

# AN EXAMINATION OF ARTICLE 38 (1) OF THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE 1945 AS A SOURCE OF INTERNATIONAL LAW

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## ABSTRACT

This article examined Article 38 (1) of the Statute of the International Court of Justice 1945 as a source of international law, the article found out that it is obvious from the establishment of the Statute of the International Law Commission in 1947 (shortly after the establishment of the International Court of Justice) to the various opinions of international law experts, it is without any doubt that there is need for the review and redrafting of the provisions of Article 38 (1).

*Keywords: Article 38, International Court of Justice, International Law, Civilized Nations*

## INTRODUCTION

States exist side by side and interact with one another in terms of trade, cooperation and conflict; hence the need for international law<sup>3</sup>. The need for peaceful coexistence, cooperation and understanding leads to the creation of multiple international organizations and further entrench the need for the international law<sup>4</sup>.

International law means different thing to different people, it can be vaguely understood as a body of rules and regulations governing the activities and relationships between states. It may also mean rules governing international organizations and international relations. Its scope and boundaries have over the years saw a significant shift in its limits and parameters. These rules are derived from treaties and conventions, agreements, international customs, general principles of law recognized by civilized nations, judicial decisions as well as teachings of renowned publicists<sup>5</sup>.

International law is broadly divided into two major categories; public and private. Public international law deals with states and recently in some cases individuals, while private international law otherwise called conflict of laws deals with conflict of individuals from different jurisdictions or states. Public law is further divided into traditional and emerging fields. It is traditionally viewed as dealing with states responsibilities, law of treaties and the sea, whilst the modern or emerging fields, includes individual international criminal responsibilities, human rights and the environment.

International law often faces some challenges and criticisms; however, this is largely due to the usual attempt in comparing it with the domestic or national laws. It does not have legislature that enact it, executive to implement it and a properly structured court system. And yet it exist, it's ascertainable and adopts a horizontal approach; whereby, all states are treated as sovereign and equal before the law<sup>6</sup>.

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<sup>3</sup> Malcolm N Shaw, International Law (6<sup>th</sup>edn, Cambridge University Press 2008) 44

<sup>4</sup> Dapo Akande 'International Organizations' in Malcolm D Evans (ed), *International Law* (4<sup>th</sup>edn, Oxford University Press 2014) 248

<sup>5</sup> Statute of the International Court of Justice 1945, Article 38 (1)

<sup>6</sup> Shaw (n 1) 70

## SOURCES OF INTERNATIONAL LAW

For a rule of international law to be binding, it must be derived from one of the recognized sources provided by Article 38(1) of the Statute of the International Court of Justice 1945<sup>7</sup>. They are the authoritative and conventional sources of international law being an integral part of the United Nations Charter<sup>8</sup>. The Article provides thus;

*'Article 38 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'*

The above section list in hierarchical order the sources of international law to be used by the international court of justice to settle dispute arising between states, this is however, not firm as there is not much priority on the hierarchy of the first three sources, while the last two are generally seen as subsidiary<sup>9</sup>.

However, experts in the field of international law expressed divergent opinions on the interpretation of Article 38 (1) (a)-(d) of the ICJ Statute<sup>10</sup>. One of the opinion is that the sources of international law listed in Article 38(1) (a)-(d) are to be treated and used equally without priority given to any one of them, while others opined that the provisions in Article 38 (1) (a)-(c) are different and have priority over the provision of Article 38 (1) (d)<sup>11</sup>.

In terms of hierarchy, China for example, adopts treaties as having priority over customary international law and other sources. This is believed to be as a result of Chinas' perceived domination of the development of customary international law by the West. As such, customs are inapplicable by the laws of China<sup>12</sup>.

Similarly, sources of international law are traditionally distinguished into material sources and formal sources. Material sources are those relating to the place usually a document where the rules or terms of an agreement are stated, this may be a convention, treaty, resolution of the United Nations or even a statement in a textbook<sup>13</sup>. The formal sources on the other hand, are those recognized by Article 38 (1) of the Statute of the International court of justice as mentioned above<sup>14</sup>. However, these sources of international law are to a large extent seen to be state oriented rather international and different from municipal laws<sup>15</sup>.

Although Articles 38 (1) of the statute of the ICJ have been provided in principle to provide guide and directions to the International Court of Justice in administering justice, it is mentioned whenever there is any meaningful discussion on the sources of international law<sup>16</sup>. It is frequently referred to and reproduced in subsequent instruments of international law even though it is only limited to the International Court of Justice<sup>17</sup>.

However, Navid R. Sato<sup>18</sup> argued that even though the applicable law within the World Trade Organization (WTO), the scope of the sources of international law as contained in Article 38 of the Statute of the International Court of Justice is not limited to the court, but other international tribunals and arbitral bodies including the World Trade Organizations tribunal. Although, not much reported, the WTO acknowledges the provisions of Articles 38 (1) including customary international law, treaty and conventions and the general principles of law recognized by civilized nations. An example was the obligation on application and acceptance of good faith by all member states as general principles of law<sup>19</sup>.

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<sup>7</sup> Hugh Thirlway, 'The Sources of International Law' in Malcolm D Evans (ed), *International Law* (4<sup>th</sup>edn, Oxford University Press 2014)

<sup>8</sup> Vladimir-DjuroDegan, On the Sources of International Criminal Law, *Chinese Journal of International Law* (2005) 45-83

<sup>9</sup> Article 38 (1) (d) Statute of the ICJ

<sup>10</sup> Aldo ZammitBorda, A Formal Approach to Article 38(1)(d) of the ICJ Statute from the Perspective of the International Criminal Courts and Tribunals, *Eur J Int Law* (2013) 24-649

<sup>11</sup> *ibid*

<sup>12</sup> *Asian Journal of International Law*, 1 (2011), pp. 233-248 Chinese Philosophy and International Law Pan Junwu

<sup>13</sup> *ibid* n 5

<sup>14</sup> *ibid*

<sup>15</sup> *Human Rights Law Review* (2015) 15(3): 441-484 1 September 2015 NHRIs and the State: New and Independent Actors in the Multi-layered Human Rights System KatrienMeuwissen

<sup>16</sup> R. McCorquodale and M. Dixon, *Cases and Materials on International Law* (4th edn, 2003), at 19

<sup>17</sup> International Law Commission, Formation and Evidence of Customary International Law, (INT LAW COM UN No A/CN.4/659, 2013) 1

<sup>18</sup> *Journal of International Trade Law and Policy* (2010) JITLP 9(2), 108-129 1 June 2010 Principle of necessity in China -- intellectual property rights Navid R. Sato

<sup>19</sup> *ibid*

On the contrary, Rose Parfitt in an article 'The Spectre of Sources'<sup>20</sup> argued that the sources of international law should be rather far from those mentioned in Article 38 (1) of the Statute of the International Court of Justice. The argument was that limiting the focus of sources of international law to Article 38 (1) only signifies legitimacy and authority in the sources to the creation of the United Nations which when formed constitute only European and Neo-European countries with much European settlers. The author further argued, that there are other sources such as Islamic law and agreements of chartered companies who later transformed into colonialist agents having dual mandate of trade and colonialism on behalf of their original countries also contributed in a significant way to the development of international law and its sources. Looking at the sources from this perspective is more complex and global. This, it was argued in the article, was never the concern of international law experts because of the 'Eurocentrism' (focus of international law to Europe against other parts of the world) which dominated the historical development of international law and its sources<sup>21</sup>.

## GENERAL PRINCIPLES OF LAW RECOGNIZED BY CIVILIZED NATIONS AS A SOURCE OF INTERNATIONAL LAW

General principles of law are relevant laws, legal principles and rules pronounced by the court as a result of analogy and consultation of existing and established principles of law that guide the legal system, public policy and other general principles of equity and justice. This is usually arrived at as a result of lack of existing law directly regulating that particular matter before the court<sup>22</sup>.

General principles of law as a source of international law were contemplated by the drafters (commission of jurist) of the Statute of the International court of justice for the future where a dispute may be before the court and no provision of a treaty and an established custom governs the issue. It was thought by the drafters that it will be inappropriate for the court to neither uphold nor reject the issue for lack of an existing law or custom<sup>23</sup>. This is coupled with the foreseen and indeed relative under development of international law and judicial precedent compared to the municipal law and the lack of legislature to enact laws to govern lacunain the law as well as emerging and new situations<sup>24</sup>.

At the time of drafting the statute of the International Court of Justice, treaty and custom were known and ascertained sources of international law and to avoid any future uncertainty,<sup>25</sup> which is legally referred to as *non liquet*, the general principles of law came into being. However, the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States adopted in Washington on 18 March 1965, a subsequent international convention has further discouraged the pronouncement of non liquet by international arbitral bodies, tribunals and the international court of justice<sup>26</sup>. This provision came into being as a result of the increasing phase of relations between private individuals and states especially on economic matters<sup>27</sup>.

However, international law experts are divided on the nature of principles to be used in arriving at the general principles of law recognized by civilized nations. While some are of the opinion that the principles of municipal laws generally applied or shared by majority of nations after a comparison should form the general principles. This view heavily relied on the phrase 'recognized by civilized nations'<sup>28</sup>. Others on the other hand, opined that while the drafters may be referring to the municipal laws, regard should also be given to international legal relations and the general laws regulating international legal relationships between states<sup>29</sup>. Meanwhile, the second view adopted the arguments of the first and made addition which is very important.

Schachter in his book<sup>30</sup> identified five categories of law to form the general principles of law as a source of international law to include; municipal laws, laws derived from specific nature of international community, laws basic to all legal systems, laws common to all societies and principles of justice which makes man a rational being<sup>31</sup>. To him, for an international law to be of general principles of law recognized by civilized nations, it must fulfill the above criteria.

Wang Tiewa, China International law expert argued that general principles of law are found and created in the resolutions of the United Nations,also, lend support and advocate for the adoption of the resolutions of the United Nations General Assembly as a source of international law<sup>32</sup>. Wang further argued that it forms a better explanation of the provisions of the United Nations Charter particularly where it was adopted by majority or all memberstates of the United Nations.

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<sup>20</sup>Eur J Int Law (2014) 25 (1): 297 1 April 2014 The Spectre of Sources Rose Parfitt

<sup>21</sup> ibid

<sup>22</sup> ibid n 1

<sup>23</sup> ibid n 5

<sup>24</sup> ibid n 1

<sup>25</sup> ibid n 5

<sup>26</sup>1965 CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES BETWEEN STATES AND NATIONALS OF OTHER STATES Adopted in Washington on 18 March 1965 section 42

<sup>27</sup>Unif. L. Rev. (2016) 21(3), pp 184 Uniform Law Review, 1 August 2016: Private law and general principles of public international law PieroBernardini

<sup>28</sup> ibid n 5

<sup>29</sup> ibid n 5

<sup>30</sup>Schachter O, *International Law in Theory and Practice* (1991) 50

<sup>31</sup>Ox. J Law Religion (2013) 2(1): 98-118 1 April 2013 The International Court of Justice and its Use of Islam: Between a Rock and a Hard Place? Urfan Khaliq

<sup>32</sup>Asian Journal of International Law, 1 (2011), pp. 233-248 Chinese Philosophy and International Law Pan Junwu

Doctrines of equity are argued to form a significant part of the general principles of law recognized by civilized nations as a source of international law. An example of these includes the doctrine of estoppel, which was applied including; *Nicaragua v United States of America*, *North Sea Continental Shelf case* and *Cameroon v Nigeria*<sup>33</sup>. Equitable doctrines in form of maxims such as 'equity will not suffer a wrong to be without a remedy', 'substance over form', 'he who seeks equity must do equity' and 'equality is equity' were applied by the international court of justice in order to bring the justice of the cases<sup>34</sup>. The author further argued that equity as general principles of law recognized by civilized nations solves and have the capacity of solving new and emerging international law disputes that are not settled by international customary law, treaty and conventions by guiding the international community<sup>35</sup>.

However, the general principle of law as a source of international law was mostly applied by arbitral bodies only but not in much instances by the international court of justice<sup>36</sup>.

## **INTERNATIONAL CUSTOM AS A SOURCE OF INTERNATIONAL LAW: IS INTERNATIONAL CUSTOM EVIDENCE OF A GENERAL PRACTICE ACCEPTED AS LAW?**

Customary international law is one of the two primary sources of international law the other being treaty. However, there are difficulties and arguments on its nature, formation and application<sup>37</sup>.

Custom is 'any recurring mode of interaction among individuals and groups together with the more or less explicit acknowledgment by those groups and individuals that such patterns of interactions produce reciprocal expectations of conduct that ought to be satisfied'<sup>38</sup>.

They are set of behaviors, values and rules adopted and practiced by a society or people over a long period of time that it has acquired historical legitimacy. These rules are later recognized either by the courts or statutory provisions<sup>39</sup>.

Customs are argued to mean established practice and a psychological element known as *opinio juris* and are binding on all states<sup>40</sup>. A study has shown that a close look at state practices and *opinio juris* has shown that customary international law has arisen and not only emerging<sup>41</sup>.

However, international law experts are divided on the position of international custom in the international law practice. States interact with each other in a particular manner and ways as a result of which these rules of customary practices sprang over time. They are sometimes seen to be a product of agreements and treaties and hence; the argument that only those states that are party to how it sprang should only be parties to it, this is discountenancing the argument that international custom or customary law have a universal application<sup>42</sup>. But in practice, it is also a double edged sword; this is because a state that rejects a particular custom in a particular case may be seen relying and adopting the same custom in another case if it is in its favor.

By its nature, customary law is a product of a process of informal creation. As such, the degree of formality found in creating other sources such as treaty cannot be seen in its formation<sup>43</sup>.

Customary international law is argued to be the two element theory. These two elements are the established practice and the psychological element known as *opinio juris*. To the traditional law experts, these two elements must coexist for an act to be a custom or customary international law.

Practice means an act which is consistently practiced, established and widespread for it to acquire the first element of becoming a custom. *Opinio juris* on the other hand means belief or psychological condition of mind of the state that the act, principle or rule is customary is the second element to be fulfilled to be a customary international law<sup>44</sup>.

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<sup>33</sup> Asian Journal of International Law Asian Journal of International Law, 6 (2016), pp. 294-325 1 July 2016 Chasing the Frontier in Humanitarian Intervention Law: The Case for *Aequitas ad Bellum* Colin Seow

<sup>34</sup> *ibid*

<sup>35</sup> *ibid*

<sup>36</sup> *ibid* n 24

<sup>37</sup> INTERNATIONAL LAW ASSOCIATION LONDON CONFERENCE (2000) COMMITTEE ON FORMATION OF CUSTOMARY (GENERAL) INTERNATIONAL LAW Members of the Committee: Professor M. H. Mendelson, Q.C. (UK): Chairman page 2

<sup>38</sup> Unger R, *Law in Modern Society* (London 1976) 49

<sup>39</sup> *ibid* n 1

<sup>40</sup> *ibid* n 5

<sup>41</sup> S Wiessner, 'Culture and the Rights of Indigenous Peoples' in A Vrdoljak (ed), *The Cultural Dimension of Human Rights* (OUP 2013) 146

<sup>42</sup> *ibid* n 5

<sup>43</sup> *ibid* n 20

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## **DIFFERENCE BETWEEN 'GENERAL PRINCIPLE OF LAW' RECOGNIZED BY CIVILIZED NATIONS AND OTHER SOURCES OF INTERNATIONAL LAW**

It is important to note from the beginning, that the incomplete nature of the provisions of international customary law, treaties and convention was what led to the creation and adoption of general principles of law as recognized by civilized nations<sup>45</sup> as a source of international law, and therefore, different from all other sources.

Although, there are divergent opinions on what the general principles of law as a source of international law refers to. And while some are of the opinion that it is a source of its own affirming and reiterating the natural law rules, others are of the opinion that it falls under the treaty and international custom as sources of international law and therefore, it does not add anything to international law<sup>46</sup>. The majority of writers are of the opinion that it is a class of its own but with limited scope and hence, different from other sources of international law.

In considering the differences between general principles of law recognized by civilized nations as a source of international law with other sources of international law, it is important to note the difficulty in differentiating treaty and international custom, this is because, of the 'somewhat 'entangled' nature of the two sources; treaties may be reflective of pre-existing rules of customary international law or may have 'a crystallizing effect for emerging rules of customary international law'<sup>47</sup>. However, notwithstanding, customary law is of its class, distinct and different from an international treaty even where they are identical<sup>48</sup> and distinct from the general principles of law as well.

There is also the difficulty in differentiating between general principles of law recognized by civilized nations and customary international law. This is because, the international court of justice constantly applied those customs that are not known to municipal laws and the question whether the general principles sprang from municipal law or not<sup>49</sup>.

One basic difference between general principles of law recognized by civilized nations and customary international law and treaty, is that it (general principles) is used where there is no express and conventional provision to govern dispute between states<sup>50</sup>.

Treaty and convention as a source of international law to be applied by the International Court of Justice, only binds states that are signatory to it<sup>51</sup>. Customary international law on the other hand must be significantly understood or practiced and the belief (psychological element) by quite a number of states to acquire the force of source of international law<sup>52</sup>. It can be formed as a result of discussions or dialogue or statement even before an action; that is modern development of customary international law<sup>53</sup>. While, general principles of law is found and applied as a result of non-existence of either of the two.

## **WHETHER INTERNATIONAL CUSTOM AS EVIDENCE OF GENERAL PRACTICE COULD OR SHOULD HAVE BEEN BETTER DRAFTED**

The question on whether international custom as evidence of general practice could or should have been better drafted have been an old question in the international law arena. The Article 38 (1) is often said to be badly drafted<sup>54</sup>. This is as well an important question, particularly taking the International Law Commission in to consideration. The commission was established by the United Nations General Assembly in 1947 for the promotion, development and codification of international law pursuant to Article 13 of the United Nations Charter 1945.

Article 24 of the Statute<sup>55</sup> of the Commission provides that;

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<sup>45</sup> *ibid* n 24

<sup>46</sup> *ibid* n 1

<sup>47</sup> International Law Commission (ILC), *First Report on Formation and Evidence of Customary International Law*, Doc A/CN.4/663 (17 May 2013) para 34

<sup>48</sup> *ibid*

<sup>49</sup> *ibid* n 24

<sup>50</sup> *ibid* n 24

<sup>51</sup> *Journal of International Dispute Settlement J Int. Disp. Settlement* (2015) 6(1): 42-73 1 March 2015 The Problem of Accommodating Indigenous Land Rights in International Investment Law MihailKrepchev

<sup>52</sup> *North Sea Continental Shelf, Judgment*, ICJ Rep 1969, 45, para 77

<sup>53</sup> *ibid* n 34

<sup>54</sup> *ibid* n 12

<sup>55</sup> Statute of the International Law Commission 1947 (emphasis mine)

*'the Commission shall consider ways and means for making the evidence of customary international law more readily available, such as the collection and publication of documents concerning State practice and of the decisions of national and international courts and on questions of international law, and shall make a report to the General Assembly on this matter'*

The commission is making efforts to provides the processes for identification of existing and new international customary law though not without challenges. Some of this challenges which are indeed challenges to the development as well as acceptance and adoption of international customary law as evidences of general practices includes; the fact that customary international law deals with controversial issues such as sovereignty of states, being through an informal process and so there is no precision like what is obtainable in the emergence of treaty and conventions, existence of international politics and politicians playing around with it; an example is the acceptance of United Nations resolutions as customary international law, increasing development of literature and writing of international law publicist and various utterances and speeches of state international and national politicians; which does not represent the position of their states on a particular international matter. Another difficulty faced is finding relevant and reliable materials, this is because some states do not publish official digest which contains their states position on international law issues and another major challenges is the evolution of the customary international law itself, and this is because, not until the end of 19<sup>th</sup> century, most bilateral agreements are not made public while there was no much multilateral agreements and treaties, but the trend has since changed<sup>56</sup>, as there are increasing multilateral agreements and treaties which are public and open for all to see.

Wang, also, lending support to the possibility of redrafting Article 38 (1) of the Statute of ICJ, argued that resolutions of the United Nations General Assembly play a significant role in the formation of customary international law as a source of international law and should have priority over and above judicial decisions and writing and teaching of international law publicists<sup>57</sup>.

## CONCLUSION

In summary, while Article 38 (1) of the Statute of the International Court of Justice provides for the sources of international law as treaties, customary law, general principles of law, judicial precedent and teaching of international law publicist, to be referred to by the International Court of Justice, these sources which are indeed serving the purposes for which they were established are not yet left without criticisms as to what constitute the sources, their adoption and application by the court as well as the acceptability it receives from various nations around the world. This led to some suggestions for the adoption of other sources such as the resolutions of the United Nations General Assembly, principles of Islamic law and the agreements, actions and inactions of chartered companies whom have played a significant role in the development of international law and its sources.

The article had found out that it is obvious from the establishment of the Statute of the International Law Commission in 1947 (shortly after the establishment of the International Court of Justice) to the various opinions of international law experts, it is without any doubt that there is need for the review and redrafting of the provisions of Article 38 (1). This is also due to the overwhelming development in the field of international law and practice as well as the different of opinion of stakeholders.

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<sup>56</sup> *ibid* n 23

<sup>57</sup> *ibid* n 29