Book - Sources of international law (Part II - Customary Law, General Principles of Law and Judicial Decisions and Qualified Teachings)

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1. Customary International Law

The second most important source of international law, and thus of international environmental law, is customary international law. Before treaties became as important as they are today, customary international law was the leading source of international law: the way things have always been done becomes the way things must be done.

Once a rule of customary law is recognized, it is binding on all states, because it is then assumed to be a binding rule of conduct. Initially, customary international law as we know it today developed in the context of the evolving interaction among European states. However, there is an increasingly prominent group of writers who suggest that other regions of the world also contributed to the evolution of customary international law.

Criteria

There are two criteria for determining if a rule of international customary law exists:

1. the state practice should be consistent with the “rule of constant and uniform usage” (inveterata *consuetudo)* and
2. the state practice exists because of the belief that such practice is required by law (opinio *juris)*.

Both elements are complementary and compulsory for the creation of customary international law. Since customary law requires this rather heavy burden of proof and its existence is often surrounded by uncertainties, treaties have become increasingly important to regulate international relations among states.

Legally binding

Customary international law is as legally binding as treaty law. It can be argued that customary international law has a wider scope: a treaty is applicable only to its parties and it does not create either rights or obligations for a third state without its consent, but customary law is applicable to *all* states (unless it constitutes regional custom).

Occasionally, it is difficult to distinguish clearly between treaty law and customary law. For example, the 1982 United Nations Convention on the Law of the Sea ("UNCLOS") comprises new international legal norms as well as codification of existing customary law. Between the date of its adoption in 1982 and the date it entered into force in 1994, non-parties to the treaty, in practice, followed many of the norms incorporated into the UNCLOS. It can therefore be said that UNCLOS largely represents customary law, which is binding on all states.

Customary law was mentioned in relation to the 1948 Universal Declaration of Human Rights. Namely, the provisions of the declaration, although not specifically intended to be legally binding, are now generally accepted as constituting customary international law.

Soft Law

Two specific terms related to the concept of customary international law require further attention. The first one is “soft law.” This term does not have a fixed legal meaning, but it usually refers to any international instrument, other than a treaty, containing principles, norms, standards or other statements of expected behaviour.

Often, the term soft law is used as synonymous with non- legally binding instrument, but this is not correct. An agreement is legally binding or is not legally binding. A treaty that is legally binding can be considered to represent hard law; however, a non- legally binding instrument does not necessarily constitute soft law.

The consequences of a non- legally binding instrument are not clear. Sometimes it is said that they contain political or moral obligations, but this is not the same as soft law. Non-legally binding agreements emerge when states agree on a specific issue, but they do not, or do not yet, wish to bind themselves legally; nevertheless they wish to adopt certain non- binding rules and principles before they become law. This approach often facilitates consensus, which is more difficult to achieve on binding instruments. There could also be an expectation that a rule or principle adopted by consensus, although not legally binding, will nevertheless be complied with.

Often the existence of non-legally binding norms will fuel civil society activism to compel compliance. The Non-Legally Binding Authorative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of all Type of Forests (“Forest Principles”), for example, are an illustration of this phenomenon. The relationship between the Forest Principles and a binding forest regime is that they are shaping or will shape consensus for a future multilateral convention, or are building upon a common legal position that will possibly come to constitute customary international law.

Jus Cogens

The second term is “peremptory norm” (jus *cogens).* This concept refers to norms in international law that cannot be overruled other than by a subsequent peremptory norm. They are of the highest order. *Jus cogens* has precedence over treaty law. Exactly which norms can be designated as *jus cogens* is still subject to some controversy. Examples are the ban on slavery, the prohibition of genocide or torture, or the prohibition on the use of force.

2. General Principles of Law

The third source of international law, as included in article 38(1)(c) of the Statute of the International Court of Justice, are general principles of law. The principles that are considered to be specifically relevant to international environmental law will be discussed in unit 3.

There is no universally agreed upon set of general principles and concepts. They usually include both principles of the international legal system as well as those common to the major national legal systems of the world. The ICJ will sometimes analyse principles of domestic law in order to develop an appropriate rule of international law.

The ICJ, in its 1996 Advisory Opinion on Legality of the Threat or Use of Nuclear Weapons, points to the Martens Clause as an affirmation that the principles and rules of humanitarian law apply to nuclear weapons. In his dissenting opinion, Judge Shahabuddeen cites the Martens Clause: “the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience”. Judge Shahabuddeen states that the Martens Clause provided its own self-sufficient and conclusive authority for the proposition that there were already in existence principles of international law under which considerations of humanity could themselves exert legal force to govern military conduct in cases in which no relevant rule was provided by conventional law. It can be construed that some treaties reflect, codify or create general principles of law.

3. Judicial Decisions and Qualified Teachings

The fourth source enumerated in article 38(1)(d) of the Statute of the International Court of Justice, judicial decisions and the teachings of the most highly qualified publicists of the various nations, is qualified as an additional means for the determination of rules of law.

Decisions of the ICJ itself or of other international tribunals, and writings of publicists are considered if: there is no treaty on a particular contentious issue in international law, no customary rule of international law and no applicable general principles of international law. Many international law journals publish articles by eminent lawyers addressing a great variety of issues pertaining to all aspects of international law.

International Law Commission

Another source for the category “highly qualified publicists” is the International Law Commission (“ILC”), established by the United Nations General Assembly in 1947 to promote the progressive development of international law and its codification.

The ILC, which meets annually, is composed of thirty-four members who are elected by the General Assembly for five year terms and who serve in their individual capacity, thus not as representatives of their governments. Most of the ILC’s work involves the preparation of drafts on topics of international law.

Some topics are chosen by the ILC and others referred to it by the General Assembly or the Economic and Social Council. When the ILC completes draft articles on a particular topic, the General Assembly usually convenes an international conference of plenipotentiaries to negotiate the articles of a convention, which is then open to states to become parties. Examples of topics on which the ILC has submitted final drafts or reports include issues pertaining to state succession, immunities and treaty law.

4. Others

There are other possible sources which the ICJ might rely on to assist in its deliberations, such as acts of international or regional organizations, Resolutions of the United Nations Security Council and the United Nations General Assembly, and Regulations, Decisions and Directives of the European Union, among others.

Also, decisions of the Conference of the Parties to a MEA, and conference declarations or statements, may contribute to the development of international law.