

Module I: Introduction to International Law

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DEFINITION, NATURE, SCOPE AND DEVELOPMENT OF I.L

- Domestic and International Legal Order
- Definitions of I.L.--- traditional and modern
- Nature I.L.– Not True Law and True Law
- Scope and Development of I.L.
- Basis or various theories of I.L.
- Deference Between Public Int. Law and Private Int.
- Perspectives on I.L. First , Second & Third World
- Difference between Public and Private I.L.
- Basic Principle of Modern I.L.
- Codification and Progressive Development of I.L.
- The Importance of I.L. in the Modern World
- Sources and Subjects of International Law
- Relations between International Law and Municipal Law

Codification & Progressive Dev. of IL

- ▶ Why the codification and progressive development?
- ▶ IL is dynamic, changing according to the various needs of international society.
- ▶ Codification before the League Of Nations
 1. *International Conferences:*
 - 1856 Paris Declaration on Law of War
 - The Hague Convention of 1899 and 1907
 2. *International Associations and International Organizations:*
 - The *Institut de Droit International* (The Institute of International Law) established in 1873 with the objective "the study, codification and development of International law" **For the contribution it made towards settlement of disputes through peaceful means, the Institute was awarded a Nobel Peace Prize as early as 1904**
 - The Hague Academy of International Law, The Harvard Law Research Institute, The American Institute of International Law etc.,

Codification Under League of Nations

- In 1924, League of Nations appointed 16 member Committee for codification. In 1927 it submitted report to the Assembly--- Topic wise discussion of Nationality, Territorial Waters and State Responsibility.
- Under the League of Nations UNIDROIT (The Rome International Institute for Unification of Private Law) was established in 1926 within the legal framework of the League.
- UNIDROIT Principles of International Commercial Contracts, International Leasing, Protection of Cultural Property are some of the contributions of UNIDROIT.
- UNIDROIT Convention on Agency in the International Sale of Goods, Geneva, 1983; UNIDROIT Convention on International Factoring, Ottawa, 1988.
- League Codification Conference of 1930 and 1931--- which represented the main forms of civilization and the principal legal systems of the world.
- International Labour Organization

UN and Codification

Article 13 (1) (a) of the U.N. Charter lays down that the General Assembly shall initiate studies and make recommendations for the purpose if “promoting international co-operation in the political field” and “encouraging the progressive development of International Law and its codification”.

The main organs as well the specialized agencies of the United Nations have played a significant role in codifying the developing International law, International Economic/Trade Law through General Assembly Resolutions and International Conventions – in the form of both *Hard* and *Soft* Law.

Codification and development of IL in emerging areas including Human Rights, Environmental Protection etc..

Various UN General Assembly Resolutions including PSNR, NIEO, Charter of Economic Rights and Duties of State, etc..

The United Nations also created specialized institutions for this purpose i.e., UNCITRAL (United Nations Commission on International Trade Law).

Perspectives on Int. Law

- ▶ Division of World – based on ideology, economy, geography etc.,
- ▶ First World or Western Countries :They deserved the credit of developing the laws of-War & peace; Resolving the dispute through Arbitration; Prior declaration before the commencement of the war.
- ▶ Second World or Socialist Countries described Law & politics as the means by which the ruling class maintained their domination of society. Their Contribution includes Non-intervention in the internal affairs of the others states; The sovereignty of states, Good neighborhood; International co-operation;
- ▶ Third World or Developing Countries: Concept and Characteristics of Third World Countries, the demands and achievements of Third World Countries, Third World Countries and IL

Basic Principles of Modern I.L.

- ▶ Well established Municipal Legal systems and not so well established IL – weakness in IL, international community has experienced world wars, etc.
- ▶ Establishment of UN
- ▶ Divided world and uniting principles or survival principles or strategies
- ▶ Sovereign Equality of States
- ▶ Principle of Good Faith (*Pacta Sunt Servenda*)
- ▶ Peaceful Settlement of Int. Disputes
- ▶ Prohibition of Use of Force
- ▶ International Co-operation
- ▶ Non-Intervention, and
- ▶ Equal Rights and Self Determination

Enforcement observance of IL

- International public opinion
- Countermeasures and self-help
- Collective or bilateral sanctions
- Afraid of losing reciprocal benefits of participation
- Collective actions of civil society
- Domestic courts and enforcement of international law;
- State applying domestic law extraterritorially
- Voluntary Consent
- Good Faith Principle
- Chapter VII of the United Nations
- Economic Globalization & Inter-dependency of World
- WTO & Changing notion of International Law

Sources of International law

- ▶ Sources-methods by which the rules have been created.
- ▶ Sources of Domestic Laws
- ▶ Classification of Sources of International Law
- ▶ Formal and Material Sources
- ▶ Primary and Secondary Sources
- ▶ Hard Law and Soft Law Sources
- ▶ Are the UN General Assembly Resolutions as Source of International Law?

Article 38 of the statute of ICJ

- ▶ (a) International convention whether general or particular establishing rules expressly recognized by the contesting states.
- (b) International Customs as evidence of a general practice accepted as law.
- (c) General Principles of law recognized by civilized nations.
- (d) Subject to article 59 judicial decisions and juristic works as subsidiary means for the determination of rules of law.
- ▶ This article not exhaustive-does not make reference to resolutions of the GA of the UN
- ▶ International Law dynamic and fast changing

Treaties

- ▶ Important source of international law
- ▶ Article 38(1) of the Statute of ICJ
- ▶ (a) Agreements between 2 or more states or between other subjects of international law by which they create a relationship between themselves.
- ▶ Bilateral and multilateral treaties.
- ▶ Formation or Conclusion of a treaty-Appointment of Representative, Negotiation, Adoption of text, Consents of the states, Ratification, Accession or Adhesion, Entry into force, Registration and publication and Application and enforcement
- ▶ Sometimes a state can make a "reservation in respect of a particular treaty, if this reservation is valid the treaty provision for which the reservation is made will not apply to that state.

Treaties Conti.

BILATERAL TREATIES

- ✚ To avoid double taxation
- ✚ FNC Treaties - Friendship, Navigation and Commerce
- ✚ BIT Treaties-Bilateral Investment Treaties

MULTILATERAL TREATIES

- ✚ Regulates trade between the contracting states in a more general way
- ✚ Aims at unification of law in order to facilitate trade and financing
- ✚ But most of them are not in force, applicable to very few countries
- ✚ Aims at Specific standards of treatment
 - Standard treatment
 - National treatment
- ▶ MFN clause Regionalism and Regional Treaties
- ▶ Commodity Agreements

International Customs

- ▶ Original and oldest source.
- ▶ Article 38(1)(b).
- ▶ Habits that are binding on the States.
- ▶ Created when a general practice followed by a number of states is recognized as law(*opinio juris*).
- ▶ Elements of custom.
 - ▶ Duration
 - ▶ Continuity
 - ▶ Generality
- ▶ Ex: the right of a state to issue its own currency rules, and its obligation to punish counterfeiters of foreign currency

GENERAL PRINCIPLES OF LAW

- ▶ First under Article 38(3) of the PCIJ and then Article 38(1)(c) of the ICJ.
- ▶ Those principles of law recognized by most or all of the states of the world community in domestic law.
- ▶ Applicable to the maintenance of any legal system.
- ▶ Ex: Res judicata, estoppel, presumption, good faith etc.
- ▶ Has to be recognized by the world court.

JUDICIAL DECISION AND JURISTIC WORK

JUDICIAL DECISIONS

- ▶ Subsidiary means and an indirect source of IL.
- ▶ Article 38(1)(d) :Decisions of the courts do not create any precedent.
- ▶ Article 59 - No binding force - Only binding between parties.
- ▶ A means of recognizing law established by other sources
ICJ-not binding on international law
Awards of International tribunal, Decision of the municipal courts and ILC

JURISTIC WORKS

- ▶ Subsidiary means for determining of rules of law.
- ▶ Juristic Work is essential in developing rules that are sourced in treaties, customs ,general principles of laws.
- ▶ Ex: Paquata Habana Case 175 US (1900)677.

RESOLUTIONS OF INTERNATIONAL INSTITUTIONS

- ▶ The resolutions passed by international organizations are not binding on their member states, except for exceptional cases.
- ▶ They provide excellent base from which to launch new proposals.
- ▶ Thus their substance is often not a reflection of present law but a fore runner of future law.
- ▶ They offer a program for a creation of new law.
- ▶ Accord resolution: The text is unanimously adopted by un org then made a part of treaty then send for signatures of the member states.
- ▶ Resolution of the E.U: Resolutions, Directions, Decisions.
- ▶ UN Security council – not binding unless taken in framework of Chapter VII of UN Charter.
- ▶ UN General Assembly - only a starting point for development of international custom or soft law.

Subjects of International Law

- ▶ Subjects and Objects of Law
- ▶ Persons or entities to whom law attributes rights and duties are the subjects of law---The term subject of I.L. refers to entities endowed with legal personality, capable of exercising certain rights & duties under Int. legal system.
- ▶ Legal Personality & Recognition of Legal Personality-
- ▶ The possession of Int. personality means - an entity is a subject of I.L., and is "capable of possessing international rights and duties, and has the capacity to maintain its rights by bringing Int. claims"

Which Entities have Legal Personality ? Or Theories

- ▶ Definition of I.L.– Traditional Vs. Modern
- ▶ Realist Theory – States alone are the subjects of I.L.-Traditional definitions
- ▶ Fiction Theory- Individuals alone are the subjects of I.L. or Supports of Monism
- ▶ Functional Theory – jurists like J.G.Starke, oppenheim , Brownlie

State as Subject of I.L.

- ▶ Realist Theory, Dualism & Traditionalist Views.
- ▶ States alone are the subjects of I.L.-Why?
- ▶ "Since the Law of Nations is based on the common consent of individual states, and not of individual human beings, states solely and exclusively are the subjects of I.L." Oppenheim
- ▶ I.L. address to States, Under I.L. states have rights and duties, states declare war and peace, enter treaties with other states, etc.

Definition & Characteristics & Classification of States

- ▶ What is state? Different things to different people
- ▶ I.L. Context state is defined as "a group of societies within a defined geographical area united to ensure their mutual welfare and security"
- ▶ Article 1 of Montevideo Convention on rights and duties of states, 1933- permanent population, a defined territory, a govt. and capacity to enter relations with other states
- ▶ Classification or kinds of States- sovereign states, Federal States, Non-self governing territories, mandate and trust territories, Protectorate states, etc.,
- ▶ Sovereignty and sovereign equality...

State as subject..

- ▶ Fundamental Rights of states- Right to equality, right to co-existence and self determination, right to independence, right to respect dignity etc.,
- ▶ ILC draft declaration on Rights and Duties of states, 1949- right to independence, right to jurisdiction, duty of non-intervention, right to equality, duty to protect Human rights and fundamental freedoms, duty to maintain peace and security , etc.,
- ▶ Condition of Admission of a state to membership in UN (Admission Case) 1948
- ▶ At. 4 of UN Charter- A state, peace loving state, must accept obligations of UN Charter, must be able to carryout obligations, and must be willing to do so
- ▶ Competence of GA for the admission of a state to UN-1950

Int. Orgs. as Subject of I.L

- ▶ L. Tunkin " Int. org. as an association of states established on the basis of treaty in accordance with I.L. in order to achieve specific objectives"- (1)Association of states-IGOs and INGOs (2)setup by treaty, (3) established for specific purposes,(4) possess int. personality and (5) created in accordance with I.L.
- ▶ Kinds of Int. Orgs- Intended duration-Ad hoc, Provisional and permanent
- ▶ Nature of their powers-Legislative, Administrative, Judicial etc.,
- ▶ Character of their objectives-single or multipurpose
- ▶ Geographical- Global, Regional & sub regional

Evolution of Int. Organizations.

- ▶ Int. orgs. before League of Nations- Int. orgs for prevention of wars, Grotius, Holy Alliance of 1815, Concert of Europe, the Hague Conventions of 1899 & 1907
- ▶ Public Int. Unions in 19th century- the ITU 1865, UPU 1874 etc.,
- ▶ Int. in the 20th century-The League of Nations and The U.N.
- ▶ Role of Int. organs. In the present day
- ▶ The UN and its specialized agencies- Ex. art. 100, 104 & 105 of UN Charter, Art. 39 of ILO, Art. 47 of ICAO.
- ▶ 1946 Convention on privileges and immunities of UN & Its members
- ▶ 1986 Vienna Convention on Law of Treaties between states & Int. orgns conformed that they have capacity to enter into treaties.
- ▶ 1994 Convention on the safety of UN & Associated Personnel. Art. 7 & 9

Supporting cases

- ▶ Reparation for injuries suffered in the service of UN of 1949-
- ▶ (1) the court was asked to determine the capacity of UN, as an organ, to bring an international claim for compensation against a state
- ▶ (2) the Court said "UN is Int. person & it is subject of I.L. and capable of possessing rights and duties and can bring int. claims.
- ▶ The above was reaffirmed by the ICJ in 1980 Interpretation of Agreement of 25th March 1951 between WHO and Egypt, the court said " Int. orgns. Are subject of I.L. and they are bound by any obligation incumbent upon them under general rules of I.L, under their constitutions or under int. agreements to which they are parties.
- ▶ 1. UN (immunities & privileges) Act 1947 to give effective to the Convention on the Privileges & Immunities of UN 1946
- ▶ UK made legislation to implement the 1994 convention on the safety of UN & Associated Personnel . In 1997 UK made legislation making crime under the above treaty is a crime under England.

Individual as Subject of I.L.

- ▶ The status of Individual is one of the most important, yet difficult question of modern I.L.
- ▶ Supporters of Monism and Fiction Theory
- ▶ Historically, those rules which first developed imposed duties to prevent piracy and slave trade, and to protect the persons and states of foreign sovereigns and their diplomatic representatives.
- ▶ Greeks- human being is the measure of all things and people unite as family, tribes, society nation, etc. were meant to serve the humanity.
- ▶ Various Int. treaties, Judicial tribunals and courts have recognized individual personality & tried under I.L. Example..
- ▶ Treaty of 1907 between five central American states established Central American Court of Justice, which provided for individuals to bring cases directly before the court.
- ▶ Under Art. 304 of the Versailles Treaty 1919, Nations of Allied & Associate powers could bring cases against Germany in their own names for compensation.

Nuremberg, Tokyo Tribunals & Individual

- ▶ In his opening statement at Nuremberg trials, 1946 the US Chief prosecutor Justice Robert Jackson declared that “ crimes against I.L. are committed by men, not by abstract entities, and only by punishing individuals who committed such crimes can the provision of I.L. be enforced”.
- ▶ The above tribunals have pointed out that “ I.L. imposed duties & liabilities upon individuals” and they declared that
- ▶ the crime against peace, crime against humanity & conspiracy to commit these crimes, as international crimes.

Regionalism, Human Rights & Individual

- ▶ European Convention for Protection of Human Rights and Fundamental Freedoms, 1950 and the European Court of Human Rights and European Commission on Human Rights have recognized and tried cases against their home governments.
- ▶ American Convention on Human Rights, 1969 and American Court of Human Rights.
- ▶ African Charter 1981 and African Commission on Human & Peoples Rights The ICSID, 1965 has enabled private foreign investor to have access to international machinery
- ▶ The Rescue Agreement of 1968 provides that " State parties under the duty to Rescue and render services to Astronauts who landed in their territory or under their jurisdiction
- ▶ The International Convention on the Suppression & punishment of Crime of Apartheid of 1974 declared apartheid a Int. crime and individual is directly responsible.

Recent Int. developments & Individual

- ▶ The ILC Draft code of Crimes Against the Peace & Security of Mankind of 1991 has reiterated the individual responsibility under I.L.
- ▶ Two Res. of Security Council on Somalia situation in the early 1990s unanimously condemned breaches of humanitarian law and stated that “those who order their commission would be held individually responsible for them”
- ▶ The ICC provides that the Court has Universal jurisdiction over persons with respect to Genocide, Aggression, serious violations of laws of war and Crime against humanity.
- ▶ Although no international Criminal Court (before the ICC) or penal tribunals, various conventions have provided some scope and tried and punish individuals who have violated laws of war, engaged in genocide or committed int. terrorist acts.
- ▶ As Anthony D' Amato has speculated “in the 19th century I.L. was concerned states Vs state, in the 20th century I.L. concerned state Vs individual and in the 21st century I.L. is going to concerned individual Vs individual”

RELATION BETWEEN INTERNATIONAL LAW AND MUNICIPAL LAW

- ▶ Introduction
- ▶ Theories on the application of International Law within Municipal Law
- ▶ Municipal Law before International Tribunals
- ▶ International Law within Municipal Sphere
- ▶ State Practices on the Domestic Application of International law—USA and UK Practice
- ▶ Domestic Implementation of International law in India— The Role of the Executive, Legislature and the Judiciary

Why implementation of I.L.?

- ▶ Changing Notions of State Sovereignty
- ▶ Globalization and its Impact on Society
- ▶ Independent States to Interdependent states
- ▶ Law Makers to Law Takers
- ▶ Role of States as Regulator to Facilitator
- ▶ Status of IL is changing from a weak (unenforceable) to strong (enforceable) Law
- ▶ Implementation not by coercion or compulsion but by consensus or cooperation

How States Implement IL

Is IL and ML are same are different?

Difference of opinion among the scholars

- Monist School
- Dualist School
- Transformation or Specific Adoption Theory
- Delegation Theory
- Harmonization Theory

Monistic Theory

- ✓ This theory initially was forwarded by Moser and Martens. It was later developed by jurists like Kelsen, Westlake and Lauterpacht.
- ✓ What is a "State"?
- ✓ Municipal law as well as International law are parts of one universal legal system.
- ✓ Municipal law is binding on individuals directly and International law is binding on them through States.
- ✓ Individuals are the root of all legal systems.

Dualistic Theory

- ✓ This theory was developed by German scholar Triepel in 1899. It was later followed by Italian jurist Anzilotti
- ✓ International law and Municipal law are two distinct, separate and self-contained legal systems.
- ✓ The two systems are distinct when it comes to sources, subjects, substance of law, principles and dynamism of subject matter.

Other Theories

Specific Adoption or Transformation
Theory:

- Supported by dualist.

Delegation Theory:

- Supported by monists.

Harmonisation Theory- Fitzmauric.

Compromise Formula:

National Law before Int. Courts and Tribunals.

Sources:

- Art 38(1)(c)
- *Resjudicata*, Estoppel, Principal of Natural Justice, etc.,
- Ex. Barcelona Traction Case 1970,
(Concept of limited liability)

National Law & Int. Obligations

States cannot plead the provisions of National law as a valid reason for violating Int.obligations.

Ex. 1. Alabama Claims Arbitration, 1872.

2. Exchange of Greek & Turkish population case

3. Lockerbie case.

4. Art 13 Draft Declaration on Rights and Duties of States, 1949.

5. Art 27 of Vienna Convention on Law of Treaties, 1969.

Domestic Enforcement of I.L. in India

- ▶ India followed the Dualism and Transformation and adoption
- ▶ Constitutional provisions relating to I.L.
- ▶ Pre-constitution: British practice
- ▶ Constitutional provisions (a) General art. 51
(b) Executive Provisions art. 53, 73, & 77
and Legislative Provisions art. 245, 253, etc.

Indian Judiciary and IL

- ▶ Indian Judiciary, though not empowered to make legislations, is free to interpret India's obligations under international law into the municipal laws of the country in pronouncing its decision in a case concerning issues of international law.
- ▶ In this respect, the Indian judiciary has played a proactive role in implementing India's international obligations under International treaties, especially in the field of human rights and environmental law.
- ▶ In plethora of cases beginning with **In re Berubari , Magan Bhai v. U.O.I, Keshavanada Bharati v. State of Kerala, Vishakha v. State of Rajasthan**, the Supreme court re-iterated that various international covenants, particularly to which India is a signatory or party, becomes part of national law, in so far as there is no conflict between the two.
- ▶ Supreme Court in **Bishambhar v. State of Uttar Pradesh** held that in the exercise of the inherent sovereign powers of the state, the parliament can even enact laws for extra territorial operation AIR 1982 SC32

Indian Judiciary and IL

- ▶ The Supreme Court reflect the dualist approach of the Indian legal system. In the words of justice Krishna Iyer in Jolly George Vergese v. Bank of Cochin, “until the [m]unicipal Law is changed to accommodate the [treaty], what binds the courts is the former not the latter”. Further, Supreme Court in State of West Bengal v. Kesoram Industries reiterated that India follows the “doctrine of dualism” and that “a treaty entered into by India cannot become law of the land...unless Parliament passes a law as required under Article 253”.
- ▶ Vishaka v. State of Rajasthan, 1997, a landmark judgment on sexual harassment of women at workplaces, it was noted that “regard must be had to international conventions and norms for construing domestic law when there is no inconsistency between them and there is a void in the domestic law”

Int. Law and Indian Judiciary

- ▶ *National Legal Services Authority v. Union of India*, 2014 – The case that recognised transgender as a third category of gender. The Supreme court said: 'If parliament has made any legislation which is in conflict with the international law, then Indian courts are bound to give effect to the Indian law, rather than international law. However, in the absence of a contrary legislation, municipal courts in India would respect the rules of international law.
- ▶ In *Vellore Citizens' Welfare Forum v. Union of India*, 1996, the court said that there is no difficulty in accepting Customary International Law, not contrary to domestic law, as part of the Indian legal system
- ▶ the Supreme Court in **Peoples' Union for Civil Rights v. Union of India**, held that it is an accepted proposition of law that the rules of customary international law which are not contrary to the municipal law shall be deemed to be incorporated in the domestic law.

Thank You

