COURSE GUIDE

INR 331
INTERNATIONAL LAW

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INTRODUCTION

INR 331 - International Law is a three credit unit course for undergraduate students of International Relations programme. The course provides an opportunity for you to understand the meaning and origin of international law, its evolution in Europe and some of the theories and conceptual debates surrounding it. At the end of this course, you should be able to understand and explain the meaning of international law, which emanates from European diplomatic practices, its use as instruments by, and for, modern states and its importance to international relations. You would also be expected to be familiar with the literature on international law and understand its role in world politics.

This course guide provides you with necessary information about the materials you will need to be familiar with for a proper understanding of the subject matter. It is designed to help you get the best of the course by enabling you to think productively about the principles underlining the issues you study and the projects you execute in the course of your study and hereafter. It also provides some guidance on the way to approach your Tutor-Marked Assignment (TMA). You will receive on-the-spot guidance from your tutorial classes, which you are advised to approach with all seriousness.

Overall, this module will fill an important niche in the study of international law as a sub-field of international relations and global politics which has been missing from the pathway of Politics and International Relations programmes offered in most departments.

WHAT YOU WILL LEARN IN THIS COURSE

Considering the proliferation of states and their changing/multiple roles in the international system and the increase in the number of non-state actors as well as their power and influence in the international system, international law will help you to gain a mastery of international relations. This course will provide an in-depth understanding of the politics of international law as documented in the literature. You will be exposed to the theoretical bases of, approaches to and principle of international laws in the way that will provide a robust understanding and the use of case studies to drive home the theoretical bases and approaches. You will then know the strength of international law, how it emerges, how much it is been respected or abused by states and the politics states play while observing or making others to observe international laws and the principles that actors observe in the international system.

COURSE AIMS

The aims of the course are to:

- explain in details the meaning and foundation of the concept 'International Law' in European diplomatic practices with a view to highlighting the meaning of other concepts in the course of study
- describe the origin, sources and history of international law in European diplomatic practices
- present an overview of the theoretical approaches and principles of international law
- discuss some international laws on the sea, outer space, environment, human rights etc.
- apply the different approaches of international law to a wide and diverse range of international legal formulation, criminal prosecution and other conflict prevention areas.

COURSE OBJECTIVES

On successful completion of the course you should be able to:

- define international law, its principles and a number of concepts therein
- state the evolution of international law and its linkage to diplomacy in Europe
- compare and contrast international law with municipal laws
- describe the roles of the states and other actors in the formulation and implementation of international laws
- apply these theoretical approaches and principles to practical world events as it happens daily.

WORKING THROUGH THIS COURSE

It is advised that you carefully work through the course studying each unit in a bid to understanding the concepts and principles in international law and how the discipline evolved and has continued to develop. Knowing the theoretical debates to this study will also be very useful in having a good grasp of the course. Your questions should be noted regularly and asked at the tutorial classes. It is recommended that students also engage new ideas generated from unfolding events around the world that International Law principles can be applied to and romance these ideas among one another and the tutorial master.

COURSE MATERIALS

1. Course Guide
2. Study Units
3. Textbooks
4. Assignment File
5. Presentation Schedule

STUDY UNITS

There are five modules in this course and each is made up of four units. In all, there are 20 units.

Module 1 Starting Point: Understanding the Concept 'International Law' within European Diplomatic Practices

Unit 1 What is International Law?
Unit 2 Europe, the Origin and Historical Development of International Law
Unit 3 Classical/Early Writers of International Law
Unit 4 The Relationship between International Law and Municipal Law

Module2 International Law: Sources, Theories, Approaches and Principles

Unit 1 Sources and Subjects of International Law
Unit 2 Theories of International Law: Positivist, Naturalist etc.
Unit 3 Principles of International Law: Principles of Self Determination, Reciprocity, Right to Protect etc.
Unit 4 Human Rights in International Law

Module 3 Some International Laws and the Environment

Unit 1 Laws of War
Unit 2 Laws of the Sea
Unit 3 Air Space and Outer Space Law
Unit 4 International Environmental Protection Laws

Module 4 The Politics of International Laws

Unit 1 Sovereignty and Recognition of States in Modern International Law
Unit 2 Jurisdiction
Unit 3 State Responsibility
Unit 4 Nationality

Module 5 International Law Related Institutions

Unit 1 The United Nations and the International Court of Justice
Unit 2 The International Criminal Court
Unit 3 The African Union
Unit 4 The Limitations and Possibilities of International Law

TEXTBOOKS AND REFERENCES

Each unit contains a list of relevant reference materials and text which can help enhance your reading and understanding of this course. It s important to note that conscious effort have been put to developing this course guide, however, it is in your interest to consult these relevant texts and many others not referenced here so as to widen your horizon and sharpen your own ability to be versatile and creative. This instruction is crucial as it will go a long way in helping you find solution to assignments and other exercises given to you.

ASSESSMENT

There are two types of assessment involved in the course: the Self-Assessment Exercise (SAE) and the Tutor-Marked Assignment (TMA) questions. The SAE are intended to prepare you on your own and assess your understanding of the course since you are not going to submit it. On the other hand, the TMA are to be carefully answered and kept in your assignment file for submission and marking. It is important you take it seriously as it accounts for 30% of your overall score in this course.

TUTOR-MARKED ASSIGNMENT

The Tutor-Marked Assessments (TMA) that you will find at the end of every unit should be answered as instructed and put in your file for submission afterwards. This account for a reasonable score and so must be done and taken seriously too. However, this Course Guide does not contain any Tutor-Marked Assignment question. The Tutor-Marked Assignment questions are provided from Unit 1 of Module 1 to Unit 4 of Module 5.

FINAL EXAMINATION AND GRADING

There will be a final examination at the end of this course. The examination duration is three hours carrying 70% of your total score and grade in this course. It is highly recommended that your Self-Assessment Examination and Tutor- Marked Assignment are taken

seriously as your examination questions will be drawn from the question treated under these assessments.

COURSE MARKING SCHEME

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

Assessment	**Marks**
Four assignments (the best four of all the assignments submitted for marking).	Four assignments, each marked out of 10%, but highest scoring three selected, thus totaling 30%
Final Examination	70% of overall course score.
Total	**100% of course score.**

COURSE OVERVIEW

Units	**Title of Work**	**Weeks Activity**	**Assignment (End of Unit)**
	Course Guide		
	Module 1		
1	What is International Law?	Week 1	Assignment 1
2	Europe, the Origins and Historical Development of International Laws	Week 2	Assignment 1
3	Classical/Early Writers of International Law	Week 3	Assignment 1
4	The Relationship between International Law and Municipal Law		Assignment 1
Module 2	**International Law: Sources, Theories, Approaches and Principles**		
1	Sources and Subjects of International Law	Week 4	Assignment 1
2	Theories of International Law: Positivist, Naturalist etc.	Week 5	Assignment 1
3	Principles of International Law: Principles of Self Determination, Reciprocity, Right to Protect etc.		Assignment 1

Units	**Title of Work**	**Weeks Activity**	**Assignment (End of Unit)**
4	Human Rights	Week 6	Assignment 1
Module 3	**Study of Some International Law**		
1	Laws of War	Week 7	Assignment 1
2	Laws of the Sea	Week 8	Assignment 1
3	Air Space and Outer Space Law	Week 9	Assignment 1
4	International Environmental Protection Laws	Week 10	Assignment 1
Module 4	**The Politics of International Laws**		
1	Sovereignty and Recognition of States in Modern International Law	Week 11	Assignment 1
2	Jurisdiction	Week 12	Assignment 1
3	State Responsibility		Assignment 1
4	Nationality	Week 13	Assignment 1
Module 5	**International Institutions**		
1	The United Nations and the International Court of Justice	Week 14	Assignment 1
2	The International Criminal Court	Week 15	Assignment 1
3	The African Union	Week 16	Assignment 1
4	The Limitations and Strengths/Possibilities of International Law		Assignment 1
	Revision	Week 17	
	Examination	Week 18	
	Total	**18 Weeks**	

WHAT YOU WILL NEED IN THE COURSE

The knowledge of Introduction to International Law and Diplomacy in Pre-colonial Africa, INR 112 taken in your first year will be of immense benefit in this course. There will also be some recommended texts at the end of each module that you are expected to purchase. Some of these texts will be available to you in libraries across the country. In addition, your computer proficiency skill will be useful to you in accessing internet materials that pertain to this course. It is crucial that you create time to study these texts diligently and religiously.

FACILITATORS/TUTORS AND TUTORIALS

The course provides 15 hours of tutorials in support of the course. You will be notified of the dates and locations 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, and watch you as you progress in the course. Send in your tutor-marked assignments promptly, and ensure you contact your tutor on any difficulty with your self-assessment exercise, tutor-marked assignment, and the grading of an assignment.

CONCLUSION

This is a theoretical as well as empirical course and so, you will get the best out of it if you can read wide, listen to as well as examine international regulations and agreement between and among states and get familiar with international reports across the globe. You will also get to know the political dimensions to international laws as individuals and states observe or ignore and enforce or weaken these laws.

SUMMARY

This Course Guide has been designed to furnish you with the information you need for a fruitful experience in the course. In the final analysis, how much you get from it depends on how much you put into it in terms of learning time, effort and planning.

I wish you all the best in INR 331 and in the entire programme!

MAIN COURSE

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MODULE 1 STARTING POINT: UNDERSTANDING THE CONCEPT 'INTERNATIONAL LAW' WITHIN EUROPEAN DIPLOMATIC PRACTICES

UNIT 1 WHAT IS INTERNATIONAL LAW?

CONTENTS

1.0 INTRODUCTION

Through its diplomatic activities, Europe as a continent has contributed immensely to the development of international law. Most of its state to state relationships prior to the First and Second World Wars have now become part and parcel of diplomacy and international law. This is more so when the wars and diplomatic activities between and among European states before the formal international legal structures were codified in various conventions and other statutory documents. Therefore, the study of international law in this study, attempts to do so bearing in mind European contributions through diplomatic practices to international law. International law is an institutional practice with a long history and presence in the international system. It is usually relied upon to state the roles and limits of actors in the international system. This underscores the fundamental importance of international law in the study of international relations. Although international relations and international law appear to be separate disciplines, their degree of separation very much depends on how participants in these disciplines define their research interests and concerns. How be it, at the level of

system-wide analysis, international law is an important resource for students of international relations. Studying international law is an important way to grasp the facts of international life, as well as the values underpinning it. It can be studied from any of the perspectives within international relations. International law has undergone a number of changes, which indeed have increased tremendously since 1945 with the emergence of international human rights law, international trade law, international criminal law, and international humanitarian law regimes; indicating the dynamics of the evolution of international law in consonance with the trajectories of international relations. Contemporary theories of international relations have to develop, part way on account of the configurations established by these networks and domains of institutional practices provided by international law.

International law comprises those structural legal relations which are intrinsic to the co-existence of all kinds of subordinate societies and persons. It confers on legal personalities, including the state societies, the capacity to act as parties in international legal relations. It determines the systematic relationship between other systemic entities. A crucial element of the international legal system is the international public law, which focuses on the inter-governmentalism of international society. International public law is that part of international law, which regulates the interaction of the subordinate public realms within the international public realm. The principal participants in the legal relations of international public law are the 'states', represented by their 'governments', that is to say, by the controllers of their respective public realms. 'States' are considered to be those societies whose internal public realm is recognised as capable of participating in inter-governmentalism. International constitutional law determines the conditions of that participation and also the participation of other persons, on the basis of legal relations to which they are made parties. The Laws of the nations are an integral part of the international legal system. It is international constitutional law which determines the participants in the international legal system (for example, making a particular society into a 'state'), and determines the conditions of their participation. The geographical and material distribution of constitutional authority among subordinate legal system cannot be finally determined by those legal systems themselves, but only by a super ordinate legal system namely international constitutional law.

2.0 OBJECTIVES

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

- define and explain the concept international law
- explain the relevance of the study of international law

- identify the different component areas of international law.

3.0 MAIN CONTENT

3.1 Definition and Meaning of International Law

International law refers to the universal system of rules and principles concerning the relations between sovereign states, and relations between states and international organisations such as the United Nations. It consists of the rules and principles of general application dealing with the conduct of States and of international organisations in their international relations with one another and with private individuals, minority groups and transnational companies. It can also be described as a system of legal relations which condition social action of state and non-state entities. International law is primarily formulated by international agreement, treaties and conventions, which create rules binding upon the signatories, and customary rules which are basically state practices recognised by the community at large as laying down patterns of conducts that have to be compiled with. The willingness to agree, accept and abide with international resolutions is crucial, particularly to the extent it will go in precluding international disputes.

Nevertheless, while it is true that international law deals with international disputes, like any other system of law, the role of international law is to regulate relations and thus help to contain and avoid disputes in the first place. The substantial part of international law, therefore, does not concern dispute resolution but dispute avoidance. It focuses on the day-to-day regulation of international relations. In the daily routine of international life, large numbers of agreements and customs are made and observed. However, the need is felt in the hectic interlay of world affairs for some kind of regulatory framework or rules network within which the game can be played, and international law fulfills that requirement. States feel this necessity because it imports an element of stability and predictability into the situation. Where countries are involved in a disagreement or a dispute, it is handy to have recourse to the rules of international law even if there are conflicting interpretations since at least there is a common frame of reference and one state will be aware of how the other state will develop its argument.

International law, like any other law is a product of social processes, which determine society's common interest and which organises the making and application of law. International law takes a customary form, in which society orders itself through its experience of self-ordering. The state of international law at any time reflects the degree of development of international society. This partly explains why international law has a threefold social function, which include the carriage of the structures and systems of society through time; the insertion of the common interest of societies into the behavior of society

members and; the establishment of a possible future for societies, in accordance with society's theories, values and purposes. By extension therefore, international law is self-constituting of all-humanity and is actualised through the law of the common interest of international society. It is that element which binds the members of the community together in their adherence to recognise values and standards. It consists of a series of rules regulating behavior, and reflecting to some extent, the ideas and preoccupations of the society within which it functions.

There is the need to emphasise that international law is different from other laws such as municipal law and conflict of laws (or private international law). This is essential given the ambiguities associated with these concepts. The former regulates relationships between natural and legal persons within a single country. The law that is applied is determined by the legislation of the same country. For example, if two Nigerians make a contract in Ghana to sell goods situated in Accra, Nigerian court would apply Ghanaian law as regards the validity of that contract. The latter regulates relationships between natural and legal persons that happen to be in more than one country, such as relationships between companies in two different countries or between parents from two different countries over the custody of children. In such cases, courts have to decide the law of which country should be applied.

It is for the above reason that international law is sometimes also called *public international law*. Public International Law (PIL) covers relations between states in all their myriad forms, from war to satellites, and regulates the operations of the many international institutions. It may be universal or general, in which case the stipulated rules bind all the states (or practically all depending upon the nature of the rule), or regional, whereby a group of states linked geographically or ideologically may recognise special rules applying only to them. The rule of international law must be distinguished from what is called international comity, which are implemented solely through courtesy and are not regarded as legally binding. Similarly, the mistake of confusing international law with international morality must be avoided. While they may meet at certain points, the former discipline is a legal one both as regards its content and its form, while the concept of international morality is a branch of ethics. This does not mean, however, that international law cannot be divorced from its values.

The above underlines the fact that the focus of international law is interstate relations and not relations between private entities and also the fact that domestic laws of any country cannot tell us what international laws are. Private entities, such as companies or individuals, however, can be *subjects* of international law. For example, international aviation

is governed by international law because there are international treaties between states about it. Similarly, individuals can be prosecuted under international criminal law or claim rights against states under international human rights law because there are interstate treaties that make these possible. International law, therefore, regulates more than just interstate relations. It also regulates other forms of relationships that states agree to regulate internationally. International law regulates the conduct of actors that make up contemporary international society. Areas of contemporary international law are numerous and include: airspace, development, bio-diversity, climate change, conduct of armed conflicts, diplomatic and consular relations, extradition, finance, fisheries, human rights, indigenous rights, intellectual property, international crimes, minority rights, natural resources, outer space, ozone layer, postal matters, peace and security, science and security, sea, trade, use of force, weapons.

SELF-ASSESSMENT EXERCISE

What do you understand by international law?

3.2 Why Study International Law?

International law can be studied to understand the history of interstate practice over the years. International law has a memory of state practice in a historical context. We can compare the amount and kinds of cooperation states had in previous centuries with the current situation by studying the international treaties in a historical perspective. International law gives us an idea about the acceptable basis of interstate cooperation and how states deal with the most pressing issues of their times through international law. A comparison, for example, between the League of Nations and the UN offer us an understanding of international affairs in terms of which ideas have been institutionalised and how effective such institutionalisation has proved. This is also very important when we talk about the reform of the international system. International law enables us to have a historically informed attitude towards what may be feasible for the future of international law.

International law can be studied in order to have an understanding of the operation of international organisations and institutions. All international organisations appeal to basic principles of international law in their operations. International organisations, in this respect, exist by virtue of international law. The workings of the United Nations (UN) General Assembly, the UN Security Council, the UN Peace-Building Commission, the UN Human Rights Council only become clear after a study of the UN Charter and relevant decisions, declarations, resolutions of these bodies. There are also an increasing number of institutional

arrangements that we cannot analyse without a clear understanding of their status and mandate in international law. Consider for example, peacekeeping or peace enforcement missions authorised by the Security Council or the refugee camps run by the UN High Commission for Refugees or the International Red Cross and Red Crescent, which is recognised to have a special mandate under international humanitarian law treaties and domestic laws.

International law can be studied to find out what the distinct international law position is on any aspect of international affairs. There are a number of views that can be offered on a particular debate in international affairs. There could be the subjective view, i.e. an account of what any stakeholder thinks is the case. There could be the normative view, i.e. an account of what would be the best position to be adopted by anyone. Finally, there could be the international law view, that is, an account of what would be the correct conduct or outcome in international law. For the student of international relations interested in understanding how international actors conduct themselves, the international law perspective is indispensable as international law aims to offer established standards of conduct. For the future policy- maker or politician, it is imperative to be able to critically appraise whether the current rules of international law are worth following or supporting or whether they are in need of fundamental revision. International law, therefore, is particularly important for international relations students who wish to criticise the actual conduct of states or would like to propose changes to existing arrangements. Given the interest of international law in the regulation of international affairs, accurate information about international treaties, the mandates and composition of international organisations, the relationship between different organisations at the international level and the way in which international institutions operate matters to international law.

International law can be studied with the purpose of understanding the power of its norms and the rise and fall of international legal frameworks. A central reason to engage with international law is to assess the extent to which the norms embedded in international law guide and control state behavior. There are a number of scenarios that may emerge in any area of international relations at any time. One scenario is that some new development may take place, for example, the possibility of exploitation of resources on the moon. It would then be necessary to assess whether there are already a number of norms that govern this area or whether different norms emerge that are able to address the concerns in a more specific way. Another scenario would be the case of states withdrawing their support from an international law rule. This would lead us to question what made the rule inadequate and what replaces it instead. Yet another scenario is the sphere of contested

norms and how a student of international relations can distinguish between a norm with weak support and a contested norm. A final systematic issue would be the circumstances under which a fundamental international legal norm may undergo change or reform. International law not only provides indicators about where the most pressing problems lie with respect to the power of norms, it also offers perspectives to international relations students about how to assess the rise and demise of international law to international relations students about how to assess the rise and demise of international law.

International law is worth studying because it is a site where we can engage with both ideas and practice about international affairs. The final answer to the *Why international law?* Question, is one about developing a certain kind of attitude to international affairs. International law contributes to how we think about international relations as a whole and the basic aims of international society. This is a different orientation of thinking, especially as opposed to thinking about the basic aims of states. More significantly, contemporary international law, with its focus stretching beyond interstate relations to areas such as the environment, human rights, trade, development, allows students of international relations to engage with questions about a fair international system and the possibility of such a system under contemporary political conditions. International law with one foot in the practice of international affairs and another one in principles and norms is a perfect location to think about the future of international relations.

SELF-ASSESSMENT EXERCISE

List and explain five importance of international law.

4.0 CONCLUSION

The international society is made up of states and non state actors. It is also made up of international organisations and other groups such as armed groups or business enterprises and individuals; whose status, powers, responsibilities and actions must however be recognised by states through international law. By implication, an essential element in the definition of international law, which provides a framework for focus, is not in its subject matter or the type of entities it regulates, but that it is law that is made by states collectively. No single state acting unilaterally can make international law; neither can a collection of corporations or individuals. International law rests with states acting together. International organisations, individuals, and corporations can all become subjects of international law and have limited powers and international personality recognised under international law. They can also help clarify what international law is by interpreting it or they can

appear in international courts. But they cannot make international law. This means that there are no predetermined limits as to what areas international law does or should regulate. This can only be determined through collective agreement amongst states.

5.0 SUMMARY

This unit has defined and explained international law. It emphatically noted that the key focus of international law is interstate relations and not relations between private entities. Private entities indeed play significant roles in the international system but only constitute part of the 'subjects' of international law. International law was also considered as a product of social processes that assumes a customary form and character in which nations develop based on their histories and experiences. The study equally made effort to clarify that although international law helps in the settlement of disputes, the principal target of international law is to regulate relations between and among states. By so doing, international law centrally focuses on the preclusion of disputes. In this unit, we equally examined some of the reasons why the study of international law is crucial. Fundamentally, international law provides the platform upon which international relations is harmoniously carried out.

6.0 TUTOR-MARKED ASSIGNMENT

Analyse the significance of European states in the framing of international law.

7.0 REFERENCES/FURTHER READING

Duplessis, I. (2008). "Soft International Labour Law: The Preferred Method of Regulation in a Decentralised Society" In: Clavet, R. et al.

Governance International Law and Corporate Social Responsibility. Geneva: International Institute for Labor Studies.

Shaw, M. N. (2008). *International Law.* London, United Kingdom: Cambridge University Press.

UNIT 2 EUROPE AND THE ORIGINS AND HISTORICAL DEVELOPMENT OF INTERNATIONAL LAW

CONTENTS

1.0 INTRODUCTION

Indeed, the ambiguity of the term ‘international law’ leads to different answers to the question of when international law ‘began’. If by ‘international law’ is meant merely the ensemble of methods or devices which give an element of predictability to international relations (as in the silent-trading illustration), then the origin may be placed virtually as far back as recorded history itself. If by ‘international law’ is meant a more or less comprehensive substantive code of conduct applying to nations, then the late classical period and Middle Ages was the time of its birth. If ‘international law’ is taken to mean a set of substantive principles applying *uniquely* to States as such, then the seventeenth century would be the starting time. If ‘international law’ is defined as the integration of the world at large into something like a single community under a rule of law, then the nineteenth century would be the earliest date (perhaps a tri. e optimistically). If, finally, ‘international law’ is understood to mean the enactments and judicial decisions of a world government, then its birth lies (if at all) somewhere in the future—and, in all likelihood, the distant future at that.

2.0 OBJECTIVES

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

- state the linkage between diplomacy in Europe and the origin(s) and historical development of international law
- identify the major ancient powers, kingdoms, and empires (especially the Greek and Roman empires) that served as the precursors of international law
- explain the main contributions of the Medieval Natural Law towards the development of international law
- demonstrate how the arguments of both the universalists and the pluralists evolved and impacted on the historical development of international law
- outline the implications of pluralism on state practice, particularly on the development of diplomatic ties among nations.

3.0 MAIN CONTENT

3.1 Origin of International Law

3.1.1 Ancient Worlds

For a vivid indication of how persons from even the most diverse cultures can relate to one another in a peaceful, predictable, and mutually beneficial fashion, it is difficult not to top Herodotus's description of 'silent trading' between the Carthaginians and an unnamed North African tribe in about the sixth century BC. When the Carthaginians arrived in the tribe's area by ship, they would unload a pile of goods from their vessels, leave them on the beach and then return to their boats and send a smoke signal. The natives would then come and inspect the goods on their own, leave a pile of gold, and retire. Then the Carthaginians would return; and, if satisfied that the gold represented a fair price, they would take it and depart. If not satisfied, they would again retire to their ships; and the natives would return to leave more gold. The process would continue until both sides were content, at which point the Carthaginians would sail away with their gold, without a word exchanged between the two groups. There was perfect honesty on both sides, as Herodotus observed. There were no problems of theft or conflict. This silent trading arrangement may have been successful in its way, but a process of interaction so inflexibly ritualistic and so narrow in subject matter could hardly suffice for political interactions between States, even in ancient times.

The major evidence in the study of the nascent international law lay in three areas of ancient Eurasia that were characterised by dense networks

of small, independent States sharing a more or less common religious and cultural value system: Mesopotamia (by, say, the fourth or third millennium BC), northern India (in the Vedic period after about 1600 BC), and classical Greece. Each of these three State systems was characterised by a combination of political fragmentation and cultural unity. This enabled a number of fairly standard practices to emerge, which helped to place inter-State relations on at least a somewhat stable and predictable footing. Three particular areas provide evidence of this development: diplomatic relations, treaty-making, and the conduct of war. A major additional contribution of the Greek city-States was the practice of arbitration of disputes, of which there came to be a very impressive body of practice.

It was not inordinately difficult for some of these practices to extend across deeper cultural lines as well. One of the earliest surviving treaty texts was between Egypt and the Hittite Empire, from the thirteenth century BC. The agreement concerned an imperial division of spheres of influence, but it also dealt with the extradition of fugitives. The problem of good faith and binding force was ensured by enlisting the gods of both nations (two thousand strong in all) to act as guardians. With the advent of the great universal religions, far more broadly-based systems of world order became possible. One outstanding example was the Islamic empire of the seventh century AD and afterwards. Significantly, the body of law on relations between States within the Muslim world (the *Dar al-Islam*, or 'House of Islam') was much richer than that regarding relations with the outside world (the *Dar al-Harb*, or 'House of war'). But even with infidel States and nationals, a number of pragmatic devices evolved to permit relations to occur in predictable ways—such as 'temporary' truces (in lieu of treaties) or safe-conducts issued to individuals (sometimes on a very large scale).

In Western history, the supreme exemplar of the multinational empire was Rome. But the Roman Empire was, in its formative period, a somewhat tentative and ramshackle affair, without an over-arching ethical or religious basis comparable to the Islamic religion in the later Arab empire. That began to change, however, when certain philosophical concepts were imported from Greece (from about the second century BC). The most important of these was the idea of a set of universal principles of justice: the belief that, amidst the welter of varying laws of different States, certain substantive rules of conduct were present in *all* human societies. This idea, first surfaced in the writings of Aristotle. But it was taken much further by the philosophers of the Stoic school, who envisaged the entire world as a single 'world city-State' (or *kosmopolis*) governed by the law of nature. Cicero, writing under Stoic influence, characterised this law of nature as being 'spread through the whole human community, unchanging and eternal'.

This concept of a universal and eternal natural law was later adopted by two other groups, the Roman lawyers and the Christian Church, and then bequeathed by them to medieval Europe. The lawyers in particular made a distinction that would have a very long life ahead of it: between a *jus naturale* (or natural law properly speaking) and a *jus gentium* (or law of peoples). The two were distinct, but at the same time so closely interconnected that the differences between them were often very easily ignored. Natural law was the broader concept. It was something like what we would now call a body of scientific laws, applicable not just to human beings but also to the whole animal kingdom as well. The *jus gentium* was the human component, or sub-category, of it. Just as the law of nature was universal in the natural world, so was the *jus gentium* universal in the *human* world.

SELF-ASSESSMENT EXERCISE

Discuss the origin and historical development of international law.

3.1.2 The Universalist Outlook: Medieval Natural Law

The European Middle Ages became the great age of natural-law thought. During this period, natural-law conceptions developed under the umbrella of the Catholic Church. But it must be remembered that the idea was not specifically Christian in its inception, but rather was a legacy of the classical Stoic and Roman legal traditions. The dominant tradition—represented outstandingly by Thomas Aquinas—was rationalist in outlook, holding the content of the natural law to be susceptible of discovery and application by means of human reason rather than of revelation.

Natural law is one of the many parts of international law that have never received the systematic study that they merit. In the present context, only a few of its most salient features can be noted. Perhaps its single most outstanding feature was its all-embracing character. It encompassed and regulated the natural and social life of the universe in all its infinite variety—from the movements of the stars in their courses to the gurgling of the four humors through the veins and arteries of the human body, from the thoughts and deeds of all of the creatures of land, sea, and air, to those of human beings and the angels in the heavens. Its structures applied universally to all cultures and civilisations, past, present, and future.

There continued to be, as in the ancient period, a distinction between the *jus natural* and the *jus gentium*, though still without any very sharp line between the two. The *jus gentium* was much the lesser of the two, being

seen largely as an application of the broader natural law to specifically human affairs. Sometimes it was regarded as comprising universal customs of purely human creation—and therefore as a sort of supplement to natural law properly speaking. These *jus gentium* rules were sometimes referred to as 'secondary' natural-law rules. It must be stressed that this original *jus gentium* did not consist entirely, or even primarily, of what would now be called rules of international law. Instead, it was a collection of laws common to all nations, affecting individuals in all walks of life, from the highest to the lowest, and dealing with all aspects of human social affairs—contract, property, crime, and the like. It was more in the nature of an ethical system of universal or trans-cultural scope, setting out general norms of conduct, as opposed to a legal code with a list of prohibitions and punishments. One aspect of this grand intellectual scheme should be particularly stressed: the fact that there was no strong tendency to think that anybody of law existed that was applicable *uniquely* to international relations as such. States, like private persons, were permitted lawfully to wage war for such purposes as the punishment of wickedness or, generally, for the enforcement of the law—but not for vainglory or conquest or oppression. This, in fact, was the conceptual kernel of natural law's most outstanding contribution to international law: the doctrine of the just war.

3.1.3 The Pluralist Outlook: The Italian City-States

Even if (as the natural-law writers maintained) the whole of human society formed a single moral and ethical community, there was no denying that the world also consisted of a welter of different polities, of a bewildering variety of sorts, and of varying degrees of independence from one another—extending all the way from the great empire of Rome itself (of Byzantium) to the patchwork of feudal jurisdictions which carpeted Western Europe.

Nowhere was the tension between the universalistic and the pluralistic tendencies of the period more evident, in practice, than in the debates over the legal status of the various 'independent' city-states of northern Italy. These obtained substantial *de facto* independence from the Holy Roman Empire in the late twelfth century, when the cities of the Lombard League defeated the forces of Emperor Frederick I. There was, however, considerable debate over what this 'independence' really meant. To this matter, two of the most prominent medieval lawyers—Bartolus of Sassoferato and his student Baldus of Ubaldis, who both wrote in the fourteenth century—turned their attention. Broadly speaking, the conclusion of Bartolus (largely echoed by Baldus) was that the cities were independent in the sense of being wholly self-governing and independent of *one another*, but that, in their relations *inter se*, they

continued to be subject to rules of the Empire. Here we see the, first glimmer, in European society, of the concept of independence of States operating in conjunction—sometimes very uneasily—with subjection to a larger set of norms governing inter-State relations. For this reason, Bartolus has been called, with some justice, the jurist theorist of international law.

SELF-ASSESSMENT EXERCISE

Describe how ancient civilisation, particularly European civilisation, contribute to the evolution of the natural law.

3.1.4 Development in State Practice

It is from the *pluralist* rather than the *universalist* side of the great medieval conceptual divide that we must look for innovations in State practice. The reason is easily seen: it is in the day-to-day relation of different States and peoples with one another that the practical problems of law are most likely to arise. Much of the State practice in the middle ages consisted of traditional ways inherited from ancient times. The area of diplomatic relations is an example, with diplomats increasingly being accorded a broad (but not absolute) degree of immunity from judicial process in host States. Beginning in about the eleventh century, European (chiefly Italian) States began to conclude bilateral treaties that spelled out various reciprocal guarantees of fair treatment. These agreements, sometimes concluded with Muslim States, granted a range of privileges to the foreign merchants based in the contracting States, such as the right to use their own law and courts when dealing with one another. The same process was at work in the sphere of maritime trading. The seafaring community made use of the laws of Oleron (which were actually a series of court decisions from the small island of that name in the Bay of Biscay), and also of a code of rules called the *Consolato del Mare,* compiled in about the thirteenth century for the maritime community of Barcelona. These codes governed the broad range of maritime activities, including the earliest rules on the rights of neutral traders in wartime.

Certain aspects of the conduct of war witnessed a high level of refinement in the middle ages—most notably the law on the ransoming of prisoners of war (a welcome step forward from the alternatives of enslavement and summary killing). ‘the law of arms’ (as it was known) was expounded in the fourteenth century, first by John of Legnano and later by a monk named Honore de Bonet (or Bouvet), whose book entitled *The Tree of Battles,* of the 1380s, became very influential. Accounts of medieval warfare, however, incline observers to harbour

grave doubts as to whether even these practical rules exerted much real influence.

With the European explorations of Africa and, particularly, the New World from the fourteenth century onward, questions of relations with non-European societies assumed an urgent importance—while, at the same time, posing an immense practical test for the universality of natural law. The Spanish conquest of the Indian kingdoms in the New World sparked especially vigorous legal and moral debates (even if only after the fact). The Dominican scholar, Francisco de Vitoria, in a series of lectures at the University of Salamanca, concluded that the Spanish conquest was justified, on the ground that the Indians had unlawfully attempted to exclude Spanish traders from their kingdoms, contrary to natural-law rules. But he also confessed that his blood froze in his veins at the thought of the terrible atrocities committed by the Spanish in the process. In 1550–51, there occurred one of the major legal confrontations of history, when two prominent, Figures—Juan Ines de Sepulveda and Barolome de las Casas—debated, at length, the lawfulness and legal bases of the Spanish conquest of the New World, under the judgeship of the theologian and philosopher Domingo de Soto. The result, alas, was inconclusive, as Soto declined to render a judgment.

In short, medieval international law was a jumble of different beliefs and practices— from the rare end conceptions of the law of nature, to the more serviceable rules by which various communities conducted their actual day-to-day business, from warfare and diplomacy, to buying and selling.

SELF-ASSESSMENT EXERCISE

In what way(s) did pluralism influence the development of state practice during the medieval era?

3.1.5 The Classical Age

In the seventeenth and eighteenth centuries, a new spirit entered into doctrinal thought on international law. This is sometimes put in terms of a secularisation of natural-law thought. That, however, is a very misleading characterisation, since natural-law itself was (and had always been) primarily secular in nature. What was new in the seventeenth century was a willingness to give a degree of formal recognition to State practice as a true source of law, rather than regarding it as merely illustrative of natural-law principles. The result was a kind of dualistic outlook, with natural law and State practice maintaining a wary, and

rather uneasy, form of co-existence—a state of affairs much in evidence to the present day.

3.1.6 Historical Development of International Law

The foundation of international law (or the law of nations) as it is understood today lie firmly in the development of Western culture and political organisations. As it were, the growth of European nations of sovereignty and the independent nation-state required an acceptable method whereby inter-state relations could be conducted in accordance with commonly accepted standards of behavior, and international law filled the gap. But although the law of nations took root and flowered with the sophistication of Renaissance Europe, the seeds of this particular hybrid plant are of far older lineage. They reach far back into history. While the modern international system can be traced back some 400 years, certain of the basic concepts of international law can be discerned in political relationships thousands of years ago. Around 2100 BC, for example, a solemn treaty was signed between the rulers of Lagash and Umma, the city-states situated in the area known to historians as Mesopotamia. It was inscribed on a stone block and concerned the established of a defined boundary to be respected by both sides under pain of alienating a number of Sumerian gods.

The next major instance known of an important, binding, international treaty is that concluded over 1000 years later between Ramses II of Egypt and the king of the Hittites for the establishment of eternal peace and brotherhood. Other points covered in that agreement signed (at Kadesh, north of Damascus) included respect for each other's territorial integrity, the termination of a state of aggression and the setting up of a form of defensive alliance. Since that date many agreements between the rival Middle Eastern powers were concluded, usually aimed at embodying in a ritual form a state of subservience between the parties or attempting to create a political alliance to contain the influence of an over-powerful empire.

After much neglect, there is now more consideration of the cultures and standards that evolved, before the birth of Christ, in the far East, in the Indian, and Chinese civilisations. Many of the Hindu rules displayed a growing sense of morality and generosity and the Chinese empire devoted much thought to harmonious relations between its constituent parts. Regulations controlling violence and the behavior of varying factions with regard to innocent civilians were introduced and ethical values instilled in the education of the ruling class. In times of Chinese dominance, a regional tributary-state system operated which fragmented somewhat in times of weakness, but this remained culturally alive for many centuries.

However, the predominant approach of ancient civilisation was geographically and culturally restricted. There was no conception of an international community of states co-existing within a defined framework. The scope for any 'international law' of states was extremely limited and all that one can point to is the existence of certain ideals, such as the sanctity of treaties, which have continued to this day as important elements in society. But the notion of a universal community with its ideal of world order was not in evidence.
The era of classical Greece, from about the sixth century BC and onwards for a couple of hundred years, has been of overwhelming significance for European thought. Its critical and rational turn of mind, its constant questioning and analysis of man and nature and its love of argument and debate were spread throughout Europe and the Mediterranean world by the Roman empire which adopted Hellenic culture wholesale, and penetrated Western consciousness with the Renaissance. However, Greek awareness was limited to her competitive city-states and colonies. Those of different origins were Barbarians not deemed worthy of association.

The value of Greece in the study of international law lies partly in the philosophical, scientific, and political analyses bequeathed to mankind and partly in the fascinating state of inter-relationship built up within the Hellenistic world. Numerous treaties linked the city-states together in a network of commercial and political associations. Rights were often granted to the citizens of the states in each other's territories and rules regarding the sanctity and protection of diplomatic envoys developed. Certain practices were essential before the declaration of war, and the horrors of war were somewhat ameliorated by the exercise, for example, of religious customs regarding sanctuaries. But no overall moral approach similar to those emerging from Jewish and Hindu thought, particularly, evolved. No sense of a world community can be traced to Greek colonies throughout the Mediterranean area.

This was left to the able administrators of the Roman Empire. The Romans had a profound respect for organisation and the law. Law knitted together their empire and constituted a vital source of reference for every inhabitant of the far-flung domain. The early Roman law (*the jus civile)* applied only to Roman citizens. It was formalistic and hard and reflected the status of a small, unsophisticated society rooted in the soil. It was totally unable to provide a relevant background for an expanding, developing nation. The need was served by the creation of the *jus gentium*. This provided simplified rules to govern the relations between foreigners, and between foreigners and citizens. The instrument through which this particular instrument evolved was the official known as the Praetor Peregrinus, whose function it was to oversee all legal relationship, including bureaucratic and commercial matters, within the

empire. The progressive rules of the *jus gentium* gradually overrode the narrow *jus civile* until the latter system ceased to exist. Thus the *jus gentium* became the common law of the Roman Empire and was deemed to be of universal application. It is this all embracing factor which so strongly distinguishes the Roman from the Greek experience, although, of course, there was no question of the acceptance of other nations on a basis of equality and the *jus gentium* remained a 'national law' for the Roman Empire.

One of the most influential of Greek concepts taken up by the Romans was the idea of Natural Law. This was formulated by the Stoic philosophers of the third century BC and their theory was that it constituted a body of rules of universal relevance. Such rules were rational and logical, and because the ideas and the precepts of the 'law of nature' were rooted in human intelligence, it followed that such rules could not be restricted to any nation or any group but were of worldwide relevance. This element of universality is basic to modern doctrines of international law and the Stoic elevation of human powers of logical deduction to the supreme pinnacle of 'discovering' the law foreshadows the rational philosophies of the West. In addition to being a fundamental concept in legal theory, Natural Law is vital to an understanding of international law, as well as being an indispensible precursor to contemporary concern with human rights.

Certain Roman philosophers incorporated those Greek ideas of Natural Laws into their own legal theories, often as a kind of ultimate justification of the *jus gentium,* which was deemed to enshrine rational principles common to all civilised nations. However, the law of nature was held to have an existence over and above that of the *jus gentium.* This led to much confusion over the exact relationship between the two ideas and different Roman lawyers came to different conclusions as to their identity and characteristics. The important factors though that need to be noted are the theories of the universality of law and the rational origins of legal rules that were founded, theoretically at least, not on superior force but on superior reason.

The classical rules of Roman law were collated in the *Corpus Juris Civilis,* a compilation of legal material in AD 534. Such a collection was to be invaluable when the darkness of the early middle ages, following the Roman collapse, began gradually to evaporate. For there was a body of developed laws readymade and awaiting transfer to an awakening Europe. The middle ages characterised by the authority of the organised church and the comprehensive structure of power that it commanded. All Europe was of one religion, and the ecclesiastical law applied to all, notwithstanding tribal or regional affiliations. For much of the period,

there were struggles between the religious authorities and the rulers of the Holy Roman Empire.

These conflicts were eventually resolved in favour of the Papacy, but the victory over secularism proved of relatively short duration. Religion and a common legacy derived from the Roman Empire were strongly unifying influences, while political and regional rivalries were not. But before a recognised system of international law could be created, social changes were essential and of particular importance during this era were the authority of the Holy Roman Empire and the supranational character of canon laws. Nevertheless, commercial and maritime developed apace. English law established the *Law Merchant*, a code of rules covering foreign traders, and this was declared to be of universal application.

Throughout Europe, mercantile courts were set up to settle disputes between tradesmen at the various fairs, and while it is not possible to state that a continent *Law Merchant* came into being, a network of common regulations and practices weaved its way across the commercial fabric of Europe and constituted an embryonic international trade law. Similarly, maritime customs began to be accepted throughout the continent. Founded upon the Rhodesian Sea Law, a Byzantine work, many of those rules were enshrined in the Rolls of Oleron in the 12th century, and other maritime textbooks, a series of common applied customs relating to the sea permeated the naval powers of the Atlantic and Mediterranean coasts.

Such commercial and maritime codes, while at this stage merely expressions of national legal systems, were amongst the forerunners of international law because they were created and nurtured against a backcloth of cross-national contacts and reflects the need for rules that would cover international situation. Such rules, growing out of the early middle ages, constituted the seeds of the international law, but before they could flourish, European thought had first to be developed by that intellectual explosion known as the Renaissance. These complex ideas changed the face of European society and ushered in the modern era of scientific, humanistic, and individualistic thought.

The rise of the nation of England, France and Spain in particular characterised the process of the creation of territorially consolidated independent units. In theory and doctrine. This led to a higher degree of interaction between sovereign entities and thus the need to regulate such activities in a generally acceptable fashion. The pursuit of political power and supremacy became overt and recognised, as Machiavelli's *The Prince* (1513) demonstrated. The city-states of Italy struggled for supremacy and the Papacy too became a secular power. From these hectic struggles emerged many of the staples of modern international

life: diplomacy, statesmanship, the theory of the balance of power and the idea of a community of state.

It is the evolution of the concept of an international community of separate, sovereign, if competing, states, that marks the beginning of what is understood by international law. The Renaissance bequeathed the prerequisites of independent, critical thought and a humanistic, secular approach to life as well as the political framework for the future. But is the latter factor which is vital to the subsequent growth of international law. The Reformation and the European religious wars that followed emphasised this, as did the growing power of the nations. In many ways these wars marked the decline of a continental system founded on the supremacy of the state. Throughout these countries the necessity was felt for a new conception of human as well as state relationships. This search was precipitated, as has been intimated, by the decline of the church and the rise of what might be termed 'free-thinking'.

SELF-ASSESSMENT EXERCISE

The foundations of international law, as it is understood today, lie firmly in the development of Western culture. What is your stance on this assertion?

4.0 CONCLUSION

A thorough review of the origin and historical development of international law shows an evolution of a social and historical variables, which have continued to shape the trend in the progression of an orderly international society. Prior to the emergence of an interstate system, the manner in which diverse nations and peoples conducted their relations shows a sense of observance of certain customs, this helped to sustain exchange. Right from period 6 BC ancient Eurasia, an era characterised as the period of nascent international law to the modern times, international law has progressed in direct proportion to the dynamics of the international system.

The legacies of great Greek and Roman Empire, with regards to the development and organisation of relations among component units in their political systems also found expression in the development of international law. However, the rise of nation-states on the global scene introduced certain structural changes in the form and nature of international law. It marked the evolution of an international community of separate, sovereign, if competing, states, with tremendous changes. By and large, the origin of international law can be traced as far back as known history.

5.0 SUMMARY

This unit located the origin of international law and also, in chronological sequence, discussed its historical development. It recorded different epochs and the significant contributions of great kingdoms and empires towards the harmonious relations of various groups and nations. International law was considered a dynamic concept, which has continued to metamorphose and to respond to the exigencies of the international system. Of course, the unique legacies of former great empires, particularly those of the Greek and Roman empires were documented. This unit equally portrayed the significance of the emergence of nation-states and the implications of such development on the framing of international law.

6.0 TUTOR-MARKED ASSIGNMENT

1. Explain the contributions of great kingdoms and empires, especially those of Greek and Roman empires towards the development of international law.
2. What were the implications of the rise of nation-states to the development of international law?

7.0 REFERENCES/FURTHER READING

Neff, S. C. (2005). *War and the Law of Nations: A General History.* Cambridge: Cambridge University Press.

Shaw, M. N. (2008). *International Law*. London, United Kingdom: Cambridge University Press.

Nijman, J. E. (2004). *The Concept of International Legal Personality: An Inquiry the History and Theory of International Law.* The Hague: TMC Asser Press.

UNIT 3 CLASSICAL/EARLY WRITERS OF INTERNATIONAL LAW

CONTENTS

1.0 INTRODUCTION

As identified earlier, international law is as old as written history. Most of the written works in international law have tended to contextualise the dominant theories of international law. From the period of the 'silent trading', to contemporary times, the contention between the advocates of law of nature (traditional natural law) and those in support of the law of nations, have preoccupied many literatures in international law. Among the early writers, whose contributions have remained outstanding include Alberico Gentili, Hugo Grotius, Thomas Hobbes, Christian Wolff's, Emmerich de Vattel, etc. Subsequent write-ups in international law have considerably grown on the strength of the works already done by these early writers; hence the importance of this section of our discussion. The opinions and documentations of Hugo Grotius and Thomas Hobbes would be given significant attention because of the depth, basis and relevance of their works in the composition of international law.

2.0. OBJECTIVES

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

- identify reasons why the works of Hugo Grotius and Thomas Hobbes are considered to have made substantial contributions to the development of international law
- enumerate the major arguments of these scholars, including those of other scholars who played a part, either in support or against the claims of the duet
- state criticisms for each of the arguments of the theorists.

3.0. MAIN CONTENT

3.1. Hugo Grotius

The writings of the Dutch scholar Hugo Grotius, whose major work *On the Law of War and Peace* was published in Paris in 1625—a work so dense and rich that one could easily spend a lifetime studying it (as a number of scholars have) is of great importance. As a natural-law writer, he was a conservative, writing squarely in the rationalist tradition. In international law specifically, he had important forerunners, most notably the Italian writer, Alberico Gentili, who produced the first truly systematic study of the law of war at the end of the sixteenth century. Where Grotius did break important new ground—and where he fully earned the renown that still attaches to his name was in his transformation of the old *jus gentium* into something importantly different, called the *law of nations.*

The distinctive feature of this law of nations was that it was regarded as something distinct from the law of *nature*, rather than as a sub-category or means of application of natural law. Furthermore, and most significantly, this law of nations was not regarded (like the old *jus gentium*) as a body of law governing human social affairs in general. Instead, it was a set rules applying specifically to one particular and distinctive category of human beings: rulers of States. For the first time in history, there was a clear conception of a systematic body of law applicable specifically to the relationship between nations.

It should be appreciated that Grotius's law of nations or 'voluntary law' as it was sometimes known, was not designed to supplant or undermine traditional natural law. Far from it, the function of this law of nations was basically an international one - filling gaps where the natural-law principles were too general, or devising workable rules as pragmatic substitutes where the application of the strict natural law was, for some reason, unfeasible. The law of nature and the law of nations, in short, were seen as partners rather than as rivals. For this reason, the earliest academic chairs in the field were commonly designated as being devoted to 'the law of nature and nations', in (presumably) happy partnership. There were some, however, who contended that the partnership between the law of nature and the law of nations was anything but a happy one. Foremost amongst these dissidents was the English writer, Thomas Hobbes. We shall explore the work of Thomas Hobbes in the next section.

SELF-ASSESSMENT EXERCISE

What is significant about Hugo Grotius' works and contribution in the development of international law?

3. 2 Thomas Hobbes

Thomas Hobbes' master work *Leviathan* was written in 1651, shortly after Grotius's death. In sharp contrast to Grotius, Hobbes denied that the pre-political condition of human society had been orderly and law-governed. He maintained, instead, that it was a chaotic, even violent, world, with self-preservation as the only true natural right. Security could only be attained by the radical step of having all of the persons in a state of nature surrender their natural rights to a sovereign power of their own creation—with the result that, henceforth, the *only* law which they would live under would be the law promulgated by that sovereign. Natural law was not rejected in its entirety, but it was radically stripped-down, to the point of being reduced, in essence to two fundamental tenets: a right of self-preservation, and a duty to perform contracts or promises. It was this stripped-down version of natural law which, in the opinion of Hobbes, constituted the sole body of law between independent nation-states.

On this thesis, the only possible way in which states could construct a stable international system was through the painstaking process of entering into agreements whenever this proved feasible. The natural-law duty to perform promises was the fundamental basis of this system, with the detailed substantive rules being provided by the various agreements that were actually concluded. These agreements could take either of two forms: written or unwritten. The written form, of course, comprised treaties, of the sort of that states had been concluding for many centuries. The unwritten form was customary law, which in this period was seen predominantly as simply a tacit or unwritten treaty.

It is hardly surprising that, amongst traditional natural lawyers (i.e., followers of Grotius), Hobbes's conclusions were unwelcome in the extreme, since they entailed the ruthless discarding of so much of the content of traditional natural law. But they were also not easily refuted. Some writers, such as Pufendorf, attempted to take at least some of Hobbes's ideas into account, while still adhering to the older idea of a detailed, substantive natural law. Others basically ignored the Hobbesian challenge as best they could and continued to expound natural law in a systematic manner. In fact, the seventeenth and eighteenth centuries were the great age of systematic jurisprudence, in which natural law was re-housed (it might be said) in grand logical edifices of a hypothetico-

deductive nature, modeled on that most magnificent of all intellectual constructions and mathematics.

The culmination of this systematic natural-law movement came in the mid-eighteenth century, at the hands of the German philosopher Christian Wolff's, who, however had been trained as a mathematician. Wolff's massive eight-volume encyclopedia of natural law contained detailed discussions of practically everything under the sun and even beyond (a discourse on the characteristics of the inhabitants of other planets)—while paying virtually no heed to state practice. It holds an honourable place on the list of the world's great unread masterpieces.

The most famous and influential writer in the Grotian tradition was the Swiss diplomat Emmerich de Vattel, whose famous exposition of T*he Law of Nations* was published in London in 1758. In a number of ways, Vattel's treatise was a popularisation of Wolff's ideas, but it was written in a very different spirit. Where Wolff had been disdainful of the voluntary law, Vattel fully embraced it, cheerfully and candidly expounding it alongside the natural law whenever appropriate. He has been accused of inconsistency—of constantly being on both sides of issues—but that charge is unfair. The fact is that he had two bodies of law to expound, which sometimes provided differing solutions to practical problems. He was generally very forthright about which law he was treating at any given time. It is we who end to misunderstand the nature of his task because the dualistic mentality of that era is so foreign to us.

The best example of the dualistic 'method' concerned war. The natural law on just wars allowed a state to resort to force in self-help to vindicate a legal right that had actually been violated (or was threatened with violation)—so that, in a given conflict, one side would be , fighting justly, and the other one not. The voluntary law, however, was not concerned over which party had the stronger legal claim to use force (i.e, it did not deal with the *jus ad bellum*, in legal terminology). Instead, it simply treated each side *as if* it had lawfully resorted to war. It then contented itself with regulating the conduct of wars, fixing rules for both parties to apply, on an even-handed basis, in their contention against one another (the *jus in bello*, in the common legal parlance). In effect, then, the natural law saw war in terms of law enforcement and as a sanction for wrongdoing. The voluntary law, in contrast, saw war more in terms of a duel.

SELF-ASSESSMENT EXERCISE

What is significant about Thomas Hobbes' works and contribution in the development of international law?

4.0 CONCLUSION

In spite of the dichotomy between the claims of Hugo Grotius, Thomas Hobbes and other early writers of international law, the basis and relevance of their perspectives have remained and will remain vital for further development of this subject matter. The controversy between the positions of the Universalists and the Pluralists still form the cornerstone of most debates in international law. Nevertheless, the important thing to note is the manner in which these divergences and convergences have, since history served as the foundation of harmonious relations between and among nations of the world.

5.0 SUMMARY

This unit has examined the contributions of some early writers of international law. It specifically looked into the works of Hugo Grotius and Thomas Hobbes who among others have left indelible marks on the growth and development of international law. Hugo Grotius' work came to the lime light for his revolutions in the field of *jus gentium*, from which emerged the concept of law of nations. His works marked a clear demarcation between the hitherto law of nature and the rise of law of nations. On the other hand, Thomas Hobbes had basically focused attention on 'correcting' what he viewed as a major misconception in relation to the impressions, *ab initio* harbored, concerning the social harmony which was thought and also taught to have existed between the law of nature and the law of nations. He insisted that socio-political systems had remained disorderly with the inclination towards self-preservation as the only true natural right. Reign of terror and survival of the fittest were the orders of the day. Security, peace and stability were later attained when the people, in a state of nature, surrendered their natural rights to a sovereign power of their own creation. They pledged to obey this sovereign, which they had agreed to handover their personal rights to. Thomas Hobbes, however, remarked that natural law was not totally abandoned, but largely stripped down. It was from this standpoint therefore, that Thomas Hobbes strongly held as forming the basis of the structures of international law – a body of law between independent nation-states. Most other writers have majorly followed the lines of argument of these two great international law experts.

6.0 TUTOR-MARKED ASSIGNMENT

1. Are there areas of similarities between the arguments of the Universalists and the Pluralists?
2. What is the core area of demarcation between the contentions of Hugo Grotius and Thomas Hobbes in relation to the universality and plurality of international law?

7.0 REFERENCES/FURTHER READING

Neff, S. C. (2005). *War and the Law of Nations: A General History.* Cambridge: Cambridge University Press.

Nijman, J. E. (2004). *The Concept of International Legal Personality: An Inquiry into the History and Theory of International Law*. The Hague: TMC Asser Press.

UNIT 4 THE RELATIONSHIP BETWEEN INTERNATIONAL LAW AND MUNICIPAL LAW

CONTENTS

1.0 INTRODUCTION

International law is concerned with the rights and duties of states in their relations with each other and with international organisations, whereas domestic (municipal or national) law, that is, the law within a state, is concerned with the rights and duties of legal persons within the State.

International law is different from other laws such as *domestic law* and *conflict of laws* (or *private international law*). The former regulates relationships between natural and legal persons within a single country and the law that is applied is determined by the legislation of that country. The latter regulates relationships between natural and legal persons that happen to be in more than one country, such as relationships between companies in two different countries or between parents from two different countries over the custody of children. In such cases, courts have to decide the law of which country should be applied. It is for this reason that international law is sometimes also called *public international law*. This is to emphasise that its focus is interstate relations.

Private entities, such as companies or individuals, however, can be *subjects* of international law. For example, international aviation is governed by international law because there are international treaties between states about it. Similarly, individuals can be prosecuted under international criminal law or claim rights against states under international human rights law because there are interstate treaties that make these possible. International law, therefore, regulates more than

just interstate relations. It also regulates other forms of relationships that states agree to regulate internationally. International law regulates the conduct of actors that make up contemporary international society.

2.0 OBJECTIVES

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

- state in clear terms, the major differences between international law and domestic law
- explain why most states chose to obey international law in spite of the absence of a coercive enforcement mechanism
- analyse the points of convergence between international law and municipal law
- discuss the impact of the wave of globalisation on both the making of international law and also on the making of municipal law.

3.0 MAIN CONTENT

3.1 Differences between International Law and Municipal Law

Fundamentally, international law differs from domestic law in two central respects:

3.1.1 The Law-Making Process

There is no supreme law-making body in international law. Treaties are negotiated between states on an *ad hoc* basis and only bind states which are parties to a treaty. The General Assembly of the United Nations is not a law-making body, and so its resolutions are not legally binding. This is not the case in municipal law. In most countries, municipal law makes provision for supreme law making body. For example, in Nigeria, the National Assembly is known as the supreme law-making body. There are methodologies for the making of laws, which must, of course, be binding on all legal and natural persons. However, we must note that the UN Security Council resolutions can take effect with respect to threats to peace, breaches of the peace, and acts of aggression. The general trend in many nations is that the parliaments are the supreme law-making bodies while courts are empowered to interpret the law and apply it to individual cases.

3.1.2 Enforcement Process

International law has no police force to oversee obedience to the international legal standards in which states agree as international standards of behavior. Similarly, there is no compulsory enforcement mechanism for the settlement of disputes. However, there are an increasing number of specialised courts, tribunals and treaty monitoring bodies as well as an International Court of Justice. National laws and courts are often an important means through which international law is implemented in practice. In some instances, the Security Council can authorise the use of coercive economic sanctions or even armed force. For example, in 1990 – 91 when Iraq invaded and occupied Kuwait the international community used armed force to enforce international law (resolutions of the Security Council). More so, the controversy over the use of armed force against Iraq highlights how difficult it can be to obtain the necessary authorisation from the Security Council under the United Nations Charter. In international law, that is the only legitimate way that collective armed force can be used. In general, international law is enforced through methods such as national implementation, diplomatic negotiation or public pressure, mediation, conciliation, arbitration (a process of resolving disputes other than by agreement), judicial settlement (including specialised tribunals).

On the other hand, municipal law generally makes provision for a national police force to oversee obedience to national legal standards to which states agree to implement. There is a compulsory enforcement mechanism for the maintenance of internal peace and order and also for the settlement of disputes. State sovereignty becomes more evident as a result of such law-making and law enforcement provisions, which characterise state power.

SELF-ASSESSMENT EXERCISE

Explain the differences between international law and municipal law.

3.1.3 Why do States Obey International Law?

Even though international law does not have the coercive enforcement processes available to domestic law, it is in the interests of most states to ensure stability and predictability in their relations with other states. By complying with their obligations, they help to ensure that other states comply with theirs. Aside from this mutual benefit, it is in every state's interests to abide by the rule of law applying to areas such as use of the sea and ocean resources and environmental protection. In a field like human rights, states may uphold international law principles, even

where there is no direct national interest, because they recognise the need to protect common and universal human values.

3.2 How do International and Domestic Law Interact?

It is important to understand how international law principles become part of domestic law, and to explain what happens if the rules conflict. The theories of **monism** and **dualism** are the two main theories that explain the relationship between international and domestic law.

Monism

In this theory, all law is part of a universal legal order and regulates the conduct of the individual state. The difference in the international sphere is that the consequences are generally attributed to the state. Since all law is part of the same legal order, international law is automatically incorporated into the domestic legal order. Some monist theorists consider that international law prevails over domestic law if they are in conflict; others, that conflicting domestic law have some operation within the domestic legal system.

Dualism

This theory holds that international law and domestic law are separate bodies of law, operating independently of each other. Under dualism, rules and principles of international law cannot operate directly in domestic law, and must be transformed or incorporated into domestic law before they can affect individual rights and obligations. The main differences between international and domestic law are thought to be the sources of law, its subjects, and subject matter. International law derives from the collective will of states, its subjects are the states themselves, and its subject matter is the relations between states. Domestic law derives from the will of the sovereign or the State, its subjects are the individuals within the state, and its subject matter is the relations of individuals with each other and with government.

Harmonisation

Neither monism nor dualism can adequately explain the relationship between international and domestic law, and alternative theories have developed which regard international law as having a harmonisation role. If there is a conflict, domestic law is applied within the domestic legal system, leaving the state responsible at the international level for any breach of its international law obligations.

SELF-ASSESSMENT EXERCISE

What is the relationship between international law and municipal law?

3.3 States and International Law in the Era of Globalisation

The State is the principal subject of international law. But the relationship between State and international law continually evolves. Each era sees the material and ideological reconstitution of the relationship between state sovereignty and international law. The changes are primarily driven by dominant social forces and powers of the time.

The era of globalisation is no exception to this rule. Globalisation is not an autonomous phenomenon. It is greatly facilitated by the actions of states, in particular dominant states. The adoption of appropriate legal regimes plays a critical role in this process. The on-going restructuring of the international legal system is not entirely dissimilar to the one that saw capitalism establish and consolidate itself in the national sphere. In that case the State shaped itself around pre-existing political structures, inserting itself among them, forcing upon them whenever it could, its authority, its currency, its taxation, justice and language of command. This was a process of both infiltration and superimposition, of conquest and accommodation. In this case what is at stake is the creation of a *unified global economic space* with appropriate international law and international institutions to go along.

These developments seek to accommodate the interest of transnational ruling elites which have come to have unprecedented influence in shaping global policies and law. They also have far reaching consequences for the peoples of the third world. First, international law is now in the process of creating and defining the democratic state. It has led to the internal structure of states coming under the scrutiny of international law and in so many ways relocated sovereign economic powers in international institutions; thereby limiting the possibilities of third world states to pursue independent self-reliant development. An emerging international law norm requires states to hold periodic and genuine elections. However, it pays scant attention to the fact that formal democracy excludes large, in particular marginal groups, from decision making power. The task of low intensity democracies, from all evidence, is to create the conditions in which transnational capital can flourish. But despite the relocation of sovereign powers in international institutions, international law does not take global democracy seriously. Global or transnational systems of representation and accountability are yet to be established.

Secondly, at the level of circulation of commodities, international law defines the conditions in which international exchange is to take place. It is a truism that markets cannot exist without norms or rules of some sort, and the ordering of market transactions takes place through layers of rules, formal and informal. In this regard, international law *inter alia* lays down rules with regard to the sales of goods, market access, government procurement, subsidies and dumping. Many of these rules are designed to protect the corporate actor in the first world from efficient production abroad even as third world markets are being pried open for its benefit.

Thirdly, international law increasingly requires the 'deterritorialisation of currencies' subjecting the idea of a "national currency" to growing pressure. The advantages of monetary sovereignty are known. It is, among other things, a possible instrument to manage macroeconomic performance of the economy; and a practical means to insulate the nation from foreign influence or constraint. The first world is today using international financial institutions, and the ongoing negotiations relating to the General Agreement on Trade in Services (GATS), to compel third world states to accept monetary arrangements, such as capital account convertibility, which are not necessarily in their interests. Thus, it will not be long before capital account convertibility becomes the norm, despite its negative consequences for third world economies. The loss of monetary sovereignty, as the East Asian crisis showed, has serious fallouts for the ordinary people of the third world. Their standards of living can substantially erode overnight.

Furthermore, human rights talk has come to have a pervasive presence in international relations and law. This development has been variously expressed: 'a new ideal has triumphed on the world stage: human rights'; 'human rights discourse has become globalised'; 'human rights could be seen as one of the most globalised political values of our time'. The fact that the omnipresence of the discourse of human rights in international law has coincided with increasing pressure on third world states to implement neo-liberal policies is no accident; the right to private property, and all that goes along with it, is central to the discourse of human rights. For the implementation of neo-liberal policies is at least one significant cause of growing internal conflicts in the third world.

Besides, labour market deregulation prescribed by international financial institutions and international monetary law has caused the deterioration of the living conditions of third world labour. Deregulation policies are an integral part of structural adjustment programs. They are based on the belief that excessive government intervention in labour markets – through such measures as public sector wage and employment policies,

minimum wage fixing, employment security rules – is a serious impediment to adjustment and should therefore be removed or relaxed. The growing competition between third world countries to bring in foreign investment has further led to easing of labour standards and a "race to the bottom." In the year 2000, nearly 93 developing countries had export processing zones (EPZs), compared with 24 in 1976. Women provide up to 80 per cent of labor requirements in EPZs and are the subject of economic and sexual exploitation. The United Nations Secretary-General himself has pointed to 'adverse labour conditions as a major factor contributing to the increased feminisation of poverty.'

In addition, the concept of jurisdiction is being rendered more complex than ever in the past. Among other things, digital capitalism threatens to make 'a hash of geopolitical boundaries' and reduce the ability of third world states to regulate transnational commerce. Where international law does not penetrate national spaces, powerful states put into effect laws that have an extraterritorial effect; third world states have little control over processes initiated without its consent in distant spaces. There is, therefore, a legitimate fear among third world states of 'a tyranny of sameness' or the 'extension transnationally of the logic of Western governmentality'. The fear is accentuated by the fact that international laws are being increasingly understood in ways that redefine the concept of jurisdiction.

Also, there has been a proliferation of international tribunals that subordinate the role of national legal systems in resolving disputes. These range from international criminal courts to international commercial arbitration to the WTO dispute settlement system (DSS). It is not the greater internationalisation of interpretation and enforcement of rules that is problematic but its differential meaning for, and impact on, third world States and peoples.

Finally, we must mention that the State is no longer the exclusive participant in the international legal process even though it remains the principal actor in law making. The globalisation process is breaking the historical unity of law and State, creating 'a multitude of decentered law-making processes in various sectors of civil society, independently of nation-states'. While this is not entirely an unwelcome development, the "paradigmatic case" of global law without the state is *lex mercatoria*. The fact is that global laws without the State are, more generally, sites of conflict and contestation, involving the renegotiation and redefinition of the boundaries between, and indeed the nature and forms, of the state, the market, and the firm.

SELF-ASSESSMENT EXERCISE

How does the spate of current globalisation facilitate the hegemony of the 'global ruling elites' to the detriment of the third world?

4.0 CONCLUSION

In spite of the discrepancies between international and municipal law, both laws have some commonalities. In many respects, international law has a tremendous influence over the municipal law; notwithstanding the fact that municipal law possesses some basic structures, which international law does not. Evidently, states find reasons to obey the provisions of international law since this position has greater benefits. States prefer to interact with one another just as international law has provided. However, there is a general understanding that the making of and provisions of international law are significantly to the interest and will of the dominant forces in the international system.

5.0 SUMMARY

We have extensively considered the relationship between international law and municipal law and noted that whereas municipal law is designed to regulate all forms of relationship between natural and legal persons within a particular country, international law is designed to regulate relationships between and among natural and legal persons that are in more than one country. This unit equally underscored the fact that although the municipal law own and have control over state apparatuses such as law-making and law enforcement mechanisms, the international law exerts a high level of influence and control over municipal law; yet without such a direct ownership and control of apparatuses. We equally underlined the fact that the spate of globalisation has, a matter of inevitability, further reduced the sovereignty of states in the making and implementation of municipal law; while favoring the interests of the hegemonic forces in international relations.

6.0 TUTOR-MARKED ASSIGNMENT

1. The wave of globalisation does not only reduce the chances of states to exercise their sovereignty but also widens the space for the dominant social, cultural, economic, and political forces to wield excessive influence and control over weaker states. Explain
2. Why do most states prefer to obey than to disobey international law?

7.0 REFERENCES/FURTHER READING

Brownlie, I. (1999). *Principles of Public International Law.* (5th ed.). Oxford: Oxford University Press.

Brownlie, I. (2008). *Principles of Public International Law.* (7th ed.). Oxford: Oxford University Press.

Charles Worth *et al.* (2006). *No Country is an Island: Australia and International Law.* Sydney: UNSW Press.

MODULE 2 INTERNATIONAL LAW: SOURCES, THEORIES, APPROACHES AND PRINCIPLES

Unit 1 Sources and Subjects of International Law
Unit 2 Theories of International Law: Positivist, Naturalist etc.
Unit 3 Principles of International Law: Principles of Self Determination, Reciprocity, Right to Protect etc.
Unit 4 Human Rights in International Law

UNIT 1 SOURCES AND SUBJECTS OF INTERNATIONAL LAW

CONTENTS

1.0 INTRODUCTION

The sources of international law are listed in the Article 38(1) of the Statute of the International Court of Justice. They include:

a) Identify various sources of international law;
b) State the methodologies towards the composition of each of the sources and their efficacy in the regulation of international relations; and
c) Recognise and identify the binding forces of these sources of international law on the subjects of international law.

2.0 OBJECTIVES

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

- identify the various sources of international law
- state the methodologies towards the composition of each of the sources and their efficacy in the regulation of international relations
- recognise the binding forces of these sources of international law on the subjects of international law.

3.0 MAIN CONTENT

3. 1 Sources of International Law

3.1.1 Treaties

International conventions are generally referred to as *treaties*. *Treaties* are written agreements between states that are governed by international law. Treaties are referred to by different names, including agreements, conventions, covenants, protocols and exchanges of notes. If states want to enter into a written agreement that is not intended to be a *treaty,* they often refer to it as a *Memorandum of Understanding* and provide that it is not governed by international law. Treaties can be bilateral, multilateral, regional and global.

The law of treaties is now set out in the 1969 Vienna Convention on the Law of Treaties which contains the basic principles of treaty law, the procedures for how treaties become binding and enter into force, the consequences of a breach of treaty, and principles for interpreting treaties. The basic principle underlying the law of treaties is *pacta sunt servanda* which means every treaty in force is binding upon the parties to it and must be performed by them in *good faith*. The other important principle is that treaties are binding only on states parties. They are not binding on third states without their consent. However, we should add that it may be possible for some or even most of the provisions of a multilateral, regional or global treaty to become binding on all states as rules of customary international law.

There are now global conventions covering most major topics of international law. They are usually *adopted* at an international conference and opened for *signature*. Treaties are sometimes referred to by the place and year of adoption, example, the 1969 Vienna Convention. If a State becomes a *signatory* to such a treaty, it is not

bound by the treaty, but it undertakes an obligation to refrain from acts which would defeat the object and purpose of the treaty.

A State expresses its *consent to be bound* by the provisions of a treaty when it deposits an instrument of *accession* or *ratification* to the *official depository* of the treaty. If a State is a signatory to an international convention it sends an *instrument of ratification*. If a State is not a signatory to an international convention but decides to become a party, it sends an *instrument of accession*. The legal effect of the two documents is the same. A treaty usually *enters into force* after a certain number of States have expressed their consent to be bound through accession or ratification. Once a State has expressed its consent to be bound and the treaty is in force, it is referred to as a *party* to the treaty.

The general rule is that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose. The preparatory work of the treaty and the circumstances of its conclusion, often called the *travaux preparatoires, are a* supplementary means of interpretation in the event of ambiguity.

3.1.2 Custom

International custom – or customary law – is evidence of a general practice accepted as law through a constant and virtually uniform usage among States over a period of time. Rules of customary international law bind all states. The state alleging the existence of a rule of customary law has the burden of proving its existence by showing a consistent and virtually uniform practice among states, including those states specially affected by the rule or having the greatest interest in the matter. For example, to examine the practice of states on military uses of outer space, one would look in particular at the practice of states that have activities in space. Most of the International Court of Justice cases also require that the states who engage in the alleged customary practice do so out of a sense of legal obligation or *opinio juris* rather than out of comity or for political reasons.

In theory, *opinio juris* is a serious obstacle to establishing a rule as custom because it is extremely difficult to find evidence of the reason why a state followed a particular practice. In practice, however, if a particular practice or usage is widespread, and there is no contrary state practice proven by the other side, the Court often finds the existence of a rule of customary law. It sometimes seems to assume that *opinio juris* was satisfied, and it sometimes fails to mention it. Therefore, it would appear that finding consistent state practice, especially among the states

with the most interest in the issue, with minimal or no state practice to the contrary, is most important.

Undisputed examples of rules of customary law are:

(a) giving foreign diplomats criminal immunity
(b) treating foreign diplomatic premises as inviolable
(c) recognising the right of innocent passage of foreign ships in the territorial sea
(d) recognising the exclusive jurisdiction of the flag state on the high seas
(e) ordering military authorities to respect the territorial boundaries of neighboring states; and
(f) protecting non-combatants such as civilians and sick or wounded soldiers during international armed conflict.

3.1.3 General Principles of Law

General principles of law recognised by civilised nations are often cited as a third source of law.
These are general principles that apply in all major legal systems. An example is the principle that persons who intentionally harm others should have to pay compensation or make reparation.
General principles of law are usually used when no treaty provision or clear rule of customary law exists.

3.1.4 Subsidiary Means for the Determination of Rules of Law

Subsidiary means are not sources of law; instead they are subsidiary means or evidence that can be used to prove the existence of a rule of custom or a general principle of law. Article 38 lists only two subsidiary means - the teaching (writings) of the most highly qualified publicists (international law scholars) and judicial decisions of both international and national tribunals if they are ruling on issues of international law. Resolutions of the UN General Assembly or resolutions adopted at major international conferences are only recommendations and are not legally binding. However, in some cases, although not specifically listed in article 38, they may be subsidiary means for determining custom. If the resolution purports to declare a set of legal principles governing a particular area, if it is worded in norm creating language, and if is adopted without any negative votes, it can be evidence of rules of custom, especially if states have in practice acted in compliance with its terms. Examples of UN General Assembly Resolutions which have been treated as strong evidence of rules of customary international law include the following:

- GAR 217A Universal Declaration of Human Rights (1948)
- *GAR 2131 Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Sovereignty (1965) [Declaration on Non-Intervention]*
- GAR 2625 Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations (1970) [Declaration on Friendly Relations]
- GAR 3314 Resolution on the Definition of Aggression

Some of these resolutions have also been treated as subsequent agreement or practice of states on how the principles and provisions of the UN Charter should be interpreted. In addition, Article 38 fails to take into account the norm-creating effect of modern global conventions. Once the international community has spent several years drafting a major international convention, states often begin in practice to refer to that convention when a problem arises which is governed by the convention - in effect treating the rules in the Convention as customary. Furthermore, if the Convention becomes universally accepted the provisions in the Convention may become very strong evidence of the rules of custom, especially if states which are not parties have also acted in conformity with the Convention. Examples of such conventions would be the 1959 Vienna Convention on Diplomatic Relations and the 1969 Vienna Convention on the Law of Treaties.

SELF-ASSESSMENT EXERCISE

Mention and explain the various sources of international law you know.

3.2 Subjects of International Law

A subject of international law (also called an international legal person) is a body or entity recognised or accepted as being capable of exercising international rights and duties. It refers to the entities or legal persons that can have rights and obligations under international law. This expression does not suggest that all entities that operate within the international arena possess rights nor have obligations that are recognisable in international law. Some of the key features of ‘subjects’ of international law are:

(i) the ability to access international tribunals to claim or act on rights conferred by international law
(ii) the ability to implement some or all of the obligations imposed by international law; and

(iii) the power to make agreements, such as treaties, binding in international law
(iv) the right to enjoy some or all of the immunities from the jurisdiction of the domestic courts of other states.

3.2.1 States

State refers to a politically organised body of people occupying a definite territory, living under a government, virtually free from external control. It is an abstraction denoting the existence of a political organisation for the regulation of the affairs of its members. The key features of a state include:

Definite territory: A state must have a definite territory which demarcates it from other states. Such territory may be large or small. Apart, from land, other elements of the state include the airspace, forest, waters, mountains, etc.

Organised government: For the continuous existence of the state, there is need to note the vitality of government; it is through the organisation of government as an institution of the state, that the will of the state is realised.

Permanence: It often said that government comes and goes whereas the state remains. This shows the strength of the durability of the state. The state has the capacity for longevity.

Population: The state comprises a given number group of men and women of common purpose and interest. However, such number is not fixed as population can still increase or decrease.

Sovereignty and Independence: A state is not subject to any external control; no matter the size of the state. A state must have the capacity to make laws and enforce the laws with every coercive power available to it; including the capacity to enter into relations with other states.

Recognition: Both within and outside, state should be identifiable. The worth of a state is sometimes determined by the extent to which it possesses political, economic, military, and technological powers. Some writers emphasise that a state must be fully independent and be recognised as a State by other states.

The international legal system is a horizontal system dominated by states which are, in principle, considered sovereign and equal. International law is predominately made and implemented by states.

Only states can have sovereignty over territory. International law must be respected by each nation to ensure world peace. The implications of the rule of law between states are far reaching, and can be fully grasped only by contrast with the conception which now rules, viz. the rule of might. Under the present system, or lack of system, when a nation's interest are supposed to conflict with those of another, the nation concerned resorts to war to secure its interest. This suggests that states, which are judges in their own disputes, can use war as an instrument of national policy and must try individually or through alliances to be stronger than every other state or group of states. But the World Wars of 1914-1918 and 1939-1945 have been slowly teaching mankind the painful lesson that a system of national security is really impossible for all at the same time, or even for a few for all time. This indeed is inherent in the logic of facts: every state or group of states cannot be stronger than every other state or group.

What then is the alternative? The answer is the rule of law among nations – international law. This involves three things:

(i) States must agree to the principle that, in matters which affect other states besides their own, they will accept the provisions of international law, as binding on themselves.
(ii) Sates must renounce the right to settle disputes by making war.
(iii) States must bind themselves to regard any act of war by any state in breach of this primary obligation as an act of war against themselves and to come to the assistance of the victim of the aggression.

States are expected to agree to the principle that, in matters which touch more than one state, they will be bound by the stipulations of international law. By extension there is the need for the rule of law between nations as there is the rule of law between individuals within each state.

States are expected to obey and comply with the principles of international law. Only states can become members of the United Nations and other international organisations. Only states have access to the International Court of Justice.

3.2.2 International Organisations

Early attempts at international organisation were half-hearted and inadequate. Besides there was no permanent organisation of a political character to bring the nations together to enable them to understand one another's point of view, settle disputes and avert wars. Largely in view

of this, the League of Nations was established in 1919 to remove these defects, promote international cooperation and achieve international peace and security.

International Organisations are established by states through international agreements. However, it must be stressed that the powers of international organisations are limited to those conferred on them in their constituent document. International organisations have a limited degree of international personality, especially vis-à-vis member states. They can enter into international agreements and their representatives have certain privileges and immunities. The constituent document may also provide that member states area legally bound to comply with decisions on particular matters. It is accepted that international organisations are subjects of international law where they:

Are permanent members of association of states, with lawful objects;
Have distinct legal powers and purposes from the member states; and
Can exercise powers internationally and not only within a domestic system.

3.2.3 Nationality of Individuals, Companies, Etc.

The freedom of the individual is considerable affected not only by the form of government but also by the relations of his state with other states. Individual are generally not regarded as legal persons under international law. Their link to State is through the concept of nationality, which may or may not require citizenship. Nationality is the status of being treated as a national of a state for particular purposes. Each state has wide discretion to determine who is a *national*. The most common methods of acquiring nationality at birth are through one or both parents and/or by the place of birth. Nationality can also be acquired by adoption and naturalisation.

Companies, ships, aircraft and space craft are usually considered as having the nationality of the state in whose territory they are registered. This is important because in many circumstances states may have international obligations to regulate the conduct of their nationals, especially if they are carrying out act activities outside their territory. Under the principle of *nationality of claims*, if a national of State A is injured by State B through internationally unlawful conduct, State A may make a claim against State B on behalf of its injured national. This is known as the doctrine of *diplomatic protection*.

Therefore, only international legal persons, as recognised subjects of international law, possess and can exercise international rights, as well

as perform international obligations. Among the subjects of international law discussed, states are conspicuously the dominant. This is chiefly anchored on the unique features of the state, which distinguishes it from other subjects of international law. Sequel to this, international law is predominately made and implemented by states. Only states can have sovereignty over territory. This should not be misinterpreted to mean that the other subjects of international law are insignificant. Far from this, other international legal entities such as international organisations equally wield great powers.

SELF-ASSESSMENT EXERCISE

Why states are accorded special recognition among other subjects of international law?

4.0 CONCLUSION

We had earlier recorded that unlike certain provisions of the municipal law in which state instruments such as the apparatuses for law making and law enforcement are available for the effective control of the state, international law does not possess these attributes. How be it, international law is not left without standards of operation. The sources available for the making of international law provide a high sense of direction for the harmonisation of rules and regulations (for both states and non-state actors) in order to achieve relative peace and order in the international scene. Thus, the absence of instruments of coercion upon the various subjects of international law is not to be interpreted as open space for chaos and anarchy. 3

5.0 SUMMARY

We have been able to mention and explain the various sources available for the construction of international law. These sources of international law are recognised in various instruments and documentations of the United Nations. They include international convention (treaties), international customs (customary laws), general principles of law, subsidiaries means for the determination of rules of law. These sources of international law help to guide and mold the growth and development of international law. In spite of lack of formal recognition of ‘general principles of law’ as a source of international law, it has played an important role especially to the extent it provides a supplementary support for the use of treaties as a source of international law.

6.0 TUTOR-MARKED ASSIGNMENT

1. Compare and contrast the various sources of international law
2. Resolutions of the UN General Assembly (UNGA) or resolutions adopted at major international conferences are only recommendations and are not legally binding. Does this statement utterly deny any relevance of the resolutions of UNGA in the framing of international law? Clarify your position.

7.0 REFERENCES/FURTHER READING

Brownlie, I. (2008). *Principles of Public International Law*. (7th ed.). Oxford: University Press. Oxford.

Shaw, M. N. (2008). *International Law*. London, United Kingdom: Cambridge University Press.

UNIT 2 THEORIES OF INTERNATIONAL LAW: POSITIVIST, HISTORICAL, NATURALIST

CONTENTS

1.0 INTRODUCTION

One explanation for the remarkable lack of attention by international lawyers to the nineteenth century lies perhaps in the pervasive dominance of doctrinaire positivism over international legal writing generally. There was much, admittedly, that was unattractive about nineteenth-century positivism, particularly to modern eyes—its doctrinaire quality, its narrow horizons, its lack of high ideals, the aura of superficiality raised to the pitch of dogma, its narrowly technocratic character, its ready subservience to power. But it would be wrong to judge it on these points alone because its solid achievements were many. If it lacked the breadth and idealism of natural-law thought, it also discarded the vagueness and unreality that often characterised natural-law thought at its worst. In many ways, positivism was a breath (or even a blast) of fresh air, countering the speculative excesses of natural-law thought. Even if positivism sometimes went too far in the opposite direction, we should nonetheless appreciate the valuable services that it performed in its time.

The positivist era was also the period in which we first saw the international community 'legislating' by way of multilateral treaties, for the most part in areas relating to armed conflict. The first major example of this was the Declaration of Paris of 1856. It restricted the capture of private property at sea, by providing that 'free ships make free goods' (that is, that enemy private property could not be captured on a neutral ship). It also announced the abolition of privatising. Within five years, it attracted over 40 ratifications. In 1868, the Declaration of St Petersburg

contained a ban on exploding bullets. More importantly, it denounced total-war practices, by stating that the *only* permissible objective of war is the defeat of the enemy's armed forces. Alongside the law of war— and in some ways in close partnership to it— was the full flowering of the law of neutrality, which, for the first time, emerged in the full light of juridical respectability as a sort of counterpart to the unrestricted right of states to resort to war on purely political grounds.

There was 'legislation' in other fields too. On the humanitarian front, the period witnessed a concerted effort by the nations of the world to put an end to slave trading. The culmination of this effort occurred in 1890, when the General Act of the Brussels Conference established an International Maritime Office (at Zanzibar) to act against slave trading. In the less-than-humanitarian sphere of imperialism, the major powers established, by multilateral treaty, the 'rules of the game' for the imperial partitioning of Africa. This took place at the Berlin Conference of 1884–85. (Contrary to the belief of some, that conference did not actually allocate any territories; it established the criteria by which the powers would recognise one another's claims).

2.0 OBJECTIVES

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

- explain the major theories of international law – the positivist, the naturalist and the historical
- identify the major differences between and among these theories
- examine the relevance of these theories in the study and understanding of international law.

3.0 MAIN CONTENT

3.1 Positivism

According to the positivists, the binding force of international law is rooted in the consent of sovereigns themselves, either through a laborious search of state practice or a catalog of explicit agreements. John Austin's famous 1832 suggestion in *The Province of Jurisprudence Determined* states that: 'the law obtaining between nations is not positive law: for every positive law is set by a given sovereign'. The duties which it imposes are enforced by moral sanctions: by fear on the part of nations, or by fear on the part of sovereigns, of provoking general hostility, and incurring its probable evils, in case they shall violate maxims generally received and respected. The early positivists' school emphasised the importance of custom and treaties as sources of

international law. Early positivist scholar like Alberico Gentili used historical examples to posit that positive law (*jus voluntarium*) was determined by general consent. At the time, Cornelius van Bynkershoek reiterated this idea but added that the bases of international law were customs and treaties commonly consented to by various states.

In one sense, remembering a late 19th century triumph of positivism puts international law on the road to pragmatism, for positivism orients us to the actual practice of states, and seems less likely to degenerate into wishful thinking or moralising about what the law should be. The 20th century tradition of realism, sociological jurisprudence, and international relations theory continue this tendency. Positivism lays the ground for pragmatism, extinguishing for a century international law's flirtation with religion and ideology. It is a paradoxical inheritance. International law rids itself of faith only by enshrining the state, making the task of international public order both more realistic and more difficult. To the question, 'How can there be order among sovereigns', there cannot be the answer, 'Well, maybe it's not possible.' To do so would be to deny the facts, since there appear to be lots of rules and legal institutions. More importantly, it would betray the internationalist project. In this sense, it was by eliminating religion that international lawyers became priests.

A group of ideas arise together: the philosophical priority of the state, the identification and rejection of naturalism, the challenge to the possibility of international public order, and a polemical tradition of international legal philosophy which could evolve only by rejecting extreme positivism. In this sense, what is now remembered as 19th century positivism sets in motion a practice of affirming its premises and rejecting its conclusion.

There have been broad traditions of response. The first approach responds theoretically, revitalising either the positivist or the naturalist tradition against skepticism. Beginning with the notion of 'consent' and an analogy to private law, and proceeding through the range of 20th centuries of international law has been variously affirmed and explained by modifying the image of absolute state sovereigns floating in a legal vacuum. A second tradition of response is associated with the 20th century tradition of international legal pragmatism and most characteristic of international law after 2nd WW. It rejects the theoretical tradition of both positivism and naturalism as irreconcilable extremes between which a middle must be built, and more importantly, as sterile intellectual projects, able to speak only to one another and unhelpful in strengthening the actual or real international legal order. In an unfortunate terminological borrowing from political science,

positivism offers no plausible 'positive' account of state practice. International legal theorists now customarily present philosophical inquiry into the possibility of international legal order among sovereigns as a dead end and as the preoccupation of an earlier, philosophical age. Consequently, there are indications that sovereignty is, in any event, no longer was what it once thought to be.

Twentieth century international legal theory less accepts the positivist answer to the question of how law might be possible among sovereigns. At the same time, the question of how international law binds, how order is possible among sovereigns, how international law distinguishes itself from politics, and how international norms are enforced in the absence of a supra-national, remained the central preoccupations of the field throughout the twentieth century.

Indeed, the 19th cent taught us the futility of philosophy, and the urgent necessity of getting beyond speculation if war is to be averted. This 19th century memory inaugurated a disciplinary anti-intellectualism, a repeated practice of demonstrating the unsatisfactory nature of both naturalist and positivist answers to the question of law's force in a world of sovereigns, and of calls for a turn to practical effort of one sort or another to expand international law in the name of peace and security. The practical project might be institution building, codification, citizen initiative or litigation, but it would not be a project of theory or philosophy.

SELF-ASSESSMENT EXERCISE

Explain the subject matter 'Positivism'.

3.1.1 Two Types of Legal Positivism in International Law

International legal positivism has had a multitude of variants since the turn of the twentieth century, but each variant contains the core distinction between moral and legal obligations. But here, we will discuss two possible variants that focus on the relationship between international law and international relations.

The first variant expressly or implicitly links legal positivism with realism. Early international legal positivists had normative reasons for maintaining the distinction between law and morality. Lassa Oppenheim, for example, asserted that a state-centric view of international politics that lauded balance of power politics provided conditions where international law could develop and promote peace and justice. The emphasis on balance of power politics linked this view

of legal positivism with a realist conception of international relations, and became a popular view among international lawyers. By the turn of the twentieth century, the majority of international lawyers counted themselves as positivists. Moreover, Oppenheim's work was influential among such international relations classical realists like E.H. Carr and Hans Morgenthau. Both camps viewed the study of the field as a science, with a careful investigator being able to determine what is or is not international law based on an analysis of the relevant international legal sources without imputing any moral judgments about what the law ought to be.

There is no necessary link between positivism and realism. The main tenets of structural realism can be stated succinctly. For structural realists, the primary unit of analysis in international relations is a rational and unitary state, with a focus on the power of the state in relation to other states in an anarchic international system. From these assumptions, we can see both the overlap between structural realism and one strong form of legal positivism and, similarly, realism's aversion to international law. With respect to structural realism's relationship with international law, some famous realists dismiss the concept altogether. Legal positivism has a narrower conception of what constitutes international law than the mainstream position in IHRL. Similarly, realism tends to dismiss international law more than its two rival international relations theories (liberal institutionalism and constructivism).

The second variant, offered here, links legal positivism with constructivism. Constructivist theory in international relations exploded onto the scene in 1992 with Alexander Wendt's *Anarchy is what states make of it: The Social Construction of Power Politics*. A positivist approach to international law grounded in constructivism can be analogised to the following situation. Near the outset of *Stalag*, William Holden's character, Sefton, bets his fellow POWs that two prisoners who were trying to escape would get caught by the Germans running the camp. The two potential escapees are shot during the attempt, and Sefton wins several packs of cigarettes. Sefton is not making any normative statement about whether the two POWs *should* have been able to escape. Rather, he placed his wager based upon his perception of the situation as it *actually existed*. Further, Sefton as a constructopositivist might even plan future escapes by other inmates—or at least recognise the validity of other inmates making such plans. What separates the construct-positivist from the realist-positivist is that the construct-positivist has no steadfast allegiance to an international system based on balance of power politics with the corresponding weak notion of the independent causal function that international law can

serve. The construct-positivist views what constitutes international law as binary—either a norm does or does not fall under the international law umbrella. At the same time, the construct-positivist recognises that both the constitutive and regulative rules of how international law is produced can change, but until this change occurs the crystallising norm should not be considered part of international law until the norm satisfies the current threshold requirements to gain status as international law.

This more nuanced view of positivism in international law has not yet been accepted among most international legal commentators. Allen Buchanan makes the point that "because positivism is a view about what the law is, not about what it should be, it is entirely neutral as to whether moral reasoning can determine how the law ought to be." This statement encapsulates the difference between construct-positivists and realist-positivists. Simply stated, one can distinguish between what is and is not international law and still engage in theorising about what international law should be. Further, as I argue, the construct-positivist can be in favor of expanding international law to recognise more moral norms. This difference saves construct-positivism from Buchanan's observation that "legal positivists make a fundamental mistake when they move from arguments against naturalism (as a position on what the law is) to the conclusion that moral theories of international law ought to be rejected." While the realist-positivist might make this mistake, the construct-positivist would not. The construct-positivist approach to international law allows for all sorts of moral theorising about what a legal rule should be, and thus provides a more robust view of IHRL.

SELF-ASSESSMENT EXERCISE

Briefly discuss the nexus between legal positivism with realism.

3.2 The Historical School

At the core of the historical school's philosophy was the thesis that each culture, or cultural unit, or nation possessed a distinctive group consciousness or ethos, which marked it off from other cultures or nations. Each of these cultural units, as a consequence, could only really be understood in its own terms. The historical school therefore rejected the Universalist outlook of natural law. This opposition to universal natural law was one of the most important features that the historical school shared with the positivists.

In international law, the impact of the historical school is evident in three principal areas. The first was with regard to customary law, where

its distinctive contribution was the insistence that this law was not a matter merely of consistent practice, however widespread or venerable it might be. A rule of customary law required, in addition, a mental element—a kind of group consciousness, or collective decision on the part of the actors to enact that practice into a rule of law (albeit an unwritten one). In fact, this collective mental element was seen as the most important component of custom, with material practice relegated to a clear second place. Customary law was therefore seen, on this view, as a kind of informal legislation rather than as an unwritten treaty (as the positivists tended to hold). is thesis marked the origin of the modern concept of *opinio juris* as a key component of customary international law.

The second major contribution of the historical school to international law was its theory that the fundamental unit of social and historical existence was not—or not quite—the State, as it was for the positivists, but rather the *nation*-state. In this vision, the State, when properly constituted, comprised the organisation of a particular culture into a political unit. It was but a short step from this thesis to the proposition that a 'people' (i.e, a cultural collectivity or nation or, in the German term, *Volk*) had a moral right to organise itself politically as a state. And it was no large step from there to the assertion that such a collectivity possesses a *legal* right so to organise itself. If 'nationality school' (as it was sometimes called) had the most impact in Italy, where its leading spokesman was Pasquale Mancini, who was a professor at the University of Turin (as well as an office-holder in the government of unified Italy). Although the nationality thesis did not attract significant support amongst international lawyers generally at the time, it did prefigure the later law of self-determination of peoples.

The third area where the influence of the historical school was felt was regarding imperialism— a subject that has attracted strangely little attention from international lawyers. It need only be mentioned here that the historical school inherited from the eighteenth century a fascination with 'stages' of history. Under the impact of nineteenth-century anthropological thought, there came to be wide agreement on a three-fold categorisation of states: as civilised, barbarian, and savage. The Scottish lawyer James Lorimer was the most prominent international-law writer in this category. The implication was all too clear that there was a kind of entitlement—moral and historical, if not strictly legal—for the 'civilised' countries to take their 'savage' counterparts in hand and to bring them at least into contact with the blessings of modern scientific life.

SELF-ASSESSMENT EXERCISE

What are the impacts of the historical school of thought on the development of international law?

3.3 Naturalism

The dominance of positivism, with its stern and forthright opposition to the very concept of natural law, brought that venerable body of thought to its lowest ebb so far in the history of international law. It should not be thought, though, that the natural-law ideals of old died out altogether. That was far from the case. If they lost the central position that they had previously held, they nevertheless maintained their hold in many ways that were not altogether obvious. One reason that natural-law ideas were not always recognisable was that, to some extent, they were re-clothed into a materialistic and scientific garb. This was particularly so with the new science of liberal political economy. Underlying this new science was a belief, directly imported from traditional natural-law thought, in a natural harmony of interests amongst human beings across the globe. This was first enunciated in a systematic way by the French physician Francois Quesnay in the 1750s, and then developed into its modern form in Britain by Adam Smith, David Ricardo, and John Stuart Mill. The centre-piece of their programme was support for free trade—and, more generally, for a breaking down of barriers between individual economic actors the world over. They were, in short, the pioneers of what came to called ‘globalisation’

In plain terms, Naturalism refers to theories of international law which locate the binding force of international norms in some sources outside sovereignty, which precedes the sovereign, or can be implied from the nature of a community of sovereigns. The natural law approach argues that international norms should be based on axiomatic truths. The source might be reason, or religion, or moral values, or it might be the traditions of the community in which sovereigns find themselves. In 1625 Hugo Grotius had argued that nations as well as persons ought to be governed by universal principle based on morality and divine justice while the relations among polities ought to be governed by the law of peoples, the *jus gentium*, established by the consent of the community of nations on the basis of the principle of *pacta sunt servanda*, that is, on the basis of the observance of commitments.

If natural law stands for nothing else, it stands for the proposition that there is some objective standard or “higher law” against which positive (man-made) law can and should be measured. H. L. A. Hart characterised the classical theory of natural law as the view “that there are certain principles of human conduct, awaiting discovery by human

reason, with which man-made law must conform if it is to be valid".'" The principal concern of the natural law theorist is, then, with the substantive content of law.

In the traditional story, 19th century international legal theorists gradually realised that these various ideas could not explain the source of law's binding force in a way consistent with the absolute nature of sovereignty and the equality of states, because all these implied some order as a means of enforcement beyond the sovereign which simply was not available in a world of sovereign state. In more traditional areas of international law, the legacy of natural law is most readily discerned in the area of armed conflict—specifically concerning what came to be called measures short of war. It has been observed that positivism basically accepted the outbreak of war as an unavoidable fact of international life, and contented itself with regulating the conduct of hostilities. But that approach applied to war properly speaking. Regarding lesser measures of coercion, the legacy of just-war thought lingered on. This was the thesis that a resort to armed self-help was permissible to obtain respect for legal rights, if peaceful means proved unavailing. The most important of these forcible self-help measures were armed reprisals. These were far from an unusual occurrence. Indeed, the nineteenth century was a golden age (if that is the right word for it) of armed reprisals. The most common cause of such actions was injury to nationals that had gone underdressed by the target country. A famous illustration was Britain's action against Greece in the 'Don Paci, co' incident of 1850, in which Britain blockaded Greek ports to compel that country to pay compensation for injury inflicted by mob action against a British subject. One of the largest scale operations was a blockade of Venezuelan ports in 1902–03 by a coalition of major European powers, to induce that State to pay various debts that were owing to foreign nationals. Reprisals sometimes also included occupations of territory and even bombardments of civilian areas.

It could hardly escape the attention of observers that reprisal actions were, for obvious practical reasons, a prerogative of the major powers—and that they accordingly gave rise to some strong feelings of resentment in the developing world. In the wake of the Venezuelan incident of 1902–03, the Foreign Minister of Argentina, Luis Drago, proposed an outright ban against the use of force in cases of contract debts, as was not forthcoming. But a milder restriction was agreed, in the so-called Porter Convention of 1907 (named for the American diplomat who was its chief sponsor), adopted by the Second Hague Peace Conference. This convention merely required certain procedural steps to be taken before armed reprisals could be resorted to in debt-default cases.

It is one of history's great ironies that the natural-law tradition, which had once been so grand an expression of idealism and world brotherhood, should come to such an ignominiously blood-spattered pass. A philosophy that had once insisted so strongly on the protection of the weak against the strong was now used as a weapon of the strong against the weak. It is, of course, unfair to condemn a whole system of justice on the basis of abuses. But the abuses were many, and the power relations too naked and too ugly for the tastes of many from the developing world. Along with imperialism, forcible self-help actions left a long-lasting stain on relations between the developed and the developing worlds.

SELF-ASSESSMENT EXERCISE

Explain the subject matter 'Naturalism'.

4.0 CONCLUSION

Generally, international law remembers the 19th century, along with the 18th and 17th, as a period of the philosophical controversies between naturalism and positivism in which positivism later became dominant. These terms, 'naturalism' and 'positivism', take on somewhat special meanings in theory of international law. They suggest alternative answers to what became international law's central riddle: How can there be a law among sovereigns when sovereignty, by definition admits no higher authority? Although positivism was by far the dominant trend in nineteenth century international law, it did fall short of having a complete monopoly. Two other schools of thought in particular should be noted. The first was a new arrival: the historical school, which was intimately connected with the romantic movement of the period. Its impact in international law has received, as yet, hardly any serious attention. The other alternative to positivism was natural law, severely reduced in prestige to be sure, but surviving rather better than has generally been appreciated. Each of these theories has its own relevance; notwithstanding the relative dominance of one over another at different epochs (for example, the dominance of the positivist theorists, particularly during the nineteenth centuries over the naturalists).

5.0 SUMMARY

The unit has extensively discussed the three known theories of international law – positivist, naturalist and the historical. The principal arguments innate in each of these theories were elucidated. For the Positivists, the binding force of international law is rooted in the consent of sovereigns themselves. Proponents of the positivist theory

emphasised the importance of custom and treaties as sources of international law. Furthermore, two variants of legal positivism were espoused in a bid to shed light on the main distinction between moral and legal obligations.

The first variant expressly or implicitly linked legal positivism with realism, while the second variant linked legal positivism with constructivism. To a large extent, the historical school has much linkage to the positivist school, particularly in relation to their forthright disapproval of the universal natural law. According to them, each culture or cultural entity possesses a unique group consciousness and a separate dialectic. Cultural relativism is perceived as an important tool in understanding each cultural milieu and also in guiding people's cultures against subtle imperialism.

For the Naturalists, the binding force of international norms could be located in some sources outside the sovereigns. They argue that international norms should be based on axiomatic truths; arising mainly from strong reasoning, religion, or moral values. In fact, the focus of the naturalists is the maximisation of the substantive content of law, which is replete with rationality.

6.0 TUTOR-MARKED ASSIGNMENT

1. The positivist and the historical schools of thought share certain assertions.
2. Identify and explain this commonality.
3. Highlight and discuss the major contentions of the positivist, the naturalist and the historical theorists.

7.0 REFERENCES/FURTHER READING

Barnett, R. E. (1978). "Toward A Theory of Legal Naturalism". *Journal of Libertarian Studies*, Vol. 2, No. 2, pp. 97-107

D'Entreves, P. (1970). *Natural Law.* (2nd ed.). London: Hutchins&Co.

Hart, H. L. A. (1961). *The Concept of Law.* Oxford: Oxford University Press.

Kennedy, K. (1996). "International Law and the 19th Century: History of an Illusion" *Nordic Journal of International Law*, 65, pp.385-420.

Shaw, M. N. (2008). *International Law.* London, United Kingdom: Cambridge University Press.

UNIT 3 PRINCIPLES OF INTERNATIONAL LAW

CONTENTS

1.0 INTRODUCTION

The general principles governing friendly relations between and among state are issues of international law and have been set out in UN General Assembly Resolution 2625, which declares that the progressive development and codification of certain principles would secure more effective application within the international community and ultimately promote the realisation of the purposes of the United Nations. States have great expectations as the major actors in the international system. So much has been done by the international society to ensure that the relations of states in the international system are carried out on predictable templates that would guarantee fair treatment for all participants in the system.

The Final Act of the Conference on Security and Cooperation in Europe, adopted at Helsinki on 1 August 1975, states that “all the principles set forth in the Declaration of Principles Guiding Relations between Participating States, that is, Sovereign equality, respect for the rights inherent in sovereignty; refraining from the threat or use of force; inviolability of frontiers; territorial integrity of states; peaceful settlement of disputes; non-intervention in internal affairs; respect for human rights and fundamental freedoms, including the freedom of

thought, conscience, religion or belief; equal rights and self-determination of peoples; cooperation among states; and fulfillment in good faith of obligations under international law, are of primary significance and, accordingly, they will be equally and unreservedly applied, each of them being interpreted taking into account the others." These are important considerations and so in the bid to pursue the task of ensuring a world in which nations have equal chances of participating in charting the course of its growth and development, certain principles of international law are of essence. These principles to a reasonable extent crisscross and facilitate each other with a view to achieving the overall objective for their formulation.

2.0 OBJECTIVES

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

- explain the main principles of international law
- identify the synergy between and among these principles
- discuss the role of International Organisations, especially the United Nations in facilitating the promotion of these principles of international law.

3.0 MAIN CONTENT

3.1 Principle of Self Determination

The Charter of the United Nations expressly establishes the right to self-determination in Article 1, paragraph 2 (Chapter I: "Purposes and Principles") and in Article 55 (Chapter IX: "International Economic and Social Co-operation"). Article 1, paragraph 2, states that one of the purposes of the United Nations is to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace. However, it should be noted that ab initio, the words "based on respect for the principle of equal rights and self-determination of peoples" did not appear in the Dumbarton Oaks Proposals. Their addition was proposed at the San Francisco Conference in the amendments submitted by the four sponsoring Governments. At the 6th meeting of Committee 1 of Commission I of the San Francisco Conference, held on 15 May 1945, emphasis were put on the right to self-determination in Chapter I of the Charter and also on the need to ensure that the principle corresponded closely to the will and desires of peoples everywhere; only insofar as it implied the right of self-government of people and not the right of secession.

The Committee had before it an amendment proposing the replacement of the words “based on respect for the principle of equal rights and self-determination of people “- by the words “to strengthen international order on the basis of respect for the essential rights and equality of the states, and of the peoples' right of self-determination”. The debates were centrally on the use of certain words which were thought to have ambiguous representations. For example, when one speaks generally of the equality of states; surely one could use the word “peoples” as an equivalent for the word “states”, but in the expression “the people’s” right of self-determination” the word “people” means the national group which do not identify themselves with the population of a state.

The debates of the Sub-Committee of Committee 1 of Commission I included an exchange of views on the meaning of the principle of self-determination of people. This discussion was summarised as follows in the report of the Rapporteur of this Sub-Committee (I/l/A) to Committee I/I (1 June 1945): It was understood: That the principles of self-determination constitute an essential norm and that the respect of this norm is a basis for the development of friendly relations, and is in effect, one of the appropriate measures to strengthen universal peace. It was understood likewise that the principle in question, as a provision of the Charter, should be considered in function of other provisions. An essential element of this principle is the free and genuine expression of the will of the people. It also extends as a general basic conception to a possible amalgamation of nationalities if they so freely choose.

Many controversies cropped up as issues unfolded. For example, the view was expressed in the Co-ordination Committee of the Conference that the simultaneous use of the words “nations” and “peoples” seemed to introduce the right to secession and that it would have been more appropriate to use only the word “people”. It was also held, as an argument against the use of the word “nations”, that international relations were established between states, not between nations. On the other hand, it was maintained that the word “nations” would be preferable, since it would cover certain members of the United Nations which had not yet attained statehood.

With a view to the creation of conditions of stability and wellbeing which are necessary for peaceful and friendly relations among nations based on respect for the principle of self-determination of people, the principle of the right to self-determination is established indirectly in Article 76 of the Charter (Chapter XII: “International Trusteeship System”), paragraph b of which provides that one of the objectives of the trusteeship system is to promote the progressive development of the inhabitants of the Trust Territories towards “self-government or

independence", taking into account, *inter alia,* "the freely expressed wishes of the peoples concerned". The same principle appears in Article 73 (Chapter XI: "Declaration regarding Non-Self-Governing Territories", where it is affirmed that: members of the United Nations which assume responsibilities for the administration of territories whose people 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 develop self-government, to take due account of the political aspirations of the people and to assist them in the progressive development of their free political institutions.

The view was expressed that an article on the right to self-determination should be included in the covenant because:

(a) that right was the source of or an essential prerequisite for other human rights, since there could be no genuine exercise of individual rights without the realisation of the right to self-determination;
(b) in the drafting of the covenant, the principles and purposes of the Charter, which included the principle of equal rights and self-determination of people, should be applied and protected;
(c) many provisions of the Universal Declaration of Human Rights had a direct bearing on the right to self-determination; and
(d) the covenant embodied that right, it would be incomplete and inoperative. It was also said that the right to self-determination was the right of a group of individuals in association; it was certainly the prerogative of a community, but the community itself consisted of individuals and any encroachment on its collective right would be tantamount to a breach of their fundamental freedoms.

At the sixth session of the General Assembly, the Third Committee continued to consider whether an article on the right to self-determination should be included in the international covenant on human rights. During the debate on this point, many delegations proposed that the General Assembly should agree to include an article on the right to self-determination in the draft international covenant on human rights. Further arguments were advanced in favor of its inclusion in the covenant and views were expressed on certain aspects of the right. It was maintained that the right to self-determination stood above all other rights and formed the corner-stone of the whole edifice of human rights. It was impossible for an enslaved people to enjoy the full economic, social and cultural rights which the Commission on Human

Rights would wish to embody in the covenant. The covenant would be devoid of all meaning if it did not include the right to self-determination. The opinion was expressed that the right to self-determination should not be confused with the rights of minorities, since the authors of the Charter had not intended to give that right to minorities. The right to self-determination should not be exercised to destroy the unity of a nation or to impede the creation of that unity, in violation of national sovereignty. With regard to the nature of the right, it was held to be a true right possessing political, economic and legal elements. The right of peoples to self-determination had two aspects: from the domestic point of view, it signified the people's right to self-government and from the external point of view their independence. It was pointed out that the application of the principle of self-determination was a condition of international peace and security and of fruitful international co-operation. Resolution 545 (VI), adopted by the General Assembly on 5 February 1952, entitled " Inclusion in the International Covenant or Covenants on Human Rights of an article relating to the right of peoples to self-determination", reads as follows: *Whereas* the General Assembly at its fifth session recognised the right of peoples and nations to self-determination as a fundamental human right (resolution 421 D(V) of 4 December 1950), *Whereas* the Economic and Social Council and the Commission on Human Rights, owing to lack of time, were unable to carry out the request of the General Assembly to study ways and means which would ensure the above-mentioned right to people and nations, *Whereas* the violation of this right has resulted in bloodshed and war in the past and is considered a continuous threat to peace, *The General Assembly* (i) To save the present and succeeding generations from the scourge of war, (ii) To reaffirm faith in fundamental human rights, and (iii) To take due account of the political aspirations of all peoples and thus to further international peace and security, and to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples.

1. *Decides* to include in the International Covenant or Covenants on Human Rights an article on the right of all peoples and nations to self-determination in reaffirmation of the principle enunciated in the Charter of the United Nations. This article shall be drafted in the following terms : ' All people shall have the right to self-determination', and shall stipulate that all states, including those having responsibility for the administration of Non-Self-Governing Territories, should promote the realisation of that right, in conformity with the Purposes and Principles of the United Nations, and that states having responsibility for the administration of Non-Self-Governing Territories should promote

the realisation of that right in relation to the peoples of such Territories;

2. *Requests* the Commission on Human Rights to prepare recommendations concerning international respect for the self determination of peoples and to submit these recommendations to the General Assembly at its seventh session.

At its seventh session, the General Assembly adopted resolution 637 (VII), of 16 December 1952, entitled "The right of peoples and nations to self-determination ". Among the ideas expressed in that resolution, the following are relevant to the present study:

(a) that the right of peoples and nations to self-determination is a prerequisite to the full enjoyment of all fundamental human rights;
(b) that every State Member of the United Nations, in conformity with the Charter, should respect the maintenance of that right in other States;
(c) that the States Members of the United Nations should uphold the principle of self-determination of all peoples and nations;
(d) that the people of Non-Self-Governing and Trust Territories have the right to self determination and that Member States should therefore recognise and promote the realisation of that right and facilitate its exercise;
(e) that the Member States responsible for the administration of Non-Self-Governing and Trust Territories should take certain practical steps pending, and in preparation for, the realisation of the right to self-determination.

As earlier noted, the right to self-determination is very crucial in the understanding of the other principles of international law. It may indeed be regarded as the fountain of the other accompanying principles of international law. We shall thus, in a jiffy review the other principles of international co-operation.

3.2 The Principle of International Co-operation

In the process of applying the principle of equal rights and self-determination of people, great importance attaches to the principle of international co-operation, for at the present time international co-operation is incompatible with any form of subjection or of pressure exerted by the strong on the weak. Such co-operation should therefore be based on the sovereign equality of states and on the equal rights and self-determination of people. Consequently, in the process of co-operation between states, reciprocity of advantages, non-interference in

the domestic affairs of states and the absence of discrimination should be respected. The concept of international co-operation is one of the fundamental ideas of the United Nations. It appears in the Charter because the world community has come to realise that, if it is to maintain peace, the United Nations cannot rest content with playing a preventive role, but should also encourage states to co-operate with one another. Co-operation between states is a prerequisite for maintaining and strengthening international peace and security and one of the most important means of- promoting peace.

Consequently, as stated in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among states in accordance with the Charter of the United Nations, every state has the duty to promote, through joint and separate action, realisation of the principle of equal rights and self-determination of people, in accordance with the provisions of the Charter, and to render assistance to the United Nations in carrying out the responsibilities entrusted to it by the Charter regarding the implementation of the principle, in order to:

(a) promote friendly relations and co-operation among states;
(b) bearing in mind that subjection of people to alien subjugation, domination and exploitation constitutes a violation of the principle, as well as a denial of fundamental human rights, and is contrary to the Charter.

However, according to the principle it is the duty of states to co-operate with one another in accordance with the Charter, as developed in the same Declaration; states to co-operate in the promotion of universal respect for, and observance of, human rights and fundamental freedoms for all, and in the elimination of all forms of racial discrimination and all forms of religious intolerance; States Members of the United Nations to take point and separate action in co-operation with the United Nations in accordance with the relevant provisions of the Charter.

In addendum, states should co-operate in the economic, social and cultural fields as well as in the field of science and technology and for the promotion of international cultural and educational progress. States should co-operate in the promotion of economic growth throughout the world, especially that of the developing countries. No state in the world today can live in total isolation, and even the most strenuous national efforts on the part of states acting individually would not solve the substantial economic and social problems facing the international community. Active co-operation is needed if the “conditions of stability and well-being” referred to in Article 55 of the Charter are to be created and the foundations laid for harmonious and friendly relations among

states. Co-operation among states is a prerequisite for maintaining and strengthening international peace and security and one of the most important means of promoting peace.

3.3 Principle of Sovereign Equality of States

The principle of equal rights and self-determination of people has its corollary another principle of international law concerning friendly relations, namely, the principle of sovereign equality of states. This latter principle is closely bound up with the struggle to attain equal rights, self-determination and independence and with the strengthening of national sovereignty. There is a close interdependence between equal rights and self-determination of people, on the one hand, and sovereign equality on the other, in that each of these principles affects the application of the other. The events that have occurred since the adoption of the Charter of the United Nations, which proclaims sovereign equality in Article 2, paragraph 1, have demonstrated not only the validity and great significance of the principle of sovereign equality, but also the need to develop it in close conjunction with the principle of equal rights and self-determination of people.

The principle of sovereign equality is of fundamental importance. The Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations stresses in its Preamble that “the purposes of the United Nations can be implemented only if states enjoy sovereign equality and comply fully with the requirements of this principle in their international relations”. The principles of sovereign equality and of equal rights and self determination of people underline fundamental rights of states, such as sovereignty and independence. The principle of sovereign equality is the touchstone for the relations which should exist between all the states in the world. It is the expression of the recent development of the concept of State sovereignty under the influence of the growing interdependence of states and the ever-increasing trend towards democratisation in international life. In these circumstances, the concept of sovereignty has been influenced by that of equality, in the context of a new form of diplomacy based on collective security and international co-operation. If all nations were equal in size and power, the principle of the sovereign equality of states would be less important that it is. However, one of the objectives of the international community is to prevent the existing disparities, so far as possible, from creating injustices and placing states in a position of inferiority in their relations with other states.

Sovereign equality is of increased importance in the modern era, when many new states have attained independence and wish to take part in international relations on a footing of complete equality. Through the application of the principle of sovereign equality, international law should protect these new states and their people from any arbitrary action and afford them genuine equality. The principle of sovereign equality applies whatever the inequalities in territory, population, economic power or degree of development between states. It ensures legal equality — that is to say, equality in law —for all states. In these circumstances, states should have not only equal rights and duties, but also equal capacity to exercise those rights and carry out those duties. No state, whatever its power, can claim special treatment or a derogation from this principle. Sovereign equality does not mean equality in power but a *de jure* equality which applies to all states irrespective of their size, capacity, wealth, economic or military power, volume of production, social and economic structure, degree of development or geographical situation. All States, large and small, are equal before the law, and no state may claim special treatment, seek advantages on any pretext, or set out to dominate other states. Since they have equal rights and duties in international law, states should have the same scope for exercising their rights and carrying out their duties. Consequently, any discrimination designed to encroach upon the sovereign rights of states constitutes a violation of the principle of sovereign equality, because the exercise of the rights deriving from sovereign equality must not be limited or compromised for political, social, economic, geographical or any other reasons.

The principle of sovereign equality means legal equality; that is to say, equal rights as specified in the Preamble to the Charter, respect for which, according to Article 1, paragraph 2, forms the basis for friendly relations among nations. Unfortunately, equality *de jure* is not always accompanied by equality *de facto,* but states, both individually and collectively, should strive to reduce and eliminate *de facto* inequalities through economic, technical, scientific and cultural co-operation and, above all, through political co-operation based on good will and a sense of fairness.

By virtue of the principle of equal rights and self determination of people on the one hand, and the principle of sovereign equality on the other, there is a duty to respect the personality of states. The personality and other essential attributes of the state, such as territorial integrity and political independence, are inviolable. Consequently, state has the right to ensure its self-preservation and its own prosperity, together with the preservation and prosperity of its constituent people, and to organise

itself. Under international law, the sole restriction on the exercise of these rights is the exercise of the rights of other states.

Sovereign equality implies the right of every state to establish its own political, social and economic structure, without interference or intimidation from outside, in the best interests of its inhabitants; that is to say, in accordance with the right of its people to self-determination. The independence of the state implies an independent domestic policy; in other words, independence in political, economic, social and cultural organisation. The jurisdiction of states within their frontiers is exercised equally and exclusively over all inhabitants, nationals and aliens alike, and over the whole territory. The principle of sovereign equality on the one hand, and the principle of equal rights and self-determination of peoples on the other, forbids any encroachment upon the authority of the State in these matters.

It is the duty of all states to refrain from any action aimed at the partial or total disruption of the national unity and territorial integrity of another country. Such behaviour is incompatible with the purposes and principles of the Charter, as is pointed out in the Declaration on the Granting of Independence to Colonial Countries and People. The principle of sovereign equality imposes on states the duty of respecting the institutions of other states and not impeding their progress. At the international level, state sovereignty and self-determination are manifested by the independence of states in foreign policy. Every state has the right to take part in solving international problems and in formulating and amending the rules of international law, to join international organisations and to become a party to multilateral treaties of interest to it. This is an important consideration. Since the modern world forms a single international community, international law is universal in character. The old rules of international law must be adapted to meet the needs of the modern community of states, or be replaced by new rules. The new states have the right to play their part in this process. Any attempt to frustrate the achievement of universality in international life — such as refusal to recognise newly independent states, or action to prevent them from exercising their rights as sovereign subjects of international law — is incompatible with respect for the principle of the sovereignty and rights of other states. Actions of this kind constitute a form of discrimination and are thus contrary to the principle of equality. To exclude particular states from participation in the life of the international community of nations would be tantamount to denying the universal character of the principle that states are equal in law and enjoy the rights inherent in full, sovereignty. In order to ensure that international law is universal, it is essential that each state should be guaranteed the right to play its due part in the international community.

This right is a necessary consequence of the unanimously accepted principle that states are juridically equal. Every State enjoys the rights inherent in full sovereignty and each state has the duty to respect the personality of other states.

3.4 Principle of Non-Intervention

There is another principle of international law concerning friendly relations and co-operation among states which ought also to be linked to the principle of equal rights and self-determination of people namely: the principle of non-intervention. In the first place, non-intervention should not be used to cover up violations of self-determination; in the second place, it should protect states and people struggling for their independence. Acts of intervention are thus violations of the principle of equal rights and self-determination of people. Intervention, by violating the fundamental rights of the state, encroaches upon that state's sovereignty and independence. The right of peoples to self-determination is simply the transposition of the concept of human rights at the collective level.

The current importance of the principle of non-intervention in domestic affairs and its connection with the principle of equal rights and self-determination of people were emphasised in the above-mentioned Declaration, which confirmed that the General Assembly was: *Mindful* that violation of the principle of non-intervention poses a threat to the independence, freedom and normal political, economic, social and cultural development of countries, particularly those which have freed themselves from colonialism, and can pose a serious threat to the maintenance of peace, [and] *Fully aware* of the imperative need to create appropriate conditions which would enable all states, and in particular the developing countries, to choose without duress or coercion their own political, economic and social institutions.

Furthermore, in its Declaration on Principles of International Law concerning Friendly Relations and Cooperation among states in accordance with the Charter of the United Nations (resolution 2625 (XXV)), the General Assembly expressed the conviction that the strict observance by states of the obligation not to intervene in the affairs of any other state is an essential condition to ensure that nations live together in peace with one another, since the practice of any form of intervention not only violates the spirit and letter of the Charter, but also leads to the creation of situations which threaten international peace and security. The principle of non-intervention in matters which are within the domestic jurisdiction of a state, like the principle of equal rights and self-determination of people and the principle of sovereign equality of

states, is designed to guarantee states the freedom, in matters of development, to follow the course which they consider to serve their fundamental interests, These principles reflect the need felt by every people to be the sole master of its fate. Respect for these principles guarantees the right of all people to achieve their aspirations and to make their full contribution to the heritage of civilisation.

Consequently, acceptance of and strict respect for the principle of non-intervention are essential features of any system for the protection of small states, especially those which have recently freed themselves from colonial domination. From this standpoint, the principle of non-intervention can be seen as the complement of the principle of equal rights and self-determination of peoples. Moreover, the principle of non-intervention is of importance to all states, since it guarantees them the enjoyment of their rights as recognised by international law.

The principle of non-intervention demands recognition of the inalienable right of every people, whether large or small, to decide its own fate, freely to choose its own form of political, economic and social development and its own way of life in keeping with its national needs and aspirations, and to affirm its national identity without interference or pressure from outside. With the entrenchment and development of the principle of self-determination, the principle of non-intervention has taken on special importance, for the disintegration of the colonial system and the accession of many new states to independence have increased the need to protect the sovereignty and independent development of those states from all outside interference.

The principle of non-intervention simply safeguards the freedom of choice without which a state and an independent people cannot exist as such — a freedom often symbolised by the expression “domestic jurisdiction” of a state. This freedom has both internal and external aspects, and consists principally in the liberty of the state to choose its own political, social, economic and legal system (subject, of course, to respect for human rights and fundamental freedoms) and to decide whether or not to maintain diplomatic relations with another state, whether or not to conclude agreements, and whether or not to join regional or international organisations. If freedom of choice were confined to essentials, it could be said that in principle the state should be protected against any action by another state designed to impose a particular choice on it.

In virtue of the principle of non-intervention, activities directed against a state's political, economic and social system and the imposition of, or the attempt to impose, a specific form of organisation or government

upon a state are prohibited. Any interference designed to encroach upon the right of a state to determine its own political, social or economic development may set up international tension likely to endanger peace. Consequently, any external pressure directed against a state's right freely to choose a particular social system or political régime should be prohibited outright. Thus not only armed intervention is prohibited, but also any form of direct or indirect intervention in the internal or external affairs of states, including political and economic intervention, and also political and economic pressure calculated to prevent people from choosing their own social system or from taking, in their own country, economic measures in their own interests. In virtue of the principle of non-intervention, “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” (General Assembly Resolution 2131 (XX), paragraph 2) are prohibited. Among such measures may be mentioned,' for example, measures of economic pressure designed to influence the policy of another country or to obtain control of essential sectors of its national economy.

Lastly, the principle of non-intervention further prohibits any armed intervention against a state or a people, any action to organise, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the régime of another state, and interference in any other form. This conclusion is of special importance, because indirect intervention presents the greater danger for developing countries. While these countries have to concentrate all their energies on development, their efforts are sometimes counteracted by foreign intervention.

3.5 Principle of Non-Use of Force

Through the principle of non-intervention, the principle of equal rights and self-determination of people is linked to the principle of non-resort to the threat or use of force. The last-mentioned principle is the corner-stone of peaceful relations between states. It is also an essential component of the system established by the Charter of the United Nations. In the Charter, the peoples of the United Nations affirmed that they were determined “to save succeeding generations from the scourge of war” and “to unite [their] strength to maintain international peace and security”. However, as long as some states are stronger than others, it is essential to protect the weak against the misuse of force by the strong, and that is one of the purposes of the rule prohibiting the use of force in international relations. This principle offers a means of protection against the misuse of force by preventing conflicts and guaranteeing complete equality of all states. It is therefore of special importance for

small states, for developing countries, for states which have just attained independence, and for people all over the world.

The Declaration of Principles of International Law concerning Friendly Relations and Co-operation among states in accordance with the Charter of the United Nations (General Assembly resolution 2625 (XXV)), recalls “the duty of states to refrain in their international relations from military, political, economic or any other form of coercion aimed against the political independence or territorial integrity of any state” and considers it “essential that all states 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”.

Aggression — the use or threat of force —is consequently a violation not only of the principle of non-use of force, but also of the principle of equal rights and self determination of people. A threat of force which infringes these principles may be direct or indirect. It may be expressed in words, in actions such as the concentration of troops in frontier areas, or in a partial or complete severance of economic or other relations. It tends to instill fear in the state and people concerned, to intimidate them and thus to compel them to change their policy. The use of force against another state may take various forms: for instance, actions conducted by regular or irregular forces, by forces of volunteers or by armed bands; acts of reprisal; invasion; or pressure or coercion of various kinds. The threat or use of force cannot have as a legal consequence military occupation or territorial gain.

The Declaration of Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations provides that “No territorial acquisition resulting from the threat or use of force shall be recognised as legal”. Non-recognition of territorial conquests is a general principle of law within the meaning of Article 38 of the Statute of the International Court of Justice, for it is embodied in many important international conventions and in other United Nations instruments, in particular the Declaration on the Strengthening of International Security (General Assembly resolution 2734 (XXV)). It can also be considered to be a corollary to the rule laid down in Article 2, paragraph 4, of the Charter of the United Nations prohibiting 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. Non-recognition of territorial conquests is the result of a legal and political assessment which every state is entitled to make of a given situation and on which it can base its conduct. However, if in certain cases the legal assessment of

the situation should be made by the Security Council or the General Assembly, and if that organ should conclude that the situation had been created by the threat or wrongful use of force, Member States would be under an obligation not to recognise that situation. Territorial acquisitions or other advantages gained through the threat or wrongful use of force cannot have legal effect, because international law cannot confer legality upon the consequences of wrongful acts incompatible with the Charter. In such cases, there should be full restitution. The traditional doctrine of acquisition of legal title by conquest has been rejected as anachronistic and contrary to the Charter of the United Nations.

The Declaration on the granting of independence to colonial countries and people condemned all armed action or repressive measures directed against people exercising their right to self-determination. There can hardly be any question of peace between nations until such time as policies which disregard the inherent right of people to forge their own destiny are brought to an end. A number of international conflicts have been due to the use of force against dependent people. The immediate elimination of colonialism is essential, and any attempt to hold back the grant of independence is unlawful. Article 2, paragraph 4, of the Charter prohibits the use of armed force not only against states but also “in [...] international relations”, and thus applies to colonial Powers which try to crush communities struggling for their freedom and independence. The illegality of the use of force against such peoples derives from the fact that such action prevents the exercise of a legitimate right deriving from the principle of equal rights and self-determination of peoples; from the fact that the General Assembly has repeatedly proclaimed that the use of force to deprive dependent peoples of their inalienable rights constitutes a flagrant violation of the Charter of the United Nations and the Declaration on the granting of independence to colonial countries and peoples; and from the United Nations practice of opposing the idea that the struggle of colonial peoples for their liberation — the most important phenomenon of the modern age — should be regarded as a violation of the prohibition of the use of force.

3.6 Principle of Freedom to Choose and Develop their Own Internal Political System

This right is expressed most clearly in the General Assembly Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations. The Charter of the United Nations uses the term “self-government” to describe this legal situation. The principle of equal rights and self-determination of people comprises, for a people

organised as an independent state, the right to take its own decisions concerning its political, economic, social and cultural systems. All people have the right to equip themselves with the political, economic and social institutions of their choice, the right to decide their own future, to choose their own form of government, to set their political objectives, to construct their systems and to draw up their philosophical programmes without any pressure, whether direct or indirect, internal or external. It should be noted that this aspect of self-determination is not of direct concern to international law, either in its essence or in its operation.

Every state has the sole right to make decisions in this field, without any external interference. This aspect of the principle covers, for every state, a number of rights, namely: the right to adopt whatever political, economic and social systems it sees fit; the right to adopt the legal system it desires, whether of constitutional law, private international law, administrative law or any other form of law, without any limitation other than respect for human rights; the right to shape its foreign policy as it deems necessary, including the right to conclude, modify and denounce international treaties, without any restrictions other than those imposed by the generally accepted rules of international law; and the right to dispose freely of its national wealth and natural resources, in accordance with its own interests.

Civil and political rights are proclaimed by both the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, which has already entered into force. The prohibition of discrimination based on criteria of race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, is of great importance in guaranteeing the free exercise of the right to self-determination. There is a link and mutual influence between civil and political rights on one hand, and economic, social and cultural rights on the other; the two groups of rights are closely connected, so that the absence of one makes enjoyment of the other impossible. Recognition and full enjoyment of economic, social and cultural rights is the only sure basis for guaranteeing the exercise of civil and political rights, since civil and political rights would be devoid of meaning if respect for economic, social and cultural rights were not assured. The efforts of the international community to establish a new international economic order have once again shown how crucial and essential it is to guarantee for all people the enjoyment of economic, social and cultural rights. The exercise of civil and political rights is also an important factor in the progressive development of conditions in which economic, social and cultural rights may be fully realised, since without political rights there

is no guarantee that people will be able to live in conditions of freedom, respect for the law and justice, in which it is possible fully to enjoy economic, social and cultural rights.

There are certain aspects of economic, social and cultural rights which affect the enjoyment of political rights. This is true of the right to work and to equal remuneration for equal work; the right to form and join trade unions; the right to education; and the right to participate in the cultural life of the community. Full and equal enjoyment of these rights is also indicative of non-discrimination in the exercise of civil and political rights.

3.7 Principle of Freedom of the People to Pursue their Own Economic Development

An essential element of the right of people to self-determination is the right to pursue their economic development. This right is denned in article 1 of the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights which provide that, by virtue of their right of self-determination, all peoples “freely pursue their economic development”, that they may, “for their own ends, freely dispose of their natural wealth and resources”, and that “In no case may a people be deprived of its own means of subsistence”. Likewise, in resolution 3171 (XXVIII) of 17 December 1973, entitled “Permanent sovereignty over natural resources”, the General Assembly reaffirmed “the inviolable principle that every country has the right to adopt the economic and social system which it deems most favorable to its development”. Furthermore, in the Declaration on the Establishment of a New International Economic Order (General Assembly resolution 3201 (S-VI) of 1 May 1974), one of the principles on full respect for which the new international economic order should be founded, is the following: *(d)* The right of every country to adopt the economic and social system that it deems the most appropriate for its own development and not to be subjected to discrimination of any kind as a result.

In the Final Act of the first Session of the United Nations Conference on Trade and Development, held in 1964, the participating states declared themselves determined to achieve the high purposes embodied in the United Nations Charter 'to promote social progress and better standards of life in larger freedom'; to seek a better and more effective system of international economic co-operation, whereby the division of the world into areas of poverty and plenty may be banished and prosperity achieved by all; and to find ways by which the human and material resources of the world may be harnessed for the abolition of poverty

everywhere. They asserted that: In an age when scientific progress has put unprecedented abundance within man's reach, it is essential that the flows of world trade should help to eliminate the wide economic disparities among nations. The international community must combine its efforts to ensure that all countries — regardless of size, of wealth, of economic and social system — enjoy the benefits of international trade for their economic development and social progress.

3.8 Principle of Peaceful Settlement of Disputes between and among States

The Charter of the United Nations provides in its Chapter I (Purposes and principles) that the Purposes of the United Nations are: “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.”

The Charter also provides in the same Chapter that the Organisation and its Members, in pursuit of the purposes stated in Article 1, shall act in accordance with, among others, the following principle: “All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered” (Article 2, paragraph 3). It furthermore, in Chapter VI (Pacific settlement of disputes), states that: “The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.” (Article 33, paragraph 1)

The principle of the peaceful settlement of disputes has been reaffirmed in a number of General Assembly resolutions, including resolutions 2627 (XXV) of 24 October 1970, 2734 (XXV) of 16 December 1970 and 40/9 of 8 November 1985. It is dealt with comprehensively in the Declaration of Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations (resolution 2625 (XXV), annex), in the section entitled “The principle that States shall settle their international disputes by peaceful means in such a manner that international peace and security and justice are not endangered”, as well as in the Manila Declaration on the Peaceful Settlement of International Disputes (resolution 37/10,

annex), in the Declaration on the Prevention and Removal of Disputes and Situations Which May Threaten International Peace and Security and on the Role of the United Nations in this field (resolution 43/51, annex) and in the Declaration on Fact-finding by the United Nations in the Field of the Maintenance of International Peace and Security (resolution 46/59, annex).

The principle of the peaceful settlement of international disputes is linked to various other principles of international law, including the principle that States 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; the principle that states shall settle their international disputes by peaceful means in such a manner that international peace and security and justice are not endangered; the principle concerning the duty not to intervene in matters within the domestic jurisdiction of any state, in accordance with the Charter; the duty of states to cooperate with one another in accordance with the Charter; the principle of equal rights and self-determination of people; the principle of sovereign equality of states; and the principle that states shall fulfill in good faith the obligations assumed by them in accordance with the Charter-are interrelated in their interpretation and application and each principle should be construed in the context of other principles. The links between the principle of peaceful settlement of disputes and the other specific principles of international law are highlighted both in the Friendly Relations Declaration and in the Manila Declaration, and include inter alia:

Good Faith in International Relations

The Manila Declaration enunciates in its section I, paragraph 1, the duty of states to “act in good faith”, with a view to avoiding disputes among themselves likely to affect friendly relations among states. Other references to good faith are to be found in paragraph 5, under which good faith and a spirit of cooperation are to guide states in their search for an early and equitable settlement of their disputes; in paragraph 11, which provides that states shall in accordance with international law implement in good faith all the provisions of agreements concluded by them for the settlement of their disputes; in paragraph 2 of section II, under which Member States shall fulfill in good faith the obligations assumed by them in accordance with the Charter of the United Nations; and in one of the concluding paragraphs of the Declaration, whereby the General Assembly urges all States to observe and promote in good faith the provisions of the Declaration in the peaceful settlement of their international disputes.

A provision similar to paragraph 5 of section I of the Manila Declaration is to be found in the third paragraph of section V of the Declaration on Principles Guiding Relations between Participating states contained in the Final Act of the Conference on Security and Cooperation in Europe.

SELF-ASSESSMENT EXERCISE

Write short notes on any six principles of international law of your choice.

4.0 CONCLUSION

It is the duty of all States to refrain from any action aimed at the partial or total disruption of the national unity and territorial integrity of another country. Such behavior is incompatible with the purposes and principles of the United Nations Charter. At the international level, state sovereignty and self-determination are manifested by the independence of states in foreign policy. Every state has the right to take part in solving international problems and in formulating and amending the rules of international law, to join international organisations and to become a party to multilateral treaties of interest to it. Since the modern world forms a single international community, international law is universal in character. The old rules of international law must be adapted to meet the needs of the modern community of states, or be replaced by new rules. The new states have the right to play their part in this process. Any attempt to frustrate the achievement of universality in international life is incompatible with the United Nations Charter, particularly as it affects the principles international law and the sovereignty and rights of other states.

For effective interstate relations, states and other subjects of international are expected to observe all the principles of international law. This injunction is crucial to the extent that these principles are interlocked. In order to achieve the primary aims and objectives of the United Nations as regards global peace and security, these principles are a necessity.

5.0 SUMMARY

In this unit, we have been able to deliberate on the principles of international law. Compliance to these principles are said to be of utmost importance for several reasons including the retention of World peace and security. The justifications for and also the manner in which these principles are interlinked were adequately clarified. For example,

the linkages between the principles of self determination and other follow up principles are such that any delinking of their provisions will certainly reduce the chances of making the most of the expected outcomes. The role of the United Nations in all of the struggles geared towards ensuring that member nations abide by these principles of international law were equally discussed in details.

6.0 TUTOR-MARKED ASSIGNMENT

1. What are the expected merits for compliance with the principles of international law?
2. What are the expected demerits for non compliance with the principles of international law?

7.0 REFERENCES/FURTHER READING

Barnett, R. E. (1978). "Toward A Theory of Legal Naturalism". *Journal of Libertarian Studies,* Vol. 2, No. 2, pp. 97-107.

Hart, H. L. A. (1961). *The Concept of Law.* Oxford: Oxford University Press.

UNIT 4 HUMAN RIGHTS

CONTENTS

1.0 INTRODUCTION

For the enjoyment of social order, citizens consider right as a legal or moral claim or entitlement to certain benefits. Human rights are rights or privileges conferred by law upon a person for self realisation and for peace and harmony in general. They are those basic rights and freedoms which a state accords to the citizens irrespective of race, sex, religious and political affiliations. They are inalienable rights which every human being is entitled to by virtue of the fact that she/he is a human being. John Locke buttressed this claim when he asserted, in the 17th century, that the power of the state should be such that liberty and freedoms are granted to the citizens without any distinction.

In the Declaration of the Rights of Man (1789) issued by the National Assembly during the French Revolution, the following categorical statement is made: men are born, and always continue, free and equal in respect of their rights'. A similar statement is found in the American Declaration of Independence (1776): 'We hold these to be self-evident, that all men are created equal … Thus, several documents had embraced and espoused the fundamental elements of human rights even before the famous Universal Declaration of Human Rights in 1948. For example, in Britain, some of core features of these rights were clearly spelt out in the Bill of Rights and Magna Carta of 1815.

To a large extent, the UDHR of 1948 is an expression of the general acceptance by countries of the world of the basic elements of human rights. It emphatically stipulates those rights, which a citizen must have

in order to enjoy good life. It has been the practice of modern governments to entrench these rights in the constitution for purposes of certainty. The UDHR contains about 30 articles, which have been categorised into six broad units:

Political Rights, which include the rights of the citizens to participate in the affairs of the state. For example, the right to vote and to be voted for. Civil Rights which include citizens rights to freedom of expression, freedom of movement, etc.

Equality before the law, which provides for non discrimination against anybody or group of people regardless of their social, economic, and political status.

Economic Rights, which seeks to guarantee the welfare of the workers through commensurate salaries and better working conditions.

Social Rights, which provides for citizens easy access to education, health care and other social benefits.

Cultural Rights, which ensures that people's rights to their identities and traditions are protected.

Seven Core Freedoms of the UDHR

Besides the above categorisation, seven core freedoms are recognisable in the UDHR. They include:

Dignity of Person: The first provision of the UDHR declares that the recognition of and respect for human rights is the foundation of all forms of justice. This declaration connotes that people should not be subjected to any form of inhuman treatment. Dignity of persons is considered as a natural right that belongs to every human being.

Freedom of Association/Assembly: Freedom of association implies that citizens are allowed to form voluntary associations ranging from labour organisations, religious organisations, social clubs, political parties, civil society organisations, etc. This provision promotes the freedom of expression because it affords the citizenry the opportunity to express their minds and opinions with regards to issues that affect their common existence.

Religious Freedom: In modern times, the right to following one's own religion and faith has become widely accepted, notwithstanding the challenges. People are free to hold their own religious beliefs and to

worship in whatever methods they deem right; without being compelled to conform to any state religion. People are not to be sanctioned on account of the ideas, philosophies or religion they hold.

Freedom of Speech: To a large extent, freedom of speech connotes the absence of fear as people express themselves, including the right to criticise the government, without being intimidated; though this must be done within the provisions of the law. It involves the freedom to write, speak or print whatever material that is available in order to express one's views on any matter of concern. This provision is very important because any attempt to suppress people's points of view would undermine any claim to democracy. However, this freedom does not suggest that people should speak or write with the hope of inciting others against the government as this could cause social disorder.

Freedom from Discrimination: There are legal frameworks put in place to ensure that one is not discriminated upon because of one's place of origin, one's religion, one's sex, one's race, one's social background, etc. Rather, equality before the law is encouraged.

Freedom to Work and own Property: This connotes the right to be gainfully employed in order to provide for one's daily needs and also to acquire property. When an individual rightfully and legally acquire properties, nobody should deprive him/her of the opportunity to use and enjoy such property. The government itself would pay some compensations or rewards when it confiscates any property belonging to anybody.

Freedom from Fear and Intimidation: This is part of the fundamental pillars of personal liberty. For example, it implies that a person cannot be subjected to arbitrary arrest, unlawful detention or imprisonment. Unfortunately, many Nigerians are denied these rights because a lot of people are sent to the prison when they had not been convicted in a court of law. There are cases of people who are molested without any legal justification. However, we must remark that there are provisions for people to seek redress through the *writ of Habeas Corpus,* which provides that a person shall not be detained for more than 24 hours without bail.

2.0 OBJECTIVES

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

- define and explain the concept Human Rights
- identify the important documents that preceded the Universal Declaration of Human Rights
- explain the nitty-gritty of the International Human Rights Law and their implications for the actualisation of the essence of international law and those of international relations
- state the impacts of the international Human Rights Law on states, which obviously are the most affected category as international legal personality
- discuss the contributions of the United Nations in providing the needed space to promote issues involved in human rights, especially those of the civil, cultural, economic and political rights.

3.0 MAIN CONTENT

3.1 International Human Rights Law (IHRL)

IHRL is a set of international rules, established by treaty or custom, on the basis of which individuals and groups can expect and/or claim certain behavior or benefits from governments. Human rights are inherent entitlements which belong to every person as a consequence of being human. Numerous non-treaty based principles and guidelines ("soft law") also belong to the body of international human rights standards. IHRL lays down rules binding governments in their relations with individuals. In spite controversies, there is a growing body of opinion according to which non-state actors – particularly if they exercise government-like functions – must also be expected to respect human rights norms. The essence is to ensure that various international actors, governmental and non-governmental actors, show greater commitments to programmes designed to enhance the quality of rights enjoyed by various persons across the world.

IHRL also contains provisions obliging states or governments to implement its rules, whether immediately or progressively. They must adopt a variety of legislative, administrative, judicial and other measures that may be necessary to give effect to the rights provided for in the treaties. This may include enacting criminal legislation to outlaw and repress acts prohibited under IHRL treaties, or providing for a remedy before domestic courts for violations of specific rights and ensuring that

the remedy is effective. There other ways through which governments could facilitate this task. It is expected that the governments should:

- Ensure that their national constitutions reflect the current position on the UDHR. This is one way to facilitate the universality of the provisions of the UDHR. In addition, other national laws should be framed in such a way to show a sense of conformity with the UDHR;
- Support individuals and groups that are genuinely devoted to the task of promoting human rights programmes in their states;
- Establish agencies and public machineries that will be solely responsible for the spreading of information relating the new resolutions of the UDHR. This is important considering the fact that there are emerging issues, which also touch on human rights matters;
- Organise for local, national and international conferences in hope of promoting human rights projects. Such conferences should be organised at regular intervals;
- Create legal frameworks to address complaints on human rights violations. Complaints relating to the abuse of human rights should be investigated and thoroughly handled. Also those found guilty should be adequately punished. This measure will certainly serve as a deterrent to others who might be thinking of doing the same; and
- Increase awareness on the advantages of respecting human rights and also on the dangers of disregarding it.

The United Nations (UN) has since its inception, initiated several programmes in support of efforts guarantee Human Rights to all. One area of such support is on the right to participatory development in international human rights law. The UN has, with various levels of ratification by its members, proclaimed a human right to development. Article 22 of the Universal Declaration of Human Rights (UDHR) states that "[e]veryone, as a member of society… is entitled to the realisation…of the economic, social and cultural rights indispensable for his dignity and the free development of his personality." In furtherance of this responsibility, the General Assembly, in 1966, signed and adopted two important resolutions - the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR).

SELF-ASSESSMENT EXERCISE

Write a short note on what you understand by International Human Rights Law.

3.2 Right to Culture and the International Covenant on Civil and Political Rights

Civil and political rights are proclaimed by both the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. The prohibition of discrimination based on criteria of race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, is of great importance in guaranteeing the free exercise of the right to self-determination. There is a link and mutual influence between civil and political rights on one hand, and economic, social and cultural rights on the other; the two groups of rights are closely connected, so that the absence of one makes enjoyment of the other impossible. Recognition and full enjoyment of economic, social and cultural rights is the only sure basis for guaranteeing the exercise of civil and political rights, since civil and political rights would be devoid of meaning if respect for economic, social and cultural rights were not assured. The efforts of the international community to establish a new international economic order have once again shown how crucial and essential it is to guarantee for all people the enjoyment of economic, social and cultural rights. The exercise of civil and political rights is also an important factor in the progressive development of conditions in which economic, social and cultural rights may be fully realised, since without political rights there is no guarantee that people will be able to live in conditions of freedom, respect for the law and justice, in which it is possible fully to enjoy economic, social and cultural rights. The ICESCR promotes the right to development, with its emphasis on state obligation to provide certain economic and social rights. It is generally believed that human rights and development have a "fundamental two-way relationship," so that the two concepts are interconnected even if the latter concept is based on positive rights.

On the other hand, there are certain aspects of economic, social and cultural rights which affect the enjoyment of political rights. This is true of the right to work and to equal remuneration for equal work; the right to form and join trade unions; the right to education; and the right to participate in the cultural life of the community. Full and equal enjoyment of these rights is also indicative of non-discrimination in the exercise of civil and political rights.

This is one aspect of international law that has continued to generate controversies. International law has initiated diverse programmes directed at the preservation of human rights, including the rights of the minorities. According to Article 27 of the International Covenant on Civil and Political Rights (ICCPR), members of "ethnic, religious, or

linguistic minorities ... shall not be denied the right ... to enjoy their own culture, to profess and practice their own religion, or to use their own language and do all of these things both as individuals and as a group". UNESCO has defined the concept of culture as the distinctive traits, including the total spiritual, material, intellectual and emotional traits that characterise a society or social group, and that include, in addition to arts and literature, their ways of life, the manner, in which they live together, their value systems, and their traditions and beliefs.
The right to culture is fundamental for indigenous people, as their cultures are distinct and threatened by the continuous pressure of assimilation by the dominant society. The right to culture should give indigenous people the right to conserve, adapt and even voluntarily change their own culture. Combined with the right to land, the right to culture gives the right to subsistence activities. A number of international and regional human rights instruments make reference to culture but indigenous cultural claims have not been fully accommodated, and the implementation of cultural rights has been somewhat neglected. Culture, in and of itself, has not often been articulated as a free-standing human right; rather, it is commonly understood as an underlying principal of human rights law with which other rights overlap. The right to culture as an autonomous right is a "synthesizer right" permeating all individual as well as collective rights. It requires the fulfillment and effective exercise of all human rights; and, reciprocally, their fulfillment is dependent upon the enforcement of many other human rights.

Collective rights are ascribed to groups of people and can only be claimed by the collective entity and its authorised agents. Both the United Nations Declaration on the Rights of Indigenous Peoples and the Inter-American Commission on Human Rights (IACHR) Draft Declaration on Indigenous Rights as well as the ILO Convention No. 16940 acknowledge certain collective rights. For example, the UN Declaration on the Rights of Indigenous Peoples establishes the collective right to the protection of cultural property and identity in addition to the rights to education and health. Article 1 of the Declaration provides: "Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights ... as recognised in ... the Universal Declaration of Human Rights and international human rights law".

SELF-ASSESSMENT EXERCISE

Recognition and full enjoyment of economic, social and cultural rights is the only sure basis for guaranteeing the exercise of civil and political rights. Is this true?

3.3 The Right to Self-Determination in Relation to Cultural Development

The Declaration of the Principles of International Cultural Co-operation, proclaimed by the General Conference of UNESCO at its fourteenth session, on 4 November 1966, contains certain principles concerning the right of people to choose their cultural system and freely to pursue their cultural development. In addition, the Declaration refers to the means of implementing this right. The Special Rapporteur proposes to take these principles as a basis for his study of this right, which derives from the right to self-determination. The United Nations instruments quoted in the preamble to the Declaration include the Universal Declaration of Human Rights, the Declaration on the Granting of Independence to Colonial Countries and People and the Declaration on the Promotion among Youth of the Ideals of Peace, Mutual Respect and Understanding between People. Taken as a whole, therefore, the Declaration of the Principles of International Cultural Co-operation must be interpreted in the particular light of the right to self-determination.

From the point of view of this study, the most important principles of the Declaration of the Principles of International Cultural Co-operation are the following:

(a) every people have the right and the duty to develop its culture; *(b)* every culture has a dignity and value which must be respected and preserved; *(c)* nations shall endeavor to develop the various branches of culture side by side and, as far as possible, simultaneously, so as to establish a harmonious balance between technical progress and the intellectual and moral advancement of mankind; *(d)* in their cultural relations, states shall bear in mind the principles of the United Nations.
Ever since the development of these foundational documents (the UDHR, ICESCR, and ICCPR), which collectively form the basis of what some call the International Bill of Rights, human rights issues have progressively continued to evolve and accordingly, the United Nations has not ceased in its plans and efforts to address emerging concepts that accompany these human rights issues. Developments in this direction could be viewed in their political contexts of both the Cold War and also within the large-scale debates surrounding relations between the so-called North (developed countries) and the South (developing countries). As a general matter, where the United States supported negative rights embodied in the ICCPR, the Soviet Union recognised positive rights found in the ICESCR. During the same period, we witnessed the emergence of two 1974 General Assembly Resolutions declaring and purportedly establishing a program of action for the New International Economic Order (NIEO). The NIEO among other pursuits sought to

decrease the divide between the North and the South based on principles of justice, equity, and reparation for past colonial harms. Needless to say, the NIEO engendered great opposition among some developed states.

On this same trend, the UN Commission on Human Rights and its Sub-Commission on the Promotion and Protection of Human Rights were abolished in June 2006, and replaced by a new successor organisation, the UN Human Rights Council, as part of an ongoing reform process within the UN. The Human Rights Council reports directly to the UN General Assembly. The creation of the Human Rights Council is intended to accord appropriate importance within the UN to human rights by creating a higher status, Council level organisation, as for security (Security Council) and development (Economic & Social Council). All three concepts are central to the UN Charter; address a perception that the Commission on Human Rights had become overly politicised, ineffective and selective in its work; to make the Human Rights Council a smaller standing body (that means, always working rather than working during only one part of the year) with members elected by all members of the General Assembly, taking into account the candidate State's contribution to the promotion and protection of human rights and the need for equitable representation across the five UN geographic regions; and establish a new system of universal periodic review of the human rights performance of UN member states. In order to ensure that human rights violators do not use the Human Rights Council to evade international scrutiny, a member of the Council can now be suspended on a two-thirds majority vote by the General Assembly for gross and systematic violations of human rights. No member may serve more than two consecutive terms.

SELF-ASSESSMENT EXERCISE

How relevant is the right to self-determination to the development of human rights?

3.4 Globalisation of Human Rights and the Third World

The idea of humanitarianism is framed by the discourse of human rights. Its globalisation is a function of the belief that the realm of rights, albeit a particular vision of rights, offers a cure for nearly all ills which afflict third world countries and explains the recommendation of the mantra of human rights to post-conflict societies. Few would deny that the globalisation of human rights does offer an important basis for advancing the cause of the poor and the marginal in third world countries. Even the focus on civil and political rights is helpful in the

struggle against the harmful policies of the State and international institutions. There is certain dialectic between civil and political rights and democratic practice that can be denied at our own peril. But it is equally true that the focus allows the pursuit of the neo-liberal agenda by privileging private rights over social and economic rights. This belief is strengthened by the fact that official international human rights discourse eschews any discussion of the accountability of international institutions while promoting policies with grave implications for both the civil and political rights as well as the social and economic rights of the poor.

In recent years, a particular form of State (the neo-liberal State) has come to be touted as its only sensible and rational form. It has been the ground for justifying the erosion of sovereignty though relocating it in international institutions. What this has permitted is the privatisation and internationalisation of collective national property. In order to understand the on-going process, the state needs to be understood in two different ways. First, 'states are clearly institutions of territorial property'. This has begun to change under the ideological onslaught which declares that the internationalisation of property rights is the surest way to bring welfare to third world people. Second, the state is to be understood 'as a social form, a form of social relations'. It allows the debunking of the concept of "national interest" and the insight that the third world ruling elite is actively collaborating with its first world counterparts in entrenching the process of privatisation and internationalisation of property rights in its own interest.

It is suggested that the post-colonial imaginary has been colonised allowing the major organising principle of Western culture, that is 'the idea of infinite development as possibility, value and cultural goal' to be implanted in the poor world. The general idea here is to displace the aspirations of third world people and scale down development to more tolerable levels. This would help avoid the burden of sustainable development from falling on the North and help sustain its high consumption patterns. It is development through structural adjustment programmes or neo-liberal policies that need to be indicted, rather than the aspirations of the people to be able to exercise greater choices and a higher standard of life.

Today, globalising international law, overlooking its history, and abandoning the principle of differential treatment, legitimises itself through the language of blame. The North seeks to occupy the moral high ground through representing the third world people, in particular African people, as incapable of governing themselves and thereby hoping to rehabilitate the idea of imperialism. The inability to govern is

projected as the root cause of frequent internal conflicts and the accompanying violation of human rights necessitating humanitarian assistance and intervention by the North.

It is therefore worth reminding ourselves that colonialism was justified on the basis of humanitarian arguments (the civilising mission). It is no different today. The contemporary discourse on humanitarianism not only seeks to retrospectively justify colonialism but also to legitimise increasing intrusiveness of the present era. Indeed, as we have observed elsewhere, 'humanitarianism is *the* ideology of hegemonic states in the era of globalisation marked by the end of the Cold War and a growing North-South divide.' Overlooked in the process is the role played by international economic and political structures and institutions in perpetuating the dependency of third world peoples and in generating conflict within them.

SELF-ASSESSMENT EXERCISE

Of what use is the globalisation of human rights to the cause of the poor and the marginal in third world countries?

4.0 CONCLUSION

Human rights talk has come to have a pervasive presence in international relations. This development has been variously expressed: 'a new ideal has triumphed on the world stage: human rights'; 'human rights discourse has become globalised'; 'human rights could be seen as one of the most globalised political values of our time'. Relatively, modern states in general recognise civil equality and the granting of human rights. Therefore, we all understand that no man is above the law and no man is punishable except according to the constitution. The equality of citizens before the law is secured above all by judicial impartiality and also by the independence of the judiciary. Every citizen is expected, in accordance with the provisions of the rule of law, to enjoy some rights, which cannot be infringed upon by other individuals or public institutions. Such rights must be entrenched in the constitution as a guarantee of the rights. The rights of the citizens cannot be denied except when there is a violation of the law or there is a threat to public security especially during emergencies.

Nevertheless, it has become very expedient to warn that the forms and dynamics of the globalisation of human rights require a deep-seated reflection in order to optimise the original aims and visions of the human rights discourse. Third Worlds are, from various points of view, not favored in the current spate of globalisation of human rights.

5.0 SUMMARY

We have examined in details the concept of human rights. We also assessed some hitherto used documents, which portrayed the basic tenets, ethics and etiquettes of and equally formed the platform upon which the Universal Declaration of Human Rights was made. Some of the documents include the American Declaration of Independence (1776), the French Declaration of the Rights of Man (1789), the British Bill of Rights and Magna Carta of 1815. Effort was made to explicate the implications of the International Human Rights Law, especially on the states. The obligations and duties that are placed upon states as a result of the provisions are enormous. States are the major instruments through which the demands of the UNDR would be realised. This unit attempted to buttress the implications of the spate of globalisation of human rights upon Third world states, which evidently are disadvantaged in the process.

6.0 TUTOR-MARKED ASSIGNMENT

1. What roles are expected of states in relation to the application of the provisions of the Universal Declaration of Human Rights?
2. How would you describe the place and position of the Third Worlds in the ongoing process of globalisation of human rights?
3. Examine the processes that culminated into the declaration of United Nations Human Rights in 1948.

7.0 REFERENCES/FURTHER READING

Adeola, K. & Victoria, D. (2011). *Civic Education for Senior Secondary Schools*. Lagos: SV Dayspring Publication Limited.

Alonge, F. K. (2005). *Principles and Practices of Governing Men: Nigeria and the Third World*. Ibadan: University Press PLC.

Lidija Knuth, (2009). *The Right to Adequate Food and Indigenous People: How Can the Right to Food Protect Indigenous People*. Retrieved 18/12/11, from http://www.fao.org/righttofood/publi09/ind_people.pdf

MODULE 3 SOME INTERNATIONAL LAWS AND THE ENVIRONMENT

UNIT 1 LAWS OF WAR

CONTENTS

1.0 INTRODUCTION

History demonstrates that mankind has always sought to limit the effect of conflict on the combatants and has come to regard war not as a state of anarchy justifying infliction of unlimited suffering, but as an unfortunate reality which must be governed by some rule of law. This point is exemplified by Article 22 of the Hague Convention: “the right of belligerents to adopt means of injuring the enemy is not unlimited, and this rule does not lose its binding force in a case of necessity.”

That regulating the conduct of warfare is ironically essential to the preservation of a civilised world was exemplified by General

MacArthur, when in confirming the death sentence for Japanese General Yamashita, he wrote: "The soldier, be he friend or foe, is charged with the protection of the weak and unarmed. It is the very essence and reason of his being. When he violates this sacred law, he not only profanes his entire cult but threatens the fabric of international society.
The law of war is a body of international law intended to dictate the conduct of state actors (combatants) during periods of conflict. It is the customary and treaty law applicable to the conduct of warfare and to relationships between belligerents and neutral states. It requires that belligerents refrain from employing any kind or degree of violence which is not actually necessary for military purposes and those they conduct hostilities with regard for the principles of humanity and chivalry. It is also referred to as the Law of Armed Conflict or Humanitarian Law, though some object to the latter reference as it is sometimes used to broaden the traditional content of the law of war.

The law of armed conflict is generally divided into two major categories, Jus ad Bellum and Jus in Bello. Jus ad Bellum is the law dealing with conflict management. It deals with laws regarding how states initiate armed conflict - under what circumstances was the use of military power legally and morally justified. On the other hand, Jus in Bello is the law governing the actions of states once conflict has started. It deals with the measure of legal and moral restraints, which should apply to the conduct of waging war. Both categories of the law of armed conflict have developed over time, drawing most of their guiding principles from history.

2.0 OBJECTIVES

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

- state the difference between *jus ad bellum (*legitimate war) and *jus ad bello* (illegitimate war)
- list the prerequisites for the declaration of a just war
- explain reasons that necessitated the formation of the United Nations (especially the war dimension to the creation of the United Nations)
- discuss the roles of the Security Council in the struggle to maintain international peace and security.

3.0 MAIN CONTENT

3.1 Origins of *Jus Ad Bellum* (Legitimate War)

Law became an early player in the historical development of warfare. The earliest references to rules regarding war referred to the conditions that justified resort to war legally and morally. Greeks began the concept of *Jus ad Bellum*, wherein a city state was justified in resorting to the use of force if a number of conditions existed (if the conditions existed the conflict was blessed by the gods and was just). In the absence of these conditions armed conflict was forbidden. Romans formalised laws and procedures that made the use of force an act of last resort. Rome dispatched envoys to the nations against whom they had grievances, and attempted to resolve differences diplomatically. The Romans also are credited with developing the requirement for declaring war. Cicero wrote that war must be declared to be just. The ancient Egyptians and Sumerians (2nd Millennium B.C.) generated rules defining the circumstances under which war might be initiated. The ancient Hittites required a formal exchange of letters and demands before initiating war. In addition, no war could begin during planting season.

SELF-ASSESSMENT EXERCISE

What is spectacular about Greece as one of the precursors of the concept of legitimate war?

3.2 The Historical Periods

3.2.1 The Just War Period

This period ranged from 335 B.C. to about 1800 A.D. The primary tenant of the period was determination of a “just cause” as a condition precedent to the use of military force. The law during this period focused upon the first prong of the law of war given that the ‘just conduct’ was valued over the ‘regulation of conduct’ (Jus ad Bellum). If the reason for the use of force was considered to be just, whether the war was prosecuted fairly and with humanity was not a significant issue. The early beginning of the *Just War* was closely connected to self-defense. Aristotle (335 B.C.) had written that war should only be employed to prevent men becoming enslaved; to establish leadership which is in the interests of the led; or to enable men to become masters of men who naturally deserved to be enslaved. Cicero refined Aristotle's model by stating that “the only excuse for going to war is that we may live in peace unharmed ....”

3.2.2 The Era of Christian Influence: Divine Justification

Early church leaders forbade Christians from employing force even in self-defense. This position became less and less tenable with the expansion of the Christian world. Church scholars had reconciled the dictates of Christianity with the need to defend individuals and the state by adopting a Jus ad Bellum position under which recourse to war was just in certain circumstances (6th century A.D.). During the middle ages, some modifications were effected. Saint Thomas Aquinas (12th century A.D.), within his Summa Theological orientation, refined this "just war" theory when he established the three conditions under which a just war could be initiated:

a. with the authority of the sovereign;
b. with a just cause (to avenge a wrong or fight in self-defense); and
c. so long as the fray is entered into with pure intentions (for the advancement of good over evil).

The key element of such an intention was to achieve peace. This was the requisite "pure motive." Saint Thomas Aquinas' work signaled a transition of the Just War doctrine from a concept designed to explain why Christians could bear arms (apologetic) towards the beginning of a juristic model. The concept of "just war" was initially enunciated to solve the moral dilemma posed by the adversity between the Gospel and the reality of war. With the increase in the number of Christian nation-states, this concept fostered an increasing concern with regulating war for more practical reasons.

Progressively, the concept of just war was passed from the hands of the theologians to the lawyers. Several great European jurists emerged to document customary laws related to warfare. Hugo Grotius (1583-1645) produced the most systematic and comprehensive work, On *the Law of War and Peace.* His work is regarded as the starting point for the development of the modem law of war. Grotius asserted a non-religious basis for this law, in spite of the dominance of Christian values in the popular narratives on the laws of war. According to Grotius, the law of war was not based on divine law, but on recognition of the true natural state of relations among nations. Thus, the law of war was based on natural and not divine law.

By the time the next period emerged, the Just War Doctrine had generated a widely recognised set of principles that represented the early customary law of war. The most fundamental of these principles are:

a. A decision to wage war can be reached only by legitimate authority (those who rule, e.g. the sovereign).
b. A decision to resort to war must be based upon a need to right an actual wrong, in self-defense, or to recover wrongfully seized property.
c. The intention must be the advancement of good or the avoidance of evil
d. In war, other than in self-defense, there must be a reasonable prospect of victory.
e. Every effort must be made to resolve differences by peaceful means, before resorting to force.
f. The innocent shall be immune from attack.
g. The amount of force used shall not be disproportionate to the legitimate objective

3.2.3 The War as Fact Period (1800-1918)

Generally, this period saw the rise of the nation state as the principle element used in foreign relations. These nation states transformed war from a tool to achieve justice to something that was a legitimate tool to use in pursuing national policy objectives. The concept of Just War was gradually pushed aside. Natural or moral law principles replaced by positivism that reflected the rights and privileges of the modem nation state. Law is based not on some philosophical speculation, but on rules emerging from the practice of states and international conventions. Since each state is sovereign, and therefore entitled to wage war, there is no international legal mandate, based on morality or nature, to regulate resort to war. Real politik replaces justice as reason to go to war. War is (based upon whatever reason) a legal and recognised right of statehood. In short, if use of military force would help a nation state achieve its policy objectives, then force may be used. This period was dominated by the real *politik of Clausewitz* who characterised war as a continuation of a national policy that is directed at some desired end. Thus, a state steps from diplomacy to war, not always based upon a need to correct an injustice, but as a logical and required progression to achieve some policy end.

Following a number of occurrences and changes in the pattern of warfare, certain significant developments signaled the beginning of the next period “Treaty Period.” Based on the “positivist” view, the best way to reduce the uncertainty attendant with conflict was to codify rules regulating this area. Intellectual focus began to shift toward minimising resort to war and/or mitigating the consequences of war.

3.2.4 Jus Contra Bellum Period

World War I represented a significant challenge to the validity of the "war as fact" theory. In spite of the moral outrage directed towards the aggressors of that war, legal scholars unanimously rejected any assertion that initiation of the war constituted a breach of international law whereas world leaders struggled to give meaning to a war of unprecedented carnage and destruction. The "war to end all wars" sentiment manifested itself in a shift in intellectual direction leading to the conclusion that aggressive use of force must be outlawed.

Prior to this period, the Hague Conferences (1899- 1907) had produced the Hague Conventions, which represented the last multilateral law that recognised war as a legitimate device of national policy. While Hague law concentrated on war avoidance and limitation of suffering during war, this period saw a shift toward an absolute renunciation of aggressive war. Furthermore, the League of Nations became unique being the first time in history that nations agreed upon an obligation under the law not to resort to war to resolve disputes or to secure national policy goals. The League was set up as a component to the Treaty of Versailles, largely because President Wilson felt that the procedural mechanisms put in place by the Covenant of the League of Nations would force delay upon nations bent on war. During these periods of delay peaceful means of conflict management could be brought to bear. The eighth Assembly of League of Nations banned aggressive war. However, the League did not attempt to enforce this duty (except as to Japan's invasion of Manchuria in 1931).

The Kellogg-Briand Pact (of 1928), officially referred to as the Treaty for the Renunciation of War, banned aggressive war. This is the point in time generally thought of as the "quantum leap." For the first time, aggressive war is clearly and categorically banned. In contradistinction from the post WW I period, this treaty established an international legal basis for the post WW II prosecution of those responsible for waging aggressive war. In spite of the dynamics of international conflicts, this treaty remains in force today. Virtually all commentators agree that the provisions of the treaty banning aggressive war have ripened into customary international law. It is noteworthy to mention that the use of force in self-defense has remained unregulated. No law has ever purported to deny a sovereign the right to defend itself. Some commentators stated that the use of force in the defense is not war. Thus, war has been banned altogether.

3.2.5 Post World War II Period

Evidently, the procedural requirements of the Hague Conventions did not prevent World War I; just as the procedural requirements of the League of Nations and the Kellogg-Briand Pact did not prevent World War II. World powers recognised the need for a world body with greater power to prevent war. Consequently, international law began to provide more specific protections for the victims of war. There was the Post-WWII War Crimes Trials (Nuremberg, Tokyo, and Manila Tribunals). Thus the trials of those who violated international law during World War II demonstrated that another quantum leap had occurred since World War I.

This period strongly ushered in the era of universality and established the principle that all nations are bound by the law of war based on the theory that law of war conventions largely reflect customary international law. The world began to focus on ex post facto problem during prosecution of war crimes. The universal nature of law of war prohibitions, and the recognition that they were at the core of international legal values (*Gus Cogens*), resulted in the legitimate application of those laws to those tried for violations.

In another dimension, the United Nations Charter, besides the shift towards outright ban on war, also extended the ban through Article 2(4) to the threat of use of force. At the early period of the Charter, that is, immediately after the negotiation of the Charter in 1945, many nations and commentators assumed that the absolute language in the Charter's provisions permitted the use of force only if a nation had already suffered an armed attack. More so, in the contemporary period, most nations have come to accept that a nation's ability to defend itself is much more expansive than the provisions of the Charter seem to permit based upon a literal reading. This view is based on the conclusion that the inherent right of self-defense under customary international law was supplemented, and not displaced by the Charter. However, this remains a controversial issue. In all, we observe that the *Jus ad Bellum* has continued to evolve. Current doctrines such as anticipatory self- defense and preemption are adapted to meet today's circumstances.

3.3 *Jus in Bello:* Regulation of Conduct during War

The second body of law that began to develop dealt with rules that control conduct during the prosecution of a war to ensure that it is legal and moral. A review of the law of war beginning from the early periods is important. In 4th century B.C Ancient China, Sun Tzu's in *The Art* of War had set out a number of rules that controlled what soldiers were

permitted to do during war. For example, he stated that captives must be treated well and cared for; and that natives within captured cities must be spared and women and children respected. Other references include the Ancient India during the 4th century B.C. The Hindu civilisation produced a body of rules codified in the Book of Manu that regulated in great detail land warfare; the Ancient Babylon in the 7th century B.C. The ancient Babylonians treated both captured soldiers and civilians with respect in accordance with well- established rules.

As it were, *Jus* in *Bello* received little attention until late in the Just War period. This led to the emergence of a Chivalric Code. The chivalric rules of fair play and good treatment only applied if the cause of war was "just" from the beginning. Other provisions made included that Victors were entitled to spoils of war, only if war was just; forces prosecuting an unjust war were not entitled to demand *Jus in Bello* during the course of the conflict; Red Banner signaled a party's intent to wage absolute war;

During the War as Fact period, the focus began to change from *Jus ad Bellum* to *Jus in Bello* also. With war as a recognised and legal reality in the relations between nations, the focus on mitigating the impact of war emerged. Memory of Solferino work served as the impetus for the creation of the International Committee of the Red Cross and the negotiation of the First Geneva Convention in 1864. Sherman's work on "War is Hell" was also concerned with the morality of war. His observation that war is hell demonstrates the emergence and reintroduction of morality. However, as his March to the Sea demonstrated, Sherman only thought the right to resort to war should be regulated. Once war had begun, he felt it had no natural or legal limits. In other words he only recognised the first prong (Jus *ad* Bellum) of the law of war. At the end of this period, the major nations held the Hague Conferences (1 899-1907) that produced the Hague Conventions. While some Hague law focused on war avoidance, the majority of the law dealt with limitation of suffering during war.

Basically, the Law of The Hague governs the use of military force and focuses on the behavior and rights of COMBATANTS. But the Law of Geneva is concerned with the principle of humanity, and the protection of civilians and other non-combatants, but also regulates and protects combatants in various ways. The law as a whole seeks to balance respect for human life in armed conflict against military necessity. The Geneva Conventions, which are often discussed, provide a codified source of what has come to be known as international humanitarian law, or 'Geneva' law 25. They are the result of a process that developed in a number of stages between 1864 and 1949 which focused on the

protection of civilians and those combatants who can no longer fight in an armed conflict. In 1977, two additional Protocols to the Geneva Conventions were opened for ratification. They clarify the status of civilians in international conflict and importantly, in conflicts that are not international, for example, in civil war, or armed insurgency against a government.

The Geneva Conventions (1949) introduced certain provisions, which clarified previous ambiguities. Article 2 asserts that the law of war applies in any instance of international armed conflict. Its conventions made a comprehensive effort to protect the victims of war. There was the birth of 'Civilian's Convention', which was post war recognition of the need to specifically address this class of individuals. The Convention also made to internationalise its provisions since the conventions are considered as customary international law. This means even if a particular nation has not ratified the treaties, that nation is still bound by the principles within each of the four treaties because they are merely a reflection of customary law that all nations states are already bound by. It marked a clear shift towards a true humanitarian motivation: the Conventions are coming to be regarded less and less as contracts on a basis of reciprocity concluded in the national interest of each of the parties, and more and more as solemn affirmations of principles respected for their own sake.

SELF-ASSESSMENT EXERCISE

Outline the significance of each epoch in the evolution of the legitimate war.

3.4 United Nations and Legal Bases for the Use of Force

3.4.1 Historical Background

Chronologically, as we have established, each historical era had its convention on the conduct of warfare. The law of war has evolved to its present content over millennia based on the actions and beliefs of nations. It is deeply rooted in history and an understanding of this history is necessary to understand current law of war principles. Between 335 B.C. and 1800, the Just War Theory introduced a moral/philosophical approach that approved of a resort to force if the cause was just. From 1800 to 1918, State Sovereignty ("War as Fact" Era) allowed for the use of war as an instrument of national policy. Sovereign states were free to employ force as a normal element of their foreign relations. Early attempts to regulate the resort to force at the level of international law began at Hague (1899 and 1907) with a

recommendation for the declaration of war. The League of Nations (1919) attempted the collective security system. The Kellogg-Briand Pact (1928) renounced recourse to war. Further shifts on the rules of warfare were observed in the Post World War ll period. Nuremburg Charter, Article 6 listed a number of crimes corning within the jurisdiction of the Tribunal for which there shall be individual responsibility. Such crimes, which were characterised as CRIMES AGAINST PEACE included planning, preparation, initiation or waging a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.

3.4.2 The United Nations Charter and the Use of Force

A. United Nations Charter provides:

Article 2(3) provides that "All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered". This provision has not been relied upon independent of those instances in which Article 2(4) is applicable. In other words, leaving a dispute unsettled, without the use or threat of force, has not been claimed to be a violation of Article 2(3).
Article 2(4). "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". This item has become the basic provision restricting the use of force among states. The article clearly noted that if an attack is not against the "territorial integrity or political independence" of another state, it is not a violation of Article 2(4). In other words if an attackers goal is not to seize territory or overthrow the government, then the attack does not violate Article 2(4).

Chapter VII addresses actions with respect to threats to the peace, breaches of the peace, and acts of aggression.

1. This Chapter gives the Security Council the power to employ non-military or military measures to restore or maintain international peace and security.
2. Article 39: "The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security".

The General Assembly Resolution 33144 recommended to the Security Council a definition of 'aggression'. … the use of armed force by a state against the sovereignty, territorial integrity, or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations'. Acts constituting acts of aggression include blockade, land, sea or air strike, etc.

Article 41: Authorises measures short of use of armed force*1*military intervention and allows the Security Council to call upon all Members to apply such measures. Includes, but is not limited to, "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." Article 42 authorises "such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security", including "demonstrations, blockades, and other operations by air, sea or land forces, by Members of the United Nations". Article 43 provides for special agreements between Members and the U.N. to provide armed forces, assistance, and facilities necessary for the purpose of maintaining international peace and security.

Chapter VIII extensively provided for regional arrangements for the settlement of local disputes. Article 52 recognises the existence of regional organisations (e.g., Organisation of American States, Arab League, Organisation of African Unity), and encourages the resolution of local disputes through such arrangements. Article 53 urges the Security Council to utilise regional arrangements for enforcement actions; regional organisations may not undertake enforcement actions without Security Council authorisation.

To cover up for possible lapses arising from lack of agreement among the members of the Security Council, the General Assembly Resolution 337(V) on "Uniting for Peace" declares:

> ". . . if the Security Council, because of a lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace, or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures, including in the case of a breach of the peace or act of aggression the use of armed force when necessary, to maintain or restore international peace and security."

Example of Cases where the Use of Force became applicable include: the 1990 Iraq (Desert Storm) invasion of Kuwait. Under the UNSCR 660, the Security Council determined that there was a breach of the peace by the Iraqi invasion of Kuwait. Further resolutions were also made to ensure the restoration of peace in that region. In 1994, the attention was on Haiti. UNSCR 940 authorised states to use all necessary means to facilitate the departure from Haiti of the military leadership, which had generated lots of controversy and also to effect the prompt handover to the legitimately elected President.

SELF-ASSESSMENT EXERCISE

Identify and explain the principal aims and objectives of the United Nations with regards to the Laws of War.

3.4.3 The Law of War and the Banner of Sovereignty

Generally, the concept of sovereignty protects a state from "outside interference with internal affairs." This is exemplified by the predominant role of domestic law in internal affairs. However, in some circumstances, international law "pierces the shield of sovereignty, and displaces domestic law from its exclusive control over issues. The law of war is also applicable but only after the requirements for piercing the shield of sovereignty has been satisfied. Once the conditions are met, it therefore intrudes upon the sovereignty of the regulated state. The extent of this intrusion will be contingent upon the nature of the conflict. Despite the nature of the conflict, the law of war includes a standard for when it becomes applicable. This standard is reflected in the Four Geneva Conventions.

Article 2 of the Convention identifies that: "[The present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognised by one of them." This is a true *clefacto* standard. The subjective intent of the belligerents is irrelevant. The law of war applies to: "any difference arising between two states and leading to the intervention of armed forces".' Thus, Article 2 effectively requires that the law be applied broadly and automatically from the inception of the conflict. The following two facts result in application of the entire body of the law of war:

SELF-ASSESSMENT EXERCISE

At what point and circumstance do you think that the international law could pierce through the shield of sovereignty and subsequently undermine domestic laws?

4.0 CONCLUSION

Those who believe in the progress and perfectibility of human nature may continue to hope that at some future point reason will prevail and all international disputes will be resolved by non violent means. Unless and until that occurs, our best thinkers must continue to pursue the moral issues related to war. Those who romanticise war do not do mankind a service; those who ignore it abdicate responsibility for the future of mankind, a responsibility we all share even if we do not choose to do so. The best to do would be to stay ready for war and yet do all within reach to ensure that we preclude war, since war does not actually favour mankind. War, including threats to the use of force, is a reality and must therefore be integrated into national plans. History is replete with diplomacies to prevent wars, the failures of diplomacy to prevent wars, the actual conduct of war, and also with efforts directed at establishing lasting peace and order. Thus, the understanding of the *war cycle* will evolve a better preparation for a relative global peace.

With special attention on laws of war, the importance of regulation cannot be overemphasised. Among others it motivates the enemy to observe the same rules; motivates the enemy to surrender; guards against acts that violate basic tenets of civilisation; protects against unnecessary suffering; safeguards certain fundamental human rights; provides advance notice of the accepted limits of warfare; reduces aggression and makes identification of violations more efficient; helps restore peace; etc.

Since 1945, the United Nations has made a lot of effort to prevent situations that could lead to the disruption of world peace and security. The principle of the peaceful settlement of disputes has been reaffirmed in a number of General Assembly resolutions, including resolutions 2627 (XXV) of 24 October 1970, 2734 (XXV) of 16 December 1970 and 40/9 of 8 November 1985. It is dealt with comprehensively in the Declaration of Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations (resolution 2625 (XXV), annex), in the section entitled “The principle that states shall settle their international disputes by peaceful means in such a manner that international peace and security and justice are not endangered”, as well as in the Manila Declaration on the Peaceful Settlement of International Disputes (resolution 37/10, annex), in the Declaration on the Prevention and Removal of Disputes and Situations which may threaten International Peace and Security and on the Role of the United Nations in this field (resolution 43/51, annex) and in the Declaration on Fact-finding by the United Nations in the field

of the maintenance of International Peace and Security (resolution 46/59, annex).

In spite of the above efforts by the United Nations, there is the need to emphasise that the Laws of War should be strengthened to ensure that some nations are not above the provisions therein. The various clauses and resolutions of the Security Council should be thoroughly observed in a manner that no *Big Nation* will influence the choices of other nations in the hope to achieving specific national interests as against the broad interest of the entire globe.

5.0 SUMMARY

This section has thoroughly surveyed the Laws of War from historical times. The stage by stage progression of the Laws of War and the peculiar characteristics of each epoch were adequately treated in this unit. The operations of the *jus ad bellum* and the *jus ad bello* at each point in the history of war. Chronologically, we examined the just war period, the era of divine justification under the Papacy, the war as a fact period, the jus contra bellum period, the Post World War II period and the periods beyond the *jus ad bello* period. Of significant attention was the shift from the period of *war as a fact*, which inaugurated the *jus ad bello* period.

This unit equally gave special focus on the works of the United Nations in its pursuit of world peace and security. It recorded the failures of previous conventions (the Hague Conventions, the League of Nations, and the Kellogg-Briand Pact) which sought to prevent world wars. The activities of the Security Council and the General Assembly in the pursuit of global peace are viewed as the hope of today's international system to actualise the vision of world security, which is first and foremost anchored on the ban of war, the use of the principle of peaceful settlement and also the ban of threat of use of force.

6.0 TUTOR-MARKED ASSIGNMENT

1. In the history of Laws of War, what are the main characteristics of the *jus ad bello period?*
2. The relative global peace and security in our contemporary international system are significantly anchored on the initiatives and operations of the United Nations Security Council's. Do you believe this assertion?

7.0 REFERENCES/FURTHER READING

Michael N. S. (2010). "Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance". *Virginia Journal Of International Law,* Vol.50 Issue 4.

Neff, S. C. (2005). *War and the Law of Nations: A General History.* Cambridge: Cambridge University Press.

Russell, F. H. (1975). *The Just War in the Middle Ages.* Cambridge: Cambridge University Press.

Tuck, R. (1999). The *Rights of War and Peace: Political Thought and the International Order from Grotius to Kant.* Oxford: Oxford University Press.

UNIT 2 LAWS OF THE SEA

CONTENTS

1.0 INTRODUCTION

The oceans have long been a critical arena for international relations. Before there was air travel and instantaneous communication, people, goods, and ideas travelled the world by ship. For centuries a strong maritime presence—both military and commercial—has been essential for states with great power aspirations. Today, even with advances in technology, seaborne commerce remains the linchpin of the global economy. As the International Maritime Organisation reports, "more than 90 percent of global trade is carried by sea." And beyond trade, a host of other issues, ranging from climate change and energy to defense and piracy, ensure that the oceans will hold considerable strategic interest well into the future.

One of the principal functions of the law of the sea is to balance the competing interests arising from different uses of the sea, such as navigation, fishing, scientific research and waste disposal. The law of the sea has developed from customary international law and international conventions, some of which codify customary international law. The principal conventions are the four conventions developed at the First UN Conference on the Law of the Sea in 1958 and the UN Convention on the Law of the Sea 1982 (UNCLOS), which entered into force in 1994. By the time it entered into force, many of its provisions had achieved sufficient acceptance to be regarded as principles of customary international law.

2.0 OBJECTIVES

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

- state the rationale behind the earlier concept of Freedom of the Seas
- explain the main activities that marked the 1967 Declaration of Principles Governing the Seabed and Ocean Floor Beyond the Limits of National Jurisdiction
- highlight the major discourses and relevance of the United Nations Conference on Laws of the Sea I, II, and III
- state the reasons why the United States' refused to accept the Part XI of the UNCLOS III.

3.0 MAIN CONTENT

3.1 Emergence of the Law of the Sea

Creating an international ocean governance framework has its roots in sixteenth-century European imperialism. As states increasingly competed for trade routes and territory, two theories of ocean use collided head-on. On one side, Spain and Portugal claimed national ownership of vast areas of ocean space, including the Gulf of Mexico and the entire Atlantic Ocean, which the Catholic Church declared should be divided between them. Opposed to this were the proponents of "freedom of the seas," a theory of vital concern to the great trading firms like the Dutch East India Company. Since no nation could really enforce claims to such enormous areas, and given the need of all the rising colonial powers to have assured access to their overseas territories, it is not surprising that the proponents of freedom of the seas, the foremost of whom was the Dutch jurist Hugo Grotius, emerged triumphant. That concept became the basis of modern ocean law. Over the next three centuries, the concept of freedom of the seas became almost universally accepted, subject only to the exception that in an area extending three miles from the shoreline, or roughly the range of iron cannons of the day, the coastal state was sovereign. Its control, however, was not absolute. Vessels of other countries were given the right of passage through the territorial sea so long as such passage was "innocent"—that is to say, "not prejudicial to the peace, good order or security of the coastal state." The nineteenth century witnessed a steady increase in ocean commerce, and freedom of the seas came to be qualified by the concept of "reasonable" use—basically, respect for the rights of others.

It was during the twentieth century, with its discoveries of important resources, such as oil, and a sharp rise in ocean uses generally, that the accepted principles began to erode. Customary law, dependent on slow,

incremental growth, could no longer move fast enough to provide generally acceptable solutions to new problems. Traditional uses multiplied. Both the world fish catch and the gross tonnage of merchant ships quadrupled in the twenty-five years from 1950 to 1975. However, the real spur to the seaward expansion of territorial claims had come a decade earlier with the discovery of oil under the continental shelf off the coast of the United States. That led President Harry S. Truman in 1945 to proclaim that henceforth the United States had the exclusive right to explore and exploit the mineral resources of its continental shelf beyond the traditional three-mile limit. Unilateral extensions were also of growing concern to the world's major maritime powers, particularly the United States and the Soviet Union. As more and more coastal states started claiming territorial seas broader than three miles (in several cases, as much as twelve miles, but in some, particularly in Latin America, far beyond), the maritime nations feared that their freedom of navigation on, over, and under critical portions of the world's oceans might be severely curtailed. They were particularly concerned that they would lose their high-seas freedoms in the 116 straits, including those of Malacca, Dover, Gibraltar, and Hormuz, that, at their narrowest point, were more than six miles but less than twenty-four miles in width. If these 116 straits became territorial seas, the rules of innocent passage would require, for example, that submarines operate on the surface, not submerged, and that over flight by aircraft be prohibited without the prior consent of the coastal state.

The maritime nations did their best but failed to cap these extensions in two UN conferences—the first in 1958, and the second in 1960—the results of which were never widely accepted. By the mid-1960s, they were eager to try again, and they lent their weight to the growing calls for a new UN conference on the law of the sea. Their calls were not the only ones. Many developing nations in the Third World were concerned about preserving international rights to non-living resources beyond the limits of national jurisdiction. In 1967, these concerns were crystallised in a remarkable speech before the General Assembly by Arvid Pardo, then the Maltese delegate. Pardo was viewed sympathetically throughout much of the world when he asked the UN to declare the seabed and the ocean floor "underlying the seas beyond the limits of present national jurisdiction" to be "the common heritage of mankind" and not subject to appropriation by any nation for its sole use. Their calls were not the only ones. Many developing nations in the Third World were concerned about preserving international rights to non-living resources beyond the limits of national jurisdiction. He urged the creation of a new kind of international agency that, acting as trustee for all countries, would assume jurisdiction over the seabed and supervise the development and recovery of its resources "for the benefit of all mankind," with the net

proceeds to be used primarily to promote the development of the poorer countries of the world.

Developing countries liked the idea for several reasons. First, since the value of the resources was then believed to be considerable, some thought it would lead to substantial development assistance for the poorest countries. Second, it gave developing countries a chance to become partners in, rather than subjects of, resource development. Developed countries also liked the prospect of a source of development funds that, for once, would not be a direct drain on their treasuries. The major maritime countries also saw the idea as the natural vehicle to finally provide a counterweight to the seaward expansion of coastal state jurisdictions.

Whatever the motive, the concept of the common heritage was embodied in a "Declaration of Principles Governing the Sea-bed and Ocean Floor Beyond the Limits of National Jurisdiction," which was adopted by the General Assembly by a vote of 106–0, with the United States voting in favour and only the Soviet bloc abstaining. The declaration called for the establishment of a new regime to oversee management of this area and to ensure the equitable sharing of benefits, with specific reference to the needs of developing countries. A companion resolution called for the convening in 1973 of a comprehensive conference to cover all ocean issues on the international agenda.

SELF-ASSESSMENT EXERCISE

Discuss the origin of the Laws of the Sea.

3.2 United Nations Conference on Laws of the Sea (UNCLOS)

UNCLOS, also called the Law of the Sea Convention or the Law of the Sea treaty, thus became the international agreement that resulted from the third United Nations Conference on the Law of the Sea (UNCLOS III), which took place from 1973 through 1982. It was the largest international conference ever held, with virtually every country in the world represented, many of them relatively new and with no prior experience in dealing with ocean issues. There was even a subgroup to look after the interests of fifty-one landlocked or geographically disadvantaged states. In essence, the conference was charged with the formidable task of creating a comprehensive framework for managing ocean uses that would be acceptable to the international community.

The Law of the Sea Convention defines the rights and responsibilities of nations in their use of the world's oceans, establishing guidelines for businesses, the environment, and the management of marine natural resources. The Convention, concluded in 1982, replaced four 1958 UNCLOS 1 treaties. We will recall that in 1956, the United Nations had held its first Conference on the Law of the Sea (UNCLOS 1) at Geneva, Switzerland. Subsequently, UNCLOS I resulted in four treaties concluded in 1958:

- Convention on the Territorial Sea and Contiguous Zone, entry into force: 10 September 1964.
- Convention on the Continental Shelf, entry into force: 10 June 1964.
- Convention on the High Seas, entry into force: 30 September 1962.
- Convention on Fishing and Conservation of Living Resources of the High Seas, entry into force: 20 March 1966.

Although UNCLOS I was considered a success, it left open the important issue of breadth of territorial waters.

In 1960, the United Nations held the second Conference on the Law of the Sea ("UNCLOS II"); however, the six-week Geneva conference did not result in any new agreements. Generally speaking, developing nations and third world countries participated only as clients, allies, or dependents of United States or the Soviet Union, with no significant voice of their own.

UNCLOS III came into force in 1994; a year after Guyana became the 60th state to sign the treaty. The convention introduced a number of provisions. The most significant issues covered were setting limits, navigation, archipelagic status and transit regimes, exclusive economic zones (EEZs), continental shelf jurisdiction, deep seabed mining, the exploitation regime, protection of the marine environment, scientific research, and settlement of disputes.

The convention set the limit of various areas, measured from a carefully defined baseline. (Normally, a sea baseline follows the low-water line, but when the coastline is deeply indented, has fringing islands or is highly unstable, straight baselines may be used.) The areas are as follows:

Archipelagic Waters: The convention set the definition of Archipelagic States in Part IV, which also defines how the state can draw its territorial borders. A baseline is drawn between the outermost points of the

outermost islands, subject to these points being sufficiently close to one another. All waters inside this baseline are designated *Archipelagic Waters*. The state has full sovereignty over these waters (like internal waters), but foreign vessels have right of innocent passage through archipelagic waters (like territorial waters).

Contiguous Zone: Beyond the 12 nautical mile limit, there is a further 12 nautical miles from the territorial sea baseline limit, the contiguous zone, in which a state can continue to enforce laws in four specific areas: customs, taxation, immigration, and pollution, if the infringement started within the state's territory or territorial waters, or if this infringement is about to occur within the state's territory or territorial waters. This makes the contiguous zone a hot pursuit area.

Exclusive Economic Zones (EEZs): These extend from the edge of the territorial sea out to 200 nautical miles (370 kilometres; 230 miles) from the baseline. Within this area, the coastal nation has sole exploitation rights over all natural resources. In casual use, the term may include the territorial sea and even the continental shelf. The EEZs were introduced to halt the increasingly heated clashes over fishing rights, although oil was also becoming important. The success of an offshore oil platform in the Gulf of Mexico in 1947 was soon repeated elsewhere in the world, and by 1970 it was technically feasible to operate in waters 4000 meters deep. Foreign nations have the freedom of navigation and over flight, subject to the regulation of the coastal states. Foreign states may also lay submarine pipes and cables.

Continental Shelf: Baseline, whichever is greater. A state’s continental shelf may exceed 200 nautical miles until the natural prolongation ends. However, it may never exceed 350 nautical miles (650 kilometres; 400 miles) from the baseline; or it may never exceed 100 nautical miles (190 kilometres; 120 miles) beyond the 2,500 meter isobaths (the line connecting the depth of 2,500 meters). Coastal states have the right to harvest mineral and non-living material in the subsoil of its continental shelf, to the exclusion of others. Coastal states also have exclusive control over living resources “attached” to the continental shelf, but not to creatures living in the water column beyond the exclusive economic zone.

Aside from its provisions defining ocean boundaries, the convention establishes general obligations for safeguarding the marine environment and protecting freedom of scientific research on the high seas, and also creates an innovative legal regime for controlling mineral resource exploitation in deep seabed areas beyond national jurisdiction, through an International Seabed Authority and the Common heritage of mankind

principle. Landlocked states are given a right of access to and from the sea, without taxation of traffic through transit states.

SELF-ASSESSMENT EXERCISE

What were the major landmarks of the UNCLOS that distinguished it from the previous frameworks put in place to guarantee peace and order on the seas?

3.3 Part XI and United State's Interest

Part XI of the UNCLOS III provides for a regime relating to minerals on the seabed outside any state's territorial waters or EEZ (Exclusive Economic Zones). It established an International Seabed Authority (ISA) to authorise seabed exploration and mining and collect and distribute the seabed mining royalty. However, the United States objected to this provision (Part XI of the Convention) on several grounds, arguing that the treaty was unfavorable to American economic and security interests. Due to Part XI, the United States refused to ratify the UNCLOS, although it expressed agreement with the remaining provisions of the Convention. To date, 162 countries and the European Community have joined in the Convention.

While the Secretary General of the United Nations receives instruments of ratification and accession and the UN provides support for meetings of states party to the Convention, the UN has no direct operational role in the implementation of the Convention. There is, however, a role played by organisations such as the International Maritime Organisation, the International Whaling Commission, and the International Seabed Authority (the latter being established by the UN Convention).

On what can be considered the sovereignty front, preserving freedoms of navigation were paramount, but there were also a number of other objectives, such as threats to fisheries and marine mammal conservation; protection of the marine environment, in particular from the growing threat of vessel source pollution; and the preservation of the high-seas freedom of scientific research. All of these, like freedoms of navigation, were being whittled away by claims of exclusive control accompanying the many extensions of coastal-state jurisdiction. To strengthen against these extensions, the convention sought the establishment of third-party settlement mechanisms for disputes, particularly those over boundaries that were already being exacerbated by new jurisdictional claims.

On what can be called the deep-seabed front, there was the effort to create a regime to manage resources beyond national jurisdictions. The

main U.S. objective was to help create a strong, viable organisation that would be effective against the further-seaward claims of coastal states. At the same time, the United States wanted to ensure access to the deep seabed for U.S.-based companies on reasonable terms and conditions that would offer the prospect of a fair profit in the light of the technical difficulties to be surmounted and the large capital investments required for development.

How well did the United States fare during the nearly ten years of negotiations that followed? Most observers believe that, as a whole, the convention met U.S. objectives reasonably well, even though the Reagan administration, which came to power in 1981, concluded that defects of the design for a seabed regime would prevent President Ronald Reagan from signing the final convention. Certainly, on the sovereignty side, the final Convention on the Law of the Sea met every significant U.S. objective.

Most important of all, the breadth of the territorial sea was capped at twelve miles, while a new transit passage regime was created that, for all practical purposes, preserved freedom of navigation and over flight of the international straits. High-seas freedoms were also preserved in the three newly created jurisdictional zones beyond the twelve-mile territorial sea: the contiguous zone out to twenty-four miles, where a coastal state could enforce customs and immigration laws; the 188-mile exclusive economic zone (EEZ), which carried the coastal state's jurisdiction over living and nonliving resources out to a total of two hundred miles; and the new archipelagic zones, which otherwise would have become internal waters of archipelagic states such as Indonesia and the Philippines, placing significant restrictions on navigation freedoms previously enjoyed in these areas. The convention also established procedures for extending coastal-state jurisdiction over areas of continental shelf beyond two hundred miles.

On the environmental front, the United States scored several important victories. It got the conference to agree to international standards for vessel-source pollution. There would be only one set of standards, worldwide, with which all vessels would have to comply. At the same time, the conference agreed to maintain the traditional right of port states to enact and enforce standards higher than the international ones for vessels entering their harbors. That was important to the United States, since an estimated 90 percent of all shipping off U.S. coasts is on its way to or from American seaports.

The Reagan administration thought that, by and large, the convention had gotten it right. Indeed, it later declared that the United States would

voluntarily abide by all non-seabed parts of the convention. The Reagan administration's objections were directed mainly at the deep-seabed side of the negotiations—the design of and the powers to be given to the new regime for governance of the mineral resource recovery in the area beyond national jurisdictions. The philosophical argument was that the United States should be able to go where it wanted and take what it wanted on a "first come, first served" basis. President Reagan would have preferred no regime at all governing the international seabed, but he realised that this was a fait accompli given the late stages of the negotiations. In the end, the Reagan administration declared it could accept Part XI only if certain changes were made in six areas having to do with matters like technology transfer, and if the United States preserved a de facto veto power in the governing organs of the new authority so that no financial obligations could be imposed on the United States without its consent. When these changes were not made by 1982, the Reagan administration refused to sign the convention.

All six of the Reagan administration's objections were fixed to the satisfaction of the United States in a subsequent supplemental agreement that was negotiated and signed by most states, including the United States, in 1994. By now, it has been adopted and ratified by most of the original signatories to the 1982 convention.

Beyond Reagan's administration, American politics has generally, continued to intensify efforts on as well as incorporate issues relating to the Laws of the Sea. Presidents, Law makers, and other top government officials have in diverse manners demonstrated their desire to protect America's interests. The United States had objected to the provisions of Part XI of the Convention on several grounds, arguing that the treaty was unfavorable to American economic and security interests. Due to Part XI, the United States refused to ratify the UNCLOS, although it expressed agreement with the remaining provisions of the Convention.
From 1983 to 1990, the United States accepted all but Part XI as customary international law, while attempting to establish an alternative regime for exploitation of the minerals of the deep seabed. An agreement was made with other seabed mining nations and licenses were granted to four international consortia. Concurrently, the Preparatory Commission was established to prepare for the eventual coming into force of the Convention-recognised claims by applicants, sponsored by signatories of the Convention. Overlaps between the two groups were resolved, but a decline in the demand for minerals from the seabed made the seabed regime significantly less relevant. In addition, the decline of Socialism and the fall of Communism in the late 1980s had removed much of the support for some of the more contentious Part XI provisions.

In 1990, consultations were begun between signatories and non-signatories (including the United States) over the possibility of modifying the Convention to allow the industrialised countries to join the Convention. The resulting 1994 Agreement on Implementation was adopted as a binding international Convention. It mandated that key articles, including those on limitation of seabed production and mandatory technology transfer, would not be applied, that the United States, if it became a member, would be guaranteed a seat on the Council of the International Seabed Authority, and finally, that voting would be done in groups, with each group able to block decisions on substantive matters. The 1994 Agreement also established a Finance Committee that would originate the financial decisions of the Authority, to which the largest donors would automatically be members and in which decisions would be made by consensus.

On February 1, 2011, the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea (ITLOS) issued an advisory opinion concerning the legal responsibilities and obligations of States Parties to the Convention with respect to the sponsorship of activities in the Area in accordance with Part XI of the Convention and the 1994 Agreement. The advisory opinion was issued in response to a formal request made by the International Seabed Authority following two prior applications the Authority's Legal and Technical Commission had received from the Republics of Nauru and Tonga regarding proposed activities (a plan of work to explore for polymetallic nodules) to be undertaken in the Area by two State-sponsored contractors (Nauru Ocean Resources Inc. (sponsored by the Republic of Nauru) and Tonga Offshore Mining Ltd. (sponsored by the Kingdom of Tonga). The advisory opinion set forth the international legal responsibilities and obligations of Sponsoring States AND the Authority to ensure that sponsored activities do not harm the marine environment, consistent with the applicable provisions of UNCLOS Part XI, Authority regulations, ITLOS case law, other international environmental treaties, and Principle 15 of the UN Rio Declaration.

On July 29, 1994, President Bill Clinton signed the Agreement on the Implementation of Part XI of the Convention on the Law of the Sea. He sent the agreement, along with the 1982 convention, to the Senate on October 7, 1994. The following month, Republicans won control of the Senate and subsequently there emerged expressions of dissatisfaction with the handling of the provisions of the convention, which the Republicans alleged jeopardised US sovereignty.

By the late autumn of 2007, the convention had become a small but notable issue in the Republican presidential campaign. Senator John

McCain (R-AZ), who had a decade long history of supporting the treaty, changed his position and opposed the convention. By early 2008, the heat of the presidential campaign brought progress on the convention to a halt. Then, following the election, the Senate's attention was taken by the growing economic crisis, precluding consideration of the convention during the lame-duck session. Under Senate rules, treaties must be reconsidered by the SFRC in each new Congress. While the committee must begin the process again, it will be able to draw upon the extensive hearings held in 2003, 2004, and 2007 to inform its next review.

SELF-ASSESSMENT EXERCISE

What was the key ingredient and provisions of the UNCLOS, which touched negatively on the US interests on the use of the seas?

4.0 CONCLUSION

The importance of and large space covered by the seas is such that requires utmost attention. Global governance of the seas and oceans of this world is a necessity that deserves the compliance of all states, notwithstanding what the specific interest of any nation might be. From time past, mankind has endeavored to work out modalities to evolve a harmonious relationship with other nations of the world given the importance of international relations against the myopic tendency towards isolationist principles, which run counter to international standards. From the 16th century, intensive operations at high seas had resulted to the emergence of various conventions on the use of the seas, beginning with the Freedom of the Seas mantra.

It is indeed imperative to opine that any opinion channeled towards lack of submission to generally accepted resolutions on the management of sea resources will spell doom for the ultimate desire to achieve the measure of peace and security envisioned through the modalities of international law. Laws of the Sea are an integral module in the entire system of international law and should be viewed with some modicum of solemnity and commitment in the interest of all.

5.0 SUMMARY

Laws of the Sea are an integral part of international law. Its provisions have been a major preoccupation of most states, especially the marine nations. During the 16th century, the major European nations, driven by uncontrolled commercial interests had begun to experience major confrontations with regards to gaining access and also to the use of international seas. By way of reconciliation, the idea of Freedom of the

Seas became operational. However, with the passage of time, other interests began to emerge. The United States' concern on the use and management of the sea had grown and shortly afterwards became dominant, particularly from the late 20th century.

Besides the Freedom of the Sea theory, other important concepts designed to control activities on the world's oceans include the UNCLOS 1 treaties of 1958, the UNCLOS II treaties of 1960, 1967 Declaration of Principles Governing the Seabed and Ocean Floor beyond the Limits of National Jurisdiction, and the UNCLOS III treaties of 1982, which came into force in 1994. In spite of great challenges, chiefly from the United States, the United Nations has extensively worked hard to ensure an *even use* of the ocean resources through the establishment of an international sea management body that would be responsible to the United Nations.

6.0 TUTOR-MARKED ASSIGNMENT

1. Why is the UNCLOS III unique?
2. What was United States' objection with regards to the Part XI of the UNCLOS III?
3. What law of the sea was generally accepted during the 16th century?

7.0 REFERENCE/FURTHER READING

Lawrence, A. K. *What goes around comes around: How UNCLOS Ratification Will Herald Europe's Precautionary Principle as U.S. Law*.

UNIT 3 AIR SPACE AND OUTER SPACE LAW

CONTENTS

1.0 INTRODUCTION

We have established the importance of international laws to nature and the environment. In line with this discussion, this unit treats environmental laws guiding the outer space, its ownership and use by the international community. The discussion also covers rules of engagement in air transportation, states' rights to activities within the lower reaches of a state and the outer space.

2.0 OBJECTIVES

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

- identify outer space laws and its usefulness to states in their activities outside a state's atmospheric reach
- explain the limits under which international regulations can prevent a state's activities on air
- state the importance of outer space laws to the states.

3.0 MAIN CONTENT

3.1 Sovereignty above State Territory

A State has sovereignty in international law above and below its land. According to international law principle, whoever owns the land, owns the space above it to infinity and the space below. This allows a State to use its own airspace and that of the high seas but not that of another State without permission.

The development of aircraft in the early 20th century added new dimension to the regulations of airspace in state interaction with one another. This is because; war planes and fighter aircrafts can be used for surveillance as well as bombings during wars different from the regular peaceful use of the airspace for mere transportation purposes.

The revolving nature of the earth and manning of human in outer space by developed countries that have had no negative implications on States sovereignty in the outer space limits States' control. This places some limit to State's control of its outer space. Different distances have been suggested as the upper limits of a state sovereignty. An aircraft can reach a height of about 20 km although the greatest aerodynamic is about 40 km. the X-15 possesses characteristics of both air and space craft and can ascend to a height of about 75 km.

Another view is that sovereignty extends as high as an aircraft can fly and the next and the next 480 km is a contiguous zone with the right of innocent passage for all other states using non-military aircraft. The distance beyond is outer space free to all other States. It is also suggested that the sovereignty should extend to the lowest height that an object is required to circle the earth and that is between 100 km and 160 km.

Therefore, state sovereignty is recognised over the lower limits of the atmosphere including the areas where conventional flights are possible. The region of outer space, where objects circle the earth is open to all states. However, States sovereignty would persist beyond the lower reaches if the activities in the outer space have grave human security breaches on the State or human welfare.

SELF-ASSESSMENT EXERCISE

1. State the conditions for the regulation and control of the outer space by states according to international law.

3.2 The Regulation and Protection of Air Transport

The Paris Conference of 1919 on Air transport reinforced the *ad coelum* principle, doctrine of absolute sovereignty above a State's sovereignty and distinguished between scheduled and non-scheduled flights. It made provision as well for the registration of aircrew, certificates of airworthiness, aircraft licenses, rule of traffic and so on.

There was also the Havana Convention of 1928. However, civil aviation today is regulated mainly by the Chicago Convention of 1944 which

reaffirms State's sovereignty over airspace but creates rights and duties for member-states in air transportation. The Convention established the regulations for air navigation and transportation as well as the International Civil Aviation Organisation (ICAO) to administer the rules. This convention adopted two out of the five freedom of air advocated by the United States including:

1. Freedom to fly across Grantor State without landing
2. Freedom to land for non-traffic purposes such as refueling and repairs

These two being transit rights while the next three are traffic rights but were not adopted.

3. Freedom to carry passengers, cargo, and mail from the Grantee State to the Grantor State.
4. Freedom to carry passengers, cargo and mail from the Grantee State to the Grantee State.
5. Freedom to carry passengers, cargo and mail from the Grantee and the Grantor States as well as from or to third States on the same route which may be intermediate or beyond.

Other regulations and convention also provides conducts in airspace travels including provision for what is expected of aircrew and prevention of crimes such as bombings, hijacking and so on. There is the Tokyo Convention on offences and other acts committed on Board Aircraft 1963, Hague Convention for the Suppression of Unlawful Seizure of Aircraft 1970 and the International Convention against the taking of Hostages 1979 among others. In all of these, a State uses reasonable force against aircraft that breaches its sovereignty such as ordering it to land but every state tries to safeguard the safety of lives and the aircraft in air transportation regulations.

SELF-ASSESSMENT EXERCISE

Clearly state and explain the provisions of the Chicago convention of 1928 and relate these provisions to air transportation regulations today.

3.3 Outer Space

From the foregoing, it could be seen that the outer space is full of activities. It is the responsibility of states and international organisations to protect the outer space. The United Nations General Assembly passed a number of resolutions calling for non-militarisation, peaceful uses and

international cooperation in space exploration and other relationship in the outer space.

The Nuclear Test Ban Treaty of 1963 prohibits the explosion of nuclear weapons in outer space or anywhere else if it will cause radioactive debris outside the territory of the State exploding it.

The Treaty on the Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and other Celestial Bodies 1967 restrict the use of outer space to peaceful uses only. It prohibits the appropriation of celestial bodies by any means and entrenches the freedom of scientific investigation, exploration and use.
There is also the United Nations Convention on International Liability for Damage caused by Space Objects 1972 concerning for instance satellites installation in the outer space. Under this convention, a launching state launches and is responsible for the payment of compensation for damage caused by the space object on earth or to aircraft in flight.

These regulations find expression in the United Nations General Assembly Resolution 1721 A (xvi) 1961 which asserts that international law applies to outer space and that "Outer Space and Celestial Bodies are …not subject to national appropriation".

SELF-ASSESSMENT EXERCISE

How influential is the United Nations in the regulation of Outer Space?

4.0 CONCLUSION

There are more conventions and protocols intended preserve the outer space and activities thereof. It is expected that by obliging to these regulations development and advancement in states' activities and uses of objects in the space will not have negative consequences on states in the relations with one another. It could be seen however that most of the conventions help to promote a mastery of the outer space by developed countries.

5.0 SUMMARY

The above identified few of the conventions on state's control of the outer space. It showed the rights and sovereignty of a state over the outer space above it and regulations for air transportation, that has become a veritable tool or relationship among states. It ended by stating

the importance of the United Nations provision in preventing the appropriation of the outer space.

6.0 TUTOR-MARKED ASSIGNMENT

1. How effective are outer space regulations to states whose technological advancements can manipulate outer space limits set by international conventions?
2. How true is the assertion that international regulations in the outer space help promote developed countries superiority in International Law?

7.0 REFERENCES/FURTHER READING

Rothwell, R. D. & Stephens, T. (2010). *The International Law of the Sea.* Oxford: Hart Publishing.

Umozurike, U. O. (2005). *Introduction to International Law*. (5th ed.). Ibadan: Spectrum Books Limited.

UNIT 4 OTHER INTERNATIONAL LAWS ON THE PROTECTION OF THE ENVIRONMENT

CONTENTS

1.0 INTRODUCTION

The environment is a very crucial part of nature and a heritage from which man derives survival. Human activities on the environment have had significant consequences both positively and negatively on the lives of man at the moment, the environment and future generations. In a bid to regulate human beings reliance on the environment, several regulations have been reached at international conferences that have today formed part of international law by which states somehow tacitly operate. This unit examines the Stockholm conference, Rio de Janeiro Conference and the Kyoto Protocol among many other international environmental regulations.

2.0 OBJECTIVES

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

- state why there are international regulations and laws on the environment
- identify some international laws of the environment
- outline the importance of these laws.

3.0 MAIN CONTENT

3.1 Stockholm Conference of 1962

The United Nations Conference on the Human Environment (also known as the Stockholm Conference) was an international conference

convened under United Nations auspices held in Stockholm, Sweden from June 5–16, 1972. It was the UN's first major conference on international environmental issues, and marked a turning point in the development of international environmental politics.

Being the precursor to the 1992United Nations Earth Summit in Rio de Janeiro, Brazil, the meeting agreed upon a Declaration containing 26 principles concerning the environment and development; an Action Plan with 109 recommendations, and a Resolution. Many believe the most important result of the conference was the precedent it set for international cooperation in addressing environmental degradation. The nations attending agreed that they shared responsibility for the quality of the environment, particularly the oceans and the atmosphere, and they signed a declaration of principles, after extensive negotiations, concerning their obligations. The conference also approved an environmental fund and an action programme, which involved 200 specific recommendations for addressing such problems as global climatic change, marine pollution, population growth, the dumping of toxic wastes, and the preservation of biodiversity. A permanent environmental unit was established for coordinating these and other international efforts on behalf of the environment; the organisation that became the United Nations Environmental Programme was formally approved by the General Assembly later that same year and its base established in Nairobi, Kenya. This organisation has not only coordinated action but monitored research, collecting and disseminating information, and it has played an ongoing role in international negotiations about environmental issues.

The conference, and more importantly the scientific conferences preceding it, had a real impact on the environmental policies, for instance, the European Community (that later became the European Union) in 1973, created the Environmental and Consumer Protection Directorate, and composed the first Environmental Action Program. In addition, the conference sensitised the globe on the importance of the environment leading to increased interest and research collaboration which for instance paved the way for further understanding of environmental issues like global warming, which has led to such agreements as the Kyoto Protocol.

SELF-ASSESSMENT EXERCISE

What are the main contributions of the Stockholm conference of 1972 to International law especially those concerning the environment?

3.2 Rio de Janeiro Conference of 1992

The Earth Summit in Rio de Janeiro was unprecedented for a United Nations conference, in terms of both its size and the scope of its concerns. Twenty years after the first global environment conference in Stockholm, the UN sought to help Governments rethink economic development and find ways to halt the destruction of irreplaceable natural resources and pollution of the planet. Hundreds of thousands of people from all walks of life were drawn into the Rio process. They persuaded their leaders to go to Rio and join other nations in making the difficult decisions needed to ensure a healthy planet for generations to come.

The conference focuses on the review of four key issue areas including:

1. Patterns of production, particularly the production of toxic components, such as lead in gasoline, or poisonous waste — are being scrutinised in a systematic manner by the UN and Governments alike;
2. Alternative sources of energy are being sought to replace the use of fossil fuels which are linked to global climate change;
3. New reliance on public transportation systems is being emphasised in order to reduce vehicle emissions, congestion in cities and the health problems caused by polluted air and smog; and
4. Greater awareness of and concern over the growing scarcity of water.

At the end, the Earth Summit as the Rio Conference is known resulted in the following documents:

1. Rio Declaration on Environment and Development
2. Agenda 21
3. Forest Principles

Moreover, two important legally binding agreements were opened for signature:

1. Convention on Biological Diversity
2. United Nations Framework Convention on Climate Change (UNFCCC).

The Earth Summit influenced all subsequent UN conferences, which have examined the relationship between human rights, population, social development, women and human settlements and the need for

environmentally sustainable development. The World Conference on Human Rights, held in Vienna in 1993, for example, underscored the right of people to a healthy environment and the right to development, controversial demands that had met with resistance from some member States until Rio Summit.

SELF-ASSESSMENT EXERCISE

State clearly the provisions of Agenda 21 and its impacts on the international environmental protection.

3.3 Kyoto Protocol of 1996

The Kyoto Protocol is a protocol to the United Nations Framework Convention on Climate Change (UNFCCC), aimed at fighting global warming arising from human industrial activities. The UNFCCC is an international environmental treaty with the goal of achieving the stabilisation of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system.

The major feature of the Kyoto Protocol is that it sets binding targets for 37 industrialised countries and the European community for reducing greenhouse gas (GHG) emissions. This amounts to an average of five per cent against 1990 levels over the five-year period 2008-2012. The major distinction between the Protocol and the Convention is that while the Convention encouraged industrialised countries to stabilise GHG emissions, the Protocol commits them to do so.

Under the Protocol, countries' actual emissions have to be monitored and precise records have to be kept of the trades carried out. The registry systems track and record transactions by Parties under the mechanisms. The UN Climate Change Secretariat, based in Bonn, Germany, keeps an international transaction log to verify that transactions are consistent with the rules of the Protocol. Reporting is done by Parties by way of submitting annual emission inventories and national reports under the Protocol at regular intervals. A compliance system ensures that Parties are meeting their commitments and helps them to meet their commitments if they have problems doing so.

The Kyoto Protocol, like the Convention, is also designed to assist countries in adapting to the adverse effects of climate change. It facilitates the development and deployment of techniques that can help increase resilience to the impacts of climate change. The Adaptation Fund was established to finance adaptation projects and programmes in

developing countries that are Parties to the Kyoto Protocol. The Fund is financed mainly with a share of proceeds from CDM project activities.
The major challenges to the reduction of GHG remain the developed countries led by the United States that has refused to sign the Protocol into law because it argues over 80 per cent of the most populous people in the world are not parties to the Protocol. According to former US President George Bush the Protocol "exempts 80% of the world, including major population centers such as China and India, from compliance, and would cause serious harm to the US economy". The protection of their economy weakens therefore the effectiveness of the Protocol just as their neglect of other international law has rendered such laws impotent.

SELF-ASSESSMENT EXERCISE

In the face of states agitation for economic development and prosperity, can the Kyoto Protocol reduce global warming?

4.0 CONCLUSION

From the foregoing, the environmental laws are many and states continue to hold international conferences to control the spate of harmful activities to the human environment.

5.0 SUMMARY

The above had taken a look at some environmental laws on the protection of the environment. It states how important it is for states to work together if these laws are to make meaningful impact on the environment as individual interests have negative implications for the enforcement and preservation of these laws.

6.0 TUTOR-MARKED ASSIGNMENT

1. What are the contributions of international environmental laws on international law?
2. Identify the strengths and weaknesses of international environmental laws on States.

7.0 REFERENCES/FURTHER READING

Baylis, J. & Smith Steve (2005). *The Globalisation of World Politics.* (3rd ed.). Oxford: Oxford University Press.

McCormick, J. (1995). *The Global Environmental Movement.* London: John Wiley.

Oyeshola, D. (2008). *Sustainable Development: Issues and Challenges for Nigeria.* Ibadan: Daily Graphics.

MODULE 4 THE POLITICS OF INTERNATIONAL LAWS

UNIT 1 SOVEREIGNTY AND RECOGNITION OF STATES IN MODERN INTERNATIONAL LAW

CONTENTS

1.0 INTRODUCTION

The general aim of this module is to identify how very key concepts are applied by states in their interaction with one another. By so doing, you will have a better understanding of these concepts as well as understand the politics involved in state interaction with one another so as to use these concepts appropriately and in future analysis. In addition, this module points out the relevance of these concepts in how states politicise international law to favour their interests.

This module is made up of four units comprising concepts like sovereignty, state jurisdiction, state responsibility, and nationalism in international law. One of the key concepts in contemporary international law and in fact international relations is sovereignty. Though, it is a concept that relates to state's recognition in the international system, especially because it grants a state the recognition to become a member of an international organisation, it is a concept that has been increasing challenged by the emergence of new actors in the international system. We therefore, in this unit, examine the various

definitions of sovereignty by scholars with the aim of enhancing our understanding of the concept and using such understanding to explain the importance of sovereignty to states in the contemporary international system.

2.0 OBJECTIVES

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

- define sovereignty from different perspectives of scholars and international organisations
- explain the evolution of sovereignty and how a state can acquire sovereignty
- state how a state can lose sovereignty
- determine the relevance of sovereignty in relation to the desire to acquire sovereignty by states in the contemporary international system where the concept has been seriously challenged.

3.0 MAIN CONTENT

3.1 What is Sovereignty?

In its simplest meaning, it is the right of a state to make and enforce laws within its territory without external influence. Traditionally, it is the right in the authority found in the ruler over the subjects. From the writings of Socrates to Thomas Hobbes have sovereignty been reckoned with. Though largely defined in absolute terms especially in the work of Jean Bodin, six books of the commonwealth in 1576, Bodin sees sovereignty as a political doctrine that is both absolute and indivisible. According to this doctrine, in every state there must be one person (or one defined group of people) who has all the powers necessary to govern the community without external influence, and who is its sovereign. Sovereignty cannot be divisible between different people rather, as was the case in the 16^{th} century; it resides in the monarch or leader of the state.

Sovereignty is the supreme, absolute, and uncontrollable power by which any independent state is governed; supreme political authority; the supreme will; paramount control of the constitution and frame of government and its administration; the self-sufficient source of political power, from which all specific political powers are derived; the international independence of a state, combined with the right and power of regulating its internal affairs without foreign dictation.

At least, sovereignty can be defined in thirteen ways. They include:

1. Sovereignty as a personalised monarch (real or ritualised);
2. Sovereignty as a symbol for absolute, unlimited control or power;
3. Sovereignty as a symbol of political legitimacy;
4. Sovereignty as a symbol of political authority;
5. Sovereignty as a symbol of self-determined, national independence;
6. Sovereignty as a symbol of governance and constitutional order;
7. Sovereignty as a criterion of jurisprudential validation of all law (*grundnorm*, rule of recognition, sovereign);
8. Sovereignty as a symbol of the juridical personality of Sovereign Equality;
9. Sovereignty as a symbol of recognition;
10. Sovereignty as a formal unit of legal system;
11. Sovereignty as a symbol of powers, immunities, or privileges;
12. Sovereignty as a symbol of jurisdictional competence to make and/or apply law; and
13. Sovereignty as a symbol of basic governance competencies (constitutive process).

An important meaning associated with the concept of sovereignty identifies it with ultimate, effective political power. It has also been identified with the nature of law itself, the reference to power and political culture.

Today and particularly from the period of enlightenment, this concept has been interpreted to mean the power of a state often shared by the powers that make, enforce and interpret laws in the country i.e. arms that make up government comprising the legislature, executive and judiciary. There are two main features of sovereignty:

(a) Separateness; and
(b) Supremacy

By separateness, a sovereign state is no longer a part of another entity either as a colony or annex. Therefore, all colonies ceased to be part of the metropolis as soon as the power to make and enforce its laws is transferred after independence. This power Kosovo also got after it was been recognised by the United Nations in 2000. Taiwan is still part of the People's Republic of China (PRC) and cannot claim sovereignty like other countries in the world. The second important part if supremacy. A state is supremely sovereign, in as much as, it can make laws and enforce it using the powerful organs in the state without external interference within its territory.

SELF-ASSESSMENT EXERCISE

Compare and contrast the salient differences between the old definition of sovereignty and the modern definition of the concepts following writings of scholars from Bodin till the 21st century.

3.2 How does a State Acquire Sovereignty?

A state can acquire sovereignty through three major ways. They include

(a) *Peaceful and formal means through independence*: This happens when a state that was a colony becomes independent and acquires sovereign status from its former colonial master. Examples of this kind of sovereign states include Nigeria in 1960, India in 1947, and Ghana in 1957. All of these states acquire independence through a constitutional formal process that is preceded by conferences and agreed date of withdrawal.

(b) *Forceful war of secession*: a state can also acquire sovereignty by successfully fighting a secession war. This usually occurs when a state is made up of multiple ethnic groups or members that have divergent views about the existence of the state. This should be contrasted with devolution and confederation, where the national power gives some form of control to regional groups or powers. In the case of forceful secession, the breakaway state(s) acquire independent and equal status at the international level as the old state. While the attempt by the eastern part of Nigeria to breakaway and form the Biafra republic in 1967 failed, Croatia, Slovenia, Bosnia and Herzegovina, Montenegro, Macedonia and Serbia were the sovereign states that emerged from the former Yugoslavia.

(c) International creation of sovereign states as well as recognition by other states and international organisations: a state can acquire sovereignty through recognition by other states and international organisations in the international system. Some states were never colonised while they were also never part of a wide sovereign entity before they acquire such sovereign status. Examples include the creation of Liberia in 1822 and Israel in 1947 with the support of the United States and Western Europe and recognised by the international system.

SELF-ASSESSMENT EXERCISE

Using concrete examples, discuss ways through which a state can acquire sovereignty and recognised by other states in the international system?

3.3 How does a State Lose Sovereignty?

Just as states acquire sovereignty and become accepted into international relations, they can also loose sovereignty and 'disappear' from the international system. There are two ways of losing sovereignty:

(a) *Voluntary loss*: A state can lose its sovereignty voluntarily when it decides to join with another state to form a more formidable state. A classical example remains the emergence of Tanzania from Tanganyika and Zanzibar in 1964. Both former states voluntary gave up their sovereignty to form a single country.

(b) *Forceful annexation*: A state can also lose its sovereignty through forceful annexation by other state(s). Although, a practice usually condemned by states and against international law, states lose sovereignty when they are being overrun by another powerful state. In international relations, the forceful annexation of Kuwait by Iraq failed in the 1991 Persian Gulf War. Had Iraq succeeded, Kuwait would have ceased to enjoy sovereignty as an independent entity free from external influence and control.

SELF-ASSESSMENT EXERCISE

Discuss the circumstances (actors and factors) surrounding the failure of Iraq to hijack the sovereignty of Kuwait in 1989.

3.4 The Relevance of Sovereignty in Contemporary International Law?

As a very important and useful concept in International law and relations, sovereignty of states is also being greatly challenged by both emerging actors and weaknesses in state existence in the international system. Those that challenge the power and existence of states do so largely due to their contributions to what is called international law. Actors particularly have emerged in international relations that have more relevance than states. They include:

(a) *International Organisations or Institutions*: They are very influential because of their roles in the recognition of a state's sovereignty and the role they play in setting international agendas and laws. Every nations needs to gain acceptance into the United Nations for its sovereignty to be acknowledged by the international system. Other international organisations for instance the World Bank, African Union among others also have towering influence on states.

(b) *Multinational Corporations (MNCs)*: MNCs wield influence over states due to their enormous wealth and geographical spread

around the world. The top ten biggest MNCs are individually richer than most counties in Africa and other developing countries in terms of their total revenue and a country's national income.

(c) *Non-Governmental Organisations (NGOs):* NGOs also play prominent role that challenge state's sovereignty in contemporary international system.

(d) *Individuals*: a good number of influential individuals now also determine what is acceptable or otherwise in the international system. Some of these individuals also have a large number of followers that states cannot, at times, control. Individuals like Bill Gates and Nelson Mandela have high influence above states in international matters.

However, this should not in any way be understood as making states sovereignty completely irrelevant. States sovereignty is crucial for many reasons some of which include that:

(a) Only states can form and be members of international organisations like the United Nations

(b) State can determine the fate and existence of MNCs in their countries through legislation and regulations

(c) The regular quest and agitation for sovereignty buttresses the point of its importance. If sovereignty is irrelevant, then Israel and Palestine would not have been at war with each other since 1948.

SELF-ASSESSMENT EXERCISE

Writing from the background that sovereignty is irrelevant in contemporary international law and relations, state the relevance of sovereignty to states.

4.0 CONCLUSION

What the above has done is to analyse sovereignty in international law. It is a concept that defines both the power of the state over and above its citizens and a standard for the understanding of the equality of states. Any state that wants to be recognised as truly independent and part of the international system must be sovereign i.e. separate and supreme and having a defined territory. This principle, states have preserved since the treaty of West Phalia in 1648.

5.0 SUMMARY

The above states the meanings and importance of sovereignty in contemporary international law. It shows that states can acquire and loss sovereignty by various means and given certain factors. However, as challenging as the concept has been in international law, given the rise of MNCs, NGOs and powerful international organisations and individuals, the concept remains a highly coveted one by states.

6.0 TUTOR-MARKED ASSIGNMENT

1. How relevant is sovereignty in contemporary international law and state relationship?
2. If states can acquire sovereignty, they can also lose it; explain how with appropriate examples.

7.0 REFERENCES/FURTHER READING

Anghie, A. (2005). *Imperialism, Sovereignty and the Making of International Law.* Cambridge: Cambridge University Press.

Nagan, P. & Hammer, C. (2003). "The Changing Character of Sovereignty in International Law and International Relations." *Public Lecture at the University of Asmara, Eritrea*.

Ojo, O. & Sesay, A. (2003). *Concepts in International Relations.* Ile-Ife: Cleanprint Publishers.

UNIT 2 JURISDICTION

CONTENTS

1.0 INTRODUCTION

The concept of jurisdiction is integral to the sovereignty of States and is fundamental to the functioning of the international legal system. This unit addresses the authority of a state over natural and juristic persons and property within it. It examines the power of a state to try cases that involve areas that concerns its jurisdiction.

2.0 OBJECTIVES

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

- define jurisdiction
- discuss the right of a State to try nationals over issues that concern its territory, treasures and powers
- state the classifications of jurisdiction
- outline the differences between jurisdiction and conflict of law or private international law.

3.0 MAIN CONTENT

3.1 What is Jurisdiction in International Law?

According to Umozurike, Jurisdiction in International law is the authority a state exercise over natural and juristic persons and property within it. It concerns mostly the exercise of this power on state territory or quasi-territory but some states exercise some measure of jurisdiction exterritorialy especially when the acts performed within or outside the

territory or quasi-territory have harmful consequences therein. In this light, jurisdiction is a positive consequence of sovereignty.

According to the Princeton University Program in Law and Public Affairs, the fundamental principles of universal jurisdiction include:

1. Criminal jurisdiction based solely on the nature of the crime, without regard to where the crime was committed, the nationality of the alleged or convicted perpetrator, the nationality of the victim, or any other connection to the state exercising such jurisdiction.
2. Universal jurisdiction may be exercised by a competent and ordinary judicial body of any state in order to try a person duly accused of committing serious crimes under international law as specified in Principle 2(1), provided the person is present before such judicial body.
3. A state may rely on universal jurisdiction as a basis for seeking the extradition of a person accused or convicted of committing a serious crime under international law as specified in Principle 2(1) provided that it has established a prima facie case of the person's guilt and that the person sought to be extradited will be tried or the punishment carried out in accordance with international norms and standards on the protection of human rights in the context of criminal proceedings.
4. In exercising universal jurisdiction or in relying upon universal jurisdiction as a basis for seeking extradition, a state and its judicial organs shall observe international due process norms including but not limited to those involving the rights of the accused and victims, the fairness of the proceedings, and the independence and impartiality of the judiciary (hereinafter referred to as “international due process norms”).
5. A state shall exercise universal jurisdiction in good faith and in accordance with its rights and obligations under international law. Jurisdiction in international law is different from the municipal meaning of jurisdiction which states the power of a court to entertain a case i.e. not all can be entertained in the various courts of the land.

Jurisdiction can be exclusive i.e. where a single state exercises control over a territorial jurisdiction or concurrent where more than one state can exercise its authority over a territorial jurisdiction as in the case of pirates.

SELF-ASSESSMENT EXERCISE

1. What is Jurisdiction in International Law?

3.2 Classifications of Jurisdiction

There are many classifications of jurisdiction. According to Levi, jurisdiction can be classified into:

Temporal: the time a state acquires or loses personality.

Spatial: the physical area over which a state has jurisdiction over persons, things and transactions.

Personal: the natural and jurisdictional persons over which a state has competence.

Material: relating to the subject matter of jurisdiction

For the American Re-statement of the Law, jurisdiction can be classified into three categories:

1. Jurisdiction to Prescribe: the power to make laws by legislation, executive act, administrative rule, regulation or determination of court.
2. Jurisdiction to adjudicate: this refers to the subjection of persons and things in both civil and criminal matter to the process of the courts and administrative tribunals.
3. Jurisdiction to enforce whether in judicial or non-judicial action, the use of resources of government to introduce or compel compliance with the law.

There are other classifications of Jurisdiction including the following:

1. Personal and territorial or quasi-territorial
2. Ordinary and extraordinary
3. Limited and Unlimited
4. Potential and actual

SELF-ASSESSMENT EXERCISE

Discuss in details five classifications of jurisdiction

3.3 International Criminal Jurisdiction

The international criminal jurisdiction gives the state the power to prosecute offenders on crimes that are intrinsically contrary to international law irrespective of nationality or territory of the crime. Piracy, slavery, war crimes are few instances of the crimes within a state's jurisdiction to punish offenders.

On piracy for instance, this offence was codified in the 1958 Convention on the Law of the Sea and 1982 UN Convention on the law of the Sea which defines it as an illegal act of violence committed by the crew or passengers of the crew or passengers of a private ship or aircraft on another ship or aircraft on the high seas.

Various offences fall under the international criminal jurisdiction apart from the few mentioned above. There are international institutions established to try offenders found guilty of these crimes since 1946 starting with the London Agreement that gave birth to the establishment of an International Military Tribunal by France, UK, USA, and defunct USSR to try the Nazi leaders for crimes against peace and humanity. Other tribunal and international criminal courts have been established to try cases of abuse in various inhuman treatment perpetrated by humans on fellow human during and after warfare.

SELF-ASSESSMENT EXERCISE

Identify some international criminal cases and how they are handled in international law.

3.4 Immunity from Jurisdiction

As states and international institutions or tribunals nationals to its jurisdiction in trials on crimes against humanity, some certain persons and institutions enjoy immunity from the jurisdiction of foreign municipal courts. These states and individuals include:

1. A foreign State
2. Foreign head of State
3. Diplomatic agents
4. Consular and international institutions
5. Agents of Consuls and International Institutions

However immunity to trial jurisdiction may be excepted if any of the following happens:

1. When a foreign state or foreign head of state sues as plaintiff, immunity will not avail for a counterclaim or set-off arising from the same dispute.
2. Issues and suits relating to land within the jurisdiction, not being land on which the foreign mission is established are not affected by a claim of immunity.
3. Where the proceedings relate to the acquisition of property through succession or gift affecting movable or immovable property.

4. In a representative action such as debenture holders' actions.
5. Winding-up process where a foreign head of state or member of the diplomatic mission claims an interest.

SELF-ASSESSMENT EXERCISE

State and explain five major reasons why some individuals are exempted from prosecution in international law.

4.0 CONCLUSION

The jurisdiction of a state over its citizens and natural resources is intended to curtail the excesses of the nationals of a state within and outside its territory so as to allow for a peaceful environment. The international community is also interested in checkmating humans' inhuman treatment to one another.

5.0 SUMMARY

The above looked at the meaning of jurisdiction. It examines its various classifications. It identified the creation of international criminal jurisdiction in the management of inhuman treatment of one another given the difficulty in the regulation of some crimes by the state singularly.

6.0 TUTOR-MARKED ASSIGNMENT

From a historic point of view, can international effort to prevent crimes against humanity end inhuman treatment in the contemporary international system?

7.0 REFERENCES/FURTHER READING

Black's Law Dictionary (6th ed.).

Levi, W. (1979). *Contemporary International Law: A Concise Introduction.* Boulder, Co: West view Press.

Ryngaert, C. (2008). "Jurisdiction in International Law". In: Lowe, Vaughan (Ed.). *Oxford Monographs in International Law.* Oxford: Oxford University Press.

Umozurike, U. O. (2005). *Introduction to International Law.* (5th ed.). Ibadan: Spectrum Books Limited.

UNIT 3 STATE RESPONSIBILITY

CONTENTS

1.0 INTRODUCTION

This unit addresses the role of states in international relations involving acts that violates international law. By looking at the world today, it becomes clear that a large number of states are repeatedly violating their international obligations. Since there is no international police, states at times act as if they are above the law. Under what legal principles can a state be held responsible for breaching international law, and what are the consequences for failing to live up to its responsibility?

The basic principle of "state responsibility" in international law provides that any state that violates its international obligations must be held accountable for its acts. More concretely, the notion of state responsibility means that states, which do not respect their international duties, are responsible to immediately stop their illegal actions, and make reparations to the injured.

2.0 OBJECTIVES

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

- define state responsibility
- mention some activities by states that violate international law
- list the roles of third party states and the international institutions in mediating violations by states
- discuss how weak or strong the international law is in checking States' excesses.

3.0 MAIN CONTENT

3.1 What is State Responsibility?

Basically, international responsibility results from an internationally wrongful act which may be committed by a State directly or by persons and entities whose claims it can espouse at the international level, including persons placed under its diplomatic protection.

State responsibility in international law provides that any state that violates its international obligations must be held accountable for its acts. More concretely, the notion of state responsibility means that states, which do not respect their international duties, are responsible to immediately stop their illegal actions, and make reparations to the injured.

The laws of state responsibility are the principles governing when and how state is held responsible for a breach of an international obligation. They establish the conditions for an act to qualify as internationally wrongful, the circumstances under which actions of officials, private individuals and other entities may be attributed to the state, general defenses to liability and the consequences of liability.

This is a fundamental principle, which forms part of international customary law, and is binding upon all states. The rules on state responsibility do not specify the content of a state's obligations under international law, for example that torture is forbidden, or that a state must provide medical services to the civilian population. These obligations are specified in numerous international law treaties and in international customary law. The rules on state responsibility merely identify when a state can be held responsible for violating those obligations, and what are the consequences if it fails to fulfill its responsibility.

The draft Convention on State responsibility produced by the International Law Commission (ILC) in 2001 recognises that a serious breach of an obligation essential for the maintenance of international community is a crime provided it is so recognised by the international community as a whole.

If a state violates international law it is responsible to immediately cease the unlawful conduct, and offer appropriate guarantees that it will not repeat the illegal actions in the future. The state also has a responsibility to make full reparations for the injury caused, including both material and moral damages.

States have legal responsibilities both towards states and individuals according to different sources of international law. States, other international entities and individuals enjoy rights and duties given to them by international law. When states violate their international obligations they may cause harm both to other states and to individuals. Therefore states have responsibilities:

1. Towards their own citizens, and people under their jurisdiction, based on human rights law.
2. Towards civilians, including occupied people, as well as combatants of the other party, during armed conflicts under international humanitarian law (IHL).
3. Towards other states, or international organisations (e.g. UN), based on general principles of international law, as well as specific bilateral and multilateral conventions that they have signed and ratified, including human rights and IHL treaties.
4. Towards the international community as a whole when it comes to very important rules, such as the prohibitions on genocide and torture.

SELF-ASSESSMENT EXERCISE

What do you understand by the term State responsibility?

3.2 How are the Excesses of States Checked?

When a state violates international law, they should reverse their action and follow a path of peace. If a state violates international law it is responsible to immediately cease the unlawful conduct, and offer appropriate guarantees that it will not repeat the illegal actions in the future. The state also has a responsibility to make full reparations for the injury caused, including both material and moral damages.

International law also prohibits third party states from being party to violations of international regulations. Article 1 common to the four Geneva Conventions places an obligation on any state that is part of an armed conflict and also on third states who are not involved in the conflict. Third states should not do anything to encourage a party to a conflict to violate IHL. States should also not take action that would assist in such violations such as arms-transfer and sale of weapons.

In addition, a state can prove it is responsible by paying Reparation which can take the form of following:

1. Restitution: To re-establish the situation which existed before the violation was committed, as long as it is not materially

impossible or involves a disproportional burden either by returning the material or if this is not possible, by paying the value of it. Examples: releasing persons who have been illegally detained, return property that was illegally seized.

2. Compensation: Financial compensation for the damages caused (in addition to the value of material that could not be restituted). It includes compensation for material damages that can be valued in money, such as loss of income and treatment for physical harm; or non-material damages, such as lost opportunities of education, as well as mental harm etc.
3. Rehabilitation: As money can never undo psychological harm and trauma caused by violations of international humanitarian law (IHL) and human rights, rehabilitation shall be offered for the victims' healing process. Rehabilitation should include medical and psychological care as well as legal and social services.
4. Satisfaction: Acknowledgement of the breach, an expression of regret or a formal apology by the violating state.

Some states are however recalcitrant. Hans Kelsen, whose fundamental position was that law, is nothing more or less than a coercive system, argued in 1948 when he drew his attention to international law that coercion in international law takes the form of forcible reprisals. A state commits a delict (in Kelsen's useful coinage and terminology) when it violates a rule of international law. The state that commits a delict opens itself up to a reprisal by other states. A reprisal is a kind of countermeasure, a tit-for-tat retaliation. The most important characteristic of a reprisal is that it would be a delict if standing alone. What saves it from being delict is that it may permissibly be taken, under customary international law, in retaliation for a delict. Kelsen came to the conclusion that international law is a coercive order because it is enforced through the reprisal mechanism.

The violations of these international regulations however have grave consequences for the international system. Cogan identifies two.

First, and most obviously, a breach of an international legal obligation can diminish the authority of the obligation itself. This might not be of concern to the breaching state, at least in the short-term, but it will probably be of concern to the State to which the obligation is owed and probably be of concern as well (in the case of multilateral obligations) to non-breaching states that support or rely upon the obligation breached, even if they are not directly harmed by the particular breach at issue.

Second, noncompliance can impede the establishment and maintenance of the international rule of law. This could be done in two ways. Noncompliance impinges on the principle that power must be exercised

in accordance with the law, a principle that might be especially dear in our current unipolar world.

4.0 CONCLUSION

A state can be sanctioned politically, economically, militarily and diplomatically. In the extreme case, such violations on another country can lead to outright warfare. This situation most states prevent through bilateral and multilateral negotiations. But in all, states, particularly powerful states, do what they like while the weak states mostly observe international laws on state responsibilities.

5.0 SUMMARY

The unit above examines the meaning of state responsibility and violations under international law that can rupture the international relations between and among states. While the international system is made up of states that sign international treaties and pacts into law, some states also violate these laws in their self(ish) interests. This does not go without violating the interests of others. It is the violation that causes disorder and conflicts and in some cases sanctions among states.

6.0 TUTOR-MARKED ASSIGNMENT

1. What are the rights of foreign nationals and companies in International law?
2. State the roles of International organisations in maintaining enforcing International Law on States.

7.0 REFERENCES/FURTHER READING

Cogan, J. K. (2004). "Noncompliance and the International Rule of Law". *The Yale Journal of Law.* Vol. 31 Number 189.

Umozurike, U. O. (2005). *Introduction to International Law.* (5th ed.). Ibadan: Spectrum Books Limited.

UNIT 4 NATIONALITY AND NATIONALISM

CONTENTS

1.0 INTRODUCTION

Nationality is one of the most important concepts in international law and state relations. Nationality shares close affinity with nationalism a concept that is very debatable both in meaning and usage and which writers have blamed for most of the conflicts in the world today calling it the Frankenstein monster responsible for the division of states, others see it as the sleeping beauty bringing about the actualisation of self determination and liberation. Nationality is a concept for identification often used in separating the people of the world from one another. This unit will therefore address the meaning and features of nationality in international law and relations.

2.0 OBJECTIVES

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

- define nationality from different perspectives
- state ways through which a national acquire nationality
- explain how nationals can lose nationality; and
- identify its connection to the study of international law in states relations with one another.

3.0 MAIN CONTENT

3.1 What is Nationality

According to Umozurike, nationality is the link that an individual has with a state which entitles it to espouse a claim in International Law.

The International Court of Justice defines nationality as a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties.

Nationality, in law refers to membership in a nation or sovereign state. It is to be distinguished from citizenship, a somewhat narrower term that is sometimes used to denote the status of those nationals who have full political privileges. Before an act of the U.S. Congress made them citizens, for example, American Indians were sometimes referred to as "noncitizen nationals."

Individuals, companies (corporations), ships, and aircraft all have nationality for legal purposes. It is in reference to natural persons, however, that the term finds most frequent use. Nationality is in fact commonly regarded as an inalienable right of every human being. Thus, the United Nations Universal Declaration of Human Rights (1948), states that "everyone has the right to a nationality" and that "no one shall be arbitrarily deprived of his nationality." Nationality is of cardinal importance because it is mainly through nationality that the individual comes within the scope of international law and has access to the political and economic rights and privileges conferred by modern states on their nationals.

Nationality determines the scope of application of basic rights and obligations of states vis-à-vis other states and the international community, such as personal jurisdiction, the application of treaties and diplomatic protection. In domestic law, nationality is a fundamental requirement for the exercise of political rights and claims to protection and correlate duties, such as military or civil service obligations, which may, however, vary according to national law.

This explains why the German Constitutional Court defines nationality as the legal requirement for an equal status implying equal duties on the one hand, equal political rights on the other hand, the exercise of which is the exclusive source of legitimacy of power in a democracy.

SELF-ASSESSMENT EXERCISE

How can you describe nationality?

3.2 Acquisition of Nationality

Article 15 paragraph 1 of the Universal Declaration of Human Rights states that everybody is entitled to a nationality. The state, through constitutional and statutory provisions, sets the criteria for determining

who shall be its nationals. The right of a state to confer its nationality is, however, not unlimited, for otherwise it might impinge upon other states' rights to determine what persons shall be their nationals. By one rule of international customary law, for instance, a person who is born within a state's territory and subject to its jurisdiction acquires that state's nationality by the fact of such birth.

In another way, nationality can be acquired through naturalisation, which happens through marriage, by voluntary application or by Act of State. Traditionally, a wife took the nationality of the husband on marriage but can turn unpleasant for the wife when the marriage breaks up. However, convention like The Hague on Certain Questions Relating to the Conflicts of Nationality Law allows women to retain their nationality after marriage. The Convention on the Elimination of Discrimination against Women also allows women equal rights as men to acquire, change or retain their nationality and the nationality of the children.

Furthermore, the act of state grants nationality to political exile to allow them move freely under diplomatic protection as well as the change of sovereignty over territory such as the cession or conquest may have consequences on nationality of the inhabitants.

Multi-nationality or Statelessness may also create nationality where a person having acquired a nationality at birth, acquired yet another nationality without losing the first nationality. A person born to a state where his parents are not nationals is also entitled to a nationality. Such a person can acquire such by being made a national of his/her state of birth. In addition, persons who are lawfully and habitually resident on its territory for a period of time beginning before the age of eighteen, that period to be determined by the internal law of the state party concerned.

SELF-ASSESSMENT EXERCISE

Using concrete examples, state how an individual can acquire the nationality of a State.

3.3 Loss of Nationality

Just as nationals acquire nationality, they can also lose it. The authority of states generally determines the loss and deprivation of nationality, just as it determines the acquisition of citizenship. Loss and deprivation of nationality affect existing rights, and they are therefore subject to stricter limits as determined in international instruments. One way is through release. Some states allow their nationals to request to be released from nationality on acquiring a new one or on its imminence. A

minor who has dual nationalities may declare for one on coming of age. This is particularly common with athletes and professionals.
Through judicial or administrative action, a national can also lose nationality. Italy, Germany, Turkey and defunct the USSR passed decrees after First World War depriving some of their citizens of their rights to nationality of these states on the basis of a long residence abroad, disaffection and some other reasons.

Obtaining naturalisation in a foreign state, taking an oath or making an affirmation or other formal declaration of allegiance to a foreign state or political subdivision thereof, entering, or serving in, the armed forces of a foreign state and making a formal renunciation of nationality before a diplomatic or consular officer of the former state for which the national is known in a foreign state.

Extradition, a process whereby, under treaty or on reciprocity, one state surrenders to another, at its request, a person accused or convicted of a criminal offence committed against the law of the requesting state. Asylum is another way of protection from trial given a person who is wanted for prosecution in another country, usually his own and for an offence that is considered to be political by the asylum state.

SELF-ASSESSMENT EXERCISE

How can nationals lose nationality?

4.0 CONCLUSION

International Law, especially the Universal Declaration of Human Rights (UDHR), makes provision for every human being's nationality. It makes provision for even refugees who are ravaged by war to lay claim to a state's nationality. This is contained in International Refugee Organisation which was replaced with the Refugee Convention of 1951 and the Protocol Relating to the Status of Refugees.

5.0 SUMMARY

The unit examined nationality. It defines it stating principles through which a citizen can be called a national of a state. It also looks at how an individual can lose nationality in International Law.

6.0 TUTOR-MARKED ASSIGNMENT

1. What is the relevance of nationality to International Law?
2. How true is the UNDHR that everyone has a right to nationality that should not be deprived?

3. With your understanding of nationality, discuss how a national can acquire and lose nationality.

7.0 REFERENCES/FURTHER READING

Umozurike, U. O. (2005). *Introduction to International Law*. (5th ed.). Ibadan: Spectrum Books Limited.

United Nations (1993). *Human Rights and Refugees Fact Sheet*, No 20.

Weis, P. (1956). *Nationality and Statelessness in International Law*. London: Stevens & Sons, Ltd.

MODULE 5 INTERNATIONAL LAW RELATED INSTITUTIONS

UNIT 1 THE UNITED NATIONS AND THE INTERNATIONAL COURT OF JUSTICE

CONTENTS

1.0 INTRODUCTION

International institutions are by and large, key actors in international relations. The aim of this unit, however, is not only to refresh your memories of international institutions but to focus on the United Nations and its organ as well as to sharpen your understanding of the roles of the International Court of Justice as an organ of the United Nations in the promotion and respect of international law. We shall also establish a linkage between this organ on the one hand and the other organs of the organisation on the other.

2.0 OBJECTIVES

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

- describe the United Nations using its organs, noting the salient contributions of the organisation and its organs to the draft, existence and recognition for international law by states

- establish the linkage between the organs of the United Nations and the International Court of Justice in the implementation of international law
- identify the weaknesses in the United Nations in its promotion of human rights, international peace and security
- state the roles of the ICJ and its rulings have implications for setting international standards and precedence in international law.

3.0 MAIN CONTENT

3.1 The United Nations

The United Nations is the most global and all encompassing organisation in the world. This organisation alone through its organs and agencies has contributed not less than 50,000 laws to International Law. Founded by 50 members at the San Francisco Conference of the United Nations, the organisation took its cue from the League of Nations earlier established to prevent conflicts of interests among states but failed to prevent the outbreak of the Second World War. It was assumed, the lessons learnt in the issues that led to the failure of the League of Nations will be corrected in the new organisation now formed with the involvement of powerful countries like the United States whose decline for membership of the league contributed to its failure. It will however, be important to add that students should make conscious effort to having access to the charter and articles of the United Nations as this will benefit students reading and understanding of the United Nations and its formation. The charter consists of 36 articles stating the expected behaviours among states when relating with one another.

Ordinarily, the United Nations is seen as the highest body comprising states of the world. Its establishment has been referred to as compromises among the powerful countries after the Second World War. While it has since then existed and modulated states interaction with one another, it has also acquired so much power that enables it to touch on state on almost every aspect. The United Nations was established by 51 countries in 1945. Today this number has grown to 194. With its secretariat in New York, the UN has six organs and countless numbers of affiliated agencies that help it to carry out its duties.

As an organisation having universal membership, the UN mandate encompasses security, economic and social development, the protection of human rights, and the protection of the environment. All of these duties, the UN tries to protect through the principles in its charter, its resolutions that regulate states interactions. Organs of the UN also help

to enforce these regulations so the international system even though anarchical enjoys some forms of order.

SELF-ASSESSMENT EXERCISE

Identify the similarities and differences between the League of Nations and the United Nations pointing out while the former failed and the latter has largely succeeded.

3.2 Organs of the United Nations

Arising from the failures of the League of Nations, part of which included the lack of its effective powers, absence of clear division of responsibilities between the main executive (the League Council) and the League Assembly, that included all member states and absence of mechanism to coordinate military and economic activities against miscreant states; the United Nations put in place six organs that will each address some of these issues and manage conflicts between and among states.

In this light, the United Nations at inception created six organs that all work together towards the attainment of the United Nations mandate. They are:

The Security Council – it is the organ that maintains international peace and security through its instrumentalities. With an initial state membership of 11, the Security Council has today increased to 15 state-membership with five (USA, Russia, France, the UK and China) as permanent members while the other 10 occupy the Security Council seat for a two-year period. This organ has the power to impose its decisions on states once such decisions are ratified by two-third of the membership including all of the permanent members. The Security Council can use peacekeepers, sanctions, embargo and any other 'necessary means' to enforce its decisions.

The General Assembly is the organ comprising all states in the United Nations. Its members meet annually to discuss issues concerning the world. They also make resolutions that nation states observe.

The Secretariat carries out the administrative and day to day running of the organisation as directed by the General Assembly, Security Council and other organs of the United Nations. It has its headquarters in New York and has affiliated offices across the world.

The Economic and Social Council was established to coordinate the economic and social work of the UN. It also consults with non-

governmental organisations, thereby establishing a link between the UN and the civil society. The ECOSOC oversees other affiliated agencies of the United Nations in carrying out the UN mandate.

The Trusteeship Council was responsible for colonies whose masters have been defeated during the Second World War. It became almost useless after all states became independent in the early 1990s.
The International Court of Justice also known as the World Court is the judicial organ of the United Nations. It consists of 15 Judges elected jointly by the General Assembly and the Security Council, the Court decides disputes between and among countries.

SELF-ASSESSMENT EXERCISE

The United Nations was established to promote international peace and security as well as friendly relations among its members, attempt a connection among the Organs of the United Nations in carrying out this mandate.

3.3 The International Court of Justice

As noted earlier, the United Nations have six organs, each of which lends its voice through its resolution to the daily development of international laws. However, it is important to note that the International Court of Justice is singled out among these organs of the United Nations for many reasons. Firstly, it understands and interprets the Charter of the United Nations in the way it should be understood and interpreted. Second, it makes proceedings and judgments that serve as precedents and by extension international laws for states in their interaction with one another. Thirdly, the ICJ opinion on any issue(s) influence to a large extent the decisions of other organs like the Security Council and the Secretariat.

The Court has a twofold role: to settle, in accordance with international law, legal disputes submitted to it by States (Contentious cases) and to give advisory opinions (Advisory proceedings) on legal questions referred to it by duly authorised United Nations organs and specialised agencies.

In Contentious proceedings, when a dispute is brought before the Court by a unilateral application filed by one State against another State, the names of parties in the official title of the case are separated by the abbreviation *v.* for the Latin versus (e.g., Cameroon vs Nigeria). When a dispute is submitted to the Court on the basis of a special agreement between two states, the names of the parties are separated by an oblique stroke (e.g., Indonesia/Malaysia).

SELF-ASSESSMENT EXERCISE

Using appropriate examples identify ways in which the ICJ has influenced the formulation and implementation of international law.

4.0 CONCLUSION

By virtue of their acceptance, towering postures and influence on states, international organisations such as the United Nations as well as its organs particularly the International Court of Justice has made tremendous input to the formulation, interpretation and implementation of international law. By the constant involvement of these organisations, the international system is in a state of near-order that would not have been without them. They have also helped states to solve their boundary, territorial and other issues that would have degenerated.

5.0 SUMMARY

In this unit, effort has been made to demonstrate the contribution of international organisations in the drafting of international law using the United Nations and its organs as the case study. The unit also demonstrates a relationship between these organs which allows these relationship to give the world a semblance of order and good relationship between and among states.

6.0 TUTOR-MARKED ASSIGNMENT

1. Submit a two-page essay (A4, double line spacing) on a robust critique of the United Nations and its organs on the development, interpretation and enforcement of International Laws.
2. Examine the contributions of the United Nations to international peace and security.
3. How influential are United Nations Resolutions on the promotion of International Law?

7.0 REFERENCES/FURTHER READING

Umozurike, U. O. (2005). *Introduction to International Law.* (5th ed.). Ibadan: Spectrum Books Limited.

Taylor, P. & Curtis, D. (2005). “The United Nations”. In: Baylis, J. & Smith, S. (Eds). *The Globalisation of World Politics: An Introduction to International Relations* (3rd ed.). Oxford: Oxford University Press.

UNIT 2 THE INTERNATIONAL CRIMINAL COURT

CONTENTS

1.0 INTRODUCTION

Another independent but equally powerful international organisation was negotiated and approved by states in the Rome Statute of 1998 that came into operation after its ratification by 60 countries in 2002. This is the International Criminal Court. It was empowered to try genocide, crimes against humanity, war crimes and crimes of aggression.

2.0 OBJECTIVES

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

- discuss the contributions of the International Criminal Court to International Law
- state the similarities and differences between international laws and municipal laws (use the example of the ICC)
- discuss areas under the ICC jurisdiction
- explain the limitations to the authority of the International Criminal Court.

3.0 MAIN CONTENT

3.1 The International Criminal Court

Since its creation under the statute of Rome in 1998 which was first ratified by 60 countries in 2002 and has risen to 120 as at 2012, the International Criminal Court has contributed in many ways to the

development of international law and practice. The ICC or "the Court" is a permanent international court established to investigate, prosecute and try individuals accused of committing the most serious crimes of concern to the international community as a whole, namely the crime of genocide, crimes against humanity, war crimes and the crime of aggression.

Some of the most heinous crimes were committed during the conflicts which marked the twentieth century. Unfortunately, many of these violations of international law have remained unpunished. The Nuremberg and Tokyo tribunals were established in the wake of the Second World War. In 1948, when the Convention on the Prevention and Punishment of the Crime of Genocide was adopted, the United Nations General Assembly recognised the need for a permanent international court to deal with the kinds of atrocities which had just been perpetrated.

The idea of a system of international criminal justice re-emerged after the end of the Cold War. However, while negotiations on the ICC Statute were underway at the United Nations, the world was witnessing the commission of heinous crimes in the territory of the former Yugoslavia and in Rwanda. In response to these atrocities, the United Nations Security Council established an *ad hoc* tribunal for each of these situations.

The ICC is a permanent autonomous court, whereas the *ad hoc* tribunals for the former Yugoslavia and Rwanda, as well as other similar courts established within the framework of the United Nations to deal with specific situations only have a limited mandate and jurisdiction. The ICC, which tries individuals, is also different from the International Court of Justice, which is the principal judicial organ of the United Nations for the settlement of disputes between states. The *ad hoc* tribunals for the former Yugoslavia and the International Court of Justice also have their seats in The Hague. The ICC is a permanent autonomous court, whereas the *ad hoc* tribunals for the former Yugoslavia and Rwanda, as well as other similar courts established within the framework of the United Nations to deal with specific situations only have a limited mandate and jurisdiction. The ICC, which tries individuals, is also different from the International Court of Justice, which is the principal judicial organ of the United Nations for the settlement of disputes between states.

SELF-ASSESSMENT EXERCISE

Describe the origin and major roles of the International Criminal Court to international law.

3.2 Crimes under ICC Jurisdiction

The mandate of the Court is to try individuals rather than states, and to hold such persons accountable for the most serious crimes of concern to the international community as a whole, namely the crime of genocide, war crimes, crimes against humanity, and the crime of aggression, when the conditions for the exercise of the Court's jurisdiction over the latter are fulfilled. The following are the interpretation of these crimes.

3.2.1 Genocide

According to the Rome Statute, genocide means any of the following acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group:

- killing members of the group
- causing serious bodily or mental harm to members of the group
- deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part
- imposing measures intended to prevent births within the group
- forcibly transferring children of the group to another group.

SELF-ASSESSMENT EXERCISE

How dangerous is genocide to International Peace and Security?

3.2.2 War Crimes

War crimes include grave breaches of the Geneva Conventions and other serious violations of the laws and customs applicable in international armed conflict and in conflicts "not of an international character" listed in the Rome Statute, when they are committed as part of a plan or policy or on a large scale. These prohibited acts include:

- murder
- mutilation, cruel treatment and torture
- taking of hostages
- intentionally directing attacks against the civilian population
- intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historical monuments or hospitals
- pillaging
- rape, sexual slavery, forced pregnancy or any other form of sexual violence

- conscripting or enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities.

SELF-ASSESSMENT EXERCISE

From your understanding of the International law on war crimes, how guilty is Liberia's Charles Taylor?

3.2.3 Crimes against Humanity

Crimes against humanity include any of the following acts committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

- murder
- extermination
- enslavement
- deportation or forcible transfer of population
- imprisonment
- torture
- rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, or any other form of sexual violence of comparable gravity
- persecution against an identifiable group on political, racial, national, ethnic, cultural, religious or gender grounds
- enforced disappearance of persons
- the crime of apartheid
- other inhumane acts of a similar character intentionally causing great suffering or serious bodily or mental injury.

SELF-ASSESSMENT EXERCISE

The international war on terror has subjected many nationals to torture and other inhuman treatment especially in the Western World and the United States in particular, how plausible is the ICC crimes against humanity in the protection of peoples' rights?

3.2.4 Crime of Aggression

As adopted by the Assembly of States Parties during the Review Conference of the Rome Statute, held in Kampala (Uganda) between 31 June and 11 May 2010, a crime of aggression means the planning, preparation, initiation or execution of an act of using armed force by a State against the sovereignty, territorial integrity or political independence of another State.

The act of aggression includes, among other things, invasion, military occupation, and annexation by the use of force, blockade of the ports or coasts, if it is considered being, by its character, gravity and scale, a manifest violation of the Charter of the United Nations.

The perpetrator of the act of aggression is a person who is in a position effectively to exercise control over or to direct the political or military action of a State.

The Court may exercise jurisdiction over the crime of aggression, subject to a decision to be taken after 1 January 2017 by a two-thirds majority of states Parties and subject to the ratification of the amendment concerning this crime by at least 30 States Parties.

SELF-ASSESSMENT EXERCISE

What do you understand by crime of aggression?

4.0 CONCLUSION

Till date, the ICC has prosecuted those involved in crimes as stated above. However, it does not just convict offenders, it attempts to rehabilitate offenders. This was why the Rome Statute created two independent institutions: the International Criminal Court and the Trust Fund for Victims. While it is impossible to fully undo the harm caused by genocide, war crimes, crimes against humanity and the crime of aggression, it is possible to help survivors, in particular, the most vulnerable among them, rebuild their lives and regain their dignity and status as fully-functioning members of their societies.

The Trust Fund for Victims advocates for victims and mobilises individuals, institutions with resources, and the goodwill of those in power for the benefit of victims and their communities. It funds or sets up innovative projects to meet victims' physical, material, or psychological needs. It may also directly undertake activities as and when requested by the Court. The Trust Fund for Victims can act for the benefit of victims of crimes, regardless of whether there is a conviction by the ICC. It cooperates with the Court to avoid any interference with ongoing legal proceedings.

5.0 SUMMARY

In this unit, we have looked at the International Criminal Court. It examined its creation and crimes coming under its jurisdiction. It also states the limits to the power of the Court as that which prosecute individuals with the support of the state and not states for the

enforcement of international law found in the Rome Statute. The responsibility to enforce warrants of arrest in all cases remains with states. In establishing the ICC, the states set up a system based on two pillars. The Court itself is the judicial pillar. The operational pillar belongs to states, including the enforcement of Court's orders.

States Parties to the Rome Statute have a legal obligation to cooperate fully with the ICC. When a State Party fails to comply with a request to cooperate, the Court may make a finding to that effect and refer the matter for further action to the Assembly of States Parties. When the Court's jurisdiction is triggered by the Security Council, the duty to cooperate extends to all UN Member States, regardless of whether or not they are a Party to the Statute. The crimes within the jurisdiction of the Court are the gravest crimes known to humanity and as provided for by article 29 of the Statute they shall not be subject to any statute of limitations. Warrants of arrest are lifetime orders and therefore individuals still at large will sooner or later face the Court.

6.0 TUTOR-MARKED ASSIGNMENT

1. With adequate examples, state the major contributions and weaknesses of the International Criminal Court to International Law.
2. The international war on terror has subjected many nationals to torture and other inhuman treatment especially in the Western World and the United States in particular, how plausible is the ICC crimes against humanity in the protection of peoples' rights?

7.0 REFERENCE/FURTHER READING

Scabas, A. W. (2007). *An Introduction to the International Criminal Court*. Cambridge: Cambridge University Press.

UNIT 3 THE AFRICAN UNION AND ITS COMMISSION ON HUMAN RIGHTS

CONTENTS

1.0 INTRODUCTION

There are many reasons to examine the role of the African Union in the study of International Law. First, it represents African only organisation having all the members of the continent and covering their general issues. Furthermore, its constitution as contained in its constitutive act accommodates the contemporary challenges facing African countries in particular in today's globalised world. In addition, the African Union has created organs like the Court of Justice similar to the International Court of Justice created by the United Nations.

In this unit, the formation of the African Union is treated as well as mention is made of the organs of the organisation. Due attention is given to the Court of the organisation and its contributions to the development of international law as far as it affects Africa and its people. The unit also looks at the African Commission for the promotion of Human Rights.

2.0 OBJECTIVES

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

- discuss circumstances surrounding the emergence and formation of the African Union
- identify its major organs and their various functions and contributions to International Law
- discuss the major duties of the African Union Court of Justice
- state the weaknesses of the African Union and the Court of Justice in addressing contemporary challenges in Africa.

3.0 MAIN CONTENT

3.1 The African Union and its Organs

The African Union emerged from the Organisation of African Unity meeting of Heads of States and Government at the Durban, South Africa in 2002. Created as an Organisation for the promotion of continental peace, unity and cooperation among its members and for the protection of the independence and sovereignty of African states in 1963, the developments in the world contributed to the adoption of a more contemporary organisation that can meet the yearning and aspirations of African States after these states have acquired independence.

The African Union has 54 member nations. Its headquarters is in Addis Ababa, Ethiopia. The organisation was initially founded in Addis Ababa on May 25, 1963, as the Organisation of African Unity. It retained that name until 2002 when it formally became the African Union (AU). In its new organisation, it creates organs that take into consideration the emerging issues that have more relevance to Africans than the quest for independence and protection of territorial integrity that were the order of the day at its creation. The AU is divided into 8 commissions and 14 directorates. However, the Assembly of the Heads of States and Governments is the supreme organ. It consists of a representative from each member nation, usually the head of state. The Assembly meets at least once a year. The key organ for the day-to-day functioning of the AU is the AU Commission.

The African Union can be said to have two types of organs i.e. nine standing organs and ad hoc organs created according to the needs of the organisation.

The standing organs are:

(a) The Assembly of the Union;
(b) The Executive Council;
(c) The Pan-African Parliament;
(d) The Court of Justice;
(e) The Commission;
(f) The Permanent Representatives Committee;
(g) The Specialised Technical Committees;
(h) The Economic, Social and Cultural Council; and
(i) The Financial Institutions.

There is also provision for other organs that the Assembly may decide to establish as the occasion requires.

SELF-ASSESSMENT EXERCISE

Stating clearly the objectives and principles of the African Union, discuss the relevance of the organisations and its organs to the protection of Africa and African states in the international system?

3.2 The African Union and Conflict Resolution

Prior to the emergence of the African Union, the OAU was responsible for the unity as well as protection of the sovereign integrity of African states. In the OAU Charter, African states were prevented from interfering in the internal affairs of a member state so as to prevent annexation and regular conflict that was part of the African states during the first few decades of independence.

However, the African Union Constitutive Act was modified to accommodate violence that a state might not be able to handle on its own. While it recognises peaceful resolution of conflicts among Member States of the Union through such appropriate means as may be decided upon by the Assembly, prohibition of the use of force or threat to use force among Member States of the Union, non-interference by any Member State in the internal affairs of another; the Union accepts the right to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely war crimes, genocide and crimes against humanity. The right of Member States to request intervention from the Union in order to restore peace and security is also allowed in the African Union principle.

African leaders also identify poverty and underdevelopment as a cause of conflict. This is perhaps one of the visions for a partnership that will reduce poverty and contribute to development on the continent. One way to address this is the African Peer Review Mechanism (APRM).

SELF-ASSESSMENT EXERCISE

Compare and contrast the Organisation of African Unity and the African Union approach to conflict resolution.

3.3 African Peer Review Mechanism Commission on Human Rights

The African Peer Review Mechanism (APRM) is an instrument voluntarily acceded to by member States of the African Union as an African self-monitoring mechanism. The mandate of the African Peer Review Mechanism is to ensure that the policies and practices of participating states conform to the agreed political, economic and

corporate governance values, codes and standards contained in the Declaration on Democracy, Political, Economic and Corporate Governance.

The APRM is the mutually agreed instrument for self-monitoring by the participating member governments. Its process looks at four focus areas:

1. *Democracy and Good Political Governance*: This area looks at ensuring that member state constitutions reflect the democratic ethos, provide accountable governance and that political representation is promoted, allowing all citizens to participate in the political process in a free and fair political environment.
2. *Economic Governance and Management*: Good economic governance including transparency in financial management is an essential pre-requisite for promoting economic growth and reducing poverty.
3. *Corporate Governance*: This area focuses on promoting ethical principles, values and practices that are in line with broader social and economic goals to benefit all citizens. It works to promote a sound framework for good corporate governance.
4. *Socio-Economic Development*: Poverty can only be effectively tackled through the promotion of democracy, good governance, peace and security as well as the development of human and physical resources.

4.0 CONCLUSION

Since its transformation from the OAU to the AU, African leaders have depended on the Organisation for the promotion and protection of regulations and relationships between and among themselves. Its proceedings have also contributed to some sort of development and conflict reduction initiatives in Africa.

5.0 SUMMARY

The above has described the emergence of the African Union. It points out that the AU widened up its scope and area of interests beyond the earlier definition of the OAU. However, it retains some essential parts of the organisation that have unity and developmental implications for Africa. The Union also has organs that have similarities with the United Nations and the European Union.

6.0 TUTOR-MARKED ASSIGNMENT

Africa is the most underdeveloped part of the world. How useful are sub-regional organisations in addressing the socio-political and economic rights of African people?

7.0 REFERENCES/FURTHER READING

Murithi, T. (2005). *The African Union: Pan-Africanism, Peace-building and Development.* Vermont: Ash Gate Pub Co.

The African Union Constitutive Act

UNIT 4 THE LIMITATIONS AND POSSIBILITIES OF INTERNATIONAL LAW

CONTENTS

1.0 INTRODUCTION

From our studies so far, so much has been examined about international law. The course shows that international law emanates from arrangements that states have with one another so as to modulate and regulate their interactions with one another. With the acceptance of international law and compliance by states, it is expected that there will be peace in international relations.

As the last unit in the last module, this unit identifies the major strengths and weaknesses of international law in international relations. This is done with the understanding that states ratification of many international laws are subject to ratification by the national or local law making body of any state before it becomes acceptable and such state recognised as party to the law. States also subject most laws null and void when such contravene municipal laws.

2.0 OBJECTIVES

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

- state the strengths and weaknesses of international law
- argue for and against the importance of international law as well as the reason for the preservation of municipal laws by states
- discuss why international law can be an instrument in international relations.

3.0 MAIN CONTENT

3.1 The Power and Potency of International Law

International Law has gained wide usage and acceptance by states and other actors in the international system. Though it is often criticised as weak and unable to regulate states behaviour, it has a number of strengths and advantages which include:

For the United Nations, without International Law, there could be chaos. International law sets up a framework based on states as the principal actors in the international legal system, and it defines their legal responsibilities in their conduct with each other, and, within state boundaries, with their treatment of individuals. Its domain encompasses human rights, disarmament, international crime, refugees, migration, nationality problems, and the treatment of prisoners, the use of force, and the conduct of war, among others. It also regulates the global commons, such as the environment, sustainable development, international waters, outer space, global communications and world trade. International law does work, at times invisibly and yet successfully. World trade and the global economy depend on it, as it regulates the activities required to conduct business across borders, such as financial transactions and transportation of goods. There are treaties for roads, highways, railroads, civil aviation, bodies of water and access to shipping for states that are landlocked. And as new needs arise, whether to prevent or punish terrorist acts or to regulate e-commerce, new treaties are being developed.

International Law helps to monitor and regulate the relationship between provinces and its international entities. This means it can govern international criminal law. Then there of course is the private international law which in collaboration with supranational laws which is the law of the nations and supranational organisations. Basically these laws are in place to make sure that there are no people out there violating laws. Here's where it becomes important: let's say your country is shipping things to another country and you expect to be paid for them, by having an international law in place it ensures that you are going to be paid because even if that other country would like to withhold payment for any reason the international law will supersede the private laws and force payment. If payment is not collected then there will be consequences to pay.

Increasingly, parties are submitting disputes arising out of international contracts to arbitration. While this is true for general commercial contracts, it is a particularly marked trend in the construction, energy and investment dispute areas. The success of international arbitration

can be explained by several major advantages it offers in comparison with litigation, especially litigation in foreign courts. However, certain disadvantages also need to be taken into account by parties in deciding whether to enter into an arbitration agreement. Both the main benefits and the principal drawbacks of international arbitration are outlined below.

3.2 The Weaknesses and Limitations of International Law

International Law has also been faced with many challenges. Its major weakness arises out of the fact that its pact are not binding on states since they enter into it voluntarily. In addition, the range of international law is much smaller than the range of national law. Although the gap is gradually narrowing, international law still is and will likely remain a fragmentary legal order simply because International obligations are based on consent not force.

Breaches of international law occur more frequently and are less effectively controlled. Internationally, the rule of power still plays a more important role than nationally where the rule of law is much more firmly established.

Rudimentary character of the institutions which make and apply international law and adjudicate disputes about international legal issues which is primitive (i.e. anarchical that does not mean war but lack of order) in the character of international community affects international law as the legal order of the international community.

4.0 CONCLUSION

The composition of the international system makes International Law a subject of many controversy but states still enter into agreements that form part of International Law. States cannot live in isolation and so must engage other actors. It can however be observed that most of these regulations are entered into for states personal interest, which states can violate when these interests are not protected by the International Law. This is why most constitutions render null and void to that state.

5.0 SUMMARY

The above unit looked at the importance of International Law to its practice. It also examines some of the weaknesses of International Law. It concludes that states set international laws and are parties to it but are apt to respecting it mostly when it protects their interests. In addition, just as most individuals like to conform to norms so as not to be labeled

deviant, most states respect International Law as much as it gives them the goodwill they need in International Relations.

6.0 TUTOR-MARKED ASSIGNMENT

1. What are the strengths and weaknesses of International law in state relations with one another?
2. Using constitutional positions of some states, how supreme are international law to local rules and activities?

7.0 REFERENCES/FURTHER READING

Gray, C. (2000). *International Law and the Use of Force* (1st ed.). Oxford: Oxford University Press.

Meliza, Haradinaj "Compare the Strengths and Weaknesses of National and International Law? To what extent can they be said to be similar or different?"

McGinnis, O. J. (2006). "The Comparative Disadvantage of Customary International Law", *Harvard Journal of Law & Public Policy,* Vol. 30 No. 1.

Onuma, Y. (2003). "International Law in and with International Politics: the Functions of International Law in International Society". *European Journal of International Law,* Vol. 14 No. 1, pp.105-139.