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CUSTOM AS A SOURCE OF INTERNATIONAL LAW

AUTHORED BY - YATI YADAV

ABSTRACT¹

International law that is based on what nations typically do or believe in is known as customary law. It plays a significant role in international law. Custom is one of the key ways to construct international law, along with general norms of law and treaties, according to legal experts, the United Nations, and its member nations.

People may disagree on the specifics of customary international law, yet most nations acknowledge its existence. The two basic components of customary international law are *opinio juris* and sufficient state practice.

The International Law Commission offered instances of proof that can support customary international law in 1950. Examples of these include international agreements, judgments rendered by courts from many nations, national laws, recommendations from legal experts in each nation, conversations between diplomats, and actions conducted by international organizations. On how to acknowledge international laws that are frequently accepted and adhered to by nations, the Commission adopted a decision in 2018. The group of UN members appreciated the findings and urged wide dissemination of them.²

¹ This Research Paper article is authored by Yati Yadav, a 5th-year Year Law Student at Manav Rachna University's School of Law.

² https://en.wikipedia.org/wiki/Customary_international_law

Introduction

The source of international law³ is influenced by a variety of factors. These include international treaties, internationally recognized laws, scholarly works, judicial rulings, and universally accepted fundamental concepts.

The International Court of Justice's Statute lists several elements, including customs, as sources of international law in Article 38⁴⁽¹⁾⁵

Customary international law⁶ refers to legal obligations that arise from longstanding traditional practices among countries. Customary international law is a type of law that is created and followed by countries. It is based on their consistent and similar actions, which set an expectation for future behavior.

Customary international law has two parts: the actions of countries (state practice) and the belief that these actions are required, not allowed, or allowed, depending on the type of rule, as a legal matter (opinio juris)

Since the beginning of time, customs have been a significant component of legislation. Some authorities think that laws are made in large part through customs, whether they are social or cultural. Customs used to be the greatest authority and governed how people behaved in the past before complex legal systems were in place. The same idea applies to international law. This article tries to comprehend the significance of customs in international law, to determine whether their significance has changed over time, and to evaluate how customs might be utilized to settle international conflicts.

³ Public international law concerns how nations and related organizations interact and conduct themselves. Multinational enterprises and individuals may also be marginally impacted by international law, and this impact is rapidly extending beyond how local laws are perceived and applied. Public international law has grown in significance and application over the past 20 years as a result of increased international trade, environmental damage, concern for human rights abuses, international travel, and global communication.

⁴ <https://www.legalserviceindia.com/legal/article-2194-sources-of-international-law-an-overview.html>

⁵ Article 38(1) of the International Court of Justice's statutes

The Court will use the following sources to decide any disputes that are brought to it in accordance with international law:

- a. general or specific international conventions establishing rules expressly recognized by the contesting states;
- b. international custom as proof of a widespread practice accepted as law;
- c. the general principles of law acknowledged by civilized nations; and
- d. subject to the provisions of Article 59, judicial decisions, and the Tribunal's rulings.

⁶ In accordance with Article 38 of its rules, the International Court of Justice is supposed to "follow international customs" and base its rulings on international law. As a result, the Court is required to take into account actions that are frequently acknowledged and regarded as legitimate.

Nature and Usage of Custom⁷

▪ Nature

Customs are flexible and open to improvements, rejections, and alterations throughout time. Because conventions are not codified laws and lack precision, they are less consistent than positive laws. Therefore, doubting the existence of a custom will not cause it to be recognized as law; instead, a custom must be consistent, common, and uniform to qualify as law. Furthermore, the North Sea Continental Shelf Cases made it very evident that customs are not the same as customary law. The International Court of Justice periodically put forward such requirements of customary international law, including the state practice and *opinio juris* that were previously discussed.

The interpretations of the International Court of Justice's requirements of customary international law have to be discussed as part of its nature, which will be explained under the usage and legal validity of customs hereinafter, as the court is expected to decide the acceptability of claims regarding current customary practices.⁸

▪ Usage

According to the International Court of Justice, a tradition must be regularly followed and taken as law to qualify as a legal system. However, it is seldom certain if someone had a good cause to think they were required by law. Making decisions based on *opinio juris*⁹ has always been challenging. You can gain a general knowledge of how the court has handled several instances involving customary international law and assessing the legitimacy and legal authority of these traditions by reading the explanation that follows.

Here are a few court decisions where individuals are debating whether customs are a respectable source of law.

⁷ https://www.academia.edu/34448401/Custom_as_a_Source_of_International_Law_pdf

⁸ https://www.academia.edu/34448401/Custom_as_a_Source_of_International_Law_pdf

⁹ “When a majority of nations agree that having a binding legal rule or principle prescribing, allowing, or forbidding particular behavior is desirable now or in the near future, it becomes a customary international law norm. This opinion qualifies as *opinio juris* and is sufficient to establish a standard of customary law.”

- North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark and The Netherlands)¹⁰

These instances demonstrated that opinio juris must also be proven for a custom to be recognized as law; state practice alone will not suffice.

Even though there may be state customs, the ratio argues that governments may adhere to them out of "courtesy, convenience, or tradition, and not out of any sense of legal duty." Opinion of the law should be established as a result. Through this illustrative case, the idea of Instant Customary Law was also brought to light.

- Asylum case (Colombia v. Peru)¹¹

According to the ICJ's ruling in this case, "Where a local or regional custom is alleged, it is the burden of the proponent to prove that this custom is established in such a manner that it has become binding on the other party." The situation also complies with the dictum that "custom is developed and becomes enforceable if it is by a consistent and uniform use practiced by the States in question. There ought to be proof that such a practice exists.

- Pacquete Habana Case¹²

In the Pacquete Habana Case (U.S. Supreme Court, 1900), the court considered State laws and practices, treaties, writings of publicists evidencing usage, and court decisions. The court held that these materials consistently demonstrated the existence of a valid customary rule giving immunity to small fishing vessels, honestly engaged in their trade, from belligerent capture during times of war.

Central Gold Mining Company Ltd v. R 29¹³¹⁴

The court concluded that in order for a custom to be considered international law, it must be demonstrated via sufficient evidence that it has the support of all nations and that no civilized nation will object.

¹⁰ Decided in the International Court of Justice on February 20, 1969

¹¹ Decided in the International Court of Justice on November 20, 1950

¹² <https://www.legalserviceindia.com/legal/article-2194-sources-of-international-law-an-overview.html>

¹³ https://www.academia.edu/34448401/Custom_as_a_Source_of_International_Law_pdf

¹⁴ Citation: – 1905, 2 King Bench 319

In light of the aforementioned legal authorities and additional instances involving comparable issues, 31 it is possible to draw the following conclusions about the basic features of customary law:

- a) Both *opinio juris* and state practice need be proven, and
- b) Both notions are intertwined.
- c) The dissemination of state practice occurs through administrative acts, legislation, judicial rulings, etc.

International Customary Laws¹⁵

According to the International Court of Justice, "international custom" can be used as proof that a widespread practice is recognized as the law. This is yet another essential resource for world law. It is not necessary to regard any routine behavior or habit as a conventional law. There are a few key requirements that must be met for something to be recognized as international customary law.

Criteria

A custom must meet two requirements to be considered law.

○ State Practice

The various elements that go into how states operate include things like how long, how frequently, and how widely they act in a particular way. A custom must have been utilized or followed for a very long time without ceasing or changing to be regarded as a law. This urge is described by the term "*usus*."

The International Court of Justice stated in 1969 that even though a practice has only been around for a short period, a rule of customary international law can be formed if many individuals adhere to it. The North Sea Continental Shelf cases brought this to light. The law that is applied immediately is known as this.

○ Acceptance of the legal nature of practice

This is often referred to as "*opinio juris*," and it denotes that there must be more than just a long history of use for a practice to qualify as a law. To use something, you must obtain permission from the government or another authority, and they must acknowledge that your usage is

¹⁵ <https://www.legalpedia.co.in/articlecontent/treaties-and-customs-as-a-source-of-international-law.html>

appropriate and not merely a matter of personal preference. According to the North Sea Continental Shelf Cases, activities must not only be taken consistently but also with the conviction that doing so is required by law to be regarded as settled practice.

- **Effect**

Once a tradition is acknowledged as a universal law, all governments are expected to uphold it, regardless of whether a state has offered its unqualified sanction or not. The actual situation in which a special case may be created is if a particular state has disagreed with the practice or usage from the time, it first began. At that stage, it must look that the protest is supported by evidence, and that evidence must carry a significant amount of weight. Governments are therefore required to act in a manner consistent with international customary law, which is not at all the case with agreements or customs. This is arguably the biggest advantage of normal law over settlement law.

Recognizing international customary law

Customary international law is described as "a general practice accepted as law" under Article 38(1)(b) of the International Court of Justice Statute. This is typically defined by two things: what states ordinarily do and what they have recognized as law (*opinio juris sive necessitatis*). This indicates that many states, especially large ones, must practice it and that states do so out of a sense of duty to the law rather than out of habit or custom.

States recognize several different types of customary international law. As non-derogable rights recognized by the international community, some customary international rules become *jus cogens*, but others may only be adhered to by a small number of nations. Whether or not these laws have been domestically or through treaties codified by the states, they are usually bound by customary international law.

Jus cogens

The international community of states recognizes a peremptory norm—also known as *jus cogens*, which is Latin for "compelling law"—as a fundamental principle of international law from which no deviation is ever permitted (non-derogable). Natural law principles serve as the foundation for these standards, hence any legislation that clashes with them should be regarded as invalid. A state violates customary international law if it permits or participates in slavery, torture, genocide, war

of aggression, or crimes against humanity, among other international crimes.

Jus cogens refers to crucial standards of international law that every nation must uphold. It is distinct from international customary law. A statute becomes international law when a state ratifies it. However, not all customary international norms are equivalent to unalterable rules. States have the authority to enact accords and regulations that conflict with long-standing international norms. However, it is forbidden to disregard some core tenets of international law.

Customs and Treaties / Conventions¹⁶

Customs are typically not recorded. They are ways that a group of individuals express their needs through their ideas or behaviors. Customs are typically impulsive behaviors or patterns of behavior related to a certain subject that spread throughout society as a result of frequent observance and application. Treaties, on the other hand, are formally binding agreements made by members of the UN, or more precisely, international law. There are some parallels between reservations and the persistent objector rule in customary law.

In addition, formality makes it harder than customs to decide whether to accept or reject someone. Many writers argue that treaties and common law are intertwined. My name is Baxter.

However, it was made apparent in the North Sea Continental Shelf ruling that there are only a select few circumstances in which a treaty can faithfully reflect the accepted norms and values of numerous nations around the world.

- a) The agreement might have produced new regulations that were embraced by all nations.
- b) A treaty could codify a developing principle of international customary law and ensure its universal acceptance.
- c) Once the treaty has been formally ratified, it could take on the force of international law through prevailing customs.

¹⁶ [https://www.academia.edu/34448401/Custom as a Source of International Law pdf](https://www.academia.edu/34448401/Custom_as_a_Source_of_International_Law_pdf)

○ **Customs and General Principles Recognized by Civilized States**

The fundamental ideas shared by civilized groups are typically based on customary values. Ideas and customs are closely related since customs are the foundation of all systems.

○ **Customs and Judicial Decisions**

As previously indicated, court decisions affect whether or not a custom is regarded as a legitimate source of customary law. Just because something is done frequently does not make it a rule. There are certain conditions, which the courts explain in light of the particulars of the case. It is evident from court rulings if something is allowed or not.

○ **Customs and Scholarly Writing**

Scholarly writing incorporates several points of view, assertions, justifications, and conclusions from a variety of sources. Traditions can be crucial in academic works that attempt to support a particular theory, although they are not always required. Various points of view on traditions have been expressed by numerous academics.

For instance, diverse perspectives on customary law were held by individuals by the names of Kelson, R. Baxter, and Francois Geny, and these perspectives were critical to the development of the area.

○ **Custom as a means for the development of International Law**

The Vienna Convention acknowledges that customs unquestionably played a significant role in the creation of laws. This also holds for the creation of international laws. Important components of customary law include Jus Cogens, Obligatio Erga Omnes, and multilateral accords or treaties that established laws against genocide, torture, and slavery. Additionally, the aforementioned modifications to customary international law demonstrate how, along with other conflict-resolution techniques, customs have contributed to the protection and upholding of human rights. A norm of international law known as jus cogens was created based on convincing evidence. The Vienna Convention's Article discusses international law, which many theorists refer to as customary law.

According to what has already been said, customs or customary international law is a reliable method of establishing rights in international law. However, this does not imply that ambiguous or perplexing circumstances have no impact on customs.

Other Sources of International Law¹⁷

Article 38 is not exhaustive because there is no full body of norms governing international law. Fairness, equality, and other considerations, as well as UN pronouncements and recommendations, all have an impact on international law.

Because the world is always changing and issues are becoming more complex, decisions taken by assemblies have a significant impact on how current international rules are fashioned. States' votes in the General Assembly and the justifications they provide reveal their voting practices and legal literacy.

As an example, in the case of USA v. Nicaragua, the court questioned whether it was permissible under international law for nations to use or threaten to use nuclear weapons. The Security Council's resolution on this matter was examined by the court along with other significant international law documents. They discovered that using or threatening to use nuclear weapons often violates the laws of war established by international law, particularly those about treating people with humanity.

The idea of fairness has been brought up in numerous cases. Fairness was acknowledged by the court in the 1968 India-Pakistan Rann of Kutch dispute as a crucial component of international law. They claimed that the nations may present their cases using these concepts.

The United Nations has recognized the urgency of advancing international law more quickly and applauded initiatives to close gaps in the representation of other sources of international law. Additionally, this group's initiatives have improved the way laws are created. Resolutions and hastened decision-making procedures involving 15 members of the Security Council and 191 members of the General Assembly are used to accomplish this.

¹⁷ <https://blog.ipleaders.in/sources-international-law/>

Conclusion and current state of custom as a source of international law

In conclusion, customs played a significant role in the development of a comprehensive set of international rules, and their legacy continues to this day. Both proponents and opponents of adopting customs as a basis of international law have made strong arguments. According to some experts, as written laws have proliferated, customs have lost some of their significance.

However, some individuals are debating whether it is vital to have unique rituals given the current state of the world.

Because of state rivalry for trade and power, the ambiguity of customary law, and the lengthy process involved in using customary law to resolve disputes, the significance of customary law/customs as a source of public international law has waned. Furthermore, it held the view that Western colonial powers pushed many of the customs that are observed by many nations in Asian and African countries. It thus led to these countries' resistance to their customs, which diminished their significance.

Customs, on the other hand, are distinct from written-down treaties and laws. Customs are very significant and changeable. It is impossible to break social norms.

Moreover, in terms of human rights, the obligation of nations to preserve those rights, and other legal systems, traditional behaviors, and customs have taken on greater significance as laws.

So, it is possible to claim that even while other sources have made customary law less powerful than it once was, it is still powerful since it embodies the desires of all governments and citizens.