

# THE SOURCES OF INTERNATIONAL LAW

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# Lecture Plan

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- The meaning of 'sources of law'
  - The sources of international law:  
Article 38 (1) of the Statute of the International Court of Justice
  - Treaties
  - Customary international law
  - General principles of law
  - Other sources
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# The Meaning of 'Sources of law'

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- The term 'sources of law' has a variety of interpretations;
  - 'material sources' – refers to a casual or historical factors explaining the factual existence of a given rule of law at a given place and time'
  - 'formal sources' or 'legal sources' – the criteria under which a rule accepted as valid and binding in a given legal system.
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# The Catalogue of Sources – Article 38 of the Statute of the International Court of Justice

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## □ Article 38(1)

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

- (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- (b) international custom, as evidence of a general practice accepted as law;
- (c) the general principles of law recognized by civilized nations;
- (d) (...) judicial decisions and the teachings of the most highly qualified publicists of the various nations, as ~~subsidiary means for the determination of rules of law.~~”

# LAW OF TREATIES

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- ❑ Introduction
  - ❑ Codification of the Law of Treaties
  - ❑ Definition
  - ❑ Conclusion of Treaties
  - ❑ Reservations
  - ❑ Registration and Publication
  - ❑ Observance, Application and Interpretation of Treaties
  - ❑ Treaties and Third States
  - ❑ Invalidity of Treaties
  - ❑ Termination of Treaties
  - ❑ Supplementary Reading
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# Introduction

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- Today, treaties are the principle source of international rights and obligations.
  - Every State is a party to hundreds of treaties, bilateral and multilateral.
  - Treaties regulate practically every aspect of State behaviour in times of peace and in times of war.
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# Codification of the Law of Treaties

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- The law of treaties has been codified. The Vienna Convention on the Law of Treaties was signed at Vienna on 23 May 1969 and entered into force on 27 January 1980 after being ratified by 35 States. Today, there are States parties to the Convention.
  - The Preamble to the 1969 Vienna Convention provides, however, that “the rules of customary international law will continue to govern questions not regulated by the provisions of the present Convention”.
  - The 1969 Vienna Convention on the Law of Treaties applies only to treaties concluded by States. An additional treaty dealing with treaties concluded between States and international organizations or between international organizations was signed in 1986 in Vienna. It has not yet entered into force.
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# Definition

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- Article 2 p. 1(a) of the Vienna Convention on the Law of Treaties defines “treaty” as
    - an international agreement concluded between States
    - in written form,
    - governed by international law,
    - whether embodied in a single instrument or in two or more related instruments and
    - whatever its particular designation.
  - This definition was formulated for the purposes of the Vienna Convention and does not define treaties at large.
  - Other names commonly used for treaties include: convention, charter, protocol, memorandum, exchange of notes, declaration, covenant, agreement, pact etc. The name given to a treaty may indicate its significance, however, it does not affect its legal character.
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# Conclusion of Treaties

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- ❑ The process of concluding a treaty may vary depending on its subject matter and the number of parties involved (bilateral treaties, multilateral treaties).
  - ❑ Every State possesses capacity to conclude treaties.
  - ❑ In the process of concluding international treaties States act through their representatives. State representatives have to produce full powers.
  - ❑ “Full powers” means a document emanating from the competent authority of a State designating a person or persons to represent the State for negotiating, adopting or authenticating the text of a treaty, for expressing the consent of the State to be bound by a treaty, or for accomplishing any other act with respect to a treaty.
  - ❑ Heads of State, Heads of Government and Ministers for Foreign Affairs, by virtue of their functions, can perform all acts relating to the conclusion of a treaty without having to produce full powers (Article 7).
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# Conclusion of Treaties

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- The process of the conclusion of treaties consists of several stages including: negotiations, adoption of the text of a treaty, authentication of the text of a treaty and expressing consent to be bound by a treaty.
  - The consent of a State to be bound by a treaty may be expressed by:
    - Signature (Article 12);
    - Exchange of instruments constituting a treaty (Article 13);
    - Ratification, acceptance or approval (Article 14);
    - Accession (Article 15).
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# Conclusion of Treaties

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- The final stage of the process of the conclusion of treaties is entry into force. Treaties enter into force in such manner and upon such date as is provided by the treaty itself or as it is agreed by the parties.
  - The 1969 Vienna Convention on the Law of Treaties entered into force on the thirtieth day following the submission of the thirty-fifth instrument of ratification.
  - The 1982 United Nations Convention on the Law of the Sea entered into force 12 months after the date of deposit of the sixtieth instrument of ratification or accession.
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# Reservations

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- ❑ A State may, while signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation.
  - ❑ Reservation means a unilateral statement, however phrased or named, made by a State by which it intends to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State (Article 2 p. 1d).
  - ❑ Formulating reservations is permitted unless the reservation is prohibited by the treaty or is incompatible with the object and purpose of the Treaty.
  - ❑ Other States may accept or object to reservations.
  - ❑ Article 309 of the 1982 Convention on the Law of the Sea provides that “No reservations or exceptions may be made to this Convention unless expressly permitted by the articles of this Convention”.
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# Registration and Publication

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- Treaties concluded by the Member States of the United Nations have to be registered with the Secretariat of the United Nations. Article 102 of the Charter of the United Nations provides that “Every treaty and every international agreement entered into by any Member of the United Nations after the present Charter comes into force shall as soon as possible be registered with the secretariat and published by it”.
  - All treaties registered are published in the United Nations Treaty Series (<http://www.un.org/> ) and translated into world languages, if necessary. There are more than 30 000 treaties registered and published since 1945.
  - Treaties are also published in States which gave consent to be bound by them. Treaties ratified by the Republic of Turkey are published in the Official Gazette
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# Observance, Application and Interpretation of Treaties

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- Every treaty in force is binding upon the parties to it and must be performed by them in good faith (*pacta sunt servanda* - Article 26).
  - In principle, a treaty is binding upon each party in respect of its entire territory (Article 29). There are, however, treaties which application is localized (e.g. treaties establishing servitudes, navigation rights on international rivers or canals).
  - The general rule of interpretation of treaties is that treaties shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose (Article 31).
  - To confirm the meaning of a treaty, recourse may be made to supplementary means of interpretation such as the preparatory work of the treaty and the circumstances of its conclusion.
  - Interpretation of treaties authenticated in two or more languages may pose special difficulties. The text of such treaty is equally authoritative in each language.
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# Treaties and Third States

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- In principle, a treaty does not create either obligations or rights for a State which is not a party to that treaty (Article 34).
  - In exceptional circumstances, a treaty may provide for obligation for third States if they expressly accept that obligation in writing (Article 35).
  - A treaty may also provide for rights for the third State, a group of States or to all States if the third States assent thereto. Their assent may be presumed (Article 36).
  - An example of a treaty providing for rights for all States is 1936 Montreux Convention providing for the freedom of navigation on the Turkish Straits.
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# Invalidity of Treaties

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- The validity of a treaty or the consent to be bound by a treaty may be impeached. Invalidity eradicates legal effects of the treaty.
  - The reasons which may lead to invalidity of treaties include:
    1. a manifest non-compliance with municipal law of fundamental importance, regarding competence to conclude treaties (Article 46);
    2. omission of restrictions of authority of a State representative, if the restriction was notified to the other negotiating States (Article 47);
    3. error, if related to the fact or situation which was assumed by a State to exist at the time when the treaty was concluded and formed an essential basis of its consent to be bound by the treaty (Article 48);
    4. fraudulent conduct of another negotiating State (Article 49);
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# Invalidity of Treaties

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- 5. corruption of a representative of a State (Article 50).
  - A treaty is automatically invalid (null and void) if:
    - 6. the expression of a State's consent to be bound by a treaty has been procured by the coercion of its representative through acts or threats directed against him (Article 51);
    - 7. its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations (Article 52);
    - 8. at the time of its conclusion, it conflicts with a peremptory norm (*jus cogens*) of general international law (Article 53). A peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.
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# Termination of Treaties

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- The termination of a treaty (or the withdrawal from a treaty) may take place in conformity with its provisions or by the consent of all the parties to that treaty (Article 54). Also, a treaty terminates if all the parties to it conclude a new treaty relating to the same subject matter.
  - In exceptional circumstances a treaty may terminate:
    1. as a consequence of its material breach by one of the parties (Article 60);
    2. because of the supervening impossibility of performance resulting from the permanent disappearance or destruction of an object indispensable for the execution of the treaty (Article 61);
    3. in case of a fundamental change of circumstances existing at the time of the conclusion of the treaty, provided the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty and the effect of the change is to radically transform their remaining obligations. However, the fundamental change of circumstances cannot be invoked to terminate a treaty establishing a boundary or if the fundamental change is the result of a breach of an obligation.
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# Supplementary Reading

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- Chin Lim and Elias Olufemi, "The Role of Treaties in the Contemporary International Legal Order", *Nordic Journal of International Law*, Vol. 66, 1997, pp.1-21.
  - Richard D. Kearney and Robert E. Dalton, "The Treaty of Treaties", *American Journal of International Law*, Vol. 64, No. 3, June 1970, pp. 495-561.
  - S.E. Nahlik, "The Ground of Invalidity and Termination of Treaties", *American Journal of International Law*, Vol. 65, No. 4, October 1971, pp. 736-756.
  - Jan Klabbbers, *The Concept of Treaty in International Law* (The Hague: Kluwer, 1996).
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