



**Introduction to the Laws of Kurdistan, Iraq
Working Paper Series**

**Public International Law:
Treaties and International
Organizations**

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Preface to the Series: *Introduction to the Laws of Iraq and Iraqi Kurdistan*

Iraq and Iraq's Kurdistan Region is at a compelling juncture in their histories. In the wake of the transition to a democratic state, the country and region economy has prospered and its institutions have grown more complex. As institutional capacity has grown, so too has the need for a robust rule of law. An established rule of law can provide assurances to investors and businesses, while keeping checks on government and private powers and protecting citizens' fundamental rights. Institutions of higher learning, such as universities and professional training centers, can and should play a key role in stimulating and sustaining this dynamic. Indeed, education is foundational.

This paper is part of the *Introduction to the Laws of Iraq and Iraqi Kurdistan*, a series of working papers produced by the Iraqi Legal Education Initiative (ILEI) of Stanford Law School. This series seeks to engage Iraqi students and practitioners in thinking critically about the laws and legal institutions of Iraq and Iraqi Kurdistan. Founded in 2012, ILEI is a partnership between the American University of Iraq in Sulaimani (AUIS) and Stanford Law School (SLS). The project' seeks to positively contribute to the development of legal education and training in Iraq.

The working paper series devotes significant attention to pedagogy. By writing in clear and concise prose and consulting with local experts at each step of the writing process, the authors strive to make the texts accessible to diverse and important constituencies: undergraduate law students, lawyers and judges, government officials, members of civil society, and the international community. By discussing the Iraqi and Kurdish legal regimes and applying specific laws to factual situations, the authors model how to "think like a lawyer" for the reader. They also use hypothetical legal situations, discussion questions, and current events to stimulate critical thinking and encourage active engagement with the material.

These working papers represent the dedicated efforts of many individuals. Stanford Law School students authored the texts and subjected each working paper to an extensive editing process. The primary authors for the initial series including papers on Commercial Law, Constitutional Law, and Oil and Gas Law, were John Butler, Mark Feldman, David Lazarus, Ryan Harper, and Neil Sawhney under the guidance of the Rule of Law Program Executive Director, Megan Karsh. Jessica Dragonetti, Emily Zhang, and Jen Binger authored the remaining papers on domestic law. Kara McBride, Cary McClelland, Neel Lalchandani, Charles Buker, Liz Miller, Brendan Ballou, and Enrique Molina authored papers primarily concerned with Iraq's engagement with international law. I also thank the former and current deans of Stanford Law School, Deans Larry Kramer and Liz Magill, for their financial support, and the Stanford Law School alum, Eli Sugarman (J.D., 2009), who acts as an advisor to the project.

The faculty and administration of American University of Iraq in Sulaimani provided invaluable guidance and support throughout the writing process. Asos Askari and Paul Craft in particular played a leadership role in getting the program off the ground and instituting an introductory law class at AUIS. Ms. Askari taught the first law class in the 2014 spring semester. Former presidents of AUIS, Dr. Athanasios Moulakis and Dr. Dawn Dekle, provided unwavering support to the project. And finally, a special thanks to Dr. Barham Salih, founder and Chair of AUIS, without whose foresight and vision this project would not have been possible.

Finally, the authors of this series of papers owe an extraordinary debt of gratitude to many thoughtful Kurdish judges, educators, lawyers, and others who work within Iraqi institutions for their critical insights. In particular, the textbooks received vital input from Rebaz Khursheed Mohammed, Karwan Eskerie, and Amanj Amjad throughout the drafting and review process, though any mistakes are solely the authors' responsibility.

ILEI plans to continue publishing working papers. All texts will be published without copyright and available for free download on the internet.

To the students, educators, legal, and government professionals that use this set of working papers, we sincerely hope that it sparks study and debate about the future of Iraqi Kurdistan and the vital role magistrates, prosecutors, public defenders, private lawyers, and government officials will play in shaping the country's future.

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TREATIES, INTERNATIONAL ORGANIZATIONS, CUSTOM, AND OTHER ELEMENTS OF INTERNATIONAL LAW

CHAPTER OBJECTIVES

- To understand the main sources of international law, such as treaties, international organizations, and custom.
- To learn the ways in which treaties, international organizations, custom, and legal scholarship interact to create effective rules in the international system.
- To explore the application of these rules to Iraq and how they affect the Kurdistan region.
- To lay the foundation for further study of international law, including international crimes committed by state actors and international transactions made by private actors, among other topics.

1. INTRODUCTION

In 1995, representatives from Kazakhstan and the European Union (EU) signed a major **treaty**, which is a formal agreement, governed by international law, which imposes obligations on the parties. This particular treaty, called the Partnership and Cooperation Agreement, created a new era of free trade between the parties. Kazakhstan and the EU agreed not to tax each other's oil and gas, as well as other measures to encourage the creation of new small businesses and corporations across borders.¹

The treaty produced profound results. By ensuring favorable terms of trade for Kazakhstan, the EU grew to become Kazakhstan's largest trade partner. Now, Kazakhstan is the destination for almost forty percent of the EU's total exports, and Kazakhstan sends nearly eighty percent of its foreign goods to the EU.² This trade treaty has led to thriving sales of oil and gas for Kazakhstan and has improved Kazakhstan's overall relations with the EU, a major organization in international affairs.³

¹ The European Union and the Republic of Kazakhstan: Partnership and Cooperation Agreement, Jan. 23, 1995, Arts. 11, 23.

² European Commission. "Kazakhstan." Accessed February 5, 2015. <http://ec.europa.eu/trade/policy/countries-and-regions/countries/kazakhstan/>.

³ Nursultan Nazarbayev, "The Next Chapter in Kazakhstan-EU Relations," *Wall Street Journal*, October 7, 2014, accessed February 5, 2015, http://www.wsj.com/articles/the-next-chapter-in-kazakhstan-eu-relations-1412703767?mod=europe_opinion.

As we will discover in this Chapter, treaties such as the one described above are a primary tool of public international law. **Public international law** is a body of law that defines the relationships, rights, and responsibilities of states. You can think of it as a set of rules for how states interact and associate with each other. Public international law is composed of international treaties, customs, organizations, and even legal scholarship from academics. In this chapter, we will explore what these tools are and how they shape daily life in Iraq.

We will start by looking at each element of public international law on its own. In Part 2, we discuss treaties and how they are developed and enforced. In Part 3, we will explore international organizations such as the United Nations (UN). In Part 4, we will investigate part of public international law composed of unwritten rules established by custom and the behavior of states over time. In Part 5, we explore two other sources of international law: judicial decisions and academic writings. Finally, in Part 6, we will summarize what we have learned using a hypothetical case study of Protostan. By the end of this chapter, you will be able to identify a state's options and responsibilities when it chooses to interact with other states.

2. TREATIES: THE LANGUAGE OF INTERNATIONAL AGREEMENT

2.1 Treaty Elements and Purposes

We begin with a formal written agreement between states, also called a treaty. In this section, we will come to understand a treaty's core elements and functions. As we move through the material, consider what makes a treaty different from other agreements that you have encountered in your life, such as a contract or a simple promise from a friend. You will be able to identify what makes a treaty unique by the end of this section.

The major source for the law of treaties is the 1969 Vienna Convention on the Law of Treaties (VCLT). This "treaty about treaties" was created by the International Law Commission. Groups of scholars from the mostly European powers, such as Great Britain, came together after the end of World War II to form this commission.⁴ So, while the VCLT has been now widely adopted by most countries around the world, you should be aware of its European beginnings. Some language reveals a focus on Western ideas about negotiation and agreement in contrast to practices elsewhere in the world.

Let us start by looking at the legal definition of a treaty. The VCLT gives the following definition.

⁴ United Nations. "International Law Commission." Accessed May 16, 2015. <http://www.un.org/law/ilc/>.

Treaty Definition⁵

“Treaty” means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.

There are five main parts, also called elements, to this definition. First, a treaty is an “international agreement,” which means that it is not purely a purely domestic agreement occurring within one state. Second, the definition emphasizes an agreement “between States.” In other words, only states can sign treaties. You have already learned much about states in the Working Paper: Introduction to Public International Law, including various theories about sovereignty and the way that states are recognized. For now, keep in mind the words of the Montevideo Convention, which defines states as having: a) a permanent population; b) a defined territory; c) government; and d) capacity to enter into relations with the other states.⁶

The third element requires a treaty to be written. A verbal agreement between states would not qualify as a treaty. Fourth, a treaty is “governed by international law.” This means that parties to a treaty agree to legally bind themselves to the treaty. When we say that a state legally binds itself, we mean that the state agrees to be punished according to international law if it does not carry out its treaty commitments. Fifth, a treaty can be composed of one or more legal instruments. **Legal instruments** are writings or other expressions of intent used to create a legal agreement. Therefore, states entering into an agreement may write their agreement in one document, or they may rely on several documents or legal instruments, to describe the terms of their agreement.

In practice, you may also hear treaties referred to as agreements, pacts, compacts, or even covenants. Use of these different terms is common. To determine whether a certain agreement is a treaty, remember to look to the five elements listed above. Does the agreement meet all five elements? All must be satisfied for a treaty to exist. Government directives, protocols, and memoranda of understanding are all examples of state declarations that are not treaties, often because the state is not agreeing to legally bind itself to the terms of its declaration.⁷ A written agreement between states is only a treaty if it is binding under international law.

⁵ Vienna Convention on the Law of Treaties, May 23, 1969, Art. 1 [hereinafter VCLT].

⁶ Montevideo Convention on the Rights and Duties of States, Dec. 26, 1933, Art. 1.

⁷ For an example of an informal agreement, see the Memorandum of Understanding Between the Government of Iraq and the European Union on Strategic Partnership in Energy, Jan. 18, 2010. http://ec.europa.eu/energy/sites/ener/files/documents/2010_01_18_iraq_mou_en.pdf.

Through this comparison, you should also be able to see the purpose of treaties. By creating more than a mere understanding, treaties impose concrete obligations upon participating states. Becoming party to a treaty means that you accept a formal writing as law. A memorandum of understanding, by contrast, has no legal effect. So, states who are parties to a treaty can have greater confidence that the terms to which they have agreed be followed by other parties. This higher confidence promotes greater trust and cooperation between states.

One should not interpret this to mean that states always adhere to terms of treaties, however. As we will see, states have some ability to leave and modify treaties without legal repercussions. However, you should focus on a treaty's power as a legal instrument when comparing it to other types of agreements between states.

Short Exercise

1. You are the President of a hypothetical country, Urland. Urland is a country rich in precious minerals, but its rocky soil also makes it difficult to grow food for your population. Drought has come, and you desperately need to feed your people. Nearby countries have the food you need. You could trade with these countries, but you want to ensure that you are getting a fair exchange for the minerals you offer. You also want to know that any trade partners will not forfeit their promises to you. What elements do you need to have in an agreement to ensure that these countries will uphold any trade terms with you?
2. Imagine that leaders from Turkey and Romania want to work together to regulate carbon emissions. Leaders from both countries meet in Istanbul, and after a weekend of deliberations, they say on live television that each country will reduce its carbon emissions twenty percent within the next five years. The leaders state that they promise to uphold their commitment before the international community. Has a treaty been formed?

2.2 Types of Treaties

Treaties can vary greatly depending on the parties involved and the topic being addressed. Here, we want to focus on the *number* of parties to a treaty, as the number of different states that sign a treaty can affect the way a treaty operates. It is most useful to begin with the difference between **bilateral** and **multilateral** treaties.

A **bilateral treaty** is a treaty between two parties. Because only two states need to agree, states use bilateral treaties to conduct direct affairs with a foreign nation. States often use these types of

treaties to establish trade agreements and to recognize political agreement. For example, the United States and Iraq conduct bilateral trade and investment through the bilateral United States-Iraq Trade and Investment Framework Agreement (TIFA).⁸ This treaty regulates things such as taxes on the goods shipped between both countries and the requirements for investing in the other nation's businesses. India and Iraq have used a bilateral treaty to express partnership and diplomatic relations through their 1952 Treaty of Friendship.⁹

Bilateral treaties have several advantages. Generally, it is easier to make an agreement with one party than with multiple parties, so bilateral treaties often offer advantages in the ease of negotiation. For similar reasons, bilateral treaties are often easier to amend than multilateral treaties. We will discuss treaty amendment later in this section.

However, bilateral treaties also present challenges. One of the most common issues with bilateral treaties is enforcement. With only one other interested party to be accountable to, bilateral treaty parties take risks in ensuring that their obligations will be met. Members of the United Nations enjoy some protection from this risk through the Article 36 jurisdiction of the International Court of Justice, to be discussed later in this Chapter.

A **multilateral treaty**, in contrast, is a treaty signed between three or more parties. Such treaties can include agreements between states in a particular region, like the East African Community, or agreements by most or all of the states in the world created to address global issues.

Multilateral treaties are an advantageous way for states to make joint commitments to a particular issue. Consider the Treaty Establishing the Arab Maghreb Union, a North-African partnership between Morocco, Algeria, Libya, Mauritania, and Tunisia.¹⁰ These member nations entered into the treaty in order to “pursue a common policy in different domains” and to uphold beliefs such as “Arab national identity” in the midst of differing worldviews.¹¹ A multilateral treaty proved an effective way for these states to express a common stance on their views and to support one another in the face of opposition.

In comparison, the Kyoto Protocol to the United Nations Framework Convention on Climate Change, better known as the Kyoto Protocol, is an example of a global-issue multilateral treaty. The treaty has been accepted by 192 countries, meaning it is considered law in nearly every

⁸ Office of the United States Trade Representative. “United States and Iraq Hold Inaugural Trade and Investment Framework Agreement Meeting and Register Progress on Bilateral Issues.” Accessed Feb. 5, 2015. <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2014/March/US-and-Iraq-hold-inaugural-Trade-and-Investment-Framework-Agreement-Meeting>.

⁹ Treaty of Friendship Between India and Iraq, Nov. 10, 1952. <http://www.commonlii.org/in/other/treaties/INTSer/1952/12.html>.

¹⁰ Treaty Instituting the Arab Maghreb Union, Feb. 17, 1989. [hereinafter AMU] http://www.wipo.int/wipolex/en/other_treaties/text.jsp?file_id=201318.

¹¹ AMU, Arts. 2, 3.

country in the world.¹² This is important, because the treaty attempts to solve a worldwide issue—climate change—by regulating how much carbon emissions countries can release into the atmosphere. Without widespread acceptance of this treaty, certain countries could still release emissions into the atmosphere that would travel across borders and harm countries that were following the rules.

Yet multilateral treaties also present unique challenges due to their complexity. Negotiating terms of treaties with multiple parties is inherently more difficult. It requires significant coordination and time. While members to a multilateral treaty also have the benefit of more parties available to hold individual parties accountable to the terms of the agreement, enforcement also proves complex. Parties must ensure that they share a common interpretation of the terms of the treaty and appropriate means of enforcement when the terms are violated.

2.3 Treaty Formation

We will now discuss how a treaty is formed and discuss some of the challenges that can arise in this process.

Treaty formation involves four basic steps: 1) negotiation and drafting; 2) authentication and adoption; 3) expressing consent; and 4) entry into force. The VCLT provides guidance on how each step of the process works.

2.3.1 Negotiation and Drafting

First, parties must come together to negotiate, or discuss, a treaty topic. Who has the power to negotiate on behalf of a state government? VCLT Article 7 states that negotiators are determined through the “accreditation of state representatives.” This process allows only individuals with full powers to negotiate a treaty on a state’s behalf.¹³ **Full powers** means the negotiating state has given clear authorization to their representative to negotiate. A state can authorize a representative in writing, and certain government officials, such as a president or foreign affairs minister, have “full powers” as a function of their position.¹⁴ Once representatives have been identified, negotiations can begin.

Treaty negotiations vary in size and scope. The formation of a treaty can be very complex, and often many people want to have a say in creating its final terms. While creation of a bilateral treaty may only require a few meetings between small negotiating teams, creation of a

¹² United Nations. “Close to Achieving Universal Participation.” Accessed May 16, 2015. https://treaties.un.org/doc/source/events/2014/Treaties/list_global_english.pdf.

¹³ VCLT, Art. 7.

¹⁴ Ibid.

multilateral treaty may involve large assemblies who negotiate in lengthy, formalized debates. Consider that the treaty establishing the United Nations, the U.N. Charter, required more than fifty participating countries and nearly a year of negotiations.¹⁵

Alongside the verbal discussions in negotiations, drafting occurs. Drafting involves putting the tentative terms of an agreement in writing. Throughout a typical treaty formation process, negotiators from all parties look at multiple rounds of drafts and suggest changes to the language. The VCLT provides few explicit rules on drafting, so treaty parties have flexibility in deciding how they want to structure the process.

2.3.2 Adoption and Authentication

Once all parties have settled on final terms, they move to **treaty adoption**, in which parties agree on the official treaty text. VCLT Article 9 says that the standard rule for adopting a treaty is by obtaining “the consent of all the States participating in its drawing up.”¹⁶ However, if the treaty is being formed at a large international conference, the conference members can agree to adopt the treaty by a two-thirds vote of the parties present. Conference members can also vote to change the number of votes needed for this form of adoption.

To prevent misunderstandings about the treaty language, representatives from all states confirm the final words in a process known as treaty authentication. **Treaty authentication** is the process in which each party signs or initials the treaty text to establish that the text is final. VCLT Article 10 also allows states to authenticate the treaty by a different procedure, if they agree to do so. Once treaty authentication is complete, states can then bind themselves to the treaty by expressing their consent.

2.3.3 Expressing Consent

Let us look at the multiple ways in which the VCLT allows states to express their consent to a treaty.

Means of Expressing Consent to Be Bound by a Treaty: VCLT Article 11¹⁷

The consent of a State to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by another means if so agreed.

¹⁵ United Nations. “History of the United Nations.” Accessed February 6, 2015. <http://www.un.org/en/aboutun/history/>.

¹⁶ VCLT, Art. 7.

¹⁷ Ibid, Art. 11.

The VCLT goes on to specify rules for the most common forms of consent: Article 12 governs consent by **signature**, in which consent is expressed by signing the treaty at negotiations. Article 14 governs consent by **ratification**, in which a state legislature approves the state's consent to be bound. Finally, Article 15 governs consent by **accession**, in which a state that did not participate in the negotiations agrees to become party to the treaty.

It is clear from Article 11 that the VCLT encourages different forms of treaty acceptance, and more than one type of acceptance can be used. What is most important is that the parties clearly express their intent to be bound, in whatever form.

2.3.4. Entry Into Force

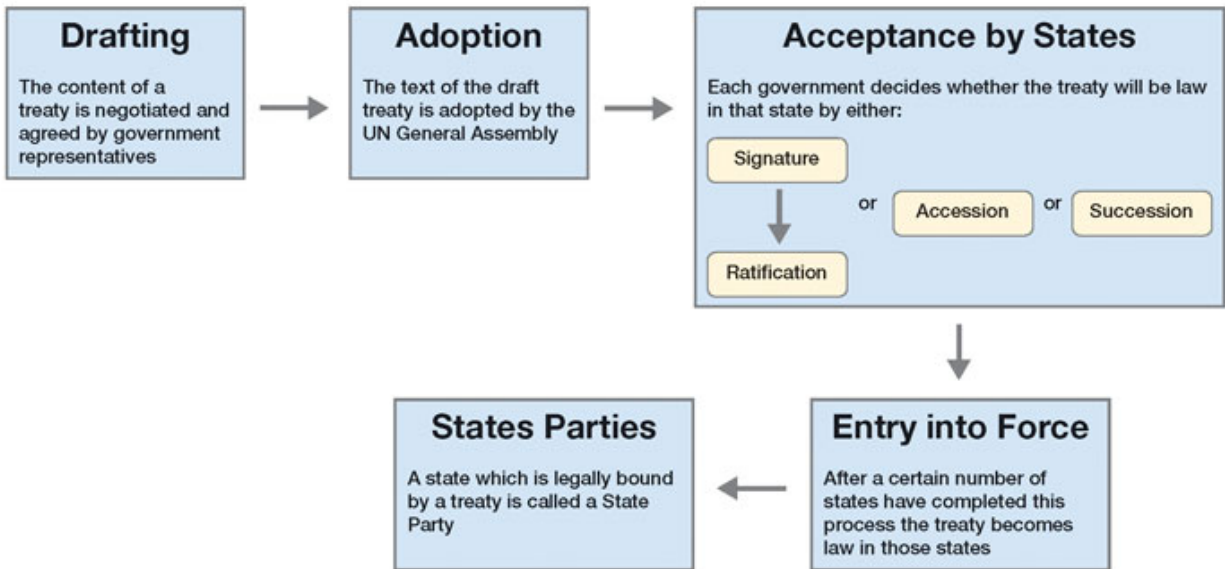
Once one party expresses its consent to be bound by a treaty's terms, the treaty still needs to take formal legal effect. This is known as the treaty's **entry into force**.¹⁸ VCLT Article 24 states that, unless the parties agree otherwise, a treaty will enter into force when "all negotiating states" have expressed their consent to be bound to the treaty's terms.¹⁹ So, just because one state has expressed its consent to be bound by a treaty, this does not mean that the treaty is in effect. That state must instead wait until all other negotiating states have also done so.

For a summary of the treaty formation material we have covered so far, look at the following diagram:

¹⁸ Ibid., Art. 24

¹⁹ Ibid.

The Treaty Process



Treaty Process Diagram, available at

https://www.minorityrightscourse.org/pluginfile.php/2856/mod_page/content/4/TreatyProcessDiagram.jpg.

2.4 Special Considerations: Reservations and Declarations

Now that you know the rules of treaty formation, it is time to learn a few exceptions to these rules. One of the most important exceptions is the ability to make reservations to a treaty. During negotiations, and at any other point up to treaty acceptance, the VCLT allows states to agree to only a *part* of the whole treaty. The parts of the treaty to which the state does not agree are a state's **reservations** to a treaty. By making reservations, a state can be a party to a treaty while at the same time choosing not to follow certain parts of the agreement.

VCLT Article 19 establishes three limits to making reservations: 1) the reservation cannot be prohibited by the terms of the treaty, 2) the reservation cannot be part of a category of objections the treaty has excluded, and 3) the reservation cannot be against the “object and purpose” of the treaty.²⁰ This third element is key; think of this as meaning that a state cannot make a reservation that goes against the spirit of the treaty. For example, consider a hypothetical climate treaty in which the first provision states that all parties endeavor to take steps to reduce harmful effects of state action on the environment. A party to this treaty would not be allowed to make a reservation on that first provision.

²⁰ VCLT, Art. 19.

In addition to reservations, parties can make declarations to a treaty. A **declaration** is a written statement formally attached to the treaty that clarifies the meaning of the treaty terms.²¹ While declarations are not themselves legally binding, they can be considered persuasive guidance for how to understand the authoritative treaty language.

2.5 Treaty Implementation

Once a treaty has entered into force, it can be considered “law” by foreign nations. However, how does a treaty member tell its citizens that this treaty should be considered binding domestic law within its own country? This is explained by the process of treaty implementation.

States can agree to **self-executing treaties**, which are treaties that are immediately incorporated into domestic law when the state consents to the treaty terms at negotiations. In contrast, states can agree to be bound only to **non-self executing treaties**, in which the state government must additionally pass domestic implementing legislation *after* negotiations have ended. For example, the Iraqi Constitution states that Iraq can only enter into non-self executing treaties. A treaty must be approved by a two-thirds majority of Iraq’s Council of Representatives before it becomes domestic governing law.²² Ultimately, whether a state chooses to adopt a self-executing theory of treaty implementation or not is its choice.

This flexibility in treaty implementation makes an unusual scenario possible. A state could sign a treaty but not ratify it, meaning that the state does not actually consider the treaty to be domestic law. Indeed, Iraq has done so on several occasions, including signing but not ratifying the 1994 Programme of Action of the International Conference on Population and Development.²³ Can you think of why a country might sign but not ratify a treaty? How would doing so be different than choosing to make reservations to a treaty before it has been accepted?

2.6 Successor State Challenges

We also want to know what happens when a state becomes dissatisfied with a treaty after it has taken legal effect. This situation can take place after a change in domestic leadership. Would a new government be bound by treaties the old government accepted on the state’s behalf?

²¹ United Nations, “Definition of key terms used in the UN Treaty Collection.” Accessed May 23, 2015. https://treaties.un.org/Pages/overview.aspx?path=overview/definition/page1_en.xml.

²² Iraqi Constitution, Article 61, Clause 4.

²³ United Nations, “United Nations Development Assistance Framework for Iraq 2011-2014.” Annex D. Accessed February 6, 2015. http://www.jauiraq.org/reports/UNDAF_May%2017_english.pdf.

Unfortunately, there is not a clear answer to this question. The two main theories of state succession with regard to treaties are (1) universal succession, and (2) the “clean slate” theory.²⁴ Under the **universal succession theory**, the successor state automatically becomes party to all of the treaties of the predecessor state and incurs all of those obligations. The **clean slate theory**, however, suggests the opposite—that new states do not incur any of the treaty obligations of the predecessor automatically, and may decide which obligations to renew.

The VCLT provides little guidance on these theories of succession. However, it does give successor states a few legal tools to modify or end their treaty obligations: treaty amendment and withdrawal.

Treaty amendment is the process by which treaty members alter the terms of a treaty that has already entered into force. VCLT Articles 40 and 41 allow members to amend treaties freely, as long as each member is given the notice and the right to participate. Unless the original treaty forbids certain changes, members may agree to amend treaties as they please.²⁵

Treaty withdrawal, also known as treaty termination, means that a treaty member ceases to recognize a treaty’s legal effect. Under VCLT Article 54, a state can withdraw from a treaty if the treaty allows for it in its terms, or if all other parties consent to the withdrawal.²⁶

Discussion Questions

1. Consider the significant change in the Iraqi government that followed the fall of Saddam Hussein. Do you believe that a universal succession theory or “clean slate” theory would be more appropriate for handling such a transition? Why? Do you think your answer should equally apply to transitions in other countries?
2. How is amending a treaty different from making reservations to a treaty?

2.7 Treaty Enforcement

We have now considered the ways in which states create, amend, and even withdraw from treaties. Yet all of these processes mean little if treaties cannot be reliably enforced. In a world without a global police authority, this presents a challenge for treaty parties.

²⁴ Matthew C.R. Craven, “The Problem of State Succession and the Identity of States under International Law,” *European Journal of International Law* 9 (1998): 142, 147. Available at <http://www.ejil.org/pdfs/9/1/1471.pdf>.

²⁵ VCLT, Arts. 40-41.

²⁶ *Ibid.*, Art. 54.

Once a treaty is accepted, the treaty parties have taken on a good faith obligation not to violate the treaty's object and purpose.²⁷ This concept is known as *pacta sunt servanda*, and it effectively means that treaty parties have made an implied agreement to be honest with each other and carry out the treaty conditions. However, states do not always behave as they say they will.

Let us consider a scenario involving the Geneva Conventions and their Additional Protocols as an example. Like the VCLT, the Geneva Conventions are multilateral treaties that are European in origin, dating to the post-World War II era. Nevertheless, they have been widely accepted around the world as establishing international commitments about the humane treatment of prisoners of war, the sick and wounded, and civilians in times of conflict.²⁸ The Additional Protocols also provide similar protections for victims of international and non-international armed conflict.²⁹

Let us say that a state at war decides to abuse these Geneva Conventions rules and commits atrocities. How can that state be punished and forced to play by the rules? In addition to thinking through this question, pay close attention to this hypothetical. You will see it again later in this Chapter.

First, the VCLT would describe the state's commission of the atrocities as a material breach of the treaty. A **material breach** is a state's unauthorized rejection of the treaty's terms, or the violation of a provision essential to the object and purpose of a treaty.³⁰ According to the VCLT, a material breach allows states affected by the breach "to invoke [it] as a ground for suspending the operation of the treaty . . . between itself and the defaulting State." However, in order for the breaching state to suffer consequences, some other state or organization must act.

2.7.1 Economic Sanctions

One way states can enforce a treaty's terms is by agreeing to impose economic sanctions on the non-compliant state. **Economic sanctions** are actions taken by one state or a group of states to suspend trade or business with another state. The intent is to harm that state's economy in order to force the state to change its policies or actions.

While some scholars praise economic sanctions as an effective way to force state compliance with treaty obligations, others indicate that sanctions can be insufficient. Professor Lisa L. Martin notes that economic sanctions against Saddam Hussein's regime in 1990 were "so

²⁷ Ibid., Art. 18.

²⁸ International Committee of the Red Cross, "The Geneva Conventions and the Additional Protocols-Basic Rules." Accessed February 6, 2015. https://www.icrc.org/eng/assets/files/other/icrc_002_0365.pdf

²⁹ Ibid.

³⁰ VCLT, Art. 60.

extensive that [his] sales of oil began to suffer immediately,” and that this use sanctions was effective in resolving the Persian Gulf crisis of the 1990s.³¹ However, Robert Pape, another political scientist, analyzed a large group of economic sanctions used throughout the twentieth century and found the “[e]vidence . . . says little . . . about whether sanctions can achieve more ambitious political goals [than mere economic harm].”³²

2.7.2 Diplomatic Pressure

States can also place political and diplomatic pressure on a violating state by choosing to withhold future agreements from that state, suspending the travel of their own citizens to the non-compliant state, and by denouncing the non-compliant state’s behavior to other nations. Although protesting a non-compliant state’s behavior provides no guarantee that the behavior will change, you should not discount the power of influence and perception within the international community. A repeated “bad actor,” such as North Korea, can be politically isolated, which can lead to serious consequences. For example, a politically isolated state might not be able to ask other states for help in a national emergency or receive assistance from other nations in a security crisis.

2.7.3 Military Measures

Lastly, states may be able to resort to military operations to enforce a treaty in extreme circumstances. We will discuss some of the ways states can do so in the rest of the Chapter.

2.8 Review

In this section, we covered the many ways in which states can create international law through treaties. You learned what a treaty is, how many states can be parties, how a treaty is formed and modified, and how it can be legally rejected. You even learned the ways in which a treaty can be enforced against parties that fail to carry out the treaty obligations to which they have agreed.

As you read the rest of the chapter, focus on how the VCLT rules help to provide clear guidance on how this part of international law works. As we continue our exploration of the material, you will find that other “rules” in the international system are not always so clearly structured.

³¹ Lisa L. Martin, “Credibility, Costs, and Institutions: Cooperation on Economic Sanctions.” *World Politics* 45 (1993): 407.

³² Robert A. Pape, “Why Economic Sanctions Do Not Work.” *International Security* 22 (1997): 93.

3. INTERNATIONAL ORGANIZATIONS: AGENTS OF INTERNATIONAL LAW

International organizations are groups of persons or states whose operation and authority are defined by both treaties and international practice. These organizations are some of the primary actors in international affairs, and they help to set and enforce many of the rules of international law.

International organizations can serve several functions. They can act as **judicial groups**, which means they interpret international law and administer justice when a dispute arises between states. They can also act as **legislative groups**, or groups who create treaties and other legal rules to help establish new international law. They can even act as **executive groups**, meaning they enforce existing international obligations, sometimes by military force. Relating to our Geneva Convention example, you can already see how some international organizations' executive functions can include enforcing treaty obligations. Now that we know the basics of how treaties work, let us see how these international organizations ensure that treaties are implemented and followed.

Our investigation will take us through several types of international organizations. To understand how to resolve violations of widely accepted international law, such as the Geneva Conventions, we will begin with intergovernmental organizations such as the UN. From there, we will work towards increasingly smaller types of international organizations, moving to regional organizations, such as the African Union, and tribunals. Lastly, we will briefly explore a unique category: international non-governmental organizations. These organizations are not created by treaty. By the end of this section, you should be able to see how we solve our question about enforcement of the Geneva Convention. You should also be able to see the way different international organizations manage different aspects of international law.

3.1 Intergovernmental Organizations: Background and Examples

The first international organizations that we will study are intergovernmental organizations. **Intergovernmental organizations** are associations between multiple states that seek to promote and maintain worldwide principles of international law.

Intergovernmental organizations as we know them are a recent phenomenon. Until the twentieth century, states pursued policy goals often on their own or through military alliances with regional partners. The Concert of Europe, an early nineteenth century security arrangement between major European powers, shows us this. Even as Concert members such as France and

Britain declared that they formed the Concert “to promote the general interest,” their aim was to avoid competition as they tried to conquer new territory for themselves.³³

This began to change with a growing “internationalist sensibility” during the early twentieth century.³⁴ In 1919, after the end of World War I, global powers in the West created the League of Nations at the Treaty of Versailles “to promote international cooperation and to achieve peace and security.”³⁵ This was one of the first truly intergovernmental organizations. Unfortunately, it failed to achieve its peaceful goals, and World War II erupted in 1939. By the end of World War II, major powers such as Great Britain, the United States, and China wanted to create a better global international organization. They created the UN, arguably the largest and most influential global international organization to date. Let us take a closer look at the UN and its main elements.

3.1.1 The United Nations

The structure of the UN follows from the **UN Charter** (the Charter), the 1945 multilateral treaty establishing the UN. Article 1 of the Charter states that the UN’s purpose is “to maintain international peace and security,” as well as to promote equal rights for all peoples and international cooperation.³⁶ While the League of Nations had a similar purpose, the UN has been more effective at upholding its aims. Perhaps this is because the UN has an extremely broad mandate and scope of powers. As of the time of this writing, 193 states are parties to the UN Charter.³⁷

The UN has a number of different departments and functions. We will focus on three of the most important: the General Assembly, the Security Council, and the International Court of Justice.

³³ Louise Richardson, “The Concert of Europe and Security Management in the Nineteenth Century,” in *Imperfect Unions: Security Institutions Over Time and Space*, ed. Helga Haftendorn et al. (New York: Oxford University Press, 1999), 48.

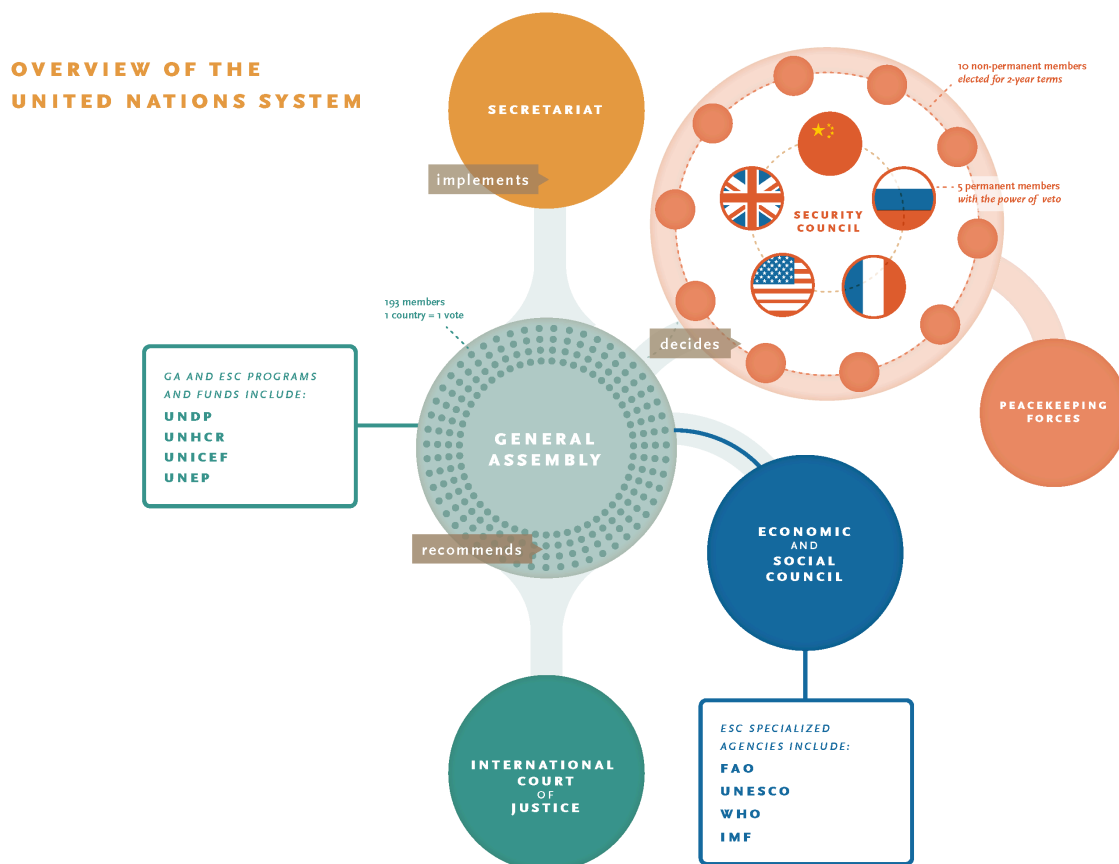
³⁴ Gideon Boas. *Public International Law: Contemporary Principles and Perspectives* (Northampton: Edward Elgar Publishing, Inc., 2012), 209.

³⁵ United Nations. “History of the United Nations.” Accessed February 6, 2015. <http://www.un.org/en/aboutun/history/>.

³⁶ Charter of the United Nations and Statute of the International Court of Justice, Art. 1, June 26, 1945 [hereinafter UN Charter].

³⁷ United Nations. “Member States.” Accessed February 6, 2015. <http://www.un.org/en/members/growth.shtml>.

Take a look at these three departments in the UN organizational chart below, and pay attention to the different role that each of these play as we explore them.



“Overview of the United Nations System,” licensed by Daniel McLaughlin (June 22, 2015).

First, Article 9 of the UN Charter establishes the **General Assembly**, which is the UN body comprised of all member nations that votes to pass recommendations on international law.³⁸ The General Assembly meets regularly every year, and additional meetings can be called by the UN Secretary-General, the Security Council, or a majority of UN members.³⁹ The General Assembly “initiate[s] studies and make recommendations” to promote a variety of goals including

³⁸ UN Charter, Art. 9.

³⁹ Ibid., Art. 20.

international cooperation, economic growth, and better worldwide health.⁴⁰ Two-thirds of the states present at the General Assembly must agree with a proposal for it to pass and each state has one vote.⁴¹ Proposals passed by the General Assembly are called **resolutions**. Because so many states participate in the UN, the General Assembly’s resolutions provide strong support for new international law norms.

Performing a somewhat different role, the **Security Council** is the UN body authorized to maintain international peace and security through all means, including the use of force.⁴² The Security Council is composed of fifteen members. Ten members are elected for two-year terms by the General Assembly. The other five, China, France, Russia, the United Kingdom, and the United States, are permanent members.⁴³

When a “threat to the peace, breach of the peace, or act of aggression” occurs, the Security Council can meet and vote on whether to take action.⁴⁴ Nine members must approve of the choice to act, also called a **Security Council resolution**.⁴⁵ Note that a Security Council Resolution is not the same as a resolution passed by the General Assembly, which you just learned about above. In the Security Council, the five permanent members each have a veto, and no Security Council resolution can pass if a state chooses to use it.⁴⁶ Under Article 25 of the Charter, all member states are bound by the decisions of the Security Council.⁴⁷

A Closer Look: No-Fly Zone, UNSCR 688

UN Security Council Resolutions have had a major impact in modern Iraqi history. The case of the 1991 Security Council Resolution highlights how powerful these resolutions can be.

Saddam Hussein’s regime had consistently persecuted Kurdish Iraqis throughout Saddam’s control of Iraq. Crimes included use of chemical weapons against Kurdish populations in the Iran-Iraq war, as well as the destruction of Kurdish villages. In the aftermath of the 1990-91 Gulf War, Iraqi forces under Saddam’s regime intensified their persecution, forcing “hundreds of thousands of Kurds” to flee Iraq.⁴⁸ The persecution drew outrage from the international community, particularly members of the UN, who decided to take action.

⁴⁰ Ibid., Art. 13.

⁴¹ Ibid., Art. 18.

⁴² Ibid., Art. 39.

⁴³ United Nations. “Security Council: Current Member.” Accessed February 11, 2015.

<http://www.un.org/en/sc/members/>.

⁴⁴ UN Charter, Art. 39.

⁴⁵ Ibid., Art. 27.

⁴⁶ Ibid.

⁴⁷ Ibid., Art. 25.

⁴⁸ Association for Diplomatic Studies and Training, “Moments in U.S. Diplomatic History.” Accessed Feb. 6, 2015. <http://adst.org/2014/06/persecution-of-the-kurds-the-documents-of-saddams-secret-police/>.

In response to the crisis, the Security Council met and in 1991 passed Resolution 688. This “condem[ed] the repression of the Iraqi civilian population,” and found that the flow of refugees “threatened international peace and security in the region.”⁴⁹ In response, the United States established a military coalition and began Operation Provide Comfort, which delivered humanitarian aid to refugees and established a no-fly zone in northern Iraq.⁵⁰ Resolution 688 demonstrated that the UN was capable of delivering real enforcement when faced with violations of international standards.

Finally, the **International Court of Justice** (ICJ) is the primary judicial body within the UN. You are already familiar with the basic structure of the ICJ, but a refresher will place this body in greater context.

The ICJ maintains fifteen judges elected to nine-year terms of office by the General Assembly and the Security Council. The ICJ has jurisdiction to hear disputes between states. These disputes may include **maritime law** claims (dealing with rights of access to oceans and claims to bodies of water), disputes over trade, or even accusations over the improper use of force. The ICJ can also give advisory opinions to legal questions submitted by the UN. **Advisory opinions** are interpretations by a court of a general issue or definition of law, not connected to a specific dispute.

Article 94 of the UN Charter states that each UN member will agree to comply with the ICJ’s decisions, and allows the Security Council to enforce non-compliance.⁵¹ Think back to our question about the Geneva Conventions at the beginning of subsection 2.7. Assuming the state committing the atrocities is a UN member, consider how this might answer the enforcement problem we discussed in our coverage of treaties. Recall that the Security Council has the ability to use force to resolve threats to the peace, breaches of the peace, or acts of aggression. Can you think of a way to enforce the Geneva Conventions without the ICJ?

For Further Consideration

Although the UN Charter aims to promote a global system of universal rights and freedoms, we should think critically about how “universal” these principles are. Knowing what you do about the history of international organizations prior to the UN, consider the thoughts of renowned Islamic scholar, Majid Khadduri.

⁴⁹ United Nations Security Council Resolution 688, Apr. 5, 1991.

⁵⁰ Daniel Haulman, “Crisis in Iraq: Operation PROVIDE COMFORT.” December 31, 1996. Accessed Feb. 6, 2015. <http://www.afhso.af.mil/shared/media/document/AFD-120823-031.pdf>.

⁵¹ UN Charter, Art. 94.

Khadduri notes that the UN principle that “the will of the people shall be the basis of the authority of the government” may conflict with Islamic principles of political justice—for example, that political authority derives from God.⁵² Similar concerns led to Saudi Arabia declining to vote on the UN’s Declaration of Human Rights in 1948.⁵³ If Saudi Arabia disagrees with this broad UN principle, can it be a UN member at all? Use your knowledge of the UN structure and treaty reservations to answer. Also, consider that your answer may change depending on whether you view this problem from the perspective of the UN or Saudi Arabia.

3.1.2 Global International Economic Organizations

The UN is not the only international organization with a global reach. Global international economic organizations also play a large role in shaping world affairs. **Global international economic organizations** provide lending and financial services to states around the world to improve their economic health. We will briefly explore three of the largest and most influential of these organizations: the World Trade Organization, the World Bank, and the International Monetary fund.

As its name suggests, the World Trade Organization (WTO) focuses on international trade matters. It was founded in 1995 as the successor to the General Agreement on Tariffs and Trade (GATT), a World War II-era free trade agreement. The WTO is a popular institution with 160 members as of 2015.⁵⁴ It is an organization for **trade opening**, the process of expanding trade to new states or markets. It is also a forum for governments to negotiate trade agreements and settle disputes. It even operates sets of trade rules to ensure fair dealings between countries. We will explore the details of the WTO’s structure in The Working Paper on International Trade, but it is important to know that this organization shapes much of the trade policy around the world. It is also known for having a highly effective trade dispute resolution system.⁵⁵ This means that when WTO members disagree over trade terms, the WTO’s judicial body tends to find swift, proper solutions for the parties.

The World Bank is also a large institution (180 members as of 2015), but it focuses more on economic growth than on free trade. Founded as part of the Bretton Woods agreement in 1944, the World Bank’s purpose is to encourage poor countries to develop by providing them with

⁵² Majid Khadduri, *The Islamic Conception of Justice* (Baltimore: Johns Hopkins University Press, 1984), 238-39.

⁵³ *Ibid.*, 238.

⁵⁴ World Trade Organization. “Understanding the WTO: Who We Are.” Accessed Feb. 11, 2015. http://www.wto.org/english/thewto_e/whatis_e/who_we_are_e.htm.

⁵⁵ Robert Z. Lawrence, “The United States and the WTO Dispute Settlement System,” *Council on Foreign Relations Special Report No. 25*, March 2007, 8.

technical assistance and funding for projects that will realize the countries' economic potential.⁵⁶ It often does this by providing long-term loans to developing countries at low interest rates in exchange for the state's agreement to implement specific economic reforms.⁵⁷ The Bank has had success in countries such as Mozambique and Lagos,⁵⁸ but its large-scale approach to reform has led to criticism of its methods.⁵⁹ Consider why or why not a developing country might take out a significant development loan from a foreign organization such as the World Bank.

Lastly, the International Monetary Fund (IMF) is also a product of the Bretton Woods agreement, but it plays a narrower role in world economics. The IMF is a **monetary institution**, which means that it helps regulate currencies and forms of payment between states. The IMF traditionally encouraged states to exchange currencies freely with each other, but in recent years it has become better known as an international **lender of last resort**.⁶⁰ In other words, states that are unable to borrow from other states in a debt crisis can still borrow from the IMF. Because of this, the IMF often makes short and medium-term loans to countries in emergencies. In contrast to the World Bank, the IMF's loans tend to have a shorter period for repayment. The IMF may place conditions upon these loans, but these conditions also tend to be less expansive than those of the World Bank.⁶¹

This section does not list every type of global international organization, but it has given you an overview of the main actors who globally influence international law. We now turn to actors who shape international law through the lens of their local worldview: regional governmental organizations.

3.2 Regional Governmental Organizations

Regional governmental organizations are groups of states seeking to protect common interests shared by others, often within a geographic area. There is no strict rule governing how large or small this area can be, and some regional governmental organizations such as OPEC focus more on a common geographic trait—such as oil—than on geographic proximity. However, these organizations share a common characteristic of promoting their specific interests first, even if they conflict with other policies of the worldwide community. The behavior of regional governmental organizations can help to form customary international law, a set of routine state

⁵⁶ International Monetary Fund, "The IMF and the World Bank: How Do They Differ?" Accessed Feb. 12, 2015. <https://www.imf.org/external/pubs/ft/exrp/differ/differ.htm>.

⁵⁷ Ibid.

⁵⁸ The World Bank, "African Successes." Accessed Feb. 12, 2015. <http://blogs.worldbank.org/african/african-successes-listing-the-success-stories>.

⁵⁹ William Easterly, "A Modest Proposal," *The Washington Post*, March 13, 2005, accessed Feb. 6, 2015. <http://www.washingtonpost.com/wp-dyn/articles/A25562-2005Mar10.html>.

⁶⁰ International Monetary Fund, "The IMF and the World Bank: How Do They Differ?" Accessed Feb. 12, 2015. <https://www.imf.org/external/pubs/ft/exrp/differ/differ.htm>.

⁶¹ Ibid.

practices so common that they acquire the force of law. We will discover the role of custom later in this Chapter.

One purpose of regional governmental organizations is to enhance a region's political, economic, or security power. We can see this clearly in statements such as that of OPEC, the Organization of the Petroleum Exporting Countries. Its founding statute states that “[n]o country may be admitted to . . . Membership which does not fundamentally have interests and aims similar to those of Member Countries.”⁶² OPEC is a group of oil exporting nations that coordinate to regulate world oil prices and ensure their political leverage in global affairs. While OPEC maintains members both in the Middle East (Iraq) and South America (Venezuela), it is best considered a regional governmental organization due to its focus on a specific common interest: oil regulation.

However, regional governmental organizations can also enforce regional identities, separate from political or economic viewpoints. Consider the Arab League. As a union of various Middle-Eastern and North African states, the Arab League collaborates on policies to safeguard the sovereignty of the regions' members.⁶³ Yet the Arab League also promotes “in a general way the affairs and interests of the Arab countries” and dedicates attention to “[c]ultural affairs,” including the influence of the Arabic language.⁶⁴ Similar clauses can be found in other prominent regional organizations such as the African Union,⁶⁵ the Council of Europe,⁶⁶ and the Association of Southeast Asian Nations (ASEAN).⁶⁷ ASEAN even uses “One Vision, One Identity, One Community” as its motto.⁶⁸

Like intergovernmental organizations, states enter into regional governmental organizations through the acceptance of a founding multilateral treaty. Also, just as the UN performs a variety of roles, many regional organizations exercise multiple responsibilities. These regional organizations even provide for their own security, so long as they do not violate UN principles on the use of force. In a famous example, the regional Organization of American States (OAS) authorized a blockade around Cuba during the 1962 Cuban Missile Crisis, which helped prevent escalation to war between the United States and the Soviet Union.⁶⁹

⁶² Organization of the Petroleum Exporting Countries Statute, Art. 7(D), 2012 [hereinafter OPEC Statute].

⁶³ The Charter of the Arab League, Art. 2, March 22, 1945 [hereinafter Arab League Charter]; Cris E. Toffolo, *The Arab League*, (New York: Infobase, 2008), 7; Charles Tripp, “Regional Organizations in the Arab Middle East,” in *World Politics*, ed. Louise Fawcett and Andrew Hurrell (Oxford: Oxford University Press, 1995), 283-308.

⁶⁴ *Ibid.*

⁶⁵ Constitutive Act of the African Union, Art. 3(j), July 11, 2000.

⁶⁶ Statute of the Council of Europe, Art. 1, May 5, 1949.

⁶⁷ The ASEAN Charter, Art. 1(2), November 20, 2007.

⁶⁸ *Ibid.*, Art. 36.

⁶⁹ James Lindsay, “TWE Remembers: The OAS Endorses a Quarantine of Cuba (Cuban Missile Crisis, Day Eight),” *The Water's Edge*, October 23, 2012. <http://blogs.cfr.org/lindsay/2012/10/23/twe-remembers-the-oas-endorses-a-quarantine-of-cuba-cuban-missile-crisis-day-eight/>.

Discussion Question

1. On March 29, 2015 the Arab League announced a plan to create a regional security force comprised of military units from its member nations. The purpose of this regional army is “to counter extremism and political instability across the Middle East.”⁷⁰ As we have already seen with UN Security Council Resolution 688, the UN also has the ability to provide military force to the region. Why might Arab League nations prefer to use a regional force? What challenges does this regional force bring to Arab League nations compared to a UN security force?

3.3 Tribunals

Many tribunals fall into the category of international organizations. **Tribunals**, such as the International Criminal Tribunal for Yugoslavia, are special courts established to hear international crimes. The Working Paper on International Criminal Law discusses the elements of these tribunals in great detail.

3.4 International Non-Governmental Organizations

Finally, some international organizations are not made up of states at all. This is the defining characteristic of **international non-governmental organizations**, sometimes referred to by the acronym, INGOs. These organizations are non-profit citizens’ groups—sometimes internationally organized—that are designed to address international issues. INGOs are not directed by any government; their members come from **civil society**, or a collection of citizens organized around an issue. INGOs perform a variety of service and humanitarian functions, bring citizen concerns to governments, advocate and monitor policies, and encourage political participation through provision of information. Examples of international non-governmental organizations include Greenpeace, which advocates for worldwide environmental regulations, Human Rights Watch, concerned with monitoring human rights violations, and the International Committee of the Red Cross, which promotes humanitarian standards in conflicts.

A key difference to note here is that international non-governmental organizations are not created by treaty. You should remember that only states can enter into treaties. Thus, a group such as Greenpeace will never become a member of the UN, or create a legally binding treaty

⁷⁰ Rory Jones & Tamer El-Ghobasy, “Arab League Agrees to Create Joint Military Force,” *Wall Street Journal*, October 7, 2014, accessed May 16, 2015, <http://www.wsj.com/articles/arab-league-agrees-to-create-joint-military-force-1427632123>.

with a specific state. Keep in mind, however, that these groups may visit with governmental organizations and lobby for change.

In this section, we learned about international organizations at a number of levels. These organizations can range from a global alliance of states to groups with no state participation at all. We also saw the various advantages and drawbacks that size and scope can mean for an international organization. With this background, we can now understand how repeated action by these players creates rules with the force of law. This legal effect comes from custom.

4. INTERNATIONAL CUSTOM: CREATING INTERNATIONAL LAW

This section looks at the way in which repeated state practice establishes customary norms that become international law. While these norms are not written, they play a very important role and form the basis of what becomes written law. We will explore the way that treaties and organizations interact with customary international law shortly.

We will explore customary international law by first looking at its basic elements: state practice and the principle of *opinio juris*. We will then progress to the relationship between states, treaties, organizations, and international custom. Our investigation will also include the ways in which states can try to avoid customary international obligations. Our goal is to complete this section knowing how customary international law is created, why it provides legal effect in international law, and how states can use it for their interests.

4.1 History and Elements of Customary International Law

Customary law is the oldest source of international law and all law generally.⁷¹ As far back as states have existed, their repeated practices have established rules for nations and their populations. The modern notion of customary international law is known as *jus gentium*, or the natural law among nations.⁷² This idea of a natural law developed from the Roman Empire's dealing with foreigners thousands of years ago.⁷³ From that point, customary law grew alongside the development of nation states by recognizing the legitimate expectations created by other states' consistent conduct.

Article 38 of the International Court of Justice defines **customary international law** as “evidence of a general practice accepted as law.”⁷⁴ There are two central elements required to

⁷¹ Gideon Boas. *Public International Law: Contemporary Principles and Perspectives* (Northampton: Edward Elgar Publishing, Inc., 2012), 73.

⁷² Ibid.

⁷³ Ibid.

⁷⁴ Statute of the International Court of Justice, Art. 38., June 26, 1945.

create customary international law: state practice, and *opinio juris*. We will explore each part in detail.

State practice means the routine performance by a state of a certain action. You can see how a certain principle would be unlikely to become an international law if no states ever practiced that principle. The idea is that, for a principle to become international law, it must enjoy a “consistency and generality of practice.”⁷⁵ There is no clear definition of what these terms mean. Generally, however, “substantial uniformity” is required, which means most states, if not all, perform the same practice. How long this practice has existed may also be a factor in whether it should be customary international law, but no particular duration is required.⁷⁶

Opinio juris is a term for a sense of legal obligation, as opposed to a sense courtesy, fairness of morality.⁷⁷ Many people struggle to understand this term. Put another way, *opinio juris* means a state feels obligated to do something a certain way. A practice that a state only considers polite cannot contain *opinio juris* and thus cannot form customary international law.

An example may help to explain the difference. Imagine South Africa always hosts foreign diplomats by buying their meals for them in South Africa. This practice has taken place for over fifty years, and, in fact, most other nations treat foreign diplomats similarly. However, while this is example of custom, or state practice, there is no evidence of *opinio juris*. South Africa does not feel obligated to treat foreign diplomats this way; it just thinks it is proper. Therefore, while we have evidence of state practice of this hospitality, we lack evidence of *opinio juris*. So, this norm is not customary international law. It cannot be enforced against a party who chooses not to treat diplomats this way.

Before moving on, it is important to clearly understand this difference between mere custom and customary international law. This exercise will test your knowledge of the principles.

Short Exercise

1. In the following examples, state whether the practice at issue is custom, customary international law, or neither. Explain your decision.

a. The United States and Japan have agreed to refrain from using certain types of nets for Tuna fishing. After both countries discovered that these nets often trap and kill dolphins

⁷⁵ Ian Brownlie, *Principles of Public International Law: Sixth Edition*, (New York: Oxford University Press, 2003), 7.

⁷⁶ *Ibid.*

⁷⁷ *Ibid.*, at 8.

unintentionally, the countries banned use of the nets and threatened to bring any violations of this agreement before the ICJ. The countries have enforced this ban since 1970.

b. Turkey offers free food and shelter to women and children fleeing the crisis in Syria, stating that such policy is the “humane thing to do.”

c. Sweden agrees to allow visitors to stay in the country for thirty days without a visa. The practice is common among many other nations who do not believe in spending resources on tracking people in the country for only a short period.

d. The UN agrees to a new proposal, the “Responsibility to Protect.” This General Assembly resolution suggests that states should be able to use force in another country, unprompted, to prevent a humanitarian crisis.

4.2 How Customary International Law, Treaties, and Organizations Interact

Think back to our definition of customary international law. Recall that we must have both state practice and *opinio juris* for customary international law to exist. You may wonder what this means since much of this chapter has focused on the ways treaties and international organizations impact international law. The answer is that these other elements help to create evidence for customary international law. So, treaties and agreements from international organizations are signals of the state practices and *opinio juris* that create rules with the force of law. Treaties and organizations can mutually reinforce principles of customary international law, or they can challenge practices and prevent them from acquiring legal effect.

We can summarize all of this interaction through Article 38 of the Statute of the International Court of Justice. Article 38 summarizes the hierarchy of the sources of international law.

The Sources of International Law: A Refresher⁷⁸

1. The [ICJ], 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;

⁷⁸ Statute of the International Court of Justice, Art. 38., June 26, 1945.

- c. the general principles of law recognized by civilized nations;
- d. 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.

4.3 Persistent Objectors

Note that not every state may wish to follow a certain customary international law. Options for these states are limited; the point of a law, after all, is that it is binding on a state. However, persistent objectors may be able to escape these obligations. **Persistent objectors** are states that clearly and consistently opt out of a custom during its formation.⁷⁹ To escape customary obligations, the state must give clear evidence of objection to the new rule, and it must object before the rule becomes international law. Otherwise, the rule binds the state, whether it likes it or not.

In practice, persistent objectors face unique challenges. If they successfully object to a customary international law, they will not be able to enforce any different version of the rule they might have preferred. Even worse, because they have objected to the customary international law, they cannot enforce that law, even when it works in their favor. Being a persistent objector thus brings few benefits apart from not having to follow a particular rule.

4.4 Jus Cogens

We just discussed a narrow exception in which states can avoid the obligations of customary international laws. However, a few customs are so widely accepted that they are considered too fundamental to allow any objection. These are called *jus cogens* norms, which the VCLT defines as “a norm from which no derogation is permitted.”⁸⁰ **Derogation** is a term for non-compliance. Therefore, any state that violates these norms will have violated international law and may face suit in an international court, such as the ICJ. You can think of *jus cogens* norms as a kind of “super” customary international law. Examples of *jus cogens* norms include prohibitions on genocide, crimes against humanity, slavery, and human trafficking.

5. ADDITIONAL SOURCES OF INTERNATIONAL LAW

⁷⁹ Ian Brownlie, *Principles of Public International Law: Sixth Edition*, (New York: Oxford University Press, 2003), 11.

⁸⁰ VCLT, Art. 53.

Our coverage of custom has now given us the most important keys to seeing how international law operates. We understand how treaties, international organizations, and custom work together in the international system. However, jurists also pay attention to a few less recognized sources of international law when deciding international cases. We will briefly note these sources: the general principles of law recognized by civilized nations, and the opinions of jurists and scholars. Think of these materials as additional sources of international law that can be built upon our foundations of treaty, organization, and custom.

5.1 General Principles of Law Recognized by the International Court of Justice

Article 38 of the Statute of the International Court of Justice establishes the “general principles of law recognized by civilized nations” as a source of international law.⁸¹ Note that the term “civilized nations” reveals some of the biases of the ICJ and its Western-centric UN background.

The framers of the Statute had “no definite consensus on the precise significance of the phrase [general principles of law],” but most tribunals now consider it to be a type of customary international law based on states’ domestic behavior.⁸² This practice is rarely used as the main source for a new custom, but it can complement developing norms that states are practicing in their external interactions with other states. For example, the 1949 *Corfu Channel* ICJ case used domestic coastal patrolling as “indirect evidence” to find liability in a sea-accident dispute between the United Kingdom and Albania.⁸³

In *Corfu Channel*, a British ship accidentally struck a mine in Albanian waters and it exploded, killing British servicemen. Albania denied fault for the explosion, yet the ICJ used evidence of Albania’s “jealous watch on its territorial waters,” including the periodic “use of force” against other British ships to conclude that Albania was liable for damages.⁸⁴

5.2 Opinions by Jurists and Scholars

Additionally, decisions by judges and academic writings are occasionally used as persuasive guidance on international law. It is important to note that international judicial decisions do not carry **precedent**, in which one judicial decision requires future judges to rule the same way on the same issue. Article 59 of the Statute of the International Court of Justice summarizes the lack of precedent for international judicial decisions as follows: “The decision of the Court has no binding force except between the parties and in respect of that particular case.”⁸⁵ This means that

⁸¹ Statute of the International Court of Justice, Art. 38., June 26, 1945.

⁸² Ian Brownlie, *Principles of Public International Law: Sixth Edition*, (New York: Oxford University Press, 2003), 16.

⁸³ Reports of the International Court of Justice, 18. 1949.

⁸⁴ Reports of the International Court of Justice, 19. 1949.

⁸⁵ Statute of the International Court of Justice, Art. 59., June 26, 1945.

judicial decisions do not create express rules about how certain actions should be treated by international law. Nevertheless, states seeking to create a new norm of international law may look to these decisions and teachings to add academic support for their viewpoint.

A prominent Islamic scholar, Dr. Sheikh Wahbeh al-Zuhili's work on international law highlights the ways that jurists and scholars can influence state practice and perception. Dr. al-Zuhili has provided scholarship on the relationship between Islamic law (fiqh) and existing principles of international law. Dr. al-Zuhili has explicitly demonstrated how Islamic law (Sharia) reinforces treaty principles that other nations do not believe come from God. For example, as states all around the world recognize *pacta sunt servanda*, Dr. al-Zuhili provides an Islamic basis for this principle: "Many Qur'anic verses made the fulfilment of covenants, contractual obligations or promises mandatory."⁸⁶ His writings have helped Islamic nations reconcile principles of international law with non-Islamic or secular states.⁸⁷

6. CASE STUDY: PROTOSTAN

With everything we have covered, it is time to test our knowledge of the elements of international law. You have learned about all of the tools used to create these rules: treaties, organizations, customs, and even persuasive scholarship. Refer back to these materials in the chapter to assist you as we examine how all of these work together in a hypothetical case study.

Exercise: The Case of Protostan

The country of Protostan is at a critical point in its development. This vibrant nation is deciding how to best secure its economic and political interests. Protostan has a large population of 200 million people, but it is a landlocked country with a small amount of territory. As a result, it must depend on trade partners to help local businesses thrive.

Protostan is a heavy oil exporter. In fact, ninety percent of all goods it sells to other nations are oil and petroleum products. This sometimes creates tension between Protostan and the UN environmental committees to which Protostan is a member.

Protostan is also the leader of a regional economic and security organization known as OORC. Protostan signed a treaty that created OORC with five other nations just three years ago. Protostan's former president helped create this organization to protect the country's economic interests. However, in the treaty, he agreed to send fifty percent of Protostan's oil exports only to

⁸⁶ Sheik Wahbeh al-Zuhili, "Islam and International Law," *International Review of the Red Cross* 87 (2005): 275.

⁸⁷ For further writings on this topic, please see Andreas Muller and Marie-Luisa Frick, *Islam and International Law: Engaging Self-Centrism from a Plurality of Perspectives* (Leiden: Koninklijke BV, 2013): 34.

OORC countries. This has led to protests and media criticism from some Protostan citizens who believe the country could do better business elsewhere.

Other business options exist. Specifically, Protostan is a bilateral partner via trade treaty with Growgaria, an energy-hungry importer aggressively pursuing additional trade treaties that would be very favorable to Protostan. However, some terms for these proposed treaties include de-regulation of the industry. Environmentalists loathe such treaties, as they allow for much pollution.

Finally, there have been tensions between Protostan, its regional OORC partner Mephestor, and the rest of OORC. Protostan and Mephestor share a strong trade relationship, but OORC tensions have flared over Mephestor's refusal to apologize for using slave labor in a controversial building project 100 years ago. Protostan continues to support Mephestor's position.

Questions

You have just been recently elected as the President of Protostan.

1. What are your country's legal commitments to all of the parties involved? Identify these.
2. Growgaria can offer you greater economic return, but OORC is more than simply an economic partnership. OORC also provides security to its members. Would you sign a treaty with Growgaria to send sixty percent of Protostan's exports to Growgaria? What might be the drawbacks to OORC, and does Protostan have other legal commitments to be concerned about with de-regulation of its oil industry?
3. If you continue to stand with Mephestor on its controversial building project, what international legal backlash might you face? What sources of international law could you look to, if any, to defend your position?

Complete these questions before moving on to the next material.

Hopefully, the Protostan hypothetical gives you a sense of the complexity surrounding decisions about treaties, international organization membership, and adherence to public international law. As you can see, there are many separate interests involved when making these international decisions. Making the right decision is therefore difficult and may depend on whose perspective you are considering.

Protostan's problems are not merely hypothetical. In fact, many nations face similar choices in international law today. Nigeria, for example, is a heavy oil exporter whose increasing trade with

China is leading to controversy with ECOWAS, an African regional organization that Nigeria helps lead.⁸⁸ Historically, ECOWAS nations have traded with Western and Middle Eastern countries, so Nigeria's shifting preference to China is causing tensions in established relationships. Azerbaijan deals with challenges similar to those Protostan has with Mephestor. Azerbaijan exports oil and belongs to a number of international organizations, but its close trade relationship with Turkey is controversial; Turkey refuses to recognize its role in an Armenian genocide many states consider a violation of a *jus cogens* norm.⁸⁹ Finally, Canada provides a case in which an oil trade agreement with the EU, called CETA, threatens de-regulation of its oil industry.⁹⁰ This policy contradicts Canada's other positions on promotion of a clean environment.

Thus, the problems presented by international law are real. States must balance their own interests against those of the international community. Knowledge of the tools of international law allows them to manage these complicated decisions.

7. CONCLUSION

As we have seen, international law is a complex body of study with many elements. States have a large number of options at their disposal when they act internationally. At the same time, states can have obligations to multiple states and organizations, and those obligations do not even need to be written into a formal agreement.

This chapter has covered the foundational tools used to shape international law: treaties, organizations, customs, and scholarship. The state of international law remains in flux. While the UN system governs many formal agreements and rules in modern international law, this system is little more than fifty years old. It is important to remember that there will always be challenges to the fundamental question of how states ensure cooperation with each other in a world without a "global" police authority. The success of these various elements of international law in part depends on its participants' support of its value.

At the same time, the rules of international law exert real power over states' actions. Iraq's experience with UN Security Council Resolution 688 provides an example. Without this ability

⁸⁸ Femi Aribisala, "ECOWAS Imperative for Nigeria." Accessed Feb. 12, 2015. <http://www.nigeriadevelopmentandfinanceforum.org/PolicyDialogue/Dialogue.aspx?Edition=63>; Michigan State University, "ECOWAS: History." Accessed Feb. 12, 2015. <http://globaledge.msu.edu/trade-blocs/ecowas/history>; Organisation for Economic Co-operation and Development, "China and Nigeria: A Powerful South-South Alliance," *West African Challenges* 5 (2011): 3.

⁸⁹ Jack Farchy, "Azerbaijan and Turkey Ties Bolstered by Energy and Political Solidarity," *Financial Times*, September 21, 2014, accessed February 12, 2015, <http://www.ft.com/cms/s/0/b11e1bec-10fa-11e4-b116-00144feabdc0.html#axzz3Kr5giYVU>.

⁹⁰ Murray Dobbin, "Why New Euro-Canada Treaty Is a Gift to Oil Firms," *The Tyee*, October 6, 2014, accessed February 12, 2015. <http://thetyee.ca/Opinion/2014/10/06/Canadian-Treaty-Gift-to-Oil-Firms/>.

to ensure some political stability, many states would refuse to conduct trade or enter into relations with other nations. Think about how these tools provide the basis for international agreement as you move into further areas of international law, including the private sphere.

GLOSSARY

Accession – an act in which a state that was not a party to the negotiations of a treaty agrees to become a party to the treaty. This occurs after the treaty's entry into force.

Advisory opinions - interpretations by a court of a general issue or definition of law not connected to a specific dispute.

Bilateral treaty - a treaty between only two parties.

Civil society – a community of citizens organized around a particular issue or policy.

Clean slate theory – a theory of treaty interpretation in which successor states do not incur any of the treaty obligations of the predecessor automatically and may decide which obligations to renew.

Customary international law - evidence of a general practice accepted as legally binding on a state.

Derogation – non-compliance, usually with a rule or norm.

Declaration – a non-binding statement that is annexed to a treaty with the goal of interpreting or explaining its provisions.

Full powers - a document granting a state representative his or her authority to bind the state to a treaty.

Global international economic organizations –associations, made up of states, which provide lending and financial services to other states around the world to improve their economic health.

Economic sanctions - actions taken by one state or a group of states to suspend trade or business with another state in order to harm their economy. They are used as a tool to change that state's behavior.

Entry into force - the process in which a treaty gains authority as law in a member states' domestic affairs.

Executive groups – groups or organizations that enforce and carry out existing international obligations, sometimes by use of military force.

General Assembly - the UN body, comprised of all member nations, that votes to pass recommendations on international law.

Intergovernmental organizations – formal associations between multiple states which seek to promote and maintain uniform principles of international law.

International non-governmental organizations – international organizations comprised of persons or companies who perform work on specific issues of international law. These are not created by treaty.

International organizations - groups of persons or states whose operation and authority are defined by both treaties and international practice.

Judicial groups – organizations which interpret the international law and administer justice when a dispute arises.

Jus cogens -a norm from which no derogation, or non-compliance, is permitted.

Legal instruments - writings or other expressions of intent used to create an agreement with the force of law.

Legislative groups, - groups who create treaties and other legal rules which help establish new international law.

Lender of last resort – term for a financial institution that loans money to a needy party when no other party will.

Maritime law - a unique body of law addressing rights of access to oceans and claims to bodies of water.

Monetary institution – an institution that helps regulate currency flows and forms of payment between states.

Non-self executing treaty - a treaty in which the state government must pass implementing legislation to give that treaty legal effect.

Opinio juris - a sense of legal obligation, as opposed to a sense courtesy, fairness, or morality.

Pacta sunt servanda – the principle that every treaty in force is binding upon the parties to it and must be performed by them in good faith.

Precedent - a judicial decision that requires the same court to rule the same way on the same issue should it arise again in the future.

Public international law – the body of rules and customs that govern the behavior of states.

Ratification – the acceptance of a treaty as having the force of domestic law through a vote of the state legislature.

Regional governmental organizations - groups of states which seek to protect a common interest shared by others within a geographic area.

Reservation – a unilateral statement, made by a state when signing, ratifying, accepting, or acceding to a treaty, where it seeks to exclude the legal effect of certain provisions of the treaty.

Resolution – a recommendation passed by the UN General Assembly.

Security Council - an executive UN body, comprised of fifteen members, authorized to maintain international peace and security through all means, including the use of force. It meets to determine when breaches of the peace or acts of aggression have occurred. Its decisions, or resolutions, are binding on UN members.

Security Council resolution - a declaration or action determined by a vote of the Security Council. Each of the five permanent Security Council members may veto a Security Council resolution and prevent it from taking effect.

Self-executing treaty – a treaty that becomes judicially enforceable upon acceptance or other expression of a state's consent to be bound to the treaty.

Shuttle diplomacy - where an independent negotiator travels between different states and suggests forms of compromise in the treaty-making process.

Signature – a way in which a state consents to be bound by the terms of a treaty through signing it at the treaty negotiations.

State – a defined population, living in a defined territory, under a single government with exclusive authority.

State practice - the routine performance by a state of a certain action.

Sovereignty - the capacity to exercise supreme authority within a territory.

Trade opening - the process of expanding trade to new states or markets.

Treaty – written agreement between states governed by international law

Treaty adoption – where all treaty parties choose to agree on the final treaty text.

Treaty amendment -the process in which treaty members alter the terms of a treaty that has already entered into force.

Treaty authentication – where representatives from treaty parties confirm the treaty's final language. This step prepares the parties for treaty adoption.

Treaty withdrawal – when a treaty member formally ceases to recognize a treaty's legal effect, either by the provisions of the treaty, or with the other members' consent.

UN Charter – a 1945 multilateral treaty, signed in San Francisco by over fifty states, establishing the UN.

Universal succession theory – a theory of treaty interpretation in which a successor state automatically becomes party to all of the treaties of the predecessor state and incurs all of those obligations.