

# International Law

*Menno T. Kamminga*

- 1 Introduction – 278**
- 2 Topics of International Law – 280**
- 3 Participants in the International Legal System – 281**
  - 3.1 States – 282
  - 3.2 International Organizations – 284
  - 3.3 The United Nations – 285
  - 3.4 Multinational Enterprises – 289
  - 3.5 Nongovernmental Organizations – 289
  - 3.6 Individuals – 291
- 4 Sources of International Law – 292**
  - 4.1 Treaties – 292
  - 4.2 *ius cogens* – 293
- 5 Jurisdiction – 294**
- 6 Characteristics of International Law – 295**
  - 6.1 Institutional Framework – 296
  - 6.2 Enforcement – 296
- 7 Trends in the Development of International Law – 297**
  - 7.1 From Prohibition of Interference in Internal Affairs to Responsibility to Protect – 297
  - 7.2 From Immunity to Universal Jurisdiction – 298
  - 7.3 From Nationality as a Favor to a Right to Citizenship – 300
- 8 Concluding Observations – 301**
  - Recommended Literature – 301**

## 1 Introduction

---

Traditionally, two kinds of law are distinguished. On the one hand, there is national or domestic law, which deals with legal relations within the territory of a single State and with the organization of that State itself. On the other hand, there is international law (sometimes called «public international law»), which deals with the legal relations between States. The sharp distinction between national and international law may have been adequate in the past, but it is no longer clear-cut. It is, for example, a mistake to assume that States are free to adopt whatever laws they like. In Member States of the European Union, a large percentage of domestic laws and regulations currently originates from Brussels. But much of European Union law in turn originates from Geneva, New York, or Nairobi. Whether they are international trade and investment rules, Security Council sanctions or greenhouse emission standards, legal standards are increasingly devised at meetings of international organizations or ad hoc international conferences around the world instead of in domestic capitals.

The interplay of rules and measures stemming from institutions at different levels may be illustrated by the *Kadi* case. The case provides an example of the interplay between the United Nations Charter (under which financial sanctions were imposed on Mr. Kadi), domestic law (under which the sanctions were implemented), EU law (under which the sanctions were first transformed and then nullified), and the law of the European Convention on Human Rights (ECHR), on the basis of which it was decided that Mr. Kadi's human rights had been violated.

### ***Kadi* case (C-402/05 P and C-415/05 P)**

In 2001 the UN Security Council decided that the assets of Yassin Abdullah Kadi, a Saudi businessman, should be frozen on suspicion that he was financially supporting terrorist activities. The Security Council has established a procedure under which the assets of persons suspected of financing the terrorist activities of Al-Qaeda and the Taliban may be frozen. The identification of suspects takes place behind closed doors on the basis of information provided by intelligence services and there is no trial. Persons that are put on the sanctions list are not informed of the measures taken against them. They simply find out 1 day that they can no longer withdraw money from their bank

accounts. Decisions are binding on the Member States of the United Nations, meaning that States are required to implement the sanctions immediately. Article 103 of the UN Charter provides that obligations under the Charter prevail over any other treaty obligations States may have. Within the European Union Security Council sanctions are transformed into EU Regulations and thereby also become binding on EU Member States under EU law.

In various court proceedings Mr. Kadi attempted to challenge the sanctions imposed on him. Initially this was in vain, but in 2008 the Court of Justice of the European Union (at that time known as the European Court of Justice) annulled the EU Regulation imposing the sanctions against him on the ground that he had not been informed of the evidence against him and therefore had not been able to challenge that evidence. Under the law of the European Convention on Human Rights – that has been incorporated into EU law – anyone charged with a criminal offence is entitled to be informed of the charges against him and to defend himself.

The *Kadi* case illustrates another shortcoming of the traditional account according to which international law is merely concerned with the legal relations between States. Although the case concerns the legal position of an individual citizen—a situation traditionally regulated exclusively by domestic law—it nevertheless turns out to be largely governed by international and European law. Apparently, international law is not merely a legal system governing relations between States but rather a legal system that also addresses individual citizens.

In some States, individuals may directly invoke rules of international law (e.g., human rights standards) before domestic courts. Such States are said to have a *monistic* approach to the relationship between international and domestic law. In other States, rules of international law may only be invoked before domestic courts after they have first been *transformed* into rules of domestic law. Such transformation may be carried out, for example, by an act of parliament introducing a human rights standard into the constitution or a piece of legislation. These States are said to have a *dualistic* approach to the relationship between international and domestic law. States are free to choose which type of relationship they prefer as long as they comply with their international legal obligations.

## 2 Topics of International Law

---

International law deals with many different topics, which include but are certainly not confined to relations between States. Here are some examples.

### War and Peace

One of the oldest fields of international law consists of the laws of war and negotiating peace to resolve conflicts between States. The well-known 1949 Geneva Conventions on humanitarian law with their Additional Protocols and the 1993 Chemical Weapons Convention are international agreements on what are lawful and unlawful means of waging war by States. Nowadays, the United Nations take a central role in safeguarding international peace and security, especially through its Security Council.

### The Sea

Shipping and the use and exploitation of the sea also are long-standing topics of international law. Questions addressed by the international law of the sea include the following:

- Which restrictions may be imposed on shipping?
- Which activities are allowed on the high seas and coastal zones?
- Are States permitted to exploit the seabed?
- Which States have fishing rights in a particular area of the sea, and how many fish can they take every year?

Many of these questions are covered by the 1982 United Nations Convention on the Law of the Sea (UNCLOS). UNCLOS also contains provisions on the compulsory adjudication of disputes concerning the interpretation and application of the Convention:

Pursuant to these provisions, the Philippines in 2013 commenced proceedings against China concerning the delimitation of the continental shelf and coastal zones in the South China Sea. In 2016, an arbitrary tribunal decided in favor of the claims submitted by the Philippines. Although it is a long-standing party to UNCLOS, China declined to participate in the proceedings or to appear before the tribunal. It stated that the tribunal's decisions were 'null and void' and had 'no binding force' even though UNCLOS clearly provides that decisions by an arbitrary tribunal shall be complied with by the parties to the dispute.

### The Environment

Environmental issues such as global warming, the emission of greenhouse gases, and the pollution of water and the atmosphere transcend the domain of national States. They are therefore also regulated by treaties negotiated between States, such as the UN Framework Convention (1992) and the Paris Agreement (2016) on Climate Change.

As has become abundantly clear over the last few decades, both trade and finance are no longer issues that can be exclusively dealt with at the national level. The World Trade Organization (WTO), the World Bank, and the International Monetary Fund (IMF), organizations governed by international law, are examples of the crucial role of international law in the sphere of economic and financial relations. The WTO has a highly respected and quickly functioning dispute settlement system under which Member States may challenge protectionist measures by other States.

Economic and Financial Relations

Crime and criminals are not confined by national borders. Crimes may have international aspects (e.g., trafficking in drugs), and criminals may move from one country to another to commit their crimes and to escape arrest. The combating of crime therefore requires international cooperation, such as the UN Convention against Transnational Organized Crime (2000), the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988), and an international organization such as INTERPOL (the International Criminal Police Organization).

Crime

Human rights are rights held by individuals vis-à-vis States. The 1948 Universal Declaration of Human Rights proclaimed that human rights are universal, but the text was not adopted by consensus. Byelorussia, Czechoslovakia, Poland, Saudi Arabia, South Africa, the Soviet Union, Ukraine, and Yugoslavia registered their disapproval by abstaining from voting in favor of the Declaration. However, the subsequent UN human rights treaties in which human rights are codified in binding form were very widely ratified by States so that the core human rights have indeed become universally accepted.

Human Rights

### 3 Participants in the International Legal System

---

(Economic) globalization is the trend toward a single worldwide system of production and consumption disregarding national frontiers. Globalization is driven, on the one hand, by technological innovation (resulting in a dramatic reduction of the costs of moving goods, people, capital, and information across the globe) and, on the other hand, by policy decisions to reduce barriers to international economic transfers. Globalization is therefore both an autonomous process driven by technological progress and a political process

Globalization

driven by policy preferences of States. It could be slowed down if political preferences change, but it cannot be halted indefinitely because technological progress is bound to continue.

Globalization has a major impact both on the status of the participants in the international legal system and consequently on the contents of international law. It boosts the influence of non-State actors at the expense of the State, the entity that has traditionally monopolized international law. Here are a few examples:

- *International organizations* benefit from globalization because States increasingly transfer competences to international institutions in response to problems that can only be adequately addressed at a global level (e.g., international trade, crime, and civil aviation).
- *Multinational enterprises* benefit from globalization because the liberalization of international trade and foreign direct investment enables them to conduct their activities and serve markets wherever this is most profitable.
- *Nongovernmental organizations* benefit from globalization because the Internet and social media help to undermine the traditional governmental monopoly of information. At the same time, these media make it easier to mobilize people and campaign against governmental abuses;
- *Individuals*—at least the lucky ones—benefit from globalization because traveling and studying abroad have become much easier and cheaper. As a matter of fact, individuals who are less well-off—such as peasants who are forced to compete on world markets—may be confronted with the negative consequences of globalization.

### 3.1 States

---

#### Expanding Circle of States

Although international law goes back thousands of years, the current system of international law is usually traced back to the peace of Westphalia (1648). The Westphalian peace treaties marked the end to the 80 Years' War between Spain and the Netherlands and the 30 Years' War in the Holy Roman Empire. They signaled the replacement of the long-standing power of the Pope and the Emperor by the sovereign power of independent Nation States. Sovereignty meant that States were henceforth the highest authority both internally (within their own territories) and externally (toward the outside

world). They no longer had to respect the authority of the Pope and the Emperor above themselves.

In true Eurocentric spirit, the States that emerged from the Westphalian peace treaties referred to each other as «Christian» States. This indicated that international law was only binding between themselves. In their colonies, they could behave as they pleased toward the indigenous population without—in any way—being restricted by the rules of international law. Slavery, for example, could be lawfully practiced outside the circle of Western States.

When in the nineteenth century Turkey and Japan were considered suitable to join the club, the label of the States to which international law applied was changed to the «civilized» States. In the uncivilized rest of the world, international law remained inapplicable.

In 1945, at the end of World War II, the label was changed once again. The Charter of the United Nations provided that States had to be «peace loving» in order to be admitted as a member of the United Nations. All States that met this—admittedly rather subjective—standard were considered fit to be admitted to the United Nations. Since no State was ever expelled from the United Nations for no longer being peace loving, it implied that international law was henceforth considered applicable to all States without exception.

## Statehood and Sovereignty

Ever since 1648, States have been the world's dominant legal entities. The number of States continued to increase as colonies became independent, and States split up into new States (such as the former Soviet Union and the former Socialist Republic of Yugoslavia). When is an entity entitled to call itself a State? This is an important question because statehood entails important legal consequences. A State is entitled to conclude treaties with other States, it can become a member of international organizations, and its sovereignty must be respected. But statehood also entails duties. A State must refrain from settling international disputes by force, and it must respect the human rights of persons within its jurisdiction.

There are three generally recognized criteria for statehood: a defined territory, a permanent population, and a government exercising effective power. Recognition by other States is not a separate requirement for statehood. A State that fails to be recognized by other States is still a State:

Palestine, Kosovo and South Sudan are among the world's newest – although in the case of Palestine and Kosovo still contested – States.

The most fundamental principle of international law is the sovereign equality of States. An expression of that sovereign equality is that all States have one vote at the General Assembly of the United Nations, whether they are a superpower or a mini-State with a few thousand inhabitants, such as the Pacific island States Nauru and Tuvalu. But there are some exceptions to this general rule. The most important is the special status of the five permanent members of the UN Security Council, to be discussed below.

Non-State actors derive whatever international legal status they have from States. States decide which rights and duties non-State actors have under international law. This demonstrates that States are still the leading participants in the international legal system in spite of the increasing importance of non-State actors.

### 3.2 International Organizations

---

The term «international organizations» refers to intergovernmental organizations (IGOs), i.e., organizations with States as members. This distinguishes them from nongovernmental organizations, organizations of which individuals are members. IGOs may have a worldwide or a regional membership. IGOs with a regional membership are the European Union and the Organization of African Unity. IGOs with a (potentially) worldwide membership are the United Nations, the World Trade Organization (WTO), and the World Health Organization (WHO).

#### Attribution of Powers

In order to safeguard the sovereign rights of their members, the competences of IGOs are based on the principle of attribution of powers. This means that they can only exercise the powers explicitly granted to them in the founding charter of the organization. This principle may cause difficulties, however, if an IGO is faced with the need to exercise powers that were not foreseen when the organization was established. Of course, the organization's founding charter can always be amended, but this requires the unanimous agreement of the Member States, which is not always easy to achieve. Even a relatively homogeneous regional organization such as the European Union has found it difficult to muster at all times the unanimity required for repeated amendments of the EU treaty.

#### Implied Powers

A way out of this difficulty has been provided by the International Court of Justice. In response to a request for advisory opinion from the UN General Assembly (in the *Reparation for Injuries Case*), the Court observed that IGOs

enjoy implied powers, which means that they may exercise the powers that are necessary to achieve the organization's objectives even when these powers have not been specifically spelled out in the organization's founding charter. This means that as long as an action is necessary to achieve the organization's objectives, it may be carried out.

As more and more responsibilities are transferred from States to international organizations, the question may arise whether these organizations are bound by international law in the same way as States. Is the World Bank required to respect treaties on international environmental protection when providing a loan for the construction of a dam in a rainforest? Are the United Nations bound by treaties on the law of armed conflicts (international humanitarian law) when carrying out peacekeeping activities under their command?

IGOs and International Law

Since treaties are the main source of international law, the question whether IGOs are bound by international law depends to a large extent on whether IGOs can become parties to treaties. Generally speaking, only States and not international organizations can become parties to treaties. This is because States are reluctant to treat international organizations on an equal footing with themselves. There are however an increasing number of exceptions to this general rule. More and more treaties provide that not only States but also the European Union as a whole can become a party:

IGOs and Treaties

For example, proposals have been made for the EU to become a party to the European Convention on Human Rights. This would mean that EU decisions will fall under the scrutiny of the European Court of Human Rights in Strasbourg; it will be able to check whether they are in conformity with the European Convention on Human Rights.

The 1949 Geneva Conventions on international humanitarian law are still not accessible to international organizations. Some years ago, the UN Secretary-General therefore issued a formal unilateral declaration according to which troops acting under UN command would henceforth be bound by the principles of international humanitarian law.

### 3.3 The United Nations

---

Among the international organizations that have been created by national States, the United Nations is the most prominent and important. The UN was formed in 1945 first and foremost

to prevent the outbreak of another world war. The UN Charter was originally signed by 51 States. It created one main body, the General Assembly, three councils: the Security Council, the Trusteeship Council, and the Economic and Social Council, and the UN Secretariat and the International Court of Justice. The UN Charter also allows the UN authority to create additional committees, agencies, and other subsidiary organs to carry out its mission.

### General Assembly

#### Membership

The United Nations General Assembly (GA) consists of representatives of the Member States. There are currently 193 States in the General Assembly; the latest state to gain UN membership was South Sudan in 2011; membership is granted by the General Assembly upon the recommendation of the Security Council. A veto by the United States has so far prevented Palestine from becoming a UN member.

As noted above, in the General Assembly, each member has one vote regardless of its size, population, or economic power.

It is important to distinguish the UN from a State: the UN does not have a legislature that passes laws that are binding on the Member States. Resolutions issued by the General Assembly are nonbinding recommendations. The General Assembly can also adopt treaties, but these must first be ratified before they become binding on ratifying States.

#### Observers

A State may also be granted observer status by the General Assembly. An observer State can attend meetings and make statements but has no voting rights. The two current observer States are the Holy See (Vatican City) and Palestine. Numerous IGOs, such as the International Committee for the Red Cross (ICRC), INTERPOL, and UNESCO, have observer status. Regional organizations such as the EU and the African Union also are observers.

### Committees and Specialized Agencies

The General Assembly has established several committees and fora for discussion and to provide reports and studies on a wide variety of topics. Most UN committee reports are available at the UN website, ► [www.un.org](http://www.un.org), in one of the six official languages of the UN: Arabic, Chinese, English, French, Russian, and Spanish.

Operating under the auspices of the United Nations also is a large network of so-called specialized agencies, some of which are in fact older than the UN itself. They include the International Labor Organization (ILO); the World Health

Organization (WHO); the Food and Agriculture Organization (FAO); the United Nations Educational, Scientific and Cultural Organization (UNESCO); the International Monetary Fund (IMF); the World Bank; the World Intellectual Property Organization (WIPO); and the World Meteorological Organization (WMO).

## The Security Council

According to the UN Charter, the UN Security Council's main purposes are to:

- Investigate any dispute or situation that might lead to international friction.
- Recommend methods of adjusting such disputes or the terms of settlement.
- Formulate plans for the establishment of a system to regulate armaments.
- Determine the existence of a threat to the peace or an act of aggression and recommend what action should be taken.
- Call on Members to apply economic sanctions and other measures not involving the use of force to prevent or stop aggression.
- Take military action against an aggressor.

Authority for the UN Security Council to accomplish these tasks is found under Chapter VI (Pacific settlement of disputes) and Chapter VII (Action with respect to threats to the peace, breaches of the peace, and acts of aggression) of the UN Charter.

Economic sanctions available to the Security Council include the suspension of trade, the embargo of goods, boycotts, and the so-called smart sanction of the freezing of individual financial assets, as used in the *Kadi* case mentioned above. Military action can take the form of naval blockade, aerial bombardment, or full-scale military operations as in the first Iraq war and more recently in Libya.

The Security Council has 15 members. Five States, China, France, Russia, the United Kingdom, and the United States, are permanent members, and each permanent member enjoys veto power against the adoption of a Security Council decision. The other ten Security Council members do not have veto power; they are elected periodically by the General Assembly.

Security Council Resolutions are binding upon the UN Member States, and those States must obey those decisions. The UN Security Council can enforce its decisions by imposing sanctions on States that refuse to comply.

## International Court of Justice

The International Court of Justice is seated in The Hague to settle disputes in accordance with international law. The Court can only settle legal disputes between States; it is not empowered to decide disputes involving non-State actors. Unlike domestic courts, the Court does not have automatic jurisdiction. It can only settle a dispute if the States concerned have decided to accept the Court's jurisdiction. States can also withdraw from the Court's jurisdiction, for example, if they object to the Court's rulings:

The United States withdrew its recognition of the jurisdiction of the International Court of Justice after the Court had found that the United States had violated the prohibition of the use of force against Nicaragua. France withdrew its recognition of the Court's jurisdiction when it disapproved of the Court's exercising jurisdiction in a case concerning French nuclear tests in the Pacific. Of the five permanent members of the Security Council, China and Russia never accepted the Court's compulsory jurisdiction.

## UN Secretariat and Secretary-General

The UN Secretariat's main purpose is the administration of the UN and its employees, including the internal affairs of the UN headquarters in New York and other offices worldwide such as in Geneva and Nairobi and the affairs of the various departments, subsidiary organs, and agencies.

The Secretary-General heads the Secretariat and is the chief administrator of the UN. Candidates for the post of Secretary-General are nominated by the Security Council and appointed by the General Assembly for no more than two 5-year terms.

Secretaries-General have been drawn from a wide variety of States, notably not from countries that are permanent members of the Security Council: Trygve Lie (Norway), Dag Hammarskjöld (Sweden), U Thant (Burma), Kurt Waldheim (Austria), Javier Pérez de Cuéllar (Peru), Boutros Boutros-Ghali (Egypt), Kofi A. Annan (Ghana), Ban Ki-moon (Republic of Korea), and the current Secretary-General, António Guterres (Portugal).

In addition to his administrative duties, various political functions have been accorded to the Secretary-General over the years. UN Charter Article 99 provides:

The Secretary-General may bring to the attention of the Security Council any matter which in his opinion may threaten the maintenance of international peace and security.

Because of this discretionary power, the post of Secretary-General carries with it a great deal of symbolic influence. It depends on the occupant whether this influence is used in practice.

### 3.4 Multinational Enterprises

---

A multinational enterprise is a company that has its headquarters in one State and its production or distribution facilities in one or more other States. The resulting octopus-like structure enables multinational enterprises to take full advantage of globalization. They can invest and set up subsidiaries where this is most advantageous, i.e., where the conditions with respect to taxation, labor costs, and environmental protection are least onerous.

States are keen to attract foreign investment from multinational enterprises because this creates jobs, encourages transfer of technology, and generates income from taxation. Governments therefore have a tendency to compete with each other by lowering their standards at the expense of their population and the environment. This process is called the «race to the bottom».

Race to the bottom

Since there are no international minimum standards regulating the conduct of companies, the race to the bottom can go on indefinitely. Proposals to create binding international minimum standards for companies have been discussed at the United Nations for quite some time, but they have met with little support from States and from companies themselves. Although one might assume that «good» companies have an interest in the creation of a level playing field that obliges their competitors to behave properly, this does not turn out to be the case. Some cynics believe that international regulation of corporate conduct will only come about after another major accident that demonstrates the dangers of the current free-for-all system. Until that happens, multinational enterprises are bound merely by the domestic legal systems in which they operate.

### 3.5 Nongovernmental Organizations

---

There is no authoritative definition of a nongovernmental organization (NGO). Typically, an NGO is defined negatively by what it is not: not a government, not a political party, not

an opposition movement. It usually consists of a group of individuals who aim to achieve certain idealistic objectives: protection of human rights or the environment, abolition of cluster bombs, etc.:

One of the oldest NGOs is the Anti-Slavery Society established in the nineteenth century to campaign for the abolition of slavery.

NGOs have no rights or duties under international law. Like multinational enterprises, they enjoy legal status only under domestic law. For example, the Netherlands branch of Amnesty International is an association established under Dutch law.

#### Consultative status

IGOs may however decide to grant certain NGOs so-called consultative status. Consultative status enables an NGO to attend meetings, circulate documents, make speeches, and lobby delegates. But NGOs with consultative status have no right to vote, and they may be deprived of their status at any time if the majority of the Member States find that they have abused it, for example, by publicly criticizing States. This illustrates how NGOs remain dependent on States for their formal international status.

Even without formal international status, however, NGOs may have significant impact on international decision making. This is because of their expertise and the fact that they represent important strands of public opinion:

The Ottawa Convention banning landmines would never have been adopted in 1997 without the forceful and sustained campaigning by a worldwide coalition of NGOs. The Rome Statute of the International Criminal Court would not have been adopted in 1998 without very effective campaigning by hundreds of NGOs around the world.

Some States have become so concerned about the perceived influence of NGOs at the international level that they have proposed the adoption of international minimum standards for NGO conduct. No such standards have been adopted so far, however. Because the power and influence of NGOs is much more limited than that of multinational enterprises, the need for the establishment of international minimum standards is less obvious for NGOs than for multinationals.

### 3.6 Individuals

---

A century ago, individuals had no rights whatsoever under international law. This meant that governments were free to treat them as they pleased. If a government saw fit to discriminate or even to exterminate a group of its population, no other State could object since there were no international standards prohibiting discrimination or genocide:

This is what happened, for example, during the Armenian genocide in the Ottoman Empire (Turkey) from 1915–1917. Ambassadors from Western countries were fully aware of the massacres that were taking place but they had to turn a blind eye for fear of interfering in the Empire's (Turkey's) internal affairs.

A turning point therefore was the adoption of the Universal Declaration of Human Rights by the UN General Assembly in 1948. The Universal Declaration was itself a nonbinding instrument, but human rights have subsequently been codified in a large number of binding international treaties.

States that are parties to these treaties are required to guarantee the rights contained in them to all persons within their jurisdiction. Individuals who consider that their rights have been violated may sometimes—after exhaustion of legal remedies before domestic courts—complain to international human rights courts or similar international bodies. A State that is violating human rights is acting contrary to its international obligations, whatever its domestic laws or its domestic courts may say. Even in North Korea or in Somalia, international law gives individuals rights that must be respected by the authorities.

It is often forgotten that individuals not only have rights but also have duties under international law, namely, the duty not to commit international crimes, such as genocide, war crimes, and crimes against humanity. These crimes are defined in the Statute of the International Criminal Court and also in ad hoc international criminal tribunals dealing with international crimes committed during armed conflicts in countries such as Yugoslavia, Rwanda, and Sierra Leone. Although only a small percentage of international crimes committed in the world are tried by these international courts and tribunals, their symbolic significance should not be underestimated. This further demonstrates the increasing status of the individual in international law.

Duties Under  
International Law

## 4 Sources of International Law

---

International law still has some of the traits of a primitive legal system, and this is reflected in the doctrine of its sources. While customary law has lost most of its importance in modern national legal systems and has given way to statutory law, in international law it still plays an important role. Examples of rules of customary law are the prohibitions of aggression, genocide, and discrimination.

Article 38 of the Statute of the International Court of Justice mentions four sources of international law:

### Art. 38 Statute of the International Court of Justice

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
  1. international conventions, whether general or particular, establishing rules expressly recognized by the contesting States;
  2. international custom, as evidence of a general practice accepted as law;
  3. the general principles of law recognized by civilized nations;
  4. 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.

### 4.1 Treaties

---

Of these four sources, «international conventions», also known as «treaties», and international custom (or customary law) are the most important ones. The central role of treaties follows from a basic principle of traditional international law, namely, that a State is bound only by the rules of international law to which it has specifically consented.

#### Voluntarism

This principle reflects voluntarism, the idea that a State can only be bound by an obligation after it has given its consent. Voluntarism follows from State sovereignty. Since States represent the highest authority in the international legal system, they are not required to accept any obligations they do not agree with. A State may express its consent to be bound, for example, by becoming a party to a treaty in which the obligation in question is included:

The way in which treaties can be concluded is regulated by the 1969 *Vienna Convention on the Law of Treaties*.

A State therefore is entirely free to join or not to join international legal instruments such as the Paris Agreement on climate change. A State may feel under political pressure to join, but it is under no legal obligation to do so. It may also leave a treaty after it has joined, in accordance with the procedure foreseen in the treaty (usually a couple of years after the deposit of the notification of withdrawal). After a State has left a treaty, it is no longer bound by its provisions, but it remains of course bound by any relevant rules of customary international law:

In 2016, Burundi, Gambia and South Africa announced that they would pull out of the Statute of the International Criminal Court and the United Kingdom declared that it would leave the European Union. The UN Charter does not have exit provisions because its founding fathers wished to create an organization with universal membership. Nevertheless, no-one could of course prevent a State from leaving the United Nations. It must be regarded as one of the organization's achievements that no Member State has ever stepped out, even when military enforcement action was taken against it (some States have temporarily suspended their membership).

## 4.2 *Ius Cogens*

The traditional voluntarist approach is being undermined by the emergence of *ius cogens* or peremptory norms of international law. Rules of *ius cogens* or peremptory norms are the highest in rank, and they override any contrary international obligations of a State. Examples of rules of *ius cogens* are the prohibition of genocide and the prohibition of aggression. Article 53 of the 1969 *Vienna Convention on the Law of Treaties* provides the following description:

### Peremptory Norms

A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, 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 and which can be modified only by a subsequent norm of general international law having the same character.

It follows that a treaty in which two States agree to commit aggression against another State is null and void because it is

incompatible with the rule of *ius cogens* prohibiting such conduct. Such a hierarchical structure of norms makes international law more comparable to domestic legal systems in which laws override regulations and constitutional provisions override ordinary laws.

## 5 Jurisdiction

---

«Jurisdiction» refers to a State's competence to make and enforce rules in respect of persons, property, or events. Such competence may be exercised in three ways: by way of legislation (by the legislature), adjudication (by the courts), or enforcement (by the police or the armed forces). The law of jurisdiction is an important chapter of international law because it is obvious that conflicts may arise if different States exercise competing jurisdiction over the same persons, property, or events:

Is the European Commission entitled to impose hefty fines on Microsoft and Apple (US companies) for their monopolistic practices worldwide? Are the United States entitled to take sanctions against non-US companies that conduct business in Cuba? Are the Netherlands entitled to prosecute a Rwandan national for her participation in the 1994 genocide?

The traditional starting point for answering such questions is that States exercise exclusive jurisdiction on their own territories. This means that there is a traditional presumption against the exercise of so-called extraterritorial jurisdiction. However, as a result of globalization (including foreign travel and migration, international trade and investment, military enforcement action, environmental degradation, transnational crime and terrorism, and legal and illegal uses of the Internet), States increasingly perceive the need to protect their own interests and the interests of the international community in respect of conduct beyond their borders.

Extraterritorial *enforcement* action (such as an arrest or a drone strike in a foreign country) is still strictly prohibited by international law unless specifically consented to by the territorial State. But *legislation* and *adjudication* in respect of extraterritorial persons or events are increasingly being permitted or even required by international law. This development is driven by idea that such exercise of jurisdiction is allowed if there is a sufficient connection between the State exercising jurisdiction and the person or the event. Whether in a

particular situation there is a sufficient connection tends to be determined with reference to several jurisdiction principles:

1. The *active nationality principle* refers to the jurisdiction a State may exercise over persons (including legal persons) that have its nationality. This principle is well established.
2. The *passive nationality principle* refers to the jurisdiction a State may exercise over conduct abroad that injures its nationals. This principle is more controversial, but it is increasingly being included in multilateral treaties aimed at combating terrorism and international crime.
3. The *protective principle* refers to the jurisdiction a State may exercise over persons who threaten its vital interests by preparing a *coup d'état*, carrying out acts of terrorism, counterfeiting currency, or conducting other activities against national security. This principle is not controversial, but it is uncertain precisely which offenses are covered by it.
4. The *universality principle* refers to the jurisdiction a State may or must exercise over certain serious crimes, irrespective of the location of the crime and irrespective of the nationality of the perpetrator or the victim. Unlike the protective principle, the interests protected by the universality principle are those of the international community as a whole. International crimes subject to universal jurisdiction include piracy, war crimes, terrorism, and torture. Although the principle is included in an increasing number of multilateral treaties, its implementation in practice may give rise to controversy because States may object to their nationals—especially their (former) officials—being tried in foreign countries.
5. The *effects principle* refers to the (civil) jurisdiction a State may exercise when foreign conduct produces substantial effects on its territory. Unlike the other jurisdiction principles, this one tends to be relied upon in commercial rather than in criminal cases. The principle originates from US case law but is increasingly accepted also in other countries as a basis for exercising jurisdiction.

## 6 Characteristics of International Law

---

How does international law compare to domestic law? Perhaps the overarching difference is that the international legal system is less developed than the average domestic legal system. Accordingly, international law has a limited, although

continuously increasing, rule density. This means that many matters are still unregulated and therefore left to the discretion of States. This is the case of course because States are reluctant to give up their freedom of action. The limited development of international law is also reflected in its institutional framework and its enforcement system.

## 6.1 Institutional Framework

---

The international legal system still lacks the institutions that are familiar in domestic and regional (European) laws, such as a centralized legislator, a centralized judiciary, and a centralized enforcement system. International institutions, which at first sight seem to play this role in the international legal system, on closer inspection turn out to have a much more limited function. As noted above, the United Nations General Assembly does not have the power to adopt global legislation. It can only adopt nonbinding recommendations. Also, as noted above, the International Court of Justice does not have automatic jurisdiction over disputes between States.

International courts and tribunals exist, but they have no hierarchical relationship to each other. Judgments of the Court of Justice of the European Union, the highest judicial organ of the European Union, cannot be appealed before the International Court of Justice, the principal judicial organ of the United Nations. A person convicted by the Yugoslavia Tribunal cannot appeal to the International Criminal Court. This creates a certain risk of diverging case law, although in practice there are not many examples of conflicting jurisprudence.

## 6.2 Enforcement

---

For its enforcement, international law is still dependent on States and on domestic institutions. There is no standing UN police force to enforce compliance with the rules of international law. The International Court of Justice relies on the willingness of States to comply with its judgments. The UN Security Council may authorize the use of force against an aggressor State, but the implementation of such a decision is dependent on a «coalition of the willing», i.e., a group of States willing to make their armed forces available for this purpose.

The International Criminal Court may issue arrest warrants against anyone suspected of having committed interna-

tional crimes, even against heads of States. This sounds impressive but for the capture of a head of State the Court relies on domestic institutions able and willing to carry out the arrest. For example, in 2009 the Court issued an arrest warrant against Sudan's President Omar Hassan al-Bashir, but he has so far managed to travel to several African countries without being arrested.

## 7 Trends in the Development of International Law

---

The emergence of non-State actors, in particular individuals, as participants in the international legal system is having a major impact on the content of international law. It undermines the traditional interstate nature of international law, which is aimed exclusively at the protection of the interests of States. This is reflected in the rise of international *ius cogens*, as described in ► Sect. 3.2. Following are some further examples of major developments in international law.

### 7.1 From Prohibition of Interference in Internal Affairs to Responsibility to Protect

---

Traditional international law primarily contains negative rules, i.e., standards that impose on States an obligation to refrain from taking certain actions. One example is the prohibition of interference in internal affairs reflected in Article 2 (7) of the UN Charter:

Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State.

The prohibition of interference in internal affairs or matters within domestic jurisdiction is a crucial element of traditional international law because it helps to protect State sovereignty against outside intervention by other States. Accordingly, under traditional international law, it is an internal affair for a government to destroy its environment or massacre its own population. No other government is permitted to intervene or even to express concern.

However, this situation changes when international standards are created according to which States have a duty to respect and protect their natural environment and the human rights of their inhabitants. Any violations of these obligations

are then no longer an internal matter of the State in question since these obligations are owed to the other States that are parties to the same convention or that are bound by the same rule of customary international law. Those other States are permitted to insist on compliance with those standards, and they may take legal proceedings against the violating State or even apply sanctions against it to force it to comply with its obligations. What amounts to an internal affair or a matter of domestic jurisdiction is therefore subject to continuous change. In fact, the scope of the notion «internal affair» is continually shrinking.

Under traditional international law, «third» States are entitled but not obliged to take remedial measures against a violating State. Often, third States will have good political reasons to simply look the other way. No government enjoys being told by another government what it should do. The natural tendency is not to criticize the behavior of other States because it increases the risk that a government may itself be at the receiving end of such criticisms in the future.

Responsibility to  
Protect

According to more recent developments in international law, however, States actually have a duty to respond, at least to serious breaches of international law. They have a responsibility to protect people against international crimes (genocide, war crimes, crimes against humanity, and ethnic cleansing). The «responsibility to protect» principle was formally adopted by the United Nations General Assembly in 2005. The principle entails that States have a responsibility to protect the human rights of their own inhabitants, but if a State fails to comply with this responsibility, the international community has a responsibility to act. Although the principle was included in a nonbinding resolution, it has since been referred to in several Security Council Resolutions that are binding on States, including in Security Council Resolutions imposing sanctions on, and authorizing the use of force against, Libya under Colonel Gaddafi. This obviously is a long way from the prohibition of interference in internal affairs that pertained in the past.

12

## 7.2 From Immunity to Universal Jurisdiction

---

Under traditional international law, the highest representatives of a State (the head of State, the head of government, and the foreign minister) enjoy immunity from criminal prosecution before foreign courts. This means that they may

not be prosecuted there for any criminal offense they may have committed. The underlying reason for this principle is that bringing these high representatives of the State to trial before foreign courts would be incompatible with the sovereign equality of States. Since all States are equal, the persons personifying them should not be subjected to the jurisdiction of other States. Moreover, if these high officials could be arrested any time they are traveling abroad, this would undermine the freedom of interstate relations. As a matter of fact, international law does not prohibit—and may even require—the prosecution of these officials in their *own* countries.

More recently, however, States have been adopting treaties that oblige States to prosecute and try certain very serious crimes, such as genocide, war crimes, crimes against humanity, and torture, irrespective of where or by whom they were committed. These treaties, which have been widely ratified, do not make an exception for high government officials. There is therefore a contradiction between the traditional immunity rules and these universal jurisdiction provisions in respect of international crimes. The dilemma sharply arose in the Arrest Warrant Case before the International Court of Justice (Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, I.C.J. Reports 2002, p. 3):

In 2000, a Belgian investigative judge issued an international arrest warrant against Abdoulaye Yerodia Ndombasi, the Foreign Minister of the Democratic Republic of Congo. He was accused of having made a speech inciting genocide against the Tutsi ethnic group. Congo responded by filing an application against Belgium at the International Court of Justice, claiming that its Foreign Minister enjoyed immunity from Belgian jurisdiction. In 2002, the case was decided in Congo's favor. The Court found that as a Foreign Minister Mr. Yerodia enjoyed full immunity and could not be prosecuted in Belgium even for international crimes. The judgment was criticized for failing to properly balance the traditional State interest of immunity for high State officials versus the emerging interest of the victims of international crimes to combat impunity for the perpetrators of international crimes. The criticism was aimed in particular at an observation by the Court according to which high State officials continue to enjoy immunity even after they have retired from office as long as the crimes of which they are accused have been committed in an official capacity.

The dilemma may be solved by assuming that high officeholders cannot be prosecuted abroad, even for international crimes, as long as they are in office. But as soon as they are no longer in office, such prosecutions would be possible even for crimes committed in function. In this way, a compromise would be found between two contradictory interests: traditional respect for other States' sovereignty and the emerging wish to bring an end to the impunity of the perpetrators of the most serious crimes.

International criminal courts and tribunals do not face this problem of immunity of high officeholders. Their statutes always specifically provide that they can try anyone irrespective of their official rank:

Accordingly, the Yugoslavia Tribunal has tried former President Slobodan Milošević (but he died before the trial was concluded). The Sierra Leone Tribunal has found Charles Taylor, the former President of Liberia, guilty of war crimes and crimes against humanity.

### 7.3 From Nationality as a Favor to a Right to Citizenship

---

Another illustration of the traditionally inferior status of the individual vis-à-vis the State in international law is the law relating to nationality. Under traditional international law, a State is entirely free to decide by which criteria and on which individuals it will confer its nationality. It should just make sure not to interfere with the rights of other States. This follows again from the fact that States are sovereign.

One result of this approach is that currently there are some 12 million stateless persons in the world. Such persons experience great difficulty in traveling, and if their human rights are violated, no State will act on their behalf.

Article 15 of the Universal Declaration of Human Rights provides that «Every-one is entitled to a nationality», but this provision is difficult to enforce because the Declaration is not binding on States. No similar provision has been included in UN human rights treaties that have been concluded subsequently. There are some treaties that attempt to reduce the number of stateless persons, but these have had limited impact. However, as the status of the individual in international law continues to strengthen, it may be expected that

nationality will gradually change from a favor that may be granted or not be granted by States into a right that can be enforced under international law.

## 8 Concluding Observations

---

International law is a highly dynamic branch of law. Its content is changing rapidly as a result of globalization and the growing influence of non-State actors. The emergence of these non-State actors on the global scene is having an increasing impact on the procedural and substantive rules of international law because they insist that their interests and their aspirations are reflected. As a result, international law is gradually being transformed from interstate law into the law of the world community. International law now covers practically all topics that are traditionally covered only by domestic law, and it is therefore extremely wide ranging. The study of international law is interesting, also for the nonspecialist, because the comparatively undeveloped nature of the international legal system stimulates reflection on fundamental aspects of the law. Although the international legal system traditionally consists of unrelated rules and institutions, there are some modest indications of an emerging international constitutional order.

## Recommended Literature

---

- Dixon M (2013) Textbook on international law, 7th edn. Oxford University Press, Oxford
- Evans MD (ed) (2014) International law, 4th edn. Oxford, Oxford University Press
- Shaw MM (2014) International law, 7th edn. Cambridge University Press, Cambridge