Changing Paradigm of Customary International Law in the Light of Developing Human Rights Law

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Abstract

An important determinant for international law and its application that finds place under Article 38(1) of the Statute of International Court of Justice is Customary International Law (CIL). This source of international law has often faced criticisms with regard to its otherwise binding nature upon States which is doubly controversial while interpreting obligations in human rights violations. This paper seeks to take a journey of the crystallization of CIL and the impact of human rights law in this process. It argues that UDHR is a culmination of the then State practices and how it influences formulation of State practices of the present day. It also advocates for the status of CIL that UDHR has attained that almost always aids the interpretation of elements of human rights within the UN Charter. However, it has also been highlighted in the paper that many provisions of UDHR have not yet been considered as rights as such in many jurisdictions as a result, UDHR lacks universality and hence dilutes its customary nature. The paper concludes by putting across a theory that several scholars now advocate whereby emergence of a newer kind of customary international law is witnessed. In furtherance to this, various general public international law concepts, documents and case laws have been re-interpreted and read into the human rights jurisprudence that gives shape to the idea that this paper proposes – the idea of a paradigm shift in the construction of CIL.

Keywords: Customary International Law, Human Rights, Usage, Magna Carta, UDHR.

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Introduction

The international legal system and global governance have witnessed enormous and comprehensive historic changes that shaped the scheme of international politics and diplomacy. Yet, these changes are infinite, but some were, from hindsight recognised by historians and political scientists, as qualitative steps in history which was an end of an era – a period of time that led to a new phase in international system that changed the outlook to international law.[3] International system is the configuration of States and other political and legal organisations[4] that has undergone tumultuous changes over the years.

With the end of the war in 1960s with peace treaties, new system emerged – the Westphalian Model.[5] After Napoleon's failure to have a new system, the Geneva Convention was set up that brought fundamental changes in international cooperation among States with a Eurocentric system. The League of Nations too clearly indicated that States have become increasingly international to have peace and security and general well-being of people. In other words, peace and security which was earlier the exclusive jurisdiction of the States had become the dominion of the world community.

The present scenario is more conspicuous and has come to the limelight because of its breath-taking speed that has not only affected the international system, but also the legal order whose effects are felt largely across the globe. The modern principles of sovereignty so developed replaced the principles of sovereignty of the 19th century with the status that got legal substance in the legal order. The idea of sovereignty, i.e. binding force of international law for all States, unless the States compromised by their will to be bound by such international law in the form of treaties or customs or any other international developments, changed significantly. War which was illegal earlier became legal provided it was justified by certain given criterion to be consulted before engaging in warfare. Further, the notion that only States possessed status of international subjects changed, thus there was emergence of international system in a new international legal order. Accordingly, the participation for international transactions changed. The legal paradigm of international law transformed.

The second half of the 19th century saw the forthcoming transcendence of international system of sovereign states. The emerging idea of the territorial states was deeply embedded in principles of self-reliance, self-sufficiency,

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3 Erik Ringmar, The Making of the Modern World' in Stephen McGlinchey (ed), *International Relations: A Beginner's Guide* (E-International Relations Publishing 2017) 13-14.

4 Klaus Knorr and Sidney Verba, *International System: Theoretical Essays* (Princeton University Press 1961) 45.

5 David Held, *Global Transformations: Politics, Economics and Culture* (Stanford University Press 1997) 37.

self-preservation and self-assertion. However, *de jure* and *de facto* recognition on these grounds became difficult since it required more resources which owing to the high demands of industrialization and mass production of goods could not be managed solely by the States and required involvement of other States. Thus, these elements had to be compromised. Such reasons led States to seek cooperation to supplement insufficiency for self-consumption and reliance was placed on new modes of cooperation that saw sovereignty being expressed in light of interdependence. These developments impacted the legal order in the following ways:

i. Establishing a comprehensive legal regime;

ii. Codification of international law;

iii. Widening the scope of international law and its provisions;

iv. Closed clubbed developments reduced giving way to all States to conglomerate into one whole.

Amidst the socio-political changes that the world was facing, international law too steered through to find newer dimensions and interpretations suiting the changing paradigm. Conceptions of human rights developed more humanely than ever before as an aftermath of the dreaded world wars and numerous civil wars. Interpretations of the courts too aligned with these modifications and much of their task revolved around defining the contours of sources that impacted international law in this changed dynamics.

The most debated of all the sources of international law recognised under Art. 38(1) ICJ Statute has been customary international law since the greatest impact of such changed dynamics of sovereignty and notions of human rights has been on this source more than any of the other sources which are well defined either by the nations (treaties) or though age-old municipal rules of law (general principles of international law) or through writings of scholars and opinions of judges.

The paper seeks to understand and evaluate the status of customary international law in the light of the developing ideas of human rights and aims to suggest what more could be added to this understanding. International law is the most volatile of all laws since it is heavily dependent upon the rapid changes that take place. Customary international law has traversed a long path and continuously modified itself. The paper seeks to bring out this journey, especially in the light of human rights developments augmented by the international community in this new international legal order and appreciate or criticize adding to the existing discourse.

Customary International Law

Custom is listed under Art. 38(1)(b) of the ICJ Statute among the sources of law upon which the International Court can draw 'international custom as evidence of general practice accepted as law'.[6] This is considered to be one of the most authoritative definitions and custom includes two elements, *firstly* general practice or *usus* and *secondly opinio juris*. While the former denotes practice of States comprising of its social, economic or political exigencies, the latter denotes the belief of States to be bound by it. In other words; the former is the content of custom and the latter is the belief that States must conform to the practice not so much, or not only out of economic, political or military considerations but because an international role enjoins them to do so.[7]

It is of significance to note that custom is not a deliberate law-making process and it crops up spontaneously and binds all nations together. Unlike in case of treaties, nations come together willingly to bind themselves to the terms of the treaty, upon legal standards of behaviour acceptable to all the other nations, custom effects of the time and need not always depend upon the long time period that it has traversed. Kelsen has thus defined custom as unconscious and unintentional law making. Finally, treaties only bind those States who either ratify or adhere to them, but customs bind all nations. This feature of universally binding nature of customs is the key point to understand the significant role it plays in human rights formulation.

Custom has been synonymously used with 'usage'.[8] However, the difference is attributable to usage as an international habit of action that has not yet received full legal attestation[9] unlike customs. To receive the legal status of customary international law, the following criterions seek fulfilment:

1. Constant and uniform usage accepted as law,[10]
2. Acceptance by more and more States,
3. General practice of the States,[11]
4. Antiquity,
5. Continuity,

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6 Antonio Cassese, *International Law* (2nd edn, Oxford University Press 2005) 156.

7 ibid 157.

8 K.C. Joshi, *International Law and Human Rights* (3rd edn, Eastern Book Company 2016) 25.

9 J.G. Starke, *Introduction to International Law* (Butterworths 1989) 36.

10 *Colombia v Peru* (Asylum Case), ICJ Rep 1950 p 395.

11 Emer de Vattel, *The Law of Nations or Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns, with Three Early Essays on the Origin and Nature of Natural Law and on Luxury* (LF edn, 1797).

6. Certainty,
7. Consistency and
8. Enjoyability as a right.[12]

It is with regard to the general practice and acceptance of nations that make the world community bound by it, irrespective of any existing treaty pursuant to the same subject-matter or a membership of a State to such treaty primarily due to *opinio juris*.

The importance of custom lies in the fact that, if the States are not parties to convention(s) or treaty(ies), the force of customary international law shall guide them towards establishing its liability or obligation.[13] To illustrate, the principle of *pacta sunt servanda* has acquired the status of customary international law and every nation is bound by it, irrespective of their membership to the Vienna Convention on Law of Treaties 1969. Moreover, incorporation of a customary norm into a treaty does not dilute the nature and resulting obligations of the treaty[14] and thus States not party to such treaty and their nationals shall yet be bound by the customary international law.

Landmark Cases on Customary International Law

Barcelona Traction Case

It was held that an essential distinction to be drawn towards obligation as a whole and those assigning in the field of diplomatic protection. It further stated that in view of importance of rights involved States have legal obligation i.e. *erga omnes*.[15]

The court also noted that some are derived from outlawing acts of aggression and genocide from principles of slavery/discrimination.[16] The court also identified two provisions of UDHR that have attained the status of CIL – acts of aggression and genocide and protection from slavery and racial discrimination. It imposes obligation on every state.

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12 ibid (n 8) 25.

13 Case concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain (*Qatar v Bahrain*) (Merits), [2001] ICJ Rep 40.

14 Case concerning Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v United States of America*), [1986] ICJ Rep 14.

15 Barcelona Traction, Light and Power Company, Limited (*Belgium v Spain*), [1970] ICJ 1.

16 ibid 32.

Lotus Case

This landmark case happens to be the first case where the idea of customary international law was re-looked while establishing the principles that criminal jurisdiction cannot be exercised by nation without any direct nexus with it and that ship registered in a nation has floating personality of the nation, which meant that any crime committed on the ship will be presumed to be committed in the state where it is registered. The idea of flagged state that was enshrined in this case is being followed by courts worldwide. These principles were since then recognised as forming part of CIL.[17]

South West Africa Case

This case recognised the principle of *jus standi*. However, it was just a persuasive view of Judge Tanaka that it is an obligation of courts to observe fundamental freedoms and rights that has taken a prominent shape now. He further observed that there is a legal obligation of all States to recognise human rights. In furtherance of this, he affirmed that international protection of human rights and fundamental freedoms is very imperfect and that these have moral and legal character by the nature of subject matter. Furthermore, the court clarified to establish and enforce that considerations exclusively based on race, religion and colour is flagrant violation of the Charter. Moreover, Judge Amoung opined that advisory opinions take judicial look into these and bind States with customs as recognised under Art. 38(1) of ICJ Statute as codification of CIL or acquired status of CIL is accepted as law.[18]

US Hostages Case

In this landmark case, ICJ held that wrongfully depriving human beings of their freedom and subjecting them to cruel treatment is incompatible with UN charter and UDHR principles. USA in its memorandum mentioned that the existence of fundamental rights for all human beings-nationals and aliens alike and the existence of corresponding duty on part of every state to respect and observe them which is now reflected *inter alia* in the charter of UN, the UDHR and the corresponding provisions of ICCPR.[19] USA cited certain fundamental rights that it guarantees which are also a part of UDHR and claimed that all individuals are entitled to it. The fundamental rights recognized by USA mostly correspond to Arts. 3, 5, 7, 9, 12, 13 of UDHR.[20]

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17 P.C.I.J. (ser. A) No. 10 (1927).

18 Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970).

19 ICJ pleading, p 182.

20 Right to Life, Liberty, Personal Security; Freedom from Torture and Degrading Treatment; Right to Equality before the Law; Freedom from Arbitrary Arrest and Exile; Freedom from Interference with Privacy, Family, Home and Correspondence and Right to Free Movement in and out of the Country respectively.

Genocide Convention Case

It was the famous case where the court held that the principles underlying the Genocide Convention, 1948 are binding on states as per article 38(1)(c) of ICJ Statute[21] primarily because they have formed a part of CIL.

Presence of USA in Namibia Case

The ICJ in this case held that to establish and enforce distinctions, exclusions, restrictions and limitations based on race, colour, descent, nation or ethnic origin constitute denial of fundamental human rights and is a flagrant violation of the Purposes and Principles of the UN Charter. Judge Ammoung relied specifically on the UDHR in arriving to his conclusions that the right to equality is a binding customary norm. "The advisory opinion takes notice of the UDHR, although the affirmation of the declaration is not binding like international convention. They can bind States on the basis of customs within the meaning of Art. 38(1)(b) as they constitute a codification of CIL, or because they acquire the force of custom through a channel that's of law".

East Timor Case

The court observed on behalf of rights of people for self-determination that Portugal's assertion that the rights of people to determine themselves separately have evolved from the Charter and UN practice is irrevocable. It is one of the essential principles of contemporary international law.

2004 Wall Case

The court recalled its observation in the East Timor case and reiterated the rights of the people including right of self-determination. It also held self-determination as an indispensable part of international law.[22]

Dissenting and Separate Opinions that shaped Customary International Law

Dissenting Opinions

In *South West Africa case*, Judge Pabilla Nervo observed that the international community has enacted important instruments which the courts must keep in mind. Accordingly, the UN Charter and the UDHR were considered to have

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21 ICJ Report (2007) 43.

22 Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, ICJ Report (2004) 136.

immense bearing on the case for its interpretation and application of their mandates so enshrined.

In *Nottebohm's case,* the court held that to confer nationality or not is left to the decision of each State since for that to be recognised, the person and nation must have some relations.[23] But, Ad hoc Judge Guggen in the dissenting judgement refused to recognise or license State's abilities for non-compliance. It was further stated that 'the protection of the individual which is so precarious under international law, would then be considered contrary to Art. 15(1) of UDHR' which lays down that everyone has the right to nationality. Refusal to exercise protection is not in conformity with the increase in the number of cases of stateless persons and protection against violation of human rights.

In *Aegean Sea case*,[24] Ad hoc Judge Stassinopoulos opined that the original source of general principle was to be found in the idea of freedom and democracy and beyond that in the UDHR.

Separate Opinion

In *South West Africa case*, Judge Bustamente viewed that it must be recalled that right of defence before law is expressly recognised by the UDHR.

Regional Courts contributing to Customary International Law

In consonance to the African Convention, African regional courts have held that the communication should draw inspiration from international law from Convention on Human and People's Rights, the Charter, UDHR in performance of the duties.[25]

The International American Court in Advisory Opinion requested by Government of Columbia, held that the charter of the organisation can be interpreted and applied as far as human rights is concerned without relating them to corresponding provisions of UDHR. It further provided that the American Declaration imposes obligation and is therefore binding.

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23 *Liechtenstein v Guatemala* [1955] ICJ 1.

24 *Greece v Turkey*, ICGJ 128 (ICJ 1978).

25 African Convention on Human and People's Rights 1981, art 60.

Changing Paradigm of Customary International Law in the Light of Developing Human Rights

Human rights violations have been flagrant in the recent past in the garb of lack of binding obligations. The States, in other words, get a free ride over the entire situation and nothing bothers them. But, if this continues, security of nationals will be surely compromised under the veil of sovereignty. Thus, a new approach is being proposed to remedy this whereby certain basic human rights will be considered to have attained the status of CIL which will prohibit the argument of the nations of not having any binding obligations and accordingly human rights will be preserved. The importance of human rights in developing CIL is unparalleled and in fact, scholars opine that most of CIL principles are in essence human rights principles.[26] Unlike treaties, customs bind every State instilling human rights in every action of States. Thus, States, in this contemporary era cannot escape the liability for violation of human rights which is an integral part of their existence.

The major pitfall of CIL can be identified as the long time that it takes to crystallize into such. Even though, time is not always the essential element or determination of CIL, but longer duration is more authoritative. In *R v Keyn*,[27] in a case of manslaughter that took place within 3 nautical miles within the territory, Justice Peacock did not allow it to be attributed to the State. Lauterpacht in that observed that the idea had not crystallized into CIL and thus could not be attributed to fall under that jurisdiction. Further, determination and interpretation becomes difficult for customs unlike treaties which are written down.

In the first ever case of an attempt towards universalization of jurisdiction heard and decided in the US Court, *Filartiga v Pena Irala*,[28] it was held with support of the *amicus curie* brief that torture had attained the status of CIL. Accordingly, the US courts could extend jurisdiction to punish for a crime that has been universally recognized. By effectuating the Alien Tort Claims Act 1789, it was held that – 'District Court will have original jurisdiction for civil action over alien for tort only committed in violation of law of nations or treaties of the American laws'.[29] USA was yet to ratify the ICCPR when this case was heard. Art. 7 of ICCPR prevent torture but it did not use provisions of ICCPR since USA had not ratified it by then. This portrays that torture had since then attained status of CIL including the right to be free from torture which is now a part of international law and also part of UDHR. In fact, the

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[26] Jordan J. Paust, 'Customary International Law and Human Rights Treaties *are* Law of the United States' (1999) 20(2) Michigan Journal of International Law 301, 303.

[27] (1876) 2 Ex D 63.

[28] 630 F.2d 876.

[29] Anthony J. Bellia Jr and Bradford R. Clark, 'The Alien Tort Statute and the Law of Nations' (2011) 78(2) The University of Chicago Law Review 445, 470.

court also held that UDHR along with several principles of international law including the UDHR form a part of CIL.[30]

India in 2016 in the *Solar Panel case*[31] in the WTO Dispute Settlement Board, even though could not get an order in favour itself accepted that CIL, treaty law and every rule of international law forms part of domestic law. This gives an idea of the changing paradigm of CIL and human rights that makes a shift from dualism to monism for India and other countries joining the league.

In *Jeeja Ghosh v Union of India*,[32] where the pilot of the aircraft prohibited a disabled person to fly since he was not fit to fly was awarded compensation by the Supreme Court opining that international law recognizes rights of disabled persons and indication that such conventions have gained the status of CIL was made.

The Human Rights Committee in its General Comment No. 24 in 1994 concluded that States need not be parties of a covenant to be bound by CIL. The advantage attached to CIL is that unlike treaties it cannot have reservations which ultimately mean that every nation is bound to follow or adhere to CIL in every circumstance whether it is a party to a treaty codifying or emanating CIL principles. For example, reservation to Genocide Convention is non-operational because it has attained the status of CIL. The Human Rights Committee accordingly chose some of the rights within the Covenants that shall have such a status. These rights include the right against slavery[33] or torture,[34] right against arbitrary detention,[35] right to presume a person innocent until proven guilty,[36] right not to deny marriage at the marriageable age,[37] protection of pregnant women[38] and the right to profess ones religion[39] and language.[40]

While construing the impact of CIL, state practice becomes utmost important because formation of CIL largely depends upon the state practice which is

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30 D.S.D, 'Enforcement of International Human Rights in the Federal Courts after *Filartiga v Pena-Irala*' (1981) 67(7) Virginia Law Review 1379, 1380.

31 India – Certain Measures Relating to Solar Cells and Solar Modules- Recourse to Article 21.5 of the DSU by India Request for the Establishment of a Panel, WT/DS456/20.

32 (2016) 7 SCC 761.

33 Universal Declaration of Human Rights (UDHR), art 4; International Covenant on Civil and Political Rights (ICCPR), art 7.

34 UDHR, art 5; ICCPR, art 7.

35 UDHR, art 9; ICCPR, art 9.

36 UDHR, art 11; ICCPR, art 14.

37 UDHR, art 16; ICCPR, art 23.

38 ICCPR, art 6.

39 UDHR, art 18; ICCPR, art 18.

40 ICCPR, art 27.

evidenced to great extent from municipal court decisions. Thus, general principles of law under Art. 38(1) ICJ do not achieve greater recognition than human rights instruments, because the former is merely the facilitator, the repository of the understanding of CIL, but the content of it lies within the latter. Accordingly, human rights norms stated in human rights instruments come to light in domestic courts and domestic laws which leads to maturation of international law. As we shall see; UDHR reflects general principles of international law which form part of various constitutions and domestic legislations, like the Italian Constitution,[41] Portuguese Constitution,[42] Romania Constitution,[43] Spanish Constitution[44] and Indian Constitution.[45] In fact, there are nations that direct courts to interpret UDHR and crimes like genocide and prevention of crimes against humanity amongst others. Yet, there is no conclusive conclusion that all general principles of international law form CIL, like all UDHR principles are not CIL, but they do help as model and inspire constitutions and other legislative documents like laws of nations. However, mere notary reference to these in the domestic framework is of no value, unless they are made justiciable and courts show timidity in enforcing orders against the governments.

While critiquing the development of CIL, Prof. Harald G Mayer noted that public international law synthesizing CIL rules found in the writings of publicists which are used by courts without verifying through witness examinations- as expert witnesses can play a vital role both to the counsel and the court[46] and chances of incorrect interpretation is high. So, keeping this view in mind as well, the next section has been developed.

UDHR and Newer CIL

UDHR has made significant impact on legislations and administrative acts worldwide. It is believed that with time UDHR has itself acquired significance and legal standard. Some see it as having gained the standard of UN Charter. It is considered as partaking in UN charter portraying obligations as a resolution of UNGA which is not binding but has supplementary effect to them as an integral part and has a binding nature. Thus, there are two parallel thoughts on this idea; *firstly*, UDHR is a part CIL and *secondly*, UDHR is supplementary to the UN Charter, i.e. for interpreting human rights aspects embedded in the Charter recourse is taken to UDHR.

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41 *Fallimento v Ministry of Finance*.

42 UDHR, art 16(2).

43 ibid, art 20(1).

44 ibid, art 10(2).

45 ibid, arts 14, 19, 20 and 21.

46 Harald G Mayer, 'The Role of Experts in Proving Rule of Law in Domestic Courts: A Commentary' (1996) 25(1) Georgia Journal of International Law 205, 212.

UDHR though contended that it has formed a part of CIL, or at least some of them have gained such status, there are some who hold it to be not so. However, no one can disregard its influential role. UDHR has gained such a status primarily through three ways-

i. by incorporating it into domestic constitution;

ii. read within Art. 38(1)(c) ICJ Statute as a part of general principles of international law; and

iii. opinions of publicists and jurists.

Normative character and judicial underpinnings were reviewed by scholars and practitioners. Accordingly, an attempt was made to severe UDHR articles to know what in it is CIL.[47] But, it is also crucial to note that there was no systematic attempt made to collect and review practice of states until lately which has made the recognition of certain UDHR principles very late and some others yet to be recognized in this field. But, once it was interpreted and the scope broadened, UDHR has now become a part of customary laws of nations having been invoked countless times within and outside the UN framework as permissible actions.[48] The *Filartiga* case too unanimously lauded the notion that certain principles of UDHR have attained the status of CIL.[49]

In 1990, the ILC Committee on Enforcement of Human Rights Law began a thorough study in 1992 and 1994 which served as a basis for its Buenos Aires Declaration on status of UDHR in national and international law.[50] This was a remarkable exercise whereby practices of States were gathered where many of the norms in UDHR and replicated in International Bill of Rights that became part of customary international law binding upon all States. This involved incorporation of rich diversity of State practices in human rights arena because whilst determining whether UDHR exists in CIL one must draw upon a variety of sources. However, there are some other rights enshrined under UDHR like right to education,[51] right to property[52] and right to free speech[53]

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47 Theodor Meron (ed), *Human Rights in International Law: Legal and Policy Issues* (Clarendon Press 2002) 34.

48 John Thomas Peters Humphrey, *Human Rights and United Nations: A Great Adventure* (Transnational Pub Inc 1984) 7.

49 Karen E. Holt, '*Filartiga v Pena-Irala* after ten years: major breakthrough or legal oddity?' (1990) 20 Georgia Journal of International and Comparative Law 543, 548. *See also*, Jeffrey Blum and Ralph Steinhardt, 'Federal Jurisdiction over International Human Rights Claim: The Alien Torts Claim Act after *Filartiga v Pena-Irala* Case' (1981) 22 Harvard International Law Journal 53.

50 'Resolution adopted by the International Law Association, reprinted in International Law Association' (Report of The Sixty-Sixth Conference, Buenos Aires, Argentina 1994).

51 UDHR, art 26.

52 ibid, art 17.

53 ibid, art 19.

that are laden with controversy because there is yet no consensus in the world community regarding their value as forming CIL.

Ian Brownlie has pointed out the variety of sources that need be referred to while construing concretization of a right as CIL. These could include the following:

- policy statements of the nations;
- opinions of jurists;
- official manual of States;
- executive decisions;
- comments of governments on drafts prepared by ILC;
- state legislations;
- national and international case laws;
- treaties;
- UNGA resolutions;
- practice of international organizations and
- any other sources that can become relevant for adjudging the effectiveness of any right as forming part of CIL.[54]

The US minister in UN General Assembly had once opined that USA would withdraw its reservations from certain human rights treaties, but in practice it did not. The question that was thus relevant to be considered was whether such official statements could be relied upon while dealing with essential facets of international law regarding its universal recognition. But, in this case, it was considered to be vague and had little value in consideration of forming part of CIL.

It is interesting to note that there is a subtle difference between formulation of CIL and formulation of CIL in regard to human rights. In this sense, whether obligations have become CIL need not be answered by the usual process of customary law formation, the mere presence of elements of human rights itself crystalizes its customary nature. States make it in a way that does not affect their nations,[55] tacit acceptance is also worthy enough to gauge the stance of the nation pursuant to a right being accepted as having formed CIL. We can now understand that the regime of CIL and its formulation has traversed the traditional criterion of opinions of States and includes various things to be studied before finalization.

In the trajectory of development of formulation of UDHR, the year 1992 probably is of significance where, Prof. Simma who was no fan of CIL, acknowledged that it has flown naturally in domestic national legal order.

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54 Ian Brownlie, *Principles of Public International Law* (7th edn, Oxford University Press 2008) 10.

55 Schachter, 'International law in theory and practice: general course in public international law' (1982) 178 Collected Courses of the Hague Academy of International Law 9, 60.

Prof. Simma points out that in the famous *Nicaragua case*[56] the court has reinterpreted facets of CIL and thus he termed such developments as court's own contribution to the soft law of CIL.[57] Also, it was around the 1990s that USA accorded recognition to CIL in the realm of human rights.[58] Prior to this, as Stephen Gradbaum, attorney at Centre for Constitutional Law asserts, right to enforce international human rights law was stalled in US courts because of their reluctance to use principles of international law.[59] It was limited only to right against torture within the Alien Torts Claim Act as discussed above. It was Prof. Alston who observed that slowly there was large and growing evidence that the first 21 articles exclusively on civil and political rights had already become a part of CIL.[60]

The Simma-Alston critique was however pre-*Nicaragua* and pre-*North Sea Continental Shelf* cases approach that looks into the past to identify customary state practice and then denotes it as state practice. In the cases mentioned, the *opinio juris* was emphasized and these scholars harped upon state practice to understand CIL. Newer interpretations were recognized within the contours of these judgments. Prof. Lemkin reflects on the Nuremberg Tribunal cases to develop and recognize non-conventional rules for a non-conventional customary law i.e. non-treaty aspects and concludes non-conventional law of human rights. In other words, the Nuremberg tribunal gave way for recognition of international human rights law that had attained the status of CIL out of not treaties, but general conscience and practice of states- in non-conventional ways. The advantage of having recognized customary human rights within CIL is that it is applicable to all nations within the international community including non-state actors which binds every nation to give respect to human rights.[61] This elaborates on the historically led recognition of customary human rights law, which essentially means that human rights have had immense impact in the formulation of customary rules of international law and thus it could be said that customary rules of international law are more humanitarian than anything else. This establishes the transition of CIL from mere rules to humanitarian in nature.

The next section attempts to look at the UDHR provisions by dissecting them in order to evaluate and weigh it as against the idea of the new CIL.

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56 Case concerning Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v United States of America*), [1986] ICJ Rep 14.

57 Gunther F. Handl, et. al., 'A Hard Look at Soft Law' (1988) 82(April) Proceedings of the Annual Meeting (American Society of International Law) 371, 378.

58 Bruno Simma and Phillip Alston, 'The Sources of Human Rights: Customs, Jus Cogens, and General Principles' (1992) 12 American Yearbook of International Law 82, 106.

59 Anne Bayefsky and Joan Fitzpatrick, 'International Human Rights Law in United States Courts: A Comparative Perspective' (1992) 14(1) Michigan Journal of International Law 1, 4.

60 Philip Alston, 'The Universal Declaration' (1983) 31 ICJ Review 69.

61 Lemkin, 'Human Rights and State "Sovereignty"' (1995-1996) 25(1) Georgia Journal of International and Comparative Law 31, 37.

Provisions of UDHR that have attained the Status

Right to Equality[62]- The principles of equality can be variedly found in different articles of the declaration. In *Namibia's case*,[63] Judge Amoung in his separate opinion viewed that our right (which might certainly be considered as a predetermined one) which the UDHR has codified is the right to equality which by common consent has ever since the older times been deemed inherent in human nature.[64] This view resembled the *Hostages case*[65] too.

Right to Life[66]– It is also read into a part of general principles of international law.[67]

Right against Torture[68]– It is one of the most widely commented articles and finds its place in CIL as also confirmed by many sources such as Preliminary report, Commissioners on UNHRs and Special representative of commission on situations in Iran 1985.[69] Whether torture can be considered as a customary international law was considered positively in the *Filartiga's case*.

Right to Effective Remedy[70]– It is as an essential requirement to ensure enjoyment of FRs but has not yet gained the status the customary international law.[71]

Right against Arbitrary Arrest, Detention, Exile[72]– It is a part of CIL as affirmed in the *Hostages case*.[73] It is provided that 'wrongfully detaining human beings ……. in conditions of hardship, manifestly unlawful and is against the principles of UN Charter and fundamental principles as enshrined in UDHR'.

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62 UDHR, arts 1, 2, 6 and 7.

63 ICJ Reports 197, pp 3, 6, 9 and 12.

64 ibid 77.

65 Namibia case, ICJ Reports 1971.

66 UDHR, art 3.

67 Nihal Jayawickrama, 'Hong Kong: Preserving Human Rights and the Rule of Law' (1997) 12(3) American University International Law Review 92.

68 UDHR, art 5.

69 Commissioners on UNHRs and Special representative of commission on situations in Iran 1985, 32 International Legal Materials 1993.

70 UDHR, art 8.

71 Richard B. Lillich, The Effectiveness of the Local Remedies Rule Today, 58 Proceedings of the American Society of International Law at Its Annual Meeting (1921-1969) (1964) 101.

72 UDHR, art 9.

73 *US v Iran* (Hostages case), [1980] ICJ 1 at 42.

Right to Free and Fair Trial[74]– It resembles comprehensive survey on criminal justice which sometimes has uncanny resemblance to ICCPR.[75] It was also mentioned in the Preliminary Report of Commission of HRs in Iran.

No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation[76]– It provides for the protection to privacy, family, home, correspondence. In the *Hostages case* it was held that the abovementioned provision is a part of customary international law.[77]

Right to Freedom of Movement and Residence…[78]– It provides for the movement clause and entails a person's right to move and settle anywhere in the world. It also includes the right to leave a country including his own and the right to return back. In the *Hostages case* this right too was held to be a part of CIL.[79]

Right to seek Asylum[80]– It provides for the seeking of asylum. It is to be noted that despite the 1951 convention and 1967 protocol the right to seek asylum is not a part of customary international law. However, it is also an established fact that duty not to return a person to a country where human rights might be violated is a CIL (*Non-Refoulement*).

Right to Nationality[81]– It provides for the right to nationality and also restricts arbitrary denial of nationality or to deny the change of nationality. This was held in the case of 'Advisory Opinion in Proposed Amendment of Naturalisation of Political Constitution of Costa Rica'.[82]

Right to Marriage[83]– It provides for right to marriage and equal rights as to marriage during marriage and its dissolution. German court also held that right to marriage is a consensus of international law and are recognised as fundamental human rights of UDHR.[84]

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74 UDHR, arts 10 and 11.

75 M. Cherif Bassiouni, 'HR in the context of Criminal Justice: Identifying international universal procedural protection and equivalent protection in domestic jurisdiction' (1993) 3 Duke Journal of Comparative and International Law 290, 292.

76 UDHR, art 12.

77 *US v Iran* (Hostages case), [1980] ICJ 1 at 182.

78 UDHR, art 13.

79 Hurst Hannum, *The Right to Leave and Return in International Law and Practice* (Martinus Nijhoff Publishers 1987) 45.

80 UDHR, art 14.

81 ibid, art 15.

82 Advisory Opinion Oc-4/84 of January 19, 1984, para 33.

83 UDHR, art 16.

84 Basic Rights to Marry Case, 72 ILR 298.

These exercises show that some UDHR provisions have binding force and some are customary international law and some are not but have binding force.

Right to Property[85]– It provides for right to property and restricts arbitral deprival of the same. It is very unique and controversial provision therefore ICCPR and ICESR does not mention about right to property. Therefore, it's a big question as to whether it is binding upon state as customary international law. The Declaration's standards become rules of CIL which as such regarded as mandatory or doctrines and practice of international law.[86] The right to property is not universally recognised by all states; but it has certain basis in CIL especially Right of Aliens in CIL while certain right are to be accorded to aliens (only that state has the right to allow to enter, but certain basic rights are given to let live in dignity). In international law some property rights are given to aliens which includes sufficient time given to wind up the business. Also, 'Family is allowed to visit alien who is admitted because he/ she has a right to family'. It is also an established fact that Host states cannot ask aliens to immediately leave. At the same time, 'Expropriation of Aliens Property' is an important issue that is highly debatable. The validity of expropriation is allowed under certain considerations i.e. for serving public purpose with appropriate compensation. Thus, right to property is non-existent and difficult to conceive as such.

Right to Freedom of Thought, Conscience and Religion[87]– It provides for the same and is supported by the Provision for Extension and discrimination of UNGA of 1981. The Preamble to Declaration on tolerance of all forms of discrimination states that Religion and Freedom must be guaranteed always. Freedom of thought, conscience and religion is aspect of justice is a matter of controversy in countries like Iran and other Islamic countries.

Right to Freedom of Expression[88]– It provides for the right to freedom of opinion and expression. It is a broad right since it is capable of swallowing itself as in right not to express itself.

Right to Assemble[89]– It provides for the peaceful assembly and association and also that no one can be compelled to be a part of an association.

Right to Social Security[90]– Art. 22 provides for social security and its realization and further it is supported by Arts. 23- 27 which provides for right

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85 UDHR, art 17.

86 Commission on Human Rights: Report on the 50th session, 31 January-11 March 1994, UN Commission on Human Rights, Organization of work, E/CN.4/RES/1994/132, 1994.

87 UDHR, art 18.

88 ibid, art 19.

89 ibid, art 20.

to work, rest etc. and these human rights are part of customary international law.

Right to Social and International Order[91]– It provides for social and international order in which the rights and freedoms set forth in the declaration can be realized. It is considered to be a propaganda- a kind of aspiration but it is difficult to say that it contains international legal norms and also forming a part of CIL.

Critiquing UDHR as forming Part of CIL

Accepting all the arguments mentioned above, there is a need to recognize that some scholars have rejected the normative standard of UDHR. The rapporteur to the UN Sub-commission on Prevention of Discrimination and Protection of Minorities observed that UDHR is of quasi legal importance from source of legal rights and duties.[92] It merely enshrines definitions than obligations. It is a matter of controversy that undermines its value. Instead of giving general interpretation as per the Charter, UDHR is definitional.[93] However, critiques of the universality view of UDHR are many who portray varied viewpoints regarding this. Issa G. Shivji is one such critic who opines that UDHR and other UN covenants can by no means be declared as universal. In fact, the predominance of intense debates on this theory itself portrays that it has not yet achieved a universally nature.[94] But, there is no universal view on this is Asia.

To conclude, it can be realized that the consequences of the declaration may be of significance so long as restraint is exercised in describing it as a legally binding instrument. However, in the years since its adoption the widespread acceptance of the authority of the declaration has led some to the opinion that while the declaration as an instrument used water Treaty. At the Tehran conference in 1968 most nations accepted that the main provisions of which proclaimed that it is imperative that the members of the international community feel all these obligations to encourage respect for human rights and fundamental freedoms for all without distinction of any kind, such as race, colour, sex, language, religion, political other opinions; that the Declaration states a common understanding of the peoples of the world concerning the

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90 ibid, art 22.

91 ibid, art 28.

92 Erica-Irene A. Daes, 'Freedom of the Individual Under Law: A Study on the Individual's Duties to the Community and the Limitations on Human Rights and Freedoms under Article 29 of the Universal Declaration of Human Rights' (1990) 3 Human Rights Study Series 50.

93 Karl Joseph, *The Contribution of Universal International Instruments on Human Rights* in De Mestral Armand, et. al., The Limitation of Human Rights in Comparative Constitutional Law (1986) 65.

94 Issa G. Shivji, *The Concept Human Rights in Africa* (1989) 51.

inalienable and inviolable rights of all members of the international community; and that although substantial progress has been made by the UN since 1948,[95] much is left to be done in regard to its adequate implementation.

Newer Developments in CIL

Apart from the provisions and principles underlying UDHR- the single most important facet of new CIL, certain other principles that have been accepted by the world community as forming an integral part of CIL. The authors have attempted to bring to light some of these that have been explained alongside few case laws that have affirmed the same.

Fernandez v Wilkinson[96] held that protection against arbitrary detention is definitely a human rights violation that has been recognized worldwide. *Forti v Suarez-Mason*[97] has opined that summary execution of murderers and causing disappearance of individuals are international crimes that have been considered as forming a part of CIL. Further, *Prosecutor v Kunarac*[98] has considered cruel, inhuman and degrading treatment as also provided under the Convention against Torture have attained CIL status.

Similarly, in the *Genocide Convention case*[99] considers Genocide as the most heinous crime and hence is surely a part of CIL regime. Scholarly opinions in this regard also of immense importance and require to be considered at this juncture. Prohibitions of slavery, slave trade, consistent pattern of human rights violation having considered as CIL[100] hold significance while comprehending the contribution of human rights and its interpretations in the formulation and development of CIL.

This is the overarching idea of a newly emerged world that values human rights transcending from the theoretical underpinnings and documents to confer recognition to them. The newly emerged CIL gives some kind of faith that the jurisprudence is ever evolving and efforts are more towards expanding the contours to encapsulate the fast-paced world. It also ushers in the awareness that more and more of such interpretations are needed from both domestic and international bodies in order to ensure respect of human rights. With analysis of human rights within the gamete of CIL was in an effort to

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95 Marc Bossuyt, *International Human Rights Protection: Balanced, Critical, Realistic* (Intersentia 2016) 1003-1005.

96 505 F. Supp. 787 (D. Kan. 1980).

97 694 F. Supp. 707 (N.D. Cal. 1988).

98 IT-96-23 & 23/1.

99 ICJ Reports (2007) 43.

100 Richard B. Lillich, et.al., 'Revised Draft of Restatement of the Foreign Relations Law of the United States and Customary International Law' (1985) 79 American Society of International Law 84.

showcase the opportunities at the disposal of world community that surpassing every barrier human rights can and have to be ensured. The beauty of human rights and CIL is synonymous- that it is universal and unrestricted.

Conclusion

The idea of human right is the most debatable yet the most significant. Sources of human rights are varied so are the human rights in itself. The first identifiable conglomeration of human rights could be traced back to 1948 when the UDHR was adopted. However, this was not a new practice but an attempt to bring together the general conscience of the world community and its people to a codified form. From the era of Magna Carta we have a long journey with the adoption of various international human rights the most significant being the three documents which formed the International Bill of Rights today- UDHR, ICCPR and ICESCR. However, human rights have had an interesting journey because as society evolves demand for human rights increased. There was need felt to incorporate more and more human rights that today there are innumerable human rights recognized almost by all the nations of the world. The primary contributor to this understanding has been customary rules of international law which comprises off to any means namely, state practice and *opinio juris*. This means that the current framework of human rights has been a historical account of the changing paradigm of this customary international law, because non-stagnancy of society compliments the changing nature of CIL influencing human rights immensely.

The paper has looked into various intricate sources, like juristic opinions, scholarly writings, judgements of international and national courts alongside state opinions through official statements to portray that the expansive interpretation of human rights that we experience now is a well-structured one which has incorporated within itself customary laws and has made it concrete and most importantly applicable to every nation irrespective of whether the States are party to the treaties concerned or not. Thus, escaping liability is no more an option for the nations, who had earlier bound themselves within the UN charter to respect, protect and promote human rights. This advantage of human rights vis-à-vis CIL is the most crucial element that deserves appreciation which has been the endeavour of the world community lead by the UN framework.

The paper has also concluded by laying emphasis on a newer kind of CIL- one which seeks to loop in various other kinds of human rights that even though have not been reflected in the UDHR or other international instruments or have largely remained constrained in domestic jurisdictions, the same can be interpreted as forming part of CIL. The examples quoted might seem feeble but certainly has the abilities to echo several voices and inspire many more so that further research works can analyse this emerging jurisprudence.

Codification of this new CIL in many more judgements, opinions and instruments is thus eagerly awaited.

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