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# Module 1: Sources of International Law (IL) & Relationship between IL and Municipal Law

## Week 1 Lecture Notes

### SOURCES OF INTERNATIONAL LAW

#### Primary Sources =

- Treaties (ICJ Statute, art 38(1)(a))
- Customary International Law (ICJ Statute, art 38(1)(b))
- General Principles of Law (ICJ Statute, art 38(1)(c))

#### Subsidiary Sources =

- Judicial decisions
- Writers

#### Soft Law =

- UN Resolutions

Note: Legal obligations may arise from more than one source (i.e., treaties and customary international law)

Starting point for sources of law = Article 38 of the ICJ Statute

### INTERNATIONAL COURT OF JUSTICE (ICJ)

Contemporary authoritative starting point for understanding sources of international law is Article 38 of the Statute of the ICJ

- One of 6 principal organs of the UN

ICJ is an organ responsible for:

- Settling disputes between states
- Jurisdiction to issue advisory opinions to UN system

### ICJ STATUTE, ART 38

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** ...
  - (b) International **custom**, as evidence of a general practice accepted as law
  - (c) The **general principles of law** recognised by civilised nations
  - (d) ... **judicial decisions** and the **teaching** of the most highly qualified **publicists** of the various nations, as **subsidiary means** for the determination of rules of law
2. This provision shall not prejudice that power of the Court to decide a case **ex aequo et bono, if the parties agree thereto.**

- The ICJ Statute is an international treaty, signed by states and annexed to the UN Charter which is also a treaty.
- Article 38 reflects international customary law as well
- However article 38 is out of date and misleading as it doesn't take into account sources like the UN resolutions etc.
- Note: Article 38 was taken from an earlier statute of the Permanent Court of International Justice (PCIJ) – which was peak judicial body. Means we can look to earlier ICJ decisions.

## TREATIES

**Definition:** In general, a legal agreement between states that has an **intention** to create legal relations **governed** by international law.

- “In general,” because in certain cases the UN can also create treaties.
- Also known as covenants, accords, protocols, covenants
- Treaties are collected in the UN Treaty Collection website (more than 560)
- Different types of treaties:
  - Bilateral (2 parties)
  - Multilateral (3 or more parties)

### Certain principles of interpretation for treaty law:

EXAMPLES INCLUDE:

- Treaties are binding only on the parties to the treaty (*pacta sunt servanda*) – i.e. states that have signed and ratified the treaty
  - Note: States can make reservations on certain treaty obligations, provided that these reservations aren't expressly prohibited within the treaty and the reservation doesn't conflict with the object of the treaty
- States must have consented to be bound by the source of international law
  - EXCEPTION TO THIS = states may still be bound by a treaty even if they haven't ratified that treaty if that provision of the treaty reflects or generates customary international law, which gives rise to the obligation
- Must be conducted in good faith
- See: *Vienna Convention on the Law of Treaties 1969* – a treaty that tells you how to interpret treaties

### Different Purposes of treaties

EXAMPLES:

- Agreed **arrangement** between two parties (akin to a contract)
  - E.g. Camp David Accords 1978 (Jordan & Israel)
  - E.g. China-Australia Free Trade Agreement (ChAFTA), entered into force 20 December 2015
- Establishing **new normative regime**
  - E.g. United Nations Framework Convention on Climate Change (UNFCCC), entered into force 21 March 1994
- Constitution of an **international organisation**
  - E.g. Treaty of the European Union, signed 7 Feb 1992
  - E.g. Rome Statute of the ICC, adopted 1998, entered into force 1 July 2002

### Different forms of treaties

- Written agreement = the most common form

- Can be an oral treaty, but rare in practice
- Can also be an exchange of letters (provided there is that intention to create legal relations)

## CUSTOMARY INTERNATIONAL LAW

CIL = 'state practices recognised by the community at large as laying down **patterns of conduct** that have to be **complied with**' (Shaw 2014, 5)

- Second main source of international law
- Considered a more ambiguous source
- Unwritten source of law – derived from how states habitually conduct themselves. Need to consider things such as:
  - Duration of that behaviour
  - Consistency
  - Repetition
  - Number of states involved (regional custom?)
  - Status of the states in relation to the subject matter (ie specially affected state?)
- *Opinio iuris* = Second Element - subjective belief that states are bound/obliged to act in a certain way

ILC Conclusions (2018): '**general practice that is accepted as law**' (conclusion 2)

**Two elements of CIL** (NOTE: both need to be satisfied for there to be CIL)

See: *Nicaragua* [1986] ICJ Reports 1986, p. 14

1. **State behaviour & practice** (objective facts)
  - Duration, consistency, repetition and generality?
2. **Psychological or subjective belief** (*opinio juris*)
  - States feel bound or obliged to act in a certain way

## ELEMENT 1: STATE BEHAVIOUR & PRACTICE

Examples:

- Diplomatic acts and correspondence
- State conduct in connection with a resolution adopted within an International Organisation
- State conduct in relation in connection with a treaty
- Military operation
- State official maps
- Decisions of national courts
- State executive decrees
- NOT: NGO policy manuals

ILC Conclusions, Part 3: A General Practice

#### **Conclusion 4**

##### **Requirement of practice**

1. The requirement of a general practice, as a constituent element of customary international law, refers primarily to the practice of States that contributes to the formation, or expression, of rules of customary international law.

2. In certain cases, the practice of international organizations also contributes to the formation, or expression, of rules of customary international law.

3. Conduct of other actors is not practice that contributes to the formation, or expression, of rules of customary international law, but may be relevant when assessing the practice referred to in paragraphs 1 and 2.

#### **Conclusion 5**

##### **Conduct of the State as State practice**

State practice consists of conduct of the State, whether in the exercise of its executive, legislative, judicial or other functions.

#### **Conclusion 6**

##### **Forms of practice**

1. Practice may take a wide range of forms. It includes both physical and verbal acts. It may, under certain circumstances, include inaction.

2. Forms of State practice include, but are not limited to: diplomatic acts and correspondence; conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference; conduct in connection with treaties; executive conduct, including operational conduct "on the ground"; legislative and administrative acts; and decisions of national courts.

3. There is no predetermined hierarchy among the various forms of practice.

#### **Conclusion 7**

##### **Assessing a State's practice**

1. Account is to be taken of all available practice of a particular State, which is to be assessed as a whole.

2. Where the practice of a particular State varies, the weight to be given to that practice may, depending on the circumstances, be reduced.

### **CASES FOR UNDERSTANDING CIL STATE PRACTICE**

*Asylum case (Colombia v Peru) ICJ Reports 1950, p.266 (H&S pp.18-20)*

#### **FACTS**

- Peruvian political theorist, Victor, who founded and led a party which was a vehicle for radical dissent in Peru. He was accused by the then military rulership in trying to participate in a military coup. To avoid this, he sought asylum in Colombian assembly in Lima, Peru. He remained in the embassy for 5 years (1949-1954), when he was allowed to leave for Mexico, until he was allowed back into Peru under a new government. Colombian government sought safe passage from their assembly in Peru to Colombia. Peru refused to grant this.

#### **ARGUMENTS**

- Colombia argued before ICJ "American international law in general supported the existence of a regional customary international norm that allowed them to qualified Victor's offence as political, and thus to grant him safe passage out of Peru."

#### **HELD BY ICJ:**

- In order to establish a rule of customary international law, there needs to be constant and uniform usage of a particular practice accepted as law. = **key authority of the requirements.**

- ICJ held there was so much uncertainty in that alleged state practice, and inconsistency on the laws of asylum signed by nations in that region, there were political factors influencing parties decisions to allow asylum
- So the ICJ held it was not possible to discern any of this as contract and uniform usage, accepted by law, with regard to the alleged rule of unilateral and definitive qualification of the offence.
- ICJ held in favour of Peru.

**Asylum case (Colombia v Peru) ICJ Reports 1950, p.266 (H&S pp.18-20)**

**ICJ held:**

Evidence of state practice 'disclose[d] **so much uncertainty and contradiction**, so much fluctuation and discrepancy in the exercise of diplomatic asylum and in the official views expressed on various occasions, there has been so much **inconsistency** in the rapid succession of **conventions on asylum**, ratified by some States and rejected by others, and the practice has been so much **influenced by considerations of political expediency** in the various cases, that it is **not possible to discern in all this any constant and uniform usage, accepted as law**, with regard to the alleged rule of unilateral and definitive qualification of the offence.'

**North Sea Continental Shelf cases (FR Germany v Denmark, FR Germany v The Netherlands) ICJ Reports 1969, p.3**

**FACTS:**

- Dispute in relation to the Delimitation of Continental Shelf in the North Sea. Area is rich in oil and gas. Each state wanted to ensure that as much as possible was in their territory. Existing bilateral agreements at the time didn't fully decide proper boundaries. Instead, there was a treaty (Geneva conventions on Continental Shelf). Article 6 determined boundaries:

*Geneva Convention on the Continental Shelf 1958, Article 6:*

Where the same continental shelf is **adjacent** to the territories of two or more States whose coasts are opposite each other, the **boundary of the continental shelf** appertaining to such States shall be **determined by agreement between them**.

In the **absence of agreement**, and unless another boundary line is justified by special circumstances, the boundary is the **median line**, every point of which is **equidistant** from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured.

- Germany had signed, but not ratified. THIS MEANS THEY WERE NOT BOUND. Germany was arguing that it should be entitled to a just and equitable share of the shelf, and in fact, if the equidistant principle was applied, Germany would actually get a much smaller portion of the shelf than Denmark and the Netherlands.
- Denmark and the Netherlands were arguing that article 6 was a rule of CIL, at the time of the treaty's adoption.

**QUESTION:**

- Was art 6 of Geneva Convention on the Continental Shelf 1958 a rule of CIL?

**HELD:**

- Article 6 has not entered in CIL.

- Reasoning:
  - ICJ looks to wording of the article 6. Text prioritises delimitation of borders by agreement, and only the equidistant as alternative.
  - Still unresolved controversies about treaties
  - Can still place reservations.
- Need to resolve dispute with equitable principles
- **In order for a treaty to generate a customary rule, it must be of 'a fundamentally norm creating character' (at 72)**
- Court considered whether a treaty can generate CIL in a short period of time
  - Found that it can, provided that state practice is consistent and uniform in relation to that practice

'The passage of only a short period of time isn't necessarily a bar to the formation of custom. But if it is a short period of time, then an **indispensable requirement** would be that within the period ... state practice, including that of States whose interests are **specially affected**, should have been **extensive and virtually uniform** ... and should moreover show a **general recognition that a rule of law** ... is involved' (at [74])

- But in this case, ICJ found there was no evidence that the states applying the equidistance principle were thinking of it as a mandatory CIL, they did not feel legally compelled to do so.
- Instead of the equidistance principle, equitable principles should be applied
- *Note: 2 dissenting opinions found the opposite*

## ELEMENT 2: OPINIO JURIS

- ICL Conclusions, **Part 7: Accepted as Law**

### Conclusion 9

#### Requirement of acceptance as law (*opinio juris*)

1. The requirement, as a constituent element of customary international law, that the **general practice be accepted as law (*opinio juris*)** means that the practice in question must be undertaken with a **sense of legal right or obligation.**

2. A general practice that is accepted as law (*opinio juris*) is to be **distinguished from mere usage or habit.**

### Conclusion 10

#### Forms of evidence of acceptance as law (*opinio juris*)

1. Evidence of acceptance as law (*opinio juris*) may take a wide range of forms.
2. Forms of evidence of acceptance as law (*opinio juris*) include, but are not limited to: public statements made on behalf of States; official publications; government legal opinions; diplomatic correspondence; decisions of national courts; treaty provisions; and conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference.
3. 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.

- **Forms of evidence include:**
  - Public statements made on behalf of states
  - Official publications
  - Government legal opinions
  - Diplomatic correspondence
  - Decisions of national courts
  - Treaty provisions

- Conduct in connection with resolutions adopted by an international organisation or at an intergovernmental conference

**North Sea Continental Shelf cases (FR Germany v Denmark, FR Germany v The Netherlands) ICJ Reports 1969, p.3 (H&S, pp.20-26)**

ICJ held:

'Not only must the acts concerned amount to **settled practice**, but they must also be ... **evidence** of a **belief** that this practice is rendered **obligatory** by the existence of a rule of law requiring it [**subjective element**]. ... States concerned must ... feel that they are **conforming to what amounts to a legal obligation**. The frequency, or even habitual character of the act is not in itself enough.' (at [77])

**CASES FOR UNDERSTANDING CIL OPINIO JURIS**

**Lotus case (France v Turkey) (1927) PCIJ**

FACTS:

- Involved a collision between Turkish vessel and France vessel, resulting in the Turkish vessel sinking and 8 Turkish nationals drowning. As a result, the Turkish survivors were taken on French Lotus back to Turkey. Turkey charged French officers with manslaughter. France protested this decision, arguing that as the flagship of Lotus, France had exclusive jurisdiction to try the manslaughter crime, and that Turkey had no jurisdiction to bring proceedings.

HELD:

- In order for there to have existed a rule of CIL which prohibited turkey from commencing criminal proceedings against the French officer, there needed to be a CIL where States were **conscious** of having such duty.
- You cannot presume opinio juris on the bases of inaction or silences, but rather states need to be conscious that they are under a legal obligation.

PCIJ held:

'only if such **abstention** were based on their being conscious of having a **duty to abstain** would it be possible to speak of an international custom. The alleged fact does not allow one to infer that state have been **conscious** of having such a duty' (at [76])

**Key Principle: Cannot presume opinio juris (and therefore custom)**

**Anglo-Norwegian Fisheries case (UK v Norway), ICJ reports 1951**

FACTS:

- Norwegian coastline was lined with lots of islands. UK was disputing the way in which Norway was drawing its baseline under islands which therefore has flow on effects to its territory out in sea. At stake was resources (fishing). If Norway followed the UK method (10mile rule), Norway wouldn't have as much territory, and England could fish there. If we followed the Norwegian method, much larger territory, and UK wouldn't be able to fish there.

- UK argued that the idea of the 10 mile rule was customary international rule, and therefore Norway would have to abide by this rule.
- Norway argued that it has adopted its particular way since at least the 1860's. Even if 10mile rule was CIL, it had long objected to it.

#### HELD:

- Rejects UK argument, the 10-mile rule is not CIL as there is inconsistent state practice, some have adopted, others haven't. Even if it had been a CIL, Norway had always opposed to any attempt to apply 10-mile rule to the Norwegian coast.
- **PERSISTENT OBJECTOR RULE:** If a state consistently objects from the outset to a new rule of CIL, it will potentially not be bound.
- ICJ looked at the Norwegian method – said that their system benefitted from 'general tolerance of foreign states'
- ICJ treats the idea of state acquiescence as an indication of customary practice
- Raises the question of what threshold is required in order for states to be conscience in order to object to a particular practice.

### PERSISTENT OBJECTOR RULE:

#### ILC Conclusions, **Part 6: Persistent Objector**

##### Conclusion 15

##### Persistent objector

1. Where a State has objected to a rule of customary international law while that rule was in the process of formation, the rule is not opposable to the State concerned for so long as it maintains its objection.
2. The objection must be clearly expressed, made known to other States, and maintained persistently.
3. The present draft conclusion is without prejudice to any question concerning peremptory norms of general international law (*jus cogens*).

### GENERAL PRINCIPLES OF INTERNATIONAL LAW

- Principles common to most or all national legal systems can in incorporated into international law
- Included in PCIJ / ICJ Statute as 'safety net' to cover problem of *non liquet* (no law)
- They are limited in scope and use
- Examples include
  - Equitable doctrines
  - Consent
  - Good faith
  - Reciprocity
  - Estoppel
  - Finality of judgement

### SUBSIDIARY SOURCES

#### 1) Judicial Decisions

- Includes decisions of international and national courts and tribunals, or domestic high courts (i.e. when HCA decided refugee issues)
- ICJ Statute, art 59
  - They are binding on the parties to that dispute only
  - In practice, ICJ does closely examine previous decisions and try to create consistence

- But generally, there is no doctrine of precedent in PIL

## 2) Writers

- Writings of jurists/academics/scholars
- Formerly, these played a greater role in international law
- However, they are now used as injecting an element of coherence and order.

## SOFT LAW

- Not listed in article 38, ICJ Statute
- 'Quasi legal' instruments
- **Non-binding**
- Shaw: 'soft law is not law'
- Yet still powerful with material effects, i.e. shaping behaviour, language, outcomes, etc.
- Examples:
  - UNGA Resolutions (yet, see discussion in *Nicaragua & Nuclear Weapons* cases)
  - UN Human Rights Committees Views and General Comments
  - ILC Draft Articles or Conclusions
  - Statements, Principles, Codes of Conduct etc.
  - Global Compacts
  - Action Plans
  - Millennium Development Goals

## STATUS OF UN GENERAL ASSEMBLY RESOLUTIONS

*Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)*, ICJ Reports 1996, p. 226

- General Assembly resolutions, even if they are not binding, they may sometimes have normative value. They can... provide evidence important for establishing the existence of a rule or the emergence of an *opinion juris*.

'... General Assembly resolutions, even if they are **not binding, may sometimes have normative value**. They can, in certain circumstances, provide **evidence** important for establishing the existence of a rule or the emergence of an *opinion juris*. To establish whether this is true of a given General Assembly resolution, it is necessary to look at **its content and the conditions of its adoption**; it is also necessary to see whether an *opinion juris* exists as to its **normative character**. Or a series of resolutions may **show the gradual evolution** of the *opinion juris* required for the establishment of a new rule.' (at [70])

## STATUS OF UN SECURITY COUNCIL RESOLUTIONS

- These are binding, even though they aren't listed under article 38

### UN Charter, Chapter V: The Security Council

Art 24(1): "In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the **maintenance of international peace and security**, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf." ...

Art 25: "The Members of the United Nations agree to **accept and carry out** the decisions of the Security Council in accordance with the present Charter."

## RELATIONSHIP BETWEEN TREATIES AND CUSTOM

- *Case Concerning Military and Parliamentary Activities in and Against Nicaragua (Nicaragua v US) (Merits) ICJ Reports 1986, p. 14*
  - Authority in relation to source of international law

### FACTS:

- Concerns the ideological and physical conflict between capitalist and communist states during the late cold war and the involvement of super powers in the proxy wars – most notable the involvement of the US in Latin American states
- This case is a dispute between Nicaragua and the US over whether the US had breached international law in using force against Nicaragua
- At the time, Nicaragua was under a left wing socialist regime
- In response, the US terminated aid to Nicaragua in 1981 on the grounds that the Nicaraguan government was supporting guerrilla fighters in El Salvador (who was an ally of the US under a right wing regime) and the US was arguing that Nicaragua was allowing soviet arms to pass through Nicaraguan ports etc in order to destabilise the El Salvadorian government
- In 1984, the US decided to fund right wing anti-government militia in Nicaragua to act against the Nicaragua government, including training, equipment and financing
- Nicaragua initiated proceedings before the ICJ, claiming that the US was breaching its obligation on non-interference under the UN charter, and under CIL through
- Nicaragua also argued that the US breached general CIL in relation to violating Nicaragua sovereignty
- US in response argued it was acting in the collective self-defence of El Salvador (which is an exception under the UN Charter whereby a UN state is allowed to use force)

### HELD *generally*:

- ICJ did not find in favour of the US in relation to the admissibility and jurisdiction – ICJ held it did have jurisdiction
- US refused to participate in the proceedings
- And the US refused to implement the judgement, i.e. through paying the compensation that they ought to have paid

### HELD (*From the second judgement in relation to merits in 1986*)

- Question = what source of international law applies?
- NOTE: US had placed a reservation on the ICJ's jurisdiction, stating they could not adjudicate on disputes arising under multilateral treaties, meaning the ICJ was prevented from considering US breaches of the UN charter as a multilateral treaty, so instead it had to consider whether it could hear disputes under CIL instead
- Court held that it COULD
- Held that CIL can also bind states, even if the content of a customary norm is identical as what is found under a treaty
- You can have parallel obligations in treaty law and in CIL

- Court affirmed that the UN Charter and its prohibition on force does not replace the identical obligation under CIL
- REASONS:
  - Looked at the way the UN Charter frames the prohibition on the use of force, in particular article 51 recognises the continuing existence of CIL
  - This means that obligations under CIL co-exist along treaty obligations
- Para 198, ICJ said that even if an obligation is identical in treaty law and CIL, these separate sources have important implications for the methods of interpreting and applying those rules

#### Key points from judgment for purpose of sources:

- States can be bound by **both** treaty and CIL for same obligation (at least in case of *jus cogens*)
  - Identical norms retain a “**separate existence**” with “different methods of interpretation and application” [178]
- State practice need **not be in absolute conformity** / “**complete consistency**” with rule to constitute custom [186]
  - ie no need for “perfect” application
- The conduct of states should **in general be consistent** with customary rule
  - Inconsistent behaviour will be treated as a **breach** of IL, and not evidence of the establishment of a new norm
- Opinio Juris can be found in GA Resolutions, ILC statements etc
- *Jus cogens* is established in PIL

#### JUS COGENS

- Literally: ‘compelling law’ i.e. a peremptory (absolute, irrefutable) norm to which no derogation is permitted
- Binds all states irrespective of whether they’ve signed a treaty in respect of that norm or whether CIL applies to them in respect of that norm
- Examples of jus cogens:
  - The prohibition on:
    - Use of force
    - Slavery
    - War crimes
    - Piracy
    - Apartheid
    - Torture
    - Genocide
  - Emerging recognition of the obligation of non-refoulement (sending refugees back to a place where they face persecution) – still contentious
- Recognised in art 53 of Vienna Convention on Law of Treaties 1969 (treaty may be void if it conflicts with jus cogens)

#### HEIRARCHY OF SOURCES IN INTERNATIONAL LAW