Law of treaties

Section A: Introduction to the law of treaties

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Chapter 2: Sources of international law with a particular focus on treaties

Introduction

This chapter gives an overview of the sources of international law. They include:

- classical sources of international law, as listed in Article 38 (1) of the Statute of the International Court of Justice (<http://www.icj-cij.org/>), such as:
  - treaties
  - customary international law
  - general principles of international law
  - judicial decisions
  - writings of eminent jurists.
- Other sources of international law include:
  - soft law
  - resolutions of organs of international organisations
  - unilateral acts
  - *jus cogens*.

Learning outcomes

By the end of this chapter and the relevant readings you should be able to:

list all the sources of international law

define a treaty

distinguish between the different types of treaties

describe the formation and elements of customary international law

enumerate important judicial decisions in the development of customary international law

describe the interrelationship between customary international law and the law of treaties

assess the role of general law principles in developing international law and name examples of such principles

assess the importance of judicial decisions and writings of eminent jurists as sources of international law

consider the character and aims of soft law as a source of international law

consider the character and aims of resolutions of organs of international organisations as a source of international law

define a unilateral act

define the concept of *jus cogens*.

Essential reading

General

Article 38 of the Statute of the International Court of Justice (Harris, Annex 1).

Articles 53 and 64 of the Vienna Convention on the Law of Treaties 1969.

Article 103 of the UN Charter (Harris, Annex 1) (please see the accompanying readings at the end of this section).

Jennings, R. and Watts, A. *Oppenheim's international law* (London: Longman, 1996) [ISBN 0582302455] ninth edition, pp.22–52 (please see the accompanying readings at the end of this section).

Nicaragua case, ICJ Reports (1986), paras 175–190 (Harris, pp.893–898).

North Sea continental shelf cases, ICJ Reports (1969), paras 70–78 and 81 (Harris, pp.24–29).

The nuclear tests cases, ICJ Reports (1974), paras 43–51 (Harris, pp.795–799).

Statement on Principles Applicable to the Formation of General Customary Law, International Law Association, London 2000 part IV (please see the accompanying readings at the end of this section).

Useful further reading

(Please note that this is **suggested** reading for you, if you have the time and the inclination to read further in this area.)

Legal consequences of the construction of a wall in the occupied Palestinian territory, Advisory Opinion of the International Court of Justice, ICJ Reports (2004), paras 154–160.

Legality of the threat or use of nuclear weapons, Advisory Opinion of the International Court of Justice, ICJ Reports (1996), paras 23–34, 37–39, 51–59, 64, 83, 97.

2.1 Classical sources of international law: Article 38 of the Statute of the International Court of Justice (ICJ)

The International Court of Justice is the principal judicial organ of the United Nations. Article 38 of the Statute is generally regarded as providing the classic, non-exhaustive listing of international law sources. It is contested whether the listing is hierarchical (i.e. treaties being the most important, customary international law, the second important source of international law, etc). In any event, the sole explicit hierarchical element is contained in Article

38(1)d, referring to 'subsidiary means for the determination of rules of law'.

Article 103 UN Charter imposes the supremacy of obligations stemming from the UN Charter for the UN Member States in case of conflict with obligations deriving from any other international agreement. In view of the fact that **all** States today are members of the UN, this is an absolute rule for all States.

Jus cogens in general is a superior norm from which derogation is not permitted and which can only be modified by another norm of the same character. In case of conflict with any other norm, *jus cogens* has an absolute priority (Articles 53 and 64 VCLT 1969). The traditional view was that such a norm may only arise from a treaty, but a more contemporary view acknowledges such a possibility on the basis of international customary law.

Activity 2.1

Distinguish between the main and subsidiary sources of international law.

Feedback: page 18.

Reminder of learning outcomes

By this stage you should be able to:

list all the sources of international law.

2.1.1 Treaties

Treaties today are the most common source of international law norms. Certain areas of international law, such as international environmental law, are almost exclusively regulated by treaties. A brief definition of a treaty is contained in Art. 2(1)a VCLT 1969. However, this definition is only for the purpose of the Convention, although it is assumed to reflect a general definition (with certain exceptions – see below):

> '"Treaty" means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or two or more related instruments and whatever its particular designation.'

Treaties may have different names, such as:

- Convention
- Agreement
- Protocol
- Pact
- Charter.

Treaties concluded between States may be:

- bilateral (i.e. concluded between two States)
- multilateral (i.e. concluded by more than two States)

- or universal (i.e. if they bind almost all States (e.g. the 1945 UN Charter or the 1973 Convention on International Trade in Endangered Species of Fauna and Flora – CITES – which has almost 160 parties)).

The content of treaties

Regarding the content of treaties, the following distinction may be made:

- so-called 'law-making treaties' (*traités lois*)
- and 'contractual treaties' (*traités-contrats)*.

This division is based on the principle that the treaties of the first category establish general patterns of behaviour for the parties over a certain period of time in certain areas. The treaties belonging to the second category regulate some specific co-operation between States, such as a transboundary movement of specific hazardous waste. However, a strict and inflexible division is very difficult to uphold, as there is no clear-cut line between these two categories.

Another category of treaties is the so-called 'normative treaties'.

These treaties correspond to an early concept of the above-mentioned law-making treaties, as observed by the Special Rapporteur of the International Law Commission, Alain Pellet, in his 1998 report. They are not based on a contractual reciprocal basis. However, a treaty is rarely entirely normative or entirely reciprocal (synallagmatic). In most cases, there is a mixture or variety of categories of norms.

Activity 2.2

Explain why treaties today are the primary source of international law.

Describe and explain the categories according to which treaties can be classified.

Feedback: page 18.

Reminder of learning outcomes

By this stage you should be able to:

define a treaty

distinguish between the different types of treaties.

2.1.2 Customary international law

Customary norms of international law arise when:

- there is a practice amongst States to act in a particular way
- States act because they believe that they are obliged to do so by the law (the so-called *opinio juris sive necessitates*, in short *opinio juris*).

Many important areas of general international law are based on customary rules. In a number of cases, these have now been incorporated into codifying conventions and some multilateral

conventions. The rules of international customary treaty law codified in the VCLT 1969 are a good example of this.

However, the formation of such rules may often be a slow process. It is difficult to establish which State practice meets the general requirements for creating such a rule, as prescribed by the International Court of Justice in the 1969 *North Sea Continental Shelf* cases, such as:

- generality
- consistency
- the relevance of participating States.

Even more difficult to establish is the subjective or psychological element of o*pinio juris* as:

- States very often do not explain the motives or reasons for their behaviour
- it is still unclear whether it is decisive to establish *opinio juris* according to what States do, or what they say.

Activity 2.3

Compare customary international law and treaty law.

Summarise the main points of the *North Sea Continental Shelf* cases in relation to the formation of customary international law.

Feedback: page 18.

Reminder of learning outcomes

By this stage you should be able to:

describe the formation and elements of customary international law

enumerate important judicial decisions in the development of customary international law.

2.1.3 Customary law and treaty rules

The interconnection between customary law and treaty rules can be described in the following way:

- codification (i.e. treaty codifies pre-existing customary international law)
- crystallisation (i.e. treaty helps to identify incipient rules of customary international law)
- formation (i.e. treaty is at the basis of the formation of a new customary international law rule).

The International Court of Justice made general observations in several cases as to the interrelationship between these two sources of international law. The most important of these are the:

- 1969 *North Sea Continental Shelf* cases
- 1986 *Nicaragua* case.

Activity 2.4

Summarise the main points of the 1969 *North Sea Continental Shelf* cases and the 1986 *Nicaragua* case with regard to the interrelationship between customary international law and treaty law.

Feedback: page 18.

Reminder of learning outcomes

By this stage you should be able to:

describe the interrelationship between customary international law and the law of treaties.

2.1.4 General principles of international law

Article 38 of the statute of the ICJ refers, in this respect, to the 'general principles of law recognized by civilised nations'. Again, the theoretical basis of what is meant by this Statement (for instance, whether this refers to principles coming from municipal law systems or other systems of law) is a topic of general law on sources.

In principle, there are certain general principles common to all systems of law which can be identified.

These include the:

- principle of good faith. This principle has fundamental importance in the law of treaties, as codified in Article 26 VCLT 1969. This principle has been mentioned in many judgments of the ICJ. Examples include the:
  - 1974 *Nuclear Test* case, when the Court said 'one of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith'
  - 1997 *Gabcikovo-Nagymaros* case (this case will be discussed in Section B and Section D).
- principle of equity. According to Brownlie, *Principles of Public International Law*, sixth edition, page 25:

  > '"Equity' is used … in the sense of consideration or fairness, reasonableness, and policy often necessary for the sensible application of more settled rules of law. Strictly, it cannot be a source of law and yet it may be an important factor in the process of decision. Equity may play a … role in supplementing the law or appear unobtrusively as a part of judicial reasoning."

Many environmental treaties are based on this principle, such as the 1997 United Nations Convention on Non-Navigational Uses of International Watercourses.

Reminder of learning outcomes

By this stage you should be able to:

assess the role of general law principles in developing international law and give some examples of such principles.

2.1.5 Judicial decisions and writings of eminent lawyers

Judicial decisions and writings of eminent lawyers are subsidiary means for determining the rules of international law. However, they differ in importance between themselves. Judicial decisions play an important role in stating the rules of international law, in particular the judgments and advisory opinions of the International Court of Justice. Although the judgments only bind the parties to a case and in that particular case, the authority of the pronouncements of the ICJ is immense. The Court helps to identify and crystallise the rules of international law.

However, the importance of other international courts and tribunals should not be underestimated. The pronouncements of international courts and tribunals are a very important source of identification of the relevant rules of international law. They include the:

- International Tribunal for the Law of the Sea

< http://www.itlos.org/ >

- International Courts of Human Rights

< http://www.echr.coe.int/echr >

< http://www.corteidh.or.cr/stars.html >

- International criminal courts

< http://www.icc-cpi.int/home.html >

< http://www.un.org/icty/ >

- Iran–United States claims tribunal.

< http://www.iusct.org/ >

We also should take into account the decisions of quasi-judicial bodies, such as:

- the United Nations Compensation Commission

< http://www2.unog.ch/uncc/ >

- international arbitration tribunals
- The Permanent Court of Arbitration:

< http://www.pca-cpa.org/ >

The writings of eminent jurists are of lesser importance in today's world. However, they are still mainly relied upon by lawyers in proceedings before national courts.

Reminder of learning outcomes

By this stage you should be able to:

assess the importance of judicial decisions and writings of eminent jurists as sources of international law

2.2 'New' sources of international law (not mentioned in Article 38 (1) ICJ Statute)

2.2.1 Soft law

Soft law instruments are non-binding and sometimes preferable to States in order to avoid binding obligations and the consequences

of their non-performance. The legal character of these instruments is disputed and not entirely clear. Soft law provisions often are incorporated in treaties such as the 1992 UN Framework Convention on Climate Change.

Examples of soft law are various non-binding declarations such as the:

- 1972 Stockholm Declaration on Human Environment
- 1992 Rio Declaration on Development and Environment.

These non-binding provisions may acquire binding force over time through the workings of international customary law (such as Principle 21 of the 1972 Stockholm Declaration (above) on the prohibition of transboundary environmental harm). Alternatively, they may harden into a binding treaty (e.g. the 1988 Baltic Sea Ministerial Declaration, which hardened into the 1992 Helsinki Convention on the Protection of the Environment of the Baltic Sea Area).

2.2.2 Resolutions of organs of international organisations

Resolutions of organs of international organisations may have a dual legal effect:

- internally – in relation to internal matters they might be binding on the Member State of those organisations or other organs (depending on the treaty establishing the organisation)
- externally – in relation to Member States or other States they are usually not binding. However, they can acquire such a legal force through the workings of customary international law.

Out of all the resolutions of organs of international organisations, the resolutions adopted by the organs of the United Nations (e.g. the General Assembly (GA) and the Security Council) are of particular importance. The basic rule for GA resolutions is that they are non-binding (externally), even if adopted unanimously. However, they may:

- state customary international law
- provide evidence of State practice and *opinio juris*.

The legal effects of resolutions of the UN General Assembly were discussed in the 1996 ICJ *Nuclear Weapons* Advisory Opinion.

Activity 2.5

Compare the legal character of soft law with the legal character of a treaty.

Explain how non-binding resolutions may become a norm of customary international law.

Feedback: page 18.

Reminder of learning outcomes

By now you should be able to:

consider the character and aims of soft law as a source of international law

consider the character and aims of resolutions of organs of international organisations as a source of international law.

2.2.3 Unilateral acts

A further source of international law may be unilateral acts of States. However, this is an exceptional situation as they acquire legally binding force only under certain circumstances. These circumstances were specified by the ICJ in the 1974 *Nuclear Test* cases if:

- there is a specific intention to create a legal undertaking
- the announcement is given publicly and made by persons authorised to engage the State.

Unilateral acts need to be distinguished from treaties and customary international law:

- as the binding force results from the State's own will[1]
- with regard to customary international law as their process of formation is entirely different[2]
- depending on the circumstances, they can be binding with regard to one State, several States or even all States (*erga omnes*).

However, similar to treaties, unilateral acts need to be based on the principle of good faith.

[1] Contrast this with treaty obligations where States create obligations through mutual agreement.

[2] Compare the section on customary law with the finding of the ICJ in the 1974 *Nuclear Tests* cases.

2.3 The norms of *jus cogens* (peremptory norms of international law)

These norms are not a source of international law in a strict sense, but they indicate the hierarchy of the norms of international law.

Article 53 VCLT 1969 defines, for the purposes of that Convention, the term of 'peremptory norm of general international law' as a norm:

- which is accepted and recognised by the international community of a State as a whole
- from which no derogation is permitted
- which can be modified only by a subsequent norm of general international law having the same character.

Furthermore, Article 53 sets out that a treaty is void if, at the time of its conclusion, it conflicts with such a norm. In consequence, the rules of *jus cogens* are rules of a fundamental character of customary international law that cannot be modified by a treaty. According to Article 64 VCLT, any treaty provision which conflicts with a rule of *jus cogens* is void, whether or not this rule developed before or after the treaty came into force. Examples of norms of *jus cogens* are the prohibition of:

- the use of force
- slavery
- piracy
- genocide.

The problems raised by norms of *jus cogens* were discussed in the 1996 ICJ *Nuclear Weapons* Advisory Opinion. The above-mentioned examples are widely accepted as norms of *jus cogens* by the

international community. However, it is difficult to make any addition to this list as the requirements for the creation of or classification as such a norm of *jus cogens* are very high (and abstract) and the legal consequences flowing from this creation or classification are far-reaching for the community of States.

Reminder of learning outcomes

By now you should be able to:

- list all the sources of international law
- define a treaty
- distinguish between the different types of treaties
- describe the formation and elements of customary international law
- enumerate important judicial decisions in the development of customary international law
- describe the interrelationship between customary international law and the law of treaties
- assess the role of general law principles in developing international law and name examples of such principles
- assess the importance of judicial decisions and writings of eminent jurists as sources of international law
- assess the importance of judicial decisions and writings of eminent jurists as sources of international law
- consider the character and aims of soft law as a source international law
- consider the character and aims of resolutions of organs of international organisations as a source of international law
- define a unilateral act
- define the concept of *jus cogens*.

Feedback to activities: Chapter 2

Activity 2.1 *You will need to compare the characteristics of treaty law with the characteristics of other sources (mainly customary international law) to find out the advantages of treaty law over those other sources.*

Activity 2.2 *You will need to remind yourself of Article 38 of the Statute of the ICJ which refers explicitly to the main distinction between those two groups of sources. You will need to remind yourself of the functions of these two groups.*

Activity 2.3 *You will need to remind yourself about the formation, characteristics and the functions of these two sources of international law. You will need to read the relevant paragraphs of the* North Sea Continental Shelf *cases and identify the elements of the formation of customary international law.*

Activity 2.4 *You will need to read the relevant paragraphs of the* North Sea Continental Shelf *cases and identify the ways in which customary international law and treaties interact.*

Activity 2.5 *You will need to remind yourself of what a treaty and soft law are as described above. You will need to remind yourself of the formation of customary international law and apply this to the resolutions of organs of international organisations.*

Sample examination questions

Question 1 Analyse the process of the formation of customary international law, including references to the relevant case-law.

Question 2 Explain the different ways of interaction between treaties and customary international law, including references to the relevant case-law.

Question 3 Explain the functions of a treaty and explain why today treaties are the primary source of international law.

Advice on answering the questions

Question 1 You should describe the elements of the formation of customary international law as identified by the ICJ in the 1969 *North Sea Continental Shelf* cases and the 1986 *Nicaragua* case. You should also be able to distinguish between the practice of States and *opinio juris* and the respective difficulties relating to both elements.

Question 2 You should read the ICJ 1969 *North Sea Continental Shelf* cases and distinguish three ways in which treaty law and customary international law can interact according to the ICJ.

Question 3 You should note the:

clear character of treaty provisions

binding character of treaty provisions

possibility to depart from customary international law between the parties.

Find further reasons why certain areas of international law are almost entirely regulated by treaties and give examples of certain treaties and such areas. You should also explain the difference between contractual and law-making treaties.