

ASPEN STUDENT TREATISE SERIES

International Law

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frequently applied as rules of decision by law courts, domestic [see Chapters 4 and 10] as well as international [see Chapters 5, 7, 8, and 9].

B. THE RULES OF INTERNATIONAL LAW

We know reasonably well how to identify rules of "municipal law" (the term used by international lawyers to denote the internal laws of national legal systems). Municipal rules of law generally are thought to emanate from national constitutions, municipal statutes, executive regulations, and the decisions of municipal courts. Oftentimes the possible sources of municipal law include not only formal legislatures, but also other political structures when these institutions are accepted to actually generate rules of law. Of course, municipal legal systems differ among themselves, and what may be a source of legislation in one country may not be so in another. For example, law courts are thought to be makers of legal rules in the United States, but not in France.

In international law, the identification of legal rules is quite different than it is in most municipal legal systems. The reason for this is directly linked to international law's very nature. Given the international political system of nation-states and the idea of state sovereignty, the sources of international law cannot be equivalent to those of most domestic laws. There are only occasional international imitations of national constitutions, parliaments, executives, and courts. For example, the United Nations system offers only skeletal international governmental bodies that have just begun to be fleshed out in practice [see Chapter 7]. This is not to say that some international organizations, especially regional ones such as the European Union, have not come close to creating municipal-like sources of international law [see Chapter 9.B]. It is only to note that, on the whole, we must abandon most municipal-like sources when we look for the rules of international law.

Given the rarity of effective formal international legislative, executive, and judicial organs, some have said quite simply that international law does not or cannot exist and that the only real rules of law are those generated by sovereign states for their own internal consumption. The trouble with such a simplistic assertion is that it contradicts centuries of practice during which governments, courts, and others have, for one reason or another, found and applied rules of international law.

B. The Rules of International Law

Traditionally, rules of international law have been identified by looking to the various forms of rulemaking conduct of two or more states. Although these different forms of conduct tend to blend one into another, it is helpful at the outset to think of each form as a discrete source of a certain sort of international law.

The first and plainest source of international law is the explicit, usually written, agreements that states make among themselves. These agreements are often labeled treaties or conventions. A municipal law analogy to this source of international law is, of course, the idea of contract. Like contracts, treaties are capable of creating voluntary, though legally binding, relations. These are sometimes known as "conventional international law" [see Chapter 2].

A second source of international law is the customary practice, other than the making of treaties, of states among themselves. Such international customary practice has municipal analogies in commercial law notions such as "the course of dealing" and "the usage of trade," where practice creates justifiable expectations of future observance. International practice is thought capable of creating binding rules of law known as "customary international law" [see Chapter 3.A].

Rather different in conception from the international practice of states as a source of international law is the general municipal practice of states. The idea is that if most or all states observe certain rules as part of their domestic laws, then it may be presumed that these rules are so fundamental as to be more or less automatically a part of international law. Such rules deriving from or reflecting the common municipal laws of states are known as "general principles of law" [see Chapter 3.B.1].

Note how at least the first two sources of international law may be said to emanate from the consent of states. With conventional international law, the states that are parties to a treaty explicitly agree to be bound by certain rules. With customary international law, their consent is implicit, to be found in their international practice.

The consensual notion is, however, not the only possible justification for believing that treaties and custom are proper sources of international law. Some have said that these forms of state conduct are simply manifestations of rules that are bound to exist regardless of state consent and that, beyond general principles of law, there are other sorts of nonconsensual rules of international law [see Chapter 3.B]. Behind such nonconsensual ideas lie notions of natural law that have been more or less fashionable over time [see Chapter 3.B.2]. A debate between natural lawyers and positive lawyers (as those who insist

on the posited rules of states are called) is longstanding in international law. At this juncture, it is more or less immaterial to decide whether positivist or naturalist notions better justify treating state agreements and practice as sources of international law, these sources, at least, being agreed to be sources all the same.

In practice, lawyers, whether positivist or naturalist by persuasion, look to a wide variety of evidences to find, apply, and develop rules of international law. In this search there is sometimes no bright line dividing the evidences of the different sources of international law. For example, a provision of a treaty may be an evidence of state custom in general as well as an evidence of a particular state agreement. It is usually true that the evidences of customary international law are more diverse than are those of conventional international law or general principles of law.

Some usual evidences of customary international law are, in no particular order, constitutional, legislative, and executive promulgations of states, proclamations, judicial decisions, arbitral awards, writings of specialists on international law, international agreements, and resolutions and recommendations of international conferences and organizations. Evidences of conventional international law include the written agreements themselves and, to a lesser degree, material related to the drafting and conclusion of the agreements. Furthermore, it may sometimes be necessary to interpret international agreements in the context of international custom, in which case the extensive body of evidences available in finding customary international law becomes relevant to the finding of conventional international law as well. Evidences of general principles of law include municipal laws, doctrine, and judicial decisions [see Chapter 3.A.3].

C. THE PROCESS OF INTERNATIONAL LAW

Just as the rules of international law are very different in kind from the rules of municipal law, so too is the process of international law quite different from that in a domestic legal system. Unlike most municipal legal systems where courts, agencies, and other formal organs of dispute settlement or rule application are all more or less coordinated in an integrated and hierarchical legal system, international legal