

Video Transcript

Sources of International Law – Gleider Hernández

Welcome to our little micro-lecture of what is Chapter 2 of *International Law*, and in this chapter we discuss what are called the sources of international law.

Now, what do we mean by sources? What we mean are the procedures and processes through which a rule comes to be regarded as valid or binding. And not everyone can simply produce a rule of international law. In fact, they are produced primarily through the practices and decisions of states, and that's what we'll be discussing through this lecture.

So, although we won't go into it in much detail, I think it's important to just outline a few conceptual points as you will go through the various sources that are identified, as they help to form a structure that takes you through the book as a whole. Now, one of the first things that will be important is to distinguish between what are called 'primary' sources and 'secondary' sources of law. The primary sources are those that are themselves binding, they are the ones that one sees directly the practices of states. So we'll look at those in a minute, but in short they are the treaties or conventions which are written agreements concluded between states, and now international organisations, on questions of international law. Those create both rules and obligations.

We will also look at something called 'customary international law' which is an unwritten source of law for the most part, but looks at what states are actually doing and whether they regard themselves as being bound by a legal rule. So for those of you educated in common law systems based on the laws of England originally, you'll see a slight parallel with the common law itself which looks at the practices of individuals and how those crystallize over time. Custom is not perfectly analogous to that, but it is rather analogous to that.

Then you'll also look at something called 'general principles of law' which are the general principles that are common to the domestic legal systems of states, and we will look at those because international lawyers also examine those to see whether there's something in common that can be brought out, or transposed, into international law. So those form broad principles that are often used to interpret existing rules, so the principle such as the rule on good faith - that treaties should be signed and observed in good faith - or a rule such as the

'clean hands doctrine', which suggests that no one should come seeking justice, for example, before a court if they also have unclean hands.

So across these chapters we will look at these various sources of law. Those are the three primary sources of law, and there is a great number of what we call 'secondary', or 'material' sources of law through which we can understand the practices of states, to which we can make sense of them, and systematise them, but which themselves are not legally binding. Those include judicial decisions, both of international courts, but also of national courts, which often explain how a rule is applied in a given scenario.

We also looked historically, although not as much today, at the writings of academics (in the language of international law they're called 'eminent publicists'), who wrote about international law and tried to make sense and to bring structure to the practices that they were observing. We also look at sources such as the decisions taken within international organisations, which are becoming much more important today as evidence that a rule exists, especially in the resolutions of the General Assembly and the Security Council of the United Nations.

One of the things to bear in mind when you look at sources of international law is who is empowered to create a rule, who is empowered to interpret the rule, and who's in power to change the rule? And those are very important questions that ought to be addressed as you read and as you make sense of these.

Now, I'll conclude with one thing, one point, and that is on where we find the enumeration of the sources of international law. Commonly, that's in something called Article 38 of the Statute of the International Court of Justice, and that is the place that states have looked to as the definitive, or authoritative, enumeration for almost a century of what the primary and secondary sources of international law are. Why is that relevant today? Because, over time, whether or not one sees it is just a treaty provision within one statute of one international court, one also has to accept that over decades of practice, states have internalised that definition, have acted upon that definition, and have themselves transformed it into a self-standing authority for the enumeration of sources. But also one sees that it is taught that way across universities, that law students around the world are being trained that this Article 38 enumeration of treaties, general principles, and custom, as the definitive enumeration of the sources of international law, comes to acquire a force within the profession, within the international legal discipline, that has an extraordinarily influential character. And so that's something that also should be borne in mind as you review this chapter.

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Thank you.