International law in its original form as the term connotes, is the sum of the rules accepted by civilized States, either expressly or tacitly, as determining their conduct towards each other, and towards each other subjects. It is a body of rules regarded by the Nations of the world as binding on them in their relations with each other, in peace and wars, and comprises the rights and duties of sovereign States towards each other. In its broad sweep and expanding concept and horizon, it governs the relationship of the people of the world, unbounded by

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1 Shilpa Jain: Introduction to International Law (2016) Eastern Book Company
political and geographical constraints, and embraces mankind as a whole, irrespective of color, creed, relation and political view.

It is impossible today for a state or country, howsoever big, developed and rich to insulate itself from the rest of the world and to pursue policies, social, political, economic or external affairs, including military that can be said to be solely in its own national self-interest. Indeed, perception of what is in one’s national self-interest is beginning to change. After all, if there is a bad harvest in the Soviet Union, e.g. chances is that price of gain in the United States will go up.

The result is that a state must face reactions and interaction of other States and the people of the world, which are often bitter and even disastrous. The nature and scope on International Law is wide pervasive enough to bring within its orbit all activities of the states and its subject. International life is passing through the throes of a great rebirth, brought about by an unprecedented expansion of knowledge and scientific research in all the known areas of human intellectual activity.

Man has pushed the frontiers of human experience beyond his widest dreams, almost literally into the limitless expanse of space itself and the stars. According to Friedman, “International law is today actively and continuously concerned with such divergent and vital matters as human rights and crimes against humanity, the international control of nuclear energy, trade organizations, labor conventions, transport control or health regulations.\(^2\)

**MEANING AND DEFINITION**

The term international law was first coined by Jeremy Bentham in 1780.\(^3\) It is synonymous with the law of nations which corresponds to French and German equivalents droit international or droit des gens. Bynershoek ascribes the origin of law of nations to reason and usage basing usage on the evidence of treaties on ordinances. He observes: “Reason commands me to be equally friendly to two of my friends who are enemies to each other, and hence it follows that I am not to prefer either in war.”\(^4\)

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\(^3\) J.G. Strake: Introduction to International Law

The well-known English jurist defines International Law as “the rules which determine the conduct of the general body of civilized states in their mutual dealings”\(^5\) Disharmony in mutual relations among independent sovereign states causes rupture in their dealings. International Law, therefore, regulates the conduct of states in their mutual dealings, hostile as well as pacific.

International law is the name for the body of customary and treaty rules which are considered legally binding by civilized states in their intercourse with each other.\(^6\)

This definition was given by Oppenheim in 1905; however there were significant changes which took place since last eight to nine decades. Therefore his definition is subject to following criticism.\(^7\)

- It is now generally recognized that not only states but public international organizations have right and duties under International law. The use of term civilized states is also severally criticized. The criterion of distinguishing so called civilized states was neither based on long history nor on culture. Even though China had 5000 years old culture, it was not included in the group of civilized states. The western states regarded only the Christian states as civilized states this criteria was undoubtedly wrong. At present there are as many as 195 member states of the UN. Which include Christian as well as Non-Christian States.

- Even individuals or other private persons may have some rights and duties. After the Second World War significant changes have taken place in the formal structure of relation of states as it is moving towards the interest and welfare of citizens of member states.

- At present it also governs relations between states and international organizations, between states and private persons, and between international organizations and private persons.

\(^5\) Ibid p. 45  
\(^6\) Ibid p. 55  
\(^7\) Ibid p. 60
It is now widely recognized that international law consists not only customary and conventional rules but also of general principles of law. Art. 38 of the Statute of ICJ mention it.

The very conception that international law as a body of rules now stands changed as static and inadequate. Like all living law international law is continuously reinterpreted and reshaped in the very process of its application by authoritative decision makers, national and international. International or any law for that matter is a dynamic concept. Law changes with the change of time and circumstances. As law, to be living, must be flexible, adaptable and changeable.

NEW DEFINITION OF OPPENHEIM (Ninth Ed.)

“International law is the body of rules which are legally binding on states in their intercourse with each other. These rules are primarily those which govern the relation of states, but states are not the only subjects of International law. International organizations and, to some extent, also individuals may be subjects of rights conferred and duties imposed by international law.”

Further states are the principle subjects of international law states are primarily, but not exclusively, the subjects of International Law. To the extent that bodies other than states directly possess some rights, power and duties in international law they can be regarded as subjects of international law, possessing international personality.

Moreover not only individuals but also certain territorial or political units other than states, to a limited extent, are directly the subjects to rights and duties under International law. Therefore the above concept and definition of international law given in ninth edition of Oppenheim’s international law is nearly similar to that given by Starke and Fenwick.

However it is still deficient in one respect because it is still conspicuous for the salience regarding general principles of law recognized by Civilized Nations. In view of the forgoing discussion and taking into consideration the present state of International law, International law

8 V.K. Ahuja, Public International Law (Lexis Nexus 2016)
may be defined “as the body of general principles and specific rules which are binding upon the members of international community in their mutual relations”\textsuperscript{9} The term International law is very appropriate for it includes States, international Organizations, Individuals and other non-state entities.

**HALL**

Certain rules of conduct which modern civilized states regard as binding on them in their relations with one another\textsuperscript{10}

**J.L. BRIERLY**

The law of Nations or International Law may be defined as the body of rules and principles of action which are binding upon civilized States in their relations with one another.\textsuperscript{11}

**PHILIP C. JESSUP**

“Law applicable to a State in their mutual relations with States.” He further adds, International law may also be applicable to certain inter-relationships of individuals themselves, where such inter-relationships involve matter of international concern.\textsuperscript{12}

**KELESEN**

International law or the law of Nation is the name of a body of rules which according to the usual definition regulate the conduct of the States in their intercourse with one another\textsuperscript{13}

**CHARLES G. FENWICK**

International law may be defined in broad terms as the body of general principles and specific rules which are binding upon the members of the international community in their mutual relations.\textsuperscript{14}

\textsuperscript{9} Ibid p. 46
\textsuperscript{10} Ibid p. 55
\textsuperscript{11} Ibid p. 60
\textsuperscript{12} Ibid p. 62
\textsuperscript{13} Ibid p. 64
\textsuperscript{14} Ibid p. 66
In the olden days social groups did not interact with one another much and with the advent of the concept of nation state, industrial development and advances made in the fields of science and technology resulted in the states coming together. International relations were established and there was a need to regulate these relations between the states.

This necessitated the development of a body of rules which governed the relations between the states and came to be known as the law of nations or international law and also as transnational law.

MODERN DEFINITION OF INTERNATIONAL LAW

The 19th century saw the development of modern international law and belongs to the analytical school of jurisprudence. The analytical school believed that law is the command of the sovereign and carries force or sanction behind it.

J.G. Starke

A celebrated jurist, J.G. Starke who is a modern writer on International Law has defined, International Law in the following words: “International Law may be defined as that body of law which is composed for its greater part of the principles and rules of conduct which States feel themselves bound to observe and therefore do commonly observe in their relations with each other and which includes also:

(a) the rules of law relating to functioning of international institutions or organizations, their relations with each other and their relations with States and individuals;
(b) certain rules of law relating to individuals and non-state entities so far as the rights or duties of such individuals and non-state entities are the concern of international community

This definition of Starke is said to be a contemporary definition, because it considers the ever changing dynamics of International Law and reflects the existing status of International Law.

On the basis of the above definition we may conclude that international law is a body of rules and principles which regulate the conduct and relations of the members of international

15 J.G. Strake: Introduction to International Law, (latest Edition)
community. The contention that States alone are subjects of international law is not only inconsistent with the changing character of international law but has become completely obsolete and inadequate. In view of the changing character and expanding scope of international law today, international institutions, some non-state entities and individuals have also become the legitimate subjects of international law.

Nevertheless it cannot be denied that even today, as pointed out by Starke, “it is composed for its greater part of the principles and rules of conduct which States feel themselves bound to observe, and therefore do commonly observe, in their relations with each other”

**THEORETICAL BASIS OF INTERNATIONAL LAW**

The nature of International Law is not similar to that of National Law. The observation that International Law is not a Law at all, was made by jurists who were educated and who developed their views from the angle of Municipal Law Jurisprudence and who expected in International Law all those aspects which they were used to under Municipal Law. They were of the opinion that, there could be no other law except Municipal Law. What they failed to observe is that, Municipal Law is essentially a centralized system, whereas, International Law operates in a decentralized system.

The term “International Law” was framed at a time when the mindset of jurists was obsessed with the concept of National Sovereignty, therefore, it can be seen that a kind of stigma and contempt has been attached to International Law. According to some of the jurists, International Law lacks a superior political authority, an effective legislative machinery and sanction or force. These jurists totally deny International Law, a legal character.

On the other hand, certain jurists believe that International Law is a true law. Their reasons for such a view are:

- **Firstly**, while traditional International Law consisted of customary rules of International Law, modern International Law consists of positive rules of International Law, which have emerged from international treaties and conventions.

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17 S.K. Verma: An Introduction to Public International Law (Prentice Hall 1998)
Secondly, when International Law questions arise, States do not rely upon moral arguments, but rely upon treaties, conventions, precedents and opinions of experts.

Thirdly, the United National Organization (UNO) is established on the true legality of International Law.

Fourthly, International Law is treated as a part of Municipal Law in some of the countries, such as, United States of America (USA) and United Kingdom (UK).

Now the question that most often crops up is whether international law is true law or not and most of the international jurists adhere to the view that international law is really a true law. The essence of law is the force or sanction behind it, if this is considered correct then international law certainly has sanctions.

The jurist who adheres to his theory, are of the view that International Law is a part of the Law of Nature. In their view, States follow International Law, because it is a part of the Law of Nature. According to Stark “States submitted to international law because their relations were
regulated by higher law, the law of nature of which international law was but a part.” In order to understand this theory, it is necessary to understand the meaning of ‘Law of Nature’.

In the beginning the law of nature was connected with religion. It was regarded as the divine law. The jurist of 16th and 17th centuries secularized the concept of law of Nature. Much of the credit for this goes to the eminent jurist, Grotius. He expounded the secularized concept of the Law of Nature. According to him, natural law was the ‘dictate of right reason’. His followers applied the law of nature as an ideal law which was founded on the nature of man as a reasonable being.

International law considered as binding because it was in fact, natural law applied in special circumstances. Vattel, a famous jurist of 18th century also expressed the view that natural law was the basis of International Law. Pufendorf, Christian Thomasius, etc are other prominent exponents of Law of Nature.

**CRITICISM**

The exponents of natural law are of the view that it is the basis of international law and has conferred binding force on international law. It may, however be noted that each follower of the law of nature gives its different meaning. They use it as a metaphor. Different jurist give its different meaning such as, reason, justice, utility, general interest of international community etc. Hence the meaning of the law of nature is very vague and uncertain. Moreover, the main defect of this theory is that it is not based on realities and actual practices of the states.

**POSITIVE LAW THEORY**

Positivism is based on law positivum i.e. law which is in fact as contrasted with law which ought to be. According to the positivist, law enacted by appropriate legislative authority is binding. The positivist based their view on the actual practice of the States. In their views,

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21 Ibid, p.75
treaties and customs are the main source of International law. The positivism became popular in 18th century.\(^\text{22}\)

In 17th century naturalist and grotians were in (vogue) popularity. The positivist claimed to have based their theory on the actual practice of States and laid emphasis on law positivum, i.e. law which is in fact. In the view of the positivist, will of the state is the main source of International Law. As pointed out by Starke, “International Law can in logic be reduced to a system of rules depending for their validity only on the fact that states have consented to them.

As pointed out by Brierly, “The doctrine of positivism teaches that international law is the sum of rules by which States have consented to be bound, and that nothing can be law to which they have not consented to be bound.”\(^\text{23}\) The Italian jurist, Anzilotti, one of the chief exponents of the positivist school deserves a special mention. According to him, the binding force of international law is founded on a supreme principle or norm known, as pacta sunt servanda.\(^\text{24}\) In his view the basis of each rule of international law is pacta sunt servanda in some or the other way

## CRITICISM

The concept of will of the state presented by the positivist is purely metaphorical, therefore the view of positivist that the whole of international law is based on the consent of the state is far from truth. To make customary international law binding upon the state no consent requires.\(^\text{25}\) A new state entering the community of nations at once becomes bound by the international customary rules, and it is never suggested that any of these are not binding. There are some principles of international law which are applicable on states although states did not give their consent for them.\(^\text{26}\)

According to the positivist view, treaties and customs are the only sources of international law. However according to Grotians, international law has originated not only from customs and treaties but also from natural law.

\(^{22}\) Ibid, p.89
\(^{23}\) Ibid, p.101
\(^{24}\) Ibid, p.122
\(^{25}\) Ibid, p.229
\(^{26}\) Art. 2 of UN Charter, Principles of UN are bonding on the non-members.
GROTIUS THEORY

Hugo Grotius was born in Holland in 1583, at the age of 15, he took the degree of Doctor of Laws at the University of Leyden. In 1609, his first work, *Mare Libertum* was published. In this book he strongly argued for freedom of the sea-going.\(^{27}\) This was very significant because at that time maritime powers were appropriating different parts of the sea. In 1625, he published his most famous work, *De Jure Belli ac Pacis* (i.e. on the law of war and peace). As pointed out by Oppenheim, “The science of modern law, of nations commences from Grotius’s work, De Jure Belli ac Pacis, because it consist of a fairly complete system of law.”\(^{28}\)

It has following four main characteristics:

1. In the first place he advocates that state should also be subject to the same rules which regulate the individuals.
2. Secondly he formulated the ‘law of peace’ which subsequently became the basis of his whole system.
3. Thirdly he contended that States violating the law may be punished by other states.
4. Fourthly in his view natural law (i.e. right reason) was the basis of determining rules for the rightful conduct of States.

Grotius’s work obtained such a worldwide influence that he is correctly styled the “Father of the Law of Nations.”

CONSENT THEORY

In the view of the supporters of this theory, consent of States is the basis of international law. States observes rules of international law because they have given their consent for it. Positivist has given much support to this view. The chief exponents of this theory are Anziloti, Triepel, Oppenheim, etc. This theory fails to explain the basis of customary international law. In the view of the supporters of this theory, States are bound to observe customary rules of international law, because they have given their implied consent for their acceptance.\(^{29}\) This

\(^{27}\) Supra Note 6, pp. 280-281

\(^{28}\) Ibid, p. 197

theory has been subjected to severe criticism by many jurists, such as, Starke, Brierly, Kelsen, Fenwick etc.

**CRITICISM**

As pointed out by Starke, in practice it is not necessary to prove that the other State or States have given their consent in regard to a specific rule of international law. According to Prof. Smith, all States are bound by international law, no matter whether they have given their consent or not. In regard to customary rules of international law, the basis of implied consent is far from correct. The States are bound by general international law even against their will.

Prof. Kelsen has cited the example of new States, which get rights and duties under international law immediately after becoming the subject of International law. Theory of consent fails to explain the case of recognition of new State. The granting of recognition is the act of other States and hence it would be wrong to say by getting recognition, the recognized state has given its consent in respect of international law.

**HISTORICAL DEVELOPMENT OF INTERNATIONAL LAW**

**ANCIENT ERA**

International law in one shape or another has existed in almost all times and ages. It is true that the concept of family of nations or one world was new to the ancient world, but nevertheless nations came into contact with one another and as a result of the contact there sprang up international trade, rules regarding the declaration and conduct of war, treaties and diplomatic privileges. The history of the Indians, Jews, Greeks and Romans is replete with such instances.

With the advance of civilization the rules regulating the dealings of civilized states with one another have become very articulate so much so that it has now become impossible for nations, big or small, to live in isolation.

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30 Ibid, p.222
31 Ibid, p.234
Traces of International Law in the form of privilege of ambassadors, treaties and the rules governing the declaration and conduct of war are to be found even in the history of ancient India.

The epic of Ramayana and Mahabharata although preaching in the main, religious discourses, make pointed references to rules and usages governing war, peace and neutrality based on Dharma. They attach due importance to the inviolability of a duta or ambassador and also heralds in battle.32

The Bhagavadgita - the book of hindu scripture whose teaching have gain appreciation far beyond the borders of India, deals with full measures with just and unjust wars. Lord Sri krishna thus address Arjuna who was overwhelmed with pity: “there is nothing more welcome for a man of the warrior class than a righteous war and it is only the lucky among the kshhatriyas, who gets such an unsolicited opportunity for war, then, abandoning your duty and losing your reputation, you will incur sin.” (Ch. II, Verses 31 to 33)33

The need for a prior declaration of war by blowing of conches by the warriors on both sides has also been emphasized there. Elaborate rules were laid down in the Arthashastra of Kautilya and Nitishastra of Kamandaka for the conduct of Government and foreign affairs.34

Kautilya advocated the abandonment of the principles of morality for the application of Dharma in the war. He advocated adoption of all means, whether fair or fouls, during war.

Manu distinguishes between righteous and unrighteous wars and observes that it is the highest merit of a valorous Kshatriya to die in a righteous war. It was forbidden to kill or wound enemy persons who had surrendered. Inviolability of temples was recognized by him. And he granted immunity to prisoners of war and non-combatants. Hindus had great regard for treaties.35

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33 Ibid, p.45
34 Ibid, p.48
35 Ibid, p.52
The Mohammedan rulers in India had also developed relations with some of the foreign States. They received ambassadors from European Countries and also entered into treaties. The Muslim rule is full of instances where war is known as Jehad was waged for the protection of Islam against an alien or hostile non-muslim State.\textsuperscript{36}

The Muslim rules governing war recognized the distinction between combatants and non-combatant and gave protection to womens, children, the aged and the infirm during the jehad. Prisoners of the war remained at the mercy of the Imam who either enslaved or killed them. Respect was paid to treaties as well.\textsuperscript{37}

The Jews had the same laws for foreigners residing on Jewish territory as for themselves. “Love the strangers: for ye were strangers in the land of Egypt.”\textsuperscript{38} A reading of the bible, however, illustrates that on account of their monotheism the Jews did not recognize other nations who professes with in polytheism as their equals.\textsuperscript{39} With friendly nations the Jews had international relations. They faithfully observed treaties and considered ambassadors as sacrosanct.

The Greeks were more civilized than heir neighbors whom they regarded as barbarians. Their notions of superiority prevented them from developing mutual relations with their neighboring nations.\textsuperscript{40} The Greeks lived in numerous small city states which were independent of one another. The inhabitants of these states belonged to the same race, blood

\textsuperscript{36} Ibid, p.56
\textsuperscript{37} Ibid, p.60
\textsuperscript{38} Ibid, p.66
\textsuperscript{39} Ibid, p.70
\textsuperscript{40} Ibid, p.75
and religion. This close affinity in course of time united these independent fragments into a community of states which observed certain rules inter se in times of war and peace.\textsuperscript{41}

They frequently resorted to arbitration for settlement of their disputes. They treated heralds and priests who carried the holy fire as inviolable. Commenced no war without a previous declaration, gave burials to warriors dying in the battlefield. Exchanged the prisons of war or let them off on payment of ransom. Special privileges were given to ambassadors who were ceremoniously received and their persons treated as inviolable.

The Greeks developed theories concerning proper conduct of war. Their expositions of these theories and the surviving records of Greek practice in war furnished authority to early writers on International law for propounding their rules.

\textbf{ROMANS}

The Romans had a set of 20 priests, termed fetials who managed relations with foreign states by the laws called jus fetials. The Romans had one set of laws which were applicable exclusively to themselves, viz., jus civile, the law applicable to Romans, and another set for foreigners, viz., jus gentium, the which they had in common with other nations.\textsuperscript{42} The jus gentium: a Latin term from which the phrase law of nations has been derived, was later on strengthened by the development of jus natural, which was the law that was constituted by right reason, common to nature and to man.

With the introduction of the general principles of law and justice having a universal application in jus gentium, it later on identified itself with jus naturale and the two terms became synonymous in Roman law. Roman law recognized four just reasons for war, viz.,\textsuperscript{43}

\begin{itemize}
  \item Violation of the roman dominions
  \item Violation of ambassadorial privileges
  \item Violation of treaties, and
  \item Support given during war to an opponant by a hitherto friendly State.
\end{itemize}

\textsuperscript{41} Ibid, p.78
\textsuperscript{42} Ibid, p.80
\textsuperscript{43} Ibid, p.82
War could be ended according to romans through a treaty of peace, by surrender or through conquest of the enemy’s country.

**DEVELOPMENT OF INTERNATIONAL LAW DURING 16TH AND 17TH CENTURIES**

According to Brierly the term International is a modern concept and it originate only during sixteenth and seventeenth centuries from the modern European State System. Therefore to understand the main features of this modern state system, it is necessary to understand the nature of International Law. The middle ages witnessed many obstacles in the growth of strong centralized Governments. The two main such obstacles were Feudalism and the Church.

The Treaty of Westphalia of 1648, ended the thirty years’ war of religion and results in to the beginning of the acceptance of new political order in Europe. Political developments were leading to the separateness and irresponsibility of every state. Meanwhile there were certain counter factors leading to intimate and constant relations of states with one another. According to Brierly the following were such causes:

- The impetus to commerce and the new route to indies
- The common intellectual background fostered by the renaissance
- The sympathy felt by co-religionist in different states of one another, from which arose a loyalty transcending the boundaries of State
- The common feeling of revulsion against war, caused by the savagery with which the wars of religions were waged.

All these causes co-opted to make it certain that the separate state could never be accepted as the final and perfect form of human association and that in the modern as in the medieval world it would be necessary to recognize the existence of the wider unity. The rise on international law was the recognition of this truth.

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44 Oppenheim’s, International Law, (9th Ed. 1992) p. 44
45 Ibid, p.48
46 Ibid, p.55
Hugo Grotius was born in Holland in 1583, at the age of 15, he took the degree of Doctor of Laws at the University of Leyden. In 1609, his first work, *Mare Libertum* was published. In this book he strongly argued for freedom of the sea-going. This was very significant because at that time maritime powers were appropriating different parts of the sea. In 1625, he published his most famous work, *De Jure Belli ac Pacis* (i.e. on the law of war and peace).

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- In the first place he advocates that state should also be subject to the same rules which regulate the individuals.
- Secondly he formulated the ‘law of peace’ which subsequently became the basis of his whole system.
- Thirdly he contended that States violating the law may be punished by other states.
- Fourthly in his view natural law (i.e. right reason) was the basis of determining rules for the rightful conduct of States.

Grotius’s work obtained such a worldwide influence that he is correctly styled the “Father of the Law of Nations.”

**DEVELOPMENT OF INTERNATIONAL LAW DURING 18TH CENTURY**

17th and 18th Centuries were conspicuous for giving birth to three different schools of International Law, namely, the Naturalist, the Positivist and the Grotians. Naturalists are those writers who were of the view that Law of Nations is only a part of the law of nature. They deny that there is any positive law of Nations. In order to understand the view of

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48 Ibid, p.35

49 Ibid, p.66

Dr. Pandhare B. D. [LL.M. Ph.D.] Asst. Prof. New Law College, Ahmednagar
Naturalist, it is necessary to understand the meaning of ‘Law of Nature’. In the beginning law of nature was connected with the religion. It was regarded as the divine law.

The jurist of 16th and 17th centuries secularized the concept of law of Nature. Much of the credit for this goes to the eminent jurist, Grotius. He expounded the secularized concept of the Law of Nature. According to him, natural law was the ‘dictate of right reason’. 50 His followers applied the law of nature as an ideal law which was founded on the nature of man as a reasonable being. International law considered as binding because it was in fact, natural law applied in special circumstances.

Vattel, a famous jurist of 18th century also expressed the view that natural law was the basis of International Law. 51 The positivist on the other hand, contended that it was the positive law of nations which had real force law. According to them, positive law of nations was the outcome of custom and International treaties.

Positivism is based on law positivum i.e. law which is in fact as contrasted with law which ought to be. According to the positivist, law enacted by appropriate legislative authority is binding. The positivist based their view on the actual practice of the States. In their views, treaties and customs are the main source of International law. The positivism became popular in 18th century. In 17th century naturalist and grotians were in (vogue) popularity. 52 The positivist claimed to have based their theory on the actual practice of States and laid emphasis on law positivum. i.e. law which is in fact.

They emphasized on law which is as distinct from law which ought to be. In their view, therefore, law enacted by appropriate legislative authority is binding. As regards the grotians, as it has been pointed out earlier that they stood in between the naturalist and the positivist. They maintained the distinction between the natural and positive law of nations as expounded by Grotius but in contradistinction to Grotius, they give equal importance to

50 Ibid, p.70
51 Ibid, p.78
52 Ibid, p.88
natural and the positive law. In their view, international law is the outcome of the law of nature as well as custom and international treaties.\(^{53}\)

Thus they had shared certain things with both the naturalist and the positivist but differed with them in so far as they gave equal importance to the natural and positive law of Nations. The most prominent among the Grotians were Christian Wolf (679-1754) and Emerich de Vattel (1714-1767).

### DEVELOPMENT OF INTERNATIONAL LAW DURING 19\(^{TH}\) and 20\(^{th}\) CENTURY

The relation of the states and their mutual contracts had greatly increased during the said period and may rules and principles were formulated on the basis of the practice of States and the needs and requirements of the changing times and circumstances. This is discussed under following heads.

#### CONGRESS OF VIENNA, 1815

It was the first important European conference where may rules of International law were formulated, e.g. rules relating to international rivers, classification of diplomatic agents, etc.\(^{54}\)

#### DECLARATION OF PARIS, 1856

The declaration of Paris was a law making treaty in which may rules relating the naval warfare were laid down. Attack on undefended people during naval war was prohibited. It was also laid that enemy ships could be sunk or otherwise destroyed during war but before doing so, precaution should be take to save the life of the crew of the ship.\(^{55}\)

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\(^{53}\) Year Book of International Law Commission (1973), p. 122  
\(^{54}\) Ibid, p.80  
\(^{55}\) Ibid, p.88
Many rules relating to the wounded and sick members of the armed forces during land warfare were laid down in Geneva Convention of 1864. Killing of wounded soldiers was prohibited and rules were made for providing certain facilities to them.\(^{56}\)

Hague Conferences of 1899 and 1907 are rightly reckoned as great landmarks relating the development of International law. They resulted in the adoption of several conventions on various subjects of international concern. These conferences emphasized the settlement of international disputes through peaceful means. Many rules relating to land warfare and naval warfare were formulated. Bombardment over undefended people was declared illegal.\(^{57}\)

Endeavour was also made to determine the limits of armament and to achieve ultimately disarmament. Duties and rights of neutral states during naval war were also clearly laid down. Yet another great contribution of Hague conference was the establishment of the Permanent Court of Arbitration. It contributed much in the attainment of the objective of international law to settle international disputes through peaceful means.

After the First World War, the Nations of the world felt the need of an International Organization which might be able not only to regulate amicably the mutual relations among the nations but could also prevent future wars. The League of Nations was established under the treaty of Versailles, 1919. For the first time it imposed certain restrictions upon the nations right to resort to war at their will.

It provided that before resorting to war, they would first settle their disputes through arbitration, judicial settlement, or enquiry by council. If their disputes were not solved through these means, they would not go to war until the lapse of three months after such failure. If any member of the League going to war in violation or disregard of the provisions

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\(^{56}\) Ibid, p.90

\(^{57}\) Ibid, p.95
of the covenant could be deemed to be enemy of the whole League of Nations.\textsuperscript{58} It established the Permanent Court of International Justice which contributed much to the progressive development of International Law. Since the establishment of League of Nations the development of International law has been accomplished primarily through the creation of International Organizations by law making treaties and the conclusion of law-making treaties through International Organizations.

**GENEVA CONVENTION, 1929**

This convention was signed by 47 states of the world. Many rules relating to the treatment of prisoners of war were laid down in this convention. Reprisal against the prisoners of war, cruelty towards them and collective penalties against them were prohibited. Rules were also formulated for providing medical and other facilities to the prisoners of war.\textsuperscript{59}

**SECOND WORLD WAR**

Almost all the above rules of International Law were flagrantly violated during the Second World War which turned into a ‘total war’. It however, sowed the seeds of a future world organization because the devastating effects and hair-splitting experiences of the war once more compelled the nations of the world to make their attempt afresh to establish an International Organization. Which may ensures lasting peace to the world and establish rule of law in the international field.\textsuperscript{60}

Consequently the Second World War indirectly led to the eventual establishment of the United Nations.

**UNITED NATIONS, 1945**

The united nations Charter came into force on October 24, 1945, and thus the United Nations was established. In the beginning the number of its members was only 51 which has now swelled to 193. The United Nations is an International Treaty which regulates the

\textsuperscript{58} Ibid, p.102  
\textsuperscript{59} Ibid, p.110  
\textsuperscript{60} Ibid, p.122
mutual relations of its members. As per Art. 13 Para1 (a) of the Charter provides that the General Assembly shall initiate studies and make recommendations for the purpose of promoting international Co-operation in the political field and “encouraging the progressive development of international law and its codification”. For this purpose, the General Assembly established the International Law Commission which conducts study and research in different aspects of International Law and submits its reports to the General Assembly.

Accordingly International Law Commission has performed its task with great distinction. Declarations have been enunciated, important principles have been formulated, new conventions have been drafted, and the ways and means for making evidence of customary law more readily available received the attention of commission also. It has also prepared draft articles of several conventions and treaties which have been eventually adopted. It has thus credibly performed the task of assisting the General Assembly in “encouraging the progressive development of International Law and its Codification”.

The more important of such treaties and conventions are

- Vienna Convention on Diplomatic Relations, 1961
- Vienna Convention on State Succession in respect of Treaties, 1969
- UN Convention Against Removal of All Sorts of Discriminations against Women
- International Convention on Protection and Punishment of crimes Against Internationally Protected Persons (including Diplomatic Agents), 1973
- International Convention on Representatives of International Institutions, 1975
- International Convention on State Property, Archives and Debts, 1983
- UN Convention on the Law of Sea, 1982
- International Convention for the Suppression of Financing of Terrorism, 1999
- International Convention for the Suppression of Acts of Nuclear Terrorism, 2005

Thus after the establishment of the United Nations the development of International Law has been effected mainly through multi-lateral law making treaties. The chief objective of International law is to establish the rule of law in international field and to ensure the
maintenance of international peace and security. It is possible only when it adopts itself to the changing times and circumstances.

CODIFICATION OF INTERNATIONAL LAW

INTRODUCTION

By the term codification we ordinarily mean the process reducing the whole body of law into code in the form of enacted law. It generally connotes a systematic arrangement of the rules of law which are already in existence According to Sir H. Lauterpacht, “The task of codifying International Law means a process of bringing about an agreed body of rules already covered by customary or conventional agreement of State."61

MEANING OF CODIFICATION

Codification means any systematic statement of the whole or part of the law in written forms, and that it does not necessarily imply a process which leaves the main substance of law unchanged, even though this may be true of some cases. In other words, codification properly conceived is itself a method of the progressive development of law.’ Codification is the process of translating customary law and the rules arising out of decisions of tribunals into statutes or conventions with little change or no change at all of the law.

The thought of codifying the law was initially put forth by Jeremy Bentham at the end of the eighteenth century and was later carried into the field of international law. It is the procedure of consolidation of statute law or a statute collecting all the law relating to a specific area and arranging them systematically in written form.

Codification was considered significant because it would enable the lawyer and the courts of law to easily and conveniently trace the law of a particular field. In 1789 Jeremy Bentham in his book, The Principles of Morals and Legislation, introduced codification of law. Later the Institute of International Law which was established in Belgium produced several drafts on different topics of international law and in the same year, Association for the

Reform and Codification of the Law of Nations was established. This Association even today continues to function by the name of International Law Association.

The first Hague Conference began the work of codification of international law and the second landmark development was the codification under the League of Nations and later under the United Nations.62 The General Assembly of the United Nations in pursuance of one of its important functions of encouraging the progressive development of international law and its codification established the International Law Commission. Subsequently the General Assembly in 1966 established a working group of 36 governmental experts in the field of international trade law and thus the United Nations Commission for International Trade Law (UNCITRAL) came into existence.63

INTERNATIONAL LAW COMMISSION

Established by General Assembly (GA) in 1947 in order to promote the progressive development of international law and its codification. It consists of 34 members elected by GA for five-year terms (eligible for re-election). It holds Meeting annually. Members serve in individual capacity (not as representatives of their Governments). Members must have recognized competence in international law, Commission members represent the principal world legal systems (geographic representation ensured).

CHARTER OF THE UNITED NATIONS, ARTICLE 13(1)

Governments drafting the Charter of the UN were opposed to conferring on the UN legislative power to enact binding rules of international law. However, strong support for conferring on the GA the more limited powers of study and recommendation, which led to the adoption of article 13(1) of the Charter: “The General Assembly shall initiate studies and make recommendations for the purpose of encouraging the progressive development of international law and its codification.” To discharge its responsibility under article 13, the GA established ILC.

63 Ibid, p.34
Article 1(1): Commission shall have for its object the promotion of the progressive development of international law and its codification;

Commission entrusted with both progressive development and codification of international law (Article 15 of Statute):

Progressive development refers to the preparation of draft conventions on subjects which have not yet been regulated by international law or where the law has not yet been sufficiently developed by state practice;

Codification refers to the more precise formulation and systematization of rules of international law in fields where there already has been extensive State practice precedent and doctrine.

Governments play an important role at every stage of the work of progressive development of international law and its codification such as

- Provide information at outset of ILC’s work;
- Comment upon drafts;
- May decide upon the initiation or priority of work; and
- Determine outcome of the Commission’s work.

ILC Statute gives Governments an opportunity to share views at every stage of Commission's work

Article 16(c) (progressive development) requires ILC, at the outset of its work, to circulate a questionnaire to Governments, inviting them to supply data and information relevant to items included in plan of work;

Article 16(g) requires Commission to publish a document containing drafts and explanations, supporting materials and information supplied by Governments in questionnaire;
Article 16(h) and (i) invite Governments to submit comments on this document, which are taken into consideration by the Commission in its final drafts; Similar provisions exist regarding codification (articles 19, 21 and 22);

Written comments submitted by States are supplemented by comments made during the annual debates of the Sixth Committee on the ILC’s report to the GA;

After the ILC has submitted its final draft to the GA on a topic, the GA normally requests comments of Governments on that draft. Such comments are considered by the Sixth Committee in connection with consideration of the topic prior to convening a diplomatic conference or in connection with the elaboration of a treaty by the GA itself.

**ILC RELATIONSHIP WITH GENERAL ASSEMBLY**

The ILC submits to the General Assembly a report on the work done at each session; Sixth Committee annually considers the ILC's reports; General Assembly, usually on the recommendation of its Sixth Committee, has: Requested ILC to study a number of topics or to give priority to certain topics, Rejected or deferred action in respect of certain drafts and recommendations of the ILC, Decided to convoke diplomatic conferences to study and adopt draft conventions prepared by ILC, and Decided to consider and adopt draft conventions prepared by the ILC.64

**ILC RELATIONSHIP WITH OTHER BODIES**

In addition to its close working relationship with the GA and its Sixth Committee, the ILC also maintains cooperative relationships with other bodies, including:

- Principal organs of the UN other than the GA;
- Specialized Agencies;
- Official bodies established by intergovernmental agreement (Pan American Union);
- Inter-American Juridical Committee;
- Asian-African Legal Consultative Committee;

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64See articles 2, 3 and 8 of the Statute of the ILC
- European Community on Legal Cooperation; and
- Arab Commission on International Law.

**SINCE 1949 THE COMMISSION HAS SUBMITTED FINAL DRAFTS/REPORTS ON**

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**ILC REPORTS RESULTING IN KEY TREATIES**

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