

# Public International Law Scaffolds

## Table of Contents

<b>Customary International Law .....</b>	<b>2</b>
Other sources of law .....	4
<b>Relationship between international and national law .....</b>	<b>5</b>
<b>Personality and Recognition .....</b>	<b>6</b>
<b>Jurisdiction .....</b>	<b>9</b>
<b>Immunity from Jurisdiction.....</b>	<b>11</b>
<b>Treaties .....</b>	<b>15</b>
<b>State Responsibility .....</b>	<b>19</b>
<b>Settlement of International Disputes .....</b>	<b>26</b>
<b>Use of Force.....</b>	<b>29</b>

## Customary International Law

### Summary

- Source of international law [art 38\(1\)\(b\) ICJ Statute](#)
- Law that is binding on States even where they have not entered into a treaty to that effect
- An obligation can exist in a treaty and at the same time can exist in customary international law (*Nicaragua* case)
- Elements (*North Sea Continental Shelf Case*)
  - 1. State Practice – actual behaviour of states
  - 2. Opinion Juris - subjective belief that a state behaved this way because it was under a legal obligation to act that way

### Element 1: State practice

- State practice looks at the acts of States AND official docs, legislation, policy instruments etc.
- **Consistency:** Customary rule “must be in accordance with a constant and uniform usage practiced by the States in question” (*Asylum* case)
  - Look at context
  - (*Nicaragua v US*) → “Consistent but not absolute conformity”
    - Instances of state conduct inconsistent with the rules should generally have been treated as breaches of the rule, not as indications of a recognition of a new rule
- **Time:** No specified amount of time that States are required to have practiced a particular custom. More important that may States adhere to the practice consistently.
  - A rule of CIL can emerge even though state practice has only been relatively recent (*North Sea Continental*)
  - In such cases, state practice must be “both extensive and virtually uniform in the sense of the provision invoked” (*North Sea Continental Shelf case*)

### Element 2: Opinio Juris

- Subjective → in acting consistently with a particular norm, state believes that are following a rule of international law (*Lotus case*)
  - Held that state had to be conscious of a duty not to prosecute in collision cases because of a legal obligation
  - Held that CIL can be act or omission → must satisfy the test

- Infer *opinio juris* from material acts (*North Sea* affirmed in *Nicaragua*)
  - *Nicaragua*: Includes judicial decisions of municipal courts, laws that have been passed, speeches by state officials, diplomatic relationships between states, attitudes of parties in general assembly resolutions, consent to particular resolutions

#### Issue: Regional Custom

- Rules that only bind a set group of states e.g. Latin America
- Standard of proof is higher than in cases with general custom
- Must be uniformly and universally accepted (*Asylum case*)
- If practice b/w 2 states is clearly established and was accepted by the Parties, then this may be a decisive factor → particular practice will prevail over any general rules (*Right of Passage over Indian Territory*)
  - Held practice permitted free passage of private person and goods but required previous authorization for armed forces

#### Persistent objector principle

- State can avoid rule of CIL if it can be shown that it has persistently objected to that rule (*Fisheries* case)
- **Elements** (*Fisheries* case):
  - 1. State must have objected to any outside attempts to apply the rule to itself
    - (a) at the initial stages and (b) in a consistent manner, and
  - 2. Other states must not have objected to the resistance

#### Jus cogens

- Substantive rules recognised as being of a higher status accepted and recognized by the international community → peremptory norms
- Fundamental principles of international law which cannot be derogated from in treaties (art 53 VCLT) or customary international law
- Includes genocide, slavery, piracy, unlawful use of force i.e. unlawfully going to war
- **Ergo omnes**: obligations which are owed to the international community as a whole (*Barcelona Traction case*)

#### Evidence of law

- Domestic legislation is not a source of international law but can be considered evidence of state practice or *opinio juris* as part of establishing CIL.
- Decisions of national courts will not be binding but can also be evidence of CIL.

#### Other sources of law

- **Article 38 (1)(c) ICJ Statute** “the **generalised principles of law** recognised by civilised nations”
  - When there’s no precedent, so judges have to deduce a rule by analogy to other existing rules or from general principles
  - E.g. res judicata rule i.e. can’t retry a case, decision is binding (*Genocide Convention (Bosnia and Herzegovina v Serbia and Montenegro) case*)
  - E.g. principle of *pacta sunt servanda* (that legal obligations must be performed in good faith): *Nuclear Tests case*
- **Art 38(1)(d) ICJ Statute** “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.”
  - **Art 59** – decisions have no binding force except as between the parties and in respect of the case under consideration

#### Resolutions, general comments and other ‘soft law’

- In addition to source of law in **art 38(1)**
- SC resolutions are binding on all UN states (**UN Charter art 25**)
- UN General assembly resolutions → Some resolutions are legally binding on members such as budgetary matters and membership (**UN Charter Art 18**)
  - Most resolutions are not legally binding but may be evidence of customary law.
- General comments: body responsible for monitoring compliance with a human rights treaty can issue a General Comment in relation to a particular provision in order to clarify the nature and scope of the States’ obligations under that provision.
- Declarations are soft law e.g. Rio declaration → not binding but political pressure to conform