

CONSIDERATIONS ON THE FORMAL SOURCES OF INTERNATIONAL LAW

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Abstract

“Law sources” designate at the same time the substantial / material law sources and the formal law sources [1]. By law sources are also designated “ways of formation of juridical norms, namely procedures and acts by which these norms come into “juridical existence”, become part of the positive law and acquire validity [2]. Thus, this paper is about the formal sources of law, whose “small number makes them present in all the juridical orders and subject to systematization” [3]. It is only these formal sources that we are going to deal with in this paper. Although the importance and the authority of each of them varies depending on juridical systems, epochs and countries, we can point out, among these sources: law, custom, jurisprudence and doctrine. In general, the specialists oppose written sources, such as legislation, to unwritten ones, such as custom, or direct sources, like law and custom, to indirect ones, like doctrine and jurisprudence, which would actually be, for instance, according to some eminent French law authors, nothing but authorities but not also French law sources [4], or official sources that generate formal rules, which are legislation and jurisprudence and unofficial sources, yielding only non formal (non official) rules, such as custom and doctrine [5]. The recognition of the formal law sources and of the obligatory character of the rules coming out of the formal law supposes a “Rule of law” [6].

Keywords: formal sources, international law, States, juridical systems, Rule of law, juridical norms

1. The notion of formal source of international law

In the framework of law sources, an extremely important role is held at present, by the international law sources.

By international law sources we understand international law norms that apply to all the States or at least to a number of two States and which can regulate all inter-State domains or at least one of them.

Being the result of a complex and dynamic process, the international law norms rely on the will of the international law subjects and are the result of the volitional agreement among the States.

When we consider the international law sources, it is practical to think less about the factors determining the creation of the juridical norms (material sources), and rather about the formal sources, as ways of expressing these norms [7].

The features specific of the international law sources are:

- common will of two or more States that decide on a juridical norm meant to govern the relations among them;
- substantiation of the will agreement into a juridical norm, custom, treaty etc.;
- presence of a juridical norm assuring the good development of the relations among States / role to assure the good development of the relations among States;
- while the internal law sources mainly come from the legislative power of a State, the international law norms rely on the agreement of wills between two or among more than two States.

Professor Raluca Miga-Beșteliu considers that the formal international law sources are juridical means by which the norms of this law are expressed [8].

In another opinion it is shown that by the international law source one understands the means of expressing the norms resulting from the States' agreement of will [9].

An important landmark for the management of the international law sources can be found in article 38 of the Status of the International Court of Justice, annexed to the 1945 UN Charter, resuming actually article 38 of the Status of the Permanent Court of International Justice of the year 1921.

Thus, the article we have referred to stipulates:

1. The Court whose mission is to solve according to the international law the cases referred to it shall apply:
 - a. The international conventions, either general or special, establishing rules recognized explicitly by the States in litigation;
 - b. The international custom as proof of a general practice accepted as law;
 - c. The general principles of law recognized by the civilized nations;
 - d. Under the reserve of the stipulations of article 59, the judicial decisions and the doctrine of the specialists best qualified in the public law of different nations as auxiliary means of determination of the rules of law.
2. The present regulation will not impinge on the Court's right to solve a case *ex aequo et bono* if the parties agree to it.

The value of this article is indicative, mentioning the main law sources used in solving international litigations. The article first enumerates the acts in which the States' consent is explicit and then passes on to those law sources in which the consent is tacit

(international custom and general principles of law), the enumeration ending with the auxiliary sources of law (jurisprudence and doctrine of the most competent specialists). Finally, the article does not exclude the Court's possibility to solve a case *ex aequo et bono*, if the parties agree to it.

As the author Raluca Miga-Beșteliu mentions, article 38 is criticized by the contemporary doctrine at least for two reasons: it is not exhaustive and a part of its formulations have been made obsolete by the evolutions in the area of international law and international relations [10].

The text evoked actually aims to indicate the law norms that have to be applied by the Court. Evidently, at present, the text is imperfect, being adopted 95 years ago. Its content is not adapted to our times. Yet, we shall note that this high jurisdictional forum is obliged to judge according to the international law, therefore according to precise norms, according to dedicated rules respected by the about 200 States signatories of the UN Charter, the Status of the International Court of Justice being part and parcel of it [11].

2. Categories of international law sources

The formal sources of the international law would be, according to the Status of the International Court of Justice (Art. 38): 1) treaty; 2) international custom; 3) general principles of law and 4) international jurisprudence and doctrine (made up of the opinions of the best specialists of various countries) [12].

2.1. The Relation and Interaction between Treaty and Custom

Although the essence of the international law is customary, it is just as true that an important role in the formation of the international law goes to the treaties. Thus, a treaty can become, in its turn, customary norm, according to Article 38 of the Vienna Convention of the year 1969 on treaty law, which foresees: "None of the provisions on treaties and third countries shall precludes a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law, recognized as such".

To create a custom, starting from conventional norm, the jurisprudence of the International Court of Justice decided on three conditions:

- the practice of the States, regarding the norms invoked, must be uniform and frequent;

- the participation to the convention must be very large and representative;
- the conventional norm must have a normative character and be able to constitute the basis of a general norm of law [13].

The interaction treaty-custom functions as follows, from a normative perspective:

1. from the treaty to the custom, in the sense that there are treaties creating new rules that can be accepted as custom;
2. from the custom to the treaty, in the sense that there are treaties that codify or reflect the custom in their regulations [14].

The customary norms of the international law become binding at the same time for all the signatory States (including for those that opposed the customary norm incorporated) and also for the States adhering later on to this Convention.

The specialized literatura [15] also mentions that one can talk about the ceasing of the effects produced by some treaties, by virtue of the international customary law. This can happen in one of the following situations: non-application of the treaty by the formation of a derogatory, contrary custom, denouncing of the treaty, when one of the parties violated the provisions of the treaty; disappearance of one of the signatory / contracting parties; application of the clause *rebus sic stantibus*; appearance of clauses of revision and the effect of wars on treaties or the effect of a war on treaties.

One can note that, on the international level, the greatest importance at present goes to the treaties codifying the international public law [16].

The international customary law constituted the object of certain codifications. The diplomatic usage (for example, the rules of diplomatic courtesy) are not considered a source of international law, since they do not have a binding character.

Nowadays, we are witnessing the delineation of an international legislation, in the sense that the international regulations acquire more and more a legislative character and are gradually losing their contractual character, a tendency manifested, especially, regarding regional integration. The international organizations usually address to the States recommendations, in quality of consultative organisms. The respective recommendations constitute a negotiation framework for the conventions of voluntary adhesion of different States. Yet, some international organizations have the permission

to adopt decisions that are binding for the member States and emit binding international decisions [17].

2.2. International Organizations and International Custom

International organizations play an important role in the international life contributing to the elaboration of international norms, to the development of the customary practice and the consolidation of the customary norms (European Union trading relations, participation of the UN to different military missions contributes to the formation of law norms in different domains) [18].

Professor Gh. Moca underlines about the custom that it continues to have a great significance in the emergence and formation of the juridical norms of the international organizations. Some rules and institutions with a general character have taken shape or are about to take shape, via the custom, in the practice of the States and of different organizations, especially of those with a universal character. Such examples are the permanent missions of the States at international organizations, the status of the States' or organizations' observers, of the international clerks, the treaties concluded by organizations and others [19].

2.3. International Law Principles

The Status of the International Court of Justice affirms, in article 38 point 1 letter c), the following: "The Court, whose mission is to solve according to the international law the disputes submitted to it will apply: ... the principles of law recognized by the civilized nations".

This formulation indicates the fact that among the law sources applied by the International Court of Justice one can find the general principles of law recognized by the civilized nations.

Various authors [20] highlight the ambiguity of these formulations or even a certain preferential perspective underlining the civilizing role of the colonial powers.

The general principles of the international law represent auxiliary/ subsidiary sources of the international law, according to the French doctrine, along with equity and the unilateral acts. According to the same doctrine, the general principles of international law are principles that are common to the juridical systems of different civilized States [21].

Regarding the juridical force of the general principles of international law, two positions have emerged so far:

I. The Romanian juridical literature presents opinions according to which, the general principles of law, defined as principles of internal law are not applicable in the international law [22]. Yet, if we have in view the common principles of the internal law systems, they will be found as elements of the customary process. If, however, we have in view the general principles of the international law, one can consider that they are norms of international law formed in the shade of the treaty or of the custom.

II. Some western doctrine specialists, such as L. Oppenheim-Lauterpacht and A. McNair (as the authors Ion Diaconu and Raluca Miga-Beșteliu mention), starting from the provisions of Art. 38 Letter c and seeing that the decisions of the International Court of Justice rely on general principles of law, consider that they can be seen, along with the treaty and the custom, as sources of international law [23].

The academician Paul Cosmovici characterized the fundamental principles of international law as norms with a high generality degree, formed and recognized in the framework of a certain normative order, meant to determine a certain behavior among the international law subjects by referring to a dynamic system of values, with an unanimous or generally accepted character [24].

Regarding the issues related to the general principle of law, Professor Paul Guggenheim [25] admitted that, beyond the principles taken over from the internal order of the States, the international law equally knows general autonomous principles, called principles of international law. Yet, the same professor appreciated that it is not necessary for them to be considered particular sources, but the reference to these principles must, first of all, be interpreted in the sense that the validity of the international customary law cannot be limited by the individual will of the States [26].

2.4. International Doctrine and Jurisprudence

The Status of the International Court of Justice (Article 38 Letter d) defines the judge's decisions and the doctrine of the best specialists of the different States, as auxiliary means for establishing the norms of law.

The form of the international law is also influenced by means that, without determining the creation or development of juridical norms, nevertheless contributes to

noticing their existence, to interpreting and highlighting juridical values or determining, unilaterally, the State conduct, in the international norm creation process.

Doctrine (according to Art. 38 of the Status of the ICJ) comprises the opinions, the perspectives of the most competent international law specialists, very good at analyzing and interpreting the juridical norms of international law.

To the creation of the international law also contribute auxiliary factors such as the doctrine, with an important role in the development of the international law and of the new texts of law, expressed both by natural persons and by scientific associations such as I.L.A. (International Law Association) and I.L.I. (International Law Institute).

An important role in this domain goes to the International Law Commission of the UN, along with the opinions, individual or separate, expressed by the judges of the International Court of Justice. The procedure of the International Court of Justice foresees the right of the judges to present in writing also other arguments than the ones included in the decision, or the right of the judge who voted against the decision to present in writing his separate opinion and the corresponding arguments (opinion dissidente).

At the same time, the international jurisprudence has a creative role in the normative process, helping with the interpretation of the international law.

Jurisprudence includes the decisions of the judicial and arbitration instances of the International Court of Justice, of the Court of Justice of the European Union from Luxemburg and of the International Arbitration Courts.

According to another opinion, international judicial decisions are acts interpreting the treaties or the custom, in order to apply the law norms in a determined case. The importance for the international law of the decisions adopted by the international judicial or arbitration instances is given by the character of the function of the international judge, who is called to apply the law, not to create it [27].

Thus, the international judge is not called to create the law, but to apply it, and its decisions must note the existence or absence of the law norms invoked by the parties and explain the sense of the existing juridical norms.

The fact that jurisprudence does not constitute but an auxiliary source of the international law is reinforced by Article 59 of the Status of the International Court of

Justice which underlines that the decisions of the Court “have no binding force except among the parties in litigation and only for the cause they solve”.

To conclude, one can keep in mind the very great importance of the doctrine in the development of the international law and its quality of essential source of inspiration for new texts of law that are to emerge. At the same time, judicial decisions, despite their important contribution to the development of the international law, do not constitute sources of it, but auxiliary, complementary means of individualization and interpretation of the juridical norm [28].

Conclusions:

A careful analysis allows one to note that among the formal sources of the internal and international law, and generally among all the law sources, there is a close connection. At the same time, the evolution of their importance and their permanent evolution in time, to get adapted to the social needs, denotes the evolutionary character of the law sources but also their capacity of adaptation from one law system to the next and from one State to the next. Essential remains, however, the fact that during any epoch and in any law system, law sources have been absolutely necessary to elaborate and realize law [29].

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