Public International Law Project

Custom
As a Source of

International Law

Compiled By Ankit Chowdhri 10/09

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Abbreviations

Ed. Ibid. ICJ No. p. PCIJ Rep. UN v.

Edition Ibidem International Court of Justice Number Page Number Permanent Court of International Justice Reporter United Nations Organization Versus

International Law: An Introduction

In any given society where people live together, conflicts of interests are bound to arise and there is always the need to do justice. Rules for the regulations of human conduct are, therefore, present in all societies. They are necessary for the stability and peace because man would not know how he should behave. As the relations of the individuals in a society are governed by municipal law, the relations of the states are governed by international law. Like municipal law, international law also maintains international order and stability in the society of nations. It is in the interest of states themselves to agree and to regulate their relations with one another. International law, also called public international law or law of nations, the body of legal rules, norms, and standards that apply between sovereign states and other entities that are legally recognized as international actors. The term was coined by the English philosopher Jeremy Bentham (1748–1832)1. Public International Law is the law of the political system of nation-states and other entities of the international sphere. It is a distinct and self-contained system of law, independent of the national systems with which it interacts, and dealing with relations which they do not effectively govern. Since there is no overall legislature or law-creating body in the international political system, the rules, principles, and processes of international law must be identified through a variety of sources and mechanisms. This can make international law appear difficult to pin down2. International law refers to those rules and norms which regulate the conduct of states and other entities which at any time are recognized as being endowed with international personality, for example international organisations and individuals, in their relations with each other.3

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International Law - Encyclopædia Britannica http://www.britannica.com/EBchecked/topic/291011/international-law 2 McKeever, Kent, Researching Public International Law. http://library.law.columbia.edu/guides/Researching_Public_International_Law 3 rd Wallace, Rebecca MM., International Law, 3 Ed., Universal Law Publishing Co. Pvt. Ltd., Delhi, 2003. p. 1.

Sources of Law in Brief

Rules and norms of any legal system derive authority from their source. 4 The "sou rces" articulate what the law is and where it can be found. In a developed municip al system, sources may be readily identifiable, for example, in India the source s of law include Custom recognized by law, Precedent and Legislation. But the sa me does not hold true in the international arena due to the lack of an internati onal legislature or a legal system where all the nations are a party. Internatio nal law is to be found in the common consent of the international community5. Th e Article 38 of the Statute of the International Court of Justice forms a good s teeping stone in the understanding of sources of international law6.

Sources of International Law

Keeping in mind that the international community neither has a Constitution nor a legislature the question relating to the sources of the sources of Internation al Law is answered by Article 38 of the Statute of the International Court of Ju stice which does not expressly mention the word „source" but spells out how the cour t is to decide disputes which may come before it for settlement. It is, however, legally binding on the International Court of Justice because of its inclusion in the Statute of the court, and is authoritative generally because it reflects state practice.7 The Article 38 reads as under8: 1. The Court, whose function is to decide in accordance with international law such disputes are submitted to i t, shall apply: a. International conventions, whether general or particular, est ablishing rules expressly recognized by the contesting states; b. International custom, as evidence of a general or particular practice accepted by law; c. The general principles of law recognized by civilized nations; d. Subject to provisi on of Article 59, judicial decisions and the teaching of the most highly qualifi ed publicists of the various nations, as subsidiary means for the determination of rules of the law.

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Wallace, Rebecca MM., International Law, 3 Ed., Universal Law Publishing Co. Pvt . Ltd., Delhi, 2003. p. 7. th Oppenheim's International Law, Volume I, 9 Ed., Pear son Education Singapore, Delhi, 2005. p. 22. 6 See Sources of International Law, p. 2. 7 th Oppenheim's International Law, Volume I, 9 Ed., Pearson Education Sing apore, Delhi, 2005. p. 24. 8 Charter of the United Nations and Statute of the In ternational Court of Justice, United Nations Department of Public Information, N ovember 2008, UN New York. p. 91.

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2. This provision shall not prejudice the power of the Court to decide a case ex aequo et bono, if the parties agree thereto. Certain distinct sources can be identified from Article 38 of the Statute of the International Court of Justice stated above. They are as under: 1. International Treaties 2. International Custom 3. The General Principles of Law 4. Judicial Decisions 5. The Writings of Publicists In this compilation the source of International Custom has been dealt with in detail.

Custom: An Introduction

In any primitive society certain rules of behavior emerge and prescribe what is permitted and what is not. Such rules develop almost subconsciously within the group and are maintained by the members of the group by social pressures and with the aid of various other more tangible implements. They are not, at least in the early stages, written down or codified, and survive ultimately because of what can be called an aura of historical legitimacy. As the community develops it will modernize its code of behavior by the creation of legal machinery, such as courts and legislature. Custom, for this is how the original process can be described, remains and may also continue to evolve.9 According to Webster10 "Long established practice considered as unwritten law and resulting for authority on long consent; a usage that has by long continuance acquired a legally binding force."

Salmond has given the reasons to highlight the importance for the recognition of custom in law. His two reasons are firstly, "Custom is frequently the embodiment of those principles which have commended themselves to the national conscience as principles of justice and public unity … The national conscience may well be accepted by the courts as an authoritative guide; and of this conscience national custom is the external and visible sign."

9 Shaw, Malcolm N., International Law, 6 Ed., Cambridge University Press, Cambridge, 2009. p. 72-73. th Quoted by Dhyani, S.N., Jurisprudence and Indian Legal Theory, 4 Ed., Central Law Agency, Allahabad, 2002. p. 182.

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Secondly, "The existence of an established usage is the basis of a rational expect ation of its continuance in the future."11 The International Court of Justice in A sylum Case: Columbia v. Peru12 described custom as a „constant and uniform usage, accepted by law", i.e. those areas of state practice which arise as a result of a belief by states that they are obliged by law to act in the manner described.13 The facts of the case have been discussed in depth later in the compilation.14 I n the abovementioned case the Court declined to acknowledge the existence of a c ustom as claimed by Columbia.

A similar case was also held by the International Court of Justice in the United States Nationals in Morocco Case15 where the denial was also a cause of ambigui ty and uncertainty. Although an international court is bound in the first instan ce to consider any applicable treaty provisions binding on the parties, the trea ty in case of a doubt be interpreted against the background of customary interna tional law, which in so far as it embodies a rule of ius cogens with which the t reaty is in conflict, will indeed prevail over the treaty.16 The various essenti als and features of custom as a source on international law have been discussed in the topics to follow.

Duration of Practice

The actual practice engaged in by states constitutes the initial factor to be br ought into account. There are a number of points to be considered concerning the nature of a particular practice by states, including its duration, consistency, repetition and generality. As far as the duration is concerned, most countries specify a recognized time-scale for the acceptance of a practice as a customary rule within their municipal systems. This can vary from „time immemorial" in the Eng lish common law dating back to 1189, to figures from thirty or forty years on th e Continent.17

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Tripathi, B.N. Mani, Jurisprudence (Legal Theory), 18 Ed., Allahabad Law Agency, Faridabad, 2008. p185. (1950) ICJ Rep. 266. 13 Kaczorowska Alina, Public Intern ational Law, Old Baily Press, London, 2002. p. 15. 14 Refer topic "Consistency" p. 6 . 15 (1952) ICJ Rep. 200. 16 th Oppenheim's International Law, Volume I, 9 Ed., Pe arson Education Singapore, Delhi, 2005. p. 26. 17 th Shaw, Malcolm N., Internati onal Law, 6 Ed., Cambridge University Press, Cambridge, 2009. p. 76.

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In international law there is no rigid time element and it will depend upon the circumstances of the case and the nature of the usage in question. In certain fi elds, such as air and space law, the rules have developed quickly; in others, th e process is much slower. Duration is thus not the most important of the compone nts of state practice.18

The jurisprudence of the International Court of Justice indicates that no partic ular duration is required for practice to become law provided that the consisten cy19 and generality of a practice are proved.

The practice relating to continental shelf was introduced in 1945, and by 1958 i t had become a customary rule of International Law. In the North Sea Continental Shelf Cases: Federal Republic of Germany v. Denmark; Federal Republic of German y v. The Netherlands20 it was recognized that there is no precise length of time during which a practice must exist; simply that it must be followed long enough to show that the other requirements of a custom are satisfied: "Although the pass age of only a short period of time is not necessarily, or of itself, a bar to th e formation of a new rule of customary law on the basis of what was originally a purely conventional rule, an indispensable requirement would be that of states whose interests are specially affected, should have been both extensive and virt ually uniform in the sense of the provision invoked – and should moreover have occ urred in such a way to show a general recognition that a rule of law or legal ob ligation is involved."

Similarly, the principle of sovereignty in the air space arose spontaneously at the outbreak of the First World War. Further it wasn"t long before the concept was extended to outer space.21 Thus the passage of a considerable time is not neces sary provided the practice is accepted by the states.

18 19

Ibid. See topic titled "Consistency" p. 6. 20 (1969) ICJ Rep. 3. 21 th Aggarwal, H.O ., International Law & Human Rights, 17 Ed., Central Law Publications, 2010. p. 20.

Consistency

The basic rule as regards continuity and repetition was laid down in the Asylum case[22] decided by the International Court of Justice in 1950. The Court declared that a customary rule must be „in accordance with a constant and uniform usage practiced by the States in question". The case concerned Haya de la Torre, a Peruvian, who was sought by his government after an unsuccessful revolt. He was granted asylum by Colombia in its embassy in Lima, but Peru refused to issue a safe conduct to permit Torre to leave the country. Colombia brought the matter before the International Court of Justice and requested a decision recognizing that it (Colombia) was competent to define Torre"s offence, as to whether it was criminal as Peru maintained, or political, in which case asylum and a safe conduct could be allowed.

The Court, in characterizing the nature of a customary rule, held that it had to constitute the expression of a right appertaining to one state (Colombia) and a duty incumbent upon another (Peru). However, the Court felt that in the Asylum litigation, state practices had been so uncertain and contradictory as not to amount to a „constant and uniform usage" regarding the unilateral qualification of the offence in question. The issue involved here dealt with a regional custom pertaining only to Latin America and it may be argued that the same approach need not necessarily be followed where a general custom is alleged and that in the latter instance a lower standard of proof would be upheld. In the Asylum Case[23] the International Court of Justice held: "The party which relies on custom … must prove that this is established in such a manner that it has become binding on the other party … that the rule invoked … is in accordance with a constant and uniform usage, practiced by the States in question, and that this usage is the expression of a right appertaining to the State granting asylum and a duty incumbent on the territorial State …" "… 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 different occasions; there has been so much inconsistency

22 (1950) ICJ Rep. 266.

23 (1950) ICJ Rep. 266.

in the rapid succession of conventions on asylum, ratified by some states reject ed by others, and the practice has been so much influenced by considerations of political expediency in the various cases, that it was not possible to discern i n all this any constant usage." However, the Court emphasized in the Nicaragua v. United States case24 that it was not necessary that the practice in question had to be „in absolutely rigorous conformity" with the purported customary rule. The Co urt continued: "In order to deduce the existence of customary rules, the Court dee ms it sufficient that the conduct of states should, in general, be consistent wi th such rules, and that instances of state conduct inconsistent with a given rul e should generally have been treated as breaches of that rule, not as indication s of the recognition of a new rule." In other words it would suffice that the cond uct in general was consistent with the rule be treated as breach of that rule ra ther than as recognition of a new rule25.

Generality

The recognition of a particular rule as a rule of international law by a large n umber of states raises a presumption that the rule is generally recognized. Such a rule will be binding on states generally and an individual state may only opp ose its application by showing that is has persistently objected to the rule fro m the date of first formulation.26 In the Anglo-Norwegian Fisheries Case: UK v. Norway27, for example, the Court rejecting the UK argument that the ten-mile clo sing line for bays was a rule of customary law, went on to observe that the even t if it has acquired the status of a rule of customary international customary l aw „in any event the …rule would appear to be inapplicable as against Norway, in as much as she has always opposed any attempt to apply it to the Norwegian coast." Ho wever, universality is not required to create a customary rule and it will be su fficient if the practice has been followed by a small number of states, provided that there is no practice conflicting with that rule. Therefore, rules of custo mary law can exist which are

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(1986) ICJ Rep. 14. Kaczorowska, Alina, Public International Law, Old Bailey Pre ss, London, 2002. p. 17. 26 Kaczorowska, Alina, Public International Law, Old Ba iley Press, London, 2002. p. 18. 27 (1951) ICJ Rep. 116.

not binding on all states: the practice may be limited to a small group of state
s, or a state may contract out of a custom in the process of formulation.28

State Practice
It is how states behave in practice that forms the basis of customary law, but e
vidence of what a state does can be obtained from numerous sources. Obvious exam
ples include administrative acts, legislation, decisions of courts and activitie
s on the international stage, for example treaty-making. A state is not a living
 entity, but consists of governmental departments and thousands of officials, an
d state activity is spread throughout a whole range of national organs. There ar
e the state‟s legal officers, legislative institutions, courts, diplomatic agents
and political leaders. Each of these engages in activity which relates to the in
ternational field and therefore one has to examine all such material sources and
 more in order to discover evidence of what states do.29

Notwithstanding the indicators of state practice, overt state practice continues
 to be important as was emphasized by the International Court of Justice in the
Continental Shelf Case: Libya v. Malta30 when the court stated: ‟It is of course a
xiomatic that the material of customary international law is to be looked for pr
imary in the actual practice and opinio juris of states even though multilateral
 conventions may have an important role to play in defining and recording rules,
 deriving from custom or indeed in developing them.” States‟ municipal laws may in c
ertain circumstances form the basis of customary rules. In the Scotia case31 dec
ided by the US Supreme Court in 1871, a British ship had sunk an American vessel
 on the high seas. The Court held that British navigational procedures establish
ed by an Act of Parliament formed the basis of the relevant international custom
 since other states had legislated in virtually identical terms. Accordingly, th
e American vessel, in not displaying the correct lights, was at fault. The view
has also been expressed that mere claims as distinct from actual physical acts c
annot constitute state practice. This is
28 29

Refer Regional Customs p. 11. th Shaw, Malcolm N., International Law, 6 Ed., Cam
bridge University Press, Cambridge, 2009. p. 82. 30 (1985) ICJ Rep. 13. 31 14 Wa
llace 170 (1871)

based on the precept that „until it [a state] takes enforcement action, the claim has little value as a prediction of what the state will actually do". But as has b een demonstrated this is decidedly a minority view. Claims and conventions of st ates in various contexts have been adduced as evidence of state practice and it is logical that this should be so, though the weight to be attached to such clai ms, may, of course, vary according to the circumstances. This approach is clearl y the correct one since the process of claims and counterclaims is one recognize d method by which states communicate to each other their perceptions of the stat us of international rules and norms. In this sense they operate in the same way as physical acts. Whether in abstracto or with regard to a particular situation, they constitute the raw material out of which may be fashioned rules of interna tional law. It is suggested that the formulation that „state practice covers any a ct or statements by a state from which views about customary law may be inferred", is substantially correct. However, it should be noted that not all elements of practice are equal in their weight and the value to be given to state conduct wi ll depend upon its nature and provenance.32

Opinio juris

To assume the status of customary international law the rule in question must be regarded by states as being binding in law, i.e., that they are under a legal o bligation to obey it. In this way customary rules of law may be distinguished fr om rules of international comity which are simply based upon a consistent practi ce of states not accompanied by any feeling of legal obligations.33 In other wor ds, the opinio juris, or belief that a state activity is legally obligatory, is the factor which turns the usage into a custom and renders it part of the rules of international law. To put it slightly differently, states will behave a certa in way because they are convinced it is binding upon them to do so.34 The Perman ent Court of International Justice expressed this point of view when it dealt wi th the SS Lotus Case: France v. Turkey35. The issue at hand concerned a collisio n on the high seas between the Lotus, a French ship, and the Boz-Kourt, a Turkis h ship. Several people aboard the latter ship were drowned and Turkey alleged ne gligence by the French officer of the watch. When the Lotus reached Istanbul, th e French officer was arrested on a

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See Shaw, Malcolm N., International Law, 6 Ed., Cambridge University Press, Camb ridge, 2009. p. 83. Kaczorowska, Alina, Public International Law, Old Bailey Pre ss, London, 2002. p. 17. 34 th Shaw, Malcolm N., International Law, 6 Ed., Cambr idge University Press, Cambridge, 2009. p. 84. 35 (1927) PCIJ Rep. Series A, No. 10, 18.

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charge of manslaughter and the case turned on whether Turkey had jurisdiction to try him. Among the various arguments adduced, the French maintained that there existed a rule of customary law to the effect that the flag state of the accused (France) had exclusive jurisdiction in such cases and that accordingly the national state of the victim (Turkey) was barred from trying him. To justify this, France referred to the absence of previous criminal prosecutions by such states in similar situations and from this deduced tacit consent in the practice which therefore became a legal custom. The Court rejected this and declared that even if such a practice of abstention from instituting criminal proceedings could be proved in fact, it would not amount to a custom. It held that „only if such abstention were based on their [the states] being conscious of a duty to abstain would it be possible to speak of an international custom". Thus the essential ingredient of obligation was lacking and the practice remained a practice, nothing more. In the North Sea Continental Shelf Cases[36] the International Court of Justice required that opinio juris be strictly provided. Here in the general process of delimiting the continental shelf of the North Sea in pursuance of oil and gas exploration, lines were drawn dividing the whole area into national spheres. However, West Germany could not agree with either Holland or Denmark over the respective boundary lines and the matter came before the International Court of Justice. The Court opined: "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. The states concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency or even habitual character of the acts is not in itself enough. There are many international acts, eg. 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."

A number of the dissenting judges, however, took issue with strict requirement. Judge Sorenson, echoing comments made years earlier by Sir Hersch Lanterpacht, argue that

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(1969) ICJ Rep. 3.

because of the difficulty in establishing opinio juris, uniform conduct should b e taken as implying the requisite intention unless the contrary was established. Judge Tanaka, in contrast, proposed that opinio juris, be inferred from evidenc e of a need for that rule in the international community.37 The approach of the North Sea Continental Shelf Cases38 was maintained by the Court in the Nicaragua case39. The Court noted that: "for a new customary rule to be formed, not only mu st the acts concerned amount to a settled practice, but they must be accompanied by the opinio juris sive necessitatis. Either the States taking such action or other States in a position to react to it must have behaved so that their conduc t is evidence of a belief that this practice is rendered obligatory by the exist ence of a rule of law requiring it. The need for such a belief, i.e. the existen ce of a subjective element, is implicit in the very notion of the opinio juris s ive necessitatis."

Given the difficulties in establishing opinio juris it seems likely that the Cou rt will place increasing emphasis on determining the extent of the practice and will be ready to infer opinio juris from those examples of practice that confirm that the actions in issue are not merely casual acts or acts dictated by intern ational comity.

Regional Customs

Custom may be either general or regional. General customs are those customary ru les binding upon the international community as a whole. Local or regional custo ms are those applicable to a group of states or just two states in their relatio ns inter se.40 Such an approach may be seen as part of the need for „respect for r egional legal traditions".41 In the Asylum Case42, discussed earlier, the Internat ional Court of Justice discussed the Colombian claim of a regional or local cust om peculiar to the Latin American states, which would validate its position over the granting of asylum. The Court declared that the „party which relies on a cust om of this kind must prove that this custom is established in such a manner that it has become binding on the other party". It found that such a custom could not be proved because of uncertain and contradictory evidence.

37 38

Kaczorowska, Alina, Public International Law, Old Bailey Press, London, 2002. p. 18. (1969) ICJ Rep. 3. 39 (1986) ICJ Rep. 14. 40 Kaczorowska, Alina, Public Int ernational Law, Old Bailey Press, London, 2002. p. 15. 41 See the Eritrea/Yemen (Maritime Delimitation) Case, 119 ILR, p. 448. Referred in Shaw, Malcolm N., th International Law, 6 Ed., Cambridge University Press, Cambridge, 2009. p. 92. 42 (1950) ICJ Rep. 226.

In such cases, the standard of proof required, especially as regards the obligation accepted by the party against whom the local custom is maintained, is higher than in cases where an ordinary or general custom is alleged.43 In the Right of Passage over Indian Territory Case: Portugal v. India44 the International Court of Justice accepted the argument that a rule of regional custom existed between India and Portugal. The Court said: "With regard to Portugal"s claim of a right of passage as formulated by it on the basis of local custom, it is observed on behalf of India that no local custom could be established between only two states. It is difficult to see why the number of states between which a local custom may be established on the basis of long practice must necessarily be larger than two. The Court sees no reason why long continued practice between two states accepted by them as regulating their relations should not form the basis of mutual rights and obligations between two states."

Such local customs therefore depend upon a particular activity by one state being accepted by the other state (or states) as an expression of a legal obligation or right. While in the case of a general customary rule the process of consensus is at work so that a majority or a substantial minority of interested states can be sufficient to create a new custom, a local custom needs the positive acceptance of both (or all) parties to the rule. This is because local customs are an exception to the general nature of customary law, which involves a fairly flexible approach to law-making by all states, and instead constitutes a reminder of the former theory of consent hereby states are bound only by what they assent to.45

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Shaw, Malcolm N., International Law, 6 Ed., Cambridge University Press, Cambridge, 2009. p. 92. (1960) ICJ Rep. 6. 45 th Shaw, Malcolm N., International Law, 6 Ed., Cambridge University Press, Cambridge, 2009. p. 93.

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