

T2 - Sources of International Law

Determining Sources of International Law

Article 38 of the ICJ Statute provides a non-exhaustive list of the sources of international law. It is settled in law Art.38(1) is a '*complete statement of the sources of international law*' per **Ure v Commonwealth (2016)**.

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

- a. **international conventions**, whether general or particular, establishing rules expressly recognized by the contesting states;
- b. **international custom**, as evidence of a general practice accepted as law; (e.g. international customary law)
- c. **the general principles of law** recognized by civilized nations (general concepts like rule of law, estoppel, remedy, etc.)
- d. subject to the provisions of Article 59, 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.

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)**).

Determining Soft Law:

Soft Law Characteristics:

- **Non-Binding Nature:** Does the source lack legally enforceable obligations? Soft law often includes resolutions, declarations, guidelines, or codes of conduct.
- **Low Modality Language:** May include declarative or aspirational 'best effort' provisions that place no legal onus on states for accountability that embody non-mandatory commitments. May include mandatory language (e.g. shall) or permissive language (e.g. encourage).
- **Institutional Context:** Was the source created by an international organization (e.g., UN General Assembly resolutions) or through informal processes? Institutional authority can lend weight to soft law.
- **State Practice and Acceptance:** How do states and international organizations treat the source? Widespread acceptance and consistent application may indicate its significance, even if not formally binding. Are states incorporating the principles into domestic law or policy, signaling a shift toward binding norms?

The Utility of Soft 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)
- Gives states the space to adjust their own way that may suit cultural and developmental needs
- The principles contained within soft law may eventually become CIL

Examples of International Custom per **Brownlie 'Principles of Public International Law'**

- Diplomatic Correspondence
- Policy Statements
- Press releases
- Opinions of official legal advisers

- Official manuals on legal questions
- Executive decisions and practices
- Orders to naval forces
- Comments by governments on ILC Drafts
- International and national judicial decisions
- Recitals in treaties and other international instruments
- A pattern of treaties in the same form
- Practice of international organs and resolutions to legal questions in the UNGA

Is there customary international law (CIL)?

RULE: Pursuant to Article 38(1)(b) of the ICJ Statute and Oppenheim (1905), it is established that international custom can become law through the transformation of consistent and non-obligatory practices of legal comity into binding obligations upon states.

CIL: “constant and uniform usage, accepted as law” (Asylum case)

For custom to become law, it must be satisfied that there is (1) objective **state practice** and is accompanied by (2) a subjective belief that such legal practice is necessary (**opinio juris**).

Step 1 - General State Practice

Definition: From Report of the International Law Commission on the Work of Its Seventieth Session (2018), highly influential but not binding) = practice of states in their international relations

For a practice to be state practice, it must satisfy the following:

1. **Need not be absolutely uniform BUT must be generally consistent.** Deviations from the practice must be justifiable either as allowable exceptions or not being relevant practice at all: **Military and Paramilitary Activities**
2. **Evidenced over a considerable period of time BUT a custom existing over a considerably short period of time is not a bar itself.** If the practice is very widespread and possesses representative participation, but exists for a considerably short period of time, then it still may constitute customary practice: **North Sea Continental Shelf**

Must be:

1. **Consistent** (Fisheries Jurisdiction 1973)
 - **TIME:** Passage of time can be short provided practice is “extensive and virtually uniform” per **North Sea Continental Shelf Cases (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.
 - **Issue:** Was the equidistance calculation part of CIL?
 - **Rule:**
 - It was held that it is possible for a customary rule to develop over a short period of time. However, if the time elapsed is short, the amount of practice required may change.
2. **Widespread and representative**
 - Consider the volume of states which practice: **North Sea Continental Shelf Cases (1969)**
3. **Need not be entirely uniform**
 - Absolutely rigorous conformity is not required but there must exhibit some general consistency - inconsistent state conduct is treated as a breach, or defended through legal exceptions and justifications: **Nicaragua Case (Merits) (1986)**
 - CASE: add in facts/rule
 - Includes: physical acts, claims, declarations in General Assembly, national judgements and inaction

(ILC Draft Recommendations, 2018 Conclusion 6).

4. The 'specially-affected state'

- The practice of states with a specific subject matter interest should be given more weight for the purpose of determining CIL: US Nuclear
 - Academic Perspective: Has been critiqued due to concern for it being used as a 'respectable disguise' by powerful states - can be manipulated for political means (e.g. a handful of states possessing nuclear weapons while promoting non-proliferation)

5. Form of Practice - immaterial

- State practice can take a wide range of forms - includes but is not limited to both physical and verbal acts: **1950 ILC Conclusion 6(1)**

Examples of state practice per **Brownlie 'Principles of Public International Law'** and codified in a non-exhaustive list per **1950 ILC note. There is no predetermined hierarchy amongst forms of practice (Conclusion 6 (3)).**

- Diplomatic Correspondence
- Practice of international organisations (Conclusion 4)
- Conduct of the State as State Practice (Conclusion 5)
- Conduct at an intergovernmental conference (Conclusion 6)
- Executive Conduct (Conclusion 6)
- Operational Conduct 'On The Ground' (Conclusion 6)
- Policy Statements
- Press releases
- Opinions of official legal advisers
- Official manuals on legal questions
- Executive decisions and practices
- Orders to naval forces
- Comments by governments on ILC Drafts
- International and national judicial decisions
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Step 2 - Opinio Juris ('accepted as law')

The practice must be accepted by the states to be opinio juris (belief that international law places a legal obligation on them to act in a certain way): Military and Paramilitary Activities in Nicaragua

RULE: "The states concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency, or even habitual character of the acts is not in itself enough": **North Sea Continental Shelf**

Examples:

- a. Failure to react (acquiescence) is considered acceptance: **ILC Conclusion 10(3)**
 - b. Omissions: public states, publications, government legal opinions, diplomatic correspondence, decisions of national courts, treaty provisions, UNGA Resolutions: **ILC Conclusion 10(2)**
1. The onus is on the party attempting to establish a custom to prove their opinion: **Asylum (Colombia vs. Peru)**
 2. Proving a custom requires states to prove the EXACT custom: **Jurisdictional Immunities of the State (Germany v Italy):**
 - CASE: facts/legal reasoning/ratio