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Legal Approaches to Public International Law and the Nature of International Affairs

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HOLLY BARRINGTON, AUG 13 2013

“What Do Legal Approaches to the Sources of Public International Law Tell Us About the Nature of International Affairs?”

Introduction: The Three Pillars of International Affairs

The symbiotic relationship between international law (IL), international politics, and normative ethics demonstrates the complex and inter-linked nature of international affairs. As such, whilst this analysis focuses on the legal approach to ‘sources’ of IL, it is imperative that all aspects of international affairs are considered in relation to ‘sources’. The ‘sources’ of international law is a term used to denote “agreed-upon....abstract normative forms....that determine two essential parameters of the system: law creation....and law ascertainment” (Skouteris 2011, p.70). The demarcation of international law ‘sources’ is attributed to Article 38 of the Permanent Court of International Justice (PCIJ) Statute[1] (League of Nations 1920); the current legally binding version can be found in the International Court of Justice Statute, Article 38. However this analysis will utilise the original 1920 conception, as the framework of the Article remains unchanged, and it is important to note that ideas of the 1920s shaped this Article. As James Crawford notes, developing on the work of the late Ian Brownlie, “the diffuse character of the ‘sources’ highlights the decentralization of international law making” (Crawford 2012, p.20), as well as the theoretical non-hierarchical nature of the doctrine of the sources. These aspects have spurred debate, often reflecting the way in which legal issues are entwined with political and ethical conceptions.

However, this doctrine is not intended to provide an ethical conception; its purpose is to decisively define “correctness” (Minkkinen 1999, p.3), afford unification for legalistic decisions, and “determin[e] verifiable juridical phenomena” (Minkkinen 1999, p.11). However, this analysis will argue that whilst we need “tools of the trade” (Skouteris 2011, p.75) to deduce law, this objective and inflexible conception of ‘sources’, as found in Article 38, does not reflect the dynamic nature of international affairs. Furthermore, Article 38 is a statist and dated conception of ‘sources’, thereby lacking an awareness of the seminal role that non-state actors play and the way in which the law has significantly evolved since 1920. Therefore, as the nature of international affairs changes, so too must our conception of PIL. As such, whilst international law tries to establish a theoretical rubicon between itself, politics and ethics (Charlesworth 2012, p.190); the reality is that these concepts are interlinked (Rubin 1997, p.192).

This analysis will urge a revision of Article 38, endorsing a conception of ‘sources’ that reflects the multi-dimensional nature of international affairs. The author will argue that we should adopt a broad and flexible conception of ‘sources’, thereby moving away from a strict positivist conception of law.

The Positivist Underpinnings of International Law

Rubin describes naturalism as an “elaboration of principles that are asserted as if self evident but with no necessary connection to wisdom or truth” (Ibid., p.54), and positivism as “merely descriptive or empirical” (Ibid.), thereby demonstrating polarity of the two conceptions. The debate between positivist and naturalist conceptions of the ‘sources’ of law is important to consider, primarily because positivism underpins the contemporary legal system

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(Rubin 1997, p.193). This debate can be associated with Martti Koskenniemi's notion of PIL being polarized by 'apology' and 'utopia' (2005, pp.25-40). This highlights the way in which there is a "duality of 'normativity' and 'concreteness'" (Kammerhofer 2004, p.537) concerning the evolution and formation of PIL. However, Egede and Sutch note that Koskenniemi argues that "international law is always political and that neither a firm adherence to the doctrine of consent or a 'flight from politics' to justice can overcome this basic fact" (2013, p.118). This demonstrates a need to bring the legalist *interpretations* of 'reality' closer to reality, without becoming 'utopian' and aspiring towards the impossible (Egede and Sutch 2013, pp.119-120).

However, positivism is the dominant position adopted by legislators, due to its prioritization of consent (Greenwood 2008, p.1), a value paramount in the post-Westphalian order of states. Additionally, Article 38 represents a positivist conception of 'sources', "making international law formally identifiable, determinate and, above all, distinct from politics and philosophy" (Egede and Sutch 2013, p.63). Article 38 also reflects the statist nature of PIL, noting that states are the only bodies that can *create* law, and only judicial decisions and academic writings can *assist in determining* legal outcomes (League of Nations 1920). As such, some scholars have argued that positivist influences are leading legalists to try to shoehorn 'new' conceptions of law into the existing framework of Article 38 (Alvarez 2005, p.484), as opposed to *adapting and evolving* PIL to reflect the changes in international affairs.

However, whilst this is the dominant perspective amongst lawyers, not all jurists follow this line of thinking. For example Christian Tomuschat, a self-described enlightened positivist, argues that positivism simply doesn't describe the current legal order (Sellers 2012, p.99). Likewise the 'Yale School' of international law has highlighted the deficiencies, noting positivism's "failure to acknowledge the complex reality" (Alvarez 2005, p.51) and its objectivist rather than "problem oriented" (Ibid., p.52) approach. As such, it could be argued that law doesn't stem from a set list as found in Article 38 of the Statute of the PCIJ, but instead, 'sources' are shaped by international society and are changeable forces. However, this still leaves the problem that plagues many lawyers: having a loose and ill-defined conception of what law is.

Article 38 of the Permanent Court of International Justice

Article 38 was originally "intended to serve as a standing order for the Court, stipulating the normative forms that the PCIJ should take into account when deciding cases" (Skouteris 2001, p.71) and didn't mention the term 'source'; instead, this concept has been imposed on Article 38 by, predominantly, positivists. However, it has since been adopted (Ibid.) and interpreted in this way by the international community and quickly acquired a seminal position in PIL. Nevertheless, the benefits of raising this closed list to such a high standing in PIL have been limited, and have had the arguably detrimental effect of "freezing the boundaries" (Svilpaite 2006, p.1) via a finite list, rather than being a tool to *discover* PIL. This has been further perpetuated by a lack of reviewing of Article 38 (Jayakumar 2011, para.4). Despite this evident weakness, Article 38 has facilitated "standardisation" through a "quasi-scientific formula for practitioners of international law" (Charlesworth, 2012, p.189) substantiating legal decisions via this "pithy mantra" (Ibid.).

However, this static conception of 'sources' is questioned by Verdross and Simma, who note that norm creation doesn't simply occur but is in a process of "liquid aggregation" (as quoted in Riedel 1991, p.63[2]) due to the reality of international affairs, which is in a "process of continuous interaction, of continuous demand and response" (McDougal 1955, p.357). As such, Article 38 merely captures the current legal will, not political reality. This analysis will now study the traditional 'sources' of law as noted in Article 38 and the influence that they exude in international affairs.

International Conventions

The significance of treaties as a 'source' of law is noted under Article 38(1)(a) (League of Nations 1920). Treaties are legally binding documents between the party States[3] based on the principle *pacta tertiis nec nocent nec prosunt*[4]. The legality of treaties is derived from the consent of the treaty parties[5], the state is then bound by the principle *pacta sunt servanda*[6] which notes the contract status of treaty ratification.

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The positivistic nature of law sparks divisive debate. One strand of scholars criticises the subjectivity of classifying 'new' sources (Root quoted in van Hoof 1983, p.137); conversely, others believe we should endeavour to be more inclusive in our conceptions of legal 'sources' (Klabbers 2003). As such there is evident tension between theoretical perspectives regarding the doctrine of the sources.

International Custom

Customary international law (CIL) is considered to be binding law if states view the principle concerned as being law (*opinio juris*[7]) and if it is general state practice[8] (*usus*). The *Asylum* case noted that for a principle to be regarded as CIL, States "must prove that this custom....[is] binding on the other party" (International Court of Justice 1950, p.69). Hence, *explicit* consent via codified ratification makes treaties a more objective source to rely on in legal disputes. However, whilst there isn't a hierarchy of 'sources' *theoretically*, in reality, fundamental or peremptory norms (*jus cogens*[9],[10]) are considered to be at the top of the legal and ethical hierarchy (Greenwood 2008, p.5). This demonstrates the strength of ethical norms in shaping actions and values in the international landscape.

General Principles of Law

Article 38(1)(c) (League of Nations 1920) uses the broad concept of "general principles" to cover any potential legal lacunas. As such, some scholars have described 'general principles' as a "fall-back source of law in the event that no treaty and no customary rule could be found to apply to a given situation" (Thirlway 2006, p.133), confirming that Article 38 is not an exhaustive provision of 'sources'. Therefore, although Article 38 doesn't refer to 'general principles' as being subsidiary, scholars and legalists have often interpreted them in this way because they are "sweeping and loose standards of conduct" (Cassese 2001, p.151).

However the value of 'general principles' as a 'source' of law is that they "bind together the various and often disparate cogs and wheels of the normative framework of the [international] community" (Ibid.). As an 'enlightened positivist,' Cassese somewhat reflects a liberal conception, demonstrating the utility of Article 38 if interpreted in a broad fashion, expanding definitions to allow for the changes that have occurred in international affairs since 1920. For this reason, 'general principles', or "norm sources" (2006, p.9) as Kolb refers to them, have been used particularly by *ad hoc* tribunals because of the flexibility that these principles offer in filling lacunas of the law.

Judicial Decisions and the Teachings of the Most Highly Qualified Publicists

The final 'source', as noted in Article 38, is that of "judicial decisions and the teachings of the most highly qualified publicists" (League of Nations 1920). Article 38 notes that these are "subsidiary means for the determination of rules of law" (Ibid.), shaping and fitting concepts in to a legal framework, rather than *creating* law. Judicial decisions are subject "to the provisions of Article 59" (League of Nations 1920), meaning that formally prior cases don't establish legal precedence. However, whilst Article 38(1)(d) was intended to provide security that judges wouldn't regard themselves as "quasi-legislators" (Charlesworth 2012, p.197), in reality seminal judicial decisions have shaped the legal landscape and have guided future decisions. This is most evident in the way in which the *Tadić* Trial Chamber relied on the rulings of the *Nicaragua* case to guide their decisions[11] (Cassese 2007). If jurists are moving closer to creating law, then we must consider to what extent law is being based on the authority from which it stems as opposed to the virtuosity of morality that it bears.

Similarly, there are evident flaws in 'the teachings of the most highly qualified publicists' as a 'source' of law. For example, Omar notes that the teachings of "Gentili, Grotius, Pufendorf, Bynkershoek and Vattel", whilst seminal, are dated and cannot be said to reflect the ever-changing nature of contemporary international affairs (2011, p.11).

However, Article 38(1)(d) demonstrates that there are evident *non liquets*[12] and lacunas in the application of the doctrine of the sources[13]. Whilst these provide freedom for jurists in interpreting the law, it simultaneously can lead to decisions becoming subjective in their nature rather than being shaped by internationally agreed upon 'sources'. This demonstrates the need to incorporate some of the potential 'new' sources into the doctrine of sources. These 'new' sources will now be considered, additionally, the problems of including naturalist conceptions in a primarily

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positivist Article will also be considered.

The Issue of Hierarchy in Article 38

Although the notion of whether Article 38 represents a hierarchy has been mentioned in brief, it is important to analyse this topic further and to question the benefits of a hierarchical system. In the original drafts of Article 38 the term “successively” was interjected between ‘sources’ (Crawford 2012, p.23), thereby creating a hierarchy to “develop an internally coherent and sufficiently independent scheme of authority” (Kennedy 1987, pp.18-19). It was seen as necessary to have a hierarchy to prevent ‘sources’ being chosen “on the basis of their content” (Ibid., p.19). However, the fact that this ordering was removed is significant in itself—an acknowledgement of the dynamic nature of ‘sources’ and the context specific way in which different ‘sources’ change in their normative weight.

However, Article 38 was adopted by the international community as a beacon of clarity, and therefore, by not distinguishing a hierarchy of ‘sources,’ their aim of establishing a more objective foundation is not fully achieved, in turn exposing elements of subjectivity. Thus, although scholars such as Cassese have urged that Article 38 be viewed as a hierarchy in the order that it is presented (Cassese 2003, p.26), Charlesworth has argued that this notion ignores the context specific nature in relation to which ‘source’ is the most legally apt; therefore, she argues that if treaties do have legal priority then it is due to the “certainty of the written word” (2012, pp.189-190) as opposed to a greater legal worth. As a result, we must be careful in distinguishing between a ‘hierarchy of ease of identification of consent’ and a ‘hierarchy of legal worth’. Additionally, it is important that we avoid imposing a theoretical hierarchy because this simply doesn’t represent reality—all ‘sources’ mentioned in Article 38 and other ‘new’ sources are capable of “generating legal norms of comparable weight” (Ibid., p.190).

New Sources of PIL

Article 38 has been criticized for having a “stylised” (Egede and Sutch 2013, p.63) conception of ‘sources’, shaped by the legal perspectives of the 1920s. However, international affairs have evolved in a variety of ways, many of which could not have been anticipated. ‘Sources’ doctrine must, therefore, be re-evaluated to mirror reality rather than remaining a useful, yet limited, artefact of the 1920s.

With new emerging actors[14], fields, and norms, we should have a legal framework that reflects the contemporary state. Instead, the current expression has been deemed by some to be “narrow, backward-looking, and at any rate, incapable of coping with the modern problems of international relations” (Riedel 1991, p.59). Additionally incorporating new actors under PIL is important in demarking international obligations[15], responsibilities, and ensuring that there is universal respect for norms.

Because ‘sources’ are in a constant state of progression, as encapsulated superlatively by Skouteris, “it is a question of moving the metaphorical rubicon to a different location, while allowing sources doctrine to maintain its on/off quality” (2011, p.76). However, if we move away from a positivist and absolutist conception of ‘sources’, then we face new methodological problems in embracing an open-ended conception of ‘sources’. This reflects Kennedy’s ‘outsider’ argument. By changing the parameters of Article 38, we are just altering the concept of ‘outsider’ (Kennedy 2004), an “intellectual strategy [that is] circular and ineffective” (Egede and Sutch 2013, p.120). However, currently Article 38 is far from exhaustive in its qualification of ‘what is law’. As such, whilst both ‘traditional’ and ‘new’ sources have methodological problems, we must critically analyse potential ‘new’ sources of law in an effort to move closer to a legal framework that reflects reality.

Unilateral Action

Some scholars have argued that there is a need to embrace unilateral action as a ‘source’ of law to establish “rules which [are] respondent to community needs” (Miri 2012, p.2737). Furthermore, unilateral action is an immediate solution to resolve or act in respect of concerns that are legal lacunas; for this reason, unilateral action is increasingly guiding the actions of states.

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The binding nature of unilateral action was explored further in the *Nuclear Tests* case which New Zealand and Australia brought against France, condemning France for carrying out nuclear testing in the Pacific (International Court of Justice 1974). In response, France said that it would cease testing. This unilateral declaration was deemed to have legally binding force by the court, “it is well recognised that declarations made by way of unilateral acts concerning legal or factual situations, may have the effect of creating legal obligations”[16] (Ibid., para.22). Clearly, the *Nuclear Tests* case demonstrates that a state can have “contractual or conventional obligation[s]” (Thirlway 2006, p.135) without it necessarily stemming from a ‘traditional’ ‘source’; as such this reveals the limited view presented in Article 38.

International Organisations, Specifically the United Nations, and Soft Law

‘Soft’ law has been defined as “non-binding rules that have legal consequences because they shape states’ expectations as to what constitutes compliant behaviour” (Guzman and Meyer 2010, p.175). Some scholars have argued that “soft law interacts with.....the boundaries of the traditional ‘sources’ of international law, but does not replace them” (Charlesworth 2012, p.199). Whilst this author is not arguing that any ‘sources’ should *replace* Article 38, this analysis does urge a *supplementation* of Article 38. The influence of ‘soft’ law has been important in international affairs providing a norm-creating effect, evident in aspects of the Universal Declaration of Human Rights. As such, the normative weight that some articles of ‘soft’ law hold has seriously questioned the “clarity of [Article 38’s] neat typology of sources” (Ibid., p.189).

Whilst a supplementation of ‘soft’ law to Article 38 might entail an introduction of a semi-hierarchical structure[17], its inclusion should be considered. Indeed, whilst the move towards a value based structure of law, away from state based consent, met cries of appeal from Prosper Weil (1983), “relative normativity” (Ibid.) is now an accepted part of the nature of international affairs. For this reason, we should certainly consider including ‘soft’ law as a ‘source’ to reflect the changing dynamics of international affairs and to prevent states from *legally* “quarantining themselves from principles vital to human survival” (Charlesworth 2012, p.200).

Thirlway argues that United Nations General Assembly (GA) resolutions should be seen as an extension of CIL rather than a ‘new’ source in its own right (2006, pp.136-137). However, there are distinct differences between these two concepts that discourage this author from adopting such a stance; indeed in their formulation, implications, and the extent to which they are legally binding all differ, and therefore, whilst they are similar, they should not be bundled under the same category of law.

Furthermore, legal rulings such as the *Nicaragua* case have seen jurists declare that the “mere fact that States declare their recognition of certain rules is not sufficient for the Court to consider these as part of customary international law” (International Court of Justice 1986, para.4). This was further emphasised in the *Legality of the Treaty or Use of Nuclear Weapons* which noted that whilst the GA has passed many resolutions by significant majority[18], these simply show “the desire of a very large section of the international community” (International Court of Justice 1996, para.45) rather than denoting a legal force. This has led Kennedy to comment that GA resolutions have a legal status as “a sort of free space between consent and justice- grounded in both, if in a somewhat ambiguous fashion” (Kennedy 1987, p.33), making their potential legal incorporation problematic. Hence, whilst the positivist underpinnings of the system are being *challenged*, they are by no means being overhauled.

However, ‘soft’ law is often supported *because* it is just that—non-binding law. In voicing support for it, states are comforted by the knowledge that it doesn’t delimit action. If it was to become a ‘source,’ it could reduce support for principles, which could be beneficial in advancing certain norms. Furthermore, its incorporation as a ‘source’ would entail a development of legality, and therefore, it would lose the qualities of ‘soft’ law. This is methodologically problematic, and this analysis, therefore, argues that whilst ‘soft’ law is a valuable *force* in international affairs, it shouldn’t be regarded as a legal ‘source’.

However, the role of the Security Council (UNSC) is somewhat different. Whilst its decisions are viewed as legally binding by the international community, its resolutions are not represented in Article 38. As such, this author argues that UNSC resolutions should be a ‘source’ of law, particularly since their decisions are becoming ‘generalised

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legislation,' as opposed to being 'case specific'[19]. From this perspective, Article 38 is significantly dated and needs to incorporate the influence that bodies such as the UNSC have in international affairs.

Jus Cogens Norms

The influence of *jus cogens* is another potential 'new' source that has sparked debate. Whilst some have argued that it is just a higher type of CIL[20] (Thirlway 2006, p.138), others have argued that *jus cogens* norms are more distinct than that and should be considered as an independent 'new' source (van Hoof 1983). This debate is interestingly captured by Shelton through the metaphor of a Manhattan no-parking zone, in which a sign reads "no parking," above that a second sign reads "absolutely no parking," and a third sign says, "don't even think of parking here" (2006, p.304). Shelton argues that the third sign doesn't add anything to the previous signs; it doesn't make it any more binding or the sanctions more severe (Ibid.). She compares this to *jus cogens* and whether it adds anything to CIL.

However, whilst a thought provoking metaphor, this author argues that it misses the central concept that these are the highest, most inexcusable, fundamental norms, of which no derogation is permitted. Whilst being similar to CIL in that they both are legally binding, developed from custom and not always codified, the normative and legal weight of the 'sources' are markedly different—the way in which a state is bound by *jus cogens* norms irrespective of consent[21] demonstrates their innate normative weight.

Furthermore, the international legal system is moving beyond a positivist-based system founded on voluntary consent. This is supported by Janis, who notes that *jus cogens* norms should be seen as distinct from CIL, because of their naturalist rather than positivist origins (1987-1988, pp.360-362). As such it would be wrong to group *jus cogens* norms as 'another type' of custom, and we should endeavour to distinguish (whilst also highlighting the worth of) these "metavalues" (Egede and Sutch 2013, p.106), and protection of them in law is owed *erga omnes*[22].

The Martens Clause

Cassese, as noted in Sutch (2012), argues that perspectives concerning the legal influence of the Martens Clause stem from three broad camps (Ibid., p.12). The first is interpretive, utilising the clause to analyse and inform perceptions. The second camp is the radical position "that principles of humanity and the public conscience stand beside treaty and custom as the basis of legal norms" (Ibid.). However, it is worth noting that this camp lacks academic support and credibility (Ibid., p.16). The third camp argues that the Martens Clause is a motivating force for developments in international humanitarian law, yet is not a 'source' in its own right (Ibid., pp.12-13). This disagreement stems from an underlying debate concerning the extent to which 'the dictates of the public conscience' can have a positive influence in law, as opposed to just delineating the values of humanity.

Furthermore, the vague and open nature of the Martens Clause (whilst beneficial in terms of timeless resonance) relies on legalist interpretation concerning the 'laws of humanity' or 'dictates of public conscience'. This has led Cassese to note that the clause doesn't directly translate into law (2000, p.192), thereby questioning whether it should be a 'source' of law. This was mirrored in the *Kupreškić* case which concluded that the Martens Clause was not a 'source' of law in its own right (International Criminal Tribunal for the former Yugoslavia 2000, para.525). In turn, Cassese has termed the Martens Clause a "general instruction" (2000, p.208), not denying its normative force, but unsure of whether it can be said to have a place in the current PIL framework.

However, irrespective of whether the Martens clause should be a 'new' source, it is significant that this concept is being debated, indicating the changing moral landscape. This is also evident in the way in which NATO's actions in Kosovo were deemed "illegal yet legitimate" (Independent International Commission on Kosovo 2000, p.4), implying that there is "more to international legitimacy than law" (Egede and Sutch 2013, p.107).

Conclusion: The Restrictions of a Legalist Conception of Sources

This analysis has studied the limitations of Article 38. Through an academic objective rigour, legalists endeavour to

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distinguish international law from the concepts of justice and politics, but in attempting to do so, law becomes unreflective of reality and somewhat dated. As Kennedy notes, the legalist portrayal of 'sources' doctrine becomes an objectivist search "for a decisive discourse—not for a persuasive justification," (1987, p.95) in turn making it a static and 'closed' conception. PIL must accept that there needs to be a greater fluidity in the conception and framing of 'sources' to ensure that the international community is in a position where a more 'full' conception of 'sources' is provided. This is encapsulated in the statement "the capacity to accommodate such normative developments in the fabric of international law theory and practice will be crucial to enhance its credibility and, arguably, its future functioning" (Bianchi 2009, p.400).

This draws this author to the conclusion that PIL is in need of reform. The international society has changed significantly in terms of new international issues, a greater shaping force of morality, and new emerging international actors; as such, it is imperative that PIL reflects this or else risk becoming unrepresentative. For this reason, it is necessary to maintain a positivist foundation whilst remaining open to incorporating 'new' non-traditional or naturalist conceptions of 'sources' of law into the current doctrine.

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pp.413-442.

[1] Henceforth referred to as Article 38.

[2] Translation.

[3] This is a general rule, however, there are exceptions (Doebbler 2006, pp.80-81).

[4] Latin translation: a treaty binds the parties and only the parties; it does not create obligations for a third state.

[5] This was noted in the *Lotus* case; that states can only be legally bound by the terms that it consents to (Permanent Court of International Justice 1927, para.214 and para.319).

[6] Latin translation: promises must be kept.

[7] Latin translation: An opinion of law.

[8] In the *North Sea Continental Shelf* case the ICJ stated that state practice should be “extensive”, widespread and representative, but not necessarily universal (International Court of Justice 1969, para.29).

[9] Latin translation: Compelling law.

[10] *Jus cogens* norms are usually also CIL (The United Nations 1969, Article 63).

[11] Even though this was later abandoned by the *Tadić* Appeals Chamber.

[12] Translation: it is not clear.

[13] This author is not arguing for an eradication of non liquets, an unrealistic objective, but instead urges legal framework that can fill some of the current non liquets with current potential ‘new’ sources. As such, this author believes that Article 38’s abundance of non liquets demonstrates that it is an outdated framework.

[14] States, whilst still being the only actor with full personality, are not the only influential actors. International organisations, NGOs, MNCs, and individuals (as norm entrepreneurs) have a significant impact, especially in relation to human rights law and environmental law.

[15] The *Reparation* case detailed the authority and power of the United Nations as an international actor (International Court of Justice 1949, pp.8-9).

[16] The term ‘may’ indicates that not all unilateral declarations are legally binding. This could cause problems of subjectivity if incorporated as a source of international law.

[17] Denoting the difference between ‘hard’ and ‘soft’ manifestations of law as opposed to ranking each ‘source’.

[18] These are non-binding and of a recommendatory nature.

[19] Particularly since resolution 1373(2001) (United Nations Security Council 2001).

[20] Lauterpacht has even argued that it should be part of ‘general principles’ (1953 as quoted in Fassbender 2009, p.43).

[21] The *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* case highlighted that *jus cogens* norms, such as those outlined in the Genocide Convention, are “binding on States, even

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without any conventional obligation”(International Court of Justice 1951, para.23).

[22] Latin translation: towards all.

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Written by: Holly Barrington

Written at: Cardiff University

Written for: Peter Sutch

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