the Taliban (in Afghanistan) nor members of Al-Qaida were parties to the Conventions, they were not entitled to claim their protection. This seems demonstrably wrong. The Conventions were for the protection of all, not simply nationals of states whose governments had ratified the Conventions. The principle of humanity is of universal application and the suggestion by the US administration that the Geneva Conventions

could be described as 'quaint' was rejected forcefully by both academic and political opinion.

Since the Geneva Conventions and their Protocols the most important developments in this field have been the development of the *ad hoc* tribunals created by the Security Council, namely the International Criminal Tribunal for the Former Yugoslavia (1993) and the International Criminal Tribunal for Rwanda (1994) intended to try international crimes committed in those two states; and the International Criminal Court, the Statute of which was completed in 1998 and which came into force in 2002. These developments are dealt with in more detail in Module 4. Suffice here to state that the United States is not a party to the Statute and has done its best to impede the development of the Court. Both the Tribunals and the Court are concerned to criminalise conduct which is in breach of humanitarian law.

4.0 CONCLUSION

It is clear that the means of warfare are not unconstrained by law. Rules constraining both conduct and means in armed conflict have developed to the point where they are not only widely ratified but must also be accepted as customary international law. In spite of US resistance the development of the International Criminal Court reflected the views of most states to the effect that an independent international tribunal may often be the appropriate forum in which to try those charged with international crimes.

5.0 SUMMARY

In proscribing the use of force in international law the UN Charter made no allowance for humanitarian intervention except upon authorisation of the Security Council. Clear though this is, it is equally clear that veto powers may prohibit intervention even where preventable atrocities are being carried out. In Kosovo an anticipated veto did not dissuade NATO from an intervention that lacked legality, though arguably not morality.

Although this action was not condemned by the majority of the international community this does not make it retrospectively lawful. Enthusiasm for such action should be tempered by a realisation that few states or regional organisations will have the power or will to intervene in states in breach of human rights obligations. Darfur in the Sudan represents a situation even worse than Kosovo but one where there is little prospect of intervention. Additionally some states, because of their power (or their powerful allies), will never be subject to humanitarian intervention no matter how deplorable their human rights record. Chechnya and the Israeli Occupied Territories are two such examples.

ANSWER TO SELF ASSESSMENT EXERCISE 1

The conclusion that you reach in answer to this question is less important than the reasoning that leads to it. It requires a consideration of why the world has been so slow to identify any right of humanitarian intervention. This stems from cynicism about the motives for intervention, apprehension of unintended consequences, and fear of casualties. Furthermore situations of egregious breaches of human rights obligations where the Security Council cannot be persuaded to act will usually be rare unless the interests of one permanent member are threatened (as was the case in Kosovo). In such circumstances, if the General Assembly is of the view that action is necessary and there is a majority of both permanent and other Security Council members favouring action it might be regarded as illegal but moral. The Kosovan intervention was not by a single state but by NATO.

Nevertheless those who opposed the intervention in the absence of a Security Council Resolution took the view that it threatened sovereignty, aggravated existing tensions and necessitated long term involvement. Although attempts to condemn the intervention were unsuccessful, this cannot be said to have legitimated the action retrospectively.

6.0 TUTOR-MARKED ASSIGNMENT

"International law contained in the Charter of the United Nations intended to proscribe the use of force in international relations, has proved inadequate. This is less the fault of the Charter than it is the fault of powerful member states and their allies who have ignored the Charter when it was thought that to do so was politically expedient." Discuss.

7.0 REFERENCES/FURTHER READINGS

Dixon, Chapter 11: *The Use of Force*, pp.304-05.

Cassese, Chapter 18: *Unilateral Resort to Force by States*, pp.366-68.

Kaczorowska, Chapter 16: *The Use of Force,* pp.442-46.

MODULE 4

UNIT 1 HUMAN RIGHTS IN INTERNATIONAL LAW

CONTENTS

1.0 INTRODUCTION

There is a popular view that there is a world of difference between theorising about human rights and drafting grand charters, covenants and conventions on the one hand, and actually working to ameliorate the unnecessary suffering of mankind on the other. It remains true that it is almost impossible to judge the effect (if any) of the work and effort manifested in many human rights documents, particularly those emanating from the United Nations. This fact should alert us to the realisation that the concept of human rights is something more than agreed means by which the quality of life of individuals is to be improved. Underlying the apparently neutral and uncontroversial phrase "human rights" is a foment of philosophical and political ideas and

disagreements that makes it remarkable that any consensus has ever been reached.

This Module begins with a discussion of what meaning can be attributed to the phrase "human rights": how they might be defined, by whom and with what significance. This might seem superfluous in a module on the international law of human rights, but it is not. As we will see, one of the primary difficulties international law has had in enforcing human rights arises from difficulties in achieving accepted definitions. Having observed these problems we will proceed to consider the politics of human rights. This unit ought to suggest that the way in which different states, different governments and different peoples and religions seek to define human rights depends upon their political perspectives. It will be suggested that the end of the Cold War and the proclaimed triumph of liberal capitalism has directly affected perspectives upon human rights. What this has meant has been much greater emphasis upon so-called civil and political rights, at the expense of economic, social and cultural rights. But of course this distinction itself reflects different political ideologies.

2.0 OBJECTIVES

At the end of this unit, you should be able to:

- explain the philosophical problems in defining human rights
- explain that an understanding of what human rights are and their order of priority is always political.

3.0 MAIN CONTENT

3.1 What are Human Rights?

Essential Reading

Kaczorowska, Chapter 12: *The International Protection of Human Rights,* pp.263-304.

Cassese, Chapter 19: *The Protection of Human Rights*, pp.375-98.

Dixon, Chapter 12: *Human Rights*, pp.32-37.

Practical lawyers might question the need for this section, and the next. Here we are attempting to provide an understanding of the meaning of human rights without which any appraisal of the role and effect of the international law of human rights is impossible. It is of course very difficult to isolate the concept of human rights from international law in

general and it will be argued that the two are not really separable. The political and ideological world that dictates international law also defines the reality of human rights. In this section there are two separate but related questions that need to be raised. The first requires us to understand what is meant by "human rights" and the second considers whether they must be seen as time and culture specific, or whether they are, as is generally asserted, universal. The answers to these questions have significant implications.

As to the first question, it is immediately clear that the concept of human rights has close links with natural law - the theory that argues that beyond the laws created by people there are natural or divine laws with which created laws must conform. With a divine explanation there can be no rational debate. Religion is about faith and not susceptible to either proof or disproof through reason. The US Declaration of Independence of 1776 stated the natural law assertion in these terms:

We hold these truths to be self-evident: That all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness;...

Such an assertion of divine law is however only possible where the constituency to which it is addressed is less than religiously diverse. Clearly when the UDHR was being drafted not all participants would have accepted such a statement - and certainly not the USSR with its state commitment to atheism. The alternative that was adopted was to make an attempt at a secular assertion of natural rights (arguably something of a paradox), namely with the paragraph:

Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world...

There are some problems with such an approach. It is an assertion without evidence and is simply unprovable. On the other hand it may be argued that the authority of the UDHR derives not from the dubious appeal to reason but from the agreement of the international community, notwithstanding the eight abstentions. It is this agreement that replaces the divinity in the document.

Additionally there can be no doubt that "human rights" exist as a social fact. By this I mean that although quite **how** any thing may be proved to be a human right remains unresolved, the reality is that human rights obtain their meaning from the fact that they receive constant recognition in the language and effect of international diplomacy and relations.

SELF ASSESSMENT EXERCISE 1

Is the concept of natural law necessary for a concept of universal human rights?

The second difficulty in the concept is related to the first. The UDHR describes itself as universal, yet paradoxically almost everyone would agree that as drafted it is clearly time and place specific. It was a response to a totalitarian and racist Nazi regime, and the desire to prevent a recurrence of such a phenomenon underlay the post-war reaction. Furthermore, although its provisions may seem largely unexceptionable, some, particularly those directed to economic rights, certainly would not find favour with many post-Cold War governments in the West. As Cassese observes (p.381):

On the whole, the view of human rights expressed in it is Western. More space and importance are allotted to civil and political rights than to economic, social, and cultural rights, and no mention at all is made of the rights of peoples. The position taken with regard to colonised peoples, who had been partially or completely denied their right to freedom, was purely formal. Nor did the Declaration say anything specific about economic inequalities between States (although today many commentators cite with increasing frequency Article 28 whereby "Everyone is entitled to an international and social order in which the rights and freedoms set forth in the Declaration can be fully realised"). In addition one could note that the Declaration did not consider the fact that some States, being underdeveloped, faced special problems when trying to guarantee certain basic rights, such as those to work, to education, to suitable housing etc.

Consequently there has been a continuing debate between so-called "cultural relativists" and "universalists", with the former arguing that the concept of human rights must necessarily differ in different cultures (hence nothing can be written in stone as irrevocably permanent) and the latter that the concept of **human** rights makes sense only if they are granted to all individuals regardless of culture and because only of their membership of the human race. The former seems reasonable but the latter desirable.

The conclusion (with which you may reasonably disagree) is that this debate is less important than it might seem. It will only seem crucial if one believes that the concept of human rights carries with it some "magical" quality over and beyond existence as social fact. In my view the importance of the concept lies in the weight implied by international

acceptance of the appellation, and much of the struggle for human rights is about seeking this acceptance.

This seems particularly clear with so-called 'third generation rights' (the first generation rights being civil and political rights and the second, economic, social and cultural rights - though this designation itself may be seen as political). Third generation rights are said to include group rights as opposed to individual rights, exemplified by the claimed right to development and the right to self-determination. In my view, whatever the objections to these rights being described as "human rights" (and there are many), once there is overwhelming acceptance by the
international community that they are human rights, it makes little sense to oppose the categorisation. For further argument on this point see Mansell, W. and J. Scott *Why Bother about a Right to Development?*

SELF ASSESSMENT EXERCISE 2

Why do some people argue that cultural relativism undercuts the whole subject of human rights and why do others think it inconsequential? (See *Feedback at the end of this unit*).

3.2 The Politics of Human Rights

Essential Reading

Dixon, Chapter 12: *Human Rights*, pp.320-23.

The protection of human rights is often portrayed as an objectively desirable and politically neutral goal. For many of us this position is unexceptionable and the thought that the protection of human rights is imbued with political premises and ideology seems inherently unreasonable. Yet such is the case. The promotion of human rights is often portrayed (at least in the West) as one of the gifts of democratic states to those less fortunate. As was argued in the last section, the history of human rights is not nearly as extended as it is often suggested. The contemporary emphasis upon human rights scarcely predates the Second World War. It was primarily because of the revulsion and incredulity that a Second World War had come so shortly after the first, that a way of talking about a different world found the language of individual rights useful.

The UDHR was very largely the product of the victorious allies, and particularly the work of the USA. But it was not an isolated project. At the end of the War the USA had laid plans for the world it hoped to see. This was one confirming economic liberalism and creating international

financial institutions to encourage free trade and a "United Nations" (originally to have been called "Associated Powers") to provide global security and stability. Human right was but one aspect of this overall plan, even if it did provide "the moral foundation". The preparation of the UDHR was not, even then, an easy matter.

There were three obvious problems and many more less obvious ones. The first of the obvious was that the disparity in ideological outlook between the first world and the second (including the so-called socialist states of the USSR) in terms of the centrality of the individual with civil and political rights seemed insuperable. The second was that for states with an Islamic population (in this case, Saudi Arabia) the idea of a right to change religion was unacceptable and indeed the very idea of a Universal Declaration seemed incompatible with the supremacy of the Koran. The third was that for a state such as South Africa, a right of participation in government and free movement of people was unacceptable (let alone the prohibition on discrimination). Nevertheless the Declaration was accepted by the General Assembly in Paris in 1948 by a vote of 48 for, none against and eight abstentions (the Soviet Bloc, Saudi Arabia and South Africa).

In retrospect, however, what seems most remarkable in the document was the inclusion of what would come to be known as economic and social rights. Amazingly these provisions received the support of (as Kirsten Sellars puts it) "everyone from Soviet Stalinists and Latin American socialists to British Keynesians and American Democrats" (p. 21). These provisions, which will be considered in the next section, would, in the twenty-first century, enjoy very little popular support in the governments of states pursuing a liberal economic agenda. Their very presence had repercussions that were unforeseen.

The objectivity of the concept of human rights was almost immediately called into question by the purposes to which human rights discourse was being put. Human rights debate became largely determined by the propaganda advantages that either party to the Cold War could gain from it.

The earliest days of the United Nations were clearly dominated by the victorious allies of the Second World War. Their status lent them a moral superiority which they exploited in the organisation. Even then however there were crucial ideological battles between the US and its allies and the Soviet Union and its allies. Probably to the surprise of Western delegates they found it difficult to hold the high ground of protecting civil and political human rights in the face of concerted opposition. Their superiority was attacked both by the "second" socialist world and the "third" (poor) world, initially from two directions.

Colonialism came to be vilified, as the proclaimed right of self-determination gained prominence and dominance. Colonialism also came to be identified with something approaching racism-white colonial masters and non-white colonial peoples. In the 1950s and 1960s respect for civil and political rights was tempered by this reality and by the emphasis placed by the so-called socialist states upon economic rights supposedly directed to ensuring the security of individuals in their ability to acquire food and housing.

The end of the Cold War and the demise of the USSR together with the end of the process of decolonisation very clearly altered human rights rhetoric in the corridors of power. As free market economics and its accompanying ideology gained ascendancy, so economic rights declined, at least in so far as they were incompatible with the policies sanctioned, blessed and often insisted upon by the international financial institutions. The African Charter on Human and Peoples' Rights, 1981, with its emphasis upon social duties and peoples' rights based upon collective community interest, is barely compatible with the new orthodoxy.

Thus a first conclusion about the politics of human rights must be that the subjects of popularity are negotiable depending upon competing or dominant ideologies. The popular economic rights represented in a claimed right to a New International Economic Order, or even a human right to development, now seem hopelessly unfashionable. Need has not changed, but the way in which it is talked about certainly has.

SELF ASSESSMENT EXERCISE 3

What, if anything, do you think are the significant differences between civil and political rights on the one hand, and economic social and cultural rights on the other?

Another fact that is inferable from the above is that a state's rhetoric (the way it talks) about human rights will reflect its own political ideology. This is obvious but important. There is a clear tension between the proclaimed universality of human rights and the particularity with which they are chosen. Liberal democratic states such as the United States and many countries within Western Europe placed emphasis upon the civil and political rights exemplified in the European Convention on Human Rights. The social provisions found within the Universal Declaration were considered inappropriate for comparable protection or even recognition. Such states effectively either ignored collective rights (as in the case of the United States), or to a large extent merely paid them lip service (as is the case of the signatories of the European Social Charter). The view that came implicitly to be promulgated was that civil and

political rights were legal and "justiciable", while others were at best desirable, and at worst utopian or even counter-productive because of their threat to the perceived productive free market economy.

Collectivist states, of course, attempted to counter these views by asserting the importance of distributive justice and the need to ensure the participation of individuals in the collective life of the state. Regrettably, though a level of security was provided for citizens by many states (a fact which has come to be accepted only since the decline in the living standards of the poorest people living in the former USSR), such were the feelings of insecurity of those governments that the governed could not be trusted with the civil and political rights which were portrayed as incompatible with a "socialist" property regime.

Meanwhile, with the rise of the so-called Asian Tiger Economies, a third perspective on human rights protection was developed. This suggested that the protection of individual civil liberties might be incompatible with the needs of development. Malaysia in particular took the view that 'the Asian tradition' led to positions on human rights which could not be reconciled even with the Universal Declaration. If these arguments seem manifestly specious to the cynical among us, and designed only to justify willful human rights abuses, this is less important (for a sense of comprehension of the human rights world) than the recognition that these arguments reflect a particular power structure with particular goals. This is a power structure dedicated to economic "progress" (that is, increased economic growth) both for its own sake and for the sake of national pride. (It is of course ironic that this latter ambition is itself evidence of continuing feelings of insecurity, if not inferiority.) Whether or not such "progress" is ever adversely affected by protecting such rights as those concerned with freedom of speech or freedom from arbitrary detention remains highly questionable.

Power and Law in the UN

Another factor in the politics of human rights has been the distinction in the effectiveness of international institutions between institutions operating under the principle of sovereign equality, and hence one vote per nation (the General Assembly), and institutions where the power of each voting state affects the strength of its vote (the Security Council with its five permanent members, or the International Monetary Fund or the World Bank where votes are weighted in accordance with economic strength). As the numbers in the General Assembly grew, so General Assembly Resolutions became increasingly independent of the wishes of the great powers. Interests diverged with the interests and pre-occupations of the "underdeveloped" newly admitted states being very different to those of the majority of founder members. This in turn

affected the status of General Assembly Resolutions. One writer (McWhinney, E) writing just as the Cold War came to an end, pertinently observed:

The Third World majority in the United Nations, and their supporting jurists, argued that the General Assembly resolutions - adopted, as they invariably were, by overwhelming majorities, with only a few Western states holding out in the form of negative votes or abstention - effectively made new law. UN General Assembly resolutions would qualify, thereby, as new sources of international law, side by side with traditional or classical sources. As an abstract, *a priori,* legal issue, this debate over the new sources remains unsolved. Western and Soviet jurists have conceded, equally, that resolutions of the General Assembly, if adopted unanimously or at least with substantial intersystemic consensus - Western bloc, Soviet bloc and Third World [written before the demise of the Soviet Union] - may acquire normative legal quality in their own right. This has clearly become the case by now, with most of the General Assembly resolutions on decolonisation, and self-determination of peoples, sovereignty over natural resources, and nuclear and general disarmament, however intransigent the last-ditch resistance of predominantly Western members may have been at the actual time of their adoption.

This statement now needs to be read with discretion. Although partially true, the failure (in effect though not in passage) of both the Resolution concerning the "New International Economic Order" and that agreeing to a "human right to development", each of which received overwhelming assent, suggests the continuing ability of the West generally and the USA in particular to deny the status of law to unwelcome resolutions. It is certain that mere numerical superiority in terms of votes cast has brought little lawmaking power to the majority. Rather, power has moved decisively to the Security Council where democracy takes second place to the acknowledgement of power - or at least power as it was perceived in 1946.

The role of the General Assembly remains as defined in the Charter: to make recommendations to its Members or to the Security Council (Article 11(1)). Article 12 provides that while the Security Council is exercising in respect of any dispute or situation the functions assigned to it' by the Charter, the General Assembly shall not make any recommendations with regard to that dispute or situation unless the Security Council requests it. The power to recommend rather than to decide belongs to the General Assembly. Thus the final ability to define human rights content does not lie with the majority of states.

The International Financial Institutions

But what of the role of the international financial institutions themselves in the politics of human rights? The international financial institutions of the World Bank and the International Monetary Fund, intended to prevent subsequent international economic recession and to promote development, were created in the immediate post-war period outside of the United Nations. If the United Nations was to be the institution promoting friendly relations among nations based upon the principle of sovereign equality, the World Bank and the International Monetary Fund were, even if their aims were no less utopian, founded upon what was seen as hard realism. That they were both to be based in Washington, the seat of US government, was not coincidental. That power within the institutions was not democratically apportioned according to the basis of sovereign equality but according to financial contribution was also crucial. Finally, the intended use of both institutions to counter totalitarian tendencies, particularly on the left, and even more particularly of communism, among states was not accidental.

Given these facts, it is obvious that poor states, though they may come to, or have to, depend upon these institutions in fact, have little say in how they are run or on the principles upon which they operate. Equally importantly, because many poor states are governed by a political and wealthy elite, the interests of that state may well coincide with those of the greatest international financial institutions even if they are inimical to the interests of the populace as a whole. Either way the effect upon the politics of human rights is significant.

In essence, the objective of the International Monetary Fund (IMF), as formed in 1944 by a treaty entering into force in December 1945, was to avert any new economic recession of the kind which had been so devastating in the 1920s and 30s. To this end, provisions in Article 1 of the IMF's Articles of Agreement in defining its purposes provided that the Fund's aims would include the following:

(1) To facilitate the expansion and balanced growth of international trade and to contribute thereby to the promotion and maintenance of high levels of employment and real income and to the development of the productive resources of all members as primary objectives of economic policy.

(2) To promote exchange stability, to maintain orderly exchange agreements among members, and to avoid competitive exchange depreciations...

(3) To give confidence to members by making the general resources of the Fund temporarily available to them under adequate

> safeguards, thus providing them with the opportunity to correct maladjustments in their balance of payments without resorting to measures destructive of national or international prosperity.

These objectives seem so innocuous and indeed benign, that it is surprising to discover the tragedies that they have led to, if not actually caused.

It is from this role of the Fund in correcting maladjustments under adequate safeguards that many of the complaints from the poor states stem. From 1980, these "adequate safeguards" have, until recently, taken the form of "structural adjustment lending", an innocuous phrase which has led to endless controversy and no little misery. There is little consensus on the effectiveness of the prescribed measures. The policies prescribed are imbued with a capitalism which eschews state intervention. Thus many of the past policies which at least appeared to make life possible for the poorest section of the population - such as subsidised food, health care and transport - are anathema to the IMF requirements in granting loans to help indebted countries. Structural adjustment has as its goal just one central objective - the elimination of unsustainable indebtedness. The orthodoxy of the IMF is that this can be achieved only in the recognition of the superiority of the market over central economic planning. Evidence for this is, in the view of most cynics of structural adjustment, very difficult to discover. The so-called Pacific tigers, which are often held up as evidence, in fact pursued state-led development - at least initially.

The bottom line, however, is that even had these structural adjustment policies been shown to achieve their limited goal, many might think that the cost of implementation is simply unacceptably high, with the wrong people (the poorest) being effectively called upon to repay loans and deficits which have brought them no benefit whatsoever. Indeed, throughout Latin America and Sub-Saharan Africa and in many states outside those regions, the period of profligate lending for doubtful purposes, benefiting overwhelmingly the political elite, led to crises where the very people who had seen no benefit were called upon to make sacrifices to overcome both debt and deficit. The policies required in structural adjustment were no more and no less than a return to economic liberalism - a policy which had frequently been rejected in order to ensure a level of social cohesion and protection of the poorest.

Thus, when the peoples of the poor nations of the world look at the IMF they see an institution whose purpose is to resolve balance of payment difficulties, instead concentrating its attention upon poor states and making demands of them which effectively ensure that they enforce economic policies which, while clearly not in the interests of their own

poor, are just as clearly very much in the interests of those with power within the IMF. The forced opening of the economy to private investment, national or international, allows unrestricted flows of capital to or from states as the market and profit require. Whatever one's views of economic ideology, what is incontrovertible is the destructive effect of such policies upon the obligation to promote economic, social and cultural rights.

SELF ASSESSMENT EXERCISE 4

Why are international financial institutions of relevance to the international protection of human rights?

As has been seen yet again in the latest round of World Trade Organisation (WTO) talks, international trade policies have traditionally favoured "developed" economies over "underdeveloped" ones. Primary commodity export is much more vulnerable to fluctuating market prices than manufactured or processed exports. Fluctuating, and often declining, prices made the process of economic planning hazardous in the extreme, necessitating subsequent IMF intervention.

Trade policies are seldom perceived to affect the protection of human rights. This is regrettable. There is an obvious relationship between trade and income, and the terms of world trade will dictate economic policies and investment decisions. Poor countries have enjoyed little autonomy in determining either. In the words of the back cover of Belinda Coote's *The Trade Trap: Poverty and the Global Commodity Markets* we must consider:

...how countries that depend on the export of primary commodities, like coffee or cotton, are caught in a trade trap: the more they produce, the lower the price falls on the international market. If they try to add value to their commodities by processing them, they run into tariff barriers imposed by the rich industrial nations. To make matters worse, they have to compete with subsidised exports dumped on the world market by rich-surplus producing countries.

The politics of trade, then, affect the political reality of human rights protection.

It may begin to be apparent that the politics of international law and human rights may (and should) be seen as intimately connected with economic and political ideology. This will be considered further later.

4.0 CONCLUSION

The question of the philosophical meaning of human rights has preoccupied many, while others have attempted to use the term in order to lend weight to demands. Some have argued that "human rights" must be clearly definable and define both the holders of the rights and those having reciprocal duties to provide them. This reasonable but narrow view, much favoured by Western governments and legal philosophers, receives much less approval from developing states, which have used the phrase to emphasise that their economic demands are demands as of right and not requests for charity.

The problem of meaning can (at least to some extent) be avoided by accepting "human rights" as social facts existing because of belief, but no less real because of this.

5.0 SUMMARY

This unit has challenged the assumption that "human rights" is a politically neutral concept. The argument is that what dictates the terms of the debate about human rights is very often the political interests and ideology of those making or rejecting demands. In addition we see the importance again of the division between civil and political rights on the one hand and economic rights on the other. It is suggested that the West has been much more concerned with the former while often making protection of the latter exceedingly difficult.

ANSWER TO SELF ASSESSMENT EXERCISE 2

Human rights are said to derive their authenticity from the fact that they are universal and belong to every individual simply from the fact of his or her "humanity". This can be seen as related to ideas of natural law but expressed in secular terms. Philosophically there are problems with this idea and many argue that the very idea of human rights itself is a concept that has arisen in a particular time and in a particular place. The questionable nature of universality can be demonstrated by the reaction of different states to different provisions in the UDHR, and particularly to those concerned with economic rights.

On the other hand, some have argued that such arguments are unnecessary, and that the authority of the concept derives from the agreement of so many states at various post-UN times that human rights are universal and indivisible. Thus they may be both universal (by agreement) and yet relative in that they are not "natural".

6.0 TUTOR-MARKED ASSIGNMENT

1. Define "human rights". Compare and contrast the philosophy of human rights with the politics of human rights.
2. Should the UDHR be seen as a politically neutral document? What are the implications of your answer?
3. A consideration of the political aspects of international human rights protection suggests that the very concept of human rights is political. The implications of this conclusion are substantial. Discuss.

7.0 REFERENCES/FURTHER READINGS

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UNIT 2 THE INTERNATIONAL BILL OF HUMAN RIGHTS

CONTENTS

1.0 INTRODUCTION

Having provided the background to the international law of human rights we will next consider the role of the United Nations in the protection of human rights through the "International Bill of Human Rights", that is, the Universal Declaration of Human Rights (UDHR) and the two covenants of 1966: the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).

2.0 OBJECTIVES

At the end of this unit, you should be able to:

- explain the meaning and scope of the provisions of the UDHR
- give an account of the significance and limitations of the UDHR
- identify the reasons for the drafting of two International Covenants on human rights
- explain the enforcement measures that each Covenant contains.

3.0 MAIN CONTENT

3.1 The International Bill of Human Rights

Essential Reading

Dixon, Chapter 12: *Human Rights*, pp.325-30.

Cassese, Chapter 13: *International Wrongful Acts and the Legal Reaction Thereto,* pp.377-89.

Kaczorowska, Chapter 12: *The International Protection of Human Rights,* pp.266-73.

The so-called International Bill of Human Rights came into existence as a result of the wording of the UN Charter. While the references in the Charter to human rights are limited, they are nevertheless significant and provide the basis for what followed. Its preamble reaffirmed the "faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women", while among the purposes and principles of the UN (in Article 1(3)) is the following:

to achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.

This in turn is reinforced by Articles 55 and 56, providing in Article 55:

With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

a. higher standards of living, full employment, and conditions of economic and social progress and development;

b. solutions of international economic, social, health, and related problems; and international cultural and educational co-operation; and

c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

Article 56 states that:

All Members pledge themselves to take joint and separate action in co-operation with the Organisation for the achievement of the purposes set forth in Article 55.

Article 55 is noteworthy for the way in which it combines the promotion of human rights and fundamental freedoms with economic and social goals. Article 68, within Chapter X of the Charter setting up the Economic and Social Council (ECOSOC), gives that body the task of establishing commissions in economic and social fields and for the promotion of human rights. Initially it was intended that the Bill of Human Rights should consist of three documents - a declaration, a convention and a document concerned with implementation. On 10 December 1948 the General Assembly sitting in Paris adopted the UDHR and also asked the Commission on Human Rights (a body created by ECOSOC in 1946) to prepare drafts of the other two documents.

From the outset there was an important question of the relationship between proclaimed civil and political human rights and economic, social and cultural rights. As we saw in the last section, the debate was to a large extent ideological. All agreed that all the rights were interrelated but quite how the relationship was to be incorporated in legal documents was fiercely contested. In the sixth session of the General Assembly (1951/52) it was resolved to request two separate Covenants, one concerning civil and political rights and the other economic, social and cultural rights, but with as much duplication as possible. The Resolution also required an article providing that "all peoples shall have the right of self-determination". It was not until 1966 that the drafting of these covenants was complete, and they entered into force almost 10 years later. As at December 2005, the ICCPR had 154 ratifications and the ICESCR 151.

One final general point should be made. While the Charter paved the way for the promotion and protection of human rights, as Kaczorowska points out (p.267) the only human right to explicitly derive directly from the Charter is the right to non-discrimination in the provision and protection of fundamental rights.

3.2 The Universal Declaration of Human Rights

Essential Reading

Kaczorowska, Chapter 12: "*The International Protection of Human Rights",* pp.267-69.

Cassese, Chapter 19: *The Protection of Human Rights*, pp.380-82.

The UDHR was explicitly not intended to be a legal document. Nevertheless, because of the disparate nature of the members of the initial United Nations (much less so than now but significant even so,

with democratic states, communist states, Islamic states and an apartheid state) it was still difficult to find words to which all states could agree. Of course because it was merely a Declaration, legal precision was not required - these were not articles that a court would have to define. Although Cassese suggests that the task involved finding the lowest common denominator of all states (that is, the things to which all could agree), as we have seen the eight abstentions suggest that success was limited. But the UDHR remains a remarkable document and nearly all states would now argue that it is almost entirely consistent with their aims and aspirations.

In retrospect what perhaps seems most surprising is not that the "communist" states merely abstained from, rather than voting against, a Declaration that included many civil and political rights that they obviously had no intention of accepting; but rather that the radical economic, social and cultural rights were acceptable to the United States in particular. Such has been the widespread acceptance of the Declaration that many of its provisions are regarded as having the status of customary rules, although this was never the intention. In the Proclamation of the Teheran International Conference on Human Rights of 1968 it was unanimously accepted that "the Universal Declaration...states a common understanding of the peoples of the world concerning the inalienable and inviolable rights of all members of the human family and constitutes an obligation for the members of the international community".

The UN Centre for Human Rights usefully summarises the provisions of the UDHR as follows:

Article 1 All human beings are born free and equal.

Article 2 Everyone is entitled to the same rights without discrimination of any kind.

Article 3 Everyone has the right to life, liberty, and security.

Article 4 No one shall be held in slavery or servitude.

Article 5 No one shall be subjected to torture or cruel or degrading treatment or punishment.

Article 6 Everyone has the right to be recognised everywhere as a person before the law.

Article 7 Everyone is equal before the law and has the right to equal protection of the law.

Article 8 Everyone has the right to justice.

Article 9 No one shall be arrested, detained, or exiled arbitrarily.

Article 10 Everyone has the right to a fair trial.

Article 11 Everyone has the right to be presumed innocent until proven guilty.

Article 12 Everyone has the right to privacy.

Article 13 Everyone has the right to freedom of movement and to leave and return to one's country.

Article 14 Everyone has the right to seek asylum from persecution.

Article 15 Everyone has the right to a nationality.

Article 16 All adults have the right to marry and found a family. Women and men have equal rights to marry, within marriage, and at its dissolution.

Article 17 Everyone has the right to own property.

Article 18 Everyone has the right to freedom of thought, conscience and religion.

Article 19 Everyone has the right to freedom of opinion and expression.

Article 20 Everyone has the right to peaceful assembly and association.

Article 21 Everyone has the right to take part in government of one's country.

Article 22 Everyone has the right to social security and to the realisation of the economic, social and cultural rights indispensable for dignity.

Article 23 Everyone has the right to work, to just conditions of work, to protection against unemployment, to equal pay for equal work, to sufficient pay to ensure a dignified existence for one's self and one's family, and the right to join a trade union.

Article 24 Everyone has the right to rest and leisure.

Article 25 Everyone has the right to a standard of living adequate for health and well-being, including food, clothing, housing, medical care and necessary social services.

Article 26 Everyone has the right to education.

Article 27 Everyone has the right to participate freely in the cultural life of the community.

Article 28 Everyone is entitled to a social and international order in which these rights can be realised fully.

Article 29 Everyone has duties to the community.

Article 30 No person, group or government has the right to destroy any of these rights.

The above summaries are important in order to appreciate the range of lofty ideals expressed and the limitations upon the protections that have been afforded since 1948. As we have suggested already, the economic, social and cultural rights seem to the governments of many Western states to be entirely anachronistic, while many of the civil and political rights are regularly abused by most states.

SELF ASSESSMENT EXERCISE

1. What is the essence of the distinction between civil and political rights and economic, social and cultural rights?
2. What, if anything, is the current legal status of the UDHR?
3. Critically consider the provisions of the UDHR. Do you consider them merely time and place specific, or do they have a claim to universal status?

3.3 The International Covenants on Human Rights

Essential Reading

Kaczorowska, Chapter 12: *International Protection of Human Rights,* pp.269-73.

Cassese, Chapter 19: *The Protection of Human Rights*, pp.382-83.

The International Covenants were drafted to give legal effect to the principles contained within the UDHR. The changes in the nature of the drafting committee from when the UDHR was formulated is immediately apparent in the choice of the first article common to both Covenants that asserts a legal human right to self-determination - a right that does not appear, let alone take pride of place in the UDHR. Its primacy reflects the drafting committee's determination that decolonisation and anti-racism (Article 2) be at the forefront of any international human rights concern.

The International Covenant on Civil and Political Rights

The ICCPR guarantees, in addition to those above, rights to life, prohibitions on torture (and cruel, inhuman and degrading treatment or punishment) and slavery, rights to liberty and security of the person, the right to freedom of movement, and rights to freedom of thought, conscience and religion. Because it is a legal document it is possible for a state to derogate from some obligations if there is an emergency threatening the life of the nation (Article 4), but not from those regarded as fundamental. What is of most interest, however, are the means chosen to give legal effect to the provisions. Part IV of the Covenant created the Human Rights Committee consisting of 18 elected independent experts (Article 28). Article 40 gave this Committee the primary task of reviewing state reports (which state parties to the Covenant are obliged to submit every five years) on the "measures they have adopted which give effect to the rights" of the Covenant.

This review provides for the public questioning of state representatives on the content of their reports. Fairly clearly such a procedure leaves itself open to abuse, such as where governments conceal the true state of affairs. The Committee has however developed a practice which allows individual members to receive reports from human rights NGOs and to ask questions based upon that information. After questioning, the Committee will give concluding observations which may well be critical. Having said that, there is little further "enforcement" and states are expected to listen to criticisms and to correct the situation before the next report in five years time.

Under Article 41 there is a further optional process providing that the Committee may receive and consider complaints from one or more state party against another state party alleging that the state complained of is not fulfilling its obligations under the Covenant. Both the alleging party and the alleged violator must have declared acceptance of this optional process. No applications have yet been made.

More important is the procedure under the First Optional Protocol, ratified by in excess of 100 states. As we will see, this is a pale imitation of the provisions for individual petition contained within the European Convention on Human Rights. The Optional Protocol allows individual communications with regard to alleged violations of the Covenant to the Committee (where the victim is a national of a state party to the Protocol, has exhausted domestic remedies, is not anonymous and the matter is not currently under another procedure of international investigation or settlement). If the Committee decides that the communication is admissible it requests comments from the state concerned and transmits these to the complainant. On the basis of all the information submitted, the Committee meets in closed session and forwards its opinion to the complainant and the state. Under Article 42 there may be an *ad hoc* Conciliation Committee with the consent of both parties but this is the end of the process.

For the sake of completeness it should be added that there is a Second Optional Protocol providing for the abolition of the death penalty in the territory of ratifying states. Forty-six states have ratified (by 2005).

The International Covenant on Economic, Social and Cultural Rights

If the enforcement measures available under the ICCPR seem extraordinarily weak, they do however seem powerful in comparison with those available under the ICESCR. This Covenant might seem to confirm that economic, social and cultural rights really are the 'children of a lesser God'. The premise that underlies the ICESCR is that these rights are not 'justiciable' and that the appropriate means for securing them is through encouragement while recognising a state's economic constraints. The only supervisory machinery provisions provide for a reporting process. Parties 'shall furnish their reports in stages, in accordance with a programme to be established by the Economic and Social Council within one year of the entry into force of the present Covenant after consultation with the States Parties and the specialized agencies concerned'.

Although ECOSOC has the power to transmit these reports to the UN Commission on Human Rights for scrutiny, in order to make general recommendations “or as appropriate for information”, and may “submit to the General Assembly, from time to time, comments of a general nature” on state reports, this extraordinarily inconsequential procedure seems scarcely consistent with the real promotion and protection of human rights.

Perhaps what is illustrated most clearly is that the range of states within the UN is so broad that, difficult though it was to draft the UNDHR, it is almost impossible to draft sensible, legally binding provisions that are relevant to all member states. It is this reality that has encouraged the development of regional protection mechanisms, to which we turn after a brief consideration of other UN human rights treaties.

4.0 CONCLUSION

It is significant that the International Bill of Human Rights is not in the UN Charter. It took 28 years, from 1948 until 1976, before human rights covenants (legal documents) entered into force. The Charter carried a commitment to the promotion and protection of human rights but most of the work was left to the Third Committee of the General Assembly and ECOSOC. The UDHR has received a remarkable level of support but with different states emphasising the centrality of different provisions. The intended convention on enforcement was never drafted and such enforcement provisions as there are, are to be found in the two Covenants.

5.0 SUMMARY

We considered international bill of Human Rights. You should now be able to:

(i) Explain the meaning and scope of the provisions of the UDHR;
(ii) Give an account of the significance and limitations of the UDHR;
(iii) Identify the reasons for the drafting of two International Covenants on Human Rights; and
(iv) Explain the enforcement measures that each Covenant contains.

6.0 TUTOR-MARKED ASSIGNMENT

1. Can you conceive a better way of securing international human rights than through the existing Covenants?
2. Are there significant differences between the UDHR and the Covenants? What are they and how may they be explained?

7.0 REFERENCES/FURTHER READINGS

The ICCPR is readily available at http://www.ohchr.org/english/law/ccpr.htm

Dixon, M. (2005). *Textbook on International Law* (5th ed.). Oxford: Oxford University Press [ISBN 0199260729].

Cassese, A. (2005). *International Law* (2nd ed.). Oxford: Oxford University Press [ISBN 0199259399].

Kaczorowska, A. (2005). *Public International Law* (3rd ed.). London: Old Bailey Press [ISBN 1858366070].

UNIT 3 PRINCIPAL INTERNATIONAL HUMAN RIGHTS TREATIES

CONTENTS

1.0 INTRODUCTION

The UN has also been responsible for promoting a number of other important human rights conventions and these will now be discussed. In turn this gives rise to the question as to why regional regimes of human rights protection should have been necessary to supplement the work of the United Nations. We will conclude that the question of enforcement is central to the law of human rights and this might be more easily achieved on a regional rather than world- wide basis.

The unit will conclude with a discussion of what has been suggested to be a crucial and developing area of human rights concern - that of the form of governance by which a state is ruled. Increasingly the argument has been made that it is only democratic governance that can satisfy human rights demands, and perhaps even that other forms of government should be regarded as of less legitimacy. This is a view that has considerable implications for the law of forceful intervention.

Whatever conclusions we reach on the international law of human rights, one thing should be quite clear. The “rise and rise of human

rights" is probably the most startling development in international law since the Second World War. In placing the protection of **individuals** at the heart of international law the old "state-centric" international law has been changed forever. Perhaps the most remarkable effect of this has been on the fundamental concept of sovereignty. In the twenty-first century no state would argue that the question of its treatment of its own nationals is a matter of only domestic concern. And here the role of non-governmental organisations (NGOs) has also been unprecedented.

2.0 OBJECTIVES

At the end of this unit, you should be able to:

- state the significant achievements of the ECHR in the realm of the protection of civil and political rights
- describe the nature and scope of the problems facing the ECHR regime in the twenty-first century
- explain the role of the UN in standard setting and drafting human rights treaties
- explain the need to consult reservations before coming to conclusions about the efficacy of such treaties
- describe the controversial nature of the effectiveness of enforcement
- explain the role of regional regimes in the protection of human rights
- explain the significance of the differences between international and regional protection of human rights
- compare and contrast different regional systems for human rights protection
- explain the basis and effect of a claim for the right of democratic governance.

3.0 MAIN CONTENT

3.1 Other International Human Rights Treaties of the United Nations

Essential Reading

Kaczorowska, Chapter 12: *International Protection of Human Rights*, pp.273-78.

In addition to the International Bill of Human Rights there are a number of other international human rights treaties of the United Nations. Once more, while the texts of the treaties are clear, the effectiveness of their provisions is difficult to assess. The usual response to this problem is to take the treaties at face value, to outline their provisions and to avoid a

discussion of effect. If an attempt is made at evaluation, this is usually done in terms of the importance of the treaties as "standard setting". In this unit we will list the principal treaties and will then look at one in more detail. Beyond the International Bill of Human Rights are (together with their Protocols, if any) the following:

- Convention for the Prevention and Punishment of Genocide, 1948. Under this treaty genocide constitutes an international crime whether committed in times of war or peace. There is no independent enforcement mechanism

- Convention for the Suppression of Traffic in Persons and of the Exploitation of the Prostitution of Others, 1950

- Convention on the Status of Refugees, 1951

- International Convention on the Elimination of All Forms of Racial Discrimination, 1965

- International Convention on the Suppression of the Crime of Apartheid, 1973

- Convention on the Elimination of All Forms of Discrimination Against Women, 1979

- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,1984

- Convention on the Rights of the Child, 1989

- International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 1990.

We will now look at the Convention on the Elimination of All Forms of Discrimination Against Women. In the words of the UN website http:// www.un.org/womenwatch/daw/cedaw/

The Convention on the Elimination of All Forms of Discrimination Against Women adopted in 1979 by the UN General Assembly, is often described as an international bill of rights for women. Consisting of a preamble and 30 articles, it defines what constitutes discrimination against women and sets up an agenda for national action to end such discrimination.

The Convention defines discrimination against women as:

"...any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field."
By accepting the Convention, States commit themselves to undertake a series of measures to end discrimination against women in all forms, including:

- to incorporate the principle of equality of men and women in their legal system, abolish all discriminatory laws and adopt appropriate ones prohibiting discrimination against women

- to establish tribunals and other public institutions to ensure the effective protection of women against discrimination

- to ensure elimination of all acts of discrimination against women by persons, organisations or enterprises.

The Convention provides the basis for realising equality between women and men through ensuring women's equal access to, and equal opportunities in, political and public life - including the right to vote and to stand for election - as well as education, health and employment. States parties agree to take all appropriate measures, including legislation and temporary special measures, so that women can enjoy all their human rights and fundamental freedoms.

The Convention is the only human rights treaty which affirms the reproductive rights of women and targets culture and tradition as influential forces shaping gender roles and family relations. It affirms women's rights to acquire, change or retain their nationality and the nationality of their children. States parties also agree to take appropriate measures against all forms of traffic in women and exploitation of women.

Countries that have ratified or acceded to the Convention are legally bound to put its provisions into practice. They are also committed to submit national reports, at least every four years, on measures they have taken to comply with their treaty obligations.

This Convention has now been ratified by more than 180 nations, which at first sight seems remarkable. It would seem that all of these nations are dedicated to the elimination of discrimination against women. Things are not, however, quite as they seem. Not only is the list of

reservations remarkably extensive but many of the reservations seem scarcely compatible with the purposes of the Convention.

(See http://www.un.org/womenwatch/daw/cedaw/reservations-country.htm for all reservations and objections to those reservations.)

The stated position of the Committee charged with administering the Convention is one of concern:

The Convention permits ratification subject to reservations, provided that the reservations are not incompatible with the object and purpose of the Convention. Some States parties that enter reservations to the Convention do not enter reservations to analogous provisions in other human rights treaties. A number of States enter reservations to particular articles on the ground that national law, tradition, religion or culture are not congruent with Convention principles, and purport to justify the reservation on that basis. Some States enter a reservation to article 2, although their national constitutions or laws prohibit discrimination. There is therefore an inherent conflict between the provisions of the State's constitution and its reservation to the Convention. Some reservations are drawn so widely that their effect cannot be limited to specific provisions in the Convention.

Impermissible Reservations

Article 28, paragraph 2, of the Convention adopts the impermissibility principle contained in the Vienna Convention on the Law of Treaties. It states that a reservation incompatible with the object and purpose of the present Convention shall not be permitted.

Although the Convention does not prohibit the entering of reservations, those which challenge the central principles of the Convention are contrary to the provisions of the Convention and to general international law. As such they may be challenged by other States parties.

Articles 2 and 16 are considered by the Committee to be core provisions of the Convention. Although some States parties have withdrawn reservations to those articles, the Committee is particularly concerned at the number and extent of reservations entered to those articles.

The Committee holds the view that article 2 is central to the objects and purpose of the Convention, States parties which ratify the Convention do so because they agree that discrimination against women in all its forms should be condemned and that the strategies set out in article 2, subparagraphs (a) to (g), should be implemented by States parties to eliminate it.

Neither traditional, religious or cultural practice nor incompatible domestic laws and policies can justify violations of the Convention. The Committee also remains convinced that reservations to article 16, whether lodged for national, traditional, religious or cultural reasons, are incompatible with the Convention and therefore impermissible and should be reviewed and modified or withdrawn.

This position effectively illustrates both the strengths and weaknesses of such a treaty. The strength is that the Convention is an international statement that clearly accepts a goal and defines discrimination against women as unacceptable and increasingly incompatible with international law - treaty law for those states that are party to the treaty, and customary international law for others. The weakness once more concerns the 'enforcement' (state reports every four years reporting progress) and reservations of doubtful compatibility. States with a substantial Muslim population in particular have entered reservations against either or both Article 2 and/or Article 16 to the effect that should there be a conflict, Shariah law must prevail. While this is unsurprising, as the Committee has observed, neither religious nor custom reasons can be allowed to effectively destroy the very purpose of the Convention.

SELF ASSESSMENT EXERCISE 1

Consider the contribution (if any) of the decision to assert a right to development as a human right.

3.2 Regional Protection of Human Rights

By now you should appreciate the possibilities and limitations of the international protection of human rights - and indeed the difficulty of making any accurate assessment of the contribution made by conventions or treaties. A cost-benefit analysis would be grippingly interesting but almost impossible to achieve. Henry Ford is supposed to have observed that he knew 90 per cent of his advertising budget was wasted, but the problem was that he was unable to discover which 10 per cent was effective. When it comes to the international protection of human rights the picture is even less clear. It is obvious that at the least there is a standard setting process with some provisions achieving a *jus cogens* status in international law, but the effect of the standard setting process is unquantifiable.

Problems of enforcement at the world level led to attempts to provide regional protection. It was anticipated that a higher degree of homogeneity amongst the participating states would make enforcement less controversial. It was in Europe that the impetus for such regional

protection was at its greatest, primarily as a reaction to the war that had had to be fought against fascist totalitarian states. In the words of the most famous historian of the development of post-war human rights, A. W.B. Simpson:

The idea that there was a link between the protection of human rights and the preservation of peace was to become a common feature of post-war thinking... Thus it came about that whereas before the Second World War there was virtually no public interest in the international protection of human rights, except in relation to European minority protection, by 1944, and even earlier, there was a widespread interest in the subject, and a growing belief that the protection of human rights against oppressive governments should be embodied in a new world order which needed to be established to establish not only security through a lasting peace, but also a just world in which governmental misconduct would be brought under the control of the international community... The idea that the war had been about the protection of the rights of individuals, originally little more than a rhetorical adornment, was coming home to roost. [Simpson, A. *Human Rights and the End of Empire*].

As we have seen, progress in the drafting of the International Covenants was not rapid and this also gave impetus to regional provision.

3.2.1 The European Convention on Human Rights

Essential Reading

Kaczorowska, Chapter 12: *The International Protection of Human Rights*, pp.289-98.

Cassese, Chapter 19: *The Protection of Human Rights,* pp.389-91.

European Convention on Human Rights

The European Convention on Human Rights (ECHR) was drafted by the Council of Europe and opened for signature in November 1950. It entered into force after 10 ratifications in 1953. There are currently 47 state parties with a combined population in excess of 800 million, each with the right of individual petition. Such an increase has more than been reflected in the number of applications. Whereas the number of cases registered with the Court in Strasbourg in 1981 was 407, by 1997 this had risen to 4,750, and in 2004, 44,100 new cases were lodged. It is said that in 2004 applications were lodged at a rate of 1,000 per month more than the Court could deal with. There were 82,100 cases pending on 1 October 2005, and this was projected to grow to 250,000 by

2010. Such was the backlog that in 2004, some 2,000 applications had been pending for more than five years. (See Woolf et al. *Review of the working methods of the European Court of Human Rights (December 2005) at*

*h*ttp://www.echr.coeint/Eng/Press/2005/Dec/lordwoolfsreviewon workingmethods2. pdf).

These changes are remarkable and of course many of them have resulted from the influx of new states since the major enlargement of the Council of Europe when countries of the former Soviet Bloc acceded to the Convention. As the Review observes, whereas the Court was originally primarily concerned to fine tune"well-established and well-functioning" democracies, it is now "working to consolidate democracy and the rule of law in new and relatively fragile democracies". In the first nine months of 2005 more than half of pending cases were from just four countries (the Russian Federation, 17 per cent; Turkey, 13 per cent; Romania, 12 per cent; and Poland, 11 per cent).

It is therefore crucial to appreciate that the ECHR is currently very different from what it used to be. When it was drafted it was based to a great extent upon the civil and political rights found in the UDHR. Of course because this was a legal document the wording had to be much more careful, and when you read the ECHR you will at once notice that almost every right is immediately heavily qualified and significantly less absolute than in the Declaration.

SELF ASSESSMENT EXERCISE 2

Examine and explain the differences between the substantive provisions concerning civil and political rights in the UDHR and the ECHR.

The history of the ECHR is well and briefly described on its website, http://www.echr.coe.int/echr

In addition to laying down a catalogue of civil and political rights and freedoms, the Convention set up a mechanism for the enforcement of the obligations entered into by Contracting States. Three institutions were entrusted with this responsibility: the European Commission of Human Rights (set up in 1954), the European Court of Human Rights (set up in 1959) and the Committee of Ministers of the Council of Europe, the latter organ being composed of the Ministers of Foreign Affairs of the member States or their representatives.

Under the Convention in its original version, complaints could be brought against Contracting States either by other Contracting States or

by individual applicants (individuals, groups of individuals or non-governmental organisations). Recognition of the right of individual application was, however, optional and it could therefore be exercised only against those States which had accepted it (Protocol No. 11 to the Convention [which came into force in 1998] was subsequently to make its acceptance compulsory).

The complaints were first the subject of a preliminary examination by the Commission, which determined their admissibility. Where an application was declared admissible, the Commission placed itself at the parties' disposal with a view to brokering a friendly settlement. If no settlement was forthcoming, it drew up a report establishing the facts and expressing an opinion on the merits of the case. The report was transmitted to the Committee of Ministers.

Where the respondent State had accepted the compulsory jurisdiction of the Court, the Commission and/or any Contracting State concerned had a period of three months following the transmission of the report to the Committee of Ministers within which to bring the case before the Court for a final, binding adjudication. Individuals were not entitled to bring their cases before the Court.

If a case was not referred to the Court, the Committee of Ministers decided whether there had been a violation of the Convention and, if appropriate, awarded “just satisfaction” to the victim. The Committee of Ministers also had responsibility for supervising the execution of the Court's judgments.

Since then there have been significant developments.

Since the Convention's entry into force thirteen Protocols have been adopted. Protocols Nos. 1, 4, 6, 7, 12 and 13 added further rights and liberties to those guaranteed by the Convention, while Protocol No.2 conferred on the Court the power to give advisory opinions. Protocol No.9 enabled individual applicants to bring their cases before the Court subject to ratification by the respondent State and acceptance by a screening panel. Protocol No. 11 restructured the enforcement machinery (see below). The remaining Protocols concerned the organisation of and procedure before the Convention institutions.

From 1980 onwards, the steady growth in the number of cases brought before the Convention institutions made it increasingly difficult to keep the length of proceedings within acceptable limits. The problem was aggravated by the accession of new Contracting States from 1990. The number of applications registered annually with the Commission increased from 404 in 1981 to 4,750 in 1997. By that year, the number

of unregistered or provisional files opened each year in the Commission had risen to over 12,000. The Court's statistics reflected a similar story, with the number of cases referred annually rising from 7 in 1981 to 119 in 1997.
The increasing case-load prompted a lengthy debate on the necessity for a reform of the Convention supervisory machinery, resulting in the adoption of Protocol No. 11 to the Convention. The aim was to simplify the structure with a view to shortening the length of proceedings while strengthening the judicial character of the system by making it fully compulsory and abolishing the Committee of Ministers' adjudicative role.

Protocol No. 11, which came into force on 1 November 1998, replaced the existing, part-time Court and Commission by a single, full-time Court. For a transitional period of one year (until 31 October 1999) the Commission continued to deal with the cases which it had previously declared admissible.

During the three years which followed the entry into force of Protocol No. 11 the Court's case-load grew at an unprecedented rate. The number of applications registered rose from 5,979 in 1998 to 13,858 in 2001, an increase of approximately 130%. Concerns about the Court's capacity to deal with the growing volume of cases led to requests for additional resources and speculation about the need for further reform.

A Ministerial Conference on Human Rights, held in Rome on 3 and 4 November 2000 to mark the 50th anniversary of the opening of the Convention for signature, had initiated a process of reflection on reform of the system. In November 2002, as a follow-up to a Ministerial Declaration on “the Court of Human Rights for Europe”, the Ministers' Deputies issued terms of reference to the Steering Committee for Human Rights (CDDH) to draw up a set of concrete and coherent proposals covering measures that could be implemented without delay and possible amendments to the Convention.

Since then another Protocol (Protocol 14) has been drafted and signed by all members except the Russian Federation. By July 2005, 13 states had ratified the Protocol, which was considered essential for the survival of the Convention. In essence it provides firstly that a single judge can decide on a case's admissibility. (There is the same number of judges as states (47).) Until this enters into force, three judges decide. Secondly, it provides that where cases are broadly similar to ones brought previously before the Court, and are essentially due to a member state failing to change their domestic law to correct a failing highlighted by that previous judgment, admissibility can be decided by three judges rather than the seven-judge Chamber. Thirdly, a case may not be admissible if

it is considered that the applicant has not suffered "significant disadvantage". However, this is not a "hard and fast"' rule. Fourthly, a member state can be brought before the Court by the Committee of Ministers if that state refuses to enforce a judgment against it. Finally, the Committee of Ministers can ask the Court for an 'interpretation' of a judgment to help determine the best way for a member state to comply with it.

In summary it may be said that the ECHR is undoubtedly the most successful regional system for the protection of human rights yet devised. Until the 1990s it had sat in a role that approached a supreme constitutional court interpreting civil liberties protection. It is now in danger of being paralysed by its own success and even further measures would seem necessary if it is to continue in its present form.

SELF ASSESSMENT EXERCISE 3

'The ECHR is a victim of its own success. Its original strength came from the relative homogeneity of the political ideology of its members. This no longer exists and the ECHR is coming to suffer from the same defects as the International Bill of Human Rights." Discuss. (See *Feedback at the end of this unit*).

3.2.2 The Inter-American System of Human Rights Protection

Essential Reading

Kaczorowska, Chapter 12: *International Protection of Human Rights,* pp.283-87.

Cassese, Chapter 19: *The Protection of Human Rights,* p.391.

The primary aim of this brief appraisal of the inter-American system for the protection of human rights is to enable a comparison with the ECHR. From the readings above you will see that opinions on the inter-American system are polarised. Kaczorowska regards it as "very disappointing" (p.287) while Cassese is much more positive.

There are two inter-American bodies concerned with the protection and enforcement of human rights: the Inter-American Commission on Human Rights (IACHR) (ironically with its headquarters in Washington, DC) and the Inter-American Court of Human Rights, located in Costa Rica. The most important documents for this system are the Charter of the Organisation of American States (OAS) and the Inter-American Convention of Human Rights, 1969. Neither the USA nor Canada is a party to the Convention.

The IACHR was created by the CAS in 1959 as an autonomous organ to ensure respect for human rights. As Kaczorowska observes, its first investigation was of Castro's Cuba and resulted in Cuban expulsion from the CAS, but it made no such “progress” with other member states notwithstanding the appearance of a number of military dictatorships with utterly deplorable human rights records. It was not difficult to see the hand of the US Central Intelligence Agency in the impotence of the IACHR. It imposed no sanctions and could merely make a declaration to the effect that a state was in breach of the (non-binding) American Declaration of the Rights and Duties of Man, 1948.

When the Convention was adopted the IACHR continued its role for the CAS but took on new tasks too. The Commission:

(a) Receives, analyses and investigates individual petitions which allege human rights violations, pursuant to Articles 44 to 51 of the Convention.

(b) Observes the general human rights situation in the member States and publishes special reports regarding the situation in a specific State, when it considers it appropriate.

(c) Carries out on-site visits to countries to engage in more in-depth analysis of the general situation and/or to investigate a specific situation. These visits usually result in the preparation of a report regarding the human rights situation observed, which is published and sent to the General Assembly.

(d) Stimulates public consciousness regarding human rights in the Americas. To that end, carries out and publishes studies on specific subjects, such as: measures to be taken to ensure greater independence of the judiciary; the activities of irregular armed groups; the human rights situation of minors and women; and the human rights of indigenous peoples.

(e) Organises and carries out conferences, seminars and meetings with representatives of Governments, academic institutions, non-governmental groups, etc...in order to disseminate information and to increase knowledge regarding issues relating to the inter-American human rights system.

(f) Recommends to the member States of the OAS the adoption of measures which would contribute to human rights protection.

(g) Requests States to adopt specific "precautionary measures" to avoid serious and irreparable harm to human rights in urgent cases. The Commission may also request that the Court order "provisional measures" in urgent cases which involve danger to persons, even where a case has not yet been submitted to the Court.

(h) Submits cases to the Inter-American Court and appears before the Court in the litigation of cases.

(i) Requests advisory opinions from the Inter-American Court regarding questions of interpretation of the American Convention.

The Commission receives individual petitions against member states of the CAS. If the member is not a party to the Convention, the Commission will judge the matter under the Declaration, but of course cannot give a binding decision. If the member is a party to the Convention then, if there is no amicable settlement, the Commission may refer the matter to the Inter-American Court of Human Rights. Individuals do not have a right of access to the Court. Both inter-state and individual cases can be heard by the Court only if contracting states have made a general or specific agreement that this will happen. In the event of an adverse judgment there is no means of enforcement.

Thus it may be seen that inter-American regional protection of human rights leaves much to be desired. Indeed, there is no surrender of sovereignty that in any way equates with the European system. It has certainly not developed comparably and although the right of individual petition is important, there does not seem to have been a major change in the quality of human rights protection offered within states as a result of the Declaration or Convention.

SELF ASSESSMENT EXERCISE 4

"Experience suggests that while regional systems for the protection of human rights are essential, it has to be realised that they can at best be supplementary to domestic state protection. Current European and American experience confirms this view." Discuss.
(See *Feedback at the end of this unit*).

4.0 CONCLUSION

The UN has been highly successful in drafting international human rights treaties. Genocide, torture, racism and apartheid are all now clearly proscribed in international law. In other areas, however, it is

harder to judge the contribution of human rights treaties to the protection of human rights. While almost all states are prepared to support a document aimed at the elimination of discrimination against women, the true intentions are inferable from the reservations entered.

5.0 SUMMARY

The ECHR has been a remarkably successful Convention in effectively guaranteeing fundamental civil and political rights. But whereas it proved competent in this, the influx of members with diverse histories and ideological outlooks has led to an unmanageable case load that will necessarily affect the jurisprudence of the Court. The ECHR reflects the European view that civil and political rights are justifiable in a way that economic, social and cultural rights are not.

The inter-American system for the protection of human rights has not been a notable success. It is much less intrusive into national sovereignty than it needs to be in order to be effective. US and Canadian participation has not been substantial. It could be argued that its emphasis has been upon human rights promotion, but the system has lived in remarkable harmony with abusive military dictatorships. In addition, to have singled out Cuba as the only member of the OAS worthy of suspension for its human rights abuses seems perverse in the extreme.

ANSWER TO SELF ASSESSMENT EXERCISE 3

This statement is probably unfortunately true. Nevertheless the homogeneity of the original states ratifying the ECHR should not be over-emphasised. Probably what most of them did share however was a functioning domestic court system that enjoyed a fair measure of support from citizens. This cannot be said of many of the new entrants into the Council of Europe. Instead, so diverse are the ethnic, language and ideological heritages that it is immensely difficult for any international court to be both empathetic to difference but consistent in human rights rulings. It may be that in due course the 46 nations will have to form regional alliances with human rights courts answerable to Strasbourg.

ANSWER TO SELF ASSESSMENT EXERCISE 4

It is becoming increasingly clear that the European Court of Human Rights will not be able to cope with the level of communications it faces at present. Historically the number of petitions was restricted in that not every state granted the right of individual petition and also the Court had made it clear that it would not generally review the decision of a domestic court where that court had sought in good faith to apply the

provisions of the Convention. Such an attitude to domestic courts is no longer reasonable given the very poor records of some states newly accepted as members of the Council of Europe. It is probable that one reason for the much more restricted role of the Inter-American Court is that many domestic courts in Central and South America have no consistent record of defending civil liberties and the rule of law.

6.0 TUTOR-MARKED ASSIGNMENT

"The reservations of states when ratifying the convention on the elimination of all forms of discrimination against women illustrate the substantial gap between approval in principle of a human rights statement and the willingness to make it effective." Discuss.

7.0 REFERENCES/FURTHER READINGS

Simpson, A. (2001). *Human Rights and the End of Empire.* Oxford: Oxford University Press [ISBN 0199267898] pp.219-20.

Dixon, M. (2005). *Textbook on International Law* (5th ed.). Oxford: Oxford University Press [ISBN 0199260729].

Cassese, A. (2005). *International Law* (2nd ed.). Oxford: Oxford University Press [ISBN 0199259399].

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UNIT 4 INTERNATIONAL LAW IN A UNIPOLAR WORLD

CONTENTS

1.0 INTRODUCTION

The purpose of this unit is to provide something of a critique of international law. What is meant by the word 'critique' is that we will attempt to stand back from the method and detail and rules of international law, to be found in this course material and particularly in your Kaczorowska textbook, in the hope that we might discover some academic questions about public international law that might reveal possible perspectives on its role which would otherwise remain invisible. To some extent this approach may be unsettling because it does call into question the objectivity of at least parts of this course material and the necessary textbooks.

It should also be liberating for those of you who have had some feeling of dissatisfaction with a course material that has often hinted at the political aspects of international law but has only occasionally explored them. Such feelings are important because they reflect the intellectual challenge of having, on the one hand, to study the rules and methods of international law as objective phenomena and, on the other, to question the neutrality of the results achieved. There are many “big questions” that it is difficult to incorporate into an undergraduate course but without which the subject itself may be misleading.

2.0 OBJECTIVES

At the end of this unit, you should be able to:

- define the concept of sovereignty in international law and show why the concept of sovereignty is not fixed in definition
- discuss the significance, importance and limitations of the concept of sovereign equality
- explain the fact that the relationship between law and power does not necessarily coincide in international law as it does in domestic law
- explain the significance of the present "unipolar" state of the contemporary world
- explain why some within the United States are willing to argue that international law is in no real sense law and that this has foreign policy implications
- explain US legitimations of the use of force.

3.0 MAIN CONTENT

3.1 Is International Law a Source of Disappointment?

Some of you are probably disappointed with international law because it seems so malleable, indeterminate and infinitely arguable. Even where the rules do seem clear and even if they are apparently broken, particularly by a powerful state, not only do retribution and enforcement seem to be beyond the ability and will of the international community, but a legal argument will often be "constructed" in order to avoid a clear legal position. A very good example of this concerns the intervention in Iraq by the US, the UK and their allies in 2003. The response of the British academic international law community was to be found in an unequivocal letter to the British newspaper of *The Guardian,* on 7 March 2003. The letter was signed by many of the most prominent UK international lawyers not in government service. It stated as follows:

We are teachers of international law. On the basis of the information publicly available, there is no justification under international law for the use of military force against Iraq. The UN charter outlaws the use of force with only two exceptions: individual or collective self-defence in response to an armed attack and action authorised by the Security Council as a collective response to a threat to the peace, breach of the peace or act of aggression. There are currently no grounds for a claim to use such force in self-defence. The doctrine of pre-emptive self- defence

against an attack that might arise at some hypothetical future time has no basis in international law. Neither Security Council resolution 1441 nor any prior resolution authorises the proposed use of force in the present circumstances.

Before military action can lawfully be undertaken against Iraq, the Security Council must have indicated its clearly expressed assent. It has not yet done so. A vetoed resolution could provide no such assent. The prime minister's assertion that in certain circumstances a veto becomes “unreasonable” and may be disregarded has no basis in international law. The UK has used its Security Council veto on 32 occasions since 1945. Any attempt to disregard these votes on the ground that they were “unreasonable” would have been deplored as an unacceptable infringement of the UK's right to exercise a veto under UN charter article 27.

A decision to undertake military action in Iraq without proper Security Council authorisation will seriously undermine the international rule of law. Of course, even with that authorisation, serious questions would remain. A lawful war is not necessarily a just, prudent or humanitarian war.

The conclusion was thus inevitable. Because Article 2(4) of the United Nations Charter proscribes the use of force except pursuant to Article 51 (allowing self defence), or pursuant to a Security Council Resolution under Chapter VII of the Charter, (the Council having been persuaded of the reality of a “threat to the peace, breach of the peace, or act of aggression” (Article 39)) an invasion of Iraq could not be lawful.

So strong, clear and seemingly incontrovertible was this position that when the UK government sought to justify intervention, it purported to accept that legal analysis while finding room for manoeuvre within it. Advice accepted by the government argued the legality of the intervention because of non-compliance by Iraq with earlier Chapter VII Resolutions which had authorised the use of force. In the UK the government accepted the need for its actions to be legal, accepted the constraints upon the use of force arising from the UN Charter, and argued within that circumscription. Thus in the UK, the governance by the UN of the use of force was accepted as representing international law, and any illegality was denied.

The important point here is that arguments in international law for almost any course of action can be constructed and generally there is no final adjudication as to their legality. It is very rare for a body such as the ICJ to be able to conclude authoritatively on the validity of legal argument. It is of course able to do so when a matter comes before it but

it is this which dictates that matters coming before it are few and far between. As a result, states may hold on to tenuous legal argument even when it seems quite unsustainable. (The UK, for instance, refused to allow the legality of its intervention in Kosovo to be tested in the ICJ when the opportunity arose, arguing, remarkably, that the law relating to humanitarian intervention was in a state of development and the ICJ might arrest that development!)

In response to such criticism of international law, there is the often proffered defence that for every situation in which international law remains arguable there are myriad times when international law either pre-empts disputes or even resolves them, but this is not wholly convincing in the face of the ability of some states to ignore the international community and its rules with almost total impunity.

Others of you may well be disappointed with international law because, it seems to reflect a very European way of seeing the world - and perhaps even a European (Western) way of dominating the world, only now being challenged by a rising China. Certainly many international rules and much international legal methodology were created in a time of Western hegemony and colonialism, and arguably some of the consequences of this remain.

Yet others will probably have noticed that public international law seems a very "gendered" way of making sense of world events. At the risk of potentially facile typifications, international law seems to be about creating, structuring and managing competition and competitiveness. The desirability, healthiness and inevitability of competition (or conflict) over co-operation is not only taken for granted but even seems "natural", and the consequent conflicts that arise seem all too often resolved by power, force or the threat of force - all causes and means which some would suggest privilege stereotypically "masculine" modes of ordering over alternatively hierarchically subordinated modes, typically understood as "feminine".

Finally you will almost certainly have been preoccupied throughout this course with the relationship between power and law. Underlying the whole of this course material has been the paradox of sovereign equality. That concept is at once at the heart of the rule of law way of organising the international community by emphasising the superiority of justice over power, and yet all too often irrelevant in the face of the reality of unequal power. The conclusion drawn from this fact could be interpreted as an attack upon the actions of powerful states and upon the USA in particular. This would be a misinterpretation. While it is not improper to be critical of the policies of any state, the fact of the status of any state is always important. Most states pursue foreign policy that

their governments perceive to be in their own interests to the maximum of their ability almost all of the time. How effective they can be depends upon both power and diplomacy. When this is appreciated it becomes clear that the USA is not acting exceptionally in attempting to achieve its foreign policy goals. It is, however, the goals themselves that are politically questionable - though this is generally beyond the range of a course in international law.

This unit therefore considers one of the two problematic areas of dispute that go to the heart of the reality of international law. It concerns the place of the USA in an international law regime in a "unipolar" world. The second which is the significance of the demonstrable ability of one client state of the US (Israel) to flout international law at will and without sanction will be considered in the next unit.

3.2 The Paradox of Sovereign Equality

Essential Reading

Dixon, Chapter 6: *Jurisdiction and Sovereignty*, pp.144-56.

Cassese, Chapter 3: *The Fundamental Principles Governing International Relationships,* p.48-55.

Kaczorowska, Chapter 6: *Sovereignty and Equality of States*, pp.95-97.

In LAW 511 we briefly considered notions of sovereignty and sovereign equality. At various points we observed how dramatically the Westphalian system (at least the theoretical Westphalian system) has changed with the rise of the United Nations and the centrality *of* human rights. Even in 1967, however, Oppenheim's *Treatise on International Law* felt able to define sovereignty as follows
(p.286):

Sovereignty as supreme authority, which is independent of any other earthly authority, may be said to have different aspects. Inasmuch as it excludes dependence upon any other authority, and in particular from the authority of another State, sovereignty is independence. It is external independence with regard to the liberty of action outside its borders in the intercourse with other States which a State enjoys. It is internal independence with regard to the liberty of action of a State within its borders. As comprising the power of a State to exercise supreme authority over all persons and things within its territory, sovereignty is territorial supremacy (dominium, territorial sovereignty). As comprising the power of a State to exercise supreme authority over its citizens at

home and abroad, sovereignty is personal supremacy (imperium, political sovereignty).

In fairness, the work does go on to recognise limits to external independence arising from treaty obligations, and internal independence through the obligation of a state to respect the fundamental human rights of its own citizens. Nevertheless the emphasis upon liberty of action seems to warrant even more qualification in the twenty-first century, at least as concerns the majority of states. Here it is appropriate to make clear the view that the constraints upon sovereignty will depend not only upon treaty commitments, but upon power. This will be explored below but first it is necessary to discuss sovereign equality briefly.

A recent book considering the question of the concept of sovereignty of direct relevance to this course is Gerry Simpson's *Great powers and outlaw states; unequal sovereigns in the International legal order*. Critically for our discussion of sovereign equality Simpson takes the view that the concept of sovereign equality has three distinct aspects not all of which lead to assumptions of real equality. The first aspect is "formal equality", defined as no more than "equality before the law" and which "extends neither to forms of jurisdictional equality nor to equal capacity to vindicate rights outside the judicial context" (p.47). I say "no more than", but as has been suggested in Module 2 this is a truly crucial feature, necessary for any international rule of law.

The second aspect is legislative equality, to be found for instance in the General Assembly of the United Nations with its single vote for each state. In truth, as he recognises, this is one of the few places where legislative equality is accepted and enjoyed. More typically strength and wealth will dictate legislative power, as is all too clear both in the Security Council and in the deliberative bodies of the international financial institutions.

Existential equality is the third aspect of sovereign equality. This is really an equal right to existence with the accompanying corollary of the principle of non-intervention (and generally certainly not for purposes of regime change). Simpson shows that traditionally, historically and contemporaneously this has been more problematic than some might wish to believe. The claimed anti-pluralist (that is, universal) virtue of "liberal democracies" (as Fukuyama would argue) he suggests resonates with times of proclaimed "Christian", "European" or "civilised" superiority used as a justification for intervention. Pariah or rogue states have replaced the heathen, the primitive and the uncivilised states which were historically beyond the realm of "unintervenability".

The point that is being made here is an important one. Simpson is suggesting that sovereign equality in the existential sense (what Kaczorowska identifies as "independence") has, at least in fact, never achieved the uncontroversial status often claimed for it, for example under the United Nations Charter. Historically the reality is that powerful states have always curbed the freedom of action of lesser states if it was in their interests so to do, and if the constraints were not counter-productive.

Both the US hegemony in Central and South America, sometimes formalised under the "Munro Doctrine", and Soviet hegemony in Eastern Europe between 1945 and 1990 are very clear examples. In both cases direct intervention was sometimes resorted to (usually with a highly doubtful claim to legitimacy) and on occasions regimes were changed. Simpson's argument is that powerful states are now questioning sovereign rights of states without democratic governance, in the same way as in the nineteenth century colonial powers justified colonial acquisitions on the assumption that all "civilised" peoples would approve. We will return to this argument when we consider the so-called "emerging right to democratic governance".

SELF ASSESSMENT EXERCISE 1

What is sovereign equality? (See *Feedback at the end of this unit*).

SELF ASSESSMENT EXERCISE 2

1. What historical factors meant that sovereignty was never (or almost never) absolute?
2. Explain the significance of the sovereign equality of states.

3.3 The USA and International Law

Having briefly observed the complexity of sovereign equality it is now necessary to consider the role of the United States, currently the world's only "super power", in the international legal regime. The question to be considered is whether the USA should be considered simply as another "sovereign equal" in international relations and international law, or whether its singular power, both military and economic, necessitates reconsideration in a "unipolar" world. In many of the earlier units we have seen that the US does not always behave as other states tend to. This was most obvious when we examined international law relating to the use of force, where the US made it clear that it was prepared to do what it thought necessary for its own security without feeling any need to seek or enjoy international approval, even if this might be interpreted as flouting international law. There are many other examples of where

the US has failed to ratify (or even sign) international treaties that have received widespread support even from its allies, the most recent examples being the treaty creating the International Criminal Court, and the Kyoto Protocol on climate change.
A body of opinion has developed in the US (particularly among the so-called neo-conservatives) which argues that America's unique strength and role in international relations must be recognised and that some form of "exceptionalism" (referred to sometimes as "exemptionalism") is not only desirable but inevitable. Those of that opinion could draw upon some international law jurisprudence. In early editions of Oppenheim's *International Law* (Longman's Green and Company, 1912, second edition) the argument had been made that it is of the essence of international law that there is both community of interest and a balance of power without which there can be no international law. This position was adopted by Hans Morganthau, the prominent international relations theorist, in the 1960s. He quoted Oppenheim as stating:

The first and principal moral [in the history of the development of the Law of Nations] is that a Law of Nations can exist only if there be an equilibrium, a balance of power, between the members of the Family of Nations. If the Powers cannot keep one another in check, no rules of law will have any force, since an over-powerful State will naturally try to act according to discretion and disobey the law. As there is not and never can be a central political authority above the Sovereign States that could enforce the rules of the Law of Nations, a balance of power must prevent any member of the Family of Nations from becoming omnipotent.

Given that international law is, as Rosenne puts it, "a system of co-ordination, rather than subordination" it is dependent upon, at the very least, the formal equality of states. If one state is in a position, or believes itself to be in a position, to act unilaterally without fear of the consequences, the force of law might seem to have disappeared. The United States, neo-conservatives and others have argued, is now in this position. Indeed as early as 1992 in a document entitled *Defence planning guidance draft* (drafted under the supervision of Paul Wolfowitz and subsequently revised by Vice President Dick Cheney) the idea was introduced that the USA was now uniquely strong enough to be able to contemplate with equanimity unilateral military action, the pre-emptive use of force and "the maintenance of a US nuclear arsenal strong enough to deter the development of nuclear programmes elsewhere". As has been pointed out, what that document did not do was to explain how such policies might be reconcilable with the many international agreements and obligations the US had voluntarily undertaken since the Second World War.

With the Project for the New American Century's letter to then President Clinton in 1997 arguing for unilateral action to overthrow Saddam Hussein's regime in Iraq regardless of a lack of unanimity among the Veto powers in the Security Council, and signed by many who had played a part in the administration of Ronald Reagan and/or the first Bush administration including Elliot Abrams, John Bolton, Robert Kagan, Richard Perle, Donald Rumsfeld and Paul Wolfowitz, the *Defence planning guidance draft* came into its own after the terrorist attacks on the USA on 11 September 2001. In *The National Security Strategy of the United States,* published under the seal of the President in September 2002, it was asserted that the United States now claimed the right of pre-emptive action, leaving the limitations on the international use of force in the UN Charter in utter disarray. And while claiming this right it was asserted that the "United States will use this moment of opportunity to extend the benefits of freedom across the globe. We will actively work to bring the hope of democracy, development, free markets, and free trade to every corner of the world."

3.3.1 American Exceptionalism

Writing in 2003, Harold Hongju Koh, Dean and Professor of International Law at Yale University, sought to analyse the content and significance of American exceptionalism. Before considering the relevance of this analysis some preliminary comments are called for. The concept of exceptionalism seems to have two broad meanings. The first, which relates to Oppenheim's proposition that any system of international law requires an equilibrium between states, seems to assert that such is the power of the United States that as a matter of fact the US cannot be a party to international law because any consequent restraints are simply unreal and would have to depend for their effectiveness upon voluntary, but disadvantageous compliance. But within this proposition are two possible conclusions.

If the US is above and beyond international law, where does this leave lesser states? Either the entire system falls and international law, failing to constrain the mightiest, similarly fails to constrain any state with the power to reject constraints in any particular case with impunity; or international law retains its distinctive character for all states but the United States. The first interpretation really is the 'nuclear' interpretation. Every principle of international law would lose its legal character and fall back into the principles of international relations. The second suggests that lesser states continue to be bound by *pacta sunt servanda* and only the US has impunity and immunity. Both cases have significant implications for the United States itself.

In the first case the gain for the US, while obvious, also carries major dangers and difficulties. In moving from the international rule of law to power relationships unmediated by law, it may be expected that if the US is to persuade other states to do its bidding, force - and the threat of force - will become a much more prominent part of US foreign policy - in itself an option with significant cost. In the second scenario where only the US is outside of the international law regime, the perils are hardly fewer. The hypocrisy of the greatest power exempting itself from the rules of international law while requiring the compliance of other states is also a dangerous position. It may be possible, at a cost, to police such a system if the US really believed it to be in its interests to do so. But when second order states seek to follow the principle espoused by the US, then, for all its power, the position of the US could not regularly prevail.

The second and more limited meaning concerning exceptionalism suggests that because of its power (and perhaps other reasons such as the US Constitution and its federal structure) the United States either must necessarily be, or should be, in a position to accept the rules of international law with a discretion not appropriate to other states. Two examples are pertinent. The US might argue that notwithstanding the number of states that have already signed and ratified the treaty creating the International Criminal Court, with its overtones of the acceptance of universal jurisdiction, its own exceptional international responsibilities and powers, together with its confidence in its own special needs and abilities mean that it must claim exemption for itself alone. This in no sense condones war crimes or crimes against humanity. It simply asserts that for the US, this is more appropriately dealt with in its own domestic jurisdiction. Even with the Kyoto Protocol on Climate Change the argument might be that, given the explicit intention of the Defence Strategy to remain the supreme power, it is inappropriate for the US to risk any lessening of its industrial power, regardless of environmental cost. Of course both these examples have many arguments in favour of compliance and many of the problems of hypocrisy remain, but some argument is perhaps maintainable.

Koh, in his analysis, distinguishes four manifestations of American exceptionalism which range from the least problematic to that deserving of the most opprobrium. Koh seems to assume that exceptionalism is much more limited in its effect than have been suggested. For Koh the two most difficult facets of exceptionalism concern firstly what Louis Henkin named “America's Flying Buttress mentality”. By this Henkin meant that the US often identified with the values expressed in international human rights documents, and often in fact complied with their requirements, yet was unwilling to subject itself to the critical examination processes provided in such Conventions. The effect was

external support (like a flying buttress) but not the internal support of a pillar.

In other words the US was willing to comply (and in fact did) but would not want to recognise any external authority as having the power to examine and judge its conduct. One sees a parallel in the US decision to intervene in Afghanistan post 9/11 without the authority of a Security Council Resolution, notwithstanding the fact that it would almost certainly have been forthcoming. The US does not want to look beyond its borders for the authority for domestic or foreign policy choices. Koh's view is that the result of this is that the US often receives unnecessary condemnation, and sometimes pariah status for appearing to align itself with other states not ratifying, or not complying with, conventions - states with appalling human rights records.

The real problem of exceptionalism, however, according to Koh, arises when the US uses its power to promote a double standard by which it is proposed that "a different rule should apply to itself than applies to the rest of the world".

Recent well-known examples include such diverse issues as the International Criminal Court, the Kyoto Protocol on Climate Change, executing juvenile offenders or persons with mental disabilities, declining to implement orders of the International Court of Justice, with regard to the death penalty, or claiming a Second Amendment exclusion from a proposed global ban on the illicit transfer of small arms and light weapons. In the post 9/11 environment, further examples have proliferated: America's attitudes toward the global justice system, holding Taliban detainees on Guantanamo without Geneva Convention hearings, and asserting a right to use force in pre-emptive self-defence... [p.1486]

Perhaps the first two examples - the ICC and the Kyoto Protocol - should be distinguished from the rest because in those cases the US did not (publicly) accept the usefulness of either for the world as a whole or for the United States. But for the rest the problem is not only the appearance of hypocrisy but the reality. For the US to ignore ICJ decisions (the only nation to have done so) and to assert that it may continue to act in a way that is contrary to internationally accepted standards because of its constitutional validation leaves similar arguments open to every pariah state in the world. While the US response is that these other states do not have similar democratic validation, this has no necessary truth.

3.3.2 The United States, Radical Exceptionalism and International Law

Within current US legal thinking there are even some who are prepared to argue that in fact international law is not really law at all. This is hardly a new perspective. Indeed in 1889 under the heading "International Law" the *Encyclopaedia Britannica's* entry read:

International Law is the name now generally given to the rules of conduct accepted as binding [between them] by the nations - or at all events the civilised nations - of the world. International law as a whole is capable of being very differently interpreted according to the point of view from which it is regarded, and its rules vary infinitely in point of certainty and acceptance. According to the ideas of the leading school of jurists it is an impropriety to speak of these rules as being laws; they are merely moral principles, - positive, it is true, in the sense that they are recognised in fact, but destitute of the sanctioning force which is the distinguishing quality of law. [Vol XIII, p.190]

One influential holder of these views is John Bolton, US Ambassador to the United Nations at the time of writing. But, whereas the 1889 author had the grace to add that the problem with that proposition is that it may "unduly depreciate the actual force and effect of the system as a whole", John Bolton would accept no such qualification. For him the legal positivism of the Austinian kind (understanding law to be defined as commands from a sovereign backed by the threat or use of coercion, sanctions or force) is an obvious truth with significant implications for international "law" and its influence on US policies generally and on the attitudes of the US administration to human rights in particular.

Bolton's attack on international law is comprehensive. It is an attack on treaty law and customary international law, along with the other usually claimed sources of international law as found in Article 38 of the Statute of the International Court of Justice of 1945.

As you will by now be aware, almost all international lawyers and all state governments are in agreement that at the heart of international law is the crucial principle of *pacta sunt servanda.* Acceptance of this principle is one immediate means of distinguishing international law from international relations. It is because it is a legal principle that it is generally accepted uncritically. This, however, does not mean that a state will invariably comply with the principle; just as in domestic jurisdiction not all will obey all laws. But two obvious points need to be made. The fact of occasional non-compliance in the domestic realm

does not negate the law. The same is true internationally. Secondly, internationally even if there is no direct sanction, the act of breaking treaty obligations will rarely be cost free, though it may be nothing more than a level of opprobrium from other states, or hesitancy upon their part to enter into future international legal relations. Universally accepted though this is, Bolton disputes it. When Bolton claimed in 1997 that regardless of the UN Charter, the US was not bound to pay its dues the response from Robert F. Turner of the University of Virginia Law School was as follows:

How do we know that international treaty commitments are legally binding? Because every single one of the 185 [now more] states that are members of the United Nations, and every one of the few states that are not, acknowledge that fact. Article 26 of the Vienna Convention on the Law of Treaties recognises the fundamental and historic principle of *pacta sunt servanda*: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith".

To be sure, like some of our own citizens, members of the international community of states do on occasions violate their legal obligations. But when they do, they never assert that treaty commitments are merely non-binding "political" undertakings. Stalin, Hitler, Kim 11 Sung, Gadhafi and Saddam Hussein all either denied the allegations against them, pretended that their acts of flagrant international aggression were really in "self-defence" to a prior attack by their victims, or proffered some other legal basis for their conduct. Not one of them asserted that treaties "were not binding", because they realised that no country would accept such a patently spurious assertion - it simply would not pass the straight-face test. [Quoted in Murphy, J. *The United States and the rule of law in international affairs.*

Why then does Bolton want to argue that treaties are not legally binding upon the USA and what are the implications? There are two aspects to his arguments here. The first is concerned with the status of treaties in the international world, and the second with the status of treaties within the domestic jurisdiction of the US. Internationally it is the lack of sanction which persuades Bolton that the obligation to comply can only be moral or political (neither to be underestimated but, he says, not to be confused with the legal). If one accepts his premise that it is only the threat or use of sanctions which makes an obligation legal then his argument is irrefutable. Few would accept the premise.

Legality is not in essence necessarily linked with sanction or punishment. Rather most lawyers would accept that the legal quality arises from the universal acceptance of the legal aspect. This is not as circular as it sounds. It is because of the acceptance of the legal quality

of *pacta sunt servanda* that overwhelmingly most states, almost all of the time, accept their treaty obligations automatically, and only very rarely subject them to unilateral reconsideration. Bolton attempts to avoid this argument by emphasising that his position does not mean that the US should not ordinarily comply with its treaty obligations, only that it need not do so. With this position the debate might seem to be purely semantic, arising from his understanding of the term "legal". It is more than that simply because by avoiding using the term "legal" Bolton hopes both to elevate the US right to ignore treaties, and to downgrade the need for compliance.

Bolton effectively admits this intention when, having observed that "In the rest of the world, international law and its 'binding' obligations are taken for granted", he goes on to observe of US citizens, "When somebody says 'That's the law', our inclination is to abide by that law. Thus if 'international law' is justifiably deemed 'law', Americans will act accordingly." (Bolton, J. "Should We Take Global Governance Seriously?" (2000) 1 *Chicago Journal of International Law* 205).

On the other hand, if it is not law, it is important to understand that our flexibility and our policy options are not as limited as some would have us believe. It follows inexorably, therefore, that the rhetorical persuasiveness of the word "law" is critically important.

It is manifest, then, and admitted that the argument he makes is driven by the end he wishes to achieve - the return of international law to the political world.

If his arguments about the international obligations arising from treaties are specious, what of customary international law? For Bolton "customary international law" deserves, at the least, inverted commas expressing incredulity. Of course debates over customary international law are familiar and continuing and there are problems in defining when customary international law comes into existence, there are difficulties in proving *opinio juris,* there are problems with the position of "the persistent objector", and there are problems with flexibility and malleability. Such nice jurisprudential questions have no place in Bolton's mind. He denies the very existence of customary law. For him, "Practice is practice, and custom is custom; neither one is law".

Again this extraordinarily extreme position is driven by the conclusion which Bolton seeks, namely the view that the US is not, and should not be, constrained in its policy decisions or conduct by any customary international law whether in its international relations or domestically. Internationally, Bolton's view is that the US must pursue its own path. If this path should coincide with what other states regard as customary

international law, that is well and good, but it is coincidence, not compliance.
As with treaty law, any recognition of customary international law has both international and domestic significance and implications. This is particularly true in the area of human rights. Bolton's fear is that through means other than internal democratic approval, changes in standards created by "the international community" might affect the US. Thus internally he fears, for instance, that US courts could (though he approves the fact that they have generally not) look to developing international customary law in determining whether the US death penalty might constitute cruel or unusual punishment. Internationally the effect might be to incur international legal condemnation for acts seen by the US administration as necessary for its own security or interests.

It might be thought that these views are so extreme that they tell us little about the USA in a "unipolar" world. In fact they are effectively proffered as a justification enabling the US to choose to remain outside of the international legal regime. And not only is John Bolton the holder of an important US post constantly concerned with international law but his position probably represents that of the majority of the Bush administration. Furthermore he is not without friends in the academic community. Let us take but one of many possible examples, Professor Michael Glennon of the Fletcher School of Diplomacy. His concern with the state of international law predates the events of September 2001, and he would regard these events as simply reinforcing his earlier arguments. In a book published in 2001 he had directed his attention to the intervention in Kosovo in particular and the question of the use of force in general. The title of the book, *Limits of law, prerogatives of power,* with the sub-title *Interventionism after Kosovo* summarises its content remarkably accurately. Glennon's argument is that it is no longer proper, sensible or accurate to speak of the Charter of the United Nations as bringing legal control over the use of force in international relations. His conclusion begins thus:

With the close of the twentieth century, the most ambitious of international experiments, the effort to subordinate the use of force to the rule of law, almost came to an end - the victim of a breakdown in the consensus among member states concerning the most basic of issues: the scope of state sovereignty. Never a true legalist order, the use-of-force regime of the UN Charter finally succumbed to massive global disagreement pitting North against South and East against West over when armed intervention in states' internal affairs was permissible. [p. 207]

He went on to conclude that such had been the extent of the violation of Charter rules that it made little sense to speak any more of a legal regime.

4.0 CONCLUSION

Arguments are sometimes made that the entire international law regime is called into question by the fact of a "unipolar" world with but one super power. This is partly because no other state or states have the power to constrain the US, and partly because international law can only move away from the criterion of power by consent. If the US elects to ignore international law it sometimes seems able to reformulate the rules in a way that reflects its own interests. Nevertheless it can be argued that, able though it may be to ignore international law, for the US to do so risks destroying the whole regime to the detriment of all.

5.0 SUMMARY

You should now be able to:

(i) Define the concept of sovereignty in international law and show why the concept of sovereignty is not fixed in definition;
(ii) Discuss the significance, importance and limitations of the concept of sovereign equality;
(iii) Explain the fact that the relationship between law and power does not necessarily coincide in international law as it does in domestic law;
(iv) Explain the significance of the present "unipolar" state of the contemporary world;
(v) Explain why some within the United States are willing to argue that international law is in no real sense law and that this has foreign policy implications;
(vi) Explain US legitimations of the use of force.

ANSWER TO SELF ASSESSMENT EXERCISE 1

Sovereign equality may have a number of different meanings, some more significant than others. The first point is the formal equality that reflects that of individuals in domestic legal systems under the rule of law. It is seen most clearly in legal disputes and particularly those that come before the ICJ. The second relates to the principle in the UN Charter by which each state enjoys equal voting strength in the General Assembly (and in other international organisations with the same provision). The third, which is more contentious, relates to the status of an independent state entitled to rely upon non-interference in its domestic jurisdiction.

6.0 TUTOR-MARKED ASSIGNMENT

How might it be possible to refute the arguments of those who argue for American exceptionalism?

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UNIT 5 THE CASE OF ISRAEL AND INTERNATIONAL LAW

CONTENTS

1.0 INTRODUCTION

One other aspect of US policy that has arguably constantly undermined the international legal regime has been its almost unconditional support for Israel, notwithstanding the fact that Israel has consistently flouted international law, at least since 1967. It is of course possible to make political arguments in support of Israeli action over the years, but its violations of international law are incontrovertible. Whether we consider the obligations in international law of belligerent occupiers or the restrictions on reprisals and pre-emptive strikes in the UN Charter, infractions are explicit and usually unashamed. US support may be seen as an extension of "exceptionalism" but it has the unfortunate feature of manifesting double standards beyond its own borders and creating international cynicism about international law in general that is surely unfortunate.

In this unit, we want to look briefly at only two examples of the privileged position Israel has enjoyed because of US support. They have been chosen for their topicality. The first concerns Israel's nuclear weapons and the second Israel's attempts to acquire territory in the face of international law.

2.0 OBJECTIVES

Atthe end of this unit, you should be able to:

- discuss the significance of the ability of Israel to flout international law because of its relationship with the USA
- explain the effect of such protection upon the perception of international law by other states
- draw some conclusions about the relationship between power, justice and international law
- formulate a critical position appreciating both the strengths and weaknesses of the contemporary international law regime.

3.0 MAIN CONTENT

3.1 Israel's Nuclear Policy

In a time of unprecedented proliferation of things nuclear (including nuclear weapons) and now a response which is forceful if belated, as we see in the cases of North Korea and Iran, the position of Israel is remarkable. India and Pakistan have recently acquired nuclear weapons, North Korea may be on the brink of doing so, and Iran is suspected by the United States (and Israel) of being in the development phase. The position of India and Pakistan now seems to be regarded by the international community as a *fait accompli* and attempts to sanction them for their nuclear weapon development have effectively been abandoned. North Korea and Iran have been informed, implicitly and explicitly, that the acquisition of nuclear weapons is unacceptable and will lead to action to prevent or destroy. Throughout all of this, however, Israel has possessed nuclear weapons and the means for their deployment with very little disapprobation expressed by her powerful friends.

An overwhelming number of states of the world are party to the Nuclear Non-Proliferation Treaty of 1968 (NPT). In 2004, 188 states were party to the treaty which entered into force in March 1970. The NPT acknowledged the reality that by 1 January 1967, five states (the current veto powers of the Security Council) had conducted nuclear weapons tests and they were defined as 'existing nuclear weapons states'. Article 1 of the NPT provided these five states with particular obligations not to transfer these weapons or to assist in their acquisition by other states. They were also obliged to pursue nuclear disarmament (Article 6).

Other states were able to join or accede to the NPT and their obligations were to not receive or seek to acquire nuclear weapons and to accept safeguards (verification of non-acquisition and/or development) from the International Atomic Energy Agency (IAEA). The reward for such states was access to nuclear energy technology for 'peaceful' purposes. Neither Pakistan nor India is a party to the treaty while North Korea, which was a party, declared its withdrawal in 1993 and 1994 from the

IAEA (but whether it did so within the terms of the treaty is questionable). Iran has been a party since 1970. Both North Korea and Iran have incurred the wrath of the USA for what it regards as breaches of treaty obligations and both the USA and Israel have stated that force may be necessary to prevent Iran from completing the development of nuclear weapons.

In an interview in January 2005 the Israeli defence minister, Shaul Mofaz, who in the past had stated that Israel had operational plans in place for a (pre-emptive) strike against Iranian nuclear facilities, argued that the US should take such steps. Seymour Hersh, an American investigative journalist, had already reported that the US already had Special Forces in Iran scouting out its nuclear facilities.

How different is the case of Israel. By the time of the NPT, to which Israel is not a party, there is strong evidence that it already had, or was on the point of developing, a small number of nuclear weapons. Production was located at Israel's nuclear facility in Dimona, in the Negev Desert south of Jerusalem. Hersh argues convincingly that Israel's nuclear developments were made with major co-operation and collaboration with France, beginning even before the Suez war of 1956. It is clear that in the earliest days of the state of Israel a number of significant Israelis were convinced that nuclear weapons would be crucial in providing a guarantee in a hostile world. The Chairman of the Israel Atomic Energy Commission (Ernst David Bergmann), which was formed in 1952, had long advocated an Israeli nuclear bomb as being crucial in ensuring “that we shall never again be led as lambs to the slaughter”. Ben Gurion, the most powerful Israeli at that time similarly laid emphasis upon the security “the bomb” would bring.

The role of the USA in the Israeli development of nuclear weapons is neither clear nor consistent. Certainly all the initial development was with France, and Israel was at pains to hide its plans and actions from the US. When the US became suspicious of the activities of Dimona, Israel carefully misled any who asked questions, and even went to the lengths of substantial subterfuge when Dimona was visited. On occasions even the President of the USA was simply lied to, as when Shimon Peres told John F. Kennedy in April 1963 in answer to a direct question: “I can tell you forthrightly that we will not introduce atomic weapons into the region. We certainly won't be the first to do so. We have no interest in that. On the contrary, our interest is in de-escalating the armament tension, even in total disarmament.” Kennedy did his best to ensure that that was the case, but his efforts were ineffectual. Finally, when in 1963 it became clear that both France and Israel were in at least the preliminary stages of bomb manufacture the US seems to have been

persuaded to take what was seen as a "pragmatic" approach. This primarily meant not seeking explicit answers to explicit questions.

While subsequent US presidents differed in the detail of what they did, none was prepared to publicly state what increasingly became public knowledge. Indeed when Israel co-operated with apartheid South Africa to test a nuclear device in the Indian Ocean, the Carter administration (probably the presidency most concerned to encourage non-proliferation) took steps to ensure that the event received minimal publicity. Even when the Israeli nuclear technician, Mordechai Vanunu, provided the British *Sunday Times* with descriptions and photographs of Israeli nuclear warheads - information which suggested to informed observers that Israel was in possession of between 100 and 200 nuclear devices - disinterested publication, particularly in the United States, was limited. Israel has never been placed under pressure to accede to the NPT by the US or its allies, nor yet to agree to inspections from the IAEA. Furthermore, "for many years [the US] Congress has made it clear to the Nuclear Regulatory Commission and other responsible parties that they did not want to have anything revealed in an open hearing related to Israel's nuclear capability".

In brief, then, Israel's position with regard to nuclear weapons is unique. It has been determined both to possess a large arsenal of nuclear weapons and to refuse either to admit to their existence or to tolerate inspection. Yet ironically it is this position which arguably has persuaded such states as Iraq and Iran of the need for reciprocity. There is evidence too that Israel has in the past even contemplated the use of nuclear devices, in 1973. While not everyone would share Israel Shahak's thesis that the possession of nuclear weapons is intended to make Israel not merely defensively secure, but also secure as **the** regional power in the Middle East, it is clear that such "defensive" ability has implications beyond defence.

It is scarcely surprising, then, that the IAEA Director-General, Mohamed EI Baradei, observed when addressing a meeting in Israel in 2004 that he was "constantly questioned about Israel's refusal to sign the Non-Proliferation Treaty that would put its nuclear facilities under IAEA supervision". He said, "this perceived double standard is leading to an erosion of the legitimacy of the NPT in the Arab world".

Two final points arising from Israel's nuclear policies need to be mentioned for their international law implications. Israel's insistence that it should remain the only state in the region with nuclear capability led of course to one manifestation of its policy of pre-emptive use of force.

Saddam Hussein's Iraqi government had, with French help and French design, built a light water nuclear materials testing reactor known as Osirak (or to the Iraqis as Tammuz 1). The Israelis doubted Iraqi claims that the reactor was for peaceful purposes, although it was under IAEA supervision and had been regularly inspected. It was destroyed by an Israeli air strike in June 1981. Secondly of course, the kidnapping, drugging and returning to Israel of the informant Mordechai Vanunu was hardly consistent with Italian sovereignty (Vanunu was seized in Rome).

3.2 Israeli Land Acquisition, Occupation and Annexation

This section is concerned only with territory which was brought under Israeli control after the 1967 war. This is not because there is no controversy over territory not allocated to an Israeli state by UN Resolution but acquired in the 1948 war but rather because the prospect of any Palestinian state recovering any land beyond the pre-1967 borders seems remote and probably unrealistic. It should, however, be mentioned that Israel is the only state in the world not to have a defined and bounded territory, which does lead to continuing debate even within Israel. Thus the territory which falls for consideration is East Jerusalem, the Golan Heights, the West Bank and (until recently) Gaza.

At first sight, international law concerning the acquisition of territory seems deceptively clear and straightforward. The UN Charter provides:

All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

In turn this proscription of the use of force has been inferred to have the effect that where use of force does occur, contrary to Article 2(4), any consequent territorial gain would be unlawful and, while it might amount to an occupation, could not lead to a transfer of sovereignty. Furthermore, although Article 51 does allow self-defence this is for the limited purpose of repelling aggression. Arguably, then, when a state acting in self-defence occupies territory, it cannot then acquire sovereignty over that territory. And Security Council Resolution 242, passed in the aftermath of the 1967 war, stressed the inadmissibility of the acquisition of territory by war. In addition the 1970 Declaration of Principles of International Law, annexed to UN General Assembly Resolution 2625, provides that:

The territory of a state shall not be the object of acquisition by another state resulting from the threat or use of force. No territorial acquisition resulting from the threat or use of force shall be recognised as legal.

The immediate inference might therefore be that Israel could never acquire territory permanently that it had conquered in 1967. This position is certainly held by governments of the overwhelming majority of states in the UN. But it is not, as we shall see, one which goes unchallenged either explicitly (as in the case of Israel) or implicitly (as in the case of the US).

Of the now three territories which remain occupied since 1967, two East Jerusalem and the Golan Heights, are distinct in the claims Israel has made over them. Although East Jerusalem had been an integral part of the East Bank within Jordan, conquest steps were quickly taken by the Israelis with a view to ensuring that it became effectively not merely occupied territory but Israeli territory. On the very day of the conquest the then Defence Minister, Moshe Dayan, visited the Jerusalem Western Wall, proclaimed that Jerusalem had been "liberated" and stated, "We have united Jerusalem, the divided capital of Israel. We have returned to the holiest of our Holy Places, never to part from it again". West Jerusalem had been declared by the Israeli Knesset to be Israel's capital city in 1950, while in the same year Jordan had formally incorporated the West Bank (including East Jerusalem) into Jordan. Jordan's assertion of sovereignty however was qualified by the parliament, stating that it acted "without prejudicing the final settlement of Palestine's just case within the sphere of national aspirations, inter-Arab co-operation and international justice".

In 1967 the 1950 declaration of the status of West Jerusalem as Israel's capital was effectively amended to extend Israel's jurisdiction over East Jerusalem, not as an area of occupation but as an integral part of Israeli Jerusalem. Very quickly some 6,000 Palestinians were evicted from the Old City in order to create an open space before the Western Wall. When the UN General Assembly called upon Israel to "rescind all measures taken [and] to desist forthwith from taking any action which would alter the status of Jerusalem", Israel responded by confiscating significant quantities of Palestinian land in East Jerusalem (some 450 acres in the first three years of occupation).

Worse still for the Palestinians, whereas the municipal boundaries of East Jerusalem as administered before 1967 included 6.5 square kilometres, Israel added an additional 70 square kilometres to the land it purported effectively to annex. The annexation was made formal by the Israeli government on 30 July 1980 in a declaration that Jerusalem was the 'eternal undivided capital' of Israel. Condemnation of the declaration

came quickly from the UN Security Council. Within a month a Resolution was passed declaring that "all legislative and administrative measures and actions taken by Israel, the occupying power, which have altered or purport to alter the character and status of the Holy City of Jerusalem...are null and void and must be rescinded forthwith". Remarkably the Resolution was passed by 14 votes to zero with the United States abstaining.
Nevertheless the assertion of annexation was never withdrawn and from 1967 Israel has determinedly promoted the policy of settling Jewish people within its defined Jerusalem municipal borders. Much land owned by Palestinians has been confiscated and expropriated and, perhaps most significantly of all, Israel has always refused to allow the sovereignty of its defined Jerusalem to be a part of any peace negotiations.

The other territory occupied after the 1967 war which Israel has purported to annex is the Golan Heights captured from Syria. The purported annexation took place in the Israeli Knesset in December 1981. The motives for this action were twofold. The first was that the area 'annexed' had important security and strategic significance and between 1948 and 1967 had been used as a base from which to shell Israel. This was contrary to the Israel-Syria Armistice Agreement made after the 1948 conflict but the Commission which oversaw the implementation of the Agreement reported many violations by each side. Indeed Moshe Dayan himself once observed that the shelling was most often a response to Israeli provocations in the demilitarised zone.

The second impetus towards annexation concerned the water resources of the region. In an area of some 1,860 square kilometres the Golan contains some 80 springs, the head waters of the Jordan River together with tributaries and the Masada Lake. The annexation was rationalised partly in defence terms and partly (by Menachim Begin) by suggesting that the original drawers of boundaries were arbitrary in their defined borders and this should be seen as a rectification.

Here again the response of the United Nations and the international community was immediate and ineffective. Security Council Resolution 497 made all the appropriate noises. It reaffirmed the inadmissibility of the acquisition of territory by force, it stated that Israel's attempt to incorporate the Syrian Golan Heights was null and void and without international legal effect, it confirmed the continuing relevance of the Geneva Convention and resolved, in the event of non-compliance, to meet again to consider taking appropriate measures. The non-compliance led to a further meeting of the Security Council and the consideration of a draft resolution calling upon all states to take steps to

ensure compliance with Resolution 497. Significantly but not unexpectedly the proposed resolution was vetoed by the US.

In the period of occupation since 1967 the Golan Heights have also been the object of Israeli settlement and by 2004 there were 34 settlements with more than 18,000 settlers claiming a reconnection to a Jewish legacy in the region. At the time of the 1967 war, many of the Syrian inhabitants fled and have not been permitted to return. Building work is continuing and there seems to be no immediate prospect of compliance with clear international law.

Israel's actions as exemplified above are explicitly contrary to international law. The result has been that the many states that support Palestinian rights of self-determination are less persuaded of the neutrality of international law than would be the case if there were real (if formal) sovereign equality. The future of international law as a legal system rather than as an aspect of international relations depends upon its acceptance as a system in which the rule of law operates.

SELF ASSESSMENT EXERCISE

Do you think that Iran's efforts to obtain nuclear power (and possibly arms) are contrary to its obligations under the Non-Proliferation Treaty?

4.0 CONCLUSION

The lack of Security Council condemnation of Israeli actions that are clearly contrary to international law has diminished the positive role for peace and security which that body might play. Although Israel's nuclear policy has never been declared unlawful, this in itself might encourage those who feel threatened by it to take steps to counter it. Policies of territorial acquisition and annexation, while not accepted by the international community have avoided Security Council condemnation only through the use of the US veto.

5.0 SUMMARY

You should now be able to:

(i) Discuss the significance of the ability of Israel to flout international law because of its relationship with the USA;
(ii) Explain the effect of such protection upon the perception of international law by other states;
(iii) Draw some conclusions about the relationship between power, justice and international law; and

(iv) Formulate a critical position appreciating both the strengths and weaknesses of the contemporary international law regime.

6.0 TUTOR-MARKED ASSIGNMENT

What are the implications for international law of unconditional US support for Israeli settlements, nuclear policy and occupation?

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