





Principles of Public International LawA Modern Approach

Mohammad Naqib Ishan Jan



Published by: IIUM Press International Islamic University Malaysia

First edition, 2008 Second Print, 2009 © IIUM Press, IIUM

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted, in any form or by any means, eletronic, mechanical, photocopying, recording, or otherwise, without any prior written permission from the publisher.

Perpustakaan Negara Malaysia

Cataloguing-in-Publication Data

Mohammad Naqib Ishan Jan

344.5918

Principles of public international law: a modern approach/ Mohammad Naqib Ishan Jan Includes index ISBN 978-983-3855-55-1 1. Law and legislation--Malaysia. 2. International law--Principles. Title.

ISBN 978-983-3855-55-1

Member of Majlis Penerbitan Ilmiah Malaysia – MAPIM (Malaysian Scholarly Publishing Council)

CONTENTS

Foreword Preface Abbreviations		xiii
		xv
		xvii
Tal	ble of Cases	xxv
1	The Nature and Development of International Law	1
	The nature of international law	1
	Definition	2 3
	Categorization: Public and private international law	
	International law and national legal system	4
	Is international law a true law?	5
	Enforcement of international law	11
	Peaceful means of enforcement	12
	Coercive means of enforcement	14
	Development of international law	18
2	Sources of International Law	25
	Treaties	26
	Custom	29
	Elements of international custom	30
	State practice and evidence of it	30
	The opinio juris	33
	Persistent objector	36
	Relationship between treaty law and customary law	37
	General principles of law	40
	Judicial decisions	42
	The teaching of publicists	44
	Other possible sources of international law	45
	Resolutions of the international organizations	46
	Soft law	47
	Equity	48
	Hierarchy of the sources	49
	Inconsistent treaties	49
	Where custom and treaty conflict	50
	Where general principles of law and treaty and custom conflict	51

3	International Law and Municipal Law	53
	The theoretical problem	53
	Monist theory	53
	Dualist theory	55
	Theory of coordination	56
	International law in the domestic legal system	57
	The United Kingdom practice	59
	The American practice	65
	The practice of Malaysia	68
	Municipal law in the international legal system	71
4	International Personality and Recognition	73
	Subjects of international law	73
	States as international persons	74
	Definition of a State	74
	Legal criteria of Statehood	75
	International organizations	81
	Non-governmental organizations	83
	Individuals	83
	Transnational Corporations	88
	Recognition of State and Government	89
	Recognition of States	89
	Recognition of governments	94
	The legal effects of recognition in Municipal Law	96
5	State Territory	101
	Modes of Acquisition of State Territory	101
	Occupation	102
	Prescription	108
	Conquest	109
	Cession	111
	Accretion and avulsion	112
	Acquiescence, recognition and estoppel	113
	Uti possidetis juris and the question of boundaries	114
6	State Jurisdiction	117
	Nature of jurisdiction	117
	Prescriptive or legislative jurisdiction	118
	Executive jurisdiction	118
	Adjudicatory or judicial jurisdiction	119
	General principles on which criminal jurisdiction is exercised	120

	Territorial principle	120
	Nationality principle	125
	Passive personality principle	126
	Protective principle	127
	Universality principle	129
	Exercise of jurisdiction over persons apprehended	133
	in violation of international law	
	Extradition	138
	Principles of extradition	139
	Enforcement jurisdiction	142
7	Immunity from Jurisdiction	143
	State (or sovereign) immunity	143
	Extend of immunity	144
	The Absolute and restrictive theories of State immunity	148
	Restrictive theory in practice	150
	Circumstances where there is no immunity	155
	The UN Convention on Jurisdictional	157
	Immunities of States and Their Property, 2004	
	Diplomatic Immunity	160
	Establishing of a diplomatic mission	161
	Inviolability	162
	Immunity from jurisdiction	165
	Persons entitled to diplomatic immunity	167
	Termination of immunity	170
	Waiver of diplomatic immunity	170
	Immunity of international organizations	172
8	The Law of Treaties	177
	The Vienna Convention on the Law of Treaties	178
	Definition of Treaty	179
	Elements of the definition	180
	The Treaty must be in written form	181
	Governed by international law	181
	Embodied in a single instrument or in two or more related instruments	181
	Treaty is given a diversity of names	183
	Intention to create legal relation	184
	The effect of unilateral statements (non-treaty situations)	185
	Conclusion of treaties	186
	Treaty-making power	186
	Consent to be bound by a treaty	188

	Reservations	191
	Entry into force	196
	Registration and publication of the treaty	197
	Amendment of treaties	197
	Application of a treaty	198
	Application of a treaty upon its parties	198
	Application of successive treaties on the same subject matter	199
	Application of a treaty upon third States	200
	Interpretation of treaties	201
	Invalidity of treaties	205
	Termination of treaties	208
9	State Responsibility	213
	Nature of State responsibility	213
	Elements of an internationally wrongful act of a State	215
	Attributability	216
	Conduct of State organ	216
	The ultra vires Conducts	221
	The Private Conducts: The Rule and the Exceptions	223
	Conduct of insurrectional or other movements	225
	Breach of an international obligation	227
	Defences or circumstances precluding wrongfulness	228
	Admissibility of claims	234
	Nationality of claim	235
	Exhaustion of local remedies	238
	Obligations erga omnes	240
	Legal Consequence of an internationally wrongful act (Remedies)	241
	Reparation	241
	Forms of reparation	242
	Implementation of the responsibility: counter measures	245
	Treatment of foreign nationals and companies	246
	Standard of treatment	246
	Expropriation of foreign-owned property	248
10	The Law of the Sea	251
	The Convention on the Law of the Sea, 1982	253
	The Territorial Sea	254
	Definition of territorial sea	254
	Breadth of the territorial sea	255
	Rights of the coastal State over its territorial sea	258

The right of innocent passage	259
Coastal State's jurisdiction over ships in passage	262
Criminal jurisdiction	262
Civil jurisdiction	263
Immunity from jurisdiction	263
Contiguous Zone	264
Exclusive economic zone	265
Definition and breadth of EEZ	265
Rights of a coastal State over its EEZ	265
Rights and duties of other States in the EEZ of a	267
coastal State	
Continental Shelf	269
Definition of the continental shelf	269
Rights of the coastal State over the continental shelf	270
The High Seas	272
Definition of the high seas	272
Freedom of the high seas	272
Jurisdiction over vessels on the high seas	273
Piracy	274
The limits of Article 101	275
Universal jurisdiction	277
Right of hot pursuit	278
Limits on the use of force in the exercise of hot pursuit	279
The doctrine of constructive presence	280
The International Sea Bed Area	281
Settlement of Disputes	282
International Tribunal for the Law of the Sea	284
11 International Law of Human Rights	287
The concept of human rights	288
Definition	288
Categories of human rights	290
Universalism and cultural relativism	292
Islam and human rights	295
State sovereignty versus human rights	298
The development of international human rights law	300
United Nations Charter	300
The Universal Declaration of Human Rights	301
The United Nations Covenants on Human Rights	304
Other United Nations and regional human rights laws	305
Human Rights and customary international law	306
Enforcement of human rights	311

12	International Environmental Law	315
	Meaning of environment and the law governs it	315
	Sources of International Environmental Law	316
	International Environmental Treaties	316
	Environmental customary international law	318
	Environmental soft law	319
	State responsibility and violation of environmental law	322
	Specific environmental obligations	325
	Pollution of the atmosphere	325
	Marine pollution	327
	Pollution from chemicals and wastes	329
	Radioactive pollution	330
13	The Law of the United Nations	333
	The Charter and the foundation of the UN	333
	The Charter of the UN	335
	Purposes and principles of the UN	335
	Collective security system and great power unanimity	337
	The UN organs	339
	The UN General Assembly	340
	The UN Security Council	343
	Functions and powers of the Security Council	348
	Enforcement actions	349
	Peacekeeping operations	354
	The International Court of Justice: Judicial review	357
	Judicial review	358
14	Peaceful Settlement of International Disputes	365
	The concept of peaceful settlement of disputes	365
	Means of dispute settlement	367
	Diplomatic means	367
	Negotiation	367
	Good offices	369
	Mediation	369
	Inquiry	370
	Conciliation	372
	Legal means	373
	Arbitration	373
	Inter-State arbitration	374
	International commercial arbitration	376
	Arbitration between a State and a private party	377

	Differences between arbitration and judicial decision	379
	Judicial Decisions	380
	The International Court of Justice	380
	Composition	381
	Functions	382
	Jurisdictions of the Court in Contentious Cases	383
	Procedure	388
	Provisional measures	388
	Third party intervention	391
	Enforcement	391
	Advisory opinion	393
15	Legal Regulation of the Use of Force	395
	The law before the UN Charter	396
	The law after the UN Charter: The prohibition of the use of force	398
	The prohibition of the use of in Article 2 (4) of the UN Charter	398
	Principle of non-intervention	403
	Armed intervention to rescue nationals abroad	406
	Humanitarian intervention	407
	Exceptions to the rule prohibiting the use of force	409
	The right of self-defence	409
	Limitations of the right of self-defence	411
	The role of the Security Council	420
	Collective self-defence treaties: NATO	422
	Enforcement action under Chapter VII of the Charter	424
16	International Humanitarian Law	427
	The nature of IHL	427
	Meaning of IHL	428
	Sources of IHL	429
	Types of armed conflict and the scope of IHL	432
	Classification of armed conflict	432
	Scope of the application of IHL	438
	Conduct of hostilities	439
	Defining legitimate military targets	439
	Methods of warfare	445
	Means of warfare	446
	Protected persons	451
	Wounded sick and shipwrecked	451

Medical personnel and facilities	453
Prisoners of war	453
Civilians	458
Implementation and enforcement of IHL	462
Implementation	462
Enforcement	464
Responsibility for breach of IHL	470
State responsibility and the legal consequences of violations of IHL	470
Individual responsibility and war crimes	475
Prosecution before international criminal courts and tribunals	481
Ad hoc International Criminal Tribunals	481
International Criminal Court	485
17 Conclusion	491
Appendix A: Model Instrument of Full Powers	493
Appendix B: Model Instrument of Ratification, Acceptance or Approval Appendix C: Model Instrument of Accession	