

## Contemporary Validity of Customary International Law with Reference to International Law Making Process

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**Abstract** - *In the absence of a designated institution for making or passing international law the international law creation process has created a conundrum. Which authority or institution has the power to originate international law, who has granted the mandate for the task of making law and the validity and acceptance of customary international law are some associated problems with the main issue. The main research problem of this paper is 'in spite of the significance of international customary law how international custom can continue to provide the same connotation and the validity in the wake of the changes happened in the present international legal system?' Although with the adoption of the Statute of the International Court of Justice the impasse related to the sources of international law has been partly resolved, the contemporary significance and the complex formula related to proving the existence of customary international law remain controversial. Much debate exists on its consistent application and pragmatism. Treaty law seems as taken over the primacy of customary law at the international arena. In this backdrop, the main objective of this research is to examine the actual position of customary international law in the current world as a source of international law. This is a qualitative research, mainly based on secondary sources, i.e., textbooks, journal articles, case law and relevant international instruments. The key findings of the research shows the continued validity of customary law is as unabated but priority-wise it has become secondary to treaties as a source of international law. The two elements involved in the satisfactory establishment of customary law- (state practice and opinio jurs) – have made the burden of proof of a new customary norm rather difficult. However, there prevail interesting examples with regard to the creation of such important norms in the present international legal system as evidence to the sustainability of customary international law in the years to come. Therefore, the research concludes by reiterating the validity and usefulness of custom as a source of international law despite the fact that it has diminished its significance as a source of law in most of the domestic legal systems. Nevertheless, it is emphasized the need to minimize or eliminate the influences of more powerful states on the creation of customary international law norms to get their strategic*

*political goals accomplished in order to depoliticized international law making process.*

**Keywords** - *sources, customary international law, international legal system*

### I. INTRODUCTION

Laws are necessary for regulating behaviour of the subjects of any given legal system. In domestic legal systems a designated organ of the government generally formulates laws. In commonwealth countries parliaments with one chamber or two chambers are entrusted with the responsibility of passing laws for their subjects. However, in the international plane the law making process is rather different and complex. In the absence of a nominated institution for making international law, such as a 'world parliament' similar to a domestic legislature, the process of international law creation has created a conundrum. Which authority has the power to originate international law, who has granted the mandate for the task of making law and the validity and acceptance of customary international law are some of the problems associated with the main issue.

The main research problem of this paper is "in spite of the significance of customary international law how can international customs continue to provide the same significance and validity in the wake of changes happened at the international legal system?". Although with the adoption of the Statute of the International Court of Justice the dilemma related to the sources of international law has been partly resolved, the contemporary significance and the application of customary international law remain controversial. Much debate exists on the definition of this source of law and its consistent application. Therefore, the main objective of this research paper is to examine the actual position of customary international law as a source of international law in the contemporary world in the backdrop of more practical and feasible sources of international law such as the treaty law and the influential resolutions adopted by the United Nations. The impact of international power politics on the creation of customary international law is also discussed.

The 'sources' articulate what the law is and where it can be found. (Wallace, 2003) Accordingly, referring to the sources of law of any legal system can bring information on an issue of law together. The 'sources' of international law constitute that reservoir of authoritative rules and principles to which the international lawyer must refer in order to ascertain the content of the law. (Jenson, 1984). However, determination of the sources of Public International Law has become an academic exercise. As a result, at the international level, there is a vigorous ongoing controversy as to what is meant by the expression "sources of international law" and which sources are the most important (Starke, 1994). Unlike at the international plane, ascertainment of the law on any given point in domestic legal systems is not usually too difficult process. For example, in the Sri Lankan legal system, when a legal issue arises one can resort to the Constitution of the country at first to see whether the matter is covered by any provision of this highest source of law in Sri Lanka. If the issue is not governed by a Constitutional provision, it should be checked by examining the plethora of statutes passed by the legislature of the country. Therefore, if an Act of Parliament of Sri Lanka deals with the issue at question the matter can be resolved through the application of the relevant statutory provision. However, in the absence of such relevant rule, court decisions of appellate courts such as the Supreme Court and the Court of Appeal should be examined. In our country, we are inherited 'judicial precedent theory' by the British as a result of the colonial occupation of the country. Therefore, the decisions of apex courts are considered binding on lower courts as judicial precedents where relevant. Although in general in the municipal law at least three primary sources, i.e., Constitution, Acts of Parliament, decisions of appellate courts help to determine the relevant legal rules applicable to a given issue, this determination is not easy at the International Level due to a number of reasons, which will be discussed in below sections of this paper. The matter has become more complicated due to the non-applicability of the judicial precedent theory as stated in the Article 59 of the International Court of Law Statute. (The decisions of the court have no binding force except as between the parties and in respect of that particular case).

II. CUSTOM AS A SOURCE OF INTERNATIONAL LAW  
Rules of customary law are regarded as one of the primary sources of international law. Although controversies prevail with regard to the priority of the sources of international law, treaties, custom and general principles of law of the civilized nations are considered the main sources as stipulated in the Article 38(1) of the Statute of the International Court of Justice (ICJ). This

Statute provides a list of sources, which can be used by the world court (ICJ). Article 38(1) of the Statute, is widely recognised as the most authoritative and complete statement as to the sources of international law. It provides that:

*...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 recognised by the contesting states; (b) international custom, as evidence of a general practice accepted as law; (c) the general principles of law recognised by civilised 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.*

This formulation is technically limited to the sources of international law, which the International Court must apply. Since all member states of the UN are *ipso facto* parties to the Statute by virtue of Article 93 of the UN Charter and even non-member states of the UN also can specifically become parties to the Statute of the Court, Article 38(1) sources are considered as important.

### III. FORMATION OF A NEW CUSTOMARY LAW RULE

Article 38(1)(b) of the Statute of the International Court of Justice indicates the technical aspects of a valid customary law. According to this provision, the Court shall apply "*international custom, as evidence of a general practice accepted as law.*" When analysing this phrase two elements of an international custom can be identified; first, general practice and second, practiced as law. However, the Statute does not define these two elements. Therefore, number of questions would arise, such as, the following: What constitutes a general practice? Who decides the underlying concepts? At what point does law come into existence? What are the relevant circumstances, contexts, time-frames and political climates, if any? (Shaw). State practice is considered the physical or the material element of a valid international custom. The practice of states is reflected in variety of governmental acts. As Jenson aptly describes the practice of a given state can be derived from the following *inter alia*; diplomatic correspondence between foreign ministries, official instructions from a government to its diplomatic missions, press releases, opinions of official advisors, domestic legislation, domestic court decisions on matters of international concern and comments of states on draft treaties. ICJ has decided in several cases with regard to this element and would be useful in determining the establishment of this element.

As Judge Cassese, 1995 has observed: [G]iven the rudimentary character of international law, and the lack of both a central lawmaking body and a central judicial institution endowed with compulsory jurisdiction, in practice many decisions of the most authoritative courts (in particular the ICJ) are bound to have crucial importance in establishing the existence of customary rules.

A. *Advantages and disadvantages of custom as a source of international law*

Custom is the oldest source as well as the broadest source of international law. Similarly, as Weeramantri states that much more than treaty law, customary international law (CIL) has the potential to universalize international law because all the other rules of law emerged from customs. Even the rules of treaty law emerged from CIL. *Pacta sunt servanda* is the underlying principle of international treaty law. It means that treaties are binding upon the parties to them and must be performed in good faith. It was reaffirmed in article 26 of the 1969 Vienna convention on Law of Treaties. It too stipulates that every international agreement for, in the absence of a certain minimum belief that states will perform their treaty obligations in good faith, there is no reason for countries to enter into such obligations with each other. According to Weeramantri this *pacta sunt servanda* principle itself a product of customary international law because it is customary international law that tells us that treaties are to be obeyed. So, the very strength of treaties is derived from a principle of customary international law. Therefore, the competing other source of international law that is treaty law has derived its force from CIL. Weeramantri says

“Treaty law grew out of customary international law; it derives its validity from the customary international law and therefore, customary international law is the mentor or guru, out of which treaty law has grown as a sort of disciple. “

Another advantage of CIL is that while rules under a treaty are binding only on the parties to the treaty to the extent that the treaty includes rules of customary law, such rules continue to bind all other states as well. Thus, even non-state parties to a treaty can be bound by the underlying customary law principles of a treaty. For an example, Sri Lanka is not a state party to 1977 Additional Protocol II of 1949 Geneva conventions on the Amelioration of the effect of Armed Conflicts. This particular treaty governs non-international armed conflict situations and Sri Lanka was having such an armed conflict for more than three decades. The treaty provisions could not bind the country but the most of its principles are considered as customary law. Therefore, Sri

Lanka is required to apply those principles in dealing with the conflict situation. Unlike treaties, custom does not require any express act of ratification or further acceptance by states. A state becomes a party to a treaty by signing and ratifying the said treaty or by acceding to it as stipulated by Vienna Convention on the Law of Treaties. But, custom does not require such acts. Nonetheless, customs require the establishment of two elements, as discussed in the above sections.

CIL has numerous disadvantages as well. Proving the existence of a valid customary law is rather difficult. It is difficult to produce evidence of its recognition in particular. In the case of Colombia v. Peru ICJ held that the physical element of the argued regional customary law principle was unable to be satisfied. In Anglo Norwegian Fisheries Case between Norway and the United Kingdom it was emphasized the need of establishing both the physical as well as the psychological elements to establish a valid CIL principle. If a state wishes to be not bound by an emerging new CIL it should resist the establishment of which from the very beginning. Then such a state is considered a persistent objector. However, if a state agrees at the outset but begin to reject it after some time it cannot get away from the obligations arising out of such a CIL principle since it is considered as a subsequent objector. As Judge Weeramanthri points out customary laws may be limited in acceptance to a few states only and different group of states or different regions of the world may follow different customary rules. Even in a general rule of customary law there may be lack of agreement on matters of details.

B. *Issues relating to Custom as a source*

There are disagreements with regard to the continued validity of customary laws in international law. Some writers deny the continued significance of custom as a source of law in the contemporary world, claiming that it is too clumsy and slow moving to accommodate the evolution of international law any more (Shaw, 2005). Some others say that it is a dynamic process of law creation and more important than treaties since it is of universal application (De Amatao, 1998). Nevertheless, another view recognises that custom is of value since it is activated by spontaneous behaviour and thus mirrors the contemporary concerns of society (Cheng, 1985). However, certain scholars perceive that the role of custom is as much diminished due to the massive increase in the pace and variety of state activities and the impact of different cultural and political traditions over the creation of customary international law. For example, Shaw, 2005 states that

*There is a continuing tension between those rules already established and the constantly evolving forces that seek changes within the system. One of the major problems of international law is to determine when and how to incorporate new standards of behaviour and new realities of life into the already existing framework, so that, on the one hand, the law remains relevant and, on the other, the system itself is not too vigorously disrupted. Changes that occur within the international community can be momentous and reverberate throughout the system.*

According to Shaw, if a new customary rule is created in contrary to an existing legal norm, such a rule will replace the already established legal norms to the contrary effect. This is the most current status of mind of the international community and the intention of the law creating actors in the international plane. In international law, law making authority lies with the sovereign states. Nevertheless, the dominance of powerful states in such a creation is inevitable. For example, Schachter, 1997 states that "*customary law, new and old, are products of political aims and conditions*" while Visscher, 1960 states that "[e]very international custom is the work of power". Byers, 1999 states:

*Although States are equally entitled to participate in the customary process, in general, it may be easier for more 'powerful' States to behave in ways which will significantly influence the development, and maintenance or change of customary rules.*

#### IV. KEY CONCERNS

Although the above comments show the inextricable link between power and customary law the significance of customary international law is hardly disputed. The underlying flexibility surrounding the customary international law tends towards the argument that customary international law in some instances is more robust than treaty law within the context of power in international relations.' For example, Byers, 1999 argues that more powerful states have larger and more resourced diplomatic corps to influence and monitor developments in international customary law. This consideration is even stronger if Koskenniemi's (1970) notion of law is accepted. He argues that

*...the distinction between the relevant and the irrelevant, and between law and power, can be achieved by introducing a psychological element into law... laws are effective because they have been internalised, and so are obeyed as a matter of course, not because of some external constraint.*

The examples pertain to the continued significance of CIL demonstrates the belief that treaty law is more important than customary law is not accurate. Cheng emphasizes the possibility for the creation of instant CIL as pointed out in the above discussion. Recent codification of customary international humanitarian law (IHL) principles by the International Committee of the Red Cross (ICRC) shows the relevancy and the current place of CIL principles as a source of international law. The ICRC has gathered the widely dispersed CIL principles pertain to different types of war situations and has found 161 Rules as well established. The importance of these CIL rules is that they can be applied to both international and non international armed conflict situations whereas this is not the case with regard to the application of treaty law principles since they require different applications depending on the nature of the armed conflict. As a result, CIL rules of IHL are proved to be very useful to fill the gaps in terms of application to both categories of armed conflicts and thus bind even the non state parties to some of IHL treaties as illustrate in the above discussion with regard to the case of Sri Lanka.

CIL has shown a remarkable significance in relation to human rights law jurisprudence. Many fundamental human rights are so well established customary practices amongst states and as a result they can be applied to make those states obliged for implementation of such valuable human rights principles. *Jus cogens* are recognized by the Vienna convention on Law of treaties as inviolable peremptory norms. Well known examples for *jus cogens* are prohibitions against genocide, slavery, war crimes and crimes against humanity. All the inviolable norms are widely considered as well established CIL principles. In the contemporary world another emerging trend is the established norms pertain to the protection of the natural environment to ensure sustainable development without harming the environment and the rights of people. For this purpose established CIL principles provide a strong legal basis. CIL of Law of the Sea was used greatly in codifying the Law of the Sea Conventions because most of the Law of the Sea principles are customary in nature.

There are many other examples to the contemporary application and significance of CIL principles. Therefore, these findings show the continued validity of customary law is as unabated. Nonetheless, priority-wise it has become secondary to treaties as a source of international law in particular before the International Court of Justice due to practical reasons such as the difficulty of proving, uncertainty of the actual scope, the current trend of making treaties to govern many areas of international

law. However, CIL as the repository of international law very often fills gaps in treaties. For an example, there can be difficulties in the interpretation of treaties since there are several interpretations possible and customary international law can tell us which of those interpretations is preferable. There prevail interesting examples with regard to the continued significance and validity of CIL principles in the present international legal system as evidence to the sustainability of customary international law in the years to come.

#### V. CONCLUSION

The key findings of the research prove the continued validity of customary law is as undiminished but priority-wise it is secondary to treaties as a source of international law. The two elements involved with the satisfactory establishment of customary law- namely state practice and *opinion juris* – have made the establishment of a new customary international law norm rather difficult. But there prevails interesting examples on the creation of such important norms in the present international legal system as evidence to the sustainability of customary international law in the years to come.

The research concludes by reiterating the validity and usefulness of custom as a source of international law despite the fact that it has diminished its significance as a source of law in most of the domestic legal systems. Nevertheless, it is emphasized the need to minimize or eliminate the powerful states being more influential on the creation of customary international law norms in order to get their strategic political goals to be accomplished.

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