THE RELEVANCE OF CUSTOMARY INTERNATIONAL LAW IN MODERN INTERNATIONAL RELATIONS

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ABSTRACT

A key tenet of international law, customary international law (CIL) continues to have a significant impact on diplomatic relations, global governance, and the creation of new standards in a world that is becoming more and more codified. This study looks at CIL as a set of unwritten laws that are based on states' regular practices and the understanding that these actions are motivated by legal obligations (opinio juris). The paper describes the two components of CIL, opinio juris and state practice, highlighting their crucial role in creating legally binding international norms that endure even after formal treaty ratification. The development of CIL is specifically discussed, along with its historical underpinnings, authoritative articulation in Article 38(1) of the ICJ Statute, and ongoing discussions regarding its identification and application in light of current issues like fragmentation, non-traditional scholarship, and the emergence of environmental and human rights law. The research emphasizes CIL's "automatic" binding effect, its gap-filling role in the absence of treaties, and its adaptability to complex and emerging areas of international concern through a thorough examination of key case law, academic opinion, and statutory provisions. With an emphasis on India's constitutional framework and jurisprudence, the study delves deeper into the relationship between CIL and municipal legal systems. It illustrates how the judicial acceptance of CIL and certain international treaties marked the shift from dualism to monism. The study comes to the conclusion that, in spite of difficulties and varying interpretations, CIL's universal applicability, normative power, and potential to influence both domestic and international law confirm its ongoing significance for modern international relations.

Introduction:-

Customary International Law (CIL) serves as a fundamental component within the complex structure of international relations, significantly impacting global governance and diplomatic discussions. It can be described as a set of unwritten rules and customs which arise from states' consistent activities and are seen as obligatory by virtue of their legality. For formal treaties and agreements to be strengthened and supported, CIL is necessary. Customary law has developed over many centuries, starting with ancient customs and developing in tandem with the establishment of structured civilizations. Its recognition as a legitimate source of international law began to gain momentum, initially based on the customary actions of states and communities. The basic concepts of the idea were first defined by early legal scholars such as Grotius and Vattel, who stressed the significance of state practice and opinio juris as essential elements for the development of customary standards.

International law is defined as "the law which regulates the interaction of nations; the law of nations or the customary law which establishes the rights and governs the interaction of independent states in peace and war," according to Black's Law Dictionary. Numerous sources have contributed to the development of international law since its inception, including treaties, customs, court rulings and general principles of law. The most authoritative statement about the origins of international law is generally acknowledged to be found in Article 38(1) of the Statute of the International Court of Justice. There are several formal and substantive distinctions between the various legal sources. One could argue that the primary source of international law is customary law. Additionally, it creates regulations that all states must abide by. However, customary international law is an unwritten source because it is not supported by any written instruments. The use of the word "custom" makes the reference obvious to a routine behavior pattern. Customary international law consists of two primary components. The first is State Practice (usus), while the second is the idea that, depending on the rule's nature, such a practice is necessary, forbidden, or permitted as a matter of law (opinio juris).

For better or worse, the two long-standing foundations of customary international law have faced significant challenges in recent decades. These two components, the consistent actions of states[1], along with the recognition (by the observing state) that such actions are executed out

[1] Y. Simbeye, Immunity and International Criminal Law (2004), at 37–38.

of a sense of legal duty (referred to as opinio juris),[2] are no longer regarded with the same level of importance they once enjoyed. In fact, since the 1970s, a variety of newer and non-traditional scholarship has surfaced, arguing against rigid adherence to state practices and opinio juris when establishing customary international law, and instead promoting a more flexible interpretive approach. In this context, additional scholars have advanced the idea that multilateral conventions or treaties with widespread ratification, which have created prohibitions on human rights offenses such as genocide, torture, and slavery serve as validation of customary international law that is obligatory for all states, not merely those that have signed.

Elements of Customary International Law:-

Custom can be defined as the legal duty that results from people's consistent behavior that sets expectations. But again, it is common knowledge that a practice alone cannot establish an international rule. The International Court of Justice (ICJ) has stressed in the **Continental Shelf, Libya vs. Malta**[3] decision that the courts will only adopt a standard practice that is recognized as law. In **Continental Shelf, Libya vs. Malta** it was highlighted that, *"It is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and opinio juris of States, even though multilateral conventions may have an important role to play in recording and defining rules deriving from custom, or indeed in developing them".*[4]

Consequently, it can be said that two conditions must be met for a conventional norm to exist:

1. The material/objective element – State Practice

2. The subjective element – Opinio Juris

(1) The Objective Element - State Practice

Opinion juris and state practice are the two main components that must come together to produce customary international law. State practice refers to how states consistently operate and behave in the international arena. It is clear from article 38(1) that "a general practice" is

[2] 2 P. Malanczuk (ed.), Akehurst's Modern Introduction to International Law (1997), at 44.
[3] Continental Shelf, Libya v Malta, [1985] ICJ Rep 13
[4] Continental Shelf (Libyan Arab Jarnahiriya vs, Malta), Judgement, I.C.J. Reports 185, (13), para 27

the primary requirement for the growth of customary international law. Since states really follow this criterion, it can be decided objectively. It is often stated that this "practice" is restricted to constructive actions rather than assertions and claims.[5] The predominant view in international society is that state practice may include not only spoken words but also silence, omission, and abstention.[6] A number of sources, such as published materials, official declarations, state statutes, and court rulings, provide evidence of state practice. However, state practice evidence, such as communication and legal advice, is rarely revealed.[7]

Under Article 38(1)b, the ICJ has attempted to make clear what constitutes genuine state practice through its decisions. While total uniformity is not required, the ICJ ruled in the Anglo-Norwegian Fisheries case that significant uniformity in the practice is.[8] It "does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule," the court ruled in the Nicaragua ruling. The Court thinks that in order to conclude the existence of customary rules, it is sufficient that states' actions generally follow them and that instances of state actions that deviate from one specific rule should typically be interpreted as infringements of that rule rather than as signs that a new rule has been recognized.[9] As a result, a significant portion of state conduct that opposes the purported rule hinders the development of a new traditional rule.

No specific amount of time is needed as long as the generality and consistency are established. Airspace and continental shelf laws have changed in comparatively short periods of time.[10] As long as state practice has been "both extensive and virtually uniform" during the relevant period, the International Court of Justice (ICJ) ruled in the North Sea Continental Shelf case that "the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new customary international law."[11]

It involves engaging in specific activities or refraining from specific behaviors on a regular basis, showing a general practice that is adhered to out of a sense of legal obligation. The character of governmental practice is the first and most controversial subject. We are more interested in the questions one must ask oneself before determining whether, for instance, press

[5] E.g. the dissenting opinion of Judge Read in the Fisheries case, ICJ Reports 1985, p. 191.
[6] Malanczuk 1997, p. 43, Tunkin, 2003, p. 124f.
[7] Malanczuk 1997, p. 39.
[8] Fisheries case, ICJ Reports 1951, p. 131, 138
[9] Nicaragua case, ICJ Reports 1986, p. 98.
[10] Crawford 2012, p. 24.
[11] North Sea Continental Shlef cases, ICJ Reports 1969, p. 43.

comments constitute state practice than in determining which specific occurrences constitute state practice and which should be disregarded: What is meant by practice? The apparent division between "acts" and "statements" conceals a more significant distinction: one argument views practice as the exercise of the right asserted, while the other incorporates the claims themselves, obfuscating the distinction between "state practice" and "opinio juris." Since a state's behavior is what it does (the "objective element") and serves as our sole reference to what it wants or "believes" to be the law, everything that a state can do or not do can be categorized as "state practice."

(2) The Subjective Element - Opinio Juris

Generally, it means the opinion of law. To distinguish between a rule of international comity, which relies on a regular practice in interstate interactions but lacks the sense of legal duty, and a rule of customary international law, opinio juris is needed. In **North Sea Continental Shelf Case**, the ICJ has ruled that *"Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, the existence of a subjective element, is implicit in the very notion of the opinio juris sive necessities."*[12] Every nation is bound by customary international law. nevertheless, there are also circumstances in which customary international law may not apply to certain states or may only apply to a small number of states; they include: Local or special custom; and the persistent objection theory and subsequent objection theory.[13]

Additionally, customary international law cannot be identified solely by evidence of state practice. Determining whether particular practices have evolved into standards of customary international law requires an understanding of opinio juris. Political expediency is one of the many non-legal reasons why states may act in certain ways. Opinion juris cannot be only deduced from State practice as these non-legal factors may affect their actions. Establishing State opinio juris is therefore not always so simple. States ought to ideally clarify which activities they believe to be legally required, for instance by public declarations or diplomatic interactions. However, state opinions on juris are not always forthcoming.

[12] North Sea Continental Shelf Case (Federal Republic of Germany vs. Denmark; Federal Republic of Germany vs. Netherlands), Judgment, I.C.J. Reports 1969, p. 77.
[13] Andre de Rocha Ferrira, "Formation and Evidence of Customary International Law." UFRGS Journal. 2013, p.192.

One could argue that the core idea of customary international law is opinio juris. It is the most contentious and poorly understood aspect of how customary international law operates. The key issue at the center of the discussion is that, on the one hand, customary lawmaking appears to be indirect and inadvertent by nature. However, passing legislation typically needs some kind of deliberate action, an act of will. The agreement or permission of states to establish obligations binding upon them has historically been highly valued in the international law system; the adage "no state can be bound without its will" may be a prime instance.

"General practice" will not become customary international law unless it is "accepted as law," which means that the practice is carried out of a sense of legal obligation, according to article 38(1)b of the ICJ Statute. However, in addition to the regulations that impose obligations under international law, there are also permissive regulations, such as the authority to prosecute foreign people for offenses committed on state soil. Regarding such regulations, the term "opinio juris" refers to the practice being carried out in a way that is deemed to be allowed by international law.[14]

Thus, we might conclude that a state practice needs conviction in order to be significant. To differentiate between a rule of customary international law and a norm of international comity which is founded on a consistent practice in interstate interactions but lacks the sense of legal obligation so the opinio juris is ultimately required.[15]

Relationship between Customary International Law and the Indian Constitution:-

The controversial issue generally arises is whether customary international law is truly a State law or not.[16] The relationship between Indian municipal law and customary international law is not specifically addressed in the country's Constitution or other laws. Following the adoption of the Constitution, Indian courts relied on English law and even US rulings for direction without considering whether they were beneficial to India. In the case of Birendra Bahadur Pandey v. Gramophone Co.,[17] the Supreme Court also took a different stance. The Court's discussion of the connection between customary international law and municipal law in general

[14] Malanczuk 1997, p. 44.
[15] Thomas M. Franck, "Legitimacy in the International System", The American Journal of International Law, Vol. 82, No. 4, Oct. 1988, p.705-707.
[16] H.H. Koh, Is International law Really State Law, 111 Harv. L. Rev. 1824 (1998); see also Bradly & Golsmith, Customary International as Part of law of the Land, 110 Harv. L. Rev. 815 (1998).
[17] Gramophone Co. v. Birendra Bahadur Pandey, AIR 1984 SC 667.

was one of the clearest examples. The Court came to the conclusion that India adheres to the Doctrine of Incorporation. It is unfortunate that Indian courts have typically relied on English and occasionally American rulings for direction rather than using their own sources and guidelines. However, it's crucial to note that no norm of customary international law ever needs to be specifically taken into account when making a final decision.

Analyzing the connection between municipal law and international law, as stated in the Constitutional framework, is crucial. In Vellore Citizen Welfare Forum v. Union of India[18] and A. P. Pollution Board v. Prof. M. V. Nayudu (Retd.)[19], the Supreme Court's obiter. Additionally, PUCL v. Union of India[20] highlighted a debate in the Indian setting on the acceptance of customary international law norms as part of domestic law. All court rulings address the perennially divisive topic of how international law and local law relate to one another in common obiter. Regarding the area of domestic law, the issue has broad ramifications.

By judicially embracing not only CIL but also international treaties, including those that India has not ratified, India has in fact shifted from the dualism concept to monism. In Vellore Citizens Welfare Forum v. Union of India[21], the Supreme Court ruled that customary rules are considered to be part of Indian domestic law if they do not conflict with municipal legislation. Subsequent rulings have confirmed this principle. Based on the Vellore Citizen case, the Supreme Court ruled in Research Foundation for Science v. Union of India[22] that the precautionary principle, a notion of environmental law, is a part of CIL and, therefore, Indian law. The Supreme Court's incorporation of CIL has been inconsistent. Even though the concept of non-refoulment is a component of CIL, the court sadly declined to rule against the deportation of Rohingya refugees to Myanmar in the 2021 case of Mohamad Salimullah v. Union of India[23]. Returning refugees to nations where they clearly face persecution is forbidden by the principle of non-refoulment. Curiously, however, the court chose not to include this idea in Indian law. International lawmaking is frequently criticized for lacking democracy. One could argue that such a democratic gap is legitimized by the judiciary's incorporation of international law without parliamentary review. Because it equates to the judiciary overriding the Parliament, the judicial integration of international law is thus questioned. The committee

[18] (1996) 5 SCC 647
[19] (1997) 1 SCC 301
[20] (1999) 2 SCC 710
[21] (1996) 5 SCC 647
[22] (2005) 10 SCC 510
[23] AIR 2021 SC 1789

also believes that this can turn into a point of disagreement between the state's other branches and the judiciary. 'International friendliness' under Article 51(c)[24] would undoubtedly create a strong presumption that neither Parliament nor the Constitution meant to violate international law. It is desirable and crucial to include more explicit provisions in the Indian Constitution in order to establish a connection between the Constitution and international law clear. To execute this on ground level, careful thought and action need to be taken. All of these principles are outlined in clear terms in Articles 13 and 14[25] of the 1949 Draft Declaration on Rights and Duties of State, which was created by the International Law Commission. It states that no State may invoke its Constitution or local laws as a defense for violating an international law principle. The link between international law and municipal law is not specifically addressed in the Constitution, which is notable in contrast to many other constitutions. However, in a number of sovereign immunity cases and, more recently, environmental litigation, the courts have used the principles of customary international law.

Relevance of Customary International law in modern world: -

In 1946, there were 74 independent nations in the world; by 1950, there were 89, and today, there are 195 nations with their own sovereign states. It is becoming more difficult to adhere to a consensus-building pattern of Customary International Law given the growing number of sovereign nations. These days, codification and express ratification are vital for all norms that must be legally enforceable. In the past, diplomatic immunity was a fundamental component of customary international law and did not need to be codified; nevertheless, in the present day, it has been strengthened by bilateral agreements, investment insurance, and other means.[26] Uncodified customary laws also play a pivotal part and are crucial because their scope is broader and codified laws only apply to people who have given their consent to follow them. In contrast, humanitarian customary laws are simply binding on everyone, and all laws must be made with all customary laws in mind.

It is evident that states' patterns of behavior are radically shifting from being entirely custom-driven to being governed by the law. This included a new aspect that tends to increase the pattern's stability and dependability. The fact that all international laws are founded on common

[24] Indian Constitution, 1949, art.51, cl.(c)
[25] "Draft Articles on State Responsibility", 2 Yearbook of International Law Commission (1973), (184, 286, 288): (GAOR, IV. Supp. 10(A/925).
[26] Sushant Biswakarma, Importance of Customary International Law, https://blog.ipleaders.in/importancecustomary-international-law/.

practices does not imply that usual rules are becoming outdated. International law will be more unified and consistent if such practices are codified. Nonetheless, the majority of international laws are founded on customary standards, and the idea behind all of these standards is the same: they have been codified for effectiveness and sufficiency.

The global applicability of CIL is one of its most important characteristics. Customary rules apply to all states and, in certain situations, non-state actors, in contrast to treaty law, which solely binds its signatories. This "automatic" binding aspect guarantees that fundamental standards, such as the bans on slavery, torture, and genocide, which are acknowledged as jus cogens or peremptory norms, apply even to governments that are not parties to particular treaties. CIL serves as the main source of law in cases when treaties are silent or nonexistent, bridging the gaps and offering direction for state action.

A substantial amount of the body of international human rights law has been established through treaties like the 1966 International Covenant on Civil and Political Rights[27] and the 1966 International Covenant on Economic, Social, and Cultural Rights, as well as declarations and resolutions like the Universal Declaration itself. Resolutions of the General Assembly, for instance, are only recommendations given to member states in line with Article 13 of the U.N. Charter[28]; they do not immediately establish legally obligatory responsibilities. However, Article 34 of the Vienna Convention on the Law of Treaties makes it plain that only ratified states are bound by treaties, stating that "a treaty never create either obligations or rights for a third State without their consent." Nonetheless, Article 38 of the Vienna Convention states that a non-party to a treaty containing a particular norm may also be bound by a comparable norm established in customary international law. However, nations' actual "practices" of upholding human rights are, at best, inconsistent with human rights standards; frequently, they commit flagrant violations of both human rights and dignity.

Conclusion:-

In the present framework of international relations, customary international law is still vital since it sets universal standards and fills in the gaps left by formal treaties. By means of states' consistent actions and their belief that such behavior is required by law (opinio juris), CIL

[27] International Covenant on Civil and Political Rights, https://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx.
[28] Human Rights Education Project and Idea, https://www.humanrights.is/en/human-rights-education-project/human-rights-concepts-ideas-and-fora/human-rights-fora/the-united-nations.

fortifies the legal system and guarantees that basic norms, like the bans on slavery, torture, and genocide, are enforceable everywhere, even by states that are not signatories to specific treaties. Despite current obstacles brought on by growing codification, changing state behavior patterns, and changing scholarship, CIL's adaptability allows it to continue to be useful, addressing new gaps and adding timeless, widely recognized principles to treaty law. Though debates about parliamentary supremacy and judicial activism continue, the Indian judiciary has embraced CIL as a means of promoting human rights, environmental conservation, and democratic ideals. The ongoing development and acceptance of customary norms guarantees that CIL will continue to be a vital and dynamic source of authority in forming a just international order as international law becomes more intertwined with national legal systems and global governance. The study emphasizes that even though there are still issues like fragmentation, inconsistent state behavior, and changing normative expectations, CIL is still essential, especially in areas where treaty law is silent, during emergencies, and when tackling universally important issues like humanitarian law, environmental protection, and human rights. CIL's normative authority and universal applicability are further strengthened by the formation of peremptory standards (jus cogens). In conclusion, the emergence of treaty law does not lessen the importance of CIL in contemporary international relations; on the contrary, it enhances and strengthens it. CIL's adaptability, moral authority, and universality guarantee its continuous relevance as the world community struggles with novel and intricate transnational concerns. Greater clarity in its identification, more inclusive interpretations that take into account the practices of other states, especially those in the Global South, and a determined attempt to reconcile it with local legal systems are all necessary to increase its role. Only then will CIL be able to reach its full potential as a 21st-century pillar of international law and diplomacy.