Chapter 2
Sources of International Law

Abstract Any scholarly work on international law would be incomplete without an overview of the sources of this important body of law regulating the conduct of states and other subjects of international law. In effect, to understand the rights, obligations, and liabilities of international entities, knowledge of the normative origins and sources of those rights, obligations, and liabilities is imperative. This is the focus of this chapter.

Contents

2.1 Introduction

Conventionally, the sources of international law are: custom, general principles of law recognized by civilized nations, judicial decisions, opinions of the most highly qualified publicists of various nations, and treaties.[1] This chapter will provide an overview of these sources.

[1] Article 38(1) of the Statute of the International Court of Justice is widely recognized as the most authoritative statement as to the sources of international law. It provides as follows: "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

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2.2 Custom

It is trite knowledge that custom as a source of law is of ancient ancestry. In their primordial context, customs emerged from primitive societies as rules of behaviour stipulating what is permissible and what is impermissible. In the contemporary setting of a complex and highly sophisticated international legal order, the existence of international rules derives from the practice and conduct of states as to what is permissible or impermissible among nations in the conduct of their relations. This, in essence, is the nature of custom today as a source of international law. In effect, states' practices and usages do constitute law for the purposes of global governance and regulation.

Two constitutive ingredients of custom as a source of international law are usually distinguished: the behavioural and the psychological. The behavioural implies that there must be a consistent and recurring action (or lack of action) by states, meaning official government conduct indicated by such activities as official statements, court decisions, legislative action, administrative decrees, and diplomatic behaviour. The psychological entails the conviction that, in each case, such behaviour is required or permitted by international law.[2] Customary international law, however, is not without controversy. Hence, the existing legal theories show that "general practice", the terminology used in Article 38(1) (b) of the Statute of the International Court of Justice, carries the connotation of repeated and similar state practice including both action and inaction. The indicia of such state practice are (1) the generality of the practice and (2) the temporal span of the practice.

A more skeptical perspective is the fivefold argument advanced by McGinnis, namely (1) that nations do not have to assent affirmatively to the creation of a principle of customary international law; that they are considered to have consented to a principle if they simply failed to object; (2) that undemocratic or even totalitarian nations wield influence on international law; (3) that many treaties and other international declarations are merely empty promises if nations do not actually enforce them; (4) that it is often unclear what the customary international legal norm is, or if one even exists; and (5) that following customary international law makes governments less transparent and accountable.[3]

Footnote 1 (continued)

rules expressly recognized by the contesting parties; (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 provision 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." Shaw 1997, p. 55; Brownlie 1990, p. 3.

[2] Bledsoe and Boczek 1987, p. 28; Shaw 1997, pp. 57–72.

[3] McGinnis 2006, p. 2.

One major issue about custom as a source of international law that needs to be addressed here is its status and application in the contemporary field of international criminal law, where the concept of universal jurisdiction has its most visible and effective application. In this regard, it is noteworthy that the rules of international criminal law, as embodied in the Statute of the International Criminal Court (ICC), now represent a synthesis of customary international law and a partial codification by treaty. In effect, there is now a significant degree of consolidation of customary law and treaty law in international criminal law.[4] This fact notwithstanding, it remains true that in the absence of a global legislative body, customary law continues to play a crucial role in international criminal law.[5] In its orthodox sense, customary international law exists if actual practice can not only be found, but tied to a sense of legal obligation. By contrast, an unorthodox perspective is that customary international law has been profoundly apolitical, in the sense that its rules have been carefully tailored to suit sovereign states irrespective of whether sovereignty inheres in a monarch or a military dictator or a popularly elected President.[6]

Jurisprudentially, however, there are some authoritative modern classic applications of the concept in international criminal law, which can justifiably be characterized as progressive developments in the law. Two such applications derive from decisions of the United Nations-backed Special Court for Sierra Leone that provide authoritative judicial endorsement of the status of international customary law as a source of international law. The first is that it is well established under customary international law that crimes against humanity, violations of Common Article 3 and Additional Protocol II of the Geneva Conventions, and serious violations of international humanitarian law do entail individual criminal responsibility, even if treaty law does not specifically delineate them as crimes; consequently, there is no violation of the principle of legality in such matters.[7] The second is that it is settled law within the jurisdiction of the Special Court that child recruitment was criminalized before it was explicitly set out as a criminal prohibition in treaty law; by November 1996, the starting point of the time frame relevant to the indictments, the principle of legality, and the principle of specificity were being upheld.[8]

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[4] Werle 2009, p. 51.

[5] Ibid.

[6] Robertson 2002, p. 174.

[7] Written Reasons for the Trial Chamber's Oral Decision on the Defence Motion on Abuse of Process due to Infringement of Principles of Nullum Crimen Sine Lege and Non-Retroactivity as to Several Counts, Prosecutor v. Brima Kamara and Kanu, Case No. SCSL-04-16-PT, T.Ch, 31 March 2004, para 33.

[8] Decision on Preliminary Motion based on Lack of Jurisdiction (Child Recruitment) Prosecutor v. Norman, case No. SCSL-2004-14AR72(E), A.Ch. 31 May 2004 para 53.

2.3 General Principles of Law Common to All Civilized Nations

The next source of international law is compendiously referred to as "general principles of law common to all civilized nations". A recurrent criticism is that the term "civilized nations" is problematic, given its apparent vagueness and the presumption that some nations may be uncivilized. The predominant scholarly viewpoint, and which has received judicial endorsement, is that the notion is founded upon a developed legal system and therefore includes all but the most primitive of societies.[9]

Furthermore, the precise legal meaning of the formula "general principles of law common to all civilized nations" is not free from controversy. There are two rival schools of thought as to its precise meaning.[10] The first is that it encompasses those basic principles of municipal law common to all national systems applicable to international relations. The other is the more restrictive meaning that it refers only to general principles of international law as distinct from specific rules of international law.[11] As a matter of jurisprudence, both legal interpretations have variously been adopted and applied by international tribunals in their adjudication processes.[12] In the context of their relevance and applicability in the more limited and specific zone of international criminal law, the doctrine of universal jurisdiction, it is instructive to recall that the International Criminal Tribunal for Yugoslavia (ICTY) did observe that:

> Whenever international criminal rules do not define a notion of criminal law, reliance upon national legislation is justified, subject to the following conditions: (i)… international courts must draw upon the general concepts and legal institutions common to all the major legal systems of the world [not only common-law or civil-law states]… (ii)… account must be taken of the specificity of international criminal proceedings when utilizing national law notions. In this way a mechanical importation or transposition from national law into international criminal proceedings is avoided.[13]

Cassese reasons that "such general principles of law include, for example, the principle of non-retroactivity of criminal law and the principle of command responsibility (germane to national law systems), since international criminal law is a branch of public international law", whose sources of law are derivable from the rules proper to international law.[14] Akin to this reasoning is that the concept of

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[9] Bledsoe and Boczek 1987, pp. 28–29.

[10] Idem, p. 29.

[11] Idem, p. 29.

[12] Idem, p. 29 for a historical perspective of the term, namely, that general principles of law are suggestive of natural law (reason) and refute the arguments of the extreme positivists in favour of the moderate positivists and the eclectics (Grotius). They also resemble the Roman *jus gentium* (law common to all nations). See also Werle 2009, p. 53 for the view that not every law found in several or all legal systems is automatically a general principle of law and therefore a component of the international legal order.

[13] Prosecutor v. Furundzija, ICTY (Trial Chamber), judgment of 10 December 1998, para 178.

[14] Cassese 2008, pp. 14–15.

"general principles recognized by civilized nations", as a source of international law, does imply that "principles of law recognized and unanimously applied in efficient legal systems are strong candidates for international law status".[15] For example, one such general principle of law is the procedural due process right of a fair trial granted to all persons charged with the commission of a crime, recognized and applied in the major legal systems of the world. Conversely, there is no universal and unanimous principle recognized by the major legal systems of the world as to what, substantively in theory and in application, constitutes "fairness", regardless of whether the adjudicatory process is adversarial or inquisitorial,[16] or based on the common-law tradition or the civil law tradition.

2.4 Judicial Decisions

Characterized as a secondary source of international law, the preponderant view is that judicial decisions are "in the narrowest sense not a true source of international law".[17] Article 38 of the Statute of the International Court of Justice (ICJ) describes "judicial decisions" as a "subsidiary means for the determination of the rules". Unlike some national jurisdictions, whose laws are based largely on the English common law (Sierra Leone being one such national jurisdiction), international courts are not bound by the doctrine of judicial precedents, technically referred to as *stare decisis*.[18] However, the existing legal position is that, despite the fact that the decisions of the ICJ are only binding upon the litigants in the case for adjudication, the court's decisions are of such immense importance as sources of law that, in spite of the provision of Article 39 of the Statute, "the court has striven to follow its previous judgments and insert a measure of certainty within the process.[19]

By parity of reasoning, it is indisputable that decisions of contemporary international war crimes tribunals have contributed significantly to the development of international criminal law. The jurisprudence of these courts abounds with evidence to this effect. In Prosecutor v. Aleksowski,[20] the Appeals Chamber of the

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[15] Robertson 2002, p. 92.

[16] Ibid.

[17] Bledsoe and Boczek 1987, p. 29.

[18] Statute of the ICJ, Article 39.

[19] Shaw 1997, p. 86.

[20] ICTY (Appeals Chamber) Judgment of 24 Mach 2000, para 97. Robertson 2002 argues that judicial decisions of international courts may influence international law under three conditions, namely: (1) If they exhibit a striking unanimity of approach to the same question; or (2) If a particular decision has won widespread respect, either for its epic quality (e.g. the Nuremberg Judgment) or for its statement of a new and subsequently accepted principle (e.g. that of compensating victims of crimes against humanity) as in the *Velasquez Rodriguez* case; or (3) Because of the power and persuasiveness of the actual opinion, even if the result is not widely accepted (e.g. The U.S. Supreme Court Ruling in *New York Times v. Sullivan*).

International Criminal Tribunal for Yugoslavia (ICTY) emphasized that "[in] the interests of certainty and predictability, the Appeals Chamber should follow its previous decisions, but should be free to depart from them for cogent reasons in the interests of justice". Hence, the distinction between primary and secondary sources of law in the specific context of the international criminal law does not seem to be of much relevance in any articulation or rationalization of the status of judicial decisions as a source of law.

2.5 Writings of Publicists

According to Article 38 of the Statute of the ICJ, "the teachings of the most highly qualified publicists of the various nations" do constitute a "subsidiary means for the determination of the rules of law". Generally, opinions of publicists are assumed to be on the same footing as judicial decisions as secondary sources of international law.[21]

2.6 Treaties or International Conventions

Citing Oppenheim[22] as authority, Shaw observes that, as a major source of international law, "treaties (or international conventions) are a modern and more deliberate method of creating international norms". The International Court of Justice, guided by Article 38(1) of its Statute, accords primacy to treaties as a source of international law, the exact statutory language being "international conventions, whether general or particular establishing rules expressly recognized by the contesting states". Treaties, however, are variously referred to as charters, covenants, declarations, general acts, international agreements, international conventions,

[21] See Bledsoe and Boczek 1987, p. 30 where they also observe that, notwithstanding the fact that the opinions of legal scholars are a subsidiary source of international law yet, (1) historically, publicists such as Hugo Grotius and Emerich De Vattel created a major influence on the evolution of international law, and (2) that modern legal scholars have also played an important role in international courts' decisions, as demonstrated by the classic American case of *The Paqete Habana; The Lola, 175 U.S. 677 (1900)*; see also Shaw 1997, p. 98 for the view that with the rise of positivism and the consequent emphasis of state, treaties and customs assume the dominant position in the exposition of the rules of the international system, causing legalistic writings to decline in importance.

[22] See Oppenheim as quoted in Jennings et al. 1992, pp. 512–513 for the proposition that "not only is custom the original source of international law, but treaties are the source of the validity and modalities of which themselves derive from customs".

pacts, and statutes.[23] The existing state of the law may be summed up thus: if the treaty is between two parties, it is a bilateral treaty binding only upon the signatories and is an example of particular international law. If the agreement is among a large number of states, it is a multilateral treaty—a "law-making treaty"—that might produce a general international legal norm.[24]

In the specific context of international criminal law, the status of treaties or international conventions as sources of law, though pre-eminent, does present some complexities. One such complexity is that under the adjudicatory framework of the International Criminal Court (ICC), Article 21 of the Court's Statute reflects three levels of rationalization. The first is the distinction between mandatory and discretionary application. The second level is the creation of a trifurcated hierarchical normative order of priority as to the sources of law. The third is the formulation of a general rule for interpretation and application. According to the Statute, the primary source of law is the Statute itself, whereas the elements of crimes and the rules of procedure and evidence are supplementary sources.[25]

Another complexity arises from recognizing that international criminal law is a branch of public international law. Based on this reasoning, it may be argued that the sources of law from which the relevant rules may be derived are those germane to international law and applied in the stipulated hierarchical normative order.[26] In this regard, Cassese notes that going back to the Nuremberg International Military Tribunal (IMT), the main relevant source is the London Agreement of 8 August 1945, which embodies both substantive and procedural law, followed by the 1998 Rome Statute of the ICC, and the Statute of the Special Court for Sierra Leone (SCSL) embodied in the Annex to the Agreement between the United Nations and the Government of Sierra Leone of 16 January 2002. The same is true of the statutes of the International Criminal Tribunal for Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), which were adopted by United Nations Security Council Resolutions and passed in 1993 and 1994, respectively.

2.7 Conclusion

Unlike sources of law in the municipal or domestic legal systems, sources of international law cannot be ascertained with the same degree of specificity, clarity, and precision. This is attributable to a major deficiency in the international

[23] Shaw 1997, p. 73.

[24] Bledsoe and Boczek 1987, p. 31.

[25] Werle 2009, p. 61.

[26] Cassese 2008, pp. 14–15.

legal system—namely the lack of a centralized legislative authority as exists in municipal law systems. Nonetheless, it is important to note that accessibility to, and systematization of, international law sources have been greatly enhanced by technological advance and sophistication.

2.8 Summary

Basic to an understanding of international law is knowledge of its sources. This chapter provides an overview of such sources: they are custom, general principles of law recognized by civilized nations, judicial decisions, opinions of the most highly qualified publicists, and treaties. Article 38(1) of the Statute of the International Court of Justice is the modern authority for what constitutes sources of international law. The normative ancestry of customs dates back to very early times regulating what in a society or community was permissible or impermissible. Today, in the context of our complex and highly sophisticated international legal order, customs, practices, and usages of states are constitutive of law for the purposes of global governance and regulation. There are two key aspects of customs, namely (1) the behavioural and (2) the psychological. The former focuses on the consistency and recurrence of the action or inaction by a state; the latter entails the conviction that in each case such behaviour is required or permitted by international law. Customary international law today plays a significant role in the sphere of adjudication of international war crimes tribunals, as illustrated by decisions of the Special Court for Sierra Leone. General principles of law common to all civilized nations are subsidiary sources of international law.

Despite its lack of precision and clarity, the orthodox view is that the phrase "civilized nations" has reference to developed legal systems and that the relevant principles are either the basic principles of municipal law applicable to international relations or general principles of international law as distinct from specific rules of international law. These principles, as sources of international law, are also operative within the domain of international criminal law. As regards judicial decisions, they, like general principles of law, are a subsidiary source of international law. The predominant scholarly view is that judicial decisions are immensely important as sources of international law despite the inapplicability of the doctrine of judicial precedents in international adjudication. Writings of the most highly qualified publicists as a subsidiary source of international law, like judicial decisions, have contributed significantly to the progressive development of international law. By far, the most important sources of modern international law are international treaties, agreements, and conventions. The relevant distinction here is between particular international law, which refers to a body of bilateral treaties, and general international law, which refers to multilateral treaties. In the area of international criminal law, the Statute of the International Criminal Court represents the quintessential example of treaties as sources of international law.

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