

Introduction to International Law

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A. PURPOSE OF THIS DOCUMENT

This document is intended to provide students an overview of international law and the structure of the international legal system. In many cases it oversimplifies the law by summarizing key principles in less than one page in order to provide the student with an overview that will enhance further study of the topic.

B. DEFINITION OF INTERNATIONAL LAW

International Law consists of the rules and principles of general application dealing with the conduct of States and of international organizations in their international relations with one another and with private individuals, minority groups and transnational companies.

C. INTERNATIONAL LEGAL PERSONALITY

International legal personality refers to the entities or legal persons that can have rights and obligations under international law.

1. States

A State has the following characteristics: (1) a permanent population; (2) a defined territory; (3) a government; and (4) the capacity to enter into relations with other States. Some writers also argue that a State must be fully independent and be recognized as a State by other States. The international legal system is a horizontal system dominated by States which are, in principle, considered sovereign and equal. International law is predominately made and implemented by States. Only States can have sovereignty over territory. Only States can become members of the United Nations and other international organizations. Only States have access to the International Court of Justice. .

2. International Organizations

International Organizations are established by States through international agreements and their powers are limited to those conferred on them in their constituent document. International organizations have a limited degree of international personality, especially vis-à-vis member States. They can enter into international agreements and their representatives have certain privileges and immunities. The constituent document may also provide that member States are legally bound to comply with decisions on particular matters.

The powers of the United Nations are set out in the United Nations Charter of 1945. The main political organ is the General Assembly and its authority on most matters (such as human rights and economic and social issues) is limited to discussing issues and making recommendations. The Security Council has the authority to make decisions that are binding on all member States when it is performing its primary responsibility of maintaining international peace and security. The main UN judicial organ is International Court of Justice (ICJ), which has the power to make binding decisions on questions of international law that have been referred to it by States or give advisory opinions to the U.N.

3. **Nationality of individuals, companies, etc.**

Individuals are generally not regarded as legal persons under international law. Their link to State is through the concept of nationality, which may or may not require citizenship. Nationality is the status of being treated as a national of a State for particular purposes. Each State has wide discretion to determine who is a national. The most common methods of acquiring nationality at birth are through one or both parents and/or by the place of birth. Nationality can also be acquired by adoption and naturalization.

Companies, ships, aircraft and space craft are usually considered as having the nationality of the State in whose territory they are registered. This is important because in many circumstances States may have international obligations to regulate the conduct of their nationals, especially if they are carrying out act activities outside their territory.

~~Under the principle of nationality of claims, if a national of State A is injured by State B through internationally unlawful conduct, State A may make a claim against State B on behalf of its injured national. This is known as the doctrine of diplomatic protection.~~

D. SOVEREIGNTY OF STATES OVER TERRITORY

Sovereignty is the exclusive right to exercise supreme political authority over a defined territory (land, airspace and certain maritime areas such as the territorial sea) and the people within that territory. No other State can have formal political authority within that State. Therefore, sovereignty is closely associated with the concept of political independence.

Classical international law developed doctrines by which States could make a valid claim of sovereignty over territory. The doctrines included discovery and occupation and prescription. During the period of Western colonial expansion new territories and islands were subject to claims of sovereignty by discovery and occupation. Sovereignty could also be transferred to another State by conquest (use of force) or by cession where the sovereignty over the territory would be ceded by treaty from one State to another.

Since a State has sovereignty over its territory, the **entry** into its territory by the **armed forces** of another State without **consent** is a **prima facie breach** of international law. Among the **attributes** of sovereignty is the right to exclude **foreigners** from entering the territory, which is traditionally referred to as the right to exclude **aliens**.

Since a State has sovereignty within its territorial sea (with some exceptions such as the **right of innocent passage**), it has the exclusive authority to exercise police power within its territory sea. For example, if foreign ships are **attacked** by "pirates" in the territorial sea of a State, the only State that can exercise police power and **arrest** the pirates in the territorial sea is the **coastal** State.

E. INTERNATIONAL OBLIGATIONS (SOURCES OF LAW)

It is generally accepted that the sources of international law are listed in the Article 38(1) of the Statute of the International Court of Justice, which provides that the Court 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.

1. Treaties

International conventions are generally referred to as *treaties*. *Treaties* are written agreements between States that are governed by international law. Treaties are referred to by different names, including agreements, conventions, covenants, protocols and exchanges of notes. If States want to enter into a written agreement that is not intended to be a *treaty*, they often refer to it as a *Memorandum of Understanding* and provide that it is not governed by international law. Treaties can be bilateral, multilateral, regional and global.

The law of treaties is now set out in the 1969 Vienna Convention on the Law of Treaties which contains the basic principles of treaty law, the procedures for how treaties become binding and enter into force, the consequences of a breach of treaty, and principles for interpreting treaties. The basic principle underlying the law of treaties is *pacta sunt servanda* which means every treaty in force is binding upon the parties to it and must be performed by them in *good faith*. The other important principle is that treaties are binding only on States parties. They are not binding on third States without their consent. However, it may be possible for some or even most of the

provisions of a multilateral, regional or global treaty to become binding on all States as rules of customary international law.

There are now global conventions covering most major topics of international law. They are usually *adopted* at an international conference and opened for *signature*. Treaties are sometimes referred to by the place and year of adoption, e.g. the 1969 Vienna Convention. If a State becomes a *signatory* to such a treaty, it is not bound by the treaty, but it undertakes an obligation to refrain from acts which would defeat the object and purpose of the treaty.

A State expresses its *consent to be bound* by the provisions of a treaty when it deposits an instrument of *accession* or *ratification* to the *official depository* of the treaty. If a State is a signatory to an international convention it sends an *instrument of ratification*. If a State is not a signatory to an international convention but decides to become a party, it sends an *instrument of accession*. The legal effect of the two documents is the same. A treaty usually *enters into force* after a certain number of States have expressed their consent to be bound through accession or ratification. Once a State has expressed its consent to be bound and the treaty is in force, it is referred to as a *party* to the treaty.

The general rule is that 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 light of its object and purpose. The preparatory work of the treaty and the circumstances of its conclusion, often called the *travaux préparatoires*, are a supplementary means of interpretation in the event of ambiguity.

2. Custom

International custom – or customary law – is evidence of a general practice accepted as law through a constant and virtually uniform usage among States over a period of time. Rules of customary international law bind all States. The State alleging the existence of a rule of customary law has the burden of proving its existence by showing a consistent and virtually uniform practice among States, including those States specially affected by the rule or having the greatest interest in the matter. For example, to examine the practice of States on military uses of outer space, one would look in particular at the practice of States that have activities in space.

Most ICJ cases also require that the States who engage in the alleged customary practice do so out of a sense of legal obligation or *opinio juris* rather than out of comity or for political reasons. In theory, *opinio juris* is a serious obstacle to establishing a rule as custom because it is extremely difficult to find evidence of the reason why a State followed a particular practice. In practice, however, if a particular practice or usage is widespread, and there is no contrary State practice proven by the other side, the Court often finds the existence of a rule of customary law. It sometimes seems to assume that *opinio juris* was satisfied, and it sometimes fails to mention it.

Therefore, it would appear that finding consistent State practice, especially among the States with the most interest in the issue, with minimal or no State practice to the contrary, is most important.

Undisputed examples of rules of customary law are (a) giving foreign diplomats criminal immunity; (b) treating foreign diplomatic premises as inviolable; (c) recognizing the right of innocent passage of foreign ships in the territorial sea; (d) recognizing the exclusive jurisdiction of the flag State on the high seas; (5) ordering military authorities to respect the territorial boundaries of neighboring States; and (6) protecting non-combatants such as civilians and sick or wounded soldiers during international armed conflict..

3. General Principles of Law

General principles of law recognized by civilized nations are often cited as a third source of law. These are general principles that apply in all major legal systems. An example is the principle that persons who intentionally harm others should have to pay compensation or make reparation. General principles of law are usually used when no treaty provision or clear rule of customary law exists.

4. Subsidiary means for the determination of rules of law

Subsidiary means are not sources of law, instead they are subsidiary means or evidence that can be used to prove the existence of a rule of custom or a general principle of law. Article 38 lists only two subsidiary means - the teaching (writings) of the most highly qualified publicists (international law scholars) and judicial decisions of both international and national tribunals if they are ruling on issues of international law. Writings of highly qualified publicists do not include law student articles or notes or doctoral theses.

Resolutions of the UN General Assembly or resolutions adopted at major international conferences are only recommendations and are not legally binding. However, in some cases, although not specifically listed in article 38, they may be subsidiary means for determining custom. If the resolution purports to declare a set of legal principles governing a particular area, if it is worded in norm creating language, and if is adopted without any negative votes, it can be evidence of rules of custom, especially if States have in practice acted in compliance with its terms. Examples of UN General Assembly Resolutions which have been treated as strong evidence of rules of customary international law include the following:

- GAR 217A Universal Declaration of Human Rights (1948)
- *GAR 2131 Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Sovereignty (1965) [Declaration on Non-Intervention]*
- GAR 2625 Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations (1970) [Declaration on Friendly Relations]

- GAR 3314 Resolution on the Definition of Aggression

Some of these resolutions have also been treated as subsequent agreement or practice of States on how the principles and provisions of the UN Charter should be interpreted.

In addition, Article 38 fails to take into account the norm-creating effect of modern global conventions. Once the international community has spent several years drafting a major international convention, States often begin in practice to refer to that convention when a problem arises which is governed by the convention - in effect treating the rules in the Convention as customary. Furthermore, if the Convention becomes universally accepted the provisions in the Convention may become very strong evidence of the rules of custom, especially if States which are not parties have also acted in conformity with the Convention. Examples of such conventions would be the 1959 Vienna Convention on Diplomatic Relations and the 1969 Vienna Convention on the Law of Treaties.

5. *Hierarchy of norms*

In theory there is no hierarchy among the three sources of law listed in Article 38 of the ICJ Statute. In practice, however, international lawyers usually look first to any applicable treaty rules, then to custom, and last to general principles.

There are two types of norms or rules – not previously discussed - which do have a higher status. First, *peremptory norms* or principles of *jus cogens* are norms that have been accepted and recognized by the international community of States as so fundamental and so important that no derogation is permitted from them. Examples of *jus cogens* principles are the prohibitions against wars of aggression and genocide. A war of aggression is the use of armed force to take over another State or part of its territory. Genocide is the killing or other acts intended to destroy, in whole or in part, of a national, ethnical, racial or religious group.

Second, members of the United Nations are bound by the Article 103 of the United Nations Charter, which provides that in the event of a conflict between the obligations of members under the Charter – including obligations created by binding decisions of the Security Council - the Charter obligations prevail over conflicting obligations in all other international agreements.

6. *Role of the International Law Commission (ILC)*

The ILC was established by the UN in 1948. The 34 members of the ILC are elected by the General Assembly after being nominated by member States. They possess recognized competence and qualifications in both doctrinal and practical aspects of international law and the ILC reflects a broad spectrum of expertise and practical experience

The mandate of the ILC is the progressive development and codification of international law. The ILC usually spends many years studying areas of international law before presenting draft articles

to the General Assembly for adoption as a draft convention. The primary written products of the ILC aside from the draft articles themselves are the detailed periodic reports prepared by the Special Rapporteurs on each subject and the official commentary for each draft article. Sometimes the official commentary to an ILC draft article or the Rapporteur's report will indicate whether that draft article is intended to codify a rule of customary law or is intended to progressively develop the law on that point. When the ILC Draft Articles are approved, they are approved together with the official commentaries.

The official commentaries to ILC draft articles and the reports of the ILC and its rapporteurs can be considered for two purposes. First, they are part of the *travaux préparatoires* when interpreting a treaty related to the subject of the draft article. Second, they are the writings of 34 highly qualified publicists speaking in unanimity and therefore serve as a subsidiary means for determining rules of customary law.

F. JURISDICTION OF STATES

1. *Principles of Jurisdiction*

The concept of *jurisdiction* refers to the power of a State to prescribe and enforce criminal and regulatory laws and is ordinarily based on the *territorial principle*, under which a State has jurisdiction over activities within its territory. Some states also claim jurisdiction over activities outside their territory which affect their territory.

States can also claim jurisdiction based upon the *nationality principle* by extending jurisdiction over their nationals even when they are outside the territory. For example, civil law countries extend their criminal law to cover their nationals while abroad while common law countries usually only do so in exceptional cases.

There is also a very narrow category of crimes – including genocide and war crimes - over which States may assert jurisdiction based upon the *universality principle*, which gives all States jurisdiction irrespective of nationality or location of the offence.

Almost all States claim jurisdiction under the *protective principle*, under which a State asserts jurisdiction over acts committed outside their territory that are prejudicial to its security, such as treason, espionage, and certain economic and immigration offences. The most controversial basis for jurisdiction – followed by very few States - is the *passive personality principle*, which establishes jurisdiction based on the nationality of the victim. In recent years States have asserted jurisdiction over terrorist acts outside their territory directed against their nationals, thereby basing jurisdiction on a combination of the protective and passive personality principles.

Modern counter-terrorism treaties establish jurisdiction among State Parties based on the *presence of the offender* within their territory. If a persons who are alleged to have committed the

offence established in the treaty (e.g, hijacking of an aircraft) is present in their territory, a State Party to the treaty is under an obligation to take the persons into custody, and to either prosecute them or extradite them to another State Party that has jurisdiction over the offence.

If two or more States have jurisdiction over a particular offence, they are said to have *concurrent jurisdiction*. In such cases the State which is most likely to prosecute the offender is the State which has custody over him. No State may exercise jurisdiction within the territorial sovereignty of another State. The police of State A cannot enter the territory of State B to arrest a person who has committed a crime in State A. Also, if a crime takes place in the territorial sea of a coastal State, no State other than the coastal State may intercept and arrest the ship carrying the offenders.

States enter into bilateral treaties to provide for the *extradition* of alleged offenders. Sending an alleged criminal to another State for investigation or prosecution in the absence of an extradition treaty is referred to as *rendition*.

The high seas and outer space are outside the territorial jurisdiction of any State. The general principle of jurisdiction in these common areas is that ships, aircraft and spacecraft are subject to the jurisdiction of the “flag State”, or State of registration. The general principle is that ships on the high seas are subject to the exclusive jurisdiction of the flag State, and cannot be boarded without its express consent. The most notable exception is piracy. All States have a right to board pirate ships on the high seas without the consent of the flag State.

2. *Immunities from Jurisdiction*

The principle of *sovereign equality of States* requires that the official representatives of one State should not be subject to the jurisdiction of another State. For example, the law of the sea provides that warships are subject only to the jurisdiction of the flag State. Even if warships commit acts contrary to the right of innocent passage or the laws and regulations of the coastal State, the coastal State’s only remedy is to escort the offending warship out of the territorial sea.

The principle of *State immunity or sovereign immunity* provides that foreign sovereigns enjoy immunity from the jurisdiction of other States. The principle of *diplomatic immunity* provides that the diplomatic agents of the sending State have complete immunity from the criminal jurisdiction of the receiving State. Since this immunity belongs to the sending State and not to the diplomat, it can be waived by the sending State. Also, the receiving State has the right to expel any diplomatic agent from its country by declaring them *persona non grata*. The premises of an embassy or diplomatic mission as well as its records and archives are also inviolable. The authorities of the receiving State cannot enter a foreign embassy without the express permission of the head of mission, even in the case of an emergency.

G. STATUS OF THE SEAS, OUTER SPACE AND ANTARCTICA

1. *High Seas*

The high seas are governed by several fundamental principles. First, no State may purport to assert sovereignty over any part of the high seas. Second, all States have the right to exercise the freedoms of the seas, including freedoms of navigation, freedom of overflight, freedom to lay submarine cables and pipelines, and freedom to conduct marine scientific research. Freedom of fishing was a traditional high seas freedom but fishing on the high seas is subject to restrictions as set out in the 1982 United Nations Convention on the Law of the Sea. It is generally agreed that freedom of the seas also includes the right of all States to use the high seas for military purposes, including weapons testing and naval exercises.

2. *Exclusive economic zone*

Coastal States are permitted to claim an exclusive economic zone (EEZ) of up to 200 nautical miles from the baselines from which the territorial sea is measured wherein they have the sovereign right to explore and exploit the natural resources of the sea and of the seabed and subsoil. The EEZ is neither under the sovereignty of the coastal State nor part of the high seas. It is a specific legal regime in which coastal States have the rights and jurisdiction set out in UNCLOS, and other States have the rights and freedoms set out in UNCLOS. Other States have the right to exercise high seas freedoms in the EEZ of any State. With respect to jurisdiction over matters outside of economic activities, the principles of jurisdiction governing the high seas apply in the EEZ.

3. *Deep Seabed beyond the limits of national jurisdiction*

The natural resources of the deep sea bed beyond the limits of national jurisdiction are vested in mankind as a whole under the principle of the *common heritage of mankind*. No State may claim or exercise sovereignty or sovereign rights over any part of this area or its resources and it is governed by the International Sea Bed Authority (ISBA). No State or natural or juridical person may appropriate any part of the area or its resources except under the authority of the ISBA.

4. *Outer Space*

The principles governing the use of outer space are similar to those that the high seas. First, no State may purport to assert sovereignty over any part of outer space. Second, all States have the freedom to use outer space for peaceful purposes. Third, States on whose registry a space object is launched shall retain jurisdiction and control over the space object and over any persons on board the space object.

5. *Antarctica*

Official claims to sectors of the ice-covered continent of Antarctica were made by seven States – Argentina, Australia, Chile, France, New Zealand, Norway and the United Kingdom. A sector was also claimed by Admiral Byrd on behalf of the United States, but the United States never officially adopted Byrd's claim, and refused to recognize the claims of the six claimant States. In 1959 the seven claimant States, together with 5 other States whose scientists had been conducting research in Antarctica (Belgium, Japan, South Africa, the United States and the USSR) entered into the Antarctic Treaty. The Antarctic Treaty "froze" the claims of the seven claimant States, and stated that no new claims to sovereignty would be made. It also stated that Antarctica should be used only for peaceful purposes. The Antarctic Treaty permits States parties to conduct scientific research in Antarctica and its provisions are generally respected by non-party States as customary law.

H. PRINCIPLES GOVERNING RELATIONS BETWEEN STATES

The general principles governing friendly relations between States are set out in UN General Assembly Resolution 2625. It states that the progressive development and codification of the seven principles below would secure their more effective application within the international community and would promote the realization of the purposes of the United Nations. Therefore, the resolution sets out the consensus in the international community on the content of the following seven principles:

- 1) 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 purpose of the United Nations
- 2) Pacific settlement of disputes
- 3) Non-intervention in matters within the domestic jurisdiction of any State, in accordance with the Charter
- 4) Co-operation with one another in accordance with the Charter
- 5) Equal rights and self-determination of peoples
- 6) Sovereign equality of States
- 7) States shall fulfil in good faith the obligations assumed by them in accordance with the Charter

I. RESPONSIBILITY OF STATES FOR WRONGFUL ACTS

The 2001 ILC Articles on the Responsibility of States for Internationally Wrongful Acts set out the principles in this important field of international law. The ILC Articles are a combination of

codification and progressive development. Even though the ILC Articles have not been adopted as an international convention, some of the provisions have been referred to by international courts and tribunals as reflective of customary international law.

States are responsible to other States for their *internationally wrongful acts*. A State commits *internationally wrongful act* when conduct consisting of an act or omission (a) is attributable to the State under international law; and (b) constitutes a breach of an international obligation owed by that State to the injured State or the international community. Therefore, if a dispute arises between two States, the first question is whether the offending State owed an international obligation to the injured State under either a treaty or under customary law. The second question is whether that obligation was breached by conduct consisting of either an act or an omission that is attributable to the offending State.

The rules on attribution are based on common sense. The conduct of an organ of the State is attributable to the State because a State acts through its official representatives, such as its Head of State, Minister of Foreign Affairs, Ambassadors and government ministries and departments. The official acts of these persons and organs are attributable to the State. The conduct of private persons or private entities is generally not attributable to the State unless the State knew of the conduct and failed to act in relation to that conduct when it had an international obligation to act. However, the conduct of a person or entity empowered by the law of the State to exercise elements of government authority is attributable to the State and a State may also ratify and adopt the conduct of private persons or control their conduct in such a manner that it can be attributed to the State.

A State is in breach of an international obligation when conduct attributable to it is not in conformity with what is required by the obligation. A State may not rely on provisions of its internal or domestic law as justification for failure to comply with an international obligation. The responsible State is under an obligation to *cease the wrongful act* if it is continuing. It is also under an obligation to offer appropriate *assurance and guarantees of non-repetition*, if circumstances so require. In addition, the responsible State is under an obligation to make full *reparation* for the injury – both material and moral – caused to the other State by the *internationally wrongful act*.

The *forms of reparation* under international law are *restitution, compensation and satisfaction*. The preferred form of reparation is *restitution*, which requires the State to re-establish the situation which existed before the wrongful was committed. Insofar as the damage is not made good by restitution, the State must pay *compensation* to cover the financially assessable damage, including loss of profits insofar as it is established. If the injury cannot be made good by either restitution or compensation, the State must provide *satisfaction*, which may consist of

acknowledgement of the breach, an expression of regret, a formal apology or another appropriate remedy.

There are defenses available to the responsible State which preclude the wrongfulness of an act, including valid consent by the injured State, self-defence, force majeure, distress, necessity and valid countermeasures. The ILC Articles set out the requirements which must be met before these defenses can be invoked. Some of the provisions of the ILC Articles on these “defences” can be classified as “progressive development” rather than a codification of customary international law.

J. THE ROLE OF THE ICJ

The ICJ is the chief judicial organ of the United Nations. All members of the UN are automatically parties to the Statute of the International Court of Justice. The jurisdiction of the ICJ in “contentious disputes” between States is subject to the principle of consent. It can obtain jurisdiction in three ways. First, the States parties to a dispute may enter into an *ad hoc* agreement to refer a particular legal dispute to the court. Second, States can submit an “optional clause declaration” to the UN Secretary-General declaring that they accept the jurisdiction of the ICJ over certain categories of disputes with other States which have also filed an optional clause declaration. This category of disputes is quite rare, as many States are not willing to accept the jurisdiction of the ICJ in advance for wide categories of disputes. Third, many international conventions contain dispute settlement clauses called “compromissory clauses” allowing disputes between States parties to the convention to refer disputes concerning the interpretation or application of provisions of that convention to the ICJ by one of the parties to the dispute. Some conventions allow States to “opt out” of such compromissory clauses.

If a dispute between two States is decided by the ICJ, the decision is final and binding as between the parties to the case. It is not binding on other States. However, to the extent that the ICJ pronounces on issues of customary law or treaty law, its judgment will be treated as an authoritative interpretation of international law by many States.

The ICJ also has advisory jurisdiction. The UN Security Council and the UN General Assembly may request advisory opinions on any legal question. The UN General may also authorize other UN organs or specialized agencies to request advisory opinions on legal questions arising within the scope of their activities.