SOURCES OF INTERNATIONAL LAW

The internationally accepted classification of sources of international law is formulated in Article 38 of the Statute of the International Court of Justice. These are:

a) International conventions

b) International custom

c) The general principles of law recognised by civilised nations;

d) Subsidiary means for the determination of rules of law such as judicial decisions and teachings of the most highly qualified publicists.

These sources will be analysed below.

A. International conventions

International treaties are contracts signed between states. They are legally binding and impose mutual obligations on the states that are party to any particular treaty (states parties). The main particularity of human rights treaties is that they impose obligations on states about the manner in which they treat all individuals within their jurisdiction.

B. International custom

Customary international law plays a crucial role in international human rights law. The Statute of the International Court of Justice refers to ‘general practice accepted as law’. In order to become international customary law, the ‘general practice’ needs to represent a broad consensus in terms of content and applicability, deriving from a sense that the practice is obligatory (opinio juris et necessitatis). Customary law is binding on all states (except those that may have objected to it during its formation), whether or not they have ratified any relevant treaty.

One of the important features of customary international law is that customary law may, under certain circumstances, lead to universal

jurisdiction or application, so that any national court may hear extra-territorial claims brought under international law. In addition, there also exists a class of customary international law, jus cogens, or peremptory norms of general international law, which are norms accepted and recognised by the international community of states as a whole as norms from which noderogation is permitted. Under the Vienna Convention on the Law of Treaties (VCLT) any treaty which conflicts with a peremptory norm is void.

Many scholars argue that some standards laid down in the Universal Declaration of Human Rights (which in formal terms is only a resolution of the UNGA and as such not legally binding) have become part of customary international law as a result of subsequent practice; therefore, they would be binding upon all states. Within the realm of human rights law the distinction between concepts of customary law, treaty law and general principles of law are often unclear.

C. General principles of law

In the application of both national and international law, general or guiding principles are used. In international law they have been defined as ‘logical propositions resulting from judicial reasoning on the basis of existing pieces of international law’.

At the international level, general principles of law occupy an important place in case-law regarding human rights. A clear example is the principle of proportionality, which is important for human rights supervisory mechanisms in assessing whether interference with a human right may be justified. Why are general principles used? No legislation is able to provide answers to every question and to every possible situation that arises. Therefore, rules of law or principles that enable decision-makers and members of the executive and judicial branches to decide on the issues before them are needed. General principles of law play two important roles: on the one hand, they provide guidelines for judges, in particular, in deciding in individual cases; on the other hand, they limit the discretionary power of judges and of members of the executive in their decisions in individual cases.

D. Subsidiary means for the determination of rules of law

According to Article 38 of the Statute of the International Court of Justice, *judicial decisions and the teachings of the most qualified publicists* are 'subsidiary means for the determination of rules of law'. Therefore, they are not, strictly speaking, formal sources, but they are regarded as evidence of the state of the law.

As for the judicial decisions, Article 38 of the Statute of the International Court of Justice is not confined to international decisions (such as the judgements of the International Court of Justice, the Inter-American Court, the European Court and the future African Court on Justice and Human Rights); decisions of national tribunals relating to human rights are also subsidiary sources of law.

The writings of scholars contribute to the development and analysis of human rights law. Compared to the formal standard setting of international organs the impact is indirect. Nevertheless, influential contributions have been made by scholars and experts working in human rights fora, for instance, in the UN Sub-Commission on the Promotion and Protection of Human Rights, as well as by highly regarded NGOs, such as Amnesty International and the International Commission of Jurists.