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Prasanna S,

Chairman of Institute of Legal Education (Established by I.L.E. Educational Trust)

No. 08, Arul Nagar, Seera Thoppu,

Maudhanda Kurichi, Srirangam,

Tiruchirappalli – 620102

Phone : +91 94896 71437 - info@iledu.in / Chairman@iledu.in

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SOURCES OF THE INTERNATIONAL LAW OF THE SEA

AUTHOR - ANTONY MERCY. F, LLM STUDENT AT THE TAMIL NADU DR. AMBEDKAR LAW UNIVERSITY, CHENNAI

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1.Abstract

"Sea" denotes to vast body of waters consisting of numerous uncontrolled natural resources. So, to regulate the administration and functioning of this gigantic body of waters and all those which dwells on this body of waters, a branch of public international law has been emerged. The primary function of the international law involves the spatial distribution of the jurisdiction of the states. This essay is mainly focus on the Sources of Law of sea. The law of the sea is a body of customs, treaties, and international agreements by which governments maintain order, productivity, and peaceful relations on the sea. Further, this paper discusses about the international treaties and agreements and customary practices followed by the states.

Keywords: *Sources – International – Law – Sea – Customs – Agreement – UNCLOS*

2. Introduction

The international law of the sea, also known as the law of the maritime domain, draws from a range of sources to govern the use and management of oceans and seas. These sources can be broadly categorized into primary and secondary sources, with the former holding greater legal weight and authority the vast expanse of the world's oceans is governed by a complex and multifaceted legal framework known as the law of the sea. This intricate system draws upon a variety of sources to establish the rights, freedoms, and responsibilities of nations in their use and management of the maritime domain. The law of the sea is commonly associated with an international treaty, the United Nations Convention on the Law of the Sea 1982 is called the "constitution for the sea".[44]This is major primary source of the international law of the sea. Understanding these sources is crucial for navigating the intricate web of regulations and ensuring sustainable and peaceful utilization of the oceans.

3. Importance of the law of Sea

The seas have historically performed two important functions: first, as a medium of communication, and secondly as a vast reservoir of resources, both living and non-living. Both of these functions have stimulated the development of legal rules**.** The Ocean as a subject of the law of the sea is one single unit and is essential characterised by the continuity of marine spaces. In other words, as Gidel pointed out, the marine spaces governed by the law of the sea must communicate freely and naturally with each other all over the world[45].

The law of sea plays a dual role in international relations. First, the primary function of international law involves the spatial distribution of jurisdiction of States, and the same applies to the law of the sea. Second, given that the ocean is one unit in a physical sense, the proper management of the oceans necessitates international cooperation between states.

[44]. *Law of the Sea*, Available at: https://worldoceanreview.com/en/wor-1/law-of-the-sea/a-constitution-for-the-seas /

[45]. G.Gidel, Le droit international public de la mer (Paris, Duchemin, 1981) Available at: Yoshifumi Tanaka " The International Law of the Sea" (Cambridge University Press, 1st Edn, 2012).

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The law of the sea also embodies certain legal concepts[46] including:

- Sovereign immunity, protecting warships and other government vessels and aircraft from search and seizure by foreign States without permission.
- Environmental and safety regimes that allocate responsibility among the flag States with which vessels are registered, the coastal States that they transit, and the port States that they visit.
- A systematic and flexible regime of dispute resolution intended to facilitate the peaceful settlement of disputes while providing compulsory dispute resolution when parties cannot reach agreement on their own.

The law of the Sea provides a legal framework for ensuring international cooperation in marine affairs, thereby safeguarding the common interests of the international community as a whole. It must be concluded, therefore, that rivers and lakes are part of the terrestrial territory and are not governed by the law of the sea, the ocean is understood to cover three elements, i.e. seabed and the subsoil, adjacent water column and the atmosphere above the sea.

4. Sources of the law of the sea

The sources of International Law are therefore twofold, namely, express consent which is given when states conclude a treaty stipulating certain rules for the future international conduct of the parties; tacit consent, implied consent or consent by conduct, which is given through states having adopted the custom of submitting to certain rules of international conduct, treaties and custom, must, according to Oppenheim, be regarded as the exclusive sources of the Law of the Nations. 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 jurisdiction of the kind possessed by national courts. The result is that international law is made largely on a decentralised basis by the actions of the 192 States which make up the international community that is United Nations. The Statute of the International Court of Justice, Article 38 Identifies five sources: -

a) Treaties between States;
b) Customary international law derived from the practice of States;
c) General principles of law recognized by civilized 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". Treaties are binding

The historic functions of the law of the sea have been long recognized as that of protecting and balancing the common interests, inclusive and exclusive of all people in the use of enjoyment of the oceans while rejecting all egocentric assertions of special interests in contravention of general community interest. The classical law of the sea divided the hydrospace into the territorial and the high seas, endowing the former to the coastal state, and keeping the latter free and open to states under the doctrine of the "freedom of the sea".

5. Formal Sources:

Salmond defines a formal source of law as that from which a rule of law derives its force and validity.[47] The primary **s**ource of a law to mean its beginning as law, clothed with all the authority required to give its binding force, then regarding international affairs there is but one source of law, and that is the consent of nations. This consent may be either tacit or express. The first is shown by custom, the habitual observance of certain rules of conduct by states in their mutual dealings though they have not

[46] .Introduction- Law of the sea Available at: https://sites.tufts.edu/lawofthesea/introduction/ ,

[47]. Salmond on jurisprudence (9th Edn)

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solemnly bound themselves in words to do so. It is expressed by long usage, practice, and custom. Express consent is given using treaties, or international documents having the force of treaties

➢ **Customary Law**

Customary Law is unwritten law derived from consistent and widespread state practice accompanied by the belief that such practice is obligatory under international law. Article 38b of the International court of Justice statue recognized as 'International Custom, as evidence of general practice accepted as law'. In the law of the sea, customary law fills gaps not covered by UNCLOS or clarifies its provisions.

Examples of customary law in the sea:

- Innocent passage: Right of foreign ships to pass harmlessly through territorial waters of another state.
- Freedom of navigation: Right of all states to navigate freely on the high seas.
- Exclusive economic zone (EEZ): Coastal state's exclusive rights to resources and jurisdiction within 200 nautical miles of its coast, even if not explicitly mentioned in UNCLOS.
- Continental shelf: Coastal state's sovereign rights over the resources of the seabed and subsoil beyond its EEZ.

Custom may be treated as a source of law if it has the following attributes:

1. Antiquity
2. Certainty
3. Continuity
4. Consistency and
5. Enjoy ability as a right

The first category is general customary law. While treaties are binding only upon the parties to them, it is widely accepted that rules of general customary law are binding upon all states in the international community. The second Category involves special or local customary law, which is applicable only within a defined group of states. It may exist between only two states.[48] Determining the existence of customary law can be complex and sometimes contested, with disagreements on the interpretation of state practice and opinio juris.

- **What is State Practice?**

Customary law is state practice that has been accepted as law. It can evolve, with new practices emerging and older ones potentially falling into disuse. Customary law can evolve, with new practices emerging and older ones potentially falling into disuse. State practice includes not only physical acts, namely what they do, but also what they say. It also includes omission because some rules of international law prohibit certain conduct by states.

In the *North Continental Shelf cases*,[49]stated that general or customary law rules and obligations 'by their Nery nature, must have equal force for all members of the international community, and cannot, therefore, be the subject of any right of unilateral exclusion exercisable at will be any one of the in its own favor". In this regard, the court further specified that general state practice includes the practise of states whose interests are specifically affected.

In the *Right of passage over Indian Territory case* [50] held that 'It is difficult to see why the number of states between which a local custom may be established based on long practice must necessarily be larger than two'.

In the *South China dispute* [51] One entity claiming the titles and rights within the area of the South China Sea, namely Vietnam, Malaysia, Brunei, and Taiwan. Based on the claims by each state, the overlapping claims between the states can be identified. Respecting island sovereignty, all states, except Brunei, claim part or all of the islands in this area. Regarding maritime entitlements, based on UNCLOS, states like Vietnam, Malaysia and the Philippines claim

[48]. Supra pg 4
[49]. North Continental Shelf cases, (ICJ reports 1969)
[50] . Right of passage over Indian Territory case (ICJ Reports 1960)
[51]. South china arbitration ICGJ 495 (PCA 2016)

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an EEZ and CS either from the mainland or archipelago, while China claims an EEZ and CS from the islands. Meanwhile, based on customary law, China may also claim historic rights from the U-shaped line.[52]

State practice as Customary Law refers to the consistent and widespread practice of states across time. It involves states consistently engaging in similar acts or conduct related to a particular issue. For example, if a majority of states consistently exercise exclusive control over resources within 200 nautical miles of their coasts, it strengthens the argument for this being customary law. The practice must be widespread, meaning a significant number of states participate, not just a select few. It must also be consistent, indicating a regular and ongoing pattern of behaviour, not isolated incidents.

- ***Opinio Juris***

Opinio juris, meaning "opinion of law" or "the belief that a practice is required by law," is a crucial element in the formation of customary international law. In the context of the Law of the Sea, it plays a vital role in establishing the legal obligations of states and shaping the norms that govern their activities in the oceans. It's important to remember that *opinio juris* is not static. It can evolve as state practice changes and new interpretations emerge. For instance, the right of innocent passage through territorial waters was initially a controversial concept, but over time, with consistent state practice and growing acceptance, it became firmly established as customary law. In *Corfu Channel case* [53]cemented the right of innocent passage as a fundamental principle of the Law of the Sea The right of innocent passage allows ships of foreign states to pass harmlessly through the territorial waters of another state. This right is crucial for international navigation and trade. Judge Alvarez emphasized the importance of *opinio juris* in establishing customary law and considered it present in the case, though he ultimately dissented on the merits of the UK's claims. While the ICJ didn't explicitly address it in the majority decision, the separate opinions demonstrate its influence in shaping the Court's reasoning and ultimately impacting the outcome of the case. Judge Tanaka, in his dissenting Opinion in the *North Shelf Continental Cases*,[54] Remarked that there was: "no other way than to assert the existence of *opinio juris* from the fact of the external existence of a certain custom and its necessity felt in the international community, rather than to seek evidence as to the subjective motives for example of state practice"

Evidence of *Opinio Juris*:

- States can express their belief in the legal obligation of a particular practice through official statements, declarations, and reservations made in treaties or within international organizations like the United Nations.
- When states enact laws and regulations reflecting a customary rule within their legal systems, it indicates their acceptance of its binding nature.
- National courts and international tribunals acknowledging and applying a customary rule in their judgments strengthen its existence and provide evidence of opinio juris.
- Widely accepted legal commentary and the consistent lack of objections from states towards a particular practice can also be seen as evidence of opinio juris.

Opinio Juris cannot exist in isolation. It must be accompanied by widespread and consistent state practice. This means that states must not only act in a certain way but also believe that they are legally bound to do so. For example, if a majority of coastal states consistently claim exclusive rights to resources within 200 nautical miles of their coasts (the Exclusive Economic Zone), and do so with the belief that this is a requirement under international law, then this practice can be considered customary law. The

[52]. Xuechan Ma, Atlantisch Perspectief, *The South China Sea dispute: Perspective of international law,* Available at: https://www.jstor.org/stable/48581297?seq=1
[53] . I.C.J. Reports 1949
[54] . Supra

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United Nations Convention on the Law of the Sea (UNCLOS) codified many existing customary rules in the Law of the Sea.

Protest, acquiescence and change in customary law

The interplay between protest and acquiescence shapes the evolution of customary law of the sea. If widespread and consistent protests meet a new practice, it is unlikely to become customary law. Conversely, sustained acquiescence can solidify a new practice as a binding rule. However, change in customary law is not a zero-sum game. In some cases, protests can chip away at existing customary rules, paving the way for their modification or even extinction. Conversely, acquiescence can reinforce existing rules, providing additional strength and clarity. Examples: The establishment of 12 nautical miles as the limit of the territorial sea was shaped by both protests and acquiescence. While some states initially objected, the practice gained widespread acceptance over time, solidifying into customary law. The claim of extended continental shelves beyond the 200 nautical mile exclusive economic zone has been met with significant protests from some states, raising questions about its potential status as customary law.

Customary Law is thus established by a pattern of claim, absence of protest by states particularly interested in the matter at hand and acquiescence by other states. Together with related notions such as recognition, admission and estoppel, such conduct or abstinence from conduct forms part of a complex framework within which legal principles are created and deemed applicable to states.[55]

The chamber of the International Court in the *Gulf of Maine Case*[56] defined acquiescence as equivalent to tacit recognition manifested by unilateral conduct which the other party may interpret as consent' and as founded upon the principle of good faith and equity.

The decision in the *Anglo- Norwegian Fisheries Case*[57] may appear to suggest to that where a state acts contrary to an established customary rule and other state acquiescence in this, then that state is to be treated as bound by the original rule. The court noted that 'in any event the .... rule would appear to be inapplicable as against Norway in as much as she had always opposed any attempt to apply it to the Norwegian Coast. In other words, a state opposing the existence of a custom from its inception would not be bound by it. This is known as the persistent objector rule.

Therefore, that customary rules are binding upon all states except for such state as have dissented from the start of that custom. This raise the question of new states except for such states and custom, for the logic of the traditional approach would be for such states to be bound by all existing customs as at the date of independence. The opposite view, based on consent theory of law, would permit such states to choose which customs to adhere to at that stage, irrespective of the attitude of other states[58].

- **Regional and local custom**

Regional and local customs play a dynamic role in the law of the sea. While the United Nations Convention on the Law of the Sea (UNCLOS) 1982 forms the primary framework for international maritime law, customary practices at regional and local levels can supplement or even modify its provisions in certain circumstances. However, navigating this interplay of legal regimes requires careful consideration of several factors. Regional and local customs cannot contradict the provisions of UNCLOS. If a conflict arises, UNCLOS prevails. For a custom to be recognized, there must be consistent practice accompanied by the belief that such practice is obligatory (opinio Juris). Evidence for both elements is crucial for

55. Sinclair, 'Estoppel and acquiescence'
56. Gulf of Maine Case ICJ reports 1984
57. Anglo- Norwegian Fisheries Case [1951] ICJ Rep 116
58 Tunkin, "Theory of International Law"

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establishing the custom's legal validity. Regional or local customs should not be discriminatory towards non-party states or individuals.

In the *Right of Passage over Indian Territory case*[59] Portugal claimed that there existed a right of passage over Indian territory as between the Portuguese enclaves and this was upheld by the International Court of justice over Indian's Objections that no local custom could be established between only two states. The court declared that it was satisfied that there had in the past existed a constant and uniform practice allowing free passage and that the practice was accepted as law by the parties and has given rise to a right and correlative obligation.

In the *North Sea Continental Cases*[60] dispute over the continental shelf in the North Sea. Germany and Denmark argued for a regional customary rule allowing for an equidistant delimitation line, deviating from the UNCLOS provisions based on geological realities. The International Court of Justice (ICJ) recognized the practice but ultimately deemed it inapplicable due to insufficient evidence of opinio juris.

In *M/V Saiga case*[61] *(Panama v. Guinea-Bissau, 2014)* the Panamanian ship detained by Guinea-Bissau claiming a regional custom allowing arrest for alleged environmental damage. The International Tribunal for the Law of the Sea (ITLOS) recognized the right to enforce environmental laws but rejected the specific regional custom due to lack of evidence.

Various Fisheries Cases in several regional agreements and customary practices regarding fisheries management coexist with UNCLOS provisions. The North Pacific Fur Seal Convention and Baltic Sea fisheries regime are examples of regional regulations supplementing UNCLOS. Courts and tribunals increasingly consider traditional fishing practices of coastal communities alongside broader conservation objectives. This is because local customs are an exception to the general nature of customary law, which involves a fairly flexible approach to law making by all states. Exceptions may prove the rule, but they need greater proof than the rule to establish themselves.

- **International convention and Treaties**

International convention and Treaties is one of the source of law of the sea under Article 38 of ICJ Statue. Therefore, United Nations Convention on law of sea 1982 is considered to be a source. International agreements are formal understandings or commitments between two or more countries. An agreement between two countries is called 'bilateral' while an agreement between several countries is 'multilateral'. The countries bound by an international agreement are generally referred to as 'States Parties'. Under International law, a treaty is any legally binding agreement between states treaty can be called a Convention, a Protocol, a Pact, an Accord, etc., It is the content of the agreement, not its name, which makes it a treaty.

Explicit reference to *pacta sunt servanda* in an international legal instrument was first made when drafting the Vienna Convention on the Law of Treaties of 1969 (VCLT). This document, which is widely considered to be the most definitive authority on treaty law and practice, refers to pacta sunt servanda as a universal rule in its Preamble and also devotes a brief article to its definition. Article 26 of the VCLT states, "Every treaty in force is binding upon the parties to it and must be performed by them in good faith." [62]

Important conventions of law of the sea:

1. United Nations Convention on the Law of the Sea (UNCLOS): Considered the "constitution of the oceans," UNCLOS is the most comprehensive and widely accepted treaty

[59] . Supra
[60] . Supra
[61]. M/V Saiga case (Panama v. Guinea-Bissau, 2014) ITLOS Reports 2014, p. 4.
[62]. Vienna Convention on the Law of Treaties of 1969 (VCLT)

on the law of the sea. Adopted in 1982, it covers a vast range of issues, including:

- Delimitation of maritime zones (territorial sea, exclusive economic zone, continental shelf) (Article 1 to Article 85)
- Navigation and freedom of the high seas (Article 86 to Article 155)
- Protection of the marine environment (Article 192 to Article 237)
- Marine scientific research (Article 238 to Article 278)
- Fisheries management (Article 62, 73, 118; Annexure I)
- Resource exploration and exploitation (Annexure III)
- Settlement of disputes (Article 279 to Article 320)

2. Geneva Conventions on the Law of the Sea (1958): Predecessor to UNCLOS, established key principles on territorial sea, continental shelf, and contiguous zone.
3. London Convention on Prevention of Marine Pollution by Dumping of Wastes and Other Matter (1972): Regulates ocean dumping of waste materials.
4. International Convention for the Regulation of Whaling (1946): Sets quotas and regulations for whale hunting.
5. Convention on the International Maritime Organization (1948): Establishes IMO as the specialized agency for maritime safety and environmental protection.
6. United Nations Fish Stocks Agreement (UNFA) (1995): Promotes sustainable management of fish stocks on the high seas.

International conventions and treaties are essential tools for governing the global ocean, promoting sustainable use and safeguarding marine resources.

- **Law making treaties**

The provision of international of law-making treaty are directly the source of international law. The main reason for this reason was that in view of the changing circumstances, customs, which were the most important source of international law, were proving to be inadequate. Consequently, States regarded it necessary and expedient to enter inti treaties and thereby established their relations in accordance with the changing times and circumstances. Law making treaties perform the same functions in the international field as legislation does in the state field. But an international treaty can enunciate universal principle only when it receives the support of the essential states[63].

Treaties and Conventions of India is bound by:

- United Nations Convention on the Law of the Sea (UNCLOS)- India ratified UNCLOS in 1995, adopting its provisions governing maritime zones, resource utilization, marine environment protection, and navigation rights.
- International Convention for the Prevention of Pollution from Ships (MARPOL) 1973/78 - Regulates various types of ship-based pollution, and India actively implements its provisions to minimize sea pollution from Indian vessels.
- London Convention on Prevention of Marine Pollution by Dumping of Wastes and Other Matter 1972 - Prohibits dumping of harmful waste in the ocean, which India enforces to protect its coastal waters.
- Convention on Biological Diversity (CBD) 1992- Promotes sustainable use of biodiversity, including marine ecosystems, and India contributes to its goals through marine conservation initiatives.
- United Nations Fish Stocks Agreement (UNFA) 1995- Promotes responsible fisheries management on the high seas, and India adheres to its principles

[63]. Leo Gross, "Sources of Universal International law in Asia States and the development of Universal International Law"

for managing tuna and other commercially important fish stocks.

Indian Legislation Influenced by Treaties:

- The Territorial Waters, Continental Shelf, Exclusive Economic Zone and Marine Parks Act, 1976: This act gives effect to UNCLOS provisions within Indian maritime zones, defining their extent and establishing India's jurisdiction over resources and activities within them.
- The Merchant Shipping Act, 1958: Incorporates MARPOL regulations and other international maritime safety standards to ensure safe navigation and pollution prevention by Indian vessels.
- The Environment (Protection) Act, 1986: Provides a broad legal framework for environmental protection, encompassing marine pollution from both land-based and sea-based sources.
- The Indian Fisheries Act, 1951: Regulates fishing activities within Indian waters, aligning with UNCLOS and UNFA principles to ensure sustainable fisheries management.

- **Treaty Contracts**

Treaty Contracts are not law-making instruments in themselves since they are between only small numbers of states and on a limited topic, but may provide evidence of customary rules. For Example, a series of bilateral treaties containing a similar rule may be evidence of the existence of that rule in customary law, although this proposition needs to be approached with some caution in view of that bilateral treaties by their very nature often reflect discrete circumstances.

7.Material Sources

"Material sources" in the law of the sea refers to the various legal and non-legal resources that can be used to inform and interpret the law. It provides evidence of the existence of rules, which, when proved, have the status of legally binding rules of general application under Article 38(1)(d) of ICJ statue.

Some material Sources are:

- General Principles of Law, established principles of international law applicable to various fields, including equity, good faith, non-discrimination, and state responsibility. These principles can guide interpretation of treaties and customary law.
- Judgments and awards by international courts and tribunals, like the International Court of Justice (ICJ) and the International Tribunal for the Law of the Sea (ITLOS), set precedents and offer interpretations of UNCLOS and other legal principles.
- Scholarly writings and publications by renowned experts on the law of the sea can offer valuable insights and interpretations of legal complexities. Consistent practices of states regarding specific issues, such as maritime boundary delimitation or marine scientific research, can inform the development of customary law and contribute to interpretations of existing legal norms.
- The International Law Commission (ILC) Draft Articles and Reports, a body of legal experts under the United Nations, studies and develops international law. While not binding, its draft articles and reports can influence the evolution of law of the sea and offer guidance on emerging issues.
- Scientific data and technical information on oceanography, marine biology, and environmental impact assessments can inform decision-making and interpretations of legal obligations related to resource management and environmental protection.
- While not legally binding, resolutions and recommendations from bodies like the International Maritime Organization (IMO) or the United Nations General Assembly can reflect consensus on specific issues and contribute to soft law development.

❖ **General Principles of law**

Article 38 (1)(c) of the statue of ICJ lists General Principles of law recognized by civilised

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states as the third source of International Law. The source helps international law to adopt itself in accordance with the changing times and circumstances. General principles can stem from various sources, including established principles of international law applicable across different fields like state responsibility, good faith, or equity. The International Law Commission (ILC) has also played a significant role in identifying and clarifying general principles relevant to the Law of the Sea through its draft articles and reports.

The International Court have recognised as general principles:

- Good faith
- Responsibility
- Prescription
- In the absence of any express provision to the contrary, every court has right to determine the limits of its own jurisdiction
- A party to a dispute cannot himself be an arbitrator or judge.
- *Res-judicta* and
- In any judicial proceeding the court shall give proper and equal opportunity of hearing to both parties.

General principles can be applied in various situations, such as

- Interpreting ambiguous provisions of treaties like UNCLOS.
- Filling gaps in legal frameworks where specific rules are absent.
- Resolving disputes between states concerning their rights and obligations at sea.
- Guiding the development of new customary international law in the evolving ocean governance landscape.

In the *North Sea Continental Shelf Cases,*[64] ICJ invoked the principle of equity to adjust continental shelf boundaries between Germany and Denmark, ensuring a more equitable outcome than rigid application of equidistant lines.

In the *M/V Saiga case (2014)*[65]: ITLOS applied the principle of proportionality in assessing a state's right to detain a foreign vessel suspected of environmental damage, limiting detention to measures necessary for investigation.

In the *Corfu Channel case*[66] when referring to circumstantial evidence pointed that this indirect evidence is admitted in all systems of law and its uses recognized by international decisions. International Judicial reference has also been made to the concept of res judicata that is that the decisions in the circumstances is final, binding and without appeal.

- **Equity of International Law**

Equity a multifaceted concept, but essentially refers to fairness, reasonableness, and justice in applying legal principles to the specific circumstances of a case. Treaties and customary law may not always provide answers for every situation, particularly emerging issues like climate change or deep-sea mining. Equity helps bridge these gaps, ensuring fair and just outcomes even in uncharted territory.

The Law of the Sea often involves competing interests, such as resource exploitation versus environmental protection or coastal state rights versus navigation freedom. Equity allows for nuanced interpretations that consider these competing priorities and seek equitable solutions. By emphasizing fairness and long-term considerations, equity encourages sustainable use of ocean resources and responsible stewardship of marine ecosystems. When interpreting treaty provisions, tribunals and courts may consider equitable principles to ensure a fair and reasonable outcome in light of the specific context. For example, the International Tribunal for the Law of the Sea (ITLOS) applied equity principles to adjust continental shelf boundaries in *the North Sea Continental Shelf Cases*, ensuring a more equitable distribution of resources between

[64]. Supra

[65]. M/V Saiga case (Panama v. Guinea-Bissau, 2014) ITLOS Reports 2014, p. 4.

[66]. Supra

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Germany and Denmark. In resolving disputes between states, tribunals often look to equity principles to find solutions that address the concerns of all parties involved. This can involve considering factors like historical context, geographical realities, and economic dependence on marine resources. The emergence of new customary law often involves the gradual acceptance of equitable practices by states. For instance, traditional fishing practices of coastal communities may gain recognition as customary law if they are deemed fair and sustainable.

The international court noted in the *Tunisia/Libya Continental Shelf case*[67], "it is bound to apply equitable principles as part of international law, and to balance up the various considerations which it regards as relevant to produce an equitable result"

The use of the equitable principle has been marked in the 1982 UNCLOS Convention, Article 59, for example, provides that conflict between coastal and other states regarding the EEZ are to be resolved based on equity, while Article 74, delimitation of the Zones between states with opposite or adjacent coasts is to be affected by agreement based on international law, to achieve an equitable solution. A similar provision applies by Article 83, to the delimitation of the continental shelf. These provisions possess flexibility., which is important but are also somewhat uncertain.

- **Judicial Decisions**[68]

In the words of Article 38, to be utilized as a subsidiary means for the determination of rules of law rather than as an actual source of law, judicial decisions can be of immense importance. While by Article 59 of the Statute of the International Court of Justice, the decisions of the Court have no binding force except as between the parties and in respect of the case under consideration, the Court has striven to follow its previous judgments and insert a measure of certainty within the process: so that while the doctrine of precedent as it is known in the common law, whereby the rulings of certain courts must be followed by other courts, does not exist in international law, one still finds that states in disputes and textbook writers quote judgments of the Permanent Court and the International Court of Justice as authoritative decisions. By interpreting UNCLOS decisions clarify ambiguous provisions of the Convention and guide its application to specific situations. It can contribute to the formation of new customary international law in areas not explicitly covered by treaty provisions. It offers authoritative rulings on contested issues, promoting peaceful settlement of disputes between states and other entities.

The ICJ's judgments in the *Nicaragua v. Honduras*[69] and *Nicaragua v. Colombia*[70] cases on maritime delimitation significantly influenced the development of customary law on this complex issue. These decisions laid out key principles and methodologies that are now widely accepted by states when negotiating maritime boundaries.

The International Tribunal of law of the sea judgments like the *Southern Bluefin Tuna Cases,*[71]while concerning specific fisheries management measures, highlighted the importance of sustainable resource utilization and conservation, principles now considered integral to customary law in the law of the sea.

It's important to note that not all judicial decisions automatically translate into customary law. The process takes time and requires consistent application and acceptance by states. However, the influence of well-reasoned and authoritative judgments can be significant in shaping the evolution of customary norms in the law of the sea. Finally, also point to decisions by the highest courts of

67. Tunisia/Libya Continental Shelf case ICGJ 126 (ICJ 1982)
68. Lauterpacht, Development of International Law: Waldock, "General Coune', and Schwarzenbenger, national Law
69 Nicaragua v. Honduras ICGJ 102 (ICJ 1988)
70 Nicaragua v. Colombia ICGJ 124 (ICJ 2012)
71 Southern Bluefin Tuna Cases Reports of International Arbitral Awards Vol. XXIII, pp. 1-57 (2000)

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federal states, like Switzer- land and the United States, in their resolution of conflicts between the component units of such countries, as relevant to the development of international law rules in such fields as boundary disputes. A boundary disagreement between two US states which is settled by the Supreme Court is in many ways analogous to the International Court of Justice considering a frontier dispute between two independent states, and as such provides valuable material for International law,

- ***Ex aequo et bono***

After enumerating the sources of International Law in Article 38(1), Article 38(2) of ICJ statute qualifies Article 38 (1) by providing: "This provision shall not prejudice the powers of the court to decide a case *ex aequo et bono*, if parties agree thereto." Thus, as pointed out by *Manley o Hudson*,[72] In a case where the parties agree that it may decide *ex aequo et bono*, the provision in the statute would seem to enable the courts to go outside the realm of the law to reach its decision. It relieves the courts from the necessity of deciding according to law. it makes possible a decision based upon considerations of fair dealing and good faith, which may be independent of or even contrary to the law. An International Tribunal can decide a dispute ex aequo et bono, and go outside the realm of law only if such power has been conferred on it mutual agreement between the parties.

❖ **Jurist Works**

It has been recognised that some writers, such as Grotius, Bynkershoek and Vattel, have had a formative influence on the development of international law. Furthermore, the monumental treatise of Gilbert Gidel, *Le droit international public de la mer* (3 vols., Paris, 1932-34) has been considered as a work of great authority in this field. Some authoritative expert bodies, such as the ILC and the *Institut de droit international,* also furnish important materials analogous to the writings of publicists.

The importance of the works of the jurists has been stressed by Justice Gray in Paquete Habana.[73] In the words of Justice Gray, '…. Where there is no treaty and no controlling executive of 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 jurists and commentators who by years of labour, research, and experience have made themselves peculiarly well-acquainted with the subjects which they treat. Such works are resorted to by judicial tribunals not for the speculations of their authors concerning what the law ought to be but for trustworthy evidence of what the law is". This case deals with the seizure of fishing vessels, its cargoes, and the capture of sailors during the state of blockade. Famous jurists who have made significant contributions to the law of the sea: Some prominent figures include Hugo Grotius, John Selden, Elizabeth Mann Borgese, Philippe Kirsch, and Tommy Koh.

In the 17th century, Dutch jurist Hugo Grotius made significant contributions to the understanding of the Law of Sea Sources. In his seminal work, "Mare Liberum" (The Free Sea), Grotius argued that the seas were open to all nations and that no single country should have exclusive control over them. This principle formed the foundation of the concept of freedom of the seas, which has become a fundamental aspect of the Law of Sea Sources

Some Influential Judges:

- Judge Shunji Yanai: Former ITLOS President, known for his contributions to judgments on marine environmental protection and fisheries management.[74]
- Judge Thomas Mensah: Current ITLOS President, recognized for his expertise in maritime delimitation and conflict resolution.[75]

[72] Available at: https://legal.un.org/ilc/documentation/english/a_cn4_l33_add2.pdf

[73]. Paquete Habana case (1900) 175 U.S 677.

[74]. The Rule of law of sea in Asia, Available at: https://www.mofa.go.jp/files/000075767.pdf

[75]. Thomas A. Mensah | Seafarers' Rights International, Available at: https://en.m.wikipedia.org/wiki/Thomas_Mensah_(lawyer)#:~:text=Mensah%20(12%20May%201932%20%E2%80%93%207,first%20president%20of%20the%20tribunal

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- Judge Rosalyn Higgins: Former ICJ President, whose judgments shaped principles on maritime zones and navigation rights.[76]

Because of the lack of supreme legislative and judicial authorities in the inter- national community, it is often difficult to identify and interpret rules of customary international law. It is also not uncommon that a treaty provision may allow more than two different interpretations. Thus, even though there is a need for caution, academic writings may have a significant role to play in the identification and interpretation of rules of international law of the sea.

❖ **Unilateral Acts**

Unilateral Acts in the Law of the Sea are actions taken by a single state without agreement or negotiation with other states. In the law of the sea, these acts can have significant legal consequences, impacting maritime boundaries, resource claims, and other aspects of ocean governance.

Types of Unilateral Acts:

- States may unilaterally declare their exclusive economic zones (EEZs) and continental shelves, extending their jurisdiction over resources and activities within these zones in maritime delimitation
- States can enact unilateral conservation measures within their EEZs, regulating fishing, pollution, or other activities impacting marine ecosystems.
- States can establish temporary or permanent exclusion zones for military exercises or weapons testing, restricting navigation and other activities within those areas.
- Coastal states may unilaterally authorize or regulate scientific research activities within their EEZs, ensuring responsible and sustainable research practices.

While not explicitly addressed in the United Nations Convention on the Law of the Sea (UNCLOS), the legal basis for unilateral acts stems from the principle of state sovereignty. States have the right to exercise control over their own territory and adjacent waters, subject to certain limitations imposed by international law.

Unilateral acts are not without limitations. They cannot violate the sovereign rights of other states. Unilateral claims cannot infringe on the established maritime rights of other coastal states, particularly within overlapping jurisdictions or shared resources. Acts must be consistent with provisions of UNCLOS and other relevant treaties, such as those on environmental protection or navigation rights. Unilateral claims should be based on scientific evidence and sound principles, avoiding arbitrariness or excessive encroachment on the rights of others. Unilateral acts can be a source of tension and dispute between states, particularly when claims overlap or are perceived as excessive or unfair.

The "fish wars" in 1970, the United States filed United States v. Washington[77], Several conflicts erupted between states over unilateral claims to fishing resources, highlighting the potential for disputes over unilateral actions.

Canada's Arctic claims[78], Canada's unilateral extension of its continental shelf claim in the Arctic has been contested by other states, raising complex legal and political issues.

Unilateral acts remain a potent tool in the law of the sea, but their legitimacy and effectiveness depend on careful consideration of legal limitations, responsible application, and a commitment to international cooperation and dialogue. By navigating these challenges, unilateral actions can contribute to the sustainable management and equitable use of the world's oceans.

7. Other sources of International law

[76]. Rosalyn Higgins, Available at: https://en.m.wikipedia.org/wiki/Rosalyn_Higgins,_Lady_Higgins

[77]. United States v. Washington, 384 F. 312 (W.D. Washington 1974).

[78]. W.R. Morrison, *Canadian Arctic Sovereignty*, Available at: https://www.thecanadianencyclopedia.ca/en/article/arctic-sovereignty#:~:text=Arctic%20sovereignty%20is%20a%20key,governments%20in%20the%2021st%20century

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Besides the main sources like the United Nations Convention on the Law of the Sea (UNCLOS) and customary international law, several other sources contribute to the framework of international law of the sea. Numerous regional agreements address specific issues like pollution, fisheries, or maritime safety in particular areas, such as the Baltic Sea or the Mediterranean Sea. Examples include the OSPAR Convention for the Protection of the Marine Environment of the North-East Atlantic and the Barcelona Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean. Treaties addressing specific topics relevant to the oceans, such as the International Convention for the Safety of Life at Sea (SOLAS) or the MARPOL Convention on the Prevention of Pollution from Ships, play a crucial role. Non-binding resolutions, declarations, and guidelines adopted by international organizations like the International Maritime Organization (IMO) or the United Nations Environment Programme (UNEP) can influence state practice and contribute to the development of international law.

It's important to note that the interaction between these sources can be complex. Treaties and conventions may codify customary law, and customary law can help interpret treaties. Additionally, new developments in technology and environmental concerns can necessitate the adaptation and evolution of the law of the sea.

Resolution and Declaration:

The UN Security Council, which has the competence to adopt resolutions under articles 24 and 25 of the UN Charter binding on all member states of the organization, Namibia case,[79] and the Lockerhie case,[80] resolutions Of the Assembly are generally not legally binding and are merely recommendatory, putting forward opinions on various issues with varying degrees of majority support. This is the classic position and reflects the intention that the Assembly was to be a parliamentary advisory body with the binding decisions being taken by the Security Council. The effect of consent to resolutions such as this one may be understood as acceptance of the validity of the rule or set of rules declared by the resolution by themselves. Principles of the United Nations Charter depend on the circumstances; Accordingly, such resolutions can speed up the process of the legalization of a state practice and thus enable a speedier adaptation of customary law to the conditions of modern life. Resolutions may evidence an existing custom or constitute usage that may lead to the creation of a custom and the *opinio Juris* requirement may similarly emerge from the surrounding circumstances, although care must be exercised here Nicaragua's case[81]

Non-binding instruments

Generally, particular non-binding instruments or documents or non-binding provisions in treaties form a special category that may be termed 'soft law. Another material source that needs particular notice is non-binding instruments, such as resolutions, declarations, and guidelines adopted under the auspices of the United Nations or other international organizations." The non-binding nature of instruments does not mean that they are without legal significance. Non-binding instruments influence the making of international law. First, some non-binding instruments lead to the conclusion of a new multilateral treaty or specific provisions of the treaty. An example can be seen in the 1970 Declaration of Principles Governing the Deep Seabed. The 1970 Declaration formed the basis for Part XI of the LOSC concerning the Area.[82] Second, some non-binding instruments may guide the interpretation of a treaty and amplify the terms of a treaty. A good example is the 1970 Declaration on Principles of International Law Concerning Friendly Relations and

[79]. Namibia case, ICI Reports, 1971, pp. 16, 54; 49 ILK, p. 29
[80]. Lockerhie case, ICI Reports, 1992
[81]. Nicaragua case, ICJ Reports, 1986,
[82]. UN Resolution 2749 (XXV) adopted on 17 December 1970.

Cooperation among States by the Charter of the United Nations.

8. Hierarchy of Sources and Jus cogens

The United Nations Convention on the Law of the Sea (UNCLOS) is the primary source of the law of the sea for most states. However, other sources exist and can be applied depending on the specific issue and the relationship between the states involved. The hierarchical relationship between these sources is typically discussed in Article 38 of the Statute of the International Court of Justice (ICJ):

- UNCLOS stands at the top of the hierarchy in matters it governs. Bilateral or regional treaties specific to particular issues may supplement UNCLOS, but cannot contradict it.
- Customary International Law refers to established practices followed by states out of a sense of legal obligation. Any rules of CIL that are consistent with UNCLOS remain valid, but those in conflict are superseded.
- General Principles of Law recognized by most legal systems can apply in the absence of specific treaties or customary rules.
- Judicial Decisions and Writings are subsidiary sources that can help interpret existing law but lack binding force themselves.

Jus Cogens:

Certain peremptory norms of international law, known as *jus cogens*, hold the highest rank in the hierarchy. These are fundamental principles considered essential for the protection of basic human rights and the international order. Some *jus cogens* norms also exist within the law of the sea, such as:

- No matter what treaty or customary rule exists, no state can condone piracy.
- The freedom of navigation on the high seas fundamental right that cannot be unilaterally restricted by any state.
- States must prevent pollution and conserve marine resources, even above other economic interests.

Jus cogens norms operate as a kind of "super-hierarchy" within the existing sources. Any source of law that contradicts a *jus cogens* norm is considered void. Article 53 of the Vienna Convention on the Law of Treaties, 1969, provides that a treaty will be void 'if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. Further, by Article 64, if a new peremptory norm of general international law emerges, any existing treaty that conflicts with that norm becomes void and terminates. This rule (jus cogens) will also apply in the context of customary rules so that no derogation would be permitted to such norms by way of local or special custom. In the context of the law of the sea, if a provision in UNCLOS or another treaty goes against a *jus cogens* norm, it would be invalid.

9. Conclusion

Humans have long sought to exploit the vast resources of the oceans for sustenance, trade, and strategic advantage. The Law of Sea Sources is a complex field that has evolved over centuries to govern the use and allocation of resources in the world's oceans. It has been shaped by International Convention and Treaties, Customary law, Judicial decisions, and works, some nonbinding instruments and sources which are mentioned in this paper. The impact of the Law of Sea Sources has been significant, providing a framework for the equitable and sustainable use of marine resources. The future development of the Law of Sea Sources is likely to be influenced by several factors. Climate change and the increasing demand for resources pose new challenges to the sustainability of the oceans. There is a growing need to address issues such as overfishing, pollution, and the preservation of marine biodiversity. The international community must continue to collaborate and strengthen the legal framework to ensure the long-term viability of the world's oceans.

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8) Tunisia/Libya Continental Shelf case ICGJ 126 (ICJ 1982)
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