UNIT 6

International Law

Learning Outcome :

Students will be able to:

- trace historical evolution of international law
- explain international law
- differentiate between Public and Private International Law
- understand the sources of international law- Customs, Treaties and ICJ (International Court of Justice) Decisions
- appreciate the role of various international human rights conventions, treaties and agreements
- understand the interplay between international and municipal laws of India
- identify the role of International Court of Justice and International Criminal Court in dispute resolution

A. Introduction

Every state has their own respective laws (domestic laws) which regulate the conduct of its citizens. These laws regulate the private, social, commercial and other activities of individuals. These internal laws (Municipal laws) also help in regulating the conduct and affairs of the state machinery.

But what happens when there is a dispute between two or more state parties? Which body of law governs their conduct? Which jurisdiction is to be applied in case of disputes related to private parties across different jurisdictions? The world requires a framework through which interstate relations can be developed. The answer to these situations lies in International Law.

B. Historical Evolution of International Law

Hugo Grotius

The term '**International Law**' was first coined by the English philosopher, Jeremy Bentham in 1780. The Dutch jurist Hugo Grotius (1583–1645) is considered to be the **founding father of modern international law** and has greatly influenced the development of this field.

Grotius emphasized the freedom of the high seas (1625; *On the Law of War and Peace*), an idea that rapidly gained acceptance amongst northern European powers that were on a mission to explore the world and colonize it.

The origin of international law is embedded in history and can be traced to cooperative agreements between peoples in the ancient Middle East but the essential structure of international law was mapped out during European Renaissance.

(i) International Law vs. Domestic Law

International law is an independent system of law that exists outside the legal orders of particular states. International law differs from domestic (Municipal) legal systems in a number of respects:

- United Nations (UN) General Assembly consists of representatives of around 190 countries. Although it has an outward appearance of a legislature but it has no power to issue binding laws.
- The resolutions passed by UN General Assembly serve merely as recommendations except in certain cases, such as to determine the UN budget, while admitting new members of the UN, and electing new judges to the International Court of Justice (ICJ) along with the Security Council.
- The international court system does not have absolute jurisdiction in international law. In contentious cases, the ICJ's jurisdiction requires the consent of the particular states that are involved.
- Also, there is no international police force or system of law enforcement, and there is no supreme executive authority.
- The UN Security Council may authorize the use of force in specific cases to compel states to comply with its decisions only where there is a prior act or threat of aggression. Any such enforcement action can be vetoed by any of the Security Council's five permanent members (China, France, Russia, the United Kingdom, and the United States). The forces involved must be assembled from member states on an ad hoc basis as there is no standing UN military.

Therefore, international law is a weak law as compared to municipal law. But unlike municipal law, international law functions in a decentralised manner. All States consider themselves independent and sovereign. The rules of conduct that exists between nations are based on customs of hundreds of years, international agreements and treaties. There is common consent of the community of nations for the enforcement of the rules and principles for international conduct.

As per Oppenheim's view, International Law is a true law. But according to Austin's View, International law is not a true law as any rule which is not enacted by any superior or legislative authority, cannot be regarded as a law.

(ii) International Law and International Relations

International law is a distinct part of international relations.

States normally conform to relevant rules and principles of international laws while responding to any international situation, if and when it arises. The states are conscious to not be negatively viewed by the international community.

The rules of international law are based on reciprocity or self-interest. Breach in international rules by a State may result in loss of its credibility and that may affect it in future relations with other states.

For instance, if a State violates a treaty to its advantage, it may induce other states to breach other treaties. This may ultimately cause harm to the state that first violated the treaty.

When international rules and principles are followed by States it creates value of certainty, predictability, and sense of common purpose in international affairs.

Globalization in the 1980's resulted in increase in international and regional organizations both in number and influence. This has resulted in expansion of international law to cover the rights and obligations of international organisations. New international law is now frequently created through

processes that require near-universal consensus.

For instance, in the area of environment, bilateral negotiations have been supplemented and at times been replaced by multilateral ones, transforming the process of individual state consent into community acceptance. This consensus-building process has resulted in various environmental agreements and Law of the Sea treaty (1982).

> The Kyoto Protocol is an international treaty aimed at combating global warming. The Kyoto Protocol was adopted in Kyoto, Japan, in 1997 and took effect in 2005. It called for participating countries to reduce their emissions of greenhouse gases and carbon dioxide emissions.

International law as a system is complex. Although in principle it is 'horizontal,' being founded upon the concept of equality of states, which is one of the basic principles of international law but in reality, some states continue to be more important than others in creating and maintaining international law.

C. What is international law?

Every **country** is referred to a 'state' in International Law.

According to Bentham's classic definition, international law is a collection of rules governing relations between states. This original definition omits two vital elements of modern international law i.e. individuals and international organizations.

International law is also called **law of nations.** International Law is a framework of rules and principles binding the relations between states, governing their conduct amongst themselves and other international entities that are legally recognized and between citizens of other nations. It is a system of treaties and agreements between nations that governs how nations interact with other nations, citizens of other nations, and businesses of other nations**.**

It is a form of law which relies on consent-based governance to a great extent, as states are not ordinarily obliged to abide by it, unless they expressly consent to a particular course of conduct. *Although certain aspects are exceptions to the consent requirement, such as principles of customary international law* or Jus cogens.

> 'Jus cogens' is a latin phrase that means 'compelling law.' It designates norms from which no derogation is permitted by way of particular agreements. Jus cogens are norms of customary international law which are so important, it cannot be changed through treaties.

International Law is therefore categorized into:

a. Public International Law

b. Private International Law

The study of 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 or domestic law of states of different countries where foreign elements are involved.

a. Public International Law

Public International Law is the law that regulates relations between states. Public International law is different from other types of laws because it is concerned with interstate regulation, i.e., it deals in regulating the conduct of one state with another and is not concerned with the relations between private entities (legal and natural persons) and even the domestic laws of any country.

The primary objective of Public International Law is to provide for a framework of rules and regulations which help in fostering stable and organized international relations.

Some key areas where public international law is applicable:			
Peace and security	Human rights	Finance	Airspace
Trade	Intellectual Property	Development	Sea
Weapons	Bio-diversity	Science and security	Fisheries
International Crimes	Climate change	Extradition	Natural resources

Now, the range of subjects concerned with international law have widened considerably.

One of the global international organisation that deals with trade between nations is the World Trade Organisation (WTO).

The World Trade Organization (WTO)

From the early days of the Silk Road to the creation of the General Agreement on Tariffs and Trade (GATT) and the birth of the WTO, trade has played an important role in supporting economic development and promoting peaceful relations among nations.

(https://www.wto.org/english/thewto_e/whatis_e/whatis_e.htm)

The World Trade Organisation (WTO) was established in 1995 and is located in **Geneva, Switzerland**. WTO has 164 members representing 98 percent of the world trade.

The World Trade Organization (WTO) is the only global international organization dealing with the rules of trade between nations. It is an intergovernmental organization that regulates and facilitates international trade. At its heart are the WTO agreements, negotiated and signed by bulk of world's trading nations and ratified in their parliaments. The goal is to help producers of goods and services, exporters, and importers conduct their business.

There are a number of ways of looking at the World Trade Organization. It is an organization for trade opening. It is a forum for governments to negotiate trade agreements. It is a place for them to settle trade disputes. It operates a system of trade rules.

Essentially, the WTO is a place where member governments try to sort out the trade problems, they face with each other.

b. Private International Law

Private International Law, often referred to as '**Conflict of Laws**', is a set of rules and principles that govern interstate interactions and transactions of private parties. It is a body constituted of conventions, model laws, domestic laws of states and secondary legal sources.

Private international law commonly involves issues like:

- which jurisdiction should be permitted to hear the case, and
- the law concerning which Jurisdiction should be applied to the issues in the case.

For example, in marriage laws, there is conflict of laws with respect to marriage related issues between couples belonging to different jurisdictions. The questions about which legal system and norms should apply forms part of private international law.

Public International Law	Private International Law
It is a set of rules which governs the intercourse between nations through determining the rights and obligations of the governments of the nations.	It comprises of certain rules and regulations which are established or agreed upon by private citizens from different nations who enter into transactions and that would govern them if a dispute were to arise.

International bodies harmonizing private laws of different countries:

There are certain international bodies which have been working towards harmonizing private laws of different countries and bringing uniformity in their application.

The bodies include organizations such as the:

- Hague Conference on Private International Law- It is convened by the government of the Netherlands, originates back in 1893, and focuses on developing conventions on a wide array of aspects of private law.
- International Centre on the Settlement of Investment Disputes (ICSID)
- International Institute for Unification of Private Law (UNIDROIT)
- United Nations Commission for International Trade Law (UNCITRAL)-It works towards developing model laws and guides, regarding international trade and commercial laws, including the UNCITRAL Arbitration Rules, and so on.

Some of the international conventions/model laws in the sphere of private international law which have gained more traction in recent times are the:

- United Nations Convention on contracts for the Sale of International Goods (CISG)- It is also referred to as the **Vienna Convention on sale of goods**. It is a multilateral treaty which provides options for avoiding choice of law issues by providing a framework of accepted substantive rules with respect to contract disputes.

  It is considered one of the most influential documents in private international law, and nowadays is deemed to be incorporated into any otherwise applicable domestic laws, unless expressly excluded.
- UNCITRAL Model Law on International Commercial Arbitration-It has provided a framework for domestic laws on international arbitration and is being adopted by an increasing number of countries, with India joining the list in 1996, and
- Geneva Convention on the execution of foreign arbitral awards, and so on.

Class Activity on International law and Current events:

The aim of this activity is to foster an understanding of the importance of international law to day-to-day international events that appear in newspapers. Students will learn from concrete examples of how people's lives are impacted by international law.

- Ask students to bring newspapers. They will look through the newspapers to find at least three articles/issues/stories/photos/words etc. related to international law. For instance, topics could be related to International business deal, Environmental protection, Human rights, War or conflict, Refugees and so on.
- Students will write a summary of the articles/issues/stories/photos/words that they were chosen.

- They can refer to the law, convention, act, or statute that would apply to the issue. Example- An article related to racism can be linked to international law i.e. Convention on the Elimination of all forms of Racial Discrimination (CEDAW). Students can use Wikipedia, Google, or UN.org to find relevant conventions or acts.

No.	Article/Issue/Story/Photo/Word related to following topics	Summary	International law applied
1	Children or youth		
2	International business deal		
3	Environmental protection		
4	Human rights		
5	War or conflict		
6	Refugees		

- Each student will present on any one of the Article/Issue/Story/Photo/Word etc she or he found interesting and identify the international law that applies to that issue. They will also answer following questions:
  - Why some international laws apply to the issue at hand while others might be ignored?
  - How do countries enforce international law in their country, e.g., Canada, India etc?
  - Do all countries enforce international law?
  - Why some countries might choose not to enforce international law?
  - What happens if international law is not applied by the countries?
  - Why is international law needed?
  - Do you think international law helps to resolve the issues it is supposed to?

D. Sources of International Law

A source of law within a domestic legal system is easier to determine. Within the domestic system it is considered as something which is not too difficult a process. One may look at the various legislations or statutes provided for by the legislature and if there is a lacunae in the statute then one may look at the decisions of the domestic courts.

But it is not so easy to pinpoint the sources of international law.

Yet, the most authoritative source of international law is **Article 38(1) of the Statute of the International Court of Justice** which provides that when a court which deals with disputes relating to international law, it shall apply the following:

Article 38(1) of the Statute of the International Court of Justice

1. *The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:*

   a. *international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;*

   b. *international custom, as evidence of a general practice accepted as law;*

   c. *the general principles of law recognized by civilized nations; subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.*

Article 38(1) of the ICJ divides the sources of international law into those of a **primary** and **secondary** nature.

The primary sources, which the Court will consider in its decisions, include conventions (or treaties), customary law, and general principles recognized by civilized nations. Therefore, **Treaties**, **customs**, and **principles of law** are the '**primary sources**' of international law.

Judicial decisions and the **teachings of publicists** are sometimes referred to as 'secondary sources or evidence of international law.

As per Article 38 (1) the **third source** of international law are 'general principles of law' recognized by 'civilized' nations'. General principles of law are used primarily to fill gaps when treaties or customary international law do not provide a rule of decision, although it is unclear what these general principles of law are. They could be general principles of justice, natural law, analogies to private law, principles of comparative law, or general conceptions of international law.

The general principles of law are also found in textbooks, general surveys or manuals, treatises, encyclopedias.

It has been suggested by scholars that as new treaties and customary law develop to address areas of international concern not previously covered, the significance of general principles will fade as these gaps in international law are filled.

Though Article 38(1) is technically limited in application to the International Court of Justice (ICJ), since the function of the court is to decide disputes submitted to it in accordance with international law and all members of the United Nations are ipso facto members, it is widely accepted that this is considered as enumerating the general norm on sources of international law.

> ***Ipso facto*** is a Latin phrase, which means 'by the fact itself', It means that a specific phenomenon is a *direct* consequence, a resultant *effect*, of the action in question.

Although the provisions of the Statute of the ICJ do not suggest any hierarchy, they are generally applied in the following order in case of disputes.

1. Treaties

A Treaty/International Convention/Charters refers to legally binding, written, agreements in which states agree to act in a particular manner as specified in the agreement.

Treaties are often complex documents, particularly with regards to those involving more than two parties as they are binding upon them and are to be entered into in good faith.

Agreements which are between different nations but without the intention of creating binding obligations are not considered treaties, however they may have political effects.

A treaty need not be one consolidated document but may consist of more than one related document.

Treaties may be drafted between states by their leaders or government departments depending on the circumstances.

How to adopt a final draft into a binding treaty?

There are a number of stages that are involved in order to convert a final draft into a binding treaty.

The final text has to be **'adopted' in an international conference by way of two-thirds majority.**

Methods to express consent to be bound by a treaty:

A state may express its consent to be bound by a particular treaty in certain cases, the most common of which are:

Consent by signature

In certain cases, treaties may be given force by way of **signatures of representatives** who have been given the full powers, i.e. authorization in writing from their state to be able to take decisions on its behalf.

Consent by exchange of Instruments

In some scenarios, consent may be recorded by way of **exchanging certain instruments, i.e. documents which contain the terms agreed to by both sides,** when these instruments provide that on such exchange they will be in effect.

Consent by Ratification

Ratification is simply understood to be the act by which a State establishes its consent to be bound by a treaty on the international plane.

This was initiated as a measure to ensure that the **representative who signed a treaty had due authority**, by seeing whether the state agrees to 'ratify' the same.

Ratification differs from country to country but usually requires a sign that the state consents to follow the provisions of the treaty. This could be established by:

- ✓ assent by the President of the State or
- ✓ require a vote of a majority in the legislature

In **multilateral treaties**, involving a number of countries, ratification is usually the most preferred method of expressing assent where one party collects the ratification of the others.

They are generally considered to be the most accepted as they are in a written form and have been explicitly assented to by the states party to the dispute.

2. Customary International Law

The second source of international law is international customs. Along with general principles of law and treaties, custom is considered as the primary source of international law.

According to Article 38(1) of the Statute of the International Court of Justice:

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

a. international custom, as evidence of a general practice accepted as law;

Customary International law consists of rules that come from 'a general practice accepted as law and exists independent of treaty law. **Customary international law** refers to **binding legal rules** that have developed on global or regional levels through **continued practice.**

Customary International law is important in current times when there is armed conflict because it fills gap in treaty law and thus strengthens the protection offered to victims.

From where is an observed custom derived and how?

An observed custom is extremely fluid and could be derived from the:

- ✓ law of nature or
- ✓ mutual consent of states.

Custom is usually derived by sifting through many layers and evidences of:

- ✓ **state practice** and
- ✓ **opinio juris**

opinio juris

Opinio juris is a shortened form of the Latin phrase ***opinio juris sive necessitatis***, which means '**an opinion of law or necessity**. 'It is the States' subjective understanding of their legally binding obligations. Opinio juris is the belief that an action was carried out as a legal obligation.

Opinio juris serves an important function. It prevents generally unwanted general practice from becoming customary law.

Customary international law is comprised of two elements:

(1) consistent and general international practice by states- it is the widespread repetition of similar international acts over time by states (**State practice**) and

(2) a subjective acceptance of the practice as law by the international community - the requirement that the acts must occur out of a sense of obligation (**opinion juris**)

International custom generally refers to a description of State practice, but only such practice as is accepted by the States themselves as legally required. It develops from a general and consistent practice of states followed by them from a sense of legal obligation. Once a certain practice is understood to be customary law, States are obliged to act as the rule of customary international law prescribes.

The test of the existence of a customary rule of law is the extent to which it is observed in the practice and behaviour of states**.**

In nutshell, to determine the existence and content of a rule of particular customary international law, it is necessary to ascertain whether there is a general practice among the states concerned that is accepted by them as law (opinion juris) among themselves.

The ***North Sea Continental Shelf cases*** confirmed that both State practice (the objective element) and opinio juris (the subjective element) are essential pre-requisites for the formation of a customary law rule. This is consistent with Article 38 (1) (b) of the Statute of the ICJ.

North Sea Continental Shelf cases

Germany Vs Denmark & the Netherlands [1969] ICJ 1 (also known as The North Sea Continental Shelf cases) were a series of disputes that came to the International Court of Justice in 1969. This case is regarding claims of three parties with regard to a Continental Shelf in North Sea, wherein both Denmark and Netherlands submitted individual disputes with Germany to the International Court of Justice. The case involved agreements among Denmark, Germany, and the Netherlaends regarding the 'delimitation' of areas, rich in oil and gas, of the continental shelf in the North Sea.

The jurisprudence of the North Sea Continental Shelf Cases sets out the dual requirement for the formation of customary international law: (1) State practice (the objective element) and (2) opinio juris (the subjective element). In these cases, the Court explained the criteria necessary to establish State practice – widespread and representative participation. It highlighted that the practices of those States whose interests were specially affected by the custom were especially relevant in the formation of customary law. It also held that uniform and consistent practice was necessary to demonstrate opinio juris – opinio juris is the belief that State practice amounts to a

legal obligation. The North Sea Continental Self Cases also dispelled the myth that duration of the practice (i.e. the number of years) was an essential factor in forming customary international law.

https://ruwanthikagunaratne.wordpress.com/2014/02/28/north-sea-continental-shelf-cases-summary/

Many other sources have been included to identify and cover more and more customs and practices in the international domain such as:

- Unsigned treaties and
- United Nations declarations.

International customary law is probably the most disputed and discussed source of international law.

For example, it is not clear when a particular State practice becomes a *legally binding* State practice. It is also unclear how one can identify a rule of international custom, or how one can *prove* its existence.

3. International Court of Justice (ICJ) decisions

***Article 59 of the Statute of the ICJ states that* the decision of the Court has no binding force except between the parties and in respect of that particular case.**

The court may have jurisdiction to decide cases in which the parties agree to appear before the court, on their own behest, and agree to be bound by the decision of the ICJ.

Article 59 of the Statute of the ICJ states that decisions of the ICJ have no binding force except on the parties to the dispute, therefore, past decisions of the ICJ are not binding.

A proceeding at ICJ, Hague

However, ICJ does refer to its past opinions when deciding new cases. The ICJ tends to examine its previous decisions, determine which cases should not be applied and rarely departs from the relevant case law.

The court may also be a forum if provided for in a treaty between parties and in certain cases it is compulsory to refer to the court with regards to certain disputes.

The court may also give advisory opinions under Articles 65-68 of the Statute of the ICJ to countries. These are not binding but are merely referrals to the ICJ to understand the point of law on the matter.

Also, Article 38 of the Statute of the International Court of Justice (ICJ) mentions **Judicial decisions** as a '**subsidiary means for the determination of rules of law**'.

There are many who feel a departure from the current system is necessary as these are outdated. However, and for the time being, these are the prevalent sources for the purpose of international law.

E. International Human Rights

International Human Rights pose a variety of questions under the framework of international law. There are various problems related to enforcement and sanctions with regards to human rights.

The Second World War had a profound impact on the development of human rights law as there was a need for a system to give rise to protection of human rights. This led to a wide spurt of activism and literature on the same.

Peace Palace Library

Peace Palace Library is located in The Hague, Netherlands and is one of the oldest libraries dedicated to international law. It has collected international law publications since 1913. The main objective of Peace Palace Library is to service the institutions residing in the Peace Palace, including the International Court of Justice, the Permanent Court of Arbitration, and The Hague Academy of International Law. The library is open to all scholars and students of international law.

Let us look into some of the key conventions and treaties promoting and protecting Human Rights in the international sphere:

- **Article 4** of the **International Covenant on Civil and Political Rights (ICCPR)** states that there are certain rights that are said to be **non-derogable** and constitute a special place in the hierarchy of rights such as:

  the right to life, freedom of thought, prohibition of slavery, etc.

  Also, there are certain rights that have also entered the framework of customary international law like:

  the prohibition of torture, genocide, slavery and the principles of non-discrimination

  These have become **inalienable** rights that do not require any specific treaty to be given effect to.

- One of the most influential documents in this regard is the **Universal Declaration of Human Rights** which deals with various provisions, a few of them being:

  - liberty of a person (Article 3)
  - equality before law (Article 7)
  - prohibitions on torture (Article 5)
  - socio-economic rights such as right to work and equal pay (Article 23)
  - right to social security (Article 25)

While the **Universal Declaration of Human Rights** is not a binding document, per se, there have been many instances where it has been referred to by cases of the International Court of Justice and is an extremely important document for the purpose of international human rights.

- Another such arrangement was **The Vienna Declaration and Programme of Action** (1993). It emphasized that all human rights were universal, indivisible, inter-dependent and interrelated.

- This led to the creation of the **post** of the **UN High Commissioner for Human rights** who would principally be responsible for UN human rights activities. The High Commissioner can make recommendations to other UN bodies and can also coordinate between them.

There are several other **key legislations** and **arrangements** such as the :

- **Convention on the Prevention and Punishment of the Crime of Genocide**

- **The International Convention on the Elimination of All Forms of Racial Discrimination** which read with provisions of the **Universal Declaration of Human Rights** give rise to a host of **enforceable rights** in both treaty and customary international law.

There are various bodies such as the:

- **Commission on Human Rights** which is known as the **Human Rights Council** since 2006. It looks into matters of human rights issues.

The Human Rights Council is continuing the work of the previously set up Commission by broadening its framework by spreading its area over a wider framework.

However, **the Human Rights Council** has faced criticisms on its political selectivity and failure to objectively review the issues in certain countries.

Given the primacy of human rights even in domestic legislatures all over the world, it is almost no surprise that international human rights law is possibly given such a high degree of importance in the world of international law.

What are ergaomnes?

Generally human rights violations are dealt with by the state/country in which they occur. However, there are certain human rights, established under treaty that may constitute *ergaomnes* obligations for the state parties.

This means that there are some violations that are so grave, that any state/ country may take action against such crimes, regardless of whether they occurred in their jurisdiction or not.

All states have a shared interest in elimination of such grave violations.

One of the most empowering features of international human rights law is that it does away with the borders and limitations of a domestic body and allows the international community to also seek an active role to protect the rights of citizens of other countries.

F. International Law & Municipal Law

Can International law be directly applied in the domestic jurisdiction?

The interplay between **municipal** and **international law** is complex.

Some authors believe that **international law** and the **law of the domestic jurisdiction**, that is **municipal law** of the country, do not intersect and are completely different entities which cannot affect or overrule each other. However, in practice it seems that this does not hold true.

Some principles with respect to conflict between international law and domestic law:

There are some principles that are clear as this conflict between international law and domestic law is concerned.

- ✓ Municipal law cannot serve as a defense to breach of international law, i.e. you cannot use a domestic law to justify breach of an international one.
- ✓ Neither can one say that their consent to a treaty has been invalidated by way of a change of its municipal law.
- ✓ Similarly, the International Court of Justice has also stated that lack of domestic legislation cannot be brought up as a defense if there is an international obligation on the state not to do a certain act.
- ✓ There have been various cases on the points that state that international law is prevalent over the domestic law however that does not mean that domestic legislations carry no force.
- ✓ Some international treaties require that countries adopt domestic legislation in line with the international obligations it has already agreed to.

Owing to such requirements there is blurring of distinction between international and municipal law and domestic courts have also started analyzing international obligations of states in domestic disputes.

Application of international law by countries to its jurisdiction:

- ✓ Each country has their own method of dealing with the application of international law to its jurisdiction.
- ✓ The provisions of international law are often used to supplement various propositions of the domestic law when they are both concurrent with each other.
- ✓ However, whenever there is a dispute between international and domestic law, supremacy of either depends mainly on the forum where the case is being contested.
- ✓ International forums generally give preference to treaty law and other international sources whereas
- ✓ Domestic forums give preference to statutes of the jurisdiction.

United Kingdom

Doctrine of transformation

In countries such as the United Kingdom, there is a doctrine of transformation that states that before any international agreement can be considered applicable domestically it must be transformed into municipal law.

This means that the provisions of the treaty need to be transformed into local law by passing a domestic legislation with concurrent provisions as the international obligations.

United States of America

In the United States of America, the position is that customary international law is federal law and if the federal courts in the US determine it to be binding then it's binding on the state courts as well.

However, no act of legislature may be invalidated merely on the basis of violation of customary international law.

The US Supreme court believes that there should be respectful consideration to be given to the interpretation of international treaties however a domestic rule to the contrary would be given supremacy over those provisions.

G. International Law & India

- **Article 51 of the Indian Constitution** specifically states that the State shall endeavor to *'foster respect for international law and treaty obligations in the dealings of organized peoples with one another'*.
- Under **Article 253** of the Constitution of India, the Parliament and the Union of India have the power to implement treaties and can even interfere in the powers of the state government in order to give power to provisions of an international treaty.

Application of international law in India to its jurisdiction:

- ➢ India generally follows that merely affirming a treaty by way of ratifying it by the assent of the executive unless the treaty requires ratification by way of an act of the legislature.

➢ In the landmark ***case of Kesavananda Bharti v. State of Kerala***, it was observed that the court must interpret the provisions of the constitution in light of the Charter of the United Nations.

Evolution of the role of international treaties with relation to the Indian Constitution:

There has been an evolution of the philosophy of the role of international treaties to which India is party to with relation to the Indian Constitution. India has dealt with the interplay of international law as fits the need of the day.

- While any restriction of rights requires the need for an amendment by legislature, enhancing or broadening the scope of such rights is allowed as long as there is nothing to the contrary or similar in domestic law.

  ➢ In the ***case of Magan Bhai Patel v Union of India***, the court held that if a treaty or international agreement restricts the rights of the citizens or modifies the laws of the state, it would be required to have a legislative measure.

  E.g. If India is a party to an international agreement to stop the killing of a species of turtle, it restricts the right to trade of certain fishermen by prohibiting killing of the turtle.

  If this treaty is to be enforced in India, the Indian Parliament needs to pass a domestic legislation regarding prohibition of the killing of such turtle species.

- If no such right is restricted then it does not need to have a legislative measure to enact it or give rise to some weight in domestic law in the treaty.
- It is also very clear of Indian law that international treaties cannot on their own override domestic law.
- Hence, these treaties which are not enabled by the legislature will not have the same force in law if there is a contradictory law provided for.

➢ However, in the ***case of Sheela Barse v Secretary*** Children's Aid Society, the Supreme Court held that India had ratified conventions regarding the protection of children and this placed an obligation on the State Government to implement these principles.

This was a case in which there were no contradictory laws and as they were supplementing the law already in force, the court held that the treaty could be applied directly to Indian law.

➢ The most revolutionary of these cases was the ***case of Vishaka v State of Rajasthan***, in which the Indian courts used the provisions of the Convention on Elimination of all forms of Discrimination against Women, (CEDAW), to create legally binding obligations regarding sexual harassment.

Therefore, India has dealt with the interplay of international law as fits the need of the day.

F. Dispute Resolution

In the domestic scenario, disputes may be resolved by way of various methods by way of application to court, mediation, conciliation or even arbitration.

In international law there may be disputes regarding large number of issues relating to treaties or some basic covenants of international law.

Treaties often employ mediation, arbitration and other such dispute resolution mechanisms to arrive at an agreeable decision.

In the event such disputes arise between states or even between individuals and the state, there are certain institutions and mechanisms in place to resolve such disputes.

International Court of Justice (ICJ) or World Court

The International Court of Justice, also known as the World Court, is the principal judicial organ of the United Nations. It settles legal disputes submitted to it by states in accordance with international law and gives advisory opinions on international legal issues from U.N. bodies and agencies.

In 1946, the General Assembly of the United Nations, enacted the Statute of the ICJ which gave rise to the institution of the International Court of Justice at The Hague, Netherlands.

All members of the UN are party to the statute of the ICJ by default owing to **Article 93 of the United Nations Charter**, and non-members may also become parties under this Article.

The judgment by the ICJ is final, binding on the parties to a case and without appeal.

The ICJ has no enforcement powers, but if states don't comply, the Security Council, the organ of the UN primarily responsible for maintaining peace and security, may take action.

Jurisdiction of ICJ:

The ICJ is thus, one of the primary sources of dispute resolution available with regards to international disputes when parties are agreeable to settle them on their own accord.

The court may have jurisdiction to decide cases in which the parties agree to appear before the court, on their own behest, and agree to be bound by the decision of the ICJ.

The court may also be a forum if provided for in a treaty between parties and in certain cases it is compulsory to refer to the court with regards to certain disputes.

ICJ at Hague

The court may also give advisory opinions under Articles 65-68 of the Statute of the ICJ to countries. These are not binding but are merely referrals to the ICJ to understand the point of law on the matter.

International Criminal Court

The International Criminal Court (ICC) is a tribunal set up through the Rome Statute in 2002 and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern and shall be complementary to national criminal jurisdictions.

The ICC has been setup with the purpose of prosecuting criminals for four major crimes :

- Crimes against Humanity
- Genocide
- War Crimes
- Crime of Aggression

Genocide

Genocide means the deliberate killing of a large number of people from a particular nation or ethnic group with the aim of destroying that nation or group.

The ICC may prosecute criminals for crimes committed in a country which accepts the jurisdiction of the court.

Thus, only if countries agree to submit to the jurisdiction can the ICC take up certain cases in which the person who has committed the crime is a national of the country or if it was committed in the territory of that country.

The cases may be referred by the country directly to the ICC or through the Prosecutor of the ICC, who is the person appointed to try cases on behalf of the ICC.

The ICC has limited jurisdiction over the ICJ with regards to certain issues pertaining to criminal matters listed under the Rome Statute.

The divide is similar to the divide of civil and criminal courts in the domestic context; however, the jurisdiction of the ICC is more restricted than that of ordinary criminal courts.

Other Dispute Resolution Mechanisms

Often the treaties entered into by the States themselves lay down the procedure to be followed in case of a dispute. For instance, the General Agreement on Trade and Tariffs provides for a dispute resolution panel within its own provisions.

Treaties often employ mediation, arbitration and other such dispute resolution mechanisms to arrive at an agreeable decision.

The United Nations has even created its own forum to deal with issues related to investment disputes in association with the World Bank.

These are some of the dispute resolution mechanisms available to resolve international disputes in international law. There are numerous other forums that can be created which are all dependent on agreements between parties and the provisions of the treaties. The ICJ's enabling provisions are also wide enough to deal with most disputes that may arise between member states.

Exercise

Based on your understanding, answer the following questions:

1. Distinguish between Public International Law and Private International Law.
2. What is the role of UN High Commissioner for Human Rights?
3. Explain the various sources of International Law.
4. What happens in case of conflict between a treaty provision and a domestic law?
5. Explain the existing dispute resolution mechanism in International Law.
6. In an international conference, aimed at formulating a resolution on an environment issue between the member countries, Indian representative headed for a consent, subject to approval by Indian Parliament. The Parliament, on considering the matter, refused to give assent and thus the terms of resolution were not implemented in India.
   a. Identify the mode of entering into the treaty opted in the given condition.
   b. Analyze the situation when it would be binding on the Indian representative to give assent to the resolution.

II. Class activities

1. Organize a session of Model United Nations (MUN) in your class.
2. Prepare a report (1000 words) on the relation between International Trade and International Law
3. Emulate a Human Rights Tribunal/ War Tribunal in your class.
4. Find out whether there is any difference between International Humanitarian Law and Human Rights Law.

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