STUDY GUIDE ICJ

A LITTLE LAW BRIEF

SEPTEMBER 1, 2020

ANGELIKI KONSTANTARA
ICJ ATSMUN

Guide to international law

Marshall Islands v. 3 Respondents

Overview of the Case

On 24 April 2014, [1]the Marshall Islands filed a number of Applications against nine countries, namely China, France, Israel, North Korea, Russia, the United States of America, the United Kingdom of Great Britain and Northern Ireland, Pakistan and India alleging that these states failed to comply with the NPT Treaty (Treaty on the Non Proliferation of the Nuclear Weapons). However, only UK, India and Pakistan have recognized the compulsory jurisdiction of the court and have thus agreed to proceed to the International Court of Justice as the Respondent Party. The Republic of Marshall Islands specifically accuses the United Kingdom of Great Britain and Northern Ireland of not fulfilling its obligations relating to the cessation of the nuclear arms race at an early date and to nuclear disarmament. Moreover, in spite the fact that they have neither signed nor ratified the NPT Treaty, the Applicant claims that both the Republic of India and the Republic of Pakistan are obliged to fulfill certain obligations laid down in the Treaty that apply to all States as a matter of customary international law. The Applicant also pointed out the necessity for India and Pakistan to ratify the treaty in the spirit of good faith negotiations. Considering though that the accusation is related to responsibilities emerging from the ratification to the NPT, the Respondents claim that non-signatory states such as India and Pakistan are not to be condemned as they are under no obligation to comply with it (article IX, paragraph 3).As a result, on 15 June 2015, within the three-month time-limit provided for in Article 79, paragraph 1, of the Rules of Court, the United Kingdom raised certain preliminary objections in the case. Preliminary objections

[1] Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom), https://www.icj-cij.org/en/case/160

were also introduced by India and Pakistan concerning the admissibility of the Application due to an absence of dispute between the parties. Having examined the statements and conduct of the Parties in each of the cases, the Court considered that they did not provide a basis for finding a dispute between the two States in each case before the Court. Since the Court did not have jurisdiction under Article 36, paragraph 2, of its Statute, it could not proceed to the merits of these cases.

Remember: You should presume that the court **has jurisdiction** to hear the case and prepare the case on the merits. In other words; take the court's jurisdiction for granted.

Statement of Law

As you do your research, you might wonder what legal basis, apart from the facts, you could use to prove your points. The aim of this guide is to familiarize you with the sources of law, which you can then call upon in order to support the interests of your party.

According Article 38 of the Statute of the ICJ[2], the sources of law are the following:

a. **international conventions**, whether general or particular, establishing rules expressly recognized by the contesting states;
b. **international custom**, as evidence of a general practice accepted as law;
c. **the general principles of law** recognized by civilized nations;
d. 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.

The first three (a, b, c) constitute the main sources of international law the ICJ takes into account when adjudicating a case. That means that they carry the same weight and they are equally evaluated. For instance, customary law is not superior to conventions (treaties) and vice versa. When it comes to judicial decisions and teachings, they are complementary sources of law, used as keys to applying the main sources of law in specific cases. The teachings can be found in books or academic articles, which you can find in google scholar. However, due to your level of studies, you might not be familiar with the legal notions presented in those articles.
Remember you MUST NOT use the ICJ's decision on your particular case as evidence, but you could take a look on the pleadings so as to corroborate your arguments. You should also bear in mind that UNGA resolutions-and not the Security Council's directives-carry no weight, as they are "soft law", which means that they are simply recommendations to the states.

We will now proceed to examining the 3 different types of evidence, as stated in the art.38.

[2] https://www.icj-cij.org/en/statute

1. International Treaties

According to article 1 of the Vienna Convention on the law of Treaties[3](VCLT), a "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. Treaties are divided into two main categories, related to the number of states that make part of them. We thus make a distinction between:

a. **Bilateral** agreements, that have been signed and ratified by 2 states, for which they are binding;

An example of a bilateral agreement is the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America for Co-operation on the Uses of Atomic Energy for Mutual Defense Purposes. The Agreement entered into force on August 4, 1958.

b. **Multilateral** agreements, that that have been signed and ratified by more than two states, for which they are binding

The NPT Treaty, as well as other UN Treaties, is an example of a multilateral treaty, joined by 191 states, including the UK. India and Pakistan have neither signed nor ratified it. The treaty was adopted as a text and opened for signature on the 1st of July 1968 but it became binding for its members as soon as it entered into force on the 5th of March 1970.[4]

Generally speaking, treaties become binding for states once they have signed and ratified them and that applies to the NPT, as stated in article IX. These two procedures indicate the State's willingness to undertake its obligations, as designated in the Treaty. Therefore, if a State party to a particular treaty fails to abide by its provisions, it is considered to have committed an internationally wrongful act and it is thus held accountable for the damage caused by its incompliance.[5]It is then obliged to compensate the states affected by its unlawful actions and comply with its obligations.[6]

[3] The Convention was adopted and opened to signature on 23 May 1969, and it entered into force on 27 January 1980. It has been ratified by 116 states as of January 2018.Some non-ratifying parties, such as the United States, recognize parts of it as a restatement of customary law and binding upon them as such.

[4] UN Office for Disarmament Affairs, https://www.un.org/disarmament/wmd/nuclear/npt/

[5] Articles 2, 3, 12, 13 of the Articles on Responsibility of States for Internationally Wrongful Acts (2001), which constitute customary law.

[6] Article 27 of the Articles on Responsibility of States for Internationally Wrongful Acts (2001).

1 b. Adoption, signing and ratification to a treaty

In the international community, where all states are sovereign and equal, there is not a central system supervising them and imposing sanctions. States have to gather together and negotiate in order to decide which measures and principles they should adhere to for the scope of international peace and security. They then sign treaties which become binding either by the signing, the ratification or the accession by the parties.[7] For instance, the NPT treaty became a binding instrument for states when it got into force in 1970 and it requires the **ratification**, and **not just the signing**, by the member states in order to create international obligations.[8] However, in the time between the signing and the ratification to a treaty, a state should demonstrate good faith and refrain from actions contradicting with the scope and the purpose of the treaty. For example a state that has signed a treaty on the prohibition of illicit traffic in narcotic drugs (UN 1988), cannot justify the expansion of its illegal drug market on the grounds of absence of ratification. The same principle also applies when a state has ratified a treaty but it has yet to enter into force.[9]

Steps towards the "birth" of treaty-based obligations

[7] Art.11 VCLT
[8] Art IX NPT
[9] Art 18 VCLT

2. International Customary law

International Customary law consists in identifying and adhering to customs. A custom is established as a source of law when it is practiced repetitively and uniformly for a certain period of time among states (longa usus), to which this practice is so important that they consider it as legally binding (opinio juris). This practice is often illustrated in some UN resolutions, because they testify for the states' actions towards a certain goal and their willingness to stick to it. For example, the prohibition of the use of force is a rule of customary law that manifests itself in the UN resolutions 2625 and 3314.All countries have agreed to refrain from using force and when they do, they try to justify their actions by seeking exemptions to this rule.[10]That means that they recognize their forceful actions as unlawful.

What makes customary law so important and debated is that it creates obligations all states should fulfill. The only possibility for a state to be exempted from a customary rule of law would require it to object persistently to the establishment of a certain practice as custom from its very beginning. This state then qualifies as a Persistent Objector.

Customary law can also be found in treaties. What that means is that some articles of a treaty, take for instance the UN Convention of the Law of the Sea (UNCLOS), might reflect an internationally accepted custom. That is highly important because, as noted above, treaties are only binding for their parties and not for non-signatory states. But when a treaty contains customary law, all states should comply to its customary provisions, even if they have neither signed nor ratified it. If they don't, they bare again international responsibility and owe compensation the states suffering by the breach of the custom.

[10] See ICJ, Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)
186 *It is not to be expected that in the practice of States the application of the rules in question should have been perfect, in the sense that States should have refrained, with complete consistency, from the use of force or from intervention in each other's interna1 affairs. The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule. If a State acts in a way prima facie incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule.*

3. International Principles of Law

The International principles of law are abstract and general notions that can be applied for the interpretation of any treaty or a custom. The Court is usually reluctant to using general principles of law as sole evidence, unless no other legal basis is provided. They express the civilized states' desire for the creation of a common legal code and permit international law to have a degree of flexibility in its application and enforcement.

The most commonly practiced principle of law is **good faith**. By good faith in domestic law[11], we mean the honesty and the sincerity of intention to deal fairly with others, without any malice or purpose to defraud them. In international law, it is used to describe a state's adherence to its obligations. It governs the creation and performance of legal obligations and is the foundation of treaty law. This principle is illustrated in article 31 of the VCLT, where it is cited that *a treaty shall be interpreted in* ***good faith*** *in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.* A similar provision on good faith when it comes to the fulfillment of treaty obligations can be found in article 300 UNCLOS. [12]The persistent use of this term in treaties indicates its significance for assuring their efficiency. Another principle, derived from the 3rd preamble of the VCLT, is the rule ***pacta sunt servanda.*** The oft-quoted Latin phrase means no more than that agreements which are legally binding must be performed[13], so that stability of international relations and treaties can be served. This ancient rule is a preponderant principle of law as it embodies the elementary and fundamental values universally agreed by all legal systems. It therefore not restricted to civilized nations, but is also applied to the relations formed by any state or citizen.

Other principles are those of **equity** and **sovereign equality** of the nations in the sense that no state is entitled to interfere into another state's territory, unless the latter has agreed on that. It is due to this principle that no state can oblige another state to appear in the ICJ for a dispute settlement without its consent. Another important principle especially when it comes to exercising countermeasures[14]against a state is the principle of

---

[11] Britannica, International Law

[12] UNCLOS,Article300

Good faith and abuse of rights

States Parties shall fulfil in good faith the obligations assumed under this Convention and shall exercise the rights, jurisdiction and freedoms recognized in this Convention in a manner which would not constitute an abuse of right.

[13] Anthony Aust, Oxford International Public Law, February 2007

[14] Art 22 of the Articles on Responsibility of States for Internationally Wrongful Acts (2001).They consist in the reaction of a state A to an attack by the other state B.

proportionality. In order for this rule to be satisfied, we have to assess whether a measure is essential, suitable for the purpose we aim to achieve and whether the advantages of its imposition outweigh the disadvantages.

Don't forget that these three sources of law, along with the complementary ones might overlap each other and apply equally. You then have to evaluate them all and use them when appropriate. Accordingly, when these sources contradict each other, you should interpret them in such a way that the meaning of the one harmonizes with the essence of the other. In order to achieve that, you should be diligent, impartial, objective and patient. That is what will make you a good ICJ-and future-judge.

Now, it is your turn to put what you've learnt into practice!

The purpose of this guide is to help you understand some legal principles that will help you serve your case. You are encouraged to go through this passage and try to adapt this theory to your argumentation. This is not a piece of evidence, it only facilitates your preparation. Good luck!