

Essay on public international law

Law



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Public International Law

As an expert you have been approached: (a) By the International Court of Justice to offer a brief opinion on the possible amendment of Article 38 of the Statute of the International Court of Justice to reflect the diversity of sources of international law

Introduction Sources of international law has long been a contentious matter amongst legal commentators and academics in the sphere of the international legal system. At the root of all legal systems, there is a fundamental need to clearly identify all sources of law, a view which is concisely expressed by a former judge of the International Court of Justice (ICJ), Robert Jennings: '[A]lthough lawyers know that the quality of certainty of law is one on which there must be much compromise, not least in the interests of justice, it is a desideratum of any strong law that there is reasonable certainty about where one should look to find it.' Given the absence of any official legislature in the area of international law, it is Article 38 of the Statute of the ICJ which response to the basic need to identify the sources of international law. The contention surrounding Article 38 concerns an emerging belief that it should be amended to reflect the diversity of sources of international law.

Ancillary to this is the criticism that the ambiguity concerning potential additional sources of international law, such as resolutions of the UN General Assembly and unilateral declarations/acts of state has given rise to the concept of "soft law", which Sztucki condemns because it risks blurring the threshold between what is legally binding and what is not. A further criticism of Article 38 is that the ability to create new laws is constrained by subsection 2 of the article. Consequentially, it is argued that no formal

system of precedent may exist as laws are only binding to the parties involved.

In essence, the question that must be addressed is whether Article 38 should be amended to reflect the contribution to the development of international law by the following influences:

1. Unilateral acts of state
2. Rules of Jus Cogens
3. Resolutions of the General Assembly Unilateral Acts of State The modalities and international legal effect of a unilateral declaration made by a state was fully explored in the Nuclear Test case and is now the subject of guiding principles adopted by the ILC. The basic principle generated from the judgment of the court, in this case, is that: It is well recognized that declarations made by way of unilateral acts, concerning legal or factual situations may have the effect of creating a legal obligation. ' It is accepted that the binding nature of unilateral acts of states is based on the principle of pacta sunt servanda and the intent to be bound. The genesis of the relationship between unilateral acts of states and their legal obligations can be traced back to the Eastern Greenland dispute, which provides the authority for the significance of unilateral acts.

Given the legal ramifications of such acts, the question thus arises as to whether they should be provided for as a source of law under Article 38. Fitzmaurice argues that unilateral acts of states examined represent, in essence, a source of obligation as distinct from a formal source of law. He contends that the law requires an obligation to be carried out but the <https://assignbuster.com/essay-on-public-international-law/>

obligation is not, in itself, law. In effect, a unilateral act represents more of a contractual obligation rather than a source of law. In addition, one must also consider the difficulty involved in generalizing so heterogeneous a category.

Rules of Jus Cogens

There has been considerable contention over the exclusion of a reference to the rules of jus cogens in Article 38. While it is sometimes proposed as an independent source of international law, one must consider the question, are the norms of rules of jus cogens not inherent in international law given the emphasis it places on human rights and its flexibility as a living instrument? In addition, one must examine the scope of Article 38 (1) (c), which provides for the application of general principles of law recognized by civilized nations. Given the vast spectrum available for the interpretation of these principles notwithstanding the fact that the rules of jus cogens are fundamental in the general principles of law recognized by civilized countries, it makes it effectively impossible to argue that they are not provided for in Article 38. Evidence of this assertion can be derived from the statement of President Baron Descamps; the draft that became Article 38 (1) (c) ' was necessary to meet the possibility of a non-liquet'.

Resolutions of the General Assembly

The confusion surrounding the role of resolutions of the General Assembly in relation to the sources of international law garners some dispute. It has long been established that these resolutions are not legally binding on States. However, there is precedent to the effect that they may form the constituent parts of customary law. For example, in *Nicaragua V United States* the ICJ

referred to GA resolutions expressly and solely to demonstrate the existence of the necessary *opinio juris*. Furthermore, in the *Legality of Threat of Nuclear Weapons* case the ICJ suggested that despite resolutions not being binding, they may still have normative value. While this case confirmed the suggestion by the ILC that resolutions do not yet constitute sources of law, it is irrefutable that they do represent evidence of State practice and an understanding of international law to the degree that they can, in fact, form part of the constituent elements of custom.

Conclusion

While it is apparent that there is an emergence of material sources of international law, one cannot purport to suggest or argue that any further formal sources of law exist. Therefore, for now, Article 38(1) remains an exhaustive statement on the sources of lawmaking in the international legal system.

Reference

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