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INTRODUCTION TO INTERNATIONAL EUROPEAN LAW

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Introduction to International and European Law

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INTRODUCTION

International law and the law of the European Union have been taught as compulsory subjects at the Faculty of Political Sciences and International Relations of Matej Bel University in Banská Bystrica in the Slovak language from the beginning of its existence since 1995, as necessary equipment for the faculty graduates at the master´s study program. After introducing the master's study program in the English language, these subjects became an inseparable part of the study plan in the first year of studies. Because of the lack of a comprehensive concept of study materials on these subjects, we have decided to prepare a concise but comprehensive textbook, entitled An Introduction to International and European Law.

In the first part of the textbook, chapters focused on public international law dealing with basic axioms of this legal branch are included. As far as the theoretical and historical introduction is concerned, we deal here with essentials of the international law, however special attention is being paid to its most important parts - the international treaty and states. The next chapter which outlines peaceful settlement of international disputes clarifies the area of diplomatic and judicial means of dispute settlement. Furthermore, arbitral and judicial institutions are presented here, which are in charge of this process. Very comprehensive and complex is the fourth chapter of this paper. It outlines the issues of diplomatic and consular law, which are in the centre of our attention during the seminars.

The second, less extensive part of this textbook, focuses on the European Union and provides essentials regarding functioning of the European Union and its institutions. Starting with general introduction related to the history of the European integration processes, we proceed to legal nature of the EU law, with special regard to the case law, due to which these basic principles have developed. The following chapter discusses sources of law and the European Union institutional structure of this supranational international organization.

We hope that the international M.A. students at the Faculty of Political Science and International Relations will find the textbook useful in their study of these relatively complex legal issues.

1. THE NATURE OF INTERNATIONAL LAW

International law (sometimes called public international law) is an independent legal system which has to be distinguished from municipal law (national or state law) and from private international law. It may be also defined *as the body of rules which are legally binding on states in their intercourse with each other.* These rules are primarily those which govern the relations of states, but states are not the only subjects of international law. International organizations and, to some extent, also individuals may be subjects of rights conferred and duties imposed by international law. (Hillier, 1998) Thus, it can only be applied between entities that have international legal personality, which subjects of the municipal law lacking. Whatever the connections which international law has with other systems of law, it is clearly distinguished by the fact, that it is not the product of a national legal system, but of States. (Aust, 2010) The States are now represented by 193 members of the United Nations and they now account the vast majority of States which make up our world.[1]

International law may be divided according to several criteria. That part of international law that is binding on all states, as is far the greater part of customary law, may be called **universal international law**, in contrast to **particular international law** which is binding on two or a few states only. **General international law** is that which is binding upon many states. General international law, such as provision of certain treaties which are widely, but not universally, binding and which establish rules appropriate for universal application, has a tendency to become universal international law. Another division is to ***ius cogens*** and ***ius dispositivum*.** *Ius cogens* is a peremptory or absolute rule – the norm accepted and recognized by the international community of States, which cannot be derogated or not complied with. It can only be modified by a subsequent norm of general international law having the same character.[2] An example could be the resolution of UN Security Council. An analogy to *ius cogens* are the **obligations *erga omnes*** pointed out as the certain obligations of State owed to all States.[3] *Ius Dispositivum* is recognized as not treaty Instruments, with which subjects are not strictly obliged to comply with, they represent only political and moral recommendation for the recipient. (Malanczuk, 1997) Such non treaty instruments are typically called Guidelines, Principles, Declarations, Codes of Practise, Recommendations or Programmes. As the typical example of the non-binding acts are considered resolutions of the

[1] In the past, international law was referred to as the law of the nations
[2] Article the Vienna Conventions on the Law of Treaties 53
[3] For example respecting a special area, such as Antarctica

General Assembly of the United Nations or General Declaration of Human Rights from 1948, which have been the source for many universal and regional human rights treaties. (Aust, 2010) Some scholars also distinguish between *hard law* and *soft law*, but these mechanisms have the same effect as *ius cogens* and *ius dispositivum*.

International law is not only governing the relations between states. Its function in structuring the international system has been enhanced because of increasing global interdependence and the self-interest of states (global corporations, Inter-Governmental organizations). It covers vast and complex areas of transnational concern, such as state responsibility, diplomatic and consular law, international organizations, economy and development, nuclear energy, air law, outer space activities, the use of the resources of the deep sea, etc. (Shaw, 2006) In connections with the growth and importance of the international law we have to mention the term **transnational law**, which is used within the phenomenon of globalization. This term relates to various aspects of law which can be applied to more than one State. In a particular conflict of laws, comparative law is applied (the study how domestic laws of different States deal with issues of domestic concern), **supranational law** (the European Union Law) and **public international law in the commercial field** (the International Commercial Law). (Aust, 2010) It may bring useful insights into the development of the, particularly how different types of law influence the others.

International law has a number of special characteristics making it completely different from highly developed national legal systems which are connected with the existence of the modern state and its apparatus. (Malanczuk, 1997) In order to analyze its typical feature, we have to compare it with the municipal or the state law characteristics. According to the Western concept of law, three most essential functions of municipal law as a feature of internal sovereignty, typically entrusted to central organs are**: law making** (legislature), **law determination** (courts and tribunals), and **law enforcement** (administration, police, army). In these terms we can say that, domestic law is addressed to a large number of governmental bodies, private individuals and groups of individuals. International law, on the other hand, is primarily concerned with legal regulations of the international intercourse of states which are organized as territorial entities, and which are limited in number and consider themselves, in spite of the obvious factual differences in reality, in formal terms as ‘sovereign’ and ‘equal’. (Malanczuk, 1997) By these axioms we can outline three features of international law. It is a horizontal system:

a) supreme legislation authority;

b) centralization of use of force;

c) differentiation of three basic functions of law making.

The lack of supreme legislation authority is represented by the General Assembly of the United Nations, which is not a legislative body, its resolutions are not binding and cannot be compared with the national law-making bodies. The law determination within international community is also limited, while International Court of Justice is unable to force the states to solve their disputes due to its non-obligatory jurisdiction. Plus, Security Council as an institution responsible for international peace and security is limited not only politically, but also legally. The UN system with its Charter claims the prohibition of use of force in international relations; however this rule was breached not only once in its history.[4] Despite these negative aspects, the international law in its all entirety is an important part of the functioning of international relations and establishes the most important rules for its subject's behavior.

Another enumeration of the principles of international law was set forth in Charter of the United Nations[5]. These are of the highest importance and claim that members of United Nations should abide:

1. the prohibition of the threat or use of force by states against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the Charter;
2. the peaceful settlement of disputes between states in such a manner that international peace and security and justice are not endangered;
3. the duty not to intervene in matters within the domestic jurisdiction of any state, in accordance with the Charter;
4. a duty of states to cooperate with one another in accordance with the Charter;
5. a principle of equal rights and self-determination of peoples
6. a principle of sovereign equality of states
7. a principle that states shall fulfill in good faith the obligations assumed by them in accordance with the Charter.

[4] For instance US preemptive attack against Iraq in 2003
[5] Articles 1 and 2 of the UN Charta

First three principles determine the first and utmost duty of the members of the international community - prohibition of use of force in international relations and obligation to resolve their disputes by peaceful means, plus non-intervention to the domestic matters of the sovereign state. These are considered as a categorical imperative of the state´s behavior in connection with international peace and security. The 4th – 6th principles point out that the states as subjects of international law are equal, i.e. there is no supreme state. The last principle constitutes a requirement of an ancient principle – *pacta sund servant.* It means that states have to fulfill their obligations in good faith. We will pay a special attention to this principle in the following chapters.

1.1 A BRIEF HISTORICAL SURVEY OF INTERNATIONAL LAW

Modern system of international law is the product of the last one hundred years. We can also mention that there have been some prototypes of international law, but the concept of international law which approximates the 21st state is the classical period or the great era of natural law in European Middle Ages. (Abass, 2012) The classical period (1600-1815) is specific with the emergence of the dualistic view of international law, with the law of the nature and the law of (coexisting) nations. Then there was an international doctrinaire positivism period also European concert of powers until 1918, the end of the World War I, and the establishment of League of Nations – the first attempt to create the universal organization to preserve international peace and security. The post-war period after the year 1945 occupies the most of the reminder of this chapter, especially the rules and principles that are in force after passing the Charter of United Nations on 25 April, 1945.

In the western history, the best example of multinational empire is an ancient Rome. Their thinking was inspired by the philosophical concepts imported from Greece. The most important was the idea of a set of universal principles of justice, the belief that amidst the welter of varying laws of different States, certain substantive rules of conduct were present in all human societies. (Abass, 2012) This idea was surfaced in the writings of Aristotle or Cicero and later it was adopted by the Christian Church. But how the ancient times influenced the development of international law? Of the biggest importance are agreements made by nations at temporal and spatial intersections of different state systems, such as the one between Ramses II and Hattusili[6], or the other between Macedon and Carthage, or

[6] The first ever concluded international contract in written form – 1800 BC

between Rome and the Aetolians. These prototypes of international contracts already included preambular passages, or the inclusion of specific legal terms or provisions, such as *maiestas* clauses or qualifications regarding after-acquired allies. (Armstrong, 2009). Another important fact form this age is that diplomacy and its institutes were developed, namely **diplomatic envoys, diplomatic hospitality (amphictionies), diplomatic immunities such as inviolability of the diplomatic personell and prototypes of judicial and arbitration forms of interstate dispute settlement**. The era of **Medieval Europe** was not very friendly towards the development of international law in general. It was the time when kings shared power with their barons, each of whom had a private army; externally, acknowledged some sort of allegiance to the Pope and to the Holy Roman Emperor. (Malanczuk, 1997) The exemption is represented by the city-states in Italy, which concluded many **international contracts** with Muslim states, mostly in merchant manner, to develop their bilateral relations and maritime trading. These so called "*Stato*" republics **developed permanent diplomatic envoys within their cities, with a wide range of features of diplomatic privileges and immunities**. (Armstrong, 2009).

The origin of the international community in its present structure and configuration is usually traced back to the Peace of Westphalia (1648), which concluded the ferocious and sanguinary Thirty Years War. (Hillier, 1998) With the gradual breakup of the Holy Roman Empire after 1648, states such as England, the Netherlands, France and Spain became strong and independent from any superior authority. Without the influence of Papal or Imperial laws, new rules were developed to govern inter-state relations.[7] These rules owed much to doctrines of canon law and of Roman law. The basis of the system was **the consensus of equal, independent sovereign states** and the rules could therefore be created by express agreement or developed out of a continued common practice. Holding such a view of the development of **international law has important consequences both for the nature and definition of international law and for the sources of international law**. (Hillier, 1998) The period which followed is called the European Concert of Powers, which is traced back to the end of Napoleonic wars until the end of the World War I. It was an era of actors, which intended to establish **international collective security creating a Holy Alliance** - group of Christian nations between the monarchies of Austria, Russia and Prussia, and an anti-revolutionary military alliance between Austria, Prussia Russia, and England, joined later also by France, to intervene against liberal and nationalist uprising threatening the

[7] In these times, there were remarkable writings of Hugo Grotius which stated essential principles of intrastate relations and international law.

established order. (Cassese, 2005) This order didn´t last longer than 90 years, due to reunited Germanys efforts to become a colonial and European superpower, which led to the outbreak of the World War I. Let us summarize the principles, which evolved up to the First World War:

- principle of territorial sovereignty securing exclusive control and jurisdiction of states over their territory;
- the freedom of the high seas;
- the law on state immunity from the jurisdiction of foreign courts;
- the law on diplomatic and consular relations;
- the principle of *pacta sunt servanda* (treaties must be kept) and *the law of treaties;*
- rules on the diplomatic protection of envoys and their property;
- neutrality.

Starting in 1919, different system of international law, based on a new concept of the nation state, was developed. By force of circumstances, it was more receptive to the idea of some restrictions of its sovereign rights (e.g. in the field of minority protection) and more sensitive to the rights of the human individual and his/her legal protection. (Hillier, 1998) For the first time in the human history, an attempt was made to organize the international community within a League of Nations, which was intended to become a universal framework for regulating peaceful intercourse of nations and for preventing armed conflict. (Shaw, 2006) The War and threat of use of force in national policy was intended to be forbidden by the League Covenant, and subsequently outlawed by the Kellogg-Briand Pact, 1928. This system was unfortunately not effective, due to disagreements within the members of the League, non-effective enforcement of peace and international law in the Manchuria and Abyssinia conflict and last but not least – the expansive policy of Nazi German and Italian states.

After the trauma of the World War II the League of Nations succeeded in 1945 to the United Nations Organization, which tried to remedy many of the defects of its predecessor. It established its site in New York, reflecting realities of the shift of power away from Europe, and determined to become a truly universal institution. (Shaw, 2006) The process of decolonization fulfilled this expectation and the General Assembly of the United Nations currently has 193 member states. Many of the trends which first came out in the nineteenth century have continued to this day. The vast increase in the number of international agreements and customs, the strengthening of the system of arbitration and the development

of international organisations have established the essence of international law as it exists today. (Shaw, 2006)

2. SOURCES OF INTERNATIONAL LAW

International law differs from domestic law and it is sometimes more difficult to find out what the law on a particular matter is. (Aust, 2010) Domestic law is usually more certain and we are able to find it mostly in legislation or judgments of a hierarchy of courts. In comparison with domestic law, international law is not so accessible, coherent or certain. As we mentioned in the first Chapter, General Assembly of the United Nations does not equate to a national legislature and there is also no hierarchy of international courts and tribunals. Therefore there remains a complex and transparent file of sources of international law, except for the publicized work of UN Law Commission. Another classification of sources of law might be into the material and formal meaning. **Material meaning** represents causal or historical influence explaining the factual existence of a given rule of law at a given place and time and **formal meaning** is represented by the criteria under which a rule is accepted as valid in the given legal system at issue (written law, made by law-making process). The first meaning is determined by the development of human society in terms of international law, which was analyzed in the previous chapter. The second meaning sets the hierarchy of sources of international law. This list is set forth in the Article 38, Statute of International Court of Justice. Its function is to decide, in accordance with international law, disputes submitted to it, and they apply to:

(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) **general principles of law** recognized by civilized nations;

(d) **judicial decisions and the teachings of the most highly qualified publicists** of the various nations, as subsidiary means for the determination of rules of law.

This article has been criticized by many international lawyers. The main reason for the criticism is that the definition is inadequate, out of date, or ill adapted to the conditions of modern international intercourse. Bu on the other hand the Court (International Court of Justice) remains bound by it, but if there had really been substantive change in international legal thinking on the questions of sources, the Court might have been expected at the least to have taken note of it, while drawing attention to its inability to go beyond the of its own Statute. (Shaw, 2006) Another view on this Article that it does not actually use the term

'sources' but rather describes how the Court is to decide disputes which come before it for settlement. Law is not necessarily simply defined in terms of how courts decide disputes. Article 38 does not refer to resolutions of the United Nations or other international organizations, yet such resolutions may play an extremely important role in international society and may arguably constitute the source of law. (Hillier, 1998) The question that will be considered at the end of this chapter is the extent to which Article 38 is to be regarded as a comprehensive list of the sources of international law.

2.1 TREATIES

"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.[8] International treaties, as the main source of international law, are prevailing and most important instruments for the development of the international law order. (Ipsen, 1999) In contrast to the process of creating law through custom, treaties (or international conventions) represent more modern and more deliberate method. Article 38 refers to international conventions, whether general or particular, establishing rules expressly recognized by the contracting states. (Shaw, 2006) The word 'convention' means treaty, and that is the only meaning which the word possesses in international law, and in international relations generally. This is a point worth emphasizing, because students wrongly misuse the terms "conventions" and "conferences", or they interchange conventions in international law with conventions of the constitution in British constitutional law. (Malanczuk, 1997) Other terms used as a synonym for treaties, or for particular types of treaties, are **agreement, pact, understanding, protocol, charter, statute, act, covenant, declaration, engagement, arrangement, accord, regulation** and **provision**. Some of these words have alternative meanings (that is, they can also mean something other than treaties), which makes the problem of terminology even more confusing.

Regarding the classification of the international treaties, we distinguish between **law making** and **contractual treaties. Law-making treaties** create obligations which can continue as law, e.g. an agreement between 90 states to outlaw the use of torture.[9] The number of law making treaties increased throughout this century. One reason for this

[8] Article 2 of the Vienna Convention on the Law of Treaties
[9] For example human rights treaties or Genocide Convention

growth is the increase in the number of states and the fact that many new states have a lack of faith in any rules of customary international law in which they have not played a part in creating. Normative treaties bind signatories as treaties, but may also provide evidence of rules of custom which bind all states. Examples of normative treaties would include treaties operating a general standard setting instrument – e.g. International Covenant on Civil and Political Rights, 1966; and treaties creating an internationally recognized regime – e.g. the Antarctic Treaty 1959. (Hilier, 1998) The term 'law-making' may be a little bit confusing and it should be used carefully – strictly speaking no treaty can bind non-signing states.[10] Even a multipartite treaty binds only those states which are party to it. But the fact that a large number of states are party to a multilateral convention does not make it binding on non-parties although its existence may be evidence of customary international law. In addition, there are two other principles which have to be explained in this respect. First, the situation in which an obligation stated in a treaty is or becomes an obligation of general customary law, in which case the non-signing party may be bound by the same substantive obligation, but as a matter of customary law and not by the effect of the treaty. Secondly, it is possible for a State not party to a treaty to accept an obligation stated in the treaty, or to derive a benefit from it if all states concerned – the parties to the treaty agreed. In effect a new treaty is concluded extending the scope of the original treaty to the third state.[11]

Another type of treaties are **contractual treaties**. They are not the sources of law but merely a legal transaction or treaties which resemble contracts (for example a treaty whereby one state agrees to lend a certain sum of money to another state). (Malanczuk, 1997) The only difference between a 'law-making treaty' and a 'contract-treaty' is one of content. As a result, many treaties concern borderline cases, which are hard to classify. A single treaty may contain some provisions which are 'contractual', and others which are 'law-making'. The distinction between 'law-making treaties' and 'contract-treaties' is not entirely useless; for instance, a 'contract-treaty' is more likely to be terminated by the outbreak of war between the parties than a law-making treaty. (Malanczuk, 1997) But it is too vague and imprecise to justify regarding law-making treaties as the only treaties which are a source of international law. The better view is to regard all treaties as a source of law. At any rate, the law of treaties applies to both types of treaties.

[10] See ICJ Judgement in Continental Shelf Case from 1969
[11] Articles 35 and 36 of the Vienna Convention on the Law of Treaties