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USA STATE PRACTICE AND TREATY LAW

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ABSTRACT

Customary practices are the basic values and needs of society. Customs are being accepted through the steps that a state takes as a sense of legal obligation. International law is changed through the evolving regimes of treaties and also through various kinds of norms that are assumed by a state which is deemed as the law governs emerging issues. When the interpretation of the treaty is observed, the history of the treaty, parties adopting practical construction and the negotiations are also included. There are various treaty aids that are accepted both internationally and domestically. International law in US domestic law was used in a specific context. A state comprises of the government department and a number of officials; it is not a living entity. State practice is how the basis of customary law is formed according to the behavior of states, but what it does can be acquired from various sources. The traditional doctrine of customary international law arises from "general and consistent practice of state followed by them from a sense of legal obligation". Once the position of USA's status is determined with regard to international law doctrine and for interpreting constitutional law and using it as persuasive authority. It should be observed that the position is not binding. In relation to Conditions added by the USA to treaty practices, there has been much work done with regard to examining the practice of treaty and its use of reservation. Direct customary law source examination is avoided by the court and even the courts can be open to binding agreements of international law.

Keywords: International Law, Treaty, State practice, Customary Law, USAs position

INTRODUCTION

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There are mainly two sources from which international law is derived. They are customary practices and international agreements. International agreements can be entered by means of executive agreement or treaty, under the US legal system.[2] Customary practices are the basic values and needs of a society at a particular time. Through customs, the actual method of a practice can be shown and carried forward to the upcoming generations. Treaties are modern deliberate and modern on the other hand with the method by which law is formed through customary laws.

According to Article 38, "international conventions, whether general or particular, establishing rules, expressly recognized by the contracting states."[3] Customs are being accepted through the steps that a state takes as a sense of legal obligation. International law is changed through the changed regimes of treaties and also through various kinds of norms that are assumed by a state which is deemed as the law governs emerging issues. Both of these, treaty and customary international law have played a chief and resuming role in the present years in international law. Here we have mentioned about US view of regulating and analyzing international law, which is the same as of various other processes of international jurisprudence that are ratified and preferred broadly.[4]

In the US Constitution, treaties are included as a part of "the supreme law of the land" and refer to the "Law of nations". International custom modifies over time, still, it is acknowledged as the law around the globe and is irrevocable and unbreakable. All the things are not accepted by the state but customs are remarked, not because they have been allowed to but because of the opinion that it is irrevocable and the force is independent of the acceptance of any person or state. It is not easy to explain customs with accuracy, to analyze the changes and the points on which they have happened if a non-compliance ever becomes a new customary law or if the present law is not followed. It is nevertheless very simple to show when codified with treaty frameworks. In the Third Restatement on Foreign Relation

[2]Madeleine K. Albright, *International Law in US Foreign Policy*, 2 THE BROWN JOURNAL OF WORLD AFFAIRS 41–48 (1995).

[3]Anthony J. Colangelo, *An Introduction to International Law in U.S. State Courts: Extraterritoriality and "False Conflicts" of Law*, 108 PROCEEDINGS OF THE ANNUAL MEETING (AMERICAN SOCIETY OF INTERNATIONAL LAW) 436–439 (2014).

[4]FEJALESNIEWSKA, *An Introduction to International Law* 9–12 (2005), https://www.jstor.org/stable/resrep18067.7 (last visited Jan 3, 2021).

Laws, it is stated that "international agreements constitute the practice of states and therefore can contribute to the growth of customary international law." Even though states are not parties to a treaty, they are generally held to the custom's standard, if a treaty represents international custom.[5] No specific requirement is there in international law for the requirement of a treaty, though legal relation is required to be created among the parties by means of their agreement.

HISTORY

In the United States of America when the interpretation of the treaty is observed, the history of the treaty, parties adopting practical construction, and the negotiations are also included. General rules of interpretation are included in "Vienna Convention on the Law of Treaties" like subsequent agreements between parties about interpretation and provisions of the treaty, parties agreeing with the after practice in the treaty's application, and rules and regulations of the law of nations which will apply to the parties.[6]

There are various treaty aids that are accepted both internationally and domestically. Recognition of the USA: When comparing the UK with the USA, the USA situation was also similar to that of the UK situation. US courts could be sued by only a recognized Government or State. However American courts were in access by the unrecognized States or Government in certain cases. USA courts seem to have greater scope than UK courts. In the case of Carl Zeis[7], the facts were to be recognized by US courts about common sense and justice. This was referred to by Lords Reid and Wilberforce. But this recognition by US courts was not given in all the cases. It was only for private rights. Executive policies were not avoided after the creation of judicial entities by states which were not recognized. The executive declaration was binding. But if states that acts of unrecognized states will not be valued then courts will have to follow it. International law in US domestic law was used in a specific

[5]Monroe Leigh et al., *The Role of International Law in U.S. Foreign Policymaking*, 86 PROCEEDINGS OF THE ANNUAL MEETING (AMERICAN SOCIETY OF INTERNATIONAL LAW) 434–455 (1992).

[6]Kristina Daugirdas& Julian Davis Mortenson, *Contemporary Practice of the United States Relating to International Law*, 109 AM. J. INT. LAW 873–888 (2015).

[7] [1967] AC 853, 954; 43 ILR

context.[8] However, to interpret various provisions from time to time the Supreme Court of the US has seen international law as persuading authority.

In 1796, there was a treaty between the USA and Tripoli for protecting the citizens of America. This was done to protect citizens from kidnapping and pirates' ransom in the Mediterranean Sea. After that USA also agreed for entering into a treaty related to cybercrime in 2001. Every year United States enters into more than 200 treaties.[9] There were also many treaties that were pending USA in Senate. Some of them are:

1) Treaties related to the Protection of the Right to Organization and freedom of association which was held in San Francisco at 31st session from 17th June to 10th July 1948.

2) On 9th July 1964, International Labor Conference adopted the 48th session which was held by Geneva related to the policy of employment.

US Constitution can be interpreted by identifying sources of international law. The U.S Supreme Court members have not given their willingness regarding the interpretation of US Constitutional through international law.[10] There was no benefit in a quantitative manner while paying attention to international law. This means international law has not been called a persuasive authority when we look upon the cases which are highly visible.

STATE PRACTICE

We need to know what this state practice is and how it covers the initiation of the state or is limited to positive and actual actions. Also what it includes and what it does. State practice is how the basis of customary law is formed according to the behavior of states, but what it does

[8]State Practice during the Pre-United Nations Period Lillich on the Forcible Protection of Nationals Abroad: Chapter III, , 77 INT'L L. STUD. SER. US NAVAL WAR COL. 25–40 (2002).

[9]Jeffrey S. Peake, *The Domestic Politics of US Treaty Ratification: Bilateral Treaties from 1949 to 2012*, 13 FOREIGN POLICY ANAL 832–853 (2017).

[10]Treaties and International agreements, , UNITED STATES DEPARTMENT OF STATE , https://www.state.gov/policy-issues/treaties-and-international-agreements/ (last visited Jan 5, 2021).

can be acquired from various sources. Examples can be acts of administrative, legislations, international state activities like making a treaty, etc.[11]

A state comprises of the government department and a number of officials; it is not a living entity. The activity of the state is extended over a whole range of national organs, like legislative institutions, legal officers of state, political leaders, diplomatic agents, and courts. Each and everything is engaged in international field activities and therefore one has to examine all material sources for evidence to know what a state does. "State practices cover any actions or statements by a state from which views of customary laws may be inferred" is considered correct. However, every state practice elements are uniform and the value given to the state conduct is determined by its nature. There were similar issues in the case dealt by the Supreme Court in line with the treaty effects on state laws which caused the drafting in paragraph 2 of Article VI.

In the case WARE vs. HYLTON[12]: the revolutionary war was ended by the Paris Treaty and it was said that both the country's creditors should "meet no lawful impediment" during the period of recovering genuine debts. At the time of American Revolution, Virginia law was enacted which provided confiscation of such debts on the ground that an alien enemy was the owner of this debt. A debt was owed by the resident of Virginiato, a British subject which got sued afterward so that the bond could be recovered in federal court.[13] It was argued by the administrator that the collection of such debts was allowed in the Treaty of Paris. In this case state law was laid down as it was violating the treaty under Article VI. Collectively, it was held by justice that federal courts had the power to determine state laws. The Virginia law under the Supremacy clause was invalidated by the court. The internal affairs have to be enclosed by the clear domain of Virginia and it was not adequate to object that the property of the debt doubted here was within the boundary of the territory of Virginia and, was therefore subject to state laws. It was held that contradictory state laws were always taken up by the federal treaties.

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[11]Detlev F. Vagts, *The United States and Its Treaties: Observance and Breach*, 95 THE AMERICAN JOURNAL OF INTERNATIONAL LAW 313–334 (2001).

[12] 3 U.S. (3 Dall.) 199 (1796)

[13]MARK E. WOJCIK, INTRODUCTION TO LEGAL ENGLISH: AN INTRODUCTION TO LEGAL TERMINOLOGY, REASONING AND WRITING IN PLAIN ENGLISH (2. ed ed. 2001).

Like treaties, many questions about customary international law arise in constitutional interpretation. In the case of the United States vs. Bellaizac-Hurtado, some foreign nationals were prosecuted under the "Maritime Drug Law Enforcement Act (MDLEA)" for getting engaged in trafficking of the drug in Panama's territorial waters. The defendants in response argued that the statutory prohibition is unconstitutional while in Article 1 it was granted to Congress the power to "define and punish the offenses against the Law of Nations[14] and while that power confers authority to criminalize conduct that customary international law prohibits custom doesn't prohibit the trafficking of drugs." The government invalidated the statute after getting persuaded by this as convictions were applied and vacated. With respect to federal law and international law, it is clear that what has to been done in these situations. The traditional doctrine of customary international law arises from "general and consistent practice of state followed by them from a sense of legal obligation". The questions of customary international laws are sometimes empirical, norms can't be identified without investigation of different state's views and practices that make up the international order. This restriction shows the belief that state consent is important for custom legitimacy.[15] Due to the multi-lateral treaty reservation of the US, the court couldn't rely on UN Charter and was therefore compelled to base its finding inline with the use of "force customary and general principles of international law". As a result of which significant jurisprudence on customary international law was developed in the Nicaragua case related to the customary international law elements, use of force and non-intervention, and customary and treaty law relations. In this case, the petitioner who filed a suit against the United States was Nicaragua, the defendant stated the reasons why the US was accountable for the activities which were carried against Nicaragua. The US challenged the International Court's jurisdiction for entertaining the case and application of Nicaragua.[16] It was held that: "The jurisdiction of the court to entertain a dispute between two states if each of the states accepted court's jurisdiction is within the jurisdiction of ICJ. The Nicaragua declaration was not deposited with the permanent court, still, it was valid, because of the potential effect it had that it would last for many years."The application of the court will be acceptable when the grounds to

[14] US Constitution, art. 1 and 8, clause 10

[15]Gary Born, *CUSTOMARY INTERNATIONAL LAW IN UNITED STATES COURTS*, 92 WASHINGTON LAW REVIEW 80.

[16]H. C. M. Charlesworth, *Customary International Law and the Nicaragua Case*, 11 AUST. YBIL 1–32 (1984).

exclude the application of a state are not there. In this case, although the admissibility and jurisdiction's questions are primarily based on the principle that the I.C.J's powers are restricted to the agreement of parties, made these things complicated.[17]

USA POSITION IN INTERNATIONAL LAW

The position of the USA has been taken into consideration by seeking the Law of Nations use in line with the interpretation of the constitution and with the international norms. The State's nature appears to be separate. Different elements making upstate will act as the modest and may take their own potentially even conflicting their interest and motivations. Unity of the state is important but operations engaged by modern states, the proper functioning of the constitution will be affected if the government starts coordinating. It will prevent the correct functioning of the institutional bodies. Therefore, separation of State is necessary for proper functioning.[18] Once the position of the USA's status is determined with regard to international law doctrine and for interpreting constitutional law and using it as persuasive authority. It should be observed that the position is not binding. The US Supreme Court is considered the ultimate arbiter of the constitution. However, rules stated by the USA regarding International law are very important.[19] An example can be given with regard to the suspect of terrorism which pertained to be the subject of debate. The USA has also signed treaties for banning all types of tortures. In this case, there is normative behavior of the USA with respect to the international norm against torture.

The question with regard to the position of the USA is whether the USA has signed the international treaty which is referred to the USA and whether it is Approved? It was later held that no country has ratified the treaty in which it has entered. Therefore it was stated that if the particular norm in the USA comes in conflict with the US Constitution then the stated position of the USA will be disregarded.[20] USA's position with regard to international law

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[17]Keith Highet, *Evidence, the Court, and the Nicaragua Case*, 81 AM. J. INT'L L. 1–56 (1987).

[18]Paul Dubinsky, *International Law in the Legal System of the United States*, 58 AM J COMP LAW 455–478 (2010).

[19]Howard B. Tolley, *The Domestic Applicability of International Treaties in the United States*, 15 LAWYER OF THE AMERICAS 71–88 (1983).

[20]State Practice during the Pre-United Nations Period Lillich on the Forcible Protection of Nationals Abroad, *supra* note 7.

principles will be taken into consideration or will be disregarded will depend on the court's assessment and its constitutionality.

CONDITIONS ADDED BY USA TO MULTILATERAL TREATIES

Looking into the conditions added by the USA to treaty practices, there has been much work done by scholars with regard to examining the practice of treaty and its use of reservation. For example, the use of international practice was examined by Professor John Gamble in 1980. He stated that 85% of multilateral treaties do not have a reservation. Professor John Gamble also examines the different types of reservations that States add in relation to "multilateral treaties" and observed that this was not a severe problem.[21] Another research with regard to the bilateral and multilateral treaty was done by Auerswald and Maltzman which said that 20% time the Senate of the US adds reservation to treaties.[22] This study was published in 2003. In both the studies the undertaking and declaration of data were not done. There was one more study conducted by Professor Kevin Kennedy which concluded that conditions were added by the Senate to 15% of multilateral and bilateral treaties. This means that the rate of conditions added by the USA to treaties is becoming higher. Mainly the conditions added by the USA include Reservations, Undertaking, and Declarations.

TREATY AND CUSTOMARY INTERNATIONAL LAW RELATION

Earlier the court of America looked at the agreement which was constituted treaty with regard to customary international law. The court looked into this issue even when the issue before the court was not related to international law but was related to domestic law. The state's authority to enter into the agreement with foreign countries was restricted in Holmes v. Jennison[23]. The Supreme Court concluded that the meaning of the treaty under Article VI was the same as the meaning of customary international law for the purpose of the domestic Constitution. After the 20th century, the customary international law reliance was reduced. Not US courts are engaged in the analysis of "Customary International law" with regard to

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[21]Cindy Galway Buys, *Conditions in U.S. Treaty Practice: New Data and Insights on a Growing Phenomenon*, SSRN JOURNAL (2015), http://www.ssrn.com (last visited Jan 10, 2021).

[22]Ted Piccone, *Why international law serves U.S. national interests*, BROOKINGS (1AD), https://www.brookings.edu/research/why-international-law-serves-u-s-national-interests/ (last visited Jan 17, 2021).

[23] 39 U.S. 540 (1840)

determining whether agreements will be binding or not. Instead of these USA focused on the negotiating context with regard to whether the agreement will be binding legally or not and whether a claim can be made by a private litigant with regard to civil matters or not. In the case of Weinberger v. Rossi[24], the federal employment statute of discrimination was to be interpreted by the Supreme Court in which the word treaty was there which provided exceptions with regard to rights and duties which was created by the statutes.

The treaty constituted within the legal system of the USA and the meaning of the treaty under the Vienna Convention in the law of treaty and under "Customary International law" was also discussed by the Rossi.[25] US court also focused on Congressional Interest and evaluation of historical practice rather than going into detail of customary international law. Direct customary law source examination is avoided by the court even the courts can be open to binding agreements of international law. The summaries of sources are consulted by courts and the codifications are convenient.

CONCLUSION

State Practice depends on the behavior of the state and that is how customary law is determined. The power to determine the state is vested in federal courts. In relation to Constitutional interpretation, there were many questions that arose about customary law just like treaties. However, because of the multilateral treaty, it was difficult for the court to rely on the "UN Charter". USA Practice in relation to treaty law has been including all the history of the treaty, parties adopting practical construction, and the negotiations. Many treaties were also pending in the US senate. USA courts were to be sued only by the recognized state government.

Coming to the Position of the USA in the Law of Nations, it has been taken into consideration by seeking the Law of Nations use in line with the interpretation of the constitution and with the international norms. It is also observed that the USA has signed treaties for banning all types of tortures. Here, if the particular norm in the USA comes in conflict with the US Constitution then the stated position of the USA will be disregarded. When conditions added by the USA to treaty practices are observed, there has been research

[24] 456 U.S. 25 (1982)

[25]Weinberger, Secretary of Defense, et al. v. Rossi et al., , 456 U.S. 25–36 (1981).

with regards to the bilateral and multilateral treaty which was done by Auerswald and Maltzma. Professor Kevin Kennedy also concluded that conditions were added by the Senate to 15% of multilateral and bilateral treaties. Through this, it can be concluded that the rate of conditions added by the USA to treaties is becoming higher. When the relation between customary law and treaty is observed, the meaning of the treaty under Article VI was the same as the meaning of customary international law for the purpose of the domestic Constitution. The treaty constituted within the legal system of the USA and the meaning of the treaty under the Vienna Convention in the law of treaty and under "Customary International law" has also been discussed in the case.