Lawbooks®
TILBURG

INTERNATIONAL LAW
MIDTERM LECTURE 1 t/m 6
2020 - 2021

Bird & Bird

MAGISTER JFT

VOORWOORD

Beste student(e),

Welkom bij het vak **International Law**. Voor je ligt de samenvatting van **Lecture 1 t/m 6** van de voorgeschreven literatuur en jurisprudentie. Met deze samenvatting is geprobeerd om de belangrijkste punten uit de voorgeschreven lesstof overzichtelijk weer te geven. Onthoud echter dat dit werk niet gezien kan worden als vervanging van de lesstof, maar slechts als aanvulling bij het studeren. Lawbooks behoudt dan ook het recht de inhoud te bepalen, en is niet aansprakelijk voor eventuele onjuistheid of onvolledigheid van de informatie.

Bij aankoop van deze samenvatting krijg je tevens de uitwerkingen van de werkgroepopdrachten. Deze kun je vinden op **https://www.lawbooks.nl/jaar2tu**. De bijbehorende uitwerkingen worden gepubliceerd in het weekend nadat de laatste werkgroep van de laatste week van dit deel heeft plaatsgevonden. De uitwerkingen verschijnen op onze officiële website (lawbooks.nl) onder het kopje *'De uitwerkingen'*. Je kunt deze dan downloaden als PDF. Vervolgens wordt er om een wachtwoord gevraagd. Het wachtwoord dat hoort bij de uitwerkingen van dit deel is:

FGT500

Dit wachtwoord is alleen geldig bij dit deel en is uitsluitend bedoeld voor de eigenaar van deze samenvatting. Lawbooks wenst je een prettig cursusverloop, veel succes met studeren en natuurlijk ook veel succes op het tentamen.

Met vriendelijke groet,

Team Lawbooks

INHOUDSOPGAVE

LITERATURE (BOOK)

OTHER MATERIALS

OVERIG

LITERATURE (BOOK)

Lecture 1: A Brief History

Aangehaalde literatuur: Jan Klabbers, *International Law*, Cambridge University Press 2017.

Chapter 1: The setting

Introduction
The existence of international relations inherently entails the existence of **international law**, which regulates the rules amongst states. International law can be divided into public international law and private international law. The latter regulates the conduct of individuals when this conduct is in some way transnational, for example a marriage between two people from different states. Public international law on the other hand is less focused on individual conduct, but more focused on the conduct **between states**. However, it would be incomplete to say that public international law only concerns states; other entities such as intergovernmental organizations and individuals can be important actors as well.

While practicing international law, one subconsciously subscribes to a certain theory on international law. There are a lot of distinctions between these theories. The main difference can be made between those with a cosmopolitan point of view, and see international law as a tool for statesman or activists, and those with a sovereign point of view that may consider international law to be intrusive in the state's "own business". Because of these views, international law cannot be studied completely separate from politics and both need to be discussed to understand this field of law more fully.

17th century
The seventeenth century is seen as the beginning of international law, even though there were already international relations before that. The seventeenth century stood out for two reasons. One of them is the conclusion of the **Peace of Westphalia** in 1648, which emphasised the concept of sovereignty. Additionally, this century was the century of **Hugo Grotius**, who was important due to his compromising view between the natural and legal positivist theories and his publication *On the law of war and peace* in which he as one of the first ones addressed the law in both war time and time of peace. Even though he is sometimes suggested to be the founding father of international law, this claim is invalid. International law is not something that was created, but something that evolved overtime.

Colonialism
International law has been closely connected with **imperialism and colonialism**. On the one hand the struggle for European states to extend their power led to the rule that oversea territories were seen as *terra nullius*, i.e. belonging to no one and they could thus claim these territories. On the other hand, local populations were needed to close deals with in order to be able to claim the exclusive trading rights as opposed to their competing powers. This led to a race for colonialism between different European powers.

Important to note was also the role of international law in slavery. At first slavery was allowed, but was later on abolished. After the abolition, a renewed colonisation took place between the powers, this time in the African continent.

International law and the global economy
The connection between international law and colonialism (the aim of which was economic gain) already suggests a **link between international law and the economy**. This link is partly portrayed by international organizations such as the World Trade Organization (from now on: WTO). This also becomes apparent in the kinds of cases that came before the International Court of Justice (from now on: ICJ), which mostly evolved around the limits of territorial ownership at land and at sea. This was particularly important when those territories were rich with raw materials such as oils. Even though international law as a whole is not about the economy, it is the legal system regulating the economy on a global scale.

Max Weber described the aim of the rule of law to be the creation of legal and economic certainty. This view was also reflected in the way international law was applied in the late nineteenth century, mainly being private law applied to public actors. Topics such as the law of treaties and dispute settlement were reflections of elements of private law to a more global setting. Only recently criminal law was given a more international dimension. However, it differs from other public international law, by having individuals as its key subjects instead of states. This perpetuates the idea that states are sovereign entities that cannot be imprisoned.

International legal system

One of the most noteworthy characteristics of international law as opposed to domestic law is the lack of a single overarching authority. It is therefore often seen as a more moral code rather than set law. However, several obligations can be found for states obliging international law.

- International law is made by the states themselves, so there is little incentive to break them. It is of course subject to change, but in general it is sensible to follow the rules they make themselves. Moreover, there is a strong common law current in international law, where it is subject to habit and routine which most states follow.
- The concept of reciprocity. Many elements of international law can be explained by this concept, as a state would not do to another state what it does not want done towards itself. Of course, this cannot be applied to fields such as environmental law and human rights.
- The role of legitimacy. The perception of rules as useful, rather than as obligatory leads to a willingness of states to comply instead of a "must".
- The need for states to interact. Whether they want to or not, states need to interact with each other, and thus the reputation of states can be of significant importance.

Despite the lack of a single authority (and its executive power such as police forces) there are mechanisms in place to deal with states that are violating international law. Therefore, it is only partly true that international law has no sanctions.

- States can use measures to convey their unhappiness with an act perpetrated by another nation. If these measures stay within the limits of international law it is called **retorsion**. This sanction is more seen as a political sanction. Think mainly of relying on the diplomatic relations between two states.
- Sometimes certain sanctions taken by states can be an illegal act in their own, but are allowed since they are in response to an earlier wrongful act committed by the other state. In this case we speak of a **reprisal** or countermeasures.
- The concepts of **self-defence and collective security** actions are measures that can be used within international law.
- Currently, international law even sometimes allows for individual imprisonment for instance war crimes. This will be discussed extensively later on.

International legal theories

Even though in practice states appear to be adhering to international law, one of the main questions for international lawyers is whether it can be considered to be binding. And following this question, the question on the origin of international law arises. This question has been the subject of several legal theories.

Naturalism

Naturalism was the prevailing view before the Reformation. Law, including international law, was given by God and was recognisable for those adhering to the right religion. The problem with this theory lies within its subjectivity; especially on an international level the conclusions varied too much.

Positivism

Positivism rejects the notion of the existence of a higher/natural law, but considers law to be something man-made. Thus, law can be derived from the states' actions. However, this theory does not fulfil the normative function of the law.

In current day international law, elements from both these theories can be recognised. Even though

nowadays it cannot be argued anymore to come from the word of God, international law is often seen as serving the common good of mankind. At the same time international law to a large extent reflects state practice and interests. Since it is impossible to claim international law is both, a lot of scholars argue that it is a continuance of the political debate instead of its settlement. A lot of smaller countries increasingly practice 'lawfare': if it doesn't have the military means to win a conflict, it will make use of is legal tools. An example of this, was Ukraine's reaction after the annexation of Crimea by Russia in 2014. Ukraine started many legal procedures against Russia, in the hope to showcase the unlawfulness of the annexation.

Relations theory
The connection between international law and politics also becomes apparent when discussing the relevance of international law.

- The realists tend to look upon this field of study as irrelevant, following from the view that states only act in self-interest, thus the choice to follow the laws is only based on whether there is something to gain.
- The liberal institutionalist approach takes this self-interest as a starting point as well, but differ from realists as they argue that if you take this interest into account, international law can be of some use. Especially in the fields of trade and investment it can be used as a tool to create certainty and stable expectations.
- A combined view of the two theories above, is the law and economics approach. This approach is prominent in U.S. academia and instead of looking upon it from a political point of view, it takes economics as a starting point presuming that states are rational actors just as consumers or firms. Finally, there is the constructive approach. As opposed to the others this does not necessarily view international law as setting out prohibited behaviour, but is also about facilitating behaviour.

All in all, international law helps to channel political dialogue; it delivers the framework and vocabulary enabling international politics. Law is a tool that can help to construct society, and thus have immense importance.

Globalization and more
Globalisation has not only had an effect on the economy, but also on cultural and social relations, religion and even on nationalist and regional feelings. Globalisation also leads to localisation, as it sparks a need for people to be embedded. Moreover, it has stimulated the need for global governance; some authority on a more global level outside of the regular legal structures. This has created the need for rules that also don't fit into the traditional field of international law, thus posing challenges and the need for international law to develop itself adapting to the changing world.

Some adaption is already seen in the upcoming of the phenomena of international criminal law and migration. With the interlinking between fields such as economics, politics and law, it is required from international lawyers to derive from their traditions and take a more multidisciplinary approach, including topics such as labour law.

Ethics
Before the rise of Westphalia, international law was viewed as given by God, making the debate on the ethics of law superfluous. Nowadays however, we have seen some clashes between ethics and international law in for instance the *Arrest Warrant* case, where the Congolese government minister could not be prosecuted for alleged human rights violations due to his immunity. However, the concept of immunity itself is in itself an ethical quality, raising questions about the relation between the two concepts.

The fact is that global ethics has remained an undeveloped concept: most philosophers develop the concept of ethics in the context of individual actors within a delimited community such as a village or state. There has been some analysis on global ethics, leading to ideas such as the ethical unacceptability of torture and genocide (*ius cogens).* Conclusively, international law is not necessarily lacking an ethical basis, but is more difficult to develop due to the diverging nature of ethics itself.

Final remarks: a critical perspective
This book will try to introduce the field of international law from a somewhat critical perspective. It will not go into the labelling of a state's behaviour as lawful or unlawful, but instead will focus on the legal justifiability of the behaviour. Moreover, it is important to keep in mind, that as in most fields of law, there is an exception to every rule and that it is not always fully inclusive since not every situation can be anticipated. Therefore, international law is constantly developing and at the end of the day is a product of a practice of argumentation.

Lecture 2: Subjects

Aangehaalde literatuur: Jan Klabbers, *International Law*, Cambridge University Press 2017.

Chapter 4: The subjects of international law

Introduction
The main **subjects of international** law are states. However, there is a lot of discussion on whether there are also other entities that are subject to international law. There is general consensus that intergovernmental organisations (from now on IO) do take part (think of the UN and the EU) which was confirmed by the Court in the 1949 *Reparation* opinion. The different opinions arise when discussing whether there any other entities can be subject to international law. A useful measurement is to ask the question whether an entity enjoys direct rights or obligations under international law. If so, it can probably qualify as a subject of international law. Based on this reasoning, you can probably safely say that individuals are subjects, but what if they organise themselves? Can NGO's or liberation movements also be considered subjects of international law? It is sometimes a thing to be aspired, since when society accepts an organisation as a subject of international law, it recognises the political legitimacy.

States
As mentioned before, States are the main subjects of international law. Their sovereignty entails that they do not have to accept any higher authority unless they consent to do so. The State was not always the dominant form of political organisation, but became so mainly due to one big advantage: the guarantee of that their authority would not be interrupted. This is reflected in the criteria formulated in **the Montevideo Convention**: the existence of a population, territory, a government and the capacity to enter into relations with states. The first can be considered formal criteria, while the latter two are more substantive ones.

1. **Population**: This can be considered as a formal criterion. It does not look at how the population got there, its size, or how it multiplies. It simply needs to have a population in order to qualify as a State.
2. **Territory**: A state should have a territory. A core territory suffices; it does not necessarily require that the territory is completely fixed nor that the boundaries are undisputed. This notion includes internal waters and the territorial sea.
3. **Effective government**: In the Montevideo Convention the term "effective" is not specified. It has however been somewhat formulated in jurisprudence. It more or less comes down to the ability for other states to contact someone in case something goes wrong. Thus, it needs to be able to guarantee that law and order will be upheld. Due to the sovereignty of states, there is no prescribed form of government. This causes some controversy because this would mean that dictatorships should be treated the same as democracies. In the nineteenth century a distinction was made between civilized and uncivilized states. It would cause too much political tension to only qualify a state as such if it has liberal democracy as its government. Often, a softer stance is taken where it is suggested to adjust the criterion to the emerging right to democratic governance.
4. **Capacity to enter into relations with states**: this criterion is linked to the historical context of the drafting of the Montevideo Convention. As colonies often enjoyed considerable autonomy, they missed the authority to enter into relations with other states without consent from the colonising state. Nowadays this criterion has evolved and is sometimes considered to be of less relevance when compared to the other criteria. It is more of a conclusion to the other three criteria.

Recognition
Apart from these criteria, the Montevideo Convention also drew attention to one of the most complicated and politicised aspects of statehood by referring to the recognition of statehood. This concept gives rise to a lot of questions on the subject of this recognition (a state or a government), whether it is about the legality of a government or merely its existence, and what the exact legal effects are. The last question gave rise to two theories:

- **Declarative theory**: this theory deems the recognition by other states to be irrelevant. It perceives recognition as a confirmation by other states that the required criteria are met, but is not in itself required.
- **Constitutive theory**: this theory compares the communities of states to a political community, thus entering the community requires the acceptance of the other members. This acceptance is vital, as it is almost impossible for a state to function if it is not accepted by the others.

The element of recognition can be considered as a political act, which is why most international lawyers prefer the declarative theory, which sees law as separate from political theory. In practice however, it often comes down to the constitutive theory since states cannot survive in isolation and politics play a role in whether a state is willing to accept another state. Thus, the legal framework provides guidance but in the end the decision to recognise is politically motivated.

Due to this political motivation, the form of government in practice does matter. This recognition can come in two forms:

- ***De jure***: here a state recognises the legitimate way in which the government of the other state has come to power.
- ***De facto***: here the state does not agree with the way the government has come to power, but recognises that they are in power and are to be seen as a negotiating partner.

Recognition is to some extent only symbolic: in practice a state can hold up some form of relations with another state without recognition.

The recognition of a state is a unilateral act (an act from only one party) affecting bilateral relations. However, there is some sort of collective recognition, namely admission to the UN. This only means that the majority recognises the state, but does not imply that every single state has expressed its recognition.

On state level recognition remains something mainly symbolic. The legal effect is mostly seen on an individual level. Think of travelling to a state that does not recognise your passport because it does not recognise your state of origin. Examples of states, which have experienced these difficulties, are South Sudan and Kosovo which both seceded from subsequently Sudan and Serbia. Especially the latter is an interesting case to analyse when wanting to learn more about statehood, recognition and state succession (discussed on page 81 of the book).

In the Kosovo case it became clearer than ever that recognition is a politically charged topic and that a mixture of both the declarative and the constitutive theories apply depending on the facts of the case.

Acquisition
To understand how states acquire their territory, one has to go back to the Roman law of property. Roman law is important since, in the period of the European discovery voyages, this was the dominant body of law. At that time, discovery was based on the presumption that the territory was uninhabited or that their habitants were of a lesser "status". Nowadays this is not a mode of acquisition. Due to the emergence of international relations, this manner didn't suffice anymore where actual possession and effective governments became requirements to claim territory.

The notion of effective government can be linked back to two concepts found in Roman law. First there was *occupation*. This entails that someone assumes ownership over a good without an owner, applying this to territory it refers to taking "no man's land". Under the concept of *prescriptio* one presumes ownership despite rival claims. Both concepts contain exercise of authority over a longer period of time, the will to do so and doing this preferably without anyone contesting this ownership. This way of occupying has become

redundant, as most territories are subject to some form of governmental authority. It almost only arises when there is a redrawing of boundaries, mostly following a major war.

Besides these modes of acquisition, there are also ways using less force. In history we can see the phenomenon of cession, where pieces of territory are exchanged for either a sum of money or for different territory. Sometimes the territory is not sold but leased. Even though this is considered a more peaceful way, it can play a role in oppression. For instance, during the colonisation where native rulers sometimes exchanged territory for European support to strengthen their local power.

Another more peaceful way is to take territorial disputes before court or arbitration. The court can then apply the existing law, but sometimes also extend to actual decisions on ownerships when the law remains vague. Especially boundary disputes, in particular maritime boundaries, have provided us with a lot of jurisprudence on this topic.

Finally, practical factors such as nature can play a role where territory can be gained by processes such as sedimentation, but can also be lost through for instance the rising of sea levels.

Internationalised territory
The notion of internationalised territory finds is basis in politics. It refers to territory that is placed either under the authority of a group of states acting together or under that of an international organisation. This can be developed due to the need for outside forces guaranteeing law and order in the country or for instance govern an area that is subject to heavy political discussion and of which the ownership is contested. A different regime is seen where constructions and treaties are set up between states in order to agree on how to handle Antarctica.

Statehood: continuity and change
After a state becomes a state, there is very little that can discontinue it. The criteria do not work the other way around; meaning that for example a state doesn't lose its status due to the lack of effective government. However, this does not mean that it is not subject to change, and here we can identify four different methods this can happen.

1. A new state may come into being due to **secession**. Think for instance of Belgium that wanted to be independent in the period after Napoleons defeat. Secession is characterised by the parent state remaining the same in name and legal identity, but with less territory.
2. States also changed as a consequence of the **decolonisation**, where the colonies gained independence. The difference with secession is that the territory was already elsewhere.
3. States can be **merged, united or reunited**.
4. States may **dissolve**. Think of the USSR and the Republic of Yugoslavia.

Due to the different forms in which state succession appears, it has been very difficult to create general principles. An attempt was made to create rules on the consequences of state succession for treaties involving these areas and resulted in the 1978 Vienna Convention on Succession of States in Respect of Treaties. However, in practice states have rarely used this as a support. The advantage of the existence of this treaty lies in the providing of a framework and vocabulary for diplomats and statesmen to discuss this issue with a somewhat legal basis.

Another issue arises with nationality of its citizens. To prevent statelessness, the UN adopted a number of articles, making the guiding principle that individuals acquire the nationality of the state territory on which they habitually reside. In practice this doesn't always go as smoothly as in theory.

The final consequence that should be noted is that of membership of international organisations. The main rule is that membership is personal (with exception to the IMF, World Bank etc.) and that if a state secedes from the parent state, it loses its membership and will have to apply for admission again.

International organizations
Due to the important role of international organisations within the global affairs, its role in international law cannot be contested. The book defines it as: "intergovernmental organisations, created by states, usually by means of a treaty, in order to exercise a task or function that states themselves are unable or unwilling to perform".

Initially IO's were used to manage communication, but its potential was recognised to deal with issues such as global security and global labour relations. Thus, where states evolve around territory, IO's are built around functions.

These organisations are the product of member states and these states are usually represented in a plenary organ, where decisions can be debated and discussed. Besides these plenary sessions that usually only take place once a year, it contains an executive organ that can act speedily and act on their own with the competences given. An example of this is the Security Council. Finally, there is also an administrative organ, which is tasked with for example preparing meetings and translating documents.

The UN
The United Nations is generally considered to be the most important international organisation of all. This is due to the platform it provides to discuss numerous topics and to the fact that almost all states in the world are a member. The UN comprises six principal organs:

1. The **General Assembly**. This is the plenary organ. It discusses matters of global justice and even though it cannot produce binding law, it derives its authority from the high number of states participating
2. The **Security Council**. This is the UN's executive organ. It holds 15 seats of which 5 are permanent members (that have the right to veto) and 10 are rotating seats that are filled every two years.
3. **Secretariat**. The head is the Secretary-General and even though its main task concerns the administration, it has additional tasks that make this secretariat very relevant.
4. **The Economic and Social Council**. This organ is amongst other things responsible for the coordination of the activities of the UN family.
5. **Trusteeship Council**. This council was initially set up to supervise the administration of trusteeship territories, but diminished in relevance when the last territory gained independence.
6. **The International Court of Justice**. There is a strong institutional connection between this court and the UN.

Other subjects
The legal status of entities besides that of states and international organisations is a lot less clear and extensive. It is often decided upon in the political arena. An increasingly important role can be seen for NGOs in international law. They can be tasked with the protection of for instance prisoners of war, but are also independently strong in encouraging the conclusion of conventions. There is also some reliance on these NGOs as providers of information on topics such as environmental disasters and human rights violations.

Indigenous people also hold a special spot in international law. Their position is discussed in connection with claims of native lands (in particular during colonisation) but also on their customs.

Finally, there are examples of entities that are considered subjects of international law, because they occupy this historical position.

Final remarks
Traditionally, the link between statehood and territory comes from the notion of seeing territory in the same way as property. However, this starts to lose its underlying rationale, since states are the only actors within international law that find their basis in territory.

Finally, the concept of recognition as a main topic of politics is important to keep in the back of your head. If a state is recognised, it is a full subject of international law. But in order to become a player, the state has to be accepted by the other members of the international community.

Chapter 6: The individual in international law

Self-determination

The sentiment of the need for groups to be protected increases when this group is under threat. Within international law, protection has been sought in the past for minorities that are being abused by the majority within a state. This most extreme tool provided by international law is the right to self-determination. This right is considered to be one of the main principles of international law. The content of this right is difficult to describe, but comes down to the right for identifiable groups to determine their way of political organisation. Pursuing this right can lead to independence from a state, integrational with another state or a different political status. There are two main problems with self-determination:

- The identification of the term "self". This factor can be considered a very subjective factor giving rise to a lot of questions, for which there is no absolute answer.
- It is very closely linked to the right of secession, but that in turns endangers the stability of existing statehood. Breaking up states can destabilise global order as it seceding from a state can interfere with the continued statehood of another group. Therefore, it might be better to perceive self-determination as a way to achieve internal self-determination (their rights being respected by the state) or more equal political participation.

Lecture 3: Sources

Aangehaalde literatuur: Jan Klabbers, *International Law*, Cambridge University Press 2017.

Chapter 2: The making of international law

Introduction
International law is often said to be a consent-based system: since states are sovereign and have no higher authority, they are the creators of international law and thus this cannot be formed without their consent. Therefore, there is also no document that specifies how it is formed. The International Court of Justice (from now on: ICJ or "the Court") has a list of instruments specified in their Statute, which is often used as a starting point for discussion on the sources of international law, but is in no way exhaustive. This chapter will discuss the sources of international law, concentrating on the general principles and customary international law. The next chapter will go into the law of treaties.

Two ships
In its jurisprudence the International Court of Justice (from now on: the ICJ) has often contributed to the understanding of the concept of international law. In the *Lotus* case the Court laid out the principle that states can act in whichever way they want as long as it does not contravene an explicit prohibition. Thus, under international law behaviour is permitted unless and until it is prohibited. This concept is not that extraordinary if you think about it: in most domestic societies people can act in whichever way they like as long as it does not violate the law.

A second case in which the Court's decision contributed to the shaping and view upon international law is the *Wimbledon* case. Here Germany posed a theoretical question: how is it possible to have law in a system of sovereign states? The Court did not agree with the irreconcilability of the two, but described them as two concepts that go hand in hand. Because of the sovereignty of states, they can enter into international engagements.

From these two cases the notion can be concluded that international law can only be made because of the sovereignty of states, but is limited due to the consent-based nature. Because of this it is argued that the rules created only flow from the will of states itself and can be seen as quite in line with the positivist theory. However, some naturalist theory is also apparent in law: it is sometimes claimed that there are some rules that are so fundamentally important they exist whether a state has consented to this or not. These rules are called *ius cogens* and include amongst others the prohibition of genocide and of torture. An important feature of these *ius cogens* is that they allow no derogation in any situation.

Article 38 Statute ICJ
In article 38 of the Statute of the ICJ a list of sources of international law is drafted. The mentioned sources are: international conventions, international custom, general principles of law. This list is not rigid in its hierarchy, where for instance the prevalence of customary law over treaties can be dependent on the case. It does however address two elements of hierarchy:

- The writings of the most highly qualified publicists as mentioned in subparagraph d of this article are mentioned as being only subsidiary. Within ICJ jurisprudence, cases have no effect of precedent. This means that only the disputes to the party are bound by the decision, and cannot be drawn into a wider spectrum.
- There is some general agreement between international lawyers that the general principles as mentioned in subparagraph c are mainly a tool to fill in gaps. Thus, this is mainly used when no other relatable source of law is applicable.

Treaties
The **treaty** is considered to be the most dominant source of law, or of rights and obligations. There is no standard treaty, they can come in all shapes and sizes. The amount of parties and the language used do not matter, what matters is that a state party expresses their consent to be bound. Overtime there has been some development on some sort of principles in customary law when concluding treaties and the effects and

application thereof. A codification of these rules took shape in the **Vienna Convention on the Law of Treaties** (VCLT), which deals with treaties between states. The rules laid down here and more details about the treaty itself will be discussed in the next chapter.

Customary Law
Customary law is the law that can be established from a certain pattern of behaviour that can be objectively verified as such. The advantage as opposed to written law, is that because it finds its basis in social practice is usually a significant part of the society's everyday life. Article 38 of the ICJ describes customary law as evidence of a general practice accepted as law. This provides us with two requirements:

- A **general practice**. In international law this does not necessarily mean that almost all states have to engage in this practice. It can also be practiced by only a handful of states in order for something to be considered to be a general practice within a region. Moreover, the notion that a long period of time is required to form a general practice, is not true. A general practice can also be formed over a short passage of time. It is also limited to those of whom this behaviour is required, to identify rules dealing with maritime issued, it will be useless to look at the practice of landlocked states such as Switzerland. The most controversial is what practice actually entails. Material acts of states and legislative acts of states can easily be labelled as practice, but this becomes more dubious when for instance arguing that statements made by states can be qualified as practice.
- This general practice must be **accepted as law**. Besides there being a general practice, it is important that it is accepted as law. There are a lot of habits or practices that are done out of courtesy, but can hardly be seen as accepted by law. This distinguishes customary law from more normative systems such as etiquette or morality. The easiest way to recognise *opinion iuris* is similar to state practice: concluding a treaty and enacting a law also show that it is considered to be legally warranted. In addition, resolutions by international organisations are also often said to reflect the acceptance of a practice of law.

Tip from Lawbooks: A case that can help you understand how customary international law is established is the *Paquete Habana* case. If you want to further understand the methodology behind the identification of a practice as customary law, try to read more about this case accompanied by the section of the book discussing this case (p. 32).

Consent and the persistent objector
As aforementioned most instruments in international law require the explicit consent of states. Within customary law though, this consent is implied and the state is automatically bound by it. If a state does not agree with a certain practice as custom, it can only escape from the binding nature if it continuously objects when such a custom is created. The persistent objector can in this way not be bound by the custom, something that was also confirmed by the ICJ. Following from the sovereignty of states it is only logical that there is a possibility to not bind itself to customary rules.

Normative problem
Since the recognition of customary law comes from the reflection of state practice, one can wonder whether state practice can also undo these rules. The ICJ has solved this dilemma through making a distinction between material acts and verbal acts. From the *Nicaragua* case one can understand this distinction more; what matters more is what states say they do and not what they actually do. Thus, not conforming rigorously to a certain rule does not diminish its authority. New rules are only created when acts not complying with the rule, are accompanied by statements that these acts are acceptable.

Law breaking and making
One of the most prominent examples that can be used in order to further understand the customary process is the formation of the customary right to claim sovereignty over the continental shelf. The *continental shelf* is the part of the landmass of a state where it continues under the sea. Often this hardly exists and the sea floor falls sharply, but sometimes is goes gradually enabling states to find and exploit reserves of oil and natural gas.

Tip from Lawbooks: Look up on Google what a continental shelf exactly entails. A visual can make clearer what it actually is. Believe us: understanding the meaning of a continental shelf will make the cases relating to this topic much less of a puzzle!

The realisation of the worth of the continental shelf led to claims of jurisdiction over these parts when they were close to the states. These proclamations of jurisdiction could be mount up to a violation of international law, as the shelf and the water above it are considered the high seas, which is outside of any jurisdictional control. However, after the US proclaimed this jurisdiction in 1945, other states did not call the US out for this violation, but decided this was beneficial for them as well and started claiming continental shelfs of their own. Before a discussion could erupt over whether it had truly become part of customary law, a multilateral convention was concluded on this topic. This was confirmed by the ICJ in 1969 when in the *North Sea Continental Shelf* cases the Court referred to the rights over the continental shelf as 'inherent' to the jurisdiction of a state.

Here you can see that a practice can pretty quickly be picked up by other states and in the end result in a codified new rule based on the will of states.

General principles
This source is laid down in subparagraph c of art. 38 of the Statute of the ICJ as "the general principles of law recognised by civilised nations". What defines general principles is that they are seen as notions inherent to the legal system that can be applied in different settings. This latter part is what differentiates them from rules.

Example: The book provides the notion of 'no one shall benefit from their own wrong'. This can be seen as a general principle, as we consider this notion as part of our legal system and is applicable to a variety of settings. This can be applied to a murder case (think of the case you discussed in your first semester where the murderer of his wife also inherited her fortune), but also indicates that when you shoplift and steal a TV, you cannot keep the TV when you get caught.

Because of their use to provide guidance on an outcome, they can be very useful when filling in gaps within the law. Other examples of general principles are the concepts of good faith or that there is no crime without a law.

Since these principles are not adopted or legislated it is more difficult to make a link to the consent by states. This however is not that weird, if you also consider that it is mostly used to fill the gaps: a case is not decided merely on a principle. Thus, it can be seen as some sort of customary law, but then on a more abstract level.

Unilateral declarations
As aforementioned there is some debate on the binding nature of unilateral statements made by states. Because these statements come in all shapes and sizes, it is impossible to make one general rule on this behaviour. The most prominent cases on this topic are the *Nuclear Tests* cases. In short, these cases evolved around promises made by French government officials that they would soon stop with nuclear testing in the area of Australia and New Zealand. Because of the formulation of these statements and the audience to which it was made indicated an acceptance of France to be bound to stop this testing and has thus created a promise for itself according to the Court. This case has been subject to strict legal criticism and can thus not be seen as an instrument of law-making without any further ado.

Other sources
Many dealings between states also take place in another way besides concluding treaties. Moreover, there are also lots of entities that are actors in global governance but are not related to a specific state. Therefore, international lawyers have a difficult path ahead of them, where it is important to keep on identifying when the activities of such actors are interfering with international law and when this does not.

This gives rise to the problem of the lack of existence of a proper criterion within international law based on which one can distinguish between law and non-law. If only states played a role within this field, this

distinction could be made relatively easy based on whether or not there is consent. However, since this is not only up to states anymore, this criterion is not usable.

A suggestion to this problem would be the 'presumption of binding force'. This would entail that normative utterances are assumed to give rise to law, unless and until the opposite can be proven. In this way there is a workable criterion, and it allows for relevant participants even if they are not states.

Finale
Because of the emergence of actors other than states it has become more and more difficult for the international legal system to identify rules that are part of this system, as the guideline of consent fails to fully cover this question. One of the main instruments that translates political agreement into enforceable rights and obligations is that of the treaty. Even though the old system is losing vitality, the relevance of treaty law remains. This will be further discussed in chapter 3.

Lecture 4: Law of Treaties

Aangehaalde literatuur: Jan Klabbers, *International Law*, Cambridge University Press 2017.

Chapter 3: Law of treaties

Introduction
The act of concluding treaties can be traced back as far as Ancient Greece where they were concluded between different city states. The basis for treaties is *pacta sunt servanda*, the Latin term for "agreements must be kept". This rule is considered to be indispensable for the conception of a system of law. If the agreements are not kept, the treaty loses its power if this is not the case.

Overtime other rules were established regarding treaties, rules on the making of them and how they are to be applied. All these rules were codified in the **1969 Vienna Convention on the Law of Treaties** (from now on: VCLT or the Vienna Convention) and reflects **customary international law** with some additions. This convention has become the leading instrument when discussing treaties between states. Two conceptual choices were made when the drafters formed the VCLT:

- This outlook of the convention is more contractual than public law inspired. This can be very simply explained if one knows that the document was prepared by four lawyers from the UK specialised in contract law. Thus, when treaties resemble legislation more and contracts less, the Vienna Convention can diminish in its applicability.
- One of the main ambitions of the treaty was to lay down the formalities evolving around a treaty rather than go into the substance of it. Therefore, it mainly contains rules on the form of treaties. In addition, it says very little about the consequences of breaching the convention.

Important to remember is that other rules can be applied when agreed upon by the contracting parties. The VCLT serves more as a given set of rules that can be used as back-up when no differing agreements have been made.

Basic Principles
There are two principles that lay the foundation for the law of treaties.

- Treaties need to be based on the free consent of states;
- The freedom of states is not unlimited. When a treaty has entered into force there are rules about the upholding of this treaty according to the VCLT. One of the most important limitations is to be found in art. 26 VCLT, which states that the parties must keep the treaty in *good faith.*

In this way one can even argue that the VCLT puts itself above domestic law. Moreover, the fact that agreements in the treaty contradict domestic law cannot be used as an excuse to fail to perform a treaty obligation. This is codified in art. 27 VCLT. This latter can become difficult when the domestic law of a country proclaims itself to be superior to international law, a problem to which no rule provides solution.

Concept of treaty
The definition of a treaty as given by the VCLT requires an agreement in written form, concluded between states and governed by international law. It does not further specify the design of a treaty, which has no legal effect. The requirement of being written down does not mean that this is inherent for an agreement to be of legal force, but merely that other agreements will not be governed by the Vienna Convention.

The requirement of government by international law was originally intended to make a distinction between treaties and other instruments between states but are subject to the domestic legal system of one of the parties (think for instance of cases where states act as a private actor in contract law). More recently, this requirement has been considered a tool as to separate treaties from instruments that are not legally binding, such as political agreements or declarations.

Conclusion of treaties
Since a state is an abstract entity, the signing of a treaty has to be done by a real person. This raises the question on who is competent to sign such a treaty. This is laid down in article 7 of the VCLT, where heads of states, governments and foreign ministers are qualified to sign on behalf of a state. It also extends some powers to ambassadors and representatives, but these are far less extensive and are mostly limited to task of negotiating on behalf of the state.

There are two main ways in which consent of a state can be expressed; either signature or ratification. Confusingly, when the latter one is the case, a treaty is often signed as to indicate its intent to ratify, but lacks consent to be bound by the treaty up until its ratification. Even though that in the period between the two a state is not yet bound by the treaty obligations, this does not mean that it can do as it pleases in the meanwhile. The *interim obligation* (art. 18 VCLT) obliges a state to not behave in a way that would defeat the object and purpose of the treaty in question. It is a kind of good faith obligation to not undermine the treaty itself. Ratification as a way of expressing consent has become less popular. Usually a mere signature suffices.

Reservations
In case a state wants to sign a treaty, but that treaty includes some provisions that a State does not agree with it can still join the treaty if it makes reservations. Reservations are basically a declaration of a state through which they want to modify or exclude a certain part of the treaty. It is mostly up to the other state parties on how these reservations are regarded. Some reservations can be seen as unacceptable, and sometimes some provisions can be excluded from the possibility of reservations in advance.

Again, the Vienna Convention will usually apply when no rules are formulated on the topic of reservations. Concerning reservations, it can be said that they have to be in line with the object and purpose of the treaty. The possible responses of a party to the reservations made by another state are mentioned in article 20 of the VCLT:

1. A state can expressly accept the reservation of another state.
2. A state can agree to it silently. The VCLT set a time limit of twelve months. If a state does not respond within this period of time, it is deemed to have accepted the reservation.
3. A state can express their disagreement, but decide that the treaty relations are more important. Thus, despite the objections it finds the conclusion of treaty more important and accepts that this reservation is required to uphold treaty relations.
4. A state cannot accept the reservation made by the other state. In this scenario the reservation does not have any effect. If this sacrifices the treaty relations, it means that the rights and obligations can become quite complicated when there are many parties to a treaty.

Example: The Netherlands, Belgium and the UK are drafting a treaty on extradition. Included in this treaty is a provision stating that if a dispute arises, they will take it before the ECtHR. The UK however, with leaving the EU, does not want to give this power to a European Court and thus makes a reservation on this provision. If The Netherlands however, does not want to accept this reservation and finds the possibility to go to the ECtHR of such significance it is willing to sacrifice the treaty, the treaty obligations will stop to exist between the two parties. The treaty can still continue, but will only have effect between the Netherlands and Belgium and between Belgium and the UK. Only the obligations between the Netherlands and the UK will not enter into force.

Thus, in most situations the reserving state gets what it wants. Attempts overtime to shift this balance a bit less in the favour of the reserving state have not worked out.

Interpretation
Much debate arises when it comes to the interpretation of treaties. Interpretation of treaties is similar to the regular traditional way interpretation methods in law.

1. **Textual approach**. This method aims at focusing on the objective meaning of the text. The disadvantages of this is the wrong presumption that words have an inherent meaning of their own,

and the ambiguity that is often left in treaties because in order to leave some space for own interpretation by the states.

2. **The intent of the drafter**. This is also described as the historical method, where a treaty is put into historical perspective in order to understand how to interpret a treaty based on what the intent was of the original drafter when drafting the treaty. However, this leaves no space for societal developments.
3. **The teleological approach** focuses less on the intent, but more on the aim of the drafter. What was he trying to achieve? The advantage of this is that it can evolve along with the developments of society. On the other hand, this can be overreached and a treaty can lose it political legitimacy it the treaty becomes unrecognisable to its own parties.

Article 31 of the VCLT is some sort of combination between the latter two, where it states that the interpretation of a treaty must be in line with the meaning of the words in the context and with the object and purpose of the treaty.

Important to keep in mind is that interpretation is no science, and also this is highly sensitive for political aspects. This does not disregard the framework that is provided on interpretation, but that it should be seen as a social practice and which can strongly differ based on who is actually interpreting a treaty text.

Application of treaties
The VCLT treats interpretation of treaties as a part of the application of them. It leaves great room for the parties to decide the subject matter, one condition being that it does not violate jus cogens norms. In the VCLT it is assumed that treaties apply to the whole territory of a state unless specified otherwise.

When international obligations conflict with each other there are several approaches one can take for resolving them. The VCLT subscribes mostly to the temporal approach. Under art. 30 VCLT, if the parties are identical, the lex posterior will prevail. If the parties are not identical, the lex posterior does not apply and the state has to choose which obligation to fulfil. Another approach is the hierarchy approach: one treaty is above another treaty. It could be said that according to art. 103 of the UN Charter, this Charter has the upper hand in cases of conflict. Yet a different approach is lex specialis. However, it is very difficult and sometimes undesirable to use this approach. The law of treaties does not have a one-size-fits-all solution in cases of conflicts so each case requires a different approach.

Revision
Revision encompasses the many ways in which treaties can change overtime. Just as with reservations, amendments are usually applicable to the whole treaty. However, also here it is possible to only modify between certain parties, as long as they do not deprive others of rights included in the original version or goes against the treaty's object and purpose.

An amendment first needs to be proposed to all of the parties. Then it can be adopted by a majority rule and in this case be ratified. If not all parties ratify it, there is no clear rule on how to act. It is often left to the circumstances of the treaty, which can for instance contain a provision that necessitates the agreement of all parties for an amendment to go through.

Overall, treaties mainly change by less formal methods, such as a change in interpretation. It should be kept in mind though, that too much flexibility in informal changes could create instability of the treaty obligations.

(In)validity
Most reasons for invalidating a treaty are linked to the consent of the state. The circumstances listed in articles 46 to 50 VCLT are factors that can be overcome in case the parties agree they do not want this wrong to cause the invalidation of the treaty. The list of articles 51-53 describe circumstances that automatically lead to invalidity of the treaty. These regard situations of "higher politics", focusing on the coercion of either state representatives or of the state itself.

This led to the discussion on the view upon peace treaties. These treaties concluding wars, often have an element of coercion. Think of Germany's participation to the Treaty of Versailles after WWI. To go around the invalidation of peace treaties, international lawyers usually let invalidity depend upon violation of the UN Charter.

One exception to the mainly formal reasons for invalidity is stipulated in article 53 of the VCLT which states that a treaty can also be invalid based on substance conflicting with *ius cogens* norms.

Tip from Lawbooks: Re-read the section on pages 65/66 of the book on *ius cogens.* This is a very important concept in international law, albeit very much a topic of discussion. Therefore, it is important that you understand this concept and the underlying notions of universality and the peremptory character.

Termination/suspension
Invalid treaties lack grounds for legal effect from the beginning. Terminated treaties on the other hand, result in legal effects coming to an end. The easiest method to terminate a treaty is by agreement of the parties. To do this there are various techniques amongst which:

- The inclusion of an expiry clause: they agree beforehand that this treaty will only be valid for a limited duration
- They can agree beforehand that a treaty terminates when the common object has been achieved.
- The treaty is replaced by a new treaty between the same states
- Disuse: a treaty that has not been applied for a long time can be seen as fallen into disuse. This does not often happen, as this is also a measurement very much open to interpretation.

If there is no agreement amongst the parties to terminate the contract, the VCLT allows for three different set of circumstances in which a party on its own can decide to terminate it ("unilateral termination"):

1. A **material breach** of the treaty can release the other party from its obligations. Important to note is that not just any breach justifies termination, leaving discussion on what adds up as a material breach. It is often conceptualised by Courts as grave breaches.
2. When there is a ***force majeure,*** circumstances that make it impossible for a contract state to fulfil its obligations, it can be used as a ground for termination. In international law this can only be the case with natural circumstances.
3. The final way of terminating a treaty is by invoking a **fundamental change of circumstances**. Because of the broad interpretation of this the ICJ has often been reluctant to accept this as a justification ground. Only when the circumstances were an essential basis for the consent of the states, the change was unforeseen and must be so radical that it transforms the rest of the obligations on the treaty. Because of these specific requirements, an appeal to this ground will in most cases not suffice.

Final remarks
In practice treaties are often more in line with Philip Allot's definition as "disagreement reduced to writing", than with the idea that it flows from likeminded parties wanting to put something in a contract. This explains why there is so much debate on the substance of treaties, or on making reservations and on how they should be interpreted. Therefore, it makes sense that there are established rules dealing with all of these questions. It is a false notion to think that politics are only part of the negotiation process; after the conclusion, law and politics play a dominant role in the continuance of the treaty.

Tip from Lawbooks: Just try to read the Vienna Convention from beginning to end once. A lot of what is discussed in this chapter can be literally found in the articles of the convention.

Lecture 5 & 6: State Responsibility

Aangehaalde literatuur: Jan Klabbers, *International Law*, Cambridge University Press 2017.

Chapter 7: Law of responsibility

Introduction
The term "responsibility" is used to describe the idea that some entity can be blamed for undesirable behaviour. In international law the concept of the responsibility of states is relatively well settled. It derives from the principle that subjects of international law can be held responsible for their behaviour and regimes have been formulated to regulate the responsibilities of states, international organisations and individuals. The most firmly established set of rules is the one relating to states and will be the main focus of this chapter.

Custom to codification
The idea of state responsibility has existed quite a while and for a long time it was established in customary international law, based on practice and judgments of courts. Because of its importance, the idea arose after WWII to codify these rules into a convention. It resulted in a set of rules formulated by the International Law Commission (from here on: ILC). The formulation of this set of articles however, took almost forty years and out fear that submitting them to international conference would lead to too many changes defeating its purpose, the idea to codify them was slowly abandoned. Instead, the articles have been endorsed by the General Assembly and are considered to reflect customary international law and are still highly authoritative.

Analysing the ILC articles shows that a distinction can be made between primary and secondary norms (similar to the norms formulated by H.L.A. Hart)

- Primary rules deal with the substance of the obligations of states. Thus, the prohibitions that are laid down in obligations.
- Secondary rules are the rules that determine how primary rules are created, interpreted and enforced. This includes the VCLT, but also the ILC articles.

To make this distinction was important in order to be able to really focus on responsibility, separating it from the discussion on what these obligations exactly entailed.

The scope of these articles is general, but do not exclude the option for special regimes to make their own rules on how to deal with violations. These have been formulated by for instance the EU and the WTO.

Two basic principles of state responsibility
The ILC articles are based on two foundational principles; attribution and internationally wrongful acts.

Attribution
This principle goes into the idea that states are responsible for acts that can be attributed to them. Since a state is and abstract concept and does not have a mind of its own, it is useful to establish responsibility through attribution. First of all, as a matter of principle states are not responsible for the activities of private parties, since it would be unfair to hold a state responsible for an action that has no relation to the state. Exceptions to this rule arise when the state is implicated in the act in one way or another.

The state can be held responsible for the acts of its organs and officials. This responsibility also extends to acts that are outside its proper competences (*ultra vires).* This rule is important since it motivates the state to control its organs and officials, since they are the only ones that can. It is limited to acts performed within their official capacity, and does not apply when a government official acts in its spare time.

Finally, important to keep in mind is that responsibility is determined under international law, and a state cannot circumvent responsibility by hiding behind its domestic law.

Internationally wrongful act
The second principle is that the responsibility is only for acts that violate international legal obligations. If a state engages in behaviour that is harmful or damaging, it cannot be held responsible if it is not illegal. A good example of this is the legal execution of the death penalty by a state. Thus, this system acts outside of the idea of strict liability but focuses on the wrongful act as an essential requirement. Some exceptions have been established in treaties such as the damage done by a state's satellites or damage under environmental agreements.

In general damage or harm is not a precondition, it only looks whether there was a violation of an international obligation.

Responsibility and private acts
Even though states cannot be held responsible for private acts, situations can occur where indirect responsibility can be assumed. Think of a state failing to prevent an illegal private act and, in that way, violating an international legal obligation. Or when a state acknowledges and adopts these illegal private acts. One of the most prominent cases was the *Tehran Hostages* case where Iran did not incur responsibility for the hostage taking of a US embassy, but did incur responsibility for related circumstances such as failing to protect the embassy.

To prevent states from evading responsibility through the outsourcing of activities, acts of a person or a group of persons is also attributable to a state when its acting under its instruction or direction.

An exception needs to be made for insurrectional movements. Their acts are by definition not attributable to a state, as this is what the insurrectionists are trying to overthrow. However, when they succeed they can still be held accountable because they themselves will form the state to whom its attributable.

Circumstances precluding wrongfulness
As in all law, there are exceptions to every rule and also within international law there are circumstances that can justify a state's behaviour that would normally be defined as a wrongful act. These exceptions are adopted in art. 20 – 25 of the ILC articles. There are some obvious examples such as acting with **consent** of the other state such as the entering of air space with permission from the other state. Another example is acting in **self-defence** (when lawful). Or the sanction of **reprisals** as discussed earlier. Interesting scenarios are those that are not wrongful due to an objective situation.

- **Force majeure**. This is a turn of events beyond the control of a state resulting in the impossibility for them to perform an obligation. The most important characteristic is that even if the state wanted to, it would have been impossible to perform the obligation.
- In the case of **distress** alternative courses of action do exist. It justifies a wrongful act though, because the action taken was needed to prevent the actor concerned to be sacrificed. The clearest example is the landing on the territory of another state in order to avoid a plane crash.
- The last ground for objective justification is **necessity**, which is also the most sensitive to political use. It bases its justification in arguing that it was necessary in order to protect a vital state interest. The ICJ confirmed its narrow approach to necessity in the Gabcikovo-Nagymaros case. Because this is so sensitive to abuse, art. 25 of the ILC articles provides strict conditions:
  1. The interest at stake must be '**essential'**
  2. The interest must be under '**grave and imminent peril**'
  3. The conduct must be **relatively harmless** towards the related state or the whole international community.

Consequences
After a state is held responsible for an internationally wrongful act, international law provides three possibilities as reparation for the injury. The function of them is not to punish, but to repair.

- **Restitution** is the main form of reparation. This is about bringing the situation back to the *status ante quo*, meaning how the situation was before the wrongful act took place. If territory for instance was unlawfully seized, this can be returned to the lawful state.

- If a situation cannot be restored, alternative reparation can come in the form of **compensation**. These only add up to the actual loss and is not about punitive damages.
- The third form mostly deals with moral damage and is known as **satisfaction**. It is about the state acknowledging that it committed a wrongful act, in which in some cases an official apology can suffice.

Responsible to whom?
When discussing state responsibility, the breach of an obligation is often considered to be against another state or a group of states. Sometimes however, this logic does not apply. A breach of human right treaties for instance, is not necessary a wrongful act against one state or a group, but more towards the international community as a whole. When this common interest is at stake the ILC articles allow any state to invoke responsibility for the interest of the community as a whole. This has been a significant innovation where it is recognised that international law is not only law between specific states, but also contains somewhat of a public element.

The idea that some obligations can be seen as obligations owed towards the international community of states as a whole are called ***erga omnes* obligations**. This is closely linked to the norms of *ius cogens,* but the exact meaning is not the same. An attempt was also made during the drafting of the ILC articles to make it possible for states to be held criminally liable. However, since this also requires punishment, this idea was eventually abandoned. The only trace it has left is that if *jus cogens* norms are violated states should not assist the wrongdoing state or recognise the situation it has created as lawful.

International organizations
For a long time, it was deemed unnecessary for an international organisation to think about the responsibility of IO's. In theory, when the IO did something wrong, the member state(s) would be held accountable. In practice however, when the International Tin Council collapsed in the 1980s due to bankruptcy, the member states invoked the separate legal entity it had to avoid liability for its debtors. Thus in 2000 the ILC started to work on the topic of creating a set of rules on the responsibility of IO's. In drafting this the ILC there were two major considerations that made it very difficult to compile this set:

- It would be unusual to create a set of rules for IO's that are completely different from those lined out for states. Thus, IO's should also be responsible on the basis of the principles of an international wrongful act that could be attributed to them.
- However, even though IO's and states are strongly linked they have fundamental differences. An IO does not have its own territory, sovereign jurisdiction or officials whose acts usually rise up to responsibility.

Furthermore, IO's are not bound to the same extent to all the rules within customary law, making it possible to argue that here are very few rules an organisation can violate to begin with. Also due to the lack of officials or troops, the requirement of attribution is a lot less clear. Currently, there is a set of rules formulated and are authoritative, but they have not yet reached the level of recognition as the articles on State responsibility. Therefore, suggestions have been made to rather try to hold IO's responsible based on the notions within administrative law, but also this has a lot of drawbacks.

Individual
The hallmark of individual responsibility under international law is that individuals can be held responsible directly without domestic law as an intermediary. However, this would require the existence of international courts and tribunals. The ones that do exist however, hold individuals responsible for transgressing the rules that form their basis, thus not on basis of the notion of violating general international law.

On a theoretical level, individual responsibility differs from the responsibility of states or IO's, where it is a lot more difficult to make the distinction between primary and secondary rules, as the latter almost does not exist when talking about individual responsibility. This becomes clear when realising that most tribunals function on an *ad hoc* basis, with the ICC being the only permanent institution.

Shared responsibility?
It can be hard to know who to hold responsible in issues such as climate change, where no one but everyone is responsible. On the one hand, states consist of individuals, so it would be logical to hold individuals accountable. But by doing so, we ignore the fact that a lot of evil can only take place in an institutionalised way. In addition to that, some evil does not stem from evil motives, but is simply a result of rational bureaucracy. On the other hand, a sole focus on the states ignores the, sometimes crucial, role of individuals. As you can see, both approaches have their downfalls. The risk is that, while bouncing between the two, both parties are let off the hook or are unjustly over punished.

Final remarks
The law on responsibility is still developing itself as we speak. The responsibility for states is already quite settled, but international law has yet to fully establish responsibility for IO's and individuals. Moreover, this topic still is dealing with a lot of questions.

OTHER MATERIALS

Lecture 1: A Brief History

Required literature: Crawford & Koskenniemi, 'Introduction'.

Crawford & Koskenniemi, 'Introduction'

Purpose of the Companion
In the past two decades international law has been of great importance. Organizations such as the **World Trade Organization (WTO)** and institutions such as the **International Criminal Court (ICC)** came into life. At the same time, there are many crises that we have to tackle. Some of these are grave human rights violations, poverty and global injustice. And even though democracy governs an increasing amount of countries, the relentlessness and conflict that it brings forth are difficult to ignore. International law has played a role in big political issues such as the legal status of Kosovo and the indictment of Colonel Ghaddafi. This book aims to portray international law within a broad historical and political context.

Context of International Law
International law is a field of law that is concerned more with political ideas and philosophical debates about peace, and less with technicality. Certain international legal concepts are heavily dependent on the **context** in which they are used.

An important context wherein international law is used is that of **diplomacy**. The close link between the law of nations and diplomacy made the international law as we know today possible. Important concepts such as territorial sovereignty, treaties and the rightful conduct in war are a result of that link. A way to look at international law, is to see it as a legal framework wherein diplomacy can function. In this view state power is the foundation of international law.

Another context wherein international law functions, is the context of imagining alternative futures in morally oriented debates. This can be relevant as ideas can transform from utopia into actual policy quite quickly.

It is disputed whether international law can be seen as actual law. In some aspects it is. It has **court systems** for example. In other ways it appears less to be so. An example of this is that courts do not have compulsory jurisdiction over states. One of the most important things of international law is its everchanging character based on the needs of its **subjects**.

International law and state
The term '**international law**' was invented by Jeremy Bentham in 1789 and came into broad use in the nineteenth century. The main focus of this field is **state and inter-state relations**. However, human rights play a big role on the international field nowadays too. The components of international law are states, governments and peoples. The government is seen as the most present component of those three. Important to note that it does not have to be a democratic government. However, the government in itself is not committed to international law, it is the state that is actually bound. Knop notes that there is an increased interest in other forms of representation outside of the state as the main focus, such as the idea of 'international civil society'. But in the field as a whole is reverting to a more **state-centric view**, with the side note that the state is defined in a much broader way.

Each state is an entity that can decide in which transactions and activities it will partake. International law sets out to reduce **conflicts of jurisdiction**, and when that cannot be achieved, to moderate the effects. The law of jurisdiction is an area where other actors than states are seen as objects instead of right-holders. Another area where international law is of importance, is the regulation of use of force. The goal is to limit and restrain that use. Another view, however, suggests that law and war are different sides to the same coin. Law could actually be used as a weapon of war.

Techniques and arenas
First of all, it is important to know the rules and principles of international law. **Article 38(1) of the ICJ Statute** is crucial in this regard. It lists treaties, custom, general principles and (as subsidiary sources) judicial decisions and doctrine as sources of rules. In practice, multiple sets of rules can be applicable in one case and the interaction between those should be taken into consideration. Usually international law prefers reasonable outcomes over determinacy of the law.

'**Soft' law**' and a '**hierarchy of sources**' push international law in opposite directions. Article 38 of the ICJ Statute does not explicitly state hierarchy but elements of hierarchy can be found in for example peremptory norms and the ICC.

Some particular fields of international law such as environmental law are gaining separate identities and may become separate legal systems. The European Union can be seen as an example of this. This fragmentation is not in itself undesirable and may be inevitable.

International law does not have separate law-making and law applying institutions that we are so used to seeing in the domestic legal systems. However, there is **institutionalization** to a degree. Courts, for example, have started to adopt some of the same roles as their domestic counterparts. But even though there has been an increase in the number of courts and litigation, Benedict Kingsbury doubts that further judicialization will take place.

International organizations are somewhat difficult to placed in the international legal system. Some try to explain them with functionalism but the function of an organization is in the eye of the beholder. Moreover, institutions often develop their own separate identities. As international organizations have become such an important part of international law, it is easy to point out the institutionalization of this field of law. A vital aspect of institutionalization is the possibility of enforcement. A possible moral hazard of a non-coercive legal order could be less voluntary participation in it.

The projects of international law
International law, although seen as 'good' in itself, faces various challenges. Though it is thought that international law functions purely on state consent, certain countries hold most of the power. Some feel like international tries to push though certain Western ideas and values.

This is very prominent in the field of **human rights**. As of right now there are a lot of treaties that protect human rights. However, there are still big structural human rights problems. It would seem like a good thing to meddle in these affairs and help restore wrongs that are being done. However, justice is selective and usually does not result in reconciliation. For communities that used to be colonized, it can be hard to believe that this time the western big powers come to spread love and not dominate.

Another hardship in international law is the income discrepancy that is present within the population. Thomas Pogge states that institutions benefit the elites and create and keep injustices in life. Yet another issue is the tension between exploitation and conservation of the environment.

Lecture 2: Subjects

Required literature: Montevideo Convention on the Rights and Duties of States 1933; General Assembly Resolution 2625.

The prescribed extra literature this week is not suitable to be summarized as the extra literature consists of treaties. We recommend that you look up these conventions and read them yourself. The Montevideo Convention contains the requirements a state has to fulfil in order to be seen as one. The General Assembly Resolution 2625 is about the friendly relations and co-operations between states.

Lecture 3: Sources

Required literature: Art. 38 of the Statute of the International Court of Justice 1945.

The prescribed extra literature this week is not suitable to be summarized as the extra literature consists of a statute. We recommend that you look up the statute and read it yourself. This Statute contains the main rules the ICJ has to adhere to.

Lecture 4: Law of Treaties

Required literature: Vienna Convention on the Law of Treaties 1969.

The prescribed extra literature this week is not suitable to be summarized as the extra literature consists of a treaty. We recommend that you look up the treaty and read it yourself. This treaty, for the most part, contains codified custom international law on treaties.

Lectures 5 and 6: State responsibility

Required literature: Amnesty International, 'On Trial: Shell in Nigeria. Legal Actions against the Oil Multinational' (10 February 2020; International Law Commission, Articles on the Responsibility of States for Internationally Wrongful Acts (2001); Kingsbury, 'International courts: uneven judicialization in global order' in Crawford & Koskenniemi (Chapter 9).

Amnesty International, 'On Trial: Shell in Nigeria. Legal Actions against the Oil Multinational' (10 February 2020

In 1965 Shell discovered oil near the Oloibiri village in Nigeria. This region became a big money-making opportunity for Shell and for years Shell has made use of it. However, Amnesty's research has discovered the many human rights violations that occurred as a result of Shell's operations there. There have been many oil spills and poorly executed cleanups. These have been detrimental to the population's health in that region. Moreover, the people there still reside in grand poverty. Since 1990's there have been protests, that where harshly squashed by the Nigerian government, sometimes even with Shell's support. Recently, an array of cases against Shell's conduct in Nigeria were begun. This report discusses a few of those cases. Amnesty lists the human rights violations that occurred. The discussed cases could serve as an important precedent for how oversees conduct by companies should take place. Companies should respect human rights, even if the local government does not do so.

International Law Commission, Articles on the Responsibility of States for Internationally Wrongful Acts (2001)

This literature is not suitable to be summarized as it consists of a treaty. We recommend that you read it yourself. It concerns the requirements and the consequences of wrongful acts.

Kingsbury, 'International courts: uneven judicialisation in global order' in Crawford & Koskenniemi (Chapter 9)

Introduction

Hugo Grotius found 'law without courts' a perfectly good way to approach international relations. Yet, the **judicalisation** is nowadays considered an indispensable aspect of international law. **International** courts and **tribunals** are increasingly seen and treated as institutions. To understand why a certain court has certain motivations, judgements and methods it is vital to know how and why they came into existence. This chapter will not give one specific definition for international court. If we were to give a definition of court, it would be more of an 'ideal type' instead of an accurate reflection of reality. The term '**international'** entails that

the court was created by some form of intergovernmental agreement (or between a national government and a foreign private entity).

Ten types of international courts: history and overview
International courts may vary from each other in certain aspects such as the level of consent they require or how big their impact is on material outcomes.

There are ten most important types on international courts:

- The importance of bilateral and multilateral arbitration grew. This resulted in the creation of the **Permanent Court of Arbitration (PCA**). By the beginning of the twentieth century there were three basic structural patterns of international arbitration that are of great importance to this day.
    - **Inter-Governmental Claims Commissions:** it was created by two governments and based on the Jay Treaty model. Private claims against another state that arose from a certain set of events were presented.
    - **Ad hoc inter-state arbitration**: it was governed by law and based on the Alabama model. The main focus were territorial and boundary disputes.
    - **Inter-state arbitration**: it was based on pre-existing legal institutional structures. The PCA is the most prominent example. These are also used for arbitrations between entities other than states.
- After the **First World War**, three other structures were created.
    - **Standing international courts**: The Permanent Court of Justice (PCIJ) was established as a mix between arbitral bilateral dispute settlement and adjudication. The PCIJ was later replaced by the **International Court of Justice** (ICJ) in 1946.
    - **International criminal courts**: the Nuremberg trials could be seen as a precedent for this type of courts. In contrast to most of the other types of international courts, the defendant's consent is not required for them to be prosecuted.
    - **International administrative tribunals**: these were established to sort through employment grievances.
- After 1945, four other categories of courts were created.
    - **Regional human courts**: the European Court of Human Rights (ECtHR) can exercise its jurisdiction over states while handling claims, made by individuals.
    - **Regional economic integration courts**: the European Court of Justice (ECJ, now CJEU) has been one crucial component of the European integration.
    - **WTO dispute settlement**: The General Agreement on Tariffs and Trade (GATT) consisted of panels that resolved complaints made by one state against another state.
    - **Investment arbitration tribunals:** these handle claims by foreign investors against states.

A court that does not fit any of these categories is the International Tribunal for the Law of the Sea (ITLOS).

There has been a big increase in routine litigation, next to the episodic litigation that is inherent in international law.

Unevenness in juridification through international courts and tribunals
While reading the previous paragraph it would be easy to overestimate the importance of these courts. They are important in some aspects, in others less so.

The issues that come forth in the courts are often dominated by liberal interests. There is hardly any room for environmental issues. Many kinds of issues simply do not appear in front of a court. This absence is important to keep in mind.

There are many other restrictions too. For example, specialist tribunals often don't have jurisdiction concerning their own institution in global context. As another example: NAFTA and WTO can disregard the tribunal's interpretation if they don't agree with it.

Which major states commit in advance to accept jurisdiction of international courts?
The world's most populous states tend not to accepts jurisdiction of international courts in advance. Most of them, however, are part of the WTO and UNCLOS. The world's most economically wealthy states are much more likely to accept jurisdiction of international courts in advance. A reason for this could be their larger influence on the design. These countries are part of the WTO and UNCLOS too. Legal liberalism continues to be important but further judicalisation is unlikely.

Divergent roles and functions of international courts
Courts can be described in instrumental terms as performers of certain roles and functions.

Courts as dispute settlers
Court can be seen as **third-party settlers of bilateral conflict**. Some problems can arise from this system. Firstly, parties can work together to trigger a court decision because it would benefit them in their relations with other parties. Secondly, one of the parties may withdraw its consent to be adjudicated if it feels like the court has friendly relations with the other party. Procedural rules have been created in order to limit the latter.

One might question why states consent to a third party deciding on a specific dispute. The answer to this is that adjudication is like a coordination game to states. They benefit more from a neutral third-party settling the conflict than from continuing negotiations. For example, it can be appealing for politicians to let a third party decide instead of making it themselves, as they could be met with public scrutiny. However, the coin can flip both ways. In some cases, politicians can face scrutiny if they bind the state to an international court's decision.

Courts as institutions to make commitments credible
The bigger question is why states would create international courts or give their consent to their jurisdiction in advance. The simplest answer is the principle of **reciprocity**. Another reason is that it makes big commitments more credible if there is a court to go to if the commitment is not upheld. This is especially important for less powerful states because they can then hold the more powerful states accountable.

Routinised adjudication as governance
Courts arise as a result of a need to ameliorate the success and effectiveness of agreements in specific issue areas. An example of this is the WTO Appellate Body. Such courts ensure that the benefits that are promised in the treaties are in practice fulfilled. Some courts, such as the one in the example, fill in the gaps in incomplete contracts. Another way in which courts assume a governance role is the influential portrayal of private commercial, non-commercial or public issues and even of governmental interests that are not carried out by the executive branch of the government in a satisfactory way.

Courts as producers of legal knowledge
The aspiration of judicalisation that gained momentum in the late nineteenth century, is in part connected to the view that courts should be part of (at least the ideal view of) the law. With the boom of judicial decisions and other materials, arose a new side to international law. These rulings have helped to identify **the norms** that come forth from the array of treaties. Many international lawyers see international law obtaining its own unique character, which can in term influence the international political scene and national law.

Another facet of the court's functions is the distillation of **factual information**. The standard model of courts is that information would be best obtained in a highly institutionalized system. This system would ensure the least number of errors and the most amount of information. Some courts and tribunals follow this pattern, others do not. A problem courts stumble upon is **difficulty in acquiring information**. Courts do not have much leverage methods and, in the past, they have been reluctant to make use of the methods that they do have. The courts work around this by relying on facts that are authoritatively established and admitted by organs of states. They can also turn to information found by UN bodies. In the rest of the cases the courts have no other choice but to make decisions with the limited information that they could obtain.

Justice and rule of law
The relationship between international courts and politics has been challenging at times. Some decisions can be seen as a beacon of hope, while others are the subjects of controversy. Grotius argued for international law to strive for **corrective justice**, instead of distributive justice. The ICJ usually practices according to this principle. For example, there are many money claims made by individuals in front of the court but most of them are decided on a corrective justice basis.

Conclusion
The conclusion shortly summarized the various topics of this chapter. You can read a summary of this chapter above. However, the conclusion, notes another thing too: three key aspects that haven't been taken into consideration in this chapter. First of all, the importance of **national courts** was overlooked. As national courts usually hold more democratic control, they are considered preferable for some issues. Second of all, there is other **transnational governance and arbitration** that is not primarily dependent on states. An example of this is the Internet Corporation for assigned Names and Numbers (ICANN). Third of all, there are **non-judicial bodies** that make authoritative decisions. An example of this is the World Bank Inspection Panel.

TREFWOORDENREGISTER

Soms ben je de vindplaats van een bepaald begrip kwijt, of heb je behoefte aan net wat meer uitleg bij een leerstuk. Lawbooks maakt daarom gebruik van een trefwoordenregister dat verwijst naar de vindplaats van populaire begrippen in de samenvatting zelf:

TIPS & TRICKS

Hieronder staan enkele tips en trucs die misschien wel van pas komen tijdens het leren, maar ook tijdens het maken van je tentamen.

Algemeen:

- Maak bij het leren gebruik van blanco (waar geen tekst op staat) tabjes in diverse kleuren. Als je te maken krijgt met een belangrijk artikel waarvan je zeker weet dat je die krijgt op het tentamen, doe hier dan een tabje bij. Dat scheelt je bij het tentamen veel tijd met opzoeken.
- In je wettenbundels mag je normaliter niet schrijven. Er zijn echter uitzonderingen. Zo mag je de titels van arresten bij de bijbehorende artikelen zetten. Verder mag je ook een bepaald artikel bij een ander artikel zetten. Tot slot mag je ook arceren, markeren en onderstrepen. Andere symbolen, tekens, teksten zijn dus **niet** toegestaan.
- Sla de jurisprudentie niet over. Leer de arresten goed, want tentamenvragen worden vaak gebaseerd op arresten. Als je de essentie van een arrest goed kent, kun je de vraag vaak eenvoudig en snel oplossen.
- Probeer de locaties van artikelen in je wettenbundel goed te kennen. Je weet dan meteen waar je moet kijken; dit zal je veel tijd schelen op het tentamen.

Specifiek voor International law:

- Hou je Engels simpel. Het is veel belangrijker dat je laat zien dat je de concepten goed weet toe te passen dan dat je de mooiste Engelse zinnen maakt. Je schiet er vaak niet veel mee op en het zal je alleen extra tijd kosten. Ook op betrekking tot het lezen: lees rustig de vragen door en streep de belangrijkste elementen aan in de casus. Zorg dat je goed de vraag leest en begrijpt wat er staat.
- Als je een casus krijgt, houdt dan in je achterhoofd dat er meestal geen sprake is van goed of fout gedrag. Je moet oordelen over de rechtmatigheid van gedrag vanuit een juridisch perspectief, niet over het gedrag zelf.
- Gebruik je gezond verstand en neem op het tentamen een stapje terug als je door de bomen het bos niet meer ziet. De meeste vragen zijn zo gebouwd dat het vrij snel duidelijk wordt in welke richting je moet gaan zitten. Als je sterk twijfelt tussen twee verschillende richtingen ga dan even door met een andere vraag en kom later terug bij de vraag waarover je twijfelde.
- Verder nog de bekende tips: begin tijdig met studeren, ga vroeg naar bed en zorg voor een stevig ontbijtje. Succes!

Lawbooks®

JE BESTE STUDIEVRIEND.