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Extended Session- Sources of International Law

Two Essential elements of customary international law

- Customary international law is a dynamic source of law in the light of the nature of the international legal system and because of the lack of centralized governmental organs but again **there are two major elements of customary international law.**
- **State Practice**
- *Opinio juris sive necessitatis* or simply *opinio juris* “an opinion of law”

What is State Practice?

What is state practice? Does it cover every **kind of behavior initiated by the state**, or is it limited to actual, positive actions? To put it more simply, does it include such things as **speeches, informal documents and governmental statements** or is it restricted to what states actually do?

- State practice can be expressed in various ways: in governmental actions concerning other States, **legislation, diplomatic notes, ministerial or other official statements of the States as well as decisions of courts and activities on the international stage.**
- A state is not a living entity, but consists of governmental departments and thousands of officials, and state activity is spread throughout a whole range of national organs. There are the state's legal officers, legislative institutions, courts, diplomatic agents and political leaders. Each of these engages in activity which relates to the international field and therefore one has to examine all such material sources and more in order to discover evidence of what states do.
- There is some disagreement as to whether, for the purpose of the formation of customary law, state practice should consist merely of concrete actions, or whether it may also include abstract verbal, i.e. **written or oral**, statements of state representatives, or their votes, at diplomatic conferences, or in UN bodies.

- The obvious way to find out how countries are behaving is to read the newspapers, consult historical records, listen to what governmental authorities are saying and peruse the many official publications. There are also records of various past leaders, official manuals on legal questions, diplomatic interchanges and the opinions of national legal advisors. All these methods are valuable in seeking to determine actual **state practice**.

The practice must be-

1. The relevant practice must be **general**, meaning that it must be sufficiently widespread and representative, as well as consistent.
2. There is no particular duration is required under **State Practice**. In the **North Sea Continental Shelf Cases 1969** the ICJ held that the passage of a considerable period of time was unnecessary (i.e. duration) to form a customary law.

Opinio juris or psychological element

What does **opinio juris sive necessitatis** mean, or what should it mean, in the context of international law? At this point, it may be helpful to offer a working translation or definition. It is a belief in (or claim as to) the legally permissible or obligatory nature of the conduct in question, or of its necessity. We shall return later to the part of the definition which refers to necessity.

Once one has established the existence of a specified usage, it becomes necessary to consider how the state views its own behaviour. Is it to be regarded as a **moral** or **political gesture** among others.

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 certain way because they are convinced it is binding upon them to do so.**

The ICJ in Nicaragua v US (Merits) case (1986) stated: For a new customary rule to be formed, not only must the acts concerned amount to a settled practice, **but they must be accompanied by the opinio juris sive necessitatis.**

1. Acquiescence under Customary International Law

The Chamber of the International Court in the **Gulf of Maine case (Can. v. U.S. 1984)** defined acquiescence as ‘equivalent to tacit recognition manifested by unilateral conduct which the other party may interpret as consent’ and as founded upon the principles of good faith and equity.

Generally, where states are seen to acquiesce. in the behaviour of other states without protesting against them, the assumption must be that such behaviour is accepted as legitimate.

Some writers have maintained that acquiescence **can amount to consent** to a customary rule and that the absence of protest implies agreement.

In other words where a state or states take action which they declare to be legal, the silence of other states can be used as an expression of *opinio juris* or concurrence in the new legal rule. This means that actual protests are called for to break the legitimizing process.

States fail to protest for very many reasons. A state might not wish to give offence gratuitously or **it might wish to reinforce political ties or other diplomatic and political considerations may be relevant.** It could be that to protest over every single act with which a state does not agree would be an excessive requirement. **It is, therefore, unrealistic to expect every state to react to every single act of every other state.**

2. Regional and local custom

It is possible for rules to develop which will bind only a set group of states, such as those in Latin America, or indeed just two states. Such an approach may be seen as part of the need for ‘respect for regional legal traditions’.

In the **Asylum case**, the International Court of Justice discussed the Colombian claim of a regional or local custom 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 custom 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.

Right of Passage over Indian Territory case 1954

3. The general principle of law recognized by civilized nations

Article 38 of ICJ list general principle of law recognized by civilized states as the third source of international law. This source helps international law to adapt itself in accordance with the changing time and circumstances. **By general principle of law, it mean that those principles which have been recognized by almost all the states.**

By general principle of law it also mean those rules or standards which we find repeated in the same form of the developed systems of law, either because they have common origin, as in Roman law or because they have express a necessary response to certain basic needs of human rights.

It is for such a reason that the provision of ‘the general principles of law recognized by civilized nations’ was inserted into **article 38 as a source of law**, to close the gap that might be uncovered in international law and solve this problem which is known legally as *non liquet*.

But perhaps this is not a terribly serious problem since **both municipal legal concepts and those derived from existing international practice** can be defined as falling within the recognized catchment area.

In February 1920, The Council of the League of Nations appointed an Advisory Committee of Jurists then a Memorandum was submitted to it by the Secretariat of the League of Nations, together with a number of draft schemes prepared by states and individuals, relating to the establishment of a World Court. “...the Court was according to the various drafts directed to apply ‘general principles of law,’ ‘general principles of law and equity,’ ‘general principles of justice and equity,’ or even ‘rules which, in the considered opinion of the Court, should be the rules of international law....”

(d) Judicial decisions

In the modern period, decisions of judicial are the main source of international law it may however **note that the decision of ICJ does not create a binding rule of international law**. Under **article 59 of ICJ** make it clear that the decision of the court will have no binding force except between the parties and respect of that particular case.

Article 38(1) (d) does not distinguish between decisions of international and national courts. The former are generally considered the more authoritative evidence of international law.

In the event of the court being unable to solve a dispute by reference to treaty law, custom or general principles, Article 38 provides a subsidiary means of **judicial decisions and the teachings of the most highly qualified publicists of the various nations be employed** – although the increase of treaty law has led to a decline in the use of the subsidiary source.

It can be suggested that cases do not make law in international law. Nonetheless, international case law, as a subsidiary means for the determination of the rules of international law, is referred to and quoted from not only by writers but also by the ICJ itself

- Although the principle of *stare decisis* does not exist in international law, the views expressed in the judgments carry a particular weight. It is accepted that decisions of international tribunals are **unbiased and objective**. This is partly because of the **process of the election** of the most qualified judges. In fact they deal with real issues and their decision will result certainly in significant effects on the contesting parties. This significant **degree of responsibility adds further weight to their judgment** which is lacking in the other subsidiary law-determining agencies.
- The process of **hearings and reasoning also enables parties to bring evidences from different angles and legal systems**, therefore an all-round view of the matter would be considered by the judges. It must, however, be borne in mind that how persuasive their judgments are depend on the fullness and cogency of the reasoning offered.
- In this regard, not only the judgment itself, but also separate and dissenting opinions should be taken into account.

The teachings of the most highly qualified publicists of the various nations

- Historically, writers have performed a major role in the development of international law. **The significance of jurists such as Hugo Grotius, Plato and Aristotle.** Even today states make plentiful reference to academic writings in their pleadings before the Court.
- Writers have played an important part in the development of international law for two main reasons, **the comparative system of international law and the absence of any legislative body.**
- In the formative period writers helped to determine the scope and content of international law. However as the body of substantive law has increased so the influence of writers has decreased – although writers still have an important role in developing new areas of law, e.g. marine pollution.

Group One

- The interplay between treaty and custom is a topic of great importance in practice and theory. Customary law and treaty law have equal authority. However, if there is a conflict between the two it is the treaty that prevails. Discuss the validity of this assertion?

Group Two

- In a number of cases the International Court has made use of recognition as it does by a number of municipal legal systems: -
 - A. Doctrine of Estoppel
 - B. Ex aequo et bono

Group Three

Other possible sources

Over the last 30 years there has been increasing support for the view that Article 38 should not be understood as a comprehensive and complete list of the sources of international law.

- A. Resolutions of international organizations
- B. Resolutions of regional organizations
- C. The International Law Commission and codification
- D. Soft law



THANK YOU