International Law

Discussion Questions

Gleider Hernández, *International Law* (Oxford University Press, 2019)

Chapter 2, The Sources of International Law

Question 1. *'There is a clear hierarchy between the sources of international law as laid out in Article 38(1) of the ICJ Statute'. Analyse critically.*

This question asks students to identify and consider the various sources enumerated in Article 38(1) of the ICJ Statute, and the relationship between them. It is generally accepted, not least from its drafting, that Article 38(1) sets out the primacy of treaties, customary international law, and general principles of law above other sources of international law. Article 38(1) does not, however, distinguish between those three primary categories of sources, though its drafting history suggests that general principles may have been inserted into the Statute of the PCIJ (the ICJ's predecessor) as a 'fall-back' in situations where neither a treaty nor a customary rule would fully resolve a specific dispute. Nevertheless, in *Military and Paramilitary Activities in and against Nicaragua (Merits)*, the ICJ emphasised the lack of hierarchy between the three principal categories, though it has noted that regard is often had to treaties in the first instance, if only for reasons of legal logic (it is generally easier to identify written rules than unwritten rules of law).

One could argue that the principles that assist in resolving conflicts between competing sources, *lex posterior* or *lex specialis*, might create an implicit hierarchy. In most cases, a treaty rule is more specific than a customary rule, generating *lex specialis* and thus an implicit primacy. However, do not take this too far: in the same way that a treaty might depart from or modify existing customary rules, so too may customary rules may depart from and eventually modify a treaty rule.

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Finally, it bears noting that the subsidiary sources of international law are of great practical importance. Even though judicial decisions and the writings of publicists are merely 'subsidiary means' (and to them we may add e.g. ILC Reports and Draft Articles, resolutions of the organs of IOs such as the General Assembly and Security Council, and other evidence, often the statements of such bodies, and in particular those of the ICJ and other international courts, are regarded as authoritative statements to interpret a treaty obligation or to ascertain the existence of a customary legal rule.

If there is any hierarchy of sources, it would be between the sources enumerated in Article 38(1) and peremptory norms of international law, or rules of *jus cogens*. A treaty becomes void if in conflict with *jus cogens*, and customary international law or general principles would of course suffer a similar fate.

Question 2. *'In addition to being consistent and widespread, practice must unfold over a long period of time for a new customary rule to be established.' Analyse this statement critically.*

Customary international law is not established mechanically. There are no objective yardsticks of duration, consistency, or uniformity upon which one can rely. For example, in *North Sea Continental Shelf*, the ICJ considered that a brief passage of time was not itself a 'bar' to the creation of a new customary rule, provided that practice was sufficiently extensive and uniform (see also *Nicaragua* and *Anglo-Norwegian Fisheries* cases). It is also widely accepted that the United States and Soviet Union crystallised custom rapidly, if not 'instantly', when they ratified the Outer Space Treaty, given the strength of *opinio juris* as to the provisions of that treaty. In this respect, time is not the indispensable factor. As regards uniformity, it need not be universal: for example objection (*Anglo-Norwegian Fisheries*, and outright non-compliance (*Nicaragua)*, none of which will undermine a customary rule for having a lack of complete uniformity. Finally, as regards consistency, once again you can have persistent objection and of course the existence of regional custom (*Asylum*) or bilateral obligations rooted in custom (see *Right of Passage*) that detract from an argument of absolute consistency.

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Finally, though the question is primarily about practice, it is not alone determinative. If *opinio juris* is sufficiently clear (as was argued during the signing of the Outer Space treaty), any issue with the duration, consistency or uniformity of practice might simply not impede the coming into being of a rule of customary international law. It would seem, therefore, that the different criteria of duration, consistency, and uniformity need to be balanced against one another, with regard paid to all of them.

Question 3. *'Even though judicial decisions are merely material or secondary sources of international law, in reality they are of enormous law-making significance.' Do you agree?*

It is true that under Article 38(1) of the ICJ Statute, judicial decisions are merely a subsidiary source of international law. This is in part due to Article 59 of the ICJ Statute, which, in order to safeguard the fundamental principles of consent to international obligations, lays down that its decisions have 'no binding force except as between the parties and in respect of that particular case'. Yet every student of international law will immediately be exposed to case law that sets out important principles of customary international law or an authoritative interpretation of a treaty provision. Such cases are important as they are often the first instance in which a treaty provision is placed in dispute, or where it is argued concretely that this or that rule has crystallised as one of customary international law. But it is not novelty that would give this influential role to judicial decisions. A more subtle argument recognising the importance of judicial decisions is the fact that judgments represent the application of the law to a given set of facts, not unlike in a problem question; and that every application or interpretation of a legal rule is indirectly contributing to our understanding of how it operates.

Nevertheless, a more sceptical student can argue convincingly that the formally subsidiary nature of judicial decisions is determinative: that judges were not elected to develop the law, and that to give outsized influence to judges is to sideline States, the central actors in international legal development. The tendency to rely on judicial decisions by English-language international lawyers can even be said to constitute a transposition from common law jurisdictions, where cases are a formal source of international law, unlike in civil law jurisdictions where courts and tribunals are not said to develop the law.

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