PART 2 – SOURCES OF INTERNATIONAL LAW

Need to consider:
- What are the rights and obligations of the parties involved?
- What is the accepted practice on a given issue?
- What are the consequences of failing to live up to prior legal commitment(s)?

Need to holistically look at sources:
- Treaties
- Customary International Law
- General Principles
- Unilateral Statements
- Judicial Decisions
- Scholarly Writings
- 'Soft Law'
    - Resolutions and Declarations of the UN GA

The term 'source' of international law has 2 meanings, as it refers to: (1) legal processes as well as; (2) the location of the norms that are the result of these processes.

States themselves mostly create international law—create the law that applies to them.

I Primary and Secondary Sources

The provision directs the principal judicial organ of the UN—ICJ to rule on cases drawing from a number of sources:

Art 38(1) *Statute of the ICJ*:

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

Primary
(a) International conventions (treaties), whether general or particular, establishing rules expressly recognised by the contesting states;
(b) International custom, as evidence of a general practice accepted as law;
(c) The general principles of law recognised by civilised nations;

Secondary
(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.

There is a hierarchy between primary and secondary sources:

The primary sources (treaties, custom, and general principles) represent processes for law-making (law-creating sources—direct legal obligation).

The secondary sources (judicial decisions and teachings) represent places where international legal norms may be found (not law-creating/do not represent all states) and aim to inform and interpret the primary sources. For example, the ILC—body of the UN (comprised of elected representatives from various nations) produce reports on the progressive development of international law. These reports are not binding law, but they interpret the existing law or provide reflections for law reform to better regulate a certain challenge.

II Treaties

Treaty is an *'an international agreement concluded between 2 ≥ states in a written form and governed by international law…*': **Art 2(1)(a)** *VCLT*.

An agreement (on the basis of consent) between sovereign states (and in some cases international organisations e.g., EU) to regulate a particular matter under international law. It is binding, creates obligations, and corresponding rights—one state's right is another state's obligation. Treaties can be bilateral (between two states) e.g., maritime or land boundaries or multilateral (between 3 or more states).

States have nearly complete freedom in the treaty-making process, so long the treaty does not contravene peremptory norms of public international law. Legal norms that are 'peremptory' or *jus cogens* are hierarchically above other legal norms, as they are norms from which no state may deviate or 'derogate'. They embody fundamental moral principles e.g., prohibitions on genocide and slavery.

Treaties are also known as 'agreements', 'conventions', 'protocols' or 'covenants', and less commonly 'exchange of letters'—title is immaterial.

The key is whether states have consented to be legally bound by the treaty (content). They are the most direct evidence of the existence of a legal obligation, as the parties' intention is written. If a state has become party to an international treaty, that implies consent to be bound by the treaty, and to perform their legal obligations in good faith. This principle is *pacta sunt servanda*—agreements must be kept.

Treaties become living instruments, which may be interpreted, amended, or modified, and implemented by states at the domestic level through changes to domestic law. They may give general guidance to ensure the domestic law practice is consistent with the objectives of the treaty.

Useful to examine how those international treaties are put into effect in the domestic context (i.e., how treaty law obligations are transformed into domestic law).

A *United Nations Audiovisual Library of International Law*

- *Lecture Series* contains a permanent collection of lectures of enduring value on virtually every subject of international law given by leading international law scholars and practitioners from different regions, legal systems, cultures and sectors of the legal profession.
- *Mini-Series* is a series of lectures delivered by leading international law scholars which aims to provide a general overview of the core topics of international law, primarily intended for users with basic or little knowledge of international law.
- *Research Library* provides an extensive online library of international law materials, including treaties, jurisprudence, documents, legal publications, research guides and selected scholarly writing, as well as international law training materials.

III Customary International Law

Is the process by which unwritten international laws are made, changed, or annulled. It is based on the general practice and beliefs of states (in some cases international organisations).

It consists of 2 elements, and arises when a particular conduct (way of behaving) is:

A *General practice (objective)*

The repetition of a particular behaviour (usually words and sometimes actions of states) that is *'sufficiently widespread and representative'* (states from various geographical regions, and with various interests, must engage in the practice), as well as '*consistent'* i.e., for a considerable period of time, states have acted in a certain (identical) manner when confronted with the same facts. See *North Sea Shelf* cases.

It can take many forms, but in particular, domestic legislation and regulations, domestic court judgements internal memoranda within ministries, declarations or comments made in international fora, 'operational conduct on the ground' (physical actions).

A state that persistently objects to the rule may be exempt from its application—'persistent objectors'—reflecting that states must consent to CIL before it can be binding upon them. They must express their objections clearly, make them know to other states, and maintain them persistently during and after the formation of the customary rule. However, once a customary rule has crystallised, however, then it is too late for a state to exempt itself. For example, France, UK and US are persistent objectors to *'the use of methods or means of warfare that are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment'*, as they indicate this rule does not apply to nuclear weapons.

NB: Some inconsistent practice may not undermine the existence of a general practice i.e., inconsistent practice is a breach of the rule.

B *opinio juris (an opinion of the law)*

Acceptance by states that this practice is required by law (legally binding). Acts motivated by a desire to honour—or create— a legal obligation (*opinion juris sive necessitatis).* It often is objectively inferred from the relevant state practice, due to the absence of any explicit statement about why a state has engaged in a particular practice (e.g., courtesy, habit, or convenience).

1 How do know when custom has become binding international law?

The existence of sufficient general and representative state practice (the objective element) is usually sufficient to create a binding custom. Evidence of *opinio juris* is usually only looked for it there is reason to believe that practice did not result from legal motivations (i.e., when there is a question about whether the practice arose out of a sense of legal duty).

International Law Association*, 'Final Report of the Committee, Statement of Principles Applicable to the Formation of General Customary International Law'* (London Conference 2000).

C *Relationship to treaty law*

Treaty law and customary law exist in parallel—the same rule may be found in both sources of law:

1) A treaty may codify a customary rule that already existed at the time of its conclusion—treaty rules are 'declaratory' e.g., law on the use of force in self-defence.
2) A treaty rule leading to the crystallisation of a rule of customary law rhat was in the process of emerging prior to the treaty's conclusion.
3) A treaty rule may itself generate a new customary rule.

IV General Principles

Are the unwritten legal norms of a broad character. International courts and tribunals could recourse to these principles in the absence of authority in other sources of international law (*non liquet*—it is not clear) e.g., when a dispute cannot be effectively resolved by specific rules in treaty or customary law.

May derive principles that are common in all domestic legal systems and transposable to the international law e.g., equity, good faith, *res judicata* (a legal matter may not be litigated again), and the impartiality of judges.

An example, is when the ICJ had to recourse to circumstantial evidence in its judgement in the *Corfu Channel* case in 1949, noting that such '*indirect evidence is admitted in all systems of law, and its use is recognised by international decisions*'. The Court held where there is no direct evidence of a given fact, domestic (and international) courts may have recourse to circumstantial evidence in order to make a factual finding my linking together a series of facts that *'lead logically to a single conclusion'*.

It refers to what is fair and reasonable in the administration of justice. For example, the ICJ often refers to equity and equitable principles when delimiting the maritime boundaries between coastal states with opposite or adjacent coasts.

It may also be understood as fundamental principles grounded in the international legal system—this is becoming increasingly recognised e.g., precautionary and preventative principles in international environmental law.

V Judicial Decisions

Judicial decisions are 'subsidiary sources' of international law, and serve as evidence of the existence or the content of rules, but not as a means for their creation. The ICJ, other international courts, and tribunals do not create binding legal precedents.

Art 59 *Statute of the ICJ*:

…[t]he decision of the Court has no binding force except between the parties and in respect of that particular case.

In practice, the ICJ rarely departs from its jurisprudence to avoid contradicting statements made in prior decisions.

However, judicial decisions carry substantial interpretive weight, which international judges and legal practice constantly refer to (and base their reasoning on) previous decisions. They serve as a key means for identifying customary rules. Further, the jurisprudence of the ICJ as fed into the work of the ILC—a UN body tasked with codifying and progressively developing international law—vice versa e.g., *Draft Articles on State Responsibility*.

See G Guillaume, 'The Use of Precedent by International Judges and Arbitrators' (2011) 2(1) Journal of International Dispute Settlement 5–23.

VI Scholarly Writings [and the International Law Commission (ILC)]

Art 38(1) *Statute of the ICJ*:

…the teachings of the most highly qualified publicists of the various nations.

Such teachings are of lesser importance that judicial decisions.

Nevertheless, academic interpretations and commentaries of esteemed academics in monographs, textbooks, journal articles and the UN Audiovisual Library of International Law are all examples of teachings that clarify the law where there is ambiguity—in addition to criticising it and theorising about it.

The work of organisations devoted to international law, in particular the ILC, Institute of International Law and the ILA, have an important role on the codification and progressive development of international law. The 34 members of the ILC are required to be 'persons of recognised competence in international law' and serve as *'publicists'* in their official capacity.

See also ongoing work of ILC on Sea Level Rise & International Law.

VII Unilateral Statements/Acts

Unilateral statements made publicly (orally or in writing), may in certain limited circumstances create binding legal obligations for the declaring state, upon which other concerned states are entitled to rely. The process by which a unilateral declaration becomes a source of law (legally binding obligation) is highly fact-specific and must be determined on a case-by-case basis i.e., content of the declaration, the circumstances surrounding it, and the reactions by other concerned states.

Unilateral declarations must be made by state officials who unquestionably have the authority to create binding legal obligations e.g., heads of state or government and ministers of foreign affairs.

For example:

> *'A state may evidence a clear intention to accept obligations vis-à-vis certain other states by a public declaration which is not an offer or otherwise dependent on reciprocal undertakings from its addresses'* (*Crawford, Browlie's Principles*)

Legal Status of Eastern Greenland (Denmark v Norway), Judgement, 1933, PCIK, Series A/B, No. 53:

Norwegian FM, Mr Ihlen: *'I told the Danish Minister today that the Norwegian Government would not make any difficulty in the settlement of this question.'*

ICJ: *'The promise was unconditional and definitive…. It follows that, as a result of the undertaking involved in the Ihlen declaration of July 22nd, 1919, Norway is under an obligation to refrain from contesting Danish sovereignty over Greenland as a whole, and a fortiori to refrain from occupying a part of Greenland.'*

United Nations Security Council Resolution 138 (1960) [Question relating to the case of Adolf Eichmann]	
Facts	• Nazi officer, Adolf Eichmann was apprehended by Mossad, the Israeli intelligence agency in 1960. • The operation involved Mossad being dispatched to Argentina, capturing Eichmann and smuggling him out, without the consent of the Argentine authorities.
Decision	UN SC responded to the unlawful Israeli incursion into Argentina by requesting Israel to offer compensation. Note, Eichmann was brought to trial in Israel for crimes against humanity and war crimes and was executed in 1962.

Nuclear Test cases (*Australia v France*, *New Zealand v France*) 1974 ICJ Rep 253	
Facts	• From the mid-1960s to the mid-1970s, France carried out atmospheric tests of nuclear devices in the South Pacific region, which according to NZ, caused radioactive fallout to be deposited on its territory. • After unsuccessful diplomatic efforts to end the atmospheric testing in the region, NZ eventually filed proceedings against France before the ICJ in 1973. • Before a hearing on the merits could proceed, the French President and Foreign Minister made a series of statements making it clear that France would cease atmospheric testing.
Decision	The Court had to consider whether these statements could have created a binding obligation for France: • States conveyed to NZ the intention of France to cease atmospheric testing, and to proceed to underground testing. • The French President and Foreign Minister had made an intentional undertaking, with binding legal effect, to the international community as a whole.

It is well recognised that declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations. Declarations of this kind may be, and often are, very specific. When it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking, the State being thenceforth legally required to follow a course of conduct consistent with the declaration.

'…nothing in the nature of a quid pro quo, nor any subsequent acceptance of the declaration, nor even any reply or reaction from other States, is required' for a unilateral statement to be legally binding: *Nuclear Test* cases.

See also ILC, 'Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations' (2006), UN Doc. A/61/10, principle 5 (ILC Guiding Principles).

VIII Soft Law (non-legally binding commitments)

International norms may be non-binding and when a legally non-binding instrument begins to play a role in the creation of international law, it can be referred to as 'soft law'. This is in contrast to 'hard law', which describe the legally binding sources.

Non-binding instruments embody political or moral commitments, rather than legal obligations. The key is to identify the intention of the parties (did the parties intend to create a legal obligation or not?).

They take a wide range of forms, including resolutions, declarations, recommendations, guidelines, and standards adopted within the framework of IOs and intergovernmental organisations generally.

For example, declarations adopted by the UN GA are not legally binding, but can shape international practice and can lead to the formation of custom or even result in the adoption of new treaties (e.g., in international environmental law). Some of the most important non-binding documents i.e., 1972 Stockholm Declaration and the 1992 Rio Declaration, have resulted progressively in binding legal commitments.

'Soft law' instruments do not constitute independent sources of international law—however, they contribute greatly:

1) Contribute to the development of a binding norm i.e., those found in customary law and treaty law.
    - For example, the Universal Declaration of Human Rights (UDHR), is a non-binding instrument adopted by the UN GA in 1948 that sets out an authoritative statement of human rights. It gave rise to binding treaties e.g., 1966 International Covenant on Civil and Political Rights.
2) May follow treaties and expand or update treaty rules i.e., through state recommendations and guidelines.
3) May be distinct from any binding rules of international law—and have a normative impactive their own right.
    - For example, the 2001 *Articles on the Responsibility of States for Internationally Wrongful Acts* includes norms that are progressive international law (might become CIL later).

IX Useful Links & Databases

1 Government websites & databases

e.g., Australian Government Department of Foreign Affairs & Trade (includes a treaty catalogue); Australasian Legal Information Institute (AustLII).

2 Online databases

e.g., Max Planck Encyclopedia of Public International Law (useful entries on all matters of international law & sources).

3 United Nations

e.g., UN Audiovisual Library of International.

4 Law Courts & Tribunals

e.g., ICJ (principal judicial organ of the UN).

5 International Law Journals

e.g., International & Comparative Law Quarterly (ICLQ); American Journal of International Law (AJIL); European Journal of International Law (EJIL) etc.

6 International Law Blogs

e.g., EJIL: Talk! Blog.