高级法律英语选读

国际法学

杨 亮 编注
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出版前言

近年来，各高等院校的法学院系竞相重视法律英语的教学，以期培养法学专业的学生阅读法学原著的能力。与之相应，已有各种版本的法律英语教材面世。其特点是集理论法学与各部门法学于一书，为不同部门法专业的读者学习各种专业词汇和知识提供了方便之道。

我社出版的这套“高级法律英语选读”丛书，分法理学、宪法与行政法学、刑法学、民商法学、国际法学五种。其专业特点显而易见。丛书选材既体现法学发展的历史轨迹，又注意吸收当代法学研究的最新成果；既有理论探讨，又有实证分析。在此基础上，各个专业内容相互交融，既自成体系，又浑然一体。选材时，尽可能涵盖本专业各方面的内容，以扩大读者的专业词汇和知识面。非但如此，书中所选内容，多是各专业的精品，因而具有较高的学术价值，是各专业研究生及相关专业研究者不可多得的参考资料。由于英文学术原作大都篇幅宏巨，在选编时，囿于篇幅所限，不得不忍痛割爱，仅择其精华。是故，可能会给读者留下内容不完整的印象，是为遗憾之事，亦敬请读者原谅。

这套读物的问世，端赖各位编著者鼎力相助，戚渊博士参与了创意、选材、组织的全过程，在此表示感谢。

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UNIT 1

The Sources of International Law[①]

国际法的渊源

Gerland von Glahn

1 A common difficulty experienced by both students and judges has been the determination or location of the specific rule of international law that would apply to a given dispute between two countries. If a law code were founded on an international scale, the problem would at most be minimal: a clear-cut listing of all existing rules, exceptions to rules, and variations in national interpretations would enable an inquirer to locate with relative ease the article or paragraph relevant to the case at hand. Unfortunately no such code exists as yet, despite numerous private attempts, often of great value, to compile codes of law on specific subjects within the general sphere and despite the commendable, frequently successful efforts of the International Law Commission of the United Nations[②].

2 How, then, are the rules of international law determined or, more to the point at this stage of the coverage of the subject, what are the sources of international law rules and principles? General agreement ap-

pears to have been reached, and is contained in Article 38 of the Statute of the International Court of Justice, that there are three major sources of international law, as well as two subsidiary means for determining of the rules of that law. It is in these sources and means that one can verify the existence and the meaning of the rules of law of nations.

3 Article 38 of the Statute directs the Court to apply: (1) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; (2) international custom, as evidence of a general practice accepted as law; (3) the general principles of law recognized by civilized nations; and (4) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists (writers) of various nations as subsidiary means for the determination of rules of law[3]. We now shall examine the nature and characteristics of these sources.

International Treaties

4 In contrast with the commentaries of a hundred years ago, *treaties* are now generally accepted as a major (and by some as *the* major) source of international law. One must beware, however, of taking such a statement too literally. Obviously the bulk of the thousands of treaties concluded among nations does not create one single general rule of international law. A commercial treaty between Guatemala and France or an extradition or consular treaty between the United States and Sri Lanka cannot create any rule of conduct for the community of nations. At best such instruments are declaratory of existing rules.

5 LAW-MAKING TREATY[4] There is one type of treaty, however, that can be regarded as a source of international law: the so-called law-making treaty, concluded among a number of countries acting in their joint interest, intended to create a new rule, and adhered to later by other

states, either through formal action in accordance with the provisions of the treaty or by tacit acquiescence in and observance of the new rule. A law-making treaty, then, is an instrument through which a substantial number of states declare their understanding of what is a particular rule of law; by which new general rules for the future conduct of the ratifying or adhering states are laid down; by which some existing customary or conventional rule of law is abolished, modified, or codified; or by which some new international agency is created. It is this kind of treaty through which *conventional* international law is created.

6 In view of the sovereign nature of the modern state, such a treaty is obligatory originally only on those states that signed and ratified it. If the initial number of ratifying states is small, the treaty does not create a new rule of general international law but, at best, only a rule of particular or regional application. As acquiescence in the new rule, formal ratification of it, or adherence to it by additional states increases and as the majority of all states finally accepts the new rule, a new principle or a new interpretation of an old rule becomes a part of general international law. States that specifically refuse to acquiesce in the new rule or that refuse to ratify the treaty or to adhere to it are, of course, not normally bound by the rule, principle, or interpretation in question.

7 The past 150 years have seen the conclusion of a great number of true law-making treaties. Among the outstanding instruments of this type have been the Declaration of Paris of 1856 (privateering, rights of neutrals in naval war), the Geneva Red Cross Convention of 1864, the Universal Postal Union Convention of 1874, the Hague Conventions of 1899 and 1907, the Covenant of the League of Nations, the Charter of the United Nations, the Geneva Conventions of 1949 (regulation of certain aspects of war, including prisoners of war and belligerent occupation), and the agreements on the Law of the Sea, in Geneva in 1958,

the 1961 Vienna Convention on Diplomatic Privileges and Immunities, and others[5].

International Custom[6]

8 Custom represents a second source of international law. In contrast with the normal meaning of the term—that is, the description of a habit—a legal custom represents a usage with a definite obligation attached to it. In other words, failing to follow a legal custom entails the possibility of punishment, sanctions, or retaliation; it means, therefore, state responsibility toward other nations.

9 The presence of customary international law is evident from the existence of an extensive body of detailed rules that comprised the bulk of accepted general international law until shortly after the end of the nineteenth century. Into this sphere of the law fall most of the rules governing such diverse areas as jurisdiction over territory, freedom of the high seas, the privileges and immunities of states, and the rights of aliens.

10 Some of the rules in question originated through the practices of a few states—practices that were adopted by others because of their usefulness, until at last general acceptance resulted in new rules of law entailing definite legal obligations. In other instances, a custom resulted from the existence of a single nation in some part of the Western world that adopted a given practice toward another in relation to some matter; eventually, other countries accepted that policy or practice without challenge or protest, and when the overwhelming number of states concerned about the subject matter assented, a new rule of law had been created, again as a legal obligation.

11 In all instances a legal custom has come into being when it can be demonstrated that states act or fail to act in a certain way because a

sense of legally binding obligation has developed. Or, as described in Article 38 of the Statute of the International Court of Justice, "international custom is evidence of a general practice accepted as law," with no requirement of universal acceptance.

Comity

12 Reports on international events occasionally refer to "rules of comity" (French: *courteoisie*). An example is the practice of a sending state to refrain from publishing the text of a diplomatic note prior to its receipt by the receiving state. Comity represents modes of state behavior that do not involve a binding or legal obligation. If such an obligation existed, the rule in question would be one not of comity but of either customary or conventional law.

13 A rule may, of course, shift from one sphere to another. For example, the salute expressed through the "dipping" of the flag by one warship to another representing a friendly foreign nation on the high seas formerly represented a rule of customary international law; today the practice is viewed merely as part of international comity. On the other hand, a rule of comity may by treaty become a part of conventional law or may evolve into a component of customary law. The essential determinant in all cases, however, is the existence or the absence of a legally binding obligation.

14 A violation of a rule of comity can be viewed at most as an unfriendly act, with no claims to reparation attached, in contrast with a violation of a rule of customary or conventional law. In the latter case, at the minimum, an apology or reparation of some sort will be demanded for the international offense incurred.

General Principles of Law

15 General principles of law form the third source of international

law. The meaning of "general principles of law recognized by civilized nations" has been the subject of extensive discussion. Two major opinions prevail: one holds that the phrase embraces such general principles as pervade domestic jurisprudence and can be applied to international legal questions. Such principles might include the concept that both sides in a dispute should have a fair hearing, that no one should sit in judgment on his own case, and so on. The other view asserts that the phrase refers to general principles of law linked to natural law as interpreted during recent centuries in the Western world, that is, the transformation of broad universal principles of a law applicable to all of mankind into specific rules of international law. It must be assumed, however, that from a legal point of view, the law of nature represents at best a vague and ill-defined source of international law. Most modern writers appear to regard general principles of law as a secondary source of international law, infrequently used in practice but possibly helpful on occasion.

16 When this source of the law was written into the Statute of the Permanent Court of International Justice, the 1920 Committee of jurists offered several interpretations of the source's meaning. It may well have been their purpose to avoid having an international court not hand down a decision because no "positive applicable rule" existed. The phrase "general principles" did enable a court, however, to go outside the generally accepted rules of international law and resort to principles common to various domestic legal systems. In fact, a number of court decisions and several law-making treaties refer to the general principles concept: the Permanent Court of International Justice, the International Court of Justice[7], in the 1907 Hague Conventions (in the so-called Martens Clause), and in Articles 67 and 158 of the 1949 Fourth Geneva (Civilians) Convention.

17 From a theoretical point of view, the acceptance of using general

principles in fleshing out the body of international law means repudiating the extreme positivist doctrine that only rules created by means of the formal treaty process or a reliance on general custom are valid.

18 Thus it appears that, as yet, many international lawyers and diplomats doubt the validity of the claim that "general principles" represent a truly usable source of international law. There has been some dissent from this view, however, in recent decades, notably in the writings of Jessup[8], Jenks[9], and particularly Rudolph B. Schlesinger[10] of Cornell University.

Judicial Decisions

19 The decisions of courts and tribunals, when applying international law, form at most an indirect and subsidiary source of international law. The decisions of domestic courts do not even bind their own governments in their international relations; yet a given decision not only reflects the interpretation of other courts as to the existence or meaning of a rule of international law but also indicates what that rule is held to mean in the country in question at the time the decision is drafted.

20 On the other hand, the decisions of international tribunals have begun to play an increasingly important part in determining the existence and meaning of rules of law. The very nature of an international tribunal such as the International Court of Justice (a group of carefully chosen, able, and impartial legal authorities representing many different legal backgrounds and systems), with its presumed advantage over a national court conceivably influenced by nationalistic or political considerations, tends to elevate the decisions and advisory opinions of such a body above mere domestic court decisions.

Writing of Publicists

21 The writings of gpublicists—that is, the works of text writers and

other private commentators—represent a definitely subsidiary source of international law and today are primarily a means for determining varying interpretations of the law. No text writer creates international law, regardless of his professional eminence. At most an outstanding writer may state what the law is in his own time and may speculate on future developments. He thus may discuss as to how the law might be improved on a given point. To the extent that his government may adopt suggestions and utilize them in the development of a usage or incorporate them in a law-making treaty concluded with a number of other states, the writer may be regarded as an indirect source of international law. In past centuries, however, the work of the publicist was of profound importance. The writings of Grotius[41], Gentilis[42], de Vattel[43], and other "greats" in the history of the law played a vital part in the growth of international law, primarily as evidence submitted by authorities to show what the rules were in their time, and not as true sources of new rules.

Equity

22 The term *equity* includes such concepts as proportionality, balance, fairness, and impartiality in the endeavor of a court to take account of the particular circumstances of a situation and to avoid inequities that would result from a mere judicial application of a general rule of law.

· (*Selected from Gerland von Glahn, Law Among Nations —An Introduction To Public International Law, Seventh Edition, 1996.*)

New Words and Expressions

1 clear-cut 明确的；确定的
3 contesting states 争议国
4 commentaries 注释；注解；解说
Guatemala 危地马拉
extradition 引渡
Sri Lanka 斯里兰卡
5 tacit 默许的；心照不宣的
acquiescence 默许
adhered to 坚持；追随；遵守
7 privateer（战时特准攻击敌方商船的）武装民船；私掠船
9 sphere 领域；范围
diverse 不同的；多样的
jurisdiction 管辖权
10 entailing 使人承担
protest 反对；抗议
overwhelming 压倒性的；大多数的
assented 赞成；同意
12 comity 礼让
13 salute 敬礼；致敬
dipping 降下；放低
high seas 公海
14 reparation 赔偿
15 pervade 普遍；流行
17 repudiating 否定；驳斥
20 tribunals 法庭；裁判所
impartial 公平的；不偏不倚的
conceivably 令人信服地
21 commentators 评论者；注释者
eminence 杰出；著名

Notes

① 作者首先引用《国际法院规约》第 38 条列举出国际法的基本渊源，然后再对这些具体渊源及确定法律规则的方法进行了较为详细的分析，特别是对国际礼让、法学家的学说能否作为国际法的渊源，提出了自己的看法。

② International law Commission of the United Nations：联合国国际法委员会，是联合国负责编纂国际法的主要机构。根据章程的规定，委员会应代表世界各大文化体系和各主要法系，其委员由各成员国政府提名，由联合国大会选出。

③ Article 38 of the Statute ... the determination of rules of law. 该规约的第 38 条规定国际法院适用：（1）不论普通或特别国际协约，确定诉讼当事国明确承认之规条者；（2）国际惯例，作为通例的证明而经接受为法律者；（3）一般法律原则为文明国家所承认者；（4）在遵守第 59 条规定的前提下，司法判例及各国权威最高之公法家学说，作为确定法律原则之补助资料者。

④ Law-Making Treaty：造法性条约。一般认为国际条约可分为契约性条约和造法性条约两类，契约性条约是专为缔约国规定权利和义务的，对非缔约国没有拘束力，不能作为具有普遍拘束力的一般国际法；造法性条约是专门确立或修改国际法原则、规则和规章、制度的，因此是一般国际法，可以作为普遍适用的国际法渊源。

⑤ Among the outstanding ... and others. 属于这一类的典型条约有：1856 年的《巴黎宣言》（有关私掠制海战中中立国的权利）、1864 年的《日内瓦红十字会公约》、1874 年的《万国邮政联盟公约》、1899 年和 1907 年的《海牙公约》、《国际联盟公约》、《联合国宪章》、1949 年的《日内瓦公约》（规范战俘、交战国占领等战争行为）、1958 年的关于《海洋法》的协定、1961 年的《关于外交特权与豁免的维也纳公约》等。

⑥ International Custom：国际习惯。也有译为国际惯例。国际习惯是最古老、最原始的渊源，在国际条约出现之前，历史上就有了国际习惯。国际习惯是各国重复类似的行为而具有法律拘束力的结果，它由两个因素构成：一是所谓的“物质的因素”，即各国的重复的类似行为；二是所谓的“心理的因素”，即被各国认为有法律拘束力。

⑦ the Permanent Court of International Justice, the International Court of Justice：分别为国际常设法院、国际法院。国际常设法院是 1922 年 2 月 15 日在海牙正式成立，共有 15 名法官，其据以活动的依据是国际联盟在 1920 年 12 月 13 日通过的《国际常设法院规约》。共处理争端案件 85 件，其中作出判决的 33 件，提出咨询意见的 28 件。1940 年 2 月起停止活动，1946 年 1 月正式解散。国际法院是 1946 年 2 月 6 日正式成立，是联合国的主要司法机关，有法官 15 名，拥有诉讼管辖权和咨询管辖权。

⑧ Jessup：杰塞普，美国国际法学者。

⑨ Jenks：詹克斯，英国国际法学者，主要著作有《人类共同法》（The Common Law of Mankind, 1958），《世界社会中的法律》（Law in World Community, 1967），《法律的新世界》（A New World of Law, 1969）。

⑩ Rudolph B. Schlesinger：鲁道夫 B. 施莱辛格，美国国际法学者。

⑪ Grotius：格老秀斯，荷兰著名国际法学家，被公认为“国际法之父”。其著作有《战争与和平法》（De Jure Belli Ac Pacis Libri tres），《海洋自由论》（Mare Liberrum），《捕获法论》（De Jure Praedae Commentarius）。

⑫ Gentilis：真提利斯，意大利著名国际法学家，是格老秀斯的先驱者之中

最重要的一个。其著作主要有《使节论》(De Legationitus),《战争法》(De Jure Belli Libri tres),《西班牙律师的辩护》(Hispanicae Advocationis Libri duo)。

⑬ de Vattel:法泰尔,瑞士国际法学家,其主要著作是1758年出版的《万国法,或适用于各国和各主权者的行动与事务的自然法原理》(Le droit des gens; on Principes de la loi naturelle appliqués a la conduite et aux affaires des nations et des souvereigns)。

Questions

1. What are the sources of international law?
2. What is law-making treaty?
3. How does international custom transform into international law?
4. Does breaking the rules of comity involve legal obligation?
5. Do writings of publicists create international law? Why?