

Table of Contents

Topic 1: Nature and Subjects of International Law	4
Subtopics	4
1.1 What is 'public international law'?	4
1.2 Subjects and objects of international law	4
1.3 The structure of the international legal system and the United Nations	5
Topic 2: Sources of International Law	6
2.1 Introduction to Sources of Public International Law	6
2.2 Customary International Law	6
2.2.1 Definition	7
2.2.2 Elements of custom	7
2.2.3 Regional custom	10
2.2.5 Evidence	12
2.3 Treaties	12
2.3.1 Definition	12
2.3.2 Relationship between treaties and custom	12
2.4 General principles of law	13
2.5 Judicial decisions	13
2.6 Scholarly writings	14
Unilateral Acts/Statements of States	14
2.7 Role of international organisations	16
General Assembly Resolutions	16
Soft Law	18
2.8 Hierarchy of sources	18
2.9 Jus Cogens	18
Topic 3: Relationship Between International and Domestic / Municipal Law	19
3.1 Introduction to the Relationship Between International and Municipal Law	19
3.2 International Law in Municipal Law	19
Theoretical Perspectives: The Monism-Dualism Debate	19
The 'Transformation' and 'Incorporation' Approaches	20
3.3 Australian Law and International Law	20
3.3.1 Australian Courts Responses to International Law	20
3.4 International Law and Its Influence on The Common Law – Customary International Law	22
3.5 Treaties and Municipal Law	22
3.5.1 Basic Principles	22
3.5.2 Treaty-making	23
3.5.3 Municipal Implementation of Treaties	23
3.5.4 The Courts	24
3.5.5 The Legislature	25
Topic 4: Personality and Recognition (Statehood)	26
Personality	26
4.1 Concept of Personality	26
4.2 States and Statehood: What is a State in PIL? Criteria for Statehood	27
4.2.1 Criteria for Statehood	27
Creation of States in PIL	29
Disappearance, Succession or Reconfiguration of States	29
Rights and Duties of States	30

4.2.2 Self-Determination	30
4.2.3 Extinction and Succession of States	31
4.3 Other Legal Persons	32
4.3.1 International Organisations	32
4.3.2 Individuals	32
4.3.3 Corporations	32
Statehood and Recognition / State Recognition	33
Recognition	33
How Does a State Become Recognised?	33
Recognition Theories	33
Recognition of States	33
Recognition of Governments	33
Legal Effects of Recognition	34
Topic 5: State Jurisdiction and Immunities I (State Jurisdiction)	34
6.1 Introduction: Prescriptive and Enforcement Jurisdiction	34
6.2 Criminal Jurisdiction	35
6.2.1 Nationality Principle	35
6.2.2 Territorial Principle	36
6.2.3 Passive Personality Principle	37
6.2.4 Protective Principle	37
6.2.5 Universal Jurisdiction	37
Topic 6: State Jurisdiction and Immunities II (Immunity from Jurisdiction)	39
7.1 Introduction to Immunity from Jurisdiction	39
7.2 State/Sovereign Immunity	39
7.2.1 Rationale, the 'Restrictive' Doctrine and 'Act of State' Doctrine	39
7.2.2 Who is Entitled to Claim Sovereign Immunity?	39
7.2.3 Heads of State, Heads of Government and Foreign Ministers	42
7.2.4 Waiver of Immunity	45
7.3 Diplomatic and Consular Immunity	46
7.3.1 General Rules	47
7.3.2 Inviolability of Missions	48
7.3.3 Inviolability of Diplomatic Agents	49
7.3.4 Personal Immunity from Local Jurisdiction	49
7.3.5 Consular Immunity	49
TOPIC 6: CASE STUDY	49
Topic 7: Law of Treaties	50
Vienna Convention on the Law of Treaties 1969: the 'treaty on treaties'	50
8.2 Definition of a Treaty	50
8.2.1 Between States	51
8.2.2 Written Form	51
8.2.3 Governed by International Law	51
8.3 Making of Treaties	51
Capacity to Conclude Treaties	51
Adoption of the Text	52
Authentication of the Text	52
Consent to be Bound	53
8.4 Reservations and Declarations	54
8.4.1 Definition and Function of Reservations	55
8.4.2 Validity of Reservations / Incompatibility with Object and Purpose	55
8.4.3 Acceptance and Objection / Rejection of Reservations	56

8.4.4 Effect of Reservations	57
8.4.5 Withdrawal of Reservations and Objections	57
8.4.6 Procedure Regarding Reservations.....	58
8.4.7 Effect of Invalidity	58
8.4.8 Australia, CEDAW and Reservations	58
8.5 Entry into Force	59
8.5.1 Obligation Prior to Entry into Force.....	59
8.5.2 Pacta Sunt Servanda	60
8.5.3 Relation with Internal Law / The Effect of National Law on Treaty Obligations.....	60
8.5.4 The Principle of Non-retroactivity	60
8.5.5 Territorial Application.....	61
8.5.6 Successive Treaties on Same Subject (or Inconsistent Treaties)	61
8.6 Interpretation of Treaties	62
8.7 Third States	63
8.8 Invalidity of Treaties	64
8.8.1 Ground 1: Violations of Internal Law / Non-Compliance with Municipal Law Requirements	64
8.8.2 Ground 2: Ultra Vires Representative.....	65
8.8.2 Ground 3: Error.....	65
8.8.3 Ground 4: Fraud.....	66
8.8.4 Ground 5: Corruption (of a Representative).....	66
8.8.5 Ground 6: Coercion (of a Representative).....	66
8.8.6 Ground: Peremptory Norms of General International Law (Jus Cogens)	67
8.9 Consequences of Invalidity	68
8.10 Denunciation, Termination of, Suspension of and Withdrawal from Treaties.....	69
Termination of A Treaty.....	69
In Accordance with the Treaty or Otherwise by Consent.....	69
Grounds for Termination	70
8.11 General Provisions on the Invalidity, Termination and Suspension of Treaties	74
Consequences of Invalidity, Termination or Suspension.....	74
Separability of Treaty Provisions	75
Loss of the Right to Invoke a Ground for Invalidating, etc. a Treaty	76
Settlement of Disputes	76
Topic 8: State Responsibility	77
9.1 Introduction to State Responsibility	77
9.2 Articles on the Responsibility of States for Internationally Wrongful Acts	77
9.3 Scope of Responsibility	77
9.3.1 Defining International Responsibility / Existence of Responsibility.....	77
9.3.2 Elements of an Internationally Wrongful Act	78
9.3.3 Characterisation of an Act as Internationally Wrongful	78
9.3.4 The Classification of International Wrongs.....	78
9.4 Elements of State Responsibility	79
9.4.1 Attribution of Conduct to a State	79
9.4.2 Breach of an International Obligation	85
9.4.3 Responsibility of a State in Respect of the Act of Another State.....	86
9.4.4 Circumstances Precluding Wrongfulness	87
9.5 Consequences of an Internationally Wrongful Act	91
9.5.1 Cessation, Reparation, Invocation	91
9.5.2 Forms of Reparation	93
9.5.3 Serious Breaches of Peremptory Norms.....	96
9.5.4 Invocation of Responsibility.....	97
9.6 Multilateral Public Order and Issues of Responsibility.....	98

9.6.1 Serious Breaches of Obligations Under Peremptory Norms.....	98
9.6.2 Invocation of Responsibility.....	100
Serious Breaches of Peremptory Norms and ICJ's Jurisdiction.....	100
Topic 9: Settlement of International Disputes / Peaceful Settlement of Disputes.....	100
10.1 Introduction to the Peaceful Settlement of Disputes.....	101
10.2 Obligation to Resolve Disputes Peacefully	101
10.3 Non-Binding Forms of Dispute Resolution / Dispute Resolution Through Non-Legal Means	102
10.4 Dispute Resolution Through Legal Means: (1) Arbitration	102
10.5 Judicial Settlement: The International Court of Justice.....	102
10.5.1 Organisation of the Court	102
ICJ: CONTENTIOUS JURISDICTION – STAGES.....	103
10.5.2 Access in Contentious Jurisdiction.....	103
10.5.3 Jurisdiction in Contentious Jurisdiction	104
10.5.4 Third States in Contentious Jurisdiction	108
10.5.5 Provisional Measures in Contentious Jurisdiction	109
Enforcement of Contentious Cases? Legal Effect of Judgements.....	110
10.5.6 Advisory Jurisdiction (of ICJ)	111
10.5.7 ICJ and Security Council	113
Topic 10: Use of Force	114
UN Charter – Article 1	114
11.1 Introduction to the Use of Force: Distinction Between Jus in Bello and Jus ad Bellum	114
11.2 Unilateral Use of Force	114
11.2.1 Prohibition on the Use of Force.....	114
11.2.2 Right to Self-Defence.....	118
11.2.2 Right to Self-Defence Continued	122
11.2.3 Legality of Nuclear Weapons	122
11.2.4 Responsibility to Protect and Humanitarian Intervention.....	122
11.3 Collective Measures Through the United Nations	123
11.3.1 Action Under Chapter VI of the UN Charter	124
11.3.2 Security Council Action Under Chapter VII: Jurisdiction	124
11.3.3 Security Council Action Under Chapter VII: Actions	124
11.3.4 Powers of the UN General Assembly.....	126

Topic 1: Nature and Subjects of International Law

Subtopics

1.1 What is 'public international law'?

- PIL **governs the interactions between state bodies and non-state bodies**. It deals with **relations between states**. It does go beyond this however – individuals, corporations, etc.

1.2 Subjects and objects of international law

- **Subjects of International law:** **States** - the law between states, **corporations** (particularly human rights law), **international organisations**.

- **Individuals** are individually criminally responsible (cannot hide behind idea of statehood).

1.3 The structure of the international legal system and the United Nations

1.3.1 Purposes of the United Nations

Charter of the United Nations, Article 1

The **Purposes of the United Nations** are:

1. To **maintain international peace and security**, and to that end: to **take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;**
2. To develop **friendly relations among nations** based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;
3. To achieve **international cooperation** in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; and
4. To be a center for harmonizing the actions of nations in the attainment of these common ends.

1.3.2 United Nations Organs

Charter of the United Nations, Article 7

1. There are established as the principal organs of the United Nations: a **General Assembly, a Security Council, an Economic and Social Council, a Trusteeship Council, an International Court of Justice, and a Secretariat.**
2. Such subsidiary organs as may be found necessary may be established in accordance with the present Charter.

1.3.3 Principles of the United Nations

Charter of the United Nations, Article 2

The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall **act in accordance with the following Principles.**

1. The Organization is based on the principle of the **sovereign equality of all its Members.**
2. All Members, in order to ensure to all of them the rights and benefits resulting from membership, **shall fulfill in good faith the obligations assumed by them in accordance with the present Charter.**
3. All Members shall **settle their international disputes by peaceful means** in such a manner that international peace and security, and justice, are not endangered.
4. All Members shall **refrain in their international relations from the threat or use of force against the territorial integrity or political independence** of any state, or in any other manner inconsistent with the Purposes of the United Nations.

5. All Members shall give the United Nations every assistance in any action it takes in accordance with the present Charter, and shall refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action.
6. The Organization shall ensure that states which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security.
7. Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

Topic 2: Sources of International Law

- Legal obligations of states & other actors of IL **may be derived from more than one source** of IL.

2.1 Introduction to Sources of Public International Law

Article 38, Statute of the International Court of Justice

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 recognised by the contesting states; (i.e. treaties) **PRIMARY**
 - b. international **custom**, as evidence of a general practice accepted as law; (CIL) **PRIMARY**
 - c. the **general principles of law** recognised by civilised nations; **PRIMARY**
 - 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. **SUBSIDIARY**
2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.

- To enable ICJ to apply any rule of IL, must be shown that it is the product of one, or more, of **three law-creating processes: treaties, CIL or general principles of law**.

2.2 Customary International Law

- **CIL: 'state practices recognised** by the **community at large** as laying down **patterns of conduct** that have to be **complied** with'.
 - **State practice:** = patterns of behaviour; habitual conduct
- **Two elements (Nicaragua [1986]):**
 - **1. State behaviour & practice (material facts – objective element)**
 - Duration, consistency, repetition and generality?
 - **2. Psychological or subjective belief (opinio juris – subjective element)**
 - States feel **bound or obliged** to act in a certain way
- **CIL = state practice ('a general practice') + opinio juris ('accepted as law').**
- **Legality of Nuclear Weapons:** Court confirmed that the substance of customary rules is to be found **"primarily in the actual practice [objective element] and opinio juris [subjective element] of states"**.

- **General and local customs:** Court recognised that, although **art.38(1)(b)** refers to “a general” practice, it allows for local (or regional) customs: **Asylum**
- **Outcome:** Local/regional custom is capable of constituting CIL. “**Constant and uniform usage, accepted as law**” must be established by the party seeking to prove the existence of CIL.

North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark and The Netherlands) I.C.J. Reports 1969 (establishing a custom)

Facts:	<ul style="list-style-type: none"> • Dispute between Germany and Denmark on the one hand, and Germany and the Netherlands on the other. Disputes concerned delimitation on maritime boundary between the 3 countries in the North Sea. G argued a treaty between D and N supporting the application of an “equidistance rule”, which G wasn’t a party to, left G with a substantially smaller continental shelf. D and N argued treaty = CIL.
Held:	<ul style="list-style-type: none"> • Held the equidistance rule didn’t reflect customary international law. • For a rule in a treaty to become a principle of CIL: <ul style="list-style-type: none"> ○ It must have a fundamentally norm-creating character (can’t be vague: clear rule/clear terms); ○ There must be widespread and representative participation; (here, G had not ratified) ○ State practice must include states whose interests are specially affected (e.g. in this case, there would need to be many coastal states as parties to that treaty); ○ Practice should be over “a considerable period of time”. But provided consistency & generality of practice are established, long practice not necessary. But during the period in question, state practice should have been “extensive and virtually uniform” (ICJ wasn’t convinced enough time passed). • Persistent objection of N: <ul style="list-style-type: none"> - Court held there was no rule of CIL that prohibited straight baseline and if there was, N was persistent objector to this rule

2.2.1 Definition

Article 38(1)(b) Statute of the International Court of Justice

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;**

2.2.2 Elements of custom

ILC Draft Conclusion 2

Two constituent elements

To determine the existence and content of a rule of customary international law, it is necessary to ascertain whether there is a **general practice** that is **accepted as law** (*opinio juris*).

ILC Draft conclusion 3

Assessment of evidence for the two constituent elements

1. In assessing evidence for the purpose of ascertaining whether there is a general practice and whether that practice is accepted as law (*opinio juris*), regard must be had to the overall context, the nature of the rule, and the particular circumstances in which the evidence in question is to be found.
2. Each of the two constituent elements is to be separately ascertained. This requires an assessment of evidence for each element.

ELEMENT 1. General Practice or state practice (objective element)

- Practice must be general – must be sufficiently widespread & representative & consistent.
- Provided that the practice is general, no particular duration is required.

ILC Draft conclusion 4: Requirement of practice

1. The requirement, as a constituent element of customary international law, of a general practice means that it is **primarily the practice of States that contributes to the formation, or expression, of rules of customary international law.**
2. In certain cases, the practice of **international organizations also contributes to the formation, or expression, of rules of customary international law.**
3. **Conduct of other actors is not practice that contributes to the formation, or expression, of rules of customary international law, but may be relevant when assessing the practice referred to in paragraphs 1 and 2.**

ILC Draft conclusion 5: Conduct of the State as State practice

State practice consists of **conduct of the State**, whether in the exercise of its executive, legislative, judicial or other functions.

ILC Draft conclusion 7: Assessing a State's practice

1. **Account is to be taken of all** available practice of a particular State, which is to be **assessed as a whole.**
2. Where the practice of a particular State **varies**, the **weight** to be given to that practice may be **reduced.**

Overarching principles of state practice: **key factors** to consider:

- **(1) Consistency**
 - **Asylum case:** need a **constant and uniform usage** in relation to the particular norm reflected in state practice.
 - **North Sea:** the practice of specially affected states should be **extensive and virtually uniform.**
 - However, no need for perfect or 'absolutely rigorous' consistency (**Nicaragua (Merits)**) → may be divergence as long as does not affect overall consistency
 - **Inaction/ failure to act may only constitute state customary practice if it is based on a conscious duty to abstain** (**Lotus Case** → decision is criticised)
- **(2) Time Factor**
 - In general, state practice (pattern of behaviour) that has formed over a **considerable period of time.**
 - But **North Sea**, can also have instant custom (custom that has formed in a **short period of time**) provided there is **widespread and representative participation** including from specially affected states.