Codifying the uncodified: A study on customary international law from a South Asian perspective

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Abstract:

International law is composed of rules, regulations, and principles of general application that deal with the intercourse of civilized States and International Organizations and the association between such States and supranational organizations with individuals or groups, whether natural or juridical. The International Law Commission deals with the task of codification; however, customary international law, which is one of the sources of international law, provides limited and incarcerated means to produce any practical result. This paper focuses on simplifying the process to codify customary international law and provides an approach to make the prospect of codification on a universal plane. Also, it attempts to discern the effects of codifying customary international law from a South Asian perspective.

1. Introduction

International law governs the relationship between civilized States, either explicitly or implicitly, it is the body of customary law and conventional rules which determine the conduct of these sovereign civilized States with each other, bilaterally or multilaterally; it also includes international personalities like individuals, international organizations, or any other entity that is globally recognized. To find the rule of custom, we have to know the *opinio juris*[1] of States. Unless a rule is accepted by States, it does not become the rule of customary international law, which is obscure and contradictory.

The concept of customary international law develops from disputes which are resolved either through war or peaceful negotiations; then this resolution becomes the precedent for the future, and ultimately it is embedded into the array of customary international law. The external war of conquest is almost archaic after World War II. Therefore, if there is any controversy between two or more nations during peacetime, the international law becomes biased; it is also referred to as co-operation bias. In the case of adversaries against the national interest of the United States,

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1 *opinio juris sive necessitates*, also in short, called as *opinio juris* which means ”an opinion of law or necessity.” See more details on <https://www.law.cornell.edu/wex/opinio_juris_(international_law)> accessed February 5, 2022.

the application of the contentious CAATSA[2] is an example of the usage of sanctions. In this paper, the effort through empirical method is to find out whether the customary international law can be codified on a universal plane? What would be the effect of codification concerning the customary law? After deliberation on these questions, there will be an attempt to give a feasible approach for codifying customary international law presenting the South Asian perspective.

2. History of codification of the international law

Jeremy Bentham[3], who coined the word 'International Law' synonymous with the Law of Nations or utopian international law, also propounded for its codification at the end of the eighteenth century. He also wrote the first private codification through the treatise 'The Principles of Morals and Legislation'. A code is a consolidation of the written law or a statute collecting all the law relating to a particular subject. The process of codification involves legislation and codification. According to Professor Theodore Woolsey, there are two processes for codifying international law, the first is scientifically determining the law, and the second is the achievement of the universal acceptance of the defined law through generally accepted multilateral conventions. He further elaborated that characteristically the second process was legislative and political.[4] However, the two processes blended up together at the Codification Conference of 1930.[5]

Codification was also aimed under the Declaration of Paris in 1856[6], at the end of the Crimean War[7], it laid down four principles for respecting maritime law:

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2 CAATSA is abbreviated for Countering America's Adversaries Through Sanctions Act, it is a legislation to deal with external aggression from Iran, North Korea and the Russian Federation and for other purposes. See, <https://www.congress.gov/115/plaws/publ44/PLAW-115publ44.pdf> accessed February 5, 2022.

3 Jeremy Bentham was a British philosopher, jurist, economist and legal scholar who propounded the theory of utilitarianism giving fourfold method for seeking pleasure and avoiding pain, See Bentham, An Introduction to the Principles of Morals and Legislation (OUP 1823); E. Bodenheimer, *Jurisprudence- The Philosophy and Method of the Law Revised* (Harvard University Press 1974).

4 Woolsey Theodore, *Introduction to the study of International Law* (Charles Scribner's Sons 1860) 76.

5 Conference for the Codification of the International Law was held at Hague in March 1930 with the agenda of nationality, territorial waters and responsibility of states for the damage caused in their territory to the persons or property of foreigners, See <https://biblio-archive.unog.ch/Dateien/CouncilMSD/C-351-M-145-1930-V_EN.pdf> accessed February 5, 2022.

6 Declaration of Paris was signed on 16th April 1856 at Paris to resolve the maritime disputes between nation-states across the world <https://ihl-databases.icrc.org/ihl/INTRO/105> accessed February 5, 2022.

7 Crimean War was fought between the Russians, the British, the French, the Turks, the Sardinians, the Austrian, and the Prussians on the Crimean Peninsula from