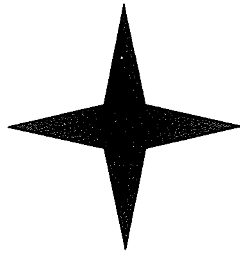
2.1.3 International instruments

World order is currently being developed through the creation of international instruments including statements, declarations and treaties. These instruments articulate legal and non-legal principles applicable in international relations.



A **declaration** is a statement that explicitly articulates a set of values that are considered to be generally or universally applicable. Declarations are not binding and do not carry the force of law. The most important declaration is the *Universal Declaration of Human Rights (UDHR)*. Declarations, and also statements, are called 'soft law' and are non-binding.

A **treaty** is a concluded, written international legal agreement between nations. Treaties are also called conventions, covenants, statutes and protocols. Treaties are binding on member states that ratify them. Treaties are called 'hard law' and are binding on member states.

W-Info 4 Where the definition for Treaty came from...

A treaty is...

"an international agreement concluded between states in written form and governed by international law..."

Vienna Convention on Law of Treatys, Article 2(1)

A treaty may be bilateral (between two nations) or multilateral (between three or more nations). Treaties are international law that has been codified and has been passed into domestic law by a threshold number of the signatory nations. Some examples of international declarations and treaties are listed below:

Declarations

- Declaration on the Protection of Human Rights and the Principle of Non-Intervention in Internal Affairs of States (1989)
- Declaration on the Rules of international humanitarian law governing the conduct of hostilities in non-international armed conflicts (1990)

Treaties

- Geneva Convention relative to the Protection of Civilian Persons in Time of War (1950)
- Treaty Relating to the use of Submarines and Noxious Gases in Warfare (1922)
- Vienna Convention on Law of Treatys

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Signing International Treaties

A nation can signal its intention to support and uphold international instruments by signing to such instruments in the UN. The expectation that follows is that nations will then ratify the instruments into their domestic law and in a manner consistent with the international instrument.

When nations opt to sign up to international declarations or treaties (conventions) they can do so at any of four different levels:

- Sign without reservation, ratify in full and submit to the compulsory jurisdiction of the ICJ. 66 nations in 2012 have accepted the compulsory jurisdiction of the ICJ.
- Sign without reservation, ratify in full and do not submit to the compulsory jurisdiction of the ICJ.
- Sign with reservation, ratify and submit to the compulsory jurisdiction of the ICJ. If signing with reservation then the reservation must be made in writing prior to signing.
- Sign with reservation but do not ratify.

International customary law

The strongest form of international law is customary international law. Customary international law is a source of international law arising from the practice of states which have a general belief that the practices in question are legally binding. If a nation feels compelled to follow the law because they feel a breach would attract a sanction, as opposed to following the law but not being concerned about sanctions (thus there is *usage*, or application of the law, but not a general acceptance) then the law is customary in nature. Thus States create customary law by practicing and applying certain rules to their activities. Customary law is developed through widespread and uniform application by States, generally over a long period of time (usually several decades, but some recent customary laws, such as the law of outer space developed over only nine years in the period 1957–1966).

Opinion juris sive necessitatis (also called *'opinio juris'*) This Latin term is central to an understanding of customary law. It means that there is a belief that an act, or way of behaving, is legally necessary. That is, states must not only undertake certain actions but also *believe* that they are necessary in the application of the law (thus they are morally *bound* to follow them).

International law is ***consensual*** in nature. This means that its strength is derived from a widespread adherence to it and a widespread acceptance of it. Customary law is often turned into treaties. It is important to understand that international customary law is a very strong form of law and it is the basis of modern day treaty law. The text box below indicates some important features of international customary law.

W-Info 5 Customary Law

Custom and customary law has four aspects to it:

1. The actual practice (behaviour) of states
2. The belief/perception by states of their own conduct and their reasons for applying certain rules to their conduct
3. *Jus cogens* norms of international law which are universally binding. Treaties which are contrary to *jus cogens* will not apply.
4. "general practice accepted as law" which means that there is general acceptance of the practice by a number of States to whom the practice is relevant. Universal, as opposed to general, acceptance creates *jus cogens*.

Adapted from: B. Clarke, International Relations, Lawbook Co, Australia, 2003 pp 38–43

W-Info 6 The *Geneva Conventions* as international customary law... but...

The 1949 *Geneva Conventions* have been universally ratified. This means that *all* 193 UN member states have signed to the conventions. This widespread support for the Conventions makes the humanitarian laws customary law. However...the Conventions were supported by two Protocols that were passed in 1977. The protocols, called the *Additional Protocols* (APs), detail the relevant international humanitarian law (IHL) that applies to situations of armed conflict ('war'). A brief summary is provided below:

Additional Protocol I lays down rules on how wars (*international armed conflicts*) may be fought. Combatants must take all feasible precautions in choosing weapons and methods of warfare in order to avoid incidental loss of life, injury to civilians and damage to civilian objects.

Additional Protocol II was the first-ever international treaty devoted exclusively to protecting people affected by *non-international armed conflicts* or civil wars.

General rules: The Additional Protocols

Include rules especially designed to protect both civilians and combatants. They stipulate that:

- combatants must not pose as civilians
- indiscriminate attacks are not allowed
- acts of violence whose primary purpose is to spread terror are prohibited
- objects indispensable to the survival of communities must not be destroyed

Who is protected by them?

Those who are not, or no longer, taking part in an armed conflict must be protected, respected and treated humanely. The Additional Protocols say that:

- All wounded and sick people, both civilian and military, must be collected and cared for, without discrimination.
- Women and children must be respected and protected from any form of indecent assault.
- Children and adolescents must be protected from the effects of war. They must not be allowed to take part in hostilities.
- Members of families separated by conflict should be reunited and they should be able to exchange personal messages. They also have the right to be informed of what has happened to missing relatives.

Source: *http://www.icrc.org/eng/resources/documents/misc/additional-protocols-1977.htm*

An issue with the APs is that only 170 nations have ratified AP I and 166 have ratified AP II meaning that they are not international customary law. USA, Israel and Iran have not ratified, and numerous nations have reservations: China, France, the UK, Russia, Syria and many others.

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Exclusive Economic Zones (EEZs) and the development of customary law

The exclusive economic zone (EEZ), is an area extending up to 200 miles from a state's coast line which it can use for exploration, exploiting, conserving and managing with respect to fishing and the use of resources. The concept of an EEZ was first articulated in 1973 at the Third United Nations Conference on The Law of the Sea (UNCLOS III). This Conference attempted to restrict the area over which a territory had legitimate control and the high seas which is the area beyond a nation's jurisdiction and free to all States. Thus this conference attempted to balance rights. The number of states claiming an EEZ, coupled with the recognition and acceptance of those claims by other states, ensured that the right to claim an EEZ soon became a right established under customary law.

Adapted from: J. Barker, International law and international relations, Continuum, London, 2003, p58

Limitations of international instruments

Whilst world order can be developed and maintained through the formation of international instruments there are several limitations that apply to international agreements. These limitations revolve around jurisdiction and sovereignty.

Jurisdiction and sovereignty

As stated earlier, under customary international law a state is defined as having a permanent population, a defined territory, a government and the capacity to enter into relations with other States (Article 1, *Montevideo Convention on the Rights and Duties of States*, 1933, quoted in Barker, 2000, p38). States are responsible for the laws applied within the jurisdiction over which the government of the state acts. No state can be compelled to obey international laws. Each state is free to choose whether it will sign international law and further, whether it will ratify international law into domestic law. This choice limits the effectiveness of international law. Every nation is free to decide what treaties it will uphold and those which it will not, or against which it has reservations.

This should not imply that international law is weak or useless. In the international regime, nations benefit from trade and interaction (direct and indirect) with other nations. Thus, if a country's government consistently acts outside of global norms then it highly unlikely that the nation will be well respected or included in important decisions. Moreover, government-to-government pressure, the work and critique of Non-Government Organisations (NGOs) and the growing importance of Intergovernmental Organisations (IGOs) mean that a level of compliance is generally desired by nations. International isolation and criticism are a source of pressure that acts as an incentive to comply with, and uphold international laws.

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World Order Case Study

Treaty on the Non-proliferation of Nuclear Weapons (NPT)*

One of the most serious threats to world order is that of nuclear proliferation. Nuclear proliferation is a reference to the acquisition of nuclear weapons. Of concern here is that the destructive force of such weapons is so vast that in the event of use of such weapons the devastation would be unprecedented.

Brief Background

The NPT is a landmark international treaty whose objective is to prevent the spread of nuclear weapons and weapons technology, to promote co-operation in the peaceful uses of nuclear energy and to further the goal of achieving nuclear disarmament and general and complete disarmament. The Treaty represents the only binding commitment in a multilateral treaty to the goal of disarmament by the nuclear-weapon States. Opened for signature in 1968, the Treaty entered into force in 1970. A total of 187 parties have joined the Treaty, including the five nuclear-weapon States. More countries have ratified the NPT than any other arms limitation and disarmament agreement, a testament to the Treaty's significance.

To further the goal of non-proliferation and as a confidence-building measure between State parties, the Treaty establishes a safeguards system under the responsibility of the International Atomic Energy Agency (IAEA). Safeguards are used to verify compliance with the Treaty through inspections conducted by the IAEA. The Treaty promotes co-operation in the field of peaceful nuclear technology and equal access to this technology for all States parties, while safeguards prevent the diversion of fissile material for weapons use.

Source: ***http://www.un.org/Depts/dda/WMD/treaty/*****; accessed on 07.09.2010**

The Australian government's view of the NPT

The NPT and the safeguards system have been successful overall in limiting the spread of nuclear weapons. The only states not to have joined the NPT are India, Israel and Pakistan. Successive Australian Governments have taken the view that the Treaty is vital to international stability and security, both globally and in our region. On 24 September 2009 the United Nations Security Council (UNSC) passed Resolution 1887. The resolution underlines that the NPT is the cornerstone of the nuclear non-proliferation regime, calls on all member states to comply fully with their obligations under the treaty, urges non-members to accede to the treaty and reinforces the right to nuclear energy for peaceful purposes.

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North Korea presents a key challenge to the NPT regime. The DPRK's announcements in 1993 and in 2003 that it had withdrawn from the NPT have led to ongoing uncertainty about its status. Following a series of ballistic missile tests on 5 July 2006 and a nuclear test on 9 October 2006, both of which were condemned by the United Nations Security Council (UNSC), the UNSC unanimously adopted Resolutions 1695 and 1718 respectively. In response to North Korea's second nuclear test on 25 May 2009, the UNSC unanimously adopted Resolution 1874 in June which sent a clear and united signal from the international community that North Korea's actions were unacceptable. The Australian Government has implemented the United Nations Security Council's trade and financial sanctions against North Korea into Australian law. All persons either having or considering business dealings in connection with North Korea should make themselves aware of the restrictions that apply to such dealings and seek independent legal advice, if required, before making commercial decisions.

Iran presents another challenge to the NPT regime: the International Atomic Energy Agency (IAEA) has repeatedly confirmed that it is unable to verify whether Iran's nuclear activities are exclusively peaceful. The UNSC has passed four resolutions against Iran: 1696, 1737, 1747 and 1803 imposed a progressive number of sanctions on Iran.

Source: *http://www.dfat.gov.au/security/npt.html;* accessed on 07.09.2010
***Note the text of the treaty is available in the Appendix of this book**

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Review Questions – International Instruments

1. Define the term international instrument.
2. List THREE (3) different types of international instrument.
3. Where does the definition of a treaty come from, and how is it articulated?
4. Distinguish between a declaration and a treaty.
5. Define the term customary international law.
6. Explain the importance of a consensus approach to international law-making.
7. Examine the following international legal terms:
   - **a.** Signatory
   - **b.** Ratification
   - **c.** Reservation
   - **d.** Compulsory jurisdiction of the ICJ
8. Explain each of the following legal maxims:
   - **a.** *Opinion juris sive necessitates*
   - **b.** *Jus cogens*
9. Detail how the *Geneva Conventions* have become customary international law.
10. Describe the importance of the 1977 *Additional Protocols* to the 1949 *Geneva Conventions*.
11. Explain the main issues that arise with respect to the lack of universal support for the *Additional Protocols*.
12. Define the term State sovereignty.
13. Explain whether the nations can easily exercise disregard for the international community.
14. With reference to the *Treaty on the Non-proliferation of Nuclear Weapons (NPT)*, examine the effectiveness of international treaty law when faced with issues of State sovereignty.

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