



PUBLIC INTERNATIONAL LAW

BY –

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Settlement of Disputes


- Disputes are inextricably linked to international relations. Increasingly these disputes are no longer just primarily between states but also between states and other parties like international organizations and other non-state actors, and between these actors mutually.
- In this context, the Charter of the United Nations (UN) plays a major role, in particular, regarding disputes between states.


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- Article 2(3) of the UN Charter States that all Member States have to settle their international disputes by peaceful means in such a manner that international peace and security, and justice are not endangered.
 - This view was again confirmed in 1982 in a resolution (Res. 37/10) of the UN General Assembly, the so-called Manila Declaration on the Peaceful Settlement of International Disputes.


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- The expression ‘dispute’ cannot be precisely defined. In a wide sense, it may mean ‘a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons.’
 - In order to establish whether a dispute exists, it must be shown the claim of one party is opposed by the other.
 - However, whether there exists an international dispute is a matter for objective determination.


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- The phrase “questions of a legal nature” is employed in the Conventions for the Pacific Settlement of International Disputes of 1899 and 1907, as well as in the Statute of the Permanent Court of International Justice, to denote disputes considered especially suited for arbitration, i.e. peacefully and judicially solved, in a layman’s language.


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- Not all disputes may be adjudicated by a judicial body. Some of them cannot be settled by a mere application of law; they have a “political” character, and they should be dealt with by a “political” character, and they should be dealt with by a political organ. Only if their character is “legal” are they suitable for court’s decision.


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- Most cases involve both political and legal elements. If both parties rely, in their assertions, on international law, the dispute is clearly a legal or justiciable one.
 - If one of them challenges some rule of law as unjust and seeks to protect its interests which find no support in the positive legal system, the dispute has a purely political character.


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- Thus, in most cases, the classification of a dispute will depend on the qualification given to it by the parties. In many cases, however, it will be difficult to characterize the dispute.
 - The importance of deciding that whether a dispute is a ‘political’ or a ‘legal’ one can be understood from the statement made by Roosevelt, while commenting on the treaties of arbitration negotiated in 1911 by the United States with Great Britain and France:


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- “It would be not merely foolish but wicked for us as a Nation to agree to arbitrate any dispute that affects our vital interest or our independence or our honor; because such an agreement would amount on our part to a covenant to abandon our duty, to an agreement to surrender the rights of the American people about unknown times in the future.


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- Such an agreement would be wicked if kept, and yet to break it – as it undoubtedly would be broken if the occasion arose- would be only less shameful than keeping it..... Of course the same reasons which make it impossible to agree to arbitrate questions that involve our vital interest, independence, or honor, apply to any proposal to submit to others the question whether or not a given dispute of such a kind is ‘justiciable’, or does or does not involve such questions and therefore should or should not be arbitrated.”

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- Such generalizations are of slight value, however, in the absence of authoritative tests and criteria to enable us to classify a given controversy under its appropriate heading. They thus lead only to fresh discussion and contention.

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- We may resort to generalizations and say that certain matters, such as the moral right of a people to a separate political existence, or the protection of the economic and commercial interests of a nation, are of a political character.
 - So likewise we may reserve questions of national policy like the Monroe Doctrine and questions of domestic jurisdiction like immigration, as being primarily political and non-legal in their nature.
 - We may say that questions to which no accepted principles of international law apply are *ipso facto* unsuited for legal settlement.


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- The distinction between legal and political disputes is important because, in International law, the procedure for the settlement of disputes has been laid down for only legal disputes. In the case concerning Border and Transborder Armed Action (***Nicaragua v. Honduras***), the Court stated that the Court is only concerned with cases involving with cases involving a legal dispute, in the sense of a dispute capable of being settled by the application of principles and rules of International law.


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- Para 2 of Article 36 of the Statute of International Court of Justice uses the term ‘legal disputes’ in relation to the compulsory jurisdiction of the Court. It is so because, perhaps, the judicial procedure provided by the Court may not be suitable for political disputes. If in any legal dispute, political aspects are present, the Court as a judicial organ will be competent to deal with a legal question only, and cannot concern itself with the political motivation, as observed by the ICJ in an advisory opinion given in Legality of the Threat or Use of Nuclear Weapons case.


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- However, when there is a dispute between two states on the question as to whether a particular dispute is or is not a legal dispute, the dispute is settled by the decision of the Court in accordance with Article 36, para 6 of the Statute which says that in the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court.


Amicable Means (Pacific Means)

- As the UN Charter does not prescribe in which way or by what means disputes need to be resolved, the parties are free to choose their dispute settlement mechanism. In the framework of international peace and security Article 33 of the UN Charter provides a number of alternatives to choose from in resolving disputes, e.g., negotiation, inquiry, mediation, conciliation, arbitration and judicial settlement.

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- Notwithstanding the free choice of means, the Manila Declaration underlines the legal obligation of parties to find a peaceful solution to their dispute and refrain from action that might aggravate the situation. The methods and procedure of dispute settlement for states also largely apply to non-state actors.


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- The Charter under article 33, Para 1 enumerates a number of peaceful means for the settlement of disputes.
 - It says that *'the parties to any dispute...shall.....seek a solution by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.'*


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- The expression 'other peaceful means of their own choice' denotes that the various means stipulated in the above Article are not exhaustive.
 - The Draft Declaration of the Rights and Duties of States under Article 8 provided that every state has the duty to settle its disputes with other States by peaceful means in such a manner that international peace and security, and justice are not endangered. Presently, the duty of a State to settle the dispute peacefully has become the customary rule of International Law and has gained the status of customary law, as ICJ declared this in the case concerning Military and Para Military activities in and against *Nicaragua*. (ICJ Reports 1986 p. 14 at p.145)


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- The peaceful means may be further divided broadly into two categories:
 - Extra-Judicial Modes of Settlement ('Diplomatic' or 'Political' means)
 - Judicial settlement

Extra-Judicial Modes of Settlement:


- **Negotiation:**
- When the disputant states settle their disputes themselves by discussion or by adjusting their differences, the procedure is called negotiation.
- Negotiation may be carried on either by the Heads of the States or by their accredited representatives or by diplomatic agents.
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- It also includes correspondence between the disputant states. Negotiation is the simplest form of settling the disputes.
 - It helps the disputant parties to bring about the needed change by mutual consent.
 - The success of negotiation as a means to settle disputes depends largely upon the degree of acceptability of claims of one party by the other, the restraint, tact and the spirit of accommodation with which the negotiations are conducted.

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- However, negotiation has certain weaknesses. On many occasions, it becomes difficult for the disputant parties to ascertain the precise and correct facts which have given rise to a dispute. Further, in those cases where the negotiations are carried on by 'big State' on the one hand, and by the 'small State', on the other hand, or to say, when the parties are unequal, it is likely that the small Power may be subjected to the will of the other.
 - The possibility of imposing influence by the big Power over its counterpart is greater in negotiation.


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- There are many instances where negotiation has been used to solve the dispute.
 - Like, in 1976, India and Pakistan settled their outstanding differences in the Simla Conference.
 - Similarly, in 1974, India and Sri Lanka settled their boundary disputes by negotiation.
 - In 1977, the Farraka Barrage Issue was also settled through negotiation between India and Bangladesh.


- The success of the negotiation as a dispute resolution is reflected in a dispute between Iran and US. The facts involved were that an Iranian Airliner was shot down on July 3, 1988, by a missile fired from an American cruiser (USS Vincennes) that killed 290 people. The USA termed the incident as accidental. But Iran filed the claim including compensation before ICJ, to which the US objected. But before the starting of oral proceedings, the Agents of the two Parties jointly informed the Court their governments have entered into negotiations that may lead to a full and final settlement of the case.


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- On February 22, 1996, the governments jointly entered into an agreement through negotiation, finally settling the dispute. The ICJ was informed of this and case was dropped from their then. According to the settlement, the US agreed to pay 131.8 Dollars to Iran as settlement of Iranian claims including compensation to the people killed in the incident. This shows how a big power can also bow down to a small power if good tactics are used during negotiation, and it reveals the true power of negotiation.
 - The United Nations General Assembly after having realized the importance of negotiation, also issued guidelines, its resolution dated December 8, 1998. (General Assembly Resolution 53/101)


Good Offices:

- When the parties are not inclined to settle their dispute by negotiation, or when they fail to settle their dispute by negotiation, they may take the assistance of a third party in resolving their differences. The third party may be appointed by the parties themselves or by the Security Council. The third party may be a state or an individual – usually an eminent citizen of a third state (whether in a private capacity or by virtue of high political office in that State).

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- For instance, McNaughton in 1949, Dixon in 1950, Graham in 1951 and Jarring in 1957 were appointed by the Security Council as the United Nations' representatives to settle the Kashmir dispute between India and Pakistan.


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- The General Assembly of the United Nations may also do so under article 14 of the Charter. However, the third party is not under any legal obligation to accept the appointment. Apart from the appointment, the third party may make an offer to the disputant States for providing its services in settling the dispute. The offer so made should not be regarded as an act of interference by a third party. The offer so made may be rejected by the parties, like, India, in 1951, rejected the offer of Austrian Prime Minister, Robert Menzie, who was given the responsibility to solve the Kashmir issue. Much depends on the person or the parties involved in the dispute and the person making an offer. It is to be noted that the views expressed by the third party acquire 'exclusively the character of advice and never have binding force'.


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- When the third party arranges a meeting of the disputant parties so that they may settle the dispute by negotiation, or wherein he acts in such a way so that a peaceful solution may be reached, the act is called good offices. The main function of the third party, offering its good offices, is to bring the parties together when they have failed to negotiate or where negotiations have earlier failed. The third party neither participates in the meeting nor gives its suggestions to the parties in this case (contrary to mediation). Once the parties have been brought together for the purpose of working out a solution of their controversies, the State or person rendering good offices has no further duties.

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- For Example, Wilson, the Prime Minister of the United Kingdom lent his good offices to India and Pakistan which resulted in the parties to reach an agreement to refer the Kutch issue to an Arbitral Tribunal. Also, The security council rendered its good offices in the dispute between the Netherlands Government and the Republic of Indonesia in 1947.

Mediation:


- Similar to the earlier case, in this method also the dispute is referred to the third party. In this case, the third party participates in the discussion along with the disputant States, and also gives its own suggestions in resolving the dispute, in contradistinction to the 'good offices'. The mediator, i.e. the third party, is required to be neutral and impartial. He must necessarily meet with them and enter into discussions. He should encourage compromise than advice adherence to the legal principles. If this course is adopted, the mediator is likely to succeed in resolving the dispute. The mediator may even sign the treaty/settlement reached by the countries.

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- Sometimes initial good offices get turned into mediation ultimately. For instance, Roosevelt, began in 1905, by merely extending his good offices to bring Japan and Russia together at Portsmouth to try to reach an agreement for a settlement of the conflicting interest at stake in the war. At a later point, he has led to interest himself in the terms of the settlement, and in the final event, he practically decided the terms of the settlement, thereby turning himself into a mediator.

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- Mediation of Soviet Premier Kosygin in the dispute between India and Pakistan which resulted in the conclusion of **Tashkent Agreement in 1966** is an example of mediation.


Conciliation:

- When a dispute is referred to a commission or a committee to investigate the basis of the dispute and to make a report containing proposals for settlement after finding out the facts, the process is known as conciliation. Thus conciliation is the process of settling a dispute where the endeavors are made to bring the disputant parties to an agreement and to make a report containing his proposals for a settlement. It is important to note that the proposals of the commission are not binding on the States because of it not being a judgment of any Court or a Tribunal. This aspect differs it from arbitration too, as in the arbitration the award is binding on the parties. Conciliation commission may be either permanent or *ad hoc*.

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- The General Assembly under Articles 10 and 14 and the Security Council under Article 24 may appoint a Commission to conciliate a dispute. The Assembly in 1949 adopted resolutions which recommended for the establishment of a panel of persons suitable for selection by parties for the commission of inquiry or conciliation, but the response of the states was not encouraging in this regard. Hence, at present, the procedure of conciliation is when the treaties provide it as a means to settle the dispute.
 - Belgo-Danish Conciliation Commission of 1952, is one instance of appointment of conciliation commission for the settlement of the dispute.

Inquiry:

- When a commission is appointed, consisting of impartial investigators, for ascertaining the facts of the disputes, the process is called an inquiry. The function of the commission is confined not only to the ascertainment of the fact. However, it is done from the judicial point of view, and it also clarifies the question of law or a mixed question of law and facts. It differs from conciliation in the sense, that in the latter suggestions are also given primarily, but in the former, only the ascertainment of facts is done.

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- Dogger Bank Incident was the first case wherein the procedure of inquiry was invoked, but after the first world war, states preferred conciliation over the commission of inquiry.
 - In 1967, the General Assembly established a United Nations Register of Experts for fact-finding wherein names of persons are mentioned whose services could be used by the states in accordance with the agreement for fact-finding in relation to a dispute.

By United Nations General

Assembly:


- Although the Assembly has not been empowered to settle the disputes by any specific means, it may discuss a dispute under Article 11 para 2 and may make recommendations to the disputant parties under Article 14 of the Charter for the measures which they may take for the peaceful adjustment of any situation, which it deems would likely to impair the general welfare of friendly relations among nations. Recommendations may be made by the Assembly after a discussion which may take place when the matter is brought before it by any member of the United Nations, or by the Security Council, or by a non-member of the United Nations. Thus, the Assembly has a 'general' power for the peaceful settlement of disputes.

By United Nations Security Council:

- Under Article 24 para I of the United Nations Charter, maintenance of International Peace and Security is the responsibility of Security Council. Charter provides various modes by which the council settles the dispute which is likely to endanger international peace and security. Security Council can take following Actions to settle disputes.
 - (i) Investigation of the disputes.
 - (ii) Recommendation for appropriate procedure or methods of adjustment.
 - (iii) Recommendation for the terms of the settlement.


Extra-Judicial Modes of Settlement:


- When a dispute is settled by the ‘international tribunal’ in accordance with the rules of International law, the process is called judicial settlement.
- The expression international tribunal is relevant. A tribunal may acquire international character because of its organization and jurisdiction.
- At present, the International Court of Justice is the most important international tribunal.

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- However, it is not the only judicial tribunal to settle the disputes.
 - The judicial settlement also includes the activities of many *ad hoc* tribunals of a semi-permanent character, including the UN Tribunal for Libya, etc.
 - However, International tribunal is different from the municipal tribunal, and also from a regional Judicial Tribunal (The Court of Justice of the European Communities).
 - At present, Arbitration and the settlement of disputes by the International Court of Justice are the important modes of the settlement of disputes.

Arbitration:

- Arbitration has been defined by the International Law Commission as ‘a procedure for the settlement of disputes between States by a binding award on the basis of law and as a result of an undertaking voluntarily accepted.’ Thus, when a dispute is submitted by the parties to a body of persons or to a tribunal for their legal decision, the process for the settlement of a dispute is called arbitration. In the case concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain (***Qatar v. Bahrain***), the ICJ defined arbitration as ‘the settlement of differences between the States by judges of their own choice, and on the basis of respect for the law.’ Before a dispute is referred to the arbitration, consent of both the parties is required. That consent may be entrapped in a special agreement called ‘compromise’.


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- Individuals constituting the arbitration commission or tribunal are called arbitrators. They are appointed by the disputant parties themselves. The composition of the arbitral tribunal is based on the principle that the arbitrators are chosen by the parties to the dispute, either by agreement between them or by a procedure laid down in the arbitration agreement. Nowadays, the tribunal has three or five members, as a rule. If parties fail to make the appointment, it can be made by the President of ICJ or by the Secretary General of UN.

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- The treaties of arbitration usually law the law and procedure which shall be applied by the arbitrators. Normally, general rules of International Law are applied by them but they may specify any other law in the compromise.
 - The award of the arbitration is binding to the parties unless it is vitiated by fraud, bribery, coercion, etc. The award settles the dispute finally since recourse to the tribunal implies an undertaking to submit to the award.
 - The Katch dispute between India and Pakistan was solved by referring it to an arbitral tribunal. The award passed was accepted by India.

International Court of Justice


(ICJ):

- The court differs from arbitration on many grounds. Firstly, that it is a permanent court and is governed by a statute. Secondly, the judges are not appointed by the parties, unlike arbitrators. Thirdly, Court being a permanent court performs a number of functions which arbitrations do not perform, like receiving documents for filing and recording. Fourthly, the court performs all these functions. Fourthly, the court is open to all states. While all members of UN are *ipso facto* are parties to the Court, non-members of the United Nations may also become a party to it after fulfillment of some conditions. Fifthly, the court applies rules under Article 38 of the statute, unlike arbitration, where parties determine rules of law to be applied on the dispute.

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- **Compulsive or Coercive Means**
 - Compulsive or coercive means for the settlement for the settlement of disputes are non-peaceful methods. Such measures involve a pressure or force on a State to settle the dispute. However, the use of compulsive measures does not mean the use of armed forces in all the cases. Normally, they include the measures which are just predecessor to war, or short of war.


Retorsion:

- ‘Retorsion’ is the technical term for retaliation. It is based, to some extent, on the principle of tit for tat. When an act is done by a State similar to that done earlier by another state, it is called Retorsion. The purpose of Retorsion is to take retaliation. The acts which are done by a State in Retorsion are not illegal. In other words, they are permitted under International Law. However, it is an unfriendly act and in given circumstances, it may be an effective tool of law enforcement.

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- This is acknowledged in practice when international conventions sometimes provide for the employment of an unfriendly act as a reaction to the breach of obligation. The cases where Retorsion are employed as a means to settle the disputes may be numerous. For instance, if the citizens of a State are given unfair treatment in another State through rigorous passport regulations, the former may also make similar rigorous rules in respect of the citizens of the latter State.
 - One of the cases of the Retorsion took place in December 1992, when two Pakistani High Commission officials were declared *persona non grata* by India, Pakistan also expelled three Indian officials and declared them *persona non grata*. The action of Pakistan can be termed as 'Retorsion'.


Reprisals:

- The term 'reprisals' includes the employment of any coercive measures by a State for the purpose of securing redress. Thus, the main purpose of the reprisals is to compel the delinquent State to discontinue the wrongdoing, or to pursue it, or both. If a dispute has arisen due to an unjustified or illegal act of a State, the other state may take any coercive measure against that State to settle the dispute. Formerly, Reprisals were restricted only to the seizure of the property or persons, but later, it included other methods as well such as bombardments, the occupation of territories of a State, seizure of ships, freezing of assets of its citizens and taking any kind of property belonging to it. Thus, it may be applied not only to the state but against the citizens of that State as well.

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- While a state is at liberty to take action of reprisal, but it has to meet some lawful conditions laid down in ***Naulilaa Incident*** case.
 - After the creation of the United Nations, the principles of non-use of force and of peaceful settlement of disputes have generally become a part of *jus cogens*, and therefore the use of force in reprisals has been prohibited (Article 2 para 4 of the Charter). Also, article 33 of Geneva Convention forbids reprisals against persons protected therein.
 - Actions taken in reprisals are illegal and are taken exceptionally, by a State for the purpose of obtaining justice. In reprisals, a State takes law into its own hands.


Embargo:

- The term 'Embargo' is of Spanish origin. Ordinarily, it means detention, but in International Law, it has the technical meaning of detention of ships in port. Hyde defines embargo as the detention within the national domain of ships or other property otherwise likely to find their way to foreign territory. The embargo may be applied by a State in respect of its own vessels or to the vessels of other States. When a state confines the operation of the embargo to its own vessels, it is known as a 'civil' or 'pacific' embargo. Such an operation is initiated in accordance with an order issued by State authorities in order to limit or interrupt or terminate its trade and economic relations with another state. The purpose is to exert financial or economic pressure on the other state.

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- When ships of other states are detained which as committed a breach of an Internal Law, the embargo is said to be 'hostile'. The purpose of such an embargo is to compel another state to settle the dispute. Such an embargo is a form of reprisals.
 - Embargo at present may be applied by a State, individually, or collectively, under the Authority of the United Nations. If an embargo is applied by a state, it should not endanger international peace and security. If it does so, it would become illegal. The collective embargo may be applied under the authority of the Security Council against a delinquent State.

Pacific Blockade:

- When the coast of a state is blocked by another state for the purpose of preventing ingress or egress of vessels of all nations by the use of warships and other means in order to exercise economic and political pressure on that State, the act is called blockade. When applied during peacetime, it is known as 'pacific blockade'. The essential requirements are that the blockade should be declared and notified; the blockade must be effective.

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- As to the validity of the pacific blockade, in international law, there was a difference of opinion among jurists, but after the creation of the United Nations, application of pacific blockade has become illegal in view of the fact that it threatens peace and security. It violates para (c) of Article 3 of Resolution adopted by the General Assembly which laid down the Definition of Aggression.
 - Collective blockades, when applied under the authority of Security Council are not illegal. It was applied against Iraq in 1990.

Intervention:

- It is another compulsive means of settling disputes between states, short of war. According to Professor Oppenheim, it is the dictatorial interference by a State in the affairs of another State for the purpose of maintaining or altering the actual condition of things. Professor Winfield has classified intervention in three categories, i.e. Internal, External and Punitive Intervention.

Conclusion:

- Peace cannot be established in the world unless states as separate entities from their citizens are not inclined to solve the disputes. As the magnitude of a dispute between the states is multiple times larger than that of the dispute between individuals, the result of its resolution is also multiple times larger than that of resolution of a dispute between individuals. Hence, individual states must resolve to solve all the disputes, by using amicable means. This is inevitable for the peace of the world, when a number of complexities, both legal and factual, increase the number of disputes too.

Thank You!