Restatement of the Law, Third, Foreign Relations Law of the United States

Case Citations

Rules and Principles

Part 1 - International Law and Its Relation to United States Law

Chapter 1 - International Law: Character and Sources

Restat 3d of the Foreign Relations Law of the U.S., § 101

§ 101 International Law Defined

International law, as used in this Restatement, consists of rules and principles of general application dealing with the conduct of states and of international organizations and with their relations *inter se*, as well as with some of their relations with persons, whether natural or juridical.

COMMENTS & ILLUSTRATIONS: **Comment:**

a. International law and remedies: cross-references. The character and general content of international law are discussed in the Introductory Note to this chapter. The sources of international law are set forth in § 102. The remedies for violation of international law are dealt with in Part IX.

b. "State" and "international organization": cross-references. "State" is defined in § 201, "international organization" in § 221.

c. Private international law (or conflict of laws). International law, which in most other countries is referred to as "public international law," is often distinguished from private international law (called conflict of laws in the United States). Private international law has been defined as law directed to resolving controversies between private persons, natural as well as juridical, primarily in domestic litigation, arising out of situations having a significant relationship to more than one state. See Restatement, Second, Conflict of Laws § 2.

In some circumstances, issues of private international law may also implicate issues of public international law, and many matters of private international law have substantial international significance and therefore may be considered foreign relations law, § 1. In recent years, private international law has been coordinated and harmonized among states, and many of its rules are the subject of international agreements. The concepts, doctrines, and considerations that inform private international law also guide the development of some areas of public international law, notably the principles limiting the jurisdiction of states to prescribe, adjudicate and enforce law. See Introductory Note to Part IV, Chapter 1, and § § 402-403, 421, and 431. Increasingly, public international law impinges on private international activity, for example, the law of jurisdiction and judgments (Part IV) and the law protecting persons (Part VII).

To the extent that conflict of laws in the United States refers to laws of two or more States of the United States, or conflicts between federal and State law, it is, except as otherwise noted, beyond the scope of this Restatement.

d. General international law and particular agreements between states. Unless otherwise indicated, "international law" as used in this Restatement is law that applies to states and international (intergovernmental) organizations generally. It includes law contained in widely accepted multilateral agreements. Undertakings of a particular state or international organization under a particular international agreement -- for example, the obligation of a state under a bilateral tax treaty with another state -- are binding under international law, but the substantive content of such

undertakings is not international law applicable generally (unless there is a wide network of similar bilateral arrangements that results in general international law; see § 102, Comment *f*).

e. Comity distinguished. Comity has been variously conceived and defined. A well-known definition is: "Comity, in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience and to the rights of its own citizens or of other persons who are under the protection of its laws." Hilton v. Guyot, 159 U.S. 113, 163-64, 16 S.Ct. 139, 143, 40 L.Ed. 95 (1895). See also § 403, Comment *a*.

REPORTERS NOTES: 1. *Previous Restatement.* The previous Restatement defined international law in § 1 and elaborated upon that definition in comments to that section. This section indicates the scope of international law; the character and jurisprudence of international law are dealt with in the Introductory Note to this chapter, and the sources and evidence of international law in § § 102-103.

Section 1 of the previous Restatement defined international law as follows:

"International Law," as used in the Restatement of this Subject, means those rules of law applicable to a state or international organization that cannot be modified unilaterally by it.

As compared with that definition, this section indicates that international law has ceased to apply exclusively to states and international organizations and now deals also with their relations with individuals and juridical persons. The reference in the previous Restatement's definition to the fact that international law cannot be changed unilaterally by a state is alluded to in the Introductory Note to this chapter.

Section 3 of the previous Restatement, "Effect of Violation of International Law," is the subject of Part IX of this Restatement, Remedies. Definitions of "state" and "international organization" contained in § § 4 and 5 of the previous Restatement are included here in § § 201 and 221.

CROSS REFERENCES: Digest System Key Numbers:

International Law 1

Restatement of the Law, Third, Foreign Relations Law of the United States

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Part 1 - International Law and Its Relation to United States Law

Chapter 1 - International Law: Character and Sources

Restat 3d of the Foreign Relations Law of the U.S., § 102

§ 102 Sources of International Law

(1) A rule of international law is one that has been accepted as such by the international community of states

(a) in the form of customary law;

(b) by international agreement; or

(c) by derivation from general principles common to the major legal systems of the world.

(2) Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation.

(3) International agreements create law for the states parties thereto and may lead to the creation of customary international law when such agreements are intended for adherence by states generally and are in fact widely accepted.

(4) General principles common to the major legal systems, even if not incorporated or reflected in customary law or international agreement, may be invoked as supplementary rules of international law where appropriate.

COMMENTS & ILLUSTRATIONS: **Comment:**

a. Sources and evidence of international law distinguished. This section indicates the ways in which rules or principles become international law. The means for proving that a rule or principle has in fact become international law in one of the ways indicated in this section is dealt with in § 103.

b. Practice as customary law. "Practice of states," Subsection (2), includes diplomatic acts and instructions as well as public measures and other governmental acts and official statements of policy, whether they are unilateral or undertaken in cooperation with other states, for example in organizations such as the Organization for Economic Cooperation and Development (OECD). Inaction may constitute state practice, as when a state acquiesces in acts of another state that affect its legal rights. The practice necessary to create customary law may be of comparatively short duration, but under Subsection (2) it must be "general and consistent." A practice can be general even if it is not universally followed; there is no precise formula to indicate how widespread a practice must be, but it should reflect wide acceptance among the states particularly involved in the relevant activity. Failure of a significant number of important states to adopt a practice can prevent a principle from becoming general customary law though it might

become "particular customary law" for the participating states. See Comment *e*. A principle of customary law is not binding on a state that declares its dissent from the principle during its development. See Comment *d*.

c. Opinio juris. For a practice of states to become a rule of customary international law it must appear that the states follow the practice from a sense of legal obligation (*opinio juris sive necessitatis*); a practice that is generally followed but which states feel legally free to disregard does not contribute to customary law. A practice initially followed by states as a matter of courtesy or habit may become law when states generally come to believe that they are under a legal obligation to comply with it. It is often difficult to determine when that transformation into law has taken place. Explicit evidence of a sense of legal obligation (*e.g.*, by official statements) is not necessary; *opinio juris* may be inferred from acts or omissions.

d. Dissenting views and new states. Although customary law may be built by the acquiescence as well as by the actions of states (Comment *b*) and become generally binding on all states, in principle a state that indicates its dissent from a practice while the law is still in the process of development is not bound by that rule even after it matures. Historically, such dissent and consequent exemption from a principle that became general customary law has been rare. See Reporters' Note 2. As to the possibility of dissent from peremptory norms (*jus cogens*), see Comment *k*. A state that enters the international system after a practice has ripened into a rule of international law is bound by that rule.

e. General and special custom. The practice of states in a regional or other special grouping may create "regional," "special," or "particular" customary law for those states *inter se*. It must be shown that the state alleged to be bound has accepted or acquiesced in the custom as a matter of legal obligation, "not merely for reasons of political expediency." Asylum Case (Colombia v. Peru), [1950] I.C.J. Rep. 266, 277. Such special customary law may be seen as essentially the result of tacit agreement among the parties.

f. International agreement as source of law. An international agreement creates obligations binding between the parties under international law. See § 321. Ordinarily, an agreement between states is a source of law only in the sense that a private contract may be said to make law for the parties under the domestic law of contracts. Multilateral agreements open to all states, however, are increasingly used for general legislation, whether to make new law, as in human rights (Introduction to Part VII), or for codifying and developing customary law, as in the Vienna Convention on the Law of Treaties. For the law of international agreements, see Part III. "International agreement" is defined in § 301(1). International agreements may contribute to customary law. See Comment *i*.

g. Binding resolutions of international organizations. Some international agreements that are constitutions or charters of international organizations confer power on those organizations to impose binding obligations on their members by resolution, usually by qualified majorities. Such obligations derive their authority from the international agreement constituting the organization, and resolutions so adoptedby the organization can be seen as "secondary sources" of international law for its members. For example, the International Monetary Fund may prescribe rules concerning maintenance or change of exchange rates or depreciation of currencies. See § 821. The International Civil Aviation Organization may set binding standards for navigation or qualifications for flight crews in aviation over the high seas.

For resolutions of international organizations that are not binding but purport to state the international law on a particular subject, see § 103, Comment *c*.

h. The United Nations Charter. The Charter of the United Nations has been adhered to by virtually all states. Even the few remaining non-member states have acquiesced in the principles it established. The Charter provisions prohibiting the use of force have become rules of international law binding on all states. Compare Article 2(6). See § 905, Comment *g*.

Article 103 of the Charter provides:

In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.

Members seem to have read this article as barring them from making agreements inconsistent with the Charter, and have refrained from making such agreements. See, *e.g.*, Article 7 of the North Atlantic Treaty, 1949, 63 Stat. 2241, T.I.A.S. No. 1964, 34 U.N.T.S. 243; Article 102 of the Charter of the Organization of American States, 1948, 2 U.S.T. 2394, T.I.A.S. No. 2361, 119 U.N. T.S. 3. And see Comment *k*.

i. International agreements codifying or contributing to customary law. International agreements constitute practice of states and as such can contribute to the growth of customary law under Subsection (2). See North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark & Netherlands), [1969] I.C.J. Rep. 3, 28-29, 37-43. Some multilateral agreements may come to be law for non-parties that do not actively dissent. That may be the effect where a multilateral agreement is designed for adherence by states generally, is widely accepted, and is not rejected by a significant number of important states. A wide network of similar bilateral arrangements on a subject may constitute practice and also result in customary law. If an international agreement is declaratory of, or contributes to, customary law, its termination by the parties does not of itself affect the continuing force of those rules as international law. However, the widespread repudiation of the obligations of an international agreement may be seen as state practice adverse to the continuing force of the obligations. See Comment *j*.

j. Conflict between international agreement and customary law. Customary law and law made by international agreement have equal authority as international law. Unless the parties evince a contrary intention, a rule established by agreement supersedes for them a prior inconsistent rule of customary international law. However, an agreement will not supersede a prior rule of customary law that is a peremptory norm of international law; and an agreement will not supersede customary law if the agreement is invalid because it violates such a peremptory norm. See Comment *k*. A new rule of customary law will supersede inconsistent obligations created by earlier agreement if the parties so intend and the intention is clearly manifested. Thus, the United States and many other states party to the 1958 Law of the Sea Conventions accept that some of the provisions of those conventions have been superseded by supervening customary law. See Introductory Note to Part V.

k. Peremptory norms of international law (jus cogens). Some rules of international law are recognized by the international community of states as peremptory, permitting no derogation. These rules prevail over and invalidate international agreements and other rules of international law in conflict with them. Such a peremptory norm is subject to modification only by a subsequent norm of international law having the same character. It is generally accepted that the principles of the United Nations Charter prohibiting the use of force (Comment *h*) have the character of *jus cogens*. See § 331(2) and Comment *e* to that section.

l. General principles as secondary source of law. Much of international law, whether customary or constituted by agreement, reflects principles analogous to those found in the major legal systems of the world, and historically may derive from them or from a more remote common origin. See Introductory Note to Chapter 1 of this Part and Reporters' Note 1 to this section. General principles common to systems of national law may be resorted to as an independent source of law. That source of law may be important when there has not been practice by states sufficient to give the particular principle status as customary law and the principle has not been legislated by general international agreement.

General principles are a secondary source of international law, resorted to for developing international law interstitially in special circumstances. For example, the passage of time as a defense to an international claim by a state on behalf of a national may not have had sufficient application in practice to be accepted as a rule of customary law. Nonetheless, it may be invoked as a rule of international law, at least in claims based on injury to persons (Part VII), because it is a general principle common to the major legal systems of the world and is not inappropriate for international claims. Other rules that have been drawn from general principles include rules relating to the administration of justice, such as the rule that no one may be judge in his own cause; *res judicata*; and rules of fair procedure generally. General principles may also provide "rules of reason" of a general character, such as acquiescence and estoppel, the principle that rights must not be abused, and the obligation to repair a wrong. International practice may sometimes convert such a principle into a rule of customary law.

m. Equity as general principle. Reference to principles of equity, in the sense of what is fair and just, is common to major legal systems, and equity has been accepted as a principle of international law in several contexts. See, *e.g.*, the delimitation of coastal state zones, § 517. That principle is not to be confused with references to "equity," and distinctions between law and equity as separate bodies of law, in traditional Anglo-American jurisprudence. Reference to equity as a principle incorporated into international law is also to be distinguished from the power, conferred on the International Court of Justice in Article 38(2) of the Statute (and on other tribunals in numerous arbitration agreements), to decide cases *ex aequo et bono* if the parties agree thereto, which permits the Court to settle a case without being confined to principles of law. See § 903, Reporters' Note 9.

REPORTERS NOTES: 1. *Statute of International Court of Justice and sources of law*. This section draws on Article 38(1) of the Statute of the International Court of Justice, a provision commonly treated as an authoritative statement of the "sources" of international law. Article 38(1) provides:

The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

(a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

(b) international custom, as evidence of a general practice accepted as law;

(c) the general principles of law recognized by civilized nations;

(d) . . . 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.

The Statute of the International Court of Justice does not use the term "sources," but this Restatement follows common usage in characterizing customary law, international agreements, and general principles of law as "sources" of international law, in the sense that they are the ways in which rules become, or become accepted as, international law. International lawyers sometimes also describe as "sources" the "judicial decisions and the teachings of the most highly qualified publicists of the various nations," mentioned in Article 38(1) (d) of the Statute of the Court, *supra*. Those, however, are not sources in the same sense since they are not ways in which law is made or accepted, but opinion-evidence as to whether some rule has in fact become or been accepted as international law. See § 103.

2. *Customary law*. No definition of customary law has received universal agreement, but the essence of Subsection (2) has wide acceptance. See generally Parry, The Sources and Evidences of International Law (1965). Each element in attempted definitions has raised difficulties. There have been philosophical debates about the very basis of the definition: how can practice build law? Most troublesome conceptually has been the circularity in the suggestion that law is built by practice based on a sense of legal obligation: how, it is asked, can there be a sense of legal obligation before the law from which the legal obligation derives has matured? Such conceptual difficulties, however, have not prevented acceptance of customary law essentially as here defined. Perhaps the sense of legal obligation came originally from principles of natural law or common morality, often already reflected in principles of law common to national legal systems (see Comment *l*); practice built on that sense of obligation then matured into customary law. Compare Article 38(1) (b) of the Statute of the International Court of Justice (Reporters' Note 1), which refers to "international custom, as evidence of a general practice accepted as law." Perhaps the definition reflects a later stage in the history of international law when governments found practice and sense of obligation already in evidence, and accepted them without inquiring as to the original basis of that sense of legal obligation.

Earlier definitions implied that establishment of custom required that the practice of states continue over an extended period of time. That requirement began to lose its force after the Second World War, perhaps because improved communication made the practice of states widely and quickly known, at least where there is broad acceptance and no or little objection. In North Sea Continental Shelf Cases, the International Court of Justice agreed that "the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law." [1969] I.C.J. Rep. 3, 44. The doctrine of the continental shelf, § 515, is sometimes cited as an example of "instant customary law." The Truman Proclamation of 1945 was not challenged by governments and was followed by similar claims by other states. The International Law Commission, engaged in codifying and developing the law of the sea during the years 1950-56, avoided a clear position as to whether the continental shelf provisions in its draft convention were codifying customary law or proposing a new development. The provisions were included in the 1958 Convention on the Continental Shelf. It was soon assumed that the doctrine they reflected was part of international law even for states that did not adhere to the Convention. See the opinion of the International Court of Justice in North Sea Continental Shelf Cases, *supra*, at 43. The doctrine of the continental shelf became accepted as customary law on the basis of assertions of exclusive jurisdiction by coastal states and general acquiescence by other states, although for some years actual mining on the continental shelf (outside a state's territorial sea) was not technologically feasible. The "practice" may be said to have consisted of acts by governments claiming exclusive rights and denying access to others.

The practice of states that builds customary law takes many forms and includes what states do in or through international organizations. Comment *b*. The United Nations General Assembly in particular has adopted resolutions,

declarations, and other statements of principles that in some circumstances contribute to the process of making customary law, insofar as statements and votes of governments are kinds of state practice, Comment *b*, and may be expressions of *opinio juris*, Comment *c*. The contributions of such resolutions and of the statements and votes supporting them to the lawmaking process will differ widely, depending on factors such as the subject of the resolution, whether it purports to reflect legal principles, how large a majority it commands and how numerous and important are the dissenting states, whether it is widely supported (including in particular the states principally affected), and whether it is later confirmed by other practice. "Declarations of principles" may have greater significance than ordinary resolutions. A memorandum of the Office of Legal Affairs of the United Nations Secretariat suggests that:

in view of the greater solemnity and significance of a "declaration," it may be considered to impart, on behalf of the organ adopting it, a strong expectation that Members of the international community will abide by it. Consequently, insofar as the expectation is gradually justified by State practice, a declaration may by custom become recognized as laying down rules binding upon States.

[E/CN.4/L. 610, quoted in 34 U.N. ESCOR, Supp. No. 8, p. 15, U.N. Doc. E/3616/Rev. 1 (1962)]. The Outer Space Declaration, for example, might have become law even if a formal treaty had not followed, since it was approved by all, including the principal "space powers." See Declaration of Legal Principles Governing the Activities of States in the Exploration and Uses of Outer Space, G.A. Res. 1962, 18 U.N. GAOR, Supp. No. 15, at 15. A spokesman for the United States stated that his Government considered that the Declaration "reflected international law as accepted by the members of the United Nations," and both the United States and the U.S.S.R. indicated that they intended to abide by the Declaration. See 18 U.N. GAOR, 1st Committee, 1342d meeting, 2 Dec. 1963, pp. 159, 161.

For the effect of General Assembly resolutions on the development of the principle of self-determination, see Western Sahara (advisory opinion), [1975] I.C.J. Rep. 4, 31. The contribution of a resolution of a multilateral conference (on the law of the sea) to customary law is cited in Fisheries Jurisdiction Case (United Kingdom v. Iceland), [1974] I.C.J. Rep. 3, 24-26, 32. For the evidentiary significance of resolutions purporting to state international law, see § 103, Comment *c*.

Resolutions that may contribute to customary law are to be distinguished from resolutions that are legally binding on members, Comment *g* and Reporters' Note 3. The latter, too, may reflect state practice or *opinio juris*, but they derive their authority from the charter of the organization, an international agreement in which states parties agreed to be bound by some of its acts.

International conferences, especially those engaged in codifying customary law, provide occasions for expressions by states as to the law on particular questions. General consensus as to the law at such a conference confirms customary law or contributes to its creation. See, *e.g.*, as to the law of the sea, Introductory Note to Part V.

The development of customary law has been described as part of a "process of continuous interaction, of continuous demand and response," among decision-makers of different states. These "create expectations that effective power will be restrained and exercised in certain uniformities of pattern. . . . The reciprocal tolerances . . . create the expectations of patterns and uniformity in decision, of practice in accord with rule, commonly regarded as law." McDougal, "The Hydrogen Bomb Tests and the International Law of the Sea," *49 Am.J. Int'l L. 357-58 (1955).*

That a rule of customary law is not binding on any state indicating its dissent during the development of the rule (Comment *d*) is an accepted application of the traditional principle that international law essentially depends on the consent of states. See Introduction to Part I, Chapter 1. Refusal of states to adopt or acquiesce in a practice has often prevented its development into a principle of customary law, but instances of dissent and exemption from practice that developed into principles of general customary law have been few. Scandinavian states successfully maintained a four-mile territorial sea although a three-mile zone was generally accepted, and Norway successfully maintained a different system of delimitation of its territorial zone. See Fisheries Case (United Kingdom v. Norway), [1951] I.C.J. Rep. 116.

An entity that achieves statehood becomes subject to international law (§ 206), notably customary law as it had developed. After the Second World War, many new states came into existence within a brief period. Their spokesmen rhetorically asked why they should be bound by preexisting law created by European, Christian, imperialistic powers. In fact, however, the basic principles of customary law were accepted, with new states joining in the process of law-making, and seeking desired changes in the law through accepted procedures, notably by international agreements codifying, developing, and sometimes modifying the law.

3. *Binding resolutions of international organizations*. Comment *g* refers to prescriptive decisions, such as those of the International Monetary Fund, or binding resolutions such as those of the Security Council pursuant to Chapter VII of the United Nations Charter, which have the effect of law for members of the organization. The United States has recognized the binding character of such resolutions, for example, the resolution imposing an embargo on products of Southern Rhodesia. See *22 U.S.C. § 287c*. Many other organs of international organizations have limited authority to impose some binding obligations, for example to determine the budget and the "dues" of each member. See, for example, the authority of the United Nations General Assembly under Article 17 of the Charter. A number of international organizations have authority to recommend rules but states are not compelled to adopt them.

4. *Conflict between customary law and international agreement.* A subsequent agreement will prevail over prior custom, except where the principle of customary law has the character of *jus cogens*, but an agreement is ordinarily presumed to supplement rather than to replace a customary rule. Provisions in international agreements are superseded by principles of customary law that develop subsequently, where the parties to the agreement so intend, in which case the earlier provision in the agreement is deemed to have expired by mutual agreement or by desuetude. If an international agreement provides for denunciation, it will ordinarily be assumed that the agreement was not intended to be replaced by subsequent custom unless the parties denounce the earlier agreement. See Akehurst, "The Hierarchy of the Sources of International Law," *47 Brit.Y.B.Int'l L. 273* (1974-75). Modification of customary law by agreement is not uncommon, sometimes through bilateral agreements, notably in the various multilateral codifications of recent decades, such as the Vienna Convention on the Law of Treaties (see this Restatement, Part III), the conventions on diplomatic and consular immunities (Part IV, § § 464-70), and the conventions on the law of the sea (Part V). There have been few instances of rules of customary law developing in conflict with earlier agreements, but that may happen more frequently as state practice responds to widespread political demands, for example, when states adopted 200-mile exclusive resource zones in the sea, in effect superseding the 1958 Law of the Sea Conventions. See § 514. Compare Arbitration between the United Kingdom and France on the Delimitation of the Continental Shelf (Decision of June 30, 1977), 18 Int'l Leg.Mat. 397 (1979), 18 R. Int'l Arb. Awards 3 (1983).

5. *Agreements codifying customary law*. An international agreement may declare that it merely codifies preexisting rules of customary international law. Such a declaration is evidence to that effect but is not conclusive on parties to the agreement. The recent "codification treaties" adopted under United Nations auspices declare that their aim is both codification and progressive development, thus leaving open whether a particular provision is declaratory of old law or a formulation of new law. See, for example, the Vienna Convention on the Law of Treaties, Introductory Note to Part III. Even such a declaration is evidence that the agreement reflects existing law in some respects, and as to these the declaration may itself be viewed as a form of state practice confirming the customary international law. Of course, states may disagree as to whether the agreement as a whole or a particular provision reflects existing law. See generally Baxter, "Treaties and Custom," 129 Recueil des Cours 25 (1970).

International agreements that do not purport to codify customary international law may in fact do so. International agreements may also help create customary law of general applicability. Comment *i*. In North Sea Continental Shelf Cases, Reporters' Note 2, at 37, the Court held that the Convention on the Continental Shelf codified the doctrine of the continental shelf as well as its basic principles, but not provisions as to which reservations were permitted. The Court suggested that a treaty rule might become "a general rule of international law" if there were "a very widespread and representative participation in the convention . . . provided it includes that of States whose interests were particularly affected." *Id.* at 42. Article 38 of the Vienna Convention on the Law of Treaties declares: "Nothing in Articles 34 to 37 precludes a rule set forth in a treaty from becoming binding upon a third state as a customary rule of international law, recognized as such." See § 324, Comment *e*.

6. *Peremptory norms* (juscogens). The concept of *jus cogens* is of relatively recent origin. See Schwelb, "Some Aspects of International *Jus Cogens* as Formulated by the International Law Commission," *61 Am.J.Int'l L. 946 (1967)*. It is now widely accepted, however, as a principle of customary law (albeit of higher status). It is incorporated in the Vienna Convention on the Law of Treaties, Articles 53 and 64. See § 331(2) and Comment *e* to that section. Comment *k* to this section adopts the definition of *jus cogens* found in Article 53 of the Vienna Convention. The Vienna Convention requires that the norm (and its peremptory character) must be "accepted and recognized by the international community of States as a whole" (Art. 53). Apparently that means by "a very large majority" of states, even if over dissent by "a very small number" of states. See Report of the Proceedings of the Committee of the Whole, May 21, 1968, U.N. Doc. A/Conf. 39/11 at 471-72.

Although the concept of *jus cogens* is now accepted, its content is not agreed. There is general agreement that the principles of the United Nations Charter prohibiting the use of force are *jus cogens*. See Comment *k*; Verdross and

Simma, Universelles Volkerrecht 83-87 (1976). It has been suggested that norms that create "international crimes" and obligate all states to proceed against violations are also peremptory. Compare Report of the International Law Commission on the work of its twenty-eighth session, draft Art. 19, [1976] 2 Y.B. Int'l L. Comm'n 95, 121. Such norms might include rules prohibiting genocide, slave trade and slavery, apartheid and other gross violations of human rights, and perhaps attacks on diplomats. Compare § 702, Comment *n*.

7. *General principles*. Article 38(1)(c) of the Statute of the International Court of Justice, Reporters' Note 1, speaks of "general principles of law recognized by civilized nations." It has become clear that this phrase refers to general principles of law common to the major legal systems of the world. The general principles are those common to national legal systems; the view of Soviet scholars that the reference is to principles of international law that have been accepted by states generally has not gained acceptance. Compare Tunkin, Theory of International Law 190 (1974). See, generally, Virally, "The Sources of International Law," in Manual of Public International Law 143-48 (Sorensen, ed. 1968). In contrast, references to "general principles of international law" ordinarily mean principles accepted as customary international law whether or not they derive from principles common to national legal systems.

Whether a general principle common to national legal systems is appropriate for absorption by international law may depend on the development of international law. For example, there is now substantial international law on human rights (this Restatement, Part VII), and it is plausible to conclude that a rule against torture is part of international law, since such a principle is common to all major legal systems. See § 702(d); § 701, Reporters' Note 1.

In addition to being an independent though secondary source of law, general principles are also supportive of other sources. That a principle is common to the major legal systems may be persuasive in determining whether it has become a rule of customary law or is implied in an international agreement. See Opinion of Judge Dillard in Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pakistan), [1972] I.C.J. Rep. 46, 109. For example, "good faith," a principle "universally recognized" (preamble, Vienna Convention on the Law of Treaties, § 321, Reporters' Note 1) was perhaps originally a principle common to the major legal systems, but is now accepted as a principle of customary law. Compare Case Relating to the Arbitral Award Made by the King of Spain (Honduras v. Nicaragua), [1960] I.C.J. Rep. 192, 219, 220, 222, 228, 236 (state cannot in good faith contest long-accepted arbitral award), and Case of the Temple of Preah Vihear (Cambodia v. Thailand), [1962] *id.* 6, 23, 42 (state cannot in good faith challenge long-accepted boundary). See Lachs, "Some Thoughts on the Role of Good Faith in International Law," in Declarations on Principles: A Quest for Universal Peace 47 (Akkerman, van Krieker & Pannenberg eds., 1977); Virally, "Good Faith In Public International Law," *77 Am.J.Int'l L. 130 (1983).*

8. *Equity*. The principle of equity is frequently invoked in discourse between states but there are few references to equity as a legal principle in international judicial decisions. One such reference was in the Fisheries Jurisdiction Case (United Kingdom v. Iceland), [1974] I.C.J. Rep. 3. "Equitable principles" have been explicitly accepted as applicable in the delimitation of boundaries between the continental shelves and between the exclusive economic zones of states, and the concept has been considered by international tribunals in that context. See § 517 and Reporters' Note 1 thereto.

9. *Previous Restatement*. The sources of international law are dealt with briefly in the previous Restatement in the comments to § 1.

CROSS REFERENCES: Digest System Key Numbers:

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Rules and Principles

Part 1 - International Law and Its Relation to United States Law

Chapter 1 - International Law: Character and Sources

Restat 3d of the Foreign Relations Law of the U.S., § 103

§ 103 Evidence of International Law

(1) Whether a rule has become international law is determined by evidence appropriate to the particular source from which that rule is alleged to derive (§ 102).

(2) In determining whether a rule has become international law, substantial weight is accorded to

(a) judgments and opinions of international judicial and arbitral tribunals;

(b) judgments and opinions of national judicial tribunals;

(c) the writings of scholars;

(d) pronouncements by states that undertake to state a rule of international law, when such pronouncements are not seriously challenged by other states.

COMMENTS & ILLUSTRATIONS: **Comment:**

a. Primary and secondary evidence of international law. Section 102 sets forth the "sources" of international law, *i.e.*, the ways in which a rule or principle becomes international law. This section indicates the means of proving, for example, in a court or other tribunal, that a rule has become international law by way of one or more of the sources indicated in § 102.

Under Subsection (1), the process of determining whether a rule has been accepted as international law depends on the particular source of international law indicated in § 102 from which the rule is alleged to derive. Thus, for customary law the "best evidence" is proof of state practice, ordinarily by reference to official documents and other indications of governmental action. (Similar forms of proof would be adduced as evidence that a state is not bound by a principle of law because it had dissented, § 102, Comment *d*). Law made by international agreement is proved by reference to the text of the agreement, but appropriate supplementary means to its interpretation are not excluded. See § 325. Subsection (2) refers to secondary evidence indicating what the law has been found to be by authoritative reporters and interpreters; the order of the clauses is not meant to indicate their relative importance. Such evidence may be negated by primary evidence, for example, as to customary law, by proof as to what state practice is in fact.

A determination as to whether a customary rule has developed is likely to be influenced by assessment as to whether the rule will contribute to international order.

For the practice of United States courts in determining international law, see § 113.

b. Judicial and arbitral decisions. Article 59 of the Statute of the International Court of Justice provides: "The decision of the Court has no binding force except between the parties and in respect of that particular case." That provision reflects the traditional view that there is no *stare decisis* in international law. In fact, in the few permanent courts, such as the International Court of Justice, the Court of Justice of the European Communities, and the European Court of Human Rights, there is considerable attention to past decisions. See § 903, Reporters' Note 8. That may be expected, too, of the Inter-American Court of Human Rights established in 1979. In any event, to the extent that decisions of international tribunals adjudicate questions of international law, they are persuasive evidence of what the law is. The judgments and opinions of the International Court of Justice are accorded great weight. Judgments and opinions of international tribunals generally are accorded more weight than those of domestic courts, since the former are less likely to reflect a particular national interest or bias, but the views of national courts, too, generally have the weight due to bodies of presumed independence, competence, impartiality, and authority.

Under the foreign relations law of the United States, determinations of international law by courts in the United States are respected to the same extent as other determinations of law; lower courts must of course accept decisions of higher courts, and the determinations of the Supreme Court of the United States are conclusive on all courts in the United States. See § 112(2).

c. Declaratory resolutions of international organizations. States often pronounce their views on points of international law, sometimes jointly through resolutions of international organizations that undertake to declare what the law is on a particular question, usually as a matter of general customary law. International organizations generally have no authority to make law, and their determinations of law ordinarily have no special weight, but their declaratory pronouncements provide some evidence of what the states voting for it regard the law to be. The evidentiary value of such resolutions is variable. Resolutions of universal international organizations, if not controversial and if adopted by consensus or virtual unanimity, are given substantial weight. Such declaratory resolutions of international organizations are to be distinguished from those special "law-making resolutions" that, under the constitution of an organization, are legally binding on its members. See § 102, Comment *g*.

REPORTERS NOTES: 1. *Writings of international law scholars.* The "teachings of the most highly qualified publicists of the various nations" are treated in Article 38(1)(d) of the Statute of International Court of Justice as subsidiary means for the determination of international law. See § 102, Reporters' Note 1. Such writings include treatises and other writings of authors of standing; resolutions of scholarly bodies such as the Institute of International Law (Institut de droit international) and the International Law Association; draft texts and reports of the International Law Commission, and systematic scholarly presentations of international law such as this Restatement. Which publicists are "the most highly qualified" is, of course, not susceptible of conclusive proof, and the authority of writings as evidence of international law differs greatly. The views of the International Law Commission have sometimes been considered especially authoritative. See, *e.g.*, North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark & Netherlands), [1969] I.C.J. Rep. 3, 33 *et seq.*

2. *Declaratory resolutions of international organizations.* Article 38(1)(d) of the Statute of the International Court of Justice, § 102, Reporters' Note 1, does not include resolutions of international organizations among the "subsidiary means for the determination of rules of law." However, the Statute was drafted before the growth and proliferation of international organizations following the Second World War. Given the universal character of many of those organizations and the forum they provide for the expression by states of their views regarding legal principles, such resolutions sometimes provide important evidence of law. A resolution purporting to state the law on a subject is some evidence of what the states voting for the resolution regard the law to be, although what states do is more weighty evidence than their declarations or the resolutions they vote for. The evidentiary value of such a resolution is high if it is adopted by consensus or by virtually unanimous vote of an organization of universal membership such as the United Nations or its Specialized Agencies. On the other hand, majorities may be tempted to declare as existing law what they would like the law to be, and less weight must be given to such a resolution when it declares law in the interest of the majority and against the interest of a strongly dissenting minority. See, *e.g.*, the General Assembly resolution declaring that the use of nuclear weapons is a violation of international law (G.A. Res. 1653, U.N. GAOR, Supp. No. 17 at 4), and the "Moratorium Resolution" declaring that no one may mine for resources in the deep-sea bed until there is an agreed international regime and only in accordance with its terms (G.A. Res. 2574(D), 24 U.N. GAOR, Supp. No. 30, at 11), both of which were challenged by the United States, a principal power immediately affected by those resolutions. See § 523, Reporters' Note 2. Even a unanimous resolution may be questioned when the record shows that those voting for it

considered it merely a recommendation or a political expression, or that serious consideration was not given to its legal basis. A resolution is entitled to little weight if it is contradicted by state practice, Comment *a*, or is rejected by international courts or tribunals. On the other hand, a declaratory resolution that was less than unanimous may be evidence of customary law if it is supported by thorough study by the International Law Commission or other serious legal examination. See, for example, the reliance on one United Nations General Assembly resolution but deprecation of another resolution by the arbitrator in Texas Overseas Petroleum Co. v. Libyan Arab Republic (1977), 17 Int'l Leg.Mat. 1 (1978).

Resolutions by a principal organ of an organization interpreting the charter of the organization may be entitled to greater weight. In some instances, such an interpretation may, by the terms of the charter, be binding on the parties, for example, those of the Council of the International Coffee Organization. See Charter of the International Coffee Organization, 469 U.N.T.S. 169. Declarations interpreting a charter are entitled to considerable weight if they are unanimous or nearly unanimous and have the support of all the principal members.

See generally Schachter, "The Crisis of Legitimation in the United Nations," 50 Nordisk Tidsskrift for International Ret 3 (1981).

CROSS REFERENCES: Digest System Key Numbers:

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