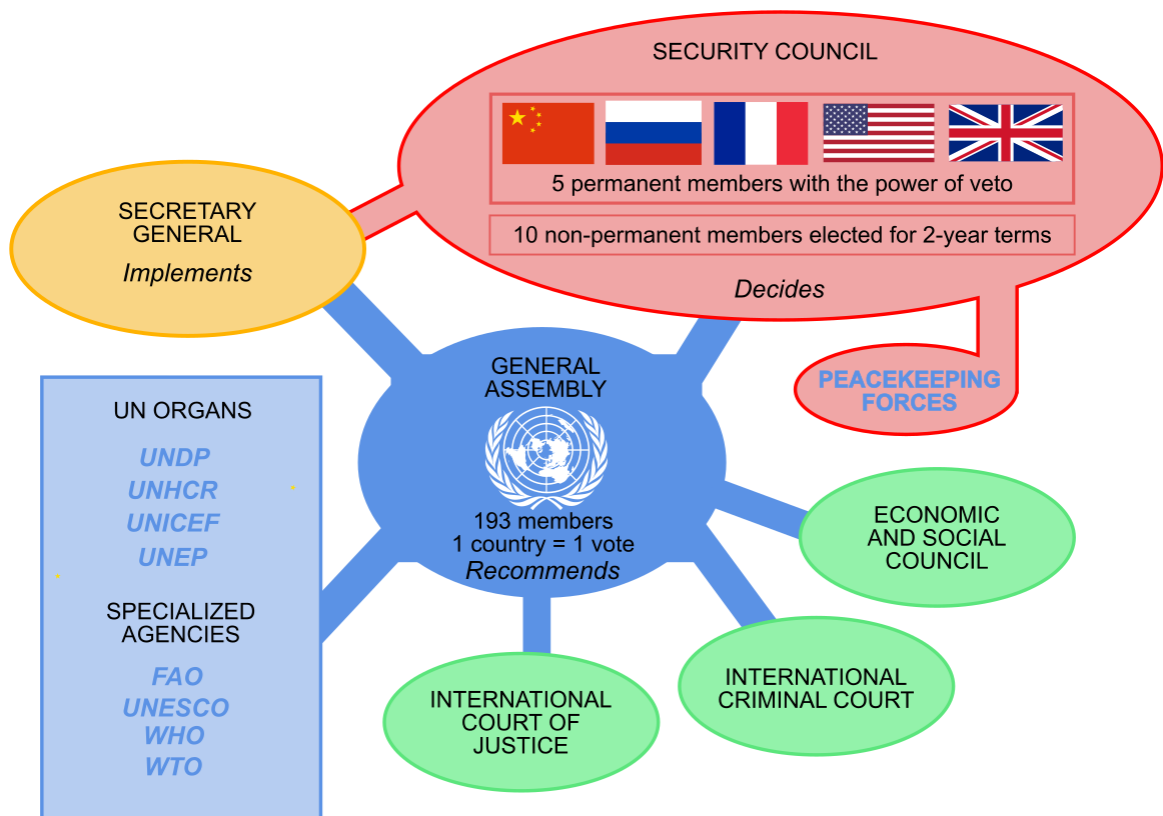


PRINCIPLES OF PUBLIC INTERNATIONAL LAW

UTS CODE: 70106



WEEK 1: SOURCES

BACKGROUND

Horizontal legal system

192 separate UN member nation states who have equal authority/power
No hierarchy or overarching authorities like federal/state division
No upward authority given by the public and no downward production of law from parliament

Nations are bound by international law through consent

States have sovereignty to refuse to be bound by international law

400 years ago = origins of modern international law

Hugo Grotius – thesis relating to maritime law

Treaty of Westphalia – creation of sovereign nation states

STEPS IN IMPLEMENTING PIL

Negotiation

Vote occurs where there needs to be a 2/3 majority for progression to adoption

Adoption

Text of the treaty is finalised

Signature

An act of good faith but it has no legal effect – carries legal effect when ratified

Ratification

Domestic act (of nation state) expressing consent to be bound

Occurs through an instrument of ratification which is lodged with the relevant international body or organisation

This does NOT bring the treaty into Australian domestic law

- NOW the ratifying nation state is bound
- NOTE: if a State was not involved in the negotiation/adoption/signature of a treaty then it can only 'accede' – accession has the same legal effect but differs in this one regard

Implementation

- Transforms the treaty into a domestic piece of legislation

NOW individuals within the nation state and not just the NS itself are bound ○

NOTE: some nations do not need this stage as ratification automatically

implements the treaty

SOURCES: ICJ Statute

Most authoritative and complete statement of the sources is in s 38(1) Statute of the ICJ

- 38(1)(a) gives ICJ authority to resolve disputes of international conventions (eg. Treaties) which are expressly recognised (ie. ratified) by contesting states
- 38(1)(b) resolve disputes surrounding international custom
- 38(1)(c) resolve disputes of general principles of law recognised by nations
- 38(1)(d) judicial decisions and teachings of highly qualified 'publicists' may be used as a subsidiary means of determining rules of law

Statute of the International Court of Justice - Article 38

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
 - 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.
2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.

Conventions/custom/principles are generally seen as the exclusive law creating processes and judicial decisions/academic writing regard as law-determining agencies

NOTE: can never separate these sources – all intertwined and carry equal authority/force except for subsidiary decisions/teachings

Lotus (France v Turkey) (1927) – State criminal jurisdiction (establishing a customary rule)

FACTS:

Collision b/w French and Turkish vessels on high seas caused by negligent navigation
 French. 8 Turkish killed
 Turkey asserted jurisdiction over French master of the watch (resp for negligent nav)
Convention Lausanne 1923: Art 16 – “all questions of jurisdiction b/w Turkey and other contracting powers, decided in accordance IL”
 France asserting customary law exclusive juris because ship was flying its flag

HELD:

Turkey did not violate IL by exercising jurisdiction over the French master
 Custom established law if no treaty - there was no such customary rule entitling France to exclusive jurisdiction
 Teachings of publicists are insufficient alone to establish custom and the cases cited as precedent did not relate to situations where ships had two different flags
 State cannot exercise its jurisdiction outside its territory unless an international treaty or customary law permits it to do so
 Within its territory, a State may exercise its jurisdiction, on any matter, even if there is no specific rule of IL permitting it to do so.
 In these instances, States have a wide discretion, which is only limited by the prohibitive rules of IL
 Changed by Art 11 of High Seas Convention = only the flag state or the state of which the alleged offender was a national had jurisdiction over sailors regarding incidents occurring in high seas

Asylum Case (Columbia v Peru) (1950) – see below

North Sea Continental Shelf cases (Germany v Denmark) (Germany v Netherlands) (1969) – see below

SOURCES: Customary International Law

Custom which 'crystallises' around a particular norm of conduct

Declared to be custom by international courts such as the ICJ and ICC

Must be performing conduct knowing that this conduct carries a legal obligation

ELEMENTS

General/state practise (objective)

- ⑩ Includes administrative acts, legislation, court decisions and intl. activities
- ⑩ Must be a constant and uniform practise (**Asylum; Anglo Norwegian Fisheries**)
- ⑩ No need for perfect or 'absolutely rigorous' consistency (**Nicaragua v USA**)
 - May be divergence as long as it does not affect overall consistency
- ⑩ Inaction/failure to act may only constitute state customary practise if it is based on a conscious duty to abstain (**Lotus – decision criticised**)
- ⑩ Look at the circumstances surrounding the practise
 - Asylum** = no CIL as no uniformity in determining criminal/political conduct
 - AN Fish** = no CIL as no uniformity in USA's way of measuring territorial sea
 - North Sea Shelf** = no CIL as no uniformity in measuring TS in Europe

Sense of legal obligation amongst states performing the practise (subjective/mental element – *opinio juris*)

- ⑩ State performed the practise because it believed it was legally obliged to do so (**Nicaragua; Germany v Italy; North Sea**)
 - High threshold to prove this (**Diallo**)
 - Not driven by economic/political factors but a legal mental element
 - ⑩ Acquiescence by states to a customary practise makes it likely CIL law (**Gulf of Maine**)
 - Actual objection must occur to break the legality of a custom – see below
- NOTE: tends to be less important where state practise is extensive – because overwhelming state practice creates rebuttable presumption of custom

PERSISTENT OBJECTOR RULE

Nations which oppose state customary practise from its inception are not bound by it (***Anglo Norwegian Fisheries; Asylum***)

- Must be a conscious and consistent opposition
 - ⑩ Can be through conscious inaction OR contrary action (***Lotus***)
 -) BUT cannot be non-conscious inaction

STATE PRACTISE

What constitutes 'enough' states to create customary law

Judged in context – often a subjective judgement

- ⑩ Normally need concurrence of the major powers
- EG: number of states declaring continental shelf and using equidistant principle in ***North Sea Continental Shelf*** cases was not 'enough'

NOTE: can be global, regional or even bilateral custom (***Right of Passage over Indian Territory; Asylum*** – practise recognised as localised in Latin America)

- Must still be positive legal acceptance by all parties to the customary rule

NOTE: custom is essentially assessed by comparing a state's practise with others

- If they all do the same thing, likely to be custom – concept of acquiescence