

SUBJECT : INTERNATIONAL LAW.
TOPIC : TREATY LAW AS A
SOURCE OF
INTERNATIONAL LAW.



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Introduction to the Concept ‘International Law’ with regard to Treaties.

The Law of Nations, or International Law, is a body of rules recognized as binding on civilized independent states in their dealings with one another and with one another's subjects.¹ At its most abstract level, international law concerns norms that govern the conduct of States and the relations between them.² International Law is comprehensive in nature and due to that it is an amalgamation of various sources, there exists no single system of laws which can interpret and extend the law but international law still exists and is ascertainable. There are ‘sources’ available from which the rules of international law may be extracted and analysed. According to Lawrence, if we take the source of law which has all the authority required to give it binding force, then in respect of International Law there is one source of law and that is the consent of Nations. This consent may be either tacit (custom) or express (treaties).³ Treaties are the principal source of Public International Law. A treaty is an agreement between sovereign States (countries) and in some cases international organisations, which is binding at international law.⁴

Historical Background of International Law with regard to Treaties.

The origin of international law is a matter of disputing among scholars. The German diplomat and historian Grewe argues that there were three distinct systems of international law after the 16th century, each of which was characterized by the interests, ideologies and policies of the power that was predominant in the relevant period: the international legal orders of the Spanish age (1494—1648), the French age (1648—1815) and of the English age (1815—1919) (which the Scots and the Welsh, of course, in contrast to Grewe, would prefer to call ‘British’). For the purpose of this introduction it suffices to broadly distinguish between the ‘classical’ system of international law (1648—1918) and the development of ‘modern’ or ‘new’ international law since the

¹ Frederick Pollock, ‘The Sources of International Law’, [1902], Vol.2, No. 8.

² Mohd Aqib Aslam, ‘Sources of International Law- An Overview’, (Legal Service India), www.legalserviceindia.com/legal/article-2194-sources-of-international-law-an-overview.html, accessed 14 June 2020

³ Tanya Agarwal, ‘Origin, Sources of International Law including Customary Rules’, (IPLeders), <https://blog.iplayers.in/sources-international-law/amp/>, accessed 14 June 2020

⁴ ‘Public International Law: Treaties’, (The University of Melbourne), unimelb.libguides.com/internationallaw/treaties, accessed 14 June 2020

First World War. From 1919 onwards a fundamental transformation of the international system took place with the attempt to organize the international community and to ban the use of force.⁵

The foundations of international law (or the law of nations) as it is understood today lie firmly in the development of Western culture and political organisation. It is basically those ideas of international law that came to fruition in the 19th century that have been so clearly rejected, that is, those principles that enshrined the power and domination of the West. The underlying concepts of international law have not been discarded. On the contrary, the new nations have eagerly embraced the ideas of the sovereignty and equality of states and the principles of non- aggression and non- intervention, in their search for security within the bounds of a commonly accepted legal framework. While this new internationalisation of international law that has occurred in the last 50 years have destroyed its European-based homogeneity, it has emphasised its universalist scope.⁶

Treaties form the basis of most parts of modern international law. The history of international treaties is as long as the history of organized human co-existence. The first treaties known today are probably those concluded by the rulers of the Hittite empire with their neighbors and vassals in the 14th century BC, followed by Hittite treaties with Ramses 2, King of Egypt, around 1280—1270 BC. The oldest international treaty preserved in full text is a friendship and commerce agreement between the Kings of Elba and Ashur concluded in the middle of the third century BC, which was found in the archive of the palace of Elba. During the early Middle Ages, treaties of a legal nature were not only concluded between more or less independent princes and authorities, but also between all kinds of authorities of different ranks and legal positions. During the Spanish Age, the first phase of the emerging modern State, international relations emancipated themselves from the Roman Curia, which was aptly illustrated by the fact that Catholic sovereigns began to conclude treaties in their own right. In the French Age, the development of intergovernmental relations reached a relevance and perfection, which was unknown before. However, the situation changed in the 19th century, due to the 40 years of peace following the Congress of Vienna in 1814/15. That period of stability, until then unknown in European history, made it possible to concentrate international treaty relations on

⁵ Peter Malanczuk, *'Akehurst's Modern Introduction of International Law'*, (first published 1970, 7th edition 1997, Routledge 1997) 10

⁶ Malcolm N. Shaw QC, *'International Law'*, (first published 2008, Sixth edition, Cambridge University Press) 39

technical and administrative issues. Although, thus, the number and the importance of international treaties increased, and their provisions constituted a large part of the contemporary positive international law, there was no structured and well-defined law of treaties. Despite the acknowledged importance of treaties for international peace and security, it was not until 1969 that the first comprehensive codification of international treaty law was adopted at the Vienna Conference on the Law of Treaties. Moreover, compared to the long history of treaties in international relations, the time it took to actually prepare a codification of the international law on treaties is just a blink of an eye. After all, it took more than 3000 years of treaty-making before the law of treaties was finally codified.⁷

Treaty Law as a source of International Law.

Treaties today are the most common source of international law norms. Certain areas of international law, such as international environmental law, are almost exclusively regulated by treaties. A brief definition of a treaty is contained in Art. 2(1) a Vienna Convention on the Law of Treaties (VCLT) 1969. However, this definition is only for the purpose of the Convention, although it is assumed to reflect a general definition (with certain exceptions—see below):

“‘Treaty’ means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or two or more related instruments and whatever its particular designation.’⁸

The Vienna Convention on the Law of Treaties is the UN agreement that codifies the rules that guide treaty relations between States. The Convention provides an international legal framework for these relations in times of peace (the effect on treaties of the outbreak of hostilities between States is explicitly excluded from the reach of the Convention).⁹ Consent to a treaty may be expressed by signature, ratification, or accession, and is binding on the parties to it, who shall perform the treaty in good faith by applying the maxim *pacta sunt servanda*. Treaties which codify already existing customary law or which have in fact attained the status of customary law are binding on non-party states as well. Treaties could be a direct source of international law or reflective of a

⁷ Oliver Dorr, ‘Introduction: On the Role of Treaties in the Development of International Law’, [2012].

⁸ M. Fitzmaurice, A. Quast, ‘Law of treaties’, (2017), <https://london.ac.uk/sites/default/files/uploads/study-guide-postgraduate-laws-law-treaties.pdf>, accessed 15 June 2020

⁹ Supra note 4

customary or general principles of law as evidence. International treaties could be law making treaties or treaty contracts. Provisions of Law-making treaty are directly the source of international law.¹⁰ The term ‘treaty’ is, however, used by some schools of thought to connote not so much an agreement in the sense of a transaction as a written instrument embodying or recording an agreement.¹¹ Treaties, clearly, are capable of sub-classification; and there is much to be said for such distinctions as that between the *traite-loi* and the *traite-contrat*—that between the treaty which has a public law and that which has merely a private law character.¹²

In contrast with the process of creating law through custom, treaties (or international conventions) are a more modern and more deliberate method. Treaties are known by a variety of differing names, ranging from Conventions, International Agreements, Pacts, General Acts, Charters, through to Statutes, Declarations and Covenants. All these terms refer to a similar transaction, the creation of written agreements whereby the states participating bind themselves legally to act in a particular way or to set up particular relations between themselves. Treaties are express agreements and are a form of substitute legislation undertaken by states. They bear a close resemblance to contracts in a superficial sense in that the parties create binding obligations for themselves, but they have a nature of their own which reflects the character of the international system.¹³

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As treaties may be concluded for innumerable purposes, it is necessary to emphasise that such treaties only are a source of International Law as either stipulate new rules for future international conduct or confirm, define, or abolish existing customary or conventional rules. Such treaties must be called law-making treaties. Many law-making treaties are concluded by a few States only, so that the law which they create is *particular* International Law. On the other hand, there have been many law-making treaties concluded which contain *general* International Law, because the majority of States, including leading Powers, are parties to them.¹⁴ A treaty to be valid must be entered into by an agent having sufficient authority or else ratified by the treaty-making power

¹⁰ Shagufta Omar, ‘Sources of International Law in the Light of the Article 38 of the International Court of Justice’, [2011].

¹¹ Max Sorensen, ‘Manual of Public International Law’, (first published 1968, Palgrave Macmillan) 177.

¹² *Ibid*, p. 179.

¹³ *Supra* note 6, p. 94.

¹⁴ L. Oppenheim, *International Law A Treatise*, (first published 1905, Second Edition, Longmans, Green and Co., 1921) 23.

within the state. A treaty may be concerning matters which are local and transitory, in which case it is of very little consequence when viewed from the standpoint of its influence upon international law.¹⁵ The relationship between two or more treaties is governed by Article 30 of the 1969 Vienna Convention, which is entitled “Application of successive treaties relating to the same subject matter.”¹⁶

Judicial Perspective of Treaties as a source of International Law.

Art. 38 (1) (d) of the Statute of ICJ states that the Court shall apply subject to the provisions of Art. 59, judicial decisions and teachings of the most highly qualified publicists of various nations, as subsidiary means for the determination of rules of law. Thus, judicial decisions and juristic works are subsidiary and indirect sources of international law. The decisions of International Court of Justice do not create a binding general rule of international law, as Art. 50 of the Statute of ICJ make it clear that the decisions of the court will have no binding force except between the parties and in respect of the particular case. Although ICJ has not adopted the common law doctrine of precedent (i.e. stare decisis), it has largely adopted its substance.¹⁷

Conclusion.

By concluding we can say that, the treaty would be a subject to the specific regime of the international law. Treaties have the virtue of allowing States to negotiate on the occasion of discussions to defend or assert their conflicting or contradictory interests. Treaties are usually used to pacify the inter-states relationships.

¹⁵ Edwin Maxey, ‘Treaties as Sources of International Law’, [Mar., 1906], The Virginia Law Register, Vol., 11, o. 11, pp. 863-866.

¹⁶ Philippe Sands, “Treaty, Custom and the Cross-fertilization of International Law”, [1998], Yale Human Rights and Development Law Journal Vol., 1 Issue 1. , p. 94

¹⁷ Supra note 2.

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