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03 – International Law

Lesson 1 : The nature and development of international law

Text A: What is International Law?

Read the text below.

International law, also called public international law or law of nations, the body of legal rules, norms, and standards that apply between sovereign states and other entities that are legally recognized as international actors. The term was coined by the English philosopher Jeremy Bentham (1748–1832).

Definition and scope

According to Bentham's classic definition, international law is a collection of rules governing relations between states. It is a mark of how far international law has evolved that this original definition omits individuals and international organizations—two of the most dynamic and vital elements of modern international law. Furthermore, it is no longer accurate to view international law as simply a collection of rules; rather, it is a rapidly developing complex of rules and influential—though not directly binding—principles, practices, and assertions coupled with increasingly sophisticated structures and processes. In its broadest sense, international law provides normative guidelines as well as methods, mechanisms, and a common conceptual language to international actors—i.e., primarily sovereign states but also increasingly international organizations and some individuals. The range of subjects and actors directly concerned with international law has widened considerably, moving beyond the classical questions of war, peace, and diplomacy to include human rights, economic and trade issues, space law, and international organizations. Although international law is a legal order and not an ethical one, it has been influenced significantly by ethical principles and concerns, particularly in the sphere of human rights.

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.

International law is an independent system of law existing outside the legal orders of particular states. It differs from domestic legal systems in a number of respects. For example, although the United Nations (UN) General Assembly, which consists of representatives of some 190 countries, has the outward appearances of a legislature, it has no power to issue binding laws. Rather, its resolutions serve only as recommendations—except in specific cases and for certain purposes within the UN system, such as determining the UN budget, admitting new members of the UN, and, with the involvement of the Security Council, electing new judges to the International Court of Justice (ICJ). Also, there is no system of courts with comprehensive jurisdiction in international law. The ICJ's jurisdiction in contentious cases is founded upon the consent of the particular states involved. There is no international police force or comprehensive system of law enforcement, and there also is no supreme executive authority. The UN Security Council may authorize the use of force to compel states to comply with its decisions, but only in specific and limited circumstances; essentially, there must be a prior act of aggression or the threat of such an act. Moreover, any such enforcement action can be vetoed

by any of the council's five permanent members (China, France, Russia, the United Kingdom, and the United States). Because there is no standing UN military, the forces involved must be assembled from member states on an ad hoc basis.

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. Although considerable attention is invariably focused on violations of international law, states generally are careful to ensure that their actions conform to the rules and principles of international law, because acting otherwise would be regarded negatively by the international community. The rules of international law are rarely enforced by military means or even by the use of economic sanctions. Instead, the system is sustained by reciprocity or a sense of enlightened self-interest. States that breach international rules suffer a decline in credibility that may prejudice them in future relations with other states. Thus, a violation of a treaty by one state to its advantage may induce other states to breach other treaties and thereby cause harm to the original violator. Furthermore, it is generally realized that consistent rule violations would jeopardize the value that the system brings to the community of states, international organizations, and other actors. This value consists in the certainty, predictability, and sense of common purpose in international affairs that derives from the existence of a set of rules accepted by all international actors. International law also provides a framework and a set of procedures for international interaction, as well as a common set of concepts for understanding it.

Do task : 3.1

Text B: Historical development of international law

Read the text below.

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. Among the earliest of these agreements were a treaty between the rulers of Lagash and Umma (in the area of Mesopotamia) in approximately 2100 BCE and an agreement between the Egyptian pharaoh Ramses II and Hattusilis III, the king of the Hittites, concluded in 1258 BCE. 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 (1135–1204) and the theologian St. Thomas Aquinas (1224/25–1274),

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 CE, 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—e.g., the 12th-century Rolls of Oléron, named for an island off the west coast of France, and the Laws of Wisby (Visby), the seat of the Hanseatic League until 1361. 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.

Early writers who dealt with questions of governance and relations between nations included the Italian lawyers Bartolo da Sassoferrato (1313/14–1357), regarded as the founder of the modern study of private international law, and Baldo degli Ubaldi (1327–1400), a famed teacher, papal adviser, and authority on Roman and feudal law. The essence of the new approach, however, can be more directly traced to the philosophers of the Spanish Golden Age of the 16th and 17th centuries. Both Francisco de Vitoria (1486–1546), who was particularly concerned with the treatment of the indigenous peoples of South America by the conquering Spanish forces, and Francisco Suárez (1548–1617) emphasized that international law was founded upon the law of nature. In 1598 Italian jurist Alberico Gentili (1552–1608), considered the originator of the secular school of thought in international law, published De jure belli libri tres (1598; Three Books on the Law of War), which contained a comprehensive discussion of the laws of war and treaties. Gentili’s work initiated a transformation of the law of nature from a theological concept to a concept of secular philosophy founded on reason. The Dutch jurist Hugo Grotius (1583–1645) has influenced the development of the field to an extent unequaled by any other theorist, though his reputation as the father of international law has perhaps been exaggerated. 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 scholars who followed Grotius can be grouped into two schools, the naturalists and the positivists. The former camp included the German jurist Samuel von Pufendorf (1632–94), who stressed the supremacy of the law of nature. In contrast, positivist writers, such as Richard Zouche (1590–1661) in England and Cornelis van Bynkershoek (1673–1743) in the Netherlands, emphasized the actual practice of contemporary states over concepts derived from biblical sources, Greek thought, or Roman law. These new writings also focused greater attention on the law of peace and the conduct of interstate relations than on the law of war, as the focus of international law shifted away from the conditions necessary to justify the resort

to force in order to deal with increasingly sophisticated interstate relations in areas such as the law of the sea and commercial treaties. The positivist school made use of the new scientific method and was in that respect consistent with the empiricist and inductive approach to philosophy that was then gaining acceptance in Europe. Elements of both positivism and natural law appear in the works of the German philosopher Christian Wolff (1679–1754) and the Swiss jurist Emerich de Vattel (1714–67), both of whom attempted to develop an approach that avoided the extremes of each school. During the 18th century, the naturalist school was gradually eclipsed by the positivist tradition, though, at the same time, the concept of natural rights—which played a prominent role in the American and French revolutions—was becoming a vital element in international politics. In international law, however, the concept of natural rights had only marginal significance until the 20th century.

Positivism's influence peaked during the expansionist and industrial 19th century, when the notion of state sovereignty was buttressed by the ideas of exclusive domestic jurisdiction and nonintervention in the affairs of other states—ideas that had been spread throughout the world by the European imperial powers. In the 20th century, however, positivism's dominance in international law was undermined by the impact of two world wars, the resulting growth of international organizations—e.g., the League of Nations, founded in 1919, and the UN, founded in 1945—and the increasing importance of human rights. Having become geographically international through the colonial expansion of the European powers, international law became truly international in the first decades after World War II, when decolonization resulted in the establishment of scores of newly independent states. The varying political and economic interests and needs of these states, along with their diverse cultural backgrounds, infused the hitherto European-dominated principles and practices of international law with new influences.

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.

The Cold War also gave rise to the coalescence of a group of nonaligned and often newly decolonized states, the so-called "Third World," whose support was eagerly sought by both the United States and the Soviet Union. The developing world's increased prominence focused attention upon the interests of those states, particularly as they related to decolonization, racial discrimination, and economic aid. It also fostered greater universalism in international politics and international law. The ICJ's statute, for example, declared that the organization of the court must reflect the main forms of civilization and the principal legal systems of the world. Similarly, an informal agreement among members of the UN requires that nonpermanent seats on the Security Council be apportioned to ensure equitable regional representation; 5 of the 10 seats have regularly gone to Africa or Asia, two to Latin America, and the remainder to Europe or other states. Other UN organs are structured in a similar fashion.

The collapse of the Soviet Union and the end of the Cold War in the early 1990s increased political cooperation between the United States and Russia and their allies across the Northern Hemisphere, but tensions also increased between states of the north and those of the south, especially on issues such as trade, human rights, and the law of the sea. Technology and globalization—the rapidly escalating growth in the international movement in goods, services, currency, information, and persons—also became significant forces, spurring international cooperation and somewhat reducing the ideological barriers that divided the world, though globalization also led to increasing trade tensions between allies such as the United States and the European Union (EU).

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 (1982) 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.

Do task : 3.3

Lesson 2: Sources of international law

Article 38 (1) of the ICJ's statute identifies three sources of international law: treaties, custom, and general principles. Because the system of international law is horizontal and decentralized, the creation of international laws is inevitably more complicated than the creation of laws in domestic systems.

Text A: Treaties

Read the text below.

Treaties are known by a variety of terms—conventions, agreements, pacts, general acts, charters, and covenants—all of which signify written instruments in which the participants (usually but not always states) agree to be bound by the negotiated terms. Some agreements are governed by municipal law (e.g., commercial accords between states and international enterprises), in which case international law is inapplicable. Informal, nonbinding political statements or declarations are excluded from the category of treaties.

Treaties may be bilateral or multilateral. Treaties with a number of parties are more likely to have international significance, though many of the most important treaties (e.g., those emanating from Strategic Arms Limitation Talks) have been bilateral. A number of contemporary treaties, such as the Geneva Conventions (1949) and the Law of the Sea treaty (1982; formally the United Nations Convention on the Law of the Sea), have more than 150 parties to them, reflecting both their importance and the evolution of the treaty as a method of general legislation in international law. Other significant treaties include the Convention on the Prevention and Punishment of the Crime of Genocide (1948), the Vienna Convention on Diplomatic Relations (1961), the Antarctic Treaty (1959), and the Rome Statute establishing

the International Criminal Court (1998). Whereas some treaties create international organizations and provide their constitutions (e.g., the UN Charter of 1945), others deal with more mundane issues (e.g., visa regulations, travel arrangements, and bilateral economic assistance).

Countries that do not sign and ratify a treaty are not bound by its provisions. Nevertheless, treaty provisions may form the basis of an international custom in certain circumstances, provided that the provision in question is capable of such generalization or is "of a fundamentally norm-creating character," as the ICJ termed the process in the North Sea Continental Shelf cases (1969). A treaty is based on the consent of the parties to it, is binding, and must be executed in good faith. The concept known by the Latin formula pacta sunt servanda ("agreements must be kept") is arguably the oldest principle of international law. Without such a rule, no international agreement would be binding or enforceable. Pacta sunt servanda is directly referred to in many international agreements governing treaties, including the Vienna Convention on the Law of Treaties (1969), which concerns treaties between states, and the Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations (1986).

There is no prescribed form or procedure for making or concluding treaties. They may be drafted between heads of state or between government departments. The most crucial element in the conclusion of a treaty is the signaling of the state's consent, which may be done by signature, an exchange of instruments, ratification, or accession. Ratification is the usual method of declaring consent—unless the agreement is a low-level one, in which case a signature is usually sufficient. Ratification procedures vary, depending on the country's constitutional structure.

Treaties may allow signatories to opt out of a particular provision, a tactic that enables countries that accept the basic principles of a treaty to become a party to it even though they may have concerns about peripheral issues. These concerns are referred to as "reservations," which are distinguished from interpretative declarations, which have no binding effect. States may make reservations to a treaty where the treaty does not prevent doing so and provided that the reservation is not incompatible with the treaty's object and purpose. Other states may accept or object to such reservations. In the former case, the treaty as modified by the terms of the reservations comes into force between the states concerned. In the latter case, the treaty comes into force between the states concerned except for the provisions to which the reservations relate and to the extent of the reservations. An obvious defect of this system is that each government determines whether the reservations are permissible, and there can be disagreement regarding the legal consequences if a reservation is deemed impermissible.

A set of rules to interpret treaties has evolved. A treaty is expected to be interpreted in good faith and in accordance with the ordinary meanings of its terms, given the context, object, and purpose of the treaty. Supplementary means of interpretation, including the use of travaux préparatoires (French: "preparatory works") and consideration of the circumstances surrounding the conclusion of the treaty, may be used when the treaty's text is ambiguous. In certain cases, a more flexible method of treaty interpretation, based on the principle of effectiveness (i.e., an interpretation that would not allow the provision in question to be rendered useless) coupled with a broader-purposes approach (i.e., taking into account the basic purposes of the treaty in interpreting a particular provision), has been adopted. Where the treaty is also the constitutional document of an international organization, a more programmatic or purpose-oriented approach is used in order to assist the organization in coping with change. A

purpose-oriented approach also has been deemed appropriate for what have been described as "living instruments," such as human rights treaties that establish an implementation system; in the case of the European Convention on Human Rights of 1950.

A treaty may be terminated or suspended in accordance with one of its provisions (if any exist) or by the consent of the parties. If neither is the case, other provisions may become relevant. If a material breach of a bilateral treaty occurs, the innocent party may invoke that breach as a ground for terminating the treaty or suspending its operation. The termination of multilateral treaties is more complex. By unanimous agreement, all the parties may terminate or suspend the treaty in whole or in part, and a party specially affected by a breach may suspend the agreement between itself and the defaulting state. Any other party may suspend either the entire agreement or part of it in cases where the treaty is such that a material breach will radically change the position of every party with regard to its obligations under the treaty. The ICJ, for example, issued an advisory opinion in 1971 that regarded as legitimate the General Assembly's termination of the mandate for South West Africa. A breach of a treaty is generally regarded as material if there is an impermissible repudiation of the treaty or if there is a violation of a provision essential to the treaty's object or purpose.

The concept of rebus sic stantibus (Latin: "things standing thus") stipulates that, where there has been a fundamental change of circumstances, a party may withdraw from or terminate the treaty in question. An obvious example would be one in which a relevant island has become submerged. A fundamental change of circumstances, however, is not sufficient for termination or withdrawal unless the existence of the original circumstances was an essential basis of the consent of the parties to be bound by the treaty and the change radically transforms the extent of obligations still to be performed. This exception does not apply if the treaty establishes a boundary or if the fundamental change is the result of a breach by the party invoking it of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.

Do task : 3.4

Text B: Custom

Read the text below.

The ICJ's statute refers to "international custom, as evidence of a general practice accepted as law," as a second source of international law. Custom, whose importance reflects the decentralized nature of the international system, involves two fundamental elements: the actual practice of states and the acceptance by states of that practice as law. The actual practice of states (termed the "material fact") covers various elements, including the duration, consistency, repetition, and generality of a particular kind of behaviour by states. All such elements are relevant in determining whether a practice may form the basis of a binding international custom. The ICJ has required that practices amount to a "constant and uniform usage" or be "extensive and virtually uniform" to be considered binding. Although all states may contribute to the development of a new or modified custom, they are not all equal in the process. The major states generally possess a greater significance in the establishment of customs. For example, during the 1960s the United States and the Soviet Union played a far more crucial role in the development of customs relating to space law than did the states that had little or no practice in this area. After a practice has been established, a second element converts a mere

usage into a binding custom—the practice must be accepted as opinio juris sive necessitatis (Latin: "opinion that an act is necessary by rule of law"). In the North Sea Continental Shelf cases, the ICJ stated that the practice in question must have "occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved."

Once a practice becomes a custom, all states in the international community are bound by it whether or not individual states have expressly consented—except in cases where a state has objected from the start of the custom, a stringent test to demonstrate. A particular practice may be restricted to a specified group of states (e.g., the Latin American states) or even to two states, in which cases the standard for acceptance as a custom is generally high. Customs can develop from a generalizable treaty provision, and a binding customary rule and a multilateral treaty provision on the same subject matter (e.g., the right to self-defense) may exist at the same time.

General principles of law

A third source of international law identified by the ICJ's statute is "the general principles of law recognized by civilized nations." These principles essentially provide a mechanism to address international issues not already subject either to treaty provisions or to binding customary rules. Such general principles may arise either through municipal law or through international law, and many are in fact procedural or evidential principles or those that deal with the machinery of the judicial process—e.g., the principle, established in Chorzow Factory (1927–28), that the breach of an engagement involves an obligation to make reparation. Accordingly, in the Chorzow Factory case, Poland was obliged to pay compensation to Germany for the illegal expropriation of a factory.

Perhaps the most important principle of international law is that of good faith. It governs the creation and performance of legal obligations and is the foundation of treaty law. Another important general principle is that of equity, which permits international law to have a degree of flexibility in its application and enforcement. The Law of the Sea treaty, for example, called for the delimitation on the basis of equity of exclusive economic zones and continental shelves between states with opposing or adjacent coasts.

Do task : 3.5

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