



UNIVERSITÀ
DI SIENA 1240

FUNDAMENTALS OF INTERNATIONAL LAW

Master's Degree Course in International Sciences (LM-52)

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Topic Three

Sources of International Law (II)

Article 38 Statute ICJ

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

- international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;*
- international custom, as evidence of a general practice accepted as law;*
- the general principles of law recognized by civilized nations;*
- subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.*

*2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto”.*



General International Law

- First degree source
- General subjective scope of application
- Customary international law
- General principles of law

Customary International Law: Basic Features

- Primary source of IL since 17th century
- Habitual conduct of states in their relations
- Irrelevance of the duration of formation
- Two constituent elements:
 - *Diuturnitas* (objective element)
 - *Opinio iuris sive necessitates* (subjective element)

Customary International Law: Scope of Application

- General scope of application: all the subjects of the international community, even if they did not participate in its creation
- Exception of the persistent objector (ICJ, *Fisheries case*, 1951)
- Regional or local customs

Kingdom Government concedes this only on the basis of historic title; it must therefore be taken that that Government has not abandoned its contention that the ten-mile rule is to be regarded as a rule of international law.

In these circumstances the Court deems it necessary to point out that although the ten-mile rule has been adopted by certain States both in their national law and in their treaties and conventions, and although certain arbitral decisions have applied it as between these States, other States have adopted a different limit. Consequently, the ten-mile rule has not acquired the authority of a general rule of international law.

In any event the ten-mile rule would appear to be inapplicable as against Norway inasmuch as she has always opposed any attempt to apply it to the Norwegian coast.

The Court now comes to the question of the length of the baselines drawn across the waters lying between the various formations of the "skjærgaard". Basing itself on the analogy with the alleged general rule of ten miles relating to bays, the United Kingdom

Customary International Law: Objective Element

- Widespread practice among the vast majority of states
- Diplomatic bilateral and multilateral practice
- Legislative, administrative and judicial practice
- Operational conduct
- Conventional practice

Customary International Law: Subjective Element

- More difficult to identify
- Mostly same pieces of state practice as those of the objective element
- International decisions, conventions, resolutions of IOs, academic writings as authoritative elements for the identification of custom
- Prevalent written form



ILC 2018 Draft Conclusions on the Identification of Customary International Law

- Non legally binding, but contribution to the development of IL
- Dualistic theory of custom (objective and subjective element) (conclusion no. 2)
- Contribution of IOs' practice and inaction as a form of practice for the purposes of *diuturnitas* (conclusions nos. 4.2 and 6.1)
- Public statements, official publications, government legal opinions, diplomatic correspondence, decisions of national courts, treaty provisions, and conduct in connection with resolutions adopted by an IO or at an intergovernmental conference as possible evidence for *opinio iuris* (conclusion no. 10.2)



General Principles of Law: Some Definitions

- *“Principles of law, private and public, which contemplation of the legal experience of civilized nations leads one to regard as obvious maxims of jurisprudence of a general and fundamental character [...] a comparison, generalization and synthesis of rules of law in various branches [...] common to various systems of national law” (H. Lauterpacht)*
- *“Cardinal principles of the legal system, in the light of which international [...] law is to be interpreted and applied” (B. Cheng)*
- *“A core of legal ideas which are common to all civilized legal systems” (R. Schlesinger)*

General Principles of Law: Basic Features

- Two different notions: GPL recognized *in foro domestico* and GP of international law
- Direction for state control
- Supplemental source and possible means to develop new sources
- Two main functions:
 - Integrative (gap-filling)
 - Interpretative



General Principles of Law: Origins

- Objective element: principles existing in most of the national legal orders and suitable to apply to interstate relations and disputes
- Voluntarist or subjective element: considered as binding or necessary also at the international level
- From the domestic to the international level (if applicable!) → they become GP of international law once extensively and consistently applied

General Principles of International Law

- Structural or instrumental character
- Substantive or material character
- Principles of: *pacta sunt servanda*, procedural principles in the field of international criminal law, good faith, *res iudicata*, *nullum crimen sine lege*, etc.
- Principle of sustainable development (?)



Soft-Law Instruments

- Non legally binding, but...
- Legal relevance as element which form evidence of the sources of law on a given subject and constitutive authoritative sources for the creation, crystallization and development of binding IL
- Declarations of principles by the UNGA



A Hierarchy of Sources?

- Not really (except for *ius cogens*)
- Conventional law may always derogate from custom and vice-versa
- Subjective application of principles of conflict resolution (*lex specialis derogat generali* and *lex posterior derogat priori*)
- Compatibility (subordination or priority) clauses to solve conflict of international norms: e.g. Art. 103 UN Charter (priority clause)