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Customary International Law: Whether Relevant in the Modern World or Not

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ABSTRACT

It is a well-known fact that custom is one of the main sources of the international law as enumerated under the Article 38(1) of the Statute of International Court of Justice. Article 38 (1) (b) defines custom as "evidence of a general practice accepted as law." There are two main elements of the customary international law. The first is State Practice (usus) and the second is belief saying that such practice is required, prohibited or allowed, depending on the nature of the rule, as a matter of law (opinio juris). Customary international law is widely accepted alongside the treaties. However, there has always been a question regarding its relevance in the 21st over the time. The present paper proposes that the customary international is absolutely relevant in the modern world and crucial at the same time. The paper focuses on three relevant aspects of the customary international law. Firstly, the legal, social and moral legitimacy of customary international law. Secondly, its usage and legal validity. Lastly, the paper discusses the relevancy of customary international law in the modern era. The authors have also tried to find the relevancy of customary international law in the humanitarian law and human rights. The moral and social legitimacy of the customary international law has been established by the courts in several cases such as the Nicaragua Case, North Continental Shelf Case and many more. However, the legal legitimacy of the customary international law has been controversial through the time. Therefore, the paper suggests that it is important to establish the legal legitimacy of the customary international law, clearing the vagueness in the same.

Keywords: *Article 38(1), Custom, Customary International Law, Legitimacy, Legal Validity, Relevance, Modern era, Human rights, Opinio Juris, State Practice.*

I. INTRODUCTION

In an article published by the American Journal of International Law in the year 2018, it was argued by the author B.S. Chimni "that the non-availability of the state practice of third world countries, and also the paucity of scholarly writing on the subject, allows the identification of

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rules of customary international law primarily on the basis of state practice of advanced capitalist nations and the opinions of their scholars."[3] A similar contention was raised by J. Patrick Kelly with respect to the determination of opinio juris, where the anecdotal evidence of the legal positions of Northern countries were the key evidence used in the process of CIL determination.[4] He, too, emphasized the decisive role of "academic and judicial elites" in making customs and decried CIL's "democracy deficit".

The Black's law dictionary defines International Law as "The law which regulates the intercourse of nations; the law of nations or the customary law which determines the rights and regulates the intercourse of independent states in peace and war." From the beginning of establishing the international law, there have been several sources of international law including treaties, international customs, judicial decisions, general principles of law etc. Article 38(1)[5] of the Statute of the International Court of Justice is widely recognised as the most authoritative statement regarding the sources of international law[6]. Some material and formal differences can be found among the different sources of law. Customary law can be said to be the oldest source of the international law. It also generates rules that are binding on all the states. However, the customary international law is not backed by some written documents, therefore, making it an unwritten source. By using the term "custom", the reference is clearly to some habitual course of conduct.[7] There are two main elements of the customary international law. The first is State Practice (usus) and the second is belief saying that such practice is required, prohibited or allowed, depending on the nature of the rule, as a matter of law (opinio juris).[8]

Many scholars are of the view that customs have always played an integral part in the law from the very beginning of the development of law and it is an important source of law. Before the development legal systems, customs used to be the governing body, shaping the behaviour of the subjects.

This papers begins by discussing the two elements of customary international law i.e. state

[3] B. S. Chimni, *Customary International Law: A Third World Perspective*, 112 AM.J.INT'LL. 1, 6 (2018).
[4] J. Patrick Kelly, "*The Twilight of Customary International Law"*, 40 VA.J.INT'LL. 449, 472 – 3 (1999).
[5] Article 38 (1) – Statute of the International Court of Justice
The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: (a) International conventions, whether general or particular, establishing rules expressly recognized by the contesting states; (b) international custom, as evidence of a general practice accepted as law; (c) the general principles of law recognized by civilized nations; (d) 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
[6] Malcom N. Show, International Law, 6th ed. (Cambridge, Cambridge University Press, 2008), p.70.
[7] D.W. Grieg, International Law, 2nd ed. (London, Butterworth and Co. Publishers Ltd, 1976), p.17.
[8] R v. NY, (2008) OJ No 2069 (QL).

practice and opinio juris. Thereafter, it throws light on the legitimacy of customary international and its usage and legal validity. This paper suggests that the customary international law plays a vital role in the development of the legal system across the globe.

II. ELEMENTS OF CUSTOMARY INTERNATIONAL LAW

Custom can be described as the legal obligation, which is derived from a settled conduct of the people creating expectations. However, it is again well-known that the mere existence of a practice is not sufficient to create an international rule. In the case of **Continental Shelf, Libya vs. Malta**[9], the ICJ has emphasized that the courts would apply only a uniform practice that is accepted as law. It was highlighted that:

"It is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and opinio juris of States, even though multilateral conventions may have an important role to play in recording and defining rules deriving from custom, or indeed in developing them."[10]

Therefore, it can be said that for a customary rule to arise, there must be the presence of two elements:

1. The material/objective element – State Practice
2. The subjective element – Opinio Juris

(A) The Objective Element: State Practice

It is also referred to as "Constant and Uniform Usage".[11] In order to analyse a state practice, the following must be taken into consideration:

i. Whose practice is relevant
ii. Which form may be taken by the practice
iii. How much uniformity should be present
iv. How long must it be observed
v. What is the role of the specially affected States?[12]

State practices can be seen in the actions of the state in the form of acts and omissions,

[9] Continental Shelf, Libya v Malta, [1985] ICJ Rep 13.
[10] *Continental Shelf (Libyan Arab Jarnahiriya vs, Malta),* Judgement, I.C.J. Reports 185, (13), para 27.
[11] Asylum, Colombia v Peru, ICGJ 194 (ICJ 1950).
[12] Andre da Rocha Ferreira et al, *Formation and Evidence of Customary International Law*, UFRGS Model United Nations Journal, ISSN: 2318-3195, Vl. 2013, p. 187, https://www.ufrgs.br/ufrgsmun/2013/wp-content/uploads/2013/10/Formation-and-Evidence-of-Customary-International-Law.pdf.

statements made by them. State practice necessary for the formation of customary international law are:

1. Consistent and uniform;
2. Generally accepted by the states;
3. Of a certain duration.[13]

In the case of **Nicaragua vs. United States[14],** several clarifications were made regarding the inconsistent state practice:

1. For a customary rule to come into force, it is not necessary to have complete consistency in State practice in respect of the rule.
2. Inconsistent State practice does not affect the formation or existence of a customary principle so long as the inconsistency is justified by the State as a breach of the rule.
3. This attempt at justifying a violation would only make the rule's customary law nature stronger.[15]

When we talk about whose practice amounts to state practice, it is important to note that the notion of the state includes the executive, legislature and judiciary; therefore, not only the acts of the state is included under state practice but also their parliament and courts. The sources of the state organs are important as well[16] such as statements by the heads of the state, opinion of the legal advisors, pledges before the international tribunal, voting pattern in the UN resolutions[17] etc. The state practice not only include the acts but also the omissions by the state that they do not do.[18]

Furthermore, the duration and uniformity of the state practice is also an important aspect. Ian Brownlie has once stated that *"the passage of time may evidence the generality and consistency of a practice but no particular duration is required."*[19] In the **Asylum case[20],** ICJ has suggested that *"a customary rule must be based on constant and uniform usage."* In this case, the formation of a customary rule was not prevented by the absence of repetition but the presence

[13] Continental Shelf, Libya v Malta, [1985] ICJ Rep 13.
[14] Nicaragua vs. United States, 1986 ICJ Rep 14.
[15] Nicaragua vs. United States, 1986 ICJ Rep 14, Oxford Reports on International Law., https://opil.ouplaw.com/view/10.1093/law-icgj/112icj86.case.1/law-icgj-112icj86.
[16] "Sources of International Law." *Max Planck Encyclopaedia of Public International Law, 2018*, https://opil.ouplaw.com/EPIL.
[17] Ibid.
[18] Lotus case (France vs. Turkey), Judgment, P.C.I.J. Reports 1927, p.28.
[19] Ian Brownlie, *Principles of Public International Law*, 7th ed. (New York, Oxford University Press, 2008), p.7.
[20] Asylum case (Colombia vs. Peru), Judgment, I.C.J. Reports 1950, p. 266.

of major inconsistencies in the practice.[21] In the case of **Anglo-Norwegian Fisheries Case[22],** it was emphasized by the ICJ that *"some degree of uniformity amongst state practices was essential but little uncertainties not amount to serious inconsistency."*[23] ICJ has also held in the **North Sea Continental Shelf Case[24]** that *"passage of only a short period of time was not an obstacle to the formation of a customary rule as long as during that time, state practice was expensive and virtually uniform."*[25] In the **Nicaragua Case[26],** it was held by the ICJ that *"it was not necessary that the practice in question had to be in absolutely rigorous conformity with the purported customary rule."* Hence from these judgements it is made clear that there is no element of right time, making it dependent on the circumstances of the case.[27] However, the state practice needs to be constant and uniform. It is important to note here that it is not necessary that absolute consistency is required, and again a little uncertainty is not considered as inconsistency.

(B) The Subjective Element: Opinio Juris

It is basically the opinion of the law. Opinio juris is necessary in order to distinguish a rule of customary international law from a rule of international comity, which is based upon a consistent practice in inter- state relations, but without the feeling of legal obligation.[28] In **North Sea Continental Shelf Case[29],** the ICJ has emphasised that *"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, the existence of a subjective element, is implicit in the very notion of the opinio juris sive necessities."*[30] The customary international law is applied to all states. However, there are some exceptions under which customary international law is applicable only to a few states or may not be binding on some specific states; they are:

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[21] Constance De La Vega, *"Elements of Customary International law"* 2018.
[22] Anglo- Norwegian Fisheries Case (UK vs. Norway), Judgment, I.C.J. Rep 1951, p.116.
[23] Malcom cited Anglo- Norwegian Fisheries Case, International Law, 6th ed. (Cambridge, Cambridge University Press, 2008), p.77.
[24] North Sea Continental Shelf Case (Federal Republic of Germany vs. Denmark; Federal Republic of Germany vs. Netherlands), Judgment, I.C.J. Reports 1969, p. 3.
[25] Geneva Convention on the Continental Shelf, 1958, para 74.
[26] Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America). Merits, Judgment. I.C.J. Reports 1986, p. 14.
[27] Ian Brownlie, *Principles of Public International Law*, 7th ed. (New York, Oxford University Press, 2008), p.7-8.
[28] David Harris, Cases and Materials on International Law. (London, Sweet and Maxwell Publishers, 2010), p.190.
[29] North Sea Continental Shelf Case (Federal Republic of Germany vs. Denmark; Federal Republic of Germany vs. Netherlands), Judgment, I.C.J. Reports 1969.
[30] North Sea Continental Shelf Case (Federal Republic of Germany vs. Denmark; Federal Republic of Germany vs. Netherlands), Judgment, I.C.J. Reports 1969, p. 77.

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1. Local or special custom;
2. The theory of persistent objection and subsequent objection.[31]

There is no minimum number of states required for the formation of a local customary law.[32] In the **Right of passage over Indian Territory Case[33],** it was ruled that *"local customary rule must be based on the same state practice and opinio juris."*[34] It must however meet two requirement:

1. The tacit acceptance of all parties concerned and;
2. The allocation of the burden of proof on the state claiming the existence of the rule.[35]

Contemplates the possibility of a state contracting out of a customary rule in the process of its formation. There must be clear evidence of objection, since there is a presumption of acceptance that has to be rebutted.[36] Under the traditional law, the states can impose objection to a customary international law during its emergence. However, the subsequent subjection allows the states to departure from an existing customary international law.[37] In the **Nicaragua Case[38]** the ICJ explained opinio juris as follows:

"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 opinio juris sive neccessitatis. Either the States taking such action or other States in a position to react to it, must have behaved so that their conduct is evidence of a belief that the practice is rendered obligatory by the existence of a rule of law requiring it. The need for such belief…the subjective element, is implicit in the very notion of opinio juris sive neccessitatis."

In the **North Sea Continental Shelf Case[39]** it was affirmed that "a belief in the legally permissible or obligatory nature of the conduct in question, or of its necessity."[40] The ICJ has

[31] Andre de Rocha Ferrira, *"Formation and Evidence of Customary International Law."* UFRGS Journal. 2013, p.192.
[32] Ibid.
[33] Right of Passage over Indian Territory Case (Portugal vs. India), Judgment, I.C.J. Reports 1960, p.6.
[34] Antonio Cassese. International Law, (New York, Oxford University Press, 2001), p.164.
[35] Andre de Rocha Ferrira, *"Formation and Evidence of Customary International Law."* UFRGS Journal. 2013, p.192.
[36] Andre de Rocha Ferrira, *"Formation and Evidence of Customary International Law*". UFRGS Journal. 2013, p.192-193.
[37] Guerreiro Teixeira, *"Is Customary International Law Consensual".* Leiden Journal, 2015, p.14.
[38] Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America). Merits, Judgment. I.C.J. Reports 1986.
[39] North Sea Continental Shelf Case (Federal Republic of Germany vs. Denmark; Federal Republic of Germany vs. Netherlands), Judgment, I.C.J. Reports 1969, p. 77.
[40] Andre da Rocha Ferreira et al, Formation and Evidence of Customary International Law, UFRGS Model United Nations Journal, ISSN: 2318-3195, vl. 2013, p. 190, https://www.ufrgs.br/ufrgsmun/2013/wp-content/uploads/2013/10/Formation-and-Evidence-of-Customary-International-Law.pdf.

established opinio juris is the main distinguishing feature between custom and comity or courtesy:

"The frequency, or even habitual character of the acts is not in itself enough. There are many international acts, e.g., in the field of ceremonial and protocol, which are performed almost invariably, but which are motivated only by consideration of courtesy, convenience or tradition, and not by any sense of legal duty." [41]

Therefore, we can say that in order to be significant, a state practice must be accompanied by conviction. Opinio juris is necessary in order to distinguish a rule of customary international law from a rule on international comity, which is based upon a consistent practice in inter-state relations, but without the feeling of legal obligation.[42]

III. LEGITIMACY OF CUSTOMARY INTERNATIONAL LAW

The legitimacy of customary international law can be understood in different ways. The argument addressing this issue was introduced by Thomas M. Franck in "Legitimacy in the International System" at the end of the cold war.[43] Franck has raised an issued saying that the concept of legitimacy is forgotten while on the other hand all the attention is given to the legality of the subject matter.[44] As per the Oxford's dictionary Legitimacy if "Conformity to the law or to the rules."[45] Beetham on the other hand gives a slightly different perception on the same arguing legitimacy as "The justification and acceptance of political authority."[46] Chris Thomas in his work "The Concept of legitimacy and international law" has stressed that legitimacy can be understood in three different ways: Legal legitimacy, Moral legitimacy and Social legitimacy.[47] Legal legitimacy can be perceived as the legal validity in the notions of positive law.[48] Moral legitimacy can be perceived as a "right to rule".[49] Social legitimacy is a mere "belief that action, rule, actor or system is morally or legally legitimate."[50] It is worth

[41] North Sea Continental Shelf Case (Federal Republic of Germany vs. Denmark; Federal Republic of Germany vs. Netherlands), Judgment, I.C.J. Reports 1969, p. 77.
[42] Andre da Rocha Ferreira et al, Formation and Evidence of Customary International Law, UFRGS Model United Nations Journal, ISSN: 2318-3195, vl. 2013, p. 190, https://www.ufrgs.br/ufrgsmun/2013/wp-content/uploads/2013/10/Formation-and-Evidence-of-Customary-International-Law.pdf.
[43] Thomas M. Franck, *"Legitimacy in the International System",* The American Journal of International Law, Vol. 82, No. 4, Oct. 1988, p.705-759.
[44] Thomas M. Franck, "Legitimacy in the International System", The American Journal of International Law, Vol. 82, No. 4, Oct. 1988, p.705-707.
[45] Oxford Dictionaries, definition of legitimacy, http://www.oxforddictionaries.com/definition/english/legitimacy
[46] Bodansky, Legitimacy in International Law and International Relations, p.5; David Beetham, "The Legitimation of Power", Palgrave Macmillan, 2nd ed., 2013.
[47] C.A. Thomas, *"The Concept of legitimacy and international law",* LSE Law, Society and Economy Working Papers 12/2013, p.7.
[48] Ibid, p.7.
[49] Ibid, p.11.
[50] Ibid, p.14.

stressing that concepts of legal legitimacy and moral legitimacy is linked to social legitimacy.

(A) Legal Legitimacy of Customary International Law

Thomas Franck has suggested a comprehensive list of criteria needed to access the legal legitimacy of the customary international law.[51] It includes: "determinacy, symbolic validation, coherence, an adherence."[52] Determinacy refers to the clarity of the content and it was perceived by Franck as one of the most important criteria."[53] Symbolic validation identifies as compliance with certain figurative procedures that give legal power to a rule.[54] The coherence of the law means "the quality of being logical and consistent.[55] Adherence will be measured as "conformity with the legal system's secondary rules about norm creation."[56]

It requires certain clarity of the content in order to have an effective implementation and use of the customary international law. The primary existence of customary rules relies on the presence of the core meaning that stays the same over a period of time.[57] Therefore, this core meaning is to be considered hand in hand with determinacy. Humanitarian law is a good example of the customary international law that fulfilled the criteria of determinacy.[58] Some fundamental rules can be found in the cases of the international judicial bodies. For instance, in the **Nicaragua Case,** the court stressed that the right to self-defence and prohibition of interventions reflect customary international law.[59] In accordance with the same, certain fundamental aspects of law on the using of force were being reflected in the customary international law with the more or less clear meaning.[60] Moreover, customary international laws could be codified in the form of treaties.[61] Such treaties would provide guidance in the content of the customary international law subsequently. Therefore, it could be possibly be said to conclude that there are certain customary international laws passing the criterion of determinacy. Further, it can be said that there is lack of clarity on customary international law regarding certain fundamental international concepts. Therefore, it is always possible to say

[51] Thomas M. Franck, *"The power of legitimacy and the legitimacy of power: International Law in an age of Power Disequilibrium",* The American Journal of International Law, Vol. 100, No.1, Jan 2006, p.93.
[52] Ibid.
[53] Ibid.
[54] Ibid.
[55] Oxford dictionaries, definition of coherence, http://www.oxforddictionaries.com/definition/english/coherence.
[56] Bodansky, Legitimacy in international law and international relations, p.13.
[57] See Wood, Second report, p.36.
[58] Jean Marie Henckaerts and Louise Doswald-Beck, *"Customary International Humanitarian Law",* ICRC and Cambridge University Press, Vol I, 2005, reprint Vol II, 2009.
[59] The International Court of Justice, Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua vs. United States of America); Merits, ICJ 1986, para 174.
[60] Ibid.
[61] James Harrison, *"Making the law of the sea: A study in the development of International Law",* Cambridge University Press, 2011, p.17.

that there is constant change in the norms of the customary international laws, which unintentionally deprives the branch from the consistency of the content or the concept. This does not make the branch of customary international law illegitimate in totality in legal sense. However, there is some part of customary international law open for broad interpretations, questioning the binding nature of some of the rules. Therefore, possibly it could be concluded that the vague content of the customary international law and the breaching concepts of consent and the sovereign equality lacks customary international law from the notion of legal legitimacy.

(B) Moral and Social Legitimacy of customary international law

Scharf in his article Accelerated Formation of Customary International Law" has said that customary international law are more widespread in their binding power in comparison to treaties.[62] It is said to be an essential addition to the generality of the international law in terms of its binding power. Therefore, in certain circumstances, the customary international fills the gap obligating to the States not wanting to join treaties. The moral value of customary international law flows from its ability to govern all with no distinction.[63] Customary international Law can be said to be a flexible branch of the international law. However, there are still certain fundamental obligations relevant to customary international law allowing no withdrawal contrary to certain treaties. One example can be human rights since it not clear as to what human rights are protected by the customary international law.[64] In some cases, customary international laws can be used to fill gaps in the international law, governing new relationships between the states before an agreement on a treaty can be made.[65] It can therefore, be said that customary international law brings a lot of practical challenges in the strict legal sense. However, on the other side, due to its contributing value to international law, the existence of customary international law seems to be morally justified. Firstly, customary international law establishes widespread obligations. Secondly, it can govern new relations between the States. Moreover, it does not require an agreement on a particular treaty. Thirdly, no withdrawal clause contributes to moral legitimacy substantially. Therefore, we can say that customary international law is morally legitimate due to its positive contribution to the

[62] Michael Scharf *"Accelerated Formation of Customary International Law",* 20 ILSA Journal of International and Comparative Law 305, 2014; Case legal studies research paper No. 2014-22, p.309.
[63] Michael Scharf *"Accelerated Formation of Customary International Law",* 20 ILSA Journal of International and Comparative Law 305, 2014; Case legal studies research paper No. 2014-22, p.309.
[64] Anthony D' Amato, "*Human Rights as part of Customary International Law: A plea for change of paradigms",* Faculty Working Papers, 88(2010), http://scholarlycommons.law.northwestern.edu/facultyworkingpapers/88.
[65] Michael Scharf, *"Accelerated Formation of Customary International Law",* 20 ILSA Journal of International and Comparative Law 305, 2014, Case legal studies research paper No. 2014-22, (309).

international law.[66] Social legitimacy can also be explained using the moral legitimacy of the customary international law. Social legitimacy can be concluded on the de facto acceptance of the customs to be the primary source of international law. This can be proven using several cases adjudicated on the basis of customary international law, statute of ICJ and the common acceptance of the customary international in the academic literature.[67] Therefore, it can be concluded that the customary international law is morally and socially legitimate.

IV. THE USAGE & LEGAL VALIDITY OF CUSTOMARY INTERNATIONAL LAW

After World War II, accepted definition of custom is found in International Court of Justice (ICJ), Statute in its Article 38(1) (b)[68].In its jurisprudence, the Court had figured out two necessary components for constitution of custom; Practice of State and the opinion juris; subjective element which is related to State consent in legal status of conduct (International Law Association 2000)[69].

Jurisprudence of ICJ and of its predecessor, the Permanent Court of International Justice (PCIJ), have helped to clarify certain issues regarding customary international law formation, in cases such as the Lotus (1927), the Asylum (1950), the North Sea Continental Shelf (1969) Nicaragua (1986) cases and Central Gold Mining Company. Nonetheless, it is important to mention that in last decade, Court has not made impactful progress in various topics in accordance with custom, keeping very cautious behavior in ascertaining customary norms existence. For instance, the Court had avoided pronunciation about certain issues as the customary character of universal criminal jurisdiction, the legal status of United Nations General Assembly Resolutions as well as another topics which typically concern scholars and the legal international community. Despite long history of custom, it still gives space to debate. To understand various legal aspects as well as validity of the Customary International Law, there is necessity to study evolution and recent development through case laws. Hence, we will discuss some of the important case laws through which the present status of customary International Law can be defined.

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[66] Artem Sergeev, *"Legitimacy of Customary International Law: Legal, Moral and Social Perspective",* (15), https://www.academia.edu/23210506/Legitimacy_of_Customary_International_Law_Legal_Moral_and_Social_Perspective.

[67] ICJ Cases, Nicaragua, Continental Shelf, Asylum, Basic International law textbooks like Malcolm N. Shaw, *International Law",* 7th ed. Cambridge University Press, (2014).

[68] https://www.icj-cij.org/en/statute.

[69] *International Law Association London Conference 2020, Committee on formation of Customary International Law, Final Report of the Committee*, http://www.law.umich.edu/facultyhome/drwcasebook/Documents/Documents/ILA%20Report%20on%20Formation%20of%20Customary%20International%20Law.pdf.

PCIJ: LOTUS CASE (FRANCE V. TURKEY)[70]

The case of S.S. Lotus was judged in 1927 by Permanent Court of International Justice, which was principal judicial organ of the League of Nations and Statute of it was later reproduced in Statute of ICJ. It is the earliest judicial pronouncement on aspect of formation and verification of customary norms which had remained significant and relevant until present time.

The case was proposed by France against Turkey, due to reason of criminal proceedings the latter had initiated in its national courts against French national. The proceedings are about collision between the S.S. Lotus, a ship which is flying the French flag, and the Boz-Kourt, which flew Turkish flag. According to France, Turkey have lacked jurisdiction so as to prosecute French lieutenant. Therefore, Court had to pronounce on the important issue that whether there was a rule of international law which prohibits exercise of jurisdiction by Turkey. After clearly analyzing all the evidence that was brought by France, it was concluded that it was not possible to verify customary norm existence affirming that jurisdiction in collision cases was of flag State.

This case is supportive of the positivist view of international law because of the affirmation that all international rules are generally based on States consent[71]. Moreover, the Court had now put burden of proof on France which require high standard of evidence so as to prove the existence of custom, as following passage had clearly demonstrates:[72]

"Even if rarity of judicial decisions is to be found among reported cases were sufficient to prove circumstance alleged by Agent for French Government, then it will merely show that States had often in practice, abstained from instituting any criminal proceedings, and not that they have recognized themselves as being obliged to do so; but only if such abstention were in conformity with conscious of having duty to abstain then would it be possible to speak of an international custom. The alleged fact will never allow anyone to infer that States have been conscious of having any such a duty; but on the other hand, as will presently be seen, there are many other circumstances which is calculated to show that contrary is true."

ICJ: ASYLUM CASE (COLOMBIA V. PERU)[73]

The Colombian-Peruvian Asylum case, or simply known as Asylum case, was brought in attention of the ICJ by Colombia against Peru. It describes Peruvian general situation, who

[70] Lotus Case (France v Turkey) P.C.I.J. (ser. A) No. 10 (1927)
[71] (Janis and Noyes 2006, 115).
[72]Ruwantika, *An Introduction to Public International Law for Students*, (July 27, 2012), https://ruwanthikagunaratne.wordpress.com/2012/07/27/lotus-case-summary/.
[73] Colombia v Peru [1950] ICJ 6.

after an unsuccessful overthrow have sought for refuge in Colombian embassy in Lima. The main dispute was that whether Peru was bound or not by an alleged local custom which had granted diplomatic asylum that will force Peru to allow for safe passage of general to Colombia[74].

To prove customary rule existence, Colombia have presented many such cases in which diplomatic asylum was respected. However, Colombia can never successfully prove this as a rule as many of those cases were completely contradictory and therefore, it was impossible to define that whether it was a genuine matter of politics or law, thus impossible to conclude that there was any opinio juris. Court have transparently stated that Peru can never be bound to this custom, even in the case if Colombia have successfully proven its existence, since Peru have never had attitudes in conformity to it and had on the contrary, objected to the rule[75].In this case , ICJ has expressly held that " Where a local as well as regional custom is alleged then in that case there it becomes proponent duty to prove the fact that customs are established in a manner that it had compulsory become binding on the concerned parties". This case abides by upon principle that Custom is created and will become binding only if it will be in accordance with regular, constant and uniform use by the States. And the other important thing is that there has to be evidence as for such practice existence.

ICJ: NORTH SEA CONTINENTAL SHELF CASES (GERMANY V. DENMARK AND GERMANY V. THE NETHERLANDS)[76]

The judgment in the North Sea Continental Shelf cases, delivered by the ICJ in 1969, is one of the significant decisions of jurisprudence of Court and one of the few occasions which went in depth into an analysis of the formation and identification of customary international law.

The case was proposed by the Federal Republic of Germany against, separately, the Netherlands and Denmark which is being reunited in one single case by the ICJ. The main controversy of case was the issue that whether rule of delimitation of continental shelf that is contained in Article 6 of the 1958 Geneva Convention on the Continental Shelf, the equidistance principle that have become customary rule which is binding on Germany who was not a party to said convention[77].

The Court in this matter have decided that, however a treaty rule can also be rule of customary

[74] https://www.icj-cij.org/en/case/.
[75] Briggs 1951, Colombian- Peruvian Asylum 1950.s
[76] ICJ: North sea continental shelf cases (Germany v. Denmark and Germany v. The Netherlands) [1969] ICJ 1
[77] *General List Nos. 51 & 52, International Court of Justice*, North Sea Continental Shelf, Germany v Denmark, Germany v Netherlands, (February 20, 1969), http://www.worldcourts.com/icj/eng/decisions/1969.02.20_continental_shelf.html.

law, but this was not case of Article 6[78]. While giving reasoning, it had established that in which ways various custom and treaties might interact: they can be declaratory of customary law which is pre-existing, crystallize developing customary law, or can give rise to a custom after its adoption. In supplement for a rule of treaty which is to be also considered a customary rule then it must have norm-creating character, which means that it can never admit derogations or be subjected to reservations

In this matter, Court have highlighted need and importance of the practice of the specially affected States by considering it an important determining factor in incorporation of treaty norms into significant corpus of customary international law. As to the necessary duration of practice, passing of only a short period of time will never be an obstacle to the customary rule formation, as long as during that time the practice is extensive and representative which include that of the States whose interests are affected specifically.

ICJ: NICARAGUA CASE (NICARAGUA V. UNITED STATES OF AMERICA)[79]

Judgment of this case delimits notion of custom as law which is the one in the Military and Paramilitary Activities in and against Nicaragua case, being proposed by Nicaragua against the United States of America and decided by the Court in 1986. The dispute is regarding the actions of the United States towards Nicaragua in context of the Sandinista Revolution. Nicaragua had claimed that United States had implicitly breached international law by using the help of direct armed force against it and by giving full support and assistance to the "contras", which were guerrillas that fights to depose the Sandinista government.

The use of force is outlawed by Article 2(4) of the UN Charter. Nonetheless, the United States have made a reservation to its acceptance to jurisdiction of ICJ, which exclude "disputes that is arising under a multilateral treaty" from it. Hence, the Court can decide that whether United States had actually violated Article 2(4) [80]or not, since UN Charter is a multilateral treaty. However, the Court had ruled prohibition of use of force which was also a rule of customary international law, thus it can always exercise jurisdiction in application of such rules[81].

In its reasoning, the Court have affirmed that, for customary rule establishment, States conduct is not needed to have been completely consistent. It is sufficient that if States practices is, in

[78] *Convention on Continental Shelf,*1958, Done at Geneva on 29 April 1958. Entered into force on 10 June 1964. United Nations, Treaty Series, 499, (311), https://legal.un.org/ilc/texts/instruments/english/conventions/8_1_1958_continental_shelf.pdf.
[79] ICJ: Nicaragua case (Nicaragua v. united states of America) 1986 I.C.J. 14
[80] *Purposes and Principle of UN, United Nations Security Council*, https://www.un.org/securitycouncil/content/purposes-and-principles-un-chapter-i-un-charter.
[81] Harris 2010, 727, Military and Paramilitary Activities in and against Nicaragua 1986, (185).

general, consistent with all the necessary rule and situations of conduct inconsistent with it are treated as breaches of that rule, and not as an indicative of new rule existence. Even if State acts in a manner which will be considered incompatible with customary rule, but it tries to justify its conduct by resorting to various exceptions and justifications contained within the rule then in that circumstances this behavior confirms, rather than weakens, the rule.

WEST RAND CENTRAL GOLD MINING COMPANY LTD. V. THE KING[82]

Petition of right was instituted by the West Rand Central Gold Mining Company. Petitioner had alleged that while travelling from Johannesburg to Cape Town before outbreak of war between South African Republic and Great Britain two gold parcels were confiscated by authorities of South African Republic. After that war broke out between the, and great Britain had defeated South African Republic. Central Gold Mining Company in its petition had claimed that responsibility for confiscating product or goods will now fall within power of State Great Britain.

The court have ruled that for a valid international custom it is very necessary that it shall be proved by certain satisfactory evidence that the custom is of such nature which have received general consent of states and no civilized state shall oppose it. In regard to various legal authorities and more cases on similar matters, significant characteristics of customary law can be concluded which says and depicts that,

a) Both opinio juris as well as State practice should be proved and

b) Both concepts should be interconnected.[83]

c) State practice is conveyed through significant administrative acts, legislation and decisions of the courts, etc.

This case is also of utmost importance to the sphere of customary law as it had explained that various important certain practice is "in force not just because it is prescribed by any superior power, but because of the reason that it is generally accepted as a rule of conduct". The Divisional Bench which had been presided by Lord Alverstone C.J after hearing the Central Gold Mining Company petition had ruled that International Law principles was never existing which make it impossible for the conquered state to be held liable to confiscated gold[84].

[82] West Rand Central Gold Mining Company Ltd. v. The King, [1905] 2 K. B. 391.
[83] http://www.uniset.ca/other/cs5/19052KB391.html.
[84] Ibid.

V. INDIAN CONSTITUTION AND CUSTOMARY INTERNATIONAL LAW

It is important to analyse the relationship of international law and municipal law which is mentioned in the Constitutional scheme. The Supreme Court's obiter in **Vellore Citizen Welfare Forum v. Union of India[85]; A. P Pollution Board v. Prof M. V Nayudu (Retd.)[86] And PUCL v. Union of India[87]** pointed out some controversy in Indian context as to whether principles of customary international law will be considered as part of law of the land or not. Common obiter of all judicial pronouncements deals with the perennially contentious issue of relationship of international law to municipal law. Issue has far reaching implications in accordance with domain of domestic law. It is very surprising to note that in all these decisions Supreme Court have not touch upon sine qua non aspect as to how customary international law would be getting automatically incorporated into domestic law of India. While Justice Kuldeep Singh in Vellore Citizen Welfare Forum case has said that it is an accepted proposition of law that rules on customary international law that are not contrary to the municipal law should be deemed to have been incorporated in the domestic law and is required to be followed by the courts of law definitely.

The most debatable issue is whether customary international law is truly State law or not.[88] In India there are no specific provisions either in Constitution or any other laws that directly deal with the relationship between Indian municipal law and customary international law. Indian Courts had recourse to English law as well as even to American decisions for guidance without examine that whether same is good for India after Constitution commencement. The Supreme Court also struck different note in case of **Gramophone Co. v. Birendra Bahadur Pandey**[89]. It was one of transparent instances when Court had discussed the relationship of Customary International law to municipal law in extension. The Court concluded that position of India subscribes to Doctrine of Incorporation.[90] It is unfortunate that the Indian Courts have generally taken recourse to English and sometimes American decisions for guidance without taking its own references and guidance. But it is important to observe that the final decision in any case never requires any particular consideration of any rule of Customary International law.

However, the obiter of the Gramophone Co. case was completely relied in the landmark case

[85] Vellore Citizen Welfare Forum v. Union of India, (1995) 6 SCC 647.
[86] A. P Pollution Board v. Prof M. V Nayudu (Retd.), (1997) 1 SCC 301.
[87] PUCL v. Union of India, (1999) 2 SCC 710.
[88] H.H. Koh, *Is International law Really State Law*, 111 Harv. L. Rev. 1824 (1998); see also Bradly & Golsmith, *Customary International as Part of law of the Land*, 110 Harv. L. Rev. 815 (1998).
[89] Gramophone Co. v. Birendra Bahadur Pandey, AIR 1984 SC 667.
[90] This conclusion of the Court based on the discussion of the theory of monism and dualism in the International law.

of Vellore Citizens Welfare Forum v. Union of India and others[91], where a three Judge Bench of the Supreme Court has referred 'precautionary principle' and the new concept of 'burden of proof' in environmental matters. Justice Kuldeep Singh, after referring to the principles that was evolved in various International Conferences and the concept of 'Sustainable Development', stated that Precautionary Principle, the Polluter-Pays Principle and the special concept of Onus of Proof which have now been emerged and govern the law in our country too, as which can be clearly seen from Articles 47, 48-A and 51-A (g) of our Constitution[92]. In fact, in number of environmental statutes, such as the Water Act, 1974[93] and other statutes, which include Environment (Protection) Act, 1986[94], these concepts had been already implied. The learned Judge declared all these principles have now become part of our law and land. The Court observed that even otherwise the above-said principles are accepted as part of the customary international law and hence there has to be no difficulty in accepting them as part of our domestic law which is the need of hour. The Apex Court have also failed to give justified reasoning on the automatic incorporation customary international law into domestic law. It has only approved obiter dicta of earlier judicial pronouncements without even going into proper validity of their reasoning.[95] It is important to note that in the Vellore Case, the Court had relied on the obiter of the Gramophone Co. case. However, in the Gramophone Co. case itself the Court have used International law as a canon of statutory construction and not as a rule of law. The Court had drastically failed to recognise that use of international law as a canon of statutory interpretation cannot give force of law to customary international law principles in the municipal domain. Further, observations made concerning with the position of customary international law under municipal law in the Gramophone Co. case can never serve as binding precedent under Article 141of Indian Constitution as these observations were made by the Court parties concession. Hence Justice Kuldeep Singh with proactive vigour finally declared that Polluter Pay principle is widely acclaimed by Indian judiciary and therefore forms part of Customary International law as it is the principle which is widely used in the Indian context by Indian courts. Therefore, it is considered as deemed to be incorporated in the municipal law.

No doubt, it is undisputed that 'International friendliness' under Article 51(c)[96] would lead to a

[91] See, Supra No. 83.
[92] Indian Const.1949 art. 47, art 48-A and art 51-A cl. (g).
[93]The Water (Prevention and Control of Pollution Act),1974, No. 06, Acts of Parliament, https://legislative.gov.in/actsofparliamentfromtheyear/water-prevention-and-control-pollution-act-1974.
[94]The Environment (Protection) Act, 1986, No.29, Act of Parliament, https://legislative.gov.in/actsofparliamentfromtheyear/environment-protection-act-1986.
[95] A.D.M. Jabalpur v. Shivkant Shukla, AIR 1976 SC 1207 & Jolly George Vergese v. Bank of Cochin, AIR 1980 SC 470.
[96]Indian Constitution, 1949, art.51, cl.(c).

strong presumption that neither Constitution and nor Parliament intended to infringe international law. Incorporation of more express provisions in the Indian Constitution is desired and importantly needed so as to make the relationship of international law and the Constitution unambiguous. Serious consideration and steps should be given to achieving this. The Draft Declaration on Rights and Duties of State which is prepared by the International Law Commission in 1949 has elaborated all these principles in unequivocal terms in Articles 13 & 14[97], according to which, no State can take the refuge under its Constitutional or municipal law for breach of an international law principle. Noticeably, unlike many other Constitutions, there are no express provisions that had been contained in the Constitution which directly deals with the relationship of international law and municipal law. But though, the courts in many cases and context have applied rules of customary international law in various cases of sovereign immunity and more recently in environmental litigation.[98]

VI. CUSTOMARY INTERNATIONAL LAW: RELEVANT IN MODERN WORLD OR NOT?

(A) Is Customary International Law Crucial Today?

World had 74 independent countries in 1946, and this number were raised to 89 by year 1950, and in present there are 195 independent countries which have their own sovereignty. With this increasing number of independent countries, it is now harder to follow a unanimous pattern of Customary International Law. Codification and express ratification is need of hour and is needed for every single norm that has to be binding these days. Diplomatic immunities were at one time was an essential part of Customary International Law and no codification of such thing was required, but in present era they are reinforced by bilateral agreements, investment insurance, and another ways[99].

It can be observed that states behaviour pattern is changing drastically from a custom driven state completely to a rule of law. This had introduced a new feature that tends to make pattern more reliable as well as stable. It does not mean that customary norms are getting obsolete, but an important fact that all International Laws are based on customary practices. Codification of such practices will tend to ensure a unanimous and uniform International Law. However, most of International Laws are based upon customary norms and the intent behind all norms are the

[97] *"Draft Articles on State Responsibility"*, 2 Yearbook of International Law Commission (1973), (184, 286, 288): (GAOR, IV. Supp. 10(A/925).
[98] Nishant Kumar Singh, *The Indian Constitution and Customary International Law: Problems and Perspectives*, https://nlsir.com/wp-content/uploads/2020/07/The-Indian-Constitution-and-Customary-International-Law_Problems-and-Perspectives_Nishant-Kumar-Singh.pdf.
[99] Sushant Biswakarma, *Importance of Customary International Law*, https://blog.ipleaders.in/importance-customary-international-law/.

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same that they have been codified for efficiency and adequacy.

Uncodified Customary Laws also plays an significant role and is important because the ambit of such laws are wider and the codified laws are binding upon only upon those who had expressed consent to follow them, but the Customary Laws which is based on humanitarian grounds are simply binding upon everyone, and all laws has to be made in keeping all Customary Laws in mind.[100]

(B) Relevancy of Customary International Humanitarian Law in Protecting Human Rights

Evolution of International human rights law in seventy years since the Universal Declaration of Human Rights[101] was adopted by the U.N. General Assembly in December 1948 that has been remarkable achievement in history. There now exists a panoply of treaties as well as additional declarations that are built on the foundation of the principles which is enshrined in the Universal Declaration that constitutes a major and significant veritable international human rights law order.

Much of the corpus of international human rights law had took form of declarations and resolutions, such as the Universal Declaration itself, and treaties, such as the 1966 International Covenant on Civil and Political Rights[102] and the 1966 International Covenant on Economic, Social and Cultural Rights. Declarations and resolutions does not create legally binding obligations directly; for example, resolutions of the General Assembly are merely recommendations which are made to member states in accordance to Article 13 of the U.N. Charter[103]. While on another hand, treaties by themselves bind only states that have ratified them which is made clear by Article 34 of the Vienna Convention on the Law of Treaties[104] (affirming that "a treaty never create either obligations or rights for a third State without their consent"). However, the Vienna Convention affirms in Article 38 that a non-party to a treaty that contains a particular norm could also be bound by a similar norm which is to be found in customary international law.

However, in context of human rights norms, the actual "practice" of states that respects human

[100] David F. Klient, *A Theory for the Application for Customary Law of Human Rights by Domestic Courts*, https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1526&context=yjil.

[101] Universal Declaration of Human Rights; Peace, dignity and Equality on healthy Planet, https://www.un.org/en/about-us/universal-declaration-of-human-rights.

[102]International Covenant on Civil and Political Rights, https://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx.

[103]*Human Rights Education Project and Idea*, https://www.humanrights.is/en/human-rights-education-project/human-rights-concepts-ideas-and-fora/human-rights-fora/the-united-nations.

[104] Vienna Convention on Law of Treaties, Multilateral Treaty No. 18232, 9 May 23,1969), https://treaties.un.org/doc/publication/unts/volume%201155/volume-1155-i-18232-english.pdf.

rights are mixed at best; very often states engage in egregious affronts to human dignity as well as rights. The question is does this necessarily prevent a customary norm to emerge? Both courts and scholars have tended to err on part of viewing negative human rights behaviour on the part of governments as a reflecting violations, not as practice that helps to establish a rule by permitting such transgressions.[105] It is also big challenge to apply all the traditional doctrine of opinio juris which is defined as a belief by states that a particular norm is already law in the context of human rights norms. One crucial reason is that it is difficult to determine whether states will believe that a putative norm is law or not. Even if some norm is declared in a resolution then in that case states which is voting in favour of the resolution can view the norm as aspirational, not as existing law, by keeping in mind with the formal status of the resolution as a recommendation. Looking into the role of customary human rights law in relation to human rights treaty law, Courts have number of times looked to human rights treaties as an evidence of customary law norms and especially when those treaties (such as, for example, the ICCPR) are widely ratified and have endorsed by states over a very long duration (in the case of the ICCPR, over 40 years since its entry came into force in 1976). In such cases, customary law most often "piggybacks" on treaty norms[106]

Customary international Humanitarian Law is a part of Customary Law and it simply refers to uncodified public International Law norms, that governs the conduct as well as legality of armed conflicts, therefore it is also known as the law of war. There are multiple treaties on international Humanitarian Laws such as Geneva Conventions that have been universally ratified and are binding upon all, but not all such treaties have been ratified by every nation-state, and such laws will be binding only upon the member states that have chosen to follow such law. Customary international Humanitarian Law bridges this gap and even those states which have not ratified any humanitarian treaty are significantly bound to follow customs during an event or armed conflict[107].

VII. CONCLUSION

Customary International Laws have existed as long as mankind has existed, they are the basic norms that are mostly based on humanitarian grounds and principle of natural justice, no laws can be drafted in contravention with them. The development of written international law, the

[105] Brian D. Lepard, *Why Customary International Law matters in protecting Human Rights*, https://voelkerrechtsblog.org/de/why-customary-international-law-matters-in-protecting-human-rights/.
[106] Anthony D'Amato, *Human Rights as Part of Customary International Law: A Plea for change of Paradigms*, https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1087&context=facultyworkingpapers.
[107] Human Rights in UN Declarations and Resolutions, https://legalanswers.sl.nsw.gov.au/hot-topics-human-rights/human-rights-un-declarations-and-resolutions.

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progressive development of international law, diminish the importance of CIL, relegating it to a marginal position[108]. The basic elements of the customary international law have not disappeared in totality. However, they are redefined to a greater extent, revaluating its importance. The research elaborated on the concept of the customary international law in the light of its relevance to the modern world and its legitimacy. The paper concluded that the customary international law can be considered legally illegitimate as it can be sometimes too vague or ambiguous. The paper on the other hand resolved that the customary international law is morally and socially legitimate. Customary international law has played an important role in establishing diplomatic relations between states. Increasing number of states may make it next to impossible to keep up with the norms. Nevertheless, it in any way does not conclude that the customary international law has lost its importance. The customary international law has no doubt positioned down scale due to developments in several alternative sources. However, international laws have a much wider scope of applicability and are binding upon everyone. They are the basis of every international prevalent today and every new norm must still abide by such customs.

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[108] *"Sources of International Law."* Max Planck Encyclopaedia of Public International Law, (2018), https://opil.ouplaw.com/EPIL.