Customary international law

Article 38(1)(b) of the *Statute of the ICJ* refers to 'international custom' as being an accepted source of international law.

A purported rule of customary international law must be of a 'fundamentally norm-creating character' (*North Sea Continental Shelf Cases* (1969)). Further requisite elements are the existence of state practice following the supposed rule and a subjective belief by states of the practice's obligatory character (*opinio juris*) (*Nicaragua* (1986)).

Norm-creating character

Is the rule complex or uncertain with respect to its precise meaning?

State practice

Look at any material which demonstrates activities and views of states and state officials (e.g. legislation, statements of officials, court decisions, voting records in international forums etc.). The consistency of a practice over time is also important.

Widespread and representative participation: State practice in support of the putative rule of customary international law must be widespread and representative, in terms of how it must be engaged in by those states whose interests will most likely be impacted upon by the rule (*North Sea Continental Shelf Cases* (1969)) [generally involves consistent practice over time].

- If a convention has attracted the 'widespread and representative participation' of states (including that of states with interests likely to be impacted upon), this may suffice in pointing towards the conclusion that a rule articulated in the convention in question has entered into the body of customary international law – even without the 'passage of any considerable period of time' (*North Sea Continental Shelf Cases* (1969)).

- **Need not be perfect:** State practice need not be perfect, in the sense that states need not have exhibited 'absolutely rigorous conformity' with the purported rule (*Nicaragua* (1986)).

- **State practice must be extensive and virtually uniform if seeking to establish that a rule has become customary in a short time:** The 'passage of only a short period of time' will not inherently preclude a new rule of customary international law from being established, but relevant state practice must be 'extensive and virtually uniform' (*North Sea Continental Shelf Cases* (1969)) [or 'overwhelming'; normally norm-creating state practice occurs consistently over time]

- **Non-compliance strengthens rule:** Non-compliance with a rule should be regarded as a contravention of the rule as opposed to supporting the emergence of a new rule. If a state clearly contravenes a rule but 'defends its conduct by appealing to exceptions or justifications contained within the rule itself', this affirms as opposed to weakening the rule (*Nicaragua* (1986)).

- **Regional customary international law:** A rule of regional customary international law may exist of there is 'constant and uniform' usage of the putative rule by the states of the particular region accompanied by *opinio juris* (*Asylum Case* (1950); *Al-Saadoon* (2010)) [potentially higher threshold compared to global custom]

Opinio juris

If there is extensive state practice, opinio juris tends to be less important (gives rise to rebuttable presumption that there is sufficient opinio juris). If there is limited state practice, opinio juris may be more important. However, habitual practice is insufficient.

Persistent objector

A rule of customary international law is binding on all states except those which have persistently objected to it throughout its emergence (*Anglo Norwegian Fisheries Case* (1951)).

The provisions of a treaty may also exist separately and be applicable as customary international law (*Nicaragua* (1986)).

Customary norms that are not of a jus cogens character can be modified or qualified through a treaty that is entered into between states. However, the amended norm dictated in the treaty will only be applicable to relations between those states unless it has passed into customary international law [see VCLT principles below].

Other sources of international law

- **General principles of law and equity:** Article 38(1)(c) of the *Statute of the ICJ* refers to 'general principles of law recognized by civilized nations' as being an accepted source of customary international law. Equity can be applied to ameliorate the harshness associated with certain rules of international law when applied to a particular case which is before an international court or tribunal, but cannot be applied as a substitute for law or to fill gaps in law (*River Meuse Case* (1937); *Frontier Dispute Case* (1985)).

- **Judicial decisions and academic writings:** Article 38(1)(d) of the *Statute of the ICJ* refers to 'judicial decisions and the teachings of the most highly qualified publicists' as being a 'subsidiary means' for determining the rules of international law. These sources of law provide 'trustworthy evidence of what the law really is' through their consideration of relevant state practice (*The Paquete Habana* (1900)).

- **UNGA Resolutions:** UN General Assembly Resolutions are not legally binding (with limited exceptions) but may be of probative value in 'establishing the existence of a rule or the emergence of an *opinio juris*' under customary international law (*Nuclear Weapons Advisory Opinion* (1996)).

- **UNSC Resolutions:** UN Security Council Resolutions are legally binding.

Note that the existence of soft law: rules that are binding but vague, and 'rules' that are clear but not binding. They can assist in establishing state practice and opinio juris.

Note also that the decisions of the ICJ have 'no binding force except between the parties and in respect of that particular case' (Art 59 ICJ Statute), but in practice, have a seminal role in identifying the relevant law and contributing towards the emergence of new law.

Treaties

Definition

A treaty is defined in art 2(1)(a) of the *VCLT* as 'an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation'.

Non-written agreements still valid but *VCLT* does not apply as a matter of treaty: The non-applicability of the *VCLT* to agreements involving non-state subjects and agreements not in written form does not affect their legal validity and does not preclude the principles in the *VCLT* from being applied 'independently of the Convention' (for example, as a matter of customary international law) (*VLCT* art 3).

- **Solemn oral undertakings can be binding:** Solemn undertakings made orally by a foreign minister can establish legally binding obligations under international law (*Legal Status of Eastern Greenland* (1933)).

- **Unilateral declarations can be binding:** Publicly expressed, unilateral declarations that are made by a state with the intention to be bound are legally binding (*Nuclear Tests Cases* (1974)).

Formalities

No form requirement: There is no prescribed form that an international agreement must take. Such agreements can be embodied in a single instrument or multiple instruments such as an exchange of notes (*Maritime Delimitation and Territorial Questions (Qatar v Bahrain)* (1994)).

- *Treaties need not involve consideration and can be 'one-sided'.*

- *Only entities with the capacity to enter into international agreements such as states, international organisations and some other international entities (not corporations: Texaco v Libya; although they can enter into internationalised contracts with states) can be parties to treaties.*

No full powers required for most senior state representatives: Heads of State, Heads of Government, Ministers of Foreign Affairs, heads of diplomatic missions and accredited state representatives sent to an international conference or organisation are empowered to enter into treaties without needing to produce full powers (*VCLT* art 7(2)).

- **Non-exempt high ranking government representative may still be able to bind their state:** High ranking government representatives that are not exempt from having to produce full powers under art 7(2) of the *VCLT* may still, in certain circumstances, be able to bind the state that they represent through their statements (*Case Concerning Armed Activities on the Territory of the Congo* (2002)).

Treaties must be registered otherwise they will be unenforceable before the ICJ: States are obliged to register with the UN Secretariat any international agreement that it enters into – failing which, the states will be barred from invoking the instrument before an UN organ such as the ICJ (*UN Charter* art 102; *VCLT* art 80)

Application

When does a treaty enter into force: A treaty enters into force in accordance with the stipulated date and manner contained within its provisions or in accordance with an agreement between the negotiating states (*VCLT* art 24(1)). In the absence of such a stipulation, a treaty enters into effect as soon as all negotiating states have expressed their consent to be bound (*VCLT* art 24(2)).

- **When is an individual state bound:** An individual party is bound by a treaty if the treaty is in force generally and if it has both signed and ratified the treaty. If a state has signed a treaty but has not ratified it, it is nonetheless obligated to 'refrain from acts which would defeat the object and purpose' of the treaty (*VCLT* art 18(a)).

- **Are new states bound by treaties entered into by their parent state:** New states which emerge from the dissolution of a state may, in general, be bound by the human rights and humanitarian treaties entered into by their parent state which involve 'no loss of sovereignty or autonomy of the new state, but are merely in line with general principles of international law that flow from the inherent dignity of every human being which is the very foundation of the United Nations Charter' (*Application of the Genocide Convention* (1996) per Weeramantry J).

Good faith requirement: Parties to a treaty which is in force are bound by its provisions and must perform its obligations in good faith (*VCLT* art 26).

Domestic law no excuse for contraventions of a treaty: A party may not rely upon domestic law to justify its contraventions of a treaty (*VCLT* art 27).

Treaties have no retroactive effect: In the absence of a contrary intention, a treaty does not have retroactive effect (*VCLT* art 28).

Treaties apply to a state's whole territory: In the absence of a contrary intention, a treaty has legal effect with respect to the whole territory of each party (*VCLT* art 29).

Treaties subject to other treaties: If a treaty stipulates that it is 'subject to' or 'not to be considered as incompatible with' another treaty, the provisions of the other treaty will prevail (*VCLT* art 30(2)).

Effect of earlier and later treaties with identical parties: If each and every party to an earlier treaty which remains in force is also a party to a later treaty, the provisions of the earlier treaty will only be applicable to the extent that they are compatible with the provisions of the later treaty (*VCLT* art 30(3)).

Effect of earlier and later treaties with different parties: If the parties to an earlier treaty which remains in force are not identical to the parties of a later treaty, relations between common parties to both treaties will be governed by the provisions of the earlier treaty only to the extent to which they are compatible with the provisions of the later treaty (*VCLT* art 30(4)(a)). Additionally, relations between a party to both treaties and a party to only one of the treaties will be governed solely by the treaty which both parties have commonly entered into (*VCLT* art 30(4)(b)).

Treaty invalid if in conflict with UN Charter: If a treaty conflicts with the UN Charter, the obligations that a party has under the latter will prevail (*UN Charter* art 103).

Treaty only binding on its parties: A treaty cannot impose obligations or create rights for a third party without their consent (*VCLT* art 34). However, this does not prevent a treaty provision from passing into customary international law (*VCLT* art 38; *North Sea Continental Shelf Cases* (1969)).

Reservations

A reservation is a 'unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State' (*VCLT* art 2(1)(d)) [cf. interpretative declarations; only relevant for multilateral treaties].

Reservations to be in writing: A reservation as well as an acceptance of and objection to a reservation must be expressed in writing and be communicated to the other parties of the treaty in addition to entities which are 'entitled to become parties to the treaty' (*VCLT* art 23(1)).

Is the reservation permissible?

Permissibility of reservations: Reservations to a treaty are permissible so long as they are not prohibited by the treaty, not outside of the scope of reservations allowed by the treaty, or otherwise, not 'incompatible with the object and purpose of the treaty' (*VCLT* art 19).

- *It is to be objectively ascertained as to whether the reservation is congruent with the 'object and purpose of the treaty' (cf. the 'opposability approach' where the parties determine whether a reservation is allowable).*

- **Historical view of impermissible reservations:** The historical view dictates that a state which makes an impermissible reservation is not a party to the treaty because its consent to be bound has been vitiated (*Reservations to Genocide Convention* (1951)).

- **Current view of impermissible reservations:** However, the emerging position is that an impermissible reservation is of no effect with the result that the state is presumed to