The term "sources of law" has many meanings. Oppenheim defines the source of law as "the particular rules which constitute the system, and the processes by which the rules become identifiable as rule of law. The sources of the rule of law, while, therefore distinct from the basis of the law, are nevertheless necessarily related to the basis of the legal system as a whole."\(^1\)

Salmond, defines formal source of law "as that from which it derives the matter and not the validity"\(^2\) Such sources can be formal sources of law and material sources of law.

A distinction has also been drawn between the formal and material sources of law. Starke also defines material sources as "the actual materials from which an international lawyer

\(^1\)Oppenheim’s International Law, p. 24

\(^2\)C. Parry, The Sources and Evidences of International Law, Cambridge, 1965
determines the rule applicable to a given situation.” The material sources of international law are of five categories namely:

1. International treaties and conventions
2. International customs
3. Decisions of judicial or arbitral tribunals
4. Decisions or determinations of the organs of international organizations. And;
5. Jurist works

The sources of international law are not as clear and not easily available, as they are in the national legal systems. Whenever a dispute between two or more State parties is referred to the International Court of Justice, Article 38 (1) of the statute of the International Court of Justice directs the court to refer to the sources listed under:

1. International treaties and conventions.
2. International custom, as evidence of a general practice and accepted as law.
3. General principles of law recognized by civilized nations.
4. The judicial dictates and teachings of most highly qualified jurists of various nations.

Article 59 of the statute of the International Court of Justice says the decision of the court has no binding force except between the parties and in respect of that case only. The judgments of the court are not universal in character. The court may also decide a case *exaequo et bono* with the consent of the parties.

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3 “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 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.

4 I. Brownlie, Principles of Public International Law, 6th edn, Oxford, 2003, chapter 1
INTERNATIONAL TREATIES

Article 38(1) (a) refers to international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

Between the two world wars and after the Second World War a large number of treaties and conventions were signed by the states to lend support to the League of Nations initially and then subsequently to the United Nations Organization. It is because of this development that modern international law which consists of positive rules of international law is also known as positive international law. Treaties (or international conventions) are a more modern and more deliberate method. They constitute the most important source of international law in the modern day scenario. The statute of the International Court of Justice uses the word "conventions" in Article 38(1) (a) of the statute of ICJ. Treaties are known by a variety of differing names, ranging from Conventions, International Agreements, Pacts, General Acts, Charters, Statutes, Declarations and Covenants.

Treaties and conventions have the same meaning and occupy the primary position under the Article by pushing international custom to the second place. Treaties are like international agreements of a contractual nature signed by two or more parties, which create rights and obligations for the parties to treaties and is governed by international law. All these terms refer to a similar transaction, the creation of written agreements whereby the states participating bind themselves legally to act in a particular way or to set up particular relations between themselves. The obligatory nature of treaties is founded upon the customary international law principle that agreements are binding (pacta sunt servanda)

CLASSIFICATION OF TREATIES

Treaties are classified as treaty contracts and law-making treaties or general and particular treaties.

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6 Ibid, p.685
7 Ibid, p.711
A treaty between two States is called a bilateral, a treaty between more than two States is said to be a multilateral treaty. In certain cases, a bilateral treaty may have a "lawmaking" effect.

The Hay-Pauncefote Treaty of 1901 between the US and UK (the treaty however is now defunct) providing that the Panama Canal should be free and open to the vessels of all nations on terms of entire equality, is an example of a law-making bilateral treaty.

As examples of important treaties one may mention the Charter of the United Nations, the Geneva Conventions on the treatment of prisoners and the protection of civilians and the Vienna Convention on Diplomatic Relations.\(^8\)

All kinds of agreements exist, ranging from the regulation of outer space exploration to the control of drugs and the creation of international financial and development institutions. It would be impossible to telephone abroad or post a letter overseas or take an aeroplane to other countries without the various international agreements that have laid down the necessary, recognized conditions of operation.\(^9\) There are also many agreements which declare the existing law or codify existing customary rules, such as the Vienna Convention on Diplomatic Relations of 1961.\(^10\)

**TREATY CONTRACTS**

Such treaties generally do not create a source of international law. They merely purport to lay down special obligations between parties. Such treaties are agreements between two states or a limited number of States on the special matter concerning the States parties to it exclusively.\(^11\)

**LAW-MAKING TREATIES**

According to Starke, the provisions of law-making treaties are directly a source of international law. Such treaties have come into existence enormously since the middle of the

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\(^8\) Ibid, p.715
\(^9\) Ibid, p.731
\(^10\) Ibid, p.742
\(^11\) Ibid, p.745
19th century. Inadequacy of custom and emergence of new international problems resulted in the signing of such law-making treaties.

These treaties, in a sense, have produced international legislation. Such treaties have further been divided into treaties laying down universal rules of international law and those laying down regional rules of international law, prescribing general or fairly general rules. Even such law-making by a treaty whether universal or general, may be in effect a "general framework Convention" imposing duties to enact legislation, or offering areas of choice, within the ambit of which States are to apply the principles laid down therein.12

**NORMATIVE TREATIES**

In view of the inherent weakness of international law, treaties do not have the force of law automatically. They do not lay down rules of law, as set out in contracts and obligations, which the State Parties are to respect. To avoid this criticism, Starke designates law-making treaties as "normative treaties". These norms are applied, subscribed or ratified by the States in their Acts.

**UNIVERSAL TREATIES**

Universal treaties are those in which all countries have consented. Four Geneva Conventions of 1949 are fine examples of principal legal documents which provide specific rules to safeguard combatants who are wounded, sick or shipwrecked, prisoners of war and civilians. These conventions constitute universal treaties.13

**INTERNATIONAL CUSTOMS**

Article 38 (b) recognizes “International Custom, as evidence of general practice accepted as law.” It is described as a "general practice and accepted as law". Vattel, in the early 19th century, has defined "customary law of nations" as "certain maxims and customs consecrated by long use, and observed by nations in their mutual intercourse with each other as a kind of law." 14

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12 Ibid, p.750
13 Ibid, p.755
14M. Mendelson, ‘The International Court of Justice and the Sources of International Law’ in Fifty Years of the International Court of Justice (eds. A. V. Lowe and M. Fitzmaurice), Cambridge, 1996, p. 63
A rule of customary law may be defined as a rule of conduct recognized by the community of nations as the right rule of conduct and having force of law. For a very long time international custom was considered as one of the prominent sources of international law. Custom may be treated as a source of international law if it fulfills the following requisites:\[15\]

**Antiquity or long duration**

Municipal law is very rigid with regard to antiquity as a custom should be practiced from times immemorial where as international law is not so rigid, even if a custom is practiced for a limited period of time it fulfills the condition of antiquity. In Municipal law a custom is required to be ancient and immemorial. But this is not necessary for an international custom. Art. 38 of the Statute of ICJ direct the world court to apply ‘international custom, as evidence of a general practice accepted as law. Emphasis is not given on a practice being repeated for a long duration.

**Uniformity and consistency**

There are two vital elements which constitute custom as a source of international law. They are:

a) The general practice of the States which considers custom as law;

b) Acceptance that it is binding in law (*opinio juris*).

**Generality of practice**

The statute of International Court of Justice provides that the court shall apply "international custom, as evidence of a general practice accepted as law". This practice is shown by the acts of States in their mutual relations with each other. The observance and acceptance of the practice gives birth to a customary rule of international law. When more and more states endorse this practice, it acquires the status of a universal custom.

The term state practice is self-explanatory the practice by states of certain international rules that demonstrate their view of the state of international law on a particular aspect. However such practice should be consistent, i.e. a state should have always maintained the same stance, and wide spread.

\[15\] Ibid, p.69

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**Dr. Pandhare B. D. [LL.M. Ph.D.] Asst. Prof. New Law College, Ahmednagar**  
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West Rand central gold mining company Ltd. v. R\textsuperscript{16}

The court ruled that for a valid international custom it is necessary that it should be proved by satisfactory evidence that the custom is of such nature that it has received general consent of the states and no civilized state shall oppose it.

**Right to passage over Indian Territory Case (Portugal v. India)\textsuperscript{17}**

ICJ pointed out that when in regard to any matter or practice, two states follow it repeatedly for a long time, it becomes a binding customary rule.

**Opinio juris sive necessitatis**

In the *North Sea Continental Shelf cases*,\textsuperscript{18} the International Court Justice pointed out that not only the acts concerned should amount to a settled practice, but they must also be such, as to be carried out in such a way, as to be evidence of a belief that this practice is rendered obligated by the existence of a rule of law requiring it. The need for such belief, i.e. the existence of a subjective element is implicit in the very notion of *opinio juris sive necessitatis*. The States concerned must, therefore, feel that they are conforming to what amounts to a legal obligation.

According to Tanaka and Sorensen, it is often difficult to discover the necessary *opinio juris* because there is an underlying notion that the State's adoption or acceptance of a particular practice is not clear. Since traditional international law consisted of customs it is known as customary international as there were very few treaties and conventions signed in those days. International custom because of its significance occupied the primary position under traditional international law.

**THE GENERAL PRINCIPLES OF LAW RECOGNIZED BY CIVILIZED NATIONS**

Article 38(1)(c) of the Statute of The International Court of Justice directs the court to apply "the general principles of law recognized by civilized nations" in deciding such disputes as are submitted to it in accordance with international law. The term “General principles of law” means those principles of law which are common and recognized by all the principal legal

\textsuperscript{16}(1905) 2 K.B. (291)
\textsuperscript{17}(ICJ Reports 1960, P.14)
\textsuperscript{18}I.C.J. Reports (1969), page 3,
systems in the world, the principles such as Justice, equity and conscience, Good faith, Res Judicata, Estoppel, Subrogation, Double Jeopardy and principles of natural justice.\textsuperscript{19}

The term "civilized nations", now has a redundant look. The present Statute of the International Court of Justice has been borrowed from or rather stepped into the shoes of the Statute of the Permanent Court of International Justice. The latter was established as per Article 14 of the Covenant of the League of Nations and inaugurated on 15 February 1922. At that time, only European States were considered to be the civilised and European States with the United States were supposed to have developed legal systems.\textsuperscript{20}

However, today we have 193 States which are members of the United Nations.\textsuperscript{21} Therefore, now the phrase "general principles of law recognised by civilised nations" means "general principles of law recognised in the legal systems of independent States".

In the absence of any express treaty or customary international law, general principles come to the rescue and fill in such gaps in international law. It includes principles incorporated in various municipal laws that are general in nature and commonly accepted by most states. They are seen as those basic legal principles which underline, and are common to, every legal system and which, being universally recognized, are known to all nations

**Equity**

Equity has also been a fertile field for the enunciation of general principles of law. In *Netherlands v. Belgium (Diversion of Waters from River Meuse case)*,\textsuperscript{22} Justice Hudson in his individual opinion said that "what are widely known as principles of equity have long been considered to constitute a part of international law, and as such they have been applied by the International Tribunals."

**Ex Aequo Et Bono**

Article 38(1) lists the four categories of sources of international law which the court is required to apply, in deciding a dispute referred to it. If the dispute cannot be decided by

\begin{itemize}
\item \textsuperscript{19} Ibid, p.75
\item \textsuperscript{20} Ibid, p.87
\item \textsuperscript{21} www. un. org
\item \textsuperscript{22}(1937) P.C.I.J. Series A.B. Case No. 70.
\end{itemize}
applying the provisions of clause (1), the court may still under article 38 (2) "decide a case in accordance with ex aequo et bono, if the parties agree thereto". Ex aequo et bono is a Roman law concept and is different from equity.

A case decided in accordance with ex aequo et bono is not decided on the basis of law but on the basis of “other considerations such as logic, reasoning and common sense. Whatever the court may in all circumstances regard as right and proper shall be applied”. The International Court of Justice has not yet decided any case on the basis of this provision of the statute. Some writers of international law have put judicial elections and the teachings of most highly qualified publicists of various nations as sources of international law.

**JUDICIAL DECISIONS**

According to Article 38(1) (d), subject to provision of Article 59 judicial decisions are subsidiary means for the determination of rules of law, thus judicial decisions unlike customs and treaties, are not direct sources of law, they are subsidiary and indirect sources of international law.

**INTERNATIONAL COURT OF JUSTICE**

The Statute of the International Court of Justice in Article 38(1) (d) designates them as "subsidiary means for the determination of rules of law". Judicial decisions do not make the law. They generally state the law. Such statements are taken as evidences of law. The doctrine of precedent does not apply in international law. Article 59 of the Statute of the International Court of Justice clearly provides that "the decision of the court has no binding force except between the parties and in respect of that particular case only". But this does not mean that the decisions of the court have no legal effect.

**INTERNATIONAL MILITARY TRIBUNALS**

International Military Tribunals such as the Nuremburg and the Tokyo tribunals constituted for the trial of major German and Japanese war criminals in 1945 and the Ad hoc International Criminal Tribunals for Yugoslavia in 1993 and Rwanda in 1994 have made...
significant contributions to the development of international law and on aspects of International humanitarian law.  

These principles laid down in the Nuremberg judgment have been adopted in the subsequent conventions such as the Genocide Convention of 1948.

**INTERNATIONAL CRIMINAL COURT (ICC)**

In the Nuremberg judgment, the tribunal made an individual accountable for his crimes in international law. It observed, "Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced." The Rome Statute of 1998 now directly brings an individual within the fold of international law for the crimes listed in the Statute of the International Criminal Court. It is expected that the court will cease to be a "giant without limbs" and will make substantial contribution in the growth and administration of international criminal law.

**DECISIONS OF NATIONAL COURTS**

The decisions of the court of every country show how the law of the nations in the given case is understood in that country will be considered in adopting the rule which is to prevail in that case. The decisions of the National courts may become the customary rule of International law in the same way as customs are developed

**JURISTIC WORKS ON INTERNATIONAL LAW**

Article 38(1)(d) also lists "the teachings and publications of most highly qualified publicists of various nations " as subsidiary means of determining a rule of international law. In the absence of established customary or treaty rules in regard to a particular matter, resort may be had to juristic work. These articles published by eminent jurists in the field of international law relating to contemporary problems faced by international law. Although juristic work cannot be treated as an independent source of international law, yet the view of the jurist may help in the

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23 ICJ Reports, 1949, p. 174
24 Ibid, p.190
25 PCIJ, Series A, No. 10, 1927, p. 18
development of law. The views of the jurist are not direct sources of international law. But they sometime become instrumental in the development of international customs.

The importance of the juristic writing has been stressed by Justice Gray as “when there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages, of civilized nations and as evidence of these, to the works of jurist and commentators who by years of labor, research and experience have made themselves peculiarly well-acquainted with the subjects which they treat. Such works are resorted to by judicial tribunals for trustworthy evidence of what the law really is.

**Paquete Habana Case** After relying on the juristic writing the Supreme Court of America ruled that the fishing vessels and unarmed sailors who pursued their work honestly and peaceably, could not be seized or apprehended during the state of blockade. International law exempts such fishing vessels and their sailors from seizure during the state of blockade.

### OTHER SOURCES OF INTERNATIONAL LAW

#### GENERAL ASSEMBLY RESOLUTIONS

General Assembly is not a world legislative body. It cannot legislate in regard to most political matters, it can only recommend. Although it is not a legislative body in the ordinary sense of the term, its law making powers have, however, generally been recognized in two special context

1) In respect to most of the internal operations of the U.N. and

2) In relation to the rules of international law which govern the conduct of member-states outside the UN.

The General Assembly resolutions are stepping stones and denote a stage in the process of political and legal development of international law. It is also one of the factors responsible for the development of international law.

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27 R. Y. Jennings, ‘International Lawyers and the Progressive Development of International Law’
28 (1900) 175 US 677 at P.700
However, a controversy has risen in respect of the legality of the General Assembly resolutions and declarations. On one hand a section of the jurists are of the opinion that the resolutions and declarations are only of political importance and have no legal significance. On the other hand another section of jurists are of the opinion that under specific situations they may have legal implications and also capable of having a binding effect.

The General Assembly of the United Nations consists of all the members of the United Nations. The Assembly has adopted various declarations and resolutions affecting the rules of international law. It's declarations and resolutions, when adopted unanimously, have much more impact. These declarations and resolutions are not legally binding, but still they play a vital role in the development of international law.\(^{30}\)

They have been called by Cheng as "instant international law". Similarly, the other documents of international character such as the Helsinki Final Act, 1975, the Bonn Declaration on International Terrorism, 1978 are described as international "soft law". These, although are not of legal nature, still have an impact on international law.\(^{31}\) Therefore it is certain that general international law was fabricated within the United Nations by the United Nations.

**SECURITY COUNCIL RESOLUTIONS**

There is absolutely no controversy regarding the binding effect of the resolutions of the Security Council relating to the enforcement measures under chapter VII of the United Nations Charter as they are a potential source of international law. The binding nature of the resolutions of the Security Council is evident from the fact that Article 25 of the United Nations Charter imposes an obligation on the members of the United Nations to accept and implement the decisions of the Security Council.

**JUS COGENS**

*Jus Cogens* is a peremptory norm of general international law which finds express mention in the Convention on the Law of the Treaties, 1969.\(^{32}\) It is a norm thought to be so


\(^{31}\)Ibid, p.4

fundamental that it invalidates rules consented to by States in treaties or custom. The term *jus cogens* has been translated into English as "peremptory norm".

Article 53 of the Convention on the Law of the Treaties deals with it. In *North Sea Continental Shelf cases*, the International Court of Justice just refers to it "without attempting to enter into" the rule of *jus cogens*. The concept of *jus cogens* has not yet crystallised. Article 64 of the Convention on the Law of the Treaties provides that "if a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates".

**ERGA OMNES**

*Erga Omnes* means in relation to all. In international law some obligations are imposed against all States but in certain cases the defaulting State alone has the obligation. However, certain States are entitled to invoke obligations *erga omnes* in proceedings before the International Court of Justice, and resort to counter measures in response to serious *erga omnes* breaches. This concept was recognised by the International Court of Justice in the *Barcelona Traction case*.

**CONCLUSION**

After having discussed the different sources of international law, the next important point that deserves our attention is the order in which these sources of international law are to be used. An authoritative order of the use of sources of international law is given in Article 38 of the statute of ICJ i.e. a) International Conventions 2) Customs 3) General Principles 4) Judicial decisions and juristic writings. However the world court in *Nicaragua V. U.S.A.* by majority has taken the view that the sources of International law are not hierarchical but are necessarily complimentary and inter related.

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33ICJ Reports, (1969),
34ICJ Reports. (1970).
351986 ICJ 14