

# Lecture 2

## Sources of International Law

# Introduction

- It is hard to identify sources of IL since there is no constitution for the international community
- We usually refer to the Art. 38 of the Statute of International Court of Justice

## Why this Court?

- It is the main judicial organ of the United Nations
- It is the successor of the former Permanent Court of International Justice (League of Nations)
- Exists to solve disputes between states
- decides in accordance with the international law

# Art. 38 Sec 1 provides:

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

This provision is often criticized:

- It is archaic
- Does not solve the hierarchy of sources of IL and conflicts between them...
- The list is not exhaustive

# Treaties

Important source of IL

## 1. law-making treaties

- Reaction on inadequacy of custom
- Wide range of activities

## 2. treaty contracts

- Similar treaties may produce a new principle
- General acceptance of a rule
- Evidential value of the treaty

# Essential characteristics of T.

- T. is binding on the parties to it by virtue of their consent
- Form of a treaty is not relevant
- Parties
  1. S - S
  2. S - IO
  3. IO - IO

# Custom

= constant and uniform usage, accepted as law

- Several sources of custom:
  - Diplomatic correspondence
  - Policy statements
  - Opinions of legal advisors
  - Executive decisions and practices
  - Etc.
- Regional vs. general C.
- Problems:
  - What duration of practice is required?
  - How uniform and consistent must the practice be to give a rise to a rule of law?
  - How general must be the practice in order to bind third states?

# Duration of practice

- No particular duration is required
- The rule must be simply followed long enough...
- Instant custom possible but no likely

# Consistency of practice

- State practice must be reasonably consistent
- 100% uniformity not necessary
- Inconsistency does not automatically give rise to a new customary rule.



# Opinio iuris

- general, uniform and consistent practice is not sufficient
- The rule must be also recognized as a law

OI = a diffuse consensus, a general set of understanding among states as to the legal relevance of different kind of behavior in different situations.

# Generality of practice

- recognition of a particular rule as a rule of international law by a large number of states raises a presumption that the rule is generally recognized
- Such norm will be binding generally on all states
- Exceptions are possible in case of states who have objected since the very beginning
- But - universality is not required!

# Relation between treaties and custom

- Both T and C are major sources of IL
- They are not in competition
- usually serve different purposes and are complementary
- Their relationship may flow in both directions:
  - T gives rise to rules of customs
  - T reflects pre-existing rules of custom
- A provision of a treaty may generate a customary rule and be binding on a third party
  1. It must be of fundamentally norm creating character
  2. Third parties have declared their consent to the rule
  3. Since the adoption of the treaty, the practice of affected states is extensive and uniform

# What if the custom and treaty conflict?

1. General rules of interpretation of interpretation apply
2. New custom does not relieve a state of its former obligations under a treaty
3. The Treaty that is in conflict with a rule of *ius cogens* is void.

# General principles of law

- GP - can be found in all legal systems
- The scope is uncertain
- Municipal (state) law is a major source
- Purpose – fill gaps in law
- Examples:
  1. Res judicata
  2. Estoppel
  3. Circumstantial evidence
  4. No one can be judge in his own suit etc.

# Judicial decisions

- There is no precedent law in IL
- Judgment are not a formal source of law
- They are binding just on parties
- Great impact on interpretation of existing rules
- Occasionally may give rise to a new rules of law

# The writings of publicists

1. Not a formal source of law
2. Subsidiary character
3. Significant impact on interpretation of IL

# Ius Cogens (peremptory norms)

- fundamental principles of IL
- norms from which no derogation is ever permitted
- E.g. genocide, maritime piracy, slaving in general, torture, and wars of aggression and territorial aggrandizement.