

Should the Decisions of the International Court of Justice and the Work of the International Law Commission be Recognized as Binding Sources of International Law?

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Abstract. This year marks the 76th anniversary of the first sitting of the International Court of Justice, and the article 38(1) of the Statute of the International Court of Justice is considered to be one of the most authoritative guides for ICJ when deciding international disputes. However, whether this provision is complete and covers all the sources of international law are of concern. Someone argues that decisions of the International Court of Justice, and the work of the International Law Commission, should be recognized as binding sources of international law as well. This essay is going to focus on the sources of international law listed in the article 38(1) of the Statute and other possible sources which are not included in this article. In addition, it will discuss the judicial decisions of the ICJ, the work of ILC, and the reasons for not adding them into the sources of international law.

Keywords: sources of International law, the Statute of the International Court of Justice, the International Law Commission, the International Court of Justice

1. Introduction

Although the article of 38 (1) of the statute of ICJ does not mention anything about 'sources', it is generally considered to be the most authoritative statement and guidance referring to the sources of international law to guide the ICJ when deciding international disputes. It contains three formal sources, including treaties, customary international law and general principles, and the subsidiary means for the determination of rules of law such as judicial decisions and teachings of the most highly qualified publicists.¹ The common classification of the sources of international law can be divided into two parts. Firstly, the formal sources refer to the sources which may create the binding rules, and the second is material sources which can supply evidence in the determination of the rules [1]. Obviously, this article concentrates on two issues. The sub-paragraphs of a to c are the formal sources

¹ Statute of the International Court of Justice art 38 (1).

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of international law and sub-paragraph d is about the material source of international law as an evidence or subsidiary to assist ICJ in deciding of rules [2].

However, whether this provision is complete or covers all the sources of international law are of concern. It is controversial on the topic of the decisions of ICJ and the work of ILC regarding whether they should be added into the formal sources and should be amended into this article. This essay will focus on these two issues and give some advice on the amendments to this article.

The first part of this essay is going to briefly introduce the three formal sources of international law listed in Article 38 (1) and analyze the elements of each source. The second part will concentrate on the sub-paragraph (d) of the Article 38 (1) especially on the judicial decisions. In this part, the reasons for the non-acceptance of the decisions of ICJ from the formal sources will be illustrated in two aspects. The first reason is that the ICJ cannot act as formal legislator and the second is that their decisions may be changed due to valid reasons. Similarly, the third part will deal with the work of ILC and the causes for not adding it to this article. The final part comes to the other possible sources of international law not listed in the Article and some advice on the amendment.

2. The sources of international law listed in Article 38 (1) Statute of ICJ

2.1. Treaties

Treaties are the international agreement in writing between states which is defined in the article 2(1) of Vienna Convention.² It only binds the states to the treaties and principle is written in the article 34 of the VCLT.³ However, the customary international law and general principles will bind all the nations. Treaties can be divided into bilateral treaties and multilateral treaties and will create obligations between the parties. Bilateral treaties refer to treaties in which only two parties participate in negotiations. Compared with bilateral treaties, multilateral treaties are more common. There are generally two formal ways for multilateral treaties to enter into force. The first is signature and ratification, and the second is accession to show that the states are “consent to be bound”. For example, in *North Sea Continental Shelf*, Germany had signed on the GCCS but not ratified, so the Court held that Germany was not bound by GCCS [4].

2.2. Customary international law and general principles

2.2.1. Customary international law

The definition of CIL is the general state practice which is accepted as law. There are two elements of the CIL. Regarding the significance of CIL, it can supplement deficiencies in areas not covered by international treaties. Firstly, the general state practice such as “constant and uniform usage”.⁵ Secondly, the practice has to be undertaken from a sense of legal obligation (*opinio juris*). International Law Commission is responsible for this work from the two elements to identify customary international law.

² *Vienna Convention on the Law of Treaties* art 2(1).

³ *Ibid* art 34.

⁴ *North Sea Continental Shelf* (Federal Republic of Germany-Netherlands) (Judgment) [1969] ICJ Rep.

⁵ *Asylum* (Colombia-Peru) (Judgment) [1950] ICJ Rep.

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(a) *General practice*

There are many forms of practice concluded by ILC such as diplomatic acts, legislative and administrative acts. If the practice has met the requirement of 'general', there is no need for the satisfaction of duration. The ICJ used different phrases in some cases to illustrate the meaning of general practice. Except for the "constant and uniform usage", the ICJ also used "extensive and virtually uniform" in recent practice.⁶ In the case of *Fisheries Jurisdiction*, the court referred to the extension of the fishing area to 12 nautical miles, which seems to be generally accepted. However, the court refused to predict the law before the legislator makes it and the increasing acceptance of the concept was also mentioned to talk about the element of general practice [7].

(b) *Opinio juris*

ILC concluded the evidence of *opinio juris* in 2018 and listed some forms such as "public statements made on behalf of States" or the previous decisions of its own case. The concept of *opinio juris* was stated in *North Sea Continental Shelf*, Denmark and the Netherlands argued that on the date of the promulgation of the Convention of Continental Shelf, the method of equidistant-special circumstances delimiting the continental shelf has been accepted as law.⁷ The court refused to admit the *opinio juris* based on prevailing practice because it was inadequate to presume *opinio juris* from a convention which lasts only for less than three years and it did not gain sufficiently widespread participation in the treaty. Similarly, in *Nicaragua*, the court referred to the *North Sea Continental Shelf* case and said that in order to form a new customary rule, not only the relevant behavior must constitute an established practice, but also must be accompanied by *opinio juris*. Each country must show that their behavior is due to the belief that their practice is followed by the requirement of an obligation due to the existing legal rules. The choice of method seems to depend on the country of law and the discretion of the courts and the approach may depend on whether the practice is primarily based on treaties [1].

(c) *The persistent objector*

The exception to customary international law is that the persistent objector to new customary will lead to the non-binding effect of it. In addition, the evidence of objection must be obvious. In the *Anglo-Norwegian Fisheries* case, ICJ held that UK failed to provide a persistent objector at Norwegian use of straight baselines, but Norway was a persistent objector to any limit on the length of such baselines.⁸ This rule strengthens the status of the element of state consent in the creation of international customs.

2.2.2. General principles of law

The general principles of law will apply where treaties and customary international law fail to guide the Court when deciding the case such as estoppel and *res judicata*. This concept is different from the principles of international law which refers to the rule of customary

⁶ Ibid.

⁷ *North Sea Continental Shelf* (Federal Republic of Germany-Netherlands) (Judgment) [1969] ICJ Rep.

⁸ *Anglo-Norwegian Fisheries (UK-Norway)* [1951] (Judgment) ICJ Rep.

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international law such as the principle of state sovereignty.

3. Subsidiary means of determination: the decisions of ICJ

3.1. The role of ICJ

The topic of this essay -the decisions of ICJ - is covered by the phrase ‘judicial decisions’. Judicial decisions include the decisions of ICJ and other international courts and tribunals and they are written in the sub-paragraph (d) of the article 38 (1) as a subsidiary means of determination to assist the court as an evidence.

The ICJ is an essential organ of the United Nations to settle disputes between the states who submit the dispute to ICJ and give advisory opinions on issues submitted by five United Nations organs and 16 specialized agencies. Currently, more cases on different aspects are heard by ICJ than before and states rely much more on the judgment and decisions of the Court within the international legal system centered on the ICJ. A decision of ICJ is considered as one of the most definitive statement of international law and some people argue that it may increase the creativity of law-making in international law [3]. Furthermore, the decisions of ICJ forge close relationships with the customs and general principles because the ICJ decisions and judgment may fill in the gap within the sources which have not been validated yet.

Some members of the United Nations suggested that the decisions of ICJ should be added into the Article 38 of the Statute of ICJ for the irreparable and greater role they play in the international law system and the close connection with other sources. Although the decisions of ICJ may strengthen international law in many aspects and the role of they play should not be overlooked in practice, the decisions of ICJ are not the formal sources of international law for many reasons.

Whether advisory opinions are included in the decisions of ICJ is controversial. Some people argue that the advisory opinions are not formal decisions of ICJ because literally they are merely opinions and advisory. However, international jurisprudence can be seen as a synonym for the judicial decisions, and advisory opinions play important roles in international jurisprudence. So the advisory opinion can be seen as one of the decisions of ICJ. In this article, the judicial decisions are juxtaposed with the writings of experts and scholars in the sub-paragraph d of the Article 38 of the statute of ICJ as a supplementary method. This shows that the legislators at that time believed that the functions of the two were similar. Indeed, it is not possible for teachings of experts and scholars to create new rule directly, but it tends to influence the decisions of the court especially in their judgments as references.

Firstly, regarding the role of ICJ in law-determining process, President Descamps initially said that the Court is acting as elucidation by jurisprudence and doctrine [5]. Although it may create legal obligations from the proceedings, it is only a subsidiary means of determination by applying and interpreting the rules, not creating sources. Compared with the three formal sources listed in Articles 38(1), the decisions of ICJ just provide material evidence of a rule rather than establishing and confirming of the rules [4]. In general, the ICJ may help the verification of the existence of state practice and *opinio juris* to determine the rules of law by relying on the documents submitted by the ILC [5]. It might be interpreted under the Article 38(1) (b) rather than as an independent source adding into this Article.

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In addition, the Court cannot act as a legislator formally and the decisions of the ICJ are only the result of the enforcement of law. The function of law-making is not included in the judicial capacity of the Court. The role of the ICJ is more like an intermediary between the sources to identify the rule of customary international law.

3.2. The decisions of ICJ may be changed and challenged

Article 59 of the Statute of the ICJ makes it clear that the binding force of the judgment of the International Court of Justice is limited to the parties to the particular dispute.⁹ In other words, the judgment of the International Court of Justice has no precedent effect on other countries and will not be binding in the future. Although judicial decisions can be used as an auxiliary means to identify legal rules, judicial precedents themselves are not laws which are binding on the ICJ.

Regarding the legal effect of the decisions of ICJ, there is no concept of *stare decisis* in international law, which is similar to civil law system to some extent. The main reason for the non-binding precedents is that the ICJ is a separate judicial institution, and it does not operate within a certain judicial hierarchy system, which is essential to the development of the principle of precedent. This means that the decisions of ICJ may be changed and challenged if the Court finds particular and valid reasons. For example, in Barcelona Traction case, the Court distinguished the interpretation of 'in force' of a former case of Aerial Incident [6].

Compared with three formal sources, which are stable, predictable and easy to follow, the decisions of ICJ may be varied in different cases due to the exclusion of the doctrine of precedent and remains uncertain. It might not be appropriate to treat the decisions of ICJ as one of the sources of international law. The decisions of ICJ are persuasive rather than binding to all the states.

4. Should the work of ILC become the sources of IL

The International Law Commission is an international law research institution affiliated to the United Nations. According to Article 13 of the Charter of the UN and Article 15 of the Constitution of the ILC, the functions of the ILC include the progressive development of international law and the codification of international law. The work of the International Law Commission contains the articles, reports and other documents. First of all, the 'progressive development of international law' means drafting conventions on national practices that have not yet been developed into law. Similarly, the codification of international law means the reasonable formulation and systematic codification of widely-existing international conventions and other international law rules. Their work may be treated as the evidence of the state practices in customary international law, but not the sources.

Regarding the relationship between ICJ and ILC, the work of ILC is an aid to assist ICJ on the determination of state practice or *opinio juris* in identifying CIL [7]. Both of the decisions of ICJ and the work of ILC contribute to the development of international law-making progress. The work of ILC on the instilling clear and predictable secondary rules on the sources will no doubt contribute to the decisions of ICJ [8]. The drafts they supply

⁹ Statute of the International Court of Justice art 59.

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mainly focus on the record of state practice and the existence of *opinio juris*, which may guide the reasoning of ICJ in their reports and judgment [10].

Accordingly, the role of ILC is to codify customary international law and submit commentary and draft conclusions on identification CIL. So the ILC does not make the new law, but gather together what we already know from cases for further convenient use. The drafts written by ILC may not become a formal part of international law unless they are added into a treaty or they have gained state practice [7]. Furthermore, the ILC may summarize the *opinio juris* of the states in their writings [9]. In addition, ILC works on the general principles of law, receiving comments on its work. This shows that the document compiled by the International Law Commission is only a transitional document, which has no binding legal effect among all the states. All the drafts the ILC submitted are non-binding although these documents are helpful and meaningful in the recognition of customary international law. In conclusion, the role of the ILC plays is more like an observer.

5. Other issues regarding the sources of international law

The Article 38(1) of the statute of ICJ is always criticized for the incompleteness and out of time. The material sources such as principles of equity and rules of morality also contribute to the international law as supplementary sources. Some scholars believe that both the resolutions of international organizations and unilateral acts may be the source of international law and be amended into the Article. Regarding the resolutions of international organizations, generally speaking, they are not legally binding, but they are binding in special circumstances. Resolutions of international organizations such as the resolutions of General Assembly can be considered evidence of state practice or *opinio juris*. The resolutions of international organizations are desirable as a new auxiliary means to help determine the rules of international law. For an unilateral act, it is more of an obligation rather than creating a new law for it because it is only binding on the country itself.

5.1. Jus cogens

However, a treaty will be void if it violates a *jus cogens* norm [10]. *Jus cogens* is similar to general principles of law but it is some fundamental criteria especially on human rights protection. It is a peremptory norm and plays a key role in the validity of law in practice. Also, it will enhance the judicial fairness in the international law system [10]. Although the definition of *jus cogens* is not clear, some issues such as the prohibition on the use or threat of force, torture, genocide and other prohibitions of aggression are considered to make up this concept [11]. In addition, ILC has worked on the suggesting list of non-exhaustive acts and considered its nature and requirements for the identification.

5.2. Is there a hierarchy of sources?

The answer to the hierarchy of treaties, customary international law and general principles is negative. However, there is a distinct hierarchy between the three formal sources and the subsidiary means such as the judicial decisions and the eminent writings. In practice, when a court is going to decide a case, there is an order for the court for application. Usually, the court may firstly look for the treaties between the parties when it comes to the sources of

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obligation of a state. If there are no relevant treaties, the court may seek to customary rules and general principles to fill in the gaps. What's more, *Jus cogens* should be considered firstly and it will prevail over any other rule.

6. Conclusion

Although the decisions of ICJ play a vital role in the international judicial system and act an interpretative function of International law, they cannot be amended as a formal source of international law. The first reason is that the decisions of ICJ is only binding on the parties concerned and does not need to be bound by its previous decisions. This means that the decision of the ICJ may be challenged and changed if there are valid reasons. This uncertainty and instability makes it unsuitable to become a stable and predictable source of international law, but a supplementary means to support the existence and evidence of CIL or as a convincing legal point of view. The second reason is that the functions of the ICJ are not legislated. It does not operate as a legislative body. As a dispute resolution structure, it aims to resolve disputes and develop international law. Therefore, the decision of the ICJ is only a structure for the implementation of international law, rather than creating a new law for all countries to follow.

Similarly, the work of ILC may serve as the evidence of the sources of international law, but may not be regarded as an independent source. As an institution closely linked to international customary law and the general principles of law, ILC is responsible for guiding the judgments of the ICJ through documents related to international customs. Usually its documents are considered as evidence of state practice or *opinio juris*. Its work, together with the decisions of the ICJ, is a supplementary content.

However, whether the first paragraph of the Article 38 of the statute of ICJ needs to be amended has always been a controversial topic because it leaves much room for other material sources. Except for the decisions of ICJ and writings of journalists, there are many other material sources used to help determine the rule of law. For example, equity, *jus cogens*, resolutions of international organizations, and so on. Although the requirement of *jus cogens* is not expressly stated in the statute of the ICJ, it is an internationally recognized norm. If it is added to the first paragraph of Article 38, it may be more persuasive.

Nevertheless, it doesn't make much sense to blindly entangle the difference between formal and material sources. These documents (material sources), helpful to revise and organize the rules of international law, such as the decisions of the ICJ and the conclusions of the ILC, are important components that promote the progressive development of international law in practice. The function of these documents cannot be ignored only for that they are not written into the first paragraph of Article 38 of the Statute of ICJ. Although this article is not comprehensive enough and may not keep pace with the modern international relationships, its value lies in providing an authoritative guidance and explanation.

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