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THE NEED TO AMEND ARTICLE 38 OF THE STATUE OF THE INTERNATIONAL COURT OF JUSTICE

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Abstract

Article 38 of the Statute of the International Court of Justice (ICJ Statute) was not introduced initially as the primary reference to the sources of international law because the word "a source" was not mentioned at all in the text of this article. Article 38 has mainly been inserted in the Statute of ICJ as a guide that facilitates the work of judges of the court to settle the disputes between states. However, it is recognised now that this article is regarded as an authoritative statement on the sources of international law (Wallace, 1997).

This paper argues that Article 38 (1) no longer reflects the actual sources of international law in the twenty-first century. In other words, there are some new and emerging sources of international law that should be included in Article 38 of the ICJ Statute. For example, the resolutions of the Security Council of the United Nations (not listed in Article 38) intervened in most areas of international law and many of such resolutions no longer are political and executive. The Security Council plays now a legislative role and has become a primary source of international law. Also, the judicial decisions of international courts can be considered in the current time as another primary source and not a subsidiary source, as stated in Article 38 (1) of the ICJ Statute. The decisions of the International Criminal Court and the ad hoc tribunals (created by the Security Council) are a good illustration of such source.

This paper concludes that the content of Article 38(1) of the ICJ does not correspond with the actual sources of international law in practice and there is a need to amend this article.

Keywords

International Court of Justice, Article 38, Sources, Security Council

1. Introduction

It is recognised that the rules and norms of any legal system derive authority from their *source* – where the law can be found or what the law is (Wallace, 1997). Within international law system, Article 38 (1) of the ICJ Statute includes the sources of international law. Therefore, this article can be considered the most important article in international law system, because it facilitates the work of judges in solving of international disputes between States and also helps researchers and practitioners in the field of international law. However, there are new changes in practice with regard to the sources of international law which should be included in Article 38 (1) of the ICJ Statute. The first part of this paper will examine the existing framework of international law sources set forth in Article 38 (1), while the new changes resulting from the practice of Article 38 (1) will be covered in the second part.

2. The existing framework of international law sources

When the draft of the Statute of the Permanent Court of International Justice (PCIJ Statute) was adopted in 1920, its Article 38 has stated that the court shall apply international conventions, international customs, general principles of law and judicial decisions and the teachings of the most highly qualified publicists of the various nations as subsidiary means for the determination of rules of law (The Permanent Court of International Justice: statute and rules, 1922). The draft statute of the International Court of Justice, prepared by a committee of jurists representing 44 States in 1945, was based on the PCIJ Statute and was therefore not a completely new text. Therefore, Article 38 (1) of the ICJ Statute has adopted the same approach as PCIJ approach in the context of sources and decided that:

The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

> ***a.*** *international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;* ***b.*** *international custom, as evidence of a general practice accepted as law;* ***c.*** *the general principles of law recognized by civilized nations;* ***d.*** *subject to the provisions of Article 59, judicial decisions and the teachings of the most*

> *highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.*

As it has been said that Article 38(1) of the ICJ Statute is the successor of Article 38 of the PCIJ Statute, both provisions are similar. Both of them did not explicitly mention the word "sources" in their texts. Rather, Article 38 in the Statutes of PCIJ and ICJ listed the rules that would be applied by the judges in dealing with international disputes (Article 38 of The Permanent Court of International Justice: statute and rules, 1922 & Article 38 of Statute of the International Court of Justice, 1945). Nevertheless, Article 38(1) of the ICJ Statute is widely recognized as the most authoritative statement as to the sources of international law (Wallace, 1997).

Article 38 has not clarified hierarchy among these sources, but paragraph (d) of the same article has used the phrase "subsidiary means" to include judicial decisions and the teachings of the most highly qualified publicists. This means that international conventions, custom and general principles of law set forth in paragraphs (a, b and c) of Article 38 (1) can be considered as the primary sources of international law. Therefore, there is consensus among international law scholars about this division. In practice, a judge of the ICJ must firstly apply any treaty between the parties of a dispute when the treaty is relevant. Thereafter, custom can be applied in the case of absence a convention. If neither a treaty nor a customary rule can be identified, general principles of law might be applied (Wallace, 1997). The final means that can be utilised by the ICJ in determining the rules of international law are the judicial decisions and writings of international scholars. This part will respectively highlight the primary and subsidiary sources set forth Article 38 of the ICJ Statute.

2.1. International conventions

As one of the primary sources of international law, Article 38 (1) of the ICJ Statute refers to international conventions, whether general or particular, establishing rules expressly recognised by the contracting states'. This source of international law can be expressed in different names such as treaty, agreement, protocol, pact, charter and covenant. All of these legal terms have an identical meaning that is "written agreements whereby the states participating bind themselves legally to act in a particular way or to set up particular relations between themselves (Shaw, 2003).

Although Article 38 (1) of the ICJ Statue has divided conventions into two kinds, general conventions and particular conventions, it is only the first kind, the general conventions or the so called the law-making treaties, constitute a primary source of International law. The former kind has universal or general application, while the latter kind applies only between two or a small number of states. (Shaw, 2003). The judges of the ICJ applied considerably many of treaties to settle several international disputes, such as the Charter of the United Nations, the four Geneva Conventions of 1949, the Vienna Convention on Diplomatic Relations of 1961, the International Covenant on Civil and Political Rights of 1966 and the Convention on the Law of the Sea of 1982.

It can be said that treaties – for many writers - constitute the most important source of international law as they are clear written rules that require the express consent of the contracting parties (Shaw, 2003).

2.2. Custom

Article 38 of the Statute of the ICJ defines international custom as evidence of a general practice accepted as law. This definition includes two elements for the formation of customary international law: a general practice and its acceptance as law. The general practice or the actual behaviour of states is known as the material or objective element, while the psychological or subjective element reflects the belief that such practice is law (Shaw, 2003).

On one hand, the material element will cover various acts adopted by a State, such as diplomatic correspondence, policy statement, executive decisions and practice and state legislation. There are a number of aspects to be considered concerning the nature of a particular practice by states. First, state practice must be uniform and consistent as declared by the ICJ in the Asylum case in 1950 (ICJ Reports, 1950). Second, custom should, to some extent, mirror the perceptions of the majority of states (Shaw, 2003). In other words, state practice should have a degree of relative generality. Certainly, universality is not required. So custom may be created by a few states, provided those states are intimately connected with the issue at hand whether because of their wealth and power or because of their special relationship with the subject-matter of the practice, for example, maritime nations and sea law (Brownlie, 2003). Third, there is no particular duration for the state practice and it will depend upon the circumstances of the case and the nature of the usage in question (Brownlie, 2003). In certain fields, such as air and space law, the rules have developed quickly; in others, the process is much slower (Shaw, 2003).

On the other hand, the subjective element is necessary from the perspective that custom as a source of international law must be distinguished from mere usage, courtesy or even tradition that can be practiced by states and lack legal force (Wallace, 1997). To put it in different words, the belief that a state activity is legally obligatory or the opinio juris is the element which turns the usage into a custom and renders it part of the rules of international law (Shaw, 2003).

In conclusion, there is a kind of disagreement about the value of custom as a source of international law. Some scholars consider custom as vague and slow-moving to accommodate the evolution of international law, while others think that it is a dynamic process of law creation, mirrors the contemporary concerns of society and it is more important than treaties (D'Amato, 1971). Despite this disagreement, no one can deny the importance of the custom by which international rules can be created in spontaneous nature and less formal way.

2.3. General principles of law

Article 38 (1) (c) of the Statute of the ICJ refers to "the general principles of law recognized by civilized nations" as a primary source of International Law. The term "civilized nations" had colonial connotations and this term is no longer acceptable because all nations are now considered as civilized (Wallace, 1997). Consequently, as long as the general principles of law for all nations are today recognised, this term must be dropped from Article 38 (1) (c). In particular, this term "would be discriminatory and incompatible with the United Nations Charter, which recognises the equality of all Member-States" (Bassiouni, 1989-1990). This source is listed third after international conventions and international customs. The Court shall apply the general principles of law in cases where treaties and customs provide no rules to be applied.

The Statute of the ICJ has not defined the concept of "the general principles of law" and there is no treaty or other instrument that clarifies the meaning of this concept (Murphy, 2006). Furthermore, there is no agreement within the international jurisprudence on what the concept means. A number of international scholars declared that the concept of the general principles of law includes the principles that exist in the national laws of states worldwide and can be applied within the international law system, such as the principle "no one shall be a judge in his own case" (Murphy, 2006). Others believe that this concept covers the principles originated from the specific nature of the international community (Murphy, 2006) or derived from international legal system. The principle of non-intervention by a state in the domestic affairs of another is a

good illustration of these principles. In fact, there is a trend accepted widely that states that the general principles of law can be derived from both of national system and international system as long as there is a need to fill the gap in a law or finding a solution for an international dispute (Thompson, 2015). In particular, international tribunals had applied general principles of law of both systems in adjudication processes (Thompson, 2015). For instance, the International Court of Justice declared in the Nuclear Tests case that the principle of good faith, is one of the principles that govern international obligations, regardless of their source (ICJ Reports, 1974). On the level of national system, the International Court of Justice in the Corfu Channel case decided that circumstantial evidence is an "indirect evidence", which has been admitted as a principle in all systems of law (ICJ Reports, 1949).

Regardless of the meaning of the concept of "general principles of law", there is a wide consensus that the general principles of law do constitute a separate source of international law. The decisions of international and national tribunals with the writings of international law scholars, are the most useful sources for ascertaining the existence and application of a given legal principle (Bassiouni, 1989-1990).

2.4. Judicial Decisions and writings of international law scholars

Article 38 (1) (d) of the ICJ Statute describes judicial decisions and writings of the most highly qualified publicist of the various nations, as subsidiary means for the determination of rules of law. It can be understood from this wording that courts and scholars are not entitled to create the rules of international law, but they can examine the primary sources (treaty, custom, general principles of law) and then decide which international rules is applicable to an issue (Murphy, 2006).

With regard to judicial decisions, it should refer to two important points. First, the purpose of inserting the condition of "subject to the provisions of Article 59" within Article 38 (1) (d) is to clarify that the judges of the ICJ are not obliged to follow their previous decisions, rather, they can adopt different decisions in new cases. In other words, the principle of judicial precedent, known in the domestic system, does not operate within international system (Shaw, 2003). Nevertheless, international courts and tribunal rely significantly on previous judicial decisions in support of building certainty and uniformity within their judicial process (Starke, 1977). Second, it is necessary to state that reference to 'judicial decisions' within the ICJ Statute should not be interpreted that this source is restricted to the decisions of international courts.

Even the decisions of domestic courts can be considered as a subsidiary source of international law (Evans, 2003).

The term of "the teachings of the most qualified publicists of the various nations" as a determined source of international law will cover "writings", "opinions" or "works" of international law scholars. The main function of those scholars is to provide reliable evidence of international rule, applicable to certain issue (Starke, 1977). For instance, international law scholars can provide through their textbooks or articles an evidence regarding existence of an international customary rule. It has been noticed that arbitral tribunals and national courts rely extensively on the works of international law scholars as a determined source of international rules (Shaw, 2003).

3. The new changes within the international law sources (Article 38)

Although Article 38 (1) of the ICJ Statute has a firm list of international law sources, the practice has shown that there are other changes within this article. The classification of sources as primary and subsidiary sources has deviated in which the subsidiary sources started to play a main role in development of international law. In addition, another new source of international has emerged into the international system. This part will highlight these changes or the new framework of international law sources.

3.1. Judicial Decisions as a Primary Source

Although the judicial decisions has been classified by Article 38 (1) as a subsidiary source of determining international law, the practice has shown that this source has a far higher standing than that (Cryer, 1996). It can be considered as a primary source for creating international law.

It is widely recognised that judges within the domestic system can create law through interpretation, and this can happen when judges reformulate rules in the process of applying them to particular cases, the reformulations become part of the body of sources of law (Swart, 2010). Such interpretation occurs when judges find gaps in the existing law and then they attempt to fill these gaps in the law (Swart, 2010). In fact, this process has been implemented within the international system. The Tadić Appeals Chamber decision on internal conflicts is a good illustration of this kind of law-making process. Rules concerning of internal armed conflicts are not wide and comprehensive compared to rules of international armed conflicts.

This gap was in a need to be filled up for a number of reasons (Cryer & others, 2010). First, internal conflicts had increased in numbers and duration, causing vastly more civilian deaths than in previous centuries. Second, internal conflicts had become more prevalent than international conflicts. Third, the increasing interdependence of States meant that internal conflicts had greater consequences for surrounding regions, increasing the urgency of regulating the conflicts. For these reasons, the ICTY Appeals Chamber in Tadić case interpreted the Geneva law and decided that that the traditional stark dichotomy between international and internal conflicts was becoming blurred, and that some war crime provisions concerning international armed conflicts are now applicable to internal armed conflicts (Prosecutor v. Tadić, 1996).

Regardless of the interpretation as a law-making process, the ICJ also contributed to develop international law by creating new rules and this can be noticed in the decision issued by the ICJ in the Arrest Warrant Case. In this case, a Belgian investigating magistrate issued "an international arrest warrant in absentia" on 11 April 2000 against the incumbent Minister for Foreign Affairs of Congo on the grounds of commission of war crimes and crimes against humanity. The questions submitted to the Court whether Minister for Foreign Affairs has any kind of immunity and to what extent this immunity (if there is) could be applied. The court has created in this case a new rule of international law by conclusion that "the functions of a Minister for Foreign Affairs are such that, throughout the duration of his or her office, he or she when abroad enjoys full immunity from criminal jurisdiction and inviolability. That immunity and that inviolability protect the individual concerned against any act of authority of another State which would hinder him or her in the performance of his or her duties" (International Court of Justice - Case Concerning the Arrest Warrant, 2002). In addition, the court extended this immunity to include the allegations concerning war crimes and crimes against humanity (International Court of Justice - Case Concerning the Arrest Warrant, 2002).

Following the examples mentioned - above, it is necessary to say that the judicial decisions are no longer restricted to determining of international rules, rather, they can now create new international rules.

3.2. Resolutions of Security Council

The Security Council as the executive organ of the United Nations (UN) has two kinds of legal acts. First, it can make recommendations that are not binding and can be adopted, for example, under chapter VI of the UN charter. Second, the Security Council can also issue

binding resolutions that determine pre-existing obligations towards States parties to the UN and even sometimes non-parties as long as a resolution is adopted according chapter VII and concerning with the maintenance of international peace and security (Articles 2(6), 24 and 25, the UN charter). The powers of the Security Council under chapter VII range from imposing sanctions on States, setting compensations commissions to creating peacekeeping operations and ad hoc criminal tribunals (Serpa Soares, 2016). It can be said that the Security Council does not create new international rules or obligations, but it executes the obligations imposed on States parties under the UN charter (Abate & Tilahun, 2009). In other words, the legal acts adopted by the Security Council generally do not constitute a source of international law. This fact can be backed by either Article 38 (1) of the ICJ Statute or the UN Charter, both do not refer to the legislative role of the Security Council.

Nevertheless, the Security Council has started recently to act as a legislature by creating new international rules or obligations (Abate & Tilahun, 2009). For instance, following the terrorist attacks in the United States on 11 September 2001, the Security Council adopted under chapter VII the resolution 1373 (2001). The resolution requires that all States shall: a) prevent and suppress the financing of terrorist act; b) criminalize the acts of funding the terrorist acts; c) freeze funds and other financial assets or economic resources of terrorists; take the necessary steps to prevent the commission of terrorist acts (S/RES/1373 /2001). Resolution 1540 (2004) is another example for the legislative role of the Security Council. All States under this resolution – adopted under chapter VII- must refrain from providing any form of support to non-State actors that attempt to develop, acquire, manufacture, possess, transport, transfer or use nuclear, chemical or biological weapons and their means of delivery (S/RES/1540/2004). Such resolutions have the characteristics of international legislation, such as that international obligations or rules are phrased in neutral language, apply to an indefinite number of cases, and are not usually limited in time (Talmon, 2005). As the resolutions 1371 and 1540 address all States and without determining specific cases or certain time in the scope of counter-terrorism and non-proliferation of weapons of mass-destruction, the resolutions impose legal obligations on all States.

It can be said that the Security Council can – under chapter VII - create international rules and obligations that did not exist before, and the resolutions of the Security Council under

chapter VII constitute sometimes a source of international law that is not mentioned explicitly within Article 38 (1) of the ICJ Statute.

4. Conclusion

Despite its use for 73 years by judges, jurists, practitioners and lawyers, Article 38 (1) of the ICJ Statute currently does not reflect the actual sources of international law. In the context of drafting of this article, although there is a wide consensus among judges and international law scholars that Article 38 (1) is the right reference to where the rules of international law can be found, the word "sources" has not been mentioned at all. Also, these sources are different from the sources actually used today in international cases and practice. The practice has shown that there is a kind of hierarchy within Article 38 (1), in which, for example, international conventions as a source has the highest priority given by the judges of ICJ and practitioners of international law in general. The judicial decisions, on the other hand, should be considered as a primary source instead of a subsidiary source as stated in Article 38. Recent judicial decisions have included new international rules, particularly, in the field of international criminal law. In other words, this source is no longer a subsidiary source that only determines the international rules, as has been stated by Article 38. Moreover, the resolutions of the Security Council of the UN adopted under chapter VII have been used to create new international rules or obligations. The resolutions 1371 and 1540 adopted by the Security Council under Chapter VII, are good illustrations of such resolutions. Thus, the Security Council should constitute a new source of international law that is not mentioned in Article 38 (1) of the ICJ Statute.

In conclusion, in light of current practice and reality Article 38 (1) of the ICJ Statute is a bit outdated, because it was drafted many years ago after II World War. This article needs to be amended in order to be compatible with what is applied and stable in the field of international law sources.

References

Abate, Mizanie & Tilahun, Alemayehu. (2009) International Organizations, the Justice and Legal System Research Institute, p81.

Bassiouni, Cherif (1989-1990). 11 Michigan Journal of International Law, p769.

Brownlie, Ian. (2003). Principles of Public International Law, Oxford University Press, p7.

Corfu Channel Case (United Kingdom v. Albania). International Court of Justice (ICJ Reports, 1949).

Cryer, Robert, Friman, Håkan & Robinson, Darryl. (2010). An Introduction to International Criminal Law and Procedure, Cambridge University Press, p 276. https://doi.org/10.1017/CBO9780511760808

D'Amato, Anthony A. (1972). The Concept of Custom in International Law, Cornell University Press.

Evans, Malcom D. (2003). International law, Oxford University Press, p117.

International Court of Justice, Case Concerning the Arrest Warrant OF 11 APRIL 2000 (Democratic Republic of the Congo v. Belgium) para 54.

Murphy, Sean D. (2006). Principles of International Law, A Thomson Reuters business, p 101.

Nuclear Tests, Australia v France. International Court of Justice (ICJ Reports, 1974).

Prosecutor v. Tadić (1996). International Criminal Tribunal for the former Yugoslavia, case no (IT-94-1).

Swart, Mia (2010). Judicial Lawmaking at the ad hoc Tribunals: The Creative Use of the Sources of International Law and "Adventurous Interpretation", p 487.

Serpa Soares, Miguel De. (2016). UN70: Contributions of the United Nations to the Development of International Law.

Shaw, Malcolm N. (2003). International Law, fifth edition, Cambridge University Press, p88. https://doi.org/10.1017/CBO9781139051903

Starke, J G. (1977). Introduction to International Law, Eighth edition, London. Butterworths, p 45.

Talmon, Stefan. (2005). the Security Council as World Legislature, the American Journal of International Law, p175.

Thompson, Bankole & John, Rosolu. (2015). Universal Jurisdiction: The Sierra Leone Profile, International Criminal Justice Series 3, p8.

Wallace, Rebecca M. M. (1997). International Law, London. Sweet &Maxwell, p7.