INL2000 BASIC PRINCIPLES OF INTERNATIONAL LAW

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The European Law Students' Association

MALTA

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INL2000: Basic Principles of International Law

05.10.2021 - Introduction

International Law differs from the legal systems which we have been introduced to and which we have previously studied. It is therefore necessary to diversify the thinking employed as it requires a different frame of mind and operates within an entirely different framework.

The two leading works on International Law are the following:
1. Brownlie's Principles of International Law
2. International Law by Malcolm Shaw

These are the recommended books for this study unit.

Journals are also very important and the recommended ones are the following:
1. The American Journal of International Law
2. International Comparative Law

Other required material: The UN Charter and the Statute of the International Court of Justice seeing as the lectures will follow the methodology of the ICJ.

What is International Law?

The system of International Law is different from the local branches of law as it is a framework of law primarily designed to regulate state behaviour. In fact, states are the primary subjects of International Law. The role of an International Lawyer is to examine how the law regulates the behaviour of states.

History of International Law and the formation of the United Nations

Prior to the middle of the last century, International Law would have been defined as a system of law which regulates the relationships between states. However, this changed following the 1945 Conference in San Francisco which established the United Nations.

Following WWI, the Allied Power came together to assemble 'The League of Nations' which was the first international organisation aimed at achieving world peace. It was built on the principles of avoiding wars at all costs, on open and respectable communication between nations, on the agreed commitment to honour treaties and on the shared desire to establish international laws. At its peak, the League of Nations was made up of 58 countries, but it ultimately failed its mission at maintaining global peace following the uprising of the Axis Powers, principally Germany, Italy and Japan, who did not honour the international treaties and who left the League of Nations. This enables the Allied Powers, led by England, France and the USA, to join forces to stop the Axis Powers.

The leaders of England and the USA, Roosevelt and Churchill, in Finland drafted the Atlantic Charter which contained the new idealistic goals for the world after the end of the war. This included an end to countries conquering each other to expand their territories, a reduction in trade restrictions, freedom of the ocean and the forcible removal of weapons from aggressive nations.

On the 1st January 1942, at the Arcadia Conference in Washington DC, 26 countries signed the 'Declaration by the UN' led by the big 4 countries: the UK, the US, the Soviet Union and China. These joined forces to defeat totalitarianism, especially Hitlerism, which the Second World War inspired. Victory over the Axis powers was necessary to defend human rights everywhere. Therefore, WWII was a war of ideals. Following the end of the war, a further 21 countries signed the 'Declaration by the UN'.

This led to Heads of States, Diplomats, Generals and other persons of political power meeting in order to create another international organisation to keep the peace. The big 4 nations held the Dumbarton Oaks Conference where they laid out the plans for this international organisation. Following, the United Nations Conference on International Organisation was held in San Francisco in April of 1945. Representatives from 50 countries came together to create the United Nations Charter which effectively brought the UN into existence. It was signed on June 26th 1945 and came into effect on October 24th 1945.

This Charter created 6 organs: the General Assembly, the Security Council, the Economic and Social Council, the International Court of Justice, the Trusteeship Council and the Secretariat.

The General Assembly's role is to inform on resolutions concerning global issues, security and diplomacy. The Assembly meets annually in New York from September to December and is made up of 193 countries and 2 observer states: Palestine and the Holy See (The Vatican). Here, each country is represented by the Head of Government or a delegate sent by the Head of Government. Within this Assembly, defence and administrative issues require a two-thirds majority while other issues require a simple majority. One country is offered a single vote.

The Security Council exists to prevent conflict on a large scale promoting peace through diplomacy and sanctions. There are five permanent members who represent the victors of WWII - France, the UK, the USA, Russia and China. These are afforded a very controversial veto power. A further ten members representing the rest of the world make up the rest of the Council. These rotate of a two year basis and Malta is up for a seat in 2023. This Council also has a peacekeeping force made up for 100,000 international soldiers.

The Economic and Social Council serves to improve standards of living and promote human rights. It is centred around developing countries and works with specialised councils such as the WHO and the High Commission for Refugees in order to facilitate most of its work.

The International Court of Justice is the judicial branch of the UN where international violations are debated and prosecuted according to International Law.

The Trusteeship Council's purpose was to help countries gain Independence but has not been operational since 1994.

The UN Secretariat focuses on the internal administrative workings of the UN. It compiles reports and facilities communication between the various councils and is headed by the Secretary General who is currently Antonio Guterres from Portugal. It is the Secretariat that establishes the the agenda for the General Assembly.

International Law, International Organisations and the United Nations

The 1945 San Francisco Conference which established the UN included a proliferation of International Organisations which have their own International legal personalities. These International Organisations are established by states but are usually independent from the states which have set them up. They report to their governing councils or assemblies and not their founding states. They have an international capacity to enter into international agreements and owing to the state of our globalised world, there is not a single aspect of international life that is not governed by one such organisation. They are extremely important especially in relation to responses to global issues which require a uniformed and targeted approach calling for international coordination and cooperation to combat. International organisations coordinate state strategies.

The United Nations and the Universal Declaration of Human Rights

In the General Assembly of 1948, the Universal Declaration of Human Rights were adopted in the unique period following the Nuremberg Trials. “These were a series of military tribunals held following WWII by Allied forced under International Law and served to hold to account and prosecute prominent members of the political, military, judicial and economic leadership of Nazi Germany, who planned, carried out or otherwise participated in the Holocaust and other war crimes.” The trails and the decisions taken under their auspices marked a turning point between classical and contemporary international law.

The Declaration of Human Rights provided a blueprint for the recognition of the Fundamental Rights and International Freedoms every person is owed by virtue of their humanity. This blueprint has been implemented to a large extent within the Council of Europe through the European Convention of Human Rights and through the existence of Human Rights Chapters within Constitutions. This indicates the recognition of the need to protect Human Dignity.

International Law today

International Law currently refers to a system of laws, regulations and prescriptions that regulate

1. The relationships between states vis-a-vis other states
2. The relationships between states and international organisations
3. The relationships between states, international organisations and individuals vis-a-vis the individuals rights and obligations under international law.

There are two fundamental facts which must be taken into account when dealing with international law: state sovereignty, i.e. the fact that international law is a system of law which serves to regulate the behaviour of independent states, and the pursuance of national interest.

STATE SOVEREIGNTY

The focus remains on state behaviour as the state is the primary concern of international law as it is the entity which has the fullest rights and obligations. Therefore, international law is a system which regulates sovereign, independent states. States enjoy sovereignty which is manifested in its right to self-determination, independence and the capacity to enter into relations with other states. This characteristic of sovereignty influences the entire texture of the framework of international law. This is because the law is a function of this reality. The independent sovereignty of states is why, for example, there exists no international parliament which legislates laws to enforce upon all states. Even in terms of the International Court of Justice, a state is free to submit or not submit its disputes to third party settlements and thus, the court is only eligible to decide disputes presented to it. There is no system of compulsory jurisdiction.

THE PURSUANCE OF NATIONAL INTEREST

In addition to the fact that this system of law is one which serves to regulate sovereign, independent states, it is also important to note that within this legal framework, the primary objective of these sovereign, independent states in international fora and through international relations is the pursuance of their national interests. This might be framed in terms of justice, equality, freedom etc. but ultimately, every state is pursuing its fundamental vital interests.
The function and purpose of international law therefore, is regulating and balancing the often conflicting interests of different states. Double standards may sometimes exist when regarding state behaviour - this is a manifestation of the pursuance of state interests within the limits of the law.

We can argue, therefore, that the basis of the entire international legal system, whether implied or explicitly states, is agreement. International law is ultimately based on state agreement which may be manifested through international treaties and through customary law, amongst other instruments. The international legal system is like a bubble. States actively rotate within this bubble of international law as they cannot exist independently from it, despite the wish of many. The equilibrium will always bring states back to the international community whether it occurs through the passage of time or through the implementation of sanctions. Often times, states which are outlawed by the international community are made to pay penalties which may lead to the collapse of that state.

12.10.2021 - Why do sovereign states respect the law?
As has been previously established, the function of International Law is to balance, harmonise and accommodate often conflicting interests of states. However, there is no supranational structure which can have the role and function of an international parliament and non compulsory courts or police force and this leads us to question: why do sovereign states respect international law and what keeps states rotating actively within the bubble of international law?

It is important to mention that, one gets the view that states do not respect the law when regarding the media. The media highlights the breakdowns of the law. However, this is a very incomplete picture, because in the majority of cases, states do respect the law and the some 35,000 treaties which we have. There is a constant respect for the law between states.

States opt to respect International Law despite their sovereignty owing to the fact that they want the benefits of living within international society. Rarely does a state break out of the bubble of

international law as it would highlight the state as being an illegal one and soon the equilibrium will bring them back within the bubble.

Sovereign states are able to kept respecting the law through a system of 'pressure points' or owing to the Doctrine of Pressure Points. This refers to a number of systems and mechanisms which press states to keep within the realm of law and ensure that states find it convenient and necessary to live within the international community of states.

These pressure points involve the following:
1. The Use of Force
- Reprisals
- Retorsion
2. Sanctions and Measures
3. Courts
4. Reciprocity and Cooperation
5. Existence of the mass media and the internet.

The Security Council and the Use of Force

The Charter of the United Nations, was drafted following two world wars that saw mankind engage in violent atrocities. Through the preamble, it was decided that force should never again be employed following the effects its employment brought about in the beginning of the 20th Century, despite the realisation and acknowledgement of the facts that it is in the nature of both mankind and the state to reduce to force.

In Article 2, paragraph 4 of the Charter, a prohibition is included which prohibits the use of force against the integrity of another state. It reads as follows:

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 Purpose of the United Nations*."

However, despite this prohibition of force, Article 2 paragraph 7 argues that while the UN Charter prohibits the influence of the United Nations on states in terms of their domestic jurisdiction, this is without prejudice to the powers of the Security Council provided under Chapter 7.

Article 2
"*7. Nothing contained in the present Charter shall authorise the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.*"

As specified previously, there are five permanent seats on the Security Council, a reflection of the victors of WWII. In some respects, the power structure established under the Charter cannot be understood to reflect the power realities of today owing to the fact that it was built on a political situation of a post-WWII world. For example, it became a global issue which the international

community couldn't accept when the China seat, one of the five permanent members, was given to Taiwan during the Nixon administration.
There are constant efforts at the UN to try and restructure the permanent seats and the veto power which the five seats have. However, in order for change to be affected, it requires the acceptance of the countries making up the permanent representatives and it is unlikely that they would erode their own power, especially considering that in certain cases, their powers and international influence have already greatly diminished since the times of WWII.

The Security Council is a political organ that exists to prevent large-scale conflict. Once a state joins the Charter of the UN, they are bound to respect the decisions of the Security Council. Therefore, over 190 members of the UN are bound by the decisions of the Security Council. This council authorises and gives legitimacy to the use of force. Through the Security Council, states can rely on collective security as provided by the Council.

The fulcrum of the maintenance of international law and order is Chapter VII of the Charter of the UN. There are three trigger points which can bring the security council to order or brings about the measures and sanctions which the Security Council is authorised to impose:

1. Action with respect to threats to the peace;
2. Action with respect to breaches of the peace; &
3. Acts of Aggression

There are enshrined within the title of Chapter VII.

Whether the powers afforded to the Security Council should be expanded or reduced and whether states were determined to ensure a limited approach were all major points of debate during the San Francisco Conference in 1945.

The mechanisms under Chapter VII begin to apply depending on Article 39. The Security Council itself has the power to determine whether such circumstances concerning threats to the peace, breaches of the peace, and acts of aggression exist.

Article 39
"*The Security Council shall determine the existence of any threat to the peace, breach of the peace, of 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 power of self-determination afforded to the Security Council under Article 39 sterilised the operation of the system owing to the Cold War and the veto powers of the five permanent representatives, which included the USA and the Soviet Union. The Cold War was an ongoing political rivalry and period of geopolitical tension between the USA and the Soviet Union and their respective allies following WWII.

This began to affect the operations of the Security Council following the engagement of Chapter VII during the Korea crisis in the 50s, following the Soviet Ambassador's failure to attend the meeting. Thereafter, the dynamic of the Cold War dictated the operations of the Security Council thanks to the existence of the veto power: If the Western Bloc asked for sanctions against the interest of the Eastern Bloc, the veto power would be put into effect. During this time, world peace was dependent on the Doctrine of Shares of Influence.

The Doctrine of Shares/Spheres of Influence enabled powers to guarantee peace in their areas of influence. While the international community was adopted the Charter of the UN and aiming to ensure peace through the principles enshrined within it, the three victors of WWII met and during the Yalta Conference, divided the world in spheres of influence. An example of this occurred when the Soviets invaded Hungary and while the other powers protested the invasion, they did not intervene or impose substantive measures as Hungary was outside their sphere of influence. The most powerful manifestation of this was the Cuba Crisis and the Soviet Missile Plan during the Kennedy Administration. During this time, both sides debated and contemplated the use of Nuclear Weaponry.
This doctrine spilled into the functioning of the Security Council through the veto vote. As long as nations maintained a good relationship with one of the five permanent powers, they would veto actions against that nation.

The Security Council once again began to work as intended following the collapse of the Soviet Union. For example, the Security Council took action under Chapter VII when Iraq invaded Kuwait. Here, the Chapter worked as envisaged: International coalition which worked.
The situation of Iraq I was the following:

Currently, we have reintroduced the notion of the doctrine of spheres of influence with new powers exercising their clout to determine new state behaviour.

What powers does Chapter VII give to the Security Council?

Once the Security Council has determined under Article 39 there there exists a threat to peace, a breach of the peace or acts of aggression, Article 40 enables the Security Council to impose provisional measures which stand to diffuse the situation without prejudice to the outcome. If a state fails to respect the provisional measure, the Security Council can take note and presumably order more measures and sanctions.

"Article 40
In order to prevent an aggravation of the situation, the Security Council may, before making the recommendation or deciding upon the measures provided for in Article 39, call upon the parties concerned to comply with such provisional measures as it deems necessary or desirable. Such provisional measures shall be without prejudice to the rights, claims or positions of the parties concerned.
The Security Council shall duly take account of failure to comply with such provisional measures."

There are two routes which can be adopted in terms of the application of these measures and sanctions:
1. The Fast Track
2. The Escalating Approach

With the manner in which the Charter is drafter, generally, a preference is made for the use of measures not involving force. However, it is made clear that whilst it is preferable to try rely on the non-use of force and then escalate should the situation warrant it, the Charter enables the Council to act if there is no purpose in delay or procrastination. This is what occurred in the Iraqi invasion, the Security Council did not rely on Article 41, but resorted to a coalition of armed forced to diffuse the situation.

Article 41
"*The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio and other means of communication, and the severance of diplomatic relations.*"

USE OF FORCE

Under Article 42, the Charter authorised the use of force should the other measures and sanctions not work. Despite that which is contained with Article 2 paragraph 4 calling for an absence of force against the integrity of another nation, Article 2 paragraph 7 protects the Security Council's authority to employ force in such a manner so as to restore and maintain international peace and security and to combat aggression against a particular state.
Article 42
"Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea or land forces of Members of the United Nations."

For a sanction to come into force, it requires the concurrence of the Permanent Members.

Secrecy of Security Council Meetings, Iraq II & Self-Defence

Technically, the debates within the Security Council are a secret owing to the considerable influence which it carries.

During Iraq II, UK Prime Minister Tony Blair and US President George W. Bush encountered a problem regarding a Security Council resolution when they entered Iraq without express permission from the Council on the suspicion that Iraq carried weapons of mass destruction.

This situation proved to be a tenacious one seeing as the Iranian regime had and made use of such weapons in the past and inflicted violence on many. However, the UK and the US couldn't garner the support of the Security Council to invade Iraq with France and the non-Western powers objecting. This situation indicated that there exist cases where even two member states of the European Union can be on different sides of such an argument. The UK and the US argued ultimately that the use of force did not require a resolution from the Security Council or subject to Security Council approval since Iran allegedly didn't honour the first resolution since it allegedly was carrying these weapons of mass destruction.

In this situation, questions concerning the legality of military action against Iraq without a UN Resolution under Chapter VII are discussed. Prime Minister Blair was very anxious to assist the US effort, but would not offer his support without the comfort of a legal opinion in favour of such action, declaring the American position to be correct. This was provided to him by Attorney General Lord Goldstein, despite his initial reluctance to advise the Prime Minister in favour military action without a Security Council Resolution. Ultimately, the Attorney General argued that there was no need for a Security Council resolution.

Despite Article 2(4) of the Charter, the Attorney General told the Prime Minister that there are three possible basis for the legitimacy of the use of force in International Law. The first two are well-established and the third is gaining ground:

1) Self Defence recognised under Article 51
2) Authorisation through the Security Council
3) Exceptional basis - The use of force to avert an overwhelming humanitarian catastrophe, i.e. the use of force on the basis of humanitarian considerations. This has come to the fore in recent years and thus is a relatively new field but has already been manifested.

An example of the third consideration came following Iraq I. When the coalition withdrew, France, the UK and the US took control of the sovereign airspace of Iraq. This was not done under the auspices of the Security Council but it was done as the coalition believed they were entitled to use military aims in order to protect certain minorities in Iraq that were exposed to the crime of genocide.

These three basis for the use of force are quite real and states believe they can use them. Conversely, a state must in its policy consider that it is possible that certain acts will attract the use of force. This is itself is significant and a deterrent.

Lord Goldsmith provided a legal opinion in favour of the action to invade Iraq and this advice was what provided the legal basis for the Blair administration to join Bush Jr in Iraq II. With hindsight, the proof of the existence of weapons of mass destruction in Iraq was never concluded and the evidence provided by the US in favour of invasive action was unfounded.

The situation created by Iraq II raised the question of self-defence in terms of Article 51, however.

Within the provisions allowing the use of force, there exists the Doctrine of Self-Defence. The right to self-defence is a long standing institution recognised both by Criminal Law and under the Charter of the UN through Article 51. The issue of self-defence under the Charter is that, at the time of drafting and perhaps reasonably so, the manner in which the Article on self-defence was framed argued that an armed attack against a state needs to have occurred in order for the state to make use of force justifiably in the name of self-defence. This was added to ensure that the justification of self-defence could not be used frivolously or as an unfounded excuse to attack another state.

Article 51
"*Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.*"

Therefore, the Charter doesn't subscribe to the Doctrine of Preemptive Self-Defence. This argument is made use of by states when they claim that the evidence is so overwhelming that waiting for an armed attack to occur is unreasonable. This was the argument made use of by Israel

during the six-day war when it attacked its Arab neighbours when troops were gathered around its borders following harsh rhetoric against Israel and declarations of a take over from their neighbours.

This argument of preemptive self-defence was made use of in Iraq II with the US being in line with this doctrine. They argued that waiting for an armed attack to occur in the face of potential weapons of mass destruction rendered the institution of self-defence useless. Thus, despite being against the old tradition of being unable to exercise self-defence unless reacting to an armed attack, the US invaded Iraq. The Secretary General of the UN declared that Iraq II was against the Charter but also admitted that in the face of potential weapons of mass destruction, the limitations of Article 51 were unreasonable.

Title?

An interesting manifestation of this entire issue of legality was the advisory opinion given by the International Court of Justice in 1996 on the legality of the use of nuclear weapons and threats, even though ultimately, this was left unsettled. This had been a burning issue for a period of time and was brought to the table by the WHO. Under the UN Charter, the right to seek an advisory opinion from the ICJ is granted to a limited number of entities. The General Assembly has the power to ask for any opinion it wishes while Specialised Agencies can ask for opinions within their mandate.
The ICJ was reluctant and ultimately did not wish to give an opinion concerning the questions of the WHO as they deemed that the agency's mandate did not cover this request. This subsequently led to the General Assembly asking for an advisory opinion regarding Nuclear Power use and threats.

In a cleverly balanced opinion in order to satisfy those who have and those who have not previously made use of such weapons, the court decided unanimously that there was no rule of international law that granted specific authorisation on the threat or use of such weapons. By eleven votes to three, (11-3), the court argued that there was no rule of international law dealing with the comprehensive and universal prohibition of such weapons.

The crux of the matter resulted in the court to be unanimous on two counts and on the final count, no resolution could be agreed upon:

1. The court was unanimous in their decision that the threat or use of nuclear weapons contradicts Article 2 (4) of the Charter and this action fails to meet the requirements necessary in order for it to be justified under Article 51 (self defence).
2. The court was unanimous in their decision that the threat or use of nuclear weapons should be subject to or compatible with the laws of armed conflict, particularly with the rules and principles of humanitarian law.
3. The court felt by seven votes to seven, (7-7), that the use of threat of nuclear weapons would be in violation of humanitarian law and essentially the court pointed out that one of the reasons was that it failed to discriminate between military and non-military persons as well as it failing to protect against irreversible environmental harm etc.
   The court decided that under the current state of international law and the facts at its disposal, the court cannot conclude definitely whether the threat or use of nuclear weapons would be lawful or unlawful "in an extreme circumstance of self-defence." While it was argued that 51 did not apply as it failed to meet all the requirements, judges referred to extreme circumstances of self-defence.

Therefore, in relation to the third count, the court decided that under the current state of international law and the facts at its disposal, the court cannot conclude definitely whether the threat or use of nuclear weapons would be lawful or unlawful "in an extreme circumstance of self defence". While it was argued that Article 51 did not apply as it failed to meet all the requirements stipulated at law, judges referred to extreme circumstances of self defence which is described as "a situation in which the very survival of the state would be at stake". Judges couldn't agree whether a nuclear state, would be entitled to use or threaten to use nuclear weapons if the very survival of that state is at risk. It left the matter open which meant that both sides of the nuclear argument found the door open to argue one way or another.

What the court couldn't decide upon is a very important issue which is one that state policy is informed by: when the very vital interests of the state is concerned, the legality of the issue is not decided upon. This is a very interesting pressure point which may influence state behaviour.

SELF-HELP

The Torrey Canyon Oil Spill was one of the first major oil tank incidents dating back to 1967 when the Torrey Canyon ran aground off the western coast of Cornwall causing an environmental disaster. In an effort to reduce the size of the oil spill and to prevent irreversible damage to the coast, the British government decided to set the wreck on fire by means of air strikes making use of 161 bombs, 16 rockers and 1,500 long tonnes of napalm and 44,500 litres of kerosene. The ship itself was registered in Liberia which had exclusive jurisdiction despite at the time being a flag of convenience. Before initiating such measures against the ship, Britain attempted to seek the approval of Liberia, however, the didn't receive a reply. The British government claimed *inter alia* that in the absence of the response of the flagship state and owing to the imminent threat of ecological damage to the coastline, they went ahead with the bombing under claims of 'self-help'. The legal opinion argued that the British had no right under self defence but that the state enjoyed a right under Doctrine of Self-Help.

An inquiry into the incident in Liberia, found that the Shipmaster Pastrengo Rugiati was to blame for the incident seeing as he took a shortcut to save time that resulted in the wreck.

Retorsion & Reprisals

Under the 'Use of Force' as a pressure point, it is also relevant to discuss the 'Retorsion' and 'Reprisals'.

RETORSION

Retorsion is a term used in International Law and refers to an act perpetrated by one nation upon another in retaliation for a similar act perpetrated by the other nation. It is an unfriendly but lawful measure takin in response to to another States' unfriendly or unlawful act. It covers those reactions which do not interfere with the target State's rights under International Law. Examples of retorsion stand to include the suspension of foreign aid to a country or the severing diplomatic ties to a nation. Such actions are within the limits of the law despite the harm they can cause.

REPRISALS

Reprisal refers to a breach of international humanitarian law which would otherwise be unlawful but in exceptional cases is considered to be lawful as an enforcement measure in response to a previous breach of international humanitarian law by the enemy with the purpose of terminating

the enemy's violation. These often times involve the use of force. They can occur when a state uses its territory to harbour terrorists and reprisals against the target state are undertaken.
Reprisals are measures of pressure that derogate from the normal rules of international law. They are carried out by a State in response to unlawful acts committed against it by another State and are intended to force that State to respect the law. Reprisals may also be carried out in response to an attack.

Non-force sanctions and measures

The non-force sanctions and measures vary from the prohibitions of trade, the prohibition of diplomatic relations, the prohibition of transport links etc. However, the issue with such measures is that they often end up hurting those the UN is trying to protect more than hurting the oppressors. This is because economic sanctions against a regime produce a host of other complications for those who are seeking and who require protections. Another problem which could arise is that sanctions of this nature could not be enforced in particular countries as they are not legally binding. This occurred in Malta in the 1980s. While Malta was a member of the United Nations and thereby was forced to abide by the sanctions put into place by the Security Council, the courts could not enforce the sanctions since they were technically not a part of Maltese Law. Therefore, whilst these economic sanctions existed, Maltese businessmen realised that it was not illegal to ignore them and continued to trade, breaking the conditions of the sanctions. Despite Malta's international obligation to follow the sanctions, the absence of domestic legislation putting such sanctions into effect legally in Malta posed many issues.
To overcome such issues, relevant law was adopted to enable the Prime Minister to enact legislation to adopt United Nations sanctions into Maltese Law.

States are obliged to follow international sanctions and must ensure that their local systems are set up in such a way that these sanctions can be enforced, otherwise liability and responsibility issues will be encountered.

The role of Courts

INTERNATIONAL COURTS

As mentioned previously, International courts do not have international compulsory jurisdiction. This is because the system deals with sovereign states. Thus, cases brought before the International Court of Justice in the Hague and the International Tribunal for the High Seas in Hamburg only have the to decided cases in disputes submitted directly to them. The International Court of Justice (ICJ) is the principle judicial organ of the United Nations and is an authoritative body made up of 15 judges that decide disputes between states in accordance with International Law. If in any given case, there is no judge of the nationality of one of the parties to a case, then that party is granted the power to appoint an *ad hoc* judge. For example, in the case **Switzerland v. Nigeria**, both parties appointed an *ad hoc* judge.

In the case of **Somalia v. Kenya**, Somalia opened the case against Kenya in 2014 over a contested area of around 100,000 square kilometres of the Indian Ocean seafloor thought to be rich in natural oil and gas reserves which both countries lay claim to. During the case, the latter party decided, once the case had started, that the court did not have jurisdiction and subsequently refused to appear. The court disagreed claiming that they had jurisdiction over this case and offered a judgment ruling largely in favour of Somalia in its long-running dispute with Kenya over their maritime border. Regardless of the fact that a party in this case did not appear, the court and tribunal must anyway adjudicate based on the interests of the party that did not appear. This case

shows that once the court decides it has jurisdiction, even if a state pulls out and refuses to be present at the proceedings, the court will carry on hearing the case.

In the case of **US v. Iran,** the Embassy of the US in Iran was invaded and taken over by 'students' in a show of support for the Iranian rebellion. This led to the kidnapping of several US diplomats within their own Embassy. The Americans tried to make use of unilateral force with the Carter administration sending in military forces that ultimately, however, failed to liberate the hostages. Following this, the matter was taken to the ICJ where it was questioned whether the use of force was justified and whether it was the responsibility of Iran to protect the diplomats. Contrary to the beliefs of Iran, the court noted that it did have jurisdiction and decided in favour of the US. This case is important as it is an indication that even one of the most powerful states on the globe resorted to a judicial statement from the ICJ to provide further authority and legitimacy to national decisions. This also impacts the reception of judgments of the ICJ and indicates their value as in such a situation the US may not have believed that the Iranian government of the day would follow the judgment yet, it still went through the proper channels in order to demonstrate the legitimacy of national aims.

Despite the fact that there is no compulsory jurisdiction, the overwhelming majority of judgements are respected by the concerned states. Under the Charter, if a state fails to implement a judgment, this judgment can be referred to the Security Council which is empowered to take further action. In the case of **Nicaragua v. US**, the US was taken to court by Nicaragua who claimed that illegalities had been committed against their state. The US refused the court's jurisdiction, yet the court held that it did have jurisdiction and subsequently decided against the US. The US did not implement the judgment and Nicaragua referred the case to the Security Council. Even though in this process the US exercised its right to a veto frustrating the Nicaraguan delegation, Nicaragua still found merit in pursuing its claim as such a course of action certainly embarrassed the US. The value of this action has a meaning in relation to states and their behaviour with other states.

MUNICIPAL COURTS

Today, as much as 90% of our legislation is structured in accordance with international rules. Maltese legislation is highly influences by international law and such an influence may be direct or indirect.

An important law to identify in this regard is the 'Ratification of Treaties Act', Chapter 304 of the Laws of Malta. This short law is highly significant as it consolidates the practise of Malta when it comes to ratifying treaties. Prior to this 1983 Act, the government was entitled to sign any agreement it desired, but this practise has not come to an end. Under Chapter 304, treaties that deal with the status of Malta in International Law and deal with the security, sovereignty, independence, territorial integrity or relationship of Malta with any multilateral organisation cannot be directly ratified by the government.

In Article 3 (3) it is made clear that no provision of a treaty shall be enforceable as a part of the law of Malta unless promulgated through the correct legislative mechanisms - i.e. unless by under an Act of Parliament. This provides the fulcrum of where the Maltese legal system and International Law circulate as under it, no treaty shall become enforceable as part of the Laws of Malta except by an order of Parliament.

Article 3

"*(1) Where a treaty to which Malta becomes party after the coming into force of this Act is one which affects or concerns -*

(a) the status of Malta under international law or the maintenance or support of such status, or

(b) the security of Malta, its sovereignty, independence, unity or territorial integrity, or

(c) the relationship of Malta with any multinational organization, agency, association or similar body, such treaty shall not enter into force with respect to Malta unless it has been ratified or its ratification has been authorised or approved in accordance with the provisions of this Act.

(2) A treaty to which subarticle (1) applies shall be ratified or shall have its ratification authorised or approved as follows:

(a) where such treaty concerns a matter referred to in subarticle (1) (a) or (b) or contains any provision which is to become, or to be enforceable as, part of the law of Malta, by Act of Parliament;

(b) in any other case, by Resolution of the House of Representatives.

(3) No provision of a treaty shall become, or be enforceable as, part of the law of Malta except by or under an Act of Parliament.

(4) The instrument of ratification shall be issued under the signature of the Minister responsible for foreign affairs.

(5) Any act of a foreign State relating to any of the matters mentioned in subarticle (1) (a)or(b) shall be laid on the Table of the House as soon as practicable by the Minister responsible for foreign affairs together with a motion giving an opportunity to the House to express itself on such act."

The ramifications of this short provision is that if Malta enters into an international obligation, the courts of Malta will only enforce that obligation if it is promulgated as part of Maltese law. In the absence of that the courts will not enforce that obligation and Malta will be liable internationally for failing to implant the obligation.

When Malta adheres to a treaty, it engages in International obligations and responsibilities. Therefore, once a nation engages into a treaty obligation, it is not a valid excuse on the international stage to argue that a nation has not observed the treaty because it is contrary to Maltese law or because there is no provision within Maltese law to implement the obligations. It is the duty of the nation to ensure that the legal system enables them to fulfil their treaty obligations - i.e. it is up to each state to follow international law. Therefore, every treaty obligation which Malta enters into must have its incorporation into Maltese law under Article 3 (3) of Chapter 304 if the courts are to enforce the rule. An example of this can be seen through the adoption of the principles of the European Convention through the European Convention Act of 1987 which was

This situation and system is a major problem for international organisations that rely on countries' incorporating the contents of treaties into domestic legislation for them to be locally enforced.

Increasingly, the domestic courts have become an important instrument in the implementation of international law which can be done directly or indirectly. Currently, owing to the system adopted in Malta International law and international rule are enforceable under Maltese law - this is also the position found in many other states. It is however not an automatic process. It differs from the system made use of in other states in which they automatically become a part of domestic law and are directly enforceable, such as in Cyprus. This is the difference between Monism and Dualism.

When regarding that which is enforceable in Maltese courts, we note that we are bound by domestic law which is the law made through the power of the Maltese Constitution. Other laws of other independent states cannot be enforced in Maltese territory.

When it comes to International Law, Malta subscribes to a dualistic system. In contrast, those countries that subscribe to the view that international norms are 'received' within the national legal order while preserving their nature of being International Law upon their ratification and publication, are countries that follow a monistic system. Dualism refer to the attitude adopted by those countries which believe that international treaties cannot as such display legal effects in a municipal sphere. For an international treaty to be enforceable in a Maltese court, it must receive a majority vote in Parliament, thus making them a part of Maltese Law through a special form of Acts of Parliament.

Malta is of the position that International Law is akin to a contract involving two or more independent states which must be voted and agreed upon in Parliament and made a part of Maltese law in order that it is enforceable. In a Monist country, as soon as Malta would have ratified the European Convention in 1966, for example, it would be enforceable in Maltese courts. However, most countries observe a dualistic legal system which requires three steps in order to make International Law enforceable in Malta:

1. The agreement must be signed;
2. The agreement must be passed through Parliament;
3. The agreement must be enacted into Maltese law.

Reciprocity & Cooperation

Reciprocity and Cooperation are two further pressure points used to keep states within the international community.

RECIPROCITY

The basis of international life and international law is that treaties and agreement must be respected. Many important institutions of international law are based on reciprocity. In International relations and treaties, the principle of reciprocity states that favours, benefits, or penalties that are granted by one state to the citizens or legal entities of another, should be returned in kind. Many important institutions of international law are based on reciprocity, for example, diplomatic immunity. This refers to the immunities and privileges afforded to diplomats and generally operate on a reciprocal basis. In fact, the Maltese legislation gives power to the Foreign Minister to withdraw diplomatic immunity from diplomats hailing from countries that don't reciprocate this protection to Maltese diplomats abroad. This is done to protect the rights and interest of Malta and the Maltese despite the fact that this action is not supported by the Vienna Convention.

COOPERATION

The term 'cooperation' has never as such been defined by an international treaty or resolution of an international organisation. Cooperation is closely linked to reciprocity and this is reflected by the proliferation of international organisations that govern every action of international life. Cooperation is necessary to deal with international problems.

There are many forms of cooperation including regional cooperation, bilateral cooperation and multilateral coordination. The former highlights the fact that the urge for international relations is very strong when dealing with common problems. An example of this is the Barcelona Convention for the Protection of the Mediterranean Sea Against Pollution. Through this convention, "*the Contracting Parties… agree[d] to individually or jointly take all appropriate measures in accordance with the provisions of the Convention and the Protocols in force to which they are party to prevent, abate, combat and to the fullest possible extent eliminate pollution of the Mediterranean Sea Area and to protect and enhance the marine environment in that Area so as to contribute towards its sustainable development. They <u>cooperate</u> in the formulation and adoption of Protocols, prescribing agreed measures, procedures and standards for the implementation of this Convention.*"
Bilateral cooperation is generally regulated through bilateral agreements and is important for the protection of rights.

Today, states have opted to cooperate in a number of areas beyond merely the allocation and regulation of sovereign rights including on matters relating to the High Seas and the sea bed, OuterSpace and Antartica.

The Existence of Mass Media and the Internet
These tools act as a means to keep states within the international community owing to the phenomenon of the mobility of shame. Today it is no longer possible for a state to hide its illegal activity behind the iron curtain as the mass media builds up an image of states living outside the law. This has an international effect on the perspective of the state which builds up till there is a collapse of the regime till the state once again lives within the bubble of the international community of states.

This is influenced and has greatly been increased by the major developments of the mass media and the internet. The mass media has today become a central feature regulating and influencing state behaviour. The influence of public opinion has the power to in turn influence decision-makers which ultimately controls how a state behaves. This is because today the world is open and globalised and new is streamed as it comes in.

It is interesting to note how potent the influence of the media is and how in turn, they shoulder little responsibility for their actions and for the damage and havoc fake news causes. For example, the fake news report that former Soviet President Mikhail Gorbachev had a heart attack and passed away during the Cold War cost billions of dollars on the stock market. Therefore, the internet has a massive impact on global plat. The internet has made news available and through certain sources, has the power to potentially affect the stability of governments.

19.10.2021 - Sources of International Law and the ICJ
In the past lectures, the nature and enforcement of International Law was discussed. The basis of the consideration of these aspect of the study of International Law is the constant bearing in mind that we are dealing with a system of law that:

1) Is primarily concerned with regulating the behaviour of sovereign, independent states that have the power of self-determination under International Law;
2) Deals with sovereign states pursing their national interest in international fora.

The power and role of International Law is to accommodate the often conflicting interest of states. This is made difficult because there is no supranational structure as found in domestic law as we

deal with sovereign states. This sovereignty of states is a fundamental premise upon which the system is based and despite it often being considered a weakness of the law, it is a a reflection of the constitutional elements that constitute the intrinsic players of international law. In order to keep states within the international community is a series of 'pressure points' are employed, as have been previously analysed.

A very important branch of International Law refers to the sources of international law. When discussing such sources, the methodology employed will mirror that adopted by the International Court of Justice when the institution comes to identify applicable international rules. All judgments have followed this methodology since the **Corfu Channel Case** which began to be heard in 1946. This was the first public international law case heard before the ICJ concerning state responsibility for damages at sea, as well as the Doctrine of Innocent Passage.

It is important to note that the court cannot apply the principles of fairness, unless authorised by the relevant parties. The court is only vested with the authority to apply the law.

The ICJ is based at the Hague in the Netherlands and is a permanent court. This means that the judges permanently reside in the Hague. Under the Charter, the court has two functions:

1. To settle disputes between states which are submitted to it, owing to the fact that the ICJ doesn't have compulsory jurisdiction;
2. To provide advisory opinions on matters relating to International Law.

Lack of Compulsory Jurisdiction and the Application process of the Court

As outlined in the first function, the court doesn't have compulsory jurisdiction and therefore, states cannot be forced to submit their disputes to the courts on a compulsory basis. At one point, the state must have agreed, either indirectly or through bilateral agreements between the parties to refer the dispute to the court. States may indirectly agree to refer disputes to the court through multilateral agreements where, within the provisions, it would be stipulated that disputes on relevant matters will be handled by the ICJ. In the case of **Libya v. Malta** on the Continental Shelf between the two states whereby in 1982, by virtue of a Special Agreement between the two states, they submitted to the ICJ a dispute relating to the delimitation of the areas of continental shelf appertaining to each of these two states. The court defined a number of equitable principles in light of relevant circumstances and applied them in its judgment which was delivered on the 3rd of June 1985. The court took account of the main features of the coasts, the difference in their lengths and the distance between them taking case to avoid any excessive disproportion between the continental shelf appertaining to a State and the length of its coastline, and adopted the solution of a median line transposed northwards over a certain distance.

By virtue of the agreement, the dispute will be submitted and it will explain to the court that which the parties require from it. Moreover, the parties will tell the court that which it needs to know to arrive to a decision. Sometimes, the agreement is not clear enough as to what it requires. In the aforementioned **Libya v. Malta** case, there was a dispute between the two countries as to what the court was being asked to produce through their judgment. One party was arguing that the role of the court in this case was to apply the applicable principles of law and come to a decision on the case and the other argued that the court was required not only to apply the relevant principles of the law but to produce a map which practically reflected the principles decided upon by the court. In the 1985 judgment, the court favoured Malta's point of view and produced a judgment which

reflected the decision it took and significantly, both Malta and Libya accepted the boundary which established a partial Continental Shelf Boundary at the south of Malta.

It is important that the dispute is submitted to the court in one of the official languages owing to the many issues created by translations. An issue of such a nature arose in the case of **Libya v. Tunisia** with the two states having agreed to refer their dispute on the Continental Shelf to the court. The agreement they entered into and submitted was in Arabic and the court refused to accept this as it wasn't in one of the official languages. The problem here was that even before the dispute had been considered, further disputes arose on translation of the agreement which extended beyond grammar and syntax differences. Each party, through this process of translation attempted to give the impression that the agreement supports further its position.

When agreements are submitted to the court, there is an agent from each country, in Malta's case the Attorney General, generally it is the Ambassador of that country in the Hague, who is the link between the state and the court through the Registrar which plays an important role. In this regard, it is important to bear in mind that while the ICJ and it other tribunals are referred to as such, they differ from regular courts in the way they are traditionally understood. This is because the clients within this court are sovereign states and therefore, the procedure of the court is established in such a manner that it respects the fact that the agent and lawyer represent a sovereign state.

When the State decided to refer the resolution of a dispute to a third party, it is delegating its national interest to be subject to the decision of a third party and thus, it is a sensitive process. It is essential, therefore, that they understand the possible outcomes of the case. Generally, states engage teams of expert International lawyers.

It must be born in mind that the decisions of the court are final and that there is no appeal system as contemplated by Article 60 of the Statute of the ICJ. Therefore, once states submit their disputes to the ICJ and the ICJ determines that they have jurisdiction, then there is no retuning from that decision and the state is bound by the decision made by the court.

Article 60:
"*The judgment is final and without appeal. In the event of dispute as to the meaning or scope of the judgment, the Court shall construe it upon the request of any party.*"

In the case of **Somalia v. Kenya**, at a stage in the proceedings, the state of Kenya refused to accept the jurisdiction of the court and did not wish to further participate in the proceedings. Following the conclusion of the trial, the court's judgment is one observers feel favours Somalia. Owing to this, Kenya issues a stern letter, a declaration of protest. Since there is no appeal system of the ICJ, many states employ extensive measures to convince the court of their position. It is important to note that the court doesn't automatically favour the opposing party should one party not be present for the hearings, even though this will negatively prejudice the absent party's case.

There does exist the <u>right of revision</u> in relation to the ICJ which is an extraordinary right contemplated through Article 61 of the Statute of the ICJ and is the only exception to the finality of the court's judgments. Here, the burden is on the state which requires the revision.

Article 61:

"*(1) An application for revision of a judgement may be made only when it is based upon the discovery of some fact of such a nature as to be a decisive factor, which fact was, when the judgment was given, unknown to the Court and also to the party claiming revision, always provided that such ignorance was not due to negligence.*
(2) The proceedings for revision shall be opened by a judgment of the Court expressly recording the existence of the new fact, recognising that it has such a character as to lay the case open to revision and declaring the application admissible on this ground."
(3) The Court may require previous compliance with the terms of the judgment before it admits proceedings in revision.
(4) The application for revision must be made at latest within six months of the discovery of the new fact.
(5) No application for revision may be made after the lapse of ten years from the date of the judgment."

The right of intervention is another important right, as the Maltese found out in 1985 through the case of **Libya v. Malta** and also through the case of **Libya v. Tunisia**. This is contained within Article 62 of the Statute of the ICJ.

Article 62:
"*(1) Should a state consider that it has an interest of a legal nature which may be affected by the decision in the case, it may submit a request to the Court to be permitted to intervene.*
(2) It shall be for the Court to decide upon this request.

In principle, the court can only decide disputes between the parties to the agreement submitted to them. This right refer to the right of another state to intervene within the dispute if it involves their rights. In the **Libya v. Tunisia** case, Malta requested permission intervene within the case, claiming an interest of a legal nature under Article 62. When regarding the character and nature of the intervention for which the permission was being sought, the Court considered that the interest of a legal nature which Malta had invoked could not be affected by the decision in the case and that the request was not one to which, under Article 62, the Court might accede. Therefore, the count turned down the request for permission, yet promised to keep Malta in mind when deciding this matter.

In the case of **Malta v. Libya**, Italy had requested to intervene during the course of proceedings stating that it had a legal interest under Article 62. The court found that this intervention was one which could not be accepted owing to its object. The application was refused despite the claim being strategically presented. Nonetheless, the court agreed that all judgments would consider the presentation made by the Italian delegation.

A final point to mention is the following: aside from the judgments of the courts being binding, the judgment of the ICJ also must be respected. In fact, should the judgments not be accepted, another state can raise the matter at the Security Council. Here, the implication is that the Security Council may take measure in roder to get the judgment implemented. Since 1946, the vast majority of judgments have been respected. An example of this is in the case of **Libya v. Chad** where, in accordance with the judgment delivered by the ICJ, Libya forfeited a large part of its claim territory. The court judgment, even if it is not enforced, is a highly authoritative instrument in the hands of a state pursing its national interests. The eminence of the court gives great authority to one's national position should the judgment be in favour of such a position.

Therefore, the framework in which the court operates is as follows: once an agreement is drawn up between the contracting parties, it is deposited with the Registrar of the court. This then triggers off a set of procedure which lead eventually to the judgment. The length of time this takes varies and is usually dependent more on the parties than on the court itself. Generally speaking, there are two sets of proceedings:

A) Written Proceedings
B) Oral Proceedings

Written Proceedings take the form of books which are called memorials where each state puts forward and outlines its position. Following there is the counter memorial state and the reply stage till eventually, the court decides that the written proceedings of the case are to be terminated and the parties are invited to an Oral Proceeding. These hearing provide the opportunity for each party to present arguments to the International Court.

These pleadings are very important and great effort and expense is devoted to hiring the very best legal team. The International Court of Justice is usually fronted by the top international lawyers and in most cases these will not be practitioners or professionals from the state itself, even though in certain cases, the state itself has the expertise in relation to certain topics. In general, the most prestigious groups of International lawyers and experts are assembled from around the world seeing as most states, even developed nations, do not have the capacity and resources to plead in front of the ICJ making use of solely local professionals. Many-a-time, there is the need to rely on foreign legal expertise in order to consolidate a state's case.

Once the court has concluded the oral proceedings, deliberations are made *in camera*. Here, a drafting committee is assembled which presents the draft. It is significant to note that at the ICJ, judges are allowed to register and explain individual opinions and even go against the judgment or the logic employed in the judgment. This process provides for a window into the confidential deliberations of the court.

Lousia Case: https://www.itlos.org/en/main/cases/list-of-cases/case-no-18/

Article 38 of the Statute

Of fundamental importance in determining what is applicable as an international rule in any given case, is Article 38 of the Statute. Amongst the provisions within this article, Article 38 (1) is perhaps the most fundamental.

Article 38:

"*(1) The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:*

a) *International conventions, whether general or particular, establishing rules expressly recognised by the contesting states;*
b) *International custom, as evidence of a general practise accepted as law;*
c) *The general principles of law recognised by civilised nations;*
d) *Subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations as a subsidiary means for the determination of rules of law.*

(2) This provision shall not prejudice the power of the Court to decide a case ex aequo et bono, if the parties agree thereto."

Every judgment of the court follows the rules stipulated in Article 38 (1) as it provides for 'instructions' as to how the organ is to go about settling disputes. This article begins by making it clear that the ICJ must decide cases between states submitted to it in accordance with International Law and goes on to explicitly identify three important factors. Firstly, the function of the court is to settle disputes between states. Secondly, it identifies the fact that in settling disputes between states, such disputes must have been submitted to the court owing to the fact that the court doesn't have compulsory jurisdiction. Finally, we note that the court must decide disputes on the basis of International Law.
In doing so, the statute refers to primarily three sources of law which the court must apply:

- Article 38 (1)(a) speaks about the application of Treaty rules
- Article 38 (1)(b) speaks about the application of Customary International Law/Unwritten Law
- Article 38 (1)(c) speaks about the application of General Principles of International Law.

These are the three sources of law which will be henceforth considered in detail as these are the principle sources which must be applied when the court is asked to provide a decision on a position in the context of International Law. It is interesting to note that while these sources were meant to be a hierarchy, it is more relevant to regard the interdependency of the sources. For example, if a treaty is silent on a certain matter, customary law under Article 38 (1)(b) begins to be regarded.

Article 38 (1)(a)

Article 38 (1)(a)
"*The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:*

a) *International conventions, whether general or particular, establishing rules expressly recognised by the contesting states;"*

Here, we begin a discussion on the Law of Treaties which can be reviewed as a part of the sources of International Law. It is important to understand the Law of Treaties in order to fully comprehend Article 38 (1)(a). Of particular importance in this regard is the 1969 Vienna Convention on the Law of Treaties.

A treaty establishes rules which are specifically agreed to by the various consenting parties. According to Article 1(a) of the Vienna Convention:
"*"treaty" means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation;*"

The agreement is reflected in the consent through signature ratification, accession and adoption that the states give. There currently exist some 35,000 treaties which cover every aspect of international life. Most of these treaties are bilateral or regional and deal with anything from political asylum to cultural exchanges and heritage. They are the work-force and backbone of International Law, despite the fact that the large body of International Law is made up of unwritten rules.

The Vienna Convention on the Law of Treaties (1969)

The Vienna Convention on the Law of Treaties (1969) which entered into force in 1980 is the primary source of the Law of Treaties. The provisions of this treaty are so widely accepted that they represent the foundation of International law practises. For a treaty to be one regulated by the Vienna Convention, it must satisfy three criteria:

1. It must be a treaty between states;
2. It must be a written treaty;
3. It must be a treaty governed by International Law.

Under this Convention, if a treaty satisfies the aforementioned qualifications and characteristics, whatever the designation of the treaty, the rules of the Vienna Convention apply.

IT MUST BE A TREATY BETWEEN STATES

With regards to the first criterion, it is important to note that treaties between International Organisations and states do also exist. An example of this is the treaty which established the UN in New York where its rights were guaranteed by the Host State Agreement, an agreement between the USA and the UN. This treaty guaranteed the privileges and immunities of the organisation and ensured, amongst many other things, access to the UN. However, such treaties are regulated not by the Vienna Convention but by other instruments. What interests us and concern

It is possible to have treaties between an international organisation and a state. An example of this is the setting up of the UN in New York where its establishment and its rights were guaranteed by the 'Host State Agreement' - an agreement between the USA and the UN. It guaranteed the privileges and immunities of the organisation, for example access to the UN which is guaranteed. For the interests of the Vienna Convention however, the only agreements which are of interest are agreements between states and organisations as the former treaties are regulated by another treaty.

IT MUST BE A WRITTEN TREATY

The next characteristic is that the treaty must be in writing. This is because International Law also recognises the importance of verbal agreements which in certain cases are considered to be binding. When an undertaking is made by a qualified person or authority, then it may create obligations for that state. In a case known as the '**Legal Status of Eastern Greenland**' decided by the Permanent Court of International Justice in a case **Denmark v. Norway**, it was found that a verbal agreement made by the Foreign Minister of Norway was binding on his state.
A more recent example and quite significant, is the verbal undertaking of France in the **Nuclear Test Case** - **Australia v. France** and **New Zealand v. France** in 1973. These two states took exception to the testing of nuclear devices in their South Pacific Region by France. As the case was about to be heard by the court, the President of France made various statements about the French halting of nuclear device testing. This public statement was taken by the court to mean that there had been an obligation created by France not to conduct Nuclear device testing and the court decided that this declaration coming from the President was so binding that the court decided that there was no further dispute and perhaps, to the irritation of Australia and New Zealand, noted that it didn't have to decide on the issue. However, such agreements are not governed by the Vienna Convention but only written agreements are subject to regulation by this Convention.

Something else to note is that such verbal agreements must be undertaken by someone with the qualifications, authority and capacity to do so. For a person to be authorised to bind their state in

agreements, there exists a list known as the Full Powers list which is issued by the Protocol Office of the Foreign Ministry. This is a document which lists those person who are authorised by the state to negotiated and conclude agreements. The necessary documentation doesn't need to be issues for treaties signed by the Head of State, the Head of Government, the Minister of Foreign Affairs or the Head of the Diplomatic Mission in the country. For these individuals, normally full authority is given to them in accordance with the Full Power Exception. A state will be bound by a treaty or a verbal agreement unless it becomes evident that the person who provided the assent on behalf of the state was acting beyond their authority.
In these cases, the treaty is without legal effect unless it is subsequently confirmed by the state in accordance with Article 8 of the Vienna Convention.

Article 8:
"*An act relating to the conclusion of a treaty performed by a person who cannot be considered under article 7 as authorised to represent a State for that purpose is without legal effect unless afterwards confirmed by that State*."

However, it is not clear from the Convention whether such confirmation must be expressly made or if it can be implied from subsequent practise, i.e. whether a state has to formally inform the other parties of the confirmation irrespective or the lack of authority or whether the confirmation to be bound by the treaty can be demonstrated in practise through the implementation of the obligations of the treaty. In the situation of lack of authority, expressly stating a state's position is ideal.

MUST BE A TREATY GOVERNED BY INTERNATIONAL LAW
The third characteristic is one that may be taken for granted, however, it is surprising to consider that there are certain agreements between states which do not necessarily apply International Law. It is important to bear in mind that sometimes it is implied that International Law applies. One arbitration tribunal decided that one has applied International Law to the contract/agreement when it is understood by both parties.

The Incorporation of International Treaties into Maltese Law

It is important, that International Treaties are incorporated into Maltese Law in order that they become enforceable, as previously discussed. Sometimes, such an incorporation is done in the treaties entirety, whereas other times, substantive parts are applied. For example, with reference to the 1987 European Convention Act, the government incorporated into Maltese law a number of substantive principles into Maltese Law. However, through the 1993 Arbitration Act, the government incorporated two international treaties verbatim as part of Maltese Law.

Once an international treaty is adopted into Maltese law, it is important to understand that the proper interpretations of the law will emerge through the use of the Vienna Convention and it is not the role of local judges to provide their individual interpretations. Occasionally, this is not understood by the judicial systems of individual nation states and judges will produce interpretations of treaties which differ from that which is agreed upon globally. A judge must consult with the Vienna Convention as well as with International jurisprudence in order to be knowledgeable about how to interpret treaties and must not apply domestic law.

A problem which can arise with the process of enacting international treaties into Maltese law is the problem of translation. Once the legislative process of a state begins to translate well

negotiated text, issues begin to arise in relation to the interpretation of the text in a foreign language. Despite such a problem, the domestication into National Law is an essential process which must be undertaken in order for an international treaty to be applied in a domestic court in dualistic countries.

Formulation of a Treaty

During the drafting process, treaties tend to follow a pattern.
Most treaties have a title which serves as an indication of the nature of the treaty. Each title has its own fine tuned meaning. Sometime, the states party to the treaty are mentioned.
This is followed by a preamble which contains within it the reasons and meaning for the treaty in generally, very free flowing terms.
This is followed by the main body of the treaty which includes the rights and obligations which the parties undertake.
The final part of the treaty refers to the procedures which speak about how to bring the treaty into force, how many states must adhere to it, how it is terminated and revised, what the official language is and other such particulars.

Treaties tend to deal with the general obligations that will be focused upon. Specific obligations, goals and targets over a period of time are generally discussed in Protocols which act as appendixes to the main treaty. These protocols are subsidiary agreements, however they may still be regulated by the Vienna Convention if they satisfy the requirements.

TYPES OF TREATIES

Generally speaking, bilateral treaties are referred to as ‘agreements’ while multilateral treaties are referred to as ‘conventions’. For example, when Malta and Italy signed the neutrality agreement which came into force in 1981, the Maltese made a declaration of neutrality which was recognised by the Italian delegation. Subsequently, the Italians, in a protocol acting as an appendix to the main treaty, outlined the financial, economic and technical assistance which Malta would receive from Italy and the financial contributions the latter state would undertake in this regard.

The most common treaties are bilateral agreements. They are similar to contracts in private law and are generally implemented upon signature following negotiations between the two parties. They are usually for a fixed term and provide for the rules regulating the behaviour between the two states in relation to conduct in a particular field.

Multilateral treaties generally come in two forms: Restricted Multilateral Treaties and General Multilateral Treaties.

The former refer to treaties between a number of states which usually involve a specific project or interest, for example the construction of a gap pipeline which crosses a number of territories. Such an agreement is therefore restricted to a number of states.
A state is eligible to join if they satisfy the requirements outlined in the treaty, for example, being a Member of the Council of Europe in order to join the European Convention on Human Rights. Usually, in these treaties, the consent of all parties is required in order to amend the treaty.

General Multilateral Treaties, by their designation, are open to all states. They may be universal or open to all states in a particular region. In contrast with the former subclassifications, usually amendments do not need the unanimous support of all the parties. Another important feature is

that one will require, generally, a fixed number of agreeing parties and not a unanimous number of states for the treaty to come into force.

SUBJECT MATTERS OF TREATIES

With reference to the subject matter of treaties, in principle, it is understood that states may choose any subject matter they wish. However, there are two obligations which limit such a choice, i.e. states are subject to the following fundamental limitations:

Firstly, the treaty may not have rules which contradict with *jus cogens*. This means that no treaty may have a subject matter that contradicts or conflicts with a peremptory or super norm of International Law. A peremptory norm is one from which no derogation is possible and which is recognised as such by the international community of states as a whole. These norms can only be modified if there is another *jus cogens* which develops.

If a state were to enter into an agreement violating *jus cogens,* the treaty would be void as according to the Vienna Convention, a treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of International Law. The reason for this is in order to ensure that the fundamental norms that are essential for the very well-being of the International Community are respected by all. There is no possibility of options out of such peremptory norms.
The fact that a peremptory norm must be recognised as such by the community of international states as a whole is subject to a lot of debate and doctrinal discussion with many arguing that one or two states disagreeing with what ought to be considered a peremptory norm should not prohibit the development of such a norm. A situation concerning the development of a peremptory norms occurred when the Soviet Bloc attempted to elevate peremptory laws which directly benefitted them and the Soviet doctrine of International Law. Ultimately, owing to Western objection, the Western thought of International Law triumphed. Circumstances of this nature is why peremptory norms are rather more restrictive.

These norms are so powerful that they extend retroactively as can be seen through Article 64 of the Vienna Convention: In the event that a new peremptory norm of International Law emerges, any existing pre-agreed treaty which is in conflict with the new peremptory norm becomes void.

Article 64:
"*Emergence of a new peremptory norm of general international law ('jus cogens'):*
If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates."

An example of *jus cogens* is the agreement not to engage aggressive with another state seeing as aggression is prohibited by the international community at large. The prohibition of torture is considered to be another. For example, no state can be party to a treaty agreeing to commit genocide.

A second restriction to the subject matter of treaties is Article 103 of the UN Charter whereby under this article, states are required to recognised in some aspects the supremacy of the Charter.

Article 103:

"*In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."*

This brief but important provision hails the supremacy of the Charter and outlines the fact that no state may enter into an obligation which conflicts with their obligations under the Charter. This is significant when considering the fact that there exist over 190 states which agree to respect the supremacy of the Charter. The UN Charter, therefore, overrides any other specific agreement between Member States which creates obligations which conflicts their obligations under the Charter. The supremacy of the Charter has to be born in mind by treaty makers particularly in respect to two obligations:

1) The resolutions of the Security Council must be respected and;
2) The decisions of the ICJ must be respected and the remedy that if a party fails to respect the obligation to implement the judgement, there is recourse to the Security Council.

For example, a treaty which would oblige parties to use force against another state would fall foul of the Charter as Article 2(4) prohibits the use of force even though under Article 51 measures of the Security Council are set up which may enable the use of such force.

In some respects, owing to this rule, it may be argued that we are moving towards a global constitution.

LANGUAGE OF A TREATY

States can choose any language they wish though general it is expected that if it is a multilateral treaty, it will be in English. In bilateral agreements, they may use any language but they must have a copy in the official language of the court - English and French.

CONCLUSION OF A TREATY

There are multiple ways through which a treaty can be concluded. A signature may reflect the desire of a state to be bound but this only applies when states agree that the treaty comes into force upon signing. This is generally the standard operating procedure when it comes to bilateral agreements.

When it comes to multilateral treaties, there is a process of ratification and accession which must accompany signing, if this is the manner in which the states agreed the treaty comes into force. Historically, the process of ratification was the manner through which the monarch was given the chance to review the conclusion of the agreement made by their delegates to confirm the content. In many case, today we require such ratification processes, tied up with the democratic processes of the state, in order to bring it into force. Therefore, generally before a state can be bound to that which they agreed in a treaty, it must go through a ratification process that varies from one constitution to another. Typically in the case of such treaties, the will remain open to signatures for a year.

ACCESSION TO A TREATY

A state may still be party to a treaty without signing it. This is referred to as accession to the treaty whereby a state becomes a party by accession. This is has the same effect as ratification but indicates that the state has not signed the treaty. When one ratifies or accedes to a treaty, a state

must present the instrument of the ratification, which is a diplomatic note, to the Registrar of the Secretary General of the UN to inform them that a country wishes to be party to the treaty.

~~The Ratification of Treaties Act, Chapter 304 of the Laws of Malta, which is the codification of the British practise with few Maltese exception, brings about four situations: the first three are found at law and the fourth exists by implication because a treaty which is not in the three sections of the law is open for ratification by the executive and is still part of the law of the state.~~

Through Article 3, this act indicates, as previously outlined, that Malta needs to domesticate international law obligations in order for them to be applicable in court. This process transforms international law obligations into Maltese Law.

26.10.2021
Therefore, as regarded, under Article 38(1)(a), the court is bound to apply any written agreement between states that is regulated by international law to settle disputes, therefore, any international convention regulated by the Vienna Convention.

Reservations to International Treaties - Article 38(1)(a)

Here we learn that what is important for the sacrament of a dispute and the application of Article 38(1)(a) is not only the existence of a treaty but the existence of a rule which is expressly recognised by the parties involved in the dispute. Therefore, the fact that two states are parties to a treaty doesn't necessarily enable the court to apply the treaty. This is owing to the process of reservation which is allowed by certain treaties. The court is unable to apply treaty rules which are not accepted by both states.

Treaties may or may not have clauses which allow for reservations. A reservation is defined in Article 2(1)(d) of the Vienna Convention.

Article 2(1)(d):
"*For the purposes of the present Convention 'reservation' means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State*"

The role of a reservation is to allow a state to become a party to a treaty but to opt out of certain parts of the treaty simultaneously. The logic behind this is that reservations allows a state to become party to a treaty which they would not have become a party to had they not had the opportunity to opt out of certain rules which would hurt national interests. This is an important mechanism based on the idea that the more states that adhere to treaties the better, therefore, if a state wishes to be a party to a treaty but it has objections to a certain rule, the power to make reservations comes in to allow for the state to adhere to the treaty nonetheless.

The power to make reservations means that the state does not agree to apply the rule contained within specific articles. For those who have not opted to reserve on the article, the rule continues to apply. This creates different legal relationships between states and allows for the creation of a list of states regulated by different legal bonds depending on whether or not they decided to make reservations.

In order to better explain this, the following example making use of three states, State A, State B and State C, to be party to Treaty X which allows for reservations will be taken into account.

State A adhere to Treaty X and makes the reservation that it will not apply Article 6.
State B adheres to Treaty X without reservations and accepts the reservation of State A.
State C adheres to Treaty X without reservations and does not accept the reservation of State A and thus, does not want to be a party to the treaty with State A.

Despite the fact that all three states appear as parties to Treaty X, in reality they are regulated by different legal relationships.

Treaty X is enforced between State A which is making the reservation and State B, but the relationship is modified by the reservation and therefore, the legal relationship between A and B is one subject to the reservation. Treaty X is not enforced between A and C seeing as C has refused to be a party to Treaty X with State A due to its reservation and therefore, there is no treaty relationship between A and C.
There is, however, a full treaty relationship between B and C which have no reservations.

Therefore, it can be noted that in such multilateral agreements, you may have a list of state parties, but at law they are regulated by different legal relationships between them.
Therefore, treaties must be regarded as a platform and what needs to be regarded by the ICJ under Article 38(1)(a) are the express rules contained within it and which countries are bound by the same rules. Therefore, the treaty per se isn't looked at but whether in that treaty there is a rule that the parties expressly recognise as applying to the dispute. If there is a dispute on the treaty between State A and State B involving a rule to which State A has made a reservation, then the court cannot apply that treaty rule as the rule is not expressly recognised as being binding on both states - If one state has a reservation to the rule, even if both courts are part of the treaty, the court cannot apply it and will have to move to Article 38 (1)(b).

The power to make reservations depends on the treaty. There are some which allow reservations to any part of the treaty, other which allow for reservations to only certain rules, such as the Geneva Convention which allowed for reservations on all rules except for Articles 1, 2 and 3, and other treaties which do not allow reservations; these are referred to as 'package deals'. The 1982 Convention on the Law of Sea does not allow for reservations to any of the some 300 rules constituting it, however, it has around 160 states in agreement with it. It often occurs, that treaties are silent on whether or not reservations are allowed which creates for an interesting scenario. Many argue that if making reservations is not directly prohibited, technically a state can make a reservation which other parties can object to. However, there also exists the presumption amongst certain states that if the treaty doesn't specifically and explicitly allow for it, a state doesn't have the right to make a reservation.

02.11.2021
Article 38(1)(b)
If a court has determined that Article 38(1)(a) doesn't apply, it moves to the application of Article 38(1)(b) of the Statute.

Article 38(1)(b):
"*The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:*
b) *international custom, as evidence of a general practice accepted as law."*

This provision of the statute requires the court to apply international custom, unwritten in international or national law, as evidence of a general practise which is accepted as law. The major issue relating to this is the identification of these unwritten rules. Despite the fact that we have some 35,000 treaties, the bulk of international law remains unwritten and therefore, in practise, many international lawyers are asked to identify customary international law. This is either because there isn't an applicable treaty rule or else, even when there is an applicable rule, the interpretation of such a rule would anyway require it to be regarded in the context of the position of customary law.

Article 38 (1)(b) establishes two constitutive elements that must be compiled with in order to establish an unwritten rule of international law. This is a very important process as once we establish that the rule exists generally, there is a presumption that it applies *erga omnes*.

THE REQUIREMENT OF A PRACTISE ACCEPTED AT LAW: *OPINIO JURIS SIVE NECESSITATIS*

Opinio juris sive necessitatis refers to the belief that an action was carried out as a legal obligation and not as a result of a cognitive reaction or behaviour habitual to an individual. In the context of international law, this refers to the belief that states have that they are acting in accordance with a legal obligation and with a practise at law. This is the test which is applied to distinguish certain acts which could constitute customary law from others which do not contribute to the formation of law.

This is important to understand owing to the fact that states behave in a multitude of manners motivated by a variety of factors. For example, a state could be acting out of a sense of courtesy. However, acts motivated by such a factor cannot be the basis of law as breaching courtesy doesn't amount to breaching international law. Similarly, states may act out of political or economic expediency and likewise, these acts cannot form the basics of a rule which develops into law. For an action to be considered in this regard it must be of such a nature that states abide by it and adhere to it as they belief they are bound to do so as a matter of legal obligation, i.e. because the state is required to undertake the practise at law.

There is little regard for what the classical doctrine calls this the 'psychological element' as it is almost impossible to detect the psychological element of a state as the thinking of the leaders of a state and that which motivates their decisions is very difficult to gauge. Therefore, it is important not what the state thinks, but what the state declares its position to be - if the state declares that it is acting in accordance with the requirements of international law, then the international community doesn't examine whether this is truly the case. This statement is relied upon and the practise is included as a relevant practise in the determination of customary international law. Owing to this procedure, it is not unheard of that states violate the existing, established law, in attempt to change the law. Attempts of this nature are highly dependent on how general or a practise this action is attracting

The evidence of a state's practise is found through a multitude of sources. These enable the identification of general practises. The most authoritative being that which is contained within the legislation of the state.
A state usually promulgates laws after intensive scrutiny and democratic debate. Therefore, in order to identify the usual practises of a state, an importance source to refer to would be the laws. For example, if one wishes to identify the state practise of Malta in relation to the outer limit of the territorial sea, a reference would need to be made to Chapter 226 of the Laws of Malta, The Territorial Waters and Contiguous Zone Act. This legislation indicates that Malta supports an out limit of 12 nautical miles. Therefore, we turn and refer to these laws in order to gauge state practise. Moreover, within this area, it is important to note that today, some 85% of out laws are inspired by either International Laws or European Union Laws. This is a more recent development following Malta's ascension into the EU and the ever sprawling affects of International Law.

Other sources indicating practise could be the actions of a High Official of the State so long as such an official has the qualifications, authority and capacity to act in such a manner as previously discussed when analysing verbal agreements. This was regarded through the case of **Australia v. France** and **New Zealand v. France** in 1973 when the Statement made by the President of France in reference to Nuclear Testing was taken to be binding in the eyes of the court. These can include motions of the House, for example the 1988 motion of the House whereby it expressed its unwillingness to receive vessels with Nuclear Weapons, as well as statements made by the Foreign Minister in Parliament. In some jurisdictions, this could also stand to include the Parliamentary reports as well as exposed confidential diplomatic correspondence. The treaty practise of a state may also constitute evidence.

Therefore, there is a whole spectrum of sources of evidence of state practise. It is important that whatever practise is regarded, it is one undertaken by a sense of legal obligation.

TEST OF GENERALITY OF PRACTISE

Once the relevant evidence is collected that indicates that a state undertakes a certain practise because they consider themselves to be obliged to do so at law, the test of the generality of practise must be applied. Through this test, what is questioned is the following: '<u>does the evidence constitute a general practise of states?</u>

This is vital as what is being identified is universal rules. Like every written rule in international law, such actions are based in agreement. In treaty law, the agreement is explicit and contractual. In customary international law, the agreement exists but is implied. It is implied through the process of generality of practise. This means that other states expect that such practise will be followed. This test is a significant test meant to identify which the rules states have implicit agreed to be bound to. Most argue that these rules bind states even if the state didn't exist at the time of the formation of the rule.

The element of generality is identified by three tests: The test of uniformity, the test of consistency and the test of specially affected states.

<u>The Test of Uniformity</u>

First, we must apply the test of uniformity to the collective evidence gathered that indicate that the practise of state is one done as the state feels they are obliged at law to perform this practise.

This rule indicates that there must be uniformity through the practise between states. Uniformity must not be absolute, what is required is substantial uniformity which means that in substance, the relevant practise which has been collected demonstrates a uniformity of practise.

When regarding, for example, the practise of the Exclusive Fishing Zone, most states claim 200 nautical miles. However, for a country like Malta, owing to the nature of the Mediterranean, 200 nautical miles is not a possibility nor is it feasible. The Maltese, then, claim 25 nautical miles. This is recognised based on relativity; those claiming 200 nautical miles cannot object to Malta's 25 nautical miles.

While uniformity need not be absolute, consistent uniformity is required in order to ensure that this rule is respected.

<u>The Test of Consistency</u>

This is the second element which is very important as it affects the security and stability of the rule being discussed. It must be established that supporting the collective evidence gathered indicating a practise undertaken by a state is one they perform as they believe they have an obligation at law to do so and is uniform amongst other states, there is a consistent practise supporting the rule. This is because if there is constance change, there is no security of the rule.

Consistency is important because it ensures that this practise support the rule is not changing often and sporadically but is consistent over a period of time. This leads to the question of duration as to what length of duration is necessary in order to establish consistency? It is interesting to note that a rule can be established with relatively no length of time. An example of this occurred when the laws of OuterSpace were being created - while the law of the seas tool over 300 years to develop and be recognised, the laws of peace took merely years to cement themselves. This is often referred to as instant customary law.

In this regard, it depends on what the new rule is attempting to do, whether a rule is attempting to create a new regime *ab inizio* in the absence of another rule or is attempted to upset a rule which has been long established. The background ought to be established in order to assess the consistency and duration parameters. Obviously, the longer the consistent behaviour, the more firm and secure the rule is. However, as mentioned with the laws of space, if a rule is being created to regulate a previously unregulated area of international life, then it is possible to imagine how a rule develops in a short period of time.

If a rule is going to upset an already existing regime, a considerable period of time is needed. Such was the case concerning the Exclusive Economic Zone first proposed by Latin American States in 1947 which endured continuous opposition from the US. This eventually became a part of recognised customary law through the practise of states.

<u>The Test of Specially Affected States</u>

Following the identification of a uniform and consistent practise, it remains to be established whether a practise is supported by those states whose vital interests are affected by the rule. This is important because on the legal plane, every practise is relevant. The degree of that relevancy is subject to the substance of the rule.

If one is discussing a rule regarding maritime resources in the adjacent waters, the practise of Switzerland and Hungary, for example, are important, but the support of the practise from coastal

states is more important seeing as they are states which are particularly affected, i.e. the 'specially affected states'.

~~Once it has been established that there exists a uniform, consistent practise which contains the participation of specially affected states, the second concern is adoption where the practise of generality becomes relative.~~

In practise in international law, the practise of state is applied depending on what the state declares its position to be. The status of a state's claim isn't examined. This is because a practise, even if it initially begins as one which is illegal, may attract a general practise if states find it in their interest to adopt that rule. When regarding the legal doctrine on the Continental Shelf, which has its foundations in a unilateral proclamation from the United States by President Truman in 1945, we identify that the international community regarded it to be the beginning of the positive law journey on the subject, despite it perhaps having been illegal action at the time.
This could bring about a change in the law and a transformation of international customary law: what began as a unilateral act of a state precipitates a general practise of states and solidifies itself as part of international law If, however, the state doesn't manage to attract a general practise as a result of their actions, then the state remains in a state of illegality - its failure to attract a general practise of states, a practise which is uniform, consistent and supported by specially affected states, the state is in a state of illegality.

Application of Article 38(1)(b) and the Doctrine of Persistent Objection

Once a rule of customary law has been established to exist satisfying the aforementioned tests, a presumption that such a rule is binding on all states exists. A general practise implies a general agreement and therefore, states will remain bound by the rule even if there exists no explicit agreement.

It is important in this regard to discuss the Doctrine of Persistent Objection, a similar mechanism to the process of reservation found in the Law of Treaties. This doctrine enables states to rebut the presumption that they are bound by a general practise, even if such practise wasn't explicitly agreed upon. It allows states to declare that it doesn't recognise a growing practise as a rule if it contradicts its national interests. Therefore, in the period of development of the rule, a state is given the chance to declare itself withdrawn from the application of this customary law. In order to effect this, a state must persistently object to the creation of the law with certain authors arguing that such objection ought to continue even after the rule is crystallised.

An example of the application of this doctrine in a practical scenario is the occasion of the anchoring of US Warships 3 nautical miles off the coast of Malta following the acceptance of the new rule which extended Malta's territorial waters to 12 nautical miles. Under International Law, Malta had the right not to allow such ships to anchor within Maltese territory. Through their actions, the US could be seen to be challenging the rule that extended the territorial sea. This action shocked the UN Conference on the Lae of the Sea which understood the extension of territorial waters to 12 nautical miles to be part of customary law. The US argued that since it had been a persistent objector to the extension of territorial sea being over 3 nautical miles, the US didn't recognise the extension. This meant that in turn, Maltese warships were entitled to stop and anchor outside the 2 mile territorial limit of the US.

In order to be a persistent objector, a state is required to consistently object to the development of the rule. Sometimes, if a state doesn't have the assets, it is not necessary to challenge by force. Protest doesn't necessarily need to involve force and the protection of a state's legal rights can be reflected in a legal diplomatic note but this needs to be persistent particularly in the face of other parties challenging the position.

Article 38(1)(c)

Article 38(1)(c):
"1. *The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:* c) *the general principles of law recognised by civilised nations.*"

If the court decides that there is no treaty rule under Article 38(1)(a) to be applied or customary law under Article 38(1)(b), the court will turn to Article 38(1)(c) of the statute which requires it to apply general principles of law as recognised by civilised nations. The reference to 'civilised nations' is an archaic one based on the League of Nations treaty. What is focused upon in this regard is the recourse of the court to general principles.

In order for this to be effected, we must go back to the drafting history of the provisions. There were many controversies in relation to this power granted to the courts as states did not wish to grant this ability to judges to be able to develop international law. There was the belief that states ought to be in charge of this development. Ultimately, the risk was taken because the alternative was that the court could not give judgments in certain areas seeing as there was no law governing such areas.

The states allow the courts to apply general principles 'by analogy' such as in the Barcelona Traction Case. In this example, judges referred to domestic legislation. It has also occurred the other way around, for example in the development of the law of space - since there were no rules to govern space exploration, they adopted the legal principles adopted by humanity in the 1600s in relation to the freedom of the High Seas and applied them to freedom of navigation in terms of space exploration.

In essence, that which was forecasted by the drafters did occur and today we have large areas of international law that are 'judge-made'. For example, the rules, regulations and delimitation of maritime boundaries have their source in judicial decisions. This operates owing to the fact that courts have made important pronouncements which states now follow and are thus the products of judge-made law at an international level. In the **Virginia G case - Panama v. Guinea-Bissau**, decided on the 14th of April 2014 by the International Tribunal for the Law of the Sea, the Panamanin tanker giving fuel to an authorised fishing vessel was arrested and confiscated within the Exclusive Economic Zone. It was argued that this was against the principle of the freedom of navigation and innocent passage as generally bunkering is considered to be a freedom. However, it was up to the court to determined whether bunkering to an authorised fishing vessel within the EEZ was part of the freedom of navigation or whether, since the tanker was supplying a fishing vessel, the fishing rules of the Convention regulated the situation. The tribunal rendered its judgment which notably clarifies the scope of sovereign rights of a coastal state with respect to living resources in its Exclusive Economic Zone.

Article 38(1)(d)

Article 38(1)(d):

"1. *The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:*
d) *subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law."*

This article refers to judicial decisions and the teaching of the highest qualified publicists, which in this case refers to the old English word for an expert in International Law. Judicial decisions and the works of expert international lawyers therefore, can be used by the court as a subsidiary means of determining the law. However, certain comments must be made in this regard.

Under Article 59 of the statute, judgments apply only to the parties of the case, but in practise, it is important for judgments to be referred to, i.e. that judgments seek the authority of previous judgments given the authority and eminence of the courts. These judgements also stand to influence the practise of states. Therefore, that which needs to be minded is if one is referring to a judicial decision to support one's case, support ought to be found not only in judicial decisions relating to that particular state but a consensus from the decisions of other states in different legal systems ought to support also.

Article 59:
"*The decision of the Court has no binding force except between the parties and in respect of that particular case."*

08.11.2021
Hierarchy of International Law
Now that the various sources of International Law made use of by the International Court of Justice have been identified, it is prudent to question whether or not these sources exist in a hierarchy>
Originally, the drafters of Article 38 of the Statute intended for there to be a hierarchy and for the sources to be considered in such a manner.

The reason for this is quite obvious seeing as we are dealing with two different types of law, the quality of them differing greatly. Firstly, we have international treaty rules that are written, agreed, firm, precise, negotiated and received explicitly. The second type of law refers to unwritten rules which are just as potent as written treaty rules, if not more potent in certain cases, however which are unwritten, uncertain and difficult to determined. This makes the quality of this form of law inferior to that of written law.
However, a true understanding of International Law will indicate that whilst treaty law is in this respect superior, unwritten rules form the bulk of the body of International Law. An interesting analogy to describe this is the following: written treaty law covering nearly every aspect of international law make up the tip of the iceberg whilst unwritten law constitutes the bulk of the iceberg below the surface.

Therefore, while a hierarchy can be identified, what is important is the appreciation of the interdependency of the sources of law and not so much the hierarchy of the sources. In practise, there exists an interplay of sources of treaty law and sources of unwritten law. Sometimes, judicial bodies such as the ICJ and the ITOLS will refer to general principles of law as outlined under Article

38(1)(c) of the statute, but this is not as common as the relationship between the sources under Article 38(1)(a) and 38(1)(b).

The general principles of treaty law as reflected in the Vienna Convention enable the treaty rules to bind only the parties to that rule. Therefore, what must be looked at is the following: has the rule in a treaty been expressly recognised by the parties in a dispute. The court will in the first place find whether there is a treaty binding between the two states to the dispute. Very often, the mistake is made whereby a list of parties to a treaty will be regarded and it will be deduced that there exists a treaty relationship between two states when frequently this is not the case. It could be that the treaty is not in force, the treaty rule is subject to a reservation or another reason whereby a treaty relationship is negated. If this situation occurs, the treaty rule is not biding on the court and therefore, the court will move to analyse Article 38(1)(b) to see whether there is a rule in customary international law applicable to the dispute.

However, the most important thing to comprehend is how treaty rules and customary rules interrelate.

The International Law Commission and the interplay between Treaty Rules and Customary International Law

The Charter of the UN sets out obligations of the General Assembly and in this respect, it gives the General Assembly the duty to codify or progressively develop the law. That is, the General Assembly is the body responsible fo identifying areas of International Law, generally areas which are under intense scrutiny and used by Member States, and ask another body of the United Nations, the International Law Commission to draft treaty rules on the different subjects. The International Law Commission is a body of eminent lawyers from different legal systems who are elected and who meet once a year in Geneva to formulate and draft treaty rules on different subjects.

Once these treaty rules have been negotiated and finalised, the International Law Commission transmits its draft articles to the General Assembly which may decide that the work has produced a sufficient basis for the convening of a diplomatic conference which will discuss the draft articles, amend, adopt and finally agree to a treaty text. An example of this process is in relation fo the development of the Law of the Sea in the 1950s when the General Assembly asked the International Law Commission to produce a legal text on the adoption of a Law of the Sea Treaty. This took them five years to accomplish and once the work was deemed sufficiently mature by the General Assembly, the first UN Conference of the Law of the Sea was held in Geneva in 1958. This conference was known as UNCLOS I.

This conference divided the text of the International Law Council into four treaties, some of which were aimed towards the codification of customary international law. The preamble of the 1958 Geneva Convention on the High Seas demonstrates that the provisions of the treaty are declaratory reflections of customary international law - the state parties have determined that the rules enjoy a general practise accepted as law and therefore, there are ramifications beyond the treaty relationship. The rules via customary international law are binding on third parties. This is a sort-of exception to the notion that treaty rules are binding only onto the parties - the rules are maintained but the bid extends beyond the parties by virtue of Article 38(1)(b). If often happens

that a state that is not party to the treaty will find itself bound by the rules of the treaty because those treaty rules reflect customary international law.

EXAMPLES WHICH DEMONSTRATE THAT CUSTOMARY LAW AND TREATY LAW ARE INTIMATELY BOUND

This, for example, is the case of the US which is not party to the 1982 UN Convention on the Law of the Sea, but nonetheless recognises, at least the majority of provisions dealing with the freedom of the High Seas, innocent passage through territorial seas etc., since these rules are reflected in customary international law. In the days of the Soviet Union, there was a lack of harmony in the interpretation of the rules of the Convention and innocent passage between the US and the Soviet Union. For example, when the US Navy was asked to challenge the Soviet rules in the Black Sea whereby the Soviet warships were sent to ram the American warships as they did not ask for permission to exercise innocent passage in the Soviet Union's territorial waters. The Soviet Union claimed that "*As far as the right of innocent passage is concerned, the following has to be elucidated: According to existing Soviet rules, foreign warships only enjoy such a right in places where sea lanes for international navigation are established … in the Black Sea there are no such designated lanes. This the American authorities and commanders of warships are well informed about and know it."* This procedure of International Law is one which is not clear cut neither through treaty nor through customary law. It is evident that the USSR adopted a more restrictive interpretation of Article 12(3) of the 1983 where it is stated that lateral innocent passage "*is permitted by way of sea lanes, customarily used for international navigation…"* Through the Uniform Interpretation of 1989, the US and the USSR clarified their interpretation on the fundamental issues at stake in relation to this point which led to the aforementioned confrontation and others of a similar nature through the outlining of eight points which surmise the procedure which is to be adopted.

In 1988, the Maltese Government accepted a request for a British aircraft carrier to enter into Maltese harbours. This decision to offer entrance offended some local workers unions, particularly those employed at the dry-docks. This led to them capturing a tanker which was being repaired in the dockyard and using it to block the entrance to the Grand Harbour to not enable the aircraft carrier to enter. This was taken to be a violation of the Maltese decision and led to important consequences. The first was that the government's insistence that once the invitation was issued, the aircraft was to be allowed entry and therefore, was given the chance to enter into St. Paul's Bay. Through this occurrence, the House of Representatives of Malta adopted a resolution which expressed the desire of the House to ensure that any visiting vessels would not carry any Nuclear Arms and that before entering Maltese territory, the visiting vessel would have to make such a declaration to the Minister of Foreign Affairs. Such declaration would constitute as proof that the vessel had no such weapons on board. This was significant as in those days, vessels were under no obligation to disclose whether or not they were carrying Nuclear Arms. This policy has now changed with the US and the UK disclosing the status of weapons onboard their vessels. While this is important, it is interesting to note that this practise is probably engaged into seeing as nowadays such weapons tend to be carried by submarines.
It is interesting to note that through the Territorial Waters and Contiguous Zone Act, Chapter 226 of the Laws of Malta, since 1982 the Prime Minister has been given the authority to adopt rules of regulation requiring permission or notification of warships and select other types of vessels in Maltese territorial waters. However, no Prime Minister has ever promulgated these types of regulations.

Similarly, in the case of **Ukraine v. Russian Federation**, which was presented in front of the Tribunal of the Law of the Sea, the Tribunal needed to provide measures of protection against Russia for its arrest of Ukrainian warships navigating through the territorial sea of Russia up to their territory lines at the end of the Black Sea. The Russians captured the vessels and those onboard. Despite this, however, the Tribunal was of the opinion that those warships were entitled to the right of innocent passage consistent with that stipulated in the Convention. Although there are still some states which require the permission or notification of passing warships in territorial waters, this is found to not be in line with the Convention nor with customary international law today. Such proceedings were held despite the Russian Federation's refusal to appear.

In the asylum case of **Colombia v. Peru**, it is proved that customary international law may also be reverted and resorted to when a treaty is in force between two states. This case dealt with the granting of diplomatic asylum in the Colombian Embassy at Lima to Victor Raul Haya de la Torre, a political leader from Peru accused of having instigated a military rebellion and coup which ultimately failed. He subsequently sought refuge in the Colombian Embassy. This was the subject of a dispute between the two states despite the fact that both were parties to the Pan-American Havana Convention on Asylum of 1928. Within this Convention, it is stated that subject to certain conditions, asylum could be granted in a foreign embassy to a political refugee who was a national of the territorial state. On the basis of this, Colombia asked Peru to provide for the safe transfer of this individual from the Embassy in question to the airport to enable the 'political refugee' to fly to Colombia. Peru refused this request. Herein lay the question of the dispute as to whether Colombia was unilaterally qualified to grant asylum to this individual considering the offence committed by the refugee against the territorial state, i.e. did the individual qualify as a political refugee or a criminal one? Peru argued that the individual qualified as the latter and thus had no obligation under the treaty to enable the protection of this individual seeking asylum.This led Peru to question the court as to whether the territorial state was bound to afford necessary guarantees to enable the refugee to leave the country safely.

In its judgment, the court decided that in fact there was no rule in the treaty which outlined which state was entitled to determine the character of the refugee, be it the state offering refuge or the prosecuting state. The court noted that Peru had not proved that the individual was a criminal, however, it found favour of a counter-claim submitted by Peru that the individual was granted asylum in violation of the Havana Convention. In this case, the court couldn't rely on Article 38(1)(a) of the statute and needed to resort to consultations in relation to Article 38(1)(b) to discover whether there was some guidance to be found in customary international law and in fact, it was upon the basis of customary law, which in the case supplemented the application of a treaty in force between two states which did not contain an express rule expressly recognised by the party in the regard necessary in this case.

TREATY RULES DEVELOPING INTO CUSTOMARY LAW (THE DOCTRINE OF NORM CREATING CHARACTER) AND THE CODIFICATION OF CUSTOMARY LAW

Having drawn the background of the interplay between these two sources, we move on to discuss in greater detail the dynamics between the two sources.

Firstly, as it has already been pointed out through the aforementioned discussions on UNCLOS I, a treaty can codify preexisting customary law. Similarly, it is also possible for the treaty rule that starts off as a contractual rule to attract the support of states from outside the treaty rule. This may lead to the creation of a general practise whereby states which are not party to a treaty begin

to adopt certain treaty rules in their practise, thereby accepting the contractual rule as a general rule of international law in accordance with Article 38(1)(b) making it binding on all states. Therefore, on one hand, we regard treaty rules that codify customary international law, and on the other hand, we have customary laws that become so uniform and consistent based off a treaty provision that they become customary law. The formation of customary practises occurs despite the fact that the treaty rule is contractual in nature and such customary rules will have an effect on third parties that were originally not subject to the contractual treaty at hand, owing to the fact uniformity and consistency of such a rule creates a general practise of states and thus such a practise would reflect customary international law. Often, once states have a written version of a rule, even if it is embedded within a treaty to which they are not a party to, the text becomes a model for state practise.

Such scenarios are found in the landmark judgement known as the **North Sea Continental Shelf Cases**. These cases submitted to the International Court of Justice in 1969 involved a dispute between Germany on one side and Denmark and the Netherlands on the other side. They revolved around the agreements between the states regarding the delimitation of areas rich in oil and gas of the continental shelf boundary in the North Sea and focused specifically on the method which ought to be employed to measure and determine the boundary.
Through this case, the court analysed the various aspects of the relationship between customary and treaty law.

The question arose as to whether the equidistance method enshrined in Article 6 of the 1958 Continental Shelf Convention applied to this case and was the method which ought to have been employed to determine this boundary.

Article 6:
"*The outer limit of the territorial sea is the line every point of which is at a distance from the nearest point of the baseline equal to the breadth of the territorial sea.*"

The German government objected to the application of the principle of equidistance as, given the geography of the coastline, equidistance would result in a major loss of the Continental Shelf for Germany. However, Denmark and the Netherlands argued that this method ought to be applied. They stated that even if this method had not been codified by Article 6, the method had stimulated a general practise accepted as law as required by Article 38(1)(b) of the statute of the ICJ for the creation of a rule of customary law. Therefore, they implored the court to impose this rule of Germany. The court said that this process was able to occur - the process through which a treaty rule attracts state practise and therefore creates customary law, can occur, and stated that when this happened, the courts observe that such a rule become binding even on states which are not party to the treaty.

The court, however, also noted that such a process must be considered with great care and owing to this established the Doctrine of Norm Creating Character. Through this, the court imposed a requirement on the linkage between a treaty rule and a subsequent rule of customary international law. This doctrine ensures that the written rule had the potential to create a general rule of international law - customary law.

Thus, the court noted it needed to examine the contents of Article 6 which Denmark and The Netherlands claimed produced a rule of customary law imposing the equidistance method of delimitation. Firstly, it was determined that the rule of equidistance as existing in Article 6

The court said that it should therefore examine the contents of Article 6 which Denmark and TN claims produced a rule of customary law imposing the equidistance method of delimitation. The court observed that the rule of equidistance, *in abstracto* and owing to its own self, did manage to fulfil this requirement of being a written rule which could possibly generate customary international law. However the structure of Article 6 of the Geneva Convention on the Continental Shelf and placement of the rule of equidistance within it still needed to be considered, especially vis-a-vis other rules in the convention.

In the first place, the court noted that as drafted, Article 6 didn't placed equidistance as a primary obligation. This is because the article speaks of there having been a boundary established on the basis of agreement first. Therefore, the court noted that the primary obligation of agreement constitute a strange preface to that which Denmark and The Netherlands refer to as a 'primary obligation of equidistance'. The court noted therefore, that as drafted, Article 6 places the emphasis on delimitation on the continental shelf agreement.

Secondly, the court pointed out that when the article refers to the use of equidistance, it makes it clear that the application of such a method was qualified by the presence of specific circumstances, for example, the position of an island far from the coast or the geographical elements forming the coastline. The court noted that this created further doubt as to whether Article 6 had the capacity to create a rule of customary International Law favouring equidistance.

Finally, the court regarded the relationship of Article 6 with respect to the other articles of the Convention. The court noted that under Article 13 of the Convention of 1958, state parties could make reservations to Article 6. However, Article 13 did not grant the same capacity for reservations to Articles 1, 2 and 3. This discrimination was taken by the court as yet another reason as to why the argument that Article 6 didn't have a norm creating character and subsequently concluded that Germany was not bound by Article 6.

It is concluded that the Doctrine of Norm Creating Character means that the rule that is being proposed to have created the general practise of equidistance through Article 6 could not actually have given birth to a rule of customary law due to the drafting placing the primary obligation on agreement. Therefore, the court said that while Article 6 could create customary law, it could not create a rule of customary law in favour of equidistance.

INFORMAL AGREEMENTS AND THE DEVELOPMENT OF CUSTOMARY INTERNATIONAL LAW
The process of a text developing customary international law is not only subject to formal texts. This process works similarly if the text is informal.

For example, at UNCLOS III it was decided that the negotiations would take place in accordance with the so-called 'gentleman's agreement'. This means it was decided that discussion and negotiation would take place by consensus and only if achieving a consensus was impossible would a vote be called. This approach meant that at this conference, over 150 states were negotiating over 100 items by consensus only. This conference was divided into 3 committees: in 1973 the President of the Conference set up three working groups and allocated to each of them various

items of the agenda. This produced the Informal Single Negotiating Text. It was called this because it was without prejudice to the position of the parties and was the sole responsibility of the chairman and the rapporteur of the working group. Thus, through this text, no state and no state position felt prejudiced. The following year, the committees met again and the Revised Single Negotiating Text was agreed upon. The subsequent year, a consolidation of all the three texts was performed and the result was the Informal Consolidation Negotiating Text. The importance of the informality and the other such devices was that it enabled negotiations to go on.

However, although these proceedings were informal within the Conference, outside the conference, states began to notice the draft articles of the informal text and began to take action in accordance with them. For example, when looking at what was to become Article 56 dealing with the Exclusive Economic Zone (EEZ), it stated that the EEZ coastal states would have the rights to conserve, manage and exploit the living and non-living maritime resources and engage in economic activity, i.e. the nationalisation of the territories and maritime resources. However, this article was informal and thus, without prejudice to the delegates in the negotiation and their respective state positions. Yet, outside the Conference, government decided that they need not wait for a conclusion and this resulted in many states beginning to adopt state practises in accordance with these rules.

Therefore, what began as an informal text became the focal point of state practise since state practise, so long as it is general and accepted by states as law, creates customary law. Therefore, within the confined of this Conference, there was informality, but in reality, International Law didn't wait and states, despite opposition of Maritime states, started to claim EEZ. This practise crystallised the law around 1979 and the ICJ demonstrated this in its judgment **Libya v. Tunisia** which was delivered prior to the adoption of the 1982 Convention on the Laws of the Seas.

In the 1985 judgment **Malta v. Tunisia**, the court agreed that even though the Convention was not in force, the institution of the EEZ had now become a part of customary law and although the parties in this dispute had not asked the court an EEZ boundary and simply a Continental Shelf boundary, the court felt in light of the emergence of EEZ as a part of customary international law, it became a reality and obliged the court to examine whether its proposed boundary would be consistent with the Continental Shelf boundary it was proposing. The court took the position that the EEZ had become a part of customary law largely based on the position of UNCLOS III and thus, the boundary it proposed needed to be tested in the light of the potential claim of Libya and Malta when they established the EEZ.

Therefore, through this we note, that even informal texts have the potential to create customary law and that such potential is manifested by a general practised based on the words of the text creating a rule of customary international law.

Conclusion

Whilst there may be a hierarchy and in its judgments, the court will indeed begin with analysis of relevant treaty rules in accordance with Article 38(1)(a), in practise what is of greater interest is the dynamics between customary and treaty law. Both work hand in hand to enable the settlement of disputes in accordance with Article 38(1) which imposes on the court the obligation to apply international law.

Emma de Gabriele

22.11.2021 - Role of International Organisation and the Status of the Individual in International Law
International Organisations

When discussing International Law, it is prudent to give due consideration to the role played by International Organisations which is constantly growing. Particular attention ought to be given to inter-governmental organisations which refer to organisations made up of Member States.

For a significant period of time, states were considered to be the sole subjects of International Law. However, this position shifted during the 20th Century and the idea that only states are the subject of International Legal Personality was challenged through the creation of international organisations and institutions that exercised a degree of independence from the states which created them. It is important to note that a major development in this regard which sped up this understanding was the establishment of the United Nations.

There exist today some 200 inter-governmental organisations which have been tasked with specific mandates and which are given a degree of functional autonomy in order to be able to discharge their responsibilities. Many of these international organisations have been set up by states as a means of establishing a permanent forum in order for representatives of states to be able to come together and discuss international affords and problems. Therefore, through such developments and owing to the essential position which they occupy on the international field, international organisations are considered to be an integral subject of International Law. Within the UN system alone there are some seventeen international organisations. Examples include the 'International Labour Organisation', which works to promote proper and fair labour standards and the 'World Health Organisation', which works in relation to international public health and to coordinate global responses to health issues.

Constitutive Elements and Features of An International Organisation

International Organisations are established by an agreement which is governed by International Law set up between two or more states.

Some organisations have general competence, such as the United Nations, while others are regional organisations with more specific competencies like the European Union.

International Organisations possess a level of international legal personality which is distinct from that of its Member States. Therefore, although it is the state that determines the power and functions of the organisation, the organisation itself enjoys a distinct international legal personality.

The notion of a subject of international law and who ought to be considered a subject is one which has developed greatly over the years. We understand a subject of international law to be an entity capable of possessing international rights and duties, thereby having an international legal personality, and who has the capacity to maintain its rights by bringing forward international claims.
The idea that a subject of international law has the capacity to bring forward international claims was stressed and elaborated upon in an advisory opinion presented by the ICJ entitled **Reparation**

for Injuries suffered in the service of the United Nations, Advisory Opinion: ICJ Reports 1949. This opinion remains the leading judicial authority on international legal personality. Firstly, it is important to clarify that the ICJ is able to exercise two types of jurisdiction: either advisory or contentious. When exercising the latter type of jurisdiction, the court settles disputes which are submitted to it by states in accordance with international law. In terms of the former jurisdiction, the ICJ is sometimes asked to give an advisory opinion, i.e. an interpretation of a specific point of international law. Although advisory opinions are not binding in the same way judgments of the ICJ are, they are still very influential as through them the court is able to generally clarify an issue of international law, the findings of which tend to be adopted by states. An advisory opinion may be requested by states, the UNGA and specific organs or organisations of the UN relative to their mandate.

The origins of this report began following the murder of Count Bernadotte in September 1948 by a band of terrorists in a part of the city of Jerusalem under Israeli control. Count Bernadotte was a Swedish diplomat that was chief UN Negotiator and mediator in the area. Following this occurrence, the UN considered Israel to have been negligent for failing to punish those individuals responsible for the murder and wished to make a claim for compensation under International Law. The role of the ICJ in this regard was to determined whether the UN had the international legal personality, and thus the capacity, to bring forward this claim. In its petition for an advisory opinion, the UNGA posed the following questions:

"*In the event of an agent of the UN in the performance of his duties suffering injury in circumstances involving the responsibility of a State, has the UN as an Organisation, the capacity to bring an international claim against the responsible de jury or de facto government with a view of obtaining the reparation due in respect of the damage caused (a) to the United Nations and (b) to the victim or to persons entitled to him.*

In the event of an affirmative reply on point I (b), how is action by the United Nations to be reconciled with such rights as may be possessed by the State of which the victim is a national?"

In its advisory opinion, the ICJ stressed and highlighted the fact that if the UN was devoid of international legal personality and thus the capacity to bring forward claims, it wouldn't be able to carry out and fulfil the functions and purposes of the organisation, in the UN's case the maintenance of international peace and security. Therefore, the ICJ regarded that the organisation needed to possess a certain level of international legal personality in order that it can carry out its function. It was noted, however, that this level of international legal personality varies from organisation to organisation - they are not necessarily identical in their nature or in the extent of their rights. The concept of international legal personality therefore has no uniform content in international law and it must be treated as reactive to the purposes of the organisation.

"*In the opinion of the Court, the Organisation was intended to exercise and enjoy, and is in fact exercising and enjoying, functions and rights which can only be explained on the basis of the possession of a large measure of international personality and the capacity to operate upon an international plane. It is at present the supreme type of international organisation, and it could not carry out the intentions of its founders if it was devoid of international personality…*

Accordingly, the Court has come to the conclusion that the Organisation is an international person… it is a subject of international law and capable of possessing international rights and duties, and that it has capacity to maintain its rights by bringing international claims".

"When the Organisation has sustained damages resulting from a breach by a Member of its international obligations, it is impossible to see how it can obtain reparation ***unless it possesses capacity to bring an international claim.*** *It cannot be supposed that in such an event all the Members of the Organisation, save the defendant State, must combine to bring a claim against the defendant for damages suffered by the Organisation."*

"Whereas a State possesses the totality of International rights and duties recognised by international law, the rights and duties of an entity such as the Organisation must depend upon its purposes and function as specified or implied in its constituent documents and developed in practice."

The ICJ also held that the UN has objective legal personality and not just personality recognised by members alone. Moreover, it noted that while the UN ought to be considered an international person that possesses international legal personality, this doesn't equate to it being a state and does not endow upon it the same international rights and duties that a state has under International Law.
"*The Organisation is an international person, That is not the same thing as saying that it is a State, which it certainly is not, or that its legal personality and rights and duties are the same as those of a State …[neither] is it … a super-State, whatever that expression may mean."*

WHAT ARE THE CONSEQUENCES OF INTERNATIONAL LEGAL PERSONALITY OF INTERNATIONAL ORGANISATIONS?

Firstly, international organisations are recognised as legal persons. The international legal personality which they possess is different from the Member States which set up the organisation, even if the members act as their executive organs of the organisation and adopt decisions which are binding on the organisation.

The international rights and duties of the international organisations can be found in treaties signed by the organisation.

Additionally, international organisations can bring international claims and international claims can also be brought against international organisations.

BASIC CHARACTERISTICS OF INTERNATIONAL ORGANISATIONS

(1) The organisation must have an objective. There must be a purpose behind setting up the organisation. Foe example, the UN's purpose is the maintenance of international peace and security.
(2) The membership of the organisation must be composed of States and/or other international organisations.
(3) It must be established by a constituent instrument, generally a treaty governed by International Law which sets out the basic framework of the organisation. This means, it provides the aims of the organisation, which states may join the organisation, how Member States can contribute to

the work of the organisation, the structure of the organisation, the privileges and immunities of the staff of the organisations, amongst other things.

(4) The organisation must have an autonomous will, distinct from that of its members.
(5) The organisation must be capable of adopting norms addressed to its members, i.e. it must provide a norm setting environment. This means that is must be capable of facilitating the adoption or the development of international rules.

International organisations are usually composed of:
- Governing Assembly
- Executive Body
- Permanent Secretariat

The Governing Assembly generally dictates the policy of the organisation and is responsible for electing the chief officer. This person is usually referred to as the Secretary General or the Director. It is also responsible for the election of members of the Executive Body. The Executive Body is generally responsible for the implementation of the policy of the organisation. The Permanent Secretariat is then responsible for the day-to-day undertakings of the organisation.

The United Nations as an International Organisation

The UN was founded in 1945 by the Charter the of the United Nations following the atrocities experienced by mankind during WWII. The headquarters of this organisation can be found in New York.
The UN takes decisions on a wide-range of global issues ranging from issues dealing with international peace and security, environmental issues, Human Rights considerations, food security, energy provisions etc. The UN currently has 193 members and a number of observer states. Malta has been a member of the UN since it gained independence in 1964.
The purposes of the UN are laid down in Chapter I Article I of the UN Charter.

Article 1:
"*The Purposes of the United Nations are:*
1. 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 inter- national law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;
2. 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;
3. To achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all with- out distinction as to race, sex, language, or religion; and
4. To be a centre for harmonising the actions of nations in the attainment of these common ends."

The UN through its operation fosters international cooperation between states and strives towards maintaining effective international peace and security. Moreover, the UN provides a permanent international forum where states can express their views in different organs, committees and bodies on different international issues.

There are six principles organs of the United Nations: The General Assembly, the Security Council, the Economic and Social Council, the International Court of Justice, the Secretariat and the Trusteeship Council.

UNITED NATIONS GENERAL ASSEMBLY (UNGA)
All UN Member States are represented at the UNGA. This forum represents the idea of the equality of states - through the voting mechanism of one vote per state, equality on a legal plane between states is fostered and reflected.

The United Nations General Assembly is the organisation's main policy-making organ and has a very broad agenda. It addresses a variety of issues within the mandate and scope of the UN Charter. The results of the organisation are manifested in its resolutions which are adopted on a wide-range of issues which are very influential and indicative of the will of the organisation and its member states. However, they are not binding upon them.

During the course of each session which begins in September, there are various committees which are set up which prepare reports for review and decisions to be made on the UNGA. An example of such a committee is the Legal Committee which reviews the work of the International Law Commission.
If a matter is reported arising out of a committee, it is discussed on the floor of the UNGA and a resolution will be adopted making use of simple majority for most issues.

UNITED NATIONS SECURITY COUNCIL (UNSC)
The United Nations Security Council (UNSC) is set up under Chapter V of the Charter and acts under Chapter VII of the Charter on action with respect to threats to the peace, breaches of the peace and acts of aggression.

The UNSC is made up of 15 Member States of the United Nations. 10 of which are non-permanent members which are elected on a rotational basis for a period of two years who are representatives of different areas of the globe. 5 of the members are permanent and these are China, France, Russia, the United Kingdom and the United States.

Within this Council all member states have one vote. Security Council resolutions require nine votes in order to be adopted. If the matter being decided upon is substantial and not procedural than all 5 permanent members must vote in favour of the resolution. The 5 permanent member states also can exercise a right to veto. If any one of the 5 permanent members cases a negative vote in the 15 member Security Council, the resolution won't pass. All members with this power have exercised their veto right through-out the functioning of the Security Council. If a permanent member doesn't wish to use the right to veto, they can abstain and the resolution can still pass if it gains 9 favourable votes.

When a resolution is adopted by the UNSC within the remit of its powers under Chapter VII of the UN Charter, the resolution is binding on all UM Member States. This occurred, for example, when the UNSC placed sanctions on Iraq under the regime of Saddam Hussein. In Malta, the procedure employed to ensure the implementation of the decisions taken by the Security Council is outlined through Chapter 365 of the Laws of Malta, the National Interest (Enabling Powers) Act. This allows for the Minister responsible to incorporate the decisions taken by the UNSC into Maltese Law, thus making them enforceable in Maltese courts.

The UNSC decides on various issues including the imposition of economic sanctions, military deployment and peace keeping missions.

ECONOMIC AND SOCIAL COUNCIL

This is the principle body within the UN responsible for policy review and dialogue. A significant amount of work of the UN is undertaken under the auspices of this council. It has the power to initiate topics to be studied and recommend these to states and the UN General Assembly. It can draft conventions, call for international conferences and the work of this council is supported by various committees and bodies which serve to review the work of the specialised agencies of the UN that operate under this council.

The Individual

Primarily, International Law seeks to regulate the international society wherein this society, states are the primary subject of International Law. In the past, the individual was considered to be an object in the hands of the state and the state could do what it wanted with the individual. Therefore, if there was a confrontation between the state and the individual, it remained a matter to be tackled by the concerned state and other states had no right to interfere. States guarded the right to deal with their own nationals and respected the rights of other states to do the same.

However, this view of individuals on the international field in no longer the case. After WWII and the atrocities mankind went through, individuals began to be considered as subjects of international law having international legal personality. This is because states began to impose personal rights and obligations on individuals. Today, there is a specific focus on individuals in International Law which seeks to protect individuals.

The status of the individual in international law can therefore, no longer be ignored. This has been confirmed by several authorities on international law including Brownlie who argued that "*There is no general rule that individuals cannot be subjects of international law, and in particular contexts individuals have rights which they can vindicate by international action.*" Additionally, Oppenheim stated that "*states are primarily but not exclusively the subjects of international law … International law is no longer, if it ever was, concerned only with states… it is no longer possible as a matter of positive law, to regard states as the only subjects of International law and there is an increasing disposition, within a limited sphere, to treat individuals as subjects of international law.*"

INTERNATIONAL LEGAL PERSONALITY - THE STATE V. THE INDIVIDUAL

As we have discerned, the individual has an important role to play in International Law and while the powers of the individual are obviously less than of the state, since they have less rights and obligations under this law, they remain important players.

The individual is according with international legal personality of a limited kind. Generally, this means that the individual is accorded rights under specific treaties. This doesn't mean, however, that the individual can bring a case in their own name before the ICJ or other International Tribunals. The individuals must go through the state. There are limitations to the rights afforded to individuals under International Law.

Both the state and the individual have international legal personalities, however, they are not the same in nature seeing as the rights and obligations at law enjoyed and owed by the former far outweighs those enjoyed and owed by the latter.

However, in the second half of the 20th Century, significant progress begun to be made whereby the individual became more 'visible' under International Law. Perhaps the clearest example of the personality of the individual being given importance in modern international law is in the development of human rights law where the individual is the central focus. Also in the development of individual criminal responsibility where the individual could be held responsible for grave crimes and violations of international law such as war crimes or crimes against humanity.

The Development of International Human Rights Law

International Human Rights Law was developed giving the individual rights on an international plane. Over the past 70 years, International law has developed in a direction allowing for the international and regional protection and enforcement of Human Rights.

Human Rights is now a universal concern and states can no longer hide behind their domestic jurisdictions to maltreat their nationals but must live up to international obligations. States have Human Rights obligations towards individuals within their jurisdiction or control and may be held responsible for breaches of those obligations.

The question of the status of the individual in International Law is evident in the application of International Human Rights Law and this is because International Law gives the individuals rights and protects the individual while recognising the individual as a participant in International Law.

Therefore, while initially in the realm of International Law individuals were simply pawns in the hands of the state, through International Human Rights Law, which transcends the boundaries of a state to protect the individual regardless of the state, the importance of the individual is emphasised. States have Human Rights obligations towards individuals within their jurisdiction and control and can be held responsible for breaches of these obligations.

THE UNIVERSAL DECLARATION OF HUMAN RIGHTS

The Universal Declaration of Human Rights can be regarded as being an incredibly important milestone in the development of this law and is one of the key events when tracing back the origins of International Human Rights Law. The then UN Commission on Human Rights, which is now the UN Human Rights Council, wanted to establish an effective Human Rights regime and worked towards the adoption of the Universal Declaration of Human Rights. Owing to its nature as a Declaration, the document itself wasn't binding on Member States. The Commission worked towards a non-binding Human Rights instrument initially as they realised that the adoption of a hard law instrument imposing human rights obligations on states may take too long to negotiate and therefore, through the non-binding nature of this declaration, made states more willing to come to discuss.

It was drafted by representatives with different legal and cultural backgrounds from all regions of the world. The Declaration of Human Rights was proclaimed by the General Assembly in Paris on the 10th December 1948 as a common standard of achievement for all peoples and nations. This Declaration set out for the first time fundamental human rights standards to be universally protected. These were contained within 30 articles covering various Human Rights including the

Right to Life, the Right to Liberty and Security, the Right to a Fair Trial, amongst others. At the same time, the Declaration recognised that individuals also have duties towards the community to ensure the respect of the rights and freedoms of others.

Article 29:
"*(1) Everyone has duties to the community in which alone the free and full development of his personality is possible.*
(2) In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.
(3) These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations."

The Universal Declaration of Human Rights remains the benchmark of Human Rights Protection.

It was subsequently followed by the adoption of legally binding Human Rights treaties at a regional and international level where basic respect for Human Rights and Fundamental Freedoms are also imposed by customary international law as well as judicially recognised by the International Courts and tribunals. Examples of treaties include 'The International Covenant on Civil and Political Rights' which has 173 state parties and 'The International Covenant on Economic, Social and Cultural Rights' which has 171 state parties. Most rights found in these treaties are also found in the Universal Declaration of Human Rights but outlined in more detail herein.

A regional Human Rights treaty of significant importance to Malta is the European Convention for the Protection of Human Rights and Fundamental Freedoms. This has 47 state parties, one of which being Malta and the contents of this convention have been adopted within Maltese Law through the promulgation of Chapter 319 of 1987, The European Convention Act. Similarly, there exists the American Convention on Human Rights. Both the ECHR and the ACHR have established judicial bodies which see to the adherence by states of their obligations under the conventions.

Unlike the regional conventions which set up judicial bodies, in International Human Rights convention, International Supervisory Mechanisms are established. These are not judicial bodies which deliver binding judgments on state, however, are very important bodies as their decisions clarify Human Rights issues and comment on certain situations in cases of Human Rights breaches.

APPLICATION OF INTERNATIONAL HUMAN RIGHTS LAW
Many Human Rights instruments will contain within them jurisdiction clauses, for example, in the European Convention of Human Rights, Article 1 deals with this issue.

Article 1:
"*The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention*."

Human Rights Courts and other bodies have affirmed that the exercise of jurisdiction is wider than the traditional basis of International Law such as the principles of territoriality and the principles of nationality. States have Human Rights obligations wherever they exercise jurisdiction, even if this is

outside their territory. Therefore, states have Human Rights obligations wherever they act using their powers and control under International Law.

This leads us to recognise how states have both positive and negative obligations when it comes to Human Rights. In terms of negative obligations, it is the duty of the state from causing Human Rights violations and positive obligations which refer to the obligation of states to engage in activities which secure the effective enjoyment of fundamental rights.

Despite the advancement in this sphere of law, an individual cannot bring international claims in all circumstances. While the individual is considered to be the subject of international law and has certain rights and obligations under International Law, this doesn't give them the ability to bring International Law claims in all circumstances and do not always means they have the ability to asset these rights. In fact, from this procedural point of view, individuals are considered to be rather disadvantaged in terms of International Law. Individuals have little access to international arenas to petition their cases. According to Article 35 and 65 of the Statute of the ICJ, only states and International Organisations can obtain judgments and advisory opinions, respectively, from the ICH. Individuals are precluded from bringing a claim before the court in respect of any subject manner in their own name. This leaves individuals to be dependent upon 'espousal of claims' or 'nationality-of-claims' rules whereby an individual must, generally speaking, pursue a claim at the international level by getting his or her government to take it up on their behalf.
This serves as a form of diplomatic protection over the individual - states have a duty to protect their nationals.

Article 35:
"(1) *The Court shall be open to the states parties to the present Statute."*

Article 65:
" *1. The Court may give an advisory opinion on any legal question at the request of whatever body may be authorised by or in accordance with the Charter of the United Nations to make such a request.*
2. Questions upon which the advisory opinion of the Court is asked shall be laid before the Court by means of a written request containing an exact statement of the question upon which an opinion is required, and accompanied by all documents likely to throw light upon the question."

In the second half of the 20th Century, we began to see a significant change where the individual is given direct access to court in connection to Human Rights Law. This development occurred mostly on a regional level where human rights treaties allowed for individual petition. Here, an individual has the power to bring a case against a state in the individual's own name. This marks significant progress and is reflected, for example, in Article 34 of the European Convention on Human Rights.

Article 34:
"*The Court may receive applications from any person, non- governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right*."

Despite this positive development, the state is still considered to be an intermediary because the state must ratify the treaty which provides for individual petition and because before an individual

brings a claim, they must have exhausted all domestic remedies in the relevant state for the claim to be considered. The reason for this is to allow for the concerned state to solve disputes at a national level before moving on to a regional or international level.

INDIVIDUAL CRIMINAL RESPONSIBILITY

The same way individuals have rights which are protected under International Law, they also have duties and can be held responsible for certain crimes. This is what is referred to as Individual Criminal Responsibility. This has become a notable feature of International Law today - it is a legal obligation imposed on all citizens which if breached can give rise to international consequences. Initially, the actions of individuals did not give rise to any type of international responsibility. Responsibility on an international plane rose twin the wrongful acts committed were attributed to a state and the state in those cases was held to be internationally responsible.

Individual responsibility was shaped predominantly through the Nuremberg Trials, a Charter of the International Military Tribunal annexed to the Agreement for the Prosecution and Punishment of the Major War Criminal is 1945. These trials were set up to try Nazi Officials following WWII. This was one of the first international instruments which conceived this idea of Individual Criminal Responsibility. Through Article 6, it is noted that responsibility arises with reference to three classes of crimes:

1) Crimes against the peace
2) War Crimes
3) Crimes against humanity

Article 6:

"*The Tribunal established by the Agreement referred to in Article 1 hereof for the trial and punishment of the major war criminals of the European Axis countries shall have the power to try and punish persons who, acting in the interest of the European Axis countries, whether as individuals or as members of organisations, committed any of the following crimes.*

The following acts, or any of them, are criminals coming within the jurisdiction of the Tribunal for which there shall be individual responsibility: -

(a) *Crimes against peace: namely, planning, preparation, initiation or waging of 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;*
(b) *War crimes, namely, violations of the laws of customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.*
(c) *Crimes against humanity: namely, murder, extermination, enslavement, decoration and other inhumane acts committed against any civilian population, before or during the war. Or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated."*

The tribunal concluded that individuals whether acting as part of organs of the state or acting under orders of state officials may be held individually responsible within the international legal

system for certain acts. "*International law imposes duties and liabilities upon individuals as well as upon states*" "*crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.*"

In this regard, a significant development occurred through the establishment of many *ad hoc* tribunals as a means of prosecuting war crimes, crimes against humanity and crimes against the peace. The International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda were established following the genocides which occurred there pursuant to two UNSC Resolutions (Res 827 (1993) and Res 955 (1995)) adopted under Chapter VII of the UN Charter. The resolutions serve as constitutive instruments establishing the Tribunal's mandates, organisational set-up and powers.

The jurisdiction of the tribunals covered war crimes, crimes against humanity and genocide. It was limited however, to crimes that were committed during a specific period in a particular place. Both tribunals shared the same appeals Chamber in order to promote consistency.

Article 7 of the Statue of the ICTY provides for individual criminal responsibility:

Article 7:
"*1. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime.*
2. The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.
3. The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.
4. The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal determines that justice so requires."

Article 6 of the Statue of the ICTR provides for individual criminal responsibility.

The creation of such tribunals spurred the movement for the creation of a more permanent International Criminal Court - ICC. It is significant that it took almost 5 decades after the Nuremberg Trials in order for such a body to be set up. This is a permanent body governed by the Rome Statute of the International Criminal Court adopted in 1998 and came into force 1 July 2002 which presently has 123 state parties.

The ICC has jurisdiction over:
- The most serious crimes of concern to the international community as a whole… specifically war crimes, crimes against humanity, genocide and aggression;
- Crimes committed after the coming into force of the Rome Statute of 1st July 2002;
- States which have become parties to the Statute;

- The alleged perpetrator is a national of a State Party or where the crime was committed in the territory of a State Party.

Article 25:
A person who commits a crime within the jurisdiction of the Court "*shall be individually responsible and liable for punishment' in accordance with the Rome Statute*".

In terms of proceedings, a prosecutor may choose *ex officio* to investigate - preliminary investigations begin whereby the prosecution assesses whether all the criteria are met in terms of jurisdiction etc. If all these are are met, then a more thorough investigation is launched. If the prosecution believe that a person did commit one of the crimes listed under the Rome Statute, the person is indicted and taken into custody. From here, pre-trial processes begins. Conviction beyond a reasonable doubt by an assembly of three judges. Guilty verdict and a sentence is issued if they believe the person has committed the offence. This is subject to appeal by defence and prosecution.