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PUBLIC INTERNATIONAL LAW AND IHL,LAW OF CRIMES, LAW OF TORTS AND CONSUMER PROTECTION

SIERRA INNOVATIONS

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LAW OF TORTS AND CONSUMER PROTECTION ACT

Chapter: 1

International law

#Introduction:

Law is that element which binds the members of the community together in their adherence to recognized values and standards. It is both permissive in allowing individuals to establish their own legal relations with rights and duties, as in the creation of contracts, and coercive, as it punishes those who infringe its regulations. Law consists of a series of rules regulating behaviour, and reflecting, to some extent, the ideas and preoccupations of the society within which it functions. And so it is with what is termed international law, with the important difference being that the principal subjects of international law are nation-states, not individual citizens. However, this particular notion has changed due to the dynamics and myriad changes in the realm of international law.

International law denotes norms to regulate relations, transactions and actions which transcend national boundaries. In the contemporary state of world affairs this branch of law has assumed immense practical importance. The lightning means of transport and almost instant communication have bridged the gaps of time and space; bringing, thus, the peoples of this planet closest ever to each other. Constraints of development and consequent industrialization have led to the increasing interdependence of nation-states. The ever growing contacts have opened unprecedented avenues of cooperation as well as of conflict. The demands of "steady and smooth intercourse between states as well as individuals have added to the significance-nay indispensability-of rules, which we know of today, as international law.

Nature:

Public international law covers relations between states in all their myriad forms, from war to satellites, and regulates the operations of the many international institutions. It may be universal or general, in which case the stipulated rules bind all the states (or practically all depending upon the nature of the rule), or regional, whereby a group of states linked geographically or ideologically may recognize special rules applying only to them, for example, the practice of diplomatic asylum that has developed to its greatest extent in Latin America. The rules of international law must be distinguished from what is called international comity, or practices such as saluting the flags of foreign warships at sea, which are implemented solely through courtesy and are not regarded as legally binding.

International law itself is divided into conflict of laws (or private international law as it is sometimes called) and public international law (usually just termed international law). The former deals with those cases, within particular legal systems, in which foreign elements obtrude, raising questions as to the application of foreign law or the role of foreign courts. By contrast, public international law is not simply an adjunct of a legal order, but a separate system altogether, and it is this field that we are concerned with in our endeavor to understand the changing geo-political scenario world over.

Definition:

Oppenheim's Definition: In 1905, Prof. Oppenheim defined international law as follows, "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. This definition by Oppenheim has become obsolete and inadequate. It has been subject to the following criticisms-

1. This definition takes into account the relations of 'states' only. But it is now generally recognized that not only states but international organizations and institutions also have rights and duties under international law. The scope of international law has widened.
2. The use of the term 'civilized states' by Oppenheim is also severely criticized. In the not too distant past, the western states regarded only the 'Christian States' as civilized states. For e.g., although China has 5000 years old culture, she was not included in the group of civilized nations.
3. It is no longer possible to regard international law as governing relations solely between states. At present it also governs relations between states and international organizations, between international organizations and private persons, between states and private persons.
4. The definition lays down that the rules of international law derive only from customs and treaties, but the Article 38 of the Statute of International Court of Justice mentions 'General Principle of Law recognized by the civilized nations' as third source of international law to be used while deciding on international dispute.
5. International law is a dynamic and living law as against Oppenheim's 'body of rules' which denotes international law as static or fixed.
6. Oppenheim's definition is a qualified one. For example the words 'legally binding' connote positive character which is diffused and diluted by the subsequent words 'by civilized states'. Oppenheim does not say that these rules are 'legally binding', but that they are considered so.

In the ninth edition of Oppenheim's book (1992) the term' International Law' has been defined differently after taking into account the new developments.

"International Law is the body of rules which are legally binding on States in their intercourse with each other. These rules are primarily those which govern the relations of States,' but States are not the only subjects of international law. International organizations and to some extent, also individuals may be subject to rights conferred and duties imposed by International law. But this definition is silent regarding the 'general principle of law' recognized by civilized nations.

Brierly's definition: "The law of nations or international law may be defined as the body of rules and principles of action which are binding upon civilized states in their relations with one another."

Gray's definition: "International law or the law of nations is the name of a body of rules which according to the usual definitions regulate the conduct of states in their intercourse with each other."

Starke's definition: "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:

* The rules of law relating to the functioning of international institutions/organizations, their relations with each other, and their relations with States and individuals; and
* 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 does not stand correct for all times to come, as and if an entity not enumerated under it ever comes within the scope of international law with the passage of time, the definition would again be subjected to criticism.

Basis:

The intellectual seeds of modern international law germinated in the 16th and 17th centuries, when the influence of the Roman Catholic Church in international affairs gradually weakened. Many early international legal theorists were concerned with axiomatic truths thought to be reposed in natural law. Among the early natural law writers, Francisco de Vittorio, Dominican professor of theology at the University of Salamanca, examined the question of just war and Spanish authority in the Americas. He did so while Spain was at the height of its power, after the violent Spanish conquest of Peru in 1536.

1. Grotius Theory: Central in the development of modern international law was Hugo Grotius, a Dutch theologian, humanist and jurist. In his principal work De jure Belli ac Pacis Libri Tres ("Three Books on the Law of War and Peace", 1625), Grotius claimed that nations as well as persons ought to be governed by universal principle based on morality and divine justice. Much of Grotius' content drew from the Bible and from classical history Just war theory of Augustine of Hippo). Drawing also from domestic contract law, he also notes that relations between politics were governed by jus gentium, the law of peoples, which had been) established by the consent of the community of nations.

   The central doctrine in his work was the acceptance of the 'law of nature' as an Independent source of rules of the law of nations, apart from custom and treaties. The Grotian law of nature was founded primarily on dictates of reason and on the rational nature of men as social human beings. Grotius distinguished between Jus Gentium (i.e., the customary law of nations which he called Jus voluntarius) and Jus natural (i.e., law of nature concerning the international relations of the States). .

2. Naturalistic theory: Most of the jurists of the sixteenth and seventeenth century were of the view that International Law is based on the law of nature. According to them there exists a system of law which emanates from God or reason or morals. International Law, according to them, is based on this very system. Prominent writers of this view are Grotius, Pufendorf and Vattel. The view has been greatly criticized by the writers of the nineteenth century on the ground that it is too vague.

3. Positive theory: According to them only those principles may be deemed as law which have been adopted with the consent of the States. The rules of law are binding upon States therefore emanate from their own free will. Bynkershoek was the exponent who was of the view that the basis of International Law is the consent of the States. The consent may be given by States either expressly or impliedly. While express consent may be given by the conclusion of treaties or the acknowledged concurrence of governments, consent may be implied in the case of established usage, i.e., custom. Thus, custom and treaties by which consent of a State is achieved are the basis of International Law. Unless and until a State has given its consent to a particular rule of International Law it cannot be regarded as binding on it. Martens and Anzilotti also share the above view. The consent theory has been criticised by many writers on several grounds. Firstly, all the rules of International Law are not derived from customs and treaties. Some of them derive from the general principles of law recognized by civilized nations. The International Court of Justice has equivocally recognized it under Article 38(I) (c) of the Statute. Secondly, a State remains bound by certain rules of International

Law even if it has not given its consent. According to Article 36 of the Vienna Convention on the Law of Treaties a treaty may be binding on third States as well. Their assent shall be presumed as long as the contrary is not indicated. Thirdly, States in some cases are bound by general International Law even against their will. The above criticisms show that the consent theory as propounded by positivists is not totally correct.

4. Eclectic theory: The views taken by the naturalists and positivists are extreme views. The jurists belonging to eclectic schools have preferred to adopt a middle course in the positivist-naturalist debate. Eclectics such as Vattel accepted the simultaneous existence of two tiers of law-one at the natural level and another at the positivist level. Thus, according to them International Law derives from both natural law as well as voluntary law (laws made with the consent of the States).

This view appears to be appropriate than those taken by the jurists of naturalist and positivist Schools, and therefore it may be concluded that International Law is based solely neither on the law of nature nor on the consent of the States.

Chapter: 2

Sources of International law

'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 International Court of Justice in Art. 38, has enumerated the following sources of International Law on the basic of primacy before the court:

1. International Conventions or treaties.
2. International Customary Law.
3. General Principles of law recognized by Civilized Nations.
4. Judicial Precedents.
5. Juristic Writings.
6. Ex aequo et bono. (Equity & good conscience)

These are to be applied in the same order by the I.C.J.

1. International Treaties :

There is primacy for this source at the International Court of Justice. Treaties are of two kinds Law-making and 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.

2. International Custom: This is the original source of International law. It manifests in

* Diplomatic Correspondence of States
* Practice of International Organizations
* State Court's decisions
* State Practice & Administrative actions etc.

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:

* Corpus test: A material fact of the actual observance of a line of conduct by the States. This must be shown as a fact.
* Animus test: There must be an intention to follow the custom. It reaches a stage of approval 'opinion juris save necessitatis' (Jurists' opinion as of necessity). Then, the principle (usage) becomes an International Custom. This is the process of the consumption 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 Habana Case* the Court (U.S. The Supreme Court) held that looking at all the facts & circumstances, there was uniform practice of giving immunity to small fishing vessels from belligerent action in times of war. This was recognized as an International Customary Law.

3. General principles of law recognized 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.

In *Administrative Tribunal Case* (I.C.J.) the court held that 'res judicata' was a well-established & generally accepted rule. It applied to 'res judicata'. (According to this, a judgment given by a competent court, bars any suit by the parties on the same issue).

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 stopped itself from questioning the Sovereignty of Danish Govt.

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.

In the *Mavromattes Palestine Concessions Case* the P.C.I.J. applied the doctrine of Subrogation.

It is stated that the recognition of 'General Principles' as a source of law would sound the death knell of positivism. This statement is overdrawn, Positivists 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 recognized by Civilized Nations/ Hence, priority is given to positive law.

4. 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, example

* 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.
* P.C.I.J.: Palmas Island Case
* International court of Arbitration: Savarkar's case, Pious Fund case, North Atlantic Coast Fisheries case etc.
* State Courts: Franconia case, Scotia case, Paqueta Habana case etc.

5. 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.

6. 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.

Chapter: 3

Recognition of States and Governments

#Introduction:

It is the free act by which one or more States acknowledge the existence of a politically organized 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).)

Modes of Recognition:

There are two modes of recognition, which may be given as:

1. De facto Recognition: - The provisionally grant; that is subject to fulfillment of all the attributes of statehood, of recognition to a new state which has acquired sufficient territory and control over the same, but the recognizing states considers it not stable more, is said to be De facto Recognition.
2. De jure Recognition: - The grant of recognition to a new born state by an existing state, when it considers that such newborn state has attained all the attributes of statehood with stability and permanency, is called De jure Recognition.

Theories of Recognition:

The Constitutive theory

Oppenheim, Hegel and Anziloti are the chief exponents of this theory. According to this theory the only certificate to issue international personality to a new born state is the consent of the already existing states. In other words a new entity shall only be called a state when the existing state acknowledges its statehood. So, the independence of a new entity shall not amount to being called a state unless it has not been recognized by the existing states.

According 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.

Constitutive theory has its own supporters: There are two aspects

* According to the traditional constitutive theory recognition is a political act pure & simple and therefore an act of policy.
* Lauterpacht differs from this. He opines that each State has a duty towards the International community to recognize 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 Extraneous political considerations, should not be taken into consideration. But it is difficult to accept Lauterpacht's views. Oppenheirn supports this theory.

The theory has severely been criticized by a number of jurists. Because, at first instance, states do not seem to accept recognition as a legal duty. And at the second instance, it creates many difficulties when a community claims of being a new state and its non-recognition will, according to this theory, imply that it has no rights, duties and obligations under international law. The theory is not correct in any sense so shall be rejected.

The Declaratory theory:

The chief exponents of this theory are Hall, Wagner, Fisher and Brierly. According to this theory, the statehood or the authority of the new Government is not dependent on the consent of the existing state but is based on some prior or existing fact. According to the followers of this theory, the recognition by the existing states is merely a formal acknowledgement of statehood and not the condition. In fact the statehood is dependent on the some prior conditions necessary for an entity to be called as a state.

International State practice has recognized declaratory theory. However, recognition is with-held for political reasons there is a retro-active effect of recognition dating back to the actual rising into existence of the State. The courts, in respect of treaties, take into consideration not the date of operation but the date of coming into existence of the State.

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.

This theory has also been criticized, because it is not correct that in all cases the existing fact shall imply statehood, rather some time the statehood may be constitutive.

Consequences of recognition:

Recognition confers a 'status' under international law & municipal law. The recognized state gets certain rights, powers and privileges, as a consequence thereof. In the absence of recognition, there would be certain disabilities to the unrecognized state. For example, it cannot sue in the municipal courts of the state which has not recognized it, similarly, its representatives cannot get privileges & immunities, etc. Recognition Cures these & other disabilities.

1. The new State acquires the capacity to enter into relations with recognized State and conclude treaties with them. The new State gets the right to send & to receive Ambassadors. (Active & Passive Legation), These ambassadors are entitled to privileges & immunities in these States,
2. Past treaties revive and come into force automatically. The new State gets the right to sue in the recognizing States.
3. It acquires for itself and for its property immunity from the jurisdiction of the recognizing States.
4. If it is a new successor State which is recognized, it becomes entitled to demand and to receive possession of its predecessor's property situated in the recognized States.
5. Recognition is retro-active and hence the courts of the recognizing States are not to question the legality of the acts (past & future) of the New State.

This means the recognized States become subject to certain obligations similarly, the new state also becomes subjects to certain obligations. Thus, it gets the benefits & burdens according to International Law.

Recognition of Government:

As we know that government is an essential part of statehood. By government it is the administrative and controlling tool of a state. Once a state comes into being, its government may change from time to time. If the change of government takes place in ordinary political life the existing states are not required to recognize the new government. But sometimes the change of a government takes place as a result of a revolution. In such a case, it becomes necessary to ascertain that whether this new revolutionary government is:

* capable of having sufficient control over the people of the territory or not, and
* Willing to maintain international responsibilities and duties or not.

So, if the existing states consider that this new government is capable of fulfilling The above conditions then the new government may be recognized. The recognition of the new regime means that the existing states are satisfied that the new government has a capacity to control and is willing to perform international duties and obligations. The recognition may be either de facto or de jure. And the intention may be expressed either by sending a message to the authority of the new government or to declare the same in a public statement.

The modern practice seems to reject the doctrine of recognition of a new government. Now, some states as USA and U.K. and others have adopted a course to give assent to the above pre conditions for a government merely by extending relation or cessation of relations with such government. Non-recognition of government doesn't affect the recognition of a state. A state remains recognized; the only consequence of the non-recognition of the new revolutionary government is the suspension of the bilateral relations between the existing state and the new government. And as soon as the said government is to be replaced by any other government, if recognized the relations shall be re-continued on the same pattern as were with the previous government of the revolutionary one. The consequences of the recognition of a new government means to keep the relations in the same manner as were with the previous government.

Chapter: 4

Nationality, Immigrants, Refugees and Internally displaced person

#Nationality:

The legal relation of the sovereign state and the citizen is said to be nationality." Nationality refers to a relationship between a person and their nation, or in legal terms, a country i.e. a place to whom a person has (or is claimed to "owe") their origin, culture, familiarity, association, affiliation, fidelity, and loyalty. The nationals of a country generally possess the right of abode in the territory of the country whose nationality they hold. Nationality of an individual is the quality of being a subject of a certain state and therefore its citizens. Nationality forms a continuing state of things and not a physical fact which occurs at a particular moment.

Nationality is regulated by municipal laws. But conflicts of municipal and international laws always happen, creating a lot of problems, due to the non-uniformity of municipal laws of the nations. So, to overcome these problems some international rules have also been recognized and others are attempted to be recognized in this behalf. As for example, double nationality, statelessness etc.

Modes of Acquisition of Nationality:

Different states have different rules regarding nationality, so there are different rules in each state for acquisition of nationality. There may be any of the following modes in different states of acquisition of nationality.

1. By Birth: - The first important and chief mode of acquisition of nationality is by birth. Every person acquires nationality by birth. The principle of acquisition of nationality by birth is known as jus soli.
2. By Descent: - Nationality may also be acquired by a person on the basis of the nationality of either parents. The principle is called jus sanguinis.
3. By Naturalization: - Nationality may also be acquired by naturalization. Nationality by naturalization means that the acquisition of nationality when a person becomes citizen of a state for a specified course of time
4. By Resumption: - Acquisition of nationality by resumption means to resume the previous nationality. Sometimes it may happen that a person loses his nationality due to several reasons, so subsequently he may acquire the nationality of the previous state.
5. By Subjugation: - In case of conquest of a state by another state all the citizens of the defeated state become the nationals of the conquering state,

the mode of acquisition is said to be acquisition of nationality by subjugation.

6. **Be Cession**: - When a state or a part of a state is ceded to another state, all the nationals of the former state acquire the nationality of the state in which their territory has been so merged.
7. **By Option**: - Nationality may also be acquired by option, in case where a parent state has been partitioned into two or more states. In such a case the inhabitants have an option to acquire the nationality of any of the successor states.
8. **By Registration**: - Nationality of a state may be acquired by registration in that state. The laws as to acquisition of nationality by registration are different in different states.

Modes of Loss of Nationality:

A person may loss his nationality of a state due to any of the following modes:

1. **By Release**: - In some states the citizens have been given a right to release their nationality. The loss of nationality by release shall only take place when an application is made by the applicant to that effect, and when such application has been accepted. In such a case the concerned person is deemed to be released from the state concerned.
2. **By Deprivation**: - Nationality may also be lost by deprivation. In other words when the authority of a state deprives a person from being its national due some reason, the person concerned is deemed to lose nationality by deprivation. To deprive a person from his nationality any of the following reasons may be invoked by the authority doing so:
    * If registration or certificate of naturalization has been obtained by means of fraud, false representation or by concealing any material fact or
    * If he has been disloyal or disaffected to the integrity of the concerned sovereign state.
    * If he has done by prejudicial act or traded with an enemy while the state, in which he has the nationality, is at war with that state.
    * If he has been continuously residing in a foreign country for a length of years.
3. **By Renunciation**: - A person may also have a right to renounce his nationality in a case where he obtains nationalities of more than one state. In such a case he has to make a choice to retain one of the nationality in which he wants to be a national.
4. **By Residence Abroad**: - Nationality may be lost by reason of expiration. In other words when a person resides abroad for a length of time. In such a case by the operation of municipal law of that state, he may lose his nationality.
5. **By Substitution**: - Loss of nationality by substitution means the loss of