

### Use of cases

When using a case as authority for something, attempt to draw analogies or draw distinctions between the important facts to show an understanding. For example, distinctions with *Nicaragua* as the US was training, giving financial support and offering encouragement to the contras in Nicaragua and hence they were responsible for their acts.

**After this, always state that decisions of international courts are a subsidiary means of determining international law according to Article 38(1)(d) of the Statute of the ICJ.**

### Skeletons

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**Advise \_ of any action that may seek under the treaty:**

1. Decide if it is a treaty under VCLT art 2(1)
2. Assume negotiation is not an issue as both have signed it
3. Legal effects: Article 12 signature means consent to be bound. But, as \_ ratified it but the other hasn't, then the other will also likely need to ratify. *Pacta sunt servanda* given life in Art 18 which applies as the treaty is not in force yet. As the purpose of the act is to \_\_\_ [State] should [do something]. Thus, the treaty is valid to the effect.
4. Standing: the State 'specially affected by the breach' under Art 42 of the Articles on the Responsibility of State for Wrongful Acts. *[on facts are they?]*
5. Breach: Art 12 of the Draft Articles of State Responsibility, if a State does not act in conformity with what is required by it by an international obligation. But, it must be bound by the obligation at the time of the act (Art 13). *[on facts what they breach?]*
6. ICJ has jurisdiction though [e.g. compromissory clause]. Therefore has authority to hear the dispute (Art 38(1) and 36(3)).
7. Any barriers to jurisdiction?
8. Hence, the ICJ on the facts can make a decision. However, it is only binding on those States (Art 59). Otherwise, the SC could enforce but they have never done it.
9. Conclusion! E.g. for these reasons, \_ may have a case against \_ before the ICJ.

**What consequences might \_ face for initiating the conflict?**

1. State the issue: E.g. The issue is if \_ can be held responsible for the Acts of \_\_\_.
2. Summarise arts 1, 2, and 3 of the Draft Articles.
3. Issue: Hence, must determine if the wrongful Act of \_\_\_ is an act attributable to \_.
4. Apply the appropriate State responsibility Article.
5. Conclusion: e.g. because of \_\_\_ the conduct is likely/unlikely attributable to \_.
6. Under article 2(4) this conduct is prohibited as there is a 'threat' and a 'use of force' against \_'s territorial integrity. The Friendly Relations Declaration supports this, although not binding, as no state shall\_\_.
7. Exceptions to the use of force: i.e. any self-defense?
8. Consequence: SC can investigate per Art 34 and make recommendations under Art 36, sanctions (Art 41). Likely to do this as it wouldn't do any harm. If it is ignored, they could authorise the use of force (Art 42).
9. Conclusion: Hence, \_ is likely responsible for the use of force by \_. The SC may take appropriate action. From its history it is likely to make a recommendation to begin with like with the Iraq invasion of Kuwait.

# Nature of International Law (Week 1)

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**Sovereignty:** Unlike domestic legal systems, the States are sovereign in International Law. James Crawford states International Law “regards each State as sovereign... it is presumed to have full authority to act not only internally but at the international level...”

The **Lotus Principle** states ‘The rules of law binding upon States therefore emanate from their own free will... Restrictions upon the independence of States cannot therefore be presumed’. ← Not as prominent as in 1927 but still demonstrates sovereignty. *Hence, sovereign equality arises as States are the source of international law, they choose to ratify a treaty or make customary international law. Hence, they are not constrained in making, or removing laws.*

**Actors:** States (statehood notes), International Organisations, NGOs (ICRC), Juridical Private Entities (NIKE or Apple which influence in labour/environmental laws etc.), Individuals (1<sup>st</sup> OP to ICCPR) Courts and Tribunals (ICJ, ICC or International Tribunal for the Law on the Sea etc.)

**Differences with domestic law:** International Law relates to the rights and duties of the States themselves where no superiority exists, all have sovereign equality. However, domestic law is concerned with the legal rights and duties of legal persons, the legislature, executive and judiciary are essentially superior to the general public. The sovereign equality in international law means that no state can force another state to do something, unlike in domestic law. Hence, per Dixon “analogies with national law [are] misleading and inappropriate.”

## Compliance with International Law (Week 1)

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Compliance is often used as a way to discredit the validity of International Law or, to overstate it. Louis Henkin asserted that “almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time.” Professor Thomas Franck argues that the key to compliance is not so much the managerial process as the fairness of international rules themselves.

**Realist perspective:** *As espoused by Jan Klabbers “states will only respect international law when it is in their self-interest to do so, and will disrespect it when it is not.” The issue with this approach is in reality States comply with human rights international law or the ICC or compromise on collective issues, thus not acting in their best self-interest. Also, an interest is not always set between states, it may differ between them.*

**Rationalist view:** *May comply depending on the reaction of other states. This view considers the unintended consequences of the action, either positive (technology growth) or negative.*

**Liberal concept:** *May comply if it is desired/supported by a majority within the state.*

**Enforcement –** *International Law is practised in a decentralised environment. The Security Council may authorise the use of force per Chapter VII of the UN Charter to ‘maintain or restore international peace and security’, or social, diplomatic and political action. However, as international law regulates legal equals it may be unwise to have a formal method of enforcement. Although, the power of veto can pose an issue to action. Courts and Tribunals do not enforce the law as they do in domestic law. The ICJ can judicially decide on matters regarding international rights but its’ decisions are not*

*binding, although they are generally followed. National Courts can also decide on substantive issues of international law e.g. the High Court.*

*States can ensure that any breach of international law results in a corresponding loss of legal rights and privileges. Similarly, a state's unlawful action may cause the community at large to impose penalties. Although, Governments do feel compelled to justify their actions on 'objective' or legal grounds, not on simple self-interest.*

**Effectiveness:** *States do not claim to be above international law. When Iraq invaded Kuwait it did not claim to be above the law, rather they argued International law justified their actions. It is used as a justificatory discourse. Nonetheless, most international laws are obeyed due to:*

Self-interest: *According to Dixon 'It is in every State's interest to abide by the rules of international law, where they lay down orderly and predictable principles for the conduct of international relations and international commerce' and the resolution of global issues in this increasingly interdependent world.*

The Psychological Rubicon: *As "Law has a self-perpetuating quality" each State faces a psychological barrier against breaking international law as it is seen as law.*

The practitioners of international law: *have a habit of obedience derived from their own training as national lawyers which serves to encourage respect for international law.*

The flexible nature of international law: *The lack of rigid and defined rules leads to modest claims and a premium on compromise. States may also be able to choose from a variety of lawful actions.*

Political loss: *A breach may result in a loss of influence or trust and could lead to a reduction in trade etc. Further, the embarrassment may arise from breaching the law.*

**Weaknesses:** Lack of institutions: *no central body can create a general body of laws in times of need. The customary law-making process may be too slow for rapid change. Lastly, there is no compulsory court system to quickly resolve disputes and enforce the outcome.*

Lack of certainty: *As the system is flexible and open-ended, disputes may arise as the law is unclear.*

Vital interests: *If a state believes its 'vital interests' to be threatened, international law may not be able to prevent illegal conduct.*

Vital rules: *international law has a poor record of preventing uses of force.*

## International Legal Reasoning (Week 2)

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*The aim is harmonization – where one norm assists a consistent interpretation of another through clarification. If two norms conflict, the interpretation that best achieves this must apply.*

### UN Fragmentation Study Maxims: - starting point for interpretation

**Lex specialis – specific norms take precedence over general ones:** Does not apply to *Jus Cogens* rules of general application in areas like slavery, genocide or crimes against humanity. IHL (LOAC) is specific law and prevails over International Human Rights Law is general law. *DRC v Uganda Case* shows a complementary approach between IHRL and IHL.

**Lex posterior – newer norms take precedence over older ones:** UN Charter, *jus cogens* and treaties that embody non-derogable obligations (like ICCPR right to life) not subject to this!

**Lex superior – a superior norm takes precedence over an inferior one:** (Customary Law, Treaties and General principles are not hierarchical). But, if specificity stated in a treaty could apply against custom. OR *UN Charter, jus cogens, erga omnes*, Art 50 of Geneva convention or Chap 7 SCR.

## Customary International Law (Week 2)

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Statute of the ICJ, Article 38(1)(b): it is 'international custom, as evidence of a general practise accepted as law' → It is binding, regardless of consent, unless persistent objector.

### The *Nicaragua case* is authority that the elements are:

The objective element of **State Practise**: Actual practise like *domestic acts by State organs, international acts of the State* (comments and votes, military conduct and instructions), *signature, accession and ratification of treaties*, or *statements* by authoritative people with authority. However, consistent with the *Anglo-Norwegian Fisheries Case*: '...activity of private individuals is of little value'.

However, *Nicaragua* decided the practise need not be perfect, just consistent with the rules. It also held that any inconsistent conduct does not undermine the law if it is treated as a breach. Also, if the State justifies its conduct by appealing to exceptions, it strengthens the rule. *The North Sea Continental Shelf case* is authority the general practice should include 'States whose interests [are] especially affected.' Also, if time is short the State practise should be 'both extensive and uniform'.

The subjective element of **Opinio juris**: i.e. a conviction that certain conduct is required by law. The *North Sea Continental Shelf case* held States must feel they are conforming to a legal obligation. Hence, the frequency, or even habitual character of the acts is not in itself enough'.

For example, support for Resolutions or Declarations, Diplomatic correspondence, Military and diplomatic instructions and manuals or domestic Parliamentary statements, court judgements.

**Persistent Objection:** A State which objects to a customary rule while it is still forming, and which maintains that objection, will not be bound by it – *Anglo-Norwegian Fisheries Case*.

**Regional or local custom:** *The Right of Passage case* is authority that 'long continued practise between two States accepted by them as regulating their relations' can form mutual obligations.