Public International Law

1. General

Public international law is traditionally described as a system of rules and principles that govern the relations between states and other subjects of international law such as the United Nations or the European Union. It is primarily created through states and covers almost all areas of inter-state activities such as trade, diplomacy, postal services, transboundary emissions, the use of outer space and, of course, war. Public international law governs issues relating to the global environment, control and jurisdiction over territory, human rights and international crime.

The main primary sources of international law are treaties and customary law. Secondary sources that explain, interpret, and help to analyze what the law is include court judgments or general legal principles that are part of all legal orders – for example, that a contract must be kept and executed in good faith.

With regard to the sources of public international law Article 38 of the Statute of the International Court of Justice (the "World Court") provides:

"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. … 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. Customary law

Customary international law is derived from the consistent practice of states accompanied by opinio juris - the conviction of states that the consistent practice is required by a legal obligation. In addition to direct evidence of state behaviour, judgments of international courts as well as the results of academic investigation have traditionally been looked to as persuasive sources of international custom.

3. Treaties

Treaties are agreements between states (and other entities under international law) and only bind the participating Parties. These treaties are often known as conventions, pacts, protocols or covenants. The Charter of the United Nations is the most important international treaty and is often referred to as the constitution of the international community. Otherwise, there is no hierarchy between different international treaties. Conflicts amongst different treaty regimes may be addressed in the treaties themselves but can be subject to often contentious questions of application and interpretation.

A number of international treaties have established entire regulatory regimes amongst their state Parties. Often institutions set up under treaty regimes monitor implementation, take further action, and facilitate the development of new legal instruments where, for example, priorities change or scientific knowledge evolves. Some treaties contain compliance and enforcement mechanisms as well as dispute settlement procedures and an increasing number of treaties allow a variety of

stakeholders to put forth political, economic, and legal issues for consideration in decision making processes.

Customary and treaty law are complementary. Treaties regularly contain codifications of customary law while subsequent state practice can develop the provision of a treaty further. Treaties and the practice of states may also lead to the creation of new rules of customary law. What constitutes currently applicable international law is however often a question of interpretation dependant on political factors operating within the sphere of international relations.

There are other (secondary) sources of binding international law, for example, court judgments or decisions of treaty bodies whose authority has been accepted by a state through an international treaty process. Also important for the determination and development of international law are international policy documents such as the 1992 Declaration of the UN Conference on Environment and Development drafted at the world summit in Rio de Janeiro (Rio Declaration). They may be described as quasi-legal instruments (or soft law) because they do not have binding force but can accelerate the formation of customary law as well as provide evidence of opinio juris.

4. Compliance

International law has not established a general compliance and enforcement mechanism. A state's inclination to uphold norms rather comes from the pressure that states put upon one another to behave consistently and to honour their obligations. Although there are various means of dispute settlement and enforcement within existing treaty regimes, it is usually through diplomacy driven by the desire of states to preserve their international reputation that violations of international law are addressed. Legality and power often operate on an equal footing.

5. Treaty application and interpretation

Treaties are interpreted through different means. These include the intention of the Parties at the time the treaty was concluded and the subsequent practice of the Parties in its application. The UN Charter (Article 27 paragraph 3), for example, explicitly provides that Security Council decisions shall be made "by an affirmative vote of nine members including the concurring votes of the permanent members". Nevertheless, these days it is fully accepted that the five permanent members of the UN Security Council only enjoy a veto right. So abstention is effectively interpreted as an affirmative vote.

The application and interpretation of treaties are generally governed by the 1969 Vienna Convention on the Law of Treaties (VCLT). Some States, for instance the US, are not Parties to the VCLT. However, most of the VCLT rules are recognised as customary international law and therefore still apply to these States.

The interpretation of treaties is covered in VCLT Articles 31 and 32. Treaties are to 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. The relevant context of a treaty includes the text, preamble and annexes, as well as related agreements made by all the Parties, or connected instruments made by some Parties and accepted by the others. For example, the UNFCCC is part of the context for interpreting the Kyoto Protocol, and vice versa.

Article 30 VCLT applies to successive treaties relating to the same subject matter. Article 30.2 states that when a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of the other treaty prevail. Under Article 30.3, when all

the Parties to an earlier treaty are also Parties to a later one, the earlier treaty applies only to the extent that its provisions are compatible with the later one. Article 30.4 covers situations where the Parties to a later treaty do not include all the Parties to an earlier one.

6. Public international and domestic law

Public international law applies between states and other subjects of international law (see above). Although it may be concerned with the interests of groups and individuals it usually confers rights and obligations to states. Only rarely (for example, under the European Convention on Human Rights) can people directly claim rights under international law.

However, law and policy making at the international level increasingly shapes domestic law. For example, new legislation or administrative procedures are adopted in order to comply with international treaty obligations. International legal principles may be used by domestic courts or in connection with civil society campaigns. In many developing countries donor support is contingent on compliance with international standards on, for example, sustainable development, good governance or human rights.