

# TREATIES: A SOURCE OF INTERNATIONAL LAW

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**Abstract:** *International law, is time and again questioned on the basis of its ambiguity and span. Jurists doubted it as true law and called it as a vanishing point of jurisprudence but it remains undoubtedly the most important branch of law governing individuals through the States. In today's time when borders and territories are more porous than ever and no country is self-dependent, international law is the need of time. The law always evolves from a course and as any other law international law has its own sources. Treaties are one of such sources of international law and being the most well structured and codified, they generate the majority of State actions in their international dealing.*

*Treaties are referred by international Court of justice many a times to ascertain the source of law so that the object and nature of the law in question can be derived effectively. Still international law is in the phase of metamorphosis and need of more concrete sources cannot be denied.*

**Key Words:** *International Court of Justice, Sources of International Law, Treaty, Custom, Lotus Case*

## Introduction:

International jurists, eternally are struggling to find out a comprehensive answer to the question as to here does international law come from? There is no "Code of International Law". International law has no Parliament and nothing that can really be described as legislation. While there is an International Court of Justice and a range of specialised international courts and tribunals, their jurisdiction is critically dependent upon the consent of States and they lack what can properly be described as a compulsory and direct jurisdiction of the kind possessed by Municipal courts.

## Sources of international law:

There is no clear enlistment about the sources of International law, however the courts are directed to refer various legal frameworks while adjudicating international law matters. The Statute of International Court of Justice through Article 38 indicates to the instruments that can be used as sources.

As per Article 38 of the Statute of International Court of Justice,

1. 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 recognized by the contesting states;
  - b) international custom, as evidence of a general practice accepted as law;
  - c) the general principles of law recognized by civilized 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.
2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto. (Ex Aequo Et Bono is a Latin term which means what is just and fair or according to equity and good conscience. Something to be decided ex aequo et bono is something that is to be decided by principles of what is fair and just. A decision-maker who is authorized to decide ex aequo et bono is not bound by legal rules but may take account of what is just and fair.)

Hence, Article 38(1) of the statutes of ICJ provides a reflection of the sources of international law, though not accurate and Article 38 did not expressly mention the word 'sources' but it is usually invoked as sources of international law. Sources of international law can be characterized as 'formal' and 'material' sources, though the characterisation is not by hierarchy but for clarification, therefore, Article 38(1) (a-c), that is, conventions or treaties, custom and general principles are formal sources whereas; Article 38(1)(d) that is, judicial decisions and juristic teachings are 'material sources'.

Formal sources confer upon rules an 'obligatory character', while material sources comprise the 'actual content of the rules'

This list is no longer thought to be complete but it provides a useful starting point so, the Statute of the ICJ, Art. 38 identifies following sources:

- (a) Treaties between States;
- (b) Customary international law derived from the practice of States;
- (c) General principles of law recognized by civilised nations; and, as subsidiary means for the determination of rules of international law;
- (d) Judicial decisions and the writings of "the most highly qualified publicists".

The treaties between states are the most well codified and structured sources of international law and in recent times of globalization and diplomatic dependency the contractual relationships between countries are increasing with each passing day developing the treaty based international law more and rapidly.

## Treaties between States: As the Source of International Law

Treaties are the principal source of Public International Law. Article 2 (1)(a) of the Vienna Convention on the Law of Treaties, 1969, defines a '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'.*

Treaties are commonly called 'agreements', 'conventions', 'protocols' or 'covenants', and less commonly 'exchanges of letters'. Frequently, 'declarations' are adopted by the UN General Assembly. Declarations are not treaties, as they are not intended to be binding, but they may be part of a process that leads ultimately to the negotiation of a UN treaty. Declarations may also be used to assist in the interpretation of treaties.

### Treaties: Types and Binding Obligations

A treaty is an agreement between sovereign States (countries) and in some cases international organisations, which is binding at international law. For example; An agreement between an Australian State or Territory and a foreign Government will not, therefore, be a treaty. An agreement between two or more States will not be a treaty unless those countries intend the document to be binding at international law.

Treaties are of two types:

- **Bilateral Treaties:** These are the treaties which are entered upon, by two of the States creating the binding obligations on each of the two contracting Parties.
- **Multilateral Treaties:** These treaties are between three or more States making them all contractually bound by the obligations of treaty once it is signed by them.

Treaties can also include the creation of rights for individuals.

### Treaty: A source of law or a source of obligation under law

A treaty is not a source of law so much as a source of obligation under law. Treaties are binding only on States which become parties to them and the choice of whether or not to become party to a treaty is entirely one for the State as there is no requirement to sign up to a treaty making it a mere source of international obligation instead of international law.

The reason as to why a treaty becomes binding on contracting States can be derived from the rule of customary international law i.e. *pacta sunt servanda*, which is a Latin term for "agreements must be kept" and requires all States to honour their pacts or treaties, making treaties more accurately, a source of obligation under law.

### Treaty: An Authoritative Statements of Customary Law

Many treaties are also important as authoritative statements of customary law. A treaty which is freely negotiated between a large number of States is often regarded as writing down what were previously unwritten rules of customary law. That is obviously the case where a treaty provision is intended to be codificatory of the existing law. A good example is the Vienna Convention on the Law of Treaties, 1969. Less than half the States in the world are parties to it but every court which has considered the matter has treated its main provisions as codifying customary law and has therefore treated them as applying to all States whether they are parties to the Convention or not.

Treaty also works as an evidence of customary law. Where a treaty provision codifies a rule of customary law the source of law is the original practice and *opinio juris* there the treaty provision is merely evidence. But that overlooks the fact that writing down a rule which was previously unwritten changes that rule. From that time on, it is the written provision to which everyone will look and debates about the extent of the rule will largely revolve around the interpretation of the text rather than an analysis of the underlying practice. Moreover, even where a treaty provision is not intended to be codificatory, but rather is an innovation designed to change the rule, it can become part of customary law if it is accepted in practice.

The fact of a large number of States agreeing upon a treaty provision is itself an important piece of State practice. If those and other States subsequently apply the treaty provision – especially where they are not parties to the treaty – then it can quickly become part of customary international law. This consideration has led some writers to distinguish between "*traités contrats*" (contractual treaties) which are only agreements between the parties and "*traités lois*" (law-making treaties).

"*Traités contrats*" (contractual treaties) which are only agreements between the parties are also called as Particular treaties because of the limited number of parties or limited character of its subject. Whereas, "*Traités lois*" (law-making treaties are called as general treaties because they are accepted by large number of the States or wide content that has universal importance is included in them.

To simplify it is better to say that all treaties are contractual as between their parties. But some also have an effect on the general law. A nature-based classification of the treaties can again be of two types Legal and Normative treaties. Legal treaties, while indicate to laws like; the United Nations Charter or the WTO agreement etc. Normative treaties indicate to norms with discretion to develop law on that basis like; International Labour Organization or the Genocide Convention of 1949 etc.

### Treaty: As a Source Referred by International Court of Justice

Treaties are one of such sources of international law and being the most well-structured and codified, they generate the majority of State actions in their international dealing. Treaties are referred by international Court of justice many a times to ascertain the source of law so that the object and nature of the law in question can be derived effectively.

### Right of Passage Over Indian Territory Case, Portugal v. India, ICJ Reports 1960, p.6

Portugal claimed Right of Passage over Indian territory in pursuance with the Pune treaty of 1779, however India questioned the treaty as not being valid and vague so not binding on any of the party.

The Court was of the view that India's refusal of passage in those cases was, in the circumstances, covered by its power of regulation and control of the Right of passage of Portugal. The court held;

As regards arms and ammunition, paragraph 4 of Article XVIII of the Treaty of Commerce and Extradition of 1878 provided that the exportation of arms, ammunition or military stores from the territories of one party to those of the other "shall not be permitted, except with the consent of, and under rules approved of by, the latter". During the British and post-British periods, Portuguese armed forces and armed police did not pass between Daman and the enclaves as of right and that, after 1878, such passage could only take place with previous authorization by the British and later by India. It may be observed that the Governor of Daman was granted the necessary visas for a journey to and back from Dadra as late as 21 July 1954. The events that took place in Dadra on 21-22 July 1954 resulted in the overthrow of Portuguese authority in that enclave. This created tension in the surrounding Indian territory. Thereafter all passage was suspended by India.

The Portuguese possessions in India included the two enclaves of Dadra and Nagar-Aveli which, in mid-1954, had passed under an autonomous local administration. Portugal claimed that it had a Right of passage to those enclaves and between one enclave and the other to the extent necessary for the exercise of its sovereignty and subject to the regulation and control of India; it also claimed that, in July 1954, contrary to the practice previously followed, India had prevented it from exercising that right and that that situation should be redressed. A first Judgment, delivered on 26 November 1957, related to the jurisdiction of the Court, which had been challenged by India. The Court rejected four of the preliminary objections raised by India and joined the other two to the merits. In a second Judgment, delivered on 12 April 1960, after rejecting the two remaining preliminary objections, the Court gave its decision on the claims of Portugal, which India maintained were unfounded.

The Court found that Portugal had in 1954 the right of passage claimed by it but that such right did not extend to armed forces, armed police, arms and ammunition, and that India had not acted contrary to the obligations imposed on it by the existence of that right. The right forming part of the international laws between India and Portugal were derived from the source i.e. treaty by the ICJ.

### **Asylum Case, Columbia v. Peru, ICJ Reports 1950, p. 266**

The issues in front of the court were:

- (1) Is Colombia competent, as the country that grants asylum, to unilaterally qualify the offence for the purpose of asylum under treaty law and international law?
- (2) In this specific case, was Peru, as the territorial State, bound to give a guarantee of safe passage?
- (3) Did Colombia violate Article 1 and 2 (2) of the Convention on Asylum of 1928 (hereinafter called the Havana Convention) when it granted asylum and is the continued maintenance of asylum a violation of the treaty?

Colombia granted asylum to a Peruvian, accused of taking part in a military rebellion in Peru. Was Colombia entitled to make a unilateral and definitive qualification of the offence (as a political offence) in a manner binding on Peru and was Peru under a legal obligation to provide safe passage for the Peruvian to leave Peru?

Peru issued an arrest warrant against Victor Raul Haya de la Torre "in respect of the crime of military rebellion" which took place on October 3, 1949, in Peru.

3 months after the rebellion, Torre fled to the Colombian Embassy in Lima, Peru. The Colombian Ambassador confirmed that Torre was granted diplomatic asylum in accordance with Article 2(2) of the Havana Convention on Asylum of 1928 and requested safe passage for Torre to leave Peru.

Subsequently, the Ambassador also stated Colombia had qualified Torre as a political refugee in accordance with Article 2 Montevideo Convention on Political Asylum of 1933 (note the term refugee is not the same as the Refugee Convention of 1951).

Peru refused to accept the unilateral qualification and refused to grant safe passage.

Colombian pleas were based on Bolivarian Agreement on Extradition of July 18th, 1911, The Convention on asylum of February 20th, 1928 (Havana Convention), The Montevideo Convention of 1933 and American international law in general.

The court concluded that the grant of asylum and reasons for its prolongation were not in conformity with Article 2(2) of the Havana Convention.

Columbia contended that Article 18, which is framed in the following terms: "Aside from the stipulations of the present Agreement, the signatory States recognize the institution of asylum in conformity with the principles of international law". "The institution of asylum", this article merely refers to the principles of international law. But the principles of international law do not recognize any rule of unilateral and definitive qualification by the State granting diplomatic asylum. Article 4 of this Agreement concerning extradition of a criminal refugee from the territory of the State in which he has sought refuge. The arguments submitted in this respect reveal a confusion between territorial asylum (extradition), on the one hand, and diplomatic asylum, on the other.

Peru plead that as it withdraws the offender from the jurisdiction of the territorial State and constitutes an intervention in matters which are exclusively within the competence of that State. Such a derogation from territorial sovereignty cannot be recognized unless its legal basis is established in each particular case.

The Colombian Government has invoked Article 2, paragraph 1, of the Havana Convention, which is framed in the following terms: "Asylum granted to political offenders in legations, warships, military camps or military aircraft, shall be respected to the extent in which allowed as a right or through humanitarian toleration, by the usages, the conventions or the laws of the country in which granted and in accordance with the following provisions:"

Peru said inter alia, "...this Convention lays down certain rules relating to diplomatic asylum, but does not contain any provision conferring on the State granting asylum a unilateral competence to qualify the offence with definitive and binding force for the territorial State."

The Colombian Government has further referred to the Montevideo Convention on Political Asylum of 1933. It is argued that, by Article 2 of that Convention, the Havana Convention of 1928 is interpreted in the sense that the qualification of a political offence appertains to the State granting asylum. Peru denied the applicability as the Montevideo Convention had not been ratified by Peru, and could not be invoked against that State.

The court held,

The normal course of granting diplomatic asylum is that a provisional qualification of the offence by a state and the territorial State has the right to give consent to this qualification.

Such a decision would be binding on Peru either because of Treaty law (in particular the Havana Convention of 1928 and The Montevideo Convention of 1933), Other principles of international law or by way of regional or local custom.

On the question of unilateral qualification for asylum the court said,

No express right of unilateral decision in Havana:

The court held that there was no expressed or implied right of unilateral and definitive qualification of the State that grants asylum under the Havana Convention or relevant principles of international law.

The Montevideo Convention was not ratified so the convention which accepts the right of unilateral qualification, and on which Colombia relied to justify its unilateral qualification, was not ratified by Peru. The Convention, per say, was not binding on Peru

No customary international rule/law establishing unilateral right is there. Considering the low numbers of ratifications, the provisions of the latter Convention cannot be said to reflect customary international law.

Colombia also argued that regional or local customs support the qualification. The court held that the burden of proof on the existence of an alleged customary law rests with the party making the allegation.

The court held that Colombia did not establish the existence of a regional custom because it failed to prove consistent and uniform usage of the alleged custom by relevant States. The fluctuations and contradictions in State practice did not allow for the uniform usage.

The court opined;

The court held that even if Colombia could prove that such a regional custom existed, it would not be binding on Peru, because Peru by its attitude proved the contrary, by refraining from ratifying the Montevideo Conventions of 1933 and 1939 which were the first to include a rule concerning the qualification of the offence in matters of diplomatic asylum

The court concluded that Colombia, as the State granting asylum, is not competent to qualify the offence by a unilateral and definitive decision, binding on Peru.

On the question of safe Passage for Torre the court said,

The court held that there was no legal obligation on Peru to grant safe passage either because of the Havana Convention or customary law.

In this case the Peruvian government had not asked that Torre leave Peru. On the contrary, it contested the legality of asylum granted to him and refused to grant safe conduct.

The court looked at the possibility of a customary law emerging from State practice where diplomatic agents have requested and been granted safe passage for asylum seekers before the territorial State could request for his departure.

Once more, the court held that these practices were a result of a need for expediency and other practice considerations over an existence of a belief that the act amounts to a legal obligation.

The court further stated;

Article 1 of the Havana Convention states that “It is not permissible for States to grant asylum... to persons accused or condemned for common crimes... (such persons) shall be surrendered upon request of the local government.”

Torre’s accusation related to a military rebellion, which the court concluded was not a common crime and as such the granting of asylum complied with Article 1 of the Convention.

On the prerequisite of Urgency as the presence of “an imminent or persistence of a danger for the person of the refugee”. The court held that the facts of the case, including the 3 months that passed between the rebellion and the time when asylum was sought, did not establish the urgency criteria in this case

Urgency cannot be interpreted as danger of prosecution

The court held that “protection from the operation of regular legal proceedings” was not justified under diplomatic asylum as the object of Havana convention was not this. So, exception would not apply.

An exception to this rule (asylum should not be granted to those facing regular prosecutions) can occur only if, in the guise of justice, arbitrary action is substituted for the rule of law.

#### **S.S. Lotus (France v. Turkey), S.S. Lotus (French steamship/steamer) & S.S. Bozkurt (Turkish steamer); 1927P.C.I.J.**

The first principle of the Lotus Case: A State cannot exercise its jurisdiction outside its territory unless an international treaty or customary law permits it to do so. This is what we called the first principle of the Lotus Case. The Court held that:

“Now the first and foremost restriction imposed by international law upon a State is that – failing the existence of a permissive rule to the contrary – it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention.” (para 45)

#### **Conclusion:**

International law develops with each passing day and treaties can be referred to formulate not a formal agreement between two or more states in reference to peace, alliance, commerce, or other international relations but also as a source of international law which is structured and concretised by the States in the form of a formal document embodying an international agreement between them. Any such agreement or compact can be helpful in the court to find the relevant law applicable amongst the parties.