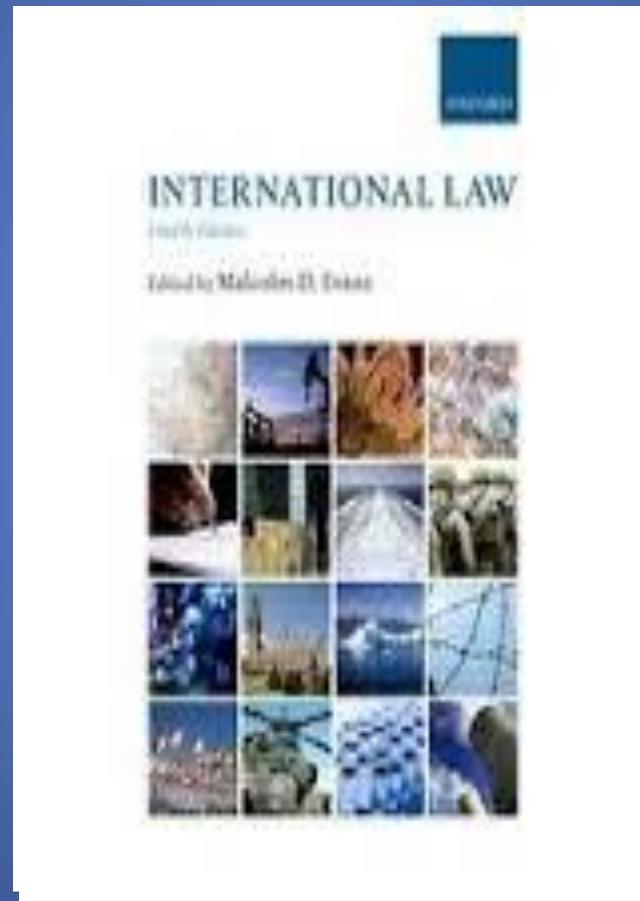


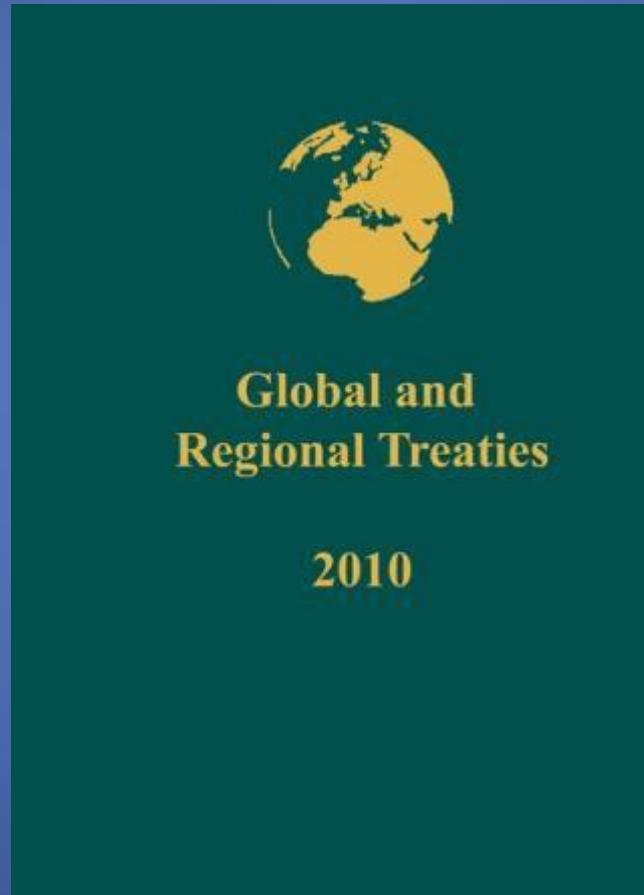
# Sources of International Law

Cecilia M. Bailliet

# Malcom Evans, International Law 4th Ed. OUP



# Treaty Collection



# Read Blogs and Journals

- International Law Blogs
- European Journal of International Law: Talk!
- American Journal of International Law
- International Law in Brief
- IntLawGrrls
- International Law Observer
- Opinio Juris

# Class Activities

- Newsroom
- Class Presentations
- Class Debate
- PIL Masters Special Seminars

# Historical Development of International Law

- De Vitoria ius inter gentes law between nations
- Vasquez ius inter principes del populos liberos law of nations
- De Suarez ius, quod omnes populi et gentes variae inter se servare debent, law which all different peoples and nations should use between themselves
- Grotius ius inter civitates, law between civilized nations and ius quod inter populos plures aut populorem rectores intercedit, law which regulates legal relations among different peoples according to the people
- Cancado Trindade- Jus Gentium

# Wilhelm G.Grewe

- The character of modern international law, and its transformations, depend upon the structure of the modern State system and the changing political groupings which have developed within that system. . .
- Permanent diplomacy is a characteristic of the modern state system, Andreas: «Hand in Hand the theory and practice of the balance of power gradually advances»

# Wilhelem G. Grewe

- In the Middle Ages, emperors and popes, princes, etc. maintained relations (including trade) with the infidels, concluded treaties with them and treated them as legitimate adversaries in armed conflict, *iusti hostes*. The idea of maintaining a minimum standard of international legal relations with the infidels on the basis of natural law, which was generally recognised as binding for all peoples, corresponded broadly to the practical needs of commercial intercourse in the Mediterranean world.

# The Line in International Law

- In 1634 Medici Lines of Tropic of Cancer and Meridian of Ferro separate the sphere of reason from that of force, beyond the lines the road of hostility began.
- Barlaeus: There is no sin beyond the equator, as though the line dividing the globe also separated virtue and vice from one another.
- No peace treaty binding beyond the equator. Maintenance of Peaceful Balance of power between old states of Europe, not new states.
- State of Nature v. State of Society
- Consider North/South and East/West divisions within international law and policy at present

# Sources of International Law

- 1. Treaties and conventions- Nuclear Test Ban Treaty
- 2. International Custom- prohibition of crimes against humanity
- 3. General Principles of Law-lex specialis derogat legi generali
- 4. Subsidiary Sources of judicial decisions and legal teachings- ICJ/ICC/ITLOS/PCA cases, Brownlie textbook on Principles of Public International Law, Crawford, Evans, International Law Commissions, Yearbooks of International Law

# Hierarchy?

- Treaties and custom are equal, subsequent treaty can displace previous custom, subsequent custom can change treaty
- Exception is jus cogens- non-derogable
- Principles below treaties and custom, gap fillers, natural law sources, rules common to all legal systems, principles of equity, general principles of international law

# Cancado Trindade: Principles are foundation of Law

- Principles reveal legitimate ends sought by law:
- Common good of human beings
- Realization of Justice at national and international level
- Primacy of Law over Force
- Preservation of Peace
- Can be regime specific- non-refoulement in Refugee Law, Principle of Humanity in IHL, Respect of Dignity of the person in HR
- Universal juridical conscience to counter unlimited state voluntarism

# Statute of the International Court of Justice Art. 38 (1)

- 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.

## Art. 38 (2)

- This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.
- Equity used in cases involving the domains of the law of the sea, human rights

# Other sources of law

- Unilateral acts of State, such as recognition
- Resolutions of International Organizations

# Treaty

- Written international agreement between States governed by international law, VCLT Art 2
- Bilateral or multilateral negotiations
- State signature indicates consent to be bound
- Ratification of treaty sent to depositary of the treaty (state or IO)
- Entry into Force

# Treaty

- Pacta sunt servanda, VCLT Art. 26, Every treaty is binding upon the parties to it and must be performed by them in good faith.
- VCLT Art. 34 A treaty does not create either obligations or rights for a third State without its consent.
- Exception where the rule is considered general customary law
- Treaties only bind state parties, but treaties may promote CIL

# Interpretation of Treaty

- 1) Textual School- ordinary meaning of text
- 2) Intentionalist School- Seek intention of the drafters
- 3) Teleological School- Seek Interpretation which best fulfills the object and purpose of the treaty
- VCLT, Art 31 «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.»

# Interpretation of Treaty,

- Context includes text of the treaty and any instrument made by the parties relevant to its conclusion
- ICJ Territorial Dispute Case, Interpretation «must be based above all upon the text of a treaty»
- Take into account subsequent agreement by parties regarding interpretation
- Consider subsequent practice of parties regarding interpretation
- Recognize relevant rules of international law applicable to relations between parties
- Supplementary Means of Interpretation Travaux préparatoires of the treaty (drafts of treaty and negotiation records)
- Interpret treaty so as to render it effective
- Specific words prevail over general words

# Termination/suspension/withdrawal of Treaty

- Express provision in treaty
- Or Consent of all parties
- Material Breach, supervening impossibility of performance, fundamental change of circumstances

# Customary International Law

- Law that has evolved from the practice or customs of states
- General, uniform and consistent practice + belief that practice is obligatory (*opinio juris*)
- Treaty may replace CIL, but treaty cannot change *jus cogens*

# Anthea E. Roberts

- Custom = State Practice (general/uniform and consistent practice by states) + Opinio Juris (practice is followed out of belief of legal obligation-statements on the legality of action)
- Actions form custom only if there is also an articulation of the legality of the action
- Traditional custom (inductive process, focuses on state practice, PCIJ SS Lotus Case, consider maritime law) v. Modern Custom (deductive, focus on opinio juris, ICJ Nicaragua Case- refer to GA resolutions on non-intervention, consider human rights)
- Kirgis Sliding Scale- Strong Practice, doesn't need Opinio Juris, and vice versa
- Lex ferenda v. Lex lata

Read Case concerning the Military and Paramilitary Activities in and Against Nicaragua, ICJ 1986, paras.174-179, 183-186

- 1. Whether a customary rule exists in the opinio juris of States, and it is confirmed by practice.
- 2. Principle of non-use of force is CIL, examines UN Charter Art. 2(4), Declaration of Principles of International Law concerning Friendly Relations and Cooperation among States

# Read ICJ Advisory Opinion on the Threat or Use of Nuclear Weapons, 1996

- International customary and treaty law does not contain any specific prescription authorizing the threat or use of nuclear weapons
- No clear prohibition of nuclear weapons, and states are profoundly divided on whether non-recourse to nuclear weapons constitutes *opinio juris*- Court does not find that there is *opinio juris*, only *de lege ferenda* which is subject to divisions

# ICJ Advisory Opinion on the Unilateral Declaration of Independence in Respect of Kosovo, (2010), paras. 78-84

- State practice from 18th, 19th, and 20th centuries contain no prohibition of declarations of independence.
- Right of self-determination in context of colonization evolved in second half of 20th century.
- Cite UN Charter Art. 2(4), Declaration on Principles of International Law concerning Friendly Relations (CIL), Nicaragua case, GA resolution, Helsinki Conference Final Act, Security Council practice
- Court considers that general international law contains no applicable prohibition of declarations of independence.

# State practice- Sean Murphy

- Acts taken by states in their diplomatic relations with one another
- Acts taken internally by states through their legislatures or courts
- Acts taken by states before international organizations
- Inaction by States
- Uniform and consistent state practice over some extended period of time
- The practice of more powerful states matters more than weaker states

# Hierarchy of Norms

- **Jus Cogens**
- Vienna Convention on the Law of Treaties Art. 53
- 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 . . .
- Jus cogens overrides conflicting norms, creates normative hierarchy
- Prohibition of aggression, slavery, genocide, racial discrimination, crimes against humanity, torture, the right to self-determination, basic rules of international humanitarian law, prohibition of piracy,
- House of Lords Pinochet case jus cogens nature of the crime of torture justifies universal jurisdiction

# Vienna Convention on the Laws of Treaties Article 19

- 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 failing under subparagraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty

# US Reservation to Article 6(5) ICCPR

- That the United States reserves the right, subject to its Constitutional constraints, to impose capital punishment on any person (other than a pregnant woman) duly convicted under existing or future laws permitting the imposition of capital punishment, including such punishment for crimes committed by persons below eighteen years of age.

# Customary International Law/Obligations Erga Omnes

- Designates the scope of application- obligations are owed to the international community as a whole- All States are entitled to invoke State responsibility in case of breach- prohibition of genocide, human rights, etc.
- Barcelona Traction Case, ICJ 1970 p.32
- ILC Commission Articles on State Responsibility Article 48
- ICJ Advisory Opinion on Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (2004) paras. 155, 159
- Erga omnes norms do not necessarily render conflicting obligations null and void.

# Customary Law

- 1. Established, widespread, and consistent practice by States
- 2. *Opinio Juris* (conviction of adhering to existing rule of law)
  
- ICJ North Sea Continental Shelf Case:
- «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, ie the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*.»
  
- See International Law Association Report on Customary International Law

# Read North Sea Continental Shelf Cases, ICJ (1969) paras 60-82

- 1. Whether the equidistance principle is a rule of customary international law
- 2. Rule not proposed by International Law Commission as an emerging rule of customary international law, it has not crystallized as a rule
- 3. States can make reservations to Article 6 in the LOS Convention
- 4. State practice not very extensive or uniform
- 5. Negative conclusion by the Court.

# Sean Murphy- Critique of CIL

- Some consider that States only follow CIL when it is in their national self-interest
- Difficult to determine state practice and opinio juris of 191 states

# Persistent objector exception

- When during the custom's formative period, a state consistently objects to the application of a customary rule to itself, the custom that eventually crystallizes will not bind that state
- ICJ Asylum Case and Anglo-Norwegian Fisheries Case (10 mile delimitation of territorial waters)
- Does NOT apply to jus cogens

# Jus Cogens

- Pacta sunt servanda
- Crime of piracy
- Use of Force other than in self-defence, Article 2(4) UN Charter
- Genocide
- Crimes against humanity
- Slavery
- Torture
- Apartheid, systemic racial discrimination

# Susan Breau: Question on CIL

- ICJ: «The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolute 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.»
- Discuss in relation to the prohibition of torture

# Soft Law

- Declarations, Political Pacts, Read the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States
- Compare Security Council Resolution 1373, General Assembly Resolution 194
- Compare Security Council Resolution 2170 and 2171 (2014)- analyze for purpose and potential for implementation in practice
- Consider output of IOs (including regional organizations), guidelines
- Codes of Conduct, MNCs- See UN Ruggie Framework Guiding Principles on Business and Human Rights