

Sources of International Law

Article 38 ICJ Statute

1. The ICJ may draw upon these four sources in coming to decisions:
 - a. **International conventions (treaties)** that establish rules expressly recognised to by the contesting states
 - b. **Customary International Law** as evidence of a general practice accepted as law
 - c. **General principles** of law recognised by civilised nations
 - d. **Judicial decisions + teachings of the most highly qualified publicists** of various nations, as subsidiary sources for determining the rules of law
2. The court may decide a case *ex aequo et bono* if parties agree – according to principles of fairness not law

No hierarchy – only *jus cogens*/peremptory norms are superior

Treaties – ICJ Statute Art 38(1)(a) – more in next topic

‘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’: *VCLT art 2(1)(a)*

Customary International Law – ICJ Statute Art 38(1)(b)

A recurring practice that is recognised and accepted by the community as a form of obligation.

- Can bind all states (even w/o explicit consent or new states) if custom is universal (*North Sea*) but if state has persistently objected from outset won't be bound (*Anglo-Norwegian Fisheries*)
- Can be bilateral (*Right of Passage*) and regional custom (*Asylum; Al-Saadoon*)
- “Constant and uniform usage, accepted as law”: *Asylum Case*
- Custom consists of unwritten rules evinced from the generality and uniformity of the practice of States and is adhered to by such States out of legal obligation or *opinio juris*: *North Sea Cont.*

SCAFFOLD

1. Is there a treaty?

If the state has **ratified the treaty** → state is bound by the rule

- But look at the content of the treaty (e.g. the treaty explicitly bans whaling for commercial purposes, not whaling altogether. So, State isn't violating treaty for scientific purposes)
 - o Is there definitive language stating the behaviour should be banned?
 - o Is only one type of behaviour banned?

If the state has **not ratified the treaty** → state may still be bound by rule if parallel obligations exist under

CIL: *Nicaragua*

- A treaty may... (*North Sea Continental Shelf Cases*)
 - o Declare CIL existent at the time the treaty was drafted

- **Language used in the treaty**

- Language that definitively states the rule is CIL → indicated it is

an existing rule under CIL (distinguished from *North Sea Cont. Shelf*)

- **Negotiating history**
 - Hesitation in drafting history as to whether the rule should be included
→ indicates it is not existing rule in CIL: *North Sea Cont. Shelf*
- **Reservations**
 - If reservations to the rule are permitted under the treaty, it was not existing CIL: *North Sea Cont. Shelf*
- Create CIL ... (see step 2)

2. **Can a treaty provision create CIL?**

State participation in a treaty regime may be evidence of state practice. A treaty may itself contribute to the formation of CIL by codifying existing CIL; crystallising emerging/developing CIL (by process of states agreeing to particular wording/formulation of emergent rule); or lay down eventual rule of CIL. For a treaty provision to create CIL... (*North Sea Continental Shelf Cases*)

- The provision must be of a **fundamentally norm-creating character**: capable of being the origin of a rule that governs the behaviour of a state (*North Sea Continental Shelf Cases*)
 - **Framing of the rule**
 - If the rule is framed as the primary obligation → indicates it is a norm-creating provision (distinguished from *North Sea Cont.*)
 - If the rule is framed as a fall-back obligation → indicated it is not a norm-creating provision (*North Sea Cont. Shelf*)
 - In *NSC*, states could use other means of determining maritime boundaries, and if those failed, the treaty said they should apply the equidistance rule
 - **Reservations**
 - If states can make reservations to the provision (where they agree to be bound by the treaty, except for the specific provision containing the rule) → indicates it is not norm-creating provision (*North Sea Cont. Shelf*)
 - **Exceptions**
 - If the treaty contains exceptions to the rule → indicates it is not norm-creating provision (*North Sea Cont. Shelf*)
- There must be **very widespread + representative participation in the treaty**
 - Including the participation of states whose interests are particularly affected by the rule – ‘specially affected’
- There must be general belief by states that they are **obliged by law to act in accordance with the rule**
 - If there is only practice of states who are party to the treaty, there is a lack of clarity regarding the motivations of the states to comply with the rule
 - Is the obligation under the treaty?
 - Is it what they consider to be an obligation under CIL?
 - **Need to identify practice coming from states who are not parties to the treaty**
 - These states have no obligations under the treaty, therefore by following a rule in a treaty, it is more likely they are doing this because they believe they

are obligated under CIL: *North Sea Cont. Shelf*

- **Passage of time between the treaty and it becoming CIL**
 - o Passage of short period of time not necessarily a bar for rule to become CIL: *North Sea*
 - o But the practice should have been extensive and virtually uniform within that short period of time amongst the states with affected interests: *North Sea Continental Shelf*
- A treaty norm may become CIL norm, but “this result is not lightly to be regarded as having been attained”: *North Sea Cont. Shelf*
 - o Consequences:
 - Treaty-turned-CIL norm binds states that are non-parties to the treaty
 - Denunciation of the treaty by a party doesn’t absolve a state of the obligation to comply with CIL

3. Does the rule meet the requirements of CIL?

North Sea Continental Shelf Cases: Confirmed that both state practice (objective element) and *opinio juris* (subjective element) are essential elements for formation of a customary law rule.

State Practice

The practice of states in their international relations

1. **Norm-creating character** – rule should potentially form basis of generally applicable universal law: *North Sea Continental Shelf Cases*
2. **Widespread/Representative Participation** – principle needs to be common among many states and should be representative within the scope of the alleged extent of the principle: *North Sea*
 - a. **Where there is a generally applicable rule** (e.g. use of force): the practice should be representative geographically, politically and legally.
 - b. **Where only certain states are affected (specially affected)** (e.g., maritime practices): practice of states with specific subject-matter interest should be given more weight → landlocked states will have limited State Practice regarding maritime practices
 - c. **Regional or bilateral custom?**
3. **Extensive and uniform** – repeatedly, thoroughly and reasonably adopted: *North Sea Cont.*
4. **Timing** – passage of short period not necessarily a bar for a rule to become CIL: *North Sea Cont.*
 - a. When dealing with smaller number of states interested in a particular issue (e.g. space exploration) → CIL will develop much faster
 - i. BUT practice should have been extensive and virtually uniform within that short period among the affected states: *North Sea Continental Shelf Cases*
 - b. When dealing with an issue that affects entire world community → CIL will develop much slower
5. **Need not be entirely uniform** – must exhibit general consistency but deviations must be justifiable as allowable exceptions or as not being relevant practice at all. Inconsistent behaviour should be treated as breaches of the rule not indication of a new rule or that the rule no longer exists: *Nicaragua*
 - a. But where there is inconsistent action, and affected states do not protest that action (e.g. state prosecutes a crime from another state’s flagship in a collision on high seas, and there are no objections from the flagship state) this indicated rule may not be CIL: *Lotus Case* → need to look at:

i. Response of the affected states to the 'violation' – are they protesting?

1. No → indicates rule is no longer CIL: *Lotus Case*
2. Yes → indicates the rule is still CIL: *Nicaragua*
3. Was the affected state/s in a position to protest?

ii. Response of the inconsistent state:

1. Has the inconsistent state tried to justify their behaviour by appealing to exceptions the rule, or using justifications contained within the rule itself?
 - a. Indicated the rule still exists as CIL: *Nicaragua*
6. **Treaty and CIL coexist** – when treaty and CIL are identical, one doesn't supersede the other – they both apply simultaneously and bind states simultaneously: *Nicaragua*
7. **Forms of state practice** – can include physical or verbal acts and under certain circumstances, inaction. Inexhaustive list: diplomatic acts and correspondence, conduct in connection with resolutions adopted by an international organisation 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: *ICJ 2018*

North Sea Continental Shelf Cases (Germany v Denmark; Germany v Netherlands) [1969] ICJ

FACTS: Dispute over the delimitation of the continental shelf between Germany, Denmark and the Netherlands. Disagreements over the rule to be applied in determining boundary.

ISSUE: Whether *Art 6 of Geneva Convention on the Continental Shelf*, prescribing equidistance, represented CIL → Germany not party but Denmark + Netherlands were and argued for the rule. **HELD:** Norms from treaties could become CIL but not in this case → insufficient state practice +

acceptance (*opinio juris*) to consider equidistance principle as CIL. ICJ opted for compromise, rejecting all parties' proposals.

STATE PRACTICE: *Art 6 of Geneva Convention* didn't constitute a customary norm, nor did it have 'norm-creating' character sufficient to establish a custom.

OPINIO JURIS: Widespread and representative participation in a convention may evidence CIL, but the *Convention* wasn't ratified widely enough. Short time no bar to CIL but wasn't extensive + virtually uniform **PRINCIPLE: Treaty provisions can evolve into CIL through extensive and virtually uniform state practice, accompanied by a sense of legal obligation (*opinio juris*), but such evolution requires clear evidence, which was lacking in this case.**

Military and Paramilitary Activities in and against Nicaragua (Nicaragua v USA) (1986) ICJ

FACTS: N alleged US unlawfully engaged in military and paramilitary activities against it, including mining waters and supporting Contra Rebels.

Jurisdiction Issue: US challenged ICJ's jurisdiction, arguing its reservation to *Art 36(2) of ICJ Statute*, excluding disputes arising under multilateral treaties like UN Charter.

HELD: ICJ found US actions violated IL, specifically the customary prohibition on the use of force and non-intervention. UN Charter principles and CIL were held to be applicable separately.

CONSISTENCY OF STATE PRACTICE: Perfect consistency in SP is not required for establishing customary norms. Breaches of norm aren't indicative of a new rule but are exceptions to existing rule.

OPINIO JURIS: The prohibitions of use of force + intervention were substantiated by *OJ*, including US's own statements and conduct.

PRINCIPLE: A CIL norm doesn't require universal or perfect adherence; it suffices if the general practice of states is consistent with the norm and any deviations are treated as breaches, not as a new custom.

Lotus Case (France v Turkey) (1927, PCIJ)

FACTS: F boat collided with T boat on high seas (under no territory) → T prosecuted + convicted F captain for MNS. F gov demanded release arguing T had no jurisdiction as crime occurred on F flagship so was on F jurisdiction only + no concurrent jurisdiction (F argued in practice, states abstained from prosecuting collision cases where crime occurred on the vessel of another state)

HELD: PCIJ rejected F argument. Sovereign states may act in any way they wish so long as they do not contravene an explicit prohibition. Codified in Art 11 UNCLOS only the flag state or the state of which the alleged offender was a national had jurisdiction over sailors regarding incidents occurring on high seas.

Opinio Juris

The belief the conduct is legally required – separates acts performed out of courtesy from those out of a sense of obligation

1. **The states concerned must feel they are obliged by law to act in a particular way:** *North Sea*
 - a. It can be difficult to establish OJ, as not always clear what motivated the state to act in a certain way
 - b. Consider other possible reasons for state compliance, rather than a sense of legal obligation → Courtesy, convenience or tradition: *NSC* & Political expediency: *Asylum*
2. **When certain acts are not done (omissions)**, it must still be proven that states did not act in such a manner because they believed they were legally obliged to refrain from that action: *Lotus*
 - a. In *Nuclear Weapons Advisory Opinion*, 50 years of practice of non-use of nuclear weapons was insufficient to establish CIL, as not accompanied by evidence of OJ
3. Consent to the formation of CIL is **rarely explicit**, and is rather reflected in **state acquiescence**:
 - a. "Failure to react over time to a practice may serve as evidence of acceptance as law (OJ), provided that States were in a position to react, and the circumstances called for some reaction": *ILC 2018 Draft Conclusions on Identification of CIL*
 - i. If the state has not reacted over time → indicates rule may be CIL as there is OJ
 1. *Costa Rica v Nicaragua*: absence of protest by Nicaragua contributed to customary fishing rights for Costa Rica
 - ii. If the state was not in a position to react → indicates the rule is not CIL, as no OJ
4. **Onus of proof** lies on state arguing for existence of a custom (*Asylum*) Unless the Court has been asked to determine the question: *Nuclear Weapons Advisory Opinion*
5. **OJ may be evidenced by** 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 (not necessarily conclusive proof): *ILC 2018 Draft Conclusions*

- a. In *Nicaragua*, ICJ treated UNGA Resolutions as evidence of OJ → may be problematic because states may vote in favour of resolutions for reasons other than their belief in the binding legal nature of statements.

***Nicaragua v Colombia* [2023] ICJ – not ‘Nicaragua’ referred to above**

FACTS: N + C contested the extent of their continental shelves, specifically how far N’s shelf extends past 200 nautical miles in proximity to C.

HELD: CIL doesn’t permit a state to extend its continental shelf beyond 200 nm when it encroaches upon the 200 nm limit from another state’s baseline.

REASONING: Informed by practice of states as recorded by UN Conventions on the Law of the Seas, despite Colombia not being a party. The observed practice of states refraining from making overlapping claims was considered as expressing *opinio juris*, sufficient to identify the CIL, even if some practices were partly motivated by non-legal considerations.

PRINCIPLE: State practice + *opinio juris*, as evidenced over time, solidify CIL, which in this case, restricts the expansion of a state’s continental shelf to the detriment of another state’s established 200nm shelf.

4. Regional Custom

A rule of CIL can develop among **only a particular geographical region**: *Asylum Case*; *Al-Saadoon*

- But the party which relied on a custom of this kind must prove that... (*Asylum Case*)
 - o Custom must be in constant and uniform usage between parties (state practice): *Asylum*
 - o Established and regarded as a binding rule of law (OJ): *Asylum Case*; *Al-Saadoon*
- Regional custom can exist among states that are not geographically proximate but nonetheless share common goals or interests – e.g., League of Arab States and the North Atlantic Treaty Organisation (NATO).
- Regional CIL can be created by a small group of states (even just two): *Rights of Passage Case*
- Regional CIL may deviate from CIL, but must not violate *jus cogens*

***Asylum Case (Colombia v Peru)* (1950, ICJ)**

FACTS: C granted asylum to the leader of a failed revolutionary group from Peru (de la Torre), within its embassy in Lima. C sought P’s permission to transport him across P territory to C. P denied and rejected C’s assertions that C retained right to determine political refugee status and was binding on P. C invoked ‘American International Law’ to justify the asylum.

HELD: PCIJ held insufficient evidence of such regional customary norm as was **no uniform and consistent practice accepted by law** among Latin-American states

***R (app. Al-Saadoon) v Sec. of State for Defence* [2010] (English Court of Appeal)**

FACTS: Iraqi detainees under British custody sought to prevent transfer to Iraq for trial on war crimes, risking death penalty.

ISSUE: Is obligation of non-refoulement to countries with death penalty regional CIL in Europe?

HELD: UK Court of Appeal dismissed app, finding no breach of the European Convention on Human Rights or other regional customary law prohibitions against transfer where the death penalty is possible.

***Right of Passage Case (Portugal v India)* (1960) ICJ**

FACTS: P claimed a customary right of passage to access its enclaves within I’s territory. I contested, arguing that longstanding practice between two states wasn’t enough to establish local custom.

HELD: ICJ recognised the **existence of bilateral custom**, affirming long-established practices between

two states can indeed form local customary law. Acknowledged P's claim to a bilateral customary right for passage based on a century-old practice underpinned by mutual rights + duties.

5. **Persistent Objector Rule**

CIL binds all states once established but if a state persistently objects from time of formation, then it may not be bound (research shows however doctrine is rarely invoked by states): *Anglo-Norwegian Fisheries*

- Once CIL established, subsequent objector has no legal effect, but may create new rule if initial violating state practice gains enough support

ILC 2018 Draft Conclusions CIL Principle 15:

1. State must have objected to rule while still in formation + continued to after becoming CIL: *ANF*
2. Obj must be clearly + publicly expressed, made known to other states + maintained persistently
 - a. *Asylum*: Even if RCIL existed, P persistently objected to idea of political asylum by refraining from ratifying various treaties on political asylum → P not bound
 - b. ***Anglo-Norwegian Fisheries Case (UK v Norway) (1951, ICJ)***
 - i. **FACTS**: UK challenged N's practice of drawing straight baselines across its indented coastline, including fjords and the skaergaard, affecting territorial waters and fishing rights, UK argued cannot be + 10 miles from opening of fjords.
 - ii. **HELD**: 10-mile rule for straight baselines, though used by some states, had not become a general rule of IL applicable to N, which had consistently opposed any attempt to use it to N's coast. Other states had acquiesced to N's objection (not challenged obj. to rule), not required for PO rule, but supports N's obj. being known to others.
3. State cannot persistently object to a ***jus cogens*** norm
 - a. **Origins**: Emerged from natural law theories of 17th century – Grotius (1925) emphasised immutable principles above human law. Term '*jus cogens*' not used but early authors still believed in the concept.
 - b. **ILC contributions**: Post WWII ILC began work on law of treaties and firmly established the term in IL. Initially controversial but undisputed recognition of *jus cogens* activities like piracy and slavery in which no state could justifiably agree to engage.
 - c. **VCLT Art 53**: JC norm is accepted + recognised by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general IL having the same character.
 - d. No universal agreement of JC norms but examples specified in **2019 ILC Report on JC Norms**: prohibition of genocide, maritime piracy, slavery, torture, wars of aggression, crimes against humanity, territorial aggrandisement, right to self-determination, use of force (**UN Charter**)

6. **UN General Assembly Resolutions/Declarations – soft law**

Can influence + shape state behaviour while having no binding status: *Nuclear Weapons Advis. Opini.*

May potentially be indicative of existing CIL, or contribute to formation of CIL:

- **State practice**
 - o Adoption (strong consensus) establishes the generality of the practice.
 - o Repetition in later resolutions establishes consistency and uniformity of the practice.
- ***Opinio juris***
 - o **Content of the resolution** (*Nuclear Weapons Advisory Opinion, 1996 ICJ*)

- Statement rule already exists in CIL: *Chagos Islands (2019)*: ICJ determined SD was part of CIL by 1960 based on finding that Declaration of the Granting of Independence to Colonial Countries and People declared CIL
 - **Wording** of the resolution said “there is a right to SD” (strong, absolutist language, not ambiguous or aspirational) → *lex lata* → CIL norm
 - **Distinguished from *Nuclear Weapons Advisory Opinion*** – statement saying “nuclear weapons should be declared illegal” → wording indicates not yet a CIL norm, only desire to prohibit in future (aspirational language → *lex ferenda*)
- **Circumstances of adoption (*Nuclear Weapons Advisory Opinion*)**
 - **Voting:**
 - High no. votes and strong consensus → indicative of OJ (*Chagos Islands*: 89 in favour, 9 abstentions, no objections)
 - Many negative votes → lack of evidence of OJ: *Nuclear Weapons Ad.*
 - Conflicting opinions in votes → lack of evidence of OJ: *Nuclear Weap.*
 - **Abstentions:** high no. abstentions → lack of evidence of OJ: *Nuclear Weap.*
- **Conduct of states after the resolution** (weather followed or not?)

Some argue they can create ‘instant CIL’

- Aftermath of 9/11 attacks, number of UNGA Resolutions condemned the attacks and stated right to self-defence against non-state actors
- As there was a high number of votes with strong consensus and almost no objections, some argue this was a form of instant CIL → seems to only exist in very exceptional circumstances

7. Consider timing (if relevant)

CIL cannot be applied retrospectively (can’t punish states for previous breaches of CIL)

Relationship between CIL and Treaties

- **Art 38(1) ICJ Statute** doesn’t establish hierarchy of sources of IL (no source is superior)
- **Treaties and CIL on same topic co-exist in parallel: *Nicaragua***
 - As noted in *Nicaragua*, where rules pertaining to use of force existed in both CIL and treaty, ICJ held CIL and treaty rules can coexist for same subject
 - Subsequent treaties don’t abrogate existing CIL → treaties apply only to parties, while CIL to the whole world
- But...
 - **CIL may displace treaties is a custom contrary to a treaty norm develops** (possible as long as it is not contrary to *jus cogens*)
 - **Treaties may be applied instead of CIL if norms more specific** (only if not violate JC)

- If 2 states choose to contract out of a rule of CIL in relations, treaty override CIL

Coexistence of CIL and treaty norms

The fact certain rules have been codified as treaty norms (that apply to parties to the treaty) does not mean they cease to exist as rules of CIL (that apply worldwide or to a specific region):

Nicaragua

- Identical rules in treaty + CIL may be distinguishable in methods of interpretation and application (e.g. state may accept rule in treaty because treaty established what the state regards as desirable institutions/mechanisms to ensure implementation of the rule)

UN Security Council Resolutions

UN Charter Art 25: SC resolutions are binding on member states

General Principles of Law – ICJ Statute Art 38(1)(c)

Introduced to avoid *non liquet* – determination that no positive law exists on the matter (treaties/CIL)

- CIL and general principles are two distinct systems and must be treated separately: *Ure v Cth*
- General principles can either be those borrowed from domestic law that can be applied to international legal questions, or principles which have developed at international level.
 - **Principles of municipal law**
 - IL recruits many rules from private systems of law, like rules of procedure, good faith, **Examples recognised by ICJ:**
 - *Res judicata* (doctrine of finality): *ICJ Advisory Opinion (1954)*; *Nicaragua v Columbia (2016)*
 - Obligation to make reparation for breach of obligation: *Germany v Poland (1927), (1928)*
 - Doctrines of acquiescence and estoppel: *Denmark v Norway (1993)*; *Cambodia v Thailand (1962)*
 - Reasonableness and fairness as equitable principles (not a source of law)
 - **Art 38(2) ICJ Statute:** parties to a dispute may agree to have case decided *ex aequo et bono* – according to principles of fairness rather than law.
 - Shown in *North Sea Continental Shelf* with equity in reasoning.
 - The way IL borrows from this source is to adapt the principles to fit the decision-making process in the international sphere (not necessarily applied as they are under domestic jurisdiction in a “lock, stock and barrel” manner): *International Status of South West Africa (1950)*
 - These principles must have sufficient acceptance in other jurisdictions to be accepted as general principles: *Intl Status of SW Africa*
 - **Principles developed at the international level**
 - Sovereign equality between states
 - Precautionary principle in environmental law

Ure v Cth (2016) HCA

FACTS: U claimed proprietary rights reefs based on CIL and general principles of law, arguing

uninhabited islands were *terra nullius* + his rights should be recognised even after Cth claimed sovereignty.

ISSUE: Whether IL recognises proprietary rights claimed by private individual over *terra nullius* land.

HELD: HCA dismissed appeal → no CIL or general principle allowing individual to claim ownership over *terra nullius*. **Art 381(1)(c)** defines 'civilised nations' as all nations, suggesting that the general principles are unwritten norms recognised within states' municipal laws and applicable at international level.

PRINCIPLES: A single instance of state practice, while theoretically capable of establishing a custom, must be part of an extensive and virtually uniform practice among relevant states. **CIL and general principles of law are distinct sources of IL; CIL requiring clear evidence of state practice and *opinio juris*, and general principles must be recognised by civilised nations derived from municipal law.**

Bay of Bengal (Bangladesh v Myanmar) (2012) ITLOS – Estoppel

FACTS: B claimed a territorial sea delimitation based on a purported agreement from 1974, which M contested, asserting no such agreement existed.

HELD: 1974 agreement was not binding → no estoppel as M's conduct didn't lead B to detrimentally change its position based on the assumption of an agreed delimitation.

PRINCIPLE: Estoppel requires one state to have relied on another state's representations to its detriment. Must be clear evidence of detrimental reliance on conduct suggesting an agreed situation between states for estoppel to apply.

Chagos Islands (Mauritius v UK) (2015) ICJ – Estoppel elements

- A State's clear, consistent representations by word, conduct, or silence.
- Representations made by an authorised agent.
- Another state acted to its detriment or conveys a benefit based on the representations
- The State's reliance on the representations was legitimate.

HELD: M relied on UK's assurances regarding marine resources. UK in breach of obligations under 1982 UN Convention on the Law of the Sea by not duly regarding M's rights.

Diversion of Water from the Meuse (Netherlands v Belgium) [1937] PCIJ – Equity in IL

FACTS: N + B had treaty re: use of water from the Meuse. N approached ICJ, claiming B breached treaty as it had constructed canals on its territory. B defended saying N had previously constructed locks on the river, which affected its use by B.

HELD + PRINCIPLE: Court has freedom to consider principles of equity as part of IL.

Advantages and disadvantages of having equity as a principle of IL:

- **Equity infra lege:** the form of equity which is used as a method of interpreting the law
 - o There is no problem with engaging in the use of equity for this purpose and it has been accepted by ICJ: *Frontier Dispute (Burkina Faso v Mali)* [1986]
- **Equity extra lege:** the form of equity which allows the courts to create exceptions from IL norms
→ this form of equity is more problematic.

Subsidiary Materials – ICJ Statue Art 38(1)(d)

Judicial decisions and the teachings of the most highly qualified publicists: *ICJ Statue Art 38(1)(d)*

These are **not formal sources** of law, they provide views as to content of IL principles

- **Judicial decisions**
 - o Including from ICJ, international tribunals, arbitral tribunals, domestic courts (but the weight given to a domestic court will depend on the analysis being the reason

for judgement, and the level of the court in the hierarchy)

- Much depends on credibility of the court, its independence, national bias, quality of decisions
- No precedent value, but consistency is strived for
- **ICJ Statute Art 59:** ICJ's decisions are only binding on party states for specific case → not binding as precedent
- But ICJ decisions have influence and ICJ often follows own earlier judgements
 - Examples of ICJ contributing to the development of new rules:
 - **Reparations case 1949:** UN has international legal personhood
 - **Reservations case 1950:** rules on reservations to multilateral treaties
 - **Nottebohm case 1955:** principle of real and effective nationality
- **Teachings of the most highly qualified publicists:**
 - More common for the ICJ to refer to publicists in 18th, 19th, and early 20th centuries
 - Now is very rare for ICJ to refer to publicists, as their writing is interpretation; not the law
 - Work of **International Law Commission** falls into this category (as subsidiary source)
 - But the work of the ILC holds a higher status than academic writing, as ILC is a UN body and eminence of who is involved

The Paquete Habana (Spain v US) (1900) US

FACTS: After Spanish-American War, US captured Spanish fishing vessels under wartime 'rules of prize' – legal principles governing capture and adjudication of enemy property at sea during armed conflict.

ISSUE: legality of seizing non-military vessels and their treatment under IL.

HELD: seizing not permissible – referenced IL establishing civilian livelihood should not be interrupted by law unless absolutely necessary.

- **On teachings of highly qualified publicists: 'Such works are resorted to by judicial tribunals not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.'**

Inconsistency between CIL + Treaty Norms, or Two Rules from Same Source

- **Principle of *lex posterior derogate priori*: a newer law repeals an older law**
 - E.g. **1949 Geneva Conventions on Treatment of POWs** override **1929 Geneva Convention on the Treatment of POWs**
- **Principle of *lex posterior generalis non derogate priori speciali*: a later general law doesn't derogate from an earlier specialised law**
 - E.g. a general treaty about the sea wouldn't override a CIL specifically about a certain maritime practice
- **Principle of *lex specialis*: the specific law prevails over the general law**

Unilateral Declarations

Not outlined in **Art. 38 of the ICJ Statute**, but in certain circumstances unilateral declarations made by a state can bind that state.

- Approach of ICJ in **Nuclear Tests** was codified by ILC in **its Guiding Principles on Unilateral Acts [2006]**, which highlight that such a statement must:
 - **Be made publicly: Guiding Principle 1**