CHAPTER – 4  THE CONTEMPORARY ISSUES UNDER INTERNATIONAL LAW

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Preliminary View

The law of state responsibility is one of the most complex areas of international law, in terms of both articulating and implementing its principles. The most usual consequence of an international wrong is to enable the injured state to avail itself of the measures and procedures available to it in accordance with international law to compel the delinquent state to fulfill its obligations, or to obtain from that state reparation for the future.

States have legal responsibilities both towards states and individuals according to different sources of international law. If a state violates international law it is responsible to immediately cease the unlawful conduct, and offer appropriate guarantees that it will not repeat the illegal actions in the future. The state also has a responsibility to make full reparations for the injury caused, including both material and moral damages. Apart from these, individual’s rights are also violated by some states and also by non state actors. So it is the responsibility of state under international law to protect or to take immediate attention to solve these problems.

The main theme of this Chapter is to focus on the new aspects of international law although they have been observing since many years. In this way critical, descriptive and comparative methods are dealt to shape the international law in contemporary perspectives. For the purposes of giving more importance on state responsibility, following issues are taken for research.

4.1 State Responsibility and Internally Displaced Persons

4.1.1 Background

In the years after the Second World War, the world has witnessed a large number of political upheavals in many countries. The European and Third World Countries are the most affected. Reason for such disturbances range from simple political rivalry, regional conflicts of a country, ethnic issues and unequal distribution of natural resources and development projects to, simple persecution of people of minorities by one country to those, one region to another region due to racial discrimination. All these caused to create refugees and internally displaced persons (IDPs) or internal refugees.

Also the background of the IDPs in both can be traced from history of protection for refugees under the International Humanitarian Law treaties in both The

The exclusion of affairs on matters relating entirely to states internal affairs on international law on account of state sovereignty under Article 2 (7)\(^1\) of the U N Charter and other Declarations like the one of friendly relations. The U N did not have any power to interfere into the internal affairs of the member states thus the problem of IDPs was left entirely to states internal affairs.

The Universal Declaration on Human Rights 1948 and the relevance of diminishing state sovereignty in relation to how a state treats its citizens also contributed to the development of the regime to protect the displaced persons in their own home territory from being discriminated from other fellow citizens.

The Geneva Convention of 1949 and the common Article 3\(^2\) on protection of civilians in civil conflicts deal with conflicts not of an international character which says that persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex birth or wealth, or any other similar criteria.

We can see from the above Articles 3\(^3\) of The Geneva Convention of 1949 that even those people who are displaced during the war especially those who are not taking active part in the hostilities they should be treated humanely without any discrimination at all.

Also we can trace the protection of the displaced persons from both Covenant on Civil and Political Rights and the Covenant an Economic, Social and Cultural Rights 1966\(^4\) which provide for the rights to the security of person. It states that:

‘Recognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created where by everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights’.

\(^1\) United Nation, The Charter of the United Nation, (Vol-22)1964, p. 61-72
\(^3\) Ibid p.25
The 1977 Protocol 11 addition to Geneva Convention of 1949 provides protection to the victims of non international armed conflicts who have been displaced due to armed conflicts. The major steps took place after the appointment of Dr. Francis M. Deng in 1992 as representative of the UN Secretary on IDPs to oversee the measures taken by various states in protecting the displaced persons in their own territories and to see that international assistance is provided to such persons.


Since IDPs reside within the borders of their own countries and are under the jurisdiction of their governments, primary responsibility for meeting their protection and assistance needs rests with their national authorities. The Guiding Principles on Internal Displacement underscore this point, setting forth the rights of IDPs and the obligations of governments towards these populations. They provide a framework for better understanding what national responsibility should entail and serve as a guide in designing an effective national response.

Now, there are estimated 20-25 million people who are internally displaced throughout the world. In 1982, the first time IDPs were counted, there was an estimated 1.2 million in eleven countries. By 1986, there were 11.5 to 14 million in 20 countries, and in 2002 there were approximately 26 million in 46 countries. The main reason for this was a dramatic increase in intra-state wars. In 1993 and 1994 alone, internal conflicts world wide forced an estimated 10,000 persons a day to flee their homes. We can see that the number of displaced persons has increased dramatically since 1982.

To assist government with this task, the Brooking Institution University of Bern Project on internal displacement, co-directed by the representative of the Secretary General on the human rights of IDPs has brought together in one document the benchmarks of national responsibility. Each benchmark marks a step that governments should consider taking to assume their obligations toward their internally displaced populations.

While governments will need to adopt the steps to fit their own national conditions, a number of the initiatives should prove common to all countries best by internal displacement. In particular, government should consider measures to prevent
or mitigate displacement; raise national awareness of the problem; collect data on the numbers and conditions of IDPs; support training on internal displacement and the guiding principle; create a national legal framework for upholding the rights of IDPs; develop a national policy on internal displacement; designate an institutional focal point on IDPs, encourage national human rights institutions to integrate internal displacement into their work; allocate adequate resources to the problem; ensure the participation of IDPs in decision making, and support lasting solutions for the displaced.

In addition, co-operation with the international community, when national capacity is insufficient to address the needs of the displaced, should be a key element in national policy, this national responsibility framework is intended to help governments address the problem of internal displacement in their countries in all its aspects.

Further, it should enable international organizations, regional bodies national human rights institutions, civil society and the displaced themselves to evaluate the extent to which national responsibility is being effectively exercised and has become the basis for advocacy efforts on behalf of the rights of the displaced.

It is the Representative’s hope that governments will carefully review the steps contained in the framework and find in them a guide to the most effective ways of dealing with internal displacement. Donor governments would also do well to review the benchmarks of national responsibility as a key element in reaching decisions on funding in support of assistance to governments with problems of displacement.

4.1.2 Definition of IDPs

There is no unanimity among the scholars about the definition of IDPs. Every scholar or an institution has its own way of perception of the definition of IDPs, and accordingly, the concept of IDPs has been discussed along the following lines. According to Janie Hampton, Editor of Internally Displaced People: A Global survey, (1997: xvi): 5

"Unlike refugees who cross international borders, those who stay within their own country must rely upon their own governments to uphold their civil and human rights. If the state chooses not to invite external assistance, then the international

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community has limited options to protect these people. In many countries it is the
government or its military forces that have caused the displacement or prevent access
to their citizens”.

The Definition for IDPs used by the United Nations follows:  

“Persons or groups of persons who have been forced to flee or to leave their
homes or places of habitual residence as a result of, or in order to avoid, in particular
the effects of armed conflict, situations of generalized violence, violations of human
rights or natural or human made disasters, and who have not crossed an
internationally recognized state border”.

Although it is a very vague definition, it attempts to include all aspects of
internal displacement. It assumes that the international aid community will become
concerned, particularly where violations of human rights occur. Ironically in practice
as per IDP: Global survey (1997), sometimes the governments concerned
exaggerates a problem in order to secure more international aid.

Thus it is very difficult to define who are IDPs, because people are forced to
flee from their homes because of either civil or international war (Afghanistan, Sri
Lanka, Israel, Palestine, Iran, Iraq and Africa as well as in Eastern Europe); natural
or man made disaster, (China, Japan, Korea, Australia and some of the South East
Asian countries); development like construction of dams or urban clearances (India,
Bangladesh) and Changes in the economy due to either industrialization or famine
(Philippines, Malaysia, Cambodia, Thailand, Hong Kong Taiwan, and Fiji).

4.1.3 The Emergence of a IDPs Norms

Throughout the Cold War, IDPs were effectively ignored. Governments were
expected to care for their own populations. When they failed to do so, or deliberately
subjected their population to abuses, governments “managed to keep the international
community at bay by invoking their sovereignty and insisting on non-interference in
the internal affairs of states”. The end of the cold war altered this dynamic considerably. As UNHCR has noted:

“The emergence of new forms of warfare, entailing the destruction of whole
social, economic and political systems, the spread of light weapons and land-mines,
available at prices which enable populations including their youngest members to be

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7 Supra Note 5, p.3
8 Cohen and Deng, Masses in Flight, 2
armed; and; perhaps most significantly, the use of mass evictions as weapon of war and as a means of establishing culturally or ethnically homogenous societies”.

Coupled with many countries unwillingness to accept massive numbers of new refugees, who created a preoccupation with preventing refugee flows entirely, was a major growth in the number of IDPs. The telecommunications revolution also dramatically increased the ability of the media to report on many of these situations, and to focus international attention of the plight of the displaced, whether starring Ethiopians, fleeing Sudanese, or displaced Kurds.

Therefore, by the early 1990s, a number of elements necessary for normative change existed with respect to how to deal with problems of population displacement. The old norm, embodied by the Refugee Convention was increasingly challenged by its members. The internal displacement situation was expanding dramatically and more importantly in full view of the world. Not only was there a wide perception that this was becoming a crisis situation, but there was also a clear recognition that such a situation was not covered under existing norms, change was necessary.

The situation, however, was complicated by the fact that any IDP regime would directly challenge the principles of sovereignty, which, while under attack from the growing international human rights movement, was still very formidable. Any solution therefore needed to either dismantle the sovereignty norm, or find a way around it.

(a) Responsible Sovereignty

Francis Deng, expanding upon Max Weber, introduced the idea that in order to be legitimate, a government must demonstrate responsible sovereignty:

Sovereignty must demonstrate responsibility, which means ensuring a certain level of protection for people. Most governments, under normal circumstances do in fact discharge that responsibility. When they are unable to do so, they call upon the international community to assist. Under exceptional circumstance when governments fail to discharge this responsibility and masses of their citizens become threatened with severe suffering and death, the international community should step

10 Cohen and Deng, Masses in Flight, 3
in to provide the needed protection and assistance even if the government of a state has not requested aid.11

Therefore, “Sovereignty cannot be used as a justification for the mistreatment of populations”.12 Further, sovereignty, in order to be meaningful must include accountability not only to the domestic constituency but also to the international community. This assumption, Deng argues, “is in fact inherent in sovereignty, for the concept implies an international system that imposes responsibilities on the state. Moreover, since the domestic constituency may lack the political power to hold the government accountable, ultimate responsibility falls upon the international community”.

(b) IDPs are Among the World’s Most Vulnerable Population Groups

At least 25 million people are uprooted within the borders of their own countries by armed conflict, generalized violence, persecution and natural and human caused disasters. The plight of these IDPs in some 52 countries is a pressing humanitarian, human rights development, and political challenge for the global community.14

IDPs are among the worlds most vulnerable population groups because of the following reason:

Legal status: IDPs have no special legal status under international law because they remain inside their own countries. No single international legal instrument or international organization is exclusively devoted to addressing their needs. This distinguishes IDPs from refugees, who have crossed an international border refugee’s benefit from clear international responsibilities for their protection and the international organization mandated legal status and rarely receives the assistance and protection afforded the world’s 13 million refugees.

National Sovereignty: IDPs who have fled state sponsored or state endorsed violence is often unable to depend or their government for assistance. In fact, some

12 Cohen and Deng, Masses in Flight, 276
13 Ibid, 277
governments invoke sovereignty to block or restrict international humanitarian assistance and long-term development aid to IDPs within their borders.

**Difficult Humanitarian Access:** ongoing conflict or generalized insecurity frequently impedes humanitarian and development aid to IDPs.

**Protracted Displacement:** Protracted violence forces some populations to remain uprooted for years or decades, separating IDPs of all ages from their homes, lands livelihoods, schools and traditional social structures. Many families are uprooted multiple times deprived of opportunities to support themselves many IDPs depend on external assistance for the most basic necessities and struggle to cope with serious psychosocial ills associated with prolonged displacement.

**Prolonged vulnerability to Danger:** IDP populations typically encounter serious security problems even after fleeing their homes. Many IDPs are deprived of a true safe haven since violence or abuse follows them as they flee. Death rates among IDPs are among the highest of all groups in humanitarian emergencies. Displaced women and children are particularly vulnerable to abuse long after the initial emergency subsides.

**Difficult Reintegration and Resettlement:** when circumstances allow them to return home safely, many IDPs remain vulnerable. They return to destroyed homes and towns, disputes over land tenure, absent or distrustful local official, and other obstacles to reintegration. Some IDPs never return home and must resettle permanently in new communities.

**Long term Development Reversed:** Prolonged displacement typically disrupts or reverses progress made in schooling, healthcare, food production, sanitation systems, infrastructure improvements, local governance, and other sectors fundamental to economic and social development. Failure to address the long-term development needs of previously uprooted population’s risks new cycles of national instability and population displacement.

### 4.1.4 The Guiding Principles on Internal Displacement

The primary responsibility for protecting and assisting IDPs rests with their national authorities is a theme that underpins and is underscored throughout the Guiding Principles on Internal Displacement, which set forth the rights of IDPs and the obligations of governments towards them. Developed at the request of governments as expressed in resolutions of the General Assembly and Commission
on Human Rights the 30 principles provide a normative framework for understanding what national responsibility should entail. Indeed, the Guiding Principles have been recognized by government worldwide as an important tool and standard for addressing situations for internal displacement, and which states have been encouraged to widely disseminate and use 45 promoting and disseminating the Guiding Principles is an important way to give recognition to the rights and special needs of IDPs and the reinforce government obligations toward these populations.

To begin with the Guiding Principles should be translated into local languages and widely distributed to local and national officials, non-state actors, and Non Governmental Organizations (NGO’S). So too should the annotations, which spell out the international legal standards on which the Guiding Principles are based, as well as the handbook for applying the Guiding Principles, which contains practical steps for making the principles operational.15

Convening national seminars on internal displacement is another helpful way of raising awareness of the Guiding Principles. Such seminars should seek to bring together local, regional and national government officials, local NGOs and other civil society groups, international organizations and certainly representatives of IDPs communities to discuss the different aspects of internal displacement in terms of the principles and promote joint strategies for addressing the problem. The principles have in addition served as an important framework for monitoring conditions in different countries they also provide guidance for developing national laws and policies to address internal displacement.

Indeed United Nations resolutions have encouraged governments to develop national laws and policies for the protection and assistance of their internally displaced populations taking into account the Guiding Principles.16 Overall, the Guiding Principles provide a normative framework that should be the basis for national as well as international responses of internal displacement.


4.1.5 Fundamental Characteristics of a National Response

A national response by definition needs to be inclusive, covering all situations of internal displacement and groups of IDPs without discrimination. Specifically, this means that national responsibility for internal displacement needs to be comprehensive in several different respects.

a) **All causes:** National responsibility for internal displacement applies to persons internally displaced in situations of conflict, communal strife and serious violations of human rights as well as IDPs uprooted as a result of natural and human made disasters, development projects and other causes. In other words, national responsibility for addressing internal displacement needs to be carried out for the benefit of all persons fitting the definition of IDPs found in the Guiding Principles which is defined earlier in definition for IDPs used by the United Nations.

Though the needs of IDPs may vary, depending on the cause of their displacement, it is important to underline that all IDPs are entitled to the protection and assistance of their government. National responsibility therefore means ensuring that IDPs receive comparable help and treatment without discrimination and regardless of the reason for their displacement.

b) **All groups:** The overwhelming majority of displaced populations are women and children. They experience particular protection, assistance and reintegration needs, which routinely are overlooked or not addressed with priority. Moreover, women and children, in particular girls, frequently face discrimination in obtaining assistance, having documents in their own names, accessing educations and income generating opportunities and having their voices heard.

National authorities have a responsibility to ensure that the special protection and assistance concerns of particular groups within IDP populations, including women heads of household, unaccompanied minors’, persons with disabilities, and the elderly, are taken into account and addressed.

Internal displacement is also a phenomenon that disproportionately affects minority ethnic groups, indigenous populations and the rural poor. Once displaced, these already marginalized groups after face discrimination in accessing protection and assistance because of ethnic, racial or ideological stigmas, which further heighten their vulnerability. Because of language barriers, they may even have difficult in communicating with government authorities and knowing their rights.
Indeed, a national response should seek to remedy the social, economic, and political cleavages that give rise to the exclusion of certain groups from the political and economic life of the nation and cause injustices and social divides that tear societies apart and fuel displacement.

c) All needs: National responsibility for international displacement requires addressing the problem in all its aspects. Attending to IDPs needs for food, clean water, shelter, medical care and other basic humanitarian assistance of course is critically important. However, a national response also requires, and its effectiveness depends on, an integrated approach that addresses protection as well as assistance concerns.

This is true even in situations of natural disaster when, although the material relief may be the most visible need, serious protection issues nonetheless can arise. Protection, moreover, denotes the range of political and civil rights as well as social, economic and cultural rights.

d) All phases: National responsibility extends across all phases of displacement. It includes preventing arbitrary displacement, ensuring the security and well being of persons once they are displaced, and well being of persons once they are displaced, and creating the conditions for durable solutions to their plight, namely through voluntary and safe return or resettlement and reintegration. Decisions as to “when internal displacement ends” must be taken on the basis of objective criteria ensuring respect for the human rights of the internally displaced.17

e) All relevant levels and branches of Government

To be truly national, a Government’s response to internal displacement must be reflected at all levels of government. Certainly, officials in the capital are likely to play a strong role in shaping a government’s response to internal displacement. However, authorities at the regional and local levels, who are likely to be more directly in contact with displaced populations, also have a critically important role to play in ensuring that national responsibility is effectively discharged on the ground.

Moreover, a national response requires the collective contributions of all relevant branches of government, including the humanitarian, human rights, health, housing, education, development and political sectors. Special mention must be made

17 Erin Mooney, “Bringing the end into sight for Internally Displaced Persons”, Forced Migration Review, Issue 17, (May 2003), pp. 4-6
of the military and police, who have particular responsibilities for ensuring IDPs physical safety.

f) All affected areas: Especially in situations of internal armed conflict, governments may not have effective control over all parts of the country. Around the world, millions of IDPs are found in areas under the control of non-state actors and out of reach of government assistance and protection.

The effective exercise of national responsibility requires undertaking or at least facilitating efforts to access, assist and protect these IDPs. Opening humanitarian space in these areas provides an opportunity also to remind non-state actors of their responsibilities.

Under international humanitarian law and the Guiding Principles, they too have responsibilities to provide protection and assistance to the internally displaced. Governments may therefore find it valuable to enlist the support of NGOs, Church groups, donors or the United Nations to help open humanitarian space to ensure the protection and assistance of IDPs in areas under the control of non-state actors and ultimately, also to resolve the conflicts in which these IDPs are caught.

4.1.6 Inadequate Government Responses

(a) Lacking Humanitarian Assistance

With some exceptions, IDPs did not receive sufficient humanitarian assistance from their governments. In fact, three in four IDPs, more than 18 million people, could not count on their national authorities for the provision of adequate assistance in 2004. They got government aid only occasionally, or not at all in at least nine countries, hosting some five million IDPs, the displaced were faced with hostile or indifferent governments not willing to assume their humanitarian responsibilities vis-a-vis the displaced population on their territories.

In at least 14 countries, governments deliberately tried to prevent international organizations from accessing IDP populations in need. On the other hand, in about half of the countries affected by internal displacement the governments did make a genuine effort to address the humanitarian needs of IDPs at a level adequate to the resources at their disposal. But since most of these countries had relatively small displaced populations, only about a quarter of the World’s IDPs benefited from such efforts.
b) Ignored Protection Responsibility

Many governments also ignored their responsibility to protect the IDPs under their authority from violence and human rights abuses. In 14 countries, with a total of over 12 million IDPs, the displaced were faced with authorities that reacted with hostility or, at best, indifference to their protection needs. Clearly, the protection situation was worst in those countries where the government itself was a main agent of displacement, as was the case for example in Sudan, Burma and Nepal.

Fifteen governments at least provided protection occasionally or in parts of the country. In the remaining 20 countries, most of them in Europe and the Middle East, IDPs were not in danger or governments tried to effectively ensure the safety of the displaced population.

4.1.7 International Response

A plethora of UN agencies, other inter-governmental organizations and NGOs carry out programmes targeting IDPs in a multitude of countries. The UN’s refugee agency UNHCR, for example, assisted 4.6 million IDPs in 2003\textsuperscript{18}, and the World Food Programme (WEP) feeds millions of displaced people. But despite these and many other activities by individual organizations, the overall international response in many countries remained patchy slow and unpredictable during 2004.

(a) Increased efforts to improve international response

The Emergency Relief Coordinator the principal focal point for the co-ordination of international assistance and protection provided to IDPs in the UN System-Stepped up efforts in 2004\textsuperscript{19} to ensure a more timely and systematic response. He strengthened the Inter Agency Internal Displacement Division within the Office for the Coordination of Humanitarian Affairs (OCHA) and focused its work on a number of priority countries. The division, set up to assist UN field operations in developing a more systematic response to internal displacement crises, undertook a number of country missions and made recommendations for improvements, but it was too early at year’s end to assess their impact.

Another instrument designed to improve the collaborative response of international agencies on the ground, the UN’s revised IDP Policy package, was

\textsuperscript{18} Implementing the Collaborative Response to Situations of Internal Displacement, Guidance for UN Humanitarian and/or Resident Coordinators and Country Teams, Inter-Agency Standing Committee, Geneva, September 2004

adopted in September 2004. The package, which among other tools includes a detailed road map for the development of IDP strategies, was disseminated for implementation to all Resident/Humanitarian coordinators, the UN officials responsible for ensuring that the needs of IDPs are addressed in a coordinated and comprehensive way at the country level.

(b) UN Involvement

The level of involvement of the UN in addressing internal displacement situations varied greatly. In less than half of the situations, the UN was trying to provide a comprehensive multi sectoral response, at least on paper. In 12 countries, the UN was involved in assisting IDPs, but the displaced were not specifically targeted or their needs were addressed only partially.

In 14 countries, nearly one third of the world’s displacement situations, the UN was not involved in assisting IDPs as a specific target group. This meant that over six million people, more than a quarter of the world’s IDP population, were effectively excluded from the assistance and monitoring provided by the UN system (although some of them may have benefited from UN programmes targeting other vulnerable groups or vulnerable populations at large).

Similarly, the level of compliance by UN country teams, the ensemble of UN agencies represented in a country with existing IDP policies also showing great differences. A number of country teams had developed IDP strategies and set up structures to ensure a coordinated approach, for example in Afghanistan, Colombia, Iraq, Liberia, Sudan and Uganda, although this did not necessarily always result in an effective and systematic response.

In April 2004 the UN Human Rights Commission adopted a new mandate for the UN Secretary-General’s Representative on IDPs, putting more stress on the human rights aspects of his work. Following this decision, the UN Secretary-General appointed Walter Kalin as his representative in September 2004.

Kalin, who played a key role in the development of the Guiding Principles on Internal Displacement, made clear that he will continue and build on the successful work of his predecessor, Francis Deng.

4.1.8 A Normative Framework for Addressing the Specific Need of IDPs

No specific international convention (treaty) protects the rights of persons displaced within their own national borders by natural disasters or other causes.
Nevertheless, as individuals who have not left their own country, they remain entitled to the full range of human rights that are applicable to the citizens of that country. The challenge is to identify those guarantees and concepts implicit in existing international law that respond to the special needs of IDPs.

In 1992 the UN Commission on Human Rights appointed Dr. Francis Deng, of Sudan, as the first Representative of the UN Secretary General on IDPs. A few years later, he was asked to prepare an appropriate normative framework. Dr. Deng then developed the Guiding Principles on internal Displacement and submitted them to the Commission in 1998.

This document details, in 30 principles, the specific meaning of IDPs of the general human rights and humanitarian law guarantees found in international law. It covers all three phases of internal displacement: the pre-displacement phase, the situation during displacement, and the phase of return or resettlement and reintegration. As Dr. Deng stressed at that time, the purpose of these principles was “to address the specific needs of IDPs world wide by identifying rights and guarantees relevant to their protection” and thus to provide guidance not only to the representative in carrying out his mandate, but also to governments, intergovernmental and non governmental organizations, and others, when they are faced with the phenomenon of internal displacement.

Dr. Deng underlined that the principles “reflect and are consistent with international human rights law and international humanitarian law” and restate the relevant principles applicable to the internally displaced which were then widely dispersed in existing instruments. Further he said, the Guiding Principles would clarify any gray areas and address gaps that may exist. They were elaborated on the basis of a thorough compilation and analysis of norms applicable to situations of

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20 See Commission on Human Rights Resolution 1996/52 (UNDOC.E/CN.4/RES/1996/52, April 19, 1996) calling “upon the Representative of the Secretary-General to continue, on the basis of his compilation and analysis of legal norms, to develop an appropriate framework in his regard for the protection of internally displaced persons”.
internal displacement as contained in relevant human right law, international law and
refugee law instruments.\textsuperscript{23}

The Guiding Principles have not been iterated in a treaty. Nevertheless, in a
resolution adopted on December 22, 2003 the UN General Assembly adopted a
resolution recalling “the relevant norms of international human rights law,
international humanitarian law and international refugee law” and recognizing “that
the protection of IDPs has been strengthened by identifying, reaffirming and
consolidating specific standards for their protection, in particular through the guiding
principles on Internal Displacement”.\textsuperscript{24} The World Summit outcome document
approved on September 16, 2005 by the UN General Assembly at the end of the
meeting at the UN of more than 150 Heads of State and Government declares, “We
recognize the Guiding Principles on Internal Displacement as an important
international framework for the protection of IDPs”.\textsuperscript{25}

These instruments were adopted by consensus, i.e. with the tacit agreement of
the United States and other participating countries. Such instruments are not formally
binding under international law, but they serve as evidence of what the international
community recognizes as the relevant norms. Thus the Guiding Principles provide
guidance to all authorities faced with problem of displacement, including US
authorities at all levels. As experience in the context of the tsunamis of December 26,
2004 has shown, the practical value of the Guiding Principles (which have been
referred to primarily when addressing displacement by armed conflict) extends to
natural disasters.\textsuperscript{26}

\textbf{The Three phases of displacement}

As has been mentioned above, the Guiding Principles cover all three phases of
displacement, namely protection against displacement, protection during
displacement, and post-displacement phase. In accordance with general international
law, the principles stress that during all three phases, the primary duty and

\textsuperscript{23} Compilation and Analysis of Legal Norms, Report of the Representative of the Secretary-General
Aspects Relating to Protection Against Arbitrary Displacement, UN Doc. Doc. E/CN-
\textsuperscript{24} UN Doc .A/RES/58/177, Preambular Paragraphs
2005/Draft outcome
130905.Pdf
\textsuperscript{26} See; Protection of Internally Displaced Persons in Situations of Natural Disaster, A working
visit to Asia by the Representative of the United Nations Secretary-General on the Human Rights
of Internally Displaced Persons, Walter Kalin, 27 February to 5 March 2005, available at
www.orchr.org/english/issues/idp/index.htm
responsibility for protecting and assisting the displaced lies not with the international community, but with national authorities (principle 3). Although principle 3 refers to national authorities, under the international law of state responsibility the national state would be responsible at the international level for the conduct of a constituent state or local authority as well. 27

(1) Protection against displacement

Natural disasters present particular challenges for the fulfillment of the national responsibility to protect persons from displacement. Earthquakes, floods, tornados, tsunamis and other natural disasters are beyond the capacity of any state to prevent. However, as affirmed in the “Hyogo Declaration” adopted at the world conference on Disaster Reduction, held in Kobe, Japan, in January 2005, “states have the primary responsibility to protect the people and property on their territory from hazards and give high priority to disaster risk reduction in national policy, consistent with their capacities and resource available to them.” 28

In this regard, international human right law, in particular the right to life, plays an important role. A state’s obligations with respect to the right to include not only the negative obligation to refrain from arbitrary deprivation of life by its own agents, but also the obligation to take positive measures to protect persons within its jurisdiction from foreseeable threats to life from other sources, whether emanating from third parties or from natural disasters. This approach has been taken by both regional and global human rights monitoring mechanisms. For example, in one Ryildiz v Turkey 29, the European Court of Human Rights was confronted with a situation where a methane explosion at a landfill site caused a landslide engulfing ten dwellings and killing thirty-nine people. A Grand Chamber of the Court found the Turkish authorities in breach of the right to life, as state officials and authorities did not do everything within their power to protect the victims from the immediate and known risks to which they were exposed. At the global level the Human Rights Committee has said that states have a duty to take positive measures to protect the right to life expressed in Article 6 of the International Covenant on Civil and

28 UN DOC.A/CONF.206/6
29 Application No 48939/99, Judgment of November 30, 2004
Guiding Principle 5 similarly calls on authorities to prevent and avoid conditions that might lead to displacement of persons.

Guiding Principle 6(2) (d) contemplates forced evaluation in cases of disasters, to the extent that the safety and health of those affected so requires. This is based on and is in line with Article 12(3) of the Covenant on Civil and Political Rights, which recognizes that freedom of movement may be restricted of provided by law and necessary to protect such things as public health. However, even in this situation Principles 7 and 8 continue to apply. These principles call for the examination of all possible alternatives to displacement, and for provision of proper accommodation in satisfactory conditions of safety, nutrition, health and hygiene. In addition, the evacuation is to be carried out in a manner respecting rights to life, dignity, liberty and security of those affected. Principle 4(1) says that the principles are to be applied without discrimination of any kind, such as race, sex, and ethnic or social origin, age or disability.

(2) Protection during displacement:

The Covenant on Civil and Political Rights sets forth basic human rights, including the right to life, the right to security of person and liberty of movement. These rights are detailed with greater specificity in the Guiding Principles. Under Principles 10, 11 and 12, the rights to life, physical integrity and personal security of all individuals affected by displacement are protected. Under Principles 14 and 15, rights to freedom of movement, including in or out of camps, and choice of residence, as well as the right to seek safety in another part of the country, are provided for. Under Principle 18, all IDPs, without discrimination, have the right to an adequate standard of living, including, at a minimum, equal access to food, shelter, water, housing, clothing and health care. Principle 20 says that individuals have the right of recognition as persons before the law, such that state authorities are obligated to provide the necessary documentation, including that lost in the course of displacement, without unreasonable restrictions.

Guiding Principle 21 focuses on property rights. It provides that no one shall be arbitrarily deprived of property, and that possessions left behind should be protected against destruction and illegal appropriation, occupation or use.

30 CCPR General Comment No 6, Para 5 (1982), in UN DOC.A/37/40; Annex V (1982)
(3) Protection after displacement:

Rights of the displaced do not cease once the initial displacement comes to an end. The Covenant on Civil and Political Rights again provides a basis for the principles on return, resettlement and reintegration. Article 12(1) of the Covenant supplies a basic right to liberty of movement and freedom to choose a residence. Guiding principle 28(1) calls on states authorities to establish the conditions and means for IDPs to return voluntarily, in safety and with dignity, to their homes or places of habitual residence, or to resettle voluntarily in another part of the country. An important corollary set forth in Principle 29(2), is that assistance is to be extendedly the competent authorities to IDPs seeking to recover, to the extent possible, lost or dispossessed property and possessions. Under Principle 28(2), special efforts should be made to ensure the full participation of the displaced persons in the planning and management of their return or resettlement and reintegration.31

4.1.9 The Nature of Protection for IDPs

Millions all over the world are currently internally displaced as a result of various causes including forcible movements to inhospitable areas, civil wars in which villages have been destroyed and ethnic persecution through government policies. Yet the plight of IDPs is a problem that is not directly addressed by any international instrument, thereby contributing to the adhoc nature of the international community’s response to such crises.

The failure of the international community to address this problem may result in a threat to the internal stability of states, since those persons who are not assisted and protected in their own country often seek such assistance and protection as refugees in other countries. In doing so, they join the already swollen ranks of the approximately 17 million refugees. Given the recent heightened awareness of the suffering endured by IDPs, it is time for the international community to address this problem from a legal standpoint.

The phenomenon of internal displacement has gradually become an internationalized one, and the reason behind this trend is not for to seek. The

presence of IDPs within national territory means that their own government bears primary responsibility for meeting their protection and assistance needs.

The irony of this is glaring, since more often than not, it is these very governments that cause or, to a lesser level of fault, tolerate such internal displacement. Therefore, in most cases they are either unwilling or unable to guarantee the basic rights and minimum needs of their IDPs. This has led to the international community; inter-governmental and non-governmental organizations taking up the cause of these hapless people.

The Nature of protection

The concept of protection encompasses all activities aimed at obtaining full respect for the rights of the individual in accordance with the spirit of the relevant bodies of law (i.e. Human Rights Law, IHL, and Refugee law). Unlike refugees, internally displaced persons have not crossed an international border. As such, no single international legal instrument is exclusively devoted to their specific protection needs.

IDPs are covered by the laws of their own country and the state is responsible for assisting and protecting them. Under human rights law which remains relevant in most cases of internal displacement, they are entitled to enjoy, in full equality, the same right and freedoms under domestic and international law as the rest of country’s citizens.

Whenever IDPs find themselves in a situation of armed conflict, they are also protected by International Humanitarian Law (IHL). In international armed conflicts this includes in particulars the Fourth Geneva Convention and Protocol I Additional to the Geneva Conventions, and in non international armed conflicts Article 3 common to the Geneva Conventions and Protocol II thereto.

IHL provides important protection for those who have already been uprooted, and, most importantly, against arbitrary displacement. This is done in several ways. First, the rules governing the conduct of hostilities prohibit attacks against civilians and destruction of objects indispensable to their survival, such as crops, livestock and drinking water installations. Second, humanitarian law provides that civilians be

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32 Third Workshop on Protection, Background Paper, ICRC (7 January 1999)
treated in a humane manner and protects them from abuses committed by the party under whose power they find themselves.

Together, these rules seek to preserve a minimum of safety and a basis for subsistence, both of which are essential to allow persons to remain in their homes and as guarantees for those who have already been displaced. In addition, humanitarian law contains express prohibitions against arbitrary displacement, and regulates the conditions under which evacuations can be carried out.

Accordingly, the implementation of IHL constitutes an important form of protection. Efforts to promote such respect include drawing the attention of the parties to existing humanitarian problems, reminding them of their legal obligations and facilitating contacts between them for the purpose of enhancing the protection of civilians.

Drawing upon the relevant provisions of these standards of international law, and refugee law by analogy, the Guiding Principles on internal displacement, published in 1998, represent the first comprehensive attempt to articulate what protection should mean for the internally displaced.

The Guiding Principles identify the rights and guarantees relevant to the protection of IDPs in all phases of displacement. They outline standards for protection against arbitrary displacement, protection and assistance during displacement, and for safe return or resettlement and reintegration. Protection as elaborated in the principles covers not only needs for physical security and safety but also the broad range of rights provided for in international law (including the right to food, to education and employment, for instance).

The principles, it should be noted, do not seek to create a privileged category of persons or to establish a separate legal status for the internally displaced. Rather, they are based on the assumption that IDPs have the same rights and obligations as other persons living in their own state. At the same time, however, they draw attention to the importance of recognizing the particular situation and needs of IDPs.

Although not a legally binding document as such the principles reflect and are consistent with international human rights and humanitarian law, and refugee law by analogy, which are binding. Having gained broad consensuses, the principles provide solid guidance on how protection activities should be oriented in order to be effective.
Notwithstanding the importance of basing protection on principles of national and international law, it nonetheless is true that protection of displaced persons “frequently will depend on non-legal skills and initiatives”.\(^{34}\) In other words, action is required to translate protection principles into effective protection on the ground. Action should also be focused on the search for durable solutions. For the essence of protection activities is the search for solutions, which might ensure or restore rights.

**Strategic areas for protection**

While there is growing recognition among humanitarian and development agencies of their responsibilities in the area of protection, including to IDPs, there remains a need to give practical meaning to such commitment. Traditionally, humanitarian and development agencies lacking an explicit protection mandate have tended to conceive of protection for IDPs as falling outside the scope of their work.

Their protection role has been limited to the extent that the provision of assistance does in itself constitute a form of protection. As such, the traditional work of humanitarian and development agencies is, indeed, inherently rights-based and the distinction between protection and assistance is false. However, human rights protection cannot be done by halves, it involves the assurance of the whole set of rights enshrined in the Universal Declaration of Human Rights. As the High Commissioner for Human Rights has said, it means ensuring “all human right for all”. The challenge of strategic programming in situations of internal displacement is therefore to ensure that this “all” includes the internally displaced and that “all “their rights are respected.

The ICRC 1999 workshop on protection identified three categories under which different types of protection activities could be grouped:

1. **Environment Building**, to include any activity aimed at creating and/or consolidating a global environment conducive to full respect for the rights of individuals;

2. **Responsive Action**, to include any activity under taken in the context of an emerging or established pattern of abuse and aimed at prevention and/or alleviating its immediate effects; and

3. **Remedial Action**, to include any activity aimed at restoring dignified living conditions through rehabilitation, restitution, and reparation.

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Following this outline, a number of strategic areas relevant to protection work in situations of internal displacement have been identified.

4.1.10 Recommendations

Nowadays the authorities at the national, international, regional and local levels have failed to address the problems affecting the IDPs in various parts of the World especially the government authorities. In particular, they have been failed to acknowledge the existence of the problem of displacement in their own territories which has resulted to violation of human rights of such persons.

So it is the duty of all states to protect the rights of IDPs. Therefore the following Recommendations should be taken seriously into consideration in solving the problems of displacement in the near future.

1. To bridge the gap between the positive statements of the government and the conditions on the ground, enhanced formulation, articulation and wider dissemination of a comprehensive and integrated national policy on internal displacement is needed. This should serve to clarify strategies for addressing the problem of internal displacement, including protection and assistance needs, and to facilitate the search for durable solutions.

2. Building upon mechanisms already in place, appropriate institutional structures for addressing displacement issues should be established within the government at all levels, (central, regional and local), including the appointment of focal points to facilitate co-ordination within the government and with United Nations agencies and other partners in the international community on issues of internal displacement.

3. The collection of disaggregated data is necessary to obtain more accurate information on the internally displaced and their needs, and therefore to target responses more effectively. In this connection, it is also crucial to develop a system to identify the numbers and nature of displacement which reportedly has resulted from the anti-terrorism operations currently under way in the country.

4. Although a significant levels of assistance is being provided to the internally displaced by governmental bodies, such as the Department of Social Welfare and Development, as well as United Nations agencies, the donor community and NGOs, there is a continuing need for better protection of displaced persons, returnees and host communities.
5. Providing assistance for return, resettlement or local integration because most of them have lack basic services. Moreover, most of the returnees have lost assets essential to their subsistence, such as animals or land in the course of the displacement. As part of its response to internal displacement, the government should determine how to ensure the restitution of, or compensation for lost property. In addition, the government should also support the resettlement and reintegration of those displaced who do not wish to return.

6. Attention must also be given to addressing the new displacement resulting from the anti-terrorism measures. Notwithstanding the sensitivity of the terrorism issue, both the government and the international community need to take measures to ensure protection against arbitrary displacement and providing protection and assistance to newly displaced persons.

7. Training in international humanitarian law and human rights law, including the Guiding Principles, for the security forces, regional administrators and other pertinent officials whose mandates and scope of activities encompass displaced communities should serve to reinforce and enhance the effectiveness of the government’s efforts to address internal displacement. Moreover, the Guiding Principles can be a useful tool for the government in developing policies, legislation and strategies for dealing with displacement, including providing protection against arbitrary displacement and protection and assistance to displaced persons.

8. Although internal displacement is a domestic problem, there must be some important linkages with similar patterns in other countries in the region. In this connection, it is worth recalling that the government, while acknowledging the problem of internal displacement and the need to strengthen its protection role, also recognizes the link between the problem in its own state and the situation in neighboring countries and the need to draw lessons from their experiences. Also the states must host regional conferences on internal displacement and migration issues and it must be prepared to cooperate with the authorities on this initiatives.

9. The United Nations agencies must establish several working groups to serve as valuable mechanisms for channeling their respective concerns with regard to assistance and protection to IDPs and discussing appropriate responses. However, these initiatives need stronger institutional support to be more effective.
10. Seeking durable solutions to the displacement problems in various states across the world.

11. Finally, while responding to the immediate protection and assistance needs of the internally displaced is pressing, it must be underscored that, in many instances, the root causes of the conflicts resulting in internal displacement are the acute disparities associated with diversities, the marginalization, underdevelopment and lack of capacity for local governance in the disadvantaged region. These deep-seated causes must also be addressed. The ultimate objective should be to create a national framework which accommodates all groups in the country and ensures the dignity of all peoples irrespective of race, ethnicity or religion.

4.2 State Responsibility and Terrorism

Terrorism is a worldwide phenomenon, which has unfortunately now come to stay in India. It is very difficult to assert with authority and preciseness what actually terrorism signifies. Is it in the nature of subversion of the existing political constitution practically to subvert the authorities of the government over a greater or less area or whether for a shorter or longer duration? In the history of every country, whether big or small, on any weighing criteria, there surfaced elements that seeded bloody carnage extending to the sense of quake-earth, to abjure brutality and sudden awakening to ferocity amongst the people who were at the any earlier point of time, were lain dormant and with miraculous height, poised for a cathartic break up along communal lines, threatening in all seriousness of the consequences the bare footing of government machinery and the people by them to be governed.\(^{35}\) The word ‘communal’, irrespective of whatever its dictionary meaning or jurisprudence, in the real concept has within its ambit beyond the thoughts of the thinkers, instinct killer and outburst of unimaginable formulations, that can threaten even the basic identity and unification of the people, and burst-out the whole nation.\(^ {36}\)

During the British regime, the revolutionary trying to overthrow the British government were termed as “terrorists” and Netaji Subhas Chandra Bose was considered as a source of inspiration to such “terrorist”. The judiciary during the British regime in India dealt with such “terrorists” under the provisions of the same India Penal Code, which is in force presently.\(^ {37}\)

35  Vijay Kumar Dewan, Law Relating to ‘Terrorists, p. 2
36  Ibid p.3
37  Ibid p.4
What to speak of India, even other countries in their political set up, keep all the time gasping with the ghost of terrorism, which cannot be completely wiped out in any country, but can be kept in check so that it does not have the force of destabilizing the government, for which the judiciary must be better equipped and more strengthened. The most disappointing aspect is that terrorist succeeds in terrorizing everybody, even the witness, judicial officers and police, so it is not difficult for them to escape conviction.

4.2.1 Concept of State Responsibility

State responsibility is a much neglected concept. State combating terrorism has failed to invoke the concept in situations where other nations, directly or indirectly, have sponsored, supported, or tolerated international terrorism. The premier advocate for pressing this concept is Prof. Richard B. Lillich, University of Virginia School of Law, who writes,

“A body of international law called state responsibility law…Should be invoked in situations where countries either encourage or tolerate terrorist acts or, if such acts are committed without the country’s participation, fail to apprehend, punish or extradite terrorists. The law is very clear and this body of international law offers a rich vein of relevant precedent that should be worked for profit”.

The concept of state responsibility was set forth in the Island of Patinas (United States V/s The Netherlands), in clear language:

“Territorial Sovereignty … involves the exclusive right to display the activities of the state, this right has as corollary a duty: the obligation to protect within the territory the rights of other states, in particular their right to integrity and inviolability in peace and in war, together with the rights which each state may claim for its nationals in foreign territory”.

The Permanent Court of International Justice (PCIJ) of the League of Nations in the Chorzow Factory decision had occasion to consider the issue of the duty of states. The Court opinion notes;

Whenever a duty established by any rule of international law has been breached by act or omission, a new legal relationship automatically comes into existence. This relationship is established between the subject to which the act is

imputable, who must “respond” by making adequate reparation, and the subject who
has a claim to reparation because of the breach of duty.

.......

International responsibility may be incurred by direct injury to the
rights of a state and also by a wrongful act or omission which causes injury to an
alien.\footnote{40}

The elements of the law of state responsibility are: states have duties, these
duties are established by international law, an act or omission that violates an
obligation established by international law is a wrong or delict, the unlawful act must
be imputable to a state, loss or damage must result from the unlawful act, the legal
relationship between the violating state and circumstances, may be entitled to
reparations or to use of force.

Three questions arise that require further study what duties do states have
regarding international terrorism? What quality of proof or evidence is required to
link a state act or omission to international terrorism and for the injured state to
demonstrate loss or damage? And under what circumstances would resort to force be
legitimate?

\textbf{4.2.2 International Terrorism and the Duty of States}

States have many obligations in international law. Among them are the duty
to settle disputes peacefully, to abstain from resort to war as an instrument of
national policy, to refrain from giving assistance to any state against which the
United Nations is taking preventive or enforcement action, to abstain from
recognizing any territorial acquisitions made by a state in violation of the UN
Charter, to see that no actions within their jurisdiction might pollute the air or water
of a neighboring state, to perform all international obligations in good faith and to
conduct all relations in accordance with international law.\footnote{41}

But the duty of particular relevance to international terrorism is described in
UN Resolution 2625, 25\textsuperscript{th} Session, 24 October 1970. This resolution obligates that
states refrain from organizing, instigating, assisting or participating in terrorist acts in
another state or acquiescing in organized activity by groups that direct their efforts
toward committing terrorist acts in a second state.\footnote{42} This duty applies at two distinct
levels. The first encompasses state activity itself (direct state involvement); the second concerns the responsibility of a state for the activities of individuals within its territory (indirect state involvement).

Although Resolution 2625 represents a clear statement as to state responsibility for terrorists acts the General Assembly clouded this duty by suggesting that it might be overridden by the right of self-determination. The resolution, in subsequent language, provides that:

“every state has the duty to refrain from any forcible action which deprives people… of their right to self-determination and freedom and independence. In their action against, and resistance to, such forcible action in pursuit of the exercise of entitled to seek and to receive support in accordance with the purpose and principles of the Charter”.43

This language makes the resolution ambiguous. It could lead to the false conclusion that use of terrorist means in pursuit of self-determination is permissible. If this is the true meaning of the resolution, then it would be unacceptable to the west. Although neither decisions nor resolution of the UN General Assembly are binding under the Charter, the west should be concerned.44 General Assembly resolutions can become authoritative if it can be said that they represent a reaffirmation by states of present day international law.

International Law recognizes the duty of states neither to abet or condone terrorism nor to permit other within their territory from doing so. This recognition arises out of other general duties, such as the duty of non intervention, the duty to refrain from fomenting civil strife in the territory of another state and to prevent others within its territory from engaging in such activities, and the duty to prevent threats to international peace and security.45 More specific duties, such as protecting diplomatic agents within state borders, reinforce and reaffirm state responsibility against terrorism.46 The totality of these duties has led international lawyers to conclude that it is “already unlawful for states to incite, finance, tolerate, assist or

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45 UN General Assembly, “Declaration on Inadmissibility of Intervention in the Domestic Affairs of States and The Protection of their Political Independence & Sovereignty” 21 December 1965, Resolution 2131, p.11
promote acts of illegal terrorism abroad”.

Therefore, to be consistent with international law the right of self-determination mentioned in Resolution 2625 cannot be interpreted in such a manner as to relieve a state from its responsibility to suppress terrorism.

(i) Direct involvement

States are liable under the concept of state responsibility for such conduct. States have an obligation not to organize, support, abet or encourage the formation of hostile expeditions within their territory that are directed against another state. Such conduct would violate the sovereignty of other states and would be contrary to the duty of non intervention and the obligation assumed in Article 2(4) of the UN Charter to refrain from the use or threatened use of force against the political independence of another state. States also have an obligation to protect foreign nationals within their territory. Consequently, when a terrorist incident arises, the territorial sovereign has the primary responsibility for managing situation and for doing so in furtherance of its international obligation.

As an abstract entity, the state becomes liable under international law through the acts or omissions of its officials and agents. These acts or omissions are imputed to the state. The acts of the head of government are always imputable to the state, as are the acts of ministers within the scope of their ministers. The same is true of all other officials and agents, irrespective of governmental level. Thus includes military and police authorities. Additionally, acts or omissions are imputed to the state even if beyond the scope of that directed so long as they are not repudiated by governmental authority and the wrong doer is not appropriately disciplined or punished.

The 1979-81 Iranian hostage situations is an example of imputability. In this case, “what was originally a non governmental act becomes a governmental act.” Other examples of involvement by heads of state in international terrorism are Idi Amin in the 1976 Air Hijacking to Entebbe and the numerous deeds of

49 In Lauterpacht, “Revolutionary Activities by Private Persons against Foreign States”, American Journal of International Law, 22, (1928), p.126
Mu’ammar al-Qudhafi of Libya. The list of subaltern involvement is extensive. The nexus in each instance is imputability. State responsibility requires a showing of a state act or omission.

(ii) **Indirect Involvement**

State toleration of international terrorism or the inability of a state to act to prevent terrorism is examples of indirect involvement. States that tolerate international terrorism are liable under state responsibility, but those that fail to act through lack of equipment, manpower, firepower, or other weakness are not. This is not to say that states in the latter category have fulfilled their international duty. There is a difference between duty and the concept of state responsibility. Duty is only one element of state responsibility.

State responsibility is rooted in the principle that “the right of jurisdiction which a government exercises within its territory carries with it the obligation to prevent the commission of injurious actions against other states. This has been said to be an obligation inherent in territorial sovereignty.”

This obligation enjoins states to prevent terrorists from organizing and training within a state, from departing the state to carry out their acts, and from perpetrating terrorist acts against foreign nationals within state. But a state obligation regarding terrorist is not absolute.

Early writers disagreed on this point. Samuel Pufendorf; Professor of the Law of Nature and Nations at Heidelberg University and later at Lund University, came the closest to arguing for the absolutist view: “Now it is presumed that the heads of a state know what is openly and frequently done by their subjects, and the power to prevent is always presumed, unless its lack be clearly established”.

Hugo Grotius, Dutch international jurist and the father of international law, argued to the contrary.

“A civil community, just as any other community, is not bound by the acts of individuals, apart from some act of neglect of its own...But, as we have said, to participate in a crime a person must not only have knowledge of it but also the opportunity to prevent it. This is what the laws mean when they say that knowledge when its punishment is ordained, is taken in the sense of toleration, so that he may be held responsible who was able to prevent a crime but did not do so, and that the

knowledge to be considered here is that associated with the will, that is knowledge is to be taken in connection with intent”.

Like Grotius, Swiss diplomat and international lawyer Emerich de Vattel also rejected the absolutist view, because “it is impossible for the best governed state or for the most watchful and strict sovereign to regulate at will all the acts of their subjects and to held them on every occasion to the most exact obedience; it would be unjust to impute to the nation, or to the sovereign, all the faults of their citizens.” Grotius and Vattel prevailed. Both knowledge and opportunity are required to find state responsibility. The standard or test has become due diligence.

The due diligence standard was affirmed in 1927 by the permanent court in S.S.Lotus.54 In 1949 the ICJ recognized due diligence when it held the Corfu Channel Case:

“It is clear that knowledge of the mine laying cannot be imputed to the Albanian government by reason of the fact that a minefield discovered in Albanian territorial waters caused the explosions of which the British warships were victims…It cannot be concluded from the mere fact of the control exercised by a state over its territory and waters that state necessarily knew, or ought to have known, of any unlawful act; perpetrated therein, nor yet that it necessarily knew or should have known, the authors”.55

The central element of due diligence is fault. State responsibility arises if a state has knowledge or should have had knowledge, and if it fails to act having the opportunity to do so. As an incidence of sovereignty, a state is required under the due diligence standard to prevent, investigate, and punish those who would inflict injury on another state or its nationals. When a nation fails to exercise due diligence, it tolerates the unlawful acts of private individuals or groups. State responsibility arises but it is not the same kind of responsibility that occurs when the state itself becomes a direct sponsor or supporter. In the latter case, the state itself is responsible for the terrorist acts while in the former it is not. In the words of Danish International Law Professor Max Sorensen, “the state is internationally responsible not for the acts of

54 Judge John.B.Moore, S.S.Lotus (France V Turkey), PCJJ, Series A, no 10(1927), p.88
55 Corfu Channel Case (United Kingdom.V. Albania), merits, 1949, ICJ, p.18
any private individuals, but for its own omissions, for the lack of “due diligence of its organs.”

International law views state involvement with international terrorism as occurring at four different levels. First, some states violate their obligations of state responsibility by sponsoring or supporting international terrorism through direct state action. These states are responsible for terrorist acts as if the state committed them. Second, some states violate state responsibility by tolerating international terrorism through lack of due diligence. These states are responsible for their own lack of due diligence and not for the terrorist acts themselves. Third, a few states, although they do not violate state responsibility obligations, fail to perform their international duty. These states are incapable of taking effective action against international terrorism. And they are responsible for committing no wrong but neither have they preserved any right.

4.2.3 Definitions

According to Darrel M Trent, Associate Director and Senior Research Fellow, Hower Institution, terrorism has “no shared definition.” Brian Jenkins of the Rand Corporation writes that terrorism is a “fad word used promiscuously….what we have in sum is the sloppy use of a word that is rather imprecisely defined to begin with.” The term terrorism is an emotive word with negative connotations; “Terrorism, like beauty, remains in the eye of the beholder.” According to psychologist H.H.A.Cooper, “terrorism is thus an easily recognized activity of bad character, subjectively determined and shaped by social and political considerations,”

Dutch Political Scientist Alex P Schmid, in political terrorism, reviewed more than 140 definitions of terrorism written between 1936 and 1981. From these he identified 22 elements and 20 purposes or functions of terrorism. The five most frequently identified elements were; violence or force, political purpose, terror or fear, threat and anticipated psychological effects or reactions by third parties. The five most frequently identified purposes or functions were to; terrorize or put the public in fear, provoke indiscriminate repression or countermeasures by established

57 Darrel M. Trent, “Terrorism: Threat and Reality”, Vital Speeches, 46, no 3 (15 November 1979), p.79
58 Brian Jenkins, International Terrorism: A New Mode of Conflict, 1975, p.2
59 Supra Note 43, p.64
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authorities, mobilize the forces of terrorism or immobilize the forces of the established authorities, affect public opinion in a positive or negative way and seize political power or overthrow regimes.60

US government has produced numerous definitions of Terrorism, the three most authoritative are,

(1) The unlawful use or threat of violence against persons or property to further political or social objectives. It is generally intended to intimidate or coerce a government, individuals or groups to modify their behaviour or policies.

(2) Premeditated, politically motivated violence perpetrated against noncombatant targets by sub national groups or clandestine state agents, usually intended to influence an audience.

(3) Unlawful use or threatened use of force or violence against individuals or property, with the intention of coercing or intimidating governments or societies, often for political or ideological purposes.

Is a legal Definition Necessary?

A generally accepted definition of terrorism does not exist in international law. The first attempt at a definition in international law was in the 1937 Convention for the Prevention and Punishment of Terrorism. That Convention defined “acts of terrorism” as “criminal acts directed against a state and intended or calculated to create a state of terror in the minds of particular persons or a group of persons or the general public.”61 Other provision of the convention severally restricted the acts recognized as crimes chiefly to those committed against public officials. The Convention never entered into force and the definition; thought by many to be narrow and unrealistic, became a dead letter.62 From that time until the present, no further definition of terrorism in international law has been formulated. A 1972 United States effort at a Convention on terrorism, which included a legal definition, failed. The most recent UN effort on terrorism, General Assembly Resolution 40/61, 9 December 1985, does not even attempt to define it.63

60 Concerning the factors and assumptions underlying the Rand Corporation’s Statistics on terrorism, see Brian Michael Jenkins, “The Study of Terrorism: Definitional Problems,” 1980, p.5-6
61 See Convention for the Prevention and Punishment of Terrorism, Opened for signature at Geneva, 16 November 1937
63 American Journal of International Law 80, no 2 (April-1986), p.435
International Lawyers are divided whether; the lack of an international law definition of terrorism is a serious problem. But most agree with the Late Judge Richard Baxter, Harvard University Law Professor and Judge of the International Court of Justice (ICJ), that “we have cause to regret that a legal concept of “terrorism” was ever inflicted upon us. The term is imprecise, it is ambiguous, and above all, it serves no operative legal purpose.”\(^{64}\) If one looks at the long history of the UN effort to define aggression, a term that much like terrorism is emotional, value laden, and inextricably intertwined in politics, then one is led to acknowledge the wisdom of Judge Baxter.\(^{65}\)

We can strive to develop definitions for particular documents as required, but we should not be consumed in the task of attempting to write a general all-encompassing legal definition to fully describe such a complex subject. Definitions are merely tools which, in and of themselves, are more or less useful. As long as we have a sense of the social phenomenon of terrorism, a general legal definition may be unnecessary. And although a general international law definition does not exist, we can proceed without one.

**International Terrorism: A Working Definition**

The Department of State defines international terrorism as “terrorism involving citizens or territory of more then one country”. However, the more detailed definition proposed by Brian Jenkins is adopted. He defines international terrorism as:

“incidents in which terrorists go abroad to strike their targets, select victims or targets because of their connection to a foreign state (diplomats, executives or foreign corporation), attack airliners on international flights, or force airliners to fly to another country. It excludes the considerable amount of terrorist violence carried out by terrorists operating within their own country against their own nationals, and in many countries by governments against their own citizens.”\(^{66}\)

As Jenkins notes, “International terrorism in this sense is violence against the ‘system’, waged outside the ‘system’. It is terrorist violence “across international” having “international repercussions: or acts of violence which are outside the

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65 Virginia Journal of International Law, 17, no 2 (1977), p.199
accepted norms of international diplomacy and rules of war” precisely this type of terrorism that is, terrorism projected across national frontiers is the concern of international law. International terrorism is an international law issue.

4.2.4 Levels of State Involvement

Prof John H. Murphy, as noted, ‘the whole issue of state support of international terrorism, however, is badly in need of typology, there are different kinds of state support”. Four levels of state involvement, from greatest to least, are sponsorship, support, toleration, and inaction through in ability to act. Because these levels have not been understood nor carefully delineated in the general literature, some confusion prevails.

State Sponsorship

State sponsorship exists when a state directly uses international terrorism “as another weapon of warfare to gain strategic advantage where they cannot use conventional means.”67 Terrorism “can be another tool for nations to project military and political power. Terrorism becomes an instrument that can be brought into action whenever a state wishes to project its power into the territory of another without accepting the responsibility, accountability, and risks of avowed belligerency”.

State Toleration

State toleration exists when states, although aware of terrorist groups within their borders, do not support them but do not act to suppress them either. Such terrorists groups may be self-supporting or may have foreign sponsors or supporters. They may carry out their terrorist activities primarily abroad having reached an unspoken understanding with the host government.

State support

State support of international terrorism exists when a state uses its resources to provide assistance in the form of training, arms, explosives, equipment, intelligence, safe havens, communications, travel documents, financing, or other logistic support but does not direct terrorist incidents. States give support when they provide capability without assuming control or direction.

67 Shuttz, “Terrorism: The Challenge to Democracies”, address before the Jonathan Institute’s Second Conference on International Terrorism, 24 June 1985
State Inaction

In this particular circumstance, the state does not wish to ignore international terrorists within its borders but lacks the ability (either through inadequate domestic police and military forces or lack of technology) to respond effectively. It may meet this responsibility by inviting another state or regional organization to assist it. If a state is incapable of responding to international terrorism and does not request outside help, then a situation may arise in which assistance may be given without an invitation. The Entebbe hostage rescue is sometimes cited as an example, although there is evidence that president Idi Amin of Uganda may have participated in the hijacking scheme and was not simply unable to act, as many previously have believed.

4.2.5 The Elusive National Counter Terrorism Policy

There can be no effective policy making in security matters unless those in power develop a political vision in which national security takes precedence over short term political gains. In a competitive electoral politics, this will entail pursuing a bipartisan approach so that the national interest does not become politically unaffordable. A political discourse at a higher plane among major political parties on critical security issues, including terrorism, would be necessary for achieving this objective.

The Second Challenge to counter-terrorist policy making emanates from the structural architecture of India’s legal constitutional framework itself. When designed, it did not foresee the type of complex internal security problems, like terrorism, emerging with trans-national and inter-state connectivity. With wars increasingly becoming cost ineffective and unpredictable instruments of achieving politico-strategic objectives, the modern world is witnessing emergence of fourth generation warfare, where the enemy is ‘invisible’- as a substitute. Even the small and weaker states can take on their more powerful adversaries in this asymmetric warfare which largely targets internal security, with terrorism as its most favored weapon. India has been witnessing the Pakistani onslaught of covert action now for nearly there decades.

Thirdly, the very nature of the terrorist phenomenon makes policy-making difficult. The first task of policy making is defining the objectives in tangible and positive terms that are sought to be achieved.
But in fighting terrorism, the state largely achieve negative goals preventing what the terrorists wish to do from happening. This list may include for instance, averting dismemberment or degradation of the state, preventing break down of the constitutional machinery, frustrating terrorist plans to kill citizens and their leader, and striking at vital installations. It will appear ridiculous for a government to claim all that has not happened as the list of their achievements. Success can not be computed on the basic of political goals denied; the innocent citizens who the terrorists could not kill, the leaders who were not attacked and vital installations which the terrorists wanted to destroy but could not.

Terrorists don’t kill in the hope that their depredation will lead to attainment of their political goals, they kill to break the will of the government. Correlation between the policy initiatives taken by the government and their real impact on terrorism is also vague, diffused and a matter of subjective interpretation. For example, the efficacy of counter terrorist laws, structural changes in the security apparatus, role of diplomatic initiatives, political engagement are all difficult to determine, at least in a short run. This provides scope of political decision makers to take positions on political consideration as there are no clear policy rights and wrongs in the battle against terrorists.

The impediments and problems not with standing, gravity of the threat and its grave implication for India’s security demand a policy driven comprehensive national response. To make it happen there is need for the two major political parties to develop a bipartisan approach towards response to terrorism. These parties should also take upon themselves the responsibility of convincing the state governments where they are in power to support legislative measures that could enable the centre to play a more active role in handling terrorism and allied threats.  

4.2.6 Policy Making

International Conventions on Terrorism set out obligations of States in respect to defining international counter terrorist offences, prosecuting individuals suspected of such offences, extraditing such persons upon request and providing mutual legal assistance upon request.

Broadly speaking there are two types of international convention on terrorism. First, there are truly international conventions which are open to

ratification to all states. There are thirteen of these international conventions at present, though as of Feb 2006 only 12 are in force.

Second there are regional multilateral terrorist conventions, such as the Council of Europe Conventions on the Prevention of Terrorism (2006); the Inter American Convention against Terrorism (2002); and the Organization of African Union Convention on the Prevention and Combating of Terrorism (1999) and Protocol (2004).

Other international instruments may also be relevant in particular circumstances, such as bilateral extraditions treaties, the 1961 Vienna Convention on Diplomatic Relations, and the 1963 Vienna Convention on Consular Relations.

There are now a number of important United Nations Security Council and General Assembly Resolutions on international terrorism, including UN Security Council Resolution 1373 and three important Security Council resolutions dealing with Libya’s conduct in connection with the sabotage of Pan Am Flight 103 on December 21, 1988, which includes UN Security Council Resolutions 731 (January 21, 1992); 748 (March 31, 1992) and 883 (Nov 11, 1993).

The following list identifies the major terrorism conventions open to ratification by all states. A brief summary is provided in each case of the principal provisions in each instrument. In addition to the provisions summarized below, most of these conventions provide that parties must establish criminal jurisdiction over offenders. (e.g., the state where the offence takes place, or in some cases the state of nationality of the perpetrator or victim, or in the case of an aircraft, the state of registration)

1. 1963 Convention on Offences and Certain other Acts Committed on Board Aircraft (Aircraft Convention)
   - Applies to acts affecting in flight Safety;
   - Authorizes the aircraft commander when necessary to ensure the safety of the aircraft or its occupants and to maintain good discipline, to impose reasonable measures including restraint on any person he believes has committed or is about to commit certain acts; and
   - Requires contracting states to take custody of offenders and to return control of the aircraft to the lawful commander.

- Makes it an offence for any person on board an aircraft in flight to “unlawfully, by force or threat there of, or any other form of intimidation, to seize or exercise control of that aircraft” or to attempt to do so,
- Requires parties to the convention to make hijackings punishable by requiring parties to the convention to make hijackings punishable by “severe penalties”
- Requires parties that have custody of offenders to either extradite the offender or submit the case for prosecution; and
- Requires parties to assist each other in connection with criminal proceedings brought under the convention.

3. 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (Civil Aviation Convention)

- Makes it an offence for any person unlawfully and intentionally to perform an act of violence against a person on board an aircraft in flight, if that act is likely to endanger the safety of the aircraft; to place an explosive device on an aircraft; to attempt such acts; or to be an accomplice of a person, who performs or attempts to perform such acts;
- Requires parties to the Convention to make offences punishable by “severe penalties”, and
- Requires parties that have custody of offenders to either extradite the offender or submit the case for prosecution.


- Defines an “internationally protected person” as a Head of State, Minister for Foreign Affairs, representative or official of a state or international organization who is entitled to special protection in a foreign state, and his/her family and
- Requires parties to criminalize and make punishable “by appropriate penalties which take into account their grave nature” the intentional murder, kidnapping or other attack upon the person or liberty of an internationally protected person, a violent attack upon the official premises, the private accommodations, or the means of transport of such person; a threat or attempt
to commit such an attack; and an act “constituting participation as an accomplice”.

5. 1979 International Convention against the Taking of Hostages (Hostages Convention)

Provides that “any person who seizes or detains and threaten to kill, to injure, or to continue to detain another person in order to compel a third party, namely, a state, an international intergovernmental organization, a natural or juridical person, or a group of persons, to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage commits the offence of taking of hostage within the meaning of this Convention”.


Criminalizes the unlawful possession, use, transfer or theft of nuclear material and threats to use nuclear material to cause death, serious injury or substantial property damage.

Amendments to the Convention on the Physical Protection of Nuclear Material

- Make it legally binding for states parties to protest nuclear facilities and materials in peaceful domestic use, storage as well as transport; and
- Provide for expanded co-operation between and among states regarding rapid measures to locate and recover stolen or smuggled nuclear material, mitigate any radiological consequences or sabotage, and prevent and combat related offences.


Extends the provisions of the Montreal Convention (see no 3 above) to encompass terrorist acts at airports serving international civil aviation.


- Establishes a legal regime applicable to acts against international maritime navigation that is similar to the regimes established for international aviation, and
• Makes it an offence for a person unlawfully and internationally to seize or exercise control over a ship by force, threat, or intimidation; to perform an act of violence against a person on board a ship if that act is likely to endanger the safe navigation of the ship; to place a destructive device or substance aboard, a ship; and other acts against the safety of ships.


• Criminalizes the use of a ship as a device to further an act of terrorism.
• Criminalizes the transport on board a ship various materials knowing that they are intended to be used to cause, or in a threat to cause, death or serious injury or damage to further an act if terrorism.
• Criminalizes the transporting on board a ship of persons who have committed an act of terrorism; and
• Introduces procedures for governing the boarding of a ship believed to have committed an offence under the convention


Establishes a legal regime applicable to acts against fixed platforms on the continental shelf that is similar to the regimes established against international aviation.


Adapts the changes to the convention for the suppression of unlawful acts against the safety of Maritime Navigation to the context of fixed platforms located on the continental shelf.


• Designed to control and limit the used of unmarked and undetectable plastic explosives.(negotiated in the aftermath of the 1988 Pan Am Flight 103 bombing)
• Parties are obligated in their respective territories to ensure effective controls over parties are obligated in their respective territories to ensure effective control over “unmarked”.

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• Generally speaking, each party must, inter alia, take necessary and effective measures to prohibit and prevent the manufacture of unmarked plastic explosives; prevent the movement of unmarked plastic explosives into or out of its territory, exercise strict and effective control over possession and transfer of unmarked explosive made or imported prior to the entry into force of the convention; ensure that all stocks of unmarked explosives not held by the military or police are destroyed, consumed, marked, or rendered permanently ineffective within three years; take necessary measures to ensure that unmarked plastic explosives held by the military or police are destroyed, consumed, marked or rendered permanently ineffective within fifteen years; and ensure the destruction, as soon as possible, of any unmarked explosive manufactured after the date of entry into force of the convention for that state.

11. 1997 International Convention for the Suppression of Terrorist Bombings (Terrorist Bombing Convention)

   Creates a regime of universal jurisdiction over the unlawful and international use of explosive and other lethal devices in, into, or against various defined public places with intent to kill or cause serious destruction of the public place.

12. 1999 International Convention for the Suppression of the Financing of Terrorism (Terrorist Financing Convention)

   • Requires parties to take steps to prevent and counteract the financing of terrorists, whether direct or indirect, through groups claiming to have charitable social or cultural goals or which also engage in illicit activities such as drug trafficking or gunrunning;
   • Commits states to hold those who finance terrorism criminally, civilly or administratively liable for such acts; and
   • Provides for the identification, freezing and seizure of funds allocated for terrorist activities, as well as for the sharing of the forfeited funds with other states on a case by case basis. Bank secrecy is no longer adequate justification for refusing to cooperate.

• Covers a broad range of acts and possible targets, including nuclear power plants and nuclear reactors,
• Covers threats and attempts to commit such crimes or to participate in them as an accomplice;
• Stipulates that offenders shall be either extradited or prosecuted;
• Encourages state to cooperate in preventing terrorist attacks by sharing information and assisting each other in connection with criminal investigations and extradition proceedings; and
• Deals with both crisis situations (assisting states to solve the situation) and post crisis situations rendering nuclear material safe through the International Atomic Energy Agency (IAEA).

A 14th International Convention is currently under negotiations.

4.2.7 Anti-Terrorism Legislation in India

Anti-terrorism legislation designs all types of laws passed in the purported aim of fighting terrorism. They usually, if not always, follow specific bombings or assassinations. Anti-terrorism legislation usually includes specific amendments allowing the state to by pass its own legislation when fighting terrorism related crimes, under the grounds of necessity. For example, the various UK Terrorist Acts during the Northern Ireland conflict have severally restricted the rights of the defense and of those accused of terrorist acts.

Terrorist and Disruptive Activities (Prevention) Act

The Terrorist and Disruptive Activities (prevention) Act, commonly known as TADA, was an Indian law active between 1985 and 1995 (modified in 1987) for the prevention of terrorist activities in Punjab. It was renewed in 1989, 1991, and 1993 before being allowed to lapse in 1995 due to increasing unpopularity due to wide spread allegations of abuse.69 The Act’s third paragraph gives a very thorough definition of “terrorism”:

“whoever with intent to overawe the government as by law established or to strike terror in the people or any section of the people or to alienate any section of the people or to adversely affect the harmony amongst different sections of the people does any act or thing by using bombs, dynamite or other explosive substance or

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inflammable substances or lethal weapons or poisons or noxious gases or other chemicals or by any other substance (whether biological or otherwise) of a hazardous nature in such a manner as to cause, or as is likely to cause, death of, or injuries to, any person or loss of, or damage to, or destruction of, property or disruption of any supplies or services essential to the life of the community, or detains any person and threatens to kill or injure such person in order to compel the government or any other person to do or abstain from doing any act, commits a terrorist act”.

It had a conviction rate of less than 1% despite the fact that, under criminal law, a confession before a police officer, even though being given under torture, was admissible as evidence in court. A Special Court known as TADA was set up to hear the cases and deliver judgments pertaining to 1993 Bombay bombings.

The legislation was ultimately succeeded by the Controversial Prevention of Terrorist Activities Act (2002-04) which was scrapped by the UPA Government.

**Prevention of Terrorist Activities Act**

The Prevention of Terrorist Activities Act (POTA) was an anti-terrorism legislation enacted by the parliament of India in 2002. The act replaced the Prevention of Terrorism Ordinance (POTO) of 2001 and the Terrorist and Disruptive (Prevention) Act (1985-95) and was supported by the governing National Democratic Alliance. The act was repealed in 2004 by the United Progressive Alliance Coalition.

**Purpose**: The act provided the legal frame work to strengthen administrative rights to fight terrorism within the country of India and was to be applied against any persons and acts covered by the provisions within the act. It was not meant as a substitute for action under ordinary criminal laws.

The act defined what a terrorist act and a terrorist is and grants special powers to the investigating authorities described under the act. To ensure certain powers were not misused and human rights violations would not take place, specific safeguards were built into the act.°° Under the new detention of a suspect for up to 180 days without the filing of charges in court was permitted. It also allowed law enforcement agencies to withhold the identities of witnesses and treat a confession

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made to the police as an admission of guilt. Under regular Indian law, a person can deny such confessions in court, but not under POTA.\textsuperscript{71}

**Repeal and Reintroduced**

Once the Act became law there surfaced many reports of the law being grossly abused.\textsuperscript{72} Claims emerged that POTA legislation contributed to corruption within the Indian Police and judicial System.\textsuperscript{73} Human rights and Civil liberty groups fought against it. The use of the act became one of the issues during the 2004 election. The United Progressive Alliance Government of India committed to repealing the act as part of their campaigning. On October 7, 2004, the Union Cabinet approved the repeal of POTA.\textsuperscript{74} However after the Bombay attacks of November 26, 2008 parliament enacted another anti terror law known as Unlawful Activities (Prevention) Act.

**Prominent POTA Cases**

- Vaiko, a prominent Tamil politician, was controversially arrested under the POTA for his support to the Liberation Tigers of Tamil Eelam.
- After the Mumbai Blasts of August 2003, three suspects were arrested under the POTA Act. The act was repealed the following year in 2004. In July 2006, a series of train bombings occurred in Mumbai. In late November 2008, Mumbai was hit with the worst terrorist attack in recent Indian history. This has led some people to question the wisdom of repealing POTA, as there has been an escalation of terrorist attacks of worsening magnitudes.\textsuperscript{75}
- S.A.R. Geelani, a Lecturer at Delhi University, was sentenced to death by a special POTA court for his alleged role in the 2001 attack on the India Parliament. He was later acquitted on appeal by the Delhi Bench of the High Court on a legal technicality.\textsuperscript{76}
- Raghuraj Pratap Singh, A.K.A. Raja Bhaiya, a mobster and member of the Legislative Assembly of Kunda, India was arrested on the orders of then Chief Minister, Kumari Mayawati. He was sent to jail under POTA.

\textsuperscript{71} Rediff.com. Its goodbye to POTA, Retrieved on July 10, 2007
\textsuperscript{72} Supra Note 69
\textsuperscript{73} “Corruption in Indian Police”, SVP National Police Academy 2004, Retrieved July 9, 2007
\textsuperscript{74} Asian Centre for the Progress of Peoples Appeal update Retrieved, July 9, 2007
\textsuperscript{75} “Bombay on its Knees”, Nazar 2008-11-28, Retrieved on 2008-12-01
\textsuperscript{76} Frontline Targeting Geelani, Retrieved on July 7, 2007


4.2.8 States Focus Future Efforts to Prevent Terrorism

An expert work group in 2004 to consider these changing conditions and a broad range of alternatives to improve terrorism prevention at the state level. As states develop strategies concerning prevention and to a lesser extent, emergency response, they should consider the following recommendations.

Recommendations - Intelligence fusion centers and analysis

States should consider:

- Establishing an intelligence fusion center to improve the collection, analysis and dissemination of information and intelligence for purposes of terrorism and crime prevention and control.
- Pursuing and investing in specialized intelligence analysis and analytical tools to provide a sustained center terrorism capability, expertise and focus.
- Identifying a lead entity such as department, agency or office to coordinate the states critical infrastructure and key asset protection responsibilities.

Recommendations - Working with other law enforcement partners

States should consider:

- Drafting and implementing a state wide counter terrorism program for the law enforcement community that supports the state’s homeland security strategy.
- Developed standardized training programs and tools for state and local law enforcement agencies to improve terrorism prevention and response capabilities.
- Implementing “regional” approaches for homeland security planning and operational purposes.
- Building partnership with key residential and commercial property owners and security personnel to provide them with resources and tools to identify and report suspicious activates.
- Developing and implementing a public education and outreach plan that establishes and formalizes public information policies and procedures that relate to terrorism prevention and response.
- Providing technical assistance and training to local government and the application and administration of homeland security grants.
- Exploring methods to improve communication and collaboration among state law enforcement agencies on national and regional levels.
• Identifying rural law enforcement challenges and solutions, particularly those surrounding agricultural security.

• Supporting and participating in joint terrorism task force structures and activities.

Recommendations- Integration with the criminal justice system

State should consider:

• Recognizing and embracing the “all crimes” approach for terrorism prevention.

• Developing and implementing protocols to leverage all criminal justice and regulatory personal resources and systems in identifying and reporting precursor crimes.

• Pursuing a balanced state law enforcement work force, assigning personnel with specialized skills and expertise for terrorism prevention to general or all purpose law enforcement efforts.

Recommendations- Governance and legal issues

state should consider:

• Examining and updating state laws to aid in terrorism prevention and response efforts.

• Establishing a principal point of oversight and review for homeland security through legislative committee or multi-branch commissions.

• Codifying the states strategic homeland security planning structures, processes and responsibilities into law.

• Examining and updating public record laws to ensure the adequate protection of private sector information and documents gathered or sent for homeland security purposes.

• Drafting a comprehensive volume of model state terrorism laws to provide states with a benchmark for measuring effectiveness of existing counter terrorism statutes.

Recommendations- other homeland security priorities

State should consider:

• Ensuring the sustainability of homeland security initiatives.

• Adopting and Supporting the National Incident Management System (NIMS) and Incident Command System (ICS)
• Enhancing the integrity of driver’s license documents and systems by supporting national standards for physical security features and state level issuance requirements.

• Adhering to the “dual use” rule of thumb for the purchase and procurement of homeland security equipment.

4.3 State Responsibility for the Treatment of Aliens

The law of state responsibility is one of the most complex areas of international law, in terms of both articulating and implementing its principles. Traditionally, the term “state responsibility” referred only for injuries to aliens. It included not only “secondary” issues such as attribution and remedies, but also the primary rights and duties of states, for example the asserted international standard of treatment and the rights of diplomatic protection. The most significant recent development in international legal studies has undoubtedly been the collapse of the intellectual barrier between the disciplines of international law and international relations. The consequences of a breach of international law have been considered generally to relate only to the states that suffer injury as a result of the breach. State responsibility arises when one state breaches its international law duty by infringing on the rights of another state.

Early efforts by the League of Nations and private bodies to codify the rules of “state responsibility” reflected the traditional focus on responsibility for injuries to aliens. The league’s 1930 codification conference in The Hague was able to reach an agreement only on “secondary” issues such as imputation, not on substantive rules regarding the treatment of aliens and their property. The process of the work is dealing with their positions and rights under international law. Internationally state responsibility attaches to breach of international obligations contained in customary law or treaties, such as multilateral environmental agreements or the humanitarian conventions. The concept of collective interest potentially, provides a valuable tool for promoting human-rights enforcement in international law. Over the past century, there has been a growing consensus that the international community as a whole has a collective interest in the fulfillment of certain fundamental human-rights obligations.

Attempts to codify and develop the rules of state responsibility have continued throughout the life of the United Nations. It took nearly 45 years, more than thirty reports, and extensive work done by five Special Rapporteurs for the ILC to reach agreement on the final text of the Draft Articles as a whole, with commentaries.

At the same time, the customary international law of state responsibility concerning the matter such as detention and physical ill treatment of aliens and their right has been rendered less important than formerly by lank, which applies to all individuals, whether aliens or nationals. The concept of a general regime of legal responsibility, which the rules of state responsibility have taken on is an inception of the civil law system and is largely foreign to the common law tradition.

4.3.1 The Treatment of Allies

The question of the protection of foreign nationals is one of the issues in international law most closely connected with the different approaches adapted to international relations by the western and third world nations. Developing countries, as well as Communist Countries formerly have long been eager to reduce what they regard as the privileges accorded to capitalist states by international law. They lay great emphasis upon the sovereignty and independence of states and resist the economic influence of the west. The latter, on the other hand, have wished to protect their investments and nationals abroad and provide for the security of their property.\(^78\)

The diplomatic protection of nationals abroad arose after the decline of the grant of special letters of reprisal, by which individuals were authorized to engage in self help activities.\(^79\) Such diplomatic methods of assisting national abroad developed as the number of nationals overseas grew as a consequence of increasing trading activities and thus the relevant state practice multiplied. In addition, since the US-UK Jay Treaty of 1794 numerous mixed claims commissions were established to resolve problems of injury to aliens,\(^80\) while a variety of national claims commissions were created to distribute lump sums received from foreign states in settlement of

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79 See also the Marrommatis Palestine Concessions Case, PCIJ, Series A, No2, 1924; ILR, p.398
Such international and national claims procedures together with diplomatic protection therefore enabled nationals abroad to be aided in cases of loss or injury in state responsibility situations.  

4.3.2 International Law Regarding State Responsibility for Injuries to Aliens

The subject of state responsibility for injuries to aliens has been of interest to legal commentators since the late eighteenth century. Not until Emmerich de Vattel proclaimed that “whoever uses a citizen ill in directly offends the state, which is bound to protect this citizen”, has this area of law been recognized as a subject fit for customary international law. Although a theoretical basis and a large body of arbitral decisions exist, state treatment of aliens is a legal topic which has been eluded codification.

The institution of diplomatic protection developed as an alternative to state sanctioned individual self-help which had been previously used to recapture a national’s private property taken by a foreign government. Diplomatic protection was recognized at an early time by de Vattel and later was reaffirmed as an elementary principle of international law by the Permanent Court of International Justice in the case of the Mavrommatis Palestine Concessions. As diplomatic protection developed in the late nineteenth and early twentieth centuries, it was influenced by the ‘Great Powers’ of western, whose influences included many instances of abuse. This abuse of diplomatic protection took the form of a more powerful nation asserting its strength over of weaker nation, regardless of the merits of the foreign investors claim. This domination led many critics to throw aside the entire institution as an alternative to the treatment of aliens in international law.

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81 See also the US- People’s Republic of China Claims Settlement Agreement of 1979, DVSPIL, 1979, pp.1213-15, and Whiteman, Digest Vol.VIII, pp.933-69
82 Note the establishment of the UN Compensation Commission following the ending of the Gulf War in 1991 to enable the Settlement of Claims arising out of that conflict.
85 Supra Note 83, p.11-14, (1984)
87 See Manley. O. Hudson, The Permanent Court of International Justice, 420 at 397, (Arno press 1972) (1943), (discussing first Marrommatis Case)
The European States asserted, and still claim today, that the rules regarding diplomatic protection are based on the theories of justices and equality. Critics generally assert two basic arguments against that claim. Procedurally, the critics, especially in Latin America, argue against the institution of diplomatic protection itself, because they regard it as an oppressive burden. At a substantive level, they argue that the state is required only to accord such treatment to aliens as it does to its own nationals. This position, adopted mainly in Latin America, ignores any international minimum standard of treatment and allows individual nations to establish any level of treatment toward aliens, since each is free to determine at what level it will treat its own nationals.

4.3.3 State Responsibility for Injury to Aliens

Under international law it is generally agreed that aliens living in a state should also be conferred upon the same rights which are given to the citizens. It is the responsibility of the state to protect rights of the aliens in the same way as they protect the rights of their citizens. State responsibilities towards aliens may be of following types.

(a) State Responsibility for Acts of Private Individuals

under international law, each state is under a duty to exercise due diligence to prevent its own subjects as well as foreign subjects who live within its territory from committing injurious acts against other states. While the state responsibility for official acts of administrative officials and members of armed forces is extensive, responsibility for private persons is limited because in practice it is impossible for a state to prevent a private person from committing injurious act against a foreign state. The duty of the state is simply to exercise due diligence and where injurious acts have nevertheless been committed, to procure satisfaction and reparation for the wronged act, as far as possible by punishing the offenders and compelling them to pay compensation, if necessary. If the citizens of a state cause some damage or harm to an alien in that state that alien gets the right to file the suit for compensation according to law of that state. Thus in such a situation the state tribunals protect the

89 Supra Note 83, p. 17-19, 21 (1984)
90 Ibid at 18-19
91 Ibid at 20
93 See Oppenheim’s, International Law, note 1, at p.549
rights of aliens. It may be noted here that the decisions of the state courts are binding upon the aliens in the same way as they are binding upon the citizens of the state. But if the decision of a state tribunal is arbitrary and against justice, the alien person has a remedy to approach his home state to settle the matter through political means and ensure that the matter is decided in accordance with the principles of international law. Since in such matters the political matter are involved, it would not be correct to say that there is any state responsibility in this connection.

(b) State Responsibility for Acts of Mob Violence

State responsibility for acts of mob violence is same as for acts of private individuals. Generally, state may be held responsible for mob violence only when it has not made due diligence to prevent it. “Out breaks of mob violence resulting in injury to the aliens raise regularly the question of prevention as well as redress. While occasional outbreaks of mob-violence may be accepted in any state, and their mere occurrence is not of itself a ground of responsibility the state is expected to use ‘due diligence’ to prevent them”. But this test is very uncertain and ambiguous. ‘Due diligence’ to prevent mob-violence depends upon the time, facts and circumstances. “What constitutes ‘due diligence’ is a question of time and circumstances. This test is so ambiguous that after jurists express the view that there is no state responsibility in respect of mob-violence. But this view is not correct. Some countries such as England and America do not support this view. If the alien person is some officer of foreign country then the state responsibility is further increased.

The reporteur for the ILC on state responsibility, Garcia Amador, concludes that the basic principle is that there is a presumption against responsibility and proposes the following provision: “the state is responsible for injuries caused to an alien in consequence of riots, civil strife or other internal disturbances if the constituted authority was manifestly negligent in taking the measures which, in such circumstances are normally taken to prevent or punish the acts in question”. There is some authority for the view that the granting of an amnesty to rebels constitutes a failure of duty and an acceptance of responsibility for their acts on the basis of a form of estoppels but in many cases this inference will be unjustified.

95 Ibid at p.339
96 Supra Note 92. p.138
Reference may also be made here to the case concerning *United States Diplomatic and Consular Staff in Tehran* 

which involved the acts of rioters and other militants who attached and occupied U.S. diplomatic and consular premises in Iran. The rioters and militants also seized the occupants and held them as hostages. Since the rioters and militants were persons without official status in the initial stages their acts could not be imputed to the state, the ICJ held Iran not responsible for the initial stages of their acts. But subsequently the situation changed when the militants became agents of the state and hence Iran was held responsible for their acts. The world Court also held Iran responsible for breach of its international responsibility to take steps to protect American diplomatic premises and to restore statuesque.

**(c) State Responsibility for Acts of Insurgents**

So far as the state responsibility for the acts of insurgents is concerned, the general rule is that it is the responsibility of the states to try to prevent the violent acts of the revolutionaries. But there is a controversy that if states are not able to prevent violent activities, whether they will be responsible or not.

According to Fenwick, state responsibility for the acts of insurgents is different from state responsibility for the acts of mob violence when there is a revolution or to put it to prevent it because it is in the interest of the state to suppress it. In the words of Fenwick, “the very existence of organized revolution raises a presumption of ‘due diligence’ on the part of the state in suppressing it, since the government had an immediate interest in such an open attack upon its authority.”

As pointed in the Ninth Edition of Oppenheim’s International Law, where the aim of insurrection or rebellion is to overthrow of government, position in principle is the same as for rioters and acts of mob violence. “The state is not responsible for acts of the insurrectionists, but is only obliged to exercise due diligence to prevent, or immediately crush the insurrection, and to punish those responsible for injury to foreigners.”

**4.3.4 Nationality of Claims**

The doctrine of state responsibility rests upon twin pillars the attribution to one state of the unlawful acts and omissions of its officials and its organs (legislative,
judicial and executive) and the capacity of the other state to adopt the claim of the injured party.\textsuperscript{100}

Nationality is the link between the individual and his state as regards particular benefits and obligations. It is also the vital link between the individual and the benefits of international law. Although international law is now moving to a stage whereby individuals may acquire rights free from the interposition of the state, the basic proposition remains that in a state oriented world system, it is only through the medium of the state that the individual may obtain the full range of benefits available under international law, and nationality is the key.

A state is under a duty to protect its national and it may take up their claims against other states. However, there is under international law no obligation for states to provide diplomatic protection for their national abroad.\textsuperscript{101} In addition, once a state does this the claim then becomes that of the state. This is a result of the historical reluctance to permit individuals the night in international law to prosecute claims against foreign countries, for reasons relating to state sovereignty and non interference in internal affairs.

This basic principle was elaborated in the \textit{Mavromattes Palestine Concessions Case}.\textsuperscript{102} The PCIJ pointed out that:

“by taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceeding on his behalf, a state is in reality asserting its own rights, it right to ensure, in the person of its subjects, respect for the rules of international law”.

Indeed, diplomatic protection was an elementary principle of international law. Once a state has taken up a case on behalf of one of its subjects before an international tribunal, in the eyes of the latter the state is sole claimant. The corollary of this is that the right of a state to take over claims is limited to intervention on behalf of its own nationals. Diplomatic protection may not extend to the adoption of claims of foreign subjects. Such diplomatic protection is not a right, but merely discussions exercised or not by the state as an extra legal remedy.\textsuperscript{103} On the other

\textsuperscript{100} Supra Note 93, p. 511 and Brownlie, \textit{Principles}, pp.480-94
\textsuperscript{101} See e.g. \textit{HMHK v Netherlands}, 94 I L R, p.342 and \textit{Commercial F S A v Council of Ministers}, 88 ILR, p.691
\textsuperscript{102} PCIJ, Series A, no. 2 1924, p.12, See the \textit{Panevezys-Saldutiskis Case}, PCIJ, series A/B, No 76; 9 ILR, p.308. See also E.de. Vattel, who noted that 'whoever ill-treats a citizen indirectly injures the state, which must protect that citizen', \textit{The Law of Nations}, 1916 trans, p.136
\textsuperscript{103} Supra note 80, p.563
hand it exercises can not be regarded as intervention contrary to international law by
the state concerned.

The scope of a state extends its nationality to whomsoever it wishes is
unlimited, except in so far as it affects other states. In the Nottenbohm Case\textsuperscript{104}, the
ICJ decided that only where there exist a genuine link between the claimant state and
its national could the right of diplomatic protection arise.

The Court emphasized that according to state practice, nationality was a legal
manifestation of the link between the person and the state granting nationality and
the recognition that the person was more closely connected with that state than with
any other.\textsuperscript{105}

4.3.5 Standard of Treatment

A state is not required to admit foreign nationals. Once aliens are admitted,
however, if a state should then fail to treat foreign nationals in a required way, it may
be held guilty of having breached an international obligation. This was endorsed by
the General Assembly in 1985 in the Declaration on the Human Rights of Individuals
who are not nationals of the country in which they live articulate the fundamental
human rights to be observed by the host state.

Aliens are assured of certain rights, such as the right of equality within the
judicial process and protection from torture, cruel or inhuman treatment, of course,
required to observe the laws of the host state and to do so with respect for the
customs and traditions of that country.\textsuperscript{106} The \textit{erga omnes} character of these
international obligations, i.e., their opposability to all members of global society,
illustrates the interest of the international community as a whole. The concept of
community interest has its roots in early writings in international law and its modern
application is inherent in two concepts; \textit{Jus Cogens} and obligations \textit{erga omnes}. \textit{Jus
Cogens} are peremptory norms of international law. These “higher norm” impose
obligations that cannot be compromised, such as the prohibitions on the use of force,
genocide, slavery, racial discrimination, and torture. Though concepts such as \textit{Jus
Cogens} and obligations \textit{erga omnes}, individuals who otherwise are voiceless and
powerless to define their rights to find a voice in the international community.

\textsuperscript{104} ICJ Reports, 1955, p.4; 22 ILR, p. 349, The court emphasized that to exercise protection, e.g. by
applying to the court, was to place oneself on the plane of international law. Ibid p.16
\textsuperscript{105} ICJ Reports, 1955, p.23; 22 ILR, p. 359
(a) National Treatment Standard

According to the national treatment standard, aliens are to be treated in the same way as nationals of the state concerned, obviously, if applied consistently, this would be to the advantage of aliens. However, international law does not regulate a state treatment of aliens in all activities for example aliens in the United Kingdom may not vote nor may they be admitted to public office. The disadvantage of the national treatment standard is obvious. A state could subject to an alien to inhuman treatment and justify such treatment on the grounds that nationals could be similarly treated. Thus, international arbitration tribunals and developed western state have denied that a state can exonerate itself by pleading that national are treated likewise, if the treatment of aliens falls short of the international minimum standard.107

(b) International Minimum Standard

Definition of internal minimum standard is not effectively defined under international law. An attempt to do so was made in 1957 when the ILC debated the second report on state responsibility of its special reporteurs.108 In the report, an article which embraced both the national minimum standard and the international minimum standard was proposed.

States were to afford to aliens the same treatment as that enjoyed by nationals, but in no circumstances was such treatment, “to be less than the fundamental human rights’ recognized and defined in the contemporary international instruments. The ILC has concentrated its attention on the codification of general principles of responsibility.

A state may incur responsibility if an alien is physically ill treated,109 or if an alien’s property is damaged.110 A state may also incur responsibility if an alien suffers maladministration of justice, for example is denied assistance of counsel, or denied adequate protection. Liability will only be incurred if the lack of protections has been either will full or due to neglect.111

The international standard concept itself developed during the nineteenth century and received extensive support in case laws.

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107 Roberts Claim, 4 R.I.A.A.77, (1926)
109 Robert Claim, Supra Note, 107; Quintanilla Claim (Mexico V U.S) 4 R.I.A.A.101 (1926)
111 Noyes Claim (U.S.V.Panama); James Claim (U.S. V Mexico), 4 R.I.A.A. 82 (1926)
In the Neer Case\textsuperscript{112}, America Superintendent of a mine in Mexico had been killed; the commission held that, the propriety of governmental acts should be put into the test of international standards. In German Interests in Polish Upper Silesia Case,\textsuperscript{113} the court recognized the existence of a common or generally accepted international law respecting the treatment of aliens, which is applicable to them despite municipal legislations. In the Garcia Case\textsuperscript{114}, the US Mexican Claims Commission emphasized that there existed an international standard concerning the taking of human life. The reference was made in the Roberts Claim,\textsuperscript{115} to the test as to whether aliens were treated in accordance with ordinary standards of civilizations.

States do enjoy discretion to deport aliens if the presence of such aliens is a threat to the public interest. It is also unquestioned that a state may legitimately refuse to admit aliens or may accept them subject to certain conditions being fulfilled.

A progressive attempt to resolve the divide between the national and international standard proponents was put forward by Garcia Amador in a report on international responsibility to the ILC in 1956. He argued that the two approaches were now synthesized in the concept of the international recognition of the essential right of man.\textsuperscript{116} He formulated two principles; first, that aliens had to enjoy the same rights and guarantees as enjoyed by nationals, which should not in any case be less than the fundamental human rights recognized and defined in international instruments; secondly, international responsibility would only be engaged if internationally recognized fundamental human rights were affected.\textsuperscript{117} This approach did not prove attractive to the ILC at that time in the light of a number of problems. However, human rights law has developed considerably in recent years and can now be regarded as establishing certain minimum standards of state behaviors with regard to civil and political rights, for examples that the relevant instruments do not refer to nationals and aliens specifically, but to all individuals within the territory and subject to the jurisdiction of the state without discrimination.\textsuperscript{118}

\textsuperscript{112} 4 RIAA, p.60, (1926); 3 AD, p.429
\textsuperscript{113} PCIJ, Series A, No.7 1926; 3 AD, p.429
\textsuperscript{114} 4 RIAA, p.119, (1926), See also the Chattin Case, 4 RIAA, p.282, (1927), 4 A.D. p.248
\textsuperscript{115} 4 RIAA, p. 77, (1926); 3 AD. p.227
\textsuperscript{116} Year Book of the ILC, 1956. Vol. II, pp. 173, 199-203
\textsuperscript{117} Year Book of the ILC, 1957, Vol 11, pp.104, 112-13
\textsuperscript{118} Article 2 of the International Covenant on Civil and Political Rights, 1966 and article 1 of the European Convention on Human Rights, 1950.
A number of cases assert that states must give convincing reasons for expelling an alien. In the *Baffolo Case*\(^{119}\), which concerned an Italian expelled from Venezuela, it was held that states possess a general right of expulsion, but it could only be resorted to in extreme circumstances and accomplished in a manner injurious to the person affected. In addition the reasons for the expulsion must be stated before an international tribunal when the occasion demanded.

Many municipal systems provide that the authorities of a country may deport aliens without reasons having to be stated. It is important to note that individual and state responsibility are separate concepts and do not prejudice one another. Evidence of this assertion appears in the ICJ decision *Military and Paramilitary Activities in and against Nicaragua*, which addressed state responsibility for the violation of international humanitarian law, but not individual responsibility.

### 4.3.6 Doctrine of Imputability

A state is liable only for its own acts and omissions and in this context; the state is identified with its governmental apparatus not with the population as a whole. If the police attack a foreigner, the state is liable if private individuals attack a foreigner, the state is not liable.

The governmental apparatus of the state includes the legislature and the judiciary as well as the executive and it includes local authorities as well as central authorities. Impunity is certainly an insult to the collective memory and to the historical truth, through which people defend the values of human life and dignity and stigmatize crime as one of the forms of exercising politics. But impunity is not only a problem from the past; it is also a phenomenon directly relevant in the present and above all, in the future. Impunity is the caution offered so that violations of human rights can go on forever.

A state is liable for the acts of its officials only if those acts are ‘imputable’ to the state. The idea of ‘imputability’ creates problems when officials exceed or disobey their instructions provided that they are acting with the apparent authority or that they are abusing powers or facilities placed at their disposal by the state.

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In ‘Youmans Case,’ Mexico sent troops to protect Americans from a mob, but instead of protecting the Americans, the troops, led by a lieutenant, opened fire on them. Mexico was held liable, because the troops had been acting as an organized military unit, under the command of an officer. On the other hand, if the troops had been off duty, their acts would probably have been regarded merely as the acts of private individuals.

In principle, a state is not responsible for the acts of private individuals, unless they were in fact acting on behalf of the state or exercising elements of governmental authority in the absence of government officials and under circumstances which justified them in assuming such authority.

The acts of private individuals may also be accompanied by some act or omission on the part of the state for which the state is liable. Such act or omission may take one of six forms.

1. Encouraging individuals to attack foreigners.
2. Failing to take reasonable care to prevent the individuals.
3. Obvious failure to punish the individuals.
4. Failure to provide the injured foreigners with an opportunity of obtaining compensation from the wrong doers in the local courts.
5. Obtaining some benefit from the individuals act.
6. Express ratification of the individual’s act, i.e. expressly approving it and stating that, persons was acting in the name of the state.

4.3.7 En Masse of Aliens

In contrast to individual expulsion of an alien, expulsion en masse of aliens may also take place. International law does not prohibit the expulsion en masse of aliens. However, en masse expulsions should be avoided in view of the fact that it is treated as an unfriendly act and in some cases may amount to breach of human rights. When President Amin of Uganda ordered for the expulsion of Asians of non Ugandan nationality, his action could not be challenged, though he was criticized vehemently for his action. It is submitted that en masse expulsion must be condemned. It should be avoided so that the relations between the states may remain friendly.

120 Peter Malanczuk, Modern Introduction to International Law, (7th Ed), p.234
4.3.8 Expropriation of the Property of Aliens

Under international law, expropriation of alien property is legitimate. Expropriation is the compulsory taking of private property by the state. Initially includes “all movable and immovable property, whether tangible, or intangible, including industrial, literary and artistic property as well as rights and interests in any property” but not, however, rights derived from contracts.

Expropriation extends beyond the actual physical taking of property to include any action which unreasonably interferes with the use, enjoyment or disposal of property. The application of taxation and regulatory measures designed specifically to deny the effective use of private property may be referred to as creeping, constructive or indirect expropriation.

Expropriation, particularly in the post-colonial period, became an important issue in international law. Both developed and developing states recognize that every state has a legitimate right to expropriate property, but while the developed states of the western tradition maintain that expropriation is only legitimate if it complies with an international minimum standard and if particular, it is accompanied by effective compensation the developing new states deny this. The expropriation must be for ‘reasons of public utility, judicial liquidation and similar measures’ as noted in the certain German interests in Polish Upper Silesia Case.

The ‘Calvo’ Clause

The Calvo Clause, which was named after its originator, an Argentinean Jurist and Statesman, was frequently included in agreements between Latin American States and foreigners.

Under the Calvo Clause foreigners accepted in advance that in the event of dispute they would not attempt to invoke the assistance of their national state. The Calvo Clause purported to deny a state its right to exercise diplomatic protection on behalf of one of its nationals. The validity of the Calvo Clause has been refuted in international tribunals which have maintained that an individual is not competent to fetter its state in such a way and that the rights of diplomatic protection and of its exercise belong exclusively to the state of nationality.

122 Art.10 (7), 1961 Harvard Draft Convention
123 Art.10 (3) (a), 1961 Harvard Draft Convention
124 Supra Note 106, p.177
125 North American Dredging Co. Claim (U.S.Mexican) 4RIAA 26, at 29(1926).
4.3.9 Exhaustion of Local Remedies

It is an established rule of customary international law that before diplomatic protection is afforded, or recourse may be made to international arbitral or judicial processes, local remedies must be exhausted.

The reason behind the rule is to allow the state concerned the opportunity to afford redress within its own legal system for the alleged wrong, to reduce the numbers of possible international claims and respect for the sovereignty of states.

Local remedies means, “not only reference to the courts and tribunals; but also the use of the procedural facilities which municipal law makes available to litigants before such courts and tribunals. It is the whole system of legal protection, as provided by municipal law.

The requirement to exhaust local remedies provides the wrong doing state with the opportunity to redress the injury using domestic remedies and helps avoid a potential flood of international claims.\(^{126}\)

A chamber of the ICJ Summarized the rule in the ELSI Case, for an international claim to be admissible, it is sufficient if the essence of the claim has been brought before the competent tribunals and pursued as far as permitted by local law and procedures without success.

The rule applies equally in human rights cases before bodies such as the Human Right Committee. In Dixit. V. Australia, the committee found that the complaint had not exhausted all available local remedies by failing to initiate proceeding in the federal court to review the decision of the minister rejecting a migrant visa to his family for health reasons.

The requirement of the exhaustion of local remedies only applies to indirect wrongs and is not relevant where the claimant state has suffered direct injury. For example, a breach of a treaty obligation would normally be considered amount to a direct wrong, but where the treaty is invoked on behalf of, nationals the local remedies rule generally still apply.\(^{127}\)

4.3.10 General Principles as to Protection of Citizens Abroad

The rules of state responsibility under this head depend on keeping a proper balance between two fundamental rights of states;

\(^{126}\) Sam Blay, Ryszard Piotrowicz and Martin Tsamenyi: *Public International Law*, (2nd Ed), p.125
\(^{127}\) ILC Draft Articles 8 and 11
i) the right of a state to exercise jurisdiction within its own territory, free from control by other states,

ii) the right of a state to protect its citizens abroad.\textsuperscript{128}

Most frequently claims are laid on the basis of what is termed “denial of Justice”.\textsuperscript{129} In broad sense, the term covers all injuries inflicted on citizens abroad in violation of international justice, whether by judicial, legislative or administrative organs, for example, maltreatment in goal, or arbitrary confiscation of property, but in its narrow and more technical sense it connotes misconduct or inaction on the part of the judicial agencies of the respondent state, denying to the citizens of the claimant state the benefits of due process of law.

In the \textit{Chattin Claim} (1927)\textsuperscript{130} the United States Mexico General Claims Commission found that a denial of justice had occurred on México’s part, and it cited certain facts in support.

“Irregularity of court proceeding is proven with reference to the absence of proper investigations, the insufficiency of confrontations, withholding from the accused the opportunity to know all of the charges brought against him, undue delay of the proceedings, making the hearings in open court a mere formality, and a continued absence of seriousness on the part of the court.”

The Commission also pointed out that the relevant procedure followed was insufficient by international standards. Similarly, in the Cutting Case, the United States intervened with Mexico in regard to the trial of an American citizen who had been arrested on a charge of criminal libel.\textsuperscript{131}

Important in this connection is the matter of exhaustion of local remedies, particularly where claims for denial of justice are brought before international tribunals. It appears to be the rule that no state should intervene or claim in respect of an alleged denial of justice to a national or other wrong until all local remedies open to that national have been exhausted without result. Another consideration is that

\textsuperscript{128} See Advisory opinions of the International Court of Justice, Reparation for Injuries suffered in the service of the United Nations, I.C.J. Reports, (1949), at pp. 174

\textsuperscript{129} Freeman, \textit{The International Responsibility of States for Denial of Justice}, (1938)

\textsuperscript{130} American Journal of International Law, (1928), Vol, 22, p.667

\textsuperscript{131} A mere error in judgment of an international tribunal does not amount to a denial of Justice; see the Salem Case , (1932), United Nations Reports of International Arbitral Awards, Vol II. at p.1202
every opportunity for redress in the municipal sphere should be sought before the matter assumes the more serious aspect of a dispute between states.

A detailed consideration of the local remedies rule lies outside the scope, but certain principles may be briefly formulated;

a) a local remedy is not to be regarded as adequate and need not be resorted to if the municipal courts are not in a position to award compensation or damages,

b) a claimant is not required to exhaust justice if there is no justice to exhaust,

c) Where the injury is due to an executive act of the government as such, which is clearly not subject to the jurisdiction of the municipal courts, semble the injured foreign citizens are not required to exhaust local remedies.

On the other hand, as the Ambatielos Arbitration (1956), between Greece and Great Britain shows, a local remedies are not exhausted if an appeal to a higher court is not definitely pressed or proceeded with, or if essential evidence has not been adduced, or if there has been significant failure to take some step necessary to succeed in the action.

According to the decision of the ICJ in the Interhandel (preliminary objections) Case, the local remedies rule applies a fortiori where the national of the claimant state concerned is actually in the course of litigating the matter before the municipal courts of the respondent state, and the municipal suit is designed to obtain the same result as in the international proceedings. Moreover, the rule applies even though the municipal courts may be called upon to apply international law in reaching a decision on the matter.

4.4 State Responsibility and Human Rights

Law is for men, but men are not for law. So long a man does not depart from the vices of selfishness, bruteness and quarrels, the rules and regulations shall apply to regulate his conduct. The history of mankind has been firmly associated with the struggle of individuals and communities against injustice, exploitation and disdain. The recognition at national and later at international level of human rights is one of the most remarkable manifestations of this struggle.

132 American Journal of International Law, (1956), Vol, 50, pp.64-679
133 I.C.J. Reports (1959), 6
Article 29 of the Universal Declaration of Human Rights itself recognizes that ultimate goal of international effort is in meeting the just requirements of morality, public orders and the general welfare in a democratic society various international covenants provide an international procedural status to individual for proper and effective implementation of human Rights. The actual realization of these human rights can be accomplished in their own communities and in their own conditions of social life. In earlier usage, the word “Right” and a legal connotation, for example, the individual had an “inalienable” right to life and he could not be deprived of that right by the state without due process of law.

Today, the word “right” has also the connotation of goal, for example; the individual has the right to free education, free legal aid, pollution free environment, free medical care etc which the state is expected to provide on the whole, we can say that “Human Rights” are rights which are entrusted with by virtue of human being, with the individual, quest for justice, quality of liberty for the fullest development of his personality. Furthermore, protection and implementation of human rights is a legal problem which requires the definition and codification of rights in the form of municipal laws and treaties.

Human rights are declared to be universal, yet state responsibility for their violations is limited by territoriality as well as by citizenship. Each state is responsible for human rights violation occurring in its own territory. In contrast, state responsibilities with regard to citizens of other states are vague and weak. Individuals can claim and enforce rights against their own state. However, non-resident, non-citizens can only claim and enforce rights against other states through their own state.

International law is designed to make each state responsible for the human rights protection of its own population; this includes litigation for violations targeting another state. Territoriality of law conflicts with the postulated universality of human rights because individuals cannot hold a state other than their own responsible for violating their rights; it is their state that should hold another responsibility. The limitation upon universal human rights stemming from territoriality of law is complemented by the institution of citizenship as the basis of the individual’s legal

135 Dr.V. Chandra, Human Rights, 1999, I Edition p.3
relationship with a particular state. Although individual rights and freedoms should be recognized for all humans, differences between the rights of citizens and non-citizens are substantial, and they seem to be increasing. However, some human rights obligations of state have been extended beyond their territorial borders.

For centuries the notion of “state sovereignty” was used as a shield by oppressive governments. But after World War II, this conception of sovereignty has changed. However, the notion of sovereignty still serves to protect against some forms of state responsibility, only now it is for more likely that countries will invoke the sovereignty of another state in order to remove themselves from any and all responsibility in assisting an outlaw state. As a result, countries have been able to do things in the international realm that they would be prohibited from doing domestically.\textsuperscript{137} For this reason an efforts has been made to develop and strengthen state responsibility, which we deem crucial for universal enforcement of nominally universal human rights.

4.4.1 Meaning of Human Rights

Human beings are rational beings. They by virtue of their being human possess certain basic and inalienable rights which are commonly known as human rights. Since these rights belong to them because of their very existence, they become operative with their birth.

Human rights, being the birth rights, are therefore inherent in all the individuals irrespective of their caste, creed, religion, sex and nationality. These rights are essential for all the individuals as they are consonant with their freedom and dignity and are conducive to physical, moral, social and spiritual welfare. They are also necessary as they provide suitable conditions for the materials and moral uplift of the people. Because of their immense significance to human beings, human rights are also sometimes referred to fundamental rights, basic rights, inherent rights, natural rights and birth rights.\textsuperscript{138}

The idea of human rights is bound up with the idea of human dignity. Thus all those rights which are essential for the maintenance of human dignity may be called human rights. Human rights are, therefore based on elementary human needs

137 Ibid p.2
as imperatives. Some of these human needs are elemental for sheer physical survival and health others are elemental for physical survival and health.

Right being immunities denote that there is a guarantee that certain things cannot or ought not to be done to a person against his will. According to this concept, human beings, by virtue of their humanity, ought to be protected against unjust and degrading treatment. In other words, human rights are exemptions from the operation of arbitrary power. An individual can seek human rights only in an organized community, i.e., state, or in other words, where the civil social order exists.

The need for the protection has arisen because of inevitable increase in the control over men’s action by the governments which by no means can be regarded as desirable. One of the achievements of the contemporary international law is to recognize the human dignity and honour.

Human rights are not created by any legislation; they resemble very much the natural rights. Any civilized country or body like the United Nations must recognize them. They cannot be subjected to the process of amendment even. The legal duty to protect human rights includes the legal duty to respect them. Members of U.N. have committed themselves to promote, respect for and observance of human rights and fundamental freedoms.  

4.4.2 The Applicability of the General Rules of International Law on State Responsibility to Human Right Cases

The question as to whether the general rules of international law on state responsibility have application to human rights violations committed by any persons has generated two opposing responses. According to one, propounded by such scholars as Andrew Clapham, these rule “should not be considered appropriate’ in the context of, for example, the European Convention for the Protection of Human Rights and Fundamental Freedoms. The other response, which the present author also, supports, posits that the general rules on state responsibility have application to international human rights law. Many scholars including Nicola Jagers, Viljam Engstrom and Celina Romany, favour this position.

Article 12 of the Draft Articles stipulates that there is a breach of an international obligation when an act of the state “is not in conformity with what is

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required of it by that obligation, regardless of its origin or character’. In Rainbow Warrior (New Zealand V France)\(^{141}\) it was held that ‘any violation by a state of any obligation, of whatever origin, gives rise to state responsibility and consequently to the duty of reparation.’\(^{142}\) Likewise, in Goobcivo –Nagymaras Project (Hungary V Slovakia) (Merits)\(^{143}\), the I C J considered it well established that ‘when a state has committed an internationally wrongful act, its international responsibility is likely to be involved whatever the nature of the obligation it has failed to respect.’\(^{144}\) This jurisprudence embraces the view that a violation of an international human rights obligation can give rise to state responsibility. Moreover, Rick Lawson has demonstrated that in practice, international human rights monitoring bodies apply the general rules of state responsibility to human rights cases, albeit without expressly referring to them.\(^{145}\)

On the basis of these authorities, human rights law and the general international law principles of state responsibility should be regarded as forming parts of a single whole. They are complementary and mutually reinforcing. As the American Law Institute has observed, the difference in history and in jurisprudential origins between the two ‘should not conceal their essential affinity and their increasing convergence.’\(^{146}\) Since the international law principles of state responsibility are general in character, and human rights rules are more specific, the latter should take precedence over the former in the event of a conflict.

That said, it is worth noting two limitations of the doctrine of state responsibility with regard to the responsibility of the state for violations of human rights in the private sphere, which partly inform Clapham’s argument.

Firstly, it has been shown that for state responsibility to arise, a connection has to be established between the state and the conduct constituting a violation of international law. This means that many internationally wrongful acts, which constitute violations of human rights by private actors but cannot be said to constitute state action, will not generate international responsibility of the state.\(^{147}\)

\(^{141}\) (1990) 20 RIAA, p. 217
\(^{142}\) Ibid p. 251
\(^{143}\) (1997) ICJ Rep. 3
\(^{144}\) Ibid 38
\(^{145}\) Rick Lawson, ‘Out of Control: State Responsibility: will the ILC’s Definition of the “Act of State” Meet the Challenges of the 21st Century?’ in Monique Castermans-Holleman, Fried van Hoof and Jacqueline Smith (Eds), p.91
\(^{146}\) Restatement (Third) of Foreign Relations Law, Part VII, introductory note
include the looting and destruction by rebel groups of people’s property, food and shelter, restriction of the availability of essential medicine by pharmaceutical corporations on a discriminatory basis, environmental pollution by MNCs resulting in health complications or death of people, child abuse and forced or child labour.

Secondly, human rights are entitlements of individuals or groups. Many rights instruments allow individuals or groups to enforce their human rights act an international level. The general international law rules of the state responsibility do not recognize the right of individuals or groups to enforce international law. It is only a state that has the right to bring an action against another state for violations of international law. 148 This limitation can have a negative impact on the enforcement of human rights obligations, especially where the state has complicit in the violations committed by private actors. While consent constitutes a defense to a case of state responsibility, human rights cannot be waived.

4.4.3 State Responsibility for Violations of Human Rights: The State’s Duty to Protect Human Rights

It is settled that human rights generate three levels of duty for the state; to respect, protect and fulfill human rights. 149 The relevant duty for our purposes is the duty to protect. This duty enjoins the state to take positive action to protect citizens and other people within its jurisdiction from violations that may be perpetrated by other states.

A survey of international and regional human rights instruments, declarations and resolutions assist in defining the nature and scope of this duty. Article 2 of the ICCPR 150 enjoins states parties ‘to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the covenant’. The duty to ‘ensure’ suggests that states have the obligation to take positive steps to guarantee the enjoyment of human rights. The provisions of the ICCPR suggest that this duty has two limbs. The first is the duty to take preventive measures against occurrences of violations of human rights by private actors. The second is the duty to take remedial measures once the violations have occurred.

The Human Rights Committee (‘HRC’), which monitors compliance by states with this instrument, has acknowledged in its general comment that ‘states

149 Paul Hunt, Reclaiming Social Rights, (1996), p.31
150 Opened for Signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) (‘ICCPR’)
have the supreme duty to prevent wars, acts of genocide and other acts of mass violence causing arbitrary loss of life’.\textsuperscript{151} It has also stated that the state ‘should take measures not only to prevent and punish deprivation of life by criminal acts, but also to prevent arbitrary killing by their own security forces’.\textsuperscript{152} According to the HRC, states should also take ‘specific and effective measures to prevent the disappearance of individuals’.\textsuperscript{153} With regard to the right to privacy, the HRC has states that this right ‘is required to be guaranteed against all such interferences and attacks whether they emanate from state authorities or from natural or legal persons’.\textsuperscript{154}

The duty to prevent is also applicable to economic social and cultural rights. The Committee on Economic, Social and Cultural Rights (CESCR) which monitors the implementation of the International Covenant on Economic, Social and Cultural Rights,\textsuperscript{155} has stated that ICESCR imposes an obligation on states parties to prevent violations of theses rights by private actors. In relation to the right to water, for example CESCR has stated that the state has an obligation to prevent third parties from ‘compromising equal, affordable, and physical access to sufficient, safe and acceptable water’.

A further obligation implicit in the duty to protect is the obligation to control and regulate private actors. The HRC has stated, for example, that states have the duty to provide a legislative frame work prohibiting acts constituting arbitrary and unlawful interference with privacy, family, home or correspondence by natural and legal persons.\textsuperscript{156} With respect to the right to privacy, this duty could be fulfilled regulating ‘the gathering and holding of personal information on computers, data banks and other devices, whether by public authorities or private individuals or bodies’.\textsuperscript{157} Similar statements have been made in respect of the right to freedom of expression.

CESCR has also stated that states have the duty to ‘ensure that activities of the private business sector and civil society are in conformity with the right to food’.

\textsuperscript{151} Human Rights Committee, General Comment 6, as Contained in Report of the Human Rights Committee, UNGAOR, 37th Sess, Annex V (2) UNDOCA/37/40/(1982)
\textsuperscript{152} Ibid (3)
\textsuperscript{153} Ibid (4)
\textsuperscript{154} Human Rights Committee, General Comment 16, as contained in Report of the Human Rights Committee, UN GAOR, 43rd Ses, Annex VI (1), UN DOC A/43/40 (1988) (‘ICESCR’)
\textsuperscript{155} Opened for Signature 16 December 1966, 999 UNIS 3 (entered into force 3 January 1976) (‘ICESCR’)
\textsuperscript{156} Supra Note 154, (9)
\textsuperscript{157} Ibid (10)
Accordingly, ‘failure to regulate activities of individuals or groups so as to prevent
them from violating the right to food of others’ is amount to a violation by states of
the right to food. In the context of the right to health, CESCR has stated that the state
is obliged to ensure that privatization ‘does not constitute a threat to the availability,
accessibility acceptability and quality of health facilities’. The state is enjoined
among other things, to control the marketing of medical equipment and medicines by
third parties, and to ensure that medical practitioners and other health professionals
meet appropriate standards of education, skill and ethical codes of conduct.

In the event of the violations occurring, the state has the duty to react them.
The HRC has stated in connection with the right to life that the state should ‘establish
effective facilities and procedures to investigate thoroughly cases of missing and
disappeared persons.’

Many other international instruments which contain both civil and political
rights and economic, social and cultural rights recognize the obligation of states to
ensure the protection of human rights in the private sphere. Key regional human
rights covenants contain similar provisions requiring states to prevent and respond to
violations of human rights in the private sphere and to regulate private actors. The
European Convention, for example, requires states to secure recognition to everyone
within their jurisdiction of the rights it recognizes. Likewise, the American
Convention of Human Rights requires states to ‘respect the rights and freedoms
recognized herein and to ensure to all persons subject to their jurisdiction of the free
and full exercise of these rights and freedoms’. Although a similar provision is
absent in the African Charter on Human and People Rights the African
Commission of Human and People’s Rights (African Commission) in commission
Nationale des Droits del ‘Home et des Liberties v Chad interpreted the duty to
protect thus:

“Even where it cannot be proved that violations were committed by
government agents, the government had a responsibility to secure the safety and the
liberty of its citizens, and to conduct investigations into murders.”

158 Supra Note 151, (4)
159 Ibid Art 1 (1)
160 Opened for Signature 22 November 1969, 1144 UNTS 123 (entered into force 27 August 1979)
(American Convention)
161 Ibid Art (1)
162 Opened for Signature 27 June 1981, 1520 UNTS 217 (entered into force 28 December 1988)
(‘African Charter’)
It can, therefore, be concluded that the duty of states to protect individuals or groups from violations of their human rights by private actors is well established in international law. This duty entails an obligation to take such preventive measures as the enactment of legislation, and the establishment of regulatory and monitoring mechanisms aimed at preventing occurrences of human rights violations in the private sphere. The state must also take reactive measures once the violations have taken place. Most importantly, these obligations do not only relate to civil and political rights they are quite clearly also applicable to economic, social and political rights. It is also evident from this discussion that the possibility of founding state responsibility under human rights law is more extensive than under the general rules of international law.

4.4.4 Transnational State Responsibility for Violations of Human Rights

(a) The Expansion of Transnational Law

Before World War II the relationship between the rulers and the citizens of particular country was treated as a completely internal matter, beyond the purview of the international community. In the past half century there has been an actual explosion of human rights instruments and mechanisms designed to protect individuals from cruel and arbitrary treatment by their own government.

In some ways an equally remarkable change in international law and in the notion of state sovereignty has been enormous growth in the transitional enforcement of human rights. Adding to previous developments relating to slavery and piracy in international criminal law, some human rights violations were defined as crimes domestically and internationally and opened the way toward transnational enforcement. A number of efforts to deal with international terrorism have also constrained transnational enforcement provisions. Article 4 of the Convention for the Suppression of Unlawful Seizure of Aircraft allowed prosecution by the state whose aircraft was hijacked, or in whose territory the aircraft landed. In addition, it specified that no ‘criminal jurisdiction exercised in accordance with national law’ was to be excluded.

Article 5 of the 1979 International Convention Against the Taking of Hostages\textsuperscript{166} went even further than this mandating jurisdiction if the offense occurs in the territory of the state, if the offender is a national or stateless resident, if the victim is a national of the state or if the offender is present in the territory of the state and not being extradited.

More recently, the Convention against Torture and other cruel, Inhuman or Degrading Treatment or Punishment has pushed transnational enforcement ever further. Article 5 mandates jurisdiction not only when torture occurs within the territory of a country, but also when the offense is committed by a national, against national or an offender is located within the states territory if extradition does not occur. The Torture Convention also permits any territorial enforcement allowed by the internal law of the state party.\textsuperscript{167}

In simply, legal grounds for the enforcement of human rights disregarding territorial boundaries have expanded, at least with regard to freedom from torture.\textsuperscript{168} But perhaps where international law has changed very little where state sovereignty might well look like it did a half century ago and beyond is in terms of establishing norms and principles of transnational state responsibility.

4.4.5 The Law of State Responsibility for Abuses beyond Territorial Borders

While international law has detailed illegal human rights practices for countries within the domestic sphere, it has remained silent as to when a state has violated international human rights law by acting abroad or by providing “aid and assistance” to another state which itself is carrying out abuses. There has been little progress in specifying transnational state obligations in international human rights law; I have mapped out recent developments in other branches of international law. They are,

(a) Transnational Environmental Harms

Under the international law, some solid grounding that the concept of state responsibility based on the principle that one state has a duty not to cause harm in or to the territory of another state. \textit{In the Trail Smelter Case}\textsuperscript{169}, Canada was found to be

\textsuperscript{166} International Convention against the Taking of Hostages, adopted Dec.12, 1979 (Article 5, UN.Doc.A/34/819, (1979)
\textsuperscript{167} Nigel.S.Radley, \textit{The International Legal Consequences of Torture, Extra-legal Execution, and Disappearance}, in NEW DIRECTIONS IN HUMAN RIGHTS, (1989)
\textsuperscript{168} Menno.T.Kamminga, \textit{Inter-State Accountability for Violations of Human Rights}, (1992)
\textsuperscript{169} \textit{Trail Smelter Case}, (U.S V/s Can), 3 R.I.A.A. 1905, (1941)
in violation of international law when emissions from an industrial plant located in British Columbia were causing environmental damage in the United States. The Claims Tribunal held that; under the principle of international law no state has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of an other or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.\(^{170}\)

Despite this precedent the law governing transnational environmental harm remains somewhat uncertain. Principle 22 of the 1972 Stockholm Declaration sets forth the current standard governing liability for transnational environmental damage. “State shall cooperate to develop further the international law regarding liability and compensation for the victims of pollution and other environmental damage caused by activities within the jurisdiction or control of such states to areas beyond their jurisdiction”.\(^{171}\)

International law has also not been successful in controlling the environmental practices of transnational corporations. The efforts in the late 1970s and early 1980s to establish a draft code of conduct ultimately failed. In 1990s there was another attempt by G-77 and the United Nations Centre on Transnational Corporations (UNCTC) to revive these efforts, but this went no where because of opposition from the Organization for Economic Cooperation and Development (OECD) countries and the United States. In 1992, UNCTC was closed and its activities integrated into the office of the United Nations Conference on Trade and Development (UNCTAD). In addition to these failed efforts internationally, industrialized countries have made little attempt to apply domestic restrictions to the environmental practices of their own corporations operating in other lands.

The General Assembly affirmed the importance of law by urging governments to “take the necessary legal and technical measures in order to halt and prevent” illegal international traffic in and dumping of toxic wastes\(^{172}\), and recognized “the necessity of developing rules of international law, as early as

\(^{170}\) Ibid, at 1965


practicable on liability and compensation for damages resulting from the transboundary movement and disposal of hazardous wastes”. 173

The first important step in the development of international law in this area was the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal.174 The Basel Convention is important for present purposes because of the changed perception of state sovereignty that it reflects. Thus, a traditional approach would be to say that there was no need for such a Convention, and that attempts to regulate the transnational shipment of hazardous wastes would violate the sovereignty of states. But the Basel Convention recognizes in fact, what it is premised upon is that a country’s responsibilities donot simply end at its borders. In 1989, the fourth ACP-EEC Convention of Lome Went, even further than the Basel Convention and adopted a prohibition on exports between the EEC and certain African, Caribbean and Pacific countries.

Furthermore, in 1990 the IAEA code of practice on the International Transboundary Movement of Radioactive Waste filled in one of the gaps of Basel Convention and delegate financial and environmental responsibility to the originating country.

(b) Transnational Security Operations by State Actors

Access to information on transnational security operations is notoriously restricted and information generally only becomes available if an involved actor makes it public or if an operation visibly fails. However when operations do enter the domain of public knowledge and thus facts become known, the responsibility of the state performing those acts is or at least should be much easier to establish.

The Human Rights Committee has held not to the place where the violation occurred, but to the relationship between the individual and the state concerned. More over, the settlement between Israel and Norway for the mistaken shooting by Massad agents of what were thought to be a Palestinian terrorist provides further indication of the acceptance of this notion of transnational state responsibility actions of state security officials.

In Letelier V Chile, the District Court held that Chilean Government along with various Chilean officials civilly liable for the wrongful deaths of Orlando Letelier, former Chilean Ambassador to the United States, and Ronni Moffit, Letelier’s assistant, from a car bomb explosion in the District of Columbia.

One of the exceptions to the foreign Sovereign Immunity Act is for the commission of the “tortious act” occurring in the United States. In this case it was proved that agents of the Chilean government had made the bomb and had placed it in the automobile themselves.

(c) Military Operation in other Countries

In question of state responsibility for military operations in other countries, it can be examined on the basis of several levels. At the domestic level, employ two sets of examples. The first is the seeming acceptance of the notion of transnational responsibility in the context of human rights abuses and atrocities committed by blue helmets of various nationalities in Somalia. The second, by way of contrast, is the unsuccessful efforts to bring suit against the United States Government for the harms to civilians ensuing from U.S. Military operations in other countries.

Next it turns, to an important decision by a regional institution, the European Commission of Human Rights, which found transnational state responsibility for abuses outside a states territorial jurisdiction during the course of military occupation of another country. In the case of Cyprus V Turkey, the European Commission of Human Rights affirmed the notion of transnational responsibility in a situation where governmental authority was exercised abroad during the course of military occupation. The facts of the case is Turkey’s armed forces invaded Cyprus in July 1974 and the following month occupied a large part of Northern Cyprus, whereupon Cyprus applied to the European Commission of Human Rights to find Turkey in violation of most of the European Convention. The issue that is most relevant for the present analysis relates to state responsibility for abuses outside Turkey’s national boarders. Turkey’s armed force operated in Cyprus, a separate and sovereign state. The Commission held that responsibility for abuses was not limited to national territory. Rather, states were obligated to secure human rights protection “to all persons under their actual authority and responsibility whether that authority is exercised within their own territory or abroad.”

176 Cyprus V Turkey, 1975 Y.B. EUR. CONVENTION OF HUMAN RIGHTS, 82-124
Finally, it analyzes, interprets and criticizes the ICJ’s opinion in *Nicaragua v. United States*.\(^{177}\) This case is important for a number of reasons. First, the Court readily accepted that the US government was responsible for a number of acts of direct harm to Nicaragua. The ICJ had no difficulty recognizing this particular aspect of transnational state responsibility. Second, the Court also questioned whether the United States could be held responsible for acts committed by the contras, a paramilitary organization that received substantial amounts of assistance from the United States. This is an example of indirect harm, and it is noteworthy that the Court indicated that there could be instances where one state could be held responsible for the actions of another state or entry so long as the first state exercise the requisite control over the actions of the latter.

### 4.4.6 Citizenship and Transnational State Responsibility

The notion of territory plays a powerful role in terms of demarcating transnational state responsibility. Thus, while citizens within a particular country generally enjoy a plethora of protection under international law against abuses committed by this state, protection for those living in other countries remains uneven and uncertain.\(^{178}\) But sometimes when a state operates or intervening in another country its actions not only affects foreign citizens but its own citizens as well. *Ramirez De Arellano v Weinberger*\(^{179}\) involved a suit brought by a U.S. citizen who alleged that during the course of military maneuvers, the United States government had unlawfully seized and destroyed the meat packing plant he owned and operated in Honduras. The defendants, officers of the executive branch denied these factual allegations and sought dismissal on a number of grounds. The District Court dismissed the suit on the basis of the political question doctrine. The court of Appeals for the District of Columbia overturned this dismissal, holding that the plaintiff was not asking the court to orchestrate American policy in Central America. The court held instead that “the Executive’s power to conduct foreign relations free from unwarranted supervision of the judiciary cannot give the executive to trample the most fundamental liberty and property rights of this countries citizenry”. The court continued the suggestion that a United States citizen who is the sole beneficial

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177 I.C.J. 14 (June 27) 1986,(here in after Military and Paramilitary Activities)
owner of viable business operations does not have constitutional rights against United States government officials threatened complete destruction of corporate assets is preposterous. If adopted by this court, as unlikely is that a Honduran citizen whose meat packing plant had been confiscated by the U.S.Government would be able to receive any form of relief at all against either the U.S.Government, the Honduran government or both.

As it has been noted at the outset, in many ways the concept of state sovereignty has changed dramatically in past half century, and because of this, the manner in which a state treats its own citizens is no longer seen as a purely domestic affair. But the notion of state sovereignty continues to protect states from responsibility for human rights violations. In fact, state sovereignty is the commonly used shield when one state has committed or facilitated gross abuses in another country, what would have been a gross abuses in another country, what would have been a gross human rights violation had it occurred in its own territory is apparently beyond the reach of human rights law. As a result, states are seemingly able to do virtually everything in their power to facilitate mayhem in another country. Yet avoid any responsibility under international law for these actions on the basis that they themselves do not actually pull the trigger, to use an aptmetaphor.

Finally it can be said that if the universality of human rights is to obtain a legal grounding, there needs to be a clear recognition in international law that harm and the responsibility for this harm comes not only at the hand of domestic governments, but in the action of other bodies as well.

4.4.7 Host State Responsibility

(a)Definition

The term ‘host state’ is normally used in respect of actors who have links to more than one state. The state in which the violation complained of occurs is called the host state if the actor concerned is based in another state (‘home state’).

The duty to protect human rights has long been governed by the principle of territoriality. This principle obliges the state to exercise due diligence to prevent and respond to violations of human rights within its territorial boundaries.

(b)Limitation of the Host State Approach

180 Supra Note 178, p. 12
However, a number of potential obstacles to the success of the doctrine of host state responsibility in ensuring indirect accountability of private actors for human rights can be listed. Firstly, this doctrine relies on a sound domestic legal system that will ensure that private actors are accountable for human rights either directly or indirectly. However, very few constitutions recognize the direct application of human rights. Most states consider legislation, common law and other political and administrative measures as sufficient to guarantee the protection of people within their jurisdiction from violations of their rights by third parties. Without recognizing the direct and indirect application of human rights in the private sphere, legislative and any other measures of protection lose human rights focus and therefore cannot effectively deal with the human rights problems. Secondly, the operation of the doctrine of host state responsibility is premised on the assumption that the state has the capacity to control and regulate private persons.

4.4.8 Home State Responsibility

(a) The Recognition of Home State Responsibility in International Law

As mentioned above, states are generally only considered responsible for breaches of human rights within their jurisdiction. Article 2(1) of the ICCPR, for example, provides that a state party has the duty to respect and ensure the rights enshrined in the ICCPR to all individuals ‘within its territory and subject to its jurisdiction’.

Ian Brownlie has argued that their principle ‘is open to serious question and can operate if at all only as a weak presumption’. Nicola Jagers and Viljam Engstrom, after reviewing a range of human rights instruments and cases have pointed out that there is a movement away from the conventional view that human rights bind the state within its territorial frontiers only. Two cases can be cited in support of this view. In Lillian Celiberti de Casariego V Uruguay, the HRC has held that art 2(1) of the ICCPR ‘does not imply that the state party concerned cannot be held accountable for violations of rights under the Covenant which its agents commit upon the territory of another state whether with the acquiescence of the

182 Nicola Jagers, Corporate Human Rights Obligations: In Search of Accountability, (2002), p.166-7; see also Supra Note 140, P.18
government of that state or in opposition to it would be unconscionable to so interpret the responsibility under article 2 of the Covenant as to permit a state party to perpetrate violations of the Covenant on the territory of another state, which violations it could not perpetrate on its own territory’.

This dictum addresses the issue of state responsibility for its own acts; however, it is broad enough to encompass the liability of the state for violations of human rights committed abroad by private actors. The Nicaragua case confirms this position. The violations in this case were committed by a rebel group in Nicaragua, but the suit dealt with the responsibility of the US for these violations.

The significance of the doctrine of home state responsibility cannot be overemphasized. Given the growing north-south advocacy networks, this device can play an important role in ensuring that actors such as MNCs respect the rights of people in developing countries, where regulatory regimes and avenues for obtaining remedies for human rights violation may not be readily available or effective. For example, Nike, a leading footwear manufacturer recently settled a case out of court in the US and agreed to put money into workplace monitoring programs in return for the withdrawal of a case alleging that it had lied about working conditions in its Asian factories.

It is interesting to note that certain domestic jurisdictions have started recognizing the role of home states in ensuring that corporate nationals respect human rights abroad. In the US, the Alien Tort Claims Act has been invoked to hold corporations directly responsible for human rights wrongs committed outside its territory.

4.5 State Responsibility and Refugee

4.5.1 Historical Development

The concept of the meaning that a person who fled into a holy place could not be harmed without inviting divine retribution was understood by the ancient Greeks.

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184 Supra Note 177, p.64

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and ancient Egyptians. However, the right to seek asylum in a church or other holy place, was first codified in law by King Ethelbert of Kent in about 600 AD. Similar laws were implemented throughout Europe in the middle ages. The related concept of political exile also has a long history, Ovid was sent to Tomis and Voltaire was exiled to England. Through the 1648 peace of Westphalia, nations recognized each others sovereignty. However, it was not until the advent of romantic nationalism in late eighteenth century Europe that nationalism became prevalent enough that the phase “country of nationalist” became meaningful and people crossing borders were required to provide identification.

The term “refugee” is sometimes applied to people who may have fit the definition, if the 1951 Convention was applied retroactively. There are many candidates, for example, after the Edict of Fontainebleau in 1685 outlawed Protestantism in France, hundreds of thousands of Huguenots fled to England, the Netherlands, Switzerland, South Africa, Germany and Prussia. Repeated waves of programs swept Eastern Europe, propelling mass Jewish emigration (more than 2 million Russian Jews emigrated in the period 1881-1920). Since 19th century, an exodus by the large portion of Muslim peoples (who are termed “Muhacir” under general definition) from the Balkans, Caucasus and Crete, took refuge in present day Turkey and moulded the country’s fundamental features. The Balkan wars of 1912-1913 caused 800,000 people to leave their homes. Various groups of people were officially designated refugees beginning in World War I.

The first international co-ordination on refugee affairs was by the League of Nations High Commission for Refugees. The Commission, led by FridtJef Nansen, was set up in 1921 to assist the approximately 1,500,000 persons who fled the Russian Revolution of 1917 and the subsequent Civil War (1917-1921), most of them aristocrats fleeing communist government. In 1923, the mandate of the Commission was expanded to include the more than one million Armenians who left Turkish Asia Minor in 1915 and 1923 due to a series of events now known as the Armenian Genocide. Over the next several years, the mandate was expanded to include Assyrians and Turkish refugees. In all these cases, a refugee was defined as a

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187 By the early 19th century, as many as 45% of the islanders may have been Muslim
person in a group for which the League of Nations had approved a mandate, as opposed to a person to whom a general definition applied.

On 31 December 1938, both the Nansen office and High Commission were dissolved and replaced by the office of the High Commissioner for Refugees under the Protection of the League.\(^{189}\) The idea of a refugee as a person who, for various possible reasons, can no longer live safely in a particular country and is therefore due special care has ancient religious roots. The humanitarian concept of special care owed to refugees has evolved substantially, however, to the point where it has anchored a fundamental shift in accepted notions of human rights under international law.

The problem of refugee is one of the most important public policy issues in the world today. It is estimated that more than 12 million refugees meet the currently accepted legal definition. However, tens of millions more are “internally displaced” refugees within their own countries. Millions more may be displaced for reasons that are not strictly within the current legal definition. Thus, to speak of refugees is to speak of an evolving set of extremely compelling moral and legal problems.

4.5.2 Definition of Refugees

A refugee is defined by the UN Convention Relating to the Status of Refugees 1951 and the UN Protocol 1967 as a person who, owing to a well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside her or his country of nationality and who is unable or unwilling to return.

Refugees defined in international instruments 1922-46, that someone was (a) outside their country of origin and (b) without the protection of the government of that state, were sufficient and necessary conditions.

According United Nations High Commissioner for Refugees (UNHCR), Refugees are people who have fled their countries due to a fear of persecution, having crossed an international border.

Under international law, refugees are individuals who are outside their country of nationality or habitual residence, have a well-founded fear of persecution because of their race, religion, nationality, membership in a particular social group or

\(^{189}\) (http://nobelprize.org/nobelprizes/peace/laureates/1938/nansenhistory.html, Nansen International office for Refugee; The Nobel Peace Prize 1938), Nobel prize.org
political opinion, and are unable or unwilling to avail themselves of the protection of that country, or to return there, for fear of persecution.

4.5.3 The Contemporary Refugee Problem

The World refugee problem has remained acute. When the Indian subcontinent was partitioned in 1947, millions of people were forced to migrate. Steady streams of refugees left China and East Germany, especially in the 1950s.\textsuperscript{190} The Korean War produced some 9 million refugees. Other major refugee creating events of the 1950s include the Hungarian Revolution (1956) and the uprising in Tibet (1958-59).\textsuperscript{191} Sub-Saharan Africa’s massive refugee problem is rooted in the continent’s colonial past. Before colonization, Africans had moved freely within their own tribal areas. However, the boundaries fixed by 19th century colonial powers often cut across tribal areas, resulting, particularly after independence, in mass movements of refugees across national borders.

By the early 1990s there were close to 7 million refugees in Africa including 4.5 million displaced in Sudan. The Vietnam War and Cambodian civil war created large numbers of Southeast-Asian refugees, the India-Pakistan War of 1971 produced about 10 million refugees, most repatriated to newly created Bangladesh.

In the 1980s and 90s fighting in Afghanistan created large Afghan refugee populations in Pakistan and Iran, and in the latter decade the conflicts in the former Yugoslavia, especially in Croatia, Bosnia, and Kosovo displaced hundreds of thousands within Europe. Conflicts in Uganda, Burundi, Rwanda, and Zaire/Congo, which sometimes spilled from one nation to the other, as well as fighting in Sudan and Somalia disrupted the lives of millions in the 20th century and early 21st century.

At the beginning of 2007 the world’s international refugee population was about 14.2 million, including the above-mentioned Palestinians. The largest displacements involved more than 2.1 million Afghans living in Pakistan, Iran and other nations, more than 1.5 million Iraqis in Syria, Jordan, and other nations, more than 680,000 Sudanese in Chad, Uganda, Ethiopia and other nations. In addition, there were an estimated 24.5 million “internally displaced persons”, individuals forced from their homes within the boundaries of their own countries. Sudan (5 million), Colombia (3 million), Iraq (1.8 million), Uganda (1.6 million), and the Democratic Republic of the Congo (1.1 million) all had enormous numbers of

\textsuperscript{190} J.Vernant, \textit{The Refugee in the Post-war World}, (1953), p.16
\textsuperscript{191} J.P.Stoessinger, \textit{The Refugee and the World Community}, (1956), p.89
internal refugees. Many governments refuse asylum to refugees, meanwhile, long-term refugees suffer various psychological hardships, and the root causes of the problem war, famine, and epidemic—remain unsolved.192

4.5.4 Early Developments of International Law Relating to Refugees

Some of the important changes caused by World War I in the general political setting in which international law developed. The war had other effects as well, however, one of which was generation of an entirely new juridical category of alien—the refugee.193 A refugee, briefly, is a person who leaves his or her country of nationality, whether voluntarily or not, and is unwilling to return there because of a well founded fear that he or she would be subjected to persecution upon return.194 There was, of course, nothing at all novel about aliens abroad fearing to return home. What was new in the twentieth century was the idea that such persons should be in some way the concern of the international community as a whole rather than being left as previously, totally at the mercy of the country in which they took refuge.

One legal development which foreshadowed the evolution of an international law relating to refugees was the custom, which gradually became more widespread in the nineteenth century, that host countries would not extradite persons within their jurisdiction if the state requesting the extradition was seeking to prosecute the person in question for a political offence.195 Although that principle has been embodied in many bilateral and multilateral treaties on extradition, the prevailing view today is that it remains a matter of optional state practice and is not required by customary international law.196

While the situation of refugees is broadly analogous to that of persons whose extradition is requested for political purposes, there are significant differences as well. Refugees are likely to materialize in substantial numbers, whereas extradition cases by their very nature involve individuals. Also, extradition cases arise, by definition, when the requesting state has taken the initiative in seeking to obtain jurisdiction over a person living in another state. Problems with refugees, in contrast, usually involve a host state’s unwillingness to allow such persons to remain in its

territory, a position it is perfectly entitled to take, in principle, under traditional international law.\textsuperscript{197} In the case of refugees, however, there is an underlying traditional international law doctrine of the very clearest sort: a state is not under any legal obligation to allow aliens to enter or to remain in its territory.\textsuperscript{198}

The League’s approach, in certain ways, appears strangely cautious from the modern perspective, yet in other ways its efforts were more ambitious than the UN’s efforts today. On the side of apparent caution, the League never assumed responsibility for refugees in general during the entire period of its existence. The evolution of a specifically legal, as opposed to humanitarian role in the case of refugees on the part of the League also evolved during the 1920’s. One of the League’s major initial successes was the devising of identity and travel documents for refugees, known informally as ‘Nansen Passports’, after the League’s first High Commissioner concerned with refugee matters.\textsuperscript{199}

The important further step came in 1928, when an International Conference on Refugee Problems agreed that the League’s High Commissioner should be allowed to exercise quasi-consular functions for Russian and Armenian refugees.\textsuperscript{200} The next development occurred in 1933, when the League drafted a convention relating to the international Status of Refugees.\textsuperscript{201} Here the bolder aspect of the League’s efforts came to the fore, in the form of requirement that states parties surrender one of their most hallowed legal prerogatives, the right to deny foreigners entry to their territory. The Convention provided that state party had to admit a refugee into its territory if the refugee was coming direct from the state at whose hands he feared persecution.

In 1938, a Second Refugee Convention was drafted under the League’s auspices. It was even less successful than the 1933 Convention, however, attracting only three ratifications.\textsuperscript{202} Clearly, much work remained for the future in the area of the rights of aliens who happened to be refugees.

\textsuperscript{197} L.Oppenheim, \textit{International Law}, p.692, (1955), Some what more precise is the conclusion stated in the \textit{Baffolo Case (Italy V Venezuela )}, 20 R.I.A.A. 528, at 537 (1903), that ‘a state possesses the general right of expulsion; but expulsion should only be resorted to in extreme instances, and must be accomplished in the manner least injurious to the person affected’.

\textsuperscript{198} Ibid p.693


\textsuperscript{201} Convention Relating to the International Status of Refugees, 1933, 159 L NTS 199

\textsuperscript{202} Supra Note 199, p.37
4.5.5 Issues of State Responsibility

The study of refugee law invites consideration not only of states obligations with regard to admission and treatment after entry, but also of the potential responsibility in international law of the state whose conduct or omissions cause an outflow. In the early 1980s, two initiatives, by Canada and the Federal Republic of Germany, drew attention to the refugee problem as a whole, including causes, effects, and consequences, and laid the foundation for future efforts to avert crises.\textsuperscript{203} A principle of responsibility for ‘creating’ refugees is easy to state, but more precise formulation of the underlying right and duties remains problematic.

Writing in 1939, Jennings posited liability on the repercussions which a refugee exodus has on the material interest of third states. In his view, conduct resulting in ‘the flooding of there states with refugee populations’ was illegal, ‘a fortiori where the refugees are compelled to enter the country of refuge in a destitute condition.’\textsuperscript{204} The doctrine of abuse of rights was adduced in answer to any argument that a state’s treatment of its nationals was not governed by international law. The duty to receive back national could not be avoided by denationalization, and a state could not ‘evade the duty by the creation of internal conditions which make it impossible for a humanitarian government to insist on return, otherwise the duty to receive back is benefit of all real significance’\textsuperscript{205}

With developments since 1939, the bases for the liability of source countries now lie not so much in the doctrine of abuse of rights, as in the breach of original obligations regarding human rights and fundamental freedoms. Legal theory nevertheless remains incomplete, in view of the lack of any clearly correlative rights in favour of a subject of international law competent to exercise protection of a the uncertain legal consequences which follow where breach of the obligations in question leads to a refugee exodus. States are under a duty to co-operate with one another in accordance with the U N Charter, but the method of application of this principle in a given refugee case requires care. Moreover, little is likely to be gained by attempting to elaborate principles of reparation for loss suffered by receiving states

\textsuperscript{203} Guy.S.Goodwin-Gill, \textit{The Refugee in International Law}, (1990), p. 226
\textsuperscript{204} Jennings, ‘\textit{Some International Law Aspects of the Refugee Question}’ 20 BYIL 98.111(1939)
\textsuperscript{205} Supra Note 203, p.227
This area of potential state responsibility remains to be developed. A more complete regime might incorporate the delinquent state’s obligation to remedy its conduct or omissions, as well as its obligations of reparation, restitution in integrum and satisfaction. Established rules of international law nevertheless do permit the conclusion that states are bound by a general principle not to create refugee outflows and to co-operate with other states in the resolution of such problem as may emerge.

First, by analogy with the rule enunciate in the Corfu Channel Case, responsibility may be attributed whenever a state, within whose territory sustainable transboundary harm is generated, has knowledge or means of knowledge of the harm and the opportunity to act.

Secondly, even if at a somewhat high level of generality, states do now owe to the international community the duty to accord to their nationals a certain standard of treatment in the matter of human rights.

Thirdly, a state owes to other state at large (and to particular states after entry), the duty to re-admit its nationals.

Fourthly, a state, in the exercise of its domestic rights is bound by the principle *sic utere tuo ul alienum non-laedas*. Finally, states are bound by the principle of co-operation.\(^{206}\)

A rule to the effect that ‘state shall not create refugees is too general and incomplete. An ambulatory principle does operate, however, which obliges states to exercise care in their domestic affairs in the light of other states legal interests,\(^{207}\) and to co-operate in the solution of refugee problems. Such co-operation would include facilitating both the voluntary return of nationals abroad and, in agreement with other states, the processes of orderly departure and family reunion.

### 4.5.6 The Moral and Legal Foundations of State Responsibility

It is first necessary to ask where the state’s responsibilities to its citizens come from, and what becomes of these responsibilities when a citizen is made a refugee. While there are numerous ways to explain the origins of state responsibility and the state’s duty to make amends for violations of individual rights, the account offered by international law is the most explicit, while that provided by social contract theory one of the most compelling.

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\(^{206}\) Ibid p.228

\(^{207}\) International Law Commission, ‘International liability for injurious consequences arising out of acts not prohibited by international law,’ UN Doc A/36/10.337,(1981)
(a) State Responsibility: Legal Views

The doctrine of state responsibility is one of the core tenants of international law. Legally speaking, state responsibility is ‘simply the principle which establishes an obligation to make good any violation of international law producing injury.’\(^{208}\) State responsibility arises out of the legal maxim stated by Grotius in 1646 that ‘every fault creates the obligation to make good the losses’. As states are the conventional subjects of international law, technically the principle of state responsibility applies only on the state to state level. Duties owed to citizens are left out. The ILC Articles on State Responsibility affirm this traditional, state centric definition of state responsibility, crystallize customary international law on state responsibility, and set out reparation, restitution, compensation, satisfaction and guarantees of non-repetition as the basic legal tools states have to remedy injuries. Although the ILC Articles took forty years to negotiate, ‘the greatest relevance of the articles may ultimately lie outside the scope of the project’ as many states have now taken on new legal obligations that are ‘unilateral or vertical, in the sense that they concern duties owed by states to individuals. Breach of these duties is unlikely to injure another state directly or give rise to classic claims for reparations.’\(^{209}\)

Nonetheless, many jurists argue that the principles underlying the ILC Articles also pertain to the obligations states owe their citizens and the Articles have been referenced in the judgments of influential human rights bodies such as the Inter American Court of Human Rights.

These developments reflect the relatively recent but fundamental shift in international law towards recognition of the rights and duties of individuals.\(^ {210}\) Agreements including the ICCPR and the ICESCR clearly delineate individual human rights the state is bound to respect, if not for moral reasons then because by signing these conventions, states have created binding legal responsibilities for themselves. The progress made in codifying these state’s responsibly to individuals has prompted some progressive scholars and government to argue that as state’s claim to sovereignty is dependent upon the state effectively shouldering its primary responsibilities, including safeguarding human rights. Deng (1995) captures this idea

\(^{208}\) Lee, L. ‘The Right to Compensation; Refugees and Countries of Asylum’, American Journal of International Law, (1986), 80, p.537

\(^{209}\) Shelton, D. ‘Righting wrongs: Reparations in the Articles on State Responsibility, American Journal of International Law, 96(4); (2002), p.834

in his discussion of “sovereignty as responsibility”. According to him, when a state grievously fails to behave responsibility towards its citizens, the state temporarily forfeits its claims to sovereignty and the international community is permitted to intervene.

Although morally compelling and legally innovative, the notion of sovereignty as responsibility has unfortunately not translated into the development of strong enforcement mechanisms to curtail the sovereignty of irresponsible states and guarantee respect for individual rights. The judges at Nuremberg famously concluded that ‘international wrongs are committed by individuals and not by abstract entities’.211 In the modern context the International Criminal Tribunals for Rwanda and the former Yugoslavia and the International Criminal Court help ensure individual criminals are held responsible for egregious human rights violations. While the importance of individual accountability cannot be underestimated, it is equally crucial that states be held liable for abuses, particularly as an individual, no matter how far beyond the moral pale, cannot shoulder sole responsibility for large scale crimes such as genocide. Individual leaders may mastermind atrocities, but both the individual and the institution must be held accountable for state sanctioned crimes if only because the duty to make amends for these crimes cannot be discharged by an individual. Even if a war criminal had extensive financial resources that could be appropriated to fund the reconstruction and restitution programs necessary to remedy their crimes, it would be profoundly inappropriate for that person to be responsible for the delivery of these programs. This duty rightfully falls upon the more abstract political entity of the state. Yet states can often evade this duty because although the principle of state responsibility ‘is well established in law and functions reasonably well in practice’ on an inter-state level, with regard to individual victims of violations of human rights law, the position remains much more uncertain and needs to be enhanced through more robust enforcement mechanisms.212

212 Gillard E ‘Reparation for Violations of International Humanitarian Law’, International Review of the Red Cross 85 (851), 2003, p.530
(b) Contracted Responsibility: A Theoretical Perspective

Feeble as legal instruments for ensuring state responsibility may be, moral arguments often hold even less sway over states. Nonetheless, social contract theory offers a compelling explanation of the origins of the state’s responsibilities to its citizens and may be used in concert with international law to mount a forceful case for the states obligation to establish, just conditions of return. Philosophers including Hobbes, Locke, Rousseau, Kant and Rawls appeal to the idea of a social contract to justify the institution of the state and illuminate what qualities political institutions should have. In its most basic form, social contract theory suggests that individuals sacrifice a significant degree of their personal liberty to the state, in return for increased security and well being, which individuals could not guarantee for them if acting alone. Thus the social contract creates mutual obligations between the citizen, who promises to respect the rule of the sovereign, and the state, which pledges to protect its citizens.213

Ironically, however, it is in addressing cases of forced migration that social contract theory is most persuasive; when the state transforms from a protector to a prosecutor, it is difficult if not impossible to forward a convincing moral justification for the state’s existence. If the state fails in its primary duty to guarantee the peoples well being, the contract is void. Yet the significance of the contract is illustrated by its very invalidation, although the contract between citizen and state is only a ‘moral artifice’, the citizen turned refugee soon discovers that this link is ironclad compared to the ephemeral relationship the refugee has with foreign states, a relationship based on little more than unenforceable international laws and fleeting compassion.214

Breaking the Bond and Imperative Repair

Shacknove argues that the refugee definition offered in the 1951 Refugee Convention is predicated on the assumption that ‘a bond of trust, loyalty, protection, and assistance between the citizen and the state constitutes the normal basis of society, and that ‘in the case of the refugee, this bond has been served’. Persecution, conflict and alienage are physical manifestations of this several bond. ‘It is the absence of state protection’, the state’s core obligation under the social contract which constitutes the full and complete negation of society and thus the basis of

refugee hood. Shacknove insightfully notes that in exchange for their allegiance, citizens can minimally expect that their government will guarantee physical security, vital subsistence, and liberty of political participation and physical movement. No reasonable person would be satisfied with less. Beneath this threshold the social compact has no meaning. The consequence of Shocknovels argument is that if every state subverted its responsibilities by creating refugees, the justification for the state system itself would crumble.

Although, this outcome seems extreme, owing the scarce resettlement opportunities, millions of refugees is denied the chance to forge new bonds of citizenship with another state and so is left outside the logic of the state system. These refugees are compelled either to continue in limbo with only limited rights in their country of asylum, or to return to their state of origin. This reality forces the question of rectifying the relationship between states and their exiled citizens on to the political and moral agenda. The implications of this question are ethically and politically significant, because in the repatriation process the terms of the social contract, typically tacit, can be made explicit. Those refugees who gain the opportunity to become citizens of a new state also effectively enter into an explicit social contract, albeit one they do not get to negotiate.

Essentially, both international law and social contract theory conceive of the state as ‘constituted by a set of duties owed to its citizens that are integral to its authority to act’. When these duties have been violated through the creation of refugees, the state must repair the broken bond between itself and its exiled citizens if it is to regain legal and moral legitimacy. Indeed, principle 1 of the Cairo Declaration of Principles of International Law on Compensation to Refugees affirms, ‘The responsibility for caring for the world’s refugees rests ultimately upon the countries that directly or indirectly force their own citizens to flee.’

4.5.7 The Refugee’s Right to Restitution: Legal and Theoretical Definitions

Like, state responsibility, the right to a remedy is affirmed by both international law and moral arguments rooted in the human rights tradition. The right to a remedy is a secondary right that follows from the breach of primary rights, such

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as the right not is tortured, or to be made a refugee. Judge Hurber maintains that ‘responsibility is the necessary corollary of a right. All rights of an international character involve international responsibility entails the duty to make reparation’. The 1928 PCIJ in Chorzow factory ruling lay down the basic remedial norms for violations of international law. The court ruled that ‘reparation must, so far as possible, wipe out all the consequences of the illegal act and re-establish the situation that would, in all probability, have existed if that act had not been committed.

Legal definitions are set out in the ILC Articles on State Responsibility and the Draft Basic Principles and Guidelines on the Right to a Remedy and Reparation for victims of violations of International Human Rights and Humanitarian Law, which were prepared under the auspices of the UN Special Reporter on the right to restitution. Legally speaking, reparation encompasses three main types of remedy; restitution, compensation and satisfaction. Restitution aims to restore the conditions that existed prior to the violation, and often involves the return of homes, artifacts or land. The ‘first form of reparation’, restitution is ‘required of the responsible state unless it is materially impossible’ or ‘involves a burden out of all proportion to the benefit deriving from restitution instead of compensation’. It is often impossible to restore the conditions that existed prior to the human rights violations that cause citizens to seek asylum, such as torture. In these cases remedy is often achieved through compensation, which involves monetary payment for material and moral injury.

Clearly not only refugees but all victims of serious human rights violations have a right to restitution. However, restitution for refugees is particularly crucial because restitution helps create just conditions of return and therefore has important implications for fostering security and development in post conflict states. Given that restitution is morally and legally well grounded and has positive practical effects. Why have so many refugees been denied it? States resist negotiating restitution with returnees because restitution is a time consuming, politically contentious. Furthermore, although restitution is crucial in cases of large scale post conflict return, macro-level approaches have traditionally dominated the peace building

219 Ibid p.849
process. Consequently, high level political agreements have typically received greater alternation than individual oriented processes such as restitution.

4.5.8 The Role of UNHCR

The office of the UNHCR located in Geneva, was established on December 14, 1950 by United Nation General Assembly resolution 428 with a mandate to lead and coordinate international efforts to protect refugees and find solutions to refugee problems throughout the world.\textsuperscript{220} Using the 1951 Convention Relating to the Status of Refugees and its 1967 protocol as its major tools, the UNHCR strives to ensure the basic human values of persons in distress and to prevent refugees from being involuntary returned to the country from which they fled, or expelled to another country where they may face persecution. As of today, there are 147 states parties to one or both of these legal instruments.\textsuperscript{221} The primary organs of the UNHCR are the High Commissioner, elected by the UN General Assembly on the nomination of the Secretary General, a Deputy, appointment by the High Commissioner, and the Executive Committee of the High Commissioner’s, programme, established by the Economic and Social Council (ECOSOC). Although ECOSOC elects its members, the Executive Committee functions as a subsidiary organ of the General Assembly, reporting directly to it.

Recent Development: State Responsibility for Refugees in Times of Occupation

The provision in question (Article 11(1)(e) of Council Directive 2004/83/EC of 29 April 2004) concerns the cessation of refugee status ‘because the circumstances in connection with which he or she has been recognized as a refugee have ceased to exist’, a stipulation commonly referred to as the ‘ceased circumstances clause’ Article 11(1)(e) of said Directive is based on Article (1)(c) (5) of the 1951 UN Convention Relating to the Status of Refugees, which therefore would be of relevance in the present case. According to Article 1(A) (2) of the Refugee Convention and its 1967 Protocol, a refugee is a person who:

“owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion is outside the

country of his nationality and is unable or owing to such fear, is unwilling to avail himself of the protection of that country”.

The special protection thus conferred to a person defined as refugee shall cease to apply if, he can no longer, because of the circumstances in connection with which he has been recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality, this shall not apply to a refugee, who is able to involve compelling reasons arising out of previous persecution for refusing to avail himself of the protection of the country of nationality.

Based on narrow reading of this provision, in recent years a number of countries, including Germany, had started returning refugees, especially from Iraq, to their country of nationality, asserting that circumstances had sufficiently, changed to justify them back. In reviewing refugee status and interpreting the criteria for cessation the German authorities e.g., had focused on whether the individual concerned, at the time of the review, faced a risk of persecution in the country of origin, either in the form of continuation of the previous danger of persecution or a new risk. In order to justify returning refugees, UNHCR cessation guidelines require change in circumstances to be (1) fundamental, (2) durable, and (3) to result in effective protection being available in the country of origin. However, for changing to be accepted as fundamental, in the case of persecution by a state, German Courts regarded it as sufficient that the persecuting regime had lost power. In regard to durability of change the only question of relevance was whether the former regime was likely to regain power. Instability resulting e.g., from military intervention was considered irrelevant in so far as there was no likelihood of the return of the previous regime, and the availability of effective protection and general issues of safety other than the likelihood renewed persecution had not been taken into account at all.

Thus, as neither widespread insecurity, precarious living conditions, nor the transitional character of the occupation of Iraq by the multinational forces were considered as relevant arguments against cessation, in practice this approach resulted

222 Germany, Federal Administrative Court, Judgment of 1 November 2005, (1 C 21.04)
223 UNHCR, Guidelines on International Protection: Cessation of Refugees Status under Article 1 © (5) and (6) of the 1951 Convention Relating to the status of Refugees, (the “Ceased Circumstance” Clause) (10 February 10, 2003) HCR/GIP/03/03 available at http://www.org/3e637a202html
224 Reports on International Organization, August 2009
in the systematic revocation of refugee status, especially of Iraqis who had fled the regime of Saddam Hussein. However, in view of the highly volatile security situation in Iraq invoking the ‘ceased circumstance’ clause in regard to refugees originating from that country would seen premature as, in the opinion of the UNHCR, the current conditions on the ground have neither fundamentally or durably changed, nor may availability of effective protection be reduced to protection against a recurring risk persecution.  

Recognition of refugee status leading to international protection in the first place entails protection against return to a country where the threat of persecution persists as enshrined in the principle of non-refoulement, but also protection allowing for a life in dignity in the host state. As the overarching objective of international protection thus is “to provide the refugee with a durable solution in addition to and beyond safety from persecution”, this aspect has to be taken into account when the “mirror image” of the decision to grant refugee status, i.e., revocation based on alleged ceased circumstance is being considered.

Primary Responsibility

Another important, related aspect concerns the general question of who bears (primary) responsibility for refugees in any given situation. While the Refugee Convention obliges all states parties to cooperate with the UNHCR in fulfilling its function of supervising the application of the provisions of the Convention and prohibits the expulsion or return (“refoulement”) of a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened, the Convention itself is silent in regard to distributing the burden of accepting refugees, which is why as a point of departure, neighboring state usually still are left with the main burden of dealing with refugee crises.

Looking at the Iraqi situation, neither the U.S, nor Iraq are even states parties to the Refugee Convention, though the U.S. is a state party to the 1967 protocol.

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226 As enshrined in Article 33 of the Refugee Convention and Article 21 of the qualification Directive
227 As enshrined in Article 3-34 of the Refugee Convention and Article 20,22-34 of the Qualification Directive.
228 Article 35, Refugee Convention
229 Article 33(1), Refugee Convention
230 Jordan and Syria e.g. currently combined host about two million Iraqi refugee, while western countries accepted only fraction of that number
Furthermore applicability of the provisions of the Refugee Convention could be asked on customary international law. But even so, no particular legal obligation to accepted a certain number of refugees may be inferred from those international rules, yet it seems intuitively wrong that of all Iraqi citizens claiming asylum in 2007, half of those claims were made in a small country like Sweden, and Sodertalje, a city of 83,000 people, took in more Iraqis than the United States and Canada combined.  

In acknowledging heightened responsibility for refugees stemming from Iraq, especially in regard to Iraqis that cooperated with the U.S. and because of this association have been exposed to reprisals by insurgents, last year the US adopted new legislation, the so-called Kennedy Bill, increasing the total intake of Iraqi refugees to the U.S and granting preferential status to e.g. Iraqi interpreters and translators seeking resettlement in the United States. But a more general claim may be made that an occupying country always carries primary responsibility for the protection of people whose lives were specifically affected by the occupying country always carries primary responsibility for the protection of people whose lives were specifically affected by the occupying powers actions, for refugees ‘created’ by war or intervention, irrespective of the legitimacy of those acts, i.e. for people who would not have been refugees were it not for preceding actions of intervening forces. Apart from a potentially increased refuge basis, such state responsibility would all the more apply in regard to persons targeted because of their direct work for the occupying powers, or indirect cooperation. Despite the recently adopted Kennedy Bill, in the main such duty currently constitutes merely a moral obligation, not a legal responsibility akin to a ‘guarantor’s obligation’, though it may be time to reconsider that stance.

A final matter of concern meriting further scrutiny relates to the question of honoring previous obligations in the process of transition from occupation to sovereignty. A point in case pertains e.g. to the People’s Mojahedin Organization of Iran (PMOI) an Iranian opposition group based in Ashraf city, Iraq. Neutral during the 2003 Iraq war, the group’s members had been designated as protected persons under the Fourth Geneva Convention by the U.S forces and reportedly provided assistance to counter terrorism efforts, and intelligence, exposing Iran’s in negotiations with the U.S with respect to the expiration of the UN mandate of the

231 “Little Baghdad” Thrives in Sweden: Sodertalje has taken in More Iraqis than the US, But mood is changing, MSNBC (19 June 2008), at http://www.msnbc.msn.com/id/25004140/
multinational forces in Iraq\(^{232}\) indicated it would claim control over Ashraf and threatened to expulse the inhabitants, even to their country of origin where serious reprisals including torture and death penalties would await them. Now that the US Iraqi status of forces agreement has been concluded basically handing over responsibility for security in “Iraqi cities, villages, and localities to Iraq by 30 June 2009, the Iraqi government did not waste much time carrying out that threat on 28 July 2009,\(^ {233}\) Iraqi security forces raided the PMOI camp in Ashraf, assaulting the unarmed Iranian dissident inside wounding several hundred and killing at least seven.

### 4.6 State Responsibility and the Environment

State responsibility in international law refers to a regime of international law applicable to international wrongs or internationally wrongful acts. However, international environmental harms are not only covered by the regime of state responsibility but also by various liability regimes. The regime of state responsibility, which deals with international wrongs, the liability regimes deal with activities not prohibited under international law. The rules of liability differ from sector to sector and are generally addressed in the international agreements. The ILC has undertaken a possible codification of both state responsibility and the liability, having regard to the different nature of the legal regimes\(^ {234}\).

However, academic writing on international environmental law attempts to bridge these regimes either by giving broader interpretation to best known cases\(^ {235}\) or by prompting crystallization of new customary law, out of soft law instruments, with a view to expanding the scope of state responsibility to include the environmental harm\(^ {236}\).

The last twenty years have witnessed increasing concern for the environment and realization that protection, to be effect, must be based on international co-operation. This has resulted in a number of inter-state efforts, for example the 1992

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232 In accordance with UN Security Council Resolution 1790, UN DOC.5/RES/1790,(18 December 2007); that mandate expired on 31 December 2008
233 US-Iraqi Status of Forces Agreement, Article 24 (2)
Earth Summit and these now exists a plethora of arrangements both at an international and regional level, designed to effects environmental protection.

The United Nations in 1972 established UNEP (United Nations Environment Programme) to implement the action programme adopted at the Conference on the Human Environment, while the European Communities have an extensive legislative programme on environment issues. The Law Commission has identified massive pollution of the atmosphere or the seas as an international crime. However, customary international law is not silent on a state’s responsibility for the environment and imposes certain restrictions on the enjoyment of a state’s recognized right in accordance with the Charter of the United Nations and the principles of international law, to exploit their own natural resources pursuant to their own environmental policies. The responsibility incumbent on states, under customary international law and expressed in principle is to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or of areas beyond the limits of national jurisdiction.

Finally, an attempt has been made to shed light on state responsibility related issues in today’s international environmental law including the Indian perspective in this regard.

**4.6.1 International State Responsibility**

International State Responsibility attaches to breaches of international obligations contained in customary law or treaties, such as multilateral environmental agreement or the humanitarian conventions. Such responsibility is affected through secondary norms that were studies by the U.N. ILC for almost fifty years ago. In 2001, the ILC finalized its Draft Articles on the State Responsibility of states for internationally wrongful acts, which offer the authoritative source of law in this matter. Even before the ILC’s conclusion, with the agreement of the concerned parties, the ICJ utilized the ILC’s Draft Articles to support its decision in the *Gabcikovo/Nagymaros Case* between Hungary and Slovakia, in relation to the state of necessity and the environmental circumstances of the case.

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240 *Case Concerning the Gabcikovo-Nagymaros Project (Hung V Slovak)*, 1997, ICJ.7 (Sept-25)
Before analyzing the norms governing the responsibility of the state, it must be emphasized that the content of the primary obligation, i.e., its environmental or criminal character, does not qualify the nature of the responsibility of the state. In other words, the responsibility of the state for the violations of its international obligations is not civil or criminal, but simply international\textsuperscript{241}.

Cases involving breaches of international environmental obligations can be distinguished according to whether the breach affects the interests of a particular nation or the interest of the international community as a whole. For instance, a nation would be particularly affected if verifiable environmental damage occurs within its borders. In such cases, the legal interest in obtaining cessation and reparation of damage is readily apparent and does not lead to major problems. However, verification is difficult where science is uncertain or where the damage is incremental and long-range, in which case international state responsibility may fail to provide an adequate remedy\textsuperscript{242}.

One example of the international community finding state liability in the context of conflict based environmental damages is Iraq’s annexation of Kuwait, which gave rise to a series of resolutions adopted by the U.N. Security Council. Among these, Resolution 687 reaffirms that Iraq’s responsible under international law for all harm, including environmental harms and the exhaustion of natural resources, resulting from its illegal invasion and occupation of Kuwait\textsuperscript{243}. Indeed international tribunal are specially designed and set up to ensure due process in determining responsibility for environmental damage.

International Judicial decisions and arbitral awards have outlined obligation. Arbitral decision of March 11, 1941, in the \textit{Trial Smelter Case}, is very significant in this regard, as it affirmed what may be called the obligation of good neighborliness as a state responsibility in the following manner.

Under the principle of international law no state has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons there in, when the case is of serious consequence and the injury is established by clear and convincing evidence. This decision is now widely considered to be part of general international law. State

practice regularly confirms its acceptance. This decision is also considered as having laid the foundation of international environmental law\textsuperscript{244}.

Another important statement of principle in regard to obligation of state, which is very often invoked in the context of environmental harm, is derived from the decision in \textit{Corfu Channel Case}, which ruled that states have duty “not to allow knowingly its territory to be used for acts contrary to rights of other states”\textsuperscript{245}.

A procedural rule of state responsibility derived from the award in the \textit{Lake Lanoux Case} is important in this context. This rule is specifically applicable in regard to the utilization of shared natural resources it plays a significant role in matters of environmental dispute resolution. According to this, states have to conduct in good faith the consultations and negotiations designed to arrive at through agreements, settlements of conflicting interests.\textsuperscript{246}

\textbf{4.6.2 Evolution of Law of State Responsibility to Environment}

The developments took place in the field of the environment, since the Stockholm Conference, ushered in a process of assimilation of rules of state responsibility into international environment law, in a gradual manner. Adoption of principle 21 of the Stockholm Declaration marks an important phase of development of law in this regard.

Principle 21 declares that state’s have “responsibility to ensure the activities with their jurisdiction or control do not cause damage to the environment of other states or areas beyond the limits of national jurisdiction”. This principle does not prohibit all kinds of Transboundary harm. Its prohibition is limited only to significant or substantial Tran boundary harm. The prohibition under this principle must be limited only to certain trans boundary pollutions that met the same conditions, the harm from the pollution:

\begin{itemize}
  \item[i)] must result from human activity,
  \item[ii)] must result from a physical consequences of a causal human activity,
  \item[iii)] must cross national boundaries; and
  \item[iv)] must be significant and substantial\textsuperscript{247}.
\end{itemize}

\textsuperscript{244} Alexandne and Dinah Shelton, \textit{International Environmental Law },(3rd Ed.Transnational, 2004) p.88
\textsuperscript{245} \textit{Corfu Channel (U.K. V/s Albania)}, ICJ Reports 1949 at 22
\textsuperscript{246} \textit{Lake Lanoux Arbitration (Spain V France)}, 1957, ILR 101
\textsuperscript{247} Georg Dahm. etal, \textit{Völkerrecht, Public International Law}, (2nd Ed. 1989), p. 445
The evolution of this principle can certainly be treated as progress over the traditional rule of state responsibility in as much as it sets some ultimate limits beyond which a state causing transboundary pollution cannot cross. Twenty years after the Stockholm Conference, the ideas presented in principle 21 of the Stockholm Declaration underwent further changes during the United Nations Conference on Environment and Development held in Rio de Janeiro in 1992. The Rio Declaration, in principle 2, recognizes that the ‘Developmental Policies of a State “can also be a balancing factor already recognized in principle 21 of the Stockholm Declaration in relation to the prohibition of significant harm.

The U.N. Conference on Environment and Development another significant development took place in the international legal arena. The principle of prohibition of causing significant harm to other or to places outside of state territory as well as the duty to take into account and protect the right of other states, has been declared as a principle of international environmental law in the advisory opinion on the legality of the threat or use of nuclear weapons. On the other hand, the political process, which brought forth principle 21 of the Stockholm Declaration and principle 2 of the Rio Declaration, has provided a strong indication of states unwillingness to accept the “no harm” principle as an absolute principle.248

The application of international rules of state responsibility in the post Rio scenario in the context of the environment remains dismally low for the following reasons.

- Under the state responsibility regime, the notions of responsibility and fault are closely interrelated.
- Any successful claim under state responsibility required a proof from the claimant of intention of recklessness on the part of the state.
- In a case where breach can’t be established the source state will be liable to repair any part of it.
- Lastly the concept of state responsibility does not foresee any duty to compensate for damage due to activities, which are not prohibited by international law.249

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In the case of the Chernobyl Nuclear accident which had caused huge loss to many countries in Europe, including France and United Kingdom, the affected countries were hesitant to make any claim due to their inability to prove direct injury, which is very essential to sustain a claim under state responsibility. This has led to processing of claims concerning environmental damage in the national courts under civil liability provisions rather than by the international tribunal or court.

4.6.3 The Basic Duty of States

The principle of State Responsibility dictates that states are accountable for breaches of international law. Such breaches of treaty or customary international law enable the injured state to maintain a claim against the violating state, whether by way of diplomatic action or by way of recourse to international mechanisms. The ICJ is also provided the necessary jurisdictional basis have been established. Customary international law imposes several important fundamental obligations upon states in the area of environmental protection. The view that international law supports an approach predicated upon absolute territorial sovereignty, so that a state could do as it liked irrespective of the consequences upon other states, has long been discredited.

The basic duty upon states is not so to act as to injure the rights of other states. This duty has evolved partly out of the regime concerned with international waterways. In the International Commission on the River Order case, the PCIJ noted that this community of interest in a navigable river becomes the basis of a common legal right, the essential features of which are the perfect equality of all riparian states in the use of the whole course of the river and the exclusion of any preferential privileges of any riparian state in relation to others. But the principle is of far wider application. It was held in the Island of Palmas Case, that the concept of territorial sovereignty incorporated an obligation to protect within the territory the rights of other states.

In the Trail Smelter Arbitration, the Tribunal noted that: under principles of international law, as well as the law of the United States, no state has the right to use or permit the use of territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons there in, when the case is of

250 See Bernie, Supra Note 236, at 184-185
251 PCIJ- Series A No 23 (1929)
252 See.33. AJIL, 1939, p.182 and 35 AJIL, 1941, p.684
serious consequence and the injury is established by clear and convincing evidence. The International Court reinforced this approach, by emphasizing in Corfu Channel Case, that it was the obligation of every state ‘not to allow knowingly its territory to be used for acts contrary to the right of other states’.

The Court also noted in the request for an examination of the situation in accordance with paragraph 63 of the Nuclear Test Case 1974, that its conclusion with regard to French nuclear testing in the pacific was without prejudice to the obligation of states to respect and protect the environment.

This judicial approach has now been widely reaffirmed in international instrument. Article 192 of the Law of the Sea Convention, 1982 provides that ‘states have the obligations to protect and preserve the marine environment, while Article 194 notes that ‘state shall take all measures necessary to ensure that activities under their jurisdiction and control are so conducted as not to cause damage by pollution to other states and their environment.’

4.6.4 The Suitable Standard

Sometimes, it can be argued that the suitable standard for the conduct of states in this field is that of strict liability. In other words, states are under an absolute obligation to prevent pollution and are thus liable for its effects irrespective of fault. In the Trail Smelter Case, Canada’s responsibility was accepted from the state, the case focusing upon the compensation due and the terms of the future operation of the smelter, while the strict theory was not apparently accepted in the Corfu Channel Case.

Treaty practice is variable. The Convention on International Liability for Damage Caused by Space Objects, 1972 provides for an absolute liability for damage caused by space objects on the surface of the earth or to aircraft in flight, but for fault liability for damage caused elsewhere or to persons or properly on board a space object. Most treaties; however, take the form of requiring the exercise of diligent control of sources of harm, so that responsibility is engaged for breaches of obligations specified in the particular instruments.

253 ICJ Reports, 1974, pp.253
254 ICJ Reports, 1995, p.288, 306
The test of due diligence is in fact the standard that is accepted generally as the most appropriate one. Accordingly, states in general are not automatically liable for damage caused irrespective of all other factors. However, it is rather less clear what is actually meant by due diligence. The test of due diligence undoubtedly imports an element of flexibility into the equation and must be tested in the light of the circumstances of the case in question. States will be required to take all necessary steps to prevent substantial pollution and to demonstrate the kind of behaviour expected of good government, while such behaviour would probably require the establishment of systems of consultation and notification. It is also important to note that element of remoteness and foreseeability is part of the framework of the liability of states. The damage that occurs must have been caused by the pollution under consideration.

4.6.5 International Liability and Payment of Compensation

Regardless of any preventive measures that states may take in undertaking activities, they may nevertheless be enabled to prevent the occurrence of the injuries in the territory of another state. The concept of liability for injuries to others, in the absence of fault, does not appear to be new to domestic law. In relation to certain activities, a casual relationship between the activity and the injury is sufficient to entail liability. This concept in domestic law has been continuously promoted for reasons of morality, social policy and maintenance of public order. In countries with more complex and developed torts law, the legislators and the courts have begun to recognize that, while some activities are tolerated by law, they “must pay their way". Further there is a question of who must bear the responsibility to compensate for damage when neither party under the law could be blamed. In some instances, strict liability has been imposed upon the party that has initiated the activity as the party that can best bear the loss for other social policies.

a) State Liability and Procedural Norms

Pollution respects no jurisdictional boundaries. Air and water carry dangerous substances from one nation to another. Such transfrontier pollution can arise from a single accident in one state that harms the environments of other states or from a continuous emission of substances that affects the environments of other states.

258 Ehrenzweig, *Negligence without fault*, (1951)
Further pollution knows no borders; legal analysts have resorted to principles of international law, writ large, to develop a comprehensive framework of environmental protection.\(^{259}\)

According to the principle of international law, the obligation to prevent transnational pollution falls solely upon the state.\(^{260}\) In case of pollution committed by private parties, international legal analysts have developed the doctrine of state responsibility to attribute activities of private citizens of states. Drawing upon international customs as the primary source of law, publicists have sought to develop an international liability scheme to regulate transboundary pollution and have codified rules of customary international law to clarify the legal duty upon states to prevent serious transnational environmental harm. But the efforts to develop an effective international liability scheme, however, failed utterly. Publicists have presupposed that extrapolations from rules of customary international law coincide with the shared interests of the individual states upon whose participation liability regime depends. Yet a regime constructed from custom obscures without resolving the differences between the conflicting values states assign the environmental protection.

The codification of general customary duties founders upon this quandary of legitimacy as those duties are furnished with mere determinate content, they become more controversial, and as a result many states refuse to bind themselves to the commands of regime. Without codification, however, the vague customary duties communicate so normative expectations or specific commands and states can claim that almost any conduct comports with international law. On the basis of doctrine of state responsibility applying before transboundary environmental injury has taken place, the procedural obligations upon states may be imposed such as the duty as assess potential environmental harm to another state from domestic activity and the duty to inform other nations of activity threatening transfrontier environmental injury.\(^{261}\)

### b) Responsibility and Liability

The word “responsibility” derives from the Latin “respondere” which was not so much used in answering questions generally as in rebutting accusations or

\(^{259}\) J. Brunee, *Acid Rain and Ozone Layer Depletion*, 3 (1988)


charges. In its English language development, the term has extended beyond the simple idea of liability of a rebuttal is not possible or successful. A person may be said to be responsible for an injury if, in the law, a duty or a standard of conduct has been imposed on him and harm to another results from a failure to meet that standard. He may also be said to be contingently liable if, as a result of his failure to fulfill his legally imposed responsibility, injury to another results. It is the contingent nature of the liability, once responsibility in both the above senses has been established, that separates responsibility from liability.

Article 139, Paragraphs 1 and 2 of the United Nations Convention of the Law of the Sea of 1982, utilize the terms responsibility and liability as denoting connected, but quite distinct, legal relations. They provide:

1. state parties shall have the responsibility to ensure that activities in the area, whether carried out by states parties, or state enterprises or natural or judicial persons which possess the nationality of state parties or are effectively controlled by them or their nationals, shall be carried in conformity with this part. The same responsibility applies to international organizations for activities in the area carried out by such organization.

2. without prejudice to the rules of international law and Annexure III article 22, damage caused by the failure of a state party or international organization to carry out its responsibilities under their part shall entail liability; states, parties or international organizations acting together shall bear joint and several liability.\(^\text{262}\)

The word responsibility indicate a duty, or as denoting the standards which the legal system imposes on performing a social role, and liability is seen as designating the consequences of a failure to perform the duty, or to fulfill the standards of performance required. That is, liability connotes exposure to legal readdress once responsibility has been established and injury arising from failure to fulfill that legal responsibility has been established.

c) The Principle of State Responsibility

Responsibility is simply the principle which establishes an obligation to make good any violation of international law producing injury, committed by the respondent state. Responsibility appears in principle, at the moment that the

\(^{262}\text{Ibid p.64}\)
internationally injurious act has taken place within the control of the state.\textsuperscript{263}

Traditionally it has been thought necessary to distinguish two different kinds of state responsibility\textsuperscript{264}. The state is originally responsible for the acts of its government, its agents and those other individuals authorized to act by the state.\textsuperscript{265} However, the state is only vicariously responsible for the acts of all other persons residing within its borders. International law being a law between states only, it must make every state in a sense responsible for certain internationally injurious acts committed by its, officials, subjects and such aliens as are temporarily resident of its territory.

Original responsibility gives the injured state the right of redress the international delinquency through a demand on the delinquent state for reparation. An international delinquency is any injury to another state committed by a state in violation of international legal duty. The ILC has dealt with the concept of an international delinquency in terms of the ‘International Illicit Act’ which arises where:

\begin{enumerate}
\item Conduct consisting of an act or omission is imputed to a state under international law; and
\item Such conduct in itself or as direct or indirect fallout of an extended event, constitutes a failure to carry out an international obligation of the state.\textsuperscript{266}
\end{enumerate}

On the other hand, the vicarious responsibility which a state bears only requires that state in addition to an apology, to compel those officials or other individuals who have committed internationally injurious act to repairs as far as possible the wrong done. In case a state complies with these requirements no blame falls upon it on account of such injurious acts.\textsuperscript{267} Further it is also true that, delatere; a state is not in general required by international law to answer to individuals for harm which it may inflict upon them.

Thus the traditional doctrine of state responsibility, therefore, is based upon fault, for example, international or negligent wrong-doing. However, the notion of fault in the context of activities which present sources of increased danger to the world community may be highly artificial and inequitable in terms of whether or not

\textsuperscript{263} Sohnand Boxter, "Responsibility of State for Injuries to the Economic Interest of Aliens".\textsuperscript{55} American Journal of International Law, 545,(1961)'\textsuperscript{264} I.L.Oppenheim, International law;(1955) 8th Ed., p.149
\textsuperscript{265} Ibid p.156
\textsuperscript{266} United Nations Document, A/CN/233 at 46,(April 16,1970)
\textsuperscript{267} Ibid p.150
a state should be held responsible for the harm resulting from such enterprises. The problem basically should be regarded as one of allocating probable or inevitable loss in such a manner as to entail the least hardship upon any individual and the preservation of the social and economic measures of the community. On these grounds, the state which sponsors and benefits from an activity should also carry the disadvantages of the activity. To exonerate such an enterprise (and its state sponsor) would have the effect of enabling it to conduct its operation at the expense of others and throw a valid operating cost on to the shoulders of its neighbours\textsuperscript{268}.

Moreover, the notion of fault is inadequate in determining state responsibility, for in the case of enterprise employing technological advances, for example, nuclear power production it may be impossible to arrive at a consensus as to the proper standard of care for the activity’s operation. Without this consensus the imputation of fault or negligence to the state would be impossible even though the activity sponsored by the state was the obvious source of international injury. Indeed, the very process of the activity may be protected from disclosure by the state’s requirement of secrecy, and thus unavailable for examiners by the claimant states or an impartial tribunal, as in case of space craft specially, proof of negligence is opt to very difficult to the necessary evidence likely to be complex and technical, but it may be know only to the government and protected by rules of military security\textsuperscript{269}. Under these circumstances, it is possible that strict liability may alleviate the limitations of original state responsibility as otherwise based upon fault. However, the establishment of strict liability as a principle of international law requires a preliminary review of the sources of international law.

4.6.6 The Issue of Prevention

Regarding the prevention issue, the secretariat reviewed numerous issues, noting that both the procedure and substantive aspects of prevention have been considered and provided for in both treaties and state practice.\textsuperscript{270} Special Reporteur Quentin-Baxter consistently recognized the importance of prevention, stating that it was his intention to emphasize prevention as well as reparation:

\textsuperscript{269} Beresford, “Liability for General Damage Caused by Space Craft”, 5 Doc.No.26,87th Conf. 1st Sect.548
\textsuperscript{270} ILC Thirty Seven Session, 6 May-26th July 1985, Study Prepared by the Secretariat a/CN.4/384,1984
‘the special rapporteur’s second major concern was to ensure that the topic would give pride of place to the duty, wherever possible, to avoid causing injuries rather to substituted duty of providing reparation for the injury caused’. 271

Special Rapporteur Mr. Baxter considered prevention to be one of the twin poles of his topic. He developed a “soft law” continuum of obligations to prevent, to inform, to negotiate, and to repair the operation of which would not require a finding of liability or responsibility based on wrongfulness.272. In his fourth report, Special Rapporteur Barboza stated that the pure obligation of prevention appears to be not autonomous, but directly linked with injury.273 The Special Rapporteur also acknowledged that allowing for a finding of wrongfulness based upon a violation of the obligations to inform and negotiate, raises fears about,

1) superimposing a regime of wrongfulness and a regime of caused responsibility,
2) attaching too much importance to prevention rather than reparation, and
3) Placing “unacceptable limits on freedom of the initiative in the territory of the source state,” to the extent that that ‘the territorial sovereignty of the affected state would thus take precedence over that of the source state with the establishment of a virtual veto against the conduct of useful activities of its territory’.

In the fifth report, Special Rapporteur Barboza stated that his approach is one of a continuum of residential obligations. He has significantly expanded and refined the article on cooperation.274 State shall cooperate in good faith in preventing or minimizing the risk of transboundary injury or if injury has occurred, in minimizing its effects both in affected state and in source state.

In the Eighth Report of ILC various views were expressed regarding extending the concept of prevention to include measures taken after the occurrence of harm in order to minimize the effect of the harm. In the opinion of some members, measures taken after the occurrence of harm were not technically of a preventive character, but were taken to mitigate harm and should be referred to as such. Some members agreed with the Special Rapporteurs broader notion of preventing they felt prevention had two aspects; to prevent the occurrence of significant harm and when

271 ILC Third Report, 1987, at p.9
272 Ibid p.10
273 ILC Fourth Report, 1988, at p.107
274 ILC Fifth Report, 1989, p.17
an accident had occurred, to avoid a multiplier effect. They detected trend, in recent years, towards broadening the scope of the concept of prevention. The United Nations Convention of the Law of the Sea was given as an example, where references were made to prevention, reduction and control of pollution of the marine environment. In some respects, provisions on prevention had been designed not to prevent altogether the harmful effect of an activity, but to limit the extent of the harm caused.

4.6.7 International Liability for the Injurious Consequences of Acts not Prohibited by International Law

Akin to responsibility but not identical to it is the possible liability of states for the injurious consequences of acts which are not prohibited by international law. The essence of the distinction between responsibility and liability is that the prerequisite to the former is an act breaching international law, while the latter is concerned with harmful effects of an activity which is not perse a violation of international law. The ILC has been addressing this matter since 1978 and much of its work has been focused on such liability for harm to the environment. Controversy, however, has arisen with respect to such issues as to whether liability should be incurred not only because of ensuing harm, but cause of the existence of risk and the circumstances in which reparation should be afforded. The issues involved are so controversial that it is unlikely that any substantive results will emerge in the foreseeable future275.

Protection of the environment is a relatively new area for international regulation. Environmental international law is constantly developing and expanding as it attempts to grapple with and solve the problems presented by greater intercourse in a technologically advanced international community. The response of international law to environmental issues simultaneously demonstrates the youthfulness and topically of the international legal system.

4.6.8 State Responsibility and International Environmental Law in Indian Perspective

India follows the dualistic concept of international law. The rules of international law require for to be specifically incorporated into national law, for the purpose of their implementation. There is a common misconception prevailed in

275 Supra Note 238, p.193
Indian judicial system to the effect that international conventions are not enforceable unless there is a specific adoption or an enactment.

Most of environmental legislations in India have been enacted immediately after the Stockholm Conference on Human Environment and are influenced by the outcome of the conference. The 42\textsuperscript{nd} Amendment to the Constitution, which allowed incorporation of environmental concerns into Directive Principles of State Policy, is also influenced by the Stockholm Conference.

The Indian policy on environmental protection is based on the inherent linkage between environment and development. The development being the main driving force in international interactions, it is not inclined to view environmental concerns in isolation from developmental imperatives. Foregoing a balance between developmental and environmental imperatives have been in its national and international agenda for many years now it believed that the right to development should be fulfilled so as to equitably meet the developmental and environmental needs of present and future generations.

The Indian perspective of state responsibility to the environment cannot be understood without and understanding its views on environment. India always believed that any protective measures on environment should preceed hand with promotion of economic development. Even at a time when international concern over environment issues was yet to fully crystallize.

The Indian Prime Minister Mrs. Indira Gandhi during the Stockholm Conference, 1972 emphasized that the environmental concerns cannot be viewed in isolation from developmental imperatives. She said; ‘poverty is the greatest polluter.’ Further says “the environment cannot be improved in conditions of poverty how can we speak to those who live in villages and slums about keeping the oceans, the rivers and the air clean, when their own lives are contaminated at the source.” This point was well taken by the Stockholm Conference on Human Environment, which confirmed the linkage of poverty and environment in a vicious spiral in which degradation of the environment increases poverty, while poverty increased environmental degradation. The linkage created between environment and development in the Stockholm Conference was further strengthened by the Earth
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Summit which adopted the Declaration of Rio and a comprehensive program of action to give effect to those principles Agenda 21.

India had always stressed the need for fulfillment of the obligation of developed countries to provide new environmentally sound technologies to the developing countries and also implement cutbacks of pollution or to take on additional obligations regarding pollution reduction. India was also critical of developed countries over using limited natural resources to exhaustion and their heavy contribution to world pollution.

The government of India’s priority had not changed even during the Johannesburg’s Summit. It demanded in the summit that the rich world should show that it was serious about talking poverty, and conserving the environment. It called upon the rich world to reduce its high consumption levels and to increase development assistance. Although India has been party to a number of multilateral environmental conventions do not have liability provisions or have rudimentary enabling provisions which await elaboration by further negotiations. It is, therefore rather hypothetical, to spell out probable the India stand on state liability or responsibility to the environment.

However, the development of a standard setting process since the Stockholm Declaration of 1972 and the interpretation of the Supreme Court in its decision in the Oleum Gas Leak Case and the recently released environmental policy document would be some help in identifying the Indian view on state responsibility to the environment.\(^{277}\)

The Indian Supreme Court has been proactive in the protection of the environment. In one of its constitutional decisions, it declared the right to a clean environment is fundamental right. In M.C. Mehta’s Case\(^ {278}\), the Apex Court laid down that “where an enterprise is engaged in hazardous, or inherently dangerous activity, and harm results to any one on account of an accident in the operation of such hazardous or inherently dangerous activity, for example in escape of toxic gas, the enterprise is strictly and absolutely liable to compensate all those affected by the accident”.

Indian courts, as court that apply common law have to acknowledge and apply the customary international law, where the relevant customary international

\(^{277}\) M.Gandhi, “State Responsibility and International environmental Law”, p. 245
\(^{278}\) M.C.Mehta V Union of India, (1987) 1 SCC 395, Popularly Known as Oleum Gas Leak Case
law is sufficiently certain. Another way of applying international legal principles through the municipal system is by expantial interpretation where the Supreme Court can relate the provisions of the international norms and conventions to which India is a party, in the of legislation, to the fundamental rights provisions of the Constitution of India. These two modes did provide enormous scope for the Supreme Court to enrich the national environmental jurisprudence including the expansion of the ambit of the state responsibility to the environment.

The government of India’s policy on the environment also employs a pragmatic approach in this regard. The National Environmental Policy (NEP) laid down 14 principles. Most of them are sustainable development related principles, where legal liability also finds a place. Mention has been made in the policy document of fault based liability and strict liability. Thus, by implication the national environmental policy subscribes to a liability scheme, which could combine fault based and strict liability.

4.7 State Responsibility and War Crimes

“Crimes against international law are committed by men, not by abstract entities, and only by punishing individual who commit such crimes can the provisions of international law be enforced”.

*Nuremberg Judgment

Historically, international law was concerned only with actions of states, while the individuals through whom States acted remained almost entirely outside its preview. Yet, since the end of the cold war the international legal system has seen a resurgence of the driving ideas behind the Nuremberg and Tokyo trials that of establishing individual criminal responsibility for grievous atrocities and mass violations of human rights and the laws of armed conflict, under international law, and before international courts, if municipal judicial systems are unwilling or unable to prosecute the offenders. The establishment of the adhoc ICTY and ICTR by the UN Security Council and the development of hybrid, internationalized criminal tribunals such as one of the Sierra Leone finally culminated in the creation of a new permanent International Criminal Court (ICC). Yet, all these developments of the past decade dealt with individual and not state responsibility for international crimes.

279 Ratner and J.S.Abrams, Accountability for Human Rights Atrocities in International Law; Beyond the Nuremberg Legacy, (2nd Ed, 2001), at 187 – 225
Indeed, it was precisely the need to remove from culpable individuals the protective shield of the state which caused the development of individual responsibility in international law, as is shown by the quotation from the Nuremberg Judgment at the beginning of this topic.

As we have seen, certain rules were made by the international community for the regulation of unchecked mass violence by belligerents in war. The efficiency and sanctity of law is primarily based on its enforcement. Infringement of law is ultimately dealt with by inflicting punishment of the perpetrators. The rules of warfare have been made to minimize human suffering and damage to property. These rules also endeavour to infuse minimum fairness in otherwise unfair use of violence. The Hague Convention, 1899 declared certain offences as war crimes.

The Second World War witnessed violations of rules of warfare with impunity. Even the Treaty of Versailles concluded after the First World War provided for trial of the Head of State and its armed forces for starting an aggressive war. The Treaty, in Article 227, recognized the right of the allied and associated powers to bring before the Germans those accused of war crimes. The Kaiser of Germany, Wilhelm II, was also to be tried before an international tribunal. But this did not materialize due to: (1) defense of superior command and absence of pre-existing law and, (2) refusal of the Dutch Government to surrender ex-Kaiser who had taken asylum there. Even the victorious states opposed such option, regarding the trial in International Court of a Head of State as “unprecedented in national and international law, contrary to the basic concept of national sovereignty”.

Infringement of the rules of warfare during the Second World War prompted the governments of the United States. In 1945, the United Nations War Crimes Commission was constituted under Lord Wright and an agreement was signed in London between USA, UK, USSR and France for establishing an International Military Tribunal. This led to the trial of Nazi leaders at Nuremberg. The victorious states also established the Tokyo Tribunal pursuant to the Potsdam Declaration of 20th July 1945. The Charter of the International Military Tribunal for the Far East

282 Articles, 227-230, The Treaty of Versailles
was approved on 19th January 1946. The trial was held in Tokyo, various special and municipal tribunals were also established for trial of such war crimes. The Israeli Supreme Court also tried Eichmann, a German national, for committing many atrocities upon Jews under the Nazi Government. The Court found him guilty and sentenced him to death. The Court noted that “these crimes, which shocked the conscience of nations, are grave offences against the law of nations itself (delicto juri’s gentium”). The Court claimed universal jurisdiction on such offences.\(^{284}\)

4.7.1 State Responsibility for a Crime

Basic Methodology of State Responsibility

One of the primary contributions of the codification effort of the ILC to develop a methodology of state responsibility is its separation of the primary rules of substantive international law from the secondary rules of state responsibility, and its focus on the latter.\(^{285}\) The Pre-World War II rules of state responsibility were intimately connected to issues surrounding diplomatic protection, state treatment of foreign nationals and the development of the international minimum standard,\(^{286}\) generally detested in the developing world.\(^{287}\) The ILC’s codification project of the law on state responsibility lasted for decades and went through several iterations, finally culminating in the 2001 Draft Articles on Responsibility of States for Internationally Wrongful Acts.\(^{288}\) The ILC did its best to formulate a separate body of rules which are applicable to a wide variety of situations, and it therefore produced the present Articles, which are logically structured in such away as to remind us of a civil code in a European legal system, Robert Ago, one of the ILC’s most influential special reporteurs on state responsibility, saw the Draft Articles as specifying:

The principles which govern the responsibility of states for internationally wrongful acts, maintaining a strict distinction between this task and the task of defining the rules that, place obligations on states, the violation of which may generate responsibility. It is one thing to define a rule and the content of the

\(^{286}\) A. Cassese, *International Law*, (2nd Ed.2005), at 241-243  
\(^{288}\) The UN General Assembly took note of the Articles by its Resolution 56/83 of 12 December 2001. See also Caron, ‘The ILC Articles on State Responsibility: The Paradoxical Relation Between Form and Authority’, 96,AJIL, (2002), 859
obligation it imposes, and another to determine whether that obligation has been violated and what should be the consequences of the violation.\textsuperscript{289}

By creating this rather bland piece of codification, the ILC has managed to relegate extreme by controversial issues to the area of primary rules, and thereby achieve both a wider acceptance of the Article and a sound methodological structure.\textsuperscript{290} Some of the more delicate questions of state responsibility such as whether fault or damages comprise a necessary element of responsibility, have also been relegated to the area of primary rules.\textsuperscript{291} Even though this solution is not entirely accepted by some commentators,\textsuperscript{292} it was viewed a very wise decision. The matter of fault is especially pertinent when state responsibility for war crime is at issue, as the very existence of war crime depends on subjective elements. The basic postulate of analysis is that state responsibility is per se neither strict nor subjective as to any required element of fault by a state, the precise nature of the responsibility, and the required degree of culpability, be it specific intent, negligence or knowledge, purely depend on the primary rules. It is quite possible to disagree with this basic starting position adopted by the ILC, as state practice can be interpreted in various ways. The ILC’s work is certainly not gospel and its authority, as well as that of the ICJ for that matter, does not place it or the ICJ beyond criticism. The basic distinction between primary and secondary rules is but one starting point, however appealing it has been criticized, and in a very powerful way.\textsuperscript{293}

It can be believed that maintaining, as much as possible, a distinction between primary and secondary rules is the only way in which we can preserve a semblance of methodological sanity, and preserve the concept of the law of state responsibility as a body of general rules, applicable in all areas except those regulated in whole or in part by a special regime.\textsuperscript{294} As we shall see, the secondary rules of state responsibility actually do not bring much specifically regarding war crime, on the contrary. it is the primary rules on war crime, and the interaction of these rules with the ones regulating state responsibility which make the whole matter

\bibitem{289} European Journal of International Law, (June. 2006), p.3
\bibitem{290} Supra Note 286, at 244-245
\bibitem{291} M.N.Shaw, \textit{International Law}, (5th Ed, 2003), at 698
\bibitem{292} Supra Note 286, at 251, Cassese rightly notes that responsibility under Articles 17 and 18 of the Draft Articles entails an element of knowledge
\bibitem{293} Allott, “\textit{State Responsibility and the unmaking of International Law}”, 29 Har.Int’LJ, (1988), 1
\bibitem{294} Crawford, “\textit{The ILC’s Articles on Responsibility of States for Internationally Wrongful Acts}”, 96 AIL (2002) 874, 876-880

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exceedingly complicated. It is in the area of primary rules where we will find answers on issues such as intent or burden of proof, while the purpose of the secondary rules is mainly to define a proper standard for attribution, which would apply even in cases not involving war crimes.

4.7.2 Definition of War Crimes

Broadly speaking, war crimes are violations of the customary and treaty rules of warfare. Such violations may be done by the armed forces or political leaders having the power to control or authority to give directions.

Rosalyn Higgins defines war crimes as inclusive of the violation of the recognized rules of warfare by members of the armed forces, illegitimate hostilities in arms committed by individuals who are not members of the armed forces.

A comprehensive definition of war crimes has been given in Article 8 of the statute of the International Criminal Court, 1998. According to it, war crimes means:

a) grave breaches of the Geneva Conventions, 1949;

b) other serious violations of the laws of war and customs applicable in international armed conflict. This definition also applies to an armed conflict not of an international character.²⁹⁵

Probably the widest definition of the international crimes as given by Prof Schwarzenberger is that they are acts which “strike at the very roots of international society.” Genocide, war crimes, piracy etc. are thus clearly and without a shade of doubt international crimes.

Professor Kelson and other older writers defined war crimes as the violation of the laws and customs of war. Prof. Higgins, war crimes include the violations of the recognized rules of warfare by members of the armed forces, illegitimate hostilities in arms committed by individuals who treason and marauding. Professor Oppenheim has given a wider definition of war crimes in the following words, “war crimes are such hostile or other acts of soldiers or other individuals as may be punished by the enemy on capture of the offenders. They include acts contrary to international law perpetrated in violation of the law of the criminals own state, such as killings or plunder for satisfying private lust and gain as well as criminal acts

²⁹⁵ The details are given in Art.8 (2) (a), (b), (c), (d) and (e). Under Art.8(2)(b), the definition covers a protracted armed conflict within a state between governmental authorities and organized armed groups or between such groups
contrary to the laws of war committed by order and on behalf of the enemy state.”

To that extent “the notion of war crimes”, observed by Oppenheim, “is based on the view that states and their organs are subject to criminal responsibility under International Law.”

4.7.3 Kinds of War Crimes

Oppenheim has distinguished four different kinds of war crimes on account of the essentially different character of the acts, namely:

1. violation of recognized rules regarding warfare committed by members of the armed forces,
2. all hostilities in arms committed by individual who are not member of the enemy armed forces,
3. espionage and war treason,
4. all marauding acts.

The following are examples of the more important violations of rules of warfare:

- Making use of poisoned, or otherwise forbidden, arms and ammunition, including asphyxiating, poisonous and similar gases,
- Killing or wounding soldiers disabled by sickness or wounds who have laid down arms and surrendered;
- Assassination, and hiring of assassins,
- Treacherous request for quarter, or treacherous feigning of sickness and wounds,
- Ill-treatment of prisoners of war, or of the wounded and sick. Appropriation of such of their money and valuables as are not public property.
- Killing or attacking harmless private enemy individuals. Unjustified appropriation and destruction of their private property and especially pillaging. Compelling the population of occupied territory to furnish information about the army of the other belligerent or about his means of defense,

297 Ibid p.567
298 B.N. Mehrish, *War Crimes and Genocide; The Trial of Pakistani War Criminals*, (1972), p.8
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- Disgraceful treatment of dead bodies on battle fields. Appropriation of such money and other valuables found upon dead bodies as are not public property or arms, ammunition and the like;
- Appropriation and destruction of property belonging to museums, hospitals, churches, schools and the like;
- Assault siege and bombardment of underfunded open towns and other habitations, unjustified bombardment of underfunded places by naval forces. Aerial bombardment for the sole purpose of terrorizing or attaching the civilian population,
- Unnecessary bombardment of historical monuments, and of such hospitals and buildings devoted to religion, art, science, and charity as are indicated by particular signs notified to the siegers bombarding a defended town,
- Violations of the Geneva Conventions,
- Attack on, or sinking of enemy vessels which have hauled down their flags as a sign of surrender. Attack on enemy merchantmen without previous request to submit to visit,
- Attack or seizure of hospital ships, and all other violations of the Hague Convention for the Adaptation of Maritime Warfare of the Principles of the Geneva Convention,
- Unjustified destruction of enemy prizes,
- Use of enemy uniforms and the like during battle and use of the enemy flag during attack by a belligerent vessel,
- Attack on enemy individuals furnished with passports or safe conducts and violations of safeguards,
- Attack on bearers of flags of truce,
- Abuse of the protection granted to flags of truce,
- Violation of cartels, capitulations and armistices,
- Breach of parole.299

The Second World War witnessed war crimes, on a scale unprecedented in history, on the part of Nazi Germany and to a lesser extent, of some of her aliens.

299 Ibid pp. 8-10
4.7.4 Important War Crimes Trials

Now it is generally recognized that there is personal responsibility for commission of war crimes. This is evident from Nuremberg, Tokyo and Peleus Trials and in some important cases.

The Scuttled U-Boats Case; (1949) 1 Law Reports of Trial of Criminals 55

This case relates to war crimes and the punishment of war criminals. The North-Western Command of the German Armed Forces surrendered on May 4, 1945 before the allied nations. The surrender included all the Sea Vessels in the said area. The surrender was made in consequence of an armistice agreement. After the signing of the instrument of surrender but before it came into effect, the German Officers ordered their subordinate officers to scuttle the U-Boats. Later on this order was countermanded. But the accused who was an instructor of the U-Boats ordered the scuttling of U-Boats and consequently the U-Boats were scuttled. The accused was arrested and was prosecuted for violating the laws of war, in his defense, the accused put forward the two arguments:

i. The terms of the instrument of surrender were not known to him as they were not intimated to him.

ii. He did not know or receive the information of countermanding of the original order regarding cutting of U-Boards.

The accused was held guilty and was sentenced to five years imprisonment.

The Court held that by 5 May, it had become clear that the U-Boats had become the property of the allied nations and could not therefore be destroyed. Even if it was admitted that the first order relating to scuttling of U-Boats was binding then in between 5th and 6th May, the incidents that had taken place could have led any reasonable man to realize that under these circumstances the scuttling of U-Boats would be violation of the laws of war. The accused knew this yet he committed the crime. The court propounded the following principles.

1. If the armed forces of a state surrender after an armistice agreement then the agreement shall be binding on both the states i.e., the surrendering state and the state to whom the surrender is made. If after the surrender, the soldiers do not observe and follow this agreement, they will be guilty of the violation of the law of war.
2. If a person scuttles the Boats or otherwise causes harm to them after the armistice agreement and surrender in pursuance thereof, he will be guilty of war crimes because after the surrender war boats become the property of the conquering state.

**Nuremberg Trial**

The Nuremberg Tribunal was established to try and punish the war criminals of Germany. The main charge against these accused was that they had committed war crimes, crimes against peace and crime against humanity during the Second World War. Under the leadership of Hitler these accused had committed inhuman atrocities upon the Jews. These accused were also charged for having violated the Treaty of Versailles, 1919 and the Pact of Paris, 1928. Great emphasis was laid on the Pact of Paris, 1928, because through it the parties had renounced war as an instrument of national policy for the settlement of international disputes.

This trial was conducted under the Charter of the International Military Tribunal, 1945. The Judges were from four victorious states (USA, USSR, France and the United Kingdom). Twenty-two leaders of the Third Reich (Germans) were tried. Out of these twelve people were awarded the death penalty, three were given life imprisonment and four were given imprisonment for various terms. Three accused persons were acquitted.

While delivering the judgment, the Nuremberg Tribunal laid down the some principles;

1. The 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.
2. The court also lay down, “The fact that a person who committed an act which constitutes a crime under international law acted as the head of the state or responsible government official does not relieve him from responsibility under international law.”
3. The Court also laid down the fact that a person acted pursuant to orders of his Government or his superiors does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him.

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300 The International Military Tribunal, Nuremberg, (1946), cmd 1964, AJIL;Vol.4(1947), p.172
301 Supra Note 281, p.264
4. The accused had raised the objection that unless there was pre-existing law, an act cannot be declared as crime nor can it be punished. The Nuremberg Tribunal rejected this argument.

5. In the view of the court the conduct of aggressive war was highest international crime. According to the court Germany was responsible for starting aggressive war against other countries which was against the Pact of Paris, 1928. Hence persons responsible for organizing and conducting this war were declared guilty.

6. The court also held the accused guilty for making bad treatment towards the prisoners of war. The accused argued that since Russia had not signed the Geneva Convention relating to the treatment of the prisoners of war, they could not be punished for the bad treatment towards the Russian prisoners of war; but the court rejected even this argument and held them guilty.

**Justification and Criticism of Nuremberg Trial**

The verdict of the Nuremberg Tribunal has been justified by a number of jurists. They have contended that war crimes, genocide and crimes against humanity are all international crimes and the offenders of such crimes should be given deterrent punishment and in this respect the Nuremberg Tribunal performed commendable work. Such Jurists have laid great emphasis upon the Pact of Paris, 1928.

On the other hand, there are a number of Jurists who have severally criticized the judgment of Nuremberg Tribunals. The main points of their criticism are as follows.

1. It was not proper to lay so much emphasis upon the Pact of Paris. In their view, the intention of the Pact of Paris was not to make war an international crime. They have also pointed out that the charge of starting war and organizing or conducting aggressive war was not justifiably leveled.

2. As pointed out by Chief Justice Marshall of America, the Nuremberg Charter declared those crimes punishable which were not punishable at the time when the crimes were committed. This was contrary to the principle of criminal law.
3. According to Prof. Schick, some of the principles incorporated in the Nuremberg Charter were contrary to the law, of nations. In his view, the plea of superior orders was rejected without any sound or concrete ground.

4. The circumstances in which the tribunal was established, impartial justice was not possible.

5. Grave doubts have been expressed in regard to the principles propounded by the Nuremberg Judgment.

6. Nuremberg Military Tribunal cannot be called an international tribunal in the real sense of the term because most of its judges belonged to the victorious nations.

Despite the above criticisms, it cannot be admitted that the principles propounded in the Nuremberg Trial have greatly influenced international law and particularly the laws of war relating to war crimes. These principles have contributed much to the development of law relating to the war crimes. The Nuremberg tribunal made it clear that the laws of war are not only for states but they are also applicable upon individuals.

Tokyo Trial

As Nuremberg Tribunal was established to try war criminals of Germany, the Tokyo Tribunal was established to try the war criminals of Japan. The Tokyo Tribunal was established by the victorious states by making an agreement and subsequently by issuing a Charter conferring jurisdiction upon the court. The Tokyo trial started hearing on June 4, 1946 and was prescribed by Sir William. A special feature of this trial was that its judges were not only from the victorious states, but some of the Judges belonged to other states also. For example, the eminent Indian Jurist Dr. Radha Vinod Pal was one of the Judges of the Tokyo Tribunal. Besides this, there were some Judges from Philippines and other countries of the Common Wealth of the Nations. During the trial the accused objected that they could not get justice from this trial because most of the judges belonged to the nations which defeated, Japan, but this objection was rejected by the Court. The Tokyo Tribunal awarded death sentences to those persons who were guilty of conducting and organizing war and awarded imprisonment for different terms to other persons accused of war crimes.

302 See also for I.A.S.(1974)
Dr. Radha Vinod Pal, who was one of the judges of the Tokyo Tribunal, delivered his dissenting judgment. According to him, war is beyond the scope of international law although its conduct is within the scope of the rules of international law. Besides, he expressed the view that conspiracy was not an independent crime under international law. Consequently he held that the accused should be declared not guilty as there was no evidence on the record to prove their guilt.

**Peleus Trial**

Peleus was Greek ship which was sunk by the German-U-Boat. After sinking the ship the commanders of the U-Boat ordered firing upon the members of the crew of the ship who were trying to save their lives through life boats. Thus out of 35 people, 22 members of the crew lost their lives in consequence of firing. After some weeks when on account of air attacks, the U-Boats were compelled to come to the court, officers on board of the boats were arrested and were prosecuted for war crimes.

The Court ruled that it is the fundamental usage of war that firing and unarmed enemies is prohibited. The court referred to an old case, namely, Llandovery Cartle (1921), wherein it was laid down, “in war of land the killing of unarmed enemies is not allowed, similarly in war at sea the killing of ship-wrecked people who have taken refuge in life boats is forbidden”.

During the trial the accused contended that they were not guilty because they fired on the orders of the superior officers, but the court rejected the plea of superior orders and held that they were bound to obey only lawful orders of their officers. There is no duty to observe orders which are not lawful consequently, the accused were held guilty and were duly punished.

**Eichmann Case** (1962)

Under Hitler, Eichmann had committed many Nazi atrocities upon the Jews. The charge against him was that he was responsible for the murders of lakhs of Jews and for inhuman treatment towards them. The spies of Israel were after him for a long time, but he was fleeing from one country to another and escaping arrest and

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303 Annual Digest of Public International Law (1923-1924), Case No.235
304 Adlof Eichmann V. Attorney General of the Government of Israel, Supreme Court of Israel, (1962), 136 I.L.R.277; I.A.S. (1973), for more details see also the case of Eichmann discussed under the heading “Principle of Universal Jurisdiction” in chapter on “Piracy” and “State Jurisdiction”.

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trial. Ultimately the Israeli spies caught him in Argentina. But on account of the fear that the Government of Argentina might not extradite him for prosecuting him for having committed war crimes, the Israeli spies abducted him from Argentina to Israel in an irregular way. In Israel Eichmann was prosecuted for war crimes and was sentenced to death. An appeal was filed in the Supreme Court of Israel. It was contended on behalf of Eichmann that the courts of Israel did not possess the jurisdiction to try him because when the crimes were committed by him, Israel as a state did not exist. That is to say war crimes were committed during the Second World War and Israel came into existence after that. But the Supreme Court of Israel rejected this argument and propounded the principle of Universal Jurisdiction in respect of war crimes and genocide.\textsuperscript{305}

**Mai Lai Trial**

Mai Lai is a village in Vietnam, the whole population of which was killed by American military personnel. It was clearly a war crime and consequently there was a great reaction in the international community and America was charged of having encouraged perpetration of war crimes of military officers in Vietnam. American nationals also expressed their resentment against such atrocities and war crimes. Due to the reaction of the international community as a whole and the pressure of the American nationals at home, the Government of America was compelled to hold a trial of the officer responsible Lt. Caley. The Court held the accused guilty and awarded punishment to him. Mai Lai trial is a landmark event, in respect of the punishment awarded to war criminals for the violation of the war crimes. Hitherto war trials were such wherein the victorious state had conducted the war crimes trials against the criminals of the vanquished nations, but Mai Lai trial marked the beginning of a new trend which shows that there will be circumstances wherein because of the reaction or public opinion of the international community, and the pressure of its own nationals, a state may be compelled to hold war criminals trials against its own officers. It is undoubtedly an auspicious beginning and augurs well for the observance of law of war in future.

**4.7.5 “Modern” as Distinguished from “Traditional” War Crimes**

At this stage, it is necessary to distinguish between “traditional” war crimes, up to and including the trials after World War II and modern developments.

\textsuperscript{305} See also J.F.S. Fawcett, “The Eichmann Case”, B.Y.B.I.L. Vol xxxVII (1962), pp.81-210
epitomized in the two adhoc International Tribunals for the prosecution of persons responsible for serious violations of IHL committed in the Territory of Former Yugoslavia Since 1991 and the International Criminal Tribunal for the prosecution of persons responsible for Genocide and other Serious violations of IHL committed in the Territory of Rwanda. These tribunals can be seen as forerunners of the ICC. The distinguishing mark between traditional and modern war crimes is found in the attribution of the impugned acts to the state or other recognized international entities.\textsuperscript{306}

The criminal acts adjudicated in the Nuremberg and Tokyo Tribunals after World War II are unquestionable acts attributable to the states concerned, Germany and imperial Japan, respectively. The accused were nearly all senior government officials or senior officers of the armed forces. Moreover, the unconditional surrenders of Germany and Japan, apart from supplying a juridical underpining for those trials and convictions, placed in the hands of the two prosecution teams all relevant government archives and other evidence then available. These factors do not exist today as regards the two adhoc tribunals, nor are they contemplated for the ICC.\textsuperscript{307}

This analysis, indeed, is recognized in Article 4, responsibility of states, of the Draft Code of Crimes which states; “The fact that the present code provides for the responsibility of individuals for crimes against the peace and security of mankind is without prejudice to any question the responsibility of states under international law”.\textsuperscript{308} Likewise, Article 4 of the Rome Statute\textsuperscript{309} provides that no provision in the statute relating to individual criminal responsibility shall affect the responsibility of states under international law. The commentary to Article 4 of the Draft Code of crimes contains a cross reference to Article 19 of the Draft Articles on State Responsibility and concludes, “The state may remain responsible and be unable to exonerate itself from responsibility by invoking the prosecution or punishment of the individuals who committed the crime”.

\textsuperscript{306} New York University Journal of International Law and Politics, (1997-1998), p.4
\textsuperscript{307} Ibid p.5
\textsuperscript{308} Draft Code of Crimes Against the Peace and Security of Mankind, G.A.Res.42/151, U.N.GAOR, 42nd Sess, at 292
4.8 State Responsibility and Indigenous Peoples

Indigenous peoples are generally considered those who inhabited a country or a geographic region at the time when people of different cultures or ethnic origins arrived, the new arrivals later becoming dominant through conquest, occupation, settlement or other means. The Bushmen of Botswana, the Ainu of Japan, the Pygmies of Central Africa, the Inuits of the Arctic, the Yanomami of Brazil, the Maori of New Zealand and the Tribal of India may be as different as day and night in their cultures, customs and traditions. But they are some of the 300 million “indigenous” individual’s world wide, face a common threat being civilized to extinction. Their names are many; Aborigines, Indian people, Natives, First people or Tribal’s. But all “indigenous peoples “belonging to 5000 or so groups scattered in more than 70 countries are descendants of the original inhabitants of their lands. The contribution of these “peoples” to modern civilization is pervasive. They were the original cultivators of such staple foods as peppers, potatoes, peas, sugarcane, garlic and tomatoes. They were the first to develop and use most of the world’s plant based pharmaceuticals, from aspirin to quinine, and have given the English language such words as Canoe, Barbecue and Squash. Despite their great influence on the food we eat, the languages we speak, and the science was and medicines we use to better our lives, “indigenous peoples” have often, at best, been forgotten and, at worst, been driven from their lands, robbed of their cultures, excluded from political decision making, brutally socialized and economically exploited.

An indigenous person from a developing nation may tell the following story; she inhabited a land of inestimable worth. To her and her family, the land represented nothing less than life itself. It reared the children and received the elders, it sustained economic welfare, it embodied individual and collective spiritually and identity. The lushness of the land, however, contained resources that were in demand by others, including numerous foreign corporations. Eventually, one or perhaps a few, of these corporations succeeded in either expropriating her land or having the land expropriated for them by the state that governs her tribe. She is not certain how it happened, nor does she care. She knows only that in the process of losing their land, members of her tribe have suffered, and with all or part of their land lost, they

311 UN Chronicle, June 1993, at p.40
continue to suffer. She reports that have lost their way of life, their spiritually, and their identity, and she says they have no domestic recourse.\textsuperscript{312}

Indigenous, who are estimated to number more than 250 million persons (approximately 4% of the world’s population) include about 5000 distinct groups, living in roughly 70 nations. They generally participate only minimally in the growing global economy, often by their own choice. They typically resist development within their territories, perceiving it as a threat to their survival as a people. This resistance often puts them in direct conflict with the government of the states in which they live, government that, generally are intensely committed to fostering that development. Despite their opposition to the developmental policies of the government, tribal people generally do not aim to establish their own separate nation state (particularly because these tribal groups are often very small). Rather, they wish to acquire local control sufficient to protect their own land and culture, as well as a voice in the decision making of the states in which they find themselves. Although these people are often in the minority, they are distinguishable from other minorities, such as the Latino population in the United States, in that their primary concern is generally the protection of their culture through preservation of their land base.\textsuperscript{313}

Indigenous peoples have generally “been organized primarily by tribal or kinship ties, have had decentralized political structures often linked in confederations, and have enjoyed shared or overlapping spheres of territorial control.”\textsuperscript{314} By contrast, the currently dominant form of government, the nation state, developed after the Treaty of Westphalia (1648). It was based upon “a model of exclusivity of territorial domain and hierarchical centralized authority”.\textsuperscript{315} Since indigenous peoples did not fit this pattern, they were historically not recognized by international law, creating another source of vulnerability. This vulnerability facilitates the victimization of indigenous people by the corrupt (illegal) exploitation of their resources. This tends to take one of three forms.

1. The most obvious of these is when government officials appropriate the land or resources of indigenous peoples for their own individual gain, in actions which

\begin{itemize}
\item \textsuperscript{313} Maivan Clech Lam, \textit{At the edge of the State: Indigenous Peoples and Self-determination}, (2000), p. 2-3
\item \textsuperscript{314} Anaya.S.James, \textit{Indigenous Peoples in International Law} 3, (1996), p. 15
\item \textsuperscript{315} Ibid p.16
\end{itemize}
are at least arguably illegal, even under Justice John’s Marshall’s right of conquest.\textsuperscript{316}

2. In the alternative, corruption occurs when government, either by omission or by active support allows private individuals to appropriate indigenous resources.

3. In addition, it is also corruption when the government itself acts in ways which are illegal under international law (Particularly as developed since World War II).

\textbf{4.8.1 Definition of Indigenous Peoples}

There is no universally accepted definition of an indigenous person. Some of the inquiries made by western science to distinguish indigenous populations include whether the community in question occupy ancestral lands or if they share common ancestry with the original occupants, and defining what the culture in general is like regarding religion, tribal system, life style, livelihood, language, residence in certain parts of a particular country or in certain regions of the world.\textsuperscript{317}

According to the Oxford dictionary “indigenous” means native, belonging naturally, that of the people regarded as the original inhabitants of an area.\textsuperscript{318} Thus indigenous peoples are generally so called because they were living on their lands before settlers came from elsewhere, they are the descendants those who inhabited a country or a geographic region at the time when people of different cultures or ethnic origins arrived, the new arrivals later becoming dominant through conquest, occupation, settlement or other means.\textsuperscript{319} This meaning conveys the domination over the original inhabitants of an area in the historical chronological sense. In the international context three types of definition are used.

The first definition is found in an International Law Instruments, the Convention Concerning Indigenous and Tribal Peoples in Independent Countries (Convention No. 169 of 1989) of ILO.

Article 1 (1) (b) of the revised Convention No 169 defines “indigenous as follows:

“Peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonization or the

\textsuperscript{316} Ibid p.17
\textsuperscript{319} U.N.\textit{The Human Rights Fact Sheet No.9, Centre of Human Rights, Geneva, (1990), at p.3
establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions”.

According to this definition indigenous peoples need not be a special category of tribal peoples and need not be confined to a particular part of the world. They may be peoples who have been affected during the establishment of the present state boundaries and who retain some of their economic, cultural and political institutions.  

The second definition is a working definition which has been accepted as an operational definition in the elaboration of an instrument that is international in character.

“Indigenous populations are composed of the existing descendants of the peoples who inhabited the present territory of a country wholly or partially at the time when persons of a different culture or ethnic origin arrived there from other parts of the world, overcome them and, by conquest, settlement or other means, reduced them to a non-dominant or colonial condition, who today live more in conformity with their particular social, economic and cultural customs and traditions than with the institutions of the country of which they now form part, under the state structure which incorporates mainly the national, social and cultural which incorporates mainly the national, social and cultural characteristics of other segments of the population which are predominant”.

Thus according to the working definition “indigenous” are those original inhabitant of a territory who for the historical reasons reduced to non-dominant or isolated or marginal population and who are socially and culturally distinct from other segments of the predominant population.

The third definition is contained in the World Bank’s Operational Directive. The directive provides that the terms “indigenous peoples”, “indigenous ethnic minorities”, “tribal groups” and “scheduled tribes” describe social groups with a social and cultural identity distinct from the dominant society that makes them vulnerable to being disadvantaged in the development process. For the purposes of this directive, “indigenous peoples” is the term that will be used to refer to these

320 ILO Convention No.169, Concerning Indigenous and Tribal Peoples in Independent Countries was adopted by the International Labour Conference at its 76th Session at Geneva on 7 June 1989. For the text of this Convention No. 169, See, ILM, Vol.1384 of 1989

groups. Within their national constitutions, statutes and relevant legislation, many of the Bank’s borrower countries include specific definitional clauses and legal frameworks that provide a preliminary basis for identifying indigenous peoples. 322

Indigenous peoples are commonly among the poorest segments of the population. They engage in economic activities that range from shifting agriculture in or near forests to wage labour or even small-scale market oriented activities.

Indigenous peoples can be identified in particular geographical areas by the presence in varying degrees of the following characteristics:

(a) a close attachment to ancestral territories and to the natural resources in these areas,
(b) self-identification and identification by others as members of a distinct cultural group,
(c) an indigenous language, often different from the national language,
(d) presence of customary social and political institutions, and
(e) primarily subsistence oriented production 323

According to this definition indigenous peoples are those social groups who have a social and cultural identity distinct from dominant society. For the identification of indigenous peoples, the definition also provides some criteria, such as, ancestry, language, customary social institution etc.

4.8.2 The Draft Declaration on the Rights of Indigenous Peoples

Since 1982, leaders of various indigenous groups had been working toward an international instrument that would embody the rights and aspirations of native peoples, as well as provide recognition and afford protection of indigenous lands. In 1993, the working groups agreed upon and published a Draft Declaration on the Rights of Indigenous Peoples (Declaration). The Draft Declaration acknowledged the right to self-determination, the right to maintain and strengthen distinct political, economic, social and cultural characteristics, the right to belong to an indigenous community or nation, and full guarantees against genocide and other acts of violence 324.

322 Supra Note 310, p.25
323 Ibid p.26
In 1995, the Commission on Human Rights, under the Umbrella of the UN’s Economic and Social Council, created an opened inter-sessional working group to elaborate and expand upon the Draft Declaration. The inter-sessional working group was open to indigenous peoples affiliated with an organization even if they did not have consultative status with the United Nations. Despite this apparently expansive and inclusive gesture, the full structure of the Commission on Human Rights would be in effect, thus making the rules stricter than those of the working group.

The first deliberations began with indigenous peoples attending the inter-sessional working groups to defend the work on the Draft Declaration that had been ongoing for twelve years. At the Second meeting in October 1996, the indigenous delegates, walked out. As the meeting opened, the delegates raised their concerns that the final version of the Declaration would not reflect the full and equal participation of the various indigenous interest and that nation-states would retain the exclusive right to determine the final contents of the document. When the inter-sessional working group’s Chairman, Jose Urrutia of Peru, confirmed these fears by making it clear that the indigenous delegates could only attend and speak at the meeting without being considered full and equal participants and that they could not initiate proposal for discussion, the delegates felt they should not sanction the proceeding with their presence. The Chairman was essentially telling them they could agree to and approve the proposals and consensus making going into the Declaration as modified by the national governments, but they could disagree with a consensus of governments. This split coincided with jockeying among some NGO’s as individual and organizational interests took precedence over broader goals, further undermining the unity among the indigenous peoples that had marked the early process.

In late October and November of 1997, the inter-sessional working group met for its third annual two week session with some harmony and satisfaction along

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327 Ibid, at 292-93, 294
with a unified sense of purpose restored to the indigenous delegates.\footnote{Andrew Gray and Jens Dahl, \textit{U.N. Declaration Enters a Third Year at the U.N. Commission on Human Rights}, in the \textit{INDIGENOUS WORLD 1997-98}, 347-49} After his re-election at the outset of the gathering, Chairman Urrutia consulted with indigenous representatives and governments, producing a compromise that divided the meeting into formal and informal sessions, with the indigenous delegates having rights to full participation in the informal session. Only after reaching a consensus in an informal session would any decision is passed to the formal sessions, which remained the domain of the national governments. This process gave the indigenous representatives a “defacto veto over any formal decision making”, providing great leverage over any proposed changes to the Draft Declaration, although still keeping the group in a weak position with regard to approval of the session’s final report, which would be done in a formal plenary session. While this procedural change finally gives the indigenous groups some meaningful authority, the veto power it created did not have to be used as the governments did not agree on any changes to existing Articles of the Draft Declaration. In sum the indigenous representatives were pleased with their ability, through a co-ordinated defense and expert counter arguments, to keep the Draft Declaration unchanged for another year.\footnote{Ibid, at 361} Although some indigenous peoples consider the declaration not forceful enough most believe it to be significant step forward. The challenge to maintain the document’s integrity will continue.

\subsection*{4.8.3 Other Current Issues}

On Decameter 10, 1994, the inauguration of the International Decade of the World’s Indigenous People was held at the United Nations. The theme for the ten years commemoration was to be indigenous people; partnership in action.\footnote{See G.A.Res.214, U.N.GAOR, 49th Sess, U.N.Doc.A/RES/49/214 (1995)} One goal of this ten year observance is to further cultivate and promote the partnership sought between indigenous people and other in the international community. Another goal is to strengthen cooperation for the solutions of problems faced by indigenous peoples in such areas as human rights, the environment, development, education and health. To achieve these goals, a voluntary fund, similar to the fund for the working group was established.\footnote{Ibid, at 239}
A major agenda item for the International Decade is consideration of a permanent forum for indigenous people within the United Nations. For more than five years, the working group has contemplated a permanent forum. The idea was part of a resolution coming out of the Human Rights Conference in Vienna. In June of 1997, a Second workshop examining the issues surrounding a permanent forum convened in Santiago, Chile. A number of governments have shown support for the establishment of a permanent forum, and some have said such a forum should have a broad mandate to extend beyond just a narrow human rights focus. Supporters suggest including issues of economic, social, cultural, political, civil, and educational development as well as providing that indigenous NGOs have a role in all relevant U.N. activities. The suggestions include placing the form at a high level within the United Nations and putting it on equal status with the Economic and Social Council. A statement issued by indigenous people representation attending a 1996 meeting in preparation for a working group session stated that the permanent forum should not take the place of the working group. Another proposal maintains the forum be a U.N. Commission on the status of indigenous people.

The United Nations recommends that its specialized agencies and organizations designate focal points for coordination with the center for Human Rights concerning activities relating to the International Decade. For example, the United Nations Educational, Scientific and Cultural Organizations (UNESCO) established in 1993 a focal point unit to work on indigenous issues within its cultural wing. Priorities for the work included obtaining money for activities and projects originating with the indigenous people involved, with special emphasis given to projects directed at enhancing the capabilities of indigenous peoples. Such efforts are centered on training and creating human resources in areas related to mother tongue or native language education, cultural heritage awareness, including the promotion of native crafts, examining and furthering traditional skills for use in protecting and responsibility developing natural resources, and encouraging regular means of dialogue with member states. This UNESCO policy has long range goals based on continuing and expanding consultation with indigenous peoples.

For many years the United Nations represented a means to attain justice for indigenous people. This is however, providing to be an illusion a representation only and not a reality. The present challenge is to define an indigenous model for resolving conflicts, setting standards of justice, and furthering international dialogue a model that would transform the United Nations into an institution that truly responds to the problems of the world. Native peoples have an opportunity to provide leadership in breaking down the monopoly of the controlling nations and to push the United Nations towards truly becoming a forum for all people of the world, a forum with an identity transcending the boundaries by lines drawn on maps.

4.8.4 International Standards

The Indigenous and Tribal Peoples Convention 1989 (No.169) has been ratified by 20 countries. It covers a wide range of issues, including land rights, access to natural resources, health, education, vocational training, conditions of employment and contacts across borders. The core concepts are consultation, participation and self-management. These places a responsibility on governments to consult indigenous and tribal people and ensure that they fully participate at all levels of decisions making processes that concern them.

The Convention includes a number of provisions which lay down responsibility for the government as well as right for indigenous peoples and individuals. Governments have the responsibility for developing, with the participation of the peoples concerned, coordinated and systematic action to protect the rights of these people and to guarantee respect for their integrity.

Indigenous peoples have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well being and the land they occupy or otherwise use. They also have the right to exercise control, to the extent possible over their own economic social and cultural development. In addition they have the right to participate in the formulation, implementation and evaluation of plans and programs for national for national and regional development which may affect them directly.

With the adoption of the United Nations Declaration on the Rights of Indigenous Peoples by the General Assembly in 2007, the UN as a whole has taken a major step forward in the promotion and protection of indigenous and tribal people’s rights throughout the world. The non-binding Declaration outlines the individual and
collective rights of indigenous peoples, and goes substantially beyond the
formulations of the more moderate ILO convention 169. But the provisions of the
Declaration and Convention No.169 are compatible and mutually reinforcing. The
Declaration provides for a specific role of UN agencies to support the realizations of
its provisions. In particular the ILO has an important role to play in this context.

While the ILO Convention does not mention the term self-determination, the
more recent UN General Assembly Declaration is very clear. Its Article 3 states that
“indigenous people have the right to self-determination. They freely determine their
political status and freely pursue their economic, social and cultural development.” It
adds, however, that the Declaration may not be interpreted as implying that anyone
can engage in any activity contrary to the Charter of the United Nations. It explicitly
does not authorize or encourage any action which would dis-member or harm the
territorial integrity or political unity of sovereign and independent states.

4.8.5 The International Labour Organization’s Conventions

In 1957 the International Labour Organization (ILO) adopted the Indigenous
and Tribal Population’s Convention No 107, which recognized both the collective
and individual land rights of indigenous peoples and their right to compensation for
confiscation of their lands by governmental agencies. Ratified by only a few
states, this contention did not prove effective even amongst the countries ratifying
it.

In 1989, Convention No 169 was adopted by the ILO over strong protests
from indigenous groups. Contained in the Convention are tenets “promoting the full
realization of the social, economic and cultural rights of these peoples with regard for
their social and cultural identity, their customs and traditions and their
institutions”.

Convention No 169 promised “special measures shall be adopted as
appropriate for safeguarding the persons, institutions, property, labour, cultures and
environment of the peoples concerned”. However, the Convention provided no
mechanism which provided for the safeguarding of rights under existing international
or domestic law, or for enforcing these measures. The Convention also promised “the

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334 Indigenous and Tribal Populations Convention, 328 U.N.T.S 247 (June 26, 1957)
337 Ibid.
social, cultural, religious and spiritual values and practices of these peoples shall be recognized and protected, and due account shall be taken of the nature of the problems which faced them both as groups and as individuals”. 338

Ultimately, the benefits of ILO conventions 107 and 169 were to provide an opportunity to identify and address the right sought by indigenous peoples. Although both conventions failed to provide indigenous peoples any concrete and identifiable rights or mechanisms to enforce those rights, they laid the ground work for further discussions.

### 4.8.6 Indigenous Peoples in International Law

Indigenous peoples in International Law are a theoretical and practical analysis of the historical, contemporary and emerging international laws that affect indigenous people.

James Anaya, analysis Indigenous Peoples into three parts. The first part outlines the development of international law and its treatment of indigenous people overtime, and identifies the recent emergence of new norms within the law’s burgeoning human rights program. The second part describes the structure and content of contemporary international norms concerning indigenous people and emphasizes the principle or self determination and its link to emerging norms. In the final part, he stresses that states and the international community have a duty to implement norms concerning indigenous people, and evaluates existing mechanism through which implementation may be secured or promoted.

James Anaya begins by tracking the historical position of indigenous people within international law and finds that the conception of their rights has changed numerous times. In the beginning, indigenous people were considered to have an autonomous existence, as well as a right to land, however, war against them was considered just. Subsequently, western society toyed with, but ultimately rejected, the idea of viewing indigenous groups as political bodies with rights under international law. A positivist view later emerged, ensuring that international law would become a legitimizing force for colonization. Finally, a trusteeship doctrine developed which further justified colonial patterns and facilitated the control of indigenous people and their lands. Then he turns to current developments within the modern era of human rights. He then asserts that although statist conceptions are

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338 *Oregon Review of International Law*, 2001, p.4
followed, they are made to contend through the United Nations and other international organizations with humanistic precepts and to be concerned with individuals. He also briefly describes the contemporary indigenous rights movement and the active role of indigenous communities in this movement.  

The second part attempts to define the structure and care elements of the contemporary body of international norms that concern indigenous people. He begins by describing the principle of self-determination, and the contemporary international practices which are based on this principle. He gives an overview of international norms concerning indigenous people, looking specifically at the following categories; non-discrimination, cultural integrity, lands and resources, social welfare and development, and self-governance.

The final section describes the implementation and effectiveness of the international norms described in the prior sections that impose, on both states and the international community, the duty to secure enjoyment of human rights and provide remedies where the rights are violated. He describes the use of negotiated agreements and state institutional mechanisms, such as executive action, legislative acts and judicial procedures, which indigenous communities may use to implement international treaties or customary laws and secure their rights. He also comments on which instruments may be most effective to achieve the goals of indigenous communities.

He analyzes the role of international procedures in implementing international norms, and the monitoring procedures that have proven to be most adaptable to the demands of indigenous people. He provides an overview of the non-treaty monitoring procedures exercised by the U.N. Working Group on Indigenous Populations and the U.N. Commission on Human Rights, and explains why they have generally been helpful in securing the rights of indigenous people. He also discusses structured treaty-based procedures, such as the ILO Convention No.169 on Indigenous and Tribal peoples and the Convention on the Elimination of All Forms of Racial Discrimination (CERD). These treaties require periodic government reports on the implementation of ratified conventions, which are then published in its annual report, along with observations on noteworthy aspects and shortcomings.

340 Ibid p.2
While Indigenous Peoples in International Law sometimes reads like a survey of different legal mechanisms within the arena of international law, it highlights which mechanisms have been and have the potential to be most useful in protecting indigenous rights.

4.8.7 State Institutional Mechanisms

International law, including applicable conventional or customary norms concerning indigenous peoples, theoretically binds the state as a corporate whole. That is, on the international plane, a state is judged as a unitary actor, notwithstanding a division of powers that may exist among branches of a state’s government or as a result of confederation. Yet in meeting or failing to meet its international obligations, the state acts or fails to act through its functional institutions, not withstanding whether the state’s system is characterized as monist or dualist.341 In the Awas Tingni Case, Nicaragua incurred international responsibility because of the particular acts and omissions of legislative, executive, and judicial agencies that, in the aggregate, resulted in a failure to protect indigenous land rights. The Inter-American Court of Human Rights in that case found responsibility by virtue of an inadequate legislative and administrative framework to address land titling petitions by indigenous communities, executive action permitting logging on indigenous lands, and judicial procedures that were flawed in their treatment of indigenous complaints against the logging. In virtually all modern states, discrete branches of government function within separate yet interrelated spheres of competency.

The Creation of the Permanent Forum on Indigenous Issues

The 1993 World Conference on Human Rights and after a period of evaluation, the U.N. Economic and Social Council established as one of its subsidiary bodies the Permanent Forum on Indigenous Issues, which met for the first time in 2002. The initiative for a permanent U.N. institution for indigenous peoples was premised on the widespread sentiment that existing international institutions and procedures were inadequate to address fully the concerns of indigenous peoples. The relatively weak informal procedures developing in the U.N. Working Group on Indigenous Populations were the only existing procedures that functioned on people’s

341 Ibid p.8
representatives and NGOs repeatedly have called attention to particular instances of government abuse or neglect.

**4.9 State Responsibility and Hijacking**

For Centuries piracy on the high seas has been recognized as heinous crime detrimental to the interests of all nations. Perpetrators of the crime found themselves unquestionably subjected to the jurisdiction of any states which seized them. Any state making the capture was authorized to take immediate and effective action to prosecute the pirates under the customary international law principle of universal jurisdiction.\(^\text{342}\)

The greatest threat posed to international (as also domestic) civil aviation today is its increasing unsafety. It is so ironical that whereas the operational hazards and natural barriers to safe, efficient and reliable civil aviation have been, more or less, over come through progress in science and technology, the hazards created by man himself remain unconquered and are rather on the increase.\(^\text{343}\)

In the 1940’s however, a different type of seizure occurred over a new means of transportation, i.e., the hijacking of aircraft. Since early reports of such incidents were referred to as air piracy, it was assumed though not substantiated through written international agreements that the “Pirates” involved could be seized and prosecuted by the state on whose territory the aircraft landed under the recognized principle universal jurisdiction over pirates as though applied to incidents on the high seas.

As the number of attempts to illegally divert aircraft increased, the use of the term “air piracy” declined and was replaced with a variety of descriptive terms, such as “aerial hijacking”, “unlawful seizure of aircraft”, or “sky jacking”. Moreover, concomitant with the decline of the concept of air piracy was the recognition of universal jurisdiction over the persons who had seized the aircraft. Thus, the failure to prosecute alleged “pirates of the sky” on the part of many nations in whose territory the illegally seized aircraft landed lends credibility to the nation that an analogy of the term piracy as applied to the high seas and piracy as applied to the “high Skies” may not be feasible.

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In the 1950’s, the majority of hijackings occurred for the purpose of securing political asylum, e.g., American aircraft to Cuba or what Oliver Lissitzyn calls “hijacking for travel purposes”. Since the alleged purpose of the hijacking was attainment of political asylum and was not animofurandi (robbery for private gains), the receiving state asserted its sovereign right to grant asylum to political refugees, regardless of the manner in which they entered that state’s territorial boundaries. In such cases, many states displayed unwillingness to prosecute the hijackers and refused to surrender fugitives to other states, despite treaty which required surrender.

A Second type of hijacking involving kidnapping, injury of some kind, the detaining of passengers and crew, or the destruction of property, appeared in the late 1960’s and early 1970’s. The purpose of such an act after entailed international blackmail, usually to foster a political movement, as evidenced by recent hijackings of aircraft to the Middle East.

A typology of hijacking attempts, motives of the perpetrators of the crime, and disposition of the perpetrators by states was established to test the degree of compliance by states following the initialing and ratification of the two major international conventions on the unlawful seizure of aircraft, namely the “Convention on Offenses and Certain Acts Committed on Board Aircraft” in Tokyo, September 14, 1963 (hereinafter referred to as the Tokyo Convention) and the “Convention for the Suppression of Unlawful Seizure of Aircraft”, signed at the Hague, December 16, 1970 (hereinafter referred to as the Hague convention).

4.9.1 Aircraft Hijacking

Aircraft hijacking is the unlawful seizure of an aircraft either by an individual or by a group. In most cases, the pilot is forced to fly according to the orders of the hijackers. However, there have been cases where the hijackers have flown the aircraft themselves. In at least one case, a plane was hijacked by the official pilot.

Unlike the hijacking of land vehicles or ships, sky jacking is usually not perpetrated in order to rob the cargo. Most aircraft hijackings are committed to use the passengers as hostages. Motives vary from demanding the release of certain inmates to highlighting the grievances of a particular community. Hijacking may also

344 Oliver J. Lissitzyn, “International Control of Aerial Hijacking: The role of Values and Interests”, American Journal of International Law, 61 (September, 1971), 83
345 Supra Note, 342, p.4
be carried out so as to use the aircraft as a weapon to target a particular location. Other hijackers may hold the hostages for ransom.

Most hijackings for hostages result in a series negotiation between the hijackers and the authorities, followed by some form of settlement. However, these settlements do not always meet the hijacker’s original demands. If the hijackers show no sign of surrendering, armed special forces may be used by authorities to rescue the hostages.

4.9.2 Some Distinctive Characteristics of the Offence of Aerial Hijacking

The offence of aircraft hijacking has certain distinctive characteristics as compared to other crimes national or international, which mark it out for special treatment. Some such characteristics are:

(i) Hijacking not only endangers the safety of the plane and the lives of its crew and passengers, but also the safety of civil aviation generally. Civil air transport is based on the confidence of the people of the world in its safety, efficiency and speed. International civil aviation is also a link in the promotion and preservation of friendly relations among states. Since aerial hijackings terribly undermine such confidence of the people, and tend to interrupt this vital link, its suppression becomes a matter of deep international concern.

(ii) Acts of hijacking in international flights can have no reference to the nationality of passengers and crew on board whose lives are endangered. However, in case of domestic flights it could become somewhat relevant in case of some countries. The hijackers too have been from at least 32 different nationalities including Indian

(iii) By now aircraft of countries from all continents have been the victims of hijacking. As such it is no longer purely a matter of concern in the Western Hemisphere. Statistics show that no state’s aircraft, whether engaged in international or in domestic traffic are proof against hijacking.

(iv) Hijacking is a danger to the safety of the aircraft, crew and passengers distinctly out of proportion to the realization of the motives of the hijacker. As such no considerations of political or other motives can exonerate the offence of the hijacker or saboteur.

(v) By the very nature of hijacking, the hijackers will attempt to divert the airplanes beyond the exercise of national jurisdiction against them, and to a
country whose, international relationships are such that they may not be returned for prosecutions. Thus, if hijacking and unlawful interference with civil aviation have to be put an end to, it is clear that they plea of political offenders could not be available to a country for refusing extradition of a hijacker. If this is impossible of achievement, obligation to prosecute and punish hijackers by severe penalties should be imposed on all states without any exception whatsoever.

(vi) The motive for hijacking during recent years has generally been politicized, though all sorts of varied motives have not been uncommon. Extortion has also been the motive in several cases of late. So far as motives other than political are concerned, the other state may reasonably be expected to extradite him since it could have no interest in granting him asylum. It is the political motive of the hijacker which generally leads to the grant of asylum to him. There is, therefore, all the more reason that this motivation ought to be curbed, rather than condoned or sheltered. The deterrence could also have the best effect in such cases; it would mean little to the mentally unbalanced, desperados or hardened criminals.

(vii) Further, mere municipal legislation by certain interested states providing for compulsory prosecution and punishment of hijackers landing in its territory or escaping to it, could not be a complete answer to the problem, since the states most willing to punish hijackers are not the ones wherein the hijackers generally land or escape.

Therefore, only the imposition of an international obligation on all states to extradite or to punish, and consequent national legislation and action by all giving effect to such an obligation could prove really fruitful.  

4.9.3 International Issues

(a) Tokyo Convention

The Tokyo Convention is a multilateral Convention, done at Tokyo between 20 August and 14 September 1963, coming into force on 4th December 1963, and is applicable to offences against penal law and to any acts jeopardizing the safety of persons or property on board civilian aircraft while in-flight and engaged in international air navigation.

The Convention, for the first time in the history international aviation law, recognizes certain powers and immunities of the aircraft commander who on international flights may restrain any persons he has reasonable cause to believe is committing or is about to commit an offence liable to interfere with the safety of persons or property on board or who is jeopardizing good order and discipline. This Convention does not apply in strictly domestic cases and excludes acts or offenses committed in the airspace of the state where the aircraft is registered, unless the point of take off or intended landing point is outside that state.

Compliance and Enforcement

The Convention authorizes the aircraft commander to impose reasonable measures, including restraint, on any person he or she has reason to believe has committed or is about to commit such an act, when necessary to protect the safety of the aircraft and for related reasons, requires contracting states to take custody of offenders and to return control of the aircraft to the lawful commander.

Reservation and Withdrawal

Article 24 paragraph 1 details the provisions for disputes between contracting states concerning the interpretation or application of the Convention. Paragraph 2 entitles each state, at the time of signature or ratification, to declare that it does not consider itself bound by paragraph 1. With respect to any state having made such a reservation, paragraph 1 shall also not be binding to other contracting states. Under Article 25, no other reservation may be made to this Convention.

Reservations have been made by China (which declared null and void the signature and ratification by Taiwan) and by Iraq, Kuwait, Oman, and the United Emirates (which refuse to recognize and will not enter into a treaty relation with Israel). In accordance with Article 23, any contracting state may denounce this convention by notification addressed to the International Civil Aviation organization (ICAO). The denunciation shall take effect six months after the date of receipt by the ICAO.

Developments

2004: During the 35th Session of the ICAO Assembly, held from 28th September to 8th October, the Council presented proposals for carrying forward the plan of action into the 2005-2007 trienniums and for updating the consolidated statement of
continuing ICAO policies related to the safe guarding of international civil aviation against acts of unlawful interference.

**2002:** On 20\textsuperscript{th} February, Member states of the ICAO, in response to the 9/11 attacks, endorsed a global strategy for strengthening aviation security world-wide at the two-day high-level Ministerial Conference held at ICAO Headquarters in Montreal. A central element of the strategy is an ICAO “Aviation Security Plan of Action”, which included regular mandatory, systematic, and harmonized audits to enable evaluation of aviation security in place in all 187 members states of ICAO. Among other elements the plan of action included identification, analysis and development of an effective global response to new and emerging threats.

**2001:** The ICAO Assembly met from 25\textsuperscript{th} September - 5\textsuperscript{th} October in Montreal, adopting a resolution calling for a full review of international aviation security conventions and of Annex 17. Other measures proposed include special funding for urgent action by the ICAO in the field of aviation security mechanism. The applicability to domestic flights of international security standards contained in Annex 17 and lacking of cockpit doors will be given high priority by ICAO’s aviation security panel.

**2000:** The Aviation security panel of the ICAO conducted a comprehensive review of Annex 17 to adjust its structure and relevancy of standards and Recommended practices. Draft Amendment 10 was developed based on the panel’s recommendations and will be considered in April 2001. The amendment will include provisions relating to code sharing, the standard Airline security program template preventive measures relating to cargo, pre-employment background checks, development of human factors, management of response to acts of unlawful interference, armed persons on board an aircraft, and penetration of security systems by the new media. To assess the implementation of Annex 17, states will be audited on a voluntary basis.

**1998:** The Convention on the Marking of Plastic Explosives for the purpose of Detection entered into force on 21\textsuperscript{st} June.

**1997:** The ICAO called attention to the still unresolved jurisdictional gap of the Tokyo Convention. Since the aircraft in flight are legally regarded as part of the territory of the state of registration of the air craft, the state where the aircraft lands will treat offenses committed on board during the flight as committed on foreign
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territory. In most cases of minor offenses the state where the aircraft lands will not have
the jurisdiction to investigate and prosecute since the convention’s provisions for
jurisdiction only extends to crimes committed on board aircraft of that state’s
own nationality.

Serving International Aviation was agreed upon at the International Conference on
Air Law held in Montreal in February. This Protocol is designed to supplement the
1971 Montreal Convention to extend the provisions to encompass terrorist acts at
airports serving international civil aviation.

1980: Agreement on a revised text of specifications in Annex 17 of the Chicago
Convention was presented to the ICAO council as Amendment 4 to the Annex. This
amendment addresses the subject of lease, Charter, and interchange of aircraft in
international operations with a view toward strengthening measures against acts of
unlawful interference with civil aviation.

1978-1979: The program of work for the United Nations Legal Committee included
the study of the lease, Charter, and interchange of aircraft in international operations
and problems with respect to the Tokyo Convention. The possible revision of the
Convention would consider whether or not it should apply to offenses committed on
board aircraft not registered in a contracting state but leased without a crew to a
lessee whose principal place of business or permanent residence is in a contracting
state.

1976: The ICAO Council tasked a Special Sub Committee of the Legal Committee
with formulating a draft protocol for the amendment of the Tokyo Convention with
the aim of solving the problems of the operation of an aircraft registered in one state
by an operator belonging to another state.

1974: The ICAO’s standards for the screening of passengers and carry on luggage
were established as Annex 17 of the Chicago Convention.

1972: On 8\textsuperscript{th} June, the president of the International Federation of Air Line Pilots
Association (IFALPA) addressed a telegram to the UN Security General requesting a
meeting of the Security Council to determine actions to implement various decisions
of the UN and ICAO of particular concern were measures against states offering
sanctuary and failing to prosecute hijackers and saboteurs.
1971: The ICAO published a security manual to assist states in taking measures to prevent acts of unlawful interference with civil aviation or to minimize the effect in the event such acts.

1970: The UN Security Council passed Resolution 286 on 9 September calling on states to take all possible legal steps to prevent further hijackings.

The Hague Convention on the Suppression of Unlawful Seizure of Aircraft opened for signature on December 16. This Convention required parties to make hijackings punishable by severe penalties and required parties that have custody of offenders to either extradite the offender or submit the case for prosecution.\(^{348}\)

**Limitations of the Tokyo Convention**

As a first effort towards a law of nations approach to aircraft hijacking, the Tokyo Convention is perhaps more notable for what it omits than for what it includes. On the positive side, the Convention abided by the basic norm of international law respecting jurisdiction among contracting states. It reaffirmed the “law of the flag”, a principle sacred to maritime law, but also alluded to concurrent jurisdiction among contracting states whose interests have been adversely affected through offenses committed on board aircraft in flight.\(^{349}\)

Most assuredly, ratification of the Convention signifies approval of a multi-state approach to promote international aviation safety. It would be fair to say, moreover, that the Tokyo Convention was neither a hijacking prevention device nor even a hijacking Convention *per se*. Only Article 11 directly relates to the phenomena of hijacking though it provides no definition or suggestion that the “unlawful seizure of aircraft” might deem recognition as an international crime.\(^{350}\)

By the fall of 1963, aircraft hijackings had not yet affected a multiplicity of states, and immediate attention to the Tokyo Convention may have seemed less imperative than other pressing international matters.\(^{351}\) Consequently, the Convention did not go into effect until December 4, 1969, Six years after the initial signing, when the required twelve ratifications were deposited with the ICAO in Montreal. The phenomenal increase of hijacking activities during that period may well have been the major incentive for senate approval of the Tokyo Convention.

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348 International Civil Aviation Organization, website: http://www.icao.int/
351 Supra Note 349, p.142
Indeed, it is quite probable that increased support of the Convention since the fall of 1969 resulted from the upsurge of hijacking attempts on both a world-wide and individual state level. Thus, nations previously unaffected by hijacking threats showed little inclination to overtly support the Convention until an incident occurred within their territorial jurisdictions or aboard aircraft registered in their countries.

The Tokyo Convention provided for the safety of passengers and crew in the event that offences were committed aboard an aircraft in flight. Yet, this agreement lacked efficacy to prosecute offenders and failed to formally recognize unlawful aircraft seizure as a crime against the law of nations. Moreover, the slow pace at which parties ratified the convention, concomitant with the large number of non-participant nations, mirrored a reluctance to secure a more definite obligation for contracting states to exercise jurisdiction over the alleged hijacker. It remained for a newer, more comprehensive international effort, the Hague Convention, to set forth the criminal nature of aircraft seizure and to provide adequate punitive guidelines under the aegis of international law.

4.9.4 The Hague and Montreal Conventions: Concerted International Action to Suppress Aircraft Seizures

In 1970–1971 the weaknesses of the Tokyo Convention were translated into the strengths of The Hague and Montreal Conventions. The provisions set forth in the Tokyo Convention had left major questions unanswered regarding custody and prosecution of hijackers. The planners of the new conventions utilized the Tokyo agreement as a vantage point from which an international law of hijacking could be effectively implemented.

The impetus to the new conventions stemmed not only from the bland provisions of the Tokyo Convention, but also from a new upsurge of aircraft seizures, seizures tantamount to international blackmail which posed an even more “urgent and drastic threat to international civil aviation” than in the past.

During the preparatory work, uncertainty arose about the potentially conflicting nature of the newly proposed provisions vis-à-vis those agreed upon in Tokyo. Even before the United States became a party to the Tokyo Convention, it made overtures to the ICAO calling for a draft protocol that would deal solely with

352 The Tokyo Convention, Article 1, Paragraph 1; Article 6, Paragraph 1; and Article 11, Paragraph 1
353 Supra Note 349, p.164
aircraft hijacking to secure some provision for mandatory extradition of the offenders.\textsuperscript{355} This protocol proposal was made to counter unforeseen legal nuances stemming from two separate conventions over essentially the same international problems.\textsuperscript{356} However, it was rejected with the assurance of the ICAO Legal Committee and Sub Committee “that states could become parties to both conventions without inconsistent obligations.” Nonetheless, a formal memorandum to the ICAO Legal Sub Committee from the International Air Transport Association provided further encouragement for review and revision of the legal status of hijacking, hopefully to elevate it to the level of “an international crime”.\textsuperscript{357}

Despite opposition from the ICAO Council regarding incorporation of mandatory prosecution into the Tokyo Convention, the Legal Committee was directed “to examine both the development of model national legislation and the possibility of an international convention dealing with the prosecution of hijackers.”

The outgrowth of these preparations was a special diplomatic conference which convened December 1-16, 1970 at The Hague to consider the draft proposal. The fruition of this effort was the Convention for the Suppression of Unlawful Seizure of Aircraft, more commonly referred to as the Hague Convention.\textsuperscript{358}

In the years since the Tokyo Convention, greater concern over the phenomenon of hijacking had been patently recognized in the global community. No less than 210 hijacking attempts had been made in this period, with more than 80 of these occurring in 1970 alone. Perhaps the greatest catalyst precipitating active state participation in the Hague Convention was the “Dawson’s Field” incident in September, 1970. Four major Jetliners were diverted to the Jordanian desert, where they were held by members of the popular front for the liberation of Palestine. This overt act of political blackmail pointed up the need for immediate international cooperation, not only to fill the prosecution voids inherent in the Tokyo Convention, but also to reach viable solutions that would prevent such acts from recurring.

\textsuperscript{355} ICAO Doc.LC/SC.SA WD7, (5/2/69)
\textsuperscript{356} Report of ICAO Legal Subcommittee on Unlawful Seizures of Articraft, in International Legal Materials, 8 (March 1969), 245
\textsuperscript{357} ICAO Sub Committee Report, Doc.8838, LC/157; See also Van Panhuys, “Aircraft Hijacking”, p.17
\textsuperscript{358} Convention for the Suppression of Unlawful Seizure of Aircraft, opened for signature December 16, 1970, ICAO DOC.8920
Consequently, the roster of participants at the Hague Convention included representatives from seventy seven states and “observes from twelve organizations interested in international civil aviation.”

The preamble of the Convention indicates the urgency of the conference and its mission. The states parties to this Convention considering that unlawful acts of seizure or exercise of control of aircraft in flight jeopardize the safety of persons and property, seriously affect the operation of air services, and undermine the confidence of the peoples of the world in the safety of civil aviation, considering that the occurrence of such acts is a matter of grave concern, considering that, for the purpose of deterring such acts, there is an urgent need to provide appropriate measures for punishment of offenders.\(^{359}\)

Proponents of The Hague Convention for the Suppression of Unlawful Seizure of Aircraft sought to fill the void in the legal system created by the Tokyo Convention. The Hague “Hijacking” Convention is considered “a milestone both in the general development of an international criminal air law and in the fight against aerial hijacking specifically”.\(^{360}\) Its provisions that any state where the hijacker is found may take jurisdiction over him give the unlawful seizure of aircraft the status of an international crime. Even if the offender is granted asylum in the receiving state, the risk of prosecution by other states serves as a forceful incentive for his remaining in the asylum state. Nation States eagerness to gain wide acceptance of the Hague Convention was evidenced in its procedural characteristics.

The significance of the trilogy of hijacking conventions rests in the fact that they (1) compound and build upon the foundation laid by one another, (2) elevate the crime of “unlawful seizure of aircraft” to the status of an international crime, (3) provide universal jurisdiction among contracting states to apprehend of the offender wherever he is found, (4) provide a forceful deterrent to the free travel of hijackers who receive asylum in a non-participating state, and (5) continue the common customary law deterrents associated with piracy \textit{jure gentium} without officially attempting to give the same name (piracy) to the offense. The sobriquet, “Air Piracy”, continues to be used by the news media and in municipal statutes to describe the “offense”, which is the conventions designation of the crime. But the evolution of

\(^{359}\) Preamble of the Hague Convention, Suppression of Unlawful Seizure of Aircraft (Hijacking), T.I.A.S.7192, U.S. Govt. pub. 69-006-71, p.4
\(^{360}\) Dr. H.O. Agarwal, \textit{International Law and Human Rights}, p.5
the crime of piracy in international law reveals a common linkage only to certain transitional elements. The actual definitive qualifications of the offense show obvious growing pairs from four centuries of development and expansion both in international commerce and in international law.

4.9.5 Responsibility for the Destruction of Pan AM Airliner and UTA

In 1988 Pan Am flight exploded over the Scottish town of Lockerbie which killed 270 persons. Persons responsible for the destruction of the aircraft were suspected to be Libyans. Libya initially did not co-operate fully in establishing responsibility for the ‘terrorist acts’ committed by its nationals. However, it agreed to hand-over two suspected persons for trial by the Scottish Judges in the Netherlands. The court in the year 2001 convicted one of them Abdel Basset Alial – Megrahi a Libyan intelligent agent, for the crime. The Libyan Government in 2003 accepted the responsibility for the bombing and agreed to compensate victim’s families. The Libyan Foreign Minister Mohammed Abderrahmane Chalgam stated that we have taken on the responsibility for the case on the basis of the international law which states that the state takes on responsibility for what its employees do. It was agreed to pay $ 2.70 billion in compensation to families of all 270 people killed.

Libya was also responsible for the destruction of the French Union Transport Aerians (UTA) flight on September 19, 1989, in Niger. In 1999 an agreement between France and Libya was concluded wherein it was agreed that the latter will pay $ 30 million to former to settle the case. Since the amount was much less than the amount of compensation settled in Pan AM flight, France has asked for higher compensation.

4.10 Thematic Approach of the Chapter

From the above discussion of the contemporary issues it can be concluded that in international law a state bears responsibility for its conduct in breach of its international obligations. Such responsibility attaches to a state by virtue of its position as an international person. In this Chapter I have analyzed all the stated issues based on methodology. Thematic approach of the contemporary issues is as follows.

361 Ibid p. 6
362 The amount of compensation could reach $10 million per victim or about $2.7 billion in total
It is well recognized, and often emphasized, that because IDPs remain within their country, they should, in accordance with established principles of international law, enjoy the protection and assistance of their own governments. Indeed, governments regularly insist that they have the primary responsibility for ensuring the security and welfare of their internally displaced populations.

That responsibility for protecting and assisting the internally displaced rests first and foremost with their national authorities is a core concept reflected in the Guiding Principles on internal displacement, which set forth the rights of IDPs and the obligations of governments towards them, and also is a central tenet guiding international and regional approaches to internal displacement.

But what, concretely, does national responsibility towards IDPs mean? How can it be measured, promoted, reinforced and supported? These are questions that are critical to address if national responsibility for IDPs is to be realized. Measurable indicators are needed to provide guidance to governments in discharging this responsibility and as a basis for assessing whether it is being effectively exercised since IDPs reside within the borders of their own countries and are under the jurisdiction of their governments, primary responsibility for meeting their protection and assistance needs rests with their national authorities.

State responsibility is a much neglected concept in dealing with international terrorism. As a complement to rights, states have duties to the international community and to other states. States that sponsor, support, or tolerate international terrorism, as well as states that do not act because of their inability to do so, fail in their international duty. A concerted positive effort must be made to place state involvement vis-à-vis international terrorism into the context of state responsibility and international duty. When a state fails in its duty, the failure should be noted. States injured by states that fail in their duty should, in appropriate cases, consider filing monetary damage claims. These claims should be filed even in cases where there is a strong indication they will not be given appropriate consideration.

The fundamental duty of any state is to ensure that its citizens are not rendered vulnerable to terrorists out to subvert the nation’s political structure and destroy its social fabric. It is equally the responsibility of the state to ensure that social and political cohesion built up over decades is not undermined by groups with political agendas that will subvert and destroy national unity.
Under the law of state responsibility for injuries to aliens, states are liable in
delictual damages for any terrorist act attributable to the state. The underlying cause
of action is premised on the responsible state’s violation of the law of armed conflict,
which imposes limitations on the use of force or threats by states against foreign
civilian populations, or laws relating to the protection of human rights, which
establish minimum standards for the treatment of people. There is an urgent necessity
to look at both theory and action in a coherent and unified manner. If human rights
law and policy is taken from outside, by the adoption, through legislation or
otherwise, of international human rights standards, there may very well be a problem
of legitimacy. Ordinary members of the community may not understand know of
agree with or accept the standards in question. Some of the standards may be seen as
conflicting with local traditions. Human rights are declared to be universal, yet state
responsibility for their violations is limited by territoriality as well as by citizenship.
While international law has detailed illegal human rights practices for countries
within the domestic sphere, it has remained silent as to when (and under what
circumstances) a state has violated international human rights law by acting abroad
or by providing “aid and assistance” to another state which itself is carrying out
abuses.

A state may only espouse a claim against another state on behalf of one of its
nationals. It is generally agreed that aliens living in a state should be given same
rights which are given to the citizen of that state. It is the responsibility of the state to
protect the rights of aliens in the same way as they protect the rights of their own
citizens. Therefore, international law will continue to protect alien property, but that
the extent of protection will more than previously be in accordance with modern
developments in domestic property orders.

In the past half century there have been enormous advances in the
development of human rights law and the instruments to implement it. States are no
longer free to do as they will in the domestic sphere. Instead, they are bound by
provisions in international law that are aimed at protecting individuals from
oppressive practices. However, millions of people are victims of human rights abuses
each year. One reason for this pathetic record is that enforcement measures are
nowhere near developments in the law. As a consequence, states are still able to
commit human rights abuses with near impunity. But even when operating within
their domestic sphere states seldom act alone. While international law has tended to recognize how one state can directly harm another state, it has been slow in understanding how one state can indirectly harm, not so much another state, but the citizens of another state. Let us be clear, this is how states harm people in other lands.

The whole notion of human rights will be a tragic force without a fuller understanding of transnational responsibilities. Interestingly enough, international law has already codified certain kinds of transnational duties, but this codification has occurred in the context of the enforcement of human right violations committed in or by other countries.

Not only is the host state responsible for protecting human rights, but home states also have an obligation to ensure that their nationals, and other actors over whom they have control, respect human rights abroad. The recognition of home state responsibility is particularly important given that corporations violating human rights in developing countries can be sued in their home states.

Today it is painfully clear that the definition of who is refugee is extraordinary complex, most frequently controversial often politically influenced and increasingly narrowly defined by nation states. The expectation that the refugee problem would “go away” was, without question, misplaced. The increased in the number of recognized refugees estimated today to be in excess of 20 million, is a horrifying and painful witness to injustice, persicussion, oppression, and the inability of people to live safely in peace and stability in their native lands.

The reasons of refugee flight are complex and intertwined, as many scholars and activities convincingly describe and analyze. Images of the recurring and massive movements of people with no other viable options for living are captured through haunting and fleeting pictures on our TV screens. These pictures, which often offer little more than simplistic explanations, images of national sovereignty being comprised of “hordes” on the more of continued and extraordinary national and international financial burdens, and perhaps most importantly, of an unending dynamic that does not seem to be amenable to solution they elicit the response, “we can’t take all the refugee, with increasingly protectionist national legislation and processing procedures, the very notices of the world as a “Global village” is undermined.
Clearly, however it is approached the global complexity of the refugee reality and the more restrictionist responses of government area challenge to both justice and peace. Responding to this forced displacement of people is beyond the capacity of any one organization. Therefore, the challenge to the international community intergovernmental, governmental and non-governmental to work cooperatively is both enormous and compelling if justice and consequent peace are to prevail. Refugees peace issue because of the national global forces that impel them to flee their native lands and because of the action of refugees on their own behalf, actions that push governments and inter governmental organizations to deal with the refugee’s presence and pressure.

The global consultations have sought to inject new energy into the development of international refugee protection and there by counter unwarranted trends at the national and even regional levels. Comprehensive solutions through which the burdens and responsibilities of hosting refugees are more equitably shared ultimately lie at the international level, even though regional cooperation efforts can also serve to strengthen protection.

All states are equally responsible under international law for their illegal acts. A state can’t relieve itself of responsibility by invoking either provisions or omissions of its domestic legislation. The concept of state responsibility in international environmental law has been evolved through hard and soft laws, predominantly built on the principle of ‘no harm’ a general principle of state responsibility. Yet, the rules of state responsibility are inadequate to address at the issues of pollution.

The multilateral environmental agreements fashioned for addressing international liability for certain kinds of pollution are so varied in nature that they are neither susceptible for generalization from which a general principle can be derived nor put in practice by great number of states leading to the creation of new norms. The contribution of Indian Legislature and Judiciary in evolving new national standard for environmental protection therefore is noteworthy. At the national level, states are proactive in promulgating stringent environment laws, contrary to the reluctance they show towards accepting an internationally agreed standard. Another possible way is, by way of codification of the law of state responsibility through integration and unification of nationality accepted environmental standards on state
responsibility and liability. Which by nature are more stringent, legalistic and free from development related expression.

A state is under a duty to notify any other state which may be threatened by harm from the abnormally dangerous activates which the state permits to be conducted within its jurisdiction. In addition to assessing and regulating the activities within its jurisdiction that pose a substantial risk of harm to other states, a state must then inform those states which may be so affected of (1) the identity of the abnormally dangerous activities which pose such a threat, (2) the harm that may be caused by those activities and (3) the measures or regulation which the state has adopted or carried out to prevent such harm from occurring.

A state, failing to prevent harm, shall be originally responsible and struck liable for the harm caused by abnormally dangerous activities within its jurisdiction to the residents or property of another state. Strict liability has an ominous sound. The legislative and judicial bodies around the world that have adopted strict liability standards in various fields, have found it to be a flexible tool, one that provides compensation for injuries suffered and one that serves as an effective incentive for prevention.

On the issue of prevention, it is important to note that strict liability is only imposed upon the occurrence of injury that public policy has determined must be compensated or must be repaired. It does not attack merely for the creation of the risk of such injury.

In the past years international law has made strides in establishing individual responsibility for crimes against international law as one of its most fundamental principles. The international community is today engaged in a triple exercise of the codification and progressive development of international law, embracing the topics of the law of state responsibility, the Draft Code of Crimes, and the establishment of the ICC.

The establishment of the ICC has at last provided IHL with an instrument that will remedy the short comings of the current system of repression, which is in adequate and all too often ignored. Indeed, the obligation to prosecute war criminals already exists but frequently remains a dead letter. It is therefore to be hoped that this new institution, which is intended to be complementary to national criminal
jurisdictions will encourage states to adopt the legislation necessary to implement international law and to bring violators before their own courts.

Indigenous peoples in particular have been victims of widespread patterns of officially sanctioned oppressive action or neglect, which has led the international community at large to establish indigenous peoples as special subjects of concern. Indigenous peoples as remain vulnerable even in states that have taken concrete steps toward compliance with contemporary international standards concerning their rights.

The international system does not today replace mechanisms needed at the state level to secure indigenous peoples rights. But a level of international competency to promote the implementation of norms upholding indigenous rights and to scrutinize state behavior in this regard is important, and justified, insofar as it may help blunt the countervailing political and economic forces that capture or influence decision making at the more local levels.

The terms “Hijacking” and “Sky-Jacking” are inappropriate because of their reflections upon the prohibition era. It is certainly unfortunate that no sound designation has been forthcoming by the international community. In the short span of ten years the international community recognized the existence of a threat to global air safety, organized and executed three multilateral agreements, and implemented forceful municipal legislation. Moreover, the technological revolution in transportation modes necessitated an expeditious transformation of attitudes and international legal procedure.

International law has sometimes been accused of decrepitude or even non-existence, yet, the reaction to unlawful aircraft seizures by the international community makes unmistakably clear its import as a tool to suppress crimes impinging upon people everywhere. The international convention is patent testimony to world-wide concern of an immediate problem, and in the case of unlawful aircraft seizures, the action was strikingly swift and forceful. Even so, only the future can reveal the ultimate impact international law will have in halting threats to civil aviation. But one thing is certain. The concerted action taken by the global community to suppress these crimes amply demonstrates a willingness to co-operate under the husbandry of a historically sanctioned international legal order. It is only through continuation of such cooperative efforts that man will be able to travel in peace and security both in the air and through history.