

# Sources of international law assignment

Law



Sources of International law Assignment Submitted by: Govinda Toshniwal  
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Introduction Sources of international law are the material and procedure out of which the rules and principles regulating the international community are developed. They have been influenced by a range of political and legal theories. During the 19th century, it was recognised by legal positivists that a sovereign could limit its authority to act by consenting to an agreement according to the principle *pacta sunt servanda*.

This consensual view of international law was reflected in the 1920 Statute of the Permanent Court of International Justice, and preserved in Article 38(1) of the 1946 Statute of the International Court of Justice. The ICJ has jurisdiction only over states that have consented to it. It follows that the court cannot hear a dispute between two or more state parties when one of the parties has not accepted its jurisdiction. This can happen even where the non-consenting party adheres to the court's statute, for mere adherence to the statute does not imply consent to its tribunals.

In addition, the court does not have jurisdiction over disputes between individuals or entities that are not states (I. C. J. Stat. art. 34(1)). It also lacks jurisdiction over matters that are governed by domestic law instead of international law (art. 38(1)). The generally recognized authoritative statement on the sources of international law is the Statute of the International Court of Justice (ICJ), Article 38(1), which specifies that the Court, in deciding disputes, shall apply:

- International conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- International custom, as evidence of a general practice

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accepted as law; • The general principles of law recognized by civilized nations; • Subject to the provisions of Article 59, the Court is entitled to refer to, 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. The treaties, custom, and principles of law—are sometimes referred to by lawyers and librarians with a common law background as “ primary sources” of international law.

When the question of preference comes between the sources of international law then the rules established by treaty will take preference if such an instrument exists. It is also argued however that international treaties and international custom are sources of international law of equal validity; this is that new custom may supersede older treaties and new treaties may override older custom. The judicial decisions and the teachings of publicists are sometimes referred to as “ secondary sources” or auxiliary sources of international.

Whereas, it is still not clear whether the general principles of law recognized by ‘ civilized nations’ should be recognized as a principal or auxiliary source of international law. Each of the Sources of international law will be discussed as under: a) Treaties: Treaties are known by a variety of terms, conventions, agreements, pacts, general acts, charters, and covenants, all of which signify written instruments in which the participants (usually but not always states) agree to be bound by the negotiated terms.

Some agreements are governed by municipal law (e. g. , commercial accords between states and international enterprises), in which case international

law is inapplicable. Informal, nonbinding political statements or declarations are excluded from the category of treaties. Here the reference is made to bilateral and multilateral treaties. Treaties with a number of parties are more likely to have international significance, though many of the most important treaties (e. g. those emanating from Strategic Arms Limitation Talks) have been bilateral. A number of contemporary treaties, such as the Geneva Conventions (1949) and the Law of the Sea treaty (1982; formally the United Nations Convention on the Law of the Sea), have more than 150 parties to them, reflecting both their importance and the evolution of the treaty as a method of general legislation in international law. Countries that do not sign and ratify a treaty are not bound by its provisions.

Nevertheless, treaty provisions may form the basis of an international custom in certain circumstances, provided that the provision in question is capable of such generalization or is “ of a fundamentally norm-creating character,” as the ICJ termed the process in the North Sea Continental Shelf cases (1969). A treaty is based on the consent of the parties to it, is binding, and must be executed in good faith. There is no prescribed form or procedure for making or concluding treaties.

They may be drafted between heads of state or between government departments. The most crucial element in the conclusion of a treaty is the signalling of the state’s consent, which may be done by signature, an exchange of instruments, ratification, or accession. Ratification is the usual method of declaring consent, unless the agreement is a low-level one, in which case a signature is usually sufficient. Ratification procedures vary, depending on the country’s constitutional structure.

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Treaties may allow signatories to opt out of a particular provision, a tactic that enables countries that accept the basic principles of a treaty to become a party to it even though they may have concerns about peripheral issues. A set of rules to interpret treaties has evolved. A treaty is expected to be interpreted in good faith and in accordance with the ordinary meanings of its terms, given the context, object, and purpose of the treaty. The treaty is also the constitutional document of an international organization, a more programmatic or purpose-oriented approach is used in order to assist the organization in coping with change.

A purpose-oriented approach also has been deemed appropriate for what have been described as “living instruments,” such as human rights treaties that establish an implementation system; in the case of the European Convention on Human Rights of 1950, this approach has allowed the criminalization of homosexuality to be regarded as a violation of human rights in the contemporary period despite the fact that it was the norm when the treaty itself was signed. A treaty may be terminated or suspended in accordance with one of its provisions (if any exist) or by the consent of the parties.

If neither is the case, other provisions may become relevant. If a material breach of a bilateral treaty occurs, the innocent party may invoke that breach as a ground for terminating the treaty or suspending its operation. The termination of multilateral treaties is more complex. By unanimous agreement, all the parties may terminate or suspend the treaty in whole or in part, and a party specially affected by a breach may suspend the agreement between itself and the defaulting state.

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The ICJ, for example, issued an advisory opinion in 1971 that regarded as legitimate the General Assembly's termination of the mandate for South West Africa. A breach of a treaty is generally regarded as material if there is an impermissible repudiation of the treaty or if there is a violation of a provision essential to the treaty's object or purpose. The concept of *rebus sic stantibus* (Latin: "things standing thus") stipulates that, where there has been a fundamental change of circumstances, a party may withdraw from or terminate the treaty in question.

An obvious example would be one in which a relevant island has become submerged. A fundamental change of circumstances, however, is not sufficient for termination or withdrawal unless the existence of the original circumstances was an essential basis of the consent of the parties to be bound by the treaty and the change radically transforms the extent of obligations still to be performed. b) Custom: The ICJ's statute refers to "international custom, as evidence of a general practice accepted as law," as a second source of international law.

Customary international law is defined as a general practice of law under article 38(1)(b). Custom, whose importance reflects the decentralized nature of the international system, involves two fundamental elements: the actual practice of states and the acceptance by states of that practice as law. The actual practice of states (termed the "material fact") covers various elements, including the duration, consistency, repetition, and generality of a particular kind of behaviour by states.

All such elements are relevant in determining whether a practice may form the basis of a binding international custom. The ICJ has required that practices amount to a “ constant and uniform usage” or be “ extensive and virtually uniform” to be considered binding. Although all states may contribute to the development of a new or modified custom, they are not all equal in the process. The major states generally possess a greater significance in the establishment of customs.

For example, during the 1960s the United States and the Soviet Union played a far more crucial role in the development of customs relating to space law than did the states that had little or no practice in this area. Thus, the mere fact that a custom is widely followed does not make it a rule of international law. States also must view it as obligatory to follow the custom, and they must not believe that they are free to depart from it whenever they choose, or to observe it only as a matter of courtesy or moral obligation.

This requirement is referred to as *opinio juris sive necessitates* (Opinion that an act is necessary by the rule of law). After a practice has been established, a second element converts a mere usage into a binding custom. In the North Sea Continental Shelf cases, the ICJ stated that the practice in question must have “ occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved. ” Customary rules crystallise from usages or practices which have evolved from the following three circumstances:

- Diplomatic relations between states
- Practice of international organs.
- State laws, decision of state courts, and state military or administrative practices.

Once a practice becomes a custom, all states in the international community are bound by it whether or not individual states have expressly

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consented—except in cases where a state has objected from the start of the custom, a stringent test to demonstrate. A particular practice may be restricted to a specified group of states e. g. the Latin American states or even to two states, in which cases the standard for acceptance as a custom is generally high. Customs can develop from a generalizable treaty provision, and a binding customary rule and a multilateral treaty provision on the same subject matter e. g. , the right to self-defense, may exist at the same time. Some criticism against customary international law is directed at its subjective character and its inconsistency. States vary greatly in their opinions and interpretations of issues regarding international law.

Thus, it is almost impossible to find enough consistency among states to draw a customary international rule from general practice. In addition, even if one state or judge finds that a practice is a rule of customary international law, another decision maker might reach a different conclusion. Altogether, the process of establishing rules of customary international law is lengthy and impeded by today's fast-changing world. c) General principles of law: A third source of international law identified by the ICJ's statute is “ the general principles of law recognized by civilized nations. These principles essentially provide a mechanism to address international issues not already subject either to treaty provisions or to binding customary rules. Such general principles may arise either through municipal law or through international law, and many are in fact procedural or evidential principles or those that deal with the machinery of the judicial process e. g. , the principle, established in *Chorzow Factory (1927-28)*, that the breach of an engagement involves an obligation to make reparation.



Accordingly, in the Chorzow Factory case, Poland was obliged to pay compensation to Germany for the illegal expropriation of a factory. Such concepts are chiefly legal reasoning and analogies drawn from private law, such as Good faith and estoppel. Perhaps the most important principle of international law is that of good faith. It governs the creation and performance of legal obligations and is the foundation of treaty law. The obligation of a state to act in a good faith is a fundamental principle of international law, this also includes equity.

Like, Article 2(2) of the UN charter requires all members to fulfil their charter obligation in good faith, also the The Vienna convention on law of treaties 1969 entails parties to perform the treaty according to Article 26, and interpret according to Article 31(1), in good faith. Another important general principle 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. ) Decision of Judicial or Arbitral Tribunal and Juristic works: Judgements of the courts and tribunals, internationally and domestic, are the subsidiary source of international law. As the judgements result from careful consideration of particular facts and legal arguments, they carry more persuasive authority. There are few international courts and tribunals, but thousands of domestic ones and most cases involving international law come before the domestic courts, often final court of appeal.

There are times when international courts have interpreted international law wrongfully. Along with the decision of the courts, the role of the writers of <https://assignbuster.com/sources-of-international-law-assignment/>

international law is also subsidiary. Earlier the views of international were very much taken into consideration but currently the main value of the international law depends on the extent to which the book and articles is the works of the writers, i. e. based on the research of the writers or by comparing the views of the writer. Conclusion

It seems that customary international laws and treaties have adapted it to the items listed in relation to the article 38 of the statute. But by seeing it completely though the adaptation has taken place from traditional to the modern sources but the amount of adaptation is not satisfactory. But there is no doubt that the Sources of international law has developed in due course of time and there is much more things which are yet to be taken into consideration. Bibliography Books: – Anthony Aust, Handbook of international Law. – I. A.

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