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Article 38(1) ICJ Statute

- Technically, Article 38(1) specifies the law the ICJ must apply, but it is accepted as stating the main sources of PIL (functioning, in Hartian terms, as a rule of recognition).
- **Article 38(1) ICJ Statute**: the Court shall apply:
  - **(a)** international conventions, whether general or particular, establishing rules expressly recognised by the contesting states (treaties);
  - **(b)** international custom, as evidence of a general practice accepted as law (customary international law);
  - **(c)** the general principles of law recognised by civilised nations;
  - **(d)** judicial decisions and the teachings of the most highly qualified publicists, as subsidiary means for the determination of rules of law.
- No formal hierarchy between (a), (b) and (c); but (d) is subsidiary. Later law prevails over earlier (lex posterior) and special law prevails over general (lex specialis). Jus cogens prevails over everything else.

(a) Treaties

- Treaties are examined in detail in Topic 4. For sources purposes:
  - **Article 2(1)(a) VCLT** defines a treaty as an international agreement concluded between States in written form and governed by international law, whatever its particular designation.
  - **Article 26 VCLT** codifies *pacta sunt servanda*: treaties in force are binding on the parties and must be performed in good faith.
  - Only binding on parties (art 34 VCLT); can codify, crystallise or initiate custom (see below).

(b) Customary international law (CIL)

CIL binds all states (except persistent objectors: below) regardless of consent to any particular instrument. It has two elements: the objective (state practice) and the subjective (*opinio juris*). The elements must be proved separately, although in difficult cases practice and opinio juris can overlap and the ICJ often infers one from the other.

State practice

- Material, objective element: the repeated conduct (acts, omissions, statements) by states.
- Forms of practice:
  - official statements of government legal advisers, foreign ministers, heads of state;
  - diplomatic correspondence, protests and claims;
  - domestic legislation and judicial decisions;
  - military manuals, operational orders and conduct in armed conflict;
  - votes in international organisations, explanations of vote;
  - treaty practice (conclusion, reservations, objections).
- Required qualities of practice:
  - **Extent:** must be widespread and representative.
    - → *Asylum case (Colombia v Peru) [1950] ICJ Rep 266*: Colombia alleged a regional CIL permitting an asylum-granting state sole right to characterise the fugitive's offence. The ICJ required proof of a constant and uniform usage practised by the states in question expressing a right and a corresponding duty. Colombia failed due to uncertainty and contradiction in practice. Principle: CIL requires constant and uniform usage, accepted as law.

        - → *North Sea Continental Shelf Cases (FRG v Denmark; FRG v Netherlands) [1969] ICJ Rep 3*: Question whether the equidistance principle in art 6 of the 1958 Geneva Convention on the Continental Shelf had become CIL binding on non-party Germany. The ICJ held that practice must be extensive and virtually uniform, including the states whose interests are specially affected. Principle: widespread, representative participation, including specially affected states.
        - → *Nicaragua v United States (Merits) [1986] ICJ Rep 14*: The Court clarified that absolute rigorous conformity with the rule is not required. Inconsistent conduct must be treated by states as a breach of the rule or justified by exceptions, not taken as evidence of a new rule. Principle: general consistency, with breaches being treated as breaches, suffices.
    - **Duration:** traditionally long, but no strict minimum.
        - → *North Sea Continental Shelf*: The passage of only a short period of time is not necessarily a bar to the formation of a new rule of CIL, provided practice is extensive and virtually uniform and includes specially affected states. Judge Sorensen's separate opinion supported rapid emergence where practice warrants. Principle: short duration is not a bar.
    - **Which states must practise:** the practice of states whose interests are specially affected must be represented (e.g. coastal states for law of the sea; nuclear weapon states for disarmament; spacefaring states for outer space). Where the alleged custom derives from a treaty, the practice of non-party states matters.

Opinio juris sive necessitatis

- Subjective element: the belief that the conduct is rendered obligatory by the existence of a rule of law requiring it.
    - → *North Sea Continental Shelf*: There are many international acts which are performed almost invariably but are motivated only by courtesy, convenience or tradition, and not by any sense of legal duty. Principle: habitual character is not enough; proof of legal obligation is required.
    - → *Lotus Case (France v Turkey) (PCIJ, 1927)*: France argued a CIL rule obliging deferral to the flag state for offences on the high seas. The PCIJ held that abstention from prosecution did not itself establish the conscious sense of duty required for opinio juris. Principle: strict evidential threshold; omission does not equal duty.
- How opinio juris is proved:
    - statements that conduct is required or permitted by international law;
    - GA resolutions, especially those adopted by wide consensus (the Court in *Nicaragua* drew opinio juris from GA Resolution 2625 (XXV));
    - practice of states in multilateral conferences and treaty negotiations;
    - ICJ and arbitral jurisprudence affirming the rule as legal.
- *note: the ICJ and Crawford's Brownlie's note that opinio juris is often inferred from general practice where practice is widespread and consistent. Candidates should be able to identify when this inference is available and when the Lotus-strict approach should be used.*

Relationship between treaties and CIL

Treaties and CIL are distinct sources and can coexist. Treaties can also be connected with custom in four principal ways. The North Sea framework is the usual starting point for problems that require transplanting a treaty rule onto a non-party state.

- Per *North Sea Continental Shelf*, a treaty provision can relate to CIL by:
    - **Codification**: declaring existing customary rules at the time of adoption.

- Commonly accepted jus cogens norms (ILC 2022 non-exhaustive list):
  - prohibition of aggression;
  - prohibition of genocide;
  - prohibition of crimes against humanity;
  - basic rules of international humanitarian law;
  - prohibition of racial discrimination and apartheid;
  - prohibition of slavery;
  - prohibition of torture;
  - right of self-determination.
  - → *Nicaragua v United States*: The ICJ implied (without formally deciding) that the prohibition on the use of force is jus cogens. Principle: prohibition of aggression is widely regarded as jus cogens.

Soft law

- Non-binding instruments (GA resolutions, declarations, codes of conduct, guidelines) that may:
  - influence treaty negotiations;
  - evidence opinio juris or state practice for CIL;
  - shape expectations and facilitate cooperation.
- **Nuclear Weapons Advisory Opinion** [1996] ICJ Rep 226 at [70]: GA resolutions, even if not binding, may have normative value; the Court considers content and conditions of adoption to decide whether they evidence opinio juris.

Unilateral declarations

- Not a source of law, but may create binding obligations on the declaring state where there is intent to be bound and the statement is made publicly.
  - → *Nuclear Tests Cases (Australia v France; New Zealand v France) [1974] ICJ Rep 253*: French public statements that it would not carry out further atmospheric nuclear tests were held to be binding unilateral obligations, based on intent and the need for good faith in the conduct of international relations. Form is not decisive; even oral and erga omnes statements can bind. Principle: unilateral declarations made publicly and with intent to be bound create legal obligations.

[note: for every sources problem, address each arguable source in turn: (1) is there a treaty on point? (2) is there CIL? (check practice, opinio juris, persistent objector, whether based on treaty and whether North Sea conditions are met); (3) is there a general principle? (4) is the rule jus cogens? (5) are there relevant subsidiary materials (judgments, writings, resolutions)?]

Topic 4: The Law of Treaties

Treaties are the principal source of modern PIL. The Vienna Convention on the Law of Treaties 1969 (VCLT) codifies most of the law, and many of its provisions reflect CIL (so the VCLT's substantive rules bind non-parties too). A treaty problem moves methodically through (1) existence, (2) consent to be bound, (3) entry into force, (4) reservations, (5) legal effect and interpretation, (6) suspension, termination and withdrawal, (7) invalidity, and (8) amendment. Each limb is set out below.

Scope of the VCLT

- **Article 1 VCLT**: the Convention applies to treaties between States.

- **Article 2(1)(a) VCLT**: a treaty is an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments, and whatever its particular designation.
- Elements of a treaty:
  - agreement between states (or between a state and an international organisation, or between IOs, governed by the 1986 VCLT between States and IOs, not yet in force);
  - in writing;
  - governed by international law (implying intent to create international legal obligations; excludes commercial agreements governed by domestic law);
  - designation is irrelevant: treaty, convention, covenant, pact, protocol, charter, agreed minutes.
  - → *Maritime Delimitation (Qatar v Bahrain) [1994] ICJ Rep 112 (Jurisdiction)*: Minutes of meetings between foreign ministers were held to constitute a treaty because they reaffirmed existing obligations, assigned enumerated tasks, and addressed relevant circumstances. Subjective intention is not decisive; the court has regard to the terms and circumstances. Principle: form is not decisive; the objective content controls.
  - → *Cameroon v Nigeria (Preliminary Objections) [1998] ICJ Rep 275*: A joint communiqué issued by heads of state was held to be a binding international agreement. Principle: oral or informal instruments can amount to treaties where content and circumstances show intent to create legal obligations.
- **Article 3 VCLT**: the Convention does not apply to agreements between states and other subjects or agreements not in written form, but this does not affect their legal force or the application of VCLT rules that would apply to them independently of the Convention.
- **Article 4 VCLT**: non-retroactivity; the Convention applies only to treaties concluded after it entered into force for the states concerned (27 January 1980 generally; later for states that acceded later). Even so, many VCLT provisions reflect CIL and so apply to earlier treaties as CIL.
  - → *Dispute regarding Navigational and Related Rights (Costa Rica v Nicaragua) [2009] ICJ Rep 213*: The Court applied the VCLT's interpretation rules (arts 31 to 32) to an 1858 treaty on the basis that they reflect CIL. Principle: VCLT interpretation rules apply as custom to pre-1980 treaties.

Making of a treaty

Capacity and representation

- **Article 6 VCLT**: every State has the capacity to conclude treaties.
- **Article 7 VCLT**: a person is considered to represent a State if they produce appropriate full powers, or it appears from the circumstances that the state intended to dispense with full powers. The following are considered ex officio:
  - heads of state, heads of government, and ministers for foreign affairs (all acts relating to the conclusion);
  - heads of diplomatic missions (adoption of the text between accrediting and receiving states);
  - representatives accredited to an international conference or organisation (adoption of the text at that conference or organ).
  - → *Armed Activities on the Territory of the Congo (DRC v Rwanda) [2006] ICJ Rep 6*: The Court confirmed the customary status of art 7 and held that heads of state, heads of government and foreign ministers are deemed to represent their state. Principle: art 7 VCLT reflects CIL.

- **Article 51 VCLT**: coercion of a state representative by acts or threats directed against them personally: the consent is without legal effect.
- **Article 52 VCLT**: coercion of a state by threat or use of force in violation of the UN Charter: the treaty is void.
- **Article 75 VCLT**: obligations imposed on an aggressor state as a consequence of UN Charter measures are not affected by art 52.
- **Article 53 VCLT**: a treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm (jus cogens).
- **Article 64 VCLT**: if a new jus cogens norm emerges, an existing conflicting treaty becomes void and terminates.

Loss of the right to invoke invalidity

- **Article 45 VCLT**: a state loses the right to invoke grounds under arts 46 to 50, 60, 61 and 62 if, after becoming aware of the facts, it has expressly agreed that the treaty is valid or is considered to have acquiesced by its conduct.

Procedure for invalidity

- **Article 65 VCLT**: the party must notify other parties of its claim and proposed measure; no objection within three months entitles it to carry out the measure.
- **Article 66 VCLT**: if an objection is raised and no solution is reached within 12 months, disputes under arts 53 or 64 (jus cogens) may be submitted to the ICJ or arbitration; other disputes go to non-binding conciliation.

Consequences of invalidity

- **Article 69 VCLT**: an invalid treaty is void and has no legal force; acts performed in good faith before the invalidation remain lawful.
- **Article 71 VCLT**: if a treaty is void by reason of conflict with jus cogens, parties must eliminate as far as possible the consequences of any act performed in reliance on the treaty.

Termination, suspension and withdrawal

A treaty can only be terminated, denounced or withdrawn from in accordance with the treaty itself or the VCLT (art 42(2)). Grounds can be intrinsic (expiry, denunciation, consent) or extrinsic (breach, impossibility, fundamental change).

Grounds

- **Article 54 VCLT**: termination or withdrawal in accordance with the treaty or at any time by consent of all parties after consultation.
- **Article 56 VCLT**: where the treaty contains no provision for termination or withdrawal, no right to withdraw is implied unless (a) the parties intended to admit denunciation or withdrawal, or (b) a right may be implied by the nature of the treaty. 12 months' notice is required.
- **Article 57 VCLT**: suspension in accordance with the treaty or by consent of all parties.
- **Article 58 VCLT**: suspension by agreement between certain parties only, where provided by the treaty or, if not prohibited, where suspension does not affect other parties' rights and is not incompatible with the object and purpose.
- **Article 59 VCLT**: termination or suspension implied by conclusion of a later treaty.

Material breach (art 60)

- **Article 60(1) VCLT**: material breach of a bilateral treaty entitles the other party to invoke the breach as a ground for termination or suspension in whole or in part.

- **Article 60(2) VCLT**: material breach of a multilateral treaty:
  - (a) the other parties by unanimous agreement may suspend or terminate in whole or in part, (i) in relations between themselves and the defaulting state, or (ii) as between all the parties;
  - (b) a party specially affected may invoke the breach to suspend the treaty in whole or in part between itself and the defaulting state;
  - (c) any party may invoke the breach to suspend the treaty with respect to itself where the breach radically changes the position of every party regarding further performance (e.g. disarmament treaties).
- **Article 60(3) VCLT**: material breach is (a) a repudiation not allowed by the Convention, or (b) the violation of a provision essential to the accomplishment of the object or purpose of the treaty.
- **Article 60(5) VCLT**: material breach does not authorise termination or suspension of humanitarian treaty provisions, in particular those prohibiting reprisals against persons protected by such treaties.
  - → *Namibia Advisory Opinion [1971] ICJ Rep 16*: The ICJ recognised that VCLT art 60 reflects CIL and that the GA could, on the basis of South Africa's material breach, terminate the Mandate over South West Africa. Principle: art 60 material breach is CIL.
  - → *Rainbow Warrior Arbitration (New Zealand v France) (1990) 82 ILR 499*: France materially breached its agreement with New Zealand by failing to seek New Zealand's consent for repatriation of one operative and failing to return two others. Principle: material breach includes both repudiation and violation of essential provisions.
  - → *Gabcikovo-Nagymaros Project (Hungary v Slovakia) [1997] ICJ Rep 7*: Hungary purported to terminate a 1977 treaty with Czechoslovakia on the basis of Czechoslovakia's alleged breach. The Court held Hungary's termination was unlawful because, at the time, Czechoslovakia had not yet committed a material breach (Variant C was still reversible). The Court applied arts 60 to 62 as CIL. Principle: material breach must exist at the time of termination.

Supervening impossibility of performance (art 61)

- **Article 61(1) VCLT**: impossibility of performance can be invoked if it results from the permanent disappearance or destruction of an object indispensable for execution. If the impossibility is temporary, it may only be invoked to suspend the treaty. ILC examples: submergence of an island, destruction of a dam, drying up of a river.
- **Article 61(2) VCLT**: impossibility cannot be invoked by a party that caused it by breaching an obligation owed to another party.
  - → *Gabcikovo-Nagymaros*: Hungary's impossibility claim failed: the legal regime of the project was not an indispensable object, and Hungary itself had contributed to the alleged impossibility by breaching the treaty. Principle: high threshold for art 61 impossibility.

Fundamental change of circumstances (art 62)

- **Article 62(1) VCLT**: a fundamental change of circumstances not foreseen by the parties can be invoked to terminate or withdraw from a treaty only if:
  - (a) the existence of those circumstances was an essential basis of the consent of the parties to be bound; and
  - (b) the effect of the change is radically to transform the extent of obligations still to be performed.
- **Article 62(2) VCLT**: the doctrine does not apply to boundary treaties or where the change results from the invoking party's own breach.