

UNIT II

(A) SOURCES OF INTERNATIONAL LAW: CUSTOM, TREATIES, GENERAL PRINCIPLES AND JUDICIAL DECISIONS

A source of International law means those origins from where it attains its authority and coercive agency. The principle sources of international law are enumerated in Article 38 of the Statute of the International Court of Justice. The four sources listed by Article 38 are: (a) international conventions or treaties establishing rules expressly recognized by the contesting states; (b) customary international law, as evidence of a general practice accepted as law; (c) the general principles of law recognized by civilized nations; (d) and 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.

TREATIES

The term “treaty” is used as a generic term embracing all kinds of international agreements which are known by a variety of different names such as, conventions, pacts, general acts, charters, statutes, declarations, covenants, protocol, as well as, the name agreements itself. A treaty may be defined as an international agreement concluded between States in written form and governed by International Law. The Vienna Convention on the Law of Treaties defines a treaty as an international agreement between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments.

Article 38 of the Statute of ICJ indicates that international conventions (treaties), whether general or particular, establishing rules expressly recognized by the contesting states should be applied by the Court to the disputes submitted to it. Although this Article divided treaties into two kinds, **general treaties and particular treaties**; it is only the first kind, the general treaties or the so called the law-making treaties, which intended to have a universal and general application, constitute a primary source of International Law. The particular treaties or the so called treaty-contracts are not directly a source of International Law since their application is limited only to the contracting parties which are two or small number of States, and they deal with limited affairs. This kind of treaties does not create new rules of Public International Law, but at best, only new rules of particular or regional application. However, as a substantial number of States accept and recognize such new rules formulated in this kind of treaties as obligatory, these rules will become part of the Public International Law. Examples of such treaties are bilateral treaties on commercial, and friendship relations. The law-making treaties constitute a primary source of International Law. Since the middle of the Nineteenth Century, there has been an astonishing development of law-making treaties. The rapid expansion of this kind of treaties has been due to the inadequacy of customs in meeting the urgent demands arose from the changes which have been transforming the whole structure of international life. Law-making treaties have been concluded to regulate almost every aspect concerning the international community. Examples of important treaties are: the Charter of the United Nations, the four Geneva Conventions of 1949, the Vienna Convention on Diplomatic Relations of 1961, the International Covenant on Civil and Political Rights of 1966 and the Convention on the Law of the Sea of 1982.

In contrast with the process of creating law through custom, treaties are a more modern, more deliberate and speedy method. They are of growing importance in International Law. Their role in the formation of new rules of International Law increases day after day. Today, the law-making treaties are considered the most important primary source of Public International Law.

CUSTOM

Custom is a habitual course of conduct. Until recent time, international law consisted for the most part of customary rules. It is the oldest and the original source, of International as well as of law in general. These rules had generally evolved after a long historical process culminating in their recognition by the international community. The terms 'custom' and 'usage' are often used interchangeably but they are distinguished. A Custom, in the intendment of law, is such usage as that obtained the force of law. Usage represents the twilight stage of custom. Custom begins where usage ends. Usage is an international habit of action that has not yet received full legal attestation. It is not necessary that the usage should always precede a custom. It is also not necessary that a usage must always become a custom. In certain cases usage gives rise to international customary law, in other cases it does not. But there is no rule of international law, or indeed any rule at all, which determines when usage shall give rise to custom. A customary element has been a feature of the rules of international law from antiquity to modern times. In ancient Greece, the rules of war and peace sprang from the common usages observed by the Greek City States. These customary rules crystallised by a process of generalisation and unification of the various usages separately observed by each city republic.

Following are the main ingredients of an international custom:-

- (i) **Duration:** Article 38 of the Statute of the International Court of Justice directs the World Court to apply 'international custom, as evidence of a general practice accepted as law'. Emphasis is not given on a practice being repeated for a long duration. In the field of international law, customs have emerged in a short duration also. As regards duration, there are certain indications in national legal systems indicating the requirement of passage of time for a particular behaviour or usage. In common law, it is referred to "time immemorial", while in civil law the period of thirty to forty years is sufficient to change the nature of such a behaviour or usage to a custom. There is no absolute criterion in international law to define the term of duration and it might be different from one case to another. What is obvious is that the duration is not an important factor in generating an international custom. In the North Sea Continental Shelf Cases, the ICJ indicated that "... the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law A clear example of a customary rule in which the passage of time was not a determinant factor is the rule of the sovereign rights of coastal States over their continental shelves. This rule rapidly became part of customary international law
- (ii) **Uniformity and consistency:** In the Asylum case, the International Court of Justice observed that the rule invoked should be 'in accordance with a constant and uniform usage practised by the States in question, and that this usage is the expression of a right appertaining to the State granting asylum and duty incumbent on the territorial State.' This follows from Article 38 of the Statute of the Court which refers to international custom 'as evidence of a general practice accepted as law'. A single act of a state agency or authority could not create any rights of custom in favour of another state which had benefited by the act; conduct to be creative of customary law must be regular and reputed. Material departures from a practice may negative the existence of a customary rule, but minor deviations may not necessarily have this negative consequence. Apart from recurrence, the antiquity of the acts may be also a pertinent consideration. Consistency is, however, an essential factor. Its importance was acknowledged by the ICJ in the Asylum Case. The Court asserted that a custom would crystallise "in accordance with a constant and uniform usage practised by the States in question."

(iii) **Generality of Practice:** Although universality of practice is not necessary, the practice should have been generally observed or repeated by numerous States. In *West Rand Central Gold Mining Co. v. R.* the Court laid down that it must be proved by satisfactory evidence that the alleged rule 'is of such a nature, and has been so widely and generally accepted, that it can hardly be supposed that any civilised State would repudiate it'. This amounts to a test of 'general recognition' by the international society of states. Test of 'general recognition' underlies the provision in the Statute of the International Court of Justice, under which the Court is directed to apply international custom 'as evidence of a general practice accepted as law', and is to be found also in Art. 53 of the Vienna Convention. Judge Read in his dissenting opinion in the Fisheries Case stated that "customary international law is the generalisation of the practice of state". In the North Sea Continental Shelf Cases, the ICJ's opinion illustrated that for the purpose of the formation of customary International Law State practice should be "both extensive and virtually uniform".

(iv) **Psychological element of an international custom:** The legal expression for the psychological element is *opinion juris et necessitatis*. States may traditionally behave in a similar way which does not always derive from legal obligation. In fact, the psychological element of customary rules distinguishes an international custom from conduct which is respected out of courtesy or comity. States perform these actions because they desire to do so. However, States respect a well-established customary rule because they are legally bound to do so. For example, flying flags when ships passing each other are a matter of courtesy or comity and there is no legal obligation to do so. If such behaviour finds a firm foundation in State practice and becomes a legal requirement in the view of States, this behaviour would achieve the power of customary rule. Accordingly, even when State practice is general, extensive, uniform, consistent, and long-established, such a practice is not itself a source of customary law. This practice will become customary law when States have a strong conviction that it should be respected due to a legal obligation. In *Nicaragua v United States* the ICJ maintained that an action of a State in conflict with an established rule should be considered as violation of the rule. This implies that such a rule must be accepted as law in order to be regarded as part of customary law. In this case, the ICJ referred to its judgement in the 1969 *North Sea Continental Shelf Cases* in which the necessity of two elements of State practice and *opinio juris* was underlined. However, some writers have not considered it an essential element.

A treaty may crystallize an emergent rule of customary international law. The treaty might pass into customary international law after its conclusion. Customary laws have been the primary laws to commence any case in the international crimes while treaties play a vital role during jurisdiction. The relationship is also reflected in that the obligatory nature of treaties is founded upon the customary international law principle that agreements are binding (*pacta sunt servanda*).

GENERAL PRINCIPLES OF LAW RECOGNIZED BY CIVILIZED NATIONS

Another source of international law is 'general principles of law'. ICJ is directed to consider 'the general principles of law recognised by civilised nations' in its decision making. What are 'general principles of law'? Does it mean that the ICJ should search for what the legal systems of the world have in common and apply those principles? Or rather, should the ICJ use methods and doctrines of domestic legal decision making to the extent that they are useful in addressing the questions before the Court, to develop an international judicial method? The preferable view seems to be that international tribunals use domestic law selectively where situations are

comparable to make the administration of international law work. Nevertheless, there are various opinions as to the origin of the general principles of law. Some regard them as being originated from the Natural Law which underlies the system of International Law and constitutes the criteria for testing the validity of the positive rules. Others regard them as stemmed from the national legal systems (Positive Law) and have been transplanted to the international level by recognition. Whatever the meaning of the term “general principles of law” and the origin of these principles, these principles are considered to be at the foundation of any legal system, including International Law. Actually, there is an agreement that the general principles of law do constitute a separate source of International Law. Examples of general principles of law are the principles of consent, equality, administration of justice, good faith, reciprocity, forbidding abuse of right and *res judicata*.

JUDICIAL DECISIONS AND THE TEACHINGS OF THE MOST HIGHLY QUALIFIED PUBLICISTS

In instances where above sources of international law have failed to provide a clear or sufficient answer to an issue, then the ICJ or other entity will refer to domestic judicial decisions of the various states as well as scholarly articles from the international community. The Statute of the International Court of Justice says that the Court shall apply judicial decisions and the teachings of the most highly qualified publicists as ‘subsidiary means for the determination of rules of law’: Traditionally, judicial decisions and writing of publicists do not themselves form a source of international law, but help the Court to identify the scope of customary law, proper interpretation of a treaty, or existence of general principles. The decisions of the ICJ have no binding force, except for between the parties in a particular case (Statute of the ICJ, Article 59). While this means that there is no formal and consistent system of binding precedent, the ICJ does have regard to its previous decisions and advisory opinions and to the law that it has applied in previous cases. It is also concerned to ensure procedural consistency. Some ICJ decisions have been influential in developing new rules of international law. For example the Reparations case, which established the legal personality of the UN; the Nuclear Tests cases, which concerned the circumstances in which a unilateral declaration is binding on the State that made it; and the Anglo-Norwegian Fisheries case concerning how the territorial sea is to be measured along a deeply indented coastline or coastal fringe of islands. Decisions of other bodies, including arbitration panels, specialist tribunals and regional courts such as the European Court of Justice and the European Court of Human Rights, assist in application of particular aspects of the law. Decisions of domestic courts, which interpret rules of international law can provide guidance as to the law, and provide evidence of the practice of that State in the development of customary international law. One may finally say that judicial decisions, whether international or national, have played an important part in the development of International Law.

JURISTIC WORKS

The jurists or publicists also declare rules by legal philosophy and analogy and also by comparing different legal systems of the world and they also analyze the historical perspectives of the different legal systems of the world. So, as they have devoted their lives for the legal study, they must be deserved to consult in deciding a dispute. In other words, their opinion on a specific question of law weights because of their valuable experiments and sound study on the topic. So, the statute further reveals that if there is no treaty, legal custom and general principles of law then the Court shall resort to writings of these jurists. The writings of publicists and jurists are important in the ongoing refinement and development of international law. They inform the shape of legal advice given to governments and therefore inform State practice; they are used in pleadings and in argument before the ICJ by States.

Historically, the writers on International Law such as Gentili, Grotius, Pufendorf and Vattel were a primary factor in the evolution of the modern International Law; they were the supreme legal authorities of the Sixteenth to Eighteenth Centuries. They determined the scope, form and content of International Law. However, the importance of legal writings began to decline as a result of the emphasis on the state sovereignty; treaties and customs assumed the dominant position in the exposition and development of International Law. Nevertheless, like judicial decisions, the opinions of legal scholars can provide evidence of the existence of customary law and can help in developing new rules of law. The opinions of legal scholars are used widely. Arbitral tribunals and national courts make extensive use of the writings of jurists. However, the International Court of Justice makes little use of jurisprudence, and judgments contain few references; this is, primarily, because of the willingness of the Court to avoid a somewhat undesirable selection of citations. However, many references to writers are found in the pleadings before the Court.

(B)TREATIES: RATIFICATION, RESERVATIONS, AMENDMENT, MODIFICATION

Treaties can be traced back as far as the early-recorded history of Mankind. Evidence for their existence has been found throughout the history. Treaties have been the major legal instruments for regulating relations between States. States concluded treaties in every conceivable subject. Ten of thousands treaties have been registered with the United Nations since 1946. Until 1980, treaties had been governed by international customary law. In 1969, the Vienna Convention on the Law of Treaties was signed, codifying and developing existing customary rules; it came into force in 1980.

The 1969 Vienna Convention on the Law of Treaties defines “treaty” as “an international agreement concluded between States in written form and governed by International Law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.” It further provides that it “does not apply to international agreements concluded between States and other subjects of international law or between such other subjects of international law, or to international agreements not in written form”. These provisions exclude agreements between states which are governed by other than International Law, agreements between States and international organizations or between international organizations, and oral agreements. The reason for the exclusion of these types of international agreements is to avoid complication and complexity if they are included in a single convention with written agreements between States, since the rules governing them differ in certain aspects from the rules governing written agreements between States. A special convention applicable to agreements between states and international organizations, or between international organizations, namely “the Convention on the Law of Treaties between States and International Organizations or between International Organizations”, was signed in 1986. However, this Convention has not yet entered into force.

Treaties may be concluded by States in any manner they wish. There are no obligatory prescribed forms or procedures to be followed. Negotiating, formulating, signing and adopting a treaty are subject to the intention and consent of the contracting States. However, the 1969 Convention on the Law of Treaties provides general rules applicable to the conclusion of treaties, rules regarding the capacity and the competent persons to conclude treaties, the adoption and authentication of the text of treaties, and the adoption of treaties. Under the Convention, every State possesses capacity to conclude treaties. Since States are represented by persons, the Convention provides rules to ensure that persons representing States have the power to adopt or authenticate the text of a treaty, or to express the consent of the State bound by a treaty.

A State may be regarded as consented to a treaty by signature when the treaty provides that signature shall have that effect, when it is established that the negotiating States were agreed that signature should have that effect, or when the intention of the State to give that effect to the signature appears from the full powers of its representatives or was expressed during the negotiation. Signing the treaty means officially affixing the names of the representatives of the contracting States. A State may be regarded as consented to a treaty by an exchange of instruments constituting a treaty when the treaty provides that the exchange of such instrument has that effect, or when it is established that the States were agreed that the exchange of the instrument should have that effect.

RATIFICATION

The signing of the treaty by the representative of a State is either a means of expressing the final consent of the State to be bound by the treaty, or an expression of provisional consent subject to ratification, acceptance or approval. The effect of signature depends upon the terms of the treaty, the agreement of the negotiating States or their intention. If the treaty is subject to ratification (acceptance or approval), then it does not become binding until it is ratified by competent authority of contracting State, namely the head of the State. Ratification by the competent authority of the contracting State is a step well established historically to ensure that the representative of the State did not exceed his powers or instructions with regard to the conclusion of the treaty. It allows a State to examine the provisions of a treaty before undertaking formal obligations. Moreover, it enables a State, in the period between signature and ratification, to pass the required legislation or to obtain the required approval. The question of how a state ratifies treaties is a matter for its internal law alone. The rules related to ratification vary from State to State. The consent of a state to be bound by a treaty is expressed by ratification (acceptance or approval) when the treaty provides for such consent to be expressed by means of ratification, when it is established that the negotiating states were agreed that ratification should be required, when the representatives of the State has signed the treaty subject to ratification, or when the intention of the States to sign the treaty subject to ratification appears from the full powers of its representative or was expressed during the negotiation. Ratification occurs when instruments of ratification are exchanged between the contracting States, or are deposited with the depositary. In the case of multilateral treaty, it usually provides that the instruments of ratification should be deposited with the State or the international organization that is appointed by the treaty to act as the depositary.

RESERVATION

It is well established in the practice of States that a State has a capacity, when becoming a party to a treaty, to accept most of the provisions of a treaty or to object, for whatever reasons, to particular provisions of a treaty. This capacity is reiterated by the Vienna Convention on the Law of Treaties which states that a State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless the reservation is either prohibited by the treaty or incompatible with its object and purpose, or the treaty permits only specified reservations. A reservation is defined by this Convention as “a unilateral statement, however phrased or named, by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or modify the legal effects of certain provisions of the treaty in their application to that State”.

The effect of a reservation depends on whether it is accepted or rejected by the other parties to a treaty, and this matter differs whether a treaty is bilateral or multilateral one. A reservation to a bilateral treaty presents no problem since it constitutes a counteroffer which may reopen the negotiation between the two parties concerning the terms of the treaty; and unless the reservation is accepted by the other party, no treaty will be concluded. However, a reservation to a

multilateral treaty causes a problem because it may be accepted by some parties and rejected by others. In such a case, the Convention on the Law of Treaties provides that a reservation expressly authorized by a treaty does not require any subsequent acceptance by the other contracting States unless the treaty so provides, and that when it appears from the limited number of the negotiating States and the object and purpose of a treaty that the application of the treaty in its entirety between all the parties is an essential condition of the consent of each one to be bound by the treaty, a reservation requires acceptance by all the parties. The Convention requires that a reservation, an express acceptance of a reservation and an objection to a treaty be formulated in writing and communicated to the contracting States and other States entitled to become parties to the treaty. However, an acceptance of a reservation by a State may be implied if it has raised no objection to the reservation by the end of a period of twelve months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty, whichever is later. An objection by another contracting State to a reservation does not preclude the entry into force of the treaty as between the objecting and reserving States, unless a contrary intention is definitely expressed by the objecting State. Unless the treaty provides otherwise, a reservation or an objection to a reservation may be withdrawn at any time. In case of the withdrawal of a reservation the consent of a State which has accepted the reservation is not required for its withdrawal. It is required that the withdrawal of a reservation or of an objection to a reservation be formulated in writing. Unless the treaty provides otherwise, or it is agreed otherwise, the withdrawal of a reservation or of an objection to a reservation becomes operative only when notice of it has been received by the concerned State. A reservation established with regard to another party modifies for the reserving State in its relations with that other party the provisions of the treaty to which the reservation relates to the extent of the reservation, and modifies those provisions to the same extent for that other party in its relations with the reserving State. However, the reservation does not modify the provisions of the treaty for the other parties to the treaty *inter se*, i.e. in their relations with each other.

AMENDMENT AND MODIFICATION

Although amendment and modification of treaties are two processes share a common aim which is an alteration or revision of a treaty, they are two separate processes accomplished by different manners and subject to different rules and conditions. Amendment relates to a formal alteration or revision of certain treaty provisions or the treaty as a whole, affecting all the parties to that treaty. Modification relates to an alteration or revision of certain treaty provisions as between particular parties only. Thus the 1969 Vienna Convention on the Law of Treaties deals with these two processes in separate articles.

Amendment: The Vienna Convention refers to three manners to accomplish amendments to treaties. The first manner is that a treaty may be amended by agreement between the parties. In such a manner, the rules described by the Vienna Convention which are related to the conclusion and entry into force of a treaty will be applied. The second manner is that a treaty may be amended in accordance with the procedure laid down in the treaty itself. Multilateral treaties, particularly those establishing international organizations, normally provide detailed procedure for amendments. The Charter of the United Nations, for example, lays down in Articles 108 and 109 the procedure for its amendments and revision. Under these Articles such amendments or revision shall take effect when adopted and ratified by two-thirds of the members of the United Nations, including all the permanent members of the Security Council. The third manner is that a treaty may be amended in accordance with the basic rules of procedure described by the Vienna Convention. The Vienna Convention specifies that any proposed amendment must be notified to all contracting States. All contracting States shall have the right to participate in the decision as to the action to be taken in regard to such proposal, and in the negotiation and conclusion of any agreement for the amendment of the treaty. Every State entitled to become a party to the

treaty is also entitled to become a party to the treaty as amended. The amendment will not bind any State already a party to the original treaty which is not a party to the amending agreement. Any State which becomes a party to the treaty after the entry into force of the amending agreement, unless it intends otherwise, is considered as a party to the treaty as amended in relation to parties bound by the amending agreement, and as a party to the unamended treaty in relation to any party to the treaty not bound by the amending agreement.

Modification: The Vienna Convention provides that two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if one of two conditions is fulfilled. The first condition, if “the possibility of such a modification is provided for by the treaty.” The second condition, if “the modification in question is not prohibited by the treaty” and provided it “does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligation, and “does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purposes of the treaty as a whole.” The Vienna Convention requires, however, that unless in the first mentioned case or if the treaty provides otherwise, the parties in question must notify the other parties of their intention to conclude the agreement and of the modification to the treaty.

SOME IMPORTANT MAXIMS RELATED TO THE GENERAL PRINCIPLES OF TREATIES:

PACTA SUNT SERVANDA: It is a doctrine borrowed from the Roman and its Latin meaning is "agreement must be kept". It has been adopted as a basic principle for governing treaties in international law. Article 26 of the Vienna Convention on the Law of Treaties says, "every treaty in force is binding upon the parties to it and must be performed by them in good faith" this is known as 'Pacta Sunt Servanda'. It is the principle in international law which says that international treaties should be upheld by all the signatories. The rule of pacta sunt servanda is based upon the principle of good faith. The basis of good faith indicates that a party to the treaty cannot invoke provisions of its domestic law as a justification for a failure to perform. The only limit to pacta sunt servanda is the peremptory norms of general international law known as “jus cogens” which means compelling law. Anzilotti regarded, "the doctrine Pacta Sunt Servanda is the basis of the binding force of international law". Many writers classify the maxim "Pacta Sunt Servanda" as a general principle of law, but it is in any event not to be doubted that the rule has all characteristics of a customary rule. The principle is regarded as the basis of validity of a treaty.

PACTA TERTIS NEC NOCENT NEC PROSUNT: It is a general principle of treaties that a treaty is binding only to the contracting parties. In other words, rights and obligations arising from a treaty are binding only to the parties to a treaty and not to a third state without its consent. This customary law principle has been expressed in a Latin maxim which is called pacta terti nec nocent nec prosunt. This rule has been incorporated under Article 34 of the Vienna Convention which says that “a treaty does not create either obligations or rights for a third State without its consent.” However, a treaty may create rights and obligations to a third State in certain cases:

1. Where a treaty provides for obligations for third States
2. Where a treaty provides rights for third States
3. When a treaty creates International Custom

REBUS SIC STANTIBUS: 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. This exception does not apply if the treaty establishes a boundary or if the fundamental change is the result of a breach by the party invoking it of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.