

PUBLIC INTERNATIONAL LAW

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Sources of International Law

STARTING POINT FOR SOURCES OF INTERNATIONAL LAW

STATUTE OF THE ICJ

ARTICLE 38

- 1 Court function is to decide in accordance with international law:
 - (a) international conventions;
 - (b) international custom;
 - (c) the general principles of law recognised by civilised nations;
 - (d) 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.
- 2 Court may decide *ex aequo et bono* (from equity and conscience) where agreed to.

ARTICLE 59

Court decision is not binding except between the parties in respect of that particular case.

‘Civilised nations’ substituted for ‘community of nations’ in draft ILC conclusions in 2023.

STATUS OF ARTICLE 38 UNDER GENERAL INTERNATIONAL LAW

Article 38 only sets out the sources of international law that the Court is to apply, which are considered to generally reflect the sources of international law.

- (a) the order in which the principal sources appear is not the order in which they must be considered;
- (b) international legal obligations unilaterally assumed by States have been argued to be classified as obligations under treaty, custom or general principles of law.

TREATIES

Treaties are registered with the UN in accordance with Article 102 of the Charter and published in the *United Nations Treaty Series*. There are two treaties on the law of treaties:

- (a) *The Vienna Convention on the Law of Treaties* 1969; and
- (b) *Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations* 1986.

ARTICLE 2 OF THE VIENNA CONVENTION ON THE LAW OF TREATIES 1969

A treaty is an international agreement between states, in written form and governed by international law, whatever its particular designation.

BILATERAL AND MULTILATERAL TREATIES

Bilateral treaties generally involve a signature by each of the States’ representatives.

Multilateral treaties generally provide for a two-step process of signature and ratification.

ARTICLE 18 OF THE VIENNA CONVENTION ON THE LAW OF TREATIES 1969

A state must refrain from acts which would defeat the object and purpose of a treaty when:

- (a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval; or
 - (b) it has expressed its consent to be bound by the treaty, pending entry into force of the treaty, provided it is not unduly delayed.
-

Peremptory Norms (*Jus Cogens*)

A peremptory norm is accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted. A treaty is void if it conflicts with a peremptory norm (Article 53 of the *Vienna Convention*).

CONCLUSION 2 OF *THE ILCs 2022 DRAFT CONCLUSIONS*

Peremptory norms of general international law (*jus cogens*) reflect and protect fundamental values of the international community. They are universally applicable and are hierarchically superior to the other rules of international law.

EXAMPLES

Some example treaties that would violate peremptory norms include:

- (a) a treaty contemplating an unlawful use of force contrary to the principles of the Charter;
- (b) a treaty contemplating the performance of any act criminal under international law;
- (c) a treaty contemplating or conniving at the commission of acts, such as trade in slaves, piracy or genocide, in the suppression of which every State is called upon to cooperate;
- (d) treaties violating human rights, the equality of States or the principle of self-determination.

CHANGES TO PREREMPTORY NORMS IN DRAFT ILC CONCLUSIONS

CONCLUSION 23 OF *THE ILCs 2022 DRAFT CONCLUSIONS*

A non-exhaustive list of peremptory norms includes (annexed):

- (a) prohibition of aggression;
- (b) prohibition of genocide;
- (c) prohibition of crimes against humanity;
- (d) the basic rules of international humanitarian law;
- (e) the prohibition of racial discrimination and apartheid;
- (f) the prohibition of slavery;
- (g) the prohibition of torture; and
- (h) the right of self-determination.

CONCLUSION 4

To identify a peremptory norm of general international law, establish that the norm:

- (a) is a general norm of international law; and
 - (b) is accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.
-

National and international tribunals have affirmed that peremptory norms may exist in contexts not limited to the validity of treaties (*ILC 2001 Commentary*). For example, a former Head of State does not enjoy immunity (under customary international law) from criminal prosecution before the national courts of another State for alleged acts of torture (*R v Bow Street Metropolitan Stipendiary Magistrate*).

PEREMPTORY NORMS AND CUSTOMARY INTERNATIONAL LAW

CONCLUSION 14 OF *THE ILCs 2022 DRAFT CONCLUSIONS*

A rule of customary international law does not come into existence if it would conflict with an existing peremptory norm of general international law, without prejudice to the possible modification of a peremptory norm by a subsequent norm having the same character.

A rule of customary law not of peremptory character ceases to exist if and to the extent that it conflicts with a new peremptory norm.

The persistent objector rule does not apply to peremptory norms of general international law.

Non-State Entities

Statehood confers the full complement of rights, capacities and obligations under international law. Even if it is concluded that an entity is not a State, it may still be a subject of international law with distinct rights, capacities and obligations.

INTERTEMPORAL LAW

Intertemporal law is a rule that a juridical fact is to be assessed in the light of the law that existed at the time when the juridical fact occurred.

EXAMPLE: WESTERN SAHARA ADVISORY OPINION

Although the 'Mauritanian entity' didn't constitute a state at the time of Spanish colonisation, the Court stated that 'the nomadic peoples of the Shinguitti country should, in the view of the Court, be considered as having in the relevant period possessed rights, including some rights relating to the lands through which they migrated.'

International Organisations

ARTICLE 2(A) OF THE DRAFT ARTICLES ON THE RESPONSIBILITY OF INTERNATIONAL ORGANISATIONS

'International organisation' means an organisation established by a treaty or other instrument governed by international law and possessing its own international legal personality. International organisations may include States and other entities as members.

INTERNATIONAL PERSONALITY

Personality distinguishes an international organisation from its members. It means:

- (a) the organisation can bring a claim in international law to maintain its own rights;³¹
- (b) the organisation is responsible for non-fulfilment of its obligations;
- (c) the organisation has certain privileges and immunities necessary for its functioning, at least within its host State if not more broadly;³² and
- (d) the organisation may conclude agreements subject to the law of treaties.

EXAMPLE: REPARATION FOR INJURIES SUFFERED IN THE SERVICE OF THE UNITED NATIONS CASE ADVISORY OPINION 1949

The questions submitted for the advisory opinion were:

- (1) in the event of an agent of the United Nations suffering injury in the course of his duties in circumstances involving the responsibility of a State, does the UN have capacity to bring an international claim against the responsible government to obtain reparations; and
- (2) in the event of (1) being affirmative, how is the action by the UN reconciled with the rights possessed by the State of which the victim is a national.

The ICJ held that the organisation was intended to exercise and enjoy a measure international personality and capacity to operate on an international plane, as it could not carry out its purposes without international personality. While not a State, the UN was an international person subject to international law and capable of possessing international rights and duties such as bringing international claims.

³¹ Dapo Akande in Malcolm Evans (ed), *International Law* 6th edition (2024).

³² *Behrami et al v France* Application No.71412/01 HUDOC (2007), where the UNMIK was responsible for deaths and injuries caused by failure of its troops in Kosovo, rather than individual sending states being responsible.

SUMMARY OF OBLIGATIONS

CASE	COURT	RULE	DESCRIPTION
<i>Nuclear Weapons</i>	ICJ	General obligation	Ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control. ³⁹
<i>Corfu Channel</i>	ICJ	General obligation	Obligation not to knowingly allow territory to be used for acts contrary to the rights of other States.
<i>Nuclear Weapons</i>	ICJ	General obligation	Use all the means at its disposal to avoid activities causing significant damage to the environment of another State.
<i>Pulp Mills</i>	ICJ	Customary rule	Prevention includes substantive obligations (of due diligence) and procedural obligations such as undertaking environmental impact assessments.
<i>Trail Smelter Arbitration</i>	ICJ Arbitral Tribunal	Customary rule	Affirmed no harm principle, also known as the principle of prevention .
<i>Responsibilities and obligations of States with respect to activities in the Area</i>	ITLOS	Precautionary approach	Where there are threats of serious or irreversible damage, lack of full scientific certainty is not a reason for postponing cost-effective measures to prevent environmental degradation.
<i>COSIS Advisory Opinion</i>	ITLOS	Potentially customary	The precautionary approach may now form part of customary international law.
<i>Responsibilities and obligations of States with respect to activities in the Area</i>	ITLOS	Procedural obligation	The procedural obligation to conduct an environmental impact assessment potentially applies in areas beyond national jurisdiction.
<i>Environment and Human Rights Advisory Opinion</i>	Interamerican Court of Human Rights	Customary rule	A customary duty of notification of States that may potentially be affected by possible significant environmental damage.
<i>General Comment No 36</i>	UN Human Rights Committee	Treaties and soft law instruments	Environmental impact assessments, State notification and cooperation, and the precautionary approach.
<i>Rio Declaration</i>	Principle 27	Soft law	States shall cooperate in good faith in the fulfilment of the principles of the declaration and further development of international law.
<i>Paris Agreement</i>	Article 3	Soft law	Parties to undertake ambitious efforts to achieve the purpose of the agreement.
<i>Paris Agreement</i>	Articles 4 and 15	Soft law	Place pressure on States to increase the ambition of their nationally determined contributions and to avoid reducing these announced contributions.
<i>General Assembly Resolution 16-10-08</i>	2022	Soft law	A human right to a clean, healthy and sustainable environment.

³⁹ *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion* [1996] ICJ Rep 226, [29]-[31].