

LAWS1023 Summary

1. Development and Nature of Public International Law

International Law: governs the relations between nation states

Lex lata: the law as it currently is

Lex ferenda: the law as it ought to be

Theories of IL

Natural Law

The idea that power of law does not come from voice of authority. Natural law says there is a higher reason why the law is the law (e.g. morality, universal principles, religious, etc.). Under natural law, horrific immoral laws would not be valid even if they came from a legitimate authority.

Positivism

In contrast, positivism says the authority is what makes the law the law. Positivists consider international law as a unified system of rules that emanates from the states' will. International law, as it is, is an "objective" reality that must be distinguished from law "as it should be." According to extreme positivist, only rules created by means of a formal treaty process or reliance on general custom are valid.

Consent Theory

Express or implied consent by states is the source of the basis of obligation in international law. The will of the State is the source of the binding authority of international law, but they also put emphasis on the way the consent is expressed by the State. The will of the State is said to be expressed in domestic law through legislation and in the case of international law through consent to international rules. According to some theorists international law is based on the actual consent of the States, it may be implied by way of custom or it might be expressly shown through treaties or other international agreements. The State's will is manifested in the form of conventional and customary rules and since they have consented to them, the rules are binding upon them, and nothing can be law to which they have not consented.

Is International Law Really "Law"?

- While in many cases it serves as a stabilizing factor in the international system, and can even be called a force for good, some believe that IL cannot be considered "law" when applied to states or state action, as its enforcement mechanisms rely on state consent, or the trust and goodwill among parties to a treaty
- "[T]heories of law ... are one of the principal causes of low morale among students of international law" – Brownlie 1955
- In Austin's view: "The law obtaining between nations is not positive law: for every positive law is set by a given sovereign to a person or persons in a state of subjection to...[the law's] author... . [T]he law obtaining between nations is law (improperly so called)... . The duties which it imposes are enforced by moral sanctions: by fear on the part of nations, or by fear on the part of sovereigns, of provoking general hostility, and incurring its probable evils, in case they shall violate maxims generally received and respected." (John Austin, Jurisprudence, 1832)
- "International law is sanctioned by habit, interest, conscience and force" (Wright, "The Outlawry of War" 19 AJIL 1 (1925) 96)

2. Sources of International Law

Sources of International Law (Article 38(1) ICJ Statute):

- a) **International conventions (treaties)**, whether general or particular, establishing rules expressly recognized by the contesting states;
- b) **International custom**, as evidence of a general practice accepted as law;
- c) **General principles** of law recognized by civilized nations;
- d) **Judicial decisions and the teachings of the most highly qualified publicists** of the various nations, as subsidiary sources for determining the rules of law

All sources of law are independent from each other. Therefore, if a state is not party to a treaty or has made a reservation regarding a provision in a treaty, they can still be held responsible under CIL or another source of law (**Nicaragua (Merits)**)

Customary International Law (CIL)

CIL: "constant and uniform usage, accepted as law" (**Asylum case**)

Consists of two elements:

- 1) **State practice**: repeated acts by states
- 2) **Opinio juris**: a state's belief that it is obliged by law to act in a particular way, distinct from mere usage or habit

1) Is there a treaty?

- If the state has **ratified the treaty** → the state is bound by the rule
 - But look at the content of the treaty (e.g. the treaty explicitly bans whaling for commercial purposes, not whaling altogether. Therefore, the state is not violating the treaty for scientific purposes)
 - E.g. is there definitive language stating the behaviour should be banned?
 - E.g. is only one type of behaviour banned?
- If the state has **not ratified the treaty** → the state may still be bound by the rule if parallel obligations exist under CIL (**Nicaragua (Merits)**)
 - A treaty may... (**North Sea Continental Shelf cases**)
 - Declare CIL existent at the time the treaty was drafted
 - **Language used in the treaty**
 - Language that definitively states the rule is CIL → indicates that it is an existing rule in CIL (**distinguished from the North Sea Continental Shelf cases**)
 - **Negotiating history**:
 - Hesitation in the drafting history as to whether the rule should be included → indicates that it is not an existing rule in CIL (**North Sea Continental Shelf cases**)
 - **Reservations**:
 - If reservations to the rule are permitted under the treaty, it was not existing CIL (**North Sea Continental Shelf cases**)
 - Create CIL... (see step 2)

2) Can a treaty provision create CIL?

- For a treaty provision to create CIL (**North Sea Continental Shelf cases**)
 - The provision must be of a **fundamentally norm-creating character**: capable of being the origin of a rule that governs the behaviour of a state
 - **Framing of the rule**
 - If the rule is framed as the primary obligation → indicates it is a norm-creating provision (**distinguished from North Sea Continental Shelf cases**)
 - If the rule is framed as the fall-back obligation → indicates it is not a norm-creating provision (**North Sea Continental Shelf cases**)

- In **NSC**, states could use other means of determining maritime boundaries, and if those failed, the treaty said they should apply the equidistant rule
- **Reservations**
 - If states can make reservations to the provision (where they agree to be bound by the treaty, except for the specific provision containing the rule) → indicates it is not a norm-creating provision (**North Sea Continental Shelf cases**)
- **Exceptions**
 - If the treaty contains exceptions to the rule → indicates it is not a norm-creating provision (**North Sea Continental Shelf cases**)
- There must be **very widespread & representative participation in the treaty**
 - Including the participation of states whose interests are particularly affected by the rule
- There must be general belief by states that they are **obliged by law to act in accordance with the rule**
 - If there is only practice of states who are parties to the treaty, there is a lack of clarity regarding the motivations of the states to comply with the rule
 - Is it the obligation under the treaty?
 - Is it what they consider to be an obligations under CIL?
 - Need to identify practice coming from states who are not parties to the treaty
 - These states have no obligations under the treaty, therefore by following a rule in the treaty, it is more likely they are doing this because they believe they are obligated under CIL
- **Passage of time between the treaty and it becoming CIL**
 - Passage of short period of time not necessarily a bar for a rule to become CIL (**North Sea Continental Shelf cases**)
 - But the practice should have been extensive and virtually uniform within that short period of time amongst the states with affected interests (**North Sea Continental Shelf cases**)
- A treaty norm may become a CIL norm, but “this result is not lightly to be regarded as having been attained” (**North Sea Continental Shelf cases**)
 - Consequences:
 - The treaty-turned-CIL norm binds states that are non-parties to the treaty
 - Denunciation of the treaty by a party does not absolve a state of the obligation to comply with CIL

3) Does the rule meet the requirements of CIL?

North Sea Continental Shelf Cases: confirmed that both state practice (the objective element) and opinio juris (the subjective element) are essential elements for the formation of a customary law rule.

i) State practice

- **1) Widespread practice (North Sea Continental Shelf cases)**
 - Number of states engaging in the practice
- **2) Representative practice (North Sea Continental Shelf cases)**
 - **Where there is a generally applicable rule** (e.g. use of force): the practice should be general and representative geographically
 - **Where only certain states are affected** (e.g. maritime practices): the practice of those states whose interests are specifically affected is most relevant in the formation of CIL
 - E.g. landlocked states are not affected by maritime practices
- **Timing:**
 - Passage of short period of time not necessarily a bar for a rule to become CIL (**North Sea Continental Shelf cases**)

- When dealing with a smaller number of states interested in a particular issue (e.g. space exploration) → CIL will develop must faster
 - When dealing with an issue that affects the entire world community → CIL will develop must slower
- But the practice should have been extensive and virtually uniform within that short period of time amongst the affected states (**North Sea Continental Shelf cases**)
- **Practice that departs from the purported rule:**
 - For a rule to be CIL, there need not be absolute rigorous conformity with the rule (**Nicaragua (Merits)**)
 - Although states may behave in a way that is inconsistent with the purported rule of state practice, this is not conclusive proof that the purported rule no longer exists as CIL (**Nicaragua (Merits)**)
 - *“In order to deduce the existence of customary rules, the Court deems it sufficient that the **conduct of States should, in general, be consistent with such rules**, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule”*
 - But where there is action that is inconsistent with the purported rule of state practice, and the affected states do not protest that action (e.g. where a state prosecutes a crime from another state’s flagship in a collision case on the high seas, and there are no objections from the flagship state), this indicates that the purported rule may not be CIL (**Lotus case**)
 - Need to look at:
 - **The response of the affected states to the ‘violation’ - are they protesting?**
 - No → indicates the rule is no longer CIL (**Lotus case**)
 - Yes → indicates the rule is still CIL (**Nicaragua (Merits)**)
 - Was the affected state/s in a position to protest?
 - **The response of the inconsistent state:**
 - Has the inconsistent state tried to justify their behaviour by appealing to exceptions the rule, or using justifications contained within the rule itself?
 - Indicates the rule still exists as CIL (**Nicaragua (Merits)**)

ii) *Opinio juris*

- **The states concerned must feel that they are obliged by law to act in a particular way (North Sea Continental Shelf)**
 - It can be difficult to establish OJ, as it is not always clear what exactly motivated the state to act in a certain way
 - Consider other possible reasons for state compliance, rather than a sense of legal obligation under international law
 - Courtesy, convenience or tradition (**North Sea Continental Shelf**)
 - Political expediency (**Asylum case, ICJ 1950**)
- **When certain acts are not done (omissions)**, it must still be proven that states did not act in such a manner because they believed they were legally obliged to refrain from that action (**Lotus case**)
 - In the **Nuclear Weapons Advisory Opinion**, 50 years practice of non-use of nuclear weapons was insufficient to establish CIL, as it was not accompanied by evidence of *opinio juris*
- Consent to the formation of a CIL is seldom explicit, and it is rather reflected in **state acquiescence**:
 - “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” (**International Law Commission’s 2018 Draft Conclusions on Identification of CIL**)
 - If the state has not reacted over time → indicates the rule may be CIL, as there is OJ
 - **Costa Rica v Nicaragua**: absence of protest by Nicaragua contributed to customary fishing rights for Costa Rica
 - If the state was not in a position to react → indicates the rule is not CIL, as there is no OJ
- The **onus of proof** lies on the state arguing for the existence of a custom (**Asylum case**), unless the Court has been asked to determine that question (**Nuclear Weapons Advisory Opinion**)

- **OJ may be evidenced by...** (but these are not necessarily conclusive proof) (**Nicaragua (Merits)**):
 - Statements by state representative
 - Obligations undertaken by states in international forums
 - Multilateral conventions

4) Regional custom

- **A rule of CIL can develop among only a particular geographical region (Asylum case, ICJ 1950)**
 - But the party which relies on a custom of this kind must prove that:
 - The custom is in accordance with a constant and uniform usage practiced by the states in question (state practice)
 - The custom is established in such a manner that it has become binding on the other party (opinio juris)
 - This custom usage is the expression of a right [of one or more states] and a duty [on one or more other states] (opinio juris)
- **Regional CIL can be created by a small group of states (even just two) (Rights of Passage case, ICJ 1960)**
 - **Facts:** India argued before the ICJ that practice between only two states was not sufficient to form a local custom. The ICJ rejected this reasoning, finding no reason why a century practice based on mutual rights and obligations was insufficient for local custom to arise.
- Regional CIL may deviate from CIL, but it must not violate jus cogens

5) Persistent Objector Rule

- A state is bound by CIL even if it has never explicitly consented to the rule or has not consented to the practice which created CIL (i.e. newly formed states are bound by CIL)
- But a state which fulfils the requirements of the a persistent objector, set out by **Principle 15 of the International Law Commission's 2018 Draft Conclusions CIL**, will not be bound by that particular rule of CIL:
 - 1) The state must have objected to a purported rule while it was still in the formation stage of becoming CIL, and must have continued to object to the rule after it became CIL (Anglo-Norwegian Fisheries Case)**
 - 2) The objection must clearly expressed, made known to other States, and maintained persistently**
 - **Asylum case (Colombia v. Peru) (ICJ, 1950)**
 - Even if there was a regional CIL that existed, it would not bind Peru, because Peru had persistently objected to the idea of political asylum by refraining from ratifying various treaties on political asylum
 - **Anglo-Norwegian Fisheries Case (ICJ, 1951)**
 - The ICJ found the 10-mile rule would be inapplicable to Norway, as Norway had persistently objected any attempt to apply this rule to the Norwegian coast
 - Other states had acquiesced to Norway's objection (not challenged its objection to the rule), which is not required for the PO rule, but it further supports Norway's objection being known to others
 - 3) A state cannot persistently object to a norm that has the character of jus cogens**
 - **VCLT Art 53:** a jus cogen norm is accepted and recognized 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
 - There is no universal agreement regarding precisely which norms are jus cogens, however, examples of jus cogens were specified in the **ICL Report on Jus Cogens Norms**: prohibition of genocide, maritime piracy, slavery, torture, wars of aggression, and territorial aggrandisement, right to self-determination

6) UN General Assembly Resolutions / Declarations

- **Are generally not binding themselves (Nuclear Weapons Advisory Opinion)**
- **May potentially be indicative of existing CIL, or contribute to the formation of CIL:**
 - **State practice**

- Adoption (strong consensus) establishes the generality of the practice
- Repetition in later resolutions establishes the consistency and uniformity of the practice
- **Opinio juris**
 - **Content of the resolution (Nuclear Weapons Advisory Opinion):**
 - Statement that the rule already exists in CIL
 - **Chagos Islands (ICJ, 2019):** the ICJ determined that SD was part of CIL by 1960 based on the finding that the Declaration of the Granting of Independence to Colonial Countries and People was declaratory of CIL
 - The wording of the resolution stated that “there is a right to SD” (strong, absolutist language (not ambiguous or aspirational) → indicative of ‘lex lata’ → existing norms of IL)
 - **Distinguished from Nuclear Weapons Advisory Opinion** - there was a statement saying that “nuclear weapons should be declared illegal”)
 - I.e. the wording indicates that there was not yet a norm under CIL that prohibited the use of such weapons, only a desire to prohibit them in future (aspirational language → indicative of ‘lex feranda’)
 - **Circumstances of adoption (Nuclear Weapons Advisory Opinion):**
 - **Voting:**
 - High number of votes and strong consensus → indicative of OJ (**Chagos Islands**: 89 votes in favour; 9 abstentions; no objections)
 - Many negative votes → lack of evidence of OJ (**Nuclear Weapons Advisory Opinion**)
 - Conflicting opinions in votes → lack of evidence of OJ (**Nuclear Weapons Advisory Opinion**)
 - **Abstentions:**
 - High number of abstentions → lack of evidence of OJ (**Nuclear Weapons Advisory Opinion**)
 - **Conduct of the states after the resolution** (whether followed or not)
- **Chagos Islands (Advisory Opinion) (ICJ, 2019):**
 - **Facts:** Chagos Islands are a part of Mauritius. M was a UK colony. In 1960s, M advocated for independence against UK. But at the same time, UK agreed to lease the CI to USA. In 1965, the UK and M made an agreement that the UK would separate the CI from M, and the CI would continue to be held by UK. The rest of M would become independent. In accordance with the deal, the UK displaced the native people from CI to other parts of M. Later, M wanted CI to be restored
 - **Held:**
 - The ICJ found that SD was part of CIL by 1960; therefore, the decolonisation of M should have been completed according to the principles of SD
 - Found this based on the finding that the Declaration of the Granting of Independence to Colonial Countries and People was declaratory of CIL:
 - Content (the wording of the resolution stated that “there is a right to SD” (strong, absolutist language (not ambiguous or aspirational) - reflective of ‘lex lata’ → existing norms of IL)
 - Circumstances of adoption (89 votes in favour; 9 abstentions; no objections)
- **Some argue they can create “instant CIL”**
 - In the aftermath of the 9/11 attacks, a number of UNGA Resolutions condemned the attacks and stated right of self-defence against non-state actors
 - As there was high number of votes with strong consensus and almost no objections, some argue this was a form of instant CIL
 - Seems to only exist in very exceptional circumstances

7) Consider timing (if relevant)

- CIL cannot be retrospectively applied (can't punish the state for previous breaches of CIL)

FACTS:

North Sea Continental Shelf Cases (ICJ, 1969)

- **Facts:** Germany and Denmark/Netherlands had a dispute over ocean boundaries - each state wanted to maximise its access to oil and gas reserves in the North Sea. Denmark/Netherlands used the 'equidistance' rule contained in the *1958 Geneva Convention on the Continental Shelf*, but Germany calculated division based on a "just and equitable" share.

Nicaragua (Merits) [1986]

- **Facts:** Nicaragua was unhappy with US military activity in the country (supporting the rebel movement in Nicaragua); argued that the US breached two treaty rules / parallel CIL obligations: 1) a state could not use force in another state's territory, and 2) that a state could not interfere in the affairs of another state.
- **Held:**
 - **Treaty argument:** While the US may be breaching its treaty obligations, the ICJ had no jurisdiction to deal with this, as the US had not ratified this treaty
 - **CIL argument:** Found that the US had breached a CIL on the use of force in another state, and interference in the affairs of another state
 - **The ICJ looked at 1) response of the affected states + 2) response of the inconsistent state**

Lotus Case (PICJ, 1927)

- **Facts:** Two ships collided on the high seas (under no territory) - Turkey prosecuted and convicted the French captain for manslaughter. The French Govt. demanded the release of the French captain - arguing that the Turkish Govt. had no jurisdiction to prosecute, as the crime occurred on a French flagship, therefore the crime was exclusively in the jurisdiction of France and Turkey had no concurrent jurisdiction (France argued that in practice, states abstained from prosecuting collision cases where the crime occurred on the vessel of another state. Both states referred the matter to the PICJ).
- **Held: the PICJ rejected France's argument**

Asylum case (Colombia v. Peru), ICJ 1950

- **Facts:** The leader of a failed coup in Peru sought asylum in Colombia - Peru rejected to give him safe passage to Colombia... Colombia argued there was a local custom in Latin America permitting political asylum.

Anglo-Norwegian Fisheries Case (ICJ, 1951)

- **Facts:** dispute between UK and Norway over how large an area of water surrounding Norway was Norwegian waters. UK argued the "10 mile rule" was CIL.

Relationship between CIL and Treaties

Relationship between CIL and Treaties

- **Article 38(1) ICJ Statute** does not establish a hierarchy of the sources of IL (i.e. no source is superior to another)
- **Treaties and CIL on the same topic co-exist in parallel (Nicaragua (Merits))**
 - As noted in Nicaragua, where rules pertaining to the use of force existed in both CIL and treaty, the ICJ held that CIL and treaty rules can coexist for the same subject
 - Subsequent treaties do not abrogate existing CIL
 - Treaties apply only to parties, while CIL applies to the whole world
- But...
 - **CIL may displace treaties if a custom contrary to a treaty norm develops** (possible as long as it is not contrary to jus cogens)

- **Treaties may be applied instead of custom if their norms are more specific** (possible as long as it is not contrary to jus cogens)
 - I.e. if two states choose to contract out of a rule of CIL in their relations, the treaty would override custom

Coexistence of CIL and Treaty Norms

- The fact that certain rules have been codified as treaty norms (that apply to parties to the treaty) does not mean they cease to exist as rules of CIL (that apply worldwide or to a specific region) (**Nicaragua (Merits)**)
 - Rules that are identical in treaty and CIL may be distinguishable in methods of interpretation and application (e.g. a state may accept a rule contained in treaty because the treaty establishes what the state regards as desirable institutions/mechanisms to ensure implementation of the rule)

UN Security Council Resolutions

UN Security Council Resolutions

- **UN Charter Art 25:** SC resolutions are binding on member states

General Principles of Law

ICJ Statute Art 38(1)(c): "general principles of law recognised by civilised nations"

- These principles were introduced into the ICJ statute to **aid the Court in deciding matters** where **treaties and CIL do not provide guidance**
- **CIL (38(1)(b)) and general principles (38(1)(c))** are different sources of IL
 - **Ure v Cth:** CIL and general principles are two distinct systems of IL and must be treated separately
- General principles can either be principles that have been borrowed from domestic law that can be applied to international legal questions, or principles which have developed at international level
 - **Principles of municipal law:**
 - IL recruits many rules from private systems of law, such as rules of procedure, good faith, res judicata [an issue decided by a court may not be reopened], unjust enrichment, estoppel
 - The way in which IL borrows from this source of law is to adapt the principles to fit the decision-making process in the international sphere (not necessarily applied as they are under domestic jurisdictions in a "lock, stock and barrel" manner) (**International Status of South West Africa Case**)
 - These principles must have sufficient acceptance in other jurisdictions to be accepted as general principles (**International Status of South West Africa Case**)
 - **Principles developed at the international level:**
 - Sovereign equality between states
 - Precautionary principle in environmental law
- Equity in IL:
 - **Diversion of Water from the Meuse:**
 - **Facts:** Netherlands & Belgium had a treaty re: use of water from the Meuse. Netherlands approached ICJ, claiming that Belgium breached the treaty bc it had constructed canals on its territory. Belgium defended itself by saying that Netherlands had previously constructed locks on the river, which affected its use by Belgium.
 - **Held:** the court has freedom to consider principles of equity as part of IL.
 - Advantages and disadvantages of having equity as a principle of IL:
 - **Equity infra lege:** the form of equity which is used as a method of interpreting the law
 - There is no problem with engaging in the use of equity for this purpose and it has been accepted by the ICJ (**Frontier Dispute (Burkina Faso v Mali)**)
 - **Equity extra lege:** the form of equity which allows the court to create exceptions from IL norms
 - This form of equity is more problematic

Subsidiary Materials

- **Subsidiary materials: judicial decisions and the teachings of the most highly qualified publicists**
- **These are not sources of law; they provide views as to content of IL principles**
- **Judicial decisions:**
 - Including from the ICJ, international tribunals, arbitral tribunals, domestic courts (but the weight given to a domestic decision will depend on the analysis behind the reason for the judgment, and the level of the court in the hierarchy)
 - Much depends on the credibility of the court, its independence, national bias, quality of decisions
 - No precedent value, but consistency is strived for
 - **Statute of the ICJ, Art 59:** the ICJ's decisions are only binding on the state parties of a specific case; they are not binding as precedent
 - But ICJ decisions have influence and the ICJ often follows its own earlier judgments
 - Examples of ICJ contributing to the development of new IL rules:
 - Reparation case 1949: UN has international legal personhood
 - Reservations case 1950: rules on reservations to multilateral treaties
 - Nottebohm case 1955: principle of real and effective nationality
- **Teachings of the most highly qualified publicists:**
 - More common for the ICJ to refer to publicists in the 18th, 19th and early 20th centuries
 - Now it is very rare for the ICJ to refer to publicists, as their writing is just an interpretation of the law; it is not law
 - The work of the International Law Commission falls into this category (as a subsidiary source), as the ILC is made up eminent international lawyers who examine the law as it currently exists and research how the law should be develop
 - But the work of the ILC does hold a higher status than academic writing, as the ILC is a UN Body and eminence of who is involved
 - **The Paquete Habana:**
 - **Facts:** Two fishing vessels from Cuba were seized by the US blockade of Cuba, which had been created amid rising tensions between the two countries. Shortly thereafter, the Spanish–American War was officially declared.
 - **Held:**
 - Coastal fishing vessels are exempt from capture as prizes of war under CIL
 - **The works of jurists and commentators are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is (such as CIL)**

Inconsistency

Inconsistency between CIL and Treaty Norms, or Two Rules from the Same Source

- **Principle of lex posterior derogat priori: a newer law repeals an older law**
 - E.g. the 1949 Geneva Conventions on the Treatment of POWs override the 1929 Geneva Conventions on the Treatment of POWs
- **Principle of lex posterior generalis non derogat priori speciali: a later general law does not derogate from an earlier specialised law**
 - E.g. a general treaty about the sea would not override a CIL specifically about an certain maritime practice
- **Principle of lex specialis: the specific law prevails over the general law**

Soft Law

- Non-binding instruments such as GA resolutions or codes of conduct
 - These may be contained as a provision within a treaty e.g. "states should endeavour to attempt to..."
 - These encourage a certain kind of behaviour that are not supported by a binding IL
- "Soft law" can sometimes shape behaviour better than hard law

- Helpful in situations where there isn't enough specificity in a hard law norm to give more detail
- Helpful way to address new / emerging issues (e.g. cybercrime, conduct in outer-space environment)
- Gives states the space to adjust in their own way that may suit cultural and development needs
- The principles contained within soft law may eventually become CIL