# LAWS2270

## Law in the Global Context

### Comprehensive Course Notes

University of New South Wales | Faculty of Law

*Public International Law* | *Private International Law* | *Comparative Law*

# Part 1: Introductory Classes - Foundations of International Law (Classes 1-5)

## 1.1 Course Overview and Methodology

This course acquaints students with three main fields of legal doctrine, practice and scholarly work: public international law (PIL), private international law or conflict of laws, and comparative law. The central premise is that laws and legal systems operate in a global context. Many transactions, events, issues and entities are governed by multiple overlapping legal systems simultaneously, requiring understanding of when and how PIL applies and when and how foreign systems of law apply to Australian actors.

The course uses a case-study method: exploration and learning through real-life situations. Three major case studies structure the course, each preceded by introductory classes establishing foundational concepts:

- Case Study 1 (Classes 6-9): Russia and Ukraine - territorial sovereignty, self-determination, use of force, ICJ jurisdiction and sanctions.
- Case Study 2 (Classes 10-13): Julian Assange - comparative law, extradition, diplomatic protection and asylum.
- Case Study 3 (Classes 14-16): Castel Electronics v TCL Air Conditioners - private international law, jurisdiction over foreign defendants, international arbitration and recognition and enforcement of arbitral awards.

A key methodological point: analysis needs to be attentive and responsive to non-legal contexts. The political or commercial objectives of the client matter. How a question is approached is at least as important as what is said.

## 1.2 Globalisation and Law

Globalisation refers to the increased movement, dispersal and interconnectedness of people, things and money, other species and organisms, ideas, cultures and religions, structures of private and public governance, information and data, and the global ecosystem. Each dimension generates legal complexity: when persons, events and entities connect to multiple jurisdictions simultaneously, no single legal system can comprehensively regulate the situation.

| Dimension | Legal Implications |
|---|---|
| **People (migration, tourism, international education)** | Immigration law, nationality, diplomatic protection, human rights |
| **Global trade and investment** | International commercial law, investor-state arbitration, PIL contracts |
| **International organisations and regulatory networks** | Treaty obligations, institutional law, UNSC authority |
| **Digital data and surveillance** | Data sovereignty, cyber law, cross-border enforcement |
| **Climate and environment** | International environmental law, compliance mechanisms, customary law |

## 1.3 Basic Concepts of Public International Law

Five foundational concepts underpin the entire field of public international law:

| Five Foundational Concepts (Class 1) |
|---|
| (1) States are the primary subjects of international law. A subject of the law is an entity capable of possessing international rights and duties and having the capacity to maintain its rights by bringing |

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| international claims (ICJ). Other entities may become subjects of international law, but generally only through their creation or recognition by states. |
| (2) Sovereign equality: states are legally equal with one another regardless of size, power or wealth. This is the basis for the one-state-one-vote rule in the UNGA and for the consensual basis of international legal obligation. |
| (3) Territorial sovereignty: as a general proposition, a state's conduct within its own territory is not regulated by international law. This is subject to significant exceptions in human rights, use of force, and other areas. |
| (4) Consent as the basis of obligation: the rules of international law are primarily established through states' consent. Consent explains why treaties (explicit consent) and customary international law (implicit consent through practice and opinio juris) are binding. However, states cannot simply opt out once a rule is established. |
| (5) Consent to jurisdiction: the ability of an international court or tribunal to resolve a dispute depends on states' consent to the jurisdiction of that court. No compulsory jurisdiction exists at the international level without consent. |

### Is International Law Really 'Law'? Megret's Framework

Megret (Cambridge Companion to International Law) identifies five positions in the debate about whether international law qualifies as law properly so called:

| Position | Core Claim |
|---|---|
| **Denier** | International law is not law: it lacks centralised enforcement, a legislature and compulsory jurisdiction. It is mere politics dressed in legal language. |
| **Idealist** | International law expresses universal moral or natural law norms. Its legitimacy derives from justice, not force or state consent. |
| **Apologist** | International law serves state interests: states comply because it is useful to them. It is ultimately reducible to state power and policy. |
| **Reformist** | International law is imperfect law that can and should be improved: better enforcement mechanisms, stronger courts, more comprehensive treaty regimes. |
| **Critic** | International law perpetuates structural inequalities between powerful and powerless states. It was designed by and for Western states and continues to serve their interests. |

Each position captures genuine features of international law. The debate is not merely academic: how one answers the question shapes legal strategy, client advice and institutional design. The course approaches international law as a system that is at once genuinely normative (states are bound by it and feel bound by it) and deeply shaped by power asymmetries.

Structural comparison with domestic law: international law differs from domestic law because it lacks a centralised legislature, executive and judiciary. It operates between equals without a superior authority. The international system is, in Bull's phrase, an anarchical society: without superiors but with shared norms. The SS Lotus principle (PCIJ 1927) captures the classical view that states start from a position of complete freedom; international law restricts that freedom rather than conferring rights upon them.

## 1.4 Sources of Public International Law (Class 2)

Article 38(1) of the ICJ Statute sets out the authoritative statement of sources of international law. All UN members are parties to the ICJ Statute under Art 93 UN Charter:

| Article 38(1) ICJ Statute: Sources of International Law |
| --- |
| (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. |
| (d) Subject to Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as a subsidiary means for the determination of rules of law. |

### 1.4.1 Treaties

The Vienna Convention on the Law of Treaties 1969 (VCLOT), Art 2(1)(a) defines a treaty as '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'. The VCLOT entered into force 27 January 1980 and has 116 parties as of 2025. Oral agreements and undertakings may still have binding effect under international law.

Designation is irrelevant: agreements, protocols, covenants, pacts and exchanges of letters may all constitute treaties, whether between states, between states and international organisations, or between international organisations.

| Key Terminology | Definition |
| --- | --- |
| **Signature** | Indicates intention to be bound but does not itself make the treaty binding. A signatory state is not a state party. |
| **Ratification** | The formal act by which a state expresses its consent to be bound. Process varies by constitutional system. |
| **Accession** | Joining a treaty already in force to which the state was not an original party. |
| **Succession** | Inheritance of treaty rights and obligations upon a change in state identity (e.g. decolonisation, dissolution of predecessor state). |
| **Entry into force** | The moment the treaty becomes legally binding on parties, according to its own terms (VCLOT Art 24). |
| **Pacta sunt servanda** | Agreements must be honoured: every treaty in force is binding on parties and must be performed in good faith (VCLOT Art 26). |

#### *Treaty-Making Process (VCLOT Arts 9-24)*

1. Stage 1 - Adoption of text (Art 9): by consent of all participating states, or by two-thirds vote at an international conference.
2. Stage 2 - Expression of consent (Arts 11-17): through signature, ratification, accession or succession as provided in the treaty. Prior to entry into force, signatories must not act to defeat the treaty's object and purpose (Art 18).
3. Stage 3 - Entry into force (Art 24): the treaty becomes legally binding on parties and must be performed in good faith.

#### *Treaty Interpretation (VCLOT Arts 31-32)*

Article 31 provides the primary rule: interpret in good faith, in accordance with the ordinary meaning of terms, in their context (the text as a whole, preamble, annexes, subsequent agreements and practice, relevant international law rules), and in light of the treaty's object and purpose. Article 32 allows supplementary

means (travaux preparatoires, negotiating history) where Art 31 yields an ambiguous, obscure, absurd or unreasonable result.

#### *Invalidity of Treaties*

VCLOT Art 52: a treaty is void if its conclusion was procured by the threat or use of force in violation of the UN Charter. VCLOT Art 53: a treaty is void if it conflicts with a peremptory norm of general international law (jus cogens) at the time of its conclusion. A new jus cogens norm renders any existing inconsistent treaty void (Art 64).

### 1.4.2 Customary International Law (CIL)

Article 38(1)(b): 'international custom, as evidence of a general practice accepted as law'. Custom has two elements, each of which must be separately ascertained (ILC Draft Conclusions 2018):

| Two Elements of Custom (ILC 2018) |
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| (1) General practice (objective element): state practice must be general, consistent and representative. It includes acts, omissions and assertions by states through their organs (executive, legislative, judicial, military). Evidence includes diplomatic acts, national legislation, judicial decisions, official positions, and treaty provisions as practice. General customary law is created by and binding upon all states. |
| (2) Accepted as law / opinio juris (subjective element): states must act out of a belief that they are legally obliged to do so, not merely from courtesy, political expediency or habit. Two approaches: (a) traditional strict approach requires proof of duty-consciousness (SS Lotus, PCIJ 1927); (b) less strict approach presumes opinio juris after sufficiently uniform practice is established (Judge Sorensen, dissent in North Sea Continental Shelf Cases). |
| Onus of proof: the party which relies on a custom must prove that it is established in such a manner that it has become binding on the other party (Asylum Case, ICJ 1950). |

#### *Jus Cogens Norms*

Jus cogens are peremptory norms of general international law of such fundamental importance that they cannot be set aside or overridden by treaty or acquiescence. Such a rule can only be modified by the emergence of a subsequent contrary jus cogens norm (VCLOT Art 53). Jus cogens norms are also generally regarded as owed to and enforceable by and against all states (obligations erga omnes).

Recognised examples: prohibition of genocide, prohibition of slavery, prohibition of torture, prohibition of acts of aggression, prohibition of racial discrimination and apartheid.

#### *Erga Omnes Obligations and Barcelona Traction*

The ICJ established the concept of erga omnes obligations in Barcelona Traction, Light and Power Company Ltd (Belgium v Spain, ICJ 1970). The Court drew a distinction between obligations of a state towards the international community as a whole (in whose protection all states have a legal interest - obligations erga omnes) and obligations arising only vis-a-vis another state. In today's international law, erga omnes obligations derive from the outlawing of acts of aggression and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination.

ARSIWA Art 48: any state (not only the injured state) may invoke the responsibility of another state for a breach of an erga omnes obligation. ARSIWA Art 41: states must cooperate to bring to an end any serious breach of a peremptory norm, must not recognise situations created by such a breach, and must not aid or assist in maintaining the breach.

#### *Persistent Objector Rule*

A state may avoid being bound by a customary norm by clearly and consistently objecting to it during the process of its formation. The objection must be expressed during formation and must be consistent and