# An Introduction to Transnational Law

## Mathias Reimann, “From the Law of Nations to Transnational Law”

The Classic Model: The Law of Nations

-limited subset of international legal issues (defined narrowly, focused only on sovereign and formally co-equal nation states who make, follow or violate international law)

-mid 20th century: added permanent international organizations and international human rights

- focused on public international law

-fairly simple legal order

-uncomplicated and internally consistent

-state centered

-field of well-defined boundaries

-clear distinction between public and private international law, concerned only with public and did not address private transactions and disputes across international boundaries

-fundamental difference between international and domestic law – addressing the relationship (monism or dualism) and whether and how international law becomes effective within certain domestic legal systems

The Expansion and Diversification of International Law

-numerous fields lying beyond the traditional law of nations have developed, matured and become important in practice

-international organizations, human rights, criminal, environmental, refugee, trade

-globalization: combined effects of internationalization of markets, increased mobility of persons and capital, age of electronic communication

-hybrids: mixed areas of public and private international law

-the world legal order has become more diversified and complex

-legal actors: states have become a much larger and more heterogeneous group as a result of de-colonization and the break-up of former federations, intergovernmental organizations have multiplied

-multiplication and rise of non-state actors: NGOs, individuals, business corporations

-sources have multiplied and diversified – treaties, customs, judicial decisions, publications, regulatory law, domestic law on transboundary issues, practices and principles eg lex mercatoria

-expansion of jurisdictional claims made by states and their institutions

-proliferation of international tribunals and dispute resolution mechanisms

-boundaries between public international law and other areas have blurred or broken down

-more uncertain and less meaningful

-less clear and rigid

# Introduction to Public International Law

## Vaughan Lowe, International Law

The Scope and Nature of International Law

The body of rules and principles that determine the rights and duties of States, primarily in respect of their dealings with other States and the citizens of other States and that determine what is a state

International law proceeds from the opposite of sovereignty, based on the principle that all States are subject to international law and must comply with it.

A formalized account of practices and principles which spring spontaneously and inevitably from the coexistence of distinct communities or which result from conscious efforts of States to co-operate in dealing with certain problems.

The Westphalia thesis: the Treaty of Westphalia in 1648 is said to have created the system of modern nation States. But the strength and continuity of international law flows not from its conceptual basis but from its routine incorporation within the daily life of governments.

Why do People comply with International Law?

Internal sovereignty – courts and government are subject to the laws of the State, no superior governmental authority is recognized

International law has no legislature, no police, no compulsory system of courts

-IL is not imposed on states against their will by an external legislature. Rules of IL mostly arise either from treaties or from customary international law.

-IL is made by states to serve their interests, so it is likely that it will be in their interest to comply with it. Compliance is caution.

-governments are repeat players in international relations. Each decision they take must make sense not only in isolation in the short term but also in the long term

Why Should People comply with International Law?

Rejection of the idea that there was a natural order that entitled rules to rule and obliged subjects to submit

Authority of IL derived from the fact that states had consented to be bound by its rules = the positivist approach

States are bound by rules of IL because they have signed up to them

Rules of IL are those regularities in international behaviour that are regarded by the community of States as being so important that they do not accept that each State is entitled to decide freely for itself whether or not to comply with the rule.

# Sources of Public International Law

## Gib Van Ert, “Sources of International Law”

Only those rules promulgated by authorities recognized as possessing law-making power and according to accepted procedures and forms enjoy the obligatoriness as binding or legal

Article 38 of the Statute of the International Court of Justice 1945

Declaratory of the sources firmly established in state practice

Direction as to what the court may consider when decided cases, does not necessarily exclude other matters which may give rise to international rights and obligations

Article 38(1) is an important statement of the sources of international law: treaties, custom, general principles of law, judicial decisions and writings of pre-eminent authors

Treaties

The most significant law-making instruments in IL

Defined in the Vienna Convention on the Law of Treaties 1969

Article 2(1): “an international agreement concluded between States in written form and governed by IL, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation”

Name of the treaty is of no significance

Rules cannot arise and a treaty cannot be created unless the parties possess an intent to create legal relations – no state may be bound without its consent

Means of expressing consent: signature and ratification

The term “state” need not necessarily exclude entities which enjoy less than full international personality – member states of federations may be international persons for some purposes

Non-state entities with international legal personality also have treaty making capacity

Custom

Revealed by state practice

Evidence of general, though not universal, state practice

State considers its behaviour to be required by law = *opinion juris* – motivated by a sense of obligation (rather than courtesy or morality)

“the purported custom must be shown to be supported by consistent state practice motivated by *opinio juris*”

Binding on all states with two exceptions:

-not binding on states that have persistently objected to it from its inception and during its formation

-regional or local custom

A treaty may be declaratory of, or come to represent, customary IL

General Principles

Of domestic law to decide matters not contemplated in treaty or customary law

Subsidiary means

Important caveat in article 59 of the ICJ Statue: “the decision of the court has no binding force except between the parties and in respect of that particular case”

In principle, there is no doctrine of precedent in IL

Decisions considered may derive from a variety of forums (may consider domestic courts)

Writings of scholars referred to not as sources but as evidence of law

International organizations

Some have or may have law-making power

Unilateral statements

Will not occur unless it is the intention of the declaring state to be bound by the statement according to its terms

Requirement of good faith

Peremptory norms (*jus cogens*)

VCLT article 53: a treaty will be void “if, at the time of its conclusion, it conflicts with a peremptory norm of general international law”

“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 IL having the same character”

States may not make treaties in breach of certain fundamental norms of international law

Test: same as the test for custom plus the norm in question if considered by states as non-derogable (impossible to displace by treaty or acquiescence)

*Erga omnes* obligations

For all the world – one owed to the international community as a whole

All peremptory norms are obligations *erga omnes*, not all obligations *erga omnes*  are peremptory norms

Soft law

May not represent the law as it exists but may be seen as the developing or desirable law

Really not law at all, may be used as evidence of new or developing IL

## John Currie, “The Law of Treaties”

*Vienna Convention on the Law of Treaties*, 1969 – came into force in 1980 – most of its substantive provisions are widely considered either to reflect the pre-existing customary IL or treaties or to have become customary IL since it came into force. Even non-parties can be considered bound. Quasi-constitutional.

The *Vienna Convention* defines a treaty as an international agreement concluded between States in written form and governed by IL, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.

Excludes certain agreements which are nevertheless considered full-fledged treaties as a matter of customary IL.

Specific focus on certain types of treaties is without prejudice to the legal force of, or application of the general law of treaties to, other types of treaties.

General working definition has four principal elements:

-an international agreement

Participatory sources of IL

-between subjects of IL

Nature of IL subjects – capacity to enter into legal relations with other international legal subjects. Corporations, individuals and non-governmental organizations are generally ineligible to enter into treaty relations

If it is determined that a party to an agreement does not possess the international legal personality necessary to conclude binding treaties, it will follow logically that the agreement under consideration is not in fact a treaty.

-formed with the intent to create binding legal obligations

States frequently enter into agreements, reach understandings, and even sign accords without any intent or expectation that such acts will produce legally binding obligations at IL.

The only way a treaty can be distinguished from such a non-binding agreement is to search for the parties’ intent on the matter.

Formality is not sufficient.

The ordinary practice is a key circumstance against which purported evidence of the parties’ intent to become bound by an agreement is to be evaluated.

Departure from the usual formalities may very well be taken as evidence of a lack of intent to be bound by a treaty.

Whether or not a treaty exists depends above all on the mutual intent of the parties to enter into binding treaty relations, and only secondarily – as an evidential matter – on the form in which that intent is expressed.

-governed by IL

Parties must intend that the agreement itself should be subject to the law of treaties with respect to such matters as its validity, application, interpretation and enforceability

General law of state responsibility should there be a failure by any party to fulfill its obligations under the treaty

Form

Oral treaties are permissible at customary IL and are governed by the same substantive rules. General law of treaties imposes virtually no restrictions of form

No rule of IL precluded a joint communiqué from constituting a binding international treaty. Whether it does depends not on its form but on the nature of the act or transaction to which it gives expression. The court must have regard above all to its actual terms and to the particular circumstances in which it was drawn up

Where the terms and even the nature of the document are vague, the prior positions of the parties can shed light on the document’s intent

Subsequent conduct of the parties

Whether a particular document constitutes a treaty depends upon the nature of the act or transaction to which it gives expression. Determined by the terms of the document, positions of the parties in prior and subsequent negotiations.

**The ultimate test** = whether the document, its terms, and the behaviour of the parties both prior and subsequent to issuing the document, together evidence an intent by the parties to commit to its terms.

Individual intentions of the persons signing may not be relevant to the existence of a binding agreement, depending on the circumstances. Where such circumstances include agreement by the states themselves as to their mutual rights and obligations, intent to enter into binding legal obligations is to be gleaned from objective outward manifestations and behaviours.

States are hesitant to interpret the absence of any conduct at all as evidence of an intent to be bound. Intent must be manifested in some way. Purely passive behaviour is likely not to furnish the requisite evidence of intent to be bound by a proposed treaty.

## Environmental Treaty Making and The North Pacific Fur Seal Treaty

Diffusion of injury and of responsibility

In domestic context such situations are typically addressed through taxation.

The US claimed to be acting not merely in order to protect the US but as trustees ‘for the benefit of mankind’ in managing seal stock.

The Tribunal upheld the right of all States to take fish on the high seas. The US had no right to regulate high seas fisheries unilaterally.

Two basic constraints that still limit the effectiveness of environmental regulations:

-regulations could not be imposed by some supranational authority upon all participants in the exploitation of the resource, because there was no such authority. The measures had to be adopted by agreement between the national States of the persons concerned.

-even when the agreement was made, it was impossible to prevent the problem of the ‘free rider’ who is not bound by the restraints imposed by the agreement and is free to reap the benefits produced by the restraints on parties to the agreement.

1911 treaty needed to achieve 5 tasks, each necessary for success but each also almost useless should any of the others fail:

-create an aggregate gain

-distribute the gain

-ensure that each country would lose by not participating

-provide incentives to comply

-deter entry by third parties

This was accomplished by: only certified skins could be imported

Scope of coastal States’ rights over areas of high seas adjacent to territorial waters. Free for use by ships of any State and not subject to regulation by coastal States

Conservative analysis, serving the broader interests of powerful States in maintaining the freedom of the seas, or heavily influenced by the analogy of the treatment of animals under the game laws in municipal legal systems.

Question of who carries the responsibility for the management of resources, what those responsibilities are, and to whom they are owed.

# Customary International Law

## Hugh M. Kindred et al., “Creation and Ascertainment of International Law”

Customary IL is composed of 2 elements:

1. There must be a consistent and general international practice among states
2. The practice must be accepted as law by the international community, subject element, *opinion juris*

Why international custom, as evidence of a general practice accepted as law is binding on states:

-consent

-estoppel

-reasonableness

Customary rules binding on all are founded in the unilateral acts of individual states

Living growing law, grounded in the practices and sanctioning expectations of nation-state officials and changing as their demands and expectations are changed by the exigencies of new interests and technology and by other continually evolving conditions in the world arena

Difficult to establish whether the behaviour of states reflects a common practice out of convenience or a sense of legal obligation. Proof of *opinio juris* is rarely displayed in explicit acceptance of one state’s claims by others; rather it is shown by their tolerance of that state’s conduct.

North Sea Continental Shelf Cases

## Non-refoulement as a Principle of Customary International Law: the Debate

The principle of non-refoulement prohibits the return of refugees, in any manner whatsoever, to the frontiers of territories where their lives or freedom would be threatened on account of race, religion, nationality, membership of a particular social group or political opinion

## James C. Hathaway, The Rights of Refugees Under International Law

*Opinio juris* not clearly satisfied – most states of Asia and Near East have routinely refused to be formally bound to avoid refoulement

UN reports widespread violation

## Guy Goodwin-Gill & Jane McAdam, The Refugee in International Law

Reiterated and refined, repeatedly endorsed, violation protested

No formal or informal opposition

Lengths that states have gone to characterize returns as something other than refoulement

# Jus Cogens and other Sources of International Law

## Hugh M. Kindred et al., “National Application of International Law”

A peremptory norm of IL that cannot be contradicted, commands obedience by all levels of government

Suresh v Canada (Minister of Citizenship and Immigration)

*Vienna Convention* article 53 defines a peremptory norm as 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 IL having the same character.

Develop over time and by general consensus

Compelling indicia that prohibition of torture is a peremptory norm:

-great number of multilateral instruments that explicitly prohibit torture

-no state has ever legalized torture or admitted to its deliberate practice and governments accused of practicing torture regularly deny their involvement, placing responsibility on individual state agents or groups outside the government’s control

-a number of international authorities state that the prohibition on torture is an established peremptory norm

Do not exclude the possibility that in exceptional circumstances deportation to face torture may be justified either as a consequence of the balancing process mandated by s 7 of the Charter or under s 1.

Bouzari v Islamic Republic of Iran

States do not accord a civil remedy for torture committed abroad by foreign states. The peremptory norm does not encompass the civil remedy.

## Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion of ICJ

Adopted with substantial numbers of negative votes and abstentions – falls short of establishing the existence of *opinio juris* on the illegality of the use of such weapons

Principles of humanitarian law:

* States must never make civilians the object of attack and must consequently never use weapons that are incapable of distinguishing between civilian and military targets
* It is prohibited to cause unnecessary suffering to combatants: it is accordingly prohibited to use weapons causing them such harm or uselessly aggravating their suffering

These rules are to be observed by all states whether or not they have ratified the conventions that contain them because they constitute intransgressible principles of ICL

Court cannot conclude with certainty that the use of nuclear weapons would necessarily be at variance with the principles and rules of law applicable in armed conflict in any circumstance – cannot reach a definitive conclusion as to the legality of the use of nuclear weapons by a State in an extreme circumstance of self-defence in which its very survival would be at stake.

## “Use of General Principles of International Law in International Long-Term Contracts”

The choice of general principles of law in an international agreement is a means of ensuring that truly international solutions will be found for the resolution of any disputes that may arise

*Lex mercatoria* – transnational rules in international contracts

Criticisms: vague, contradictory

Not a list but a method to be used to determine the rules applicable to an international commercial relationship

Choice of law clause – whether the parties have given any indication as to how the applicable rules should be determined – any instructions as to the method of determining the applicable rules must take precedence

Failing a clear identification, an analysis of comparative law, international instruments and arbitral case law in order to establish relevant rules

Where the parties have agreed to the application of transnational rules or have remained silent

Where the chosen national law is silent on an issue, fill the gap using general principles

# The Reception of Public International Law in Canada

## Hugh Kindred, “The Use and Abuse of International Law Sources by Canadian Courts: Searching for a Principled Approach”

Both customary and conventional international rules must be obeyed, each state is left to determine for itself how the obligations will be fulfilled. (state sovereignty – right of every state to establish its own internal social, political, and constitutional organization, subject to the restraints of IL standards)

Canadian Constitution is silent on how to determine the impact of IL within Canadian law – fallen to the courts

Customary law is directly applicable

Treaty provisions must be transformed by some legislative act

International obligations on Canada are applicable by the courts only to the extent that they are laws of Canada.

Not all conventional IL need to be implemented. If they do not affect the rights and duties of persons within the reach of Canadian laws.

Governments may implement treaty provisions by executive action.

The exercise of the treaty implementing power must be manifest in the implementing legislation and not be left to inference (Laskin) – severely limits the occasions when treaty provisions can be said to have been implemented

By virtue of the general power of s 91

Incorporated into the text of the legislation but without reference to their international source.

SCC would assume a statute is implementing legislation if its language is redolent of the treaty’s provisions. Courts will assume a statute is implementing legislation if its language reflects an international obligation. **Starting presumption – similarity signals implementation.**

Legislative history and other extrinsic evidence to demonstrate the intention to take account of international treaty provisions even though they are not mentioned.

Implementation may now be a passive act

Parliament is presumed not to intend to legislate contrary to international treaties or general principles of international law – where the legislation is clear one need not and should not look to IL.

Contextual approach – inclusiveness of the methodology – total or entire context of the statute in question demands the courts have recourse to any and all relevant IL sources

Implicit implementation of ratified treaty provisions in the presence of legislation that applies the same rights and fulfills the same obligations

Spirit and values underlying a relevant ratified treaty as aids in the interpretation of related statutes and delegated administrative powers, in addition to rights under the Charter

## Natasha Affolder, “Domesticating the Exotic Species: International Biodiversity Law in Canada”

Advances on the international level often fail to be effectively translated into national law

Effective implementation is one reason why a treaty might not receive judicial mention

Quantity of judicial comment on a treaty is not necessarily significant. What matters is the quality of the engagement with an international source.

Judges may not address the arguments at all or they may expressly acknowledge that IL arguments will not be considered.

*MacMillan Bloedel* BCSC – international agreements and resolutions not expressed in Canadian law are not relevant to the inquiry

BCCA held that BC courts have no jurisdiction to apply IL

Invitation for advocates to argue points of IL with greater clarity and precision

A number of Canadian cases reveal that the courts are willing to consider substantive provisions of an international treaty in the interpretation of its enabling domestic statutes

More expansive use of international law sources where international law sources are seen as useful interpretive aids outside the limited context of enabling legislation

Beginning to reflect some willingness to engage with IL sources in interpreting Canadian law

In well over 50% of the cases where international treaties are cited, their mention can be traced back to the argument of an environmental advocacy group.

The significant role of environmental advocacy groups in bringing IL arguments to the attention of Canadian courts may be unique to the environmental law area.

## *R v Hape*, 2007 SCC

Money laundering and Conspiracy to launder funds – office in Turks and Caicos Islands

RCMP officers conducted their investigation there under the authority of local police. Searches were covered by locally issued warrants.

Counsel argued that evidence obtained by an unreasonable search and seizure contrary to s 8

Disposition: SCC unanimously dismissed Hape’s appeal against his conviction, holding that admission of the evidence had not violated Hape’s *Charter* rights.

Issue: Proper scope of application of the Charter, its territorial reach and limits

Law: s 32 does not expressly impose any territorial limits on the application of the Charter

Analysis: The issue of applying the Charter to activities that take place abroad implicates the extraterritorial enforcement of Canadian law

**Doctrine of adoption**: Prohibitive rules of international custom may be incorporated directly into domestic law through the CL, without need for legislative action, provided there is no valid legislation that clearly conflicts with the customary rule.

Rules of IL are incorporated automatically, as they evolve, unless they conflict with legislation

IL knows no rule of stare decisis

Justified on the basis that international custom, as the law of nations, is also the law of Canada unless, in a valid exercise of sovereignty, Canada declares that its law is to the contrary. Parliamentary sovereignty dictates that a legislature may violate IL but that it must do so expressly.

Equality is a legal doctrine according to which all states are, in principle, equal members of the international community.

**Principle of non-intervention** – right to be free from intrusion by other states in its affairs and the duty of every other state to refrain from interference.

**Comity**: informal acts performed and rules observed by states in their mutual relations out of, politeness, convenience and goodwill, rather than strict legal obligation; deference and respect – principle of interpretation

Based on a desire for states to act courteously towards one another

Justified on the basis that they facilitate interstate relations and global cooperation

Ceases to be appropriate where it would undermine peaceable interstate relations and the international order.

The need to uphold IL may trump the principle of comity.

**Prescriptive** jurisdiction: power to make rules, issue commands or grant authorizations that are binding upon persons and entities.

**Enforcement** jurisdiction: power to use coercive means to ensure that rules are followed, commands are executed or entitlements are upheld. To give effect to its laws.

**Adjudicative** jurisdiction: power of a state’s courts to resolve disputes or interpret the law through decisions that carry binding force.

The primary basis for jurisdiction is **territoriality –** plenary authority to exercise prescriptive, enforcement and adjudicative jurisdiction over matters arising and people residing within its borders, limited only by the dictates of customary and conventional IL

**Nationality** principle: states assert jurisdiction over acts occurring within the territory of a foreign state on the basis that their nationals are involved.

Principle of **universal jurisdiction**: jurisdiction may be asserted over acts committed in other countries by foreigners against other foreigners – confined to the most serious crimes

The exercise of jurisdiction by one state cannot infringe on the sovereignty of other states. States may have valid concurrent claims to jurisdiction. Even if a state can legally exercise extraterritorial jurisdiction, whether the exercise of such jurisdiction is proper and desirable is another question. Where two or more states have a legal claim to jurisdiction, comity dictates that a state ought to assume jurisdiction only if it has a real and substantial link to the event.

States must refrain from exercising extraterritorial jurisdiction over matters in respect of which another state has, by virtue of territorial sovereignty, the authority to decide freely and autonomously.

Principle of **consent**: A state cannot act to enforce its laws within the territory of another state absent either the consent of the other state or, in exceptional cases, some other basis under IL.

Charter applies only to matters that are within the authority of Parliament or the provincial legislatures.

*R v Cook* applying the Charter would not interfere with the sovereign authority of the foreign state

Unreasonable to require compliance with a cumulation of foreign and Canadian standards.

When Canadian authorities are guests of another state whose assistance they seek in a criminal investigation, the rules of that state govern.

The Charter usually does not apply to the activities of Canadian government agents in foreign countries because, when these agents are acting abroad, they are not acting in respect of a matter within the authority of Parliament of the provincial legislatures as s 32 stipulates.

Charter can apply to the activities of Canadian officers in foreign investigations where the host state consents. The investigation would be a matter within the authority of Parliament and would fall within the scope of s 32.

Consent clearly is neither demonstrated nor argued on the facts.

Cases in which consent is demonstrated may be rare.

Methodology for determining whether the Charter applies to a foreign investigation

1. Determine whether the activity in question falls under s 32
   1. Is the conduct at issue that of a Canadian state actor?
   2. Whether there is an exception to the principle of sovereignty that would justify the application of the Charter to the extraterritorial activities of the state actor
2. Whether evidence obtained through foreign investigation ought to be excluded at trial because its admission would render the trial unfair

Holding: Charter did not apply, admission of evidence would not render Hape’s Canadian trial unfair

DISSENT (3)- held that the RCMP were acting in their capacity as Canadian police officers, under the authority of local police. The Charter therefore did apply.

2 judges thought that application of the Charter to events outside Canada would not violate extraterritoriality

Majority (5) thought that it would.

## Canada (Justice) v Khadr, 2008 SCC

The Charter can be applied outside of Canada because the US was in breach of IL

Facts: Canadian citizen held at Guantanamo bay, interrogated by Canadian officials, sought disclosure

Analysis: the process in place at the time has been found to violate US domestic law and international human rights obligations to which Canada is party.

US Supreme Court held that the detainees had illegally been denied access to habeus corpus and that the procedures under which they were prosecuted violated the Geneva Convention. This is sufficient to establish violations of IL obligations.

Participation in the Guantanamo Bay process which violates international instruments would be contrary to Canada’s binding international obligations.

Ratio: principles of IL and comity of nations do not extend to participation in processes that violate international human rights obligations. Comity that would normally justify deference to foreign law do not apply in this case.

Disposition: The Charter applies.

# Mixing Public and Private International Law: Transnational Civil Human Rights Litigation

## United States Alien Tort Claims Act

## Abdullahi v Pfizer Inc.

## Kiobel v Royal Dutch Petroleum

# Nature and Purposes of Comparative Law

## Konrad Zweigert & Hein Kotz, An Introduction to Comparative Law (1987)

## Anne-Marie Slaughter, “Judicial Globalization” (2000)

# Use of Comparative Law

## The Special Advocate System. Charkaoui v Canada (2007) SCC

## Hate Speech. R v Keegstra (1990) SCC