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UNIT -I

INTRODUCTION TO INTERNATIONAL LAW

In the long march of mankind, a central role has always been played by the law. The basis behind the law is that peace and order is necessary and chaos is crucial to a just and stable existence. Law is that element which binds the members of the community together in their adherence to recognized values and standards. Law is both permissive and coercive in allowing individuals to establish their own legal relations with rights and duties in the former and as it punish those who infringe its regulations.[1]

Law is especially a set of rules which regulates behavior and respects the ideas and preoccupations of the society within which it functions. International law differs only in the sense that it regulates relations among nation states and municipal law regulates relation between individuals. The question *"Whether international law is a true law or not?"* should be considered as outdated. International law since the middle of the last century has been developing in many directions as the perplexities of life in the modern era have multiplied. A municipal law should be based on certain specific set of values – social, economic and political and these values form the base for legal framework which order the life in that environment. Similarly international law is a product of its environment. It has developed in accordance with the realities of the age.

Change is the only rule which is unchangeable. There is a continuing tension between those rules already established and the constantly evolving forces that seek changes within the system. One of the major problems of international law is to determine when and how to incorporate new standards of behavior and new realities of life into the already existing framework so that on the one hand, the law remains relevant and on the other, the system is not disrupted.

The scope of international law today is immense. From the regulations of space expeditions to the question of the division of the ocean floor, and from the protection of human rights to the management of international financial system its involvement has spread out from the primary concern of maintenance of peace and security to all the interests of contemporary international life.

The advent of nuclear arms created a status quo in Europe and a balance of terror throughout the world. The rise of international terrorism has posited new challenges to the system as States and international organizations struggle to deal with this phenomenon while retaining respect for the sovereignty of States and for human rights.

International law respects first and foremost the basic State oriented character of world politics, units of formal independence benefitting from equal sovereignty in law and equal possession of the basic attributes of statehood have succeeded in creating a system enshrining such values. Illustrations could be noted which include non intervention in internal affairs, territorial integrity, non-use of force and equality of voting in the UN General Assembly. But many factors cut across State borders and create a tension in world politics, such as inadequate economic relationships, and international concern for human rights. Law mirrors the concern of forces within states and between states.

International law has expanded horizontally to embrace the new States which have been established recently, it has extended itself to include individuals, groups and international organizations within its scope. It has also moved into new fields covering such issues as international terrorism, problems of environmental protection and mutual legal assistance in commercial and criminal matters.

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[1] Malcom N Shaw, International law, 5th edition, 2003.

The 19th century's theory of positivism had the effect of focusing the concerns of international law upon the sovereign States. States alone were considered to be subjects of international law and should be contrasted with the status of non-independent states and individuals as objects of international law. So the restrictions upon the independence of the State could not be presumed[2]. But the gradual sophistication of the positivist doctrine, combined with the advent of new approaches to the whole system of international relations, has broken down this exclusive emphasis and extended the roles played by non-state entities such as individuals, multinational firms and international institutions.

Together with the evolution of individual human rights, the rise of international organizations marks perhaps the key distinguishing feature of modern international law. The range of topics covered by international law has expanded hand in hand with the upsurge in difficulties faced and the proliferation in the number of participants within the system. Today international law is no longer exclusively concerned with issues relating to the territory or jurisdiction of States narrowly understood, but is beginning to take into account the specialized problems of contemporary society. Many of these have already been referred. So the focus of the present study or course material is the brief coverage of subjects that international law is concerned with.

ORIGIN, SCOPE AND NATURE OF INTERNATIONAL LAW

The law of Nations as it is understood firmly lies in the development of western culture and political organization. Sovereignty a European notion and the independent Nation State concept required a commonly accepted standards of behaviour among the states to conduct inter State relations. International law filled the gap. If we trace the early origins of international law it dates back to 1000 of years ago. In 2100 BC a treaty was signed between the rulers of Lagash and Uma in the area called Mesopatomia as historians call to be city states. The next important treaty signed between Ramese II of Egypt and the King of Hittities was more inclusive of different points covered under the agreement that is concerned not only the establishment of eternal peace and brotherhood but also respect for each other's territorial integrity, the termination of a State of aggression and the setting up of a form of defensive alliance.

Since then several agreements entered between the rival Middle Eastern powers. Ancient Israel contributed a Universal ethical stance coupled with rules of warfare and a fair system of law based on morality guided the subsequent generations.

The classical era of Greece about sixth century BC has contributed for a rational and critical thought of mind, and its constant questioning, argument and debate about man and nature spread throughout Europe along with Hellenic culture that penetrated western consciousness which lead to the birth of Renaissance. The City States of Greeks were linked together in a network of commercial and political associations through several treaties. Rights granted to the citizens of the State in each other's territories and the rules related to diplomatic envoys were developed.

The Romans gave profound respect for organization and law. Jus civille was applied among Roman citizens. As it was found to be insufficient to provide a background for expanding and developing nation it resulted in the augmentation of Jus gentium (law of Universal application). The middle ages were characterized by the struggle between religious authorities and rulers of Roman Empire and as Europe were of one religion ecclesiastical law applied to all. But secularism proved its victory shortly. Nevertheless commercial and maritime law developed as English law established Law Merchant, commercial rule of universal application. Mercantile courts were set up throughout Europe to settle disputes. This paved the way for the constitution of embryonic international trade law. Since trade developed among the States maritime law also kept its pace of development.

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[2]S.S.Lotus Case, PCIJ, Series A, No.10. p.18.

The rise of nation state of England, France and spain has developed territorially consolidated units and the need was felt that interaction between these sovereign entities must be regulated. The state's pursuit of political power and supremacy realized and recognized (Machiavelli's The Prince- 1513) which formed the basis for the evolution of the concept of an international community of separate, sovereign states that marks the beginning of what is understood by international law. Similarly the struggle by the city states of Italy for supremacy has resulted in the mean course for the development of many concepts of international law like diplomacy, Statesmanship, balance of power and community of States. The doctrine of sovereignty emerged with the rise of modern state and emancipation of international relations. Systematic analysis of the concept was done by Jean Bodin in 1576 (six livers de la Republique) who emphasized the necessity for the existence of sovereign to make laws. This idea of sovereign as supreme legislator mooted the principle of state supremacy in international relations.

BASIS OF OBLIGATION UNDER INTERNATIONAL LAW

Basically two theories constitute the basis of obligation under International law i.e., Naturalism and Positivism. Natural law, one of the most influential Greek concepts was taken up by Romans which was formulated by the Stoic philosophers of third century BC. These rules were rational, logical and rules of universal relevance because they were rooted in human intelligence which could not be restricted to particular group or individual but were of worldwide relevance.

Natural law is considered to be vital for the proper understanding of international law as this theory is considered to be the precursor for today's human rights law. Jus gentium of Roman law has incorporated Greek ideas of Natural law in order to enshrine rational principles common to all civilized nations. The early theories of international law have inculcated natural law principles as basis for international law. St Thomas Acquinas (13th century) merged Christian and natural law ideas and he maintained natural law formed part of law of God and rational creatures' participation in eternal law. Reason was the essence of man and must be involved in the ordering of life according to divine will. With this sophisticated intellectual background the scholars of the Renaissance period approached the question of the basis and justification of international law. The new approach to modern international law could be traced from the writings Spanish philosophers of 16th century like Franscisco Vitoria, Suarez, Alberico Gentilli (De Jure Belli- a comprehensive discussion of the law of war and a section of law of treaties). Hugo Grotius (father of International law) considered tobe supreme Renaissance man and his extensive work De Jure Belli ac pacis (1623-24) is considered to be remarkable.

POSITIVISM AND NATURALISM

Naturalism expounded by Pufendorf identified international law with law of nature and regarded natural law as moralistic system. Other naturalists also ignored actual practices of the States and made a theoretical construction of absolute values. The theorists who adhere to this theory are of the view that international law is part of the law of nature. States adhere international law because their relations were regulated by higher law i.e., the law of nature. Law of nature was connected once with religion. 16th and 17th centuries has secularized the concept of law of nature especially Grotius expounded the secularized concept of the law of nature and it was explained as the dictate of the right reason. Vattel also a natural law theory supporter expressed that natural law was the basis of international law. The other naturalists are Pufendarf, Christian Thomasius. So natural law is based upon "what ought to be".

Positivism is based on law Positivum which is opposed to what ought to be i.e., what it is?. The positivists base their theory on actual practices of the States. Positivists regard treaties and customs are the main sources of International law. Bynker-Shoek as one of the exponents of the positivist school, views in the ultimate analysis as Will of the States is the main source of international law. According to Brierly

positivism in International law is nothing but the sum of the rules by which they have consented to be bound. Anzillotti one of the chief exponents of the positivist school explains that the binding force of International law is founded on a supreme principle or norm known as Pacta Sunt Servanda i.e, agreements between the states must be respected and followed in good faith.

DEFINITION OF INTERNATIONAL LAW

The birth of International law can be traced back to ancient times. Jeremy Bentham has coined the word 'International law' in 1780 that means the body of rules which regulate the relations among the States.

Black's Law Dictionary defines law as, that "which is laid down, ordained, or established,"[3] and the international law is, "which regulates the intercourse of nations; the law of nations."[4] As per Oppenheim, "International law is the body of rules which are legally binding on states in their intercourse with each other."[5] Lord Coleridge, CJ, defined, "International law as the law of nations is that collection of usages which civilized states have agreed to observe in their dealings with one another."[6] Oppenheim defines 'Law of nations or International law is the name for the body of customary and conventional rules which are considered legally binding by civilized states in their intercourse with each other'. There are some other definitions by J.L.Brierly and Hackworth that says International law consists of a body of rules governing the relations between the States.

In *Queen V Keyn*, Lord Coleridge defines International law 'as the collection of usages which civilized nations agreed to observe in their dealings with one another' (also refer to *West Rand Central Gold Mining Company V R, & S.S.Lotus Case.)* However the definition of International law by Starke is considered to be appropriate for the simple reason that the definition is comprehensive and exhaustive as it reflects the present position of International law.

J.G.Starke defines "International law as that body of law which is composed for the greater part of the principles and rules of conduct which states feel themselves bound to observe and therefore do commonly observe in their relations with each other and which includes also

(a) the rules of law relating to the functioning of international institutions or organizations, their relations with each other and their relations with states and individuals and (b)certain rules of law relating to individuals and non state entities so far as the rights or duties of such individuals and non state entities are the concern of the international community.

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[3] See, Black's Law Dictionary, 700.
[4] See, Black's Law Dictionary, 649.
[5] See, Oppenheim's International law, Ninth Edition, vol. 1, PEACE, (ed. Sir Roberts Jennings and Sir Arthur Watts) (Pearson Education, Universal Law Publishing Company, 1996).
[6] See, Queen v. Keyn (1876).

SOURCES OF INTERNATIONAL LAW

CONTENTS

INTRODUCTION

The 'sources of international law' are those rules and principles based on which International Law is discovered or created, evolves and develops into binding law amongst the sovereign states. Unlike the domestic legal system where the sources of law can be ascertained with a greater degree of certainty, the sources of international law involves a tricky question as there is no hierarchical character of a legal order with gradation of authority to make law as it governs the conduct of sovereign states as such.[7]

The question of sources is primal in any system of law as law making is a continuous process in any viable legal system.

Herbert Briggs pointing the confusion of the term "sources" describes it as "the methods or procedures by which international law is created."[8] George Schwarzenberger "proposed the term law creating process for primary sources i.e. treaties, customs and general principles of law; and law determining agencies for 'subsidiary means for determination of law', i.e. judicial practice and doctrines."[9] Oppenheim contends that there is a difference between formal and material sources; formal being the source from which the legal rule derives its legal validity; and material providing the substantive content of that rule.[10] Long before the establishment of UN and ICJ, in the 19th and 20th centuries, many treaties and conventions played a great role in the development of international law, such as Geneva Convention 1864, Hague Conventions of 1899 and 1907, Treaty of Locarno 1925, to name a few. After establishment of UN in 1945,

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[7] See, Malcolm N. Shaw, International Law, Sixth Edition, Cambridge University Press, pp. 69-70.
[8] See, Herbert Briggs, The Law of Nations, 2nd ed., (New York, 1952), p. 44.
[9] See, George Schwarzenberger, International Law, p. 26-27.
[10] See, Sir Robert Jennings, Sir Watts Arthur, Oppenheim's International Law, (Indian Branch: Peerson Education, 1996), 23. (Cited by: Shagufta Omar, Sources of International law In the light of the Article 38 of the International Court of Justice)(available at: http://ssrn.com/abstract=1877123).

treaty acquired the most important mode of development of international law, starting from Bill of Rights and various sectoral instruments under the United Nations Treaty Series many thousand treaties have been registered with the United Nations. It is important to note that Art. 38 of the ICJ is generally regarded as an authoritative statement of the sources of international law, though it does not mean to provide an exhaustive list of the sources of international law. These provisions are in fact, expressed in terms of the function of the Court. The first three sources listed i.e. treaties, custom, and principles of law, are sometimes referred to as "primary sources", whereas the last two, judicial decisions and the teachings of publicists are referred to as "subsidiary" or "secondary sources" or evidence of international law rules. It shall not prejudice the Court's power to decide a case '*ex aequo et bono*' if the parties agree.[11]

TREATY AS A SOURCE OF INTERNATIONAL LAW:

The first though not the foremost source of international law is international treaties as laid down in Art. 38 of the ICJ Statute. A treaty is defined as " an international agreement concluded between states in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation."[12] Conventions, International Agreements, Pacts, General Acts, Charters, Concordants, Declarations and Covenants are some of the various designations of treaty.

The various titles assigned to these international instruments does not have any overriding legal effects. Both the 1969 Vienna Convention and the 1986 Vienna Convention[13] do not distinguish between the different designations of these instruments. Instead, their rules apply to all of those instruments as long as they meet certain common requirements.

Treaties, in contrast to custom constitute a more formal and conscious source of law. Treaties are expected to follow the precepts of the Vienna Convention on the Law of Treaties[14] which serves as the basis for the purpose of interpretation of treaties, whereas the contours of custom remain vague; the frequent repetition of certain practices may indicate the existence of a customary rule.

Treaty law is "made" by negotiators and their governments; customary law "emerges" in the daily practice, in legal opinions, writings of eminent scholars, etc., Similarly in cases brought before the World Court, one or several treaties will be invoked by the contesting States, their relevance or non relevance giving rise to differences between the parties, which the Court must solve in order to decide the dispute.

RELEVANCE OF TREATIES AS A SOURCE OF INTERNATIONAL LAW:

The United Nations Charter lays down its determination "to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained."[15] Thus a treaty is an important source of international law creating legal obligations on the parties to the same and they are bound to adhere and respect their treaty obligations. Consent to a treaty may be expressed by signature, ratification, or accession, and is binding on the parties to it. The principle that treaties are binding on the parties and have to be followed in good faith is derived from a rule of customary international law called as *'pacta sunt servanda'*.[16] Treaties could be a direct source of international law or reflective of a customary or general principles of law as evidence.

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[11] See, Statute of the International Court of Justice, Art. 38(2).
[12] See, The Vienna Convention on the Law of Treaties, 1969; Art. 2.
[13] Vienna Convention of the Law of Treaties between States and International Organisations or between International Organisations, 1986.
[14] The 1969 Vienna Convention has 114 parties (as of November 2014). This treaty is binding only among its parties and it is not a treaty with global participation, yet it is widely acknowledged that many of its provisions have codified existing customary international law. The customary International Law principles laid down in the VCLT is binding even on non-parties to the Convention.
[15] See, The United Nations Charter, 3rd Preambular Paragraph.
[16] See, The Vienna Convention on the Law of Treaties, 1969, Art. 26.

Permanent Court of International Justice in the *Wimbledon case*, inferred from Art. 380 to 386 of the Treaty of Versailles as well as Art. 2 and Art. 7 Hague Convention of 1907 in coming to a conclusion that a state remains neutral even though it allows passage through an international waterway of ships carrying munitions to belligerents.[17] In the *Nottebohm case*[18], the PCIJ has referred to the Bancroft Treaties and the Pan- American Convention of 1907 to which neither of the parties to the dispute were signatories in rendering its decision. The practise of citing treaties for substantiating the claim of a party in dispute though these treaties were not signed by them was widely prevalent.[19] A case in point would be the development of Air and Space Law where customary international law plays a very limited role due to the meteoric rise and growth of the subject within a short duration. Here treaties have given rise to the international rule of sovereignty over the superjacent airspace. International law has made several inroads in the maxim '*pacta tertiis nec nocent nec prosunt*' in the sense that it is said that when a rule is repeated in a large number of treaties the rule passes into customary law, or that when an important multilateral convention has been in existence for some time, its provisions become absorbed into customary international law.

LAW MAKING TREATIES AND TREATY CONTRACTS

Treaties are express agreements and are a form of substitute legislation undertaken by states. They bear a close resemblance to contracts in a superficial sense in that the parties create binding obligations for themselves, but they have a nature of their own which reflects the character of the international system.[20] Treaties require the express consent of the contracting parties and so they are considered to comprise of the most important sources of international law in the views of certain scholars. Treaties in this regard are viewed as superior to custom, which involves an agreement in tacit form.

Treaties may be divided into 'law-making' treaties, which are intended to have universal or general relevance, and 'treaty-contracts', which apply only as between two or a small number of states. Law-making treaties are those treaties which are of a norm creating Character and are also called as 'normative treaties'.[21]A Law-making treaty refers to those agreements whereby states augment their understanding of international law upon any specific topic or establish new rules which are to guide them for the future in their international conduct. Such law making treaties necessarily, require the participation of a large number of states to emphasize this effect, and may produce rules that will bind all. They include human rights treaties, boundary treaties and certain other instruments based on universal substantive legal principles such as the genocide convention and the UN Charter.

'Treaty-contracts' on the other hand are not law-making instruments in themselves since they are between only small numbers of states and on a limited topic, but may provide evidence of customary rules. The term 'treaty contract', refers to those treaties which resemble a contract treaty such as one in which a state agrees to lend money to another state are not sources of law, but merely legal transactions.[22] They create rights and obligations purely as regards the parties concerned and have not much of political and legal significance. States, international organizations, and the other internationally recognized entities alone can conclude treaties under international law. In the *North Sea Continental Shelf case*[23], the ICJ held that there was no obligation on the part of West Germany with respect to a provision in the Convention on Continental Shelf, 1958 which had not been ratified by it and the same had not entered customary

[17] See, S.S Wimbledon Case, 1923 P.C.I.J. (ser. A) No. 1.
[18] See, Liechtenstein v. Guatemala 1955 ICJ 1.
[19] See, The Asylum Case (Colombia v. Peru) 1950 ICJ 6. In the instant case, Colombia cited different Extraditions treaties not signed by neither party to support their argument. It was rejected by the Court as not pertinent to the question of diplomatic immunity which was the matter in dispute.
[20] See, Malcolm N. Shaw, International Law, Sixth Edition, Cambridge University Press, p. 94.
[21] The term 'normative treaty' was used by the ILC in its study of the topic "The law and practice relating to reservations to treaties" (e.g. Report of the International Law Commission (Fifty-sixth session, 2004), GAOR Supplement No. 10 (UN Doc. A/59/10), p. 290).
[22] See, Michael Akehurst, Modern Introduction to International Law, Routledge, p. 39.
[23] See, Germany v, Denmark and Netherlands, (1969) ICJ 1.

international law status. The Court further ruled that, even non-parties are bound by treaties reflecting customary law not because it is a treaty provision but because it reaffirms a rule or rules of customary international law.[24]

CUSTOM AS A SOURCE OF LAW

The second source of international law listed in Art. 38 (1) of the Statute of the International Court of Justice is 'international custom, as evidence of a general practice accepted as law'. It is placed on the same footing as international conventions as a primary source of international law. A custom generally refers to an established pattern of behavior that can be objectively verified within a particular social setting i.e., "what has always been done and accepted by law." J.L. Brierly describes it as follows: "Custom in its legal sense means something more than mere habit or usage; it is a usage felt by those who follow it to be an obligatory one. There must be present a feeling that, if the usage is departed from, some form of sanction probably, or at any rate ought to, fall on the transgressor."[25] Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation.[26] International custom is described by Hans Kelsen as "unconscious and unintentional lawmaking". It does not arise from a deliberate legislative process, but rather as a collateral effect of the conduct of States in their international relations.[27] Thus international custom refers to those legal obligations which are recognized, applied and complied by states in the international arena though they are not explicitly codified by treaty law.

As confirmed by the ICJ in the *Nicaragua case*[28], custom is constituted by two elements, the objective one of 'a general practice', and the subjective one 'accepted as law', the so-called *opinio juris*. In the *Continental Shelf case*[29], the Court stated that the substance of customary international law must be 'looked for primarily in the actual practice and opinio juris of States'. A new rule of customary international law cannot be created unless both of these elements are present. Thus it is evident customary international law emerges from patterns of behavior among states. These behavior patterns are called state practice and along with a corresponding belief that this practice is based on a legal obligation or opinio juris, they are considered as customary international law.

Customary international law plays a pivotal role in international law as it creates binding legal obligations on all states on certain universal legal concepts of international law which attain the status of international custom. The legal standing of many of the most important humanitarian principles, including principles of human rights and humanitarian protections in war, may depend heavily on their status as international custom. And this, in turn, is especially important because principles of customary international law in many countries is treated as law of the law without explicit act of legislation and in some countries it is capable of overriding contrary domestic law. With respect to customary international law, states are bound in the same manner as treaty law. But the primary difference is that, with respect to international conventions as a general rule only consenting parties are bound while in the case of customary international law all nation states are bound by legal obligations arising out of it.

STATE PRACTICE: THE OBJECTIVE ELEMENT OF INTERNATIONAL CUSTOM

The scholars have classified the requirements in what is referred to as the two-element theory, by which for a customary rule to arise, two elements must be present: on the one hand, there must be a significant State practice, and, on the other hand, the practice must follow from opinio juris, i.e. the belief that such practice reflects international law. Firstly, let us deal with the objective or material element of customary international law; State practice, also referred to as "constant and uniform usage" in the *Asylum case*.

[24] See, Malcolm N. Shaw, International Law, Sixth Edition, Cambridge University Press, p. 95.
[25] See, J.L Brierly, The Law of Nations: An Introduction to the International Law of Peace, Oxford University Press, 1963. p. 59
[26] See, Restatement of the Law, Third, Foreign Relations Law of the United States, St. Paul, Minn.: American Law Institute Publishers, 1987.
[27] See, Antonio Cassese, International Law, Oxford University Press, p. 156.
[28] See, The Republic of Nicaragua v. United States of America - Case concerning the Military and Paramilitary Activities in and against Nicaragua (1986) ICJ 1.
[29] See, Libya v. Malta - Case concerning the Continental Shelf (1985) ICJ 13.

While assessing State practice, two distinct matters need to be addressed, viz., the selection of practice that contributing to the creation of customary international law and the assessment of whether this practice establishes a rule of customary international law. It is widely accepted that the reiterated conduct of States fulfills the objective element for the formation of customary norms.[30] The practice of the executive, legislative and judicial organs of a State can contribute to the formation of customary international law. The State comprises the executive, legislative and judicial branches of government. The organs of these branches can engage the international responsibility of the State and adopt positions that affect its international relations.[31]

The negotiation and adoption of resolutions by international organisations or conferences, together with the explanations of vote, are acts of the States involved. The greater the support for the resolution, the more importance it is to be accorded. Likewise, statements made by States during debates on the drafting of resolutions constitute State practice and have been included where relevant.[32]

International Organizations have international legal personality and can participate in international relations in their own capacity, independently of their member States. In this respect, their practice can contribute to the formation of customary international law. To establish a rule of customary international law, State practice has to be virtually uniform, extensive and representative. Although some time will normally elapse before there is sufficient practice to satisfy these criteria, no precise amount of time is required. As stated by the International Court of Justice in the *North Sea Continental Shelf case*[33]*:*

"the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law on the basis of what was originally a purely conventional rule, an indispensable requirement would be that within the period in question, short though it might be, State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked; and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved."

Different States must not have engaged in substantially different conduct, some doing one thing and some another. In the *Asylum case*[34], the International Court of Justice was presented with a situation in which practice was not sufficiently uniform to establish a rule of customary international law with respect to the exercise of diplomatic asylum. In this respect, it stated that:

"The facts brought to the knowledge of the Court disclose so much uncertainty and contradiction, so much fluctuation and discrepancy in the exercise of diplomatic asylum and in the official views expressed on various occasions, there has been so much inconsistency in the rapid succession of conventions on asylum, ratified by some States and rejected by others, and the practice has been so much influenced by considerations of political expediency in the various cases, that it is not possible to discern in all this any constant and uniform usage, accepted as law."

However, the Court in the *Fisheries case*[35] held that "too much importance need not be attached to a few uncertainties or contradictions, real or apparent" in a State's practice when making an evaluation. It is enough that the practice is sufficiently similar. It was on this basis that the ICJ found in the *Continental Shelf cases* that the concept of the exclusive economic zone had become part of customary law. Even though the various proclamations of such a zone were not identical, they were sufficiently similar for the Court to reach this conclusion.

[30] See, Mark Weisburd, The International Court of Justice and the Concept of State Practice. University of Pennsylvania Journal of International Law, Vol 31:2 (accessed from: https://www.law.upenn.edu/journals/jil/articles/volume31/issue2/Weisburd31U.Pa.J.Int'lL.295(2009).pdf).

[31] See, Michael Akehurst, Modern Introduction to International Law, Routledge, p. 43.

[32] See, Jean-Marie Henckaerts and Louise Doswald-Beck, Customary International Humanitarian Law, Volume I: Rules (accessed from: https://www.icrc.org/eng/assets/files/other/customary-international-humanitarian-law-i-icrc-eng.pdf).

[33] See, Germany v. Denmark and Netherlands, (1969) ICJ 1 p. 43.

[34] See, Colombia v. Peru, (1950) ICJ Rep. 266.

[35] See, United Kingdom v Norway [1951] ICJ 3.

The ICJ jurisprudence shows that contrary practice itself does not prevent the formation of a rule of customary international law as long as this contrary practice is condemned by other States or denied by the government itself and therefore does not represent its official practice. Through such condemnation or denial, the original rule is actually confirmed.[36] The International Court of Justice dealt with such a situation in the *Nicaragua case*[37] in which it looked at the customary nature of the principles of non-use of force and non-intervention, stating that:

"It is not to be expected that in the practice of States the application of the rules should have been perfect, in the sense that States should have refrained, with complete consistency, from the use of force or from intervention in each other's internal affairs. The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolute rigorous conformity with the rule. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule. If a State acts in a way prima facie incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule. [38] "

It does not need to be universal; a "general" practice suffices and no precise number or percentage of States is required.[39] In the words of the International Court of Justice in the *North Sea Continental Shelf cases*, the practice must "include that of States whose interests are specially affected".

The International Law Commission has similarly considered verbal acts of States as contributing towards the creation of customary international law. It did so, for example, in the context of the Draft Articles on State Responsibility where it considered the concept of a "state of necessity" to be customary.[40]

The International Criminal Tribunal for the Former Yugoslavia has stated that in appraising the formation of customary rules of international humanitarian law, "reliance must primarily be placed on such elements as official pronouncements of States, military manuals and judicial decisions".[41]

In the *Lotus case*[42], the Permanent Court of International Justice rejected France's argument in favor of a rule restricting jurisdiction over negligent acts committed on board of a ship to the flag State, which it justified by citing the almost complete absence of prosecutions by States others than the flag State. The PCIJ considered that such omission was not a clear evidence of custom, since the abstention from prosecution could be motivated by various reasons—not necessarily by the existence of a customary norm. The same approach was taken by the ICJ in the *Nuclear Weapons case*[43] when it dismissed the argument that there was a customary rule prohibiting the use of such weapons because States had refrained from using them since 1945.

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[36] See, Gerald Postema, Customary International Law: A Normative Concept (accessed from: http://www.law.cam.ac.uk/microsites/philosophical_historical_and_legal_perspectives/documents/part_3/ii/4/GPostema_V1.doc.).)

[37] See, The Republic of Nicaragua v. United States of America - Case concerning the Military and Paramilitary Activities in and against Nicaragua (1986) ICJ 1.

[38] See, Jan Wouters and Cedric Ryngaert, The Impact of Human Rights and International Humanitarian Law on the Process of the Formation of Customary International Law, Institute for International Law Working Paper No. 121 - February 2008 (accessed from: https://www.law.kuleuven.be/iir/nl/onderzoek/wp/WP121e.pdf).

[39] See, Ian Brownlie, Principles of Public International Law, 4th ed. p. 8.

[40] See, ILC, Draft Articles on State Responsibility, Yearbook of the ILC, 1980, Vol. II, Part 2, UN Doc. A/CN.4/SER.A/1980/Add.1 (Part 2), 1980, pp. 34–52.

[41] See, The Prosecutor v. Dusko Tadiæ, Case No. IT-94-AR72, Decision on the defence motion for interlocutory appeal on jurisdiction, 2 October 1995, p. 99.

[42] See, France v. Turkey, (1927) PCIJ Series A no. 10.

[43] See, ICJ Advisory Opinion on Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion of 8 July 1996 - General List No. 95.

OPINIO JURIS: THE SUBJECTIVE ELEMENT OF INTERNATIONAL CUSTOM

The other requirement for the existence of a rule of customary international law, *opinio juris*, relates to the need for the practice to be carried out *as of right*. Mendelson defines *opinio juris sive necessitatis* as "a belief in the legally permissible or obligatory nature of the conduct in question, or of its necessity".[44]

The particular form in which the practice and this legal conviction needs to be expressed may well differ depending on whether the rule involved contains a prohibition, an obligation or merely a right to behave in a certain manner. The subjective or psychological aspect is known by the Latin expression *opinio juris sive necessitatis*, which literally translates as "opinion of law or necessity", or simply *opinio juris*. It is reflected in the text of Article 38 (1) (b), as it provides that, for custom to exist, a general practice must be accepted as law. It continues to be the most debated and least comprehended facet of customary international law.[45]

A good illustration would be the *Lotus case* in which France disputed Turkey's right to prosecute for a collision on the high seas. France argued that the absence of such prosecutions proved a prohibition under customary international law to prosecute, except by the flag State of the ship on board which the wrongful act took place. The Court disagreed because it was not clear whether other States had abstained from prosecuting because they thought they had no right to do so or because of some other reason, for example, lack of interest or belief that a court of the flag State is a more convenient forum. The Court stated there was no evidence of any consciousness of having a duty to abstain.[46]

The International Court of Justice in the *North Sea Continental Shelf case* dealt with another ambiguity in which Denmark and the Netherlands argued that a customary rule existed requiring a continental shelf to be delimited on the basis of the equidistance principle, *inter alia*, because a number of States had done so. The Court considered that the basis of the action of those States remained speculative and that no inference could be drawn that they believed to be applying a rule of customary international law. The States that had delimited their continental shelf on the basis of the equidistance principle had behaved in accordance with that principle but nothing showed that they considered themselves bound by it. The International Court of Justice held in this regard that:

"Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the opinio juris sive necessitatis."[47]

The State must follow the practice because of a belief that they are bound by law to do so rather than because of the demands of courtesy, reciprocity, comity, morality, or simple political expediency.

Therefore, only when it is accompanied by such conviction it becomes *opinio juris*. It becomes a *sine qua non* to distinguish a rule of customary international law from a rule of international comity, which is based upon a consistent practice in inter-State relations, but without the "feeling of legal obligation".

An example of a practice amounting to international comity, but not custom, is the saluting at sea by a ship of another ship flying a different flag. The ICJ has pointed this out in the *North Sea Continental Shelf case* judgment, establishing opinio juris as the main distinguishing feature between custom and comity or courtesy:

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[44] See, Maurice Mendelson, The Formation of Customary International Law. Vol. 272, p. 269.
[45] See, Jörg Kammerhofer, Uncertainty in the Formal Sources of International Law: Customary International Law and Some of Its Problems. European Journal of International Law, 2004: 523-553.
[46] See, France v. Turkey, (1927) PCIJ Series A no. 10.
[47] See, Germany v. Denmark and Netherlands, (1969) ICJ 1 p. 76.

"The frequency, or even habitual character of the acts is not in itself enough. There are many international acts, e.g., in the field of ceremonial and protocol, which are performed almost invariably, but which are motivated only by considerations of courtesy, convenience or tradition, and not by any sense of legal duty."[48]

Ian Brownlie argues that the International Court of Justice has taken two divergent approaches to *opinio juris*. Under the first approach, called no scrutiny, the court simply assumes *opinio juris* exists if there is uniform state practice. Under the second approach, called strict scrutiny, the court demands positive evidence that *opinio juris* exists. The stricter method was applied in three important cases: by the PCIJ in the Lotus case and by the ICJ in the North Sea Continental Shelf and Nicaragua cases. In these cases, a higher standard of proof was required, since the Court did not accept that a continuous practice was prima facie evidence of the belief in the existence of a legal obligation.[49]

JUS COGENS:

In international law, the term *"jus cogens"* (literally, "compelling law") refers to norms that command peremptory authority, superseding conflicting treaties and custom. *Jus cogens* norms are considered peremptory in the sense that they are mandatory, do not admit derogation, and they can be modified only by general international norms of equivalent authority.[50] *Jus cogens* refers to the legal status that certain international crimes reach, and obligatio erga omnes pertains to the legal implications arising out of a certain crime's characterization as jus cogens.

In other words, the norm describes such a bare minimum of acceptable behavior that no Nation State may derogate from it. It is argued by some that the overwhelming application of the norm against executing juvenile offenders has rendered it a *Jus cogens* norm. The treaties, pronouncements, and practices demonstrate that the prohibition has become as widespread and unquestionable as have the prohibitions against slavery, torture, and genocide. There are no contrary expressions of opinion by any country, nor by any agency charged with the enforcement and interpretation of the within-cited international accords.

The emergence of *Jus cogens* can be traced to the late 60s and rests upon the idea that a certain category of law that derives from reason and humanity (natural law) should prevail over man-made law (consent-based law).[51] The establishment for peremptory norms was a result of the initiatives of socialist and developing countries.

Art. 53 of the Vienna Convention on the Law of Treaties defines a peremptory norm which is a synonym to *Jus cogens* as "a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." Similarly, Art. 64 of the VLCT state that, "if a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates."

GENERAL PRINCIPLES OF INTERNATIONAL LAW

General principles of law recognized by civilized nations are often cited as a third source of International law.[52] Article 38 of the ICJ Statute lists "general principles of law recognized by civilized nations" as one of the sources of applicable law in cases of disputes arising under International Law. These are general principles that apply in all major legal systems. An example is the principle that persons who

[48] See, Germany v. Denmark and Netherlands (1969) ICJ 1 p.79.
[49] See, Ian Brownlie, Principles of Public International Law, 4th ed. p. 10.
[50] See, Vienna Convention on the Law of Treaties, Art. 53.
[51] See, Evan J. Criddle & Evan Fox-Decent, A Fiduciary Theory of Jus Cogens, The Yale Journal of International Law, Vol. 34:331 (accessed from: http://www.yale-university.org/yjil/files_PDFs/vol34/Criddle_Fox-Decent.pdf).
[52] See, Statute of the ICJ, Art. 38 (1) (c).

intentionally harm others should have to pay compensation or make reparation.[53] General principles of law are usually used when no treaty provision or clear rule of customary law exists.[54]

General Principles of law in the international domain were already recognized in the Hague Conferences of 1899 and 1907. To adequately comprehend what exactly is at stake in the debate on the true nature of the "general principles of law", it is important to refer to the function that they are meant to serve. The general principles of law are primarily regarded as a mechanism to alleviate the problem of legal gaps. The main objective of inserting this paragraph in Article 38 is to fill in gaps in treaty and customary law and to meet the possibility of a *non liquet.*[55]

The rules of Pacta sunt servanda, that contracts must be kept[56]; the right of self defense[57]; for one's own cause no one can be a judge; that the judge must hear both sides; and the principle of *res judicata*[58] are all considered to be general principles of international law. Perhaps the most important general principle, inherent in international legal rules, is that of good faith[59], enshrined in the United Nations Charter, and its elaboration in the Declaration of Principles of International Law Concerning Friendly Relations and Co-operation among States adopted by the General Assembly in resolution 2625 (XXV).

The ICJ in the *Aegean Sea Continental Shelf case*[60] said that the judges are to interpret the rules of international law as they are in the present and not at the time of the drafting. Thus, the use and functionality of General Principles is not to be assessed based on the fact that the motive for their inclusion was the dislike for nonliquet so that it does not appear. The proliferation of legislation has in most parts eliminated this problem. However, General Principles are not excluded from finding a new position in the international law today.

Another important general principle of international law is that of equity, which permits international law to have a degree of flexibility in its application and enforcement. The Law of the Sea treaty, for example, called for the delimitation on the basis of equity of exclusive economic zones and continental shelves between states with opposing or adjacent coasts.

In a number of cases references to equity has been made as a set of principles constituting the values of the system. The decision of Judge Hudson in the *Diversion of Water from the Meuse case*[61] in 1937 regarding a dispute between Holland and Belgium is typical example.[62] The Netherlands complained that Belgium by constructing a lock in Belgian territory had violated an agreement between the two States that they would both take water from the River Meuse only at a certain point. However, the Netherlands had also constructed and operated for a period of time a similar 'unlawful' lock in its own territory.

Judge Hudson pointed out that what are regarded as principles of equity have long been treated as part of international law and applied by the courts. 'Under article 38 of the Statute', he declared, 'if not independently of that article, the Court has some freedom to consider principles of equity as part of the international law which it must apply.' However, one must be very cautious in interpreting this, although

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[53] See, Chorzow Factory Case, PCIJ, Series A, No. 17, 1928.

[54] See, Robert Beckman and Dagmar Butte, An Introduction to International Law (accessed from: http://www.ilsa.org/jessup/intlawintro.pdf).

[55] The term 'non liquet' means the possibility that a court or tribunal could not decide a case because of a 'gap' in law. Remarkably, the ICJ applied the doctrine of non liquet in the Nuclear Weapons case, Advisory Opinion, (1997) 35 ILM 809.

[56] See, Advisory Committee of Jurists, Procès-verbaux of the Proceedings of the Committee, June 16th – July 24th, 1920, with Annexes (1920) 335.

[57] See, The Republic of Nicaragua v. United States of America - Case concerning the Military and Paramilitary Activities in and against Nicaragua (1986) ICJ 1.

[58] See, The Corfu Channel Case (United Kingdom v. Albania); Assessment of Compensation, 15 XII 49, International Court of Justice (ICJ), I.C.J. Reports 1949, p. 244; General List No. 1, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007, p. 43.

[59] See, Nuclear Test case (Australia v France), ICJ Rep. 1974, 268, para, 46; cited by Shaw, International Law, 104.

[60] See, Aegean Sea Continental Shelf case (Greece v. Turkey), Judgment, I.C.J. Reports 1978, p. 3.

[61] See, (Netherlands v Belgium) [1937] PCIJ (ser A/B) No 70, 4.

[62] It has to be noted that this is an important case where the Permanent Court of International Justice applied the doctrine of 'clean hands' in delivering the judgment.

on the broadest level it is possible to see equity as constituting a creative charge in legal development, producing the dynamic changes in the system rendered inflexible by the strict application of rules. Equity has been used by the courts as a way of mitigating certain inequities, not as a method of refashioning nature to the detriment of legal rules.

Judge Anzilotti of the Permanent Court of International Justice, concurred, describing the maxim 'one who seeks equity must do equity' as: so just, so equitable, so universally recognised, that it must be applied in international relations. It is one of the general principles of law recognised by civilized nation.[63] In the *Rann of Kutch Arbitration*[64] between India and Pakistan in 1968 the Court agreed that equity formed part of international law and that accordingly the parties could rely on such principles in the presentation of their cases.

The *Anglo Norwegian Fisheries case* [65], provides an example of principle of estoppels or acquiescence. The British refrained for almost 300 years from fishing in Norwegian coastal waters until 1906 when a few British vessels started doing so. In 1911 when a British trawler was seized for violating Norwegian regulations as to permissible fishing zones, the United Kingdom complained that the Norwegian government had made use of unjustifiable straight base-lines across the fjords in delineating its sea-boundaries. The Court found that the boundaries imposed by Norway were not contrary to international law. As part of its finding, the Court considered it significant that Norway had applied its method of delimitation consistently over a very long period, that this was well-known to the United Kingdom, and, with this knowledge, it had abstained from making any complaint.

In the *Frontier Dispute case*[66], between Mali and Upper Volta, the Court stated that it would be unjustified in resorting to equity to modify an established frontier inherited from the colonial powers. Equity as a legal concept was said by the Court to be a direct emanation of the idea of justice – but it was not simply an arbitrary concept of 'fairness' which could be interposed at will by a court or tribunal. The Court declined to alter the frontier to reflect some argued concept of equity.

An intriguing application of the clean hands doctrine can be seen in the dissenting opinion of Judge Morozov in the *Tehran Hostages case*.[67] Following the 1979 occupation of the United States embassy in Tehran by militants, the United States brought a claim against Iran before the International Court pursuant to the Treaty of Amity, Economic Relations and Consular Rights of 1955. While the Court was deliberating the United States launched a military operation inside Iran in an attempt to rescue the hostages, as well as initiating economic sanctions. The Court, by majority, found in favour of the United States. Judge Morozov found against the United States because, by invading Iran and imposing sanctions, it had, in his view, deprived itself of the right to rely upon treaty obligations to bring its claim.[68]

Further the clean hands doctrine can also be seen in the recent dissenting opinion of Judge ad hoc Van den Wyngaert in the *Arrest Warrant case*.[69] The Democratic Republic of the Congo brought proceedings against Belgium, who had issued an arrest warrant in absentia in respect of its Foreign Minister, Mr Yerodia, alleging that Belgium was precluded from doing so on the basis of diplomatic immunity. Judge Van den Wyngaert found that the Congo was precluded from bringing its claim: because of its own failure to investigate and prosecute Mr.Yerodia it did not come to the Court with clean hands.[70]

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[63] See, Diversion of Waters from the River Meuse (Netherlands v Belgium) [1937] PCIJ (ser A/B) No 70, 4, 50.
[64] See, Rann of Kutch Arbitration (India v. Pak.) (The Indo-Pak. Western Boundary Case Trib. 1968), excerpts reprinted in 7 I.L.M. 633, 667 (1968).
[65] See, The Anglo Norwegian Fisheries case (United Kingdom v Norway) [1951] ICJ Rep 116, 124.
[66] See, Frontier Dispute, Judgment (Burkina Faso/Republic of Mali) I.C.J. Reports 1986, p. 554.
[67] See, Tehran Hostages Case(United States v Iran) [1980] ICJ Rep 3, [3] (Morozov J
[68] See, Justice Margaret White, Equity - A General Principle of Law Recognized by Civilized Nations? Vol 4 No 1 QUTLJJ (Queensland University of Technology Law and Justice Journal) (accessed from: https://lr.law.qut.edu.au/article/download/177/170).
[69] See, (The Republic of Congo v Belgium) [2002] ICJ Rep 2.
[70] See, Arrest Warrant (The Republic of Congo v Belgium) [2002[ICJ Rep 2, [35] (Van den Wyngaert J).

JUDICIAL DECISIONS AND SCHOLARLY WORKS AS A SOURCE OF INTERNATIONAL LAW

Subsidiary means are not sources of law; instead they are subsidiary means or evidence that can be used to prove the existence of a rule of custom or a general principle of law. Article 38 lists only two subsidiary means - the writings of the most highly qualified publicists (international law scholars) and judicial decisions of both international and national tribunals if they are ruling on issues of international law. The scope of the ICJ source of international law, "writings of most highly qualified publicists" includes authoritative writings by well-regarded scholars and jurists. However, the Statute is silent on the meaning of "most highly qualified", and the travaux préparatoires offer little guidance on this point.

The influence of writers such as Gentili, Grotius, Pufendorf, Bynkershoek and Vattel were considered authorities in determining the scope, form and content of international law is unparallel. Today, however, juristic writings are considered only as a material or evidential source only. They are used as a method of discovering what the law is on any particular point rather than as the source of actual rules, and the writings of even the most respected international lawyers cannot create law. There is considerable debate amongst the scholars as regards the relevance of subsidiary sources under Art. 38(1)(d) of the ICJ Statute.

Schwarzenberger in reference to the works of scholars states that they must try their hardest not to blur the border lines between *lex lata* (law as it is) and *lex ferenda* (law as it ought to be). In this context, the remarks of Justice Gray in the *Paquete Habana case,* that "such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be but for trustworthy evidence of what the law really was" is noteworthy.[71] The jurisdiction of the ICJ, specified in article 36 (1) of its Statute, "...comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force..." The United Nations' Charter further stipulates that all members of the United Nations are ipso facto parties to the ICJ Statute.[72]Besides decisions, the ICJ is authorized to render advisory opinions on any legal question, when requested by the General Assembly or the Security Council.

Other organs of the United Nations and specialized agencies may also request advisory opinions of the ICJ on legal questions arising within the scope of their activities, when authorized by the United Nations General Assembly (UNGA).[73] The ICJ, by the very nature of its functions, plays an important role in the development of international law. Thus International Court of Justice closely examines its previous decisions and will carefully distinguish those cases which it feels should not be applied to the problem being studied. [74]

Thus even as a subsidiary source, judicial decisions are important in the determination of the existence of the legal rules and their content. A unanimous, or almost unanimous, decision plays an important role in the progressive development of the law. In the *Anglo-Norwegian Fisheries case,* with its statement of the criteria for the recognition of baselines from which to measure the territorial sea, which was later enshrined in the 1958 Geneva Convention on the Territorial Sea and Contiguous Zone.

Further, the recent proliferation of international tribunals and courts, such as courts on human rights, international criminal courts and the Tribunal for the Law of the Sea is likely to lead to conflicting decisions on international law as there is no ultimate legal authority in the sense of a supreme court to harmonize such conflicts. The ICJ is not in such a position because it lacks any formal relations with other international courts and tribunals.[75]

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[71] See, Michael Peil, Scholarly Writings as a Source of Law: A Survey of the Use of Doctrine by the International Court of Justice, Cambridge Journal of International and Comparative Law (1)3: 136–161 (2012) (accessed from: http://joomla.cjicl.org.uk/journal/article/pdf/50).
[72] See, The UN Charter, Art. 93.
[73] See, The UN Charter, Art. 96.
[74] See, Shahabuddeen, Precedent (cited by: Malcolm N. Shaw, International Law, Sixth Edition, Cambridge University Press, p. 110).
[75] See, Michael Akehurst, Modern Introduction to International Law, Routledge, p. 51.

RESIDUARY SOURCES OF INTERNATIONAL LAW

Resolutions of the UN General Assembly or resolutions adopted at major international conferences are only recommendations and are not legally binding. However, in some cases, although not specifically listed in article 38, they may be subsidiary means for determining custom. If the resolution purports to declare a set of legal principles governing a particular area, if it is worded in norm creating language, and if is adopted without any negative votes, it can be evidence of rules of custom, especially if States have in practice acted in compliance with its terms. The examples of such UNGA Resolutions which have been treated as strong evidence of rules of customary international law include the Universal Declaration of Human Rights[76] (1948), the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Sovereignty[77] (1965), the Declaration of Principles of International Law Concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations[78] (1970). Some of these resolutions have also been treated as subsequent agreement or practice of States on how the principles and provisions of the UN Charter should be interpreted.

The Assembly has produced a number of highly important resolutions and declarations and they have definite impact upon the direction adopted by modern international law. The way states vote in the General Assembly and the explanations given upon such occasions constitute evidence of state practice and state understanding as to the law. Where a particular country has consistently voted in favour of, for example, the abolition of apartheid, it could not afterwards deny the existence of a usage condemning racial discrimination and it may even be that that usage is for that state converted into a binding custom.

The 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples[79], which was adopted with no opposition and only nine abstentions and followed a series of resolutions attacking colonialism and calling for the self-determination of the remaining colonies, has, it would seem, marked the transmutation of the concept of self-determination from a political and moral principle to a legal right and consequent obligation, particularly taken in conjunction with the 1970 Declaration on Principles of International Law.

HIERARCHY OF SOURCES

Article 38 of ICJ is not an exhaustive statement for describing sources of international law as since its formulation in 1945, many changes in the international community have taken place. In theory there is no hierarchy among the three sources of law listed in Article 38 of the ICJ Statute. In practice, however, international lawyers usually look first to any applicable treaty rules, then to custom, and last to general principles. In the drafting history of this provision the proposal was made that the sources listed should be considered by the Court 'in the undermentioned order' (a-d). This proposal was not accepted and the view was expressed that the Court may, for example, draw on general principles before applying conventions and custom.[80]

Judicial decisions and writings clearly have a subordinate function within the hierarchy in view of their description as subsidiary means of law determination in article 38(1) of the statute of the ICJ, while the role of general principles of law as a way of complementing custom and treaty law places that category fairly firmly in third place. The question of priority as between custom and treaty law is more complex. As a general rule, that which is later in time will have priority. Treaties are usually formulated to replace or codify existing custom, while treaties in turn may themselves fall out of use and be replaced by new customary rules.[81]

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[76] See, Part A of UN General Assembly Resolution 217 III, UN Doc A/RES/3/217/, 10 Dec. 1948.
[77] See, UN General Assembly Resolution 2131 (XX), UN Doc A/RES/20/2131, 21 Dec. 1965.
[78] See, UN General Assembly Resolution 2625 (XXV), UN Doc A/RES/25/2625, 24 Oct. 1970.
[79] See, UN General Assembly Resolution 1514 (XV), UN Doc A/RES/2/1514, 14 Dec. 1960.
[80] See, Michael Akehurst, Modern Introduction to International Law, Routledge, p. 56.
[81] See, Malcolm N. Shaw, International Law, Sixth Edition, Cambridge University Press, p. 123.

Article 38 makes no reference to such a hierarchy but it is possible to discern elements of a hierarchy in certain respects. The relationship between treaties and custom is particularly difficult.[82] Clearly a treaty comes into force, overrides customary law as between the parties to the treaty; one of the main reasons why states make treaties is because they regard the relevant rules of customary law as inadequate. Thus, two or more states can derogate from customary law by concluding a treaty with different obligations, the only limit to their freedom of lawmaking being rules of jus cogens, which will be discussed below.

But treaties can come to an end through desuetude—a term used to describe the situation in which the treaty is consistently ignored by one or more parties, with the acquiescence of the other party or parties.

There are two types of norms or rules not previously discussed which do have a higher status. First, peremptory norms or principles of *jus cogens* are norms that have been accepted and recognized by the international community of States as so fundamental and so important that no derogation is permitted from them.[83] Second, members of the United Nations are bound by the Article 103 of the United Nations Charter, which provides that in the event of a conflict between the obligations of members under the Charter - including obligations created by binding decisions of the Security Council - the Charter obligations prevail over conflicting obligations in all other international agreements.

Desuetude often takes the form of the emergence of a new rule of customary law, conflicting with the treaty. Thus, treaties and custom are of equal authority; the later in time prevails. This conforms to the general maxim of *lex posterior derogat priori* (a later law repeals an earlier law). However, in deciding possible conflicts between treaties and custom, two other principles must be observed, namely *lex posterior generalis non derogat priori speciali* (a later law, general in nature, does not repeal an earlier law which is more special in nature) and *lex specialis derogat legi generali* (a special law prevails over a general law).

Since the main function of general principles of law is to fill gaps in treaty law and customary law, it would appear that general principles of law are subordinate to treaties and custom. Judicial decisions and learned writings are described in Article 38(1)(d) as 'subsidiary means for the determination of rules of law', which suggests that they are subordinate to the other three sources listed: treaties, custom and general principles of law. Judicial decisions usually carry more weight than learned writings, but there is no hard and fast rule; much depends on the quality of the reasoning which the judge or writer employs. In sum, the different sources of international law are not arranged in a strict hierarchical order. Supplementing each other, in practice they are often applied side by side. But, if there is a clear conflict, treaties prevail over custom and custom prevails over general principles and the subsidiary sources.

[82] See, Christopher Greenwood, International Law: An Introduction (accessed from: http://legal.un.org/ avl/pdf/ls/Greenwood_outline.pdf).
[83] See, Shagufta Omar, Sources of International law In the light of the Article 38 of the International Court of Justice)(available at: http://ssrn.com/abstract=1877123).