

LMS ID: 40374-Nimra Maheen-082

Q No. 6

Sources of International Law

Introduction:

Under the article 38(1) of the ICJ statute, the first 5 are the sources of international law and among of them, the first 3 are the direct / primary source of international law that are binding on the states and later ones are the non-binding in nature that depend on the subject of state.

Sources of International Law:

The sources of international law under the article 38(1)

of ICL stature are given below.

- 1- Treaties or conventions
- 2- Customs
- 3- General principle of law recognised by civilised nations
- 4- Decision of judicial or arbitral tribunal
- 5- Juristic work

1- Treaties

It is an agreement whereby 2 or more states recognize or agree on the conditions mentioned in the treaties.

Treaties provision is mentioned in Article (2) of ~~the~~ Vienna Convention on law of Treaties 1969.

Types:

- 1- law making treaties
- 2- Treaty contracts.

2-

Customs

Difference between usage and customs

- Usages are non-binding in nature while customs are binding in nature.
- No penalties or sanctions on the violation of usages but penalties or ~~sanctions~~ sanctions on violation of customs.

From Usage to Custom:

- 1- The generality of principle in the state and its uniformity derived with the practice.
- 2- Recognized by ICJ (International Court of Justice).
- 3- This is not necessary for a custom to be practiced for a long time.

The custom is more transformed nature of the usages and practiced in the state.

3- General Principles of law recognised by civilised nations

The general principles of law particularly developed from the ancient civilisations that practiced law such as Roman law, Greek law and Muslim law.

The association of human with the law is particular feature.

Example. Res judicata, estoppel, good faith.

4- Decision of judicial or arbitral tribunal

Judicial tribunal

The forum for judicial tribunal is the International Court of Justice (ICJ). The ICJ can give advisory opinion, however, it is non-binding in nature. If one party defies the agreement then ICJ is considered to dispose off the case or decision. ICJ does not follow the doctrine of precedent (It means

Its decision is valid until the presence of new case).

Ex Aequo et Bono can be included in the judicial tribunal.

Arbitral Tribunal

Form of arbitral tribunal is called Permanent Court of Arbitration (It is neither court nor

permanent). The decision of the arbitrator is called Award.

Any party having the case concerned to the decision or the issues related to case can be solved by the arbitrator.

5- Juristic Work

The interpretation and work of jurist also helped in the development of the international law.

Jus Cogens : Part of customary law or distinct source

Jus cogens is the maxim that is used in the international law and it provide the same reference to the constitution of any state that is the ultimate source of any state.

Jus cogens is distinct source rather part of customary law because the general principles also helped the development of international law. Therefore, the jus cogens also present in the law developed internationally but various other sources binding states to regulate the affairs.

How it is distinct source?

The involvement of other sources of international law either direct or secondary sources such as general principles of law recognised

by civilised nations, international comity, state papers, Equity and justice widened the scope of international law.

Unilateral Declarations

The unilateral declarations stated by the states for the development of the relations can't serve the purpose of treaty law and the reason involves that treaty is the agreement between 2 states atleast. so it does not fulfil the condition.

Customs are those practiced rules that are also accepted by the other states. The sole purpose of unilateral declaration can't be termed as customs or just an independent source. The declarations of unilateral work or agreement is the either custom or the independent source.

Treaty law, custom or the independent source:

Sometimes state develop norms or practices that are generally adopted by the individuals of that state, this is not essential for it to be recognized or accepted by the other states. In context of unilateral declaration, it is wise to say that such declaration can serve as the independent source. For example, the constitution of UK is almost unwritten because it is based on the conventions that are not legally documented.

Conclusion:

The first 5 are the sources of international law as mentioned in the article 38(1) of ICJ statute. Moreover, *jus cogen* is distinct source rather part of customary law. Unilateral declarations should be treated as independent source.

Q No-5

Origin of International Law

Introduction:

The precise historical account on the origin of the international law is difficult to discuss because in every century various contributions played an integral role for the development of international law. The central focus of any such account should be based on the contributions and theories that developed or enhanced the purpose of international law. The emergence of international law governs the sovereignty between the states and the development of relations between the states.

Difficult to render an accurate historical account on origin of international law:

The contribution of nations although developed the purpose of law but it was generally understood as the internationalism instead of the international law. The notable work of various lawyers such as Oppenheim, Starke, Brierly, Fenwick, Helsen, Kelsen and the Holland provided the origin of international law. Hugu grotius is the father of international law. It can be divided into segments for the easy understanding of the origin of international law.

1- Development during 5-15th century and before.

2- Development during 16th and 17th century.

3- Development during 18th century and more.

Before the 16th and 17th century, there was concept of city states and they develop the laws.

Central Focus:

The central focus for the origin of international law can be the laws developed by the city states various decades ago.

In order to govern the relations within states or with the other state, the concept of obeying the rules was evident. The

approach for any such account can be considered the central focus such as the illustration given below:

From the existence of the city states to the modern nation-state system.

1- Development during 5-15th century and before:

4 civilisation

- contribution of jews
 - ↳ laws to confer diplomatic privileges
 - ↳ law for the treaties
- contribution of greeks
 - ↳ laws for war and peace
 - ↳ law for the diplomatic relations
- contribution of romans
 - ↳ jus gentium
 - ↳ jus civile
 - ↳ jus naturally
- contribution of Muslims
 - ↳ laws for the war & peace
 - ↳ law for the relations

2- Development during 16th and 17th century:

2 school of thoughts

Naturalist

- main concept is Reason
- Dictate of right reason
- Divine law

Positivist

- main concept is Consent
- the consent of the state to abide by the developed rules.

Positivist

- Theory of consent — involves the consent of state
- Theory of auto-limitation — states intentionally limits itself to abide by rules
- Pacta sunt servanda — the agreement must be kept.

3- Development during 18th century and more:

Essential elements:

- develop rules to govern the relations
- Hugo Grotius → father of international law
- laws developed through the UN charter

UN Charter is of universal nature that either the state is member of the UN or not, it is conferred to obligate the rules.

such as laws of war, Genocide Convention and Humanitarian law.

Need of International law:

The emergence and need of international law is important to regulate the

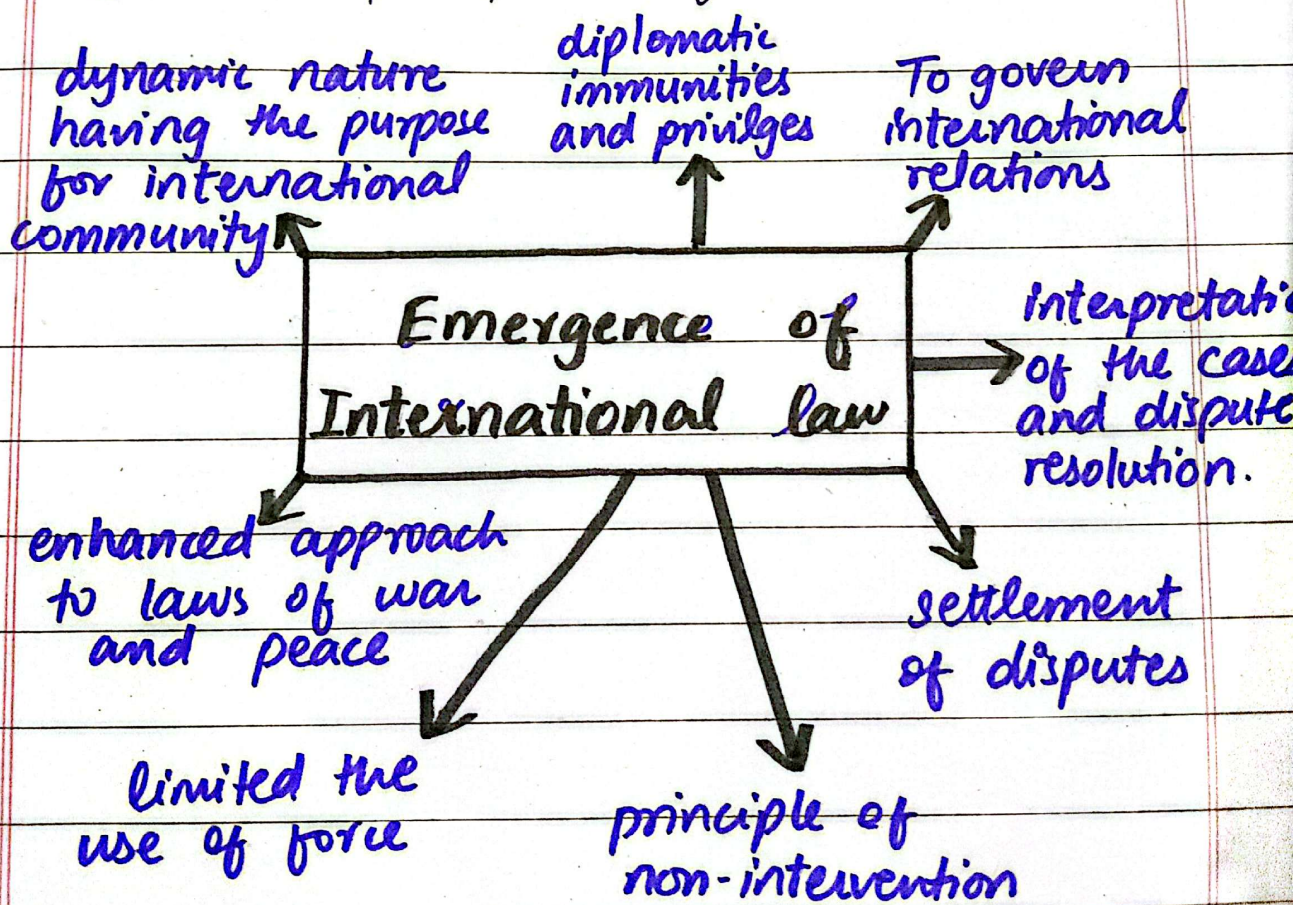
relations between the states.

Although state is sovereign in its character but between the states, international law serves as the sovereign entity.

International law mainly began to develop the laws related to war and peace as it was practiced in the city states for the peaceful settlements. It is dynamic in nature not static one. The example of US constitution is best fit because of its rigid in nature and the absence of evolving phenomenon. The international law evolved through the various cases such as:

- Nicaragua Vs US
- Corfu channel Case
- North sea continental shelf Case
- Nottebohm Case
- Reparation for Injuries

Chapter VI and VII of the UN Charter deals with peaceful settlement of disputes and actions with respect to threats to peace, breaches of the peace and acts of aggression. The advisory opinion of ICJ also serve as the interpretation of the agreement, International Humanitarian law for the effective principles of war.



Critical Analysis:

This is evident to render an accurate account on the history or origin of international law. Although, the contribution of previously existed entities emboldened the role of law for the relations of state. The development of international law binds the state to abide by the rules and the role of laws relating to the prisoners of war, non-intervention principle, settlement of disputes, genocide convention. International law is acting as ultimate authority for the development of relations.

Q No. 4

Article 1 of 1933 Montevideo Convention

Introduction:

Rights and Duties of States formulated in the Montevideo Convention of 1933 and the development of legally provisions under the Montevideo Convention. The article 1 of the convention is accurate reflection of the criteria of statehood. even in modern context of International Law. Because it fulfills the requirement of the statehood and also the rights and duties of the concerning states. There is no doubt that it provides the precise criteria for the state.

Criteria of Statehood:

For granting the title of state, Article 1 provides the criteria of statehood based on following 4 elements:-

- 1- Permanent population.
- 2- Established Government.
- 3- Territory should be defined.
- 4- Capacity to enter into relations with other state.

Permanent Population:

The permanent population included in the criteria of the statehood because without the existence of the permanent population of the state, the relations can't be governed.

Government:

The established government is the other criteria for statehood.

Government of any state regulate the governing laws and rules with the relation between the individual and state.

Defined territory:

For any state, the granting of statehood title the defined territory of the state matters. It is the proper boundary of any state and it does not permit the intervention of any other state into its own.

Capacity to enter into relations with other state:

State should has the capacity to develop relations with the other states, it can be of any aspect. The development of economic, social, cultural ties can serve as the example.

Relevancy in modern context of International law:

The essential elements for the criteria of statehood fulfills the accurate requirement for any state. Based upon the attributes of statehood, any other state can recognize that state and can develop the relations such as signing of treaty or diplomatic ties.

Statehood attributes:

The development of this criteria provides the basis of recognizing the other state based upon the Article 1 of Montevideo Convention on Rights and Duties of States. In the modern era, states follow the elements of statehood in order to recognize any state and

development of relations.

Example:

Afghanistan has the interim government instead of established government, ^{India} Pakistan does not recognize it but based upon the visits to India. It is serving as the relation.

Pakistan does not recognize Israel because of its no defined territory. Without fulfilling the criteria of statehood, no one can recognize that entity as a separate state. But the dominating powers relates the phenomenon provided under the Article 1 of 1933 Montevideo Convention.

Conclusion:

Legally, the Article 1 of 1933 Montevideo Convention on

rights and duties of state provided the clear attributes of Statehood. But the influence of dominating powers often violate the aspect of statehood and prefer to develop the relations without recognizing it as state. For governing relations, still attributes of statehood serves as the ultimate criteria and the need to follow it should consider.
