

Table of Contents

1 Sources of International Law & Relationship between International law and municipal law	2
2 Statehood - Personality and Recognition	11
3 Jurisdiction and Immunities.....	15
4 Law of Treaties	25
5 State Responsibility.....	33
6 Use of Force	45
7 Settlement of disputes	51

STATE BASED RESPONSIBILITY – TREATY LAW

1. Does the ICJ have jurisdiction?
2. What is the relevant international law?
3. Does the state have capacity to enter into the treaty? (recognition)
4. Is the state bound by the treaty?
5. Application of treaties.
6. Is consent to the treaty invalid?
7. Has there been a breach of the treaty?
8. Are there grounds for terminating the treaty?
9. Has there been a use of force?
10. Is the State responsible for the breach? (attribution)
11. Are there circumstances precluding wrongfulness? (defences)
12. Are there any consequences of the state's responsibility? (remedies)

Tips for exam:

1. Go to instructions and question – understand legal perspective
2. Then read facts carefully in favour of the instructions
3. List out legal issues
4. Ensure you have read the question and know what State you are advising on
5. Must say HOW or WHY something supports your argument

1 Sources of International Law & Relationship between International law and municipal law

STEP 1: Intro – advise XYZ if it is in violation of international obligations...

In this circumstance, there is a material issue relating to sources of international law. **STATE**'s International obligations can arise from four sources per article 38(1) of the Statute of the ICJ. Here, the most relevant sources are **INSERT**, and (**will depend on facts**). Before addressing any question of hierarchy, it must first be determined whether each source is binding under international law.

- **IF UNSC Resolution:** Additionally, there is a UN security council resolution.

Art 38(1) ICJ – The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

- a) International conventions → treaties
- b) International customs → customary IL
- c) General principles of law recognised by civilized nations
- d) Subsidiary source

STEP 2: Customary International Law – Recognition

It may be argued that the rule of **INSERT** is customary international law (CIL). Custom is defined as constant and uniform usage, practice by States accepted as law (*Asylum Case 1950*). For **APPLY THE PRINCIPLE** to be considered customary international law, it must satisfy the objective element of **state practice** and the subjective element of **opinio juris** (*Nicaragua 1986*).

ELEMENT #1: State Practice (objective)

Accordingly, **STATE A's practice** can be deemed to exhibit state practice due to **APPLY WHAT IS RELEVANT ON THE FACTS**;

< CONSIDERATIONS >

- ILC Draft Conclusion 4:
 - ILC Draft Conclusion 4 states that State practice must primarily contribute to the formation, or expression, or rules of CIL (4(1)).
 - In some cases, practice by international organisations may also contribute (4(2)).
 - Conduct by other actors does not constitute State practice but may still inform its assessment (4(3)).Accordingly, **APPLY FACTS**
- ILC Draft Conclusion 5:

- ILC Draft Conclusion 5 states that state practice consists of the acts of the state, whether in the exercise of its executive, legislative, judicial or other functions. Accordingly, **APPLY FACTS**
- ILC Draft Conclusion 6:
 - ILC Draft Conclusion 6 outlines that state practice may take a wide range of forms, including physical acts, verbal acts, and inaction (6(1)). It includes, but is not limited to, Diplomatic acts of states and correspondence, conduct in relation to resolutions in various international organisations, the conduct of the executive, legislative and administrative acts, and decisions of national courts (6(2)). Accordingly, **APPLY FACTS**
- ILC Draft Conclusion 7:
 - Per ILC Draft Conclusion 7(1), when assessing a state's practice, account is to be taken of all available practice of a particular State, which is to be assessed as a whole. Accordingly, **APPLY FACTS**
- Consistency
 - State practice must be generally consistent and continuous (*Asylum* case), though not perfectly uniform. Minor deviations are treated as breaches, not as evidence of a new rule (*Nicaragua* case). Practice must also be common, concordant, and accepted without significant objection (*Fisheries Jurisdiction* case). Accordingly, **APPLY FACTS**
- Time factor
 - There is no fixed time requirement for a custom to form; what matters is that State practice is sufficiently long, extensive, and virtually uniform to demonstrate acceptance as law (*North Sea Continental Shelf* case). Accordingly, **APPLY FACTS**
- Generality
 - Per ILC Draft Conclusion 8(1), for a rule to be considered CIL, it must be widely accepted and include participation by states whose interests are specially affected (*The North Sea Continental Shelf Case*). Accordingly, **APPLY FACTS**
- Abstention/ inaction
 - A State's failure to protest a rule may be taken as consent to that rule. However, mere abstention from a practice does not indicate the existence of a customary norm unless it reflects a deliberate decision to abstain because the State believes the custom exists (*Lotus* case). Accordingly, **APPLY FACTS**

ELEMENT #2: *Opinio Juris* (subjective) ← can be found in GA Resolutions, ILC statements, etc

As state practice has been established, it must be shown that the practice was *opinio juris*. This means that the state practice must be undertaken with a sense of legal right or obligation (ILC Draft Conclusion 9) (*Lotus Case*). On the facts, *opinio juris* can be seen as **STATE A's Practice...**

< CONSIDERATIONS TO ASCERTAIN OPINIO JURIS – APPLY RELEVANT > :

- “the practice in question must be undertaken with a sense of a legal right or obligation” (ILC Draft Conclusion 9)
- Forms of evidence (ILC Draft Conclusion 10)
 - Public statements made on behalf of the States
 - Official publications
 - Governmental legal obligations
 - Diplomatic correspondence
 - Decisions by national courts
 - Treaty provisions
 - Conduct in connection with resolution adopted by an international organisation or at an intergovernmental conference
- UNGA resolutions, even though they may not be binding, may be evidence of establishing *opinio juris* (*Nuclear Weapons (Ad Op)*)
- UNSC description of a **NORM** reflects strong *opinio juris* (*Nicaragua*)
- Failure to react over time to a practice may serve as evidence of acceptance as law (*opinio juris*), provided that States were in a position to react and the circumstances called for some reaction (ILC Draft Conclusion 10(3))
- High threshold to prove – subjective element (*North Sea Continental Shelf Case*)
- Can be global, regional or even bilateral custom (*Asylum Case*)
- Did the State perform the practice because it believed it was legally obliged to do so? (*North Sea Continental Shelf Case*)
- State practice ‘should moreover have occurred in such a way as to show a general recognition that a rule of law or a legal obligation is involved’ (*North Sea Continental Shelf Case*)
- No presumption of *opinio juris* (*Lotus Case*)

CONCL: Thus, the rule of **INSERT** is likely a CIL as **State A’s** conduct is likely to satisfy the requirement of state practice and *opinio juris*.

< EXCEPTIONS >

IF CUSTOM ONLY APPLIES TO FEW STATES (REGIONAL/LOCAL):

Whilst article 38(1)(b) of the ICJ Statute refers to ‘general practice’ for customary law that applies to a limited number of states, it is necessary to ascertain either there is ‘good practice among States concerned, or that it is accepted by them as law’ (ILC Draft Conclusion 16). Further, the ‘party which relies on a custom of this kind must prove that this custom is established in such a manner that it has become binding on the other party’ (*Asylum Case*).

Therefore, **State's** regional customary law is likely to remain binding, given the consistent and accepted practice among the relevant states over **insert relevant time period**, which supports the existence of a binding local custom.

IF PERSISTENT OBEJCTOR RULE:

The State of **INSERT (APPLICANT)** may escape the application of customary law if it 'persistently objects' to its application (*Norwegian Fisheries Case; Asylum case*). To be successful, the state must have raised objection to the rule immediately and continue to object over time (*Norwegian Fisheries case*). Here, **(RESPONDENT) INSERT FACTS**. Therefore, it is **LIKELY/UNLIKELY** that **APPLICANT** will satisfy the rule.

Accordingly, as **APPLICANT HAS/HAS NOT** maintained a persistent and timely objection, it is **LIKELY/UNLIKELY** that they are bound by the customary rule under Article 38(1)(b) of the ICJ Statute.

Thus, as there is state practice and *opinio juris*, it is likely that **PRACTISE/RULE** will be considered customary international law.

STEP 3: Treaties – Recognition

STATE has agreed to/become a party of **TREATY**. Treaties are international agreements concluded between States in written form and governed by international law, which give rise to obligations and rights between the parties (Article 2(1)(a) VCLT). They exist and operate separately from customary international law (*Nicaragua*). On the facts, there appears to be a **bilateral/multilateral** treaty between **STATES. NOW APPLY WHICH ONE:**

1. **BILATERAL** = The general pattern regarding bilateral treaties is that the act of signing the treaty binds the State (*Legal Status of Eastern Greenland*). Here, **STATE HAS/HAS NOT** signed the **TREATY** therefore **it is/is not** binding. **OR**
2. **MULTILATERAL** = A multilateral treaty is binding if a state signs and ratifies the treaty (*North Sea continental shelf*). Therefore, as **STATE** has **ACCEPTED/NOT ACCEPTED** the treaty, it is now a binding source of international obligations.

< CONSIDERATIONS, APPLY IF RELEVANT >

- States that do not sign and ratify are not bound by a treaty (*North Sea Continental Shelf*)
 - BUT they are if a treaty provision reaffirms customary law

- If multilateral treaty that has signed but not ratified → Although STATE has not ratified the treaty, as signatory state, it is obliged not to act in a way that would defeat the object and purpose of the treaty (Art 18 VCLT)
- Even if a treaty provision and customary law have exactly the same content, they still exist and operate separately (*Nicaragua*)
- All parties must perform treaties in good faith (Article 26 VCLT)
 - *Pacta sunt servanda* – primary rule relating to treaties
- Treaties are binding in all territory of an accepting state (Art 29 VCLT)
- Treaties do not bind parties in relation to any act before they entered into the treaty (Art 28 VCLT)
 - Unless a different intention appears in the treaty (Art 28 VCLT)
- Domestic law cannot be invoked to avoid treaty obligations (Art 27 VCLT)
- Successive treaties
 - Normally, where there are successive treaties on the same subject, newer treaty will have precedence where there is incompatibility (Art 30(3) VCLT)
 - BUT intention expressed in a treaty as to compatibility with a newer or later treaty determines its application (Art 30(2) VCLT)
- Third party states
 - Treaty will not create obligations OR rights for a third-party state without that state's consent (Arts 34, 35 VCLT)
 - BUT may confer a right on a third-party state if there is an intention to do so in the treaty (Art 35 VCLT)
 - Same with an obligation (Art 36 VCLT)

Reservations (note if dispute about whether a reservation, go to other reservation scaffold below under LAW OF TREATIES)

Consideration must be given to STATE A's proposed reservation STATE RESERVATION. The reservation would APPLY FACTS...

- Reservation permitted unless
 - Rule out expressly by treaty in question (Art 19(a) VCLT)
 - If the treaty is silent on question
 - If reservation is incompatible with object and purpose of treaty (19(c) VCLT)
- Acceptance of reservation
 - If treaty allow reservations, then acceptance of other parties not required unless the treaty so provides (art 20(1) VCLT)
- Effect of reservation
 - A reservation is established with another State modifies the specific treaty provisions for reserving state (21(1)(a)) AND the subject state (21(1)(b) VCLT)

STEP 4: General Principles of Law

Where no treaty or customary law applies, the Court may apply general principles of law recognised by states with functioning legal systems (Art 38(1)(c) ICJ Statute). Examples include equity, estoppel, and good faith (*North Sea Continental Shelf*). These principles provide foundational reasoning across legal systems and may be inferred to international disputes.

STEP 5: Unilateral Acts of States

Unilateral declarations may give rise to binding legal obligations if made with the intent to be legally bound (*Nuclear Tests Case 1974*)

STEP 6: Judicial Decisions

Based on Article 38(1)(d) of the ICJ, an International Court may use judicial decisions and the teachings of the most highly qualified publicists of various nations as a subsidiary means for the determination of rules of the law.

STEP 7: Soft Law

In addition to the established source of **TREATY/CUSTOM** present here, soft law can also be recognised with **INSERT FACTS**. Whilst soft law does not bind nations, it may lead to the creation of future international laws. Here there can be seen with **INSERT FACTS**.

- UN General Assembly Resolutions and Declarations
 - General Assembly resolutions, while not binding, may have a normative value and contribute to the formation of customary international law where repeated and widely supported, particularly in establishing *opinio juris* (*Legality of Nuclear Weapons Advisory Opinion, para 70*).
- Resolutions from other international organisations
- Unilateral state acts
 - Must be clear intention of a nation and an element of publicity/notoriety

STEP 9: UNSC Resolution

The United Nations Security Council may adopt resolutions in accordance with its overarching responsibility for maintaining international peace and security (Article 24, UN Charter). Under Art 25 of the UN Charter, all members of the UN are obliged to accept and carry out the decisions under a resolution (*Namibia*). The scope of obligations under a UNSC resolution will depend on whether it has been passed pursuant to Chapter VI or Chapter VII. On the facts, the Security Council has passed a resolution under Chapter **VI/VII**, which **INSERT CONSEQUENCES—e.g., creates binding obligations under Art 25 or constitutes a recommendation only.**

Chapter VI – (lesser obligatory power per *Namibia* **RECOMMENDATION)**
Chapter VI concerns the settlement of disputes.

Article 36

1. The Security Council may, at any stage of a dispute of the nature referred to in Article 33 or of a situation of like nature, recommend appropriate procedures or methods of adjustment.
2. The Security Council should take into consideration any procedures for the settlement of the dispute which have already been adopted by the parties.
3. In making recommendations under this Article the Security Council should also take into consideration that legal disputes should as a general rule be referred by the parties to the International Court of Justice in accordance with the provisions of the Statute of the Court

Chapter VII (Unquestioned power) **BINDING OBLIGATION**

Chapter VII concerns threats to international peace and security. In general, resolutions adopted by the Security Council acting under Chapter VII of the Charter, are considered binding, in accordance with Article 25 of the Charter.

Article 39

The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security

Validity of UNSC Resolutions

As a general rule, the ICJ has no power to review SC decisions but can determine if an SC resolution is beyond jurisdiction conferred by the UN Charter (*Namibia*). This may be occasioned in the advisory jurisdiction of the Court (*Certain Expenses; Namibia*) or in the course of contentious litigation (*Lockerbie*).

NOTE: Go to Settlement of Disputes if resolving question of JURISDICTION

STEP 9: Hierarchy of Sources (Important)

Given that there are multiple sources of international obligations, it is necessary to establish which authority has priority. The general rule of priority is that the more specific (*lex specialis*) or more recent (*lex posterior*) rule may prevail unless a *jus cogens* norm is involved. Here, **SOURCE** was created more recently and therefore has prima facie priority.

< CONSIDERATIONS, APPLY IF RELEVANT >

Jus Cogens ← established in public international law

The rules of priority are complicated by norms or obligations in international law, which are deemed to be of an inherently superior status. A rule of *jus cogens* is non-derogable and peremptory, thereby enjoys the highest status within customary international laws, is binding on all nations and cannot be pre-empted by treaty (Art 53 VCLT; *US v Matta-Ballesteros*).

On the facts, **RULE** is a rule of *jus cogens*, therefore has ultimate priority in these circumstances (*North Sea continental shelf*).

Notes

- *Jus cogens* = war crimes, slavery, genocide, torture, piracy, prohibition of unlawful use of force, apartheid (declared *jus cogens* by judicial decisions and General Assembly resolutions)
- Per Article 53 of the VCLT, a treaty is void if it conflicts with a *jus cogens* norm, such as the prohibitions on genocide, slavery, torture, or use of force.

Erga Omnes ← obligations owed to international community as a whole

The rules of priority are complicated by norms or obligations in international law, which are deemed to be of an inherently superior status. **SOURCE** is an obligation *erga omnes* due to **INSERT**:

Notes

- Prima facie, all *jus cogens* are also *erga omnes*
- Other examples include: upholding Genocide Convention is an obligation *erga omnes*

Si Omnes ← obligation toward another state (normal rules)

UNSC Resolution

In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail (Article 103 UN Charter).

Treaties & Australian Law

- *Australia follows a dualist system*: Treaties do not have automatic domestic effect.
- *Executive power (s 61 Constitution)*: Commonwealth can enter treaties, but this does not make them enforceable domestically.
- To give legal effect, a treaty must be incorporated into Australian law by legislation passed by Parliament (*Nulyarimma v Thompson* (1999)) → strong transformation approach (*Dietrich v The Queen* 1992)
- Court would rather interpret legislation in a way that's consistent with treaty law than an approach that is inconsistent (*Minister for Immigration v Teoh*)
- Treaties that have been ratified but not implemented DO NOT CREATE A CAUSE OF ACTION in domestic courts (ie does not create 'justiciable rights for individuals') (*Minogue v Williams* 2000)
 - In *Project Blue Sky Inc v ABC*, the Court found that the Australian content quota potentially conflicted with treaty obligations between Australia and New Zealand. The statute expressly required the broadcasting authority to **have regard** to international obligations. This case affirmed the principle that the role of treaties in statutory interpretation **depends on the wording of the legislation**.

CIL & Australian Law

- Australia follows the doctrine of incorporation for customary international law (CIL).

- CIL is part of Australian common law unless it is inconsistent with statute or case law.
- Courts may refer to CIL to develop or interpret common law, especially in unsettled areas.
- CIL does not override clear domestic legislation.
- CIL (e.g. crime of genocide) is not directly enforceable without enabling legislation (*Nulyarimma v Thompson* (1999))

General Rule: In dualist systems like Australia, international law (including treaties) does not have domestic legal effect unless it is implemented by legislation. However, legislation may direct or allow decision-makers to act consistently with treaty obligations.

2 Statehood - Personality and Recognition

STEP 1: Intro – advise XYZ whether its recognition of ABC’s statement is a violation of international law

For **STATE’s** recognition to be a violation of international law, there must either be a failure of legal personality or an illegal aspect of the recognition. Per the declaratory theory, recognition is an acknowledgment but not a creator of statehood. State’s can exist and hold rights and duties under IL without recognition. Factually, it is likely that **personality/recognition/both** will be relevant to these circumstances.

Note: Recognition can apply to governments also

STEP 2: Legal Personality

Concept of legal personality → crucial in international law as it determines who holds rights and duties, can enforce rights, enter treaties, join institutions, and appear before international courts; without it, entities are mere objects without legal standing

International legal personality (ILP) is the ability to possess rights and obligations under international law. ILP can attach to states (*Montevideo convention*), international organisations (*Reparations for Injuries Ad Op (1949)*). Here, **PURPORTED STATE/SUBJECT** must be assessed against the criteria applicable to a **state**.

Statehood

The widely accepted criteria for the ILP qualification of states are governed by article 1 of the *Montevideo Convention on Rights and Duties of States 1933 (Montevideo Convention)*. Primarily, a state must have a permanent population, a defined territory, a government, and the capacity to enter into relations with other states.

< APPLY EACH CRITERIA >

1. Permanent Population

Firstly, a state must have a permanent population (*Duchy of Sealand Case*). Mere physical presence is insufficient; there must be a reasonably stable community to meet this concept of a population (*Western Sahara Ad Op*). However, no minimum size is necessary, and a nomadic people can still satisfy this criterion (*Western Sahara Ad Op*).

Accordingly, it is **likely/unlikely** that **SUBJECT** will satisfy this requirement because **INSERT FACTS**, thereby demonstrating a **presence/absence** of a stable community.

2. Defined Territory

Secondly, a state must have a defined territory (*Duchy of Sealand Case*). There must be a consistent, identifiable core territory under effective control, even if boundaries are disputed (*North Sea Continental Shelf Case*; *Western Sahara case*). The size of the territory is irrelevant.

Accordingly, it is **likely/unlikely** that **SUBJECT** will satisfy this requirement because **INSERT FACTS**, thereby demonstrating a defined territory.

3. Government

Thirdly, a state must have a government (*Duchy of Sealand Case*). This requires an effective government capable of exercising centralised authority and control over its population and territory without the assistance of foreigners (*Aaland Islands Case*). The government must be effective with centralized legislative and administrative organs (*Prof. James Crawford*). Additionally, temporary instability or civil war does not negate statehood (*Aaland Islands, Croatia 1991*).

Accordingly, it is **likely/unlikely** that **SUBJECT** will satisfy this requirement because **INSERT FACTS**, thereby demonstrating government.

- **Note:** a territory lacks an effective government if there is no one to contact or hold responsible in case of need (*Island of Palmas Case*)