

Critically evaluate whether Article 38 of the Statute of the International Court of Justice provides a hierarchical and exhaustive list of the sources of international law.

Introduction

Article 38 of the Statute of the International Court of Justice provides that:

“1. 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.*

2. This provision shall not prejudice the power of the Court to decide a case ex aequo et bono, if the parties agree thereto.”¹

Robert Jennings, a former judge of the International Court of Justice once stated that ‘*although lawyers know that the quality of certainty of law is one on which there must be much compromise, not least in the interests of justice, it is a desideratum of any strong law that there is reasonable certainty about where one should look to find it*’.² It might be said that Article 38 provides this certainty as to where to find a definitive statement of international law, by listing the sources which either create law or identify law and placing them into a hierarchy.³

¹ International Court of Justice, ‘Statute of the Court’, (ICJ, 2016) <<http://www.icj-cij.org/documents/?p1=4&p2=2>> accessed 18 July 2016

² Robert Jennings, “What is International law and How Do We Tell It When We See It?”, [1985] *The International Lawyer* 1033

³ Martin Dixon, *Textbook on International Law*, (Oxford University Press 2007), 23

The purpose of this essay is to critically evaluate whether Article 38 of the Statute of the International Court of Justice does indeed provide a hierarchical and/or exhaustive list of the sources of international law. It will be shown that Article 38 does not provide an exhaustive list of the sources of international law, missing out sources such as the instruments of the United Nations and other non-state actors (which do not fall neatly into any of the above categories), and only provides a very broad guide to the hierarchy of the sources of law which it does list, in a manner that is overly simplistic and sometimes inaccurate. However, it will be seen that this matters little, as the International Court of Justice has articulated its own hierarchy and is content to take into account other sources of law not listed in the Statute in a way which has not caused any practical issues and may even be beneficial to the dynamic nature of international law.

The Meaning of 'Sources' of Law

It is to be noted from the outset that the scope of this essay concerns the 'sources' of law, a term that requires careful definition. For the purposes of this essay, the definition of a source of law is not to be limited to instruments or actions which act to create law (the most obvious type of this 'law making' source being treaties, a deliberate act of creating legally binding relations between States), as Article 38 also includes as a source of law the teachings of jurists and other academic publications. Academic publications are naturally not a law making source of law, but rather are a source whereby the law can be *determined*. The definition of a source of law, therefore, must include both law making source, law determining sources (such as judicial opinions) and law evidencing sources (such as the practice of States).⁴ For this reason the debate over the nature of the law determining and evidencing sources of law as 'real law',

⁴ Ibid., 26-27

as well as the hard law/soft law debate, is beyond the scope of this essay; all will be treated as sources of law.

Omissions from Article 38

There are a number of examples which can be given of sources of international law that are missing from the list given in Article 38, showing that it is not an exhaustive guide to the sources of international law. The first most glaring omission from the list given in Article 38 is the non-treaty instruments of the United Nations, such as the resolutions of the General Assembly and the decisions of the Security Council, as well as other measures taken by international bodies other than formal treaties with States. It also fails to take into account diplomatic correspondence between agents of States and unilateral State declarations.

It might be argued that these instruments of international bodies and the diplomatic correspondence between States are not true sources of international law, but are instead '*merely evidence of state practice and thus subsumed under the head of customary law*'⁵. This might be an explanation of the failure to list diplomatic correspondence and unilateral declarations as sources of law in the Statute, as these are State actions and so can be written off as incorporated under Article 38(1)(b).

However, in the case of the actions and instruments of international bodies, these are fundamentally the actions of non-state actors, not State actors, and so do not neatly fit into the category of mere evidence of state practice. Nevertheless, these actions often have great significance in forming law (even though not all of them are intended to be legally binding), and in many instances place States under some kind of normative obligation (at the very least, a moral obligation)⁶. This is also true of the actions of other powerful non-state actors, such as

⁵ Ibid., 24

⁶ Rebecca Wallace, *International Law: A Student Introduction*, (Sweet & Maxwell, 1992), 29

multinational corporations. Unless the actions of non-state actors are considered to be themselves a separate source of law to custom (at least a law evidencing source, and potentially a law-making source of law, at least in the case of some United Nations instruments), this is a difficult phenomenon to explain away.

Support for the proposition that the instruments of international organisations and diplomatic correspondence between States are some kind of legal source can be found in the judicial decisions of the International Court of Justice (these decisions themselves being a law-determining source according to the Statute). Diplomatic correspondence was heavily relied on by the International Court of Justice to determine the parties' legal positions in *Nauru v Australia (Jurisdiction)*.⁷ Similarly, Resolutions of the United Nations were taken into account when determining the applicable law in the *Nicaragua v USA*⁸ case, while decisions of the Security Council were deemed to create a special form of law binding on the addressee in the *Kosovo* case.⁹ The proposals of the International Law Commission have also been used to support the ICJ's findings of law on several occasions.¹⁰

With respect to resolutions of the General Assembly, in his Separate Opinion in *The Voting Procedures Cases*, Judge Lauterpacht explicitly stated that:

'It would be wholly inconsistent with the sound principles of interpretation as well as with the highest international interest, which can never be legally irrelevant, to reduce the value of the Resolutions of the General Assembly - one of the principal instrumentalities of the formation of the collective will and judgment of the community

⁷ *Nauru v Australia (Jurisdiction)* [1992] ICJ Rep. 240

⁸ *Nicaragua v USA* [1986] ICJ Rep. 14

⁹ *Accordance with International Law of the Unilateral Declaration of Independence In Respect of Kosovo* [2010] ICJ Rep. 403

¹⁰ Santiago Villalpando, "On the International Court of Justice and the determination of the rules of law", [2013] L.J.I.L. 243

of nations represented by the United Nations – and to treat them... as nominal, insignificant, and having no claim to influence the conduct of the members.’¹¹

Similarly, the support of some States for the implementation of the International Law Commission’s *Articles on Responsibility of States for Internationally Wrongful Acts* as a General Assembly resolution rather than a convention¹² indicates that even States view the instruments of international organisations as an intermediary between treaties and ‘not law’.

It appears from the above that, despite the fact that Article 38 omits several significant sources of law from its list, the International Court of Justice is content to take them into account as sources of law, either in the law-making or the law determining sense, regardless. As a matter of practice, therefore, the fact that Article 38 is non-exhaustive has no great impact on the application of international law by the International Court of Justice.

Article 38 and the Hierarchy Between the Listed Sources

It is noteworthy that Article 38 does not explicitly state that the sources it lists are to be taken to be in any kind of hierarchy (with the exception of judicial and jurist writings, which are explicitly stated to be subsidiary and law determining rather than law creating). In this sense, the Statute does not provide a hierarchy of the sources of international law.

However, it might be argued that a hierarchy can be implied from the ordering of the sources in Article 38. If the hierarchy of the sources of law listed in Article 38 is taken in the order they are listed, this would mean that, firstly, conventions and treaties are the supreme form of law, overriding all else, followed by customary law. The general principles of law as recognized by civilised nations would act only as a source of last resort where no other law can be found, or

¹¹ *The Voting Procedure on Questions Relating to Reports and Petitions Concerning the Territory of South West Africa* [1955] ICJ Rep. 67, 122.

¹² James Crawford, Simon Olleson, “The continuing debate on a UN convention on state responsibility”, [2005] I.C.L.Q. 959

alternatively a guide to interpretation of higher forms of law, or, alternatively, a mere way of identifying higher forms of law and not a law making source in and of itself (the Statute does not make this clear and it is the subject of much academic debate). Meanwhile, the writings of jurists and judicial decisions, being at the very bottom of the hierarchy, are on the face of the Statute a subsidiary means of identifying and potentially interpreting the other sources of law, rather than a law making source, to be turned to as a matter of last resort.

It is certainly the case that as a general rule, custom acts to fill the gaps between treaties; the treaty obligations of the parties being the primary point of reference for determining the applicable international law.¹³ It is also the case that general principles are relied on only where there is a gap with respect to treaty and customary law (in very limited circumstances such as, for example, whether or not certain rules of evidence or principles like *res judicata* exist with respect to the International Court of Justice as a matter of international law¹⁴), or as a guide to interpreting treaty and custom¹⁵. Meanwhile, judicial decisions and academic publications are for the most part merely subsidiary guides to identifying the former sources. However, the order of sources listed in Article 38 of the Statute is not a completely accurate guide to the priority of the sources of international law, particularly where the relationship between custom and treaties are concerned.

To begin with, it is not the case, as is often true at the inter-State level, that the creation of a treaty will necessarily have precedent over custom by overriding the existence of any parallel customs. If a number of States enter into a treaty intended to, or which has the effect of, codifying a custom, the customary rule remains alive and binding.¹⁶ This can have great

¹³ *Gulf of Maine Case* [1984] ICJ Rep 246

¹⁴ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* [2007] ICJ Rep. 2

¹⁵ *Fisheries Jurisdiction Case (UK v Iceland)* [1974] ICJ Rep 3

¹⁶ *Nicaragua v USA*, (n 8)

significance where the International Court does not have the jurisdiction to decide a case by reference to a treaty for whatever reason, as was the case in *Nicaragua v USA*. This makes the use of treaties to opt out of customary rules not straightforward, and perhaps even not possible in some instances. This is not compatible with the notion that conventions are an absolutely higher form of law than customary rules.

Secondly, there is a class of customary rules which is generally accepted to take precedence over the obligations of treaties, named *jus cogens* (also known as peremptory norms).¹⁷ A peremptory norm is a customary rule which is regarded as sufficiently fundamental or important (for whatever reason) that it cannot be derogated from by treaty or any other form of law (though how the norm is enforced procedurally can be the subject of a valid treaty, even where it would impede the enforcement of the norm¹⁸). The prohibition against war crimes, slavery and torture are common examples of peremptory norms.¹⁹ This is a clear instance of the implied hierarchy lacking the nuance to make it entirely accurate, as the possibility of customary law which cannot be overridden is not mentioned. Indeed, there is one school of thought which characterises treaties and conventions as mere contracts between States²⁰, binding on those States because there is a peremptory norm of customary law that makes them so (though in practice this is of little import since the effect of treaties is the same whether this is true or not).

Thirdly, there are some areas where the hierarchy of sources is uncertain. For example, where a rule of customary law develops after the formation of a treaty, it is entirely unclear which would have priority: the treaty or the rule of custom.²¹ If the treaty has priority, the hierarchy

¹⁷ See for example: Vienna Convention on the Law of Treaties 1969, Article 53

¹⁸ *Jurisdictional Immunities of the State (Germany v Italy: Greece Intervening)* [2012] ICJ Rep. 140

¹⁹ Cherif Bassiouni, "International Crimes: 'Jus Cogens' and 'Obligatio Erga Omnes'", [1996] Law and Contemporary Problems 68

²⁰ *Maclaine Watson v Dept of Trade and Industry* [1989] 3 ALL ER 525, Lord Templeman

²¹ Dixon, (n 3)

as listed in Article 38 is accurate. If the later rule of custom would override the treaty, this would imply that custom and convention are actually of equal rank, with the perception that treaties are a higher form of law merely being a symptom of the fact that customary rules on a topic tends to pre-date treaties on that same topic. Since Article 38 is not explicit on the question of hierarchy between sources, it provides no assistance in answering this question. It is noteworthy, however, that the International Court of Justice has strived to avoid treaties coming into conflict with later customary norms by interpreting treaties in such a way that they complement the customary rule rather than contradict it. For example, in the *Danube Dam Case*, the treaty in question was interpreted to be capable of its effect being modified in the light of later custom.²² It may be that the debate over what would happen if a later customary rule conflicted with a treaty obligation is therefore moot. This approach is perhaps desirable; it keeps international law dynamic and flexible while reducing the possibility for contradiction and conflict.

Finally, there are some academics who are of the opinion that the characterisation of the judicial decisions by Article 38 as a merely subsidiary, law determining source of law may be inaccurate in some instances. For example, Villalpando points to an ‘*autocatalytic process*’ by which the International Court of Justice relies on the writings of the International Law Commission to support findings of law, who in turn rely on the ICJ to describe what the law is, leading to a process where new rules of law are created by ‘*mutual reaffirmation...without any external practice*’ (as is necessary for a rule of custom or a treaty).²³ Even the judges of the International Court of Justice have admitted that they do more than simply identify and

²² *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* [1997] ICJ Rep. 7

²³ Santiago Villalpando, (n 10), 248-249

apply pre-existing law, but rather create new law; the development of the law of maritime delimitation is a particularly strong example of this happening.²⁴

Similarly, Baker points to evidence that the jurisprudence of many of the ad hoc international criminal courts is capable of quickly making effective changes to the customary law, leaving it doubtful that state practice is still the only source of international custom (or at least that the influence of non-state judicial actors on state actors is so strong that it should be considered a law evidencing source of law of at least equal significance to the general principles of law mentioned at Article 38(1)(c) and perhaps even the general practice of States mentioned in 38(1)(b)).²⁵ If this view of the nature of judicial decisions is correct, where within the hierarchy these *sui generis* sources of law created or evidenced by non-state actors fit is certainly unclear from the Statute (especially since the Court tends to describe them as rules of custom).

Overall, the hierarchical position of the first two sources of law, treaty and custom, is much more nuanced and complicated than is implied by their ordering in Article 38 of the Statute. Likewise, the Statute's treatment of judicial decisions as merely subsidiary sources of law at the bottom of the hierarchy may not be an accurate representation of how judicial statements of law are treated in practice. However, the implied hierarchy provided by the Statute does still provide a useful guide in where to begin identifying the substance of international law, and the nuances that exist in practice are not so myriad or complex as to render identifying the rules of international law an unacceptably unpredictable exercise.

Conclusion

²⁴ Alberto Alvarez-Jimenez, "Methods for the identification of customary international law in the International Court of Justice's jurisprudence: 2000-2009", [2011] I.C.L.Q. 681

²⁵ Roozbeh Baker, "Customary international law in the 21st century: old challenges and new debates", [2010] E.J.I.L. 173

In conclusion, Article 38 does not propound a hierarchical and exhaustive list of the sources of public international law. It might be argued that the fact that Article 38 fails to list all of the sources of international law is problematic. Article 38 is said by some to not merely be ‘*a convenient collection of various bases of international law*’²⁶, but in fact a provision which dictates the only sources of international law which the International Court of Justice is permitted to apply and take into consideration when dealing with disputes between parties or advising States on the content of the law. While this may or may not have been the intention of those drafting the provision, it is how many jurists have interpreted it, and is the most obvious literal interpretation of it.²⁷

In practice, however, the International Court of Justice has been perfectly capable of taking into account other sources of international law in its judgements, especially the instruments and actions of non-State actors, and has developed its own rules concerning the hierarchy of the sources of international law which is broadly set, predictable and does not deviate too often from the implied hierarchy given by the order in which sources are listed in Article 38.

It may even be the case that the search for an exhaustive list of the sources of international law and a set hierarchy between those sources is a fool’s errand. There may well be ‘*ongoing spontaneous germination of international law which by nature defies any relationship with pre-existing formal sources*’.²⁸ With that in mind, the more flexible approach of the Court of Justice in identifying and applying alternative sources of law and giving them a loose hierarchy is to be welcomed as keeping international law suitably dynamic while maintaining an acceptable

²⁶ Mark Weisburd, *Failings of the International Court of Justice*, (Oxford University Press, 2015), 28

²⁷ Marc Beiser, Linda Taylor, ‘Article 38(1): an exhaustive statement on the sources of international law’, [2004] S.L.T. 219

²⁸ *Ibid.*, 220

level of certainty, and the fact that Article 38 of the Statute is incomplete and its implied hierarchy inaccurate not to be lamented too heavily.



OxbridgeEssays

Bibliography

Table of Cases

Accordance with International Law of the Unilateral Declaration of Independence In Respect of Kosovo [2010] ICJ Rep. 403

Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro) [2007] ICJ Rep. 2

Case Concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia) [1997] ICJ Rep. 7

Fisheries Jurisdiction Case (UK v Iceland) [1974] ICJ Rep 3

Gulf of Maine Case [1984] ICJ Rep 246

Jurisdictional Immunities of the State (Germany v Italy: Greece Intervening) [2012] ICJ Rep. 140

Maclaine Watson v Dept of Trade and Industry [1989] 3 ALL ER 525

Nauru v Australia (Jurisdiction) [1992] ICJ Rep. 240

Nicaragua v USA [1986] ICJ Rep. 14

The Voting Procedure on Questions Relating to Reports and Petitions Concerning the Territory of South West Africa [1955] ICJ Rep. 67

Table of Legislation

International Court of Justice, 'Statute of the Court', (*ICJ*, 2016) <<http://www.icj-cij.org/documents/?p1=4&p2=2>> accessed 18 July 2016

Vienna Convention on the Law of Treaties 1969

Books

Dixon M, *Textbook on International Law*, (Oxford University Press 2007), 23

Wallace R, *International Law: A Student Introduction*, (Sweet & Maxwell, 1992)

Weisburd M, *Failings of the International Court of Justice*, (Oxford University Press, 2015)

Journal Articles

Alvarez-Jimenez A, “Methods for the identification of customary international law in the International Court of Justice's jurisprudence: 2000-2009”, [2011] I.C.L.Q. 681

Baker R, “Customary international law in the 21st century: old challenges and new debates”, [2010] E.J.I.L. 173

Bassiouni C, “International Crimes: ‘Jus Cogens’ and ‘Obligatio Erga Omnes’”, [1996] Law and Contemporary Problems 68

Beiser M, Taylor L, ‘Article 38(1): an exhaustive statement on the sources of international law’, [2004] S.L.T. 219

Crawford J, Olleson S, “The continuing debate on a UN convention on state responsibility”, [2005] I.C.L.Q. 959

Jennings R, “What is International law and How Do We Tell It When We See It?”, [1985] The International Lawyer 1033

Villalpando S, “On the International Court of Justice and the determination of the rules of law”, [2013] L.J.I.L. 243