

The Influence of International Law on Foreign Policymaking

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Abstract

This paper has encompassed the practices of foreign policies in relation to the international law as accorded in different international organizations validated by the members of nation-states. International law is a set of rules, principles, and standards which regulate the international relations between and among states. Foreign policy making refers to the formulations of the norms, values, and guidelines of how concerned sovereign states conduct their relations with other sovereign states. It is assumed that international law has been developing since the development of human society. In modern times international law has been developed based on the Code of Hammurabi, Magna Carta (1215), the Westphalia Treaty (24 October 1648), and dozens of modern international laws. The influence of international law in the formulation of the foreign policy of sovereign states started in ancient times. However, it became influential only after the development of the concept of the modern sovereign states. This study has focused on the influence of international law in the foreign policymaking of state. The particular sovereign states have their guidelines about their foreign policy. In addition, the particular state has its distinct conception of the domestication of international laws. Therefore, the influence of international law on the foreign policy of any sovereign state depends upon the process of domestication of international law by that particular state. In the modern era, most sovereign states are also state parties to international laws. Hence, the foreign policy of most modern states has been influenced by the international law. This study has focused on the influence of international law in the foreign policymaking of a sovereign state.

Key Words: International Law, Foreign Policymaking

Introduction

According to *Black's Law Dictionary*, "the legal system governing the relationship between nations, more modernly, the law of international relations, embracing not only nations but also such participants' international organizations and individual (such as who invoke their human rights or commit war crimes (Garner, 2009, p.892). International law is the law governing the relationship between states and international organizations (between or among themselves this last area is relatively underdeveloped or at least still articulated (Fry, Goldstein, and Longhorn, 2002, p. 454). International Law has also been seen as conferring rights and obligations upon individuals. This is done by agreement between states (and so international law remains principally, the law between states (and so international law remains principally the law between states) to confer such specific rights (e.g., human rights) and to punish individuals for the commission of certain crimes,

or agreements between states to set up tribunals, such as the international criminal court or other war crime tribunals. Specifically for trying individuals who have been alleged to have committed violations of international law (Fry, Goldstein, and Longhorn, 2002, p.453). According to Oppenheim “International law is the name for the body of customary and conventional rules which are considered legally binding by civilized states in their intercourse, which are another (Chandra, 1996, p. 3).

According to Briedly “International law is the body of principles of action which are binding upon civilized states in their relations with each other’s (Chandra, 1996, p.3). International law is the sum total of rules, principles, customs According to Cheney Hyde Charles, “International law are sets of theories and rules from/by which states bind towards these theories and rules behave with each other’s collectively (Paudel, 2053, p. 2). According to Hans Kelson, International Laws are a set of those rules which regulate bilateral /multilateral relations Paudel, (2053., and agreements which states accept as having the force of law for the regulations of international relations (Chandra, 1996, p. 3). According to Cheney Hyde Charles, “International law are sets of theories and rules from/by which states bind towards these theories and rules behave with each other’s collectively (Paudel, 2053, p. 2). According to Hans Kelson, International Laws are a set of those rules which regulate bilateral /multilateral relations Paudel, (2053. pp. 3). International law refers to those rules and norms that regulate the conduct of states and other entities which at any time are recognized as being endowed with international personality. For illustration, International Organizations and to a certain extent individuals is in their relations with each other (Wallace & Martin Ortega, 2009, p. 2). International Law is sometimes conceived to be divided into public and private parts, the first concerning the legal relations of states the second involving the law governing the foreign transactions of individuals, and cooperation public international law mostly concerns the political interactions of states. Private international law concerns legal aspects of the international economy and conflict and cooperation among the national legal system (Janis, 1989, p.2). John Austin defined international law as a body of rules, set and enforced by sovereign political authority. Hence the rules do not come from authority. Hence when the rules do not confirm the sovereign, they would not be legal but moral dashing on this positive law concept Austin declared the law as a code of morality (Rao, p.7). According to J. K. Stork international law may be defined as that body of law that is composed for its greater parts of the principles and rules of conduct that states feel bound to observe in their relations with each other and which includes also a) The rules of Law relating to the functioning of international organizations, their relations with each other and their relations with states and individuals and b) Certain rules of law relating to individual and non-state entities so far as the rights and duties of such individuals and non-state entities are the concern of international community (Basyal, 2066, p.3). According to the traditional definition international law is the rule governing the relation between states only subjects of international law. The modern definition of International Law is concerned with the conduct of the state and its relations with the institutional

organizations. It has covered the rights duties and obligations of respective subjects of International Law (Aryal, Subedi & Thapa, 2010, p. 339).

According to Article 20 of the United Nations Charter, the principles of International Laws are the principles of sovereign equality, principles of peaceful settlement of disputes, principles of territorial integrity and political independence, non-interference in internal affairs of other states, etc. According to United Nations General Assembly Resolution number Re 2625 i.e. the declaration of principles of international law concerning friendly relations/ friendly relations declaration 1970 AD.

a) Principle of Non-use of Force

The principle is that states shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state or in any other manner inconsistent with the principles of the UN Charter.

b) Principles of Peaceful Settlement of Disputes-

The principle is that state shall settle their international disputes by peaceful means in such a manner that international peace and security and justice are not endangered.

c) Principle of Non-Intervention

The duty does not intervene in matters within the domestic jurisdiction of any state following Chapters.

d) Cooperation with each other

The duty of states to cooperate by the Charter

e) The principles of equal rights and self-determination

The principles of equal rights and self-determination of People.

f) The principle of sovereign equality

The principle of sovereign equality of states.

g) Principle regarding UN Charter

The principle that states shall fulfill in good faith the obligations assumed by them following the UN charter (Rosen stock, 1971, pp. 713-735). According to the formulation of national interest foreign policy of a state is the substance of foreign relations. It is a systematic statement of deliberately selected national interests. It includes a bundle of principles and practices that regulate a state's behavior. Foreign policy, therefore, is the external behavior of the states. Foreign policy is a complex interplay of geography, history, present requirements, and perception of the national interest by the ruling elite, and the ideological consciousness of the policymakers besides the national and international scenario (Aryal, Subedi, and, Thapa, 2010, p.11). The determinants of foreign policy are geography, history, political system/policies/ political ideology, military might/ power/ security perspective, language, culture, Religion, Economy / Economic status, Trade/ trade relationship, leadership, etc. The internal factors of foreign policy are geography, history, national capacity, public opinion, etc. the external factors of foreign policy are International organizations (UNO, WTO, EU, ASEAN, IMF, WB, and ADB, etc.), international law, power holding countries, and new trends in the international arena,

neighboring countries, etc. The policy-making factors of foreign policy are the attitude of policymakers (Aryal, Subedi, and Thapa, 2010, pp. 12-13).

Foreign policy has been defined by scholars, thinkers, and practitioners in different ways. Thomas bailey defines foreign policy as a “definite course or method of action carefully selected by the government from possible alternatives and designed in the nation’s interest to achieve well-established goals such as peace, security, and prosperity” (Hamal, 2014, 1). In the conception of Robert Jackson and George Sorenson’s foreign policy is “an attempt to influence the goals and activities of other actors (states) whom they cannot completely control. In the conception of Padelford and Lincoln, “Foreign policy is a key element in the process by which a state translates its broadly conceived goals and interests into the concrete course of action in its external dealings (Hamal, 2014, pp.1-2).

There are several approaches to the foreign policy-making process. The traditional approach refers to knowing the history, government, interests, and concerns of other countries and making one’s foreign policy accordingly. Another approach is the comparative approach, which focuses on gathering and analysis of data and information as to the foreign policy of other countries and institutions for Formulating appropriate national policy towards them (Hamal, 2014, p.4). The next approach is the bureaucratic approach which studies and analyzes the process, means, and methods of other countries ‘foreign policymaking so that national processes and methods could be tailored as per need. The cognitive approach emphasizes gaining knowledge about the experience, style and, world view of the rulers of other countries. It can help form views and develop strategies while dealing with foreign countries based on their position and style (Hamal, 2014, pp.4-5). There is also a social-constructivist approach that focuses on foreign policymaking based on the ideas and viewpoints of the leaders and policymakers of other countries and entities. Finally, the multi-dimensional approach demands a study of other relevant theories while making foreign policy, as no single theory is enough for this process (Hamal, 2014, pp. 4-5).

There are three levels of making foreign policy. The First is the systemic level. Where a broad view of the global scenario is taken, the distribution of power among nations is studied, and political and economic interdependence is considered while making foreign policy (Hamal, 2017, p. 5). The Second level is the national level in which the type of government, the relationship between the nation and its society, and the bureaucratic setup play vital roles. In the autocratic government foreign policymaking become a centralized matter, whereas the democratic system of government allows a participatory approach (Hamal, 2014, p.5). The third level is the individual decision-making level. At this level, the vision, ideas, beliefs, and priorities of the leaders become critical factors for the country’s foreign policy-making (Hamal, 2014, p. 5).

Foreign policy refers to the policy of one sovereign state towards the sovereign state. The eastern philosophers Manu, Kautilya, and Western philosophers Machiavelli, Plato, etc. explain foreign policy. According to Eastern philosopher Kautilya there is some self-interest behind every friendship without self-interest (Mannadiaer, 2010, p.83). There

while establishing relations of one country with another country. For illustration, According to article 51(m) of the constitution of Nepal to conduct independent foreign policy based on the charter of the United Nations, Non-alignment, principle of Panchasheel (Mutual respect for sovereignty, territorial integrity and national independence, non-aggression, non-interference in each other's internal affairs, equality and mutual benefit and peaceful co-existence), International law and the norms of world peace, taking into consideration of the overall interest of the nation while remaining active in safeguarding, territorial integrity, independence, and national interest of Nepal.²

There are two major orientations of the foreign policy-making process. These are the governmental orientation of foreign policy-making and the non-governmental orientation of foreign policy-making. The major factors of the orientation of foreign policy-making are interest in foreign policy, isolation towards foreign policy, non-alignment, hegemony or dominance, status quo, expansionism or imperialism, ambiguous ideology, etc. (Siwakoti, 2073, pp.389-393). The major determinants of foreign policy-making are population, geographical situation, natural resources, industrial capacity, armed force, language, religion, caste, and cultural factors, ideology, policy-makers, world view, Environmental elements, world organizations, the response of the concerned countries, etc. (Aryal, 2077, pp. 30-33).

2. The Influence of International Law in Foreign Policymaking

Whether international law influence in foreign policymaking of a state or not is determined by the nature of international treaties, conventions, covenant, declarations, agreements, etc. On the other hand, the process of domestication of international law by the concerning state is another important aspect while the international law influence or does not influence the foreign policy of that state. In other words, whether the state is obeying dualism or monism is the most important thing which determines the influence of international law in the foreign policymaking of that country. Dualism means the international laws signed by the representatives of concerned countries have to pass to domesticate international law. On the other hand, while the representative of the concerned country signed in international law if there is no need to pass from parliament to enforce that international law it is called monism.

According to the Vienna Convention of Law of Treaty, 1969, a treaty means an international agreement concluded between states in written form and governed by international law. This definition has not included treaties between states and the international organizations but some international treaties have been performed between states, and international organizations. According to Article 38 (1) (a) of the international court of justice, treaty is the main source of international law.³ Conventions⁴, Statute,

² The Constitution of Nepal, Article 51(m)

³ International Court of Justice, Article 38(1).

⁴ Conventions denote bilateral agreements up to the 19th century but it refers to formal multilateral treaties. It affects worldwide and it remains open to the world community. Mostly while preparing Convention, it is negotiated by international organizations.

Declaration⁵, Charter⁶, Act, agreement, Peer Understanding, protocol⁷, Covenant, engagement, arrangement, and accord have mostly referred to the treaty but sometimes these terminologies denote different meaning. Law-making treaties, contract treaties, international treaties, regional treaties, peace and friendship treaties, political treaties, multilateral, treaties, and bilateral treaties are major kinds of treaties. Free consent, good faith or confide, Pacta Sunt Servanda i. e. every treaty is binding upon the parties to it and must be performed in good faith, etc. are the principles of treaties. Treaties are major medium/ means of international law, treaties are the main basis for international and regional institutions, and treaty introduces cooperation and co-existence. Treaty means to resolve disputes of the international community. Treaty is the basis of the transformation of capital and technology.

Statement of intent to negotiate, readings to negotiate, negotiation of a framework agreement or principles, negotiation to finalize a treaty, process of concluding the treaty agreement, etc. are stages of the formulation of treaties. Firstly understand treaty is open or restricted. If that treaty is open the process of the treaty starts. If any state is unable to respect to perform treaty then it appoints a representative. According to Section 107 of the Vienna Treaty, the state can provide full authority to its representatives. What kind of practice i.e. monism or dualism has been practiced by the state is most important to formulate the foreign policy of the concerned state. If any state implements international law (treaties) as their national law there is no need to separate law from enforcement treaties and that treaty remains as the part of national /municipal law. The United States of America, France, Germany Belgium, etc. are guided by monism. So, while formulating foreign policy they obeyed provisions of international treaties ratified, accede, and accepted or approved by them. However, the states which do not implement international law as their domestic/municipal law there is a need to separate distinct /separate national laws to enforce international treaties. For illustration, Nepal also has been practicing dualism according to the Constitution of Nepal 2015 and Nepal Treaty Act 1991 AD. According to article 278 (1) of the constitution of Nepal, 2015 the authority to perform treaty and agreement is vested in the Federal government of Nepal.⁸ According to article 279(1) of the constitution of Nepal, the ratification, accede, acceptance or approval is according to the law of the federal government of Nepal.⁹ According to article 279 (2), the treaty relating to peace and friendship, security and strategic importance, border/boundary of Nepal, and natural resources and its utility and division have to be passed by a two-

⁵ Declarations refers to documents based on a common understanding to do or not to do in any issue. It is not valid as a treaty but there are more state parties so it has moral value. For illustration Universal Declarations of Human rights.

⁶ Charter established international and regional organizations. It determines function, duty, and rights, so it is like statutes of organizations it is obligatory for state parties.

⁷ Protocols are formulated to include remaining/ additional things after the enforcement of treaties. These protocols are optional. The legal authorities of the protocol are the same as the treaty. Protocols amend adding new provisions. For illustration International Covenant on Civil and Political Rights, 1966.

⁸ The Constitution of Nepal, Article 278(1).

⁹ The Constitution of Nepal, Article, 279(1).

third majority of members of the federal legislative/parliament of Nepal. In addition, the simple kinds of treaties and agreements can be passed by a simple majority of the federal parliament of Nepal.¹⁰ According to article 279 (3), any treaties and agreement might not be enforced while it is not ratified, accede, and accept or approved by the federal parliament of Nepal.¹¹ According to 279 (4), of the Constitution of Nepal, the treaties and agreements which is against territorial integrity will not be performed in any cost.¹² According to Article 51(m) (2), Nepal to review treaties concluded at the past and make treaties agreements based on equality and mutual interest.¹³

According to Section 2 (a), of the Treaty Act of Nepal, 1991 the treaty refers to the written agreement between two or more two states or two or more two intergovernmental organizations /institutions. It also denotes all sorts of documents of the same nature.¹⁴ According to section 9 (1). of the Treaty Act, 1991 of Nepal, in case of the provision of a treaty to which Nepal or the government of Nepal is the party upon its ratification, accession, acceptance and approval by the parliament, is inconsistency with the provision of prevailing law, the inconsistency provision of the law shall be void for that treaty and the provisions of the treaty shall prevail.¹⁵ According to section 9 (2), of the Treaty Act, 1991 AD of Nepal, any treaty of which Nepal or the government of Nepal is the party and has not ratified, accede, accepted, or approved by parliament, imposes any obligation or burden upon Nepal or the government of Nepal and in case legal arrangement needs to be traded for its enforcement, the government of Nepal shall initiate action as soon as possible to enact laws or its enforcement.¹⁶

If any state fully and partly disagrees with any international treaties then they can register their reservation¹⁷ about the full or partial provision of that particular international law. If a state disagrees on any subject matter of international treaty or agreement, if any provision of treaty or agreement is against the constitution and existing law of concern states, if there is a lack of sufficient source, means, and administrative capacity to implement the particular provision of the concern treaty and agreement, if there is the necessity to register the reservation any state can be registered its reservation against any international treaty and agreements. But reservation should not be registered against the existence of any treaty. And there are two conditions i.e., if there is the provision of registration of reservation then states can register reservation against the full and partial

¹⁰ The Constitution of Nepal, Article, 279(2).

¹¹ The Constitution of Nepal, Article, 279(3).

¹² The Constitution of Nepal, Article, 279(4).

¹³ The Constitution of Nepal, Article, 51(m).

¹⁴ Treaty Act of Nepal, 1991, Section 2(a)

¹⁵ Treaty Act of Nepal, 1991, Section 9 (1)

¹⁶ Treaty Act of Nepal, 1991, Section 9 (2)

¹⁷ Reservation is a unilateral statement, however, phrased or named made by a state, when signing, ratifying, accepting, approving, or acceding to a treaty. Whereby its purpose is to exclude or modify the legal effect of certain provisions of the treaty in their application.

provision of concern treaty is there is no any provision to registered reservation then states cannot register reservation against that particular treaty or agreement.

The foreign policy of most countries is guided by international law. i.e., Charter of the United Nations and other international treaties, conventions, and protocols, Covenant, Declaration, agreements, etc. But the foreign policy of a few countries like China, North Korea, Cuba, etc. is guided by Marxist, Leninist i.e., Socialist political thought and Theory. The determinants of the foreign policy of a state are geography, history, language, religion and culture, economic strength, military strength, trade and commerce, political leadership, and, changing international situation (Acharya, 2014, pp. 2-8). So, the formulation of foreign policy is not only guided by international law.

The Charter of the United Nations Organization (UNO) itself is one of the major international laws. The preamble of the UN Charter mentioned that “To save succeeding generations from the scourge of war.” After the establishment of the UN, there had been occurring dozens of wars i.e., Vietnam War, the Iran-Iraq War, the Arab war, the War on terror, etc. It indicates that the rulers of the member states of the United Nations (most powerful states) do not follow the provisions of international law including the UN Charter. According to the preamble of the United Nations Organization “In the equal right of ...and of nations large and small and establish conditions under which justice and respect for the obligations, arising from treaties and other sources of international law can be maintained.” But in the present context, this provision has not been followed by some of states. For illustration, the permanent members of the United Nations Organizations (UNO) or veto holder countries China, France, Russia, the United Kingdom and the United States of America, and other powerful countries like India do not respect the sovereign equality of small states like Nepal.

Discussion

Whether international law is actual law or not is a debatable issue in the international arena. The famous scholar of Law Holland stated, “International law is the vanishing point of jurisprudence”. According to that statement, international law is not actual law. Some other scholars of international law argued that there is no legislation to formulate international law and there is no executive body at the international level to enforce international law so, international law is not actual law. But dozens of scholars argued that international law is actual law. There are different schools of thought in international law as well. The positivist school of law mentioned that “Law is the command of the sovereign”. The socialist school of the law argued that “Law is the instrument of exploitation”. The realist school of thought mentioned that “Law is the decision of judges” etc. so the influence of international law in the foreign policy-making process also depends upon states to states. But it can be said that there is a strong presence of international law while formulating foreign policy in most of the states of the world. There are hundreds of international laws in the form of treaties, conventions, covenants, declarations, protocols, agreements, accords, declarations, etc. these international laws are implemented in member states of United Nations Organizations based on their process of

domestication of international law i.e., whether they follow monism or dualism. So, there is more or less influence of international law in formulations of the foreign policy of small to larger states of the world.

The powerful states can interrupt the system of the world but Small comparatively weak states are interrupted by the system of the world. While the powerful states like permanent members of the UN Security Council China, France, Russia, the United Kingdom, and the United States of America formulate their foreign policy they do not follow international laws properly. But while the formulation of the foreign policy of comparatively weak countries i.e., Nepal Bangladesh etc. is guided by norms, values, and provisions of international laws. Most of the international laws have emphasized cooperation among and between the states i.e., liberalist approach but the foreign policymaking process of permanent members of the UNO i.e., China, France, Russia, the United Kingdom Britain, and the United States, and regional powers India are guided mostly realist approach. Furthermore, the foreign policy-making process of the comparatively weak states i.e., Nepal, Bangladesh Somalia, Nigeria, etc. is guided by international laws i.e., cooperative approach i.e., liberalist approach. For illustration, the USA, China, India, and Russia, deny ratifying or ratification with reservations of some of the international treaties and agreements. But comparatively weak countries Like Nepal, Bangladesh, etc. ratified most of the international Laws without any reservations.

Conclusion

International laws are major sources of domestic policies of the sovereign states in the modern age. Therefore, international laws are also a major source of the foreign policy of any sovereign state. There are hundreds of international laws which are related to foreign affairs including the Vienna convention on laws of treaties 1969, the Vienna Convention on Diplomatic Relations (VCDR) 1961, Vienna Convention on Consular Relations (VCCR) 1963, etc. On the other hand, there are dozens of human rights laws and humanitarian laws including the International Covenant on Civil and Political Rights (ICCPR) 1966, the International Covenant on Economic, Social and Cultural Rights (ICESCR) 1966, and the Convention on Elimination of all forms of Discrimination against Women (CEDAW) 1979, the Convention of Right of Child (CRC) 1989, etc. Most countries ratified and domesticated these international instruments. But the implementation aspect is not that satisfactory. So, all of the states of the world should be sincere about all of the international laws including foreign affairs-related international laws while formulating their foreign as well as domestic policy. It assists to construct the present world as more cooperatively and amicably.

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