



Master Programme in European and International Law

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Public International Law (VAK 06-009)

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Sources

Municipal law

Distinction between

- Formal sources (“source of law”)
- Material sources (“justice, equity”)

Sources

Formal sources

Formal sources are legal procedures and methods for the creation of rules of general application which are legally binding on the addressees (“law-making”)

Sources

Material sources

Material sources provide evidence of the existence of rules which, when proved, have the status of legally binding rules of general application

Sources

Statute of the International Court of Justice

“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.”

Sources

International law

- Generally regarded as a complete statement of the sources of international law
- *Formal sources* do not exist as such in international law
- No real hierarchy among the different sources
- System of priority of application only dictated by the order (a) to (d)
- “Primary sources” = (a) and (b)

Sources

International conventions

Art. 38 (1)(a) Statute of the ICJ

“A treaty only creates law as between the States which are parties to it.” (PCIJ, 1926)

States and other international entities enjoy full freedom as regards the modalities and form of agreement (contractual freedom).

No rules prescribing any definite procedure or formality to create international conventions.

Sources

Terminology

Terminology varies but the substance is the same: agreement, treaty, convention, protocol, covenant, etc.

The wills of two or more subjects of international law for the purpose of regulating their interests by international rules.

Sources

Examples

- “Law-making” treaties
- The conclusions of international conferences
- Resolutions of the UN General Assembly

Sources

“Law-making” treaties

Such treaties create legal obligations the observance of which does not dissolve the treaty obligation, i.e. general norms for the future conduct.

Example: Hague Conventions of 1899 and 1907, Parts of the UN Charter of 1945

Sources

Conclusion of international conferences

The “Final Act” or other statements of conclusions of a conference of States may be a form of multilateral treaty.

This may constitute some evidence of the state of the customary law on the very subject.

Sources

UN GA Resolutions

Resolutions of the UN General Assembly are generally not binding on member states, but may be evidence of the opinions of governments.

There are examples of “law-making” resolutions: The Resolution on Prohibition of the Use of Nuclear Weapons for War Purposes.

Sources

Vienna Convention

The 'birth' and 'death' as well as interpretation of treaty law according to the 1969 Vienna Convention on the Law of Treaties (82 Member States).

Sources

Making of Treaties

- A State expresses its intent to be legally bound by a treaty by “ratification”.
- “signature” is not sufficient
- Art. 6-18 Vienna Convention

Sources

Reservations

- Reservations are made to:
 - exclude the application of one or more provisions,
 - place a certain interpretation on them.
- The reservation has to be accepted by all other contracting parties.
- Art. 19-23 Vienna Convention

Sources

International custom

Art. 38 (1)(b) Statute of the ICJ

International custom, “as evidence of a
general practice accepted as law”.

Sources

Elements

- State practice (*usus*)
 - Consistency of the practice (need not be absolutely uniform)
 - Generality of the practice (general recognition, but not from all States)
- Corresponding views of the States (*opinio iuris*)

Consistency of the Practice

- Complete uniformity is not required
- Substantial uniformity is required
- Freedom of determination

Generality of the Practice

- Universality is not required
- Determining the value of abstention from protest (constant objectors)

Sources

Examples

- Diplomatic correspondence
- Policy statements
- Press releases
- Comments by governments
- State legislation
- International and national judicial decisions
- Practice of international organs
- Resolutions of the United Nations General Assembly
- Etc.

Sources

Opinio iuris

- “psychological element”
- Sense of legal obligation (NOT courtesy, fairness, etc.)

Sources

Influencing Factors

- Emerging economic interests (e.g. the Law of the Sea)
- Area of fundamentals (e.g. prohibiting racial discrimination)
- Updating and elaboration of parts of customary law which have been considered more or less acceptable by newly independent States

Relations of Sources

- Later law repeals an earlier one (*lex posterior derogat priori*)
- A special law prevails over a general law (*lex specialis derogat legi generali*)

Sources

General principles of law

Art. 38 (1)(c) Statute of the ICJ

in practice of tribunals:

- Arbitral tribunals
- The International Court of Justice and its predecessor

Sources

Judicial decisions

Art. 38 (1)(d) Statute of the ICJ

- Decisions of international tribunals
- Decisions of the Court of Justice of the EC
- Decisions of national courts
- Ad hoc international tribunals
- Federal courts
- Pleadings in cases before international tribunals

Sources

Decisions of international tribunals

- Arbitral tribunals
- Decisions of the ICJ, ICC, ITLOS
- Judicial precedent

Sources

Decisions of national courts

Such decisions may involve a free investigation of the point of law and consideration of available sources.

The value of these decisions varies considerably (e.g. because of a narrow national outlook or inadequate use of the sources).

Sources

Ad hoc international tribunals

Such tribunals may produce valuable pronouncements on delicate issues.

Examples: IMT (Nuremberg/Tokyo),
ICTY and ICTR (The Hague)

Sources

Federal Courts

Such courts had to decide disputes between members of the communities involved on the basis of doctrines of international law.

Examples: US Supreme Court, Swiss Federal Court

Sources

Writings of publicists

Art. 38 (1)(d) Statute of the ICJ

- Constitute ONLY evidence of law
- Reflect national and other prejudices

Examples: draft articles by the International Law Commission (ILC), Harvard Research drafts, reports and resolutions of the Institute of International Law

Sources

Developments

- 1969 Vienna Convention on the Law of Treaties (to make international regulations of treaties more certain, detailed and consonant)
- New category of general international rules: peremptory rules (*ius cogens*)
- The objection to the formation of a customary rule by a State is questionable

Sources

Discussion

- Do you see an advantage in having no hierarchy among the sources of international law?
- Do treaties or customs represent the international community better?
- Do we need peremptory norms (*ius cogens*)?



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Further reading:

A. Cassese, International Law, 2001, pp. 117-159

Further information:

<https://elearning.uni-bremen.de>