


MAKALAH



INTERNATIONAL LAW

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Introduction

- Why International Law in this Course
- Private vs. Public International Law
- What is International Law
- Definitions
- International and National law
- Functions of International Law
- Sources in International Law
 - Treaties
 - International Customary Law
- Interpretation Principles in International Law

Public and private international law

- **Private int. law/ Conflict of law**
 - Deals with international relations between individuals or legal persons
 - In situations where the laws of more than one State may be applied
 - International business law
- **Public int. law**
 - The subject of today et seq

What is International Law?

- **Law/rules**
 - Written and unwritten
- **States**
 - When is the law binding
 - Obligations to whom?
- **Exceptions?**
 - Development in obligations
- **Treaties, Covenants, Conventions**

Old definition

“International law is a strict term of art, connoting that system of law whose primary function is to regulate the relations of states with one another.”

New definition

”a body of rules, contained in various sources, including treaties and customs, which the subject of international law have accepted as binding on them either in their relations with one another per se, or in those with other juristic or natural person.”

State relations

- **Bilateral and multilateral**
- **General, regional (EU, ASEAN) and particular (few states, not generally accepted)**
- **State sovereignty (principle of legality in int. law)**

The (legal) basis for int. law

- **Consent**
 - **Contractual obligations**
- **None law-making institution in int. law**
- **State must accept int. law for it to exist**
 - **In the State's own interest**
 - **What about int. customary law?**
 - **Membership of the int. community**

The limits to State consent as the basis for int. law

- **Consent vs. peremptory norm**
 - Most fundamental norm in the hierarchy of norms
- **Consent vs. customary law**
 - The nature of customary law forces all states to comply, consenting or not
- **Consent vs. pre-existing norms**
 - New states cannot choose whether or not they will accept a already existing custom

The functions of int. law

- Encouraging friendly relations between States
- Outlawing wars among nations
- Promoting peaceful resolutions of disputes among nations

UN Charter art. 1

- Development
 - Fragmentation
 - Expansion

Examples of different areas regulated by international law

- Law of the sea
 - International economic law – trade
 - Int. Environmental law
 - Other areas
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- Law of armed conflict
 - International criminal law
 - Human rights law

International and National law

- Solving conflict
- Monism vs. dualism
- National principles
 - Codification and implementation
 - enforcement
- International enforcement mechanisms
 - Two stage system
 - International Court of Justice

Sources in International Law

International Court of Justice Statute, Article 38

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.

Treaties

- **What is a treaty?**

Defined in the Vienna Convention Article 2, letter a:

(a) “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**;

- **And when is it ratified?**

Defined in the Vienna Convention Article 2, letter b:

(b) “ratification”, “acceptance”, “approval” and “accession” mean in each case **the international act** so named whereby a State establishes on the international plane its **consent to be bound by a treaty**;

Norway vs. Denmark

International Customary Law

None-treaty obligations

- ICJ Statute Article 38, paragraph 1, letter b.

*“international custom, **as evidence** of a general practice accepted as law”;*

“as evidence”

- Meaning that customary international law can be discerned by a **widespread repetition** by States of similar international acts over time (State practice);

Requirements in order to be accepted as Customary International Law

- Customary international law "... consists of rules of law derived from;
 - **consistent conduct** of States
 - acting out of the **belief that the law required** them to act that way
 - Acts must occur out of **sense of obligation** (*opinio juris*)
 - Acts must be taken by a significant **number** of States and not be rejected by a significant number of States

- A marker of customary international law is consensus among states exhibited both by widespread conduct and a discernible sense of obligation

Examples of Int. Customary Law

- Non-refoulement (refuge law),
- Some Human Rights. Which?
- Immunity of visiting foreign heads of state,
- What about humanitarian intervention?
- Other examples are those principles that falls under Jus Cogens.

Jus Cogens

- Jus Cogens means a **peremptory norm** which is a fundamental principle of international law which is accepted by the international community of states as a norm from which no derogation is ever permitted.
- Different from “ordinary CL”
- Examples:
 - genocide
 - maritime piracy
 - slaving in general
 - torture
 - and wars of aggression and territorial aggrandizement

Vienna Convention article 53

Article 53

Treaties conflicting with a peremptory norm of general international law (“jus 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.

Examples where Jus Cogens has been stated

- **Execution of juvenile offenders**
 - Michael Domingues v. United States
- **Torture**
 - International Criminal Tribunal for the Former Yugoslavia stated in *Prosecutor v. Furundžija*
- **Convention on the Prevention and Punishment of the Crime of Genocide.**
(Bosnia and Herzegovina v. Yugoslavia)

The Erga Omnes principle

- ***Erga omnes*** (in relation to everyone) is frequently used in legal terminology describing obligations or rights *toward all*.
- For instance a property right is an *erga omnes* right, and therefore enforceable against anybody infringing that right. An *erga omnes* right (a statutory right) can here be distinguished from a right based on contract, which is only enforceable against the contracting party.
- In international law it has been used as a legal term describing obligations owed by states towards the community of states as a whole.

Examples of Erga Omnes

- **Barcelona Traction Case**

- "... an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature, the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations erga omnes.

- **Piracy in the bay of Aden outside Somalia:**

- All states have an erga omnes in complaining to the Somalian State that it should put a stop to the piracy practice in the open ocean outside Somalia.

Interpretation Principles in International Law

Vienna Convention on the law of treaties (1969) Article 31

General rule of interpretation

1. 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**.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its **preamble and annexes**:
 - (a) *any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;*
 - (b) *any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.*
3. There shall be taken into account, together with the context:
 - (a) *any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;*
 - (b) *any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;*
 - (c) *any relevant rules of international law applicable in the relations between the parties.*
4. A **special meaning** shall be given to a term if it is established that the parties so **intended**.

Preamble of the Vienna Convention

“Having in mind the principles of international law embodied in the Charter of the United Nations, such as **the principles of the equal rights and self-determination of peoples, of the sovereign equality and independence of all States, of non-interference in the domestic affairs of States, of the prohibition of the threat or use of force and of universal respect for, and observance of, human rights and fundamental freedoms for all,**

Affirming that the rules of **customary international law will continue** to govern questions not regulated by the provisions of the present Convention...”

What is the purpose of interpretation principles?

- **Legal unity**
 - Procedures equal for all states
 - Fairness
 - Everyone is subjected to the same rules
 - Power
 - Equality
- **Legal certainty**
 - States must know what they accede
 - Predictability
- **Trust**
 - States must trust that what they accede is what they believe they accede
- **What does this imply for the Courts when interpreting?**

Treaty reservations

- **What is a reservation?**

Vienna Convention article 2, letter d, states:

(d) “reservation” means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, hereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State;

Clash between treaties and the principles of customary law, jus cogens and erga omnes

- ***Vienna Convention, Article 43***
Obligations imposed by international law independently of a treaty

The invalidity, termination or denunciation of a treaty, the withdrawal of a party from it, or the suspension of its operation, as a result of the application of the present Convention or of the provisions of the treaty, shall not in any way impair the duty of any State to fulfill any obligation embodied in the treaty to which it would be subject under international law independently of the treaty.

Clash between treaties and national legislation

- ***Vienna Convention Article 27***

Internal law and observance of treaties

“A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty...”

Terima Kasih!