

# **Public International Law**

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# **Chapter One**

## **Introduction to International Law**

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- Definition of International Law
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- Definition of Sovereignty and Its History
- The Erosion of State Sovereignty

# What is Public International Law?

- To start simply, *public international law* is the law that governs inter-State relations.
- Shortly, it is a law that govern the various relationships between or among states.

(Ctd...)

- Moreover, you may think of International Law as the law that applies to ***international actions***, whether committed by States, international organizations, or even individuals.

(Ctd...)

- As **J.L. Brierly** puts it in his celebrated book, (The Law of Nations, 1963) international law is *“the body of rules and principles of action which are binding upon civilized states in their relations with one another.”*

# ATTENTION!

- Discuss the differences between the *Classic* (traditional) and *Contemporary* definitions of International Law.

# ***Public International Vs. Private International Law***

- There is some confusion between Public International Law and Private International Law (Conflict of Law).
- Let us clear away any misunderstandings about private and public international law.

(Ctd...)

- Private international law is more properly and accurately called *conflict of laws*.
- It is the body of rules of the domestic law of a state which applies when a legal issue contains *a foreign element*.
- This law decide whether a domestic court should apply foreign law or cede jurisdiction to a foreign court.

(Ctd...)

- Example- Whether the law of Ethiopia or Kenya is more appropriate for a private lawsuit arising out of a contract entered into by two Kenyans living in Ethiopia?
- This issue is addressed by private international law/conflict of law.

(Ctd...)

- But ***public international law*** is a law that governs inter-state relationship.
- Public international law involves ***a super-legal system*** that operates between States and exists separate from domestic laws.
- It is not the product of any domestic legal system.

(Ctd...)

- One thing that you should know is that International laws are not written down in one book like the Civil Code or Criminal Law of Ethiopia.
- There is *no international government* that has the authority to pass/make/codify such international law.

(Ctd...)

- Rather, international laws are the *byproduct of actions*- the actions of *States* and other *international actors* like IO's.
- If the majority of powerful States in the world decided to cancel all their international commitments and obligations, then *international law would cease to exist*.

(Ctd...)

- *However this is not the case in reality.*
- States are bound together by ***goodwill*** and ***mutual interest***.
- The point here is that international laws depend almost entirely on the States that create these laws.
- For this reason, public international law has a ***“political aspect”***.

(Ctd...)

- The rules in international law are built on *shifting ground*; the rules change form as the ground underneath them moves, as nations push up against one another and attempt to negotiate for a better position.

(Ctd...)

- For instance, imagine the impact of *war* on treaties entered between two countries.
- Also, consider the relationship between a *powerful and weak state*.

# Is International Law Really a “Law”?

- Unfortunately, this question is still being asked.
- The answer depends on *what is meant by law*.
- For instance, many countries commit a flagrant breach of international law.
- International law has no ready sanction for its breach.

(Ctd...)

- Because, there is no international police force or army that can immediately step in.
- As a result of this, international law is often perceived as not really law.
- **H. L. A. Hart** argued, “law derives its strength from ***acceptance by the society*** that its rules are binding, ***not from its enforceability***”.
- So, International law is a law.

# Conceptual Requirements

- There are certain basic concepts that you should know to understand international law.
- Firstly, you should know *what a treaty is*.

# Treaties

- You may think of a treaty as a “source” of international law generally.
- You may also suggest that treaties are something that codify international law.
- But, ***most treaties are not written to codify generally applicable international law.***

(Ctd...)

- Rather, most treaties are just like contracts.
- Most treaties are agreements in which State parties give up something of value in exchange for something else.
- **Only state parties** to the treaty are bound by the treaty.
- **Non signatory states** to the treaty are not bound by the treaty.

(Ctd...)

- That is why we say treaties are **not generally applicable laws** in international law.
- However, there are some treaties with a universal acceptance across the world.
- To sum up, ***treaties are agreements*** between two or more State parties.
- At the same time, ***treaties are sources*** of PIL.
- **For example**, Assume two States go to war over a border.

(Ctd...)

- At the end of the war, they negotiate a settlement to decide the border.
- The settlement will be in the form of a **treaty** between the two States.
- Therefore, this border treaty between the two states can be considered as an *agreement* between the two states.
- In addition, this specific treaty constitute a *source* of international law.

# International Custom

- Secondly, “***International custom***” is another source of international law that you should know about.
- Unlike treaties, ***international custom is almost always generally applicable.***
- That is to mean, customs are rules that **apply to all States in the world.**

(Ctd...)

- Customs are not the product of express rulemaking by States (like treaties) but rather ***they are created out of the patterns of State behavior.***
- They are the result of persistent and repeated *state practices* for a fairly long period of time.

(Ctd...)

Example:

- If all States give **protection to foreign embassies as a matter of right**, this act of protecting such embassies would become an *international custom* and thus an *international law* binding each and every state in the world.

(Ctd...)

- ❑ So, **Treaty** and **custom** are the source of PIL.
- ❑ In addition, **general principles of law**, **Judicial decisions** and **teachings of qualified publicist** are also sources of international law.
- ❑ Read **Article 38** of the ICJ Statute for further clarifications.

# **IL's applied at the international level and IL's in domestic courts**

- Thirdly, you should know the difference between:

- 1. International laws applied at the international level &**
- 2. International laws applied in domestic courts.**

# **IL's applied at the international level**

- A state in an international court generally may not use its domestic laws as an excuse or justification to alter its international obligations.
- The domestic laws of Ethiopia – including the FDRE Constitution – are not relevant in deciding Ethiopia's international obligations in disputes before international tribunals.

(Ctd...)

- **Example**- If Egypt brings a suit against Ethiopia in the International Court of Justice concerning Ethiopia's Great Renaissance Dam on Nile River, Ethiopia cannot refer to its constitution to support its arguments.
- **REASON**- *domestic laws are not sources of International Law.*

# IL's applied in Domestic Courts

- Domestic courts often refer to treaties (and international customs) when deciding disputes between the individual litigants before them.
- The Constitution of the FDRE incorporates international treaties into the domestic law of Ethiopia as “***an integral part of the law of the land.***” Article 9(4) of the Constitution.

(Ctd...)

- **Example**- Assume dispute arises between the one foreign diplomat and Ethiopian officials at the Ethiopian airport when the bag of a foreign diplomat was searched.
- When dealing with a domestic case involving the search of a diplomat's bags at the Airport, an Ethiopian court may refer to international treaties on diplomatic immunity, as well as domestic laws, for authority.

(Ctd...)

- What if there is a contradiction between International treaties to which Ethiopia is a party and Ethiopia's domestic laws?
- **Example-** Assume there is a conflict between the domestic laws of Ethiopia (Say, Proclamation) and International Treaty to which Ethiopia is a signatory.
- **Which rule will prevail?**

(Ctd...)

- In fact, it is possible for the domestic court to give priority to the domestic rule and, in effect, it is the violation of international obligation that Ethiopia owes to some other State.
- Such a decision by a domestic court would be a valid decision for Ethiopia and, at the same time, it is a violation of international law.

# **The Concept of State Sovereignty**

**A. Definition of Sovereignty and its History**

**B. The Historical Background of State Sovereignty**

**C. The Erosion of State sovereignty**

**D. Theories of state behavior**

# **The Concept of State Sovereignty**

## **A. Definition of Sovereignty and its History**

- A State's sovereignty is its independence.
- The word "sovereign" implies some ultimate authority, a master with no master above someone, a free and autonomous entity.
- Under International law, all states are sovereign.

...Ctd

- The concept of State sovereignty has two core elements.
- First, the State has exclusive control over its territory and its internal affairs.
- Other States cannot go into Ethiopian territory without Ethiopia's permission.
- This is called the concept of "Internal Sovereignty"

...Ctd

- Second, States are autonomous entities and, in principle, cannot be bound to an obligation without their consent.
- One state cannot coerce the other in international relations and dealings.
- Treaties are not imposed on countries but rather entered into upon by their free consent.
- This is called “External Sovereignty”.

...Ctd

- If States are truly independent of one another, then their relations must be based on their *free consent*.
- A treaty is binding on a State only if that State *agrees* to be bound by it.
- This is the central essence of External Sovereignty.

...Ctd

## Implications of Sovereignty

- The concept of State sovereignty has many implications for inter-state relations.
- The first implication is that *the State must speak with one voice at the international level.*
- Other States *are not supposed to engage in dealings with sub-state groups at all.*

...Ctd

- The second implication is that *other States should not interfere in internal matters of a sovereign State* like the type of government a State adopts – whether monarchical, democratic, socialist, or the way a State treats its citizens.
- Therefore, states cannot interfere in internal matter of other states.

...Ctd

- In fact, State sovereignty is an *international custom*, established through the behavior of States.
- It is *a custom so fundamental* that it is not necessary to prove it when arguing before an international court.

- Though it is customary law, Sovereignty is often confirmed/reaffirmed in various international and regional treaties.
- **For example**, the UN Charter states in **Article 2, Section 7**: “Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state.”

- Thus, the UN cannot intervene in internal matters of member states.
- This is an affirmation of the first aspect of sovereignty, that a State should have exclusive control over its internal affairs.
- **QUESTION- IS THERE ANY EXCEPTION BY WHICH THE UN CAN INTERVENE IN INTERNAL AFFAIRS OF ITS MEMBER STATES?**

- **SEE** article 2(7) and Chapter 7 of the UN Charter.
- In principle, the UN cannot intervene in internal affairs of member states.
- But there are exceptional situations by which UN will intervene in internal matters of states.
- What are these exceptions?

## **Chapter 7- Article 39 of the UN Charter**

- The Security Council shall determine the existence of any *threat to the peace, breach of the peace, or act of aggression* and shall make recommendations, or decide what measures shall be taken ....., to maintain or restore *international peace and security*.

- Therefore, if the act of any member state amounts to threat to the peace, breach of the peace, or if any state commits an act of aggression, the UN will intervene to restore international peace and order.
- Without these grounds, the UN cannot interfere in the internal affairs of the member states.

- In addition to the UN Charter, another expression of State sovereignty is found in *the UN General Assembly Resolution adopted in 1970*.
- This resolution is called ***“Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States”***.

...Ctd

- *This Declaration on Principles of International Law Concerning Friendly Relations* dictates that:
  - ❑ *“No state or group of states has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other state.*

...Ctd

- Moreover, it dictates that, *“Any armed intervention and all other forms of interference or attempted threats against the personality of the state or against its political, economic and cultural elements are in violation of international law.”*

## B. The Historical Background of State Sovereignty

- *State sovereignty* and the modern *nation-state* really came into being in 1648 with the adoption of ***Treaty of Westphalia*** that ended the 30 Years War in Europe.
- The Treaty of Westphalia is also called *Peace of Westphalia*.

...Ctd

- The War arose in part out of tensions between Catholics and Protestants countries between and among several European states.
- **The Treaty of Westphalia:**
  - I. 1<sup>st</sup>, It recognized independent territorial States and
  - II. 2<sup>nd</sup>, It gave State governments exclusive authority to deal with their internal affairs.

...Ctd

- This marked the birth of the modern concept of sovereignty (Internal Sovereignty).
- As a result of the Westphalia system, states are considered as sovereign.
- Since then, States exercised comprehensive, supreme, unqualified and exclusive control over its designated territorial domain.

...Ctd

- So, is state sovereignty then a Euro-centric doctrine?
- However, the concept of External Sovereignty is relatively a recent development in International Law.

## C. The Erosion of State Sovereignty

- Sovereignty is customary law which is affirmed by many international legal instruments.
- According to the concept of Sovereignty, *States are bound by the rules which they had accepted and consented.*
- In principle, this is true. But the reality is something different.

...Ctd

- Today, owing to social interdependence and to the predominance of the general interest, states are bound by many rules which have not been ordered by their will.
- This is called ***“The Erosion of State Sovereignty”***.
- Now a days, states are not absolutely sovereign and free like the previous decades.

...Ctd

- The sovereignty of states is ***being eroded and minimized by various factors*** in contemporary international law.
- Now a days, many states are bound by many rules which have not been ordered by their will and consent.

...Ctd

- Sovereignty of states has been eroded by **international laws** and **international bodies**.
- These international laws and international organizations **restrict the sovereignty of States** from the outside.

- **For instance, International organizations** like the International Criminal Court (ICC) threatens and erodes state sovereignty.
- The ICC asserts jurisdiction over citizens of states that have not ratified the treaty. This threatens countries sovereignty.
- USA is not a party to the International Criminal Court (ICC).

...Ctd

- **International laws** also threatens and erodes state sovereignty.
- **Imagine how you might raise a State sovereignty argument in an international case.**
- **See the following Example:**

...Ctd

- **EXAMPLE** - Let us say that Egypt is trying to prevent Ethiopia from building a hydro-electric dam on the Nile river before international court (ICJ).
- **As representative for Ethiopia,** what is your answer? (support your answer by the concept of state sovereignty)

**The Answer is:**

- According to the principle of State sovereignty, the **Ethiopian government** *has exclusive control over its own territory & resources.*
- Therefore it is ***“Ethiopia’s sovereign discretion whether to build the dam or not.”***
- We can do what ever we want on our resource.

...Ctd

- **Egypt** may assert various ***treaty rights to Nile river.***
- Importantly, **Egypt** will rely on the famous international customary law which is called “**No Harm Rule**”.
- According to this **custom**, Ethiopia can use its water resources BUT it can not bring harm to downstream neighbors.

...Ctd

- So, from this point we can understand that the sovereignty of Ethiopia on its resource is being eroded by **international laws** as well as **customs**.

CTD...

# **What are the Factors for the Erosion of State Sovereignty?**

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***1. Globalization- (A rapidly broadening and deepening global economic interdependence among states)***

- The paradigm example of a surrender of state sovereignty in the economic arena is the European Union.

...Ctd

- Today, EU is moving almost toward deeper social and political union, (only some states resisting).
- National currency and coinage undergo a radical transformation within the Euro Monetary Area.
- For instance, French cannot print its currency.

...Ctd

- So, European countries are surrendering their absolute sovereignty to the EU.
- Can you imagine the future **United States of Africa** with one national currency, common border and a united army?

## **2. International organizations**

- IOs have also become enormously influential in global politics.
- Membership in an international organization, such as UN, and EU, automatically means that the joining state voluntarily waives a certain degree of sovereignty.

...Ctd

- For example-
  - ❑ The WTO System,
  - ❑ The World Intellectual Property Organization (WIPO)
  - ❑ The EU
  - ❑ The ICC
  - ❑ The G-8, etc...
- All of these IOs poses a threat to sovereignty.

### **3- Universally recognized basic human rights**

- A state forfeits its claims of sovereignty if it fails to treat its citizens according to international standards of human rights.
- For instance, if a state commits the crime of genocide, war crime and crime against humanity, the international community will intervene.

...Ctd

- The issue of *humanitarian intervention* has been of rising importance in the last fifteen years.
- This has given rise to the notion of *conditional sovereignty/qualified sovereignty*.

## **4- Limits on sovereignty derived from the coexistence of sovereign states**

- Here the reason for the erosion of state sovereignty is the need for *peaceful coexistence among nations*.
- Accordingly, *a state should not carry out activities on its territory which cause substantial damage to the territory of other states.*

# Theories of State Behaviour

- It has been noted that *most States obey most international laws most of the time.*
- Certainly it is true that most international laws are obeyed by states most of the time.
- The State is an aggregate of State officials, and it does not obey the law because it has to obey the law but rather because it is in its *self-interest* to do so at any given moment.

...CTD

- In fact, as mentioned already, there is *no central body* in international relations with the ability to enforce international obligations – especially not against powerful States.
- If this is true, then *it is unlikely* that *the fear of punishment* prevents States from breaking international obligations, and again *unlikely* that *a concern with legality* really motivates State officials to follow international norms.

- **So, what motivates states to respect IL?**
- The main problem with any *theory of State behavior* is that it is difficult to define what the controlling interests of the State are.
- *What is the State's self-interest?*
- How do we connect the *individual interests of State officials* with the *interests of the State*?
- Are we talking about *long-term interests* or *short-term interests*?

# Example

- The relations between the two states (let us say State A and B) at any time can be described as a set of rules.
- **Consider a border between A and B.**
- *The border is a rule* that delineates the territory of each state, where it is understood that neither state can send individuals or objects across the border without the permission of the other state.
- *Territorial borders* are generally thought to be constituted and governed by international law.

- **Assume that states A and B respect the border.**
- The theory of international law posits that one of four things might explain this behavioral regularity.

**1.** *First, it is possible that neither of the two states has an interest in projecting power across the border.*

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- State A does not seek resources in state B's territory.
- State A would not seek them even if B were unable to resist encroachment.
- State B has the same attitude to state A.
- When a pattern of behavior – *here, not violating the border* – results from each state acting in its self-interest without any regard to the action of the other state, we call it a **coincidence of interest.**

- There is a **Second possible explanation** for the border.
- *State A might be indifferent* between one border and another border
- The *additional territory might benefit* state A, but *it would also bring with it costs*.
- *State B has the same set of interests and capacities.*

- So the two states can plan accordingly and avoid conflict.
- This state of affairs is called **coordination**.
- In cases of coordination, *states receive higher payoffs if they engage in identical or symmetrical actions than if they do not.*
- For instance, all parties do better if they *coordinate on driving on the right, or driving on the left*, than if they choose different actions.

...CTD

- A third possible explanation for the border is **cooperation.**
- *States A and B would each benefit by having some of the other's territory, all things being equal.*
- But each knows that if it tried to obtain more territory, *the other state would resist, and a costly breakdown in relations, and possibly war, would result, making both states worse off.*

...CTD

- The border is maintained by mutual threats to retaliate if the other state violates the border.
- In such cases of cooperation, *states reciprocally refrain from activities that would otherwise be in their immediate self-interest in order to reap larger medium- or long-term benefits.*

- **The final possibility is coercion.**
- State A is satisfied with the existing border, but state B seeks to expand its territory at A's expense.
- *If B is sufficiently powerful, it can dictate the new border. Because state A is weaker and state B benefits from the extra territory whether or not state A resists, state A yields (either before or after military conflict) and a new border is created.*

...CTD

- *Other states might or might not object: they also might benefit from the new border or be powerless to resist it.*
- Coercion results when a powerful state (or coalition of states with convergent interests) forces weaker states to engage in acts that are contrary to their interests (defined independently of the coercion).