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RESEARCH PAPER

The Preponderance of International Courts in the Conflict of Treaty Law and Customary International Law

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ABSTRACT

The foundations of a society's legal system are profoundly impacted by the law's historical context. International law is separate from the laws of particular countries. Legal determination in the community is more difficult than in a sovereign state because there is no worldwide legislature or system of courts with binding jurisdiction. Almost from the start, there were legal professors who believed that the Statutes were the ones responsible for establishing authority. This means that if a treaty establishes a norm that conflicts with an existing international custom, the rule in the treaty will take precedence. While some legal experts believe the Statute was created to establish a hierarchy, others argue that its only goal was to give a compilation of the international law sources in the order in which a court would properly analyze them. This study looks at how international courts tend to rule in situations where customary international law and treaty law are in direct opposition to one another.

Keywords: Customary International Law (CIL), International Courts (I.C.), Law of Treaty, Opinio Juris, State Practice

Introduction

There are a variety of unanswered questions in international law, and the same was thought nearby customary international law (CIL). Two of the most important components of the establishment of customs are opinio juris and state practice. (Walden, 1978) On the other hand, their precise nature is not entirely defined, nor is their typical formation recognized. It is unknown what exactly "state practice" is or how it can be produced when it has been regarded as law. Additionally, it is unclear how that can be created. (Walden, 1978)

The particular ambiguities associated with CIL are linked to the general ambiguities at a broader scale. The Statute of the International Court of Justice (ICJ) in Article 38 elaborates that it stands practical but cannot be considered binding. Our understanding of the process through which customary laws are developed is restricted. The paper suggests that the "deduction and induction" method is problematic. (Kammerhofer, 2004) They only provide temporary alleviation, not long-term solutions to problems. No matter how one addresses them, codified constitutions and the lack of a greater legal culture produce additional uncertainty in the system. When concepts and principles are accepted without question, they are codified into legal frameworks. This is a perplexing scenario in and of itself. (Kammerhofer, 2004)

Literature Review:

Both treaty law and customary international law are recognized as sources of international law by Art. 38(1) of the ICJ Statute. ... Only those states that have agreed to be bound by the treaty (often by ratification) are actually bound by the treaty's terms. However, "a general practice accepted as law" is the source of what we call "customary international law." (Goldsmith, 1999)

If a treaty is a codification of customs, if it has crystallized emergent rules of customary law, or if it forms the basis for the passage of its provisions into customary law through the normal process of state practice, then the rules contained in the treaty will also be binding as a matter of customary law. Treaty law is distinct from customary law primarily because it is presented in written form and is solely obligatory on the state signatories to the treaty. It is possible for non-signatory states to develop a custom after the adoption of a treaty. In accordance with a treaty, a duty is based on the voluntary agreement of participating states. Most scholars agree, however, that states' approval—whether express for treaties or implied for new customary international law—is what gives them their normative authority. (Kammerhofer, 2004)

When treaty law and customary international law contain the same principles, there is no basis for the claim that treaty law "supersedes" customary international law, rendering the latter null and void. When the United States argued that international treaty law, and especially the United Nations Charter, "subsumed" and "supervened" customary international law in the case of Nicaragua v. United States (Nicaragua v. USA), the International Court of Justice (ICJ) disagreed. (Sabharwal, 2000)

When negotiating a treaty, governments can include procedures or pathways for the treaty to be modified without jeopardizing its underlying structure as a means of introducing flexibility into the treaty regime. The treaty's authors might also appoint an official interpretation to settle any future disagreements about the text's meaning. After a treaty enters into force, governments may engage in further kinds of lawmaking to clarify their treaty rights or duties, such as proposing gap-filling adaptive interpretations, concluding related bilateral agreements, or using a number of soft law methods. However, these workarounds don't address the underlying issue of following state behavior that violates treaty law, behavior that might rapidly evolve into incompatible customary international law. (Jordan, 1967)

Research Methodology:

Analytical research was used for this study, which entailed reviewing existing literature and analyzing the actions and decisions of international courts, tribunals, and states in order to address the research questions and resolve the issue of international court follow-up in cases of contradiction between customary international law and treaty law. The final stage of this research entails an advantageous overview of the research findings, as well as advice for addressing the identified concerns. I will collect relevant data from a variety of sources, including books, articles, and academic papers. These sources will provide useful insights and information on disputes between customary international law and treaty law. This data will be thoroughly analyzed by the researcher in order to assess and evaluate the research topics.

The study will pay close attention to examining the decisions taken by international courts, tribunals, and nations in order to answer the research issues. This study will shed light on how disputes between customary international law and treaty law have been addressed and resolved in practice. To obtain a better grasp of the topic, the researcher will consult relevant case studies, court decisions, and legal opinions.

Research Question:

- Why is it challenging to coherently explain Customary International Law, with its requirement on State Practice and Opinio Juris?
- Why is treaty law given precedence over customary international law in International Courts with Case Law?

Research Objectives:

- To answer the research questions, the study will focus on the decision taken by international courts, tribunals, and states courts.
- To obtain a better grasp of the conflict between Customary International Laws and Treaty Laws.

Customary International Law

Customary International Law (CIL) relics a eminent foundation of law, although it is not codified in any way, and it is responsible for establishing standards that all nations must follow. These CIL regulations have two different subparts or components. In the first place, state practice needs to be uniform and ubiquitous. Second, there needs to be a "belief in a legal responsibility," which is what the Latin phrase "opinio juris" is. (Kirchner, 1989)

According to the International Court of Justice (ICJ), " Additionally to this, the acts implicated chosen an established practice; however, they must be of such a nature or be performed in such a manner, with regard to constitute proof of a credence whereby this practice is declared mandatory as a result of the existence of a guideline that requires the problem."... The Nations implicated should consider that people comply thru what corresponds to a lawful duty. ' *(ICJ Reps, 1969, page 3, at the page number 44; North Sea Continental Shelf cases)*. (Nelson, 1972) Both components must be in place before a new CIL may be established; see the *The Case of the S.S. Lotus (Fr. Vs Turk.) (1927) and the Advisory Opinion on Nuclear Weapons (1996)*. However, these aspects certainly need a more in-depth examination. (Kammerhofer, 2009)

Bilateral and Multilateral Customary International Law

A custom known as "Multilateral Customary International Law" is recognized everywhere on the globe. In contrast, a "Bilateral Customary International Law" is recognized merely two countries. (MacChesney, 1960) The International Court of Justice is on record as having recognized this in the instance of Portugal and India's Right of Passage Over Indian Territory, where the decisions of courts from both countries were considered. "No reason why cooperation between the two nations, which has already been occurring for a significant amount of time and is currently recognized by them as controlling relationship between them, ought non to frame the assumption of associated freedoms and compulsions amongst the two countries." (MacChesney, 1960)

International Customary Law and Its Requirement

The following are the two components that make up what is known as customary international law (Weisburd, 1995):

i. Consistent and generalized behavior on the international level on the practice of states.

ii. An unofficial acknowledgment of the custom by members of the global community in their capacity as legal authorities (opinion juris).

The Characterization of State Practice — What is State Practice?

This statement tends to spark a lot of debate among people. What exactly does it mean, and how can it define "practice"? According to one viewpoint, they become practices when these declared rights are exercised. The other one suggests that the statements are practice in and of themselves. The conceptual distinctions between "*state practice*" and "*opinion juris*" become more chaotic. To some extent, the word "state practice" can refer to

anything a state decides to do or not do. This will be the "objective element" of behaviors and serves as our guide in determining what a nation "wants" or "appears to believe" the law to be. (Crootof, 2016)

According to the perspectives of Anthony D'Amato and Michael Akehurst on this well-known topic may be beneficial. D'Amato asserts that " an act is not a claim. " and that "avow alone," even though jurist can define a lawful custom, cannot form the factual element of custom. It would include a state's decision not to intervene in situations where it could and promises to act. On the other side, Akehurst's notion is that declarations are also a state practice. This is the viewpoint that the vast majority hold, as demonstrated by international courts' decisions. (D'Amato, 2017)

Two distinct interpretations might be given to the idea of state practice. The first one implies that all of a state's actions and omissions in its international affairs are unbiased and does not imply that the state seeks to dictate that behavior in any way. This idea is not particularly useful in most contexts. The second approach provides a far more all-encompassing perspective: "State practice implies such action or declaration by means of a country as of which opinions concerning Customary International Law meight be derived." This would include the state's requirements and convictions that are considered regular. Some writers believe that 'opinio juris' is not the most important aspect of state practice; rather, they feel that the core of state practice lies in its autonomy. If a state decides to engross in the repetition of torture, this does not indicate that there are not enough practices prohibiting it. (Orakhelashvili, 2018) In the *Nicaragua case*, the International Court of Justice (ICJ) made the following statement: "In demand to interpret the validity of usual norms, the bench thinks it necessary that the behavior of countries ought, in overall, be harmonious aforesaid a norm; and those illustrations of country conduct conflicting with a certain regulation should normally stand viewed by means of breaks of that regulation, non in place of signs of the adoption of an innovative rule." *(International Court of Justice in Nicaragua Case, ICJ Reps, 1986, p. 3 at 98.)* (Gill, 1989)

Opinio Juris

It is claimed, per opinio juris, a certain activities of a state are lawfully mandatory, which results in the formation of a custom, and that these activities are deemed to be a component of the rules that govern worldwide law (see, e.g., *the North Sea Continental Shelf cases (1969)* (ICJReports, 1969) *and the Lotus case* (LotusCaseReport, 1927)). On the other hand, this does not completely meet my expectations. It does not consider that many rules, like rules establishing sovereignty over continental shelves, are permissive. Taking all of this into consideration discussion, meaning of "opinio juris" denotes to a conviction in right and reality as opposed to obligation.

Furthermore, there is nothing substantive or material about debating the beliefs and ideas of a state in the context of this discussion. It is not very natural and appears to be arbitrary. A more effective strategy may be to use opinio juris, which can be defined as the pronouncement of a legal entitlement or the salutation about lawful compulsion. When efficient adequate repetition, an entirely new custom norm will form on its own accord. (Kammerhofer J. , 2004) The new regulation applies to all states and is bound by the principle of "persistent objector." This principle permits a country to circumvent the request of a new-fangled regulation if it repeatedly opposes the rule before it comes into existence. However, opinio juris suffers from a fundamental weakness that enables the development of new customs and laws. This flaw makes it possible for new laws and customs to emerge. But given that all governments are obligated to abide by an established legal system, how may new customary rules develop? (Kammerhofer J. , 2004)

It is quite challenging to provide concrete evidence of true opinio juris. A growing emphasis is placed on behavior inside international organizations, utmost remarkably the

United Nations. In a few different instances, the International Court of Justice (ICJ) decided to adopt outcome from the General Assembly that validate opinio juris. They concentrated on the specifics of the resolutions at issue and made decisions regarding the conditions under which they would be adopted. Nevertheless, a great deal rides on the perspectives of the governments in question, whether they are signatories to a treaty or stakeholders in the approval of a United Nations resolution. The court has also referred major codification conventions to the activities of the International Law Commission (ILC) with the same goal of ensuring that they are reliable with worldwide commandment. The judgment that was made in the case involving *Anglo-Norwegian Fisheries* (Green, 1952) may give the impression that it suggests that once one nation behaves in a particular way that is counter to a recognized customary rule as well as other countries acquiesce in all this, then maybe that state is to be viewed as though it is not obligated by the rule that was created in the first place. (Green, 1952)

This demonstrates that international attorneys and legal jurists vehemently disagree with the extent, application, and construction of International Customary Law due to what has been demonstrated here. Both the specific characteristics of state practice and Opinio Juris bring up the topic of self-referral as a potential problem. It is quite complicated to comprehend the customary international rules rationally because state practice is not obvious, and opinio juris might often conflict. (Cheng, 1965)

Treaties

International bodies and states can come to agreement on a treaty, likewise recognized as an exchange of protocol, notes, convention, or accord. The creation of treaties is the other primary source of international law. Using more appropriate terminology, they serve more as a basis for obligations imposed by the law. Treaties are only legally binding on the states that sign up to be parties to them, while individual governments are not required to comply with their terms.

Pacta Sunt Servanda is a principle of international customary law that holds that governments that become parties to a treaty are obligated to uphold its legality. Because of this, all governments are obligated to uprightly their respective treaties, which is another reason treaties are considered sources of legal duty. Numerous agreements are also significant as official declarations of customary law simultaneously. (Wehberg, 1959) Drafting a treaty between several governments is frequently referred to as "writing down" formerly unwritten customary law standards such as the *Vienna Convention on the Law of Treaties (1969)*. (Wehberg, 1959)

Treaty Laws Take Precedence Over the Customary International Law:

According to Trachtman, only thirteen out of a total of three hundred various norms of international customary law have not remained adopted in treaties or codified, which accounts for only 4.33 % of CILs. He contends that contemporary international society is confronted with a myriad of issues, including but not limited to cybersecurity, the preservation of the world's ecosystem, the liberty of mobility of individuals, services, besides goods, and the maintenance of worldwide medical services and that this is the reason why a shift toward treaties is preferable toward the practice of law based on international customs, which may not effectively respond to the challenges. He also thinks customary international law may not effectively tackle the difficulties of reducing poverty, protecting human rights, and regulating conflict. He says this in the context of suggesting that the law may not be effective.

If it is recognized in practice, a provision of a treaty takes the latent to become incorporated into the body of customary rule, even if the provision of the treaty was not intended for codification but rather represents an innovation. In addition, even in situations

instances in which a treaty clause is not applicable meant to stand modificatory nevertheless is relatively a novelty aiming to transform the regulation, it is nevertheless possible for such provision to turn out to be portion of customary law if adopted in repetition. Perceive, for example, the cases concerning the *North Sea Continental Shelf* from 1969 (Nelson, 1972): "Even though the passing just a little amount of time isn't really required., or as a whole a challenge to the establishment of a up-to-date rule of international customary law taking place the source of what was formerly a virtuously customary regulation, an imperative prerequisite that this takes place even inside the time frame in issue, notwithstanding the fact that it could be quite brief, state practice, particularly those belonging to nations having benefits are exclusively precious, ought to have been consistent with the rule." *[T]he passages (ICJ Reps, 1969, p. 43*)

In the years after 1945, numerous treaties addressing various aspects of international law, such as extremism, terrorism, diplomacy, discrimination, atrocities, and the processes of treaty creation, amongst others, have been adopted, which has resulted in some of the most significant developments in international law. In order to reach success, keep in observance that when there are two or more rules that are relevant, the judgment needs to be made by following the maxims lex specialis derogat legi generali and lex posterior derogat legi priori (UN ILC's "Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law," *[2006] GAOR 61st Session Supp 10, 400, at 408–18*; Interpretation in International Law). When there is a conflict between the treaty and conflicting customary international law, the treaty is taken into consideration to be the lex specialis rule and is given precedence. (Fitzmaurice, 2013)

Conclusion

To conclude, in none of these decisions is it stated that a newer piece of International Customary Law could supersede an existing international treaty duty. On the one hand, they maintain that the subsequent behavior of the participants may not only be significant to the exegesis of a treaty but may even affect the contents of the treaty itself. The scope of this regulation is significantly more limited compared to the stance taken in the Draft Restatement. Practice between the stakeholders in a treaty is the only subsequent action allowed to amend the treaty's terms. On the other hand, new customs could originate from the actions or even just the declarations of nations or organizations that are not necessary parties to the treaty.

Similarly, previous cases have determined that a treaty is superior to preceding international customary law. However, other authorities remark that the judgments could rest on other criteria, such as the treaty's higher specificity or future ratification. Some authorities mention these to establish the hierarchical supremacy of treaties over customs, while others add that these determinations could rely on other grounds.

Recommendation:

1. When there is a dispute between two different standards of international law, the concept of lex specialis dictates that the more specific or specialized norm takes precedence over the general norm. Because it is a purposeful and voluntary agreement between states that tackles particular concerns in a detailed and specific manner, treaty law is considered to be more specific than customary international law in this context. The reason for this is because treaty law addresses particular issues in a manner that is both precise and specific.

2. The parties to a treaty are obligated to fulfill their legal responsibilities as a result of the agreement's binding nature and the fact that it was willingly entered into by the governments involved. When a nation joins another in the signing of a treaty, that nation takes on the responsibility of ensuring that its laws are in line with the terms of the pact. As a result, in the event that a disagreement develops between a provision of a treaty and a rule of customary international law, the provision of the treaty will, in most cases, take precedence over the customary law rule.

3. It is essential to keep in mind that this basic rule may have some wiggle room in it for certain circumstances. For instance, if a rule of customary international law has been given the status of jus cogens, which refers to obligatory standards of general international law, then it is considered to have a higher significance than treaty law. The norms of jus cogens are fundamental principles of international law that are acknowledged by the international community as a whole. These fundamental principles of international law cannot be deviated from by any state by the use of treaties or any other methods. The bans on committing genocide, enslavement, and torture are all examples of norms that fall within the category of jus cogens.

4. The principle of lex specialis dictates that in the event of a conflict between customary international law and the law established by a treaty, the elements of the treaty that are deemed to be more particular will be given precedence. However, in the extremely rare instances in which a body of customary international law has been elevated to the rank of jus cogens, that body of law takes precedence over any applicable treaties.

References

Cheng, B. (1965). United Nations Resolutions on Outer Space:“Instant” International Customary Law? *Indian Journal of International Law*, 5(23). 34-47

Crootof, R. (2016). Change Without Consent: How Customary International Law Modifies Treaties. *Yale J. Int'l L.*, 41, 237.

D’Amato, A. (2017). Is International Law Really “Law”? . *In The nature of international law* , Transnational Publishers, Inc

Fitzmaurice, M. (2013). Interpretation of human rights treaties. In *The Oxford handbook of international human rights law*. oxford academic

Gill, T. D. (1989). *Litigation strategy at the International Court: A case study of the Nicaragua v. United States Dispute* (Vol. Vol. 9). Martinus Nijhoff Publishers.

Green, L. C. (1952). The Anglo-Norwegian Fisheries Case, 1951 (ICJ Reports 1951, p. 116). *The Modern Law Review*, 15(3), 373-377.

ICJReports. (1969). *North Sea Continental Shelf.* ICJ Reports.

Kammerhofer, J. (2004). Uncertainty in the formal sources of international law: customary international law and some of its problems. *European Journal of International Law*, 15(3), 523-553.

Kammerhofer, J. (2009). Gaps, the nuclear weapons advisory opinion and the structure of international legal argument between theory and practice. In J. Kammerhofer, *British year book of international law* (pp. 80(1), 333-360). British year book of international law. Academic Press

Kirchner, J. (1989). *Völkergewohnheitsrecht aus der Sicht der Rechtsanwendung: Möglichkeiten und Grenzen bei der Ermittlung völkergewohnheitsrechtlicher Normen. Florentz.*

LotusCaseReport. (1927). *The Case of the S.S. 'Lotus,.* PCIJ Series A.

MacChesney, B. (1960). Case Concerning Right of Passage Over Indian Territory (Portugal, v. India). *American Journal of International Law*, 54(3), 673-691.

Nelson, L. D. (1972). The North Sea Continental Shelf Cases and Law-Making Conventions. *The Modern Law Review*, 35(1), 52-56.

Orakhelashvili, A. (2018). *Akehurst's Modern Introduction to International Law.* Routledge.

Trachtman, J. P. (2014). The Obsolescence of Customary International Law. Elsevier

Walden, R. M. (1978). Customary International Law: A Jurisprudential Analysis. *Israel Law Review*, 13(1), 86-102.

Wehberg, H. (1959). Pacta sunt servanda. *American Journal of International Law*, 53(4), 775-786.

Weisburd, A. M. (1995). The effect of treaties and other formal international acts on the customary law of human rights. *Ga. J. Int'l & Comp. L*, 12(4), 25-99.