

# **UNIT I**

## **ORIGIN & DEVELOPMENT**

### INTRODUCTION

International law is a distinctive part of the general structure of international relations. In contemplating responses to a particular international situation, states usually consider relevant international laws. International law is distinct from international comity, which comprises legally nonbinding practices adopted by states for reasons of courtesy (e.g., the saluting of the flags of foreign warships at sea). In addition, the study of international law, or public international law, is distinguished from the field of conflict of laws, or private international law, which is concerned with the rules of municipal law as international lawyers term the domestic law of states of different countries where foreign elements are involved.

### **EVOLUTION OF INTERNATIONAL LAW**

There was little scope for an international law in the period of ancient and medieval empires, and its modern beginnings coincide, therefore, with the rise of national states after the Middle Ages. Rules of maritime intercourse and rules respecting diplomatic agents soon came into existence. At the beginning of the 17th century, the great multitude of small independent states, which were finding international lawlessness intolerable, prepared the way for the favorable reception given to the *De jure belli ac pacis* [concerning the law of war and peace] (1625) of Hugo Grotius, the first comprehensive formulation of international law. Though not formally accepted by any nation, his opinions and observations were afterward regularly consulted, and they often served as a basis for reaching agreement in international disputes. The most significant principle he enunciated was the notion of sovereignty and legal equality of all states. Other important writers on international law were Cornelius van Bynkershoek, Georg F. von Martens, Christian von Wolff, and Emerich Vattel.

### **HISTORICAL DEVELOPMENT**

International law reflects the establishment and subsequent modification of a world system founded almost exclusively on the notion that independent sovereign states are the only relevant actors in the international system. The essential structure of international law was mapped out during the European Renaissance, though its origins lay deep in history and can be traced to cooperative agreements between peoples in the ancient Middle East. A number of pacts were subsequently negotiated by various Middle Eastern empires. The long and rich cultural traditions of ancient Israel, the Indian subcontinent, and China were also vital in the development of international law. In addition, basic notions of governance, of political relations, and of the interaction of independent units provided by ancient Greek political philosophy and the relations between the Greek city-states constituted important sources for the evolution of the international legal system.

Many of the concepts that today underpin the international legal order were established during the Roman Empire. The *jus gentium* (Latin: “law of nations”), for example, was invented by the Romans to govern the status of foreigners and the relations between foreigners and Roman citizens. In accord with the Greek concept of natural law, which they adopted, the Romans conceived of the *jus gentium* as having universal application. In the Middle Ages, the concept of natural law, infused with religious principles through the writings of the Jewish philosopher Moses Maimonides and the theologian St. Thomas Aquinas, became the intellectual foundation of the new discipline of the law of nations, regarded as that part of natural law that applied to the relations between sovereign states.

After the collapse of the western Roman Empire in the 5th century, Europe suffered from frequent warring for nearly 500 years. Eventually, a group of nation-states emerged, and a number of supranational sets of rules were developed to govern interstate relations, including canon law, the law merchant (which governed trade), and various codes of maritime law. In the 15th century the arrival of Greek scholars in Europe from the collapsing Byzantine Empire and the introduction of the printing press spurred the development of scientific, humanistic, and individualist thought, while the expansion of ocean navigation by European explorers spread European norms throughout the world and broadened the intellectual and geographic horizons of western Europe. The subsequent consolidation of European states with increasing wealth and ambitions, coupled with the growth in trade, necessitated the establishment of a set of rules to regulate their relations. In the 16th century the concept of sovereignty provided a basis for the entrenchment of power in the person of the king and was later transformed into a principle of collective sovereignty as the divine right of kings gave way constitutionally to parliamentary or representative forms of government. Sovereignty also acquired an external meaning, referring to independence within a system of competing nation-states.

The Dutch jurist Hugo Grotius has influenced the development of the field to an extent unequalled by any other theorist. Grotius excised theology from international law and organized it into a comprehensive system, especially in *De Jure Belli ac Pacis* (1625; *On the Law of War and Peace*). Grotius emphasized the freedom of the high seas, a notion that rapidly gained acceptance among the northern European powers that were embarking upon extensive missions of exploration and colonization around the world.

The development of international law both its rules and its institutions is inevitably shaped by international political events. From the end of World War II until the 1990s, most events that threatened international peace and security were connected to the Cold War between the Soviet Union and its allies and the U.S.-led Western alliance. The UN Security Council was unable to function as intended, because resolutions proposed by one side were likely to be vetoed by the other. The bipolar system of alliances prompted the development of regional organizations e.g., the Warsaw Pact organized by the Soviet Union and the North Atlantic Treaty Organization (NATO) established by the United States and encouraged the proliferation of conflicts on the peripheries of the two blocs, including in Korea, Vietnam, and Berlin. Furthermore, the development of norms for protecting human rights proceeded unevenly, slowed by sharp ideological divisions.

Since the 1980s, globalization has increased the number and sphere of influence of international and regional organizations and required the expansion of international law to cover the rights and obligations of these actors. Because of its complexity and the sheer number of actors it affects, new international law is now frequently created through processes that require near-universal consensus. In the area of the environment, for example, bilateral negotiations have been supplemented and in some cases replaced by multilateral ones, transmuting the process of individual state consent into community acceptance. Various environmental agreements and the Law of the Sea treaty have been negotiated through this consensus-building process. International law as a system is complex. Although in principle it is “horizontal,” in the sense of being founded upon the concept of the equality of states one of the basic principles of international law in reality some states continue to be more important than others in creating and maintaining international law.

The growth of international law came largely through treaties concluded among states accepted as members of the "family of nations," which first included the states of Western Europe, then the states of the New World, and, finally, the states of Asia and other parts of the world. The law making conventions of the Hague Conferences represent the chief development of international law before World War I.

The nuclear age and the space age have led to new developments in international law. The basis of space law was developed in the 1960s under United Nations auspices. Treaties have been signed mandating the internationalization of outer space (1967) and other celestial bodies (1979). The Law of the Sea treaty (1982) clarified the status of territorial waters and the exploitation of the seabed. Environmental issues have led to a number of international treaties, including agreements covering fisheries (1958), endangered species (1973), global warming and biodiversity (1992). Since the signing of the General Agreement on Tariffs and Trade (GATT) in 1947, there have been numerous international trade agreements.

## **DEFINITION, NATURE AND THEORIES**

### **DEFINITION**

International law is a body of rules considered legally binding in the relations between national states. It is also known as the law of nations. It is sometimes called public international law in contrast to private international law (or conflict of laws), which regulates private legal affairs affected by more than one jurisdiction. It consists of the rules and principles of general application dealing with the conduct of States and of international organizations in their international relations with one another and with private individuals, minority groups and transnational companies.

**Oppenheim** has defined international law as the “Law of Nations or International Law is the name for the body of customary and conventional rules which are considered legally binding by civilized States in their intercourse with each other.” In the ninth edition of Oppenheim's book the term 'international law' has been defined as 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 Organisations and, to some extent, also individuals may be subjects of rights conferred and duties imposed by International law.”

In the words of **J G Starke** : “ 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 :

- (i) The rules of law relating to the functioning of international institutions or organisations, their relations with each other, and their relations with states and individuals; and
- (ii) 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 the international community.

This definition goes beyond the traditional definition of international law. Law is a process, and this is equally true for International Law. It is now well established that the principle components of International Law is no more confined to binding customary and conventional rules but also consists of “general principle of Law” which are constantly enriching the International Jurisprudence.

Thus we can say that International Law defines the legal responsibilities of States in their conduct with each other, and their treatment of individuals within State boundaries. Its domain encompasses a wide range of issues of international concern such as human rights, disarmament, international crime, refugees, migration, problems of nationality, the treatment of prisoners, the use of force, and the conduct of war, among others. It also regulates the global commons, such as the environment, sustainable development, international waters, outer space, global communications and world trade.

## NATURE & THEORIES

Austin in his definition of law has given more importance to sanction and fear in compliance of law. In case of International law there is neither sanction nor fear for its compliance hence it is not law in proper sense of the term. But now the concept has changed and International Law is considered as law. There is no consideration of fear or sanction as essential part of law. If fear and sanction are considered necessary then there are sufficient provisions in UNO charter for compliance of the International Law as Law. According to Bentham’s classic definition international law is a collection of rules governing relations between states.

According to Oppenheim, International Law is law in proper sense because:-

- (i) In practice International Law is considered as law, therefore the states are bound to follow them not only from moral point of view but from legal point of view also.
- (ii) When states violate international law then they do deny the existence of international law but they interpret them in such a way so that they can prove their conduct is as per international law.

Starke while accepting International Law as Law has said, “that in various communities law is in existence without any sanction and legal force or fear and such law has got the same acceptance as the law framed and enacted by state Legislative Assemblies. With the result of international treaties and conventions International Law is in existence.

It is pertinent to mention here that from the above noted contents it is clear that the following grounds are supportive for accepting the International Law as law:-

- (i) Now so many disputes are settled not on the basis of moral arguments but on the basis of International Treaties, precedents, opinions of specialists and conventions.
- (ii) States do not deny the existence of International Law. On the contrary they interpret International Law so to justify their conduct.
- (iii) In some states like USA and UK international Law is treated as part of their own law. A leading case on the point is the, Paqueta v/s Habana-1900. Justice Gray observed that the international law is a part of our law and must be administered by courts of justice.”
- (iv) As per statutes of the International Court of Justice, the international court of Justice has to decide disputes as are submitted to it in accordance with International Law.
- (v) International conventions and conferences also treat international Law as Law in its true sense.
- (vi) The United Nations is based on the true legality of International Law.
- (vii) Customary rules of International Law are now being replaced by law making treaties and conventions. The bulk of International Law comprises of rules laid down by various law-making treaties such as, Geneva and Hague conventions.

International Law is law but the question arises as to what are the basis of International Law. There are following theories which support it as real law:-

1. **Naturalist Theory:-** The Jurists who adhere to this theory are of the view that International Law is a part of the Law of the Nature. Starke has written, “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.” Law of nature was connected with religion. It was regarded as the divine Law. Natural Laws are original and fundamental. They incorporate the will of the Governor and governed and advance their consent or will. That is why international law is also based on natural law. Vattel Furfendorf, Christain, Thamasius, Vitona are the main supporters of this theory. It was viewed that natural law is uncertain and doubtful but it is accepted that Natural Law has greatly influenced the growth and has given the birth to International Law and its development. Most of its laws are framed from Natural Law.
2. **Positivist Theory:-** The inadequacies inherent in the naturalists postulations brought to birth another school of thought known as the positivist school. Positivism rejected divine authority as the basis for law and argued that only law that existed was what its subject agreed to. They stressed the consensual basis of law; rights and responsibilities of international actors were protected by laws and standards of behaviour which they aligned with themselves. Positivism stresses the overwhelming

importance of the state and tends to regard international law as founded upon the consent of the state. This theory is based on Positivism i.e. law which is in the fact as contrasted with law which ought to be. The positivists base their views on the actual practice of the states. In their view customs and treaties are the main sources of International Law. According to German economist, Hegel, "International Law is the natural consent of states. Without the consent of states, no law can bind the states. This consent may be express or implied." 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 also 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."

The critics of the above views say that consent is not always necessary for all laws. There are some laws which are binding on states irrespective of their consent e.g. Vienna Convention on the Law of Treaties. Article 36 of the Treaty says that the provisions of the Treaty may be binding on third parties even if they have not consented to it.

3. **Eclectic or monist** school of thought was the third theory which posited that two levels of law existed. One, which is universal and timeless, was God-given, and the other which is finite and voluntary, was man-made. The eclectic school attempted to bridge the gap between naturalists and positivists; has a perception that naturalist law and positivist law were simply different sides of the same coin.

The Neo-realist assertions which came as a reaction to the position of the monist school of thought stated that rules were irrelevant, but policy and values were important. International law to the neo-realist was just a product of the desires of the prevalent powers. They contended that international law was not a constraint on power, but a product of power; not timeless; not universal; and need not to be accepted by consent, but might be imposed by power. Neo-realist being somewhat a modification of the dualist position attempts to establish a recognised theoretical framework tied to reality.

**Holland** has remarked that International Law is the vanishing point of jurisprudence. In his view, rules of international law are followed by courtesy and hence they should not be kept in the category of law. The international Law is not enacted by a sovereign King. It has also no sanctions for its enforcement which is the essential element of municipal law. Holland further says that International Law is the vanishing point of Jurisprudence because in his view there is no judge or arbiter to decide International disputes and that the rules of International Law are followed by States by courtesy. It is now generally agreed that Holland's view that international law is the vanishing point of jurisprudence is not correct. The jurists who do-not consider international law as the vanishing point of jurisprudence say that there is difference between state law and International Law. International Law cannot be enacted by the state but still there is agency for its enforcement. According to Dias, "International Law is obeyed and complied with by the states because it is in the interests of states themselves."

But now it is well settled that International Law is law. It is true that International Law is not enacted by sovereign and has no agency for its enforcement. But it is true that it is a weak law. A majority of International lawyers not subscribe to this view is based on the proposition that there are no sanctions behind international Law are much weaker than their counterparts in the municipal law, yet it cannot be successfully contended that there are no sanctions at all behind international law.

On the basis of above discussion it may be concluded that the International Law is in fact law and it is wrong to say that it the vanishing point of Jurisprudence.

International Law is said to be a “weak Law.” The weaknesses of International Law become evident when we compare it with Municipal Law. The following are some of the weaknesses of International Law:-

- (i) The greatest shortcoming of International Law is that it lacks an effective executive authority to enforce its rules.
- (ii) Lacks of effective legislative machinery:- Since the International Laws are based on international treaties and conventions. Therefore these are interpreted by the states according to their self-interest.
- (iii)The International court of Justice lacks compulsory jurisdiction in the true sense of the term. The International court of Justice which is situated in Hague (Netherland) is not authorised to take cases of all states. The cases can be filed in this court with the mutual consent of concerned states.
- (iv)Due lack of effective sanctions, rules of International Law are frequently violated. There is no sense or fear of sanction in the International Law with the results the laws are violated frequently by the States.
- (v) As per article 2(7) of UNO Charter, UNO is not competent to interfere in the domestic matters of states. International law cannot interfere in the domestic matters. Keeping in view these facts in several cases International Law proves to be ineffective and weak.
- (vi) There is one more reason behind the weakness of International Law i.e., its uncertainty. In addition to this it has not been able to maintain international peace and order.

Paton says that, “from institutional point of view International Law is a weak. It has no legislative support though there is international court of justice but that functions or takes case on the basis of mutual consent of states. It has no power to get the decisions implemented.”

Despite the above mentioned weaknesses, it has to be noted that International Law is constantly developing and its scope is expanding. It is a dynamic concept for it always endeavours to adopt itself to the needs of the day.