LEX SCRIPTA MAGAZINE OF LAW AND POLICY
ISSN- 2583-8725

VOLUME-2 ISSUE-1
YEAR: 2023

EDITED BY:

LEX SCRIPTA MAGAZINE OF LAW AND POLICY

LEX SCRIPTA MAGAZINE OF LAW AND POLICY, VOLUME-2: ISSUE-1

LEX SCRIPTA MAGAZINE OF LAW AND POLICY, VOL-2, ISSUE-1
ISSN-2583-8725

SOURCES OF INTERNATIONAL LAW CONSIDERING THE INTERNATIONAL COURT OF JUSTICE'S ARTICLE 38

Author: Shivam Kumar Pandey

(*Research Scholar, Rashtriya Raksha University)*

ABSTRACT

Among the most important formal origins of contemporary foreign treaties and agreements constitute law occasionally referred to as traditional resources. Formally speaking, When it comes to defining rights and obligations under international law, they are the most reliable source, but they are also the source that is most generally applicable and originating (producing force of application). Any analysis of the foundations as the body of international law acknowledged authoritative declaration of Article 38 of the International Court of Justice's Statute enumerates the sources of international law. It says:

1. The Court shall have jurisdiction, and its function shall be to render decisions on any matters referred to it in compliance with global law.

(a) Worldwide conventions, either specific or general, that establish guidelines acknowledged by the disputed States;

(b) Foreign tradition, which attests to a common custom recognised as legislation;

(c) Universal legal values acknowledged by civilised countries;

(d) Judges' rulings and the lessons of the world's most accomplished publicists, subject to article 59's provisions, as supplemental methods for establishing the rule of law.

2. If both parties consent, a matter may be decided ex aequo et bono by the court without being hindered by this clause.

Is the essay comprehensive in describing every source of international law? This is a topic to be explored or do other sources exist as well? Which other sources are there? and do they have a hierarchy of their own?

The explanation of "sources" and the many international law's sources will be covered, along with the claims made about the exclusive power of treaties and conventions as international law's sources.

KEYWORDS: International Law, Consent, International Court of Justice, Guidelines, Article 59

INTRODUCTION

Since international law is presumed to govern the mutual connections of states, it follows that law serves as an instrument for controlling how any civilization interacts with itself. Law is defined as "that which is laid down, ordained, or established" in Black's Law Dictionary and "which regulates the intercourse of nations; the law of nations" is what is meant by international law. International law has been characterised by nearly all standard older works is a collection of norms and principles that nations only bond in their reciprocal relations; this concept is also reflected in the definitions provided by Oppenheim, Hall, and Brierly. Definitions given in cases like West and Central Gold Mining Co. Ltd v. King (1905), Queen v. Keyn (1876), and S.S. Lotus case (1927) show the courts' uniform stance on international law.

The application of foreign law to dynamic global circumstances has led to a perpetual reconstruction of the legal system. Following World War II, there were notable advancements in the establishment of global institutions and organisations, and the range of International law has undergone modifications. It is now claimed that international law regulates interactions both between states and private organisations and between private organisations and international organisations. Therefore, a more modern definition of international law—such as that provided by Prof. J. G. Starke and Schwarzenbergers—expands the conventional ideas of the subject to grant rights and obligations to intergovernmental international organisations as well as to individuals.

Any legal system must address the fundamental issue of sources. Any workable legal system involves ongoing lawmaking. International law is able to adapt to the always evolving requirements for regulation by: creating new laws; and updating and improving already-existing laws in light of their legal foundations. It becomes clear when looking at the beginnings of international law that the word "sources" carries a variety of sometimes contradictory meanings. Herbert Briggs notes that there is "a confusion surrounding the term "sources," characterising it as "the techniques or protocols, this is the source of international law.

George Schwarzenberger "introduced the term law determining agencies for ‘subsidiary means for determination of law', i.e. judicial practice and primary sources, i.e. treaties, customs, and general principles of law." Oppenheim distinguishes between formal and material sources

when describing its multiple meanings. Formal sources provide the legal rule's legal validity, whereas material sources supply its substantive content. For example, a concluded treaty could be the formal source of a custom. Salmond is in agreement as well. Thus, it may be stated that "there are recognised and accepted methods by which legal rules come into existence in the context of international law."

INTERNATIONAL ORGANISATION DEVELOPMENT THROUGHOUT HISTORY

The necessity to build the psychological concept of global governance is where the evolution of IO may be traced. Major IOs didn't exist until the 19th century; earlier, smaller councils like the United Provinces of the Netherlands, the Swiss Confederation, and the Hanseatic League existed.

The thirty-year religious battle reached its conclusion in 1648 together with the Westphalia Peace, which was the primary initiator of the International Organisation of Conferences (IO). This conference brought together all the representatives from numerous governments and was an international event. Problems arising between more than two states could not be sufficiently and adequately resolved by embassies developing bilateral needs.

Prior to the First World War, conferences were used to find consensus on important problems. The Congress of Vienna in 1815, for example, represented the first organised effort to control international affairs through the use of regular international conferences.

In order to guarantee the smooth operation of crucial communication channels, like the Rhine and Danube rivers, international non-governmental organisations (NGOs) and during the 19th century, International Committee of the Red Cross and other public international organisations intergovernmental groups were established. This resulted from a number of contradictions in the ad hoc character of these meetings, which the concerned states might only draw upon on their own initiative and were limited to a single state.

The first international organisation was the League of Nations created to organise operations between states in what some have called "low politics," or the more mundane aspects of life, such as transportation and communication. As society continued to evolve, it became apparent that an effective body of IO could be determined. Nevertheless, the nation's league was dissolved in the wake of World War II because of its ineffectiveness, and 1919 saw the founding of the United Nations.

THE COURT OF INTERNATIONAL JUSTICE

The Permanent International Court of Justice (PCIJ) served as the model for the ICJ. The United Nations' forerunner, the League of Nations, was founded in 1920, formed PCIJ with the goal of preserving international peace and harmony in the wake of international War I. Despite being a permanent institution open to all governments, its decline after the 1930s and eventual inability to stop World War II led the leading nations to call for the establishment of a new, better judicial system. The PCIJ Statute serves as the foundation for the ICJ Statute, was enacted at the San Francisco Conference of 1945, which involved fifty countries.

Anytime two or more parties are unable to agree on anything and have conflicting interests, a legal dispute may result. This idea also holds true for international law, which assigns the International Court of Justice (ICJ) in order to resolve disputes amongst nations. The establishment of the ICJ by the UN in 1945 and serves as its chief court. Situated in the Netherlands' The Hague, As the highest court in the world, it can offer advisory opinions or settle disputes regarding matters of international law. The United Nations Charter's Article 33 specifies the processes that must be used to resolve disputes, including negotiations, arbitration, mediation, and judicial settlement. The mediation procedure allows parties to amicably resolve their differences with one another. A settlement reached by arbitration is subject to the third party's unbiased decision, which results in a statement that is legally binding. However, judicial settlement is a more stringent norm that adheres to the ICJ's definition of arbitration.

MEMBERSHIP OF ICJ

1. Tenure & election

The fifteen justices that make up the ICJ are appointed to nine-year terms, renewable once, and required to be citizens of separate nations. Every three years, the Security Council and General Assembly of the UN must nominate a candidate who receives an absolute majority of the vote to choose one-third or five members of the Court.

2. Candidate proposal

All state parties to the Court's Statute are permitted to submit suggestions for prospective judges to the International Criminal Court (ICC). The PCA, or Permanent Arbitration Court, which is chosen by each state, is tasked with making such a suggestion; the governments of the participating states are unable to do so. Four people make up PCA, and they are eligible to join the arbitral tribunal in accordance with the 1899 and 1907 Hague Conventions. The group may submit up to four nominations; however, it may only submit two nominations from members of its own nationality; the remaining nominations may come from members of any nation.

3. Nationality and termination

The Court must ensure that each member comes from a different country of origin by refusing to include citizens of the same state. Furthermore, the Court must collectively reflect the world's fundamental major legal systems. A member no longer serves as a delegate from their home nation or any other nation when they are chosen. The court's members must firmly affirm that they will always act impartially and with diligence. No member of the Court may be removed from office without the consent of the other members in a unanimous vote.

ICJ'S PRESIDENCY

1. Elections and tenure

When it comes to choosing the President and Vice-President, nationality is not a factor. Secret ballot elections are used by the Court's members to choose the President and Vice-President every three years. Additionally, re-election is permitted. However, an absolute majority must be reached for the election process to proceed.

2. Operational

The President oversees and leads all of the Court's sessions and makes sure that everything runs well. The Budgetary and Administrative Committees assist in this regard. When the President is ill or unable to perform their duties as President, the Vice-President assists and steps in for them.

SUBJECT MATTER TO ICJ

There are three types of cases that the ICJ hears.

1. Disputed matters

These are problems that come up between two states. Since people and groups are unable to bring their cases before the ICJ, the states frequently represent the concerns of individuals or organisations within their own states in these situations. "Diplomatic protection" is the term for this activity.

2. Unexpected problems

In these kinds of instances, the person seeking relief is asking for something to stop more harm or to safeguard their rights. Such interim remedies and actions are ordered by the ICJ and are in effect while the matter is being challenged before the ICJ.

3. Advisory matters

In order to assist them in any situation needing legal interpretation, this involves other UN bodies such as the UNGA and the UNSC.

ICJ'S JURISDICTION

The ICJ possesses authority over a number of instances, but its jurisdiction is frequently questioned. In cases involving contentious issues, both parties frequently favour the ICJ's aid to resolve the dispute so that the parties shall abide by the ruling. The ICJ also has compulsory jurisdiction, which is voluntary and is obtained when a state agrees to accept the mandatory jurisdiction under curtained defined matters. The nature of the legal dispute under which compulsory jurisdiction can be recognised before the court is listed in Article 36 of the Statute. However, this jurisdiction is not very effective because states frequently tend to exclude themselves from some aspects of the case. Furthermore, the ICJ has jurisdiction over any pronouncements it has made as well as cases in which a state has asked for assistance in pursuing its legal rights.

Since the ICJ lack enforcement authority, the UNSC may intervene if a state's refusal to abide by a ruling endangers the peace and harmony of the region. Article 94 of the UN Charter grants the UNSC the authority to suggest actions or carry out exceptional measures to carry out the ruling at the request of the state that has been harmed. The world community views the court's decision as valid thus far, which increases the likelihood that the affected states would accept the decision and abide by it.

ICJ'S ARTICLE 38

The fact that the ICJ's Article 38 is seen as a definitive statement of the foundations of international law is noteworthy, even if it does not aim to provide a list of them. Actually, these paragraphs express the Court's goals in terms of its mission. Customs, legal principles, and treaties are the first three sources that are cited; these are sometimes called "primary sources." The remaining two sources are publicists' teachings and judicial decisions; they are called "secondary sources" or proof of global legal standards.

1. Article 38 (1)(a)

Whether they are specific or generic, "conventions" are the original source under ICJ Article 38 1(a) of international law. Finding a treaty that addresses the matter is the first legal application of the law in any settled international dispute. The decision is based on any relevant treaties that may exist. Treaties constitute the second historical foundation for international law. They were created to provide mutual conduct standards more specificity than a custom could. "A treaty is defined as an agreement made between two or more States or other subjects of international law," according to the definition of the term "convention," regardless of its formal name.

Many treaties and conventions, including the Treaty of Locarno, the Hague Conventions of 1899 and 1907, and the Geneva Convention of 1864, significantly contributed to the development of international law even prior to the 19th and 20th centuries, when the UN and ICJ were founded. Following the UN's founding in 1945, treaties became the primary means of developing international law. Thousands of treaties have been registered with the UN, starting with the UN Treaty Series' many sector-specific treaties and the Bill of Rights.

A treaty is defined as "an agreement whereby two or more states establish or seek to establish a relationship between them governed by international law," as stated in the codified legislation that governs treaty negotiations, the 1951 Vienna Convention on Law. A contract is obligatory on the parties involved, who must respect the pacta sunt servanda maxim and carry out the treaty in sincerity. Assent can be expressed by signing, ratifying, or accession. treaties that codify the law or custom of the land that has truly come to be recognised since non-party states are bound by customary law. Treaties can be used to establish customary law, general law principles, or as a direct source of international law. International contracts could adopt agreements or treaties.

2. Article 38 (1)(b)

The second source listed Article 38 1(b) refers to custom. "The oldest and original source of both general law and international law is custom." This is the fundamental tenet of contemporary international law. When a usage is accepted by most people or acknowledgement by the states in their reciprocal relationships, it is recognised that such a usage or habit has evolved into a state obligation as well as a right; it becomes a custom. A custom cannot be deemed a norm of international law simply because it is widely acknowledged; rather, the nations must acknowledge it as such and given legal force, a status called juris opinio.

The definition of international custom is "evidence of general practice accepted as law" in Article 38 (b) illustrates this point and highlights the two fundamental components of custom:

opinio juris and practice. the ruling of the International Court of Justice decisions in cases such as the *S.S. Lotus, the North Sea continental shelf, Nicaragua v. United States of America*, *West Rand Central Gold Mining Company Ltd. v. R., the Peruvian asylum case, the Asylum case between Columbia and Peru*, *the Advisory Opinion on the use of Nuclear Weapons* (1996), and others demonstrate how international custom is applied. When in doubt, an international court interprets a treaty provision against customary law, even though it must first take that provision into consideration. In the event that a jus cogen and a treaty clause conflict, the jus cogen will take precedence.

3. Article 38 (1)(c)

The third accepted foundation of international legislation by the civilised world is enumerated in Article 38 1 (c). When it comes to legal precepts that are applicable to state-to-state relations, most contemporary lawyers agree that "general principles of law" are universal rules that hold true for all national legal frameworks. Additionally, they relate to standards or norms that are recurrent in developed legal systems in roughly the same form, either because of their common heritage or as an essential reaction to certain fundamental requirements of interpersonal relationships.

Examples include the requirement that contracts be upheld (pacta sunt servanda) and that fault-related damages be compensated for. the individual's right to self-defence against attacks on himself, his family, or the community against obvious and current risk; Judges are not allowed to preside over cases on their own; they are required to hear arguments from both sides. The United Nations and the rules of international law pertaining to amicable relations and collaboration, both uphold and expand upon the concept of good faith among States, which was the General Assembly's 1970 resolution 2625 (XXV), is arguably the most important overarching concept found in international law principles.

The primary goal of adding this paragraph to the purpose of Article 38 addresses the possibility of a non-liquet and fills in any customary and treaty law. The Arbitration Tribunal applied broad principles in the following cases: *AMCO v. Republic of Indonesia, Nuclear Tests, Chorzow Factory in 1928–1953, Barcelona Traction (1970), Administrative Tribunal case,* and others.

4. Article 38 (1)(d)

According to the Statute of the International Court of Justice, the fourth and fifth sources of law in Article 38 1 (d), directing the Court to consider court judgements and the guidance of

the most skilled publicists in each country as auxiliary sources of law. Consequently, rather than establishing new law, court decisions are considered to be indirect, material, or law-identifying sources. Rather, they proclaim already-existing legislation. Article 59 of the International Court of Justice's Statute stipulates that choices rendered by the courts are only legally bind on the parties involved and the particular issue at hand. The precedent doctrine does not exist in international law, in contrast to the Common Law, as we see that in its disputes, the Court itself references state rulings, the PCIJ and ICJ as authoritative bodies in their rulings, and legal scholars in their academic works.

Because of this, Court rulings are crucial in establishing the existence of and substance of legal rules—even as a secondary source. Progressive legal growth requires a decision that is almost universally acknowledged. Decisions and suggestions made in the Nottebohm, Genocide, Fisheries, and Reparation cases, for example, have greatly influenced general foreign law.

In Article 38-1(d), the term "the teachings of the most highly qualified publicists of the various nations" is also included as a subsidiary. Writers from the 16th to the 18th centuries, such as Gentili, Grotius, and Pufendorf, had a major impact on how international law developed.

Vattel and Bynkershoek were regarded as authorities for defining the parameters, elements, and content of international law; in contemporary times, legal books are considered only relevant or corroborated sources. Even the world's most renowned solicitors works cannot establish legislation; instead, they are used to determine the law on any specific topic. Textbooks are not the source of actual rules.

An exhaustive explication of the origins of international law is not provided by Article 38 of the ICJ, as the essay's introduction states, because a lot has changed in the international community since the law's creation in 1945. Additional Resources that have helped and are thought Declarements imposed on member nations by decisions issued by the Security Council, non-binding documents known as "soft law," like resolutions, recommendations, and declarations approved by the United Nations General Assembly and other international organisations, conferences on global civility and ethics, and equality—both

(a) in the sense that justice and rationality thinking about and

(b) in a sense that is more narrowly legal understood as constituting elements of broad legal principles or norms—are among the important developments in the ongoing development of international law.

(c) in the sense of Article 38(2) of the International Court of Justice, which gives the court the power to settle a dispute between the party's ex aequo et gratis.

As of yet, the ICJ has not rendered a decision based on Article 38 (2). Other secondary sources of international law could include state papers exchanged during diplomatic contacts, official advice provided to officers by legal advisors, and judicial reasoning leading to the discovery of principles.

5. Modern Sources of International Law

i. General Assembly Resolutions

International organisations have been crucial to the development of and formulation since the United Nations' founding, of international law. One of the main U.N. organs, the General Assembly, established the Commission on International Law. Even so, they are not mentioned in Art. 38 of the ICJ Statute, organ rulings and conclusions are increasingly acknowledged as an important foundation for international law. General Assembly resolutions adopted by the UN lack legal force and are therefore not enforceable by the United States. Whether or not they were approved by a resounding majority of votes, they do not impose any legal responsibilities on its members.

A review of cases such as the Anglo-Norwegian Fisheries Case (ICJ, Rep. 1951), the South West Africa Voting Procedure Case (ICJ, Rep. 1955), the ICJ's Advisory opinion on Namibia, and the Western Sahara Case suggests that the General Assembly's collective pronouncements may have legal weight even though they are non-binding.

CONCLUSION

The aforementioned reasoning and instances lead one to the determination that Article 38 provides a thorough overview of the primary sources of international law, both formal and material, designating agreements, traditions, and overarching concepts as the main official sources; supplying broad guidelines to bridge the spaces between treaties and customary law; and as a supplementary method, offering judicial decisions, which, according to the same article's provision, have now evolved into a trend-setting body of evidence that is extremely valuable in establishing legal norms. These decisions are also represented in the courses taught by the most accomplished publicists from different nations. However, because judicial rulings are particular to the facts and limited to the relevant states, they will continue to be subsidiary. Provision of equity is also available in Still the concerned states' assent.

The article's provisions cannot be deemed entirely comprehensive, as additional precautions listed in the previous paragraphs also play a significant role in addressing the increasingly intricate challenges that the global society faces, encompassing areas of international law, both private and public. Given that treaties are now a primary origin of international law, it is evident from the explanation above that the It is false to say that the only important ways to create international law are through conventions and treaties.

It's concluded that The process of developing international law is unique in that there is no hierarchy between custom and treaties as sources of law; instead, norms of general international law, such as the ban on torture and non-refoulement, have even more power under jus cogens, or peremptory norms. States cannot even deviate from jus cogens through customary laws or treaties. As a result, jus cogens is the highest rule in international law in terms of hierarchy.

REFERENCES

- Brierly, J. L., The Law of Nations, 6th ed., Edited by Humphrey Waldock. London: oxford University Press, 1963.
- Briggs, Cf., Herbert, The law of Nations, 2nd ed., New York, 1952. 5. Chamara Sumanapala, International Law: Conventions and Customs, Dec 5, 2010, available at: http://www.suite101.com/content/international-lawconventions-and-customs-a316939#ixzz17omhh0Q5
- Verma, S. K., An Introduction to Public International Law, Prentice-Hall of India Pvt. Ltd. 2004.
- Vienna Convention on the Law of Treaty 1969, Article 2, available at: http://treaties.un.org/Pages/ViewDetailsIII.aspx?&src=TREATY&mtdsg_no=XXIII~1&chapter=23&Temp=mtdsg3&lang=en
- G. Schwarzenberger , International law, vol.1. 3rd ed., London: Stevens and Sons Ltd., 1957.