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# EVOLUTION OF SOURCES OF INTERNATIONAL LAW: HOW IT IS DIFFERENT FROM DOMESTIC LAW

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## ABSTRACT

At the International level, we need some laws which can govern States and maintain peace among States or in the world. The different scholars have been given different definitions of International law. Some scholars includes States excludes international organization, individuals and other non-state entities whether some scholars include state, individuals, international organizations as well as non-state entities. After finding the meaning, scope and nature of the international law, there is a question that what is the source of International law? How can we find or believe that it is an international law and from where these rules have come into existence? In this article, we will discuss about What is the meaning of International law, why we need International Law, What are the other sources of International Law and How it is different from Domestic Law?

## WHAT IS INTERNATIONAL LAW?

"International Law" and "Law of Nation" are the same and equivalent terms. The word International law was first used or introduced by the *Jermey Bentham* in 1789. There are two wide and important definitions of international law which were given by the Oppenheim and Starke.

According to *Oppenheim*, International law is the name for the body of customary and treaty rules which are considered legally binding by states in their intercourse with each other. In this definition, he only includes states and ignores others subjects of international law. But in 1955, he was given another definition or revised definition of international law which was different form previous one. He states that international organisations and individuals are also the subjects of international law.

According to *Starke*, International law is that body of law which is composed its greater part of

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the principles and rules of conduct which States feel themselves bound to observe and commonly observe in their relations with each other. He states that international law regulates the rights and duties of international institutions or organisations, individuals or non-state entities along with the State.[2]

Starke's definition is much similar to the revised definition of Oppenheim.

**WHY WE NEED INTERNATIONAL LAW AS SOURCE?**

There was no International Organisation or International Court of Justice to solve the dispute between two States or among the States at International level. It was very important to maintain peace and order in the world and there were no definite sources of International Law that they can follow. After World War I and II, it was necessary to establish an organisation, rules and regulations, law and order etc. so the peace and prosperity can be maintain in the world. A good relationship can be established or created among the States by treaties, it helps to maintain mutual understanding between States regarding a particular issue or matter. There are certain rules which are binding on the States.

**SOURCES OF INTERNATIONAL LAW**

The sources of International law is not mentioned anywhere as a codified law but **Article 38** of the **Statute of the International Court of Justice** has relevance with the sources of International law. There is a hierarchy in the sources of International law. These are as follows:

1. International Treaties and Conventions
2. International Customs
3. General Principles recognised by Civilised Nations
4. Judicial Decisions and the Teachings of the High Qualified Publicists.

**INTERNATIONAL TREATIES AND CONVENTIONS**

In the *Statute of International Court of Justice*, International Treaties are the most important source of the international law. **Article 38(1)(a)** of the Statute lays down that when the court deciding any matter or dispute shall apply international conventions whether it is general or particular which establishing rules recognized by the contesting states expressly. Therefore, Treaties have a dominant importance in International law. Now, what are treaties? Treaties are agreement between two or more than two States or among other subjects of International law by which they create or intend create relationship between themselves. Sometimes, these are two types of treaties at international level i.e. General Treaties and Particular Treaties. According to

[2] What is International Law? https://www.findlaw.com/hirealawyer/choosing-the-right-lawyer/international-law. (Last visited on 17th April, 2021)

Article 38 of the Statute of the International Court of Justice applies on 'general' as well as 'particular' treaties when a particular when a dispute is brought before it.

- GENERAL TREATIES – General Treaties are those treaties in which most of the States of the world are parties and open to accession by others. These treaties may be referred to as **"Law making treaties"** and creates general norms for the parties in legal propositions in future. Basically, obligations in the treaties are the same for all the parties. Hague Convention of 1899 and 1907, the General Treaty for the Renunciation of War of 1928, Geneva Protocol of 1925 and the Geneva Conventions, 1949 are example of these treaties. These treaties or law-making treaties are binding only those states which are parties to the treaty. They do not binding on the states which are not parties to that treaties. The exception of these treaties is that the International Court of Justice can recognise a treaty which may create rights and obligations for States not parties to the treaty. E.g. The Charter of the United Nations.
- PARTICULAR TREATIES – Generally, These are referred to bilateral treaties or pluriateral or ordinary treaties where there are two parties or more than two parties. They are also known as Contractual types of treaties (**Contractual treaties**) or **'Treaty Contracts'**. Such treaties create for two or more than two States while law making treaties or general treaties which create law for most of the states in the world. Most of the laws or rules on extradition have evolved through the conclusion of bilateral treaties.

On the above paragraph, we noted that all the treaties whether it is general or particular treaty, are binding on the contracting parties. Treaties have significant role in the International Law and help to determined the issues to which they relate and have actual effectiveness.

**CUSTOMS**

Customs is the original source of the international law and it is the most important source among all the sources. But in hierarchy, it comes after treaties. Customs is the foundation stone of the modern international law. A large part of international law consisted customary rules. Generally, International law means 'a kind of qualified practice'. Customs evolve or develop through the practices and usages of nations and their recognition from the nations. *Westlake* defines custom is that line of conduct which the society has consented to regard as obligatory. The obligation is based upon the common consent of most of the nation extending over a period of time and sufficient duration. Custom is referred to those habits which are binding upon the states. When a habit or usage becomes an obligatory on a state

to practice, it is known as Custom.

- **FORMATION OF CUSTOMARY RULES -** Customary International laws are the results of general and consistent practice of States which is followed by them in a sense of legal obligation. There was a case in respect to custom i.e. *North SeaContinental Shelf Case*, it this case it was stated that *"Not only acts must concerned amount to a settled practice but they must also be carried in such a way as to be evidence of belief that this practice is rendered obligatory as a rule of law requiring it by the existence".* In order to establish customary international law there should be three elements are required i.e. Duration, Continuity and Generality.

a) Duration – When a particular usage is practiced by the States for a long duration, it has tendency to become a custom. An 'immemorial' practice or long practice is not necessary for becoming a custom. A usage may become custom in short term also. The concept of Continental Shelf was introduced in 1945 and it became customary international law in 1958.

b) Uniformity or Consistency – A practice should be uniformly or consistently followed by the States. It should be constant while complete uniformity is not required. It should be 'substantial'. The substantial inconsistencies of the practice prevent the creation of a customary international law, but minor consistencies do not.

c) Generality – The usage should be practiced by most of States or as a general in order to transform into a custom. There is no necessity to take consent from all the State to the formation of a customary rule.

- **KINDS OF CUSTOMARY RULES –** There are two kinds of customary rules, General and Particular Customary Rules.

    a) General Customary Rules – Those rules which are binding on all the States generally such as rules of the law of treaties, diplomatic intercourse or law of the Sea. These rules shall not apply on those States who refuse to recognise it consistently.

    b) Particular Customary Rules – These rules are also known as **Local Customary Rules**. These rules have developed between two States by practice. Those rules are binding on these two States.

There is also another kind of customary rules i.e. **Exceptional Customary Rules ofInternational Law.** These rules are binding on the whole or on a religion community of

States in relation with one or another few subjects of international law.

**GENERAL PRINCIPLES OF LAW RECOGNISED BY THE CIVILISED NATIONS**

**Article 38(1)(c)** of the Statute constitutes an important landmark in the history of international law, it recognise the existence of the third source of International law i.e. General Principles of law recognised by the civilised nations which is independent from treaties and customs. This source also inserted under **Article 38(3) of the Statute of Permanent Court of International Justice.**

A General principle of law is a source which comes after treaties and customs in hierarchy. It means that the Court is directed to apply general principles of law where there is no treaty (relevant to the dispute) or custom (applied in a particular case). These principles have been recognised by the most of the States of the world in their domestic laws. This source recognised as a most authoritative instrument in sources of International Law. It has been increasingly used at present or today by the Court in those cases especially where no law is applicable at a particular point. Rationality for the inclusion of general principles may fairly presume to be reasonable and necessary to the maintenance of Justice under any legal system.

**JUDICIAL DECISION AND TEACHING OF HIGHLY QUALIFIED PUBLICISTS**

- **JUDICIAL DECISIONS –** Judicial decisions are the subsidiary means or source for the determination of the rules of law. Therefore, they are the subsidiary and indirect source of International Law. They have no binding force on the States but to the parties of a particular case. In many areas or cases of international law where judicial decisions constitute the best means of ascertainment of what the law is. Under the head of 'Judicial Decisions' decisions of the following courts may be considered:
    1. International Court of Justice – International Court of Justice is the main International Judicial Tribunal at present. Its decisions are binding only to the parties to a particular case. **Article 59** of the Statute states that "The decision of the Court has no binding except to the parties in respect of that particular case. The Court stated that the object of Article 59 is to prevent the legal principles accepted by the court in a particular case from applying and being binding on other States or in other disputes or case. It simply means that the decision of the Court does not become precedent but it has relevance for the future cases. The decisions of the International Court of Justice have a great impact on the existing

rules of International Law which cannot be ignored by the other tribunals or by the Court itself.

2. Awards of the International Tribunal – These awards, such as the Permanent Court of Arbitration were created by the Hague Conferences of 1899 and 1907 and other tribunals also. They have contributed a lot in the development of International Law. It has been considered that awards of tribunals are not judicial but a merely quasi diplomatic compromise. Therefore, they cannot be treated as a source of International Law. On a few occasion, the Permanent Court of International Justice has referred these awards in their decisions.
3. Decisions of the Municipal Courts – According to Oppenheim, Decisions of the Municipal Courts are not sources of International Law. But according to **Article 38(1)(d)** of the Statute, Municipal decisions are relevant in International field. Such decisions are considered with respect and have influence on the International Law especially decide the matter due to non-availability of the rules. Whenever the issue arises relating to the rights of the States, International Law has not established its own rules, it has to refer the relevant rules of Municipal Law that's why decisions of Municipal Courts are considered important.
4. Decisions of the Regional Courts – In a recent development of International Law, the creation of the Regional Court for settling the dispute in a particular area or case is necessary. Examples of Regional Courts are *the Court of Justice of the European Communities, the European Court of Human Rights* and *the Inter-American Human Rights.* They have contributed a lot and immensely to the development of International law in particular areas.

- **HIGHLY QUALIFIED PUBICISTS OR WRITING OF JURISTS**

The Statute lays down that the teachings of the most qualified publicist of the various nations are subsidiary means for determination of rules of law. It excludes the teachings of acknowledged sources of International Law. Juristic works are not an 'Independent' source of law. Often, Juristic opinions throw light on the rules of International law and their writings make the rules easy or rules can be frame easily. The value of Juristic writings and works increased where treaty customary laws do not exist. Often, the writings of qualified jurists are cited in the decisions of the Courts. E.g. Grotius, Valtel and Bynkershoek etc. are jurists whose writings have

been quoted in International Court of Justice and in other tribunals also.[3]

## OTHER SOURCES OF INTERNATIONAL LAW

There are various other sources of International Law which were not mentioned under the Statute of International Court of Justice. Equity and Resolutions are the sources of International Law among them.

- Equity – The term equity as a source of International Law is used in the sense of fairness, reasonableness and policy. It is necessary for the sensible application of the more settled rules of law in a dispute or matter. However, the word equity has not been mentioned in the Statute of the International Court of Justice because its inclusion gives too much discretion to the Court in a dispute which is brought before the Court. Therefore, Equity cannot be a source of International Law but it has great importance in those matters where rules are not readily available. Under **Article 38(2)** of the Statute, the Court has authorisation to decide a case *ex acquo et bono*, if the parties agree. In the case of ***Continental Shelf (Tunisia v. Libya),*** the Court stated that "Equity as a legal concept is a direct emanation of the idea of Justice. The Court whose task is administered justice is bound to apply the rule of Equity".
- Resolutions of the General Assembly – Resolutions of the General Assembly do not possess any legal character and they do not create any legal obligations on is member. These resolutions are not binding on the States but it can be adopted unanimously or by the two-third majority of member, if the contents of resolution are matter of common interest to all the States.[4]

## HOW SOURCES OF INTERNATIONAL LAW IS DIFFERENT FROM DOMESTIC LAW

There are so many differences between the sources of International Law and Domestic Law. There is no hierarchy in the sources of Domestic law while in the International Law, there is a hierarchy in the sources. In the sources of Domestic law, they prefer Custom first as an important source of law while in the International law they give preference to treaty and treaty supersedes customs. Generally the sources of International Law are not rigid and flexible and it can be apply only in few occasions. But the sources of Domestic Law are rigid and it can be changed over a long period or with the passage of time and it can apply on the citizens of the

[3] Dr. H.O. AGARWAL, INTERNATIONAL LAW & HUMAN RIGHTS, 22nd Edition, Re-print 2019

[4] Sources and Practice of International Law, https://courses.lumenlearning.com/masterybusinesslaw/chapter/sources-and-practice-of-international-law/ (last visited on 30th April,2021)

Country. The sources of International are not binding on the States till the State accepts it. Meanwhile, the sources of Domestic law are binding on the citizens of that Country (including organisations, individuals etc.). According to many scholars, both International law and Domestic law are the same or part of one legal system whereas many scholars considered International Law and Domestic law are different or part of two different legal systems.

## CONCLUSION

The sources of International Law are various but in the Statute of the International Court of Justice, there are only four sources are mentioned. These sources are very important to decide a case or dispute between the States or among the States. The Statue should mention other sources of International Law also it helps to Court in finding of principles of International Law. Sometimes it is binding on the States and helps them to create a good relationship with each other. We can find legal principles under sources of International Law because of that the Court can maintain peace and order in the world. The States can apply the International Law in their domestic laws. There are so many differences between sources of International law and Domestic Law. But sources of International Law play an important role in the maintenance of peace and order, prosperity in the world.