PUBLIC INTERNATIONAL LAW

INTRODUCTION

International Law' is one of the finest subjects for studying, ‘as it opens up new horizons to navigate beyond the egg-shell enclosure of one ’ s mental faculties. It is our duty to know the law of our Country {Ignoranlia juris non. excusat!) but it is a privilege to know the Law of Nations. States are legal persons and are subjects of International Law. It is impossible to imagine the States today, carrying on their multifarious activities across the borders, on an unprecedented scale, in a legal vacuum! That ipso facto must justify the existence of a large number of principles and rules governing the conduct of the States. In recent years the proliferation of International Institutions, has given a new dimension to the Law of Nations. Moreover, there is so much of International activity that hundreds of conferences and meeting are held round the year, speaking volumes to the fact, that International Law is in operation. In recent years a countless number of Conventions and treaties have been concluded so much so the corpus of the Law of Nations has grown in its magnitude Much credit goes to the "International Law Commission" which has toiled in chiseling & trimming to draft form the norms of International Law scattered in various forms often obscure and indefinite.

The basic principles of the subject should be carefully studied with a broad outlook, to understand the significance; Cases and Materials should be adroitly selected. Specialization should be attempted later. World Peace is the cherished objective of all Nations. International Law is a means to reach that. The sounding prophetic words' of Isaiah “States shall beat their swords into ploughshares and their spears into pruning hooks; Nation shall not lift sword against nation neither shall they learn war anymore,' became the roots of pacifism and has grown over the centuries into the concept of World Peace. State is a composite body consisting of men. Let us then learn specialise and endeavour to bring about World Peace and Security, Opportunity may open up to enable you to serve in a bigger capacity but until then there is no reason to get disappointed! They also serve who only stand and wait!

Legal Basis of International Law

i) Definition : International Law is defined as a body of principles & rules commonly observed by States in their mutual relationship with each other. It; includes the law relating to States & International organisations and also International Organisations inter se. It also includes the rules of law relating to international institutions and individuals, and non-State entities and individuals.

ii) Though there are theories on the legal basis. of International Law, the Austinian theory has received wide attention. Austin opined that International Law was not law at ail and called it a 'Positive International Morality' and hence it had only moral force. He called it a set of opinions or sentiments current among nations generally and "laws improperly so called". Hobbes, Pufendrof, Bentham and Holland were of the same view. Holland said that it was at the vanishing point of jurisprudence. Austin defined law as a 'body of rules, set and enforced by a sovereign political authority. Hence when the rules do pot come from the sovereign, they would not be legal, but moral. Basing on this positive law concept Austin declared International Law as a code of morality. .

iii) Reply to Austin by Oppenheim : This definition is inadequate and incorrect because there is no reference to unwritten law (custom) as courts understand and apply them. Customary rules or rules of morality are founded on conscience. Hence, law must be defined to include the unwritten law. Neither the law making sovereign authority nor the court is essential for a law to exist. In the primitive community that was the position. In the modern State, the common consent of the people is expressed through the legislature (Parliament). But, there are unwritten laws as well. *.

iv) Wider Definition : Law may therefore, -be defined 'as a body of rules in a community framed by common consent, and enforced by an external power'. This definition answers the State-made law and the customary law. Hence, in a State, the Parliament (representatives of the Community) is the law making body and that law is enforced by the Community called the State. A custom is made by the community and is enforced by the community itself (Courts recognise them as a source 6f law). Hence, this definition is wider. Applying this definition if we are to justify that International Law is 'Law', we must prove the existence of : (a) An International community, (b) A body of International Rules and (c) A system of enforcement (sanction),

a) International Community : The States together form an International Community. There are common interests in the field of science and technology. There is a 'world net-work of communications through telegraphic, telephonic connections and radios. There are Inter-State connections by railways, airways and ship navigation. Further, there is cultural co-operation and common interests on education etc., Establishment of Organisations like the United Nations and the Specialised Agencies, Regional Agencies etc., speak volumes to the fact that there is a World Community.

b) Body of International Rules : Treaties & International customs are the main sources of International law. Austin's views however right for his time, are not true of present day International Law; International customs are being formulated into treaties & conventions. There is great volume of international legislation

Eg. : Declaration of Paris 1856, Hague .Conventions of 1899 & 1907, Peace Treaty 1919, Treaty for Renunciation of War 1929, the U.N. Charter 1945, various conventions of the Law of the Sea Conference 1958, Vienna Conventions on Diplomatic Relations etc., There are also a large number of International Customary Rules, evolved from diplomatic relations and correspondence from the practice of international Organizations & State Practices, etc : These are formulated into treaties & conventions. The International Law Commission is playing its major role in this process. Thus, there is no legal vacuum, but a body of international law in operation.

2. Intervention-pure & simple.

3. Pacific Settlement under the U.N. Charter-; Also to Collective Security Measures of the Security Council.

4. Punishment of Offenders: e.g. : War Criminals. There are also rules of 'International. Community' based on goodwill, courtesy & reciprocity & Austin is

correct when his 'code of international morality' . * "' • refers to them. But, those are different from International legislation noted above.

5. Political questions may be resolved through the General Assembly or the Security Council. Judicial questions may be decided by the International Court of Justice. There is a frequent resort to Arbitration as well. , Hence, for enforcement there is the sanction (or force) of the International Community.

Conclusion: As all the three elements are present, International! law is evidently law. Of course, the frequent violations of International Law, show the weakness of the sanction of International Law. But, as Oppenheim, rightly concludes, 'Compared to Municipal Law, it is a weak law, but a weak law is still a law.'

Sources of International Law

Meaning : 'Source', according to Oppenheim, means the ultimate origin from which the law originates. When we see a river and desire to know its source, we must go up the river until we reach a particular point where the water is oozing out naturally from the soil. That is the source of the river. Similarly, in order to find out the source of the principles of International Law we must track back to a particular point. That is the source.

The Statute of the I.C.J. in Art. 38, has enumerated the following sources of International Law on the basic of primacy before the court: a) International Conventions or treaties. b) International Customary Law. '. . c) General Principles of law recognised by' Civilised Nations. d) Judicial Precedents. e) Juristic Writings. f) Ex aequo et bono. (Equity & good conscience) These are to be applied in the same order by the I.C.J. a) International Treaties : There is primacy for this source at the International Court of Justice. Treaties are of two kinds : (i) Law-making and (ii) Treaty-contract. Eg.: Pact of Paris 1956; Hague conventions of 1899 & 1907, Peace Treaty 1919, Treaty for the Renunciation of War, 1929, Geneva Convention relating to Prisoners of War 1929. Conventions of the Law of the Sea Conference 1958 are examples. (ii) Treaty-contracts -are non-law making in nature.

International Custom:

This is the original source of International law. It manifests in (i) Diplomatic Correspondence of States, (ii) Practice of International Organisations (iii) State Court's decisions, (iv) State Practice & Administrative actions etc.

Origin :

Custom has its-origin in a usage.,If the usage is continuous, uniform and followed for a number of years it becomes a custom. Usage is the twilight zone of custom. But. two conditions must be satisfied : (i) Corpus test : A material fact of the actual observance of a line of conduct by the States. This mus. be shown as a fact. (ii) Animus test : There must be an intention to follow the custom. It reaches a stage of approval 'opinio juris sive necessitatis' (Jurists' opinion as of necessity). Then, the principle (usage) becomes an International Custom. This is the process of the consummation of an usage into an International custom. In the Lotus Case, the Court (P.C.I.J.) held that the opinio juris must be drawn from all the circumstances, & not merely from the facts on hand. In the Right of Passage case (Portugal Vs. India), the I.C.J. held that a particular practice between two States only may give rise to binding customary law. It held that Portugal had a right of passage for civilians but not for military officials.

In the Paquete Hebana Case the Court (U.S. Supreme Court) held that looking to all the facts & circumstances, there was uniform practice of giving 'immunity to small fishing vessels from belligerent action in times of war. This was recognised as an International Customary Law. In the Asylum case there was a rebellion in Lima (Capital of Peru), and the rebelleader Haya de la tarre, sought asylum in the Columbian embassy, which it granted considering him as a political refugee. The Peruvian Govt. contested this before the I.C.J. The Colombian Govt. relied on International custom., but in vain. As the custom of granting diplomatic asylum was not established, the court held that the grant of asylum was without legal authority. The Peruvian Govt. claimed for handing over of the rebel, from Colombian Embassy. The I.C.J. held in Haya de la Tarre's case, that this decision was that Colombian Govt. had no right to give asylum. It did not mean that he should be handed over to Peru ! (He was safely taken to Colombia).

General principles of law recognised by Civilized Nations

This is the third source of International Law according to the Statute of the I.C.J. (Art. 38). If there is no International Treaty or International Custom, the court applies this source. One of the essential duties of the Court is to decide the case and not to plead its inability or helplessness on the ground that the law is silent or obscure. Hence, it may evolve a process to arrive at a general principle by taking into consideration the Municipal laws of the major countries of the World. A principle which is common in these countries may be raised to International level. As Lord Phillimore points out these are principles which are common in all Countries or jurisprudences like the principles of Res Judicata, Subrogation etc.

Hence, if the Court finds that a rule has been accepted generally as a fundamental rule of justice by most Nations in their Municipal Law, it may be declared as a rule of International Law. (i) In Administrative Tribunal Case (I.C.J.) the court held that 'res judicata' was a well-established & generally accepted rule. It applied 'res judicata'. (According to this, a judgment given by a competent court, bars any suit by the parties on the same issue). (ii) In the Eastern Greenland Case the court applied the doctrine of Estoppel and held that the Norway Govt. had accepted references to Danish Sovereignty over Eastern Greenland, 85 thus had estopped itself from questioning the Sovereignty of Danish (iii) In the Temple of Preah Vihear Case the I.C.J. held that Thailand was precluded by her conduct from questioning Cambodia's sovereignty over the Temple. (iv) In the Mavrommatis Palestine Concessions Case the P.C.I.J. applied the doctrine of Subrogation.

Comments : It is stated that the recognition of 'General Principles' as a source of law would sound the deathknell of positivism. This statement is overdrawn, Positivits believe in the common consent of the States as the basis of International Law. Naturalists believe in the superiority of natural law only. Hence, these two are opposite schools. The; above comment is a reference to this and believes that the recognition of 'General Principles' based on Natural law ended the positivists theory. But, this is not so. The I.C.J. applies Treaties & Customs and only in their absence, resorts to the 'General Principles of Law recognised by Civilised Nations/ Hence, priority is given to positive law.

d) Judicial Precedents:

The decisions of the I.C.J., the P.C.I.J., the International Arbitration Tribunals and the National Supreme Courts form the fourth source of International Law. This is followed

by the Courts not only as a source, but also as the best evidence available to show the existence of rules of International Law referred to in those decisions, e.g.. (i) I.C.J.. decisions. The Fisheries Case (drawing of straight base- line to determine the territorial waters), the Reparations case declaring the U.N. as successor to the League of Nations & that U,N. is an International Person have laid down new principles of International law. ii) P.C.I.J. : Palmas Island Case iii) International court of Arbitration : Savarkar's case, Pious Fund case, North Atlantic Coast Fisheries case etc. iv) State Courts : Franconia case, Scotia case, Paqueta Habana case etc.

e) Juristic Writings :

This is the source, next to the precedents. The I.C.J. may refer to the teachings of the most highly qualified; publicists of the various nations. In the 16th & 17th Centuries, writers on International law held a pre-eminent position as this system of law was in its slow ebb of development. Even today in areas where the law is uncertain the classics of the jurists are referred to by the State's before the I.C.J. and Arbitration Tribunals in support of their arguments. The judges pay regard to the juristic writings as they are persuasive in nature. The classical works of Gentili, Hugo Grotius, Zouche, Pufendorf, Bynkershoek, Moser, Van Martens, Vattel, etc., are relied upon. References are made to Oppenheim's treatises, and Lauterpacht's writings, and to the texts of the International Law Commission.

f) Ex aequo et bono

This is the final source. This means equity & good conscience. This saves the situation of helplessness of the Court. One of the fundamentals of the judiciary is to solve the .dispute on hand and not plead its helplessness or non- availability of any definite law. In such a case, as a last resort, the court relies on its own concept of equity and good conscience & decides the case on hand, if the parties agree e.g., The P.C.I.J in the Diversion of water from the River Meuse case said 'He who seeks equity must do equity'. Hence, one party by non-performance, cannot take advantage of a similar non-performance by the other party. In the Rann of Kutch Arbitration (India V. Pakistan), both parties relied on equity as part of International law, in deciding the boundary dispute between the two parties the Tribunal found the two deep inlets of Nagar Parkar as part of Pakistan, on grounds of equity. In the Continental Shelf Cases and in the Barcelona Traction Case, the I.C.J has applied equitable principles to solve the disputes.

International Law Vs. Municipal Law

i) Introduction : Two aspects are to be noted in the relationship between Municipal Law & International Law. One is the theoretical question whether both laws are part of a Universal legal order, or, are two different systems. The other is the conflict between them in the Municipal courts as to the primacy of Municipal Law over International Law, or vice versa ii) Two Schools: . The two schools are the Dualistic & the Monistic schools: Monistic School : According to Anzilotti and Triepel, International Law & Municipal Law are two separate & distinct systems of law-one is the antipode of the other. The reasons are :

Sources : Municipal law has Acts of Parliament arid local custom as sources of law, whereas International law has treaties and International customs as primary sources. Thus they are different. Secondly : Individuals are subjects in Municipal law, whereas the States are subjects in International law. Thirdly : Under Municipal law the State

has its sway over the individuals, whereas International law is between or among Sovereign States. Dualistic School : Dualists school has been opposed by the Monistic school (also called Vienna School) which holds the following views : (founder Kelsen). Firstly : Ultimately it is the conduct of the individual that is regulated in both the systems of Municipal 86 International law. Secondly : Law is a command on the subjects (Individuals or States) independently of their will. Thirdly : Both the systems are the manifestations of a single, conception of law. Two .branches of the same tree. From the above schools it is evident that International law and Municipal law are separate according to the Dualists but one and the same according to the Monists. iii) Practice of States : In U.K.: Primary Rule : International Customs : According to Blackstone, Customary International Law is part of the law of the land. The British Courts follow this rule but subject to two conditions ; 1. That such a rule should not be against any British Statute. 2. That once the Court decides, it is followed thereafter. The Blackstone's Theory was confirmed by judicial determinations (Dolder V. Hunting field, Nevello V. Toogood etc.).

Franconia, a German ship, collided with a British vessel within the British Maritime Belt. The British Vessel sank and one person -died. The British Court convicted the master of the German ship for manslaughter. Question arose about the jurisdiction of the Court as the incident had happened within the British territorial waters. The House of Lords, held that the English Court wa, bound by Municipal Law and Municipal Law had not provided for the Jurisdiction hence no jurisdiction. This was neutralized by the Parliament which passed the Territorial Jurisdiction Act 1878 by extending the jurisdiction. 2. West Rand Gold Mining Co .V. King 1905. This was a Company working a gold mine in South Africa. The Govt. officials seized gold belonging to the Company & according to laws they were to pay compensation or return the same. South Africa was defeated by the British, and, the gold was brought to England.

Thereupon, the Company sued the English Govt. for return of the gold or for compensation. The Crown made a Declaration which stated that the British Govt. as a successor would not respect the commitments of the South African Govt. The Court held that the Company was not entitled to the gold or for compensation, as the Crown Declaration was Municipal Law. binding on Municipal Courts Hence, municipal Law prevailed. 3) Chung Chi Cheung V. King (Privy Council). C was a cabin boy on board a Chinese vessel. 'When the Vessel was in Hongkong Territorial Waters, he shot & killed the Captain. & another person. C was duly committed. But. the question was whether the Court of Hongkong (a British ' Colony then) had jurisdiction to try the case. The Privy Council held that the Court had jurisdiction. The conviction was affirmed. Rules of Interpretation . The rules emerge from British practice . * A rule of construction that the Parliament did not intend-to deviate from international law. This is a presumption.

ii) A rule of evidence according to which courts take notice of International law. b) Treaties : Negotiation, signature ratification are matters, belonging to the prerogatives of the Crown. But legislation is necessary, if treaties 4 are :- * 1. Affecting the rights of subjects (citizens). 2. Modifying a statute. * 3. Vesting additional powers on the Crown. 4. Imposing financial burden. Legislation is also necessary, if there is a provision for cession of the territory. Hence in case of treaties, incorporation is necessary, otherwise, Muncipal law will prevail. Practice of States : In U.S.A. i) International Custom : The procedure is the same as in U.K. ii) International Treaties : The practice Is different- a s the U.S. Constitution in Art. 6(2) provides that treaties are The

Supreme – Law of the land'. There is a clear distinction between self executing and non-self executing treaties. Self executing treaties operate without legislation. In case of non- self- executing treaties. they will he operative only after legislation, INDIA : Art. 51, of Directive Principles of State policy, provides tor respect for International Law'. This provision is a reference to the State Policy only. Broadly speaking the practice of U.K. is followed in India, (Beruberi Union Case).

RECOGNITION

Definition : It is the free act by which one or more States acknowledge the existence of a politically organised independent sovereign community capable of observing International obligations. The recognition is for the membership of the 'Family of Nations'. Until 1857, there was an European family of Nations but in 1857, Turkey was admitted to it and since then, it is no longer an exclusive European family of Nations. Today - recognition is with reference to this family of Nations. (This is different from the membership to the United Nations).)

Theories : There are two theories :i) The Constitutive? theory and ii) The Declaratory theoryAccording to the Constitutive theory, the act of recognition alone creates statehood, whereas according to the Declaratory theory, State exists prior to , and, independent of recognition. The act of recognition is merely a formal acknowledgment of. an established situation. Hence, a new State becomes a member of the family of Nations ipso facto by rising into existence and recognition supplies only the necessary evidence of this fact. According to the Montevideo Convention 1933, the essentials of statehood are : a permanent population, definite territory, and established Go'Vt., and full capacity to enter into International relations with other States. Sometimes a definite territory is not always essential as is evident from State practice during World War II. Hence, if these essentials are present, there is Statehood according to declaratoy theory whereas according to Constitutive theory, such a community should be recognised by other States. Constitutive theory has its own supporters: There are two aspects, (a) According to the traditional constitutive theory recognition is a political act pure & simple and therefore an act of policy, (b) Lauterpacht differs from this. He opines that each State has a duty towards the International community to recognise a new State which fulfils the legal requirements of Statehood or other necessary qualifications. This is a quasi- judicial authority. This duty is similar to the duty under the Charter of United Nations for admission to the U.N. under Art. 4 Extaneous political considerations, should not be taken into consideration. But it is difficult to accept Lauterpacht's views. If according to him, it is a legal duty to recognise, what is the sanction behind this duty? Further, the actions of State in recognising is yet uncontrolled by Independent rules. Even the Declaration of Rights & Duties of' States 1949, does not prescribe such a duty. It is the traditional theory that is largely in vogue, as .a matter of vital policy.

Oppenheirn supports this theory. a) International State practice has recognised Declaratory theory. However, recognition is with-held for political reasons, b) There is retro-active effect of recognition dating back to the actual rising into existence of the State, c) The courts, in respect of treaties, take into consideration not the date of operation but the date of coming into existence of the State. In Luthor V Sagor : P company had owned a quantity of wood in Russia, but it was nationalized by Russia which it took over in 1919, under a order. This wood when sold by the Govt was bought by D company from the new USSR Govt. P claimed that the decree was not applicable as U.K. had not recognised USSR Govt. in 1919. U.K. recognised in 192.1.

The English Court held that the Crown's recognition of Soviet regime in 1921 was retroactive dating back to the time of Soviet regime seizing power in 1917 and hence, its seizure of timber was recognised as legal. Hence, ipso facto by raising into existence, the new community becomes a member of the family of Nations & recognition is only an acceptance of this fact. Podesta Costa's theory : His opinion that recognition is Facultative and not obligatory is more in accord with State practice. When recognition is granted by States, they make it certain that the new State to be recognised had the requisite legal qualifications. Only to this degree, the act of recognition is a duty.

De facto & Dejure

De facto is purely provisional or temporary. But de jure is final and binding. De facto can be withdrawn if the existing circumstances show that the new community is no longer holding the power and status. But, de jure recognition is permanent and cannot be withdrawn. iii) De facto deals with factual status, whereas de jure deals with the juridical status. vi) De facto is generally granted looking to the developments as regards insurgents capacity and establishment. De jure is given if the granting State, is fully. satisfied about the International capacity of the insurgent state. The recognising State grants recognistion de jure, when the recognised state has fulfilled the requirements for statehood and his the capacity to follow International obligations ; However, it may grant de facto recognition when there is only actual fulfillment of these requirements and hence may be temporary & provisional This does not mean that de facto should be given first & then de jure. In the estimation of recognising state, the recognised state has the capacity to follow international obligations either de facto or de jure. This is the policy of the State.