INTERNATIONAL LAW AND PAKISTAN'S DOMESTIC LEGAL ORDER

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1. INTRODUCTION

The problem of relationship between international law and municipal law has been the subject-matter of much controversy between jurists and scholars of the Law of Nations. As we shall see later, every case in a municipal court in which a rule of international law is asserted to govern the decision raises the problem. In fact the greatest disparity in approach to this subject has been between those who support the 'dualist' doctrine and those who follow the 'monist' theory. In present times discernable disparity in state practice has further accentuated the disparate approach of these two schools of thought.

According to the states which follow the 'dualist' doctrine the starting point is the proposition that law is an act of sovereign will which is supreme within the state. Consequently, international law and domestic law are differentiated and are treated as two totally separate and distinct legal systems. International legal norms, therefore, irrespective of its source, would not automatically form part of the law of the State. In order to apply a rule of international law within the state it is necessary to incorporate it in the domestic law in accordance with the relevant legislative or administrative procedures established in its municipal legal system.

On the other extreme the 'monists' believe in the unitary conception of law. According to this concept international and domestic law are two facets of the same single legal structure and as such the monists see no difficulty in applying international legal norms within the municipal legal order without the need for their incorporation. In fact some jurists, and even states, have in their practice accorded higher status to international law so that in case of any

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inconsistency or conflict between municipal and international law primacy is given to the latter. According to the followers of this doctrine, if a state exceeds the limits prescribed by international law its acts shall be void.

In order to have a clear understanding of the two doctrines and their relationship *inter se* it may be appropriate, at the outset, to examine the disparate practices of states and to determine how states, following different doctrines, apply the rules of international law within the framework of their domestic legal order and how the conflict, if any, between rules of international law and the legal system applicable within the state have been resolved. This can be viewed from various angles and reduced to three contrasting approaches, viz. (1) the primacy of international law, (2) the primacy of domestic law, and (3) harmonization between the two concepts mentioned above. A survey of the practice of some states in which rules of international law operate as part of municipal law without express municipal adoption or incorporation would reveal that there is considerable diversity in the domestic procedures whereby the states give effect within their municipal legal orders to rules of international law, depending on whether the rules are based on customary law or treaties.

For example, in the United Kingdom rules of customary international law which are universally recognized are given effect by English courts without the need for any specific act incorporating those rules into English law, subject to the overriding effect of statute law. In Austria customary international law is applied by Austrian courts by virtue of Article 9 of the Constitution of 1955 which provides that generally recognized rules of international law are component parts of Austrian law. Article 25 of the Basic Law of the Federal Republic of Germany provides that the general rules of international law form part of the federal law and take precedence over the laws and create rights and duties directly for the inhabitants of the federal territory. Under Article 29 of its Constitution Ireland "accepts the generally recognized principles of international law as its rules of conduct in its relations with other states". Similarly Article 10 of the Italian Constitution declares that the Italian juridical system conforms to the generally recognized principles of international law.

The above examination of the practice of states would clearly indicate that the states in question follow the 'monist' doctrine as far as customary international law is concerned and that there is, more or less, an automatic incorporation of customary international law into the domestic law whose legality can be traced to either common law, as in the UK, or to their constitutions as in the case of the Federal Republic of Germany, Belgium, Ireland and Italy. In cases where automatic incorporation of international customary law in the domestic system is based on the constitution, international norms so established shall normally prevail over the statute law.

As regards treaties it seems that most of the countries follow the 'dualist' doctrine in that there is no automatic incorporation. As in the case of customary international law, practice varies. In Ireland, Italy, Luxembourg, Switzerland, France, the United States and the United Kingdom treaties do not automatically apply within the municipal order. Some act, either executive or legislative, is necessary in order to make the provisions suitable for domestic application. In some cases legislative cover is required. In other cases the treaty may be submitted for legislative approval as in the United States and Switzerland. In yet other cases an act of the executive is required for their applicability, such as the official publication of the treaty, as in France. These examples of states adopting different methods for domestic applicability of treaties are by no means exhaustive.

2. THE PRACTICE IN PAKISTAN

Pakistan follows the 'dualist' doctrine both in case of customary international law and treaties. In both cases the applicability in the municipal legal order of Pakistan would depend on the subject matter which determines the act of state required for their domestic application: either a legislative cover or an executive act, having the effect of making the international provisions suitable for application by the courts of Pakistan. Broadly speaking a distinction may be made between the following three categories:

- (i) Rules of international law not covered by a statutory instrument;
- (ii) Rules of international law which are already covered by a legislative instrument;
- (iii) Rules of international law which conflict with a statutory instrument or which may require legal cover for their application.

Before a detailed examination is undertaken of the legal aspects regarding the applicability of international law in Pakistan it is imperative to identify the organ of the Government which in Pakistan is responsible to take such actions as are deemed necessary for the implementation of international obligations. For this purpose the constitutional provisions need to be examined to pinpoint the governmental agency responsible for the conduct of Pakistan's international relations.

Article 97 of the Constitution of the Islamic Republic of Pakistan defines the extent of the executive authority as follows:

"Subject to the Constitution, the executive authority of the Federation shall extend to the matters with respect to which Majlis-e-Shoora [Parliament] has

power to make laws, including exercise of rights, authority and jurisdiction in and *in relation to areas outside Pakistan*.” (Emphasis added).

While it is clear that Article 97 assigns the functions of external relations to the Federal Government, the extent of the functions is not clearly specified. While it may not be possible to define, with any degree of precision, the executive functions ‘in relation to areas outside Pakistan’, it can be stated that they are roughly a residue of functions of the government, after separation of the legislative and judicial functions. These may include the functions which relate to the direction of foreign policy and all those acts which are ancillary thereto, including the provision of legislative cover, if so needed, for the implementation of international legal obligations within Pakistan. In fact, the extent of the executive authority in foreign relations is, to some extent, elaborated, though not exhaustively, in the Fourth Schedule under the Federal Legislative List which assigns ‘External Affairs’ to the Federal Government, illustrating this by including within its ambit such subjects as defence of the Federation or any part thereof, the security of Pakistan, *implementation of treaties, pacts, agreements*, extradition, etc. If any legal cover is needed for the implementation of bilateral treaties or multilateral treaties to which Pakistan has become a party, it is the federal legislature that is competent, whenever necessary, to enact the law to give municipal legal effect to the treaty. Consequently there should be a close coordination between the executive and the legislative organs, which in turn may depend on the prevailing form of government. For the purpose of a clear understanding of the enforcement mechanism the governmental set-up under the constitution of Pakistan will be briefly discussed hereunder.

Pakistan is a federal state with a parliamentary form of government based on the Westminster pattern. In the case of a presidential form of government the separation of powers or, more appropriately, the division of governmental functions, sometimes complicates coordination between the executive and the Parliament. In a parliamentary form of government, however, as established under the constitution of Pakistan, the two functions, legislative and executive, coalesce in the same group of persons. In this system the people who legislate and those who govern are the same. Consequently, the municipal effectuation of international obligations requiring legal cover is ensured by the close cooperation between the two organs of the State concerned. As long as the government has the majority in Parliament, which is necessary for its existence, legal cover would not be difficult to provide.

As regards formulation of policy, generally the federal government has discretion. The Constitution merely provides political guidelines. These guidelines are contained in Article 40 which lays down that:

“The state shall endeavour to preserve and strengthen fraternal relations among Muslims countries based on Islamic unity, support the common interests of the peoples of Asia, Africa and Latin America, promote international peace and security, foster goodwill and friendly relations among all nations, and encourage the settlement of international disputes by peaceful means.”

Article 40 merely provides general guidelines of foreign policy and does not deal with the municipal applicability of international law rules. It is up to the Government of Pakistan to determine, in the exercise of its sovereign discretion, the extent to which it should give municipal effect to its international obligations keeping in view its laws and practice. This approach is followed with regard to both treaties and customary international law. Keeping the above in view I shall now discuss the modalities of according municipal validity to international obligations and the determination of the choice of approach in order to achieve that aim.

3. APPLICABILITY OF INTERNATIONAL LAW RULES IN THE ABSENCE OF MUNICIPAL LAW ON THE SUBJECT

There may be international customary law rules or bilateral or multilateral treaty provisions for which there is no legal cover for their applicability. The question arises whether the provisions can be applied in the municipal legal order of Pakistan without further measures being taken to provide legal cover. This type of situation may arise not too frequently and is practically limited to the following two cases: (1) where the treaty or customary rule does not create direct rights or obligations for the legal subjects of the municipal legal order and, (2) where the rights granted or obligations imposed do not come into conflict with the existing laws in force within the state concerned.

For an answer to the question we have to examine the status of customary international law and treaties, particularly in relation to their application by the courts of Pakistan. In this regard it is worth pointing out that Pakistan has been a part of the British Empire and that the legal system that we inherited and which is applied by our courts is based on the Anglo-Saxon law. This point has been clearly established by the Lahore High Court in *Saeed Ahmad v. Mahmood Ahmad*.¹

¹ *Saeed Ahmad v. Mahmood Ahmad*, PLD [1968] Lahore 520 at 524. In this case reliance was placed on G.C. CHESIRE's *Private International Law*.

According to Justice ANWAR-UL-HAQ, Judge of the Lahore High Court who pronounced the judgement,

“it is submitted [. . .] that as we in this country have inherited the English judicial system and the English concepts of law, both municipal and international, the practice obtaining in England and other Anglo-Saxon countries should be held to prevail in Pakistan as well.”

The practice of our courts of applying customary international law is best illustrated in the more recent case of *M.A. Qureshi v. The Union of Soviet Socialist Republics*.² This case involved the question of whether or not the then USSR enjoyed absolute sovereign immunity from being sued in the Courts of Pakistan. The Karachi High Court³ accepted the plea and dismissed the suit on the ground that USSR enjoyed absolute immunity. Justice QADEERUDDIN stated that “I would only add that the Private International Law of this country is bound to be a part of the law of this country for otherwise the courts of this country would be unable to administer it”.

At the time this case was instituted in the Sind (Karachi) High Court there was no law to govern sovereign immunity. The plaintiff appealed to the Supreme Court for quashing of the judgement. The Supreme Court, in order to come to a definite conclusion, examined the customary international law principles and state practice regarding sovereign immunity.

While examining customary international law principles the Court opined that “to prove the existence of a rule of international customary law or General Law, it is necessary to establish that states act in this way because they recognize a legal obligation to this effect”. After examining the practice of states the Supreme Court came to the conclusion that

“to give our answer straight away, our study has led us to the conclusion that the grant or acceptance of absolute jurisdictional immunity to a foreign state has neither been a uniform practice nor a rigid obligatory rule, and there has never been a uniformity of courts of various countries in this respect, and if at any interval of time in the world it was so considered then it has undergone a tremendous change and has rather entrenched to the contrary.”⁴

In addition to the state practice the Supreme Court also surveyed the case-law beginning with the observations of Lord DENNING in the famous case

² PLD [1981] Supreme Court 377.

³ *M.A. Quraishi v. The USSR*, PLD [1968] Karachi 443.

⁴ *Supra*, n.2.

*Ibrahim Rahimtoola v. Nizam of Hyderabad.*⁵ The Court also took into consideration the views and opinions of jurists and expert writers and came to the conclusion that "it will appear that they also constitute, if not conclusive, at least prima facie evidence of the development of restrictive immunity." The Supreme Court decided the case on the basis of the restrictive immunity principle, viz. no immunity for transactions of a commercial nature.

This was an instance of the prevailing international law principle being applied by the court where municipal law on the matter was non-existent at that point in time.⁶

The question of relationship between international law and domestic law was also discussed in the most recent case of *Messrs. Najib Zarab Ltd. v. The Government of Pakistan*.⁷ The issues to be examined by the Karachi High Court were stated to be whether "there is any mandate of international law or if the rules of international law afford us any guidance and if such mandate or guidance is perceptible under Pakistan law". Two questions arise for our consideration. First, whether international law is, of its own force, drawn into the law of the land without the aid of municipal law and secondly, whether, once so drawn, it overrides municipal law in case of conflict. It has been said in England that there are two schools of thought, one school of thought propounding the doctrine of 'incorporation' and the other the doctrine of 'transformation'. After examining the British practice the Court came to the conclusion that

"we are of the view that nations must march with the international community and the municipal law must respect rules of international law, even as nations respect international opinion; the comity of nations requires that rules of international law may be accommodated in the municipal law even without express legislative sanction provided they do not run into conflict with Acts of Parliament."

The legal status of treaties would also be the same and the same principles shall apply as demonstrated in the above mentioned case.

⁵ (1957) 3 All E.R. 441 and [1958] AC 79.

⁶ It was only in 1981 that Pakistan enacted the State Immunity Ordinance which confined the restrictive immunity principle.

⁷ PLD [1993] Karachi 93. Summarized in 3 AsYIL (1993) 206.

4. APPLICABILITY OF INTERNATIONAL LAW IN FACE OF OTHER APPLICABLE LAW GOVERNING THE SAME MATTER

In Pakistan, the application of international law rules by the courts is subject to two limitations. The first is their conflict with a statute or an Act of Parliament. The second limitation is the one imposed by the Islamic Laws or the Shariat and is imposed by the Constitution of the Islamic Republic of Pakistan.

4.1. Law repugnant to the injunctions of Islam

The Constitution of the Islamic Republic of Pakistan makes the 'Objectives Resolution'⁸ as its substantive part. Under one of the 'Objectives' of this 'Resolution' the State of Pakistan resolved to make Pakistan a sovereign independent state

"wherein the Muslims shall be enabled to order their lives in their individual and collective spheres in accordance with the teachings and requirements of Islam as set out in the Holy Quran and Sunnah."

Article 227 of the Constitution further provides that

"All existing laws shall be brought in conformity with the injunctions of Islam as laid down in the Holy Quran and Sunnah [. . .] and no law shall be enacted which is repugnant to such injunctions."

To ensure this the Constitution by its Article 203 establishes a Federal Shariat Court which

"may, [either of its own motion or] on the petition of a citizen of Pakistan or the Federal Government or a Provincial Government, examine and decide the question whether or not any law or provision of law is repugnant to the injunctions of Islam, as laid down in the Holy Quran and the Sunnah of the Holy Prophet [. . .]."

⁸ In 1985 (P.O.No.14 of 1985) an "Objectives Resolution" was made substantive part of the Constitution by insertion of an Art.2A. See A.P. BLAUSTEIN & G.H. FLANZ, *Constitutions of the Countries of the World*, Vol. 14, Islamic Republic of Pakistan (release 93-4) at 233.

If the Shariat Court decides that a law or legal provision is indeed repugnant to the injunctions of Islam it shall give a reasoned decision and determine the extent to which such law or provision is so repugnant and specify the day on which its decision shall take effect⁹. In such a situation either the Government takes steps to amend the law so as to bring it in conformity with the injunctions of Islam, or, if no action is taken by the Government, then such a law or, as the case may be, any specific provision therein, shall, to the extent to which it is held to be so repugnant, cease to have effect on the day on which the decision of the Court takes effect.

In view of the provisions of the Constitution referred to above it is impossible that a rule of customary international law or a treaty provision which is in conflict with the principles of Islamic Law as laid down in the Quran and the Sunnah of the Prophet would ever be applied in Pakistan. There is a dicta to this effect in the Supreme Court judgement in the case of *M.A. Qureshi v. The USSR*.¹⁰ In it Justice MUHAMMAD AFZAL ZULLAH, while discussing the relation between customary international law and the law in Pakistan with respect to the question of state immunity as well as to the rule of law in Pakistan in case of absence of statutory regulation, stated:

“[It] is no more good law to interpret [the] expressions ‘justice, equity and good conscience’ to mean the rules of English Law, as in any way applicable in Pakistan. Instead, accepted and fundamental principles and juridical norms of Islam, its philosophy, jurisprudence and its common law shall govern the application of the rules of justice and equity as also would control the discretion of the judges when the question of good conscience and fairplay are involved.”¹¹

Justice Dr. NASIM HASAN SHAH while supporting Justice ZULLAH stated that:

“Whenever the expression ‘justice, equity and good conscience’ occurs in law it shall be interpreted in accordance with Islamic law and principles. When law gives discretion to the court and it can be exercised in more than one way, it would be so exercised so as to advance justice and fairplay as understood in Islam. Rules of prudence, propriety and abundant caution and similar other considerations would be applied only in consonance with Islamic standards. Present law when required to be applied to new situation would be followed

⁹ This is a special feature. Only the Shariat Court has been specifically so authorized by the Constitution.

¹⁰ *Supra*, n.2.

¹¹ This opinion is based on an earlier judgement of Justice ZULLAH in *Haji Nizam Khan v. Additional District Judge, Lyalpur*. PLD [1976] Lahore 930.

and applied so as to advance Islamic principles. All doubts in interpretation of laws and appreciation of evidence would be resolved in a manner consistent with Islamic principles and jurisprudence in preference to any other contrary norm.”¹²

Applying the principle to the question of restricted sovereign immunity Justice Dr. NASIM HASAN SHAH stated:

“I am of the view that on account of the increasing involvement of states in international trade and economic relations it is only fair and equitable that they should be amenable to the jurisdiction of the courts as private traders in respect of their private/commercial activities. This view is consistent with the principles of justice and equity, the principles of Islam as well as the trend of state practice of most states. In fact, in our country, the law is that the courts can fill in the gaps which may be found in it by resort to the principles of Islamic law, justice and equity. Wherever, while interpreting the statute law, more than one interpretation are possible, the one consistent with Islamic principles and jurisprudence may be adopted. Out of two otherwise equally possible interpretations one of which advances the principle of policy and Islamic provisions of the constitution and the other does not, the former, unless prohibited by ‘written’ constitution and the written law, may be adopted.”

While dealing with the question of immunity of the sovereign in English law and its conflict with the Islamic principles Justice SHAH held:

“The Muslim Shariat does not embrace the concept of the British Common Law that a sovereign can do no wrong and cannot be sued in the municipal court in his own domain. On the contrary, in Shariat a sovereign can be sued in the Court of Qazi and like any other citizen is subject to his jurisdiction and bound to carry out any decree or order passed against him by the Qazi.”

As in the case of customary international law it would be difficult for the court to apply treaty law in case it conflicts with the principles of Shariat. This limitation imposed on the law by the Shariat in Pakistan can best be illustrated with reference to concrete examples.

Pakistan is committed to safeguard the welfare of the child as enjoined by Islam. Consequently, Pakistan’s delegation actively participated in the adoption of the Convention on the Rights of the Child, adopted on 20 November 1989. However, the provisions relating to ‘Adoption’ were found to be repugnant to

¹² Ibid.

the Islamic legal system which does not recognize adoption as a mode of filiation. Consequently Pakistan could become a party to the Convention only subject to the Pakistani legal position vis-à-vis the Shariat. Therefore, ratification of the Convention took place with the following reservation:

“Provisions of the convention shall be interpreted in the light of the principles of Islamic laws and values.”

Pakistan faced a similar problem while negotiating the UN Declaration on Social and Legal Principles with Reference to Foster Placement and Adoption Nationally and Internationally. Most of the Muslim states, including Pakistan, expressed their inability to agree to the provisions on adoption as these were repugnant to the principles of Islam. As a result the UN General Assembly recognized the principle of ‘Kafala’ of Islamic law as an equivalent humanitarian principle that could be applied by states practising Shariat.

4.2. Applicability of rules of international law in face of coinciding municipal legislation

In the preceding discourse, I discussed the applicability of customary international law or treaties relating to matters not covered by domestic law, and the limits imposed by Islamic law on their applicability in countries like Pakistan, where Shariat is the dominant law from which there can be no derogation. I shall now discuss the case where customary international law rules or treaty provisions can be applied without the need for a specific legal cover as the existing municipal legislation already provides such cover. In certain cases international principles or international obligations can be implemented by a mere executive order or administrative directive. Here municipal legislation and international legal norms coincide. In such a situation it could be argued that the international law rules form part of a broader complex of norms for the regulation of activities within the municipal legal order.

For example, in order to give municipal legal effect to the Convention on the Privileges and Immunities of the United Nations Pakistan enacted the United Nations (Privileges and Immunities) Act, 1948. However, to enable the Government of Pakistan to extend similar facilities to other international organizations and their representatives and officials, if it so decides, the Act of 1948 provides in its section 2 that where in pursuance of any international agreement, convention or other instrument it is necessary to accord to any international organization or its officials and representatives privileges and

immunities similar to those extended to the United Nations and its officials and representatives, the only thing that needs to be done is for the Federal Government to issue a notification in the Official Gazette (a purely executive act) in order that the 1948 Act takes effect with regard to the international organization mentioned in the notification.

There are also legislative enactments which enable the Federal Government to implement international obligations incurred by Pakistan under any specific international instrument. If the Government, under an international instrument, has to relax the conditions under which a foreign national is to stay in Pakistan, the Government can do so under Section 10 of the Foreigner's Act 1946 which provides that the

"Federal Government may by order declare that any or all of the provisions of this act or the orders made thereunder shall not apply, or shall apply with such modifications or subject to such conditions as may be specified, to or in relation to any individual foreigner, or any class or description of foreigners."

Similarly, if exemption from registration is to be granted to officials or representatives of international organizations who are posted in Pakistan under a treaty, then, under section 6 of the Registration of Foreigners Act, 1939,

"the Federal Government may, by order, declare that any or all the provisions of the rules made under this Act shall not apply, or shall apply with such modifications or subject to such conditions as may be specified in the said order, to or in relation to any individual foreigner or any class or description of foreigners."

Pursuant to the 1939 Act, the Registration of Foreigners (Exemption) Order 1966 was issued in compliance with Pakistan's international obligations of extending the facility of non-registration to diplomatic and consular agents, UN personnel, etc. Exemption from duties, customs and other taxes can also be granted by the Central Board of Revenue in accordance with the authority vested in it under the Finance Act. These are some examples where rules of customary international law or treaty law are already covered by or form part of the municipal legal order of Pakistan.

Legal cover will not be necessary either where a treaty is concluded upon specific authorization of an instrument of domestic law. The Pakistan Extradition Act of 1972 provides that extradition is possible only to a state with which there is either an extradition treaty or in respect of which a notification is issued in the Official Gazette. If Pakistan intends to enter into extradition arrangements with another country it will have to enter into a treaty with that state. The obligations incurred under that treaty will then be

implemented in Pakistan on the strength of the Extradition Act of 1972. Incorporation of the treaty through enactment of legislation for the purpose of implementation would not be necessary. Only its notification would be required for the courts to take cognizance of the treaty, but this is purely an administrative act.

4.3. Applicability of rules of international law in face of conflicting municipal law

While discussing the limitations on incorporation of rules of international customary law or treaty law in the municipal legal system I mentioned Shariat from which there can be no derogation. The other limitation is the municipal law in force. Consequently, in most countries the law of the land prevails over international legal norms unless the constitution of the state provides otherwise. In Pakistan international law has no superior status and municipal law shall prevail in case of inconsistency between it and international law rules.

Right from the beginning the courts in Pakistan have given superior status to the domestic law in case of conflict between the latter and international law rules. Originally, the courts in Pakistan took the view that a customary international law rule could not be applied unless it had the cover of municipal law. This point was made adequately clear in the case of *Federation of Pakistan v. Messrs Dalmia Cement Co. Ltd.*¹³ In this case the Supreme Court of Pakistan observed that

“if the proposition that a new state is bound by the obligations of its predecessor is accepted, even then it will not be possible to grant any relief to the respondent company, *because in the absence of a statutory recognition the municipal courts have no authority to enforce such an obligation.*”

However, as discussed earlier, this concept has undergone some changes and international legal norms were enforced by the Courts of Pakistan even in the absence of ‘statutory recognition’. The courts adopted a uniform and consistent policy in cases where there was a conflict between international law and domestic law provisions. But while deciding cases brought before them the courts were confronted with two types of situations, namely (1) where the treaty itself prescribed legislation for its implementation and (2) where the

¹³ PLD [1962] Supreme Court 260.

customary international law or treaty rules were at variance with the statutory instruments in force in Pakistan.

In cases where a treaty prescribes the adoption of legislation for its implementation it is not always necessary to enact laws. If a legal instrument already exists it shall automatically cover the treaty. If there is no existing implementing legislative instrument and if the treaty cannot be implemented through an executive order, then covering legislation would be needed. This brings us to the second point of discussion namely where the customary or treaty rule of international law comes into conflict with domestic law or other rules or customs having the force of law in Pakistan.

As already stated earlier Pakistan follows the 'dualist' doctrine both with regard to customary international law and treaties, but as also adverted earlier, in certain circumstances the courts of Pakistan do take judicial notice of, and apply international customary law or treaty law as a matter of policy to meet the ends of justice. This is evident from the reasons enunciated in the cases of *M.A. Qureshi v. The USSR*¹⁴ and *Messrs Gammon-Layton v. Secretary of State of the USA*¹⁵ on the question of sovereign immunity. However, in the latter case, while pronouncing on the question of applicability of international law rules where municipal law applied, the court expressed the view that it could not "engraft upon" the provisions of domestic law "general principle[s] of international law which our legislature did not think it proper to do so".

The matter was also dealt with, at considerable length, in *Messrs Najib Zarab Ltd v. The Government of Pakistan*.¹⁶ In this case the court examined two issues namely, (1) whether international law is, of its own force, drawn into the law of the land without the aid of municipal law and (2) whether so drawn, it overrides municipal law in cases of conflict.

While examining the two British doctrines of 'incorporation' and 'transformation' the Court was favourably inclined towards the practice that nations must march together and for that reason it supported the principle that municipal law must respect international law rules, and international law norms may be accommodated in municipal law whenever possible even without express legislative sanction,

"provided they do not run into conflict with Acts of Parliament. But when they do run into such conflict, the sovereignty and the integrity of the Republic and the supremacy of the constituted legislatures in making laws may

¹⁴ *Supra*, n.2.

¹⁵ PLD [1965] (W.P.) Karachi 425.

¹⁶ *Supra*, n.7.

not be subjected to external rules except to the extent legitimately accepted by the constituted legislatures themselves.”

It is, therefore, clear that in Pakistan in case of a conflict of international law rules with domestic law, the later shall prevail. It is difficult to go against the domestic law which reflects the will of a sovereign state. The national courts, being one of the principal organs of a sovereign state, and not of international law, must apply national laws if international law conflicts with it. However, Pakistan being a member of the comity of nations, its courts must, as far as possible, in the absence of a *prima facie* conflict, interpret the municipal law so “as to avoid confrontation with the comity of nations or the well established principles of international law”. It is only where the provisions of domestic law are incapable of being interpreted in any other manner and conflict is inevitable, that the domestic law shall prevail. In *Messrs. Najib Zarab v. The Government of Pakistan*¹⁷ the Court accepted the interpretation given in the authoritative book on ‘Interpretation of Statutes’¹⁸ which states:

“Every statute is to be interpreted and applied, as far as its language admits, as not to be inconsistent with the comity of Nations or with the established rules of international law.”

This principle was also accepted in an earlier case in which Justice NASIM HASAN SHAH, placing reliance on the same book, held:

“The Law of Pakistan is that every statute is to be so interpreted and applied, as far as its language admits, as not to be inconsistent with the comity of Nations or with the established rules of international law.”

The language used is almost a verbatim reproduction of the principle contained in the book on interpretation.

5. CONCLUSIONS

On close examination of the various decisions of Pakistani courts it becomes clearly discernable that any rule of customary international law which have the following two constitutive elements, viz. (a) a general practice of states and (b) acceptance by states of this general practice as law, would be

¹⁷ See *supra*.

¹⁸ Sir Lenon Maxwell, at page 107.

applied by the courts in Pakistan provided the same do not conflict with any provision of statutes or the principles of Islamic Law. In this regard it is recommended that the courts in Pakistan may take judicial notice of the rules of international law just as they do of foreign law.

International law is, and as a result of its continuing development in catering for newly emerging situations would remain, a highly specialized branch of the legal system with which domestic courts do not deal with frequently in their ordinary course. Like the status of foreign law in our domestic courts, international legal principles also constitute a question of fact with which the courts in Pakistan may not be conversant and, therefore, views and opinions of experts on international law may be permitted. Both prudence and justice demands that the courts of Pakistan should treat international law on the same footing as foreign law and, in support of it, admit the opinion of experts on international law. The courts may invite international law experts to appear as *amicus curiae* to assist the courts provided that the rule of international law in question is not *prima facie* in conflict with a statutory instrument or the Shariat. Books on international law have been admitted and relied on by the courts.¹⁹ However, the books of which courts should take judicial notice and admit in evidence in support of a legal proposition, must be authoritative, standard international law text books, universally accepted as such.

¹⁹ See, e.g., *M.A. Quraishi v. The USSR*, *supra* n.2 at 432-3.