

Researching International Law Sources

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Topics for Discussion:

- What is international law?
- Characteristics of the international legal system
- The recognized sources of international law
- Treaties as a source of international law rules
- Custom and general principles
- Judicial decisions and academic writings
- Other sources



What is International Law?

- International law is the system of principles and rules traditionally designed to govern relations between States (e.g. “inter-nation” law)
- International law also governs relations between States and other actors in the international legal system, including inter-governmental organizations (also called international organizations) such as the United Nations
- International law is a separate legal system from national/domestic law
- And as such, international law relies on different research sources than those used for domestic law research



- International law is also called “public international law” and was previously referred to as “the law of nations”, which may assist in finding treatises and general texts in a library
- International law is a distinct and separate subject from private international law or “conflicts of law”
- International law is also distinct from foreign law or comparative law



Characteristics of the international legal system

- Principal subjects are States (countries), not individuals nor “legal persons” such as companies.
- National law is concerned primarily with the legal rights and duties of legal persons within a body politic (the State), while international law is concerned primarily with the rights and duties of States.



Characteristics of the international legal system

- International law is a decentralised legal system. It lacks a central law-making authority. There is no world Parliament, thus no Acts of Parliament (statutes). Domestic statutes may, however, transform international law rules into domestic law rules.
- In Canada, an international treaty is not automatically part of the law of Canada. The treaty obligations must be transformed (implemented) into domestic law obligations by the enactment of legislation.



Characteristics of the international legal system cont'd

- Lack of central enforcement machinery. There is no international police force to enforce international law, although there are some enforcement bodies e.g. the UN Security Council, the International Criminal Court (ICC), and the World Trade Organization (WTO)
- International law is an evolving, normative system. It can lack certainty, but also has flexibility.
- The impact of power and politics is more directly relevant. The practice of international law is intrinsically connected to politics, diplomacy and the conduct of foreign relations.



Sources of International Law

- It is trite but true that every legal system must have some criteria by which laws are recognized.
- Even though international law does not possess formal institutions responsible for law creation (such as a global Parliament or Legislature), there are recognized and accepted methods by which legal rules come into existence, as well as several ways in which the precise content of these legal rules can be identified
- These are the “sources of international law” - a topic always discussed in any textbook on international law



Sources of International Law

- The traditional starting point for a discussion of the sources of international law is Article 38(1) of the *Statute of the International Court of Justice* (annexed to the *UN Charter*)
- The ICJ (or “World Court”) is the principal judicial organ of the UN, located in The Peace Palace in The Hague, the Netherlands
- The Statute of the International Court of Justice is a treaty setting out the powers and functions of the ICJ
- Article 38(1) is technically a direction to the ICJ; however, it is widely recognized and accepted as being an accurate summary of the key sources of international law generally



Article 38(1) of the ICJ Statute

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 contracting States;
- b) international custom, as evidence of a general practice accepted as law;
- c) the general principles of law recognized by civilised nations; and
- d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as a subsidiary means for the determination of rules of law.



International Conventions

- Conventions are treaties – the term “conventional international law” refers to international treaty law
- Treaties can cover any subject matter and can have as few as two States Parties or apply to all States
- A treaty is “any international agreement concluded between States ... governed by international law whatever its designation”
- Thus it does not matter whether the instrument is called a convention, a treaty, a protocol, a charter, a covenant, an act, a statute, or a pact
- All are treaties if the parties intended to conclude an agreement to be binding under international law



Finding Treaty Texts and Treaty Information

- Treaties are only binding on States that have given their consent to be bound (typically for multilateral treaties through “ratification” or “accession”)
- Lawyers must never rely on a treaty without checking the treaty ratification record to ensure that the State of concern is a “party”
- Being a “signatory” does not necessarily mean a state is a “party”
- Treaties are made in stages – with signature or adoption often indicating agreement to a final text and the end of negotiations, while the ratification (or accession) stage is when a State gives its consent to be bound



Canada's Treaty Obligations

- Information on the treaties to which Canada is a state party can be found on the Government of Canada's "Canada Treaty Information" website at: <http://www.treaty-accord.gc.ca/>
- This site contains the signature and ratification records for Canada, the *Canada Treaty Series* (Can. T.S.) citation, and some treaty texts
- It also contains information on Canada's new practice of tabling treaties in Parliament (applicable since January 2008)
- The "Can. T.S." cite is acceptable in court as evidence of the treaty



Finding Treaty Texts Generally

- Secret treaties of alliance were a contributing factor to World War I
- In the inter-war period, the international community imposed registration and publication requirements for all treaties
- This obligation is continued today in Article 102(1) of the *UN Charter*:
 - “Every treaty and every international agreement entered into by any Member of the United Nations after the present Charter comes into force shall as soon as possible be registered with the Secretariat and published by it.”
- Thus, once a treaty is in force, it must have an official source (and citation)



Finding Treaty Texts Generally

- The official (hard-copy) publication for many treaties (post-1946) is the *United Nations Treaties Series* (UNTS)
- A new website (as of December 2008) provides free electronic access to the UNTS at: <http://treaties.un.org/>
- For earlier treaties, the League of Nations had a similar requirement of registration and publication for treaties, resulting in the *League of Nations Treaties Series* (LNTS)
- The LNTS database can now be accessed online through a link found on the UN Treaties website
- They are also available on Hein Online



- The UN treaty website at <http://treaties.un.org> can also be used to check the ratification record for a particular treaty to ensure that the State with which a lawyer is concerned has in fact given its consent to be bound by that treaty
- This website can also provide information on reservations lodged by States and objections issued by other states in response to reservations



Historic Treaties

- Some very useful collections of historic treaties are also maintained by university libraries
- For example, the Yale Law Library maintains the Avalon Project for documents in law, history and diplomacy at:
<http://avalon.law.yale.edu/>
- The Avalon Project contains a special collection of documents concerning the Nuremberg trials at:
http://avalon.law.yale.edu/subject_menus/imt.asp
- And a collection on the laws of war:
http://avalon.law.yale.edu/subject_menus/lawwar.asp



Interpreting Treaty Texts

- Some treaty depositary websites can also provide links to the *travaux préparatoires* (the preparatory works) which can be used as treaty interpretation aids
- The Treaty Office of the Council of Europe, for example, provides links to explanatory memoranda concerning various European treaties, see: <http://conventions.coe.int/>
- The Council of Europe is responsible for the European Convention on Human Rights of 1950, which is similar to the Canadian Charter of 1982 (see further: <http://www.echr.coe.int>)



Interpreting Treaty Texts

- For law of the sea matters, a helpful website is provided by the UN Division for Ocean Affairs and Law of the Sea: <http://www.un.org/depts/los/index.htm>
- For trade law matters, the website of the UN Commission on International Trade Law (UNCITRAL) may offer assistance: <http://www.uncitral.org/>
- For bilateral investment treaties (BITs), especially copies of awards, decisions and orders, I recommend Prof. Andrew Newcombe's website at: <http://ita.law.uvic.ca/>



Finding Treaty Texts by Subject

- Treaties can be on any subject - thus searching by subject rather than by depositary can also be useful, especially if you don't know that there is a relevant treaty on point
- The Electronic Information System for International Law, hosted by the American Society of International Law, is one of the best starting points, available at: <http://www.eisil.org/>
- This website contains sections on various subjects from both public law and private law perspectives, including air and space law, international dispute settlement, and international environmental law



Finding Treaty Texts by Subject

- Full-text versions of treaties can also be published in subject-specific paper collections, also known as “document books”, often found in law libraries
- See, for example, A. Roberts and R. Guelff, eds, *Documents on the Laws of War*, 3rd ed. (Oxford University Press, 2000)
- Ian Brownlie and Guy Goodwin-Gill, eds, *Basic Documents on Human Rights*, 4th ed. (Oxford University Press, 2006)
- Ian Brownlie, *Basic Documents in International Law*, 5th ed. (Oxford University Press, 2002)



Finding Treaty Texts by Subject

- UN websites for specific fields are also reliable, such as the Office of the High Commissioner for Human Rights as a source for human rights treaties:
<http://www.ohchr.org/EN/Pages/WelcomePage.aspx> (select the pull-down menu for "Your human rights")
- University-maintained websites can also be reliable sources, such as the University of Minnesota's Human Rights Library at:
<http://www1.umn.edu/humanrts/>
- The ICRC maintains an International Humanitarian Law database with information on 100 treaties at:
<http://www.icrc.org/ihl>



Finding Treaty Texts by Region

- For those interested in European treaties negotiated and concluded within the institutional framework of the Council of Europe (since 1949), there is a designated website containing links to the 200 treaty texts, the signature and ratification records, information on reservations, and explanatory memos (since 1965) at <http://conventions.coe.int/>
- Note: The 48-member Council of Europe is not the same organization as the 27-member European Union, with the EU having its own website at: <http://europa.eu/>



Finding Treaty Texts by Region

- Canada has been a member of the Organization of American States (OAS) since 1990
- Information on treaties negotiated and concluded within the institutional framework of the OAS, including treaty texts and ratification records, can be found at:
http://www.oas.org/DIL/treaties_and_agreements.htm



Applying Treaty Law

- The general rules of treaty law were codified by States in the late 1960s, based on preparatory work by the International Law Commission (ILC)
- These rules can now be found in the *Vienna Convention on the Law of Treaties* (VCLT) – a treaty adopted in 1969, which came into force in 1980, available at:
http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf
- A leading monograph on treaty law generally is A. Aust, *Modern Treaty Law and Practice*, 2nd ed. (Cambridge University Press, 2007)



Custom and General Principles

- Customary law, meaning the rules of international law derived from a widespread and uniform state practice that is followed out of a sense of legal obligation, cannot be researched the same way as treaties
- Best research starting points are textbooks, casebooks, treatises and journal articles relevant to the particular subject matter
- Many customary rules are also supported by decisions of the ICJ identifying such a rule, with casebooks being a useful research tool for this



Custom and General Principles

- A similar difficulty exists with finding the third category of sources of international law, namely general principles of international law
- Best research starting points are textbooks, casebooks, treatises and journal articles relevant to the particular subject matter
- For example, Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Cambridge University Press, 2006)
- ICJ decisions may also assist here too



State Practice

- As custom is based on state practice, some States are very diligent at keeping, and making public, records of their practice
- Access to this information can be obtained through a law journal, with some journals being better than others, or through the websites of the ministries of foreign affairs for individual states
- States which provide substantive documentation on their websites include the United States (www.state.gov), the United Kingdom (www.fco.gov.uk), Canada (www.international.gc.ca), and France (www.diplomatie.gouv.fr).



State Practice

- For commentary on recent state practice, I would note that the *British Yearbook of International Law*, the *Canadian Yearbook of International Law*, and the *American Journal of International Law* have a regular section on practice for the UK, Canada, and the US respectively
- The US State Department also publishes its own annual *Digest of State Practice in International Law*
- This digest is also available at:
<http://www.state.gov/s/l/c8183.htm>



Judicial Decisions

- Judicial decisions are a subsidiary source in international law. They are a persuasive authority, and not a binding authority, as there is no rule of *stare decisis* in international law.
- This category of sources is not limited to the judgments and advisory opinions of the International Court of Justice (ICJ), available at: <http://www.icj-cij.org> (and Westlaw)
- The official report series is the “ICJ Reports” (with Westlaw citing the page numbers of the ICJ Reports)
- This is a bilingual report series (En/Fr)



Judicial Decisions

- There are other international courts, such as the European Court of Human Rights, which may be relevant, online at: <http://www.echr.coe.int/>
- Or the panels of the World Trade Organization: <http://www.wto.org>
- For the Reports of International Arbitral Awards (RIAA), see: <http://www.un.org/law/riaa/>
- And there was the Permanent Court of International Justice (PCIJ), which existed before the International Court of Justice (ICJ) in the inter-war period
- The PCIJ's jurisprudence is still relevant today, and can be found via a designated link on the ICJ's website



Judicial Decisions

- But there is no reason to limit this subsidiary source to international judicial decisions
- National judicial decisions, especially those of the highest courts, can also be a persuasive source, especially in certain subfields of international law, such as state immunity, extradition, and the protection of human rights
- A useful research tool to obtain case law from the highest courts of several countries is the World Legal Information Institute website at:
<http://www.worldlii.org/>



International Law Reports

- One of the best sources for finding judicial and arbitral decisions, from a variety of jurisdictions, on various subjects within the field of international law is the *International Law Reports* (ILRs)
- The ILRs are published by Cambridge University Press, and report all significant cases from 1919 on
- While searching the hard-copy volumes of the reports via the index is probably still the most effective research method, a searchable electronic database for the ILRs has been developed by Justis



International Legal Materials

- Another reliable and useful publication, which publishes judicial decisions as well as other primary source material, is *International Legal Materials* (ILMs)
- The ILMs are published bimonthly by the American Society of International Law since 1962. Materials are selected for their usefulness to scholars, practitioners and business and government officials, both in the United States and abroad.
- Before the advent of electronic access to UN documents, the ILMs were a crucial source for copies of recent treaties and other documents



International Legal Materials

- An ILM cite can serve as a parallel citation, e.g. *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331, (1969) 8 ILM 679 (entered into force 27 January 1980)
- A similar service was offered by a Supplement included with the AJIL prior to 1962, e.g. *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, 78 UNTS 277, (1951) 45 AJIL Supp 6 (entered into force 12 January 1951)
- The ILMs are available electronically via Westlaw (from 1980 on) and Lexis (1962 on)



Academic Writings

- As indicated in Article 38(1), the teachings of the most highly qualified publicists are a subsidiary source for the rules of international law
- Leading general treatises include: Ian Brownlie, *Principles of Public International Law*, 7th ed. (Oxford University Press, 2008) and Malcolm Shaw, *International Law*, 6th ed. (Cambridge University Press, 2008)
- See also Jennings and Watt, eds, *Oppenheim's International Law* (Longman, 1992) – very good, but getting somewhat out-of-date
- For a useful textbook overview, see John Currie, *Public International Law*, 2nd ed. (Irwin Law, 2008)



Finding Journal Articles

- Searching an index to journal article literature by keyword or subject terms is an efficient research technique for finding commentary
- My favourites are the *Index to Legal Periodicals*, *Legal Trac*, and the *Index to Foreign Legal Periodicals* to produce a list of potential journal articles relevant to a particular topic
- For some journal articles, the University of Alberta Law Library has included a hypertext link to the full-text version of the article in the index
- I also use Hein Online to obtain the text of a journal article, once I've found the citation from the Indexes



Casebooks

- Casebooks, by which I refer to published collections of excerpts from key cases and other materials, are also a good starting point for research
- Suggested texts with a Canadian focus include: Currie, Forcese & Oosterveld, *International Law: Doctrine, Practice and Theory* (Irwin Law, 2007), and Kindred *et al*, eds., *International Law: Chiefly as Interpreted and Applied in Canada*, 7th ed. (Edmond Montgomery, 2006)
- There are others, such as the widely respected David J. Harris, *Cases and Materials on International Law*, 6th ed. (Sweet and Maxwell, 2004)



Other Sources?

- UN Security Council Resolutions are binding on all States
- The texts can be found online at: <http://www.un.org/Docs/sc/>
- Section 2 of the Canadian *United Nations Act*, R.S.C., c. U-2, enables the Governor in Council to make such orders and regulations as are “necessary and expedient” to provide for the implementation and enforcement of Security Council resolutions under Canadian law
- These can include counter-terrorism initiatives, including restrictions on bank accounts, asset freezes, and restrictions on flying on planes



International Law Commission

- The International Law Commission (ILC) was established in 1947 with the task of codifying and progressively developing international law.
- The ILC produces useful studies and makes recommendations to states, including recommendations for new treaty texts
- Its reports are not binding, but they can offer researchers helpful guidance on certain subjects.
- Available online at:
<http://www.un.org/law/ilc/>



UN General Assembly Resolutions

- UN General Assembly resolutions are not a source of legal obligation
- However, the Assembly's resolutions can indicate evolving views and normative developments. They may also indicate political commitments made by States, and lay the groundwork for future treaty actions.
- A useful UN research guide to resolutions can be found at:
<http://www.un.org/depts/dhl/resguide/gares1.htm>
- Since 1987, the UN has published the Assembly resolutions in Supp. No. 49 of the annual General Assembly Official Records (GAOR). These can now be found online.



UN General Assembly Resolutions

- GA Resolutions are therefore found in UN Doc. A/**/49 (where "A" means Assembly, "**" indicates the session, and "49" means Supplement No. 49)
- Session numbers are easy to guess since the UN was founded in 1945, and the Assembly meets annually, thus the 63rd Session took place in 2008
- Once you know the UN Doc. number, either for the resolution itself, or for the supplement of the GAOR in which all the resolutions are printed, you can easily obtain a copy from the Official Documentation System of the United Nations database (aka "ODS") by plugging in the UN Doc. number:
<http://documents.un.org>



UN Reports

- The UN produces all sorts of reports, studies, and proposals
- While I am cautious of over-extending arguments about “soft law” sources as authorities for legal rules, these reports can be useful research tools
- The best starting point for following UN-sponsored activity in a specific field is the UN website at <http://www.un.org>
- The UN Organization Chart is helpful as it contains hypertext links to the official websites for various UN bodies: http://www.un.org/aboutun/chart_en.pdf



Yearbook of the United Nations

- The *Yearbook of the United Nations* can also be a useful research tool
- The Yearbook contains detailed accounts of the actions of the UN principal organs, bibliographic citations to primary documents, and full-texts of major resolutions
- It is also available online at:
<http://unyearbook.un.org/>
- An explanation of UN Document symbols can be found at:
<http://www.un.org/depts/dhl/resguide/symbol.htm>

