PUBLIC INTERNATIONAL LAW

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Topic 1: Sources

1.1 Nature of public international law

What is international law?

The laws that govern the relationship between nation-states and establish fundamental human rights.

Why do we have it?

- To allow trade and communication between nation-states
- To establish fundamental human rights
- To solve environmental problems

Who is involved in making it?

United Nations Security Council
International Courts
Intergovernmental Organisations (IGOs)
Non-Governmental organisations (NGO's)

What's a nation-state?

The legal term for a country with the following characteristics:

1. Defined geographically
2. Effective Government
3. A permanent population
4. The capacity to enter international negotiations.

State Sovereignty:

The state has the authority to make rules for its population and the power to enforce these rules. As a nation state, the laws of other countries do not bind Australia nor can other nation states impose their laws on Australia.

Other:

First international laws – rules of warfare
Contemporary PIL – product of last century
Key subject matters: navigation, trade between countries, economic prosperity

Domestic legal systems are of a 'vertical' nature

1. Common law / judge-made law is vertical: created by an authority; judge has power of the court.
2. Hierarchical / vertical nature of precedent: where difference of opinion between judges, 1 rule prevails.
3. Ultimate Court of Appeal in domestic legal systems eg HCA. All courts below the ultimate appeal court are bound by precedent.
4. Legislative law is vertical: statutes can override ct precedent
5. Legislative law is vertical: entity above (Parliament) binds all citizens falling within state parameters, regardless of whether citizens agree with the law.

All domestic legal systems (common / civil / religious / communist systems) are vertical.

International law is of a 'horizontal' nature

States are all equal
States are subjects & creators of PIL → states making laws for states ∴ horizontal.
International law based on state sovereignty → consensual

Exception to consensual nature: jus cogens (= non-derogable principles of public international law: e.g right to be free from genocide / torture / slavery / apartheid)

1.2 Sources of public international law

Identifying the sources of applicable law is more complicated in PIL than it is in domestic law. There is no single universal authority that enacts PIL.

Sources of law are identified in Article 38 – The ICJ sets out the conventionally recognised formal sources:

(*Statute of ICJ* Art 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.

Essentially, there are **three** main sources of PIL:

1. **Treaty Law:** a binding agreement between two or more independent states.
2. **Customary International Law:** created and sustained by the constant and uniform practices of states in circumstances that give rise to the legitimate expectation of similar conduct in the future (binding on all states).
3. **General Principles of Law:** Universal principles of law common throughout the world.

In addition, judicial decisions and juristic writings are considered to be a subsidiary source of PIL.

1.3 Treaties

> Statute of ICJ Article 38 (1)(a)
> 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;

- Treaties are a formal binding agreement between nation-states that governs the relations between those parties.
- They are governed under the *Vienna Convention on the Law of the Treaties 1969* (VCLT).
- Can be bilateral or multilateral.
- A treaty is a written legal document (instrument) agreed between States and governed by international law.
- It may be in the form of a single instrument, or two or more related instruments.

1.4 When is a treaty binding?

2 modes of expressing consent which binds the state:

I. **Ratification** = state agrees for treaty's terms to be transplanted into state's own domestic law

- Note: there may be a minimum number of state ratifications required to put the treaty into effect e.g 60 states / percentage

II. **Accession** = state accepts offer / opportunity to become party to a treaty ('accede') already negotiated & signed by other States.

- Same legal effect as ratification
- Usually occurs after treaty has entered into force
- See *VCLT* Art 2(1)(b) & Art 15

Treaty = covenant / protocol / statute
≠ declaration

Negotiations = conference on whether ratification is the appropriate mode of expressing consent; agreement reached in conference on ratification requirements.

- 2/3 majority needed
- Conference could last for years

Adoption = year when parties settle on treaty's subject matter / content

Signature = act of good faith in support of recent adoption

- Treaty is 'open for signature' after option
- No binding obligations arising from signature
- Usu number of signatories > ratifying states

Reservations = ratification of a certain part of a treaty but not others.

- Viewed as poor form
- Whether reservations are allowed is decided upon in negotiations
- State may not opt out of major oblig in treaty which would undermine treaty.

1.5 Treaties in Australia

- Executive ratifies i.e Department of Foreign Affairs & Trade (DFAT)
- Once DFAT ratifies, Parliament must implement treaty into domestic law ('transformation').
- Subject to conflicting domestic laws – does treaty encroach on our right to political freedom / speech?
- Const s 59(xxix) – external affairs power / right to legislate with respect to 'external affairs'
- *Minister of State for Immigration & Ethnic Affairs v Teoh*: where Aus ratified treaty but has not transformed treaty ->
- Common law states are generally not internationalist -> extra step required to implement ratified treaties.

1.6 Customary international law

Elements of CIL:

- CIL is created and sustained by the constant and uniform practices of states in circumstances that give rise to the legitimate expectation of similar conduct in the future (binding on all states).
- Custom = communal standards, code of conduct, acceptable practice, normative conduct.
- It requires:
  - Act / Practice (objective element) **&**

- opinio juris (subjective element)
    - occurred because it was a legal obligation *not* convenience / economic efficiency)

Statute of ICJ Article 38(1)(b)
The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
b. international custom, as evidence of a general practice accepted as law;

Statute of ICJ Art 38(1)(b): 2 elements of customary int'l law:

- 'a general practice' ✓
- 'accepted as law' (opinio juris) ✓

Custom only exists where practice is:

- consistent ✓ and
- widespread ✓and
- practiced over time ✓
    - Historically, customary international law developed over decades; repetitive conduct of states before opinio juris was declared.
    - BUT since 1970s, instantaneous customs can be formed where other states follow suit.
    - Instantaneous customs formed where sense of urgency / area with a gap in international law / acting swiftly is important.
    - With instantaneous customs: opinio juris emerges first THEN expectation that state practice will follow the identified *opinio juris*.

The ICJ explained opinio juris, in the ***Nicaragua*:**

"[…] for a new customary rule to be formed, not only must the acts concerned 'amount to a settled practice', but they must be accompanied by opinio juris sive neccessitatis. Either the States taking such action or other States in a position to react to it, must have behaved so that their conduct is evidence of a belief that the practice is rendered obligatory by the existence of a rule of law requiring it. The need for such belief..the subjective element, is implicit in the very notion of opinio juris sive neccessitatis. "

Elements of custom

A. General practice or State practice (objective element)

Consistency

- Must be common, consistent and concordant: *Fisheries Jurisdiction Case*
- Degree of participation from states who are most likely affected: *North Sea Continental Shelf Cases*
- Even where there is an absence of substantial dissent: *Nicaragua*
- General tolerance of the international community threshold must be satisfied: *Anglo-Norwegian Fisheries case.*
- In the *Asylum case* (Columbia v Peru) (1950)
    - The court rejected a claim to CIL.
    - 'so much uncertainty and contradiction, so much fluctuation and discrepancy….it was not possible to discern any constant and uniform acceptance of law'.

Time Factor

- No longer a need for the state practice to be established over a length time.
- 'Instant Custom' – courts take into account any changes to the international community
- Time needed before actions or behaviours are considered a state practice for establishing customary international law should be short, extensive and virtually uniform. *North Sea Continental Shelf* cases.

Generality

- Demonstrate a state has accepted the practice rather than participated.
- See Asylum case as above.

B. Opinio Juris (subjective element)

- CIL test requires proof that the state has followed or applied the custom due to legal obligation.
- Presumption is satisfied where a large number of states conform to a general practice.
- ***Lotus case:*** Merely abstaining from doing something does not amount to evidence of opinio juris.

Local or Regional custom

- In the *Right of Passage over Indiant Territory Case;* Local custom could not be established between 2 states only.
- *Asylum* case, ' a constant and uniform practice by the states in question is to be considered regional custom'.
- UN General Assembly resolutions are used as a guide.

Jus cogens – compelling law

- A peremptory norm to which non-derogation is permitted
- Not open to appeal or challenge.
- Use of force, Slavery, War Crimes, Crimes Against Humanity, Genocide, Torture.
- **Article 53**, Vienna Convention on the Law of Treaties (1969)('VCLT')
- *North Sea Continental Shelf* cases, per Judge Lachs (p.229)

Persistent objector and subsequent objector (exception)

- Failure to contribute or follow a practice does not entitle the state to argue this rule
- State must demonstrate that it has adopted and maintained a consistent policy that opposes the rule: *Anglo Norwegian Fisheries Case.*
- Dissent will not relieve a state from having to comply with the developing rule of *jus cogens.*

Significant cases on customary international law

- ***Assylum Case:*** *'* while there had been repetition in this case, practice contained too many inconsistances and did not amount to uniform usage'.

- ***Anglo Norweigian Fisheries Case:*** **'** Actual practice of states did not justify the creation of any such custom… in fact, Norway has always opposed any attempt to apply the rule.'

- ***North Sea Continental Shelf:*** **Art 6 – Geneva Convention –** is not a rule of customary international law and cannot bind states.

- ***Nicaragua:***
  - The existence of customary law can be identified by actual state practice and *opinio juris* of the states. However, the practice does not have to be in absolute conformity with the rule.
  - The conduct of states should in general be consistent with the rule and state conduct inconsistent with the rule should generally be treated as breaches of that rule.
  - *Opinio juris* can be found in, *inter alia*, General Assembly Resolutions, statements of the state representatives and in the conclusion of treaties covering the same aspects as customary law.
  - Showed that the concept of *jus congens* is established in international law.
  - A state is still bound by customary law if it is a party to a treaty containing the same obligation, i.e. the state is bound by both the treaty and by custom, at least when the law at issue is a rule of *jus cogens*.

1.7 General legal principles

Another source of international law is 'general principles of law'.

> Article 38(1)(c)
> The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
> c. the general principles of law recognized by civilized nations;

- Source of law that draws upon well recognised legal principles to deal with gaps in the law
- General notions of justice and equity
- Borrows heavily from municipal legal systems rather than specific (*Barcelona Traction Case)* The principles that fill the gaps in law include:
  - Consent; Estoppel; Good Faith;
  - Finality of Judgement; Reciprocity; Equity

- Operate to avoid gaps in law and as a source of inspiration for the courts to draw upon.
- *Chorzów Factory (Indemnity)* case (Germany v Poland) (Merits) – applied a concept that would be readily understand by most lawyers, 'a breach of an engagement involves an obligation to make reparation'.
- *Diversion of Water from the Meuse* case (Netherlands v Belgium) (1937) PCIJ, Ser.A/B, No.70, per Judge Hudson at 7677

1.8 Judicial decisions

> Article 38(1)(d)
> The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
> 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.

- As set out iin Art 38(1)(d) of ICJ Statute judicial decisions and the writings of distinguished jurists can be used as a subsidiary means of determining the law.