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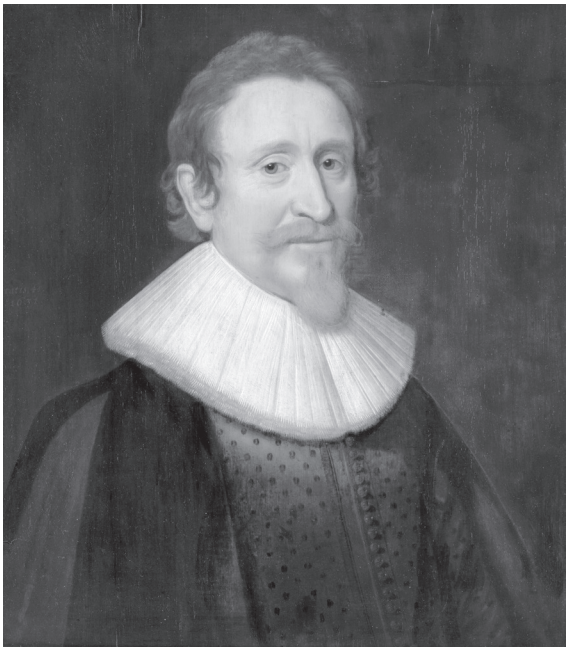

Hugo Grotius - Michiel Jansz van Mierevelt,
portré 1631

Készült
a Szegedi Tudományegyetem
Állam- és Jogtudományi Kara
Nemzetközi Jogi és Európa-jogi Tanszékén

Tanszékvezető:
Blutman László
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Orsolya Johanna Sziebig

Basics of International Law

Course Book

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"A man cannot govern a nation if he cannot govern a city;
he cannot govern a city if he cannot govern a family;
he cannot govern a family unless he can govern himself;
and he cannot govern himself unless his passions are subject to reason."

Hugo Grotius

Tartalom

Chapter 1 History of International Law

The question regarding to the nature and definition of international law were raised by several scholars. The role of international law and the issue how it is formed are also important factors. Nowadays, international law has a great influence to domestic law via international treaties, conventions and the general rules of international law. The States adopt, modify and in some cases exclude international legal norms. International law mainly referred as a creation of the Western nations. On the other hand historically it's a more complex issue, because ancient nations and States had a great influence to the development of international law. In this chapter you can learn more about the history of international law from the ancient times to the modern ages.

History of ancient times

The written international law is more than thousands years old. The oldest international law documents are guarded at the Louvre in Paris as part of the exhibition 'The beginnings of writing'. The most important memories of human civilization are connecting to the ancient Mesopotamia. The oldest monuments are from the 30-25th century BC. The **border dispute between Uruk and Lagash** results the first known international treaty, in a form of a cone-shaped document, made of stone and the treaty not just settled the dispute but also envisaged a sanction in case of breaching.[1] One of the significant objects is a cone-shaped document, known as the **Cone of Enmetena**, the king of Lagash.[2]

Lagash (the modern Tell al-Hiba) was also known as Sirpurla by the Sumerians, and was located to the north-west of the confluence of the Euphrates and Tigris. It was one of the oldest cities in Sumer and also the home of the E-Ninnu temple (the shrine of Nin-girsu (or Ninib, or Ninurta) the patron god of Lagash). Nearby Girsu was the religious centre for the State. Lagash became one of the main players in Sumerian politics, alongside Ur and Uruk.[3]

Also important memories are the **clay tablets** form the Acadian times, also referring alliance contracts between cities of Mesopotamia, such as Agade and Awan (around 23th century BC).[4]

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1 Kovács 2011. p. 19.

2 https://www.cemml.colostate.edu/cultural/09476/images/iraq02-03t04-960w.jpg

3 http://www.historyfiles.co.uk/KingListsMiddEast/MesopotamiaLagash.htm

4 Kovács 2011. p. 20.

Also major monuments remained from the Hittite times, around 13th century BC. The Kadesh Treaty was adopted by the help of the envoys of Ramses II, the Egyptian pharaoh, and the Emperor Hattusilis III. They finally concluded one of the oldest peace treaties in the history. The peace treaty ended the Egyptian Hittite war that lasted more than 80 years. The two ancient superpowers finally ended the war with the treaty in 1276 BC. The Kadesh Treaty is not the oldest treaty but it is the oldest known that was concluded between two independent States with equal power and status. Unfortunately, the original treaty that was carved to a silver table was disappeared but several replicas were found.[5]

It's well known that the **middle and central eastern nations** were using intermediary languages e.g. aramaic. They were familiar with the institution of diplomatic protection, the inviolability of envoys and with some protocol rules such as bestowal. Regarding to the pottery tables from Hittite gardens they used arbitration as dispute resolution method.[6]

The **long and rich cultural traditions of ancient** Israel, the Indian subcontinent, and China were also important in the development of international law. The **Greek city-States** constituted important sources for the evolution of the international legal system by the basic notions of governance, political relations, and the interaction of independent units.[7]

The nations of the ancient times were contesting all the time and new war outbreaks were common. Due to the fact that some nations were extremely cruel even with the prisoners of war or with the civilians, some legal norms were accepted by the States and City-States in order to prevent massive ferocity. On the other hand these norms were not widely accepted and they were not legally binding. Assyrians are famous for their cruelty.[8]

The **Roman Empire** had a great influence to international law and many of the concepts that today brace the international legal order were established during the Roman Empire. One example is the *jus gentium* (meaning: 'law of nations'), for example, was invented by the Romans to govern the status of foreigners and the relations between foreigners and Roman citizens. In accord with the Greek concept of natural law, which they adopted, the Romans conceived of the *jus gentium* as having universal application. In the Middle Ages, the concept of natural law, infused with religious principles through the writings of the Jewish philosopher Moses Maimonides (1135–1204) and the theologian St. Thomas Aquinas (1224/25–1274), became the intellectual foundation of the new discipline of the law of nations,

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5 http://www.documentarytube.com/articles/egyptian-hittite-peace-treaty--one-of-the-oldest-treaties-in-the-world

6 Kovács 2011. pp. 20-21.

7 https://www.britannica.com/topic/international-law/Historical-development

8 Kovács 2011. p. 21.

regarded as that part of natural law that applied to the relations between sovereign States.[9]

History of middle ages

In the middle ages the most significant international law instruments were the peace treaties, alliances and the dynastic marriages. The great separation ended the unity of Christianity. This can be called the most significant medieval **schism**, so the East-West schism divided Christendom into Western (Roman Catholic) and Eastern (Orthodox) branches. It began in 1054 as a result of various disputes and actions, and it has never been healed. In 1965 Pope Paul VI and the ecumenical patriarch Athenagoras I abolished the mutual excommunications of 1054 of the pope and the patriarch of Constantinople. Later, another important medieval schism was the Western Schism between the rival popes of Rome and Avignon and later, even a third pope. The greatest of the Christian schisms was that involving the Protestant Reformation and the division from Rome.[10]

Among the documents that were adopted in these years, the *Dictatus Papae* -'Those Things Dictated by the Pope' (Pope Gregory VII 1075.) has to be highlighted. The infallibilitas of the Roman church was stated: "That the Roman church has never erred; nor will it err to all eternity, the Scripture bearing witness."[11]

At the field of war times **the idea of chivalry** (the sum of the ideal qualifications of a knight, including courtesy, generosity, valor, and dexterity in arms) was followed and breached in many cases. On the other hand the first international tribunal established to call Peter von Hagenbach to account who has violated the rules of war.[12]

The **Treaty of Tordesillas** (7 June 1494.) is an agreement between Spain and Portugal accommodated by Pope Alexander IV. The treaty aimed at settling conflicts over lands newly discovered or explored by Christopher Columbus and other late 15th century voyagers.[13]

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9 https://www.britannica.com/topic/international-law/Historical-development

10 https://www.britannica.com/topic/schism

11 The Dictates of the Pope. point 22. https://www.usna.edu/Users/history/abels/hh315/dictatus-papae.html

12 „After it was discovered that his troops had raped and killed innocent civilians and pillaged their property during the occupation of Breisach, Germany, Hagenbach was tried before a tribunal of twenty-eight judges from the allied states of the Holy Roman Empire, which at that time included Austria, Bohemia, Luxembourg, Milan, the Netherlands, and Switzerland. Hagenbach was found guilty of murder, rape, and other crimes against the 'laws of God and man', stripped of his knighthood, and sentenced to death" in: Scharf, Michael and Schabas, William, Slobodan Milosevic On Trial: A Companion (2002)

13 https://www.britannica.com/event/Treaty-of-Tordesillas

The **Hanseatic League** (**Hansa alliance**) was an alliance of trading goods that established and maintained a trade monopoly along the coast of Northern Europe, from the Baltic to the North Sea, during the Late Middle Ages and Early modern period (13-17th century A.D.).

The international sea shipping and customary law was summarized in written form: in the **Catalan Consolat del Mar** (collection of Mediterranean maritime customs and ordinances in the Catalan language, 1474.).

History of modern international law

Geographical discovery had a significant influence to the development of the European States and to international law as well. The possibility of colonization and world trade formed the picture of western European countries; meanwhile the central and eastern European countries were fallen behind.[14]

Albertico Gentili (1552-1608), Italian scholar had a great influence to international law. In his main book *De jure Belli*, published in 1598, he provided a comprehensive discussion on the law of war and the law of treaties. Gentili became a professor in Oxford, called the originator of the secular school of thought in international law.[15]

Hugo Grotius was born in 1583 in the Netherlands and later he has been called the father of international law. He mastered history, theology, mathematics and law as well. His primary work, *De Jure Belli ac Pacis* was written between 1623 and 1624. Grotius retrained the theoretical distinction between a just and unjust law and considered justice essential. His work at the law of the sea was enduring. He proclaimed the freedom of seas and opposed closed sea concept.[16]

Two major different schools can be identified. Firstly, the naturalist school (**Samuel Pufendorf** (1632-1694)) who identified international law completely with the law of nature. On the other hand, the other school is called positivism (**Richard Zouche** (1590-1660) and **Bynkershoek** (1673-1743)) which distinguished between international law and the law of nature and had a more practical concept. Positivism developed as a modern nation-state system after the eace of Westphalia in 1648. Both positivism and naturalism appeared in the work of **Vattel** (1717-1767) who was a Swiss lawyer. His main work is the *Droit des Gens* that based on natural law but practically oriented. He introduced the doctrine of the equality of States into international law.[17]

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[14] Kovács 2011. p. 31.

[15] Shaw 2008. p. 23.

[16] Shaw 2008. pp. 23-24.

[17] Shaw 2008. pp. 24-26.

The above mentioned **Westphalia Treaty** was one of the main documents of international law in the early modern history. The Westphalia area of north-western Germany and also the name of the treaty that concluded the famous Thirty Years' War. The Thirty Years' War was one of the most destructive conflicts in the history of Europe. Actually, it was a series of connected wars began in 1618, when the Austrian Habsburgs tried to impose Roman Catholicism on their Protestant subjects in Bohemia. It pitted Protestant against Catholic, the Holy Roman Empire against France, the German princes and princelings against the emperor and each other, and France against the Habsburgs of Spain. The Swedes, the Danes, the Poles, the Russians, the Dutch and the Swiss were all dragged in or dived in. Commercial interests and rivalries played a part, as did religion and power politics. The six month long peace conference was opened in Münster and Osnabrück in December 1644 with the involvement of 194 States.[18] The Treaty itself not just concluded the devastating war in Europe but also provides significant international law principles such as the foundation of the modern state system and articulating the concept of territorial sovereignty. The Peace of Westphalia confirmed the Peace of Augsburg (1555), which had granted Lutherans religious tolerance in the empire.[19]

The Westphalia Peace Conference just was a beginning in a row that led to the **Congress of Vienna**, another main event of international relations. The aforementioned **conferences** were: in Nijmegen (1678–1679), in Rijswijk (1697), in Utrecht (1713), in Vienna (1738), in Aachen (1748), and in Paris (1763) to the Paris peace conference that ended the American War of Independence (1783). After more than two decades of war following the French Revolution, the major event of the **Congress of Vienna** marked the establishment of a new political and legal order for Europe. The defeat of Napoleon (1769–1821) in 1813–1814 by a huge coalition of powers under the leadership of Britain, Russia, Austria, and Prussia gave the victorious powers an opportunity to stabilize Europe. This they intended to do by containing the power of France and recreating the balance between the great powers. The Vienna order was built on the principle that the great powers, a group into which France retook its traditional place, would take common responsibility for the general peace and stability of Europe. The great power principle' also determined the organization and working of the congress itself, because the important negotiations and decisions took place in the committees of five (Britain, Russia, Austria, Prussia, and France) and of eight (also including Spain, Sweden, and Portugal).[20]

The Vienna Conference adopted a policy to restore the *status quo ante bellum* (the situation as it was before the war), in practice it meant to return to 1793 as far as possible. The Congress of Vienna was just a first step in the row of Congresses

[18] http://www.historytoday.com/richard-cavendish/treaty-westphalia

[19] https://www.britannica.com/event/Peace-of-Westphalia

[20] Lesaffer, Randall: *The Congress of Vienna (1814–1815).* http://opil.ouplaw.com/page/congress-vienna-1814-1815

which have been called as the '**Congress System**' although it was never a system. The meaning of the 'Congress System' is that diplomats felt that they should work closely and meet regularly in peacetime to preserve the peace. It was not a proper treaty but a 'gentlemen's agreement' which is a verbal agreement. It was decided that when and where conflict could lead to international war, a congress would meet to talk it out first. The following conferences were: 1815 Congress of Vienna, 1818 Congress of Aix-la-Chapelle, 1820 Congress of Troppau, 1821 Congress of Laibach and finally, 1822 Congress of Verona.[21]

After the Vienna Conference the international law became 'Eurocentric' in order to preserve the so called civilized, Christian States. In comparison the international law became geographically internationalized because of the expansion of European powers.[22]

The **Monroe Doctrine** was enunciated by President James Monroe in his message to the Congress in 1923 (2 December). Declaring that the Old World and New World had different systems and must remain distinct spheres, Monroe made four basic points: (1) the United States would not interfere in the internal affairs of or the wars between European powers; (2) the United States recognized and would not interfere with existing colonies and dependencies in the Western Hemisphere; (3) the Western Hemisphere was closed to future colonization; and (4) any attempt by a European power to oppress or control any nation in the Western Hemisphere would be viewed as a hostile act against the United States.[23]

The USA had a constant territorial growth because of the sales contracts that were first proceeded with Napoleon (1803, Louisiana) than in 1867 with Russia (Alaska). Some regions became part of the States after wars e.g. New-Mexico, Texas, California and Florida.[24]

The **development of military technology and the grown destructive power of weapons** are resulted a multiplied danger in case of armed conflicts. After the Battle of Solferino, the Austrians lost 14,000 men killed and wounded and more than 8,000 missing or prisoners; the Franco-Piedmontese lost 15,000 killed and wounded and more than 2,000 missing or prisoners. These heavy casualties contributed to Napoleon III's decision to seek the truce with Austria that effectively ended the second War of Italian Independence. The bloodshed also inspired Henri Dunant to lead the movement to establish the **International Red Cross**.[25] That was the time when the humanization of conflicts became a real concept for the international community, and as a first step the **Geneva Convention** was accepted in

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[21] Bloy, Marjie: *The Congress of Vienna, 1 November 1814 - 8 June 1815.* http://www.victorianweb.org/history/forpol/vienna.html

[22] Shaw 2008. p. 27.

[23] https://www.britannica.com/event/Monroe-Doctrine

[24] Kovács 2011. p. 36.

[25] https://www.britannica.com/event/Battle-of-Solferino

1864.[26] The Hague Peace Conferences[27] in 1899 and in 1907 irrevocably influenced international law and settled the will of States to solve the disputes in a peaceful way, besides, international courts were created. On the other hand in the 20th century the whole globe had to face with the most devastating wars of mankind.

The **First World War** not just undermined the concept of a dynamic and optimistic Europe and the century of peace but also ended the self-confidence of European super powers and the concept of European civilization.[28] Speaking before the U.S. Congress on 8 January 1918, President **Woodrow Wilson** enumerated the last of his Fourteen Points, which called for a "general association of nations… formed under specific covenants for the purpose of affording mutual guarantees of political independence and territorial integrity to great and small states alike."[29] From the point of history the creation of the **League of Nations** is a significant step of the development and evaluation of international relations. The League of Nations was the very first international organization where the States were attempting to create a frame in order to prevent war and preserve peace within the nations. It was suffering of severe weaknesses; on the other hand the effort of nations is valuable.

Japan involved China in 1931, just two years later they left the League. Italy attacked Ethiopia; Germany committed a series of internal and external aggressions. The USA has never been a member to the League.[30] In 1933 Germany withdraw from the League. The Soviet Union was expelled from the organization in 1939 following its invasion of Finland. The **Second World War** was a huge trauma for the international community and the League was succeeded in 1946 by the United Nations (UN).[31]

Peace treaties after the **First World War**

Date	*Place*	*State (with the Allied Powers)*
7 May 1919.	Versailles	**Germany**
10 September 1919.	Saint-Germain-en-Laye	**Austria**
27 November 1919.	Neuilly	**Bulgaria**
4 June 1920.	Trianon	**Hungary**
10 Augustus 1920.	Sevres*	**Turkey**

*(*replaced by the Treaty of Lausanne in 1923)*

[26] Shaw 2008. p. 37.

[27] See: Chapter 6.

[28] Shaw 2008. p. 30.

[29] *President Woodrow Wilson's Fourteen Points.* http://avalon.law.yale.edu/20th_century/wilson14.asp

[30] For membership information: http://worldatwar.net/timeline/other/league18-46.html

[31] Shaw 2008. pp. 31-31.

In the last seven decades, since the Second Great War was ended, the international community was able to prevent the outbreak of another World War. On the other hand, regional and internal conflicts became new forms of aggression that the existing norms and practices are not ready to handle or solve. The nations have to face with the new forms of crimes, such as transnational organized crime, wildlife crime, terrorism and others. The UN is the most important international organization that can obligate the States. The international law has to develop in line with the new challenges of the 21th century. For example, the environmental legislation regime has been mainly formed in the last couple of decades. There are more and more international organizations, the number of intergovernmental organizations (IGOs) has multiplied and the civil sphere (non-governmental organizations, NGOs) has a great representative role.

NOTA BENE

- ✓ The importance of ancient times in the development of international law
- ✓ The first international treaties
- ✓ City-States and the Roman Empire
- ✓ Dictatus Papae
- ✓ Treaty of Tordesillas
- ✓ Hansa alliance
- ✓ Alberto Gentili
- ✓ Hugo Grotius
- ✓ Westphalia Treaty
- ✓ Congress of Vienna
- ✓ Congress System
- ✓ Monroe Doctrine
- ✓ The challenges of modern ages
- ✓ The League of Nations and the United Nations
- ✓ Peace treaties after the First World War

Recommended readig

The Oxford Handbook of the History of International Law. Edited by Bardo Fassbender. Oxford University Press, 2013.

Sulyok Gábor: *Treaties, Origin* In: Rüdiger Wolfrum. (Edited) Max Planck Encyclopedia of Public International Law. Oxford: Oxford University Press, 2015. pp. 1-12.

Sulyok Gábor: *Breach of Treaties in the Ancient Near East.* Journal of the History of International Law 19. pp. 1-27. (2017)

Chapter 2 Sources of international law

There are many differences between domestic law and international law. Sometimes it's difficult to find out the relating law on a certain issue. Domestic law usually provides a hierarchy of norms and a basic catalog of sources and legal norms. In contrast, international law is not so easily accessible, coherent and certain.

International law is derived from various sources. The commonly accepted list that provides the sources of international law can be found in **Article 38(1) of the Statue of the International Law of Justice**. The Statue of the International Law of Justice is an annex to the Charter of the United Nations. It's also important to note that there is no formal hierarchy between the sources of international law.[32]

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
   a. **international conventions**, whether general or particular, establishing rules expressly recognized by the contesting states;
   b. *international custom*, as evidence of a general practice accepted as law;
   c. the **general principles of law** recognized by civilized nations;
   d. subject to the provisions of Article 59, **judicial decisions and the teachings of the most highly qualified publicists** of the various nations, as subsidiary means for the determination of rules of law.
2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.[33]

a.) International conventions and international treaties[34]

The term of international convention in the Statue refers to all of the bilateral and multilateral treaties. The UN Treaty Series provides wide range of information regarding to international treaties. The United Nations Treaty Series (UNTS) is a publication produced by the Secretariat of the United Nations containing all treaties and international agreements registered or filed and recorded by the Secretariat since 1945.[35] Besides, the series of 'Multilateral Treaties deposited with Secretary-General', published by the Secretariat of the United Nations from

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[32] Aust 2010. pp. 5-6.

[33] ICJ Statue Art. 38 (1) (2)

[34] *See*: Chapter 5 of this Book

[35] https://treaties.un.org/Pages/Content.aspx?path=DB/UNTS/pageIntro_en.xml

1959 to 2009 are available online. There is a publication of Multilateral Treaties Deposited with the Secretary-General but it was discontinued in April 2010.[36]

b.) Customary international law

Customary international law, or as it is stated in the Statue of ICJ international custom, must be distinguished from customary law. Customary law is a term of domestic law and deals with family matters, land and other internal issues. On the other hand, customary international law or international customs are important sources of international law. A rule of custom "evolves from the practice of States, and this can take a considerable or a short time."[37] Customary international law is a dynamic source of law in the light of the nature of international legal system and because of the lack of centralized governmental organs.[38] The evidence of substantial uniformity of practice by a remarkable number of States is inevitable for customs. State practice can be expressed in various ways: in governmental actions in relation to other States, legislation, diplomatic notes, ministerial or other official statements of the States. The evidence of custom can be appeared in the decision of international organizations, especially in the resolutions of the UN General Assembly.[39]

The customs can be regional as well, not just universal. Regional customary law especially appears in the practice of South-American countries because their cohesion based on common language, political and economical characteristics. The International Court of Justice also acknowledges the existence of regional customs if there is a comprehensive practice of States that is accepted as regulation for their relation in question.[40]

Customary international law has two main constitutive elements. The first is the coincident, permanent **practice of the States** (objective element) and the second is the *opinio juris* (subjective element). Besides, the interpretation of these elements, especially the interpretation of the subjective element is quite loose by the International Court of Justice:[41] "*...international custom as evidence of a general practice accepted as law the Court may not disregard the essential role played by general practice. Where two States agree to incorporate a particular rule in a treaty, their agreement suffices to make that rule a legal one, binding upon them; but in the field of customary international law, the shared view of the Parties as to*

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[36] https://treaties.un.org/Pages/Content.aspx?path=Publication/MTDSG/Page1_en.xml

[37] Aust 2010. p. 6.

[38] Shaw 2008. p. 73.

[39] Aust 2010. p. 6.

[40] Kovács 2011. p. 145.

[41] Kovács 2011. p. 143.

the content of what they regard as the rule is not enough. The Court must satisfy itself that the existence of the rule in the opinio juris of States is confirmed by practice...It is not to be expected that in the practice of States the application of the rules in question should have been perfect, in the sense that States should have refrained, with complete consistency, from the use of force or from intervention in each other's interna1 affairs. The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule. If a State acts in a way prima facie incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule."[42]

The **objective element** of customary international law is the practice of the States. The objective element means the cohesive practice of the States in time and space. The time dimension of customs has a traditional perception that means if the practice exists more than 99 years ago, the criteria considered as fulfilled. On the other hand because of the technical and scientific development in some law areas only a couple of decades are enough to clear the practice of States (such as the space law). And this was strengthened by the International Court of Justice as well: "*although the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law…, an indispensable requirement would be that within the period in question, short though it might be, State practice,…and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved*."[43]

The **subjective element** of the customary international law is the *opinio juris*. *Opinio juris* is a belief that following the practice is not just a simple gesture but a real legal obligation. As it clearly stated in the judgments of the International Court of Justice: "*not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit*

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[42] *Case Concerning Military and Paramilitary activities*. (Nicaragua v. USA) Judgment. I.C.J. Reports 1986. p. 98.

[43] *North Sea Continental Shelf Cases.* (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands) Judgment I.C.J. Reports 1969 p. 43.

in the very notion of the opinio juris sive necessitatis. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation."[44]

But what is happening if a State doesn't want to accept the general practice and customs? When a norm of international law is in its rudimental stage, the State has the opportunity to consistently and openly object to it. After time, a norm may apply to other States as customary international law that have consistently and regularly followed it with a belief that they are legally obligated to do so. But the norm will nevertheless not apply to the State that objected to it in its formative stages. This State called the **persistent objector**.[45]

Codification of international customary law

For a very long time written sources were not so important in international law so the codification of international legal norms has started only in the beginning of the 19th century. The reasons for codification were the certainty of law and the better availability. The fist written sources, treaties were accepted at the most urgent fields of international relations: warfare regulations and the peaceful dispute settlement procedures.[46]

The Charter of the United Nations refers to codification in its 13 Article: "*the General Assembly shall initiate studies and make recommendations for the purpose of: promoting international co-operation in the political field and encouraging the progressive development of international law and its codification*."[47] The International Law Commission was established by the General Assembly, in 1947, to undertake above mentioned mandate of the Assembly. The following topics are on the working programme of the Commission: identification of customary international law, subsequent agreements and subsequent practice in relation to interpretation of treaties, immunity of State officials from foreign criminal jurisdiction; provisional application of treaties; protection of the environment in relation to armed conflicts; protection of the atmosphere; crimes against humanity; *jus cogens*; succession of States in respect of State responsibility.[48] Besides, there is a debate relating to the progressive development of customs by the Commission. In some cases the written treaty or convention goes beyond the clear international customary law and incorporate different or not widely accepted norms as well. The debate about the relationship between codification and progressive development is not new; it goes back to the beginning of the ILC and earlier, it has been the

[44] *North Sea Continental Shelf Cases.* (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands) Judgment I.C.J. Reports 1969 p p. 44.

[45] *Customary International Law*. American Society of International Law and the International Judicial Academy December 2006, Volume 1, Issue 5

[46] Kovács 2011. pp. 150.

[47] UN Charter Art. 13. (1)

[48] http://legal.un.org/ilc/

subject of continued discussion both in the literature and in the Commission from its earliest days.[49]

The question regarding to codification is: treaty or customs, which one is better? The question cannot be decided easily, because both international customs and international treaties have advantages and disadvantages. When it comes to the modification of an adopted regulation, the State practice can be changed by the lapse of time if all or at least many of the States are following the new way. On the other hand adopting a written treaty usually lasts long and there are special norms for modification that can harden the adoption of new rules. Legal certainty can be a problem in connection with customs. Written forms of law and international treaties are especially useful at this field. The obliged parties are also easily ascertainable with regard to international treaties, meanwhile in connection with international customary law it can be uncertain. "Treaties and customary international law are indeed importantly different as lawmaking processes, but they are not so different with regard to compliance and enforcement."[50]

	International Treaties	**International Customs**
As a source of law	Written	Unwritten
Content	Certain	Might be uncertain
Obliged parties	Certain (ratification problems and the possibility of reservations might raise concerns)	Might be uncertain (persistent objector, regional customary law)
Modification	Under the rules of the treaty or general international law, usually takes long	By the modification of States' practice, depends on the law area

c.) The general principles of law recognized by civilized nations

The term of "recognized by civilized nations" means all of the independent States and all of the nations.[51] The general principles of international law:

- Prohibition of the threat or use of force
- Duty to settle disputes peacefully
- Duty of non-intervention
- Duty to cooperate

[49] *See: The Work of the International Law Commission*. 8th Edition. Volume 1. UN Publication, New York pp. 46-47.

[50] Meyer, Timothy: *How Different are Treaties and Modern Customary International Law? A Response to Verdier and Voeten*. https://www.asil.org/blogs/how-different-are-treaties-and-modern-customary-international-law-response-verdier-and-voeten

[51] Kovács 2011. p. 155.

- Principle of equal rights and self-determination of peoples
- Principle of sovereign equality of States
- Principle of good faith[52]

Unilateral acts of States

The unilateral acts of States are usually not considered as a source of international law just if some requirements are fulfilled. Unilateral acts, while not sources of international law as understood in article 38(1) of the Statute of the ICJ, may constitute sources of obligation. The requirements were established by the International Court of Justice at the case of The Nuclear Tests.[53]

"*When it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking, the State being thenceforth legally required to follow a course of conduct consistent with the declaration. An undertaking of this kind, if given publicly, and with an intent to be bound, even though not made within the context of international negotiations, is binding. In these circumstances, nothing in the nature of a quid pro quo nor any subsequent acceptance of the declaration, nor even any reply or reaction from other States, is required for the declaration to take effect, since such a requirement would be inconsistent with the strictly unilateral nature of the juridical act by which the pronouncement by the state was made*."[54] "*It is well recognized that declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations…The binding character of the undertaking results from the terms of the act and is based on good faith; interested States are entitled to require that the obligation be respected*."[55]

Requirements: the intention to be bound of the state making the declaration in question, the element of publicity or notoriety, principle of good faith, possibility of recognition, and the statement is made by those who can undertake obligation in the name of the Sate. [56]

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[52] *See*: Chapter 4.

[53] *Nuclear Tests Case* (Australia v. France), Judgrnent, I.C.J. Reports 1974, p. 253.

[54] *Nuclear Tests Case* (Australia v. France) p. 267.

[55] *Nuclear Tests Case*, Summary of Judgement p. 3.

[56] Shaw 2008. p. 122.

Jus cogens

The term of *jus cogens* means compelling law, also called the *peremptory norms of general international law*. These are the most important norms of international law and no derogation is permitted by any other sources of international law. Most of the scholars and States agree in the existing of compelling legal norms. On the other hand there is a debate with regard to the exact content, sources of *jus cogens* and the means of identification, and application, as well as to its precise effects and role within the international legal order also questionable. Besides, many international law instruments refers to *jus cogens* such as the 1969 Vienna Convention on the Law of Treaties (Art. 64): "*if a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates*." Also the declaration on guiding principles adopted by the International Law Commission in 2006 (Principle 8): "*a unilateral declaration which is in conflict with a peremptory norm of general international law is void*." And the Draft articles on Responsibility of States for Internationally Wrongful Acts (Art. 26 of the draft accepted in 2001): "*nothing in this chapter precludes the wrongfulness of any act of a State which is not in conformity with an obligation arising under a peremptory norm of general international law*."[57]

The concept of *jus cogens* based upon an acceptance of fundamental and superior values within the system and also refers to the Natural Law thinking. The *jus cogens* norms are not just rules of international law but rather "*rather rules of a particular and superior quality*".[58]

During the discussion if the Vienna Convention on the Law of Treaties many suggestions were made to add exampled for *jus cogens*: a treaty contemplating an unlawful use of force contrary to the principles of the Charter, a treaty contemplating the performance of any other act criminal under international law, a treaty contemplating or conniving at the commission of acts, such as trade in slaves, piracy or genocide, acts which constitute crimes under international law; treaties violating human rights, the equality of States or the principle of self-determination were mentioned. Later, only the general prohibition was adopted in the treaty because they do not want to limit the scope of the article just to the listed norms.[59]

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[57] Lagerwall, Anne: *Jus Cogens.* http://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0124.xml

[58] Shaw 2008. pp. 125-126.

[59] *Yearbook of the ILC*, 1966, Vol. II. p. 248.

Judicial decisions and the teachings of the most highly qualified publicists

Judicial decision and the teachings of the most highly qualified publicists are listed as subsidiary means for the determination of rules of law. So they are not real sources of law but help to understand the meaning of law.

The judicial decisions mainly refer to the decisions of the International Court of Justice, but in this form the interpretation of the clause it's a bit challenging. The decisions of the ICJ have force only *inter partes* (*between the parties*): "*the decision of the Court has no binding force except between the parties and in respect of that particular case*." The principle of Roman law, *praetor ius dicere potest, facere non potest*, valid at the field of international law (the judge only interprets, but not creates the law). On the other hand the ICJ has preceded a coherent practice and the parties are able to prognosticate the decision of the court or at least the direction of the decision. The ICJ has phrased the preceding decisions of the Court, and the advisory opinions as well.[60]

Soft law

The term "soft law" refers to instruments which do not have any legally binding force, or whose binding force is weaker than the binding force of other sources of international law, the "hard law" (actual binding legal instruments and laws). The final documents of conferences are typical forms of soft law. Soft law has a great importance at international law and even the application is quite favorable by States.[61] It's hard to define soft law, because various defections can be found in literature. Regarding to Shelton soft law norms are "*normative provisions contained in non-binding texts*".[62] The term of soft law encompasses soft rules that are included in treaties, non-binding or voluntary resolutions, recommendations, codes of conduct, and standards.

Ex aueque et bono

The Statue of the International Court of Justice states that: the provisions of the Statue shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto. In this case equity not just forms but grounds

[60] Kovács 2011. pp. 164-165.

[61] Kovács 2011. p. 162.

[62] Shelton, Dinah: *Commitment and Complianc. The Role of Non-binding Norms in the International Legal System*. Oxford: Oxford University Press, 2000.

the decision of the ICJ. It happens if the parties agree that positive law (treaties, customs and other sources of international law) exists but it's not acceptable or not favorable for them or the dispute cannot be decided upon law.[63]

International law and municipal law

International law became more and more important in international relations and the amount of international conventions as well legal norms has been multiplied in the last centuries. Until the 19th century law was only dependent on the will of sovereign States and was accepted by the national authorities. That confused the scholars whether the application and follow of international law depend on the will of the sovereign States or not. Besides, how the conflict between international law and domestic law can be resolved?[64]

The main scholars of **monism** are Hegel and Kelsen. The monism refers to international law and domestic law as the same, so there is no theoretical problem to apply international law.[65] **Hegel**, the German thinker analyzed the issues and according to that particular school of thought, international law was a branch of state law and the compulsory character of international law was derived from the convergent will of all States. Scholars of that period conceived international law as a 'common law' of nations. The first attempt of **Kelsen** to answer the above mentioned questions was the book of "*Das Problem der Souveränität und die Theorie des Völkerrchts*" published in 1920 and he was very critic towards Hegel. Hegel refers to refers to the *Grundnorm* (basic norm) as an *Ursprungsnorm* (originary norm). The hypothetical *Grundnorm* of the entire system must be found in the federal (or international) system.[66]

The **dualists** considered international law and domestic law as different. International law based upon agreements between States and customs.[67] One of the scholars, **Triepel** gained international recognition in the field of international law through his work International Law and National Law from 1899 (*Völkerrecht und Landesrecht*). Developing the consequences of the concept of sovereignty, Triepel examined the relationship between international law and national law as a relationship between independent legal systems.[68] Regarding to dualism the

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63 Kovács 2011. p. 169.

64 Shaw 2008. p. 29.

65 Kovács 2011. p. 60.

66 Rigaux, Francois: Hans Kelsen on International Law. European Journal of International Law (1998). pp. 325-343.

67 Shaw 2008. pp. 29-30.

68 Jacobson, Arthur – Schlink, Bernhard (ed.): *Weimar. A Jurisprudence of Crisis*. Berkeley: University of California Press, 2000. p. 172.

international law has to find a way to domestic law. For international treaties this mean that the treaties has to be transformed to domestic law. **Anzilotti**'s work is the "Lectures on International Law (*Corso di diritto intemazionale*)". In the view of Anzilotti the "States' legislative competence is essentially a function of public international law, and some of the rules concerning conflict of laws do indeed pertain to this system of law."[69]

NOTA BENE

- ✓ The sources of international law and the Art. 38 of the ICJ
- ✓ The definition of international conventions
- ✓ The elements of customary international law
- ✓ *Opinio juris*
- ✓ The importance of codification
- ✓ International Law Commission
- ✓ Advantages and disadvantages of international customs and treaties
- ✓ The general principles of law
- ✓ Unilateral acts as a sources of international law
- ✓ The meaning of *jus cogens*
- ✓ Judicial decisions and the teachings of the most qualified publicists
- ✓ The definition of soft law
- ✓ The meaning of *ex aueque et bono* decisions
- ✓ Monism
- ✓ Dualism

Recommended Reading

Guzman, Andrew T. – Meyer, Timothy L.: *Internaitonal Soft Law*, 2 J. Legal Analysis 171 (2010), Available at: http://scholarship.law.berkeley.edu/facpubs/695

Greenwood, Christopher: *Sources of International Law: An Introduction*. Available at: http://legal.un.org/avl/pdf/ls/greenwood_outline.pdf

Hossain, Kamrul: *The Concept of Jus Cogens and the Obligation Under The U.N. Charter*, 3 Santa Clara J. Int'l L. 72 (2005). Available at: http://digitalcommons.law.scu.edu/scujil/vol3/iss1/3

[69] Gaja, Giorgio: *Positivism and Dualism in Dionisio Anzilotti*. European Journal of International Law (1992) 123

Chapter 3 Subjects of international law

In any legal system entities (individuals and companies) can possess legally enforceable rights and duties. The domestic law recognizes them as a 'legal person' "possessing the capacity to have and to maintain certain rights, and being subject to perform specific duties." We have to raise the question which entities have legal personality. Without legal personality institutions and other groups cannot operate. In domestic law legal personality is given by the legislation of the State. Each State has its legislation connecting to legal entities and providing certain rights and duties. Usually legal personality is given to individuals and to limited companies, to the forms of public partnership.[70] There is no difference in international law regarding to the term of legal personality. Legal capacity means that the legal entity may hold the right and duties provided by law. Legal capacity is the attribute of a person who can acquire new rights, or transfer rights, or assume duties, according to the mere dictates of his own will, as manifested in juristic acts, without any restraint or hindrance arising from his status or legal condition.[71] On the other hand the typical subjects of municipal law are not typical subjects of international law and individuals are exceptionally subjects of international law. Besides, States are typical subjects of international law and international organizations as well.[72]

States

The criteria of statehood

The **criteria of statehood** derived from the **Montevideo Convention** (1933)[73] A State as a person of international should pass the following qualifications:

(a) a permanent population; (objective)
(b) a defined territory; (objective)
(c) government; (objective)
(d) capacity to enter into relations with the other States. (subjective) [74]

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[70] Shaw 2008. p. 195.

[71] *The Law Dictionary.* http://thelawdictionary.org/capacity/

[72] Nagy Károly 1999. p. 9.

[73] *Convention on Rights and Duties of States*. Signed at Montevideo 26. December 1933, entered into force 26. December 1934.

[74] Montevideo Convention Art.1.

The fist requirement is the permanent **population**. The largeness of population is irrelevant. We can name States with large population, such as China or India or with small populations, such as Luxemburg or Nauru. The nature of population does not settled by international law: the population may largely consist of nomads (such as in Somalia), it may be ethnically (relatively) homogeneous (such as in Iceland) or very diverse (such as in the former Soviet Union), it may be very poor (such as in Sierra Leone, where in 2000 nearly 70 percent of the population lived below the poverty line) or it may be very rich (as in many Western States). The fulfillment of the criteria of population does not depend on the nationality of the population. The nationality depends on the Statehood, because the States have a right to create their own legislation how the nationality is granted. The States are able to grant nationality, because they are considered as States.[75]

The second criterion is a **defined territory**. The only important requirement is the existence of a core territory. Other than that, the international hasn't posits any further requirement, such as minimum or maximum size. There are States with small territory, such as Luxemburg or Nauru, especially islands; on the other hand, there are large countries, such as the USA or Russia, China or India.[76]

The criterion of **government** is interpreted at the Island of Palmas arbitration by Huber. In Huber's opinion the government itself is not enough to fulfill the requirement of statehood but it has to be effective as well "*….have displayed sovereignty over the Island of Palmas (or Miangas) in an effective continuous and peaceful manner*."[77] Effective governments allow the State to contact other entities. International law doesn't specify at the field of government. As long as law and order can be guaranteed, the requirements considered as fulfilled.[78] The government must be sovereign and independent, so that within its territory it is not subject to the authority of another State. A **failed state** means a state that is unable to perform the two fundamental functions of the sovereign nation-state in the modern world system: firstly, it cannot project authority over its territory and peoples; furthermore, it cannot protect its national boundaries. Somalia is a great example as a failed state, which descended into state collapse under rival warlords. Failed states usually struggle with humanitarian and emergency issues and crumbling infrastructure.[79]

Lastly the **capacity to enter into international relations** is a subjective criterion of statehood. International relations between States can appear in the form of

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[75] Zadeh, Ali Zounuzy: *International Law and the Criteria for Statehood: The Sustainability of the Declaratory and Constitutive Theories as the Method for Assessing the Creation and Continued Existence of States*. Phd Thesis, Tilburg University, 2011. p. 22.

[76] Klabbers, Jan: *International Law*. Cambridge University Press, New York, 2013. pp. 70-71.

[77] *Island of Palmas Arbitration (USA v. Netherlands)*. Reports of International Arbitral Awards. 1928. Vol. II pp. 829-871. p. 857.

[78] Klabbers 2013. p. 71.

[79] https://www.britannica.com/topic/failed-state

diplomatic relations or direct negotiations. The capacity to enter into international relations includes the capacity to adopt international conventions and treaties.

Recognition of States

Recognition is a formal acknowledgment by another State that an entity possesses the qualifications of statehood. International law is dominated by two competing theories of state recognition, the "declaratory" view and the "constitutive" view. The **constitutive** theory says that recognition of an entity as a State is not automatic and a State is only considered as State when it is recognized as such. The already existing States have a considerable discretion to recognize an entity as State or not. The **declaratory** theory is the opposite of the constitutive theory. The declaratory theory holds that recognition is irrelevant because the states have no discretion in determining whether an entity constitutes a State. Regarding to the declaratory theory, the status of statehood is based on fact, not on individual state discretion. The majority of contemporary scholars and commentators favor this theory.[80]
The **Montevideo Convention** also referred to the recognition of States:

"The political existence of the state is independent of recognition by the other states. Even before recognition the state has the right to defend its integrity and independence, to provide for its conservation and prosperity, and consequently to organize itself as it sees fit, to legislate upon its interests, administer its services, and to define the jurisdiction and competence of its courts. The exercise of these rights has no other limitation than the exercise of the rights of other states according to international law."[81] It's clear that the Montevideo Convention follows the declarative theory or recognition.

The recognition is a political act and in connection with the relations between States it's constitutive. On the other hand the recognition of new entities as States is a merely political decision, based on mainly political motivations and interest.[82] There is no such an obligation towards States to recognize the new entities as States but there is an obligation not to recognize as lawful under some circumstances. Even if that entity satisfies all criteria of statehood, it is possible to withdraw recognition because "unilateral act". Non-recognition is considered as an option if the new state as a partner in international relations appears to be so serious that

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[80] Worster, William: *Sovereignty: two Competing Theories of State Recognition*. http://www.exploringgeopolitics.org/publication_worster_willliam_sovereignty_constitutive_declatory_statehood_recognition_legal_view_international_law_court_justice_montevideo_genocide_convention/

[81] Art. 3.

[82] Klabbers 2013. p. 73.

the community of States that the other states would like to leave this new entity out of the international community.[83]

The recognition can be classified as the following:

Effect of the recognition:

- *De iure*: final and full recognition

"The recognition of a state merely signifies that the state which recognizes it accepts the personality of the other with all the rights and duties determined by international law. Recognition is unconditional and irrevocable."[84]

- *De facto*: temporary, restricted recognition
- *Ad-hoc*: recognition only for one occasion e.g. exchange of war prironers.

Procedure of recognition:

- Express: the State *expresses verbis* state that the new entity is a state.
- Implicit: diplomatic relations, international treaty. If a State starts diplomatic relations with another entity, the recognition of the other entity is implied.

"The recognition of a State may be express or tacit. The latter results from any act which implies the intention of recognizing the new state."[85]

Way of Recognition:

- Individual: one State recognizes another entity as a new State.
- Collective: two or more States recognize another entity as a new State.

The **consequences** of recognition: extend to the level of intergovernmental relations; the recognition of citizenship, possibility of normal diplomatic relations.

The **recognition of governments** has to be separated from the recognition of States. These are two different issues. The government cannot be recognized without the recognition of the State as a legal person, but the State can be recognized without the recognition of the government. The problem arises usually from the unconstitutional change of the government. Different theories have been developed in connection with the recognition of governments.

The **Tobar doctrine** is a doctrine of non-recognition of governments that first enunciated by Carlos Tobar, the Minister of Foreign Relations of Ecuador, in March 1907. The governments that came into power unconstitutionally should not be recognized until the government is accepted by the inhabitants via e.g. elections. The **Estrada doctrine** is a policy, named after the Mexican foreign minister who first propounded it in 1930. Regarding to the doctrine, a State abstains from taking any position on the validity of a new government in another State, on the basis that taking such a position would constitute an unjustified interference in the domestic affairs of that other State.

[83] Hillgruber, Christian: *The Admission of New States to the International Community*. European Journal of International law 9 (1998), pp. 491-509. p. 494.

[84] Montevideo Treaty Art. 6.

[85] Montevideo Treaty Art. 7.

There are certain acts or events that **cannot influence the statehood** and the legal personality of the States. Firstly, occupation (occupation is a form of international armed conflict that arises when a territory, or parts thereof, come under the authority of foreign hostile armed forces, even if it is not met with armed resistance) or other illegal use of force against the State (for example in the case of Kuwait). Changes of the national emblems (flag, etc.) of the State do not influence statehood, neither the changes of the name or constitution. Changes in the government do not affect statehood.

A State become **extinct** because of the substantial changes in territory, population or government, or even, in some cases, by a combination of all three. Extinction takes place only in the following cases: merger (A+B=C, e.g. Tanganyika and Zanzibar became Tanzania), assimilation (e.g. German unification), disintegration (C= A+B e.g. Czechoslovakia = Czech Republic and the Slovak Republic). The regime change that happened in several countries in the beginning of the 1990's caused affected by questionable decisions of the international community. The Russian Federation got the seat of the Soviet Union in the Security Council on the other hand Yugoslavia went through a proper admission procedure and become a UN member state only in 2000.[86]

The legal personality of States:

- objective;
- full;
- unrestricted.

International Organizations

The term of International organization means an organization established by a treaty or other instrument governed by international law and possessing its own international legal personality. International organizations may include as members, in addition to States, other entities.[87]

The characteristics of international organizations:

- developed by States and based on the participation of States (international organizations (IGOs) - a non-governmental organization (NGO) is a non-for-profit, voluntary citizens' group, which is organized on a local, national or international level to address issues in support of the public good);[88]
- established by a treaty or other instrument governed by international law;
- has its own founding document;

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[86] Nagy Károly 1999. pp. 121-124.

[87] Draft articles on the responsibility of international organizations, with commentaries Art. 1.

[88] https://www.apa.org/international/united-nations/acronyms.pdf

- has its own organs (usually a secretariat, a decision making committee or council and a plenary organ);
- the legal personality of an organization needs to be distinct from that of its member States.[89]

International organizations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties.[90]

The legal personality of international organizations:

- subjective: depends on the recognition of States, except the United Nations;

"The Organization shall enjoy in the territory of each of its Members such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes."[91]

"On this point, the Court's opinion is that fifty States, representing the vast majority of the members of the international community, had the power, in conformity with international law, to bring into being an entity possessing objective international personality, and not merely personality recognized by them alone, together with capacity to bring international claims"[92]

- derivative: given by the founding States;
- restricted: as it States in the founding treaty.

Individuals

The legal personality of individuals is **exceptional** is international law and limited to two main areas:

- active: human rights;
- passive: direct obligations of individuals and the international responsibility of individuals (crimes against mankind and war crimes).[93]

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89 Kovács 2011. p. 290.

90 *Advisory opinion on the Interpretation of the Agreement* of 25 March 1951 between the WHO and Egypt

91 UN Charter Art. 104.

92 *Reparation for injuries suffered in the service of the United Nations*, Advisory Opinion: I.C. J. Reports 1949, p. 174. p. 185.

93 Kovács 2011. p. 315.

Peoples and Nations

The self-determination of peoples and nations is a basic principle of international law.

Minorities

Unusually the States provides legal personality via internal acts and bilateral agreements to minorities in order to provide rights.[94]

Mankind

The common heritage of mankind, sometimes also called the common heritage of humankind or humanity, compared with age-old concepts such as *res nullius* and *res communis omnium usues*. The new concept actually assumed prominence after the speech of Arvid Pardo, the Maltese ambassador to the United Nations, delivered at the United Nations General Assembly in November 1967, calling for the deep seabed beyond national jurisdiction and the resources contained therein to be declared the common heritage of mankind. The concept was accepted at the law of the sea, but it has since been expanded to other issues, such as outer space and the Moon, Antarctica, human rights, human genomes, and plant genetic resources.[95]

The Sovereign Order of Malta

The Sovereign Order of Malta is a religious order of the Catholic Church since 1113 and a subject of international law. The Sovereign Order of Malta has diplomatic relations with over 100 States and the European Union, and permanent observer status at the United Nations. It is neutral, impartial and apolitical. Today, the Order of Malta is active in 120 countries caring for people in need through its medical, social and humanitarian works.[96]

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[94] Kovács 2011. p. 376.

[95] Egede, Edwin: *Common Heritage of Mankind* 30 July 2014. http://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0109.xml

[96] Kovács 2011. p.376.

The Holy See and Vatican City

Vatican City is the smallest independent State in the world in terms of inhabitants and size. Vatican City State was founded following the signing of the Lateran Pacts between the Holy See and Italy on 11 February 1929. These were ratified on 7 June 1929. Its nature as a sovereign State distinct from the Holy See is universally recognized under international law.

International Committee of the Red Cross

The International Committee of the Red Cross is a sui generis legal person of international law. It was created by the Swiss internal law but gained more and more tasks by the Geneva Conventions and finally practices the duties of an intergovernmental organization. It has quasi diplomatic privileges and immunities due to its neutral status and humanitarian work.[97]

Transnational companies

In terms of the investments protection rules provided by international public and private law.

NOTA BENE

- ✓ The meaning of legal personality and the legal capacity
- ✓ The criteria of statehood
- ✓ Montevideo Convention
- ✓ The definition of the recognition of States
- ✓ Declarative and constitutive theories
- ✓ The classification of recognition of States
- ✓ Recognition of governments
- ✓ Tobar doctrine
- ✓ Estrada doctrine
- ✓ Extinction of States
- ✓ The legal personality of States and international organizations
- ✓ The definition of international organizations
- ✓ Individuals in the international law
- ✓ Special legal persons of international law

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[97] Kovács 2011. p. 375

Recommended reading

The UN in general: http://www.un.org/en/index.html

The main organs of UN: http://www.un.org/en/sections/about-un/main-organs/

Reinalda, Bob: *Routledge History of International Organizations*. New York: Routledge, 2009.

The Vatican City: https://www.britannica.com/place/Vatican-City

Minority Rights: *International Standards and Guidance for Implementation*. UN, 2010. Available at: http://www.ohchr.org/Documents/Publications/MinorityRights_en.pdf

Szalai Anikó: *Protection of the Roma Minority under International and European Law*. Hague: Eleven International Publishing, 2015.

Muchlinski, Peter – Ortino, Federico – Schreuer, Christoph: *The Oxford Handbook of International Investment Law*. Oxford University Press, 2008.

Chapter 4 Principles of international law

Definition of principles: a fundamental, primary, or general law or truth from which others are derived an adopted rule or method for application in action. *A fundamental truth or proposition that serves as the foundation for a system of belief or behavior or for a chain of reasoning*. At international law we are talking about governing principles that affects to the practice of the countries. The States should comply with them in order to maintain peace and ensure the quality of their relation. So, we have to separate the principles generally (general principles of fairness and justice which are applied universally in legal systems around the world) and the governing principles of international law.

Legal sources: there is no laxative list of governing principles but there are significant documents that can serve as a table of principles:

- **UN Charter**
  - Chapter I. Purposes and Principles
  - Art. 2. 1-7
  - Duty to settle disputes peacefully Art. 2 (3) and Chapter VI.
  - Duty of non-intervention Art. 2 (7)
  - Duty to cooperate Art. 55 (b) and 56.

Article 2

The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles.

1. The Organization is based on the principle of the sovereign equality of all its Members.
2. All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfill in good faith the obligations assumed by them in accordance with the present Charter.
3. All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.
4. All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.
5. All Members shall give the United Nations every assistance in any action it takes in accordance with the present Charter, and shall refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action.

6. The Organization shall ensure that states which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security.
7. Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

- **Declaration on Principles of International Law, Friendly Relations and Co-operation among Sates in accordance with the Charter of the United Nations**, 1970[98]
  - the legal nature of the document is disputed whether it's a legally binding document or a recommendation
- **Charter of Bogotá**: Charter of the Organization of American States, 1948.[99] (Art. 5.)
  - basic obligations and rights of the States
  - right to self-preservation
- **OSCE** (Organisation of Security and Cooperation in Europe): Helsinki Final Act, 1975. 10 principles of cooperation of States[100]

Declaration on Principles Guiding Relations between Participating States

I. Sovereign equality, respect for the rights inherent in sovereignty
II. Refraining from the threat or use of force
III. Inviolability of frontiers
IV. Territorial integrity of States
V. Peaceful settlement of disputes
VI. Non-intervention in internal affairs
VII. Respect for human rights and fundamental freedoms, including the freedom of thought, conscience, religion or belief
VIII. Equal rights and self-determination of peoples
IX. Co-operation among States
X. Fulfillment in good faith of obligations under international law

[98] A/RES/25/2625: http://www.un-documents.net/a25r2625.htm

[99] https://treaties.un.org/doc/Publication/UNTS/Volume%20119/volume-119-I-1609-English.pdf

[100] http://www.osce.org/helsinki-final-act?download=true

A. Principle of sovereign equality of States

Principle of sovereign equality of States is one of the oldest principles of international law. First time it appeared at the Westphalia Treaty (1648.).[101] The national sovereignty of States has been expanded to the territorial integrity as well. The full sovereignty includes several factors: judicial equality, respect personality of other States, inviolability of territorial integrity and political independence. In practice, within the international relations the States negotiate, cooperate or litigate with other States and they are equal in sovereignty.

In general sovereignty means supreme and independent power or authority in government as possessed or claimed by a State or community the quality or State of being sovereign, or of having supreme power or authority. The meaning of sovereignty: it's an actual status plus the right of the State, but ability as well that on their territory the State is able to wield a power. The State is independent (politically) and the country's independent authority has the right to govern. Sovereignty assumes an unlimited power over a country.

Historically sovereignty appeared in the work of Grotius: sovereignty is that a State should be able to govern itself. Later Bodin (Angers, 1529/1530 – Laon, 1596) was a theorist of absolute sovereignty and gave the first detailed explanation. First time the monarch possessed sovereignty later the State under the rule of law. The principle of sovereignty appeared in the middle age and from the 15th century it strengthened. The above mentioned Westphalia Treaty added equality to sovereignty and has resulted the principle of sovereign equality of States. The UN Charter refers to the principle: "*the Organization is based on the principle of the sovereign equality of all its Members*".[102] The UN Declaration on Friendly Relations also States: "all States enjoy sovereign equality. They have equal rights and duties and are equal members of the international community, notwithstanding differences of an economic, social, political or other nature." In particular, sovereign equality includes the following elements: States are judicially equal; Each State enjoys the rights inherent in full sovereignty; Each State has the duty to respect the personality of other States; The territorial integrity and political independence of the State are inviolable; Each State has the right freely to choose and develop its political, social, economic and cultural systems; Each State has the duty to comply fully and in good faith with its international obligations and to live in peace with other States.[103] The Helsinki Final Act also refers to sovereignty: "*the participating States will respect each other's sovereign equality and individuality as well as all the rights inherent in and encompassed by its sovereignty, including*

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[101] https://is.muni.cz/el/1423/podzim2008/MVZ430/um/Treaty-of-Westphalia.pdf

[102] UN Charter Art. 2.

[103] Declaration on Principles of International Law, Friendly Relations and Co-operation among Sates The principle of sovereign equality of States a)-f)

in particular the right of every State to juridical equality, to territorial integrity and to freedom and political independence. They will also respect each other's right freely to choose and develop its political, social, economic and cultural systems as well as its right to determine its laws and regulations. Within the framework of international law, all the participating States have equal rights and duties. They will respect each other's right to define and conduct as it wishes its relations with other States in accordance with international law and in the spirit of the present Declaration. They consider that their frontiers can be changed, in accordance with international law, by peaceful means and by agreement. They also have the right to belong or not to belong to international organizations, to be or not to be a party to bilateral or multilateral treaties including the right to be or not to be a party to treaties of alliance; they also have the right to neutrality."

Sovereignty has to main sides: **external** that means the relationship between a sovereign power and other States and **internal**: the relationship between a sovereign power and its own subjects, government, independence. The full sovereignty means that government possesses full control over affairs within a territorial or geographical area or limit.

Despite the full sovereignty of States, several **bounds** can be identified: the *ius cogens* norms, the prohibition of start a war, the resolutions of the UN Security Council have to be respected. The States are legally equal in their rights, but in practice they are not. This especially appears in the voting system of the international organizations. In international relations during negotiation usually there is a party with better opportunities and positions. Usually the same rights won't result the same opportunities for countries.

B. Principle of equal rights and self-determination of peoples

Principle of equal rights and self-determination of peoples became one of the most disputed principles. Within the context of decolonization it was accepted. Self-determination of peoples means freedom of the people of a given area to determine their own political status and to gain independence. The principle of self-determination sometimes results the breach of prohibition the use of force in order to stop independence movement. The UN Charter contains the principle of self-determination: "*to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace*."[104]

The UN General Assembly accepted the Declaration on the Granting of Independence to Colonial Countries and Peoples in 1960.[105] The Declaration in

[104] UN Charter Art. 1. 2.

[105] General Assembly resolution 1514 (XV) of 14 December 1960.

1960 was accepted by the General Assembly because of the permanent member's veto in the Security Council. At the time of the resolution the permanent members that still had colonial legal ties or associations. "*All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development*.[106] *All States shall observe faithfully and strictly the provisions of the Charter of the United Nations, the Universal Declaration of Human Rights and the present Declaration on the basis of equality, non-interference in the internal affairs of all States, and respect for the sovereign rights of all peoples and their territorial integrity*."[107] The Helsinki Final Act also refers to the principle: "*the participating States will respect the equal rights of peoples and their right to self-determination, acting at all times in conformity with the purposes and principles of the Charter of the United Nations and with the relevant norms of international law, including those relating to territorial integrity of States. By virtue of the principle of equal rights and self-determination of peoples, all peoples always have the right, in full freedom, to determine, when and as they wish, their internal and external political status, without external interference, and to pursue as they wish their political, economic, social and cultural development. The participating States reaffirm the universal significance of respect for and effective exercise of equal rights and self-determination of peoples for the development of friendly relations among themselves as among all States; they also recall the importance of the elimination of any form of violation of this principle*." Self-determination can be practiced in several ways: with the foundation of an independent State, the new entity can join to an existing State or gain different political status.

On the other hand this young principle that arose from the years of decolonization became disputed in the last couple of decades. Even the United Nation and the international community are not sure in the validation of self-determination in connection with the new examples (e.g. Catalonia or Kosovo). The Declaration of Friendly Relations form 1970 establishes the duty towards States to "*promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples*" but only in accordance with the provisions of the UN Charter. On the other hand States that "*nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States*". Obviously the principle of self-determination opposes the integrity of States and challenges the international community.

The self-determination has two sides: the **internal** side of self-determination means autonomy that can be cultural or territorial; the **external** side of self-determination is the independence.

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[106] General Assembly resolution 1514 (XV) of 14 December 1960. 2.

[107] General Assembly resolution 1514 (XV) of 14 December 1960. 7.

Sovereignty v Self-determination

C. Prohibition of the threat or use of force

Until the end of the First World War, the use of armed force was not an illegal act but an acceptable way of settling disputes. In 1919, the Covenant of the League of Nations and, in 1928, the Briand-Kellogg Pact sought to outlaw war. The adoption of the United Nations Charter in 1945 confirmed the trend: "*all Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nation*."[108] However, the UN Charter upholds States' right to individual or collective self-defense in response to aggression by another State (or group of States). The UN Security Council, acting on the basis of Chapter VII of the Charter, may also decide to resort to the collective use of force in response to a threat to the peace, a breach of the peace or an act of aggression. *Jus ad bellum* refers to the conditions under which States may resort to war or to the use of armed force in general. The prohibition against the use of force amongst States and the exceptions to it (self-defense and UN authorization for the use of force), set out in the United Nations Charter of 1945, are the core ingredients of jus ad bellum. *Jus in bello* regulates the conduct of parties engaged in an armed conflict. International humanitarian law is synonymous with jus in bello; it seeks to minimize suffering in armed conflicts, notably by protecting and assisting all victims of armed conflict to the greatest extent possible.[109]

[108] UN Charter Art. 2. 4.

[109] *What are jus ad bellum and jus in bello*? 22 January 2015. https://www.icrc.org/en/document/what-are-jus-ad-bellum-and-jus-bello-0

The UN Charter uses different wordings: "*threat to the peace*," "*act of aggression*," or "*armed attack*". The prohibition of the threat or use of force became one of the most important international law principles and a *jus cogens* norm indeed. The UN charter establishes an obligation of peaceful dispute settlement: "*the parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice*."[110]

The **definition of force** is to use of any weapons by a State directed against another State. Threat or use against the sovereignty of other States. On the other hand force can appear in several ways. Armed force is the most serious, but political or economical force are also possible. In the last decades especially the developing countries and the former socialist countries have tried to extend the notion of force. Their argument was that the effects might be equal to military force. But this argument was clearly rejected. The UN Charter uses the word "force" only in connection with military force. The political and economic coercion is in relation to the principle of nonintervention.

Just war theory (*jus bellum justum*) deals with the justification of how and why wars are fought. The justification can be either theoretical or historical. Just war theory has a long history: St. Augustine provided comments on the morality of war from the Christian perspective; Saint Thomas Aquinas in the *Summa Theologicae* presents the general outline of what becomes the traditional just war theory later (Francisco de Vitoria (1486-1546), Francisco Suarez (1548-1617), Hugo Grotius (1583-1645), Samuel Pufendorf (1632-1704), Christian Wolff (1679-1754), and Emerich de Vattel (1714-1767)).[111] The Catholic Church gives certain conditions for the legitimate exercise of force, all of which must be met: the damage inflicted by the aggressor on the nation or community of nations must be lasting, grave, and certain; all other means of putting an end to it must have been shown to be impractical or ineffective; there must be serious prospects of success; the use of arms must not produce evils and disorders graver than the evil to be eliminated.[112]

The prohibition of force has been developed via doctrines and documents. The **Drago Doctrine** refers to a principle asserted by Argentine Minister of Foreign Affairs Luis María Drago in 29 December 1902. The doctrine held that international law did not authorize European powers to use armed intervention to force American republics to pay public debts. The doctrine was not new in principle, though its concept is narrower than that of the earlier **Calvo Doctrine** from which it grew. The subject was presented at the Hague Conference of 1907,

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[110] UN Charter VI. Art. 33. 1.

[111] http://www.iep.utm.edu/justwar/

[112] *Catechism of the Catholic Church*, para. 2309.

when a modified version of the Drago doctrine was adopted.[113] The **Covenant of the League of Nations** was adopted in 1919. The Covenant stated: "*the Members of the League undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League. In case of any such aggression or in case of any threat or danger of such aggression the Council shall advise upon the means by which this obligation shall be fulfilled*."[114] Besides, wars for dispute settlement were not prohibited, just aggressive war. **Kellogg-Briand Pact**, also called **Pact of Paris** (27 Augustus 1928) is a multilateral agreement to eliminate war as an instrument of national policy: "*the High Contracting Parties agree that the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them, shall never be sought except by pacific means*."[115] After the Second World War the **UN Charter** finally outlawed the use of force: "*all Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations*."[116] **The Declaration on Friendly Relations** also contains the principle of "*that States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State or in any other manner inconsistent with the purposes of the United Nations*"

- Every State shall settle its international disputes with other States by peaceful means in such a manner that international peace and security and justice are not endangered.
- States shall accordingly seek early and just settlement of their international disputes by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements or other peaceful means of their choice. In seeking such a settlement the parties shall agree upon such peaceful means as may be appropriate to the circumstances and nature of the dispute.
- The parties to a dispute have the duty, in the event of failure to reach a solution by any one of the above peaceful means, to continue to seek a settlement of the dispute by other peaceful means agreed upon by them.
- States parties to an international dispute, as well as other States shall refrain from any action which may aggravate the Situation so as to endanger the maintenance of international peace and security, and shall act in accordance with the purposes and principles of the United Nations.

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[113] https://definitions.uslegal.com/d/drago-doctrine/

[114] Convenant of the League of Nations Art. 10.

[115] Kellog-Briand Pact Art. II. http://avalon.law.yale.edu/20th_century/kbpact.asp

[116] UN Charter Art. 2. 4.

- International disputes shall be settled on the basis of the Sovereign equality of States and in accordance with the Principle of free choice of means. Recourse to, or acceptance of, a settlement procedure freely agreed to by States with regard to existing or future disputes to which they are parties shall not be regarded as incompatible with sovereign equality.
- Nothing in the foregoing paragraphs prejudices or derogates from the applicable provisions of the Charter, in particular those relating to the pacific settlement of international dispute.[117]

The definition of aggression has been settled by the **General Assembly Resolution A/RES/3314 (XXIX) of 1974**: "*aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this Definition*."[118]

Exceptions:

1. **right to self-defence**: nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.[119] **Carolina Case** (1837)[120]: that necessity of self-defence, instant, overwhelming, leaving no choice of means (**necessity**); must be limited by that necessity, and kept clearly within it (**proportionality**) and **imminent**.
2. But a there is a so called "**preventive self-defence**" (self-defence without being physically attacked first) takes place when an attack is merely possible or foreseeable. The right to use pre-emptive self defence in the light of an imminent attack has not been ruled out by the ICJ. But state practice suggests that there is no right of preventive self-defence under international law.
3. **Collective self-defence**: the UN Charter, which authorizes the Security Council to investigate any situation threatening international peace; recommend procedures for peaceful resolution of a dispute; call upon other

[117] Declaration on Principles of International Law, Friendly Relations and Co-operation among Sates. Prohibition of the threat or use of force

[118] A/RES/3314 (XXIX) of 1974 Art. 1. https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/739/16/IMG/NR073916.pdf?OpenElement

[119] UN Charter Chapter VII. Art. 51.

[120] http://avalon.law.yale.edu/19th_century/br-1842d.asp

member nations to completely or partially interrupt economic relations as well as sea, air, postal, and radio communications, or to sever diplomatic relations; and enforce its decisions militarily, or by any means necessary.

4. **NATO: North Atlantic Treaty Organisation**: calls on member states to assist another member under attack. "*The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defence recognised by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area. Any such armed attack and all measures taken as a result thereof shall immediately be reported to the Security Council. Such measures shall be terminated when the Security Council has taken the measures necessary to restore and maintain international peace and security*."[121] This article was invoked after the September 11 attacks on the United States, after which other NATO members provided assistance to the USA war on terror in Afghanistan.

D. Duty of non-intervention

The principle of non-intervention is one of the oldest principles of international law. It means that „*Every State has an inalienable right to choose its political, economic, social and cultural systems, without interference in any form by another State*."[122] Has the right to decide the matter that arose from sovereignty freely and to determine its political, social and cultural system. Historically the principle of non-intervention appears in the French Constitution 1793.[123] Later, in 1823 the Monroe Doctrine raised the issue again in connection with USA-Europe relation: the United States would not interfere in the internal affairs of or the wars between European powers and the United States recognized and would not interfere with existing colonies and dependencies in the Western Hemisphere.[124] The use of force or other aggressive act fulfills the criteria of intervention, on the other hand a friendly advice or a simple intercession cannot be considered as intervention.

[121] The North Atlantic Treaty (1949) Art. 5.

[122] Declaration on Principles of International Law, Friendly Relations and Co-operation among Sates. The principle concerning the duty not to intervene in matters within the domestic jurisdiction of any State, in accordance with the Charter

[123] They do not interfere in the government of other nations; nor do they permit other nations to interfere in theirs.

[124] See: Chapter 1.

The UN Charter also refers to intervention to domestic affairs: "*nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII*."[125] Intervention, so the use of force by one state against the internal or external affairs of another is considered to be an unlawful act but there are several exceptions. Lawful interventions

- invitation, or on request of the State in question
- two States agree on the matter of intervention in an international treaty
- in the matter of need (state emergency, or emergency of people)
- humanitarian intervention: a state's use of "military force against another state when the state declared aim of that military action is ending human rights violations being perpetrated by the state against which it is directed." The humanitarian aid is not considered as use of force. The humanitarian intervention holds essential characteristics: humanitarian intervention involves the threat and use of military forces as a central feature and it is an intervention in the sense that it entails interfering in the internal affairs of a state. But the intervention is motivated by humanitarian objectives. Examples: Somalia 1992, Rwanda1994, East Timor 1999, NATO bombing of Yugoslavia 1999, Coalition military, intervention in Libya (2011)

The case of The Republic of Nicaragua v. The United States of America (1986): the ICJ awarded in favor of Nicaragua and against the USA and awarded reparations to Nicaragua. The ICJ stated that the USA had violated international law by supporting the contras in their rebellion against the Nicaraguan government and by mining Nicaragua's harbors. The Court found in its verdict that the United States was "in breach of its obligations under customary international law not to use force against another State", "not to intervene in its affairs", "not to violate its sovereignty", "not to interrupt peaceful maritime commerce."

E. Duty to settle disputes peacefully

The principle of pacific dispute settlement appears in the UN Charter and declarations as well. The UN Charter sentences an own chapter the VI. to Pacific Settlement of Disputes.[126] The Declaration from 1970 also states that: "*every State*

[125] UN Charter Art. 2. 7.

[126] See: Chapter 6.

shall settle its international disputes with other States by peaceful means in such a manner that international peace and security and justice are not endangered."[127]

F. Duty to cooperate

States have the duty to co-operate with one another, irrespective of the differences in their political, economic and social systems, in the various spheres of international relations, in order to maintain international peace and security and to promote international economic stability and progress, the general welfare of nations and international co-operation free from discrimination based on such differences.

To this end:

- States shall co-operate with other States in the maintenance of international peace and security;
- States shall co-operate in the promotion of universal respect for, and observance of, human rights and fundamental freedoms for all, and in the elimination of all forms of racial discrimination and all forms of religious intolerance;
- States shall conduct their international relations in the economic, social, cultural, technical and trade fields in accordance with the principles of sovereign equality and non-intervention;
- States Members of the United Nations have the duty to take joint and separate action in co-operation with the United Nations in accordance with the relevant provisions of the Charter.

States should co-operate in the economic, social and cultural fields as well as in the field of science and technology and for the promotion of international cultural and educational progress. States should co-operate in the promotion of economic growth throughout the world, especially that of the developing countries.[128]

G. Principle of good faith

Every State has the duty to fulfill in good faith the obligations assumed by it in accordance with the Charter of the United Nations. Every State has the duty to fulfill in good faith its obligations under the generally recognized principles and rules of international law. Every State has the duty to fulfill in good faith its obligations

[127] Declaration on Principles of International Law, Friendly Relations and Co-operation among Sates. The principle that States shall settle their international disputes by peaceful means in such a manner that international peace and security and justice are not endangered

[128] Declaration on Principles of International Law, Friendly Relations and Co-operation among Sates. The duty of States to co-operate with one another in accordance with the Charter

under international agreements valid under the generally recognized principles and rules of international law. Where obligations arising under international agreements are in conflict with the obligations of Members of the United Nations under the Charter of the United Nations, the obligations under the Charter shall prevail.[129]

NOTA BENE

- ✓ The definition of principles
- ✓ The legal sources of principles of international law
- ✓ The principle of sovereign equality of States
- ✓ The principle of equal right and self-determination
- ✓ The ratio between sovereignty and self-determination
- ✓ The frames of use of force
- ✓ The duty of non-intervention
- ✓ The principle of peaceful dispute settlement
- ✓ The duty to cooperate
- ✓ The principle of good faith

[129] Declaration on Principles of International Law, Friendly Relations and Co-operation among Sates. The principle that States shall fulfill in good faith the obligations assumed by them in accord-ance with the Charter

Chapter 5 Law of Treaties

International treaties are one of the **main sources of international law**, also mentioned in the Statue of the International Court Justice (see Chapter 2.). The legal sources regarding to the law of treaties consist of the customary international law (the practice of the States) and the international conventions specially sentenced to this topic. Two main international conventions were accepted with regard to the law of treaties:

- the **Vienna Convention on the Law of Treaties**, 1969. (entered into force: 27/01/1980)
- the **Vienna Convention on the Law of Treaties between International Organizations and States**, 1986. (not yet in force)

The *comparison of international* treaties and customary international law is manageable via the following aspects:

	International Convention	**International Customary law**
Adaption (use)	Has to enter into force (ratification is needed)	Need more time to apply (because of the requirement of coherent practice)
As a source of law (appearance)	Written	Unwritten
Content	Clear (can be interpreted)	Indefinite (can raise problems e.g. with human rights)
Obligated addressee	Clear (ratifications, reservations)	Could be indefinite

Definition of treaty

Under the rules of the Convention, treaty *means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation*.[130]

In a more general way, a '*treaty*' is a formally concluded and ratified agreement between States. The term is used in general referring to instruments binding at

[130] Vienna Convention on the Law of Treaties, 1969. UN Treaty Series Vol. 1155, 1-18232 Article 2. 1. (a)

international law, concluded between international entities (States or organizations). Under the Vienna Conventions on the Law of Treaties, a treaty must be (1) a binding instrument, which means that the contracting parties intended to create legal rights and duties; (2) concluded by states or international organizations with treaty-making power; (3) governed by international law and (4) in writing.[131]
Treaties can be referred to by a number of different names:

- **Convention**: usually the most important multilateral treaties (United Nations Convention on the Law of the Sea, Convention on the Rights of the Child).
- **Agreement**: issues with less importance or agreements for a shorter time period (General Agreement on Tariffs and Trade (GATT)).
- **Charter**: basic document of international organizations or treaties with special content (Charter of the United Nations, The European Social Charter).
- **Statute**: basic document of international courts (Statue of the International Court of Justice).
- **Declaration**: today it's not common, in history generally used for conventions (Declaration of Saint Petersburg).
- **Framework agreement**: international treaties accepted with general provision, usually amended later (UN Framework Agreement on Climate Change).
- **Exchange of notes**: less formal agreements consisting of two or more instruments with the same content and signatures (exchange of war prisoners).
- **Protocol**: treaties accepted with regard to framework agreements in order to clear the detailed rules or to amend the provisions (Kyoto Protocol).
- **Pact**: treaties containing majestic obligations (e.g. human rights) (Pact of Bogota).

Classification of treaties

The subjects of treaties are varied from environment to human rights, economical, social issues, so all aspects of human interaction.

With regard to the created legal norms the treaties can be 'treaty-contracts', with the creation of administrative treaty, in order to settle one concrete case and lose their force with fulfillment. Or the treaties can be 'law-making' treaties that are intended to gain universal or general relevance.

[131] https://www.unicef.org/french/crc/files/Definitions.pdf

Under the applicable legal norms if the treaty created by only States, the provisions of the 1969. Convention is used. In case of international organizations the 1969. Convention cannot be applied.

Regarding to the number of parties to the treaty it can be the following: bilateral (between two members); particular (more than two members but based on a particular objective subject e.g. NATO); regional (more than two but based on a geographical territory e.g. Council of Europe); universal (any State could be a party to the treaty e.g. UN).

The possibility of membership to the treaties is not always reachable. In case of open treaties any State can join to the treaty (usually treaties with universal value). In case of semi-open treaties the possibility of membership depends on the fulfillment of objective criteria (e.g. geographical). In case of semi-closed treaties it depends on the fulfillment of subjective criteria (e.g. the invitation of parties). In case of closed treaties no other party can join to the treaty (e.g. bilateral treaties).

<table>
<tr><th colspan="6">Classification of treaties</th></tr>
<tr><td>Subject</td><td colspan="5">all aspects of human interaction, for example human rights, economical, environmental…all aspects of human interaction</td></tr>
<tr><td rowspan="2">Created legal norms</td><td colspan="3">Treaty-contracts Administrative</td><td colspan="2">Law-making</td></tr>
<tr><td colspan="3">To settle one concrete case and lose their force with fulfillment</td><td colspan="2">Creating legal norms for future interactions</td></tr>
<tr><td rowspan="2">Applicable legal norms</td><td colspan="2">State-State</td><td colspan="2">State - International organization</td><td>International organization - International organization</td></tr>
<tr><td colspan="2">1969. Vienna Convention</td><td colspan="3">1986. Vienna Convention[132]</td></tr>
<tr><td rowspan="2">Number of parties</td><td>Bilateral</td><td>Particular</td><td>Regional</td><td colspan="2">Universal</td></tr>
<tr><td>Between two</td><td>Particular objective criteria</td><td>Geographical criteria</td><td colspan="2">Any</td></tr>
<tr><td rowspan="2">Possibility of membership</td><td>Open</td><td>Semi-open</td><td>Semi-closed</td><td colspan="2">Closed</td></tr>
<tr><td>Any</td><td>Objective criteria</td><td>Subjective criteria</td><td colspan="2">None</td></tr>
</table>

[132] It's not yet in force, but the rules are commonly applied by the parties.

The general structure of treaties

The structure of the treaties depends on several factors, such as the subject of the treaty, the length of the treaty and the obligations of the treaty. In general the structure of an international treaty consists of the following:

- **Title**: the "name" of the treaty.
- **Preamble**: main aims, the reason of creation of the treaty, usually written in solemn style.
- **Main text**: definitions, terms, created obligations, accepted provisions.
- **Final clauses**: generally include articles on the settlement of disputes, amendment and review, the status of annexes, signature, ratification, accession, entry into force, withdrawal and termination, reservations, designation of the depositary, and authentic texts. In addition, articles may be included that address the relationship of the treaty to other treaties, its duration, provisional application, territorial application, and registration.
- **Testimonium**: the final, formal wording of a treaty beneath which the diplomatic representatives sign.
- **Attachments**

The creation of international treaties

In the long procedure of creating international treaties, the first step is the negotiation whether a new international instrument is needed or not in the subject of the future treaty. When this decision is made, the contracting parties are coming together to decide the content of the treaty and to create it. The procedure is depends on the subject and the type of the treaty, because the creation of significant treaties with many parties last long, meanwhile a bilateral treaty can be accepted more easily.

Different types of participation:[133]

'**Contracting State**' means a State which has consented to be bound by the treaty, whether or not the treaty has entered into force.

'**Party**' means a State which has consented to be bound by the treaty and for which the treaty is in force.

'**Third State**' means a State not a party to the treaty.

1. Conclusion of treaties

Every State possesses capacity to conclude treaties.[134] A person is considered as representing a State for the purpose of adopting or authenticating the text of

[133] Convention 1969. Part. Art. 2. (f)-(g)-(h)

[134] Convention 1969. Part II. Art. 6.

a treaty or for the purpose of expressing the consent of the State to be bound by a treaty if:

(a) He produces appropriate full powers; or
(b) It appears from the practice of the States concerned or from other circumstances that their intention was to consider that person as representing the State for such purposes and to dispense with full powers.

2. In virtue of their functions and without having to produce full powers, the following are considered as representing their State:

(a) Heads of State, Heads of Government and Ministers for Foreign Affairs, for the purpose of performing all acts relating to the conclusion of a treaty;
(b) Heads of diplomatic missions, for the purpose of adopting the text of a treaty between the accrediting State and the State to which they are accredited;
(c) Representatives accredited by States to an international conference or to an international organization or one of its organs, for the purpose of adopting the text of a treaty in that conference, organization or organ.[135]

Regarding to Full Powers Guidelines 2010[136]

Secretary-General's requirements applicable to full powers:

1. Signature by the Head of State, Head of Government or Minister for Foreign Affairs or a person acting, *ad interim*, in one of the above positions;
2. Title of the treaty;
3. Express authorization to sign the treaty or undertake the treaty action concerned;
4. Full name and title of the person duly authorized to sign;
5. Date and place of signature of the instrument of full powers; and
6. Official seal. This is optional and cannot replace the signature of one of the three authorities of State.[137]

2. Adaption of text

The negotiation depends on the interest of States and the personal knowledge and ability of the representative. In some cases the direct negotiation towards the content of the treaty is preliminary supported by expert panels. Technical rules e.g. the method of voting etc. necessarily appears during the negotiation. In case of bilateral treaties, the negotiation is much easier, because only the consent of the States has to be reached. In case of multilateral agreements, the technical rules, regulations have to be accepted before the negotiation, in order to specify the required majority, voting procedures and other technical aspects. If

[135] Convention 1969. Part II. Art. 7.

[136] LA41TR/221/Full Powers Guidelines 2010

[137] For model instruments: https://treaties.un.org/doc/source/model_instruments-E.pdf

necessary because of the complexity or length of the treaty, the regulation can set up commissions, for example general commission, special or technical commission.[138]

'*Adoption*' is the formal act by which the form and content of a proposed treaty text are established. As a general rule, the adoption of the text of a treaty takes place through the expression of the consent of the States participating in the treaty-making process. Treaties that are negotiated within an international organization will usually be adopted by a resolution of a representative organ of the organization whose membership more or less corresponds to the potential participation in the treaty in question. A treaty can also be adopted by an international conference which has specifically been convened for setting up the treaty, by a vote of two thirds of the states present and voting, unless, by the same majority, they have decided to apply a different rule.[139]

If the negotiation ends and the text of the treaty is acceptable for the participants, the text has to be finalized before the signature. The term '*authentication*' refers to the procedure whereby the text of a treaty is established as authentic and definitive. Once a treaty has been authenticated, states cannot unilaterally change its provisions. If states which negotiated a given treaty do not agree on specific procedures for authentication, a treaty will usually be authenticated by signature, signature ad referendum or the initialling by the representatives of those states.[140]

The text of a treaty is established as authentic and definitive:

(a) By such procedure as may be provided for in the text or agreed upon by the States participating in its drawing up; or

(b) Failing such procedure, by the signature, signature ad referendum or initialing by the representatives of those States of the text of the treaty or of the Final Act of a conference incorporating the text.[141]

3. Consent

The **consent** of a State to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed.[142]

a. Signature

1. The consent of a State to be bound by a treaty is expressed by the signature of its representative when:

(a) The treaty provides that signature shall have that effect;

[138] Kovács 2011. p. 92-93.

[139] Convention 1969. Part II. Art. 9.

[140] Glossary of terms relating to Treaty actions [Glossary] https://treaties.un.org/Pages/Overview.aspx?path=overview/glossary/page1_en.xml#full

[141] Convention 1969. Part II. Art. 10.

[142] Convention 1969. Part II. Art. 11.

(b) It is otherwise established that the negotiating States were agreed that signature should have that effect; or
(c) The intention of the State to give that effect to the signature appears from the full powers of its representative or was expressed during the negotiation.
2. For the purposes of paragraph 1 :
(a) The initialling of a text constitutes a signature of the treaty when it is established that the negotiating States so agreed;
(o) The signature ad referendum of a treaty by a representative, if confirmed by his State, constitutes a full signature of the treaty.[143]

A representative may sign a treaty '*ad referendum*', under the condition that the signature is confirmed by his State. In this case, the signature becomes definitive once it is confirmed by the responsible organ.[144] It's not a signature of full value but the government has to confirm the treaty. It happens usually in two cases: when the representative of the State went beyond his mandate during the negotiation or because of the length of the internal constitutional procedure the State's Foreign Affairs Minister didn't get governmental authorization in time, but the positive decision is foreseeable.[145]

Some treaties provide that States can express their consent to be legally bound just upon signature (definitive signature). This method is most commonly used in bilateral treaties and rarely used for multilateral treaties. In the latter case, the entry into force provision of the treaty expressly provides that a State can express consent to be bound by definitively signing the treaty, signing without reservation as to ratification, acceptance or approval.[146] Where the signature is subject to ratification, acceptance or approval, the signature does not establish the consent to be bound. However, it is a means of authentication and expresses the willingness of the signatory State to continue the treaty-making process. The signature qualifies the signatory State to proceed to ratification, acceptance or approval. It also creates an obligation to refrain, in good faith, from acts that would defeat the object and the purpose of the treaty.[147]

A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when:

(a) It has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or

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[143] Convention 1969. Part II. Art. 12.

[144] Glossary

[145] Kovács 2011. pp. 96-97.

[146] UN Treaty Handbook p.6.

[147] Glossary

(b) It has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.[148]

b. Exchange of instruments

The consent of States to be bound by a treaty constituted by instruments ex changed between them is expressed by that exchange when:

(a) The instruments provide that their exchange shall have that effect; or
(b) It is otherwise established that those States were agreed that the exchange of instruments shall have that effect.[149]

c. Ratification, acceptance and approval

1. The consent of a State to be bound by a treaty is expressed by ratification when:

(a) The treaty provides for such consent to be expressed by means of ratification;
(b) It is otherwise established that the negotiating States were agreed that ratification should be required;
(c) The representative of the State has signed the treaty subject to ratification; or
(d) The intention of the State to sign the treaty subject to ratification appears from the full powers of its representative or was expressed during the negotiation.

2. The consent of a State to be bound by a treaty is expressed by acceptance or approval under conditions similar to those which apply to ratification.[150]

Where the signature is subject to ratification, acceptance or approval, the signature does not establish the consent to be bound. However, it is a means of authentication and expresses the willingness of the signatory State to continue the treaty-making process. The signature qualifies the signatory State to proceed to ratification, acceptance or approval. It also creates an obligation to refrain, in good faith, from acts that would defeat the object and the purpose of the treaty.[151]

The instruments of 'acceptance' or 'approval' of a treaty have the same legal effect as ratification and consequently express the consent of a State to be bound by a treaty. In the practice of certain States acceptance and approval have been

[148] Convention 1969. Part II. Art. 18.

[149] Convention 1969. Part II. Art. 13.

[150] Convention 1969. Part II. Art. 14.

[151] Glossary

used instead of ratification when, at a national level, constitutional law does not require the treaty to be ratified by the head of State.[152]

d. Accession

The consent of a State to be bound by a treaty is expressed by accession when:
(a) The treaty provides that such consent may be expressed by that State by means of accession;
(b) It is otherwise established that the negotiating States were agreed that such con sent may be expressed by that State by means of accession; or
(c) All the parties have subsequently agreed that such consent may be expressed by that State by means of accession.[153]

'Accession' is the act whereby a State accepts the offer or the opportunity to become a party to a treaty already negotiated and signed by other States. It has the same legal effect as ratification. Accession usually occurs after the treaty has entered into force. The Secretary-General of the United Nations, in his function as depositary, has also accepted accessions to some conventions before their entry into force. The conditions under which accession may occur and the procedure involved depend on the provisions of the treaty. A treaty might provide for the accession of all other States or for a limited and defined number of States. In the absence of such a provision, accession can only occur where the negotiating States were agreed or subsequently agree on it in the case of the State in question.[154]

4. Depository

After a treaty has been concluded, the written instruments, which provide formal evidence of consent to be bound, and also reservations and declarations, are placed in the custody of a depositary. Unless the treaty provides otherwise, the deposit of the instruments of ratification, acceptance, approval or accession establishes the consent of a State to be bound by the treaty. For treaties with a small number of parties, the depositary will usually be the government of the State on whose territory the treaty was signed. Sometimes various States are chosen as depositaries. Multilateral treaties usually designate an international organization or the Secretary-General of the United Nations as depositaries. The depositary must accept all notifications and documents related to the treaty, examine whether all formal requirements are met, deposit them, register the treaty and notify all relevant acts to the parties concerned.[155]

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[152] Glossary

[153] Convention 1969. Part II. Art. 15.

[154] Glossary

[155] Glossary

Unless the treaty otherwise provides, instruments of ratification, acceptance, approval or accession establish the consent of a State to be bound by a treaty upon:

(a) Their exchange between the contracting States;

(b) Their deposit with the depositary; or

(c) Their notification to the contracting States or to the depositary, if so agreed.[156]

5. Registration and publication

Every treaty and every international agreement entered into by any Member of the United Nations after the present Charter comes into force shall as soon as possible be registered with the Secretariat and published by it. No party to any such treaty or international agreement which has not been registered in accordance with the provisions of paragraph 1 of this Article may invoke that treaty or agreement before any organ of the United Nations.[157] Treaties shall, after their entry into force, be transmitted to the Secretariat of the United Nations for registration or filing and recording, as the case may be, and for publication.[158]

6. Entry into force

Typically, the provisions of the treaty determine the date on which the treaty enters into force. Where the treaty does not specify a date, there is a presumption that the treaty is intended to come into force as soon as all the negotiating States have consented to be bound by the treaty. Bilateral treaties may provide for their entry into force on a particular date, upon the day of their last signature, upon exchange of the instruments of ratification or upon the exchange of notifications. In cases where multilateral treaties are involved, it is common to provide for a fixed number of States to express their consent for entry into force. Some treaties provide for additional conditions to be satisfied, e.g., by specifying that a certain category of States must be among the consenters. The treaty may also provide for an additional time period to elapse after the required number of countries has expressed their consent or the conditions have been satisfied. A treaty enters into force for those states which gave the required consent. A treaty may also provide that, upon certain conditions having been met, it shall come into force provisionally.[159]

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[156] Convention 1969. Part II. Art. 16.

[157] UN Charter Art. 102.

[158] Convention 1969. Part VII. Art. 80.

[159] Glossary

Reservations

A reservation is a declaration made by a State by which it purports to exclude or alter the legal effect of certain provisions of the treaty in their application to that State. A reservation enables a State to accept a multilateral treaty as a whole by giving it the possibility not to apply certain provisions with which it does not want to comply. Reservations can be made when the treaty is signed, ratified, accepted, approved or acceded to. Reservations must not be incompatible with the object and the purpose of the treaty. Furthermore, a treaty might prohibit reservations or only allow for certain reservations to be made.[160]

A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless:

(a) The reservation is prohibited by the treaty;
(b) The treaty provides that only specified reservations, which do not include the reservation in question, may be made; or
(c) In cases not falling under sub-paragraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.[161]

Interpretation of treaties

After the treaty is negotiated, signed, ratified and valid, the interpretation of the provision can be questionable. The well interpretation of the treaty is inevitable in order to use it in practice. If the provisions of the treaty are clear, the interpretation does not needed, because '*in claris non fit interpretatio*', so when a rule is clearly intelligible, there is no need of proposing a (usually extensive) interpretation. Because the multilateral treaties have to be accepted by several parties and they have to agree in one text, the clauses are usually very general and interpretation is needed. Even the Vienna Convention provides guidelines for interpretation in Section 3. For interpretation, several principles can be used as a helping guide for the parties to the treaty. The authentic interpretation is given by the contracting parties, those who had accepted the treaty. In most of the cases the first Articles of the treaty defines the terms that are used in the text of the treaty, providing interpretation.[162]

A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.[163]

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[160] Glossary

[161] Convention 1969. Part II. Art. 19.

[162] Kovács 2011. p. 120.

[163] Convention 1969. Part III. Art. 31. 1.

The scientific interpretation of the treaty is provided by the scholars and usually written in the relevant literature, but because of the nature of this interpretation, it's not obligatory.[164]

The aim of interpretation is to search and reconstruct the will of the contracting parties at the time of the adaption of the treaty. In the light of the Mavrommatis Case, the term of interpretation means the 'to the interpretation or the application of the provisions'.[165]

The tools of interpretation are the following:

– **grammatical interpretation**: based on the official language of the treaty

1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.

2. A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree.

3. The terms of the treaty are presumed to have the same meaning in each authentic text.

4. Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.[166]

– **travaux preparatoires - historical interpretation**: preparatory works contain the various documents including reports of discussions, hearings and floor debates that were produced during the drafting of a Convention, treaty or an agreement. *Travaux preparatoires* of a statute or treaty are usually recorded so that it can be used later in order to interpret that particular statute or treaty.[167]

– **logical interpretation**: *argumentum a maiori ad minus* (from the larger scale argument to the smaller one); *argumentum a contrairo* (argument from the contrary. An argument for different treatment made by negative reasoning from another argument.); *inclusio unius-exclusio alterus* (including one excludes the other)

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[164] Kovács 2011. p. 121.

[165] The Mavrommatis Palestine Concessions August 30th, 1924. No.2. p. 15.

[166] Convention 1969. Part III. Art. 33.

[167] https://definitions.uslegal.com/t/travaux-preparatoires/

– **taxonomical interpretation**: how the international treaty can be settled into the existing system of international law in the light of international treaties, international customary law and other sources of law.

– **practical interpretation**: the enforcement of the treaty subject to interpretation.

– **teleological interpretation**: interpretation based on the aims of the treaty.

The interpretation of the treaty has to be proceeded under the principles of '*pacta sunt servanda*', and the requirement of good faith.[168]

Invalidity and termination of treaties

I. Invalidity

The section sentenced to invalidity of the Vienna Convention can be subdivided into three categories. The grounds of invalidity can be separated into two main parts, the absolute and relative grounds of invalidity.

I.1. *Absolute Invalidity*

A. Coercion

In international relations a large variety of influences and pressure can be identified, that can be used by the stronger States against the weaker ones in order to add or delete provisions, lines from the treaties.[169] The problem was raised by Judge Padilla Nervo at the International Court in the Fisheries Jurisdiction case when he stated that: "there are moral and political pressures which cannot be proved by the so called documentary evidence, but which are in fact indisputably real and which have, in history, given rise to treaties and conventions claimed to be freely concluded and subjected to the principle of *pacta sunt servanda*."[170]

The coercion has two main types:

1. Against the representatives of the State (coercion against person)

The expression of a State's consent to be bound by a treaty which has been pro cured by the coercion of its representative through acts or threats directed against him shall be without any legal effect.[171]

[168] Kovács 2011. pp. 122-125.

[169] Shaw 2008. 943.

[170] ICJ Reports, 1973, p. 47; 55 ILR, p. 227

[171] Convenion 1969. Part V. Section 2. Art. 51.

2. Against the State (coercion against State)

A treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations.[172]

B. Conflict with ius cogens

A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.[173]

I.2. *Relative Invalidity*

Within relative invalidity the first two cases (A and B) are covering the issues in which the representative of the State, when expressing consent to be bound by a treaty on its behalf, violates its internal law or exceeded his power.[174]

A. Competence – violation of international law about the competence to conclude treaties

There was a question among international lawyers whether the breach of municipal law can cause the invalidity of treaties or not. The issue is settled by the Vienna Convention in two paragraphs and the International Court of Justice also faced with the problem at the case of Cameroon v. Nigeria.[175] The Court stated that "there is no general legal obligation for states to keep themselves informed of legislative and constitutional developments in other states which are or may become important for the international relations of these states".[176]

1. A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.

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[172] Convenion 1969. Part V. Section 2. Art. 52.

[173] Convenion 1969. Part V. Section 2. Art. 53.

[174] Nahlik, S. E. : The Grounds of Invalidity and Termination of Treaties. 65 Am. J. Int'L. 736 1971. p. 740.

[175] Shaw 2008. p. 940.

[176] ICJ Reports, 2002, pp. 430-431.

2. A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith.[177]

B. Exceeding competence

If the authority of a representative to express the consent of a State to be bound by a particular treaty has been made subject to a specific restriction, his omission to observe that restriction may not be invoked as invalidating the consent expressed by him unless the restriction was notified to the other negotiating States prior to his expressing such consent.[178]

C. Error

The scope of error as a reason for invalidation is very limited in international law. The case, where it was raised in practice, called the 'Temple case'. "The International Court of Justice rejected Thailand's argument that a particular map contained a basic error and therefore it was not bound to observe it, since the plea of error cannot be allowed as an element vitiating consent if the party advancing it contributed by its own conduct to the error, or could have avoided it, or if the circumstances were such as to put that party on notice of a possible error."[179]

1. A State may invoke an error in a treaty as invalidating its consent to be bound by the treaty if the error relates to a fact or situation which was assumed by that State to exist at the time when the treaty was concluded and formed an essential basis of its consent to be bound by the treaty.

2. Paragraph 1 shall not apply if the State in question contributed by its own conduct to the error or if the circumstances were such as to put that State on notice of a possible error.

3. An error relating only to the wording of the text of a treaty does not affect its validity; article 79 then applies.[180]

D. Fraud

If a State has been induced to conclude a treaty by the fraudulent conduct of another negotiating State, the State may invoke the fraud as invalidating its consent to be bound by the treaty.[181]

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[177] Convenion 1969. Part V. Section 2. Art. 46.

[178] Convenion 1969. Part V. Section 2. Art. 47.

[179] Shaw 2008. pp. 941-942.

[180] Convenion 1969. Part V. Section 2. Art. 48.

[181] Convenion 1969. Part V. Section 2. Art. 49.

E. Corruption

If the expression of a State's consent to be bound by a treaty has been procured through the corruption of its representative directly or indirectly by another negotiating State, the State may invoke such corruption as invalidating its consent to be bound by the treaty.[182]

The procedure for invalidation and the Consequences of invalidity

The differentiation between refers to the grounds. The breach of municipal law, error, fraud and corruption can be invoked by the concerned party, but the so called absolute grounds can be invoked by any party to the treaty. The absolute invalidity affects to whole treaty but in the case of error, fraud and corruption, the treaty can be partly invalidated if the affected part can be separated. [183]

1. A treaty the invalidity of which is established under the present Convention is void. The provisions of a void treaty have no legal force.

2. If acts have nevertheless been performed in reliance on such a treaty:

(a) Each party may require any other party to establish as far as possible in their mutual relations the position that would have existed if the acts had not been performed;

(b) Acts performed in good faith before the invalidity was invoked are not rendered unlawful by reason only of the invalidity of the treaty.

3. In cases falling under articles 49, 50, 51 or 52, paragraph 2 does not apply with respect to the party to which the fraud, the act of corruption or the coercion is imputable.

4. In the case of the invalidity of a particular State's consent to be bound by a multilateral treaty, the foregoing rules apply in the relations between that State and the parties to the treaty.[184]

II. Termination

Denunciation can be interpreted as a unilateral act by which a party would like to terminate its participation in a treaty. Lawful denunciation of a bilateral treaty terminates it. The term of denunciation is used in connection with multilateral treaties as well, but the better term is withdrawal in this case, because if one party leaves the multilateral treaty, it won't terminate the whole treaty. Nowadays the

[182] Convenion 1969. Part V. Section 2. Art. 50.

[183] Kovács 2011. pp.118-119.

[184] Convenion 1969. Part V. Section 5. Art. 69.

treaties become more specific and comprehensive at the field of duration and termination, but the Vienna Treaty also provides regulation for termination.[185]

II.1. *Based on the will of the parties*

– Terminating event

– **Time or Event**

The termination of a treaty or the withdrawal of a party may take place: in conformity with the provisions of the treaty.[186] A treaty may come to an end if its purposes and objects have been fulfilled or if it is clear from its provisions that it is limited in time and the requisite period has elapsed.[187]

– **Number of parties to the treaty fall below the minimum**

Unless the treaty otherwise provides, a multilateral treaty does not terminate by reason only of the fact that the number of the parties falls below the number necessary for its entry into force.[188]

Renunciation

Renunciation is the unilateral pronouncement towards the other parties or party that the forwarder does not want to be a party to the treaty. The international law hasn't got any formal requirements for these unilateral pronouncements. The pronouncement considered as done if the addressee received it. If there is a period of notice the starting time lasts from the aforementioned date.[189]

Except as the treaty or the present Convention otherwise provide, any notification or communication to be made by any State under the present Convention shall:

(a) If there is no depositary, be transmitted direct to the States for which it is intended, or if there is a depositary, to the latter;
(b) Be considered as having been made by the State in question only upon its receipt by the State to which it was transmitted or, as the case may be, upon its receipt by the depositary;

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[185] Aust 2010. p. 93.

[186] Convenion 1969. Part V. Section 2. Art. 54. a)

[187] Shaw 2008. p. 946.

[188] Convenion 1969. Part V. Section 2. Art. 55.

[189] Nagy Károly 1999. pp. 394-395.

(c) If transmitted to a depositary, be considered as received by the State for which it was intended only when the latter State has been informed by the depositary in accordance with article 77, paragraph 1(e).[190]

Termination by the definite understanding of the parties

– **Mutual Consent**

The termination of a treaty or the withdrawal of a party may take place: at any time by consent of all the parties after consultation with the other contracting States.[191]

– **Derogation by later customary law**

In international law the customary international law and treaties are equal sources, so a norm that of customary international law can modify or terminate the international treaties or certain provisions of them.[192]

– **Revision**

1. A treaty shall be considered as terminated if all the parties to it conclude a later treaty relating to the same subject-matter and:
(a) It appears from the later treaty or is otherwise established that the parties intended that the matter should be governed by that treaty; or
(b) The provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time.

2. The earlier treaty shall be considered as only suspended in operation if it appears from the later treaty or is otherwise established that such was the intention of the parties.[193]

II. 2. *Based on the general rules of international law*

– **Performance**

The aim of the treaty has been completed and the will of the parties is to terminate the treaty after this provision has been fulfilled.

[190] Convenion 1969. Part VII. Art. 78.
[191] Convenion 1969. Part V. Section 2. Art. 54. b)
[192] Nagy Károly 1999. p. 397.
[193] Convenion 1969. Part V. Section 3. Art. 59.

– **Severance of diplomatic or consular relations or armed conflict between the parties or the effect of armed conflicts**

The severance of diplomatic or consular relations between parties to a treaty does not affect the legal relations established between them by the treaty except in so far as the existence of diplomatic or consular relations is indispensable for the application of the treaty.[194]

The armed conflict won't terminate the treaties between the conflicting parties automatically but under the rules of international law it might have a severe effect to the treaty. In some extend the armed conflict won't affect the force of the treaty e.g. in the case of treaties concerning the rules of warfare. In some cases because of the armed conflict the force of the treaty can be suspended e.g. the treaties concerning diplomatic relations. And in rare cases the treaties can be terminated as the effect of armed conflicts, especially the bilateral political agreements.[195]

– **Bilateral treaties terminate if one of the parties loses its statehood**

– **Supervening impossibility of performance**

The impossibility of performance can be a legal or actual impossibility.

1. A party may invoke the impossibility of performing a treaty as a ground for terminating or withdrawing from it if the impossibility results from the permanent disappearance or destruction of an object indispensable for the execution of the treaty. If the impossibility is temporary, it may be invoked only as a ground for suspending the operation of the treaty.[196]

2. Impossibility of performance may not be invoked by a party as a ground for terminating, withdrawing from or suspending the operation of a treaty if the impossibility is the result of a breach by that party either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.[197]

– **Fundamental change of circumstances (*clausula rebus sic stantibus*)**

A fundamental change of circumstances can be a reason of termination, but just if some requirements are ascertainable as they established by the Vienna Convention.

A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen

[194] Convenion 1969. Part V. Section 2. Art. 63.

[195] Nagy Károly 1999. p. 400.

[196] Convenion 1969. Part V. Section 2. Art. 61. 1.

[197] Convenion 1969. Part V. Section 2. Art. 61. 2.

by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless:

(a) The existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and
(b) The effect of the change is radically to transform the extent of obligations still to be performed under the treaty.

There are exceptions, when the reason of termination cannot be called even is the requirements are ascertainable.

2. A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty:

(a) If the treaty establishes a boundary; or
(b) If the fundamental change is the result of a breach by the party invoking it either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.

3. If, under the foregoing paragraphs, a party may invoke a fundamental change of circumstances as a ground for terminating or withdrawing from a treaty it may also invoke the change as a ground for suspending the operation of the treaty.[198]

– **Material breach**

1. A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part.

2. A material breach of a multilateral treaty by one of the parties entitles:

(a) The other parties by unanimous agreement to suspend the operation of the treaty in whole or in part or to terminate it either:
  (i) In the relations between themselves and the defaulting State, or
  (ii) As between all the parties;
(b) A party specially affected by the breach to invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State;
(c) Any party other than the defaulting State to invoke the breach as a ground for suspending the operation of the treaty in whole or in part with respect to itself if the treaty is of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations under the treaty.

[198] Convenion 1969. Part V. Section 2. Art. 62.

3. A material breach of a treaty, for the purposes of this article, consists in:
(a) A repudiation of the treaty not sanctioned by the present Convention; or
(b) The violation of a provision essential to the accomplishment of the object or purpose of the treaty.

4. The foregoing paragraphs are without prejudice to any provision in the treaty applicable in the event of a breach.

5. Paragraphs 1 to 3 do not apply to provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties.[199]

Consequences of termination

1. Unless the treaty otherwise provides or the parties otherwise agree, the termination of a treaty under its provisions or in accordance with the present Convention:
(a) Releases the parties from any obligation further to perform the treaty;
(b) Does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination.

2. If a State denounces or withdraws from a multilateral treaty, paragraph 1 applies in the relations between that State and each of the other parties to the treaty from the date when such denunciation or withdrawal takes effect.[200]

NOTA BENE

- ✓ The main conventions connecting to international treaties
- ✓ The definition of international treaty
- ✓ The main names of international treaties
- ✓ Classification of treaties
- ✓ The general structure of international treaties
- ✓ The definition of contracting State, Party and Third State
- ✓ The main steps of the creation of international treaties
- ✓ The forms of consent
- ✓ Depository
- ✓ The definition of reservations
- ✓ The meaning of treaty-interpretation

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[199] Convention 1969. Part V. Section 2. Art. 60.

[200] Convenion 1969. Part V. Section 2. Art. 70.

- ✓ The tools of treaty-interpretation
- ✓ The meaning of invalidity of treaties and the grounds
- ✓ The meaning of termination of treaties and the grounds

Recommended reading

UN Treaties: https://treaties.un.org/

Draft articles on the effects of armed conflicts on treaties. Yearbook of the International Law Commission, 2011, vol. II, Part Two.

Guide to Practice on Reservations to Treaties. Yearbook of the International Law Commission, 2011, vol. II, Part Two.

Ulf Linderfalk: On The Interpretation of Treaties. Springer 2007.

Available at: http://www.corteidh.or.cr/tablas/r32592.pdf

Chapter 6 The Peaceful Settlement of International Disputes

As it is easily recognizable from the history of international law, States always had disagreements or disputes over territories or rights. Even the creation of the first known international treaty was connected to a border dispute between two City-States, Umma and Lagash.

The peaceful settlement of international disputes is one of the **core principles of international law** as it clearly stated in the I. Chapter of the UN Charter:

"T*o maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace*;" (Art.1.)

The Article 2 of the UN Charter establishes an obligation for the Member States:

"*The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles.*

3. All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered."

The United Nations has accepted several important Resolutions regarding to the peaceful dispute settlement. The **2625 (XXV) Resolution** was accepted by the General Assembly in 1970 and still considered as one of the main documents of dispute settlement. The name of the Resolution is the following: Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (usually referred as Resolution on Friendly Relations and Co-operation among States).[201]

Definition of dispute

Firstly, the definition of the term '**dispute**' has to be settled. Generally a dispute is an argument or disagreement between persons or States because of various reasons such as interest, will or personal believes. The international law follows

[201] A/RES/25/2625 24 October 1970

the definition that was created by the Permanent Court of International in the **Mavrommatis Case**:[202]

"*A dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons*."

Historically the most common disputes were over borders or territories, nowadays environmental issues and disputes over natural resources or over the continental shelf[203] become more and more important in the practice of the international courts.

There is a theoretical difference between legal disputes and political disputes. A **legal dispute** is a disagreement over the existence a legal duty or right, or over the extent and kind of compensation that may be claimed by the injured party for a breach of such duty or right. In the cases of the International Court of Justice it was clearly stated that the **political aspect** of a legal dispute does not compromise the procedure of the ICJ if the jurisdiction is ascertainable. A great example for the usage of this principle is the **Nicaragua case**:[204]

"…*Court has never shied away from a case brought before it merely because it had political implications or because it involved serious elements of the use of force*." (point 96.)

Legal Background

The aforementioned topic of dispute settlement has a strong legal background in the forms of international treaties, conventions and other binding/non-binding documents. The significant law goes back to the **Hague Peace Conferences that were held in 1899 and in 1907**. The Convention for the Pacific Settlement of International Disputes was created in 1907 and it's a still binging document, means a real obligation for the States. The relating UN documents were mentioned already, but hereby the UN Charter has to be highlighted again, as specific Chapters of the UN Charter are sentenced to the pacific dispute resolution among States.

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[202] THE MAVROMMATIS PALESTINE CONCESSIONS SERIES A – No 2 August 30th, 1924. p. 11.

[203] „The continental shelf of a coastal State comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance." United Nations Convention on the Law of the Sea (UNCLOS) 1982. Art. 76.

[204] Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984, p. 392.

Accepted documents of the 1899 Hague Peace Conference:

- A non-binding Final Act of the International Peace Conference ('Final Act of the 1899 Conference'),
- The Convention for the Pacific Settlement of International Disputes ['Convention I (1899)]
- the Convention with Respect to the Laws and Customs of War by Land ['Convention II (1899)']
- The Convention for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention ['Convention III (1899)']
- The Hague Declarations of 1899 [IV, 1] Prohibiting the Discharge of Projectiles and Explosives from Balloons
- Declaration [IV, 2] concerning Asphyxiating Gases
- Declaration [IV, 3] concerning Expanding Bullets)
- Six *voeux* (included in the Final Act of the 1899 Conference)

Accepted documents of the 1907 Hague Peace Conference:

- Convention for the Pacific Settlement of International Disputes [Convention I (1907)]
- Convention respecting the Limitation of the Employment of Force for Recovery of Contract Debts [Convention II (1907)]
- Convention relative to the Opening of Hostilities [Convention III (1907)]

This convention sets out the accepted procedure for a state making a declaration of war.

- Convention respecting the Laws and Customs of War on Land [Convention IV (1907)]
- Convention relative to the Rights and Duties of Neutral Powers and Persons in case of War on Land [Convention V (1907)]
- Convention relative to the Legal Position of Enemy Merchant Ships at the Start of Hostilities [Convention VI (1907)]
- Convention relative to the Conversion of Merchant Ships into War-ships [Convention VII (1907)]
- Convention relative to the Laying of Automatic Submarine Contact Mines [Convention VIII (1907)]
- Convention concerning Bombardment by Naval Forces in Time of War [Convention IX (1907)]
- Convention for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention [Convention X (1907)]
- Convention relative to Certain Restrictions with regard to the Exercise of the Right of Capture in Naval War [Convention XI (1907)]
- Convention relative to the Establishment of an International Prize Court [Convention XI (1907)]

- Convention concerning the Rights and Duties of Neutral Powers in Naval War [Convention XII (1907)]
- Declaration Prohibiting the Discharge of Projectiles and Explosives from Balloons [Convention XIII (1907)]

The VI Chapter of the UN Charter called the 'Pacific Settlement of Disputes' and consist the basic issues sentenced to dispute settlement.

The methods of dispute settlement

- Diplomatic (non-adjudicatory) Procedures:
  - Negotiation
  - Good offices
  - Mediation
  - Commission of Inquiry (Inquiry)
  - Conciliation
- Judicial Settlement:
  - Arbitration: ad hoc and the Permanent Court of Arbitration (PCA)
  - The International Court of Justice (ICJ) (predecessor: Permanent Court of International Justice (PCIJ)
- The procedures of International Organizations

Article 33 of the VI Chapter of the UN Charter provides a 'list' with dispute settlement methods for the States that they can choose in a case of pacific dispute settlement:

"*The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice. The Security Council shall, when it deems necessary, call upon the parties to settle their dispute by such means*."

Diplomatic (non-adjudicatory) Procedures

The diplomatic methods don't have a binding character but the disputant parties may accept the proposal of the third party.

Negotiation

Negotiation is the most basic way of settling differences. It's a back-and-forth communication between the parties to the conflict with the goal of trying to find a solution. Negotiation allows the parties to participate directly in decisions that

affect them.[205] Direct negotiation is a fundamental mean of resolving international disputes and it was established and formed by international law and the States' practice as well. It's a prompt and flexible way to settle the disputes between States and can be used in order to solve both political and legal disputes. Negotiation is the most effective tool to settle the international disputes in a simple and peaceful way. During the negotiation only the disputants are attending, no third party involved. The result of negotiation may bring rules for the future, for example bilateral agreements. Negotiation can be used as a first step before other conflict management tools in order to clear the background of the disagreement. There are some drawbacks of negotiation, indeed, such as it's not objective in some cases and there is always a weaker party among the disputants with less opportunities or resources, and as a result the interests of this party can be undermined by the other parties to the dispute.

At the international field, when we are talking about the disputes between States, several factors have to be considered in order to achieve a successful negotiation: the disputants have to be committed for a successful dispute resolution; only high level negotiations can oblige the States later (ministerial or presidential level); the will of the States to compromise.

Good offices

In comparison with negotiation, there is a third party involved to good offices who is trying to call negotiation between the conflicting States into existence. Good offices means a friendly offer of service by a third State to parties involved in the dispute. Offering good offices does not consider as an unfriendly act. The good offices can be a real technical help as well, for example a neutral State provides a place for disputants to negotiate. The third party offering good offices must be acceptable to all the parties. There are several examples at international field for good offices, for example UN officer Brian Urquhart represented the Secretary General's office for many years, proving good offices in the Congo, the Middle East, Cyprus, and Namibia.

Mediation

The difference between good offices and mediation is that, whereas good offices consists in various kinds of actions tending to call negotiation between conflicting States into existence, mediation consist a direct conduct of negotiations between the parties. Good offices is often confused with mediation, on the other hand diplomatic practice and treaties do not always distinguish between good offices and mediation, because both consists of a friendly interposition of a third power to adjust differences and lead to a pacific solution of the dispute between two or more States. As a result, treaties and international conventions tend to include good offices

[205] Methods for Resolving Conflicts and Disputes, Oklahoma Bar Association http://www.okbar.org/public/Brochures/methodsForResolvingConflictsAndDisputes.aspx

in the same grouping with mediation. Thus the Pact of Bogota (1948) deals with Procedures of Good Offices and Mediation together under Chapter II. It might be convenient to say that "Good Offices" stops where mediation begins, if the degree of participation by the third party is taken into consideration. There may as such be border line cases where the two procedures are hardly distinguishable. The role of the mediator is to assist the parties in the settlement of the controversies in the simplest and most direct manner, avoiding formalities and seeking an acceptable solution.[206] The World Bank provided good offices and mediated the solution to the Indus River dispute, which resulted in the negotiation of the 1960 Indus Waters Treaty. Another example of a mediated dispute is the Israeli – Jordanian bilateral negotiations which were combined with informal discussions where American and Russian diplomats acted as mediators which resulted in the 1994 Treaty of Peace between Israel and Jordan.[207]

Commission of Inquiry

The Hague Convention for the Pacific Settlement of International Disputes (1899 and 1907) provides detailed rules for this dispute settlement procedure in Part III. 'International Commissions of Inquiry'. This form of dispute settlement is very useful when the disputant States need 'fact-finding', so the dispute arises mainly from the background, the facts. When the fist Convention for the Pacific Settlement of International Disputes was accepted in 1899, several rules were created for Inquiry. In 1904, the Dogger Bank Case[208] had a huge role in the development of the procedure of Commission of Inquiry and the developed rules were incorporated to the Convention 1907. The Dogger Bank Incident (also known as the North Sea Incident or the Russian Outrange) took place in 1904. Russia was at war with Japan and a number of Russian warships mistook British trawlers for Japanese Navy ships and fired on them. In the chaotic incident a number of Russian ships also fired at each other. The incident came close to sparking a war between Britain and Russia.[209] The Dogger Bank Case was the first time when the Inquiry procedure was used in practice as a conflict management tool.

The definition of Commission of Inquiry under the Hague Convention:

"*In disputes of an international nature involving neither honour nor vital interests, and arising from a difference of opinion on points of facts, the Contracting Powers deem it expedient and desirable that the parties who have not been able*

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[206] Sucharitku, Sompong: *Good Offices as a Peaceful Means of Settling Regional Differences* 1968. International Arbitration, Liber Amicorum for Martin Domke, pp. 338-347. (Pieter Sanders, ed., Martinis Nijhoff 1967)

[207] http://www.unwatercoursesconvention.org/the-convention/part-vi-miscellaneous-provisions/article-33-settlement -of-disputes/33-1-5-good-offices-and-mediation/

[208] The Dogger Bank Case (Great Britain v. Russia), (1908) 2 Am. J. Int'l L. 931-936 (I.C.I. Report of 26 Feb. 1905)

[209] In details: http://britishseafishing.co.uk/the-dogger-bank-incident/

to come to an agreement by means of diplomacy, should, as far as circumstances allow, institute an International Commission of Inquiry, to facilitate a solution of these disputes by elucidating the facts by means of an impartial and conscientious investigation." (Art.9.)

International Commissions of Inquiry are constituted by special agreement between the parties in dispute, called *Inquiry Convention* that consist: the facts to be examined; it determines the mode and time in which the Commission is to be formed and the extent of the powers of the Commissioners and procedural matters (where the Commission is to sit, and whether it may remove to another place, the language the Commission shall use and the languages the use of which shall be authorized before it, as well as the date on which each party must deposit its statement of facts, and, generally speaking, all the conditions upon which the parties have agreed).

There are more frames for Inquiry procedure, such as the PCA has also adopted Optional Rules for Fact-finding Commissions of Inquiry. The Espoo Convention (Convention on Environmental Impact Assessment in a Transboundary Context) entered into force in 1997 and Article 3 and appendix IV of the Convention provide an inquiry procedure. The paragraph 15 of the appendix to decision III/2 is also relevant ("*Where a matter is being considered under an inquiry procedure under Article 3, paragraph 7, of the Convention, that matter may not be the subject of a submission under this decision*.").

Examples for Commissions of Inquires:

- On 19 January 2017, the Hawaiian Kingdom Government and Lance Paul Larsen entered into a Special Agreement to form a Fact-finding Commission of Inquiry under the auspices of the PCA because of the award[210] that was given in 2001: "*At one stage of the proceedings the question was raised whether some of the issues which the parties wished to present might not be dealt with by way of a fact-finding process. In addition to its role as a facilitator of international arbitration and conciliation, the Permanent Court of Arbitration has various procedures for factfinding, both as between States and otherwise*."
- Independent International Commission of Inquiry on the Syrian Arab Republic was established on 22 August 2011 by the UN Human Rights Council in order to investigate all alleged violations of international human rights law since March 2011 in the Syrian Arab Republic.
- M B Shah Commission on illegal mining of iron ore and manganese in Goa. The Government of India has set up Shri Justice M. B. Shah Commission of Inquiry for Illegal Mining of Iron Ore and Manganese via Notification dated 22nd November, 2010.

[210] Larsen v. Hawaiian Kingdom, 119 Int'l L. Rep. 566, 597 (2001) 13.1.

- The first Protocol of 1977 to the Geneva Conventions of 1949 added an important new element to support the implementation of international humanitarian law. It provided in article 90 (set out on pp 10 - 13 along with the common article in the 1949 Conventions relating to enquiries) for the establishment of a permanent International Humanitarian Fact-Finding Commission (IHFFC).

Conciliation

Hudson, 1944: "Conciliation…is a process of formulating proposals of settlement after an investigation of the facts and an effort to reconcile opposing contentions, the parties to the dispute being left free to accept or reject the proposal formulated." Oppenheim, International Law, 1940: "The process of settling a dispute by referring it to a commission of persons whose task it is to elucidate the facts to make a report containing proposals for the settlement, but not having a binding character of an award or judgment."

When conciliation is used, a commission of inquiry is introduced to investigate and report on the facts surrounding a particular dispute. The report need not be in the form of an award, and the parties involved may freely decide whether or not they will give it any effect. Conciliation is distinguishable from arbitration in that the terms of a conciliation settlement constitute proposals to the disputing powers, whereas an arbitration settlement is binding.

Judicial Settlement

In comparison with the diplomatic dispute resolution methods and procedures, the judicial forms hold a significant difference, as the final result of the procedure, usually called award is binding for the parties, the decided case became "*res iudicata*". But in the family of judicial settlement methods various mechanisms are in present, providing a wide range of procedures for the disputants. The main parts of the aforementioned procedures are the arbitration and the permanent international judicial dispute settlement bodies.

Jennings: „*the adjudicative process can serve, not only to resolve classical legal disputes, but it can also serve as an important tool of preventive diplomacy in more complex situations*."

Arbitration

Arbitration is for resolving disputes by referring them to a neutral party for a binding decision, generally called an award. The arbitration body may consist of a single person or an arbitration board, usually of three members. The arbitration has two main types: the 'ad hoc' and the institutional arbitration (the Permanent Court of Arbitration). Arbitration has a long history since the ancient times as a method of alternative dispute resolution, especially at the field of commercial disputes. The modern history of arbitration connects the United States of America,

because of the Jay's treaty[211] of 1794 and the Alabama case[212] 1872. The Hague Convention for the Pacific Settlement of International Disputes also provides detailed rules in the Title IV On International Arbitration.

"*International arbitration has for its object the settlement of differences between States by judges of their own choice, and on the basis of respect for law*."

Ad hoc arbitration

Arbitration is a great way to settle the dispute and achieve a binding award as a result. In order to use the dispute via arbitration, the consent has to be given for the procedure. The consent can be grounded in several ways. Firstly by arbitration treaties, that are model treaties for the disputant parties, usually provide the basic procedural matters as well. The second way is the special provision of treaties, treaties with arbitration clauses. For example the UNCLOS also refers to arbitration as a dispute settlement method in Article 188.

"*Submission of disputes to a special chamber of the International Tribunal for the Law of the Sea or an ad hoc chamber of the Seabed Disputes Chamber. Disputes concerning the interpretation or application of a contract referred to in article 187, subparagraph (c)(i), shall be submitted, at the request of any party to the dispute, to binding commercial arbitration, unless the parties otherwise agree*."

Finally, when the disputants decide that they would like to settle the dispute via arbitration, a special type of document, a compromise has to be created by the parties. The compromise consists of the basics of the procedure, such as the creation of the arbitration body (the number of the involved arbitrators, the method of selection and replacement), the rules of procedure, and the questions that the board has to decide.

The arbitration award is final and binding; on the other hand there are some reasons for nullity the decision of the board as the following: invalidity of the compromise, corruption of a member of the tribunal, serious breach of the rules of procedure, serious breach of law, essential error. There is a possibility for the rectification of an error for example to correct a name or an amount. The case can be reopened if an unknown fact comes to the surface that was hidden at the time of the decision of the tribunal.

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[211] Treaty of Amity Commerce and Navigation, between His Britannick Majesty; and The United States of America, by Their President, with the advice and consent of Their Senate. It was negotiated by Supreme Court Chief Justice John Jay and signed between the United States and Great Britain on November 19, 1794. The reasons of increased tension were the British military posts located in America's northwestern territory and the British interference with American trade and shipping after the Revolutionary War.

[212] Alabama claims of the United States of America against Great Britain Award rendered on 14 September 1872 by the tribunal of arbitration established by Article I of the Treaty of Washington of 8 May 1871 8 May 1871 Vol. XXIX, pp.125-134 http://legal.un.org/riaa/cases/vol_XXIX/125-134.pdf Especially with regard to responsibilities of neutrals toward belligerents.

Arbitration is a useful process of dispute resolution because of its flexibility on the other hand for cases where expertise is required, the arbitrators can be chosen with regard to the expert field. The disputants have influence to several factors, such as they have the right to choose the arbitrators, lay down the applicable law, rules of procedures and to set the timetable for the board.

Permanent Court of Arbitration (PCA)

The PCA is an intergovernmental organization with 121 contracting parties, serves as a permanent frame for disputants who are seeking a final decision for their disagreement by arbitration. The PCA was established in 1899 to facilitate arbitration and other forms of dispute resolution between States. In the last years the PCA has developed into a modern, multi-faceted arbitral institution that is now perfectly situated at the juncture between public and private international law to meet the rapidly evolving dispute resolution needs of the international community. The PCA was officially established by the Convention for the Pacific Settlement of International Disputes, accepted at The Hague in 1899 during the first Hague Peace Conference. Chapter II on the Permanent Court of Arbitration:

"*With the object of facilitating an immediate recourse to arbitration for international differences, which it has not been possible to settle by diplomacy, the Signatory Powers undertake to organize a permanent Court of Arbitration, accessible at all times and operating, unless otherwise stipulated by the parties, in accordance with the Rules of Procedure inserted in the present Convention*."

The International Bureau is in The Hague, serves as record office for the Court and a channel for communications relative to the meetings of the Court. The members of the Court are potential arbitrators appointed by Contracting Parties. Each Contracting Party state is entitled to nominate up to four persons of "known competency in questions of international law, of the highest moral reputation and disposed to accept the duties of arbitrators" as "Members of the Court." Members of the Court are appointed for a term of six years, and their appointments can be renewed. In addition to forming a panel of potential arbitrators, the Members of the Court from each Contracting Party constitute a "national group," which is entitled to nominate candidates for the election to the International Court of Justice (article 4(1) of the Statute of the International Court of Justice). The Members of the Court (along with the judges of the ICJ) are among a handful of groups entitled to nominate candidates for the Nobel Peace Prize.[213] The PCA also provides special optional rules: Panels of Arbitrators and Experts for Environmental Disputes and Panels of Arbitrators and Experts for Space-related Disputes.

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[213] Members of the Court https://pca-cpa.org/en/about/structure/members-of-the-court/
List of the Members (2017) https://pca-cpa.org/wp-content/uploads/sites/175/2016/08/PCA-184006-v20-Current_List_Annex_1_Members_of_the_Court_update_20170531.pdf

The PCA Arbitration Rules (2012)[214] are a consolidation of four prior sets of PCA procedural rules: the Optional Rules for Arbitrating Disputes between Two States (1992); the Optional Rules for Arbitrating Disputes between Two Parties of Which Only One is a State (1993); the Optional Rules for Arbitration Between International Organizations and States (1996); and the Optional Rules for Arbitration Between International Organizations and Private Parties (1996).

The PCA has a significant case law, for example the Island of Palmas (or Miangas) (The Netherlands v. the United States of America, 1925.) or the Boundaries in the Island of Timor (The Netherlands v. Portugal, 1913.) but the importance of the court decreased by the creation of the ICJ.

International Court of Justice (ICJ)

History of the Court

After the First World War the League of Nations was created. The Article 14 of the Covenant of the League of Nations gave the Council of the League responsibility for formulating plans for the establishment of a Permanent Court of International Justice (PCIJ).

"*The Council shall formulate and submit to the Members of the League for adoption plans for the establishment of a Permanent Court of International Justice. The Court shall be competent to hear and determine any dispute of an international character which the parties thereto submit to it. The Court may also give an advisory opinion upon any dispute or question referred to it by the Council or by the Assembly*."

At the stage of planning it was decided that the PCIJ should have its permanent seat in the Peace Palace in The Hague, which it would share with the Permanent Court of Arbitration. It was accordingly in the Peace Palace that on 30 January 1922 the Court's preliminary session devoted to the elaboration of the Court's Rules opened, and it was there too that its inaugural sitting was held on 15 February 1922, with the Dutch jurist Bernard C. J. Loder as President. Institutionally the Permanent Court of International Justice was brought into being through, and by, the League of Nations, but it was nevertheless not a part of the League. There was a close association between the two bodies, which found expression inter alia in the fact that the League Council and Assembly periodically elected the Members of the Court and that both Council and Assembly were entitled to seek advisory opinions from the Court, but the latter never formed an integral part of the League, just as the Statute never formed part of the Covenant. In particular, a Member State of the League of Nations was not by this fact alone automatically a party to the Court's Statute. Between 1922 and 1940 the PCIJ dealt with 29 contentious cases between States and delivered 27 advisory opinions. Unfortunately the Second World War had serious consequences for the Court. In

[214] https://pca-cpa.org/wp-content/uploads/sites/175/2015/11/PCA-Arbitration-Rules-2012.pdf

1943, the United Kingdom Government took the initiative of inviting a number of experts to London to constitute an informal Inter-Allied Committee to examine the matter. This Committee, under the chairmanship of Sir William Malkin (United Kingdom), held 19 meetings, which were attended by jurists from 11 countries. In its report, which was published on 10 February 1944, it recommended that the Statute of any new international court should be based on that of the Permanent Court of International Justice; that advisory jurisdiction should be retained in the case of the new Court; that acceptance of the jurisdiction of the new Court should not be compulsory; that the Court should have no jurisdiction to deal with essentially political matters. In April 1946, the PCIJ was formally dissolved, and the International Court of Justice, meeting for the first time, elected as its President Judge José Gustavo Guerrero (El Salvador), the last President of the PCIJ. The Court appointed the members of its Registry (largely from among former officials of the PCIJ) and held an inaugural public sitting, on the 18th of that month. The first case was submitted in May 1947.[215]

The CHAPTER XIV of the UN Charter is "THE INTERNATIONAL COURT OF JUSTICE". All Members of the United Nations are ipso facto parties to the Statute of the International Court of Justice. A State which is not a Member of the United Nations may become a party to the Statute of the International Court of Justice on conditions to be determined in each case by the General Assembly upon the recommendation of the Security Council. (Art.93.) The Statue of the ICJ is attached to the UN Charter. The ICJ composed of 15 members, elected regardless of their nationality from among persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are jurisconsults of recognized competence in international law, but from different nationalities (Statue Art. 2.).

Election of judges

All States parties to the Statute of the Court have the right to propose candidates. These proposals are made not by the government of the State concerned, but by a group consisting of the members of the Permanent Court of Arbitration. The 15 judges of the ICJ elected to nine-year terms of office by the United Nations General Assembly and the Security Council. These organs vote simultaneously but separately. In order to be elected, a candidate must receive an absolute majority of the votes in both bodies. Because of this rule, sometimes a number of rounds of voting are necessary to be carried out. In order to ensure a measure of continuity, one third of the Court is elected every three years. Judges are eligible for re-election. Should a judge die or resign during his or her term of office, a special election is held as soon as possible to choose a judge to fill the unexpired part of the term. The distribution of membership of the Court among the principal regions of the globe

[215] http://www.icj-cij.org/court/index.php?p1=1&p2=1#Permanent

is as follows: Africa 3, Latin America and the Caribbean 2, Asia 3, Western Europe and other States 5, Eastern Europe 2, which corresponds to that of membership of the Security Council. Although there is no entitlement to membership on the part of any country, the Court has always included judges of the nationality of the permanent members of the Security Council.[216] No member of the Court can be dismissed unless, in the unanimous opinion of the other members, he has ceased to fulfill the required conditions.

The members of the Court, when engaged on the business of the Court, shall enjoy diplomatic privileges and immunities. (Art. 19.) Every member of the Court shall, before taking up his duties, make a solemn declaration in open court that he will exercise his powers impartially and conscientiously. (Art. 20.) No member of the Court may exercise any political or administrative function, or engage in any other occupation of a professional nature. (Art. 16.) The judges have to remain independent: 1. No member of the Court may act as agent, counsel, or advocate in any case. 2. No member may participate in the decision of any case in which he has previously taken part as agent, counsel, or advocate for one of the parties, or as a member of a national or international court, or of a commission of enquiry, or in any other capacity. 3. Any doubt on this point shall be settled by the decision of the Court. (Art. 17.)

Chambers

The Court may from time to time form one or more chambers, composed of three or more judges as the Court may determine, for dealing with particular categories of cases; for example, labour cases and cases relating to transit and communications. The Court may at any time form a chamber for dealing with a particular case. The number of judges to constitute such a chamber shall be determined by the Court with the approval of the parties. Cases shall be heard and determined by the chambers provided for in this article if the parties so request. (Art. 26.)

Jurisdiction of the Court

It's not a legislative body but in some cases has a great influence to international law and generates a general trend or a way, how to interpret the law (principles). The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force. The procedures can be separated into two main parts: the contentious cases, so the ICJ has capacity to decide disputes between States and the advisory opinion, when requested so to do by particular qualified entities.

The States parties to the present Statute may at any time declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in

[216] http://www.icj-cij.org/court/index.php?p1=1&p2=2

all legal disputes concerning: a. the interpretation of a treaty; b. any question of international law; c. the existence of any fact which, if established, would constitute a breach of an international obligation; d. the nature or extent of the reparation to be made for the breach of an international obligation. (Art. 36.)

Declarations made under Article 36 of the Statute of the Permanent Court of International Justice and which are still in force shall be deemed, as between the parties to the present Statute, to be acceptances of the compulsory jurisdiction of the International Court of Justice for the period which they still have to run and in accordance with their terms. Whenever a treaty or convention in force provides for reference of a matter to a tribunal to have been instituted by the League of Nations, or to the Permanent Court of International Justice, the matter shall, as between the parties to the present Statute, be referred to the International Court of Justice. (Art. 36.)

Four ways to declare the jurisdiction of the ICJ:

– The declarations referred to above may be made unconditionally or on condition of reciprocity on the part of several or certain states, or for a certain time.

– Compromise: a special document, usually in a form of a treaty in order to provide jurisdiction for the ICJ to decide the dispute between the States.

– Compromise clause: a clause is a written part of an existing treaty, developing jurisdiction for the ICJ in the case of dispute that arises in connection with the treaty.

– Forum prorogatum: if a State has not recognized the jurisdiction of the Court at the time when an application instituting proceedings is filed against it, that State has the possibility of accepting such jurisdiction subsequently to enable the Court to entertain the case: the Court thus has jurisdiction as of the date of acceptance in virtue of the rule of forum prorogatum.

The ground of the ICJ's decision

The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; b. international custom, as evidence of a general practice accepted as law; c. the general principles of law recognized by civilized nations; d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law. 2. This provision shall not prejudice the power of the Court to decide a case ex aequo et bono, if the parties agree thereto.

Procedure

In **contentious cases** the first stage of the procedure usually refers to the preliminary objections of the States involved to the case regarding to the procedure of the ICJ. These objections are connecting to the jurisdiction of the ICJ or denies the admissibility of the case (for example it's a political case, it's not a legal problem, not relevant, it has already settled, historical, just a part of a longer dispute that cannot be decided separately). The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party. There are two main stages of the procedure: the written and the oral. The written part is more significant in front of the international courts and tribunals, so in the procedure of the ICJ the written part has a more emphasis. The oral part gives the opportunity for the parties to summarize their opinions regarding to the case and provides opportunity for the judges to raise concerns or questions that remained unsettled after the written part of the procedure. During the procedure the burden of proof lies upon the party seeking to asset a particular fact or facts. There is an opportunity to intervene to the procedure if a third party would like to participate. Whenever a State consider that it has an interest of a legal nature which may be affected by the decision in the case, it may submit a request to the Court to be permitted to intervene. It shall be for the Court to decide upon this request. The decision is given by the judges under the rules of procedure. All questions shall be decided by a majority of the judges present and in the event of an equality of votes, the President or the judge who acts in his place shall have a casting vote. The decision of the court is final and binding; on the other hand in some cases there is an opportunity to revise the decision. The revision of the decision of the court is possible as the following: an application for revision of a judgment may be made only when it is based upon the discovery of some fact of such a nature as to be a decisive factor, which fact was, when the judgment was given, unknown to the Court and also to the party claiming revision, always provided that such ignorance was not due to negligence. The proceedings for revision shall be opened by a judgment of the Court expressly recording the existence of the new fact, recognizing that it has such a character as to lay the case open to revision, and declaring the application admissible on this ground. The Court may require previous compliance with the terms of the judgment before it admits proceedings in revision. The application for revision must be made at latest within six months of the discovery of the new fact. No application for revision may be made after the lapse of ten years from the date of the judgment. When the decision of the court raises concerns, there is an opportunity to ask the court to interpret the decision, but a hidden appeal has to be rejected. The decision has to be followed and fulfilled by the parties but in some cases the obliged former disputant fails to meet with this requirement. In this case the Security Council can be informed by the other party, on the other hand there I no obligation towards the Security Council to deliver a resolution.

The **advisory opinion** is usually not binding, delivered by the Court on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request. The written request containing an exact statement of the question upon which an opinion is required, and accompanied by all documents likely to throw light upon the question. For the advisory opinion the general procedural rules of the contentious cases are implicated.

NOTA BENE

- ✓ The peaceful dispute settlement as a main principle of international law
- ✓ The definition of dispute
- ✓ The legal sources of pacific dispute settlement
- ✓ The classification of peaceful dispute settlement procedures
- ✓ The diplomatic forms of dispute settlement
- ✓ The importance of arbitration
- ✓ Ad hoc and permanent arbitration
- ✓ Judicial dispute settlement
- ✓ The International Court of Justice

Recommended reading

Handbook on the Peaceful Settlement of Disputes between States, UN 1992.

Avaiable at: http://legal.un.org/cod/books/HandbookOnPSD.pdf

Chapter 7 Responsibility of States

The subject of State responsibility is a major area of interest in the development of international law since the first half of the twentieth century. It had been selected for codification under the League of Nations as well. It was one of the principal subjects of the conference in The Hague in 1930. In 1948, the United Nations General Assembly established the International Law Commission and State responsibility was selected amongst the first 14 topics to be dealt with by the new body. Later in 1997, the Commission appointed J. Crawford as Special Rapporteur and from 1998 to 2001 the ILC undertook a second reading of the draft Articles.[217]

The final version of the draft was adopted in 2001. The importance of the document was appreciated by the resolution adopted by the General Assembly on 6 December 2010.[218] With regard to the states the draft of Responsibility of States for Internationally Wrongful Acts (2001) was adapted. It's not a form of a treaty but the content of the draft can be considered as legally binding as part of international customary law, because it's widely approved and applied in practice, including by the International Court of Justice. With regard to the international organizations the ILC adopted a similar draft on the articles on the Responsibility of International Organizations (2011). The international law, especially conventions established special rules on responsibility considering environmental law, nuclear energy and activities in space.

The **Responsibility of States for Internationally Wrongful** Acts consists of four main parts:

- Part One (The Internationally Wrongful Act of the State, articles 1-27) is further divided into five Chapters (General Principles, articles 1-3; Attribution of Conduct to a State, articles 4-11; Breach of an International Obligation, articles 12-15; Responsibility of a State in Connection with the Act of another State, articles 16-19; Circumstances Precluding Wrongfulness, articles 20-27).
- Part Two (Content of the International Responsibility of a State, articles 28- 41) is divided into three Chapters (General Principles, articles 28-33; Reparation for Injuries, articles 34-39; Serious Breaches of Obligations under Peremptory Norms of General International Law, articles 40-41).

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[217] Crawford, James: *Articles on responsibility of states for internationally wrongful acts*. http://legal.un.org/avl/pdf/ha/rsiwa/rsiwa_e.pdf

[218] A/RES/65/19 Responsibility of States for internationally wrongful acts http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/65/19

- Part Three (The Implementation of the International Responsibility of a State, articles 42-54) consists of two Chapters (Invocation of the Responsibility of a State, articles 42-48; Countermeasures, articles 49-54).
- Part Four (articles 55-59) contains the final five General Provisions of the text.[219]

The international courts dealt with several cases concerning State's responsibility. It's general norm of international law that any breach of agreement creates an obligation of reparation. The Chorzow Factory Case[220] was a case of the Permanent Court of International Justice between Poland and Germany. There was an agreement between the two States (Geneva Upper Silesia Convention, 1922.). The main question was whether a State can be held responsible for expropriation of alien property if the breach of international law was committed by a Government's organs or officers.[221] The PCIJ affirmed in the Wimbledon Case that when a State commits an internationally wrongful act against another State international responsibility is established "immediately as between the two States".[222]

Principles of International Responsibility

Every internationally wrongful act of a State entails its international responsibility.

The internationally wrongful act is an act or omission of the State that constitutes a breach of an international obligation and is attributable to the State.

Supremacy of international law: the characterization of an act as internationally wrongful is governed by international law and not internal law.

The constituent elements of State responsibility

There is an internationally wrongful act of a State when conduct consisting of an action or omission: (a) is attributable to the State under international law; and (b) constitutes a breach of an international obligation of the State.[223]

1) **Breach of international obligations:** the characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as

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[219] *Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries* 2001. [Draft] http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf

[220] *Chorzow Factory Case* (Germany vs. Poland) 1928. P.C.I.J. (ser. A) No. 17 (Order of Sept. 13)

[221] http://lawhelpbd.com/international-law/auto-draft-9/

[222] *Case of the S.S. „Wimbledon"* United Kingdom, France, Italy & Japan v. Germany Judgment 1923, P.C.I.J., Series A, No. 1, p. 15, at p. 30

[223] Draft Art. 2.

lawful by internal law.[224] Every State has the duty to carry out in good faith its obligations arising from treaties and other sources of international law, and it may not invoke provisions in its constitution or its laws as an excuse for failure to perform this duty.[225] Any breach of international obligations can fulfill the criteria e.g. universal, bilateral or multilateral international agreements, customary international law. A wrongful act or offence is frequently preceded by preparatory actions which are not to be confused with the act or offence itself. It is as well to distinguish between the actual commission of a wrongful act (whether instantaneous or continuous) and the conduct prior to that act which is of a preparatory character and which "does not qualify as a wrongful act".[226] Damage is not an element of responsibility. It has relevance when deciding on reparation. The damage has different types: material, moral or political.[227]

2) **Attribution**: defines under what circumstances the act of persons and organs can be considered an act of the State, because the act as an entity always acts via a person or organ.
   a. **Organs of the State**: the general rule is that the only conduct attributed to the State at the international level is that of its organs of government, or of others who have acted under the direction, instigation or control of those organs, i.e. as agents of the State. It has different forms: legislative branch, executive branch or judicial branch.[228] The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State. An organ includes any person or entity which has that status in accordance with the internal law of the State.[229]
   b. **Conduct of persons or entities exercising elements of governmental authority**: The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.[230]

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[224] Draft Art. 3.

[225] General Assembly resolution 375 (IV) of 6 December 1949.

[226] *Gabčikovo-Nagymaros Project* (Hungary/Slovakia), Judgment, 1. C. J. Reports 1997, p. 7

[227] Kovács 2011. p. 463.

[228] Draft p. 38.

[229] Draft Art. 4.

[230] Draft Art. 5.

c. **Conduct of organs placed at the disposal of a State by another State**: The conduct of an organ placed at the disposal of a State by another State shall be considered an act of the former State under international law if the organ is acting in the exercise of elements of the governmental authority of the State at whose disposal it is placed.[231] The conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions.[232]
d. **Conduct directed or controlled by a State**: The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.[233]
e. **Conduct carried out in the absence or default of the official authorities**: The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority.[234]
f. **Conduct of an insurrectional or other movement**: The conduct of an insurrectional movement which becomes the new Government of a State shall be considered an act of that State under international law. The conduct of a movement, insurrectional or other, which succeeds in establishing a new State in part of the territory of a pre-existing State or in a territory under its administration shall be considered an act of the new State under international law. 3. This article is without prejudice to the attribution to a State of any conduct, however related to that of the movement concerned, which is to be considered an act of that State by virtue of articles 4 to 9.[235]
g. **Conduct acknowledged and adopted by a State as its own**: Conduct which is not attributable to a State under the preceding articles shall nevertheless be considered an act of that State under international law if and to the extent that the State acknowledges and adopts the conduct in question as its own.

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[231] Draft. Art. 6.
[232] Draft Art. 7.
[233] Draft Art. 8.
[234] Draft Art. 9.
[235] Draft Art. 10.

3) **The lack of circumstances precluding wrongfulness**: Chapter V sets out six circumstances precluding the wrongfulness of conduct that would otherwise not be in conformity with the international obligations of the State concerned. In general, there is a breach of international obligations which are attributable to the State, but in these circumstances the State won't be responsible. The invocation of a circumstance precluding wrongfulness in accordance with this chapter is without prejudice to (a) compliance with the obligation in question, if and to the extent that the circumstance precluding wrongfulness no longer exists; (b) the question of compensation for any material loss caused by the act in question.[236]
   a. **Consent**: Valid consent by a State to the commission of a given act by another State precludes the wrongfulness of that act in relation to the former State to the extent that the act remains within the limits of that consent.[237] The consent must be voluntary and valid with regard to the Draft. The consent cannot be contrary to peremptory norms. The consent has to be given before or during the breach of obligation. For example the in 1999 the NATO was bombing of Belgrade by troops using Hungarian air space and it was considered as lawful, because Hungary gave its consent to it.[238]
   b. **Self-defence**: The wrongfulness of an act of a State is precluded if the act constitutes a lawful measure of self-defence taken in conformity with the Charter of the United Nations.[239] The right to self-defence is governed by the 51 Art. of the UN Charter.[240] This is not to say that self-defence precludes the wrongfulness of conduct in all cases or with respect to all obligations. Examples relate to international humanitarian law and human rights obligations.[241] A famous case concerning self-defence is the Carolina Case: "…the destruction of the Caroline was an act of necessary self-defense".[242]

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[236] Draft Art. 27.

[237] Draft Art. 20.

[238] Kovács 2011. pp. 476-478.

[239] Draft Art. 21.

[240] Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

[241] Draft p. 74.

[242] *Caroline case* (1837-1842) United States of America v Great-Britain http://avalon.law.yale.edu/19th_century/br-1842d.asp

c. **Countermeasures in respect of an internationally wrongful act** (countermeasures): The wrongfulness of an act of a State not in conformity with an international obligation towards another State is precluded if and to the extent that the act constitutes a countermeasure taken against the latter State in accordance with chapter II of Part Three.[243] In the literature concerning countermeasures, reference is sometimes made to the application of a "sanction", or to a "reaction" to a prior internationally wrongful act; historically the more usual terminology was that of "legitimate reprisals" or, more generally, measures of "self-protection" or "self-help".[244] In order to be justifiable, a countermeasure must meet certain conditions: it must be taken in response to a previous international wrongful act of another State and must be directed against that State; the injured State must have called upon the State committing the wrongful act to discontinue its wrongful conduct or to make reparation for it; the effects of a countermeasure must be commensurate with the injury suffered, taking account of the rights in question.[245] Plus it must be proportional; has to be reversible; with respect to human rights and to the UN Charter's regulation considering the prohibition of use of force. A notification has to happen before the countermeasures taken and a way to settle the dispute peacefully has to be offered.[246]
d. **Force majeure**: The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the act is due to force majeure, that is the occurrence of an irresistible force or of an unforeseen event, beyond the control of the State, making it materially impossible in the circumstances to perform the obligation. It's not applicable if the situation of force majeure is due, either alone or in combination with other factors, to the conduct of the State invoking it; or the State has assumed the risk of that situation occurring.[247]
e. **Distress**: The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the author of the act in question has no other reasonable way, in a situation of distress, of saving the author's life or the lives of other persons entrusted to the author's care. It cannot be applied if the situation of distress is due, either alone or in combination with other factors, to the conduct of the State invoking it; or the act in question is likely to create a comparable

[243] Draft Art. 22.

[244] Draft p. 75.

[245] *Gabčikovo-Nagymaros Project* (Hungary/Slovakia), Judgment, 1. C. J. Reports 1997, p. 7. para. 83-85.

[246] Kovács 2011. p. 479.

[247] Draft Art. 23. 1. 2.

or greater peril.[248] Article 24 is limited to cases where human life is at stake. The tribunal in the "Rainbow Warrior"[249] arbitration appeared to take a broader view of the circumstances justifying a plea of distress, apparently accepting that a serious health risk would suffice.[250]

f. **Necessity**: Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act: (a) is the only way for the State to safeguard an essential interest against a grave and imminent peril; and (b) does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if: (a) the international obligation in question excludes the possibility of invoking necessity; or (b) the State has contributed to the situation of necessity.[251]

Legal consequences of International Responsibility

The legal consequences are very similar to municipal law. The legal consequences of an internationally wrongful act under this Part do not affect the continued duty of the responsible State to perform the obligation breached.[252] So the State still has a continued duty to perform the international obligation and to cease immediately the unlawful conduct. The State responsible for the internationally wrongful act is under an obligation: (a) to cease that act, if it is continuing; (b) to offer appropriate assurances and guarantees of non-repetition, if circumstances so require.[253]

The State has to provide guarantees and assurances if reasonable under the circumstances. Finally, the reparation is needed. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State.[254] Full reparation for the injury caused

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[248] Draft Art. 24. 1. 2.

[249] See: *Case concerning the difference between New Zealand and France concerning the interpretation or application of two agreements* concluded on 9 July 1986 between the two States and which related to the problems arising from the Rainbow Warrior Affair. Decision of 30 April 1990 http://legal.un.org/riaa/cases/vol_XX/215-284.pdf

[250] Draft p. 79.

[251] Draft Art. 25. 1. 2.

[252] Draft Art. 29.

[253] Draft. Art. 30.

[254] Draft Art. 31.

by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination:[255]

- *restitution*: a State responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed, provided and to the extent that restitution: (a) is not materially impossible; (b) does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation.[256]
- *compensation*: actual damage, loss of profits, interest. The compensation shall cover any financially assessable damage including loss of profits insofar as it is established.[257]
- *satisfaction*: satisfaction may consist in an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality but cannot be out of proportion or humiliating.[258]

Serious breach

Serious breach: the breach of peremptory norm of general international law that indicates other legal consequences:

- States shall cooperate to bring to an end through lawful means;
- no State shall recognize as lawful a situation created by a serious breach;
- no State allowed to render aid or assistance in maintaining that situation.[259]

The implementation of State responsibility into practice[260]

- A State is entitled as an injured State to **invoke the responsibility** of another State if the obligation breached is owed to: (a) that State individually; or (b) a group of States including that State, or the international community as a whole, and the breach of the obligation: (i) specially affects that State; or (ii) is of such a character as radically to change the position of all the other States to which the obligation is owed with respect to the further performance of the obligation.[261]

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[255] Draft. Art. 34.

[256] Draft Art. 35.

[257] Draft Art. 36.

[258] Kovács 2011. p. 481.

[259] Draft Art. 41. 1. 2. 3.

[260] Kovács 2011. pp. 482-488

[261] Draft Art. 42.

- The responsibility of a State may not be invoked if the injured State has **validly waived** the claim.[262]
- **Plurality of injured States**: Where several States are injured by the same internationally wrongful act, each injured State may separately invoke the responsibility of the State which has committed the internationally wrongful act.[263]
- **Plurality of responsible States**: Where several States are responsible for the same internationally wrongful act, the responsibility of each State may be invoked in relation to that act. 2. Paragraph 1: (a) does not permit any injured State to recover, by way of compensation, more than the damage it has suffered; (b) is without prejudice to any right of recourse against the other responsible States.[264]
- **Responsibility of individuals**: The articles are without prejudice to any question of the individual responsibility under international law of any person acting on behalf of a State.
- **Special provisions**: the criterion of diplomatic protection are citizenship/ nationality and the exhaustion of local remedies
- The responsible State is **willing to provide** reparation.
- The responsible State **refuses to provide** reparation:
    - self-help: countermeasures
    - international courts: e.g. International Court of Justice
    - international organizations: UN

Responsibility for high-risk activities

- International responsibility for national activities in **outer space**: article VI of the Outer Space Treaty[265]
- **Nuclear power**: Paris Convention on Nuclear Third Party Liability (1960) Protocol to Amend the 1963 Vienna Convention on Civil Liability for Nuclear Damage (1963) Convention on Supplementary Compensation for Nuclear Damage (CSC) (1997)
- **Oil Pollution**: International Convention on Civil Liability for Oil Pollution Damage (1969)

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[262] Draft. Art. 45. 1.

[263] Draft Art. 46.

[264] Draft Art. 47.

[265] *See*: Hermida, Julian: *International Space Law.* http://www.julianhermida.com/algoma/intlawreadingsspacelaw.pdf

NOTA BENE

- ✓ The theoretical background of States' responsibility
- ✓ The legal background of States' responsibility
- ✓ The main principles of States' responsibility
- ✓ The elements of States' responsibility
- ✓ The breach of international obligations
- ✓ The definition and forms of attribution
- ✓ The lack of circumstances precluding wrongfulness
- ✓ The legal consequences of States' responsibility
- ✓ The responsibility for high-risk activities

Recommended reading

Responsibility of States for Internationally Wrongful Acts. Avaiable at: http://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf

Crawford, James: *Articles on Responsibility of States for Internationally Wrongful Acts 2001*. Avaiable at: http://legal.un.org/avl/ha/rsiwa/rsiwa.html

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A/RES/3314 (XXIX) of 1974.

A/RES/65/19 of 2010. Responsibility of States for internationally wrongful acts

Catechism of the Catholic Church

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Convention on Rights and Duties of States

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