

Where Does Article 38 Stand Today?

Written by Kirthi Jayakumar

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KIRTHI JAYAKUMAR, OCT 12 2011

A nineteenth century postulate of positivism suggested that a sovereign could limit his authority to act by consenting to an agreement (as per the principle of *pacta sunt servanda*) and that treaties bind only those privy to them (as per the principle of *pacta tertiis nec nosunt, nec prosunt*). This positivist, consensual view of international law remains preserved in Article 38 of the 1946 Statute of the International Court of Justice (ICJ), which is the definitive statement on the sources of international law. This article will discuss the relevance of Article 38 today and highlight some of its weaknesses and points for improvement.

According to Article 38, the ICJ is required to apply, among other things, international conventions (that are expressly recognized by the contesting states), international custom, (as evidence of a general practice accepted as law), general principles of law, judicial decisions, and juristic writings as means for the determination of rules of law.[1] Clause 2 of the Article speaks of the settlement of disputes *ex aequo et bono* (meaning 'in keeping with equity and good conscience') and without prejudice to the power of the Court.[2]

There has been much discussion about Article 38's standing and its treatment of the conceptual scope and framework of the sources of international law. The Article's aim is to determine exactly what the ICJ may deem to be international law and what it may apply when deciding disputes or giving advisory opinions. Consequently, scholars, lawyers, and others involved with international law have been looking into the four sources of law that Article 38 enumerates: international conventions, international custom, the general principles of law, and judicial decisions and the teachings of the 'most highly qualified publicists'.

So where does Article 38 stand today? In terms of its use in the real world, the Article has been a ready guide for those wanting to determine the sources of international law, to gauge the pulse of the law. Aside from this, the article has not been subjected to interpretation by the ICJ or debate in international fora, so as to suggest its overhauling. If we look at the core principles and the wording of Article 38, we can see that it is fraught with redundant information and irregularities, and needs to be reviewed. The reasons for this are plenty and are considered below.

First and foremost, the hierarchical arrangement of the sources themselves is fallacious. Although Article 38 lists the primary sources, it is in fact not based on *lex specialis derogat generali* (meaning 'a law governing a specific subject matter overrides a law that only governs general matters') and hence it should not have a hierarchy. However, practice and scholarly usage suggests otherwise. To understand the futility of the hierarchical arrangement, one needs to read Article 53 of the Vienna Convention on the Law of Treaties. This Article indicates that the norms of international law are accepted and recognized by the international community as a whole and there can be no derogation whatsoever from them. The fact that peremptory norms are prevalent in both customary and treaty law means that neither type of law can be typified as being 'superior' or 'above' the other. Besides, the ICJ is not the only international dispute resolution body; there are plenty of tribunals, arbitration-based organizations, and courts. With so many international dispute resolution bodies, it is parochial to think that the ICJ has the last word on the question of sources.

Second, Article 38 restricts the evolution and applicability of legal principles to states. It ignores other entities that qualify as subjects of international law. The foundation stone of international law is the protection of sovereignty and the equality of states. The Statute of the ICJ was drafted with the world order at the end of the Second World War in

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mind. International law at that juncture presumed that states were the only subjects of the law. A slew of human rights conventions, regional treaties governing regional alliances, and conventions addressing violent non-state actors (such as terrorists) all suggest the induction of non-state entities as subjects of international law. Article 38 continues to presuppose that international law deals with states alone. It ignores all non-state actors, which have evolved as subjects of international law today.

Third, the Article emphasizes a consent-based legal system that hinges upon voluntary action. In reality, states are often bound by norms that they have not explicitly consented to. In theory, states are bound to follow only those norms that they consent to, whether by signing a treaty or by believing that a custom binds them. Additionally, several commonly followed practices are grouped under the heading of 'general principles of law'. In reality, states are actively bound by norms that they have not quite consented to. Several *jus cogens* obligations (those obligations that are of a peremptory nature, from which no derogation shall be permitted) and even *erga omnes* obligations (those obligations that bind everyone, irrespective of their consent to being bound) have not really been consented to, but nevertheless bind all states. For example, the Security Council, pursuing its mandate under Chapter VII of the United Nations (UN) Charter, passes resolutions with a fifteen-state body that bind other states even though they have not consented to the same. Therefore, the consent-based legal system cannot be the only basis for international law.

Fourth, Article 38 is incomplete in many respects. Conspicuously absent are the role of the resolutions of the UN General Assembly and the Security Council and an enumeration of what constitutes customary international law and general state practice. In reality, states are bound by *jus cogens* and *erga omnes* obligations, but nothing in the statutory matrix explains the importance of these principles. The Article is also silent on persistent objectors (states that object to a usage *before* it becomes a custom), subsequent objectors (states that object to a customary practice *after* the usage has evolved into a custom), and their role in the evolution of customary international law. It makes no mention of *opinio juris* (the principle that a state follows a custom because it believes itself bound to follow it); it does not speak of how many states must follow a practice in order for it to be considered a custom; nor does it say how one may determine the existence of a customary practice itself. The role of regional customary practice is also excluded. The consequent complications are plenty, since states bear the burden of proving that they are either bound or not bound by a specific custom or practice.

Fifth, much of the redundancy in Article 38 comes from the language of the provision itself. Using the phrase 'civilized nations', Article 38 is still couched in the terminology of the post-war period, where the ideological supremacy and the superior status assumed by some states marked the legal mindset of the UN's founding fathers. Today, the Article should speak of 'states' and not qualify them as 'civilized' or 'uncivilized', for there really is no longer a true hierarchy of states. When the Statute of the ICJ was drafted, the five founding members of the UN assumed a higher position in comparison to the rest of the world, most of which was just becoming states after decolonization. Much of this 'higher' status is growing irrelevant today, with talk of expanding the permanent membership of the Security Council and dismantling the veto power that its five permanent members currently hold.

Finally, the importance that the Article attaches to the "teachings of the most highly qualified publicists of various nations" and to customary and state practice has less relevance in a world comprising nearly 200 states and counting. When the Statute was drafted, there were about 40 nation-states that made up the international anarchical system and relying on scholarly opinion was a feasible practice. Today, that feasibility is lost in the burgeoning number and varied practices of states. Many of these teachings are actually intellectual writings and often have political overtones. In all fairness, one cannot call these 'sources of law', since each author professes a viewpoint quite distinct from the next. If these teachings were construed to be sources of law within the ambit of Article 38, given the number of texts that exist today, there would hardly be any law—the contradictions in viewpoints alone would be enough to confuse anyone.

International law cannot afford to be watered down. Starting at the top, there are so many questions as to what the law itself is, and what the true source is of something that has come to be law. True, the international branch of law has come to be known as soft law, but one cannot turn a blind eye to the areas that scream for improvement and that can, in fact, be improved. The sources of law are fraught with irregularities and questions still remain. Although Article 38 has helped define international law as a discipline distinct from politics and international relations, it has

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fallen short of seeing the process through. As dynamic as society is, law needs to be one step ahead to ensure that there is a means to keep actions and omissions in check. Therefore, reviewing Article 38 would bode well for the evolution of international law.

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[1] M. Mendelson, The International Court of Justice and the Sources of International Law, in V.Lowe/M.Fitzmaurice (eds.), *Fifty Years of the International Court of Justice*, 1996, 63-89

[2] Charles De Visscher: *De l'equite dans le reglement arbitral ou judiciaire des litiges de droit international public*, Paris 1972, pp.17-26

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