CHAPTER X

INFLUENCE OF INTERNATIONAL LAW AND

WORLD OPINION

INTERNATIONAL LAW

Upto this point we have studied foreign policy in connection with orientations, objectives, instruments, national attributes, structure and ideology. In this chapter examine the international law and its influence on the international state system. In theory this law is common to all states. It incorporates the experience of many centuries during which people have lived side by side and done business with each other; it may properly be spoken of as the moral code of states.

International law, understood in terms of rules binding sovereign political collectivities can be traced back to the fourth and third millennium B.C. These rules were at best rudimentary, they covered activities such as sending of and safe conduct of emissaries, formalities involving the initiation and cessation of hostilities and the arrangement of truces and hostilities. These rules were further formalized by the customary practices of the Greek, Chinese, Roman and Ancient Indian city-states and republics. The contribution of these were primarily philosophical.

Medieval Europe through its customary practices contributed to the development of rules of commerce and clarified rights and duties of merchants on land and sea. During the same period laws of the sea for belligerents and neutrals were considerably elaborated and the highly controversial concept of "just war" was advanced by religious scholars like St. Augustine (345-430 A.D.).

Beginning in the sixteenth century, the writings of great scholars of international law became a major source of identification, propogation and development of international law. Francisco de Vitoria (1557) wrote
about the justice of Spanish Conquests in America. The writings of these scholars were also deeply influenced by the Peace of Westphalia. It has often been held that the date of origin of the modern state system could be pinpointed to the year 1648, the year of the Peace of Westphalia, which brought about the end of the Thirty Year War in Europe. The settlement is important due to the evolution and acceptance of several new ideas. First, it marked an end to the notion of a universal Christian community. It codified the recognition that politics was based on secular rather than otherworldly claims. Second, it recognised the notion of political sovereignty as a basis of international law. Third, it was the first time that a general European Congress was created to settle a conflict. Since then, the history of Europe could be traced from one congress to another. The end of any great war forces scholars to think on lines related to it. Alberico Gentili and Francisco Suarez elaborated the doctrines of just and unjust war, and differentiated between natural law and the laws practiced by various states. Samuel Pufendorf, author of *The Law of Nature and Nations* (1672), became the leader of the naturalist school of legal thought. Cornelius van Bynkershoek, whose major works were *The Forum of Ambassadors* (1721) and *Questions of Public Law* (1737), became the leader of the positivist school of legal thought, who were opposed to the naturalist school. The difference between the two schools of thought are more philosophical than pragmatic. The naturalist tend to view law in a hierarchical fashion, and do not believe in the law of the jungle or the state of anarchy. They assume the existence of a universally and generally applicable laws. The positivists on the other hand, are realists who claim that the basic ingredient of the international system is sovereignty and unaccountability of the states. In comparison of the municipal system of law (ordinary domestic law), which is considered to be the standard legal model, international law falls far short. In most instances municipal law is made by well-developed legislative institutions such as parliaments, congresses, or presidiums but international law has no institutionalised legislative source. The United Nation's General Assembly is the nearest thing to a global parliament. But the resolutions passed by the General Assembly do not have any binding power. Municipal laws are generally administered
by the executive branch of the government, which has all encompassing power over its subjects. Whereas there is no institution at the global level to similarly implement the international law. The United Nation's Security Council, veto bound and security oriented, stands for the collective will of the great powers and can only act when occasionally all the great powers are in agreement or at least none of them is opposed to the measures being proposed. The Secretary General of the United Nations and occasionally the U.N. Peace keeping force can be considered to be the rudimentary form of global administration. Finally the municipal system of law is interpreted and applied to specific disputes and have compulsory jurisdiction, whereas the International Court of Justice hears only those cases that are brought to it by consenting governments, and then too no authority exists which could enforce the decisions.

In nation states municipal law supplies credible and comprehensive legal procedure that replaces or contains inter subject violence as a method of regulating disputes and bringing about change. International Law in contrast, categorically legitimizes war as one of the tools of bringing about change in the international arena. At best it seeks to control the means and styles of waging war.

The primary subjects of International Law are the states acting through their recognised governments. For certain issues like privileges and immunities of their functionaries, international organisations have also been considered subjects of international law. Individual human beings however have only been treated as objects of international law never their subjects, even though after the World War I and specially after World War II major efforts were made to hold individuals responsible for acts of the state in the so called Nuremberg and Tokyo trials.

The objective criterion for acceptance as sovereign member - a state-by the international community are threefold: population, territory and an autonomous and effective government. Once a state becomes a member of the international community, the related issue of governmental recognition or non recognition usually arises following revolutions, coups d'états, and other violent forms of sudden governmental change.

Sources of Law
What are the sources from which International Law springs? The first is custom, the second treaties. Besides these two important sources
there are a few other sources like general principles etc.

The Law from Customs

Customary law comprises of rules that states have come to consider as binding on themselves because of generally accepted usage over a long period of time. For reasons of self benefit, habit and fear of repercussions states will follow a certain course of action. As this becomes the "done thing" it acquires some validity, until a time is reached when it is considered as obligatory. Most of the rules governing the freedom of the high seas would fall into this category. Policymakers are thus forced to be aware of international customs in their day to day dealings with other states.

The Law from Treaties

Treaties can be divided into two major categories: specific and law making. Specific treaties are usually bilateral agreements that settle concrete issues or provide for unique arrangement between two states, bilateral treaties become part of the international law as it applies to the two signatories such as the Simla Agreement which lays down the code of settlement of problems bilaterally with a special reference to the Kashmir problem. This treaty has been news recently as Pakistan is trying to avoid this piece of international law but most of the countries around the world do not support it, as such Pakistan has been unable to make much headway, inspite of all efforts.

Law making treaties such as the Hague Convention on the Law of Wars (1907), the Geneva Convention on the Law of the Seas (1958), or the Non Proliferation Treaty which many western countries are asking India to sign. Such treaties may codify or clarify existing customs, rules and relationship, create new rules of relationship or specify conditions under which particular activities could be conducted, or under which particular rules and relationships are not operational. Law making treaties, as drafted by the International Law Commission account for an increasing volume of international law that is being codified.

Many of the multilateral treaties have been arrived at after long and bloody wars in which the victors defeated the opponents and imposed the treaty on them by force. In this manner international law, implicitly recognizes and legitimizes the use of force as an instrument of arbitrating change.
From the policymaker's perspective there are two key points to remember about treaties. First once a treaty is signed and ratified there is an established right and obligation relationship between the signatories recognized by all other states. One is legally bound to do, or not to do certain things, thus limiting the signatories autonomy accordingly. Therefore treaties must be entered into cautiously with careful attention given to their specific provisions.

Second and equally important no state is bound by a treaty it has not legally accepted. Thus the policymaker does not need to worry about being legally obliged by agreements between other states. For example in the area of arms control since France and China are not parties to agreements such as Limited Test Ban Treaty they are free to conduct nuclear tests whenever they please whether they be in the atmosphere or under water or whatever, which the Soviet Union or the United States can not do.

Another important point to be noted is that no two states are parties to all the same agreements and states are bound only by those agreements they have to which they are parties, thus the rules binding on each state are different from those binding on any other state. Because of this there is no universal or quasi universal standards in many areas.

The Law from other sources

In addition to custom and treaties, there are several somewhat less significant sources of international law, namely judicial decisions, so called general principles, and the writings of scholars. Occasionally states are parties to controversy before an international court, in which case the policymaker would obviously be concerned with the judicial decision. This however, is not the usual situation. The reason is that the primary source of international judicial jurisdiction is the willingness of the states to submit their disputes for judicial determination, and states are simply unwilling to submit matters of major significance. After all, in all judicial proceedings there is always a loser and no state wants an outsider (the court) to have the power to make it be that loser. The inevitable result is that policymakers usually consider judicial decisions to be a source of secondary importance only.

The same conclusion is true for general principles and the writings of scholars. The very generality of the principles mean that they are
susceptible to widely varying interpretations, and policymakers will take advantage of this. Scholarly writings abound with conflicting views and controversy thus providing a basis for determining what someone considers the law to be (or have been), but it also allows one considerable latitude in interpretation. Both of these sources may be consulted but neither will be considered binding by the policymakers.

The Role of Law

What is the role of law for the policymaker? Often the subject of International Law is "studied" with an aim either to demonstrate it's great (or potentially great) impact on foreign relations or to show that it has very little real value. Naturally neither approach could be very helpful to the policymaker, who requires a pragmatic approach. He or she has to determine the actual role that international law plays, and to understand the role it can play, without regard to proving it's worth or limitations.

When speaking of international law one is referring to the rules and the norms of conduct that parties recognise as binding in their relations with other parties. Such rules may prescribe certain actions, or prohibit certain other mode of behaviour or perhaps specify and define the conditions that lead to operationalising of various rights and/or obligations. A large number of scholars of international law have attached the label of "weak" to international law. I totally disagree with this view. It is not so much "weak" as it is limited in it's applications to the full range of existing international problems. One must always remember that from the beginning international law has been the creature of the states, and it continues to be so. The states do not wilfully disregard the precepts of their own creature namely international law, but they have drawn definite boundaries around the areas of disagreement and types of problems they care to have settled through legal procedures. The distinction that states make between justiciable and non justiciable has been drawn on the basis of utility to the tool to them. Usually states refuse to settle problems covering subjects like national honour, independance etc. In short matters covered under the definition of vital interests. This does not mean that the states do not respect international law or that it is "weak" it only means that no state would usually allow
disputes pertaining to its vital interests to be decided by means of
legal procedure. That international law is not "weak" is borne out by
the fact that the compliance of the states to the precepts of international
interests in the area of secondary, is exemplary, for example in the last 100
years, out of the thousands of cases handled through arbitration or
international courts, the instances of non compliance could be counted
literally on one's fingertips - surely an excellent record.

Where then does the view arise that international law is "weak" and
ineffective? It is precisely in connection of those issues that the
states have not been willing to submit to legal settlement. The weakness
of international law is usually discussed almost invariably in connection
with the enforcing of some treaty or convention originally imposed by
coercion. When a treaty is forced upon a state law is made concerning
issues that the state would not under freer conditions consent to it.
The most obvious example is the treaty imposed by a victor on a vanquished
after a war. Such treaties imposed upon defeated states as a rule tend
to be enforced for as long as the victors are in a position to enforce
them. An example of this is the Treaty of Versailles in the hands of
Nazi Germany. There is a classic set of argument and counter arguments
that go on in such cases. While the former victors consider the treaty
as binding the vanquished side follows it only till it must, and gives
it up as soon as it can safely do so without inciting overwhelming sanct-
ions. 9

Treaties of international law are a formalisation of the status quo,
the flexibility inherent in the law is the flexibility confined by the
boundaries of that specific status quo. In the vast majority of the
cases, states find treaties to be of mutual satisfaction because treaties
are after all a way of formalising their relationship at a point of
time. Then there is a case when the states collectively wish to create
a new status quo say in the shape of the I.M.F. or the E.E.C. even in
this case the benefits are mutual and all states are party to the law
willingly. But when a treaty is designed by one state or a group of
states to perpetuate the status quo abhorant to another state or group
of states, whom they can at the moment coerce, the situation is entirely
different. Far from mutual interest in upholding the treaty, in this
case the relationship is that of a jailor and a jailed. When the victor
are confronted with a situation in which an imposed treaty is being challenged they theoretically have three alternatives: they can enforce the treaty if they are capable and willing to do so, or they revise the treaty on the basis of more mutual advantage, or they can passively watch the resurgent power break it's bonds. Thus we find, that international law is not weak except in a restricted sense that it will not by it's mere existence, enforce rules and treaties that effect the vital interests of states but are one sided in their advantage.

The distinction that states make between legal and political problems is therefore an arbitrary one having it's basis on the attitude of the particular state towards the status quo. Where the state is willing to accept the status quo, or is willing to create a new status quo already agreed by all the involved parties, in respect to a given issue it would be prepared to deal with it legally, all issues not falling into this definition ipso facto become political issues, on which the state is willing to deal politically but not legally. Nothing can strengthen international law beyond this point, neither would the states want it to protrude beyond this point. In the meanwhile the states will continue to handle legal problems legally without any enforcement difficulty. For political problems, especially those involving vital interests the main resort will continue to be diplomacy and/or war.10

**New inadequacy in Law**

New inadequacies arise all the time in the field of international law. These arise in part due to the great lag between the necessity for, and the actual development of the rules pertaining to it. Currently for example there is a strong disagreement over the use of nuclear weapons in outer space, limits to a state's territorial waters, rights of passage through straits or canals, issues involving continental shelf, the deep sea bed, the high seas, the polar regions etc. Other problems are regarding expropriation of foreign property by the various governments and the compensation entitlement thereof. The other areas where international law is proving inadequate are questions such as: What should be the status of terrorists/ freedom fighters under the law? Who is responsible for the acts of these people if they do not fall under the authority of one government? Who will differentiate between the hijacking of a plane for private gains and the hijacking for bringing about political change? Are aggrieved countries entitled to ask for the extradition
of such freedom fighters /terrorists? What should be the limits of support for such groups by third parties; or are third parties not entitled to support them? Are governmentally administered reprisals legal? How does one distinguish between political refugees and economic refugees? Is there an international duty to accept a quota of homeless and stateless refugees? Till the international law has answers for such questions it will be considered weak.12

In conclusion, the international system, unlike a national or a provincial one, exists in the absence of a supranational legislature. Customary law and treaty law are substitutes for legislated rules. The difficulties inherent in a decentralised system are clear: states may disagree and thereby delay the evolution of a desperately needed law. In a sense the word "law" is a misnomer in this context. A more appropriate designation would be norms: a set of prescribed rules of conduct which one ought to adhere to, not adhere to them may bring bad conscience, disgrace or even social ostracism. The principal and perhaps the only shortcoming is that the subject desides when it is applicable and when not.

Why is the Law Obeyed?

Since only the states can punish the lawbreaker, why is the law obeyed? A point of immense significance is that it usually is obeyed. The rules and norms of behaviour accepted as binding by the states in their mutual relations are in most instances scrupulously observed. In most of their activities policymakers are very concerned with acting in accordance with recognised legal procedure.

Why is this so? We have already seen that international law originated because of perceived needs, the knowledge that it would be advantageous to all if there were certain accepted modes of operations in selected areas. This is still the most common reason for not violating the law: it is simply to one's benefit to obey.

In addition to specific advantages that may flow from observing certain rules, there are two related considerations. First there is the expectation of reciprocity, that is, the idea that other states will reciprocate by also undertaking certain obligations. It is hoped that this would lead to a situation of mutual self advantage with each party having more to gain than lose by observing the law. The second related aspect is that stability and predictability are enhanced, when actions are
legal factors to be of primary importance in any conflict that might endanger the state's vital interests, i.e., survival, territorial integrity, belief system or governmental economic structure. These types of situations, although in a minority quantitatively, are clearly the most significant in terms of peace and security. This is especially so if the other states involved perceive the question to be of vital interest to them. And because there are no central mechanisms to force the policymakers to consider international law in such situations, legal factors remain of secondary importance in determining policy outcomes where peace and security are heavily involved.

Because policymakers usually prefer not to violate treaty provisions openly but will not let legal considerations inhibit their efforts to achieve fundamental objectives, frequently escape clauses are written into the agreements. In the Non Proliferation Treaty for example, each party has the right to withdraw if it decides that "extraordinary events" related to the Treaty's subject matter have jeopardized its "supreme interests."

Although they have little impact as a constraint or determinant in questions where vital interests involved, however often legal considerations do play some role. Firstly even in such situations policymakers seek to characterise their activity as being in accordance with international law. Sometimes this is not a deliberate manipulation of facts and principles but rather the employment of one of the several possible legitimate interpretations available. As there are no uniform standards in many areas so different interpretations are available. Quite naturally policymakers will tend to interpret things to their own benefit, and quite often they do so sincerely believing that they are not distorting things at all.

Secondly if policymakers cannot make some at least semi-plausible argument to the effect that their policy is in accord with some legitimate interpretation, they may invoke the principle of rebus sic stantibus, a doctrine meaning that the treaty is void or voidable because fundamental circumstances have altered since its inception. Rebus sic stantibus is a well established principle in international law though there is, as one might well expect, considerable disagreement over its appropriate usage.

Thirdly the policymakers may seek to use the law tactically to justify
and support positions already taken. A decision may be made on the basis of capability considerations, for example, and then the policymaker will put together a legal argument to justify the decision. Cases in point would be the 1948-49 Berlin Blockade and the so-called quarantine of Soviet ships during the Cuban Missile Crisis of 1962. Although elaborate legal justifications were developed for American policies there is little evidence to indicate that legal considerations in any way influenced the policymaker's decisions.

It is important to remember that international law is just but one of the factors impinging on the policymakers as they formulate and implement foreign and they would evaluate it in that context. Given the international political environment of decentralised anarchy, and this is a very salient point, it is the parties who determine the law's role and they will do so in terms of their perception of the relative importance and utility to them, both generally as well as in specific cases. In most instances they will act in ways that they sincerely perceive to be legal because it is in their interest to do so, but if it comes to a choice between obeying the law and attaining one's fundamental objectives, the consideration for international law certainly will lose. 14

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