PUBLIC INTERNATIONAL LAW

BY –

SURBHI WADHWA

Assistant Professor (Law)

Jiwaji University,

Gwalior

Sources of International Law

- It is generally accepted that the sources of international law are listed in the Article 38(1) of the Statute of the International Court of Justice, which provides that the Court shall apply:

a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

a) international custom, as evidence of a general practice accepted as law;
b) the general principles of law recognized by civilized nations;
c) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Custom

- Custom is one of the primary sources of International Law.
- In International Law, it is considered to be of particular importance because of its decentralized nature. Two conditions are essential for an act of a State to constitute as custom:

- The first being the State practice itself, it is not necessary that the act of a State necessarily needs to be positive in nature. State practice should be extensive, uniform and consistent and prevail for at least such a period of time as would establish it as a recognized act of States.

- The second essential is opinio juris, which means, the psychological belief of a State that its act is creating a legally obligatory position for itself.
- But it should be noticed that not every activity of a State would necessarily create binding rules of customary law.

- For instance, if a particular pattern is used by the State on a particular issue in the General Assembly, it is reflective of the maxim opinio juris.
- International custom – or customary law – is evidence of a general practice accepted as law through a constant and virtually uniform usage among States over a period of time.

- Rules of customary international law bind all States.
- The State alleging the existence of a rule of customary law has the burden of proving its existence by showing a consistent and virtually uniform practice among States, including those States specially affected by the rule or having the greatest interest in the matter.

- For example, to examine the practice of States on military uses of outer space, one would look in particular at the practice of States that have activities in space.

- Most ICJ cases also require that the States who engage in the alleged customary practice do so out of a sense of legal obligation or opinio juris rather than out of comity or for political reasons.
- In theory, opinio juris is a serious obstacle to establishing a rule as custom because it is extremely difficult to find evidence of the reason why a State followed a particular practice.

- In practice, however, if a particular practice or usage is widespread, and there is no contrary State practice proven by the other side, the Court often finds the existence of a rule of customary law. It sometimes seems to assume that opinio juris was satisfied, and it sometimes fails to mention it.

- Therefore, it would appear that finding consistent State practice, especially among the States with the most interest in the issue, with minimal or no State practice to the contrary, is most important.

- Undisputed examples of rules of customary law are
- (a) giving foreign diplomats criminal immunity;
- (b) treating foreign diplomatic premises as inviolable;
- (c) recognizing the right of innocent passage of foreign ships in the territorial sea;
- (d) recognizing the exclusive jurisdiction of the flag State on the high seas;.

Treaties

- The concept of treaty is based on *pacta sunt servanda*, which is a customary law principle which means promises must be kept.
- In a treaty, countries create their terms of rights and obligations out of their volition, thus it is very similar to a contract.

- Therefore, a treaty is a written agreement between two or more States which lays down the manner in which every State would act while doing dealings with other participating States.
- Sometimes, in place of treaties other terms such as charters, declarations, conventions and statutes are often used.
- However, there is a slight difference in meaning of these terminologies.

- International conventions are generally referred to as treaties.
- Treaties are written agreements between States that are governed by international law.
- Treaties are referred to by different names, including agreements, conventions, covenants, protocols and exchanges of notes.

- If States want to enter into a written agreement that is not intended to be a treaty, they often refer to it as a Memorandum of Understanding and provide that it is not governed by international law.
- Treaties can be bilateral, multilateral, regional and global.

- The law of treaties is now set out in the 1969 Vienna Convention on the Law of Treaties which contains the basic principles of treaty law, the procedures for how treaties becoming binding and enter into force, the consequences of a breach of treaty, and principles for interpreting treaties.

- The basic principle underlying the law of treaties is pacta sunt servanda which means every treaty in force is binding upon the parties to it and must be performed by them in good faith.
- The other important principle is that treaties are binding only on States parties. They are not binding on third States without their consent.

- However, it may be possible for some or even most of the provisions of a multilateral, regional or global treaty to become binding on all States as rules of customary international law.
- There are now global conventions covering most major topics of international law.

- They are usually adopted at an international conference and opened for signature.
- Treaties are sometimes referred to by the place and year of adoption, e.g. the 1969 Vienna Convention.
- If a State becomes a signatory to such a treaty, it is not bound by the treaty, but it undertakes an obligation to refrain from acts which would defeat the object and purpose of the treaty.

- A State expresses its consent to be bound by the provisions of a treaty when it deposits an instrument of accession or ratification to the official depository of the treaty.
- If a State is a signatory to an international convention it sends an instrument of ratification.

- If a State is not a signatory to an international convention but decides to become a party, it sends an instrument of accession.
- The legal effect of the two documents is the same.
- A treaty usually enters into force after a certain number of States have expressed their consent to be bound through accession or ratification.

- Once a State has expressed its consent to be bound and the treaty is in force, it is referred to as a party to the treaty.
- The general rule is that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.
- The preparatory work of the treaty and the circumstances of its conclusion, often called the travaux preparatoires, are a supplementary means of interpretation in the event of ambiguity.

General Principles of Law

- As in International Law there is no cohesive body for legislating laws or any Court that has the power to set precedents, thus it is relatively undeveloped as compared to the Municipal Law.
- Article 38 of the Statute of the ICJ provides for 'general principles of law recognized by civilized nations' as a source of law.

- In the Chorzow Factory Case, the general principle of International Law, it is the duty of a State to make reparations upon the breach of an international obligation, was recognized by the Permanent Court of International Justice.

- In the Corfu Channel Case, while referring to circumstantial evidence, the ICJ pointed out that 'in all systems of law indirect evidence is admitted and its use is recognized by International decisions'. The principle of res judicata is too recognised by International Law.

- General principles of law recognized by civilized nations are often cited as a third source of law.
- These are general principles that apply in all major legal systems.
- An example is the principle that persons who intentionally harm others should have to pay compensation or make reparation. General principles of law are usually used when no treaty provision or clear rule of customary law exists.

Judicial Decisions

- As per Article 38, judicial decisions are recognized as subsidiary means of determination of law.
- Article 59 of the Statute of the ICJ states that the decisions of the Court can only guide them but does not have any binding value on the Court and the court is authorised to apply the previous decisions of the court which are known as the evidence of International Law. Thus, the doctrine of stare decisis is not followed in International Law.

- ICJ through its case laws, advisory opinions and judges

- role-play a major role in the law-making process. One of the major examples of this was laid down in the case of Nicaragua vs. USA where the principle of the prohibition against the use of threat or use of force was recognised. This principle is now considered to be a part of Customary International Law.

- In another case, that is, *Alabama Claims* arbitration, ICJ gave recognition to the peaceful settlement of international disputes. In this, judicial and arbitration methods were used in resolving conflict.

Writings of the Publicists

- As per Article 38, teachings of the highly qualified writers of International Law such as Gentili, Grotius, and Vattel are considered as the subsidiary means of determination of law.
- The role of the writers is extremely significant in providing a structure and coherence in the field of International Law.

- Textbooks are used as a method of discovering law on any particular point and law cannot be created even by the writings of the most respected International Lawyers.
- As they provide an understanding and explanation of the principles of International Law these are considered as an evidentiary source of law.

Conclusion

- International Law is a set of rules which are necessary in order to regulate the behaviour of nation-States towards each other so as to ensure peace and welfare of the International community.
- It helps in resolving disputes amongst States.

- International Law may influence internal laws too and may become a part of domestic law.
- It is not necessary for International Law to be codified into an agreement. There have been a lot of developments in the Modern International Law and the International Court of Justice is considered as the principal body responsible for upholding the tenants of International Law.


Thank You!