B.A. DEFENCE STUDIES

Year	Subject Title	Sem.	Sub Code
2018 -19 Onwards	**CORE XV: INTERNATIONAL LAW**	VI	18BDS63C

Objective:

The laws that govern war and peace are outlined to the learners in this course.It is bound to create an awareness amongst them about the legality or otherwise of events that happens in the global arena.

Credit: 5

UNIT IINTRODUCTION

1. Definition, basis of International Law
2. Nature, Source and Codification.
3. Relationship between International Law and Local Law

UNIT II INTERNATIONAL LAW& DISPUTES

1. Settlement of International Disputes
2. War, its legal Character and Effects
3. Enemy Character Termination of War and Postiliminium.

UNIT-I

TOPIC-1

DEFINITION AND NATURE OF INTERNATIONAL LAW

This article will be devoted to a discussion of the nature and definition of international law, and will be an application to state conduct of the reasoning already applied to individual con- duct. It has already been pointed out that law, when classified with respect to the external factors determining

conduct, may be divided into the jural conception of the conduct of bodies which are not subject to the restraints of external political power, and the jural conception of the conduct of bodies which are so subject. Independent states have also been distinguished and described as the only bodies in the world whose conduct is not subject to ex- ternal political power. International law, therefore, is that branch of law which relates to the conduct of independent states. In the previous article we have pointed out that independent states are living organisms having certain inherent powers and unrestrained by any exterior political power. The unrestrained exercise of this power would result in anarchy. Each state is in fact restrained by certain factors, and the exercise of re- strained power by a state results in an appreciable amount of international order. Our task now is to discover what those re- straints are and how they may be described and their operation known. It is important for the student of international law clearly to keep in mind that we start with unrestrained power of organisms as a fact, and study the restraints which exist on the exercise of those powerOPI-1 A state has an interest in an object, just as an individual has, when any change in that object will affect the state. Since, how- ever, the activity of a state is confined almost entirely within its own limits by the facts of international life, it follows that the in- terests of a state will be few in .number. Those which may exist are enumerated in tabular form in the note.l An individual inter- est will be subordinate to the collective interest of the state. Thus, an individual has an interest in his own life; the state has an interest in its preservation, and it is better that the state should be preserved and one or more individuals perish than that a few individuals should survive and the state should perish. The extent to which state or individual interests prevail varies in different communities and in the same community at different times, depending on various factors which are immaterial to the present discussion. The interest of a state is unprotected by external political power, but is protected by the factors determin- ing independent state conduct which will next be discussed. The factors determining the conduct of an independent state are easily described, and a brief reference to them will be suffi- cient. There is no political authority external to an independent state, consequently no power which can afford redress for dam- age to a state interest, determine a dispute between two states, or coerce an independent state to perform any particular act. States do, however, observe habitual and uniform conduct in many particulars, to which they are influenced by certain factors, to understand which we must bear in mind that although states are in fact organisms, they are operate act without some one or more human wills determining that act. The behavior of the state will therefore be subject to the same principles as govern the conduct of men, because no man, upon assuming a state office, can divest himself of human attributes and become an impersonal machine. An independent state will be governed in its conduct by-

(A) Self-interest,

(B) Inherent prejudice,

(C) International public opinion,

(D) Custom or precedent,

(E) Pressure from one or more other states, apart from political power.

A state act will be influenced in any given case by these factors in varying degrees, and they may or may not act together. Self-interest will in some cases control and the others will be defied. The force of habit and custom is so great in human affairs that a state will endeavor to show that what is

demanded by self-interest is in accordance with prece-, dent and international public opinion. These factors will be re- ferred to, for convenience, as international factors determining the conduct of independent states.

3 They are of varying force and the views of most of the writers on international law are colored by the emphasis placed on a particular factor to the ex- clusion of the others. The principles of ethics as influencing conduct are excluded from this discussion. These principles, so far as they may be determined and agreed upon are solely the result of a more ad- vanced culture and regard for the interest of others than is common to the average member of the community and are there- fore representative in a small part of public opinion. The opera- tion of these principles is too weak, therefore, to justify the in- clusion of them in the factors which actually operate with effect in international life.

4 The influence of ethics is naturally very strong in theory, as the writers represent the best element in the community, and accordingly we find most of them over-empha- sizing the ethical aspect of the subject and coloring their state- ments of international law with this view so strongly that they generally leave an entirely erroneous impression. There is no universal standard of justice,

5 consequently the opinion of what is just in any particular case will only be the opinion of the writer, and it is clear from a cursory examination of the facts of the international life that the conduct of independent states falls far short of the general standard of justice entertained by even the middle classes of the individuals in the world. Justice will therefore figure in our discussion only as an ideal to be striven for but rarely attained,

6 and totally irrelevant in an inquiry into the jural conception of independent state conduct. The conduct of independent states as determined by these factors forms a body of facts which may be reduced to some semblance of order by analysis, just as in the case of the conduct of individuals. The description of that orderly conduct is re- ferred to as a rule. It is true that the states on particular occa- sions do endeavor to determine what the rule is, that is, find a description of the conduct to be followed, and determine their action accordingly. Among states we find a very large amount of self-conscious action in which the state is voluntarily and con- sciously endeavoring to adjust its conduct to some description which may be obtained of conduct in the past, or to the play of the international factors of conduct as they operate at that par- ticular time.

7 There is in international affairs also an unconscious adjustment of the conduct of each independent state to the inter- ests of other states and the welfare of the community of states as a whole, which adjustment is maintained until the incentive to damage the interest of another state becomes so great that the international factors of conduct are disregarded and an act of damage results. The various states follow certain habitual con- duct from motives of necessity and self-interest; that is, volun- tarily, without any special pressure from another state.8 This conduct exists apart from any description. We have the same difficulty in international relations in separating the rule and the factors. We can see more clearly, since we are dealing with larger bodies, how conduct to a large extent is orderly, and how

the tendency is voluntarily to adhere to an habitual course of conduct unless there is some powerful motive to the contrary. An independent state may have an interest, but it cannot have any potentiality of redress secured by external political power for the simple reason that there is no such

power in existence. A state, therefore, whose interest has been damaged by the conduct of another state, will be able to obtain redress when denied only by setting in motion the external factors influencing the conduct of independent states to which we have already referred. These factors may also be set in motion by a state which has not been damaged, for selfish purposes. There will often be a difference of opinion, as to which there is no power competent to decide, whether in any case there has been a damage to a state interest, or whether the state is proceeding for the purpose of obtaining redress or merely for selfish ends.0 The interest of a state may be damaged by the force of nature, by the act of another state, or by the act of an individual. The independent state thus damaged will seek redress through any one or more of the external factors influencing state conduct as follows: Where the damage is caused by act of an independent state against the independent state itself; where caused by act of a dependent state wholly ex- cluded from international life against the independent state on which it is dependent; if.partially existing in international life against such dependent state to the extent allowed by the inde- pendent state upon which it is dependent. If the damage is caused by a dependent state dependent on the independent state damaged, the redress is a matter of municipal law unless the de- pendent state exists to such an extent in international life as to bring its conduct wholly or partially within the influence of the factors already referred to affecting the conduct of independent states, in which case the redress is wholly or partially under these. If the damage is caused by an individual, a distinction is to be drawn between a member of the state and an alien. If by a member of the state damaged, the redress is a matter of muni- cipal law. If by a member of another state, the redress is against the state of which he is a member in

in the case of a dependent state wholly shut off from interna- tional life. Where the damage is done to a member of the state while within the jurisdiction of another state, the individual will have the redress, if any, afforded by the municipal law of that state, and his own state will have a redress through international factors of conduct against the other state. In international life, therefore, the law is in a condition of self-help, or rather, we should say, international life is in a condition of self-help; that is, each state must act for itself and cannot rely on any superior political power, as the individual can in municipal life. Al- though the state must act for itself, the international factors of conduct in many cases constitute an external force assisting the state. It is therefore not strictly accurate to confine our atten- tion to the act of the state and ignore the other elements, because in many cases the state acting by itself will be unable to secure redress. It appears, therefore, that we have certain bodies and facts concerning those bodies, to wit, their conduct, the external fac- tors determining that conduct, which operate by way of restraint on the inherent power of the state organism, and further, that the conduct so determined may be described in terms of order. Our next task is to define international law, that is, to see how the word "law" is applicable to those facts we have referred to. It is necessary to examine the nature, scope, application and definition of international law, and then dispose of certain subor- dinate topics, some of which are to be distinguished and ex- cluded from the discussion. In defining international law, there- fore, we have to consider the distinction between the conduct and the factors determining that conduct, and further remem- ber that we cannot exclude one or the other of them, but must embrace them all in our definition. International law, therefore, is the conception in terms of order of the conduct of independent states'? as influenced by external and internal factors, from which external factors are excluded the forces of nature and external political power, which we may call the jural conception of the conduct.

The nature of international law and the international system In the following chapters, much will be said about the substance of international law, the method of its creation and the legal persons or 'subjects' who may be gov- erned by it. The purpose of this fi rst chapter is, however, to examine the very nature and quality of this subject called 'international law'. For as long as it has existed, international law has been derided or disregarded by many jurists and legal com- mentators, not always because of their own ideology or the political imperatives of the states of which they are nationals. They have questioned, fi rst, the existence of any set of rules governing inter-state relations; second, its entitlement to be called 'law'; and, third, its effectiveness in controlling states and other international actors in 'real life' situations. In the fi rst two decades of the twenty-fi rst century, this theo- retical rejection of the prescriptive quality of international law by some jurists may appear to have been borne out by the practice of states, groups and individuals who have engaged in internationally 'unlawful' action without even the remotest pos- sibility of their conduct being checked by the international legal system. Whatever the legal merits of the US-led invasions of Iraq and Afghanistan, or the detention of 'terrorist' suspects without trial, or the unhindered resort to indiscriminate violence against civilians by groups based in existing states (with or without the support of another state's government), or the rejection by some of international minimum standards for the protection of the environment, the perception has been that inter- national law is failing in one of its primary purposes – the maintenance of an ordered community where the weak are protected from arbitrary action by the strong. Some commentators have even suggested that the twenty-fi rst century needs to accept a new reality where international law is accepted as a political and moral force, but not a legal discipline . Others would argue that the content of international law should change in order to be less prescriptive and more permissive, especially as the world faces challenges undreamt of when international law fi rst began to be regarded by some as genuinely 'legal' in quality. There is, of course, some truth in these criticisms, but let us not pretend that we are arguing that international law is a perfect legal system. It is not, but neither is the national legal system of any state. Historically, there have been successes and failures for the international legal system, as there are for the national legal systems of all states. The invasion of Kuwait by Iraq in 1990 and the situation in Libya in 2011 produced a signifi cant and lawful response from the international commu- nity, but the United Nations failed in Bosnia, Somalia and Sudan and most recently in Syria in 2012. Likewise, the denial of procedural and substantive rights to those being held in detention by the USA at Guantanamo Bay during the Bush Presidency constituted a violation of the international law of human rights worthy of much

The nature of international law and the international system2criticism, but it pales beside the activities of Pol Pot in Cambodia in the late 1970s or the Rwandan genocide of the 1990s. On the other hand, these episodes can be contrasted with the successful UN-led efforts to bring self-determination and then independence to East Timor in 2002, the groundbreaking establishment and opera- tion of the International Criminal Court responsible for prosecuting individuals for violation of fundamental international human rights, the protection of civilian populations during the Libyan civil war of 2011 and the continuing impact of the International Court of Justice in regulating states' use of the world's oceans and their natural resources. In other words, the story of international law and the inter- national legal system, like so many other legal systems, is one of achievement and

disappointment. So, in much the same way that we would not suggest that the law of the UK is somehow 'not law' because it is currently proving impossible to control cross-border internet crime, it does not necessarily follow that international law should be dismissed as a system of law because there are international actors that seem determined to ignore it. The way in which the international system deals with these high-profi le crises, and the many other less headline-grabbing incidents that occur on a daily basis whenever the members of the international community interact, goes to the heart of the debate about whether 'international law' exists as a system of law . However, to some extent, this debate about the nature of international law is unproductive and perhaps even irrelevant. The most obvious and most frequently used test for judg- ing the 'existence' or 'success' of international law is to compare it with national legal systems such as that operating in the UK or Russia or anywhere at all. National law and its institutions – courts, legislative assemblies and enforcement agencies – are held up as the defi nitive model of what 'the law' and 'a legal system' should be like. Then, because international law sometimes falls short of these 'standards', it is argued that it cannot be regarded as 'true' law. Yet, it is not at all clear why any form of national law should be regarded as the appropriate standard for judging inter- national law, especially since the rationale of the former is fundamentally different from that of the latter. National law is concerned primarily with the legal rights and duties of legal persons (individuals and companies) within a body politic – the state or similar territorial entity. This 'law' commonly is derived from a legal superior (e.g. a parliament or person with legislative power), recognised as legally competent by the society to whom the law is addressed (e.g. in a constitution), and in situa- tions where the governing power has both the authority and practical competence to make and enforce that law. International law, at least as originally conceived, is different. It is concerned with the rights and duties of the states themselves. In their relations with each other, it is neither likely nor desirable that a relationship of legal superiority exists. States are legal equals and the legal system which regulates their actions between themselves must refl ect this. Such a legal system must facilitate the interaction of these legal equals rather than control or compel them in a poor imitation of the control and compulsion that national law exerts over its subjects. Of course, as international law develops and matures it may come to encompass the legal relations of non-state entities, such as 'peoples', territories, international organisations (governmental and non-governmental), individuals or multinational companies, and it must then develop institutions and procedures which imitate in part the functions of the institutions of national legal systems. Indeed, the re-casting of international law as a system based less on state sovereignty and more.

The nature of international law and the international system 3on individual liberty is an aim of many contemporary international lawyers and there is no doubt that very great strides have been made in this direction in recent years. The establishment of the International Criminal Court is perhaps the most powerful evidence of this development. However, whatever we might hope for in the future for international law (see section 1.7), it is crucial to remember that at the very heart of the system lies a set of rules designed to regulate states' conduct with each other, and it is this central fact that makes detailed analogies with national law misleading and inappropriate.

TOPIC-2

Sources of International LawThe main sources of international law are treaty law, international customary law and general principles of law recognised by civilised nations.Treaty lawTreaties and Conventions are written agreements that states willingly sign and ratify and as such are obliged to

follow. Such agreements, which are also called statutes or protocols, govern the mutual relations between states. They are, however, only binding on those states that have signed and also ratified the particular treaty. The Vienna Convention of the Law of Treaties of 1969, sets out the fundamental legal rules relating to treaties. The Vienna Convention defines a treaty, identifies who has the capacity to conclude a treaty, and outlines treaty interpretation, disputes, and reservations.The basis of treaty law is 'pacta sunt servanda', which means that agreements must be honoured and adhered to. Many states are involved in the process of drafting a treaty, which often includes stark disagreement on the scope and content of the agreement. In order to increase the number of signatories and ratifications of a treaty, and hence global order, international law does allow for states to limit the full application of a treaty, or clarify their specific understanding of the legal content. This is done through reservations, declarations and derogations.

Reservations are defined by the Vienna Convention as:

A unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State. (Article 2 (1)(d)) Only specified reservations are permitted and they cannot undermine the object and purpose of the Treaty. For more information on treaty reservations see the website of the International Law Commission. Declarations, unlike reservations, do not affect legal obligations, but are often made when a State expresses its consent to be bound by a specific treaty. The State uses the declaration to explain or clarify its understanding of particular aspects of the treaty text. For examples see the reservations and declarations made to the Fourth Geneva Convention. Some treaties, especially human rights treaties, provide for a derogations system, which allow for a state party to temporally suspend or limit their legal obligations in exceptional circumstances, for example during armed conflict or national emergency. For example, the freedom of assembly may be limited during times of armed conflict. However, some rights can never be derogated from under any circumstances, notably the prohibition on torture, inhumane and degrading treatment. For more on derogations and human rights law see the website of the Rule of Law in Armed Conflict Project. It is important to note that international humanitarian law (IHL) does not have a system of derogations, as it is a body of law specifically designed to provide minimum protection during armed conflict.

Customary international law

Customary international law is made up of rules that derive from "a general practice accepted as law". Customary international law is comprised of all the written or unwritten rules that form part of the general international concept of justice.Unlike treaty law, which is only applicable to those states that are parties to the particular agreement, customary law is binding upon all states, regardless of whether they have ratified a treaty. Unlike treaty law, customary international law is limited in that it is not codified in a clear and accessible format and the content of the rules is generally less specific that what you may find in a treaty. However, as a source of IHL, customary international law is of fundamental importance in armed conflict due to the limited protections afforded to internal conflicts by treaty law and the lack of ratification of key treaties. Customary international law exists independently from treaty law and in 2006 the Independent Commission of the Red Cross (ICRC) published a collection of the rules of IHL considered to be customary in nature. They identified 161 Rules of customary international law.

How does a rule become customary international law?

When states respect certain rules consistently in their international and internal relations, with legal intentions, these practices become accepted by the international community as applicable rules of customary international law. There are two criteria for identifying a rule as part of customary international law: state practice (usus) and legal nature of that practice. State practice (usus) - Customary law is confirmed through the behaviour of states (objective criteria), manifested through their official statements and actions. Legal nature of practice (Opino Juris) is the expressed opinion of states, individually or collectively, that their actions have a legal and not a mere policy basis.In short, customary international law is based on consistent actions by the majority of the international community. Examples of customary international law are the prohibition on the arbitrary deprivation of life, the prohibition on torture, and the rule that civilians and civilian objects cannot be the subject of direct attacks during armed conflict.

UNIT-I

TOPIC-3

The Difference between International Law and National Law The definition of international law centers on the word “inter,” which means “between,” as opposed to “intra,” which means “within.” So, literally, “international law” is defined as “law between nations (States),” which stem from agreements, embodied in a treaty, or customs that is recognized by all nations. According to Article 38 of the Statute of the International Court of Justice, sources of international law, in order of precedence, are: (a) international conventions (treaties); (b) international custom, as evidence of a general practice accepted as law; (c) the general principles of law recognized by civilized nations; and (d) judicial decision and the teachings of the most highly qualified publicists of the various nations.National law, which is often referred to as domestic law, are those laws that exist “within” a particular nation (State). National laws are also recognized as the expression of the State itself, since it emanates from the local authority, which could be the law making institution, such as the United States Congress or the French Parliament. In some States, called States with a common law tradition, laws could also come from decisions made by judges, which is also called case law. Other States, called States with a civil law tradition, do not recognize judge made law, but only laws enacted by the legislature.In 1936, the United States Supreme Court explained the difference between the two laws. In particular, the case centered on a joint resolution passed by the Congress on May 28, 1934, that prohibited the sale of arms and munitions of war in the United States to Bolivia, and a proclamation by the President on the same day that established an embargo in order to carry out the joint resolution. The defendant, Curtiss-Wright Export Corporation, was indicted for violating the joint resolution. In United States v. Curtiss-Wright Export Corporation, the defendant was alleged to have sold fifteen machine guns headed to Bolivia in violation of the joint resolution. Federal legislation includes bills and joint resolutions that are signed by the United States President and made into law. As part of its decision, the Supreme Court needed to distinguish between the joint resolution, being a Congressional law, and the power of the President under international law. The Supreme Court stated, “Neither the Constitution nor the laws passed in pursuance of it have any force in foreign territory unless in respect of our own citizens, and operations of the nation in such territory must be governed by treaties, international understandings and compacts, and the principles of international law.”In The Appollon, the Supreme Court also concluded, “The laws of no

nation can justly extend beyond its own territories except so far as regards is own citizens. They can have no force to control the sovereignty or rights of any other nation within its own jurisdiction." In other words, Congressional legislation has no effect beyond the territorial borders of the United States, but when the United States operates in a foreign State it is bound by international laws. Legislation of every independent State, to include the United States Congress, is not a source of international law, but rather a source of national law of the State whose legislature enacted it. In The Lotus case, the international court stated, "Now the first and foremost restriction imposed by international law upon a State is that—failing the existence of a permissive rule to the contrary—it may not exercise its power in any form in the territory of another State [Lotus, PCIJ, ser. A no. 10, 18 (1927)]."After two failed attempts to acquire Hawai'i by a treaty, which is international law, from an insurgency established by the United States diplomat on January 17, 1893, and admitted by President Grover Cleveland to be unlawful, the United States Congress enacted a joint resolution "purporting" to annex the Hawaiian Islands on July 6, 1898, and President William McKinley signed it into United States law the following day. The President and Congress stated it was a military necessity to annex the Hawaiian Islands during the Spanish-American War in order to protect the west coast of the United States from foreign invasion.The joint resolution was introduced as House Resolution no. 259 on May 4, 1898, after the Senate could not garner enough votes to ratify a so-called treaty of annexation. During the debate in the Senate, a list of Senators rebuked the theory that a joint resolution has the effect of annexing a foreign territory.Sen Augustus BaconSenator Augustus Bacon, stated, "The proposition which I propose to discuss is that a measure which provides for the annexation of foreign territory is necessarily, essentially, the subject matter of a treaty, and that the assumption of the House of Representatives in the passage of the bill and the proposition on the part of the Foreign Relations Committee that the Senate shall pass the bill, is utterly without warrant in the Constitution [31 Cong. Rec. 6145 (June 20, 1898)]." ALLEN,_William_VincentSenator William Allen stated, "A Joint Resolution if passed becomes a statute law. It has no other or greater force. It is the same as if it would be if it were entitled 'an act' instead of 'A Joint Resolution.' That is its legal classification. It is therefore impossible for the Government of the United States to reach across its boundary into the dominion of another government and annex that government or persons or property therein. But the United States may do so under the treaty making power [31 Cong. Rec. 6636 (July 4, 1898)]." Thomas_B._TurleySenator Thomas Turley stated, "The Joint Resolution itself, it is admitted, amounts to nothing so far as carrying any effective force is concerned. It does not bring that country within our boundaries. It does not consummate itself [31 Cong. Rec. 6339 (June 25, 1898)]."In a speech in the Senate where the Senators knew that the 1897 treaty was not ratified, Senator Stephen White stated, "Will anyone Sen Stephen Whitespeak to me of a 'treaty' when we are confronted with a mere proposition negotiated between the plenipotentiaries of two countries and ungratified by a tribunal—this Senate—whose concurrence is necessary? There is no treaty; no one can reasonably aver that there is a treaty. No treaty can exist unless it has attached to it not merely acquiescence of those from whom it emanates as a proposal. It must be accepted—joined in by the other party. This has not been done. There is therefore, no treaty [31 Cong. Rec. Appendix, 591 (June 21, 1898)]."Senator Allen also rebuked that the joint resolution was a contract or agreement with the so-called Republic of Hawai'i. He stated, "Whenever it becomes necessary to enter into any sort of compact or agreement with a foreign power, we cannot proceed by legislation to make that contract [31 Cong. Rec. 6636 (July 4, 1898)]."According to Westel Willoughby, a United States constitutional scholar, "The constitutionality of the annexation of Hawaii, by a simple legislative act, was strenuously

contested at the time both in Congress and by the press. The right to annex by treaty was not denied, but it was denied that this might be done by a simple legislative act…Only by means of treaties, it was asserted, can the relations between States be governed, for a legislative act is necessarily without extraterritorial force—confined in its operation to the territory of the State by whose legislature it is enacted."years later, in 1988, the United States Attorney General reviewed these Congressional records and in a legal opinion stated, "Notwithstanding these constitutional objections, Congress approved the joint resolution and President McKinley signed the measure in 1898. Nevertheless, whether this action demonstrates the constitutional power of Congress to acquire territory is certainly questionable." The Attorney General then concluded, "It is therefore unclear which constitutional power Congress exercised when it acquired Hawaii by joint resolution."Hawai'i was never a part of the United States, and has been under an illegal and prolonged occupation since the Spanish-American War.