

PPL Hypothetical Notes

Seminar 18: Sources of public international law: customary international law

I. INTRODUCTION

Customary international law is law which has evolved from the practice or customs of states (Dixon). As such, Article 38(1)(b) of the Statute of the International Court of Justice identifies international custom 'as evidence of a general practice accepted by law'.

In this case, the proposed customary law is XX.

To determine whether this is a rule of customary international law, we must firstly evaluate whether there is State practice of that law (Dixon). Secondly, we must evaluate whether there is opinio juris of that law, this being the belief by states that they hold a legal obligation to undertake such a practice (Dixon).

It is possible for customary international law to consist of local custom. In the Asylum Case, the Court recognised Article 38 of the Statute of the ICJ as including local custom as well as general custom. Local customary law may exist where practice has been developed between two or more states, all of whom have recognised the practice as binding (Dixon). In this case, customary international law is alleged to exist between 2 states. The existence of custom between so few states does not invalidate its existence.

II. STATE PRACTICE

-Examples: actual state activity, diplomatic statements, national legislation, practice of States within international organisations, statements of legal principles

Firstly, we must evaluate whether there is State practice of the proposed customary international law. In this case, XX could potentially be interpreted to be State practice of XX customary international law.

There are 3 main characteristics that XX must have in order for it to be considered State practice of XX [customary law] these being consistency, generality, and duration (Dixon). We will evaluate these 3 elements in order to ascertain whether State practice exists in this case.

A. Consistency of practice

Firstly, we must evaluate the level of consistency of the state practice. State practice must be reasonably consistent, settled, and uniform (Dixon). There need only be substantial, not total consistency (Dixon).

PICK A RULE TO APPLY:

The degree of consistency may vary according to the subject matter of the rule in dispute (Anglo-Norwegian Fisheries Case).

- For positive obligations in which a State is obliged to do something, a **greater degree of consistency** is necessary for the formation of a customary norm.

- For passive obligations in which a State is obliged to refrain from doing something, a **lesser degree of consistency** is necessary for the formation of a customary norm.
- Any alleged change to a customary rule which is jus cogens (defined by the **International Law Commission** as a peremptory norm of general international law accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted) would need to be supported by almost **universally consistent** state practice before it could take effect

The mere existence of some state practice which is contrary to an existing or emerging rule of customary law should not be taken as being destructive of that rule (**Nicaragua Case**). Contrary state practice should be assumed to be action in breach of the rule (**Nicaragua Case**).

In this case, [say what the practice was and how consistent it was].

B. Generality of practice

Secondly, we must evaluate the generality of the state practice. State practice must be 'common, consistent and concordant' (**Fisheries Jurisdiction Case**), as well as 'constant and uniform' (**Asylum Case**). Discuss case state practice.

Special weight may be given to 'states whose interests are specially affected' (**North Sea Case**) – the practice of states directly affected by customary law is more significant (**Dixon**)

Not all states need to participate before a general practice can become law (**North Sea Case**)

Initial and sustained objection to a rule will prevent a state from being bound by it (**Anglo-Norwegian Fisheries Case**); but will not prevent other states from forming customary law (**Dixon**) in practice a persistent objector will not remain outside the new customary rule for long (**Dixon**)

C. Duration of practice

The Statute of the ICJ does not provide any clear specifications of the duration of practice required for general state practice to mature into customary law (**Dixon**).

The length of time necessary varies from subject to subject (**North Sea Case**).

The passage of only a short period of time does not necessarily rule out the formation of customary law (**North Sea Case**). If it has been a short period of time since a law came into force, state practice **MUST** be extensive and uniform; duration, consistency, and generality were insufficient in the **North Sea Case**.

D. Conclusion

II. OPINIO JURIS

The second element of customary international law formation which must be proven is opinio juris. Simple frequency or habitual practice of a customary law is insufficient for proving its existence (**North Sea Case**). In order for this practice to constitute law, states must recognise

this practice as a legal obligation, rather than merely habitual, this being 'opinio juris' (Lotus Case). Opinio juris cannot be established from the frequency or habitual nature of the practice alone (North Sea Case).

- Repeated, unvarying public statements of governments (Jurisdictional Immunities of the State Case)

- States' position in General Assembly resolutions, diplomatic statements, treaties covering similar grounds (i.e., bilateral agreement), domestic practices of states, decisions of international organisations (i.e., UN General Assembly)

- North Sea Case: NO opinio juris as over half of the states who engaged in the practice were or shortly after became parties to the Convention; they were acting because they were bound by the Treaty, not because they thought the customary law was legally binding

III. CONCLUSION

If (1) state practice and (2) opinio juris satisfied, customary international law is binding on all states

Changing customary law

- Must be changed in the same way it comes about: there must be sufficient state practice contrary to the existing rule supported by opinio juris (Dixon).