

1. ORIGIN, DEVELOPMENT, BASIS AND PRESENT STATUS OF INTERNATIONAL LAW

SYNOPSIS:

- A. Introduction*
- B. Origin and Development of International Law*
- C. Public International Law and Private International law*
- D. General International Law and Particular International Law*
- E. Codification of International Law*
- F. Basis of International Law*
- G. International Law Commission*
- H. Present status of International Law*
- I. Conclusion*

A. INTRODUCTION:

International Law is a body of rules which regulates the conduct of States in their mutual inter relations.

Oppenheim defines International law as - the body of customary and conventional rules which are considered legally binding by civilized States in their intercourse with each other.

Starke defines International Law as - the body of law composed for its greater part, the principles and rules of conduct which States feel themselves bound to observe and therefore do commonly observe in their relations with each other.

Thus the object of International law is to produce an orderly system of international relations among States and other bodies.

B. ORIGIN AND DEVELOPMENT OF INTERNATIONAL LAW:

The modern International Law had its origin in the 15th century though International Law prevailed in the ancient period.

1. ANCIENT PERIOD:

- a. In Egypt, International Law seems to have existed in ancient days. From the presence of certain treaties, nationality, etc, it is evident that International Law existed even among the ancient Jews also.
- b. In ancient India, the **Dharma Sastras, Manusmriti, Kautilaya's Arthshastra, Ramayana and Mahabharat** revealed about the just and unjust wars, thus showing the existence of certain rules of International Law during the period.

Therefore, Sir Oppenheim's contention that International Law is only a product of modern Christian civilization is not correct as there is clear evidence that rules of International law existed in ancient India also. However, the rules in ancient India were not uniform.

- c. In ancient Rome, the International rules were based on religious morality. (E.g.) Roman law contracts, conventions of diplomatic agents, etc.
- d. In ancient Greece, the inter- state relations were found to be regulated by religious oriented International Law.

2. 15TH & 16TH CENTURIES:

During the middle ages, there was little development of International Law. Only in the 15th century, International Law began to develop. The important reasons for such growth of International Law during 15th century are as follows.

- a. After the downfall of Roman Empire, a number of States disintegrated.
- b. The sea trade was revived during this period. So, the maritime law originated.
- c. Trade leagues were formed to protect the trading communities.
- d. The system of sending and receiving of representatives between States developed.
- e. The Industrial renaissance paved the way for the progress of International Law.
- f. The various writings of authors about international peace also formed the basis for progress of International Law.
- g. The keeping of standing armies by certain States compelled the formulation of rules of warfare.

- h. By the fall of Church and the origin of Sovereign States, the concept of Natural Law was revived which became the basis of International Law.
- i. Since most of these States had their own maritime rules, customary rules of maritime law evolved.
- j. To protect the trade and trading citizens, leagues and associations were established. These leagues stipulated for arbitration on controversies between their members.

3. 17TH & 18TH CENTURIES:

- a. During this period, eminent writers systematized the subject of International Law and also suggested many new rules and principles.
- b. **Sir Hugo Grotius** who is now considered the **Father of the modern International law** contributed much towards the growth of International Law.
 - i. He was the first writer to give a systematic treatment of International Law.
 - ii. He only laid down the rules of justice which would be binding on men living in a social State.
 - iii. He also secularized the concept of Nature and showed that the basis of law of Nature was human nature itself.
 - iv. He also emphasized the binding force of International treaties and advocated peaceful settlement of disputes by negotiation, arbitration, etc.

v. De jure belli ac pacis:

In 1625, he wrote his famous book **De jure Belli ac pacis** which laid the foundations of International Law.

De jure belli ac pacis libri tres contains three books, On the Law of War and Peace.

This book was first written and published in 1625 by Sir Hugo Grotius.

- Book I advances his ideas and conception of war and of natural justice.
- Book II identifies three 'just causes' for war: self-defense, reparation of injury, and punishment.
- Book III deals with the rules that govern the conduct of war once it has begun. According to Grotius, all parties to war are bound by such rules, whether their cause of war is just or not.

His arguments in the first book constitute – the theory of just war, the second book - about the justice in the resort to war and the third book - about the justice in the conduct of war. Thus, these books by Grotius laid the foundation for the present rules of war in international law.

vi. He distinguished between the Jus Gentium, the Customary Law of Nations, and the Jus Naturae (the Natural Law of Nations).

vii. He advocated for the freedom of sea.

viii. He said that the prisoners of war should be treated adequately by the captor.

ix. He introduced the concept of 'just war' and 'unjust war'.

c. During this period, the **treaty of Westphalia** ended the 30 years of war in the Roman Empire. This treaty also attempted the formation of an International organization for maintenance of peace.

d. Further, the jurists got divided into three schools of thought namely **Naturalist** (Law of Nature is the basis of International Law), **Positivist** (Custom and Treaties are the basis of International Law), **Grotians** (Custom, treaty and Law of Nature are the basis of International Law).

4. 19TH CENTURY:

During this period, Treaties, International Conferences and International Arbitral Tribunals played a vital role in the development of International Law. For e.g., Alabama award Claim, the Congress of U.N.O. Convention of Paris, Geneva Convention, Hague Conference, etc, dealt with different rules of International Law in their own spheres.

5. 20TH CENTURY (I AND II WORLD WAR):

a. The tendency of 19th century continued till the beginning of First World War.

- b. After the I World war, the **Treaty of Versailles** laid the foundation of **League of Nations, Permanent International Court of Justice**.
- c. The Important treaties namely **Treaty of Locarno, Kellogg Briand Pact** were entered into, which declared war as illegal and advocated settlement of disputes in a peaceful manner through the League of Nations.
- d. The above treaties were denounced by Germany in 1936 and it led to the outbreak of II World War. After the Second World War was over, the international organizations like the **United Nations Organisations** and **the International Court of Justice** were established.

C. PUBLIC INTERNATIONAL LAW AND PRIVATE INTERNATIONAL LAW:

The expression “International Law” generally means “Public International Law” and it is, as a system, applies to all States. It is universal and applies everywhere including man’s activities in space and in celestial bodies.

Private International Law, on the other hand, is a law of different States and it concerns mainly matters between individuals under the jurisdiction of two or more different States.

Contracts of sale or service between persons in different countries are governed by Private International Law.

Difference between Public International Law and Private International Law:

1. While public International Law deals primarily with the States and to some extent, with the individuals, the private International Law deals primarily with the individuals of two States.
2. While rules of private International Law are part of the Internal law of the State concerned, the Public International Law applies universally.
3. While public International Law is applied uniformly to all the States, the Private International Law differs from one State to another State.
4. Private International Law is enacted mainly through legislations of different States, whereas Public International Law is evolved largely through the consent of the States by custom and treaties.

However, the distinction between public International Law and private International Law is at present getting reduced, because many rules of private International Law have become the rules of Public International Law.

D. GENERAL INTERNATIONAL LAW AND PARTICULAR INTERNATIONAL LAW:

Some jurists have divided International Law as general International Law and particular International Law. General International Law is binding on many

States to become universal International Law. Particular International Law is binding only on two or a few States.

E. CODIFICATION OF INTERNATIONAL LAW:

The term codification means the process of reducing unwritten laws into written enacted laws. The object of codification is to make the law definite, remove the uncertainty and make it easily understandable.

The History of Codification:

The idea of codification of International law started at the end of the 18th century. The declaration on the rights of the nation was the first work on codifications.

The following are important instances of codification:

1. The Declaration of Paris 1856
2. Codification by individuals like Professor Lieber, David, Duddley and others.
3. The Hague Peace Conferences of 1899 and 1907.
4. Declaration of London, 1909.
5. Hague Codification Conference of 1930.

U.N. Charter and codification of International law and its codification. As recommended by the committee the General Assembly adopted a resolution establishing the International Law Commission.

F. BASIS OF INTERNATIONAL LAW:

The basis for the authority of international law is the same as the basis for early laws of every nation. It is the '**the general consent of those to be bound by them**'.

Such general consent of those to be bound by them is **strengthened by custom and continued consented practice.**

There is **no common superior among nations** to enforce the principles of international law,

Similarly, no single nation can introduce a new principle of international law into this system.

In the case of *The Antelope*, the Supreme Court of the United States held,

"As no nation can prescribe a rule for others, none can make a law of nations."

Further it said -

"Undoubtedly, no single nation can change the law of the sea. The law is of universal obligation, and no statute of one or two nations can change it.

It further observed -

"International law rests upon the **common consent of civilized communities**. It is of force, not because it was prescribed by any superior power, but because it has been generally accepted as a rule of conduct"

“Whatever may have been its origin, whether in the usages of navigation or in the ordinances of maritime states, or in both, it has become the law of the sea only by the **concurrent sanction of those nations constituting the commercial world**”.

“Many of the usages which prevail, and which have the force of law, doubtless **originated in the positive prescriptions of some single state**, which were at first of limited effect, but which **when generally accepted** became of universal obligation”.

For eg., the Rhodian law is the first system of marine rules, but it soon became of general authority, because it was subsequently accepted and assented to as a wise and desirable system by other maritime nations.

Thus only if general assent of concerned nations is effective to give sanction to international law, there can be growth and development of maritime rules.

(All so refer Chapter No. 7, page no. 67)

The Commission submitted the following final reports for codification:

1. Draft convention on rights and duties of States.
2. Question of international criminal jurisdiction.
3. Reservation to multilateral conventions.
4. Question of defining aggression.

5. Draft code of offences against peace and security.
6. National including statelessness.
7. Law of the sea.
8. Arbitral procedure.
9. Diplomatic intercourse and immunities.
10. Consular relations.
11. The Law of treaties.

Codification and development of International law has thus become very important because International law may enable the states to conduct their relations along orderly and predictable lines. The absence of rules and principles of International law may lead the world to anarchy and ultimately to annihilation of mankind.

G. INTERNATIONAL LAW COMMISSION:

The International Law Commission was established by General Assembly of the United Nations in 1948. It was established for the purpose of **“Promotion of the progressive development of international law and its codification.”**

HISTORY OF INTERNATIONAL LAW COMMISSION:

Several attempts were made in the effort to codify international law.

1. By the Resolution of the Assembly of the League of Nations, the **Committee of Experts** recommended for the **Progressive Codification of International Law**.
2. The Committee of Experts' work led to the League of Nations Codification Conference of 1930. The Conference dealt mainly with the issues of **Nationality laws, Territorial waters and State Responsibility to damage caused to foreign nationals**.
3. The United Nations adopted many concepts of the League's resolution in Article 13, Paragraph 1 of the Charter of the United Nations.
4. On December 11, 1946, the General Assembly passed **Resolution 94**, to establish a '**Committee of Legal Experts**' to make recommendations to the UN Secretary-General on the ways the General Assembly could encourage the progressive development of international law and its codification.
5. The Committee of Experts consisted of 17 members and convened from May 12 to June 17, 1947. It recommended to establish a '**Permanent UN Commission**' to promote these objectives.
6. On November 21, 1947, the UN General Assembly passed Resolution 174, provided for the creation of an "International Law Commission" to fulfill the obligations of the Charter. The Commission consists of 34 members elected by the General Assembly.

The purposes of creation of an "International Law Commission" are as follows-

1. Promoting the codification of International law.
2. Solving problems within both public and private International law.
3. Working procedures for the Commission were elaborated in Articles 16-26.
4. The work of the Commission is regulated by its Statute.
 - a) Governments are requested to submit to the Commission their written opinions on the issues in question, as specified in the plan of work.
 - b) The appointed 'Rapporteur' writes a report of his or her recommendations on the subject under discussion.
 - c) The report gets approved by the rest of the Commission and by the UN Secretary-General before it becomes an 'Official Commission Document'.
 - d) The Commission reconsiders the report after receiving additional written opinions from governments, and the report is submitted to the General Assembly for approval.
5. If the commission is requested by a government, an inter-governmental organization or a UN agency to

draft proposals for international conventions on various issues, the Commission formulates a plan of work and receives written opinions from governments on the issue in question. This final draft is also submitted to the General Assembly.

6. The commission also works independently of external requests by its regular work of considering questions of international law. In these cases also, all recommendations for actions are submitted to the General Assembly for final approval.

MEMBERS OF THE COMMISSION:

1. The list of members of the International Law Commission are persons of recognized competence in international law". The members of the Commission are persons who possess recognized competence and qualifications in both doctrinal and practical aspects of international law.
2. Members are drawn from the various segments of the international legal community, such as academia, the diplomatic corps, government ministries and international organizations.
3. No two members of the Commission may be nationals of the same State.

ANNUAL SESSIONS OF THE COMMISSION:

1. I SESSION, 1949:

- a) The Commission formulated principles based on the '**Judgement of the Nuremberg Tribunal**' and

drafted a '**New Code of Offences Against the Peace of Mankind**'.

- b) It prepared a document on the rights and duties of States in International law. It established a '**Criminal Chamber**' within the International Court of Justice, for prosecuting political leaders guilty of crimes against International law.
- c) It made a '**General Survey**' of '**Topics of International Law**' that require codification into treaties and conventions.
- d) It studied the '**Rights and Duties of States**'.
- e) It defined the crimes against the peace of mankind in relation to the Nuremberg Principles.
- f) It explored the possibility of establishing a '**Judicial Body**' to prosecute leaders **guilty of genocide**.
- g) It found ways to make the **rules and documents of International law** available to the public and scholars.
- h) Highest priority was given to the topics of **Law of Treaties, Arbitration and Regime of the sea**, and rapporteurs were elected accordingly.

2. II SESSION, 1950:

The II session was held in Geneva from June 5 to July 29, 1950.

The agenda and the final resolutions of the session were as follows:

- a) The draft declaration on the **'Rights and Duties of States'**.
- b) Priority to the issue of **'Territorial Waters'**
- c) Formulated a set of **'Seven Principles'** to be referred to as **"Nuremberg Principles"**.
- d) Establishing an **'International Court'** to try political leaders guilty of genocide -
- d) Discussion regarding **'Laws of Treaties'**.
- e) Discussion regarding **'Arbitral procedure between states'**
- f) In the **'Regime of the High Seas'** - every ship on the high seas must have only one nationality flag for identification purposes.
- g) Wide distribution be made of UN publications on International law and that the UN begin publications of documentary series on international tribunals and national laws and constitutions of various states.

3. III SESSION, 1951:

The 3rd session was held in Geneva from May 16 to July 27, 1951.

The agenda of the session was as follows:

- a) Formulated the **'Draft Code of Offenses against the Peace of Mankind'**.
- b) Discussed **'Duties of states in the event of the outbreak of hostilities'**
- c) In **'Law of treaties'** the acceptance of reservations to multilateral treaties accepted.

4. IV SESSION, 1952:

The commission adopted a preliminary draft regarding arbitral procedure consisting of 32 articles.

5. V SESSION, 1953:

The commission began work on drafting a convention to reduce the problem of **'Statelessness'**.

6. VI SESSION, 1954:

The commission formulated a draft convention for the reduction of statelessness and a draft code of crimes against the peace of mankind.

7. VII SESSION, 1955:

The 7th session was held in Geneva from May 2 to July 8, 1955.

- a) The commission adopted Provisional articles concerning the regime of the high seas.

- b) Its recommendations the UN Secretary General paved the way to orderly publication of the commission's yearbook.

Till 2013, the International Law Commission held **65 sessions** and during these sessions, it helped UNO to **codify many International unwritten laws**.

ACHIEVEMENTS:

The work of International Law Commission has led to the creation of a number of treaties and other works of international law that are key to the present international legal order.

The following are the important works of International Law Commission.

The Vienna Convention on the Law of Treaties.

The Vienna Convention on Succession of States in respect of Treaties.

The Vienna Convention on Diplomatic Relations.

The Draft Articles on the Responsibility of States for Internationally Wrongful Acts.

The International Criminal Court, first proposed in December 1948 at the request of the UN General Assembly.

CRITICISM:

1. Many governments ignored the conclusions of International Law Commission and refrained from

accepting its recommendations when formulating conventions.

2. Its annual sessions were brief and hence did not allow thorough study of the problems under discussion.
3. The Commission refrained from formulating principles on new issues and thus presented itself as incompetent.

H. PRESENT STATUS OF INTERNATIONAL LAW:

The increasing multi-lateral treaties became the sources of International legislations. International Law has become an indispensable body of rules to regulate the orderly relations between States. It has almost become impossible to maintain State relations without the help of International Law.

The development of International Law is at a faster rate by Codification by International Law Commissions and by establishment of number of Permanent International Organisations. The scope of International Law has widened to cover economic and social interest of States and also the fundamental freedom of human beings.

J. CONCLUSION:

International Law has become an important tool to maintain International peace and order. The scope of International Law also has become wide. To put it in the words of Prof. Starke, the International Law in the present status includes the laws relating to the

functioning of International Institutions and their relation with each other and also their relation with States and individuals and Non-State entities.

However, International Law is still a weak law due to its limited effectiveness. It should become strong and effective to enable the States to live in peace and prosperity.

UNIVERSITY QUESTIONS FOR REVIEW:

1. *Trace the origin and development of International law.*
2. *“The scope of International law has become wide unlike in the past”- Comment.*
3. *Define “International Law”. Trace the post second world war development in the definition of international Law?*
4. *Write Short Notes on: (a) Hugo Grotius (b) Ancient International law (c) Basis of International Law (d) International Law Commission (e) Present day status of International Law.*



2. DEFINITION AND NATURE OF INTERNATIONAL LAW

(INTERNATIONAL LAW - A TRUE LAW OR NOT)

(INTERNATIONAL LAW - A VANISHING POINT OF JURISPRUDENCE)

(MOST IMPORTANT)

SYNOPSIS:

- A. Introduction**
- B. Definition**
- C. International Law - is not a law**
- D. International Law - a law**
- E. International Law - a weak law**
- F. Steps to strengthen International Law**
- G. International Law - a vanishing point of Jurisprudence**

A. INTRODUCTION:

Even from the early stages of International Law, there was much speculation about its juristic nature. There were extreme views and sharply divided opinions on this controversial point. The controversy is due to the weakness of International Law and also in the way of defining it.