

## CHAPTER II

### LITERATURE REVIEW

#### A. Theoretical framework

##### 1. Theory of theoretical claims

###### a. Remedial Theories

The first type of territorial claims has been dubbed a “remedial right only” theory.<sup>21</sup> The Remedial theories of secession are generally associated with the philosopher Allen Buchanan.

Buchanan describes how a territorial claim could take the shape of a generalized right to have a territorial state, rather than as a right to a particular state.<sup>22</sup> The group might have a history of domination, discrimination and violation of rights, which cannot be protected against without giving that group a state of its own. In order to protect itself, the people in question must achieve full independence in the meaning of international law. They must, in short, become a state. The grant of territory upon which to found a new state, constitutes as a remedy for

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<sup>21</sup> Allen Buchanan, *Theories of Secession*, (26 PHIL. & PuB. AFF: 1997). P.31,34

<sup>22</sup> Ibid. P.36

past injustices, as well as providing the means to allow the secessionist group better to defend itself.<sup>23</sup>

#### b. Direct Territorial Theories

The second type of territorial claim that might be used to justify secession is more directly territorial. Territoriality is not a means to an end (as where victims of human rights violations seek a state in order better to defend themselves). Nor is it designed as compensation for past wrongs that the victims suffered. Rather, the proponent of secession argues that his or her group is entitled to a particular territory on its own merits, as a consequence of international law concerning rightful acquisition.<sup>24</sup>

International law is relatively clear on the principles of lawful acquisition of territories.<sup>25</sup> When there was still *res nullius* available-land unclaimed by any existing state-international law supported acquisition by occupation.<sup>26</sup> Territory could also be acquired legally by signing a treaty or by peacefully exercising sovereignty over an area over a long period of time without protest from the other claimant

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<sup>23</sup> *Ibid.* p.39

<sup>24</sup> *Ibid*

<sup>25</sup> See generally Sir Robert Y. Jennings, *The Acquisition of Territory in International Law* (Manchester Univ. Press 1963).

<sup>26</sup> *Ibid* p.20

states.<sup>27</sup> The legal methods for resolving questions of disputed territorial sovereignty are founded on widely recognized principles of international law.

## 2. Monism and dualism theory

If international law does act directly on the individual, it must be part of a universal system. The doctrine that principles of law-whether national or international-constitute a single body of rules is monism. In discussing the law of nature, Vattel emphasized the centrality of those rights inherent in the individual prior to entering into political society. In return for obedience, the state has the duty to uphold these rights, and a failure to do so severs the bond of political obligation. The Declaration of Independence is eloquent on this point. The monist concludes that natural rights require a holistic approach to legal obligations, which must be considered in their totality and not reduced to component parts. The concept of natural right embedded in universal law is the basis of monist theory.<sup>28</sup>

The logic of monism rests on the assumption that the human desire for order requires a fusion of international and national legal codes, the latter being termed municipal law. For example, the United Nations Convention against

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<sup>27</sup> *Ibid* p.6

<sup>28</sup> James H. Wolfe, *Modern International law : An Introduction to the Law of Nations* (New Jersey :Pearson Education Inc., 2002) p.13

Torture (1984) codified the law proscribing the resort to physical and mental duress as a matter of state policy. Monists insist that the ban on torture must be universal, for international law cannot condemn an activity which then might be permitted under municipal law. The conviction that general international law functions as a constitution governing the community of states is the foundation of monism.<sup>29</sup>

The opposing point of view is dualism. Dualistic theory postulates that international and municipal law are two interrelated, but separate legal codes. Only municipal law acts upon the individual and the effectiveness of international law depends exclusively on enforcement by a sovereign state. Specifically, the Convention against Torture as cited will only take effect in a given state when its government enacts enabling legislation and demonstrates a willingness to enforce the same. Otherwise, the ban on torture is limited to a moral imperative.<sup>30</sup>

Dualists highlight three points in support of their argument. First, they stress that the source of municipal law derives from statutes enacted by national legislatures, while international law reflects inchoate custom and state practice. Second, municipal law is hierarchical in its governance of relations

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<sup>29</sup> A leading advocate of the monist school is Hans Kelsen, especially in his earlier writings. See the first edition of *Principles of International Law* (New York:Rinehart and Co., 1952), pp.303-305, 404.

<sup>30</sup> James H. Wolfe *Ibid* p.14

among persons, and international law regulates the ties between sovereign and equal states comprising the international community, yet international law applies to a relatively narrow range of transactions among states.<sup>31</sup> For these reasons, dualists insist that municipal law and international law, while they are related, serve different purposes and should not be considered as part of the same system.

### 3. Two theories of recognition of a state

The two theories of recognition is the *declaratory* and *constitutive* recognition, which may be applied to governments as well as states. The declaratory theory is a statement of political fact acknowledging that a state or government exists and therefore merits recognition. The constitutive theory asserts that the act of recognition itself constitutes a new state or government.<sup>32</sup> Although governments are not always consistent in adhering to one theory or another, in general the Great Britain favors the declaratory approach while the United States adheres to the constitutive practice.<sup>33</sup>

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<sup>31</sup> Lassa Openheim, *International Law: A Treatise*, vol.1, *Peace*, 6<sup>th</sup> ed.. Hersh Lauterpacht (London:Longmans, Green and Co., 1947), p.34-37. Also Malcolm N. Shaw, *International Law*, 4<sup>th</sup> ed. (Cambridge: At the University Press, 1997), p.100-101.

<sup>32</sup> Brierly, p.138-140. Also see James Crawford, *The Creation of New States in International Law* (New York: Oxford University Press, 1979), p.15-19

<sup>33</sup> James H. Wolfe *Ibid* p.52

Advocates of realpolitik will find support in the declaratory theory, which stresses the acceptance of a political fact irrespective of the legitimacy bestowed by a democratic and constitutional form of government. The interest of a state requires diplomatic relations with all other members of the international community, and accordingly recognition is extended without implying approval or disapproval. If international law is to regulate the relations of states, then it must be universal. To withhold recognition from a state is to deny its right to exist. From this perspective recognition becomes a necessary act, even a duty.<sup>34</sup> The state exists and its sovereignty and independence are not subject to external approval. For another state to question the legitimacy of a new state runs counter to the doctrine of territorial supremacy.<sup>35</sup> The assumption that the international system is a loose anarchy of sovereign entities leads to the conclusion that the declaratory principle is the correct one.<sup>36</sup>

Constitutive theorists argue that recognition not only bestows rights, but stresses the obligation of the newly formed state to fulfill its duties as a member of international society. The government of a new state must affirm a readiness to enter into constructive relations with other states on the basis of international law.<sup>37</sup>

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<sup>34</sup> Ti-chiang Chen, *The International Law of Recognition* (New York: Frederick A. Praeger, 1951), p.3-

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<sup>35</sup> Malcolm N. Shaw, *International Law*, 4<sup>th</sup> ed. (New York: Cambridge University Press, 1997), p.296-303

<sup>36</sup> James H. Wolfe *Ibid*

<sup>37</sup> James H. Wolfe *Ibid*

## **B. Conceptual framework**

### **1. General review of international law**

R.N. Gilchrist defines International law as :

“International Law is the body of rules which civilized states observe in their dealings with each other. These rules being enforced by each particular state according to its own moral standard or convenience”.

International Law or the law of nations consists of the rules and principles of general application dealing with the conduct of States and of international organizations in their international relations with one another and with private individuals, minority groups and transnational companies. Parties that may be involved in the international law are referred as International Legal Personalities. They can bear rights and obligations in the International Law.<sup>38</sup>

International Legal Personality refers to the entities or legal persons that can have rights and obligations under international law, they consist of States, International Organizations, Nationality of individuals and companies, etc. Throughout the nineteenth century, American and British jurists rendered decisions on the law of nations as reflected primarily in custom and in the

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<sup>38</sup> Robert Beckmann and Dagmar Butte, “Introduction to International Law”

<https://www.ilsa.org/jessup/intlawintro.pdf> downloaded on 10 November 2016

writings of such scholarly commentators as Grotius and Vattel. In 1945, the Statute of the International Court of Justice expanded the list of the sources of international law to include the following in order of priority, based on Article 38 of the Statute of International Court of Justice :

- a. international conventions (multilateral lawmaking treaties),
- b. international custom
- c. general principles of law, and
- d. judicial decisions complemented by writing of publicists

During the times, the national law has to obey or follows the International Law. States have to obey the international law in order to achieve peace and diminish conflict between states.

## **2. State**

- a. The characteristics of a state

Customary international law as mentioned in The 1933 Montevideo Convention on the Rights and Duties of States, recognizes four indispensable characteristics of statehood is in which the subject possess an indigenous population, a defined territory, autonomous government and having a capacity to establish relations with other states.

The first two criteria are objective and are relatively easy to establish, but the subjective nature of the third and fourth criteria makes it a political issue. Acceptance of a new state as a member of the United Nations reflects a political judgment rather than a legal determination.

The characteristics of a statehood :

a. Population

The requirement that the entity under consideration has a permanent population is generally readily ascertainable and, with the growing world population, usually met. But for example, Antarctica, which has research stations that are usually occupied, but not by those who would regard themselves as permanent residents, is probably one of the few substantial areas that would not meet this test. However, that it does not require any large number of inhabitants is shown by some small states such as Liechtenstein, Monaco or some of the many islands that have assumed statehood in recent times.<sup>39</sup>

b. Territory

In most instances land frontiers of states are marked by established border controls at points where there is substantial

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<sup>39</sup> Richard K. Gardiner, *International Law*, (Pearson Education Limited: 2003), p.172

usage of crossing points and by unchallenged lines on maps. However, the latter may become contested when some reason arises, such as identification of potential for development of economic significance. Lines on maps may then be relegated to being just part of the picture. One instance where such lines have come to have a greater significance than they might otherwise warrant, though, is where former colonies have become neighbouring states. These have commonly accepted the lines drawn by their colonial predecessors. This is a principle known as *uti possidetis iuris*.<sup>40</sup>

Disputes over the line of particular territorial boundaries are often very well suited to arbitration or judicial settlement.

The same applies to resolution of disputes over maritime frontiers. There have been many instances of resolution of differences over delimitation of sea areas such as the continental shelf whose importance to states and oil companies was a major feature of the second half of the twentieth century. Distinct from these aspects of territorial definition, which are essentially issues of “delimitation” or where a line is to be drawn, are territorial disputes connected with broader claims to substantial

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<sup>40</sup> *Ibid*, p.175

tracts of territory. Examples of these are the dispute between India and Pakistan over Kashmir, the claim by the People's Republic of China to Taiwan, and also the assertion by The Palestinians of their right to territory for the state of Palestine. The high political content of such disputes makes these less suited to arbitration or other judicial settlement. Thus other way of resolving the issues may be needed.<sup>41</sup>

The “traditional” means of acquisition of territory, and of title to it, which writers have commonly identified are : occupation of *terra nullius* (no one's land); conquest and annexation; cession; accretion; and prescription.<sup>42</sup>

a) Occupation of *terra nullius*

*Terra nullius* has some role in assessing historic legal status. For example, determining whether the territory had been *terra nullius* was the first question in the ICJ's consideration of the Western Sahara.<sup>43</sup>

b) Conquest and annexation

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<sup>41</sup> *Ibid*, p.175

<sup>42</sup> *Ibid*, p. 177

<sup>43</sup> *Western Sahara*, Advisory Opinion, (1975) ICJ Rep 12

Conquest and annexation are not currently available as means of acquisition of territory, being incompatible with the UN Charter.<sup>44</sup> Conquest according to West's Encyclopedia of American Law is a term used in feudal law to designate land acquisition by purchase; or any method other than descent or inheritance by which an individual obtains ownership of an estate. On the International Law it is known as the process whereby a sovereign nation is, by force of arms, made to submit to another nation; the defeated country thus becomes part of the empire of the conqueror. Annexation is the term that follows it, annexation means a forcible transition of one state's territory by another state. By that, conquest and annexation is not compatible with The United Nations Charter that had prohibited the act of aggression as mentioned in article 1.1 :

*“The purposes of the United Nations are to maintain international peace and security, and to that end : to take collective measures for the prevention and removal of threats to the peace, and for the suppression*

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<sup>44</sup> Richard K. Gardiner, *ibid*

*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”*

In article 2.3 :

*“All members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered”*

In 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.”*

It is also incompatible with The Fourth Geneva Convention 1949 that restricted the effects of annexation

on the rights of persons with the territories as mentioned  
in the GCIV Article 47 :

*“Protected persons who are in occupied territory shall not be deprived, in any case or in any manner whatsoever, of the benefits of the present Convention by any change introduced, as the result of the occupation of a territory, into the institutions or government of the said territory, nor by any agreement concluded between the authorities of the occupied territories and the Occupying Power, nor by any annexation by the latter of the whole or part of the occupied territory.”*

GCIV Article 49 that prohibits mass movement  
of people out of or into occupied territory :

*“Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive. ... The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies.”*

Nevertheless, occupation of territory by force has occurred in the lifetime of the Charter, and recognition of the consequences *de facto* has been a political matter rather than overt acceptance of any continuing right of conquest and annexation. Moroccan occupation of the Western Sahara, the Chinese hold on Tibet, and Israeli settlements in occupied Palestine (which the researcher will bring further elaboration to the case in chapter IV), would show the unfortunate truth of the maxim *inter arma silent leges* (laws fall silent amidst the clash of arms) were in the case that the rule of law was firmly established in the first place.<sup>45</sup>

#### c) Cession and accretion

The act of cession means the assignment of property to another entity. In international law it commonly refers to land transferred by a treaty. Ballentine's Law Dictionary defines cession as "a surrender; a giving up; a relinquishment of jurisdiction by a board in favor of another agency". In contrast with annexation, where property is forcibly given up, cession is

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<sup>45</sup> Ascribed to *Bouvier's Dictionary of Law*, by John Bouvier (1856)

voluntary or at least apparently so. Cession remains a possibility, even if improbable other than in the context of settlement of a dispute. For example, the surrender of Hong Kong island was by treaty under the sovereignty of the United Kingdom. Since, however, the island was dependent on the nearby “New Territories”, whose lease from the People’s Republic was due to expire at the time of handover, description of the surrender of Hong Kong as cession is a formal description of a political reality.

Meanwhile accretion refers to the possibility of physical emergence of extensions of territory, it may be through geographical processes, such as alluvion (the deposit of sediment) or vulcanism.<sup>46</sup>

#### d) Prescription

Prescription, in international law, is sovereignty transfer of a territory by the open encroachment by the new sovereign upon the territory for a prolonged period of time, acting as the sovereign, without protest or other contest by the original

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<sup>46</sup> Richard K. Gardiner, *ibid*

sovereign.<sup>47</sup> This doctrine legalizes de jure the de facto transfer of sovereignty caused in part by the original sovereign's extended negligence and/or neglect of the area in question.

c. Government

According to Duhaime's Law Dictionary, government is an organization of law-making and law enforcement; the form and institutions by which law and order are developed and maintained in a society. For a government to be effective it must control the state, meaning that it must have control of its organs of authority, its territory and its people. Absent this degree of control, governments of other states will be wary of dealing with an entity as a government because of doubts as to the effectiveness of any concluded transaction, concern that any such dealings may lead to embroilment in domestic matters, and fear that an insecure authority may rapidly be replaced by one which will look askance at any foreign government which has accorded undue respect to a deposed predecessor.<sup>48</sup>

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<sup>47</sup> Randall Lesaffer, "Argument from Roman Law in Current International Law: Occupation and Acquisitive Prescription." [www.ejil.org/article.php?article=289&issue=14](http://www.ejil.org/article.php?article=289&issue=14) downloaded on 10 November 2017

<sup>48</sup> Richard K. Gardiner, *ibid*, p. 179

A second practical consideration is that the government of a state must be in a position to act internationally in however rudimentary a fashion. This links with the fourth recognized requirement of statehood which is the capacity to enter into international relations. Essentially, what is meant here by being in a position to act internationally is that there must be some recognized focus for the conduct of international relations. This will usually be someone identified as a foreign ministers, or some indicator that the head of state is conducting foreign affairs, such as by appointment of emissaries or ambassadors.<sup>49</sup>

The government also has the authority to bind the state. The government is in some senses synonymous with the state, but more as its agent than its personification. Governments come and go but the state is generally much more persistent. The effect of the government's authority to bind the state is that international commitments made by one government cannot simply be disowned by a successor government. Even if a treaty is in the form of commitments between governments, it is the state which is bound. A subsequent government can obtain release

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<sup>49</sup> *Ibid*, p. 180

from a treaty's obligations only by the due processes of termination or denunciation of the treaty.<sup>50</sup>

d. A capacity to enter into relations with the other states

The capacity to enter into relations with other States is an attribute of the existence of an international legal personality.

According to Dr. Walid Abdulrahim, a professor of law in the Beirut Arab University, A State must have recognized capacity to maintain an external relations with other States. That capacity is essential for a sovereign State; whereas lack of such capacity will avert the entity from being an independent State. Capacity distinguishes States from lesser entities such as members of federation or protectorates, which do not manage their own foreign affairs, and are not recognized by other States as full-members of the international community.

**b. Sovereignty of a State**

The classical definition of sovereignty is the authority of a government to suspend constitutional guarantees and rule by decree. On the modern period, the French political philosopher Jean Bodin (1530-1596) defined sovereignty as :

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<sup>50</sup> *ibid*

“... absolute and perpetual power vested in a commonwealth which in Latin is termed *majestas*”<sup>51</sup>

The definition contains the core concept of the modern state, which knowledges no authority other than itself, either internally or externally. According to Bodin, sovereignty was associated with the person of the monarch, a supreme lawgiver but one bound by the law of nature. Sovereignty was not the arbitrary and capricious use of power.<sup>52</sup>

But J.L Brierly a british legal theorist has reviewed the development of the doctrine and concluded that in its present-day form sovereignty is :

“...merely a term which designates an aggregate of particular and very extensive claim that states habitually make for themselves in their relations with other states.”<sup>53</sup>

The flexibility of Brierly’s definition reflects and suits the realities of the modern international system.

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<sup>51</sup> Jean Bodin, *Six Books of the Republic* (1576) quoted in *The Great Political Theories*, ed. Michael Curtis (New York:Avon Books, 1961) 1:272

<sup>52</sup> Charles Howard McIlwain, *The Growth of Political Thought in the West, from the Greeks to the End of the Middle Ages* (New York:Macmillan, 1932), pp. 286-287

<sup>53</sup> J.L Brierly, *The Law of Nations : An Introduction to the International Law of Peace*, 6<sup>th</sup> ed. (New York:Oxford University Press, 1963), p.47

### 3. United Nations

The United Nations (UN) is an international organization founded in 1945. It is currently made up of 193 Member States. The mission and work of the United Nations are guided by the purposes and principles contained in its founding Charter, the Charter of The United Nations. Due to the powers vested in its Charter and its unique international character, the United Nations can take action on the issues confronting the humanity in the 21st century, such as peace and security, climate change, sustainable development, human rights, disarmament, terrorism, humanitarian and health emergencies, gender equality, governance, food production, and more.<sup>54</sup>

The UN also provides a forum for its members to express their views in the General Assembly, the Security Council, the Economic and Social Council, and other bodies and committees. By enabling dialogue between its members, and by hosting negotiations, the Organization has become a mechanism for governments to find areas of agreement and solve problems together.

The organizational structure of the UN is indicated in Article 7 of the UN Charter, which states :

(1) There are established as the principal organs of The United Nations:

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<sup>54</sup> United Nations “History of the UN”, <http://www.un.org/un70/en/content/history> accessed on 12 November 2016

A General Assembly

A Security Council

An Economic and Social Council

A Trusteeship Council

An International Court of Justice

And a Secretariat

(2) Such subsidiary organs as may be found necessary may be established in accordance with the present Charter.

The General Assembly and Security Council respectively represent bodies commonly found in international organisations, that it is a “plenary” body in which the entire membership participates, and a smaller body that is composed of selected representatives which supervises the work of the organization between periodic gatherings of the plenary. The UN differs from this model in that the Security Council has permanent members and a periodically elected membership, meeting whenever necessary. It also has a more specialized role than the executive body of many international organisations, being the organ charged with primary responsibility for the maintenance of international peace and security. The UN has two further “Councils”, the Economic and Social Council and the Trusteeship Council,

which as well as the ICJ and the Secretariat, are designated as principal organs.<sup>55</sup>

The headquarters of the UN is located in New York but its operations and representation are worldwide. Thus a significant area of legal regulation arises from the relations of the UN itself with the host state for its headquarters, and its relations with each state in which it has representatives or in which it carries out its functions.<sup>56</sup>

#### **a. The General Assembly**

The Assembly has the power to make recommendations to States on international issues within its competence. It has also initiated actions—political, economic, humanitarian, social and legal—which have affected the lives of millions of people throughout the world. The landmark Millennium Declaration, adopted in 2000, and the 2005 World Summit Outcome Document, reflect the commitment of Member States to reach specific goals to attain peace, security and disarmament along with development and poverty eradication; to safeguard human rights and promote the rule of law; to protect our common environment; to meet the special needs of Africa; and to strengthen the United

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<sup>55</sup> Richard K. Gardiner, *ibid*

<sup>56</sup> *ibid*

Nations. In September 2015, the Assembly agreed on a set of 17 Sustainable Development Goals, contained in the outcome document of the United Nations summit for the adoption of the post-2015 development agenda (resolution 70/1).<sup>57</sup>

According to the Charter of the United Nations, the General Assembly may:

1. Consider and approve the United Nations budget and establish the financial assessments of Member States
2. Elect the non-permanent members of the Security Council and the members of other United Nations councils and organs and, on the recommendation of the Security Council, appoint the Secretary-General
3. Consider and make recommendations on the general principles of cooperation for maintaining international peace and security, including disarmament
4. Discuss any question relating to international peace and security and, except where a dispute or situation is currently being discussed by the Security Council, make recommendations on it

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<sup>57</sup> General Assembly of the United Nations “Functions and Power of the General Assembly”

<http://www.un.org/en/ga/about/background.shtml> accessed on 12 November 2016

5. Discuss, with the same exception, and make recommendations on any questions within the scope of the Charter or affecting the powers and functions of any organ of the United Nations

6. Initiate studies and make recommendations to promote international political cooperation; the development and codification of international law; the realization of human rights and fundamental freedoms; and international collaboration in the economic, social, humanitarian, cultural, educational and health fields

7. Make recommendations for the peaceful settlement of any situation that might impair friendly relations among countries

8. Consider reports from the Security Council and other United Nations organs

The Assembly may also take action in cases of a threat to the peace, breach of peace or act of aggression, when the Security Council has failed to act owing to the negative vote of a permanent member. In such instances, according to its “Uniting for peace” resolution of 3 November 1950, the Assembly may consider the matter immediately

and recommend to its Members collective measures to maintain or restore international peace and security.<sup>58</sup>

The General Assembly meets in regular annual sessions in the last months each year. For the conduct of its detailed work, the General Assembly divides the load among seven committees which are themselves plenary bodies. The Sixth Committee is known as the “Legal Committee”. The main purpose of the work of the Sixth Committee is to enable members of the UN to oversee developments in international law and to consider legal matters of concern to the UN. The outcome of the Committee’s work is expressed in draft resolutions which it puts to the plenary of the General Assembly for the latter to adopt.<sup>59</sup>

The role of the General Assembly as part of the law-making machinery of the UN is considered below, including its relationship with the International Law Commission and other specialist UN bodies. Here it is sufficient to look briefly at the powers of the Assembly to make decisions binding on member states. Such powers to bind states directly are limited. They do not even extend to all the important matters which the General Assembly addresses. Some assessment of what are considered to be “important matters” can be deduced from the

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<sup>58</sup> *ibid*

<sup>59</sup> Richard K. Gardiner, *ibid* p.228

requirement that decisions of the General Assembly on these are made by a two-thirds majority, other matters being decided by simple majority (each member has one vote).<sup>60</sup> On this criterion, important matters include:

“recommendations with respect to the maintenance of international peace and security, the election of the non-permanent members of the Security Council, the election of the members of the Economic and Social Council, the election of members of the Trusteeship Council in accordance with paragraph 1 of Article 86, the admission of new Members to the United Nations, the suspension of the rights and privileges of membership, the expulsion of Members, questions relating to the operation of the trusteeship system, and budgetary questions.”<sup>61</sup>

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<sup>60</sup> Richard K. Gardiner, *Ibid* p.229

<sup>61</sup> UN Charter, Article 18

## **b. The Security Council**

### **1. The Purpose of the Security Council**

The composition of the Security Council reflects the origins of the UN as an organization intended to prevent recurrence of world wars of the kind that occurred in the twentieth century. The idea was to create a body composed of the most powerful states, as permanent members of the Council, and a representative selection of other members of the UN, elected to participate in the Council's work for two years at a time.<sup>62</sup> This small body of 15 states would function continuously and supervise implementation of the primary task of the UN, maintenance of international peace and security. The Council was to have power to require all members to apply mandatory sanctions and to arrange for military forces under its direct overall command to take any necessary action.<sup>63</sup>

Under the Charter, the Security Council has primary responsibility for the maintenance of international peace and security. It has 15 Members, and each Member has one vote.

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<sup>62</sup> UN Charter, Article 23

<sup>63</sup> Richard K. Gardiner, *Ibid* p.233

Under the Charter, all Member States are obligated to comply with Council decisions. The Security Council takes the lead in determining the existence of a threat to the peace or act of aggression. It calls upon the parties to a dispute to settle it by peaceful means and recommends methods of adjustment or terms of settlement. In some cases, the Security Council can resort to imposing sanctions or even authorize the use of force to maintain or restore international peace and security. The Security Council also recommends to the General Assembly the appointment of the Secretary-General and the admission of new Members to the United Nations. And, together with the General Assembly, it elects the judges of the International Court of Justice.<sup>64</sup>

To decide on important matters, the victors in the Second World War prescribed a system requiring a weighted majority of votes, a system designed to secure the support of all the permanent members. However this rule applies only to substantive decisions of the Council. Thus, while decisions of the Security Council on procedural matters are made by a simple affirmative vote of nine members, decisions on all other matters

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<sup>64</sup> United Nations “The Security Council” <http://www.un.org/en/sc/>, accessed on 12 November 2017

require the same number of affirmative votes but these must include the “concurring” votes of the permanent members.<sup>65</sup>

The creators of the United Nations Charter conceived that five countries — China, France, the Union of Soviet Socialist Republics (USSR) [which was succeeded in 1990 by the Russian Federation], the United Kingdom and the United States —, because of their key roles in the establishment of the United Nations, would continue to play important roles in the maintenance of international peace and security. They were granted the special status of Permanent Member States at the Security Council, along with a special voting power known as the "right to veto". It was agreed by the drafters that if any one of the five permanent members cast a negative vote in the 15-member Security Council, the resolution or decision would not be approved.<sup>66</sup>

All five permanent members have exercised the right of veto at one time or another. If a permanent member does not fully agree with a proposed resolution but does not wish to cast

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<sup>65</sup> UN Charter, Article 27

<sup>66</sup> United Nations, “The Right to Veto” <http://www.un.org/en/sc/meetings/voting.shtml> accessed on 12 November 2016

a veto, it may choose to abstain, thus allowing the resolution to be adopted if it obtains the required number of nine favourable votes.<sup>67</sup>

## 2. Law of the Security Council

The Security Council, unlike the General Assembly, does not have a role in the general development of international law; but international law is nevertheless closely allied to the Council's political functions at the core of its activities. Thus the Council does have powers in relation to international peace and security which amount to laying down the law. Three examples illustrate this. First, the Council can require states to impose mandatory sanctions to apply pressure to a wrongdoer. Second it can control, deploy or oversee use of military force in certain circumstances. Third, it can set up subsidiary bodies to determine legal matters.<sup>68</sup>

Into the first category fall "mandatory" resolutions of the Council which require states to take "measures not involving the use of armed force", including "complete or partial interruption

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<sup>67</sup> *ibid*

<sup>68</sup> Richard K. Gardiner, *Ibid* p.233

of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations”.<sup>69</sup> Thus states may be required to change or suspend the normal operation of their laws in order to comply.

The second category is rather more complex. An underlying principle of the UN Charter is that states may not unilaterally use aggressive (non-defensive) force.<sup>70</sup> In place of war between states, the Charter was intended to usher in an era of “collective security”. The Security Council was to be the executive power ensuring collective security. It was to have at its disposal forces supplied by member states. While states preserved the right to use force to self-defence if the subject of an armed attack, the Security Council was to be informed so that it could take over after the immediate needs had been met and could then restore international peace and security.<sup>71</sup>

The main developments in the third category (establishment of institutions by the Security Council) have been

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<sup>69</sup> UN Charter, Article 41

<sup>70</sup> UN Charter, Article 2(4). Collective self-defence and regional organisations are part of the larger picture

<sup>71</sup> Richard K. Gardiner, *Ibid* p.234

quite recent. Under Article 29 of the Charter, the Council has powers to establish subsidiary organs, but has used its powers under Chapter VII to establish two of the most significant international legal bodies of recent times. These are the UN Commission settling claims arising from Iraq's invasion of Kuwait and the International Criminal Courts for the Former Yugoslavia and Rwanda. Both perform functions having something a judicial character comparable to those performed by courts and tribunals in national legal systems.<sup>72</sup>

### 3. Security Council's Powers

Specific powers granted to the Security Council for the discharge of its general duties described in Article 24 of the Charter are laid down in Chapters VI, VII, VIII, and XII. The scope of these chapters of the Charter is shown by their respective headings:<sup>73</sup>

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<sup>72</sup> Richard K. Gardiner, *Ibid*

<sup>73</sup> Richard K. Gardiner, *Ibid* p.233

## VI PACIFIC SETTLEMENT OF DISPUTES

VII ACTION WITH RESPECT TO THREATS TO  
THE PEACE, BREACHES OF THE PEACE AND  
ACTS OF AGGRESSION

## VIII REGIONAL ARRANGEMENTS

## XII INTERNATIONAL TRUSTEESHIP SYSTEM

## 4. Resolution of dispute

## a. Negotiation

Negotiation is the least structured of the seven methods. The process is informal, and a third party does not play a role. The essence of negotiation is compromise, and political considerations may often be paramount although the question may be couched in legal terms.<sup>74</sup>

## b. Good Offices

At this stage a third party enters the scene, albeit in a restricted role. Good offices involves an effort by a disinterested government to bring the contending parties together usually by facilitating communication and providing a secure conference site. Good offices may entail a political risk for the third party, for a failure of the bilateral negotiations may well lead to a diplomatic embarrassment. In a

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<sup>74</sup> James H. Wolfe, *ibid* p.112-113

parliamentary system of government the foreign minister would be exposed to searching questions from the opposition. Therefore good offices should only be entered into when the government in question enjoys firm political support and is reasonably certain of success. Otherwise a government may find that it has undercut its international prestige.

International organizations may provide good offices without running a political risk. Starting in 1975, the United Nations Security Council authorized the secretary-general to undertake a mission of good offices aimed at restoring the political unity of the divided Republic of Cyprus.<sup>75</sup> Successive secretaries-general have undertaken this mission, which requires them to submit a semiannual report on the Cyprus question to the Security Council. In February 1998, tensions in the Persian Gulf had reach a point at which Anglo-American military action against Iraq seemed imminent. The Security Council authorized Secretary-General Kofi Annan to undertake a good offices mission to Baghdad, where he succeeded in de-escalating the crisis. An international civil servant can draw upon the prestige of the intergovernmental organization (IGO) he or she represents without running the risk of

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<sup>75</sup> United Nations, Security Council, *Official Records*, Resolution 367 (March 12, 1975) reprinted in Necati Ertekun, *The Cyprus Dispute* (Nicosia: K. Rustem and Brother, 1984), p.254-255

compromising national honor. IGOs are uniquely suited for the task of good offices.<sup>76</sup>

### c. Mediation

The dividing line between good offices and mediation is so indistinct that the two methods are often linked. The Annan mission to Iraq implied some measure of mediation. Nevertheless mediation is a step beyond good offices because a third party is at the conference table and is able to intervene in the discussion by proposing a settlement of the contentious issue.<sup>77</sup> At the first Hague Conference (1899) twenty six states parties concluded a multilateral treaty, which defined mediation as follows :

The part of the mediator consists in reconciling the opposing claims and appeasing the feelings of resentment which may have arisen between the States at variance.

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<sup>76</sup> James H. Wolfe, *ibid* p.113

<sup>77</sup> *ibid* p.113

And further :

Good offices and mediation, either at the request of the parties or on the initiative of Powers strangers to the dispute, have exclusively the character of advice and never have binding force.<sup>78</sup>

## C. Legal Framework

### 1. The Charter of United Nations

#### a. Article 1

“The purpose 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”

#### b. Article 10

“The General Assembly may discuss any questions or any matters within the scope of the present Charter or relating to the powers

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<sup>78</sup> Pacific Settlement of Disputes: First Hague Conference (July 28, 1899), 1 Bevans 230,235

and functions of any organs provided for in the present Charter, and, except as provided in Article 12, may make recommendations to the Members of the United Nations or to the Security Council or to both on any such questions or matters.”

c. Article 11

“1. The General Assembly may consider the general principles of co-operation in the maintenance of international peace and security, including the principles governing disarmament and the regulation of armaments, and may make recommendations with regard to such principles to the Members or to the Security Council or to both.

2. The General Assembly may discuss any questions relating to the maintenance of international peace and security brought before it by any Member of the United Nations, or by the Security Council, or by a state which is not a Member of the United Nations in accordance with Article 35, paragraph 2, and, except as provided in Article 12, may make recommendations with regard to any such questions to the state or states concerned or to the Security Council or to both. Any such question on which action is necessary shall be referred to the Security

Council by the General Assembly either before or after discussion.

3. The General Assembly may call the attention of the Security Council to situations which are likely to endanger international peace and security.

4. The powers of the General Assembly set forth in this Article shall not limit the general scope of Article 10.”

c. Article 14

“Subject to the provisions of Article 12, the General Assembly may recommend measures for the peaceful adjustment of any situation, regardless of origin, which it deems likely to impair the general welfare or friendly relations among nations, including situations resulting from a violation of the provisions of the present Charter setting forth the Purposes and Principles of the United Nations.”

## **2. The Balfour Declaration**

The Balfour Declaration was a letter dated 2 November 1917 from the United Kingdom's Foreign Secretary Arthur James Balfour to Walter Rothschild, 2nd Baron Rothschild, a leader of the British Jewish community, for transmission to the Zionist Federation of Great Britain and Ireland. It read :

“His Majesty's government view with favour the establishment in Palestine of a national home for the Jewish people, and will use their best endeavours to facilitate the achievement of this object, it being clearly understood that nothing shall be done which may prejudice the civil and religious rights of existing non-Jewish communities in Palestine, or the rights and political status enjoyed by Jews in any other country.”

The text of the letter was published in the press one week later, on 9 November 1917. The "Balfour Declaration" was later incorporated into both the Sèvres peace treaty with the Ottoman Empire, and the Mandate for Palestine. The original document is kept at the British Library.

### **3. The Mandate of Palestine**

The Mandate system was instituted by the League of Nations in the early 20th century to administer non-self-governing territories. The mandatory power, appointed by an international body, was to consider the mandated territory a temporary trust and to see to the well-being and advancement of its population.<sup>79</sup>

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<sup>79</sup> “History & Overview 1922-1948”

<http://www.jewishvirtuallibrary.org/jsource/History/mandate3.html> accessed on 20 November 2016

The preamble of the mandate document declared:

“Whereas the Principal Allied Powers have also agreed that the Mandatory should be responsible for putting into effect the declaration originally made on November 2nd, 1917, by the Government of His Britannic Majesty, and adopted by the said Powers, in favour of the establishment in Palestine of a national home for the Jewish people, it being clearly understood that nothing should be done which might prejudice the civil and religious rights of existing non-Jewish communities in Palestine, or the rights and political status enjoyed by Jews in any other country.”

#### **4. UN Resolution 181**

The United Nations Partition Plan for Palestine was a proposal by the United Nations, which recommended a partition of Mandatory Palestine at the end of the British Mandate. On 29 November 1947, the UN General Assembly adopted the Plan as Resolution 181(II).<sup>80</sup>

The resolution recommended the creation of independent Arab and Jewish States and a Special International Regime for the city of Jerusalem. The Partition Plan, a four-part document attached to the resolution, provided for the termination of the Mandate, the progressive withdrawal of British armed forces and the delineation of boundaries between the two States and Jerusalem. Part I

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<sup>80</sup> "A/RES/181(II) of 29 November 1947". United Nations. 1947. Retrieved 11 January 2012

of the Plan stipulated that the Mandate would be terminated as soon as possible and the United Kingdom would withdraw no later than 1 August 1948. The new states would come into existence two months after the withdrawal, but no later than 1 October 1948. The Plan sought to address the conflicting objectives and claims of two competing movements, Palestinian nationalism and Jewish nationalism, or Zionism.<sup>81</sup> The Plan also called for Economic Union between the proposed states, and for the protection of religious and minority rights.

#### **5. UN Resolution 242**

United Nations Security Council Resolution 242 (S/RES/242) was adopted unanimously by the UN Security Council on November 22, 1967, in the aftermath of the Six-Day War. It was adopted under Chapter VI of the UN Charter. The resolution was sponsored by British ambassador Lord Caradon and was one of five drafts under consideration.

Operative Paragraph One "Affirms that the fulfillment of Charter principles requires the establishment of a just and lasting peace in the Middle East which should include the application of both the following principles:

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<sup>81</sup> William B. Quandt, Paul Jabber, Ann Mosely Lesch, *The Politics of Palestinian Nationalism*, (University of California Press, 1973) p.7.

(i) Withdrawal of Israeli armed forces from territories occupied in the recent conflict;

(ii) Termination of all claims or states of belligerency and respect for and acknowledgment of the sovereignty, territorial integrity and political independence of every State in the area and their right to live in peace within secure and recognized boundaries free from threats or acts of force."

## **6. The Geneva Convention Relative to the Protection of Civilian Persons in**

### **Time of War approach**

Article 1 :

"The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances."

Article 2 :

"In addition to the provisions which shall be implemented in peacetime, 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 recognized by one of them.

The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.

Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.”

Article 49 :

“Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive.

Nevertheless, the Occupying Power may undertake total or partial evacuation of a given area if the security of the population or imperative military reasons so demand. Such evacuations may not involve the displacement of protected persons outside the bounds of the occupied territory except when for material reasons it is impossible to avoid such displacement. Persons thus evacuated shall be transferred back to their homes as soon as hostilities in the area in question have ceased.

The Occupying Power undertaking such transfers or evacuations shall ensure, to the greatest practicable extent, that proper accommodation is provided to receive the protected persons, that the removals are effected in satisfactory conditions of hygiene, health, safety and nutrition, and that members of the same family are not separated.

The Protecting Power shall be informed of any transfers and evacuations as soon as they have taken place.

The Occupying Power shall not detain protected persons in an area particularly exposed to the dangers of war unless the security of the population or imperative military reasons so demand.

The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies.”

## **7. Declaration of Principles on Interim Self-Government Arrangements**

This agreement establishes the general guidelines for the negotiations to come and lays the foundations for a Palestinian Interim Self-Government in the West Bank and Gaza for a transitional period of five years. The agreement stipulates measures for the transfer of authority from the Israeli military government and its Civil Administration to the authorized Palestinians and lays the basis for

permanent status talks based on Security Council Resolutions 242 and 338.

### **8. Vienna Convention**

Article 26 (Pacta Sun Servanda)

“Every treaty in force is binding upon the parties to it and must be performed by them in good faith.”