

## SOURCES OF INTERNATIONAL LAW PROBLEM QUESTION

### SOURCES OF INTERNATIONAL LAW – Article 38(1) Statute of the ICJ

- Article 38(1) is the legal authority for sources of IL.

The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

- International conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- International custom, as evidence of a general practice accepted as law;
- The general principles of law recognized by civilized nations;
- 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.

<p><b><i>JUS COGENS</i></b> <b>(peremptory norm)</b></p>	<p>A fundamental principle of IL that is accepted by the international community of states as a norm from which no derogation is permitted.</p> <p><b>Non-Exhaustive List:</b> Report of the ILC 71<sup>st</sup> Session 2019</p> <ul style="list-style-type: none"> <li>Prohibition of aggression</li> <li>Prohibition of genocide</li> <li>Prohibition of crimes against humanity</li> <li>Basic rules of international humanitarian law</li> <li>Prohibition of racial discrimination and apartheid</li> <li>Prohibition of slavery</li> <li>Prohibition of torture</li> <li>The right to self-determination</li> </ul>
<p><b>a) INTERNATIONAL CONVENTIONS</b></p>	<p>Is the State/s involved bound by any treaties or conventions?</p> <p><b>QUESTIONS TO ASK:</b> Treaty Question</p> <ul style="list-style-type: none"> <li><b>Is the treaty binding on state X?</b> <ul style="list-style-type: none"> <li>Did the right person give consent to be bound? (<i>DRC v Rwanda</i>)</li> <li>RED FLAG – If the country is not a party or not ratified a treaty, you still have to consider whether the treaty has enforced CIL or a provision has become CIL (<i>North Sea Continental Shelf</i>)</li> </ul> </li> <li>Is the treaty invalid for some reason?</li> <li><b>Interpretation issues:</b> Articles 31 and 31 VCLT</li> <li>Jus cogens issues in treaty? <ul style="list-style-type: none"> <li>VCLT Art 53 – treaties in conflict with peremptory norm are invalid</li> </ul> </li> <li><b>If State X wants to withdraw from the treaty consider:</b> <ul style="list-style-type: none"> <li>Invalidity</li> <li>Material breach by another party (Article 60 VCLT)</li> <li>Impossibility (Article 61 VCLT)</li> <li>Fundamental change of circumstances (Article 62 VCLT)</li> </ul> </li> <li>Check whether these give state X the right to terminate or just suspend the treaty.</li> </ul>
<p><b>b) CUSTOMARY INTERNATIONAL LAW</b></p>	<p>Has a rule in question become part of CIL?</p> <ul style="list-style-type: none"> <li>Is there evidence of State Practice + <i>opinio juris</i>?</li> </ul> <p><b>1. STATE PRACTICE</b> (objective)</p> <p>What the States do, it does not matter what they think/reasons for doing it.</p> <ul style="list-style-type: none"> <li>Duration and consistency of practice <ul style="list-style-type: none"> <li>Does not need absolute conformity (<i>Nicaragua Case 1986</i>)</li> </ul> </li> <li>Generality of practice</li> <li>Widespread and consistent</li> </ul> <p><b>2. OPINIO JURIS</b> – ‘accepted as law’ (subjective)</p> <p>The reason/s for a State’s practice. Do they think that they have a legal obligation for following/implementing a practice?</p> <ul style="list-style-type: none"> <li><b>YES:</b> <i>opinio juris</i> is satisfied (<i>Nicaragua Case 1986</i>)</li> <li><b>NO:</b> <i>opinio juris</i> is not made out (<i>North Sea Continental Shelf Cases</i>)</li> </ul> <p><b>QUESTIONS TO ASK:</b></p> <ul style="list-style-type: none"> <li>Negotiating history of the treaty – hesitant or law?</li> </ul>

	<ul style="list-style-type: none"> <li>• Has the provision in question become CIL?</li> <li>• Has the entire Convention since become part of CIL? <ul style="list-style-type: none"> <li>◦ Possible for a short period of time subject to special conditions – Within a short period of time State practice including that of specially affected States should have been both extensive and virtually uniform within that period of time. (<i>North Sea Continental Shelf Cases</i>)</li> </ul> </li> <li>• Has it been satisfied in this case?</li> </ul> <p>Does the State being subjected to the CIL rule fulfil the requirements of the <b>PERSISTENT OBJECTOR RULE</b>?</p> <ul style="list-style-type: none"> <li>• <b>YES:</b> They are not bound</li> <li>• <b>NO:</b> They are bound</li> </ul> <p><b>Requirements/Questions to ask:</b></p> <ul style="list-style-type: none"> <li>• Is there persistent objecting to a rule WHILST it is crystallising into CIL?</li> <li>• Is the objection made publicly? (<i>UK v Norway; Asylum Case</i>)</li> <li>• Is there any <i>jus cogens</i> norm that it seems to be violating?</li> </ul> <p><b>ILC 2018 Draft Conclusions on Identification of CIL:</b></p> <ul style="list-style-type: none"> <li>• Failure to react over time to a practice may serve as evidence of acceptance as law (<i>opinio juris</i>), provided that States were in a position to react and the circumstances called for some reaction. (Conclusion 10.3)</li> </ul> <p><b>Principle 15</b></p> <ol style="list-style-type: none"> <li>1. Where a State has objected to a rule of CIL while that rule was in the process of formation, the rule is not opposable to the State concerned for so long</li> <li>2. Objection must be clearly expressed, made known to other states and maintained persistently</li> <li>3. Present draft conclusion is without prejudice to any question concerning peremptory norms of general international law (<i>jus cogens</i>)</li> </ol> <p><b>UN General Assembly Resolutions: (1996 Nuclear Weapons Advisory Opinion)</b></p> <ul style="list-style-type: none"> <li>• Generally not binding</li> <li>• Potentially can be evidence of State Practice</li> <li>• Also potentially count as evidence for <i>opinio juris</i> (<i>Nicaragua Case</i> – UNGA resolutions upholding the principle of non-intervention were used by ICJ as evidence)</li> <li>• <b>BE AWARE:</b> Countries may adopt UNGA resolutions for political reasons</li> <li>• Differences of opinion between States on aspects of the resolution may indicate that no <i>opinio juris</i> exists – resolutions which attract negative votes or abstentions are unlikely to be regarded as reflecting CIL.</li> <li>• <b>Terminology and context:</b> <ul style="list-style-type: none"> <li>◦ Describing the law as is in present tense – something must be done or something is prohibited.</li> <li>◦ Future tense – not enough</li> <li>◦ Certainty of language</li> <li>◦ Circumstances under which resolution was adopted</li> <li>◦ Are States describing the law as it stands or what they hope future law looks like?</li> </ul> </li> <li>• <b>Adoption:</b> Voting Records <ul style="list-style-type: none"> <li>◦ Important to help evidence <i>opinio juris</i> as gives indication of acceptance by States especially if language is strong</li> <li>◦ <b>EXAM:</b> if not given voting info then say this info is important and relevant to determining <i>opinio juris</i> – indicates to marker you know it is relevant.</li> </ul> </li> </ul> <p><b>REGIONAL CUSTOM (<i>Asylum Case</i> 1950)</b>  Regional custom can become CIL in their respective regions but do not become CIL for nations outside the region.</p>
c) <b>GENERAL PRINCIPLES</b>	Domestic principles so widespread we classify them as general principles. (IL that draws from ML)

	<b>Examples:</b> <ul style="list-style-type: none"> <li>• Equity is a principle of IL (<i>Diversion of Water from the Meuse</i>)</li> <li>• Corporations (<i>Barcelona Traction Case</i>)</li> </ul>
<b>d) SUBSIDIARY MEANS</b>	Things in this section are used to help interpret a) – c), thus it is not weighted as strongly as a source of IL. <b>Examples:</b> <ul style="list-style-type: none"> <li>• Judicial decisions (ICJ not bound by previous decisions)</li> <li>• Teachings of the most highly qualified academics</li> <li>• Decisions of national courts (<i>Lotus Case</i>)</li> </ul>

### ***Lotus Case (France v Turkey) PICJ 1927***

Relates to CIL. State practice alone is not enough to establish CIL.

- **FACTS:** France and Turkey had ships sailing in the high seas (no man's land) which collided and killed 8 Turkish sailors.
  - Turkey prosecuted the captain of the Turkish ship and the captain of the French ship
  - French captain was prosecuted, convicted and sentenced to jail in Turkey
  - France argued Turkey had no right to do this and the crime happened on a French ship and thus in France's jurisdiction.
  - Both States agreed to refer the issue to the ICJ
- **QUESTION:** Did Turkey violate IL when Turkish courts exercised jurisdiction over a crime committed by a French national outside of Turkey?
  - If yes, should Turkey pay compensation to France?
- **DECISION:** Turkey did not violate IL by instituting criminal proceedings against the French captain.
- **PRINCIPLES:**
  - A 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, in any matter, even if there is no specific rule of IL permitting it to do so. In these instances, States have a wide measure of discretion, which is only limited by the prohibitive rules of IL.
  - (dictum) *Opinio juris* is reflected not only in acts of States (*Nicaragua Case*), but also in omissions when those omissions are made following a belief that the said State is obligated by law to refrain from acting in a particular way.

### ***Anglo-Norwegian Fisheries Case (UK v Norway) [1951] ICJ***

Relates to CIL and Persistent Objector Rule. Adds to the *Asylum Case*.

- **FACTS:** Case concerns the methods used (10 mile rule) to delimit Norway's territorial sea/fisheries zone.
  - UK requested the court to decide if Norway has used a legally acceptable method in drawing the baseline from which it measured its territorial sea.
  - UK argued CIL did not allow the length of the baseline drawn across a bay to be longer than 10 miles
  - Norway argued that its delimitation method was consistent with general principles of IL
- **QUESTION:** Is the 10 mile rule a rule of CIL and should it apply to Norway?
- **DECISION:** Rejected the UK argument and ruled that the 10 mile rule inapplicable against Norway as CIL as she persistently objected to the 10 mile rule being applied to the Norwegian Coast.
- **REASONING:**
  - Insufficient State practice
  - The general toleration of foreign States with regard to the Norwegian practice is an unchallenged fact – helped strengthen Norway's position.