

A. Introduction to International Law

The term international law refers to public international law. This is different from private international law, which is part of domestic law, and foreign relations law, which is about the relation between a certain state and other states.

What is international law?

Contemporary international law includes those rules and norms that regulate the conduct of states and other entities which at any given time are recognized as possessing international personality.

States are the main subjects of international law. At first, international law only regulated relations between independent states and mainly within diplomatic relations and war. Nowadays, there are more subjects of international law and its content has expanded as well. Problems of international concern need collective state action and modern technology has led to closer and more frequent contact between states and their peoples. As a result, the contact needed to be regulated by new rules. Another expansion is that international law also deals with matter which traditionally was regarded as being within a state's domestic jurisdiction, like use of territory or treatment of inhabitants. This means individuals have international personality to some extent, because they have certain rights. International law has limited the sovereignty of states in favor of more recognition of human rights.

The traditional definition of law (a system that regulates state relations) is not applicable anymore. International law has to change according to new developments.

What is the nature of international law and what are its aspects?

One can question whether international law is actually law, but states have accepted it as such and refer to it in their constitutions. Most of the time, states act in accordance to international law as well. Some people say international law is not effective, because it has failed to maintain international peace. They do not keep in mind that law cannot dictate the politics and behavior of states. Also, international law cannot prevent its own violation, like municipal criminal law cannot prevent crimes. International law is a means to handle a situation, like all other sorts of law. When international law breaks down, it is more the fault of the operators within the legal system than the fault of law. International law is effective on a day-to-day level, but these are only small accomplishments.

International law has some characteristics. Its principal participants are equally sovereign states. International law is not forced on states, there is no legislature, and it is not obligatory, but sanctions can be used to influence an 'offending' state. These sanctions can be economic and diplomatic, but the public opinion is important as well. States also act according to international law because of the role of reciprocity; it is for its own good. International law is decentralized and is founded on the consent of states to accept obligations that limit their behavior. International law is made primarily by (a) customary international law and (b) treaties.

How has international law developed?

The earliest expressions of international law were the rules of war and diplomatic relations. During the Age of Discovery, rules on governing the acquisition of territory became more important and they talked about the principle of freedom of seas because this was necessary for the expansion of trade. International law therefore grew out of necessity. As international engagement increased, international law expanded. It was rooted in Western European traditions and values and this bias could be seen in its content. After the Second World War, states agreed that there had to be more international cooperation and the United Nations was created. Now, issues that used to be domestic became international.

When new states were created by decolonization, the rules were challenged by these new states and nowadays, there is a heterogeneous group of states that is very different in its economics, culture and ideology. Also, individuals became subjects of international law. Globalization and modern technology has brought states closer together.

B. What are the sources of International Law?

Sources are important to express what the law is and where it can be found. However, there is no international legislature, international court or international constitution. There are no law-giving sources, so no organs and no tasks are defined. How can the lawfulness be determined? Article 38 of the Statute of the International Court of Justice (ICJ) says how conflicts should be approached. The sources named are international conventions (treaties), international custom and general principles recognized by civilized nations. Sources of international law can either be formal or material. Formal sources constitute what the law is and material sources identify where the law is to be found.

States can also ask the Court to decide a case by using principles as fairness and equality instead of just using strict rules. This is called: *ex aequo et bono*. This principle has not been used so far.

Even though Article 38 is just a direction to the ICJ, it is seen as an authoritative statement on the sources of international law. In practice there is a hierarchy of procedure. First, the treaty is applied. By absence of a treaty, the custom is applied and if there is not a custom, general principles can be invoked. Judicial decisions and writings can determine the rules of international law, but they are not a source. Nowadays, international law is more specialized and divided into different fields, called the 'fragmentation of international law'. International law also relies on other, more dynamic sources, such as acts of international organizations and soft law.

Customary law

First states simply did what they wanted to do, but when the contact between states increased, certain norms of behavior turned into rules of customary law. Custom becomes less important as the legal system matures. Its contribution is still reflected in many treaties.

What is custom?

Custom is a practice followed by those concerned because they feel legally obliged to behave in such a way. It is important that it is done out of legal obligation or a feeling that violation would produce legal consequences. Custom becomes law due to two elements:

- Material element: the behavior and practice of states;
- Psychological element: the subjective conviction held by states that the behavior in question is compulsory and not discretionary.

Custom needs to have those two elements in order to be custom. When a rule becomes custom, it is called crystallization into customary law.

The material element

There is no set time limit or duration of practice. This unimportance of time is highlighted by the North Sea Continental Shelf cases. The length of time required to establish the rule depends upon other factors. For example, if there is an existing rule that needs to be revised in order to make the new rule, it will take more time.

Before state practice can be considered as law, it needs to have a 'constant and uniform usage'. The importance of frequency of practice depends on the circumstances. More significant than frequency is consistency. Do the states really behave according to the custom? For example, in the Asylum Case, the ICJ decided that there was too much variance and difference in the state practice that it could not be accepted as customary international law. Inconsistency however, must be analyzed before it can negate the crystallization of a rule into customary law.

Universal practice is not necessary in order to become customary law, but general practice is. The attitude and the identity of the affected states are more important than the number of states. A regional custom should be acknowledged and supported by all states involved; there must be a constant and uniform usage. If a state opposes to a rule of customary international law, it is not bound by the rule. Dissent has to be expressed before the rule is established. When a state does not show its dissent, it is regarded as consent. When a new state enters the international legal community after a practice is accepted as customary law, it is bound by the rule. If a new rule is made in an area where there is an existing rule, the number of states indulging in the behavior contrary to the old rule is compared to the number protesting against the creation of the new rule.

State practice does not need to be in absolute conformity with the rule for it to be custom. How can customary international law be changed if conflicting behavior is an obstacle for the crystallization of a practice into law? The conflicting behavior can also be inconsistently expressed. If the members of the international community are evenly divided in their support for the old and the new law, then there is a period of vagueness. Sometimes, rules exist side by side. How quickly it will change is dependent on the response of states.

Treaties, statements by national legal advisers and diplomatic correspondence can be indicators of state practice. All states need to acknowledge a practice as customary law, not just the states party to the case. When deciding whether a practice is customary law, the circumstances should be taken into account.

The psychological element; opinio juris

There must be a distinction between rules which are regarded as legally obligatory and those which are discretionary. *Opinio juris* is the subjective belief maintained by states that a particular practice is legally required of them. The original term is *opinio juris sive necessitates*. The states must believe that the practice is obligatory and they must not think that they are free to disregard at any moment. *Opinio juris* can be deduced from the attitude of parties and states towards General Assembly Resolutions. The problem is that it is different to say when a practice has turned into law. The state's acceptance or recognition to the binding character of the rule must be established. The party itself must demonstrate that the custom is so established that it is binding. In the Lotus case and the North Sea Continental Shelf cases, there was not enough proof that a practice was custom.

Sometimes, state act contrary to the old rules in the belief that their behavior will turn into new law. The reaction of other states determines whether the new practice gains the necessary *opinio juris*. There can also be instant custom. This is when a great number of states have the same behavior responding to the circumstances. It is a response to new situations which demand a quick response. It is rare. An example are the North Sea Continental Shelf Cases.

Custom is no longer the most appropriate way of deciding what international law is. There is an increasing use of treaties.

Treaties

Treaties only apply to the states which have agreed to its terms. States are able to opt out. Treaties can be (a) bilateral, which means that they are between two states or (b) multilateral, which means that they are between several states. There is also a distinction between (a) law-making treaties, that can only create particular law between the signatories and (b) treaty contracts, which have many signatories and create law per se. Treaties create international law for the parties signing it. Multilateral treaties have a wider effect and can be seen as law-making because the provisions of the treaty can become customary international law. Multilateral treaties have a quasi-legislative effect.

When a provision of a treaty exists in multiple bilateral treaties, the provision may be considered as customary international law.

There are certain rules if customary law and a treaty exist for the same issue. Customary law and treaties have the same authority in international law, but the treaty does take precedence. Generally, the latter prevails, but a treaty does not prevail over customary law if customary law is *jus cogens*. If a treaty alters a customary rule, it should change according to the established rule, unless the treaty is intended to change the old rule;

There are two treaties that do have a universal effect, namely (a) those establishing a special international regime and (b) those establishing an international organization.

General principles

A *non liquet* situation is a situation in which the ICJ cannot give a decision based on law because there are no relevant legal rules. This situation was likely to arise in international law and to fill up those gaps, general principles were created. General principles are those which are common to the major legal systems of the world, mainly the civilian legal system and the common law system. General principles prevent a case from being shelved when the international law has no rules for the situation.

Equity

Principles of equity are akin to general principles, but it differs from it because equity reflects values which affect the application of law. General principles relates mainly to procedural techniques. Equity is not a source of law, but it can affect the way law is applied. For example, the court can always apply equity over other rules.

When the ICJ cannot solve a conflict by treaties, custom or general principles, they can use 'judicial decisions and the teaching of the most highly qualified publicists of the various nations.' Judicial decisions and writings are means of determining what the law is on a given issue and they constitute the material sources of international law. They are not law, but they describe where law can be found.

Judicial decisions

The Court is not obliged to follow previous decisions, but when there are no treaties, customs or general principles, they do examine previous decisions in order to solve a conflict. The ICJ has delivered a number of judgments and Advisory Opinions that have influenced international law. Arbitration decisions have influenced the growth of international law as well. The importance of it depends on the subject matter and the parties. To assess the contribution of arbitration decisions reference should be made to the contents of the compromise; the agreement between the parties to the arbitration which may specify if it should be applied. Arbitration may not necessarily be applying international law.

National Courts' decisions

The weight of a decision of a national court depends upon the standing of the court concerned. A national court decision can serve as evidence of a state's position.

Writers

Writers help determine, mould and articulate the content and principles of international law. Writers can provide interpretations of law and identify areas where international regulation should be encouraged. Writings are not a source of law but a means of determining what the law is on a given subject.

Soft law

Soft law contains non-legally binding international instruments. It can be found in different forms. There is legal soft law (treaties) and non-legal soft law (voluntary resolutions, statements etc.) Soft law must be in written form.

An advantage of soft law is that it can be used when negotiations stand still when states do not agree about the obligations. A disadvantage is that it discourages states from undertaking 'hard law' (legally binding obligations). Soft law can eventually become hard law. An example of soft law is the Universal Declaration of Human Rights. Many of the provisions of this Declaration have become customary law.

Acts of international organizations

Certain General Assembly (UN) resolutions, called 'Declarations of Principle', have considerable moral force, even though they are not legally binding. General Assembly resolutions have no legal effect. Their impact is dependent on factors as the subject matter, the majority and the support of the states. Representatives of state vote in the General Assembly and the vote can reflect the state's position on a given issue. The voting can indicate what the law is or should be. Regional organizations like the Council of Europe, the European Union, the African Union and the League of Arab States can demonstrate what they consider to be law.

International law commission

In 1946, the International Law Commission (ILC) was given the task of furthering the progressive development and codification of international law. Progressive development was the preparation of draft conventions on subjects that were not regulated yet. Codification is the more precise formulation and systemization of rules in fields where there has already been practice. Codification can result in a treaty. The 34 members of the ILC sit as individuals. The ILC is responsible for preparing particular subjects for the making of treaties and for establishing customary law. The draft articles can lead to a convention.

Norms of international law

International law is dependent on state consent to assume an obligation. States can object to rules, but certain norms are peremptory. These norms cannot be modified. The term is *jus cogens*. A treaty provision that conflicts with a norm that is *jus cogens* is void. When a new peremptory norm develops, contrary treaties are void as well. A peremptory norm is 'accepted and recognized by the international community of states as a whole', as described by the Vienna Convention on the Law of Treaties. Norms that are accepted as *jus cogens* are for example the prohibitions on genocide, torture and slavery.

Conclusion

The sources of international law and the importance of the different sources change in response to the growing number of actors and subject matters. Art. 38 of the ICJ Statute is the starting point for the consideration of sources of contemporary international law. The most important sources are (a) treaties, (b) customary law and (c) general principles. Other sources can be for example soft law and writings.