A BRIEF OVERVIEW OF INTERNATIONAL LAW

by

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In matters of world-wide concern, it is international law that determines the responsibilities and obligations of each State, organisation or individual. In the past 50 years, the world has become even more interconnected with the huge leaps in communication and technology, and a growing dependency on other countries for resources and services. Despite recent bad press from some governments, international law is both necessary and important for international cooperation at every level. On a day-to-day level, international law functions effectively with little or no awareness by the participants and without any noticeable seams. One can travel internationally, television events are broadcast world-wide and postal and electronic mail is delivered across borders due to international agreements. The term "international law" actually covers different subsets of law including private international law, public international law, supranational or regional agreements and foreign policy law. When the term "international law" is used in the media or in everyday discussion, the reference is generally to public international law. A short overview of both private international and public international law is given below.

Private International Law

"Private international law" (as civil law countries such as France, Italy and Spain refer to it) or "conflict of laws" (as common law countries such as the United Kingdom, the United States, Australia and Canada refer to it) is a body of law developed to resolve private, non-state disputes involving more than one jurisdiction or one foreign law element. As the common law name -- conflict of laws -- implies, where more than one jurisdiction has an interest in a legal action, there may be a conflict between laws of the different jurisdictions involved. Conflict of laws will apply in situations such as marriage, birthrights, divorce, settlement of property, and commercial disputes when more than one jurisdiction is involved. The two questions that need to be settled in these cases are, 1) does the proposed court or tribunal in a certain nation-state (State) have the jurisdiction to hear and decide this case? and 2) which of the competing States' laws should be applied to resolve this case?

An example involving conflict of laws would be the situation where a husband and wife who live in London, England decide to divorce. The wife is a Brazilian national and the husband is a British national. Together, they own property in England and in France. If the wife believes she would get better treatment in a Brazilian court than an English court, she may want to bring divorce proceedings in Brazil rather than in England. The husband may decide to bring his own court action in England if he believes this court would give him a better result than a Brazilian court would.

Because States have different divorce laws, each court to which an action is brought must decide if it has the jurisdiction to hear and rule on the underlying case before it. It must also decide if it is the appropriate forum for deciding the dispute. Here, the appropriate court in Brazil and in London will first have to resolve the conflict of laws questions before the particulars of the divorce case can proceed. If a court decides it has the jurisdiction to hear the case, it will then decide which law should apply to the case. This may mean that a Brazilian court applies English law to the divorce case. Generally, the more foreign law elements that are present in a conflict of laws situation, the more complex is the analysis to reach a resolution.

Public International Law

(i) Generally

International law (previously referred to as the law of nations) consists of rules, laws and principles that govern the relations between States and which bind all international actors. At the core of international law is the belief that all commitments made publicly, formally and voluntarily by a State should be honoured ("*pacta sunt servanda*"). In practice, international law

is based on reciprocity of treatment; one State treats other States as it wants to be treated. The development of international law has occurred over time. Initially, international law exclusively applied only to international diplomatic situations and to the conduct of war. Until the last half of the twentieth century, international law only applied to and between States. Now it has been expanded to cover international organisations such as the United Nations and the International Committee of the Red Cross, and certain individuals (such as for war crimes).

One important factor to realise and understand about international law is that it works in a totally different way to domestic or municipal law. International law applies on a consensual basis between countries, rather than being imposed by a single ruling world-body or government. Because of this, international law tends to work horizontally, across the spectrum, as opposed to domestic law, which works vertically. States consent to the international legal obligations and responsibilities either implicitly through custom or explicitly through treaties and agreements. Once international law is agreed to, it cannot be unilaterally changed at will by a State. For example, despite the U.S. government's recent announcement that it now considers the crime of "conspiracy" to be an international crime, the rest of the international community disagrees with the United States that it amounts to a separate crime. Conspiracy will only become an international crime if other States agree with the United States in a treaty that it is a crime or if it develops through customary law.

One criticism of international law is that it doesn't work. The true picture of international law is that it does work, but only to the extent the participants make it work by following the law. As with domestic law, international laws are sometimes broken. This is expected, since many of the issues that arise on the international stage are political ones. While international law does not have the same strong enforcement measures a State has under its domestic law, there are different options available that can be used against a State which refuses to fulfil its international obligations and responsibilities.

When international law is violated, other States and/or international organisations may use diplomacy to address the situation. Because reciprocity is an important part of international law, the threat of condemnation by other States can be a powerful tool against some but not all States. Sanctions involving economic or financial threats or promises can be used by one or more States against the State in violation of international law. Treaties with the violating State can be suspended. A State's assets, such as its ships or any of its bank accounts, can be seized for legitimate reasons. There are also two international courts: the International Court of Justice and the permanent International Criminal Court (ICC), both located in The Hague, The Netherlands. States can bring inter-state disputes or ask for advisory opinions from the International Court of Justice. The International Criminal Court moves forward with the same type of international criminal work that the United Nations' tribunals in Rwanda, the former Yugoslavia, and Sierra Leone have been doing for over the past decade. This international criminal court has only secondary jurisdiction. Cases cannot be brought at the ICC unless the relevant State involved is either unable or unwilling to try an individual under its national courts for any of the following crimes: genocide, crimes against humanity, war crimes or the crime of aggression.

(ii) Specifically

International law consists of certain norms which, with the consent of States, have become binding obligations. Consent by States is given either by following certain international practices over a long period of time under a belief that there is a legal requirement to do so (customary law) or is given expressly by entering into written agreements with one or more States (treaty law). Other sources of international law include judicial decisions, peremptory norms (*jus cogens*), and

articles written by scholars of international law. These sources of international law are also listed in Article 38 of the Statute of the International Court of Justice.

Customary law

Customary international law, unlike the express law of international treaties and conventions, is not initially written down as law but develops into law with practice over time. Two elements must be present before something becomes law by custom: there must be a general practice by States of a certain norm (generally, either to support or prohibit a certain action) over a long period of time and there must be the generally held belief by States that this norm is accepted as law (*"opinio juris sive necessitate"*). This last element requiring the belief that something is legally obligated sets it apart from other behaviours between States which are merely due to courtesy, tradition or convenience. Once both elements are present, than the new customary law will apply to and be binding on every State in the world. Not every State has to follow the practice of a custom in order for it to become customary law. A shipping practice and custom followed by all sea-faring States will still become customary law even if a State which is land-locked and owns no ships doesn't practice the custom. At the same time, this customary shipping law will apply to the land-locked State if it ever undertakes any shipping. In determining whether there is a general practice of a custom factors such as the number of States, and the relative size and importance of the States following the custom will be considered. The amount of time such custom is followed by States is also an important factor.

If a State disagrees with a new custom being followed, it must make persistent objections at the time the law is being form. No objection can be made to a customary law once that law is fully recognised and practised. What happens to the dissenting State is a matter of dispute among international law scholars and theorists. Some, including one International Court of Justice decision, believe that when a State makes a timely and continuous protestation against a new customary law, this law will not apply to it. Other scholars believe that due to the nature of international customary law, once the law is formed, it will apply to all States in the world, even those who disagreed with it.

Since customary law applies to all States, any part of a treaty or convention that mirrors customary law will apply to all States by virtue of it being customary law. This means that when a treaty merely restates customary law, a State which is not a party to the treaty will have the same legal obligations and responsibilities as those States that are legal parties to the treaty.

At the present time, the use of custom to develop new laws is curtailed by several factors. One factor is the expanded number of States that now play a part on the international stage. Certain requirements and actions may have evolved in the past into customary law because of the lack of a quick and dependable method of communicating between the countries of the world. Countries were more isolated even from their own borders. A powerful shipping State could insist on having certain papers for shipping property to other countries. The practice of this custom would spread out from the centre where only a few States followed it to where it was accepted as a legally binding practice. Today, with the ease of global communication, it may be more difficult to develop new customs over several decades, with States believing they are legally obligated to follow such customs. Another factor is that international law has moved beyond diplomacy and the conduct of war, especially in the last 60 years. To deal with the different international topics and issues that arise, States now prefer to use treaties.

Treaty law

The Vienna Convention on the Law of Treaties (1969) describes treaties as international, written agreements made between States that are governed by international law. The term, treaty,

includes arrangements, protocols, covenants, conventions and agreements. Every treaty acts in the same manner as a contract between all the parties signing the treaty. Being a written contract, States that are party to a treaty can identify what has been agreed and what obligations are owed by each party and to whom. Treaties between two States are referred to as bilateral or bipartite treaties while treaties between more than two States are referred to as multilateral or multipartite treaties.

Only States and international organisations may become parties to international treaties. As a corollary to this, treaties apply in the first place to States and to State policy. A State may be able to modify its obligations under a treaty by making a reservation at the time it signs, ratifies, accepts, approves or accedes to a treaty. According to the Vienna Convention on the Law of Treaties, a *reservation* is a "unilateral statement made by a State purporting to modify or exclude the legal effect of certain provisions of the treaty in their application to that State". Reservations must be timely made; they cannot be filed after a State or organisation has becomes a party to the treaty. Also, reservations do not apply to bilateral treaties since the two parties can negotiate any changes in the treaty before signing it. A treaty may specify if reservations are allowed, are allowed only for certain sections of the treaty or are not allowed. If a treaty is silent, States may try to make reservations and see what happens. Traditionally, a reservation could only be made if all the States who were party to the specific treaty agreed with the reservation. This view became untenable in time as more States entered into treaties, making it sometimes impossible to obtain a consensus from every State on a reservation. Now, reservations are generally acceptable from the States agreeing to a treaty unless (i) they are not allowed under the relevant section or treaty, or (ii) they are incompatible with the object and the purpose of the treaty. There are numerous rules of how reservations apply to the treaty in question and to the other contracting parties. A State may prefer to make a statement of understanding to a treaty it is signing. An *understanding* or *interpretative declaration* is a statement setting out a particular State party's interpretation of what the treaty is saying. Unlike a reservation, it does not generally modify a State's international legal obligations under the treaty.

A State's obligations under a treaty may also be limited or disregarded during an emergency if a treaty is *derogable.* The common meaning of derogation is to steer away or not to be bound. A treaty that is derogable, in whole or in part, allows any State which is party to it to be released from its legal obligations under the treaty during a certain time such as a war or national emergency to the extent necessary to deal with the event. Such derogation allows each State more focus and latitude during times of emergency. Usually the State is required to notify the Secretary-General of the United Nations when this type of situation occurs. Once the emergency is over, each State is expected to again follow all of its treaty obligations, including any that have been suspended. In contrast to derogable treaties are those treaties that specify that they are *non-derogable.* When a treaty or a section of a treaty is non-derogable, all obligations and responsibilities under that treaty or that section of the treaty continue at all times for every State party even in the case of war or national emergency. The prohibition of using torture is an example of a non-derogative obligation. Even when a State is under an armed attack, it is prohibited in all cases to use torture against anyone: its citizens, its military, members of the opposing attacking group or anyone else.

As a final point between customary and treaty law, both have equal authority in international law. There are small refinements, such as if both customary law and treaty law apply to an issue in dispute, then the treaty provision will be the one to apply and follow. If customary law and a treaty state different, conflicting views about a certain situation, then the treaty provisions will apply unless expressly agreed otherwise by the States involved. An important principle of

international law to remember is that treaty law does not prevail over or supersede prior customary law that is *jus cogens.*

Jus cogens
International law also contains certain rules referred to as *jus cogens* or peremptory norms. These norms reflect law that is so fundamental that no State can ignore it or attempt to contract out of it by a subsequent treaty. *Jus cogens* has been called the public policy of international law. The Vienna Convention on the Law of Treaties defines peremptory norms as those norms "accepted and recognised by the international community of States as a whole" and from which "no derogation is permitted and can only be modified by a subsequent norm of international law having the same character". The norms generally accepted as being *jus cogens* are genocide, piracy, slavery, and torture. In principle, all States are prohibited from these actions; in practice, this is the world that is aspired to.

Applicability of international law versus States' domestic law
In international matters, international law has supremacy over the domestic law of States. In 1988, the International Court of Justice stated, "It is a fundamental principle of international law that international law prevails over domestic law." This is a truism as it would make no sense to have an international legal system that could be changed by any State's subsequent domestic law. There must be a legitimate, albeit, different system of law at the international and global level that offers predictability, consistency, and dependability with the actual force of law. Under both customary law and treaty law, States have international responsibilities and obligations. These obligations continue to exist under international law despite a State's own domestic law which may contradict such law. An illustration of this is Article 13 of the Draft Declaration on Rights and Duties of States 1949 which says, "States may not invoke provisions in its constitution or its laws as an excuse for failure to perform its duty."

Turning to a State's domestic or municipal law, what is the position that domestic courts and tribunals take when faced with international law? What happens if there is a conflict between international law and domestic law? There is no single, consistent answer to these questions as each State applies international law according to its own domestic laws. Some States such as the Federal Republic of Germany, consider that both international law and domestic law form part of one large system of law. When a new international treaty is signed by a State holding this view, the treaty will automatically become part of its applicable law without any further action by the government. Under this view, if there is any conflict between international law and domestic law on a subject, international law will probably prevail.

The other principal view held by States (including the United Kingdom and the United States on treaty law) is that international law and domestic law are two mutually exclusive systems of law. Each area of law, international and domestic, is a separate system of law with neither system being in contact with the other. The States following this view generally require an express act by their domestic legislations before an international law can become part of their domestic law. One shortcoming of this second view occurs when the two systems of law (international and domestic) apply to the same situation and are in conflict. Sir Gerald Fitzmaurice, a former judge of the International Court of Justice, concluded that when the areas of international law and domestic law overlap, there is not a conflict of legal systems but, instead, a conflict of obligations. In the 1991 case, *United States v Fawaz Yunis*, the D.C. Appeals Court said, "Statutes inconsistent with principles of customary international law may well lead to international law violations. But within the domestic legal realm, that inconsistent statute simply modifies or supersedes customary international law to the extent of the inconsistency."

Two common law countries, the United Kingdom and the United States, are similar as to how they adopt both international customary and treaty law into their domestic legal systems. Both of these States have constitutions although the United Kingdom's is unwritten. Both States follow the first view given above for international customary law. That is, each State considers customary international law as being part of its system of law. In the United Kingdom, if a law has evolved through custom, then the U.K. accepts it outright, without any further action, as law. It is only in those situations where customary law is inconsistent with a British statute that the British courts refuse to uphold a customary law.

The United States follows the same view for customary law. Customary law is accepted in U.S. domestic law on the same basis and level as U.S. federal law. It is treated as federal law. Unlike treaty law, the U.S. Constitution does not require Congressional approval for customary law to become part of U.S. law. If there is a conflict between customary law and domestic law, the U.S. courts will uphold domestic law. At the same time, this support of domestic law does not relieve the U.S. government of its international obligations and responsibilities under customary law.

In contrast to customary law, the adoption of treaty law occurs in both the United Kingdom and the United States by legislative action, following the second view given above. In the United Kingdom, a treaty cannot be adopted into the domestic law until it is specifically incorporated by the legislature through an Enabling Act. Since Parliament is not required to negotiate or to consent to international treaties, the use of the Enabling Act allows this legislative body to become involved, mainly as a guard against executive abuse. Enabling Acts do not attach to every treaty, such as those regulating the conduct of war and the cessation of territory. The United Kingdom also follows a practice referred to as the Ponsonby Rule. This rule lays aside a treaty for some 21 days after it has been signed and before it is ratified. As with customary law, if there is a conflict between a treaty and a domestic statute, the domestic law will be the one that rules. Obviously, this is only an overview of the process and there are other considerations to be aware of.

Under the United States' constitution, international treaties are required to be signed by the executive branch and approved by two-thirds of the Senate (one of two legislative bodies) before they can become U.S. law. Once signed and ratified, these treaties have the same status as federal law. The U.S. government also enters into congressional-executive agreements. These agreements require a majority approval by both the House of Representatives and the Senate (both legislative bodies) before being signed into law by the U.S. president. Most of these congressional-executive agreements are trade agreements. There are also "self-executing treaties" which do not require any legislative action. A treaty will be self-executing if that is the intent of the treaty's authors. These treaties must be unambiguous, certain, and not dependent on subsequent legislation for its implementation. In the United States, as with customary law, any conflict between a ratified treaty and a subsequent federal statute will mean that the later-agreed federal statute prevails.

For both the United Kingdom and the United States, there is an important presumption that the domestic legislature does not intend to infringe on international law. In the U.S., congressional acts are to be construed as conforming to international law. The U.S. courts strive to interpret these acts so they are not in conflict with earlier treaty provisions. In the event a treaty to which the U.S. is a party to is subsequently superseded by federal legislation, the U.S. government must follow the new federal law domestically but it will continue to be obligated to fulfil its international responsibilities under the treaty. If it does not do so, it will be in breach of international law. The United Kingdom has a similar dual responsibility to fulfil both its domestic obligations and its international obligations which may be in conflict.

Final comment
Both international public law and private law are vast, complex areas of law. The above summary is only given as an overview. While this is an attempt to give the reader a better understanding of international law, there may be other lawyers who object to any above interpretations of the law. It must be pointed out that many international scholars disagree between themselves on the smaller details of the law, including whether international law is actually made up of rules or other determinants or is actually law.

There are many books and textbooks on international law. One exceptional and thought-provoking book on international law is by Rosalyn Higgins, former president of the International Court of Justice, entitled, *Problems & Process, International Law and How We Use it* (Clarendon Press 2004). A more rudimentary but comprehensive book is by Rebecca M.M. Wallace, entitled, *International Law*, 5th edition, (Sweet & Maxwell 2005).

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