Sources of I. Law

Sources may be regarded as methods or procedure by which I. Law is created.

Sources may be regarded as from which resources anything is derived as from which resources its knowledge is received these resources are called the sources of that subject.

Sources of I. Law refers to where ① States ② organizations ③ individuals and ④ Courts can finds principles of I. Law.

Body of rules which regulate the conduct of Sovereign States in their relation with one another.

Sources of I. Law refers to ① materials ② methods and ③ procedure out of which the rules and principles regulating the I. Community are developed.

For the absence of any codified law on the sources of I. Law. Article 38 of the Statute of the I. Law Court of Justice has become reference which mentioned the following sources of I. Law.

1. International Conventions, whether general or particular establishing rules expressly recognized by the Contesting states.

2. International Custom: as evidence of a general practice accepted as law

3. General principles of law recognised by civilized nations.

4. Judicial decisions and the teachings of the most highly qualified publicists of the various nations

The list enumerated in the above Article is not exhaustive. Two examples Article 38 makes no reference to resolutions of the General assembly of U.N.O. and other institutions. So the fifth sources of I. Law may be regarded as

5. Decisions or determinations of the organs of International Institutions.
+ It has now become the well-recognised resources

International Conventions:-

At present I. treaties are the most imp sources of I. Law. Article 38(1)(a) of the Statute of I. Law Court of Justice lays down that the Court while deciding any dispute shall apply I. Conventions. Whether general or particular expressly rules establishing rules expressly recognised by the Contesting states. in preference to other sources of I. Law.

X → The terminology varies but the substance is the same. Treaties embody the express consent of the parties to the rule laid therein

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Treaties may be regarded as agreements between two or more states by which they create or intend to create a relationship between them.

The term 'Conventions' is used in a general and inclusive sense. It would seem to apply any treaty, Convention, protocol, or agreement, regardless of its title or form.

A Convention may be general either because of the number of the parties to it, or because of character of contents of it. It may be particular because of the limited number of parties, or because of the limited character of its subject-matter.

General treaties are those wherein most of the states of the world community are parties and which are open to accession by others. They in course of time, crystalize into rules of universal International Law, which are binding on all the member states of the world community, be they parties to them or not. General treaties may also be referred to as law making treaties which creates general norms for the future conduct of the parties and the obligations are basically the same for all parties

(Ex) — Hague Convention of 1899, 1907
Geneva protocol of 1925
Geneva Conventions of 1949

The law making treaties are binding only to the parties thereof. The laws which these treaties create are not universal.

(v) A treaty, such as the charter of the U.N may create rights and obligation for states not parties to the treaty.

Particular treaties are generally referred to bilateral treaties, or ordinary treaties wherein number of parties is two or more than two. They are also known as Contractual type of treaties or treaty Contracts. Such treaties create law for two or more states, and therefore they have been distinguished from law making treaties which create law for most of the states.

Ordinary treaties normally do not establish rule of general law, but they are of immense importance. Most of the rules of an extradition have evolved through the conclusion of bilateral treaties.

Thus I. treaties may be of two types:-

X
i. Law making treaties
2. Treaties Contract

1. The provisions of law making treaty are directly the source of I. Law. Till the formation of the 16th Century Customs were the most imp sources of I. Law. Proved to be inadequate Consequently, States regarded it necessary and expedient to enter into treaties and thereby established their relations in accordance with the changing trends and circumstances. Law

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Law making treaties may again be divided into following two types:-

1. Treaties enunciating rules of universal international law:-
   - U. N. Charter is the best example
2. I. treaties which lay down general principles:-
   These treaties are entered into by a large number of Countries:-
   (EX)
   - (1) Geneva Convention on the law of the Sea 1958
   - (2) Vienna Convention on the law of treaties 1969

Imp (1) Law making treaties perform the same functions in the I. field as legislation does in the state field. Law making treaties are the mean through which I. law can be adapted to in accordance with the changing times

(B) Treaty Contract - A
As Compared to law making treaties, treaties Contracts are entered into by two or more States. The provisions of such treaties are binding on the Parties to the treaty. A treaty enter into by a few states is subsequently accepted by many other States as they enter into similar treaties.

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Custom :

Custom is the original and oldest source of I. Law and at a time it was the most important amongst the sources. Custom is the foundation stone of the modern I. Law. It was so because a large part of I. Law consisted of customary rules

Customary rules of I. Law are the rules which have been developed in a long process of historical development, which evolve through the practices and usages of nations and their recognition by the Community of nations.

Art 38(b) of the Statute of I.C.J. recognises International Custom, as evidence of general practice accepted as law, as one of the sources of I. Law.

Customs may be regarded as an advanced stage of usages which means those habits which are often repeated by states stark- where a custom begins usage ends. A usage is a general practice which does not reflect a legal obligation. But custom is more than mere practice. Custom is referred to those habits which are regarded as binding upon the States. Thus when a habit or usage becomes obligatory on a state to practice, it is known as custom.

A customary rule therefore emerges only when it is proved by satisfactory evidence that the prescribed rule has been

accepted generally by the states and it has been so established as to be legally binding on the other party.

The P.C.I in the Asylum Case formulated the requirements of Custom in International law by stating that "The Party which relies on Custom ... must prove that this Custom is established in such a manner that it has become binding on the other party

The main ingredients of International customs are Long Duration, Uniformity and Consistency, Generality (Should be practiced by the most of the States.)

~~Some writers have~~

Some writers have regarded the ~~presence of~~ presence of another element opinio Juris et necessitatis which means that Recognition of a certain practice as obligatory by the state. i.e. State must recognise the custom as binding upon them as law.

Customary rules of I. Law have developed as a result of

(I) Diplomatic relations between states
(II) practice of I. organs
(III) State laws, decision of state Courts and state military or administrative practices
(IV) Treaties between states.

Oct 1953 to July 1954

1779

31st Dec 1974

There has been a marked decline in the importance of Customs as a source of I. Law in modern times. This is mainly due to the fact that the process of the development of a new Custom is very slow. Principles but and as Compared to it, Rapid changes Can be effected through treaties and Conventions so as to adopt I. Law in accordance with the changing times and circumstances.

Customs and treaties both are important sources of I. Law but as far as treaties are Concerned, when they are Concluded and Come into force, they take precedence between the parties to that treaty over Customary Laws.

(Ex) A usage may become Custom even in a short time. practice relating to Continental Shelf and Rules relating to Air Space have become Custom in a short time.

(i) The Concept of Continental Shelf was introduced in 1945 and by 1958 it had become a Customary ~~Rule~~ Rule of I. Law

(ii) Similarly, the principles of Sovereignty in the air space arose spontaneously at the outbreak of the First World War.

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General Principles of law recognised by Civilized States:-

(iii) Para (1) (c) of Article 38 of the Statute of I.C.J. lists general principles of law recognised by civilized states as the third source of I. law. It means that the Court is directed to apply general principles of law only when there is no treaty relevant to the dispute or when there is no customary I. law.

Two views are prevalent about the phrase general principles of law recognised by civilized nations

(1) The phrase includes such general principles which are found in domestic jurisprudence and can be applied to I. legal questions. Such as

(a) Both sides of dispute should be given a fair hearing.

(b) None can be judge in his own case.

(2) The other view regards the phrase as linked to natural law as interpreted during recent centuries in the western world. According to this view general principles of law recognised by civilized nations have emerged as a result of transformation of broad universal principles of law applicable to all mankind

A matter that has been adjudicated by a Competent Court and therefore may not be pursued further by the same party.

Res judicata, Estoppel etc are examples of the general principles of law recognized by almost all the states.

Estoppel :- the principle which precludes a person from asserting something contrary to what is implied by a previous action or statement of that person

The International Court have recognized as general principles:

(i) good faith
(ii) A party to dispute can not himself be an arbitrator or judge
(iii) Res judicata
(iv) To hear both sides
(v) The rule of Pacta Sunt Servanda that Contracts must be kept.
(vi) The principle that reparation must be made for damage caused by fault
(vii) The right to Self defence

(iv) Decisions of Judicial Court.

Subsidiary and indirect source of I. Law because the decisions of the Courts do not create any precedent and they have no binding force except to parties to a case.

Article 59 of the Statute of the Court has made it clear that "The decision of the Court has no binding force except between the parties and in respect of that particular case."

Imp. The Creation of the regional International Courts for setting the disputes in a particular area is a recent development of I. Law.

(Ex) ① The Courts of Justice of European Communities.
② European Court of H.R.
③ Inter American Court of H.R.

(v) Juristic Work :-

The Statute of I.C.J. lays down that the teachings of the most highly qualified jurists of the various nations are a subsidiary mean for the determination of rules of law. The value of juristic writings carries more weight particularly in those fields of I. Law where treaty or customary rules do not exist. Grotius, Vattle, Lauterpacht.

Moreover many rules have been framed on the basis of the writings of the jurists.

(V)

Article 38 doesn't at all mention decisions of determinations of organs or I. Institutions as sources of law. The reason for this that by this time I. organisations had not assumed such an imp role as they have done now.

The evolution of I. organisations represents a significant stage in the history of and development of I Law. I. Organisation in its wider sense is the process of organising complexity of I. relations. In a narrow sense it is an I. institutions based on multilateral I. agreement entered into by Sovereign states.

→ The league of Nations may be described as the first comprehensive experiment in the development of I. organisations

After the establishment of U.N. most of the development of I law and its codification has taken place through the instrumentality of I. organisations. General Assembly, one of the principal organ of U.N. has established I. L. Commission which not only surveys the whole field of I. law but also prepares drafts and make recommendations to these aspect to General Assembly. The General assembly in its turn adopt its recommendations and recommend the holding of I. Conference for adopting I. ~~Convention~~ Conventions on different topics.