Excerpt

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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 becoming 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 preparatoires, 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.