

PUBLIC INTERNATIONAL LAW

Public International Law

Course and exam notes

Sources and treaties

States and territory

Jurisdiction and immunity

Responsibility and dispute settlement

11 TOPICS

Principles, authorities and exam reference

Contents

01	Scope of international law.....	3
	International legal persons and the Montevideo criteria	
02	Sources of international law	3
	Treaties · Customary International Law · Jus Cogens · Soft Law	
03	The law of treaties.....	7
	VCLT · Reservations to Treaties · Interpretation of Treaties	
04	International and domestic law	14
	Monism · Dualism · Treaties and Australian law	
05	Statehood/self determination.....	19
	Recognition · Unlawfulness · Self Determination	
06	Title to territory	22
	Territorial change · Territorial disputes · Types of territory	
07	State jurisdiction.....	27
	Criminal jurisdiction · Civil jurisdiction · Extradition	
08	Immunity.....	31
	VCDR · Foreign state immunity · Personal immunity	
09	State responsibility.....	36
	Attribution of Conduct · Breach · Diplomatic protection	
10	Use of force	41
	Self defence · Security Council · Humanitarian intervention	
11	International dispute settlement.....	45
	Diplomatic methods · ICJ · Judgments	

TOPIC 01

SCOPE OF INTERNATIONAL LAW

- Global legal system created through treaties, customary international law and general principles of law
- States are the 'subjects' or 'international legal persons' who have obligations and rights.
- Montevideo Convention, 4 criteria – Population, defined territory, effective and independent government, capacity to enter into relations with other states.
- International organisations also possess legal personality.

TOPIC 02

SOURCES OF INTERNATIONAL LAW

- Article 38 of the **Statute of the International Court of Justice ('ICJ Statute')**
- Lists the sources as treaties, custom, general principles (no order or hierarchy to these). Of secondary importance which can be considered are judicial decisions and academic writing.
- However, it has come under fire for not referencing other sources of law in jus cogens or unilateral declarations. It also ignores soft law.

Treaties

- **1969 Vienna Convention on the Law of Treaties** (art 2(1)(a)) defines an international convention 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.'*
- **Art 26** – *'every treaty in force is binding upon the parties to it and must be performed by them in good faith'*

Customary International Law

- Art 38(1)(b) of the **ICJ Statute** refers to *'international custom, as evidence of a general practice accepted as law'*
- A recurring **state practice** that is recognised and accepted as a form of obligation
- Possible to have universal, bilateral and regional customs
- Must be accompanied by a belief that the practice is legally required **Opinio Juris**.

ELEMENT 1: State Practice

- Possible evidence of state practice includes treaties, court decisions, legislation, diplomatic correspondence and the practice of international organisations.
- The practice must be of sufficient duration, consistency etc. to have weight to prove the existence of a customary norm. Need not be absolutely uniform.

Military and Paramilitary Activities in and against Nicaragua – deviations from the practice must be justifiable either as allowable exceptions or as not being relevant practice at all. At [186]: *"It is not expected that in the practice of States the application of the rules in question should have been perfect, in the sense that States should have refrained, with complete consistency, from the use of force or from intervention in each other's internal affairs. The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally be treated as breaches of that rule, not as indications of the recognition of a new rule. If a State acts in a way prima facie incompatible with a recognised rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule."*

- It is possible for a customary rule to develop over only a short period of time.

North Sea Continental Shelf - dispute between Netherlands, Germany and Denmark as to the division of their shared continental shelf. Netherlands and Denmark were party to the 1958 Convention on the Continental Shelf which provided that the boundary is determined by the equidistance approach. Germany was not a party and wanted a different approach.

- Netherlands and Denmark sought to prove the equidistance approach was customary.
- At [73]-[74]: *“With respect to the other elements usually regarded as necessary before a conventional rule can be considered to have become a general rule of international law, it might be that, even without the passage of any considerable period of time, a very widespread and representative participation in the convention might suffice of itself, provided it included that of States whose interests were specially affected.”*
- *Although the passage of only a short period of time is not necessarily, or if itself, a bar to the formation of a new customary international law on the basis of what was originally a purely conventional rule, an indispensable requirement would be that within the period in question, short though it might be, State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked; - and should moreover have occurred in such a way to show a general recognition that a rule of law or legal obligation is involved.*
- The notion of a practice of a ‘specially affected state’ being given more weight when considering customary law is controversial – powerful states can claim to always have special status for any international developments.

ELEMENT 2: Opinio Juris

- Separates state acts done as a courtesy from acts done out of a sense of obligation.
- Deduced from the acts of states e.g. public statements, official publications. Or failure to react over time to a practice is a rejection of it. (ILC Report on Customary Law)

At [77] of **North Sea Continental Shelf**: *“Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law required it. The need for such a belief i.e. the existence of a subjective element, is implicit in the very notion of the opinio juris sive necessitatis. The States concerned must therefore feel that they are conforming to what amount to a legal obligation. The frequency, or even habitual character of the acts is not in itself enough.”*

- ICJ has treated General Assembly resolutions as opinio juris. May be problematic as states vote for multiple reasons.

At [188] of **Nicaragua**: *“The Court has... to be satisfied that there exists in customary international law an opinio juris as to the binding character of such abstention. The opinio juris may, though with all due caution, be deduced from, inter alia, the attitudes of the Parties and the attitude of States towards certain General Assembly resolutions... it may be understood as an acceptance of the validity of the rule or set of rules declared by the resolution”*

Local or Regional Custom (still requires state practice AND opinio juris)

- Possible for custom to be limited to a group of states in a geographical region, or states not proximate but bound by common goals/interests i.e. League of Arab States, NATO

Asylum (Colombia v Peru) – Colombia argued that a regional custom of granting diplomatic asylum for political reasons could be evidenced in the practice of Latin American states. ICJ said it is possible for a regional custom to exist, however in this case it couldn't be invoked against Peru who had consistently repudiated the rule.

- Burden of Proof: *“The Party which relies on a custom of this kind [a regional or local custom] must prove that this custom is established in such a manner that it has become binding on the other Party.”* Asylum Case
- Possible to be between just two states **Right of Passage over Indian Territory** – Portugal claimed a bilateral custom allowing for free passage between Portuguese enclaves and India. ICJ noted:

“It is difficult to see why the number of States between which a local custom may be established on the basis of a long practice must be larger than two. The Court sees no reason why long continued

practice between two States accepted by them as regulating their relations should not form the basis of mutual rights and obligations between the two States.”

Persistent Objector: Exemption from customary law

- A state can exempt itself if from the time of formation it consistently objects to the rule.
- The state must clearly and publicly express its objection consistently.
- A subsequent objection has no legal effect. However a subsequent objection could potentially create a new rule which initially violates the old rule but if the conduct is supported by enough states, becomes the new rule.

Anglo-Norwegian Fisheries – UK complained about Norway drawing straight baselines across fjords resulting in significant waters being enclosed within its territorial seas.

ICJ: *“In these circumstances the Court deems it necessary to point out that although the ten-mile rule has been adopted by certain States both in their national law and in their treaties and conventions, and although certain arbitral decisions have applied it as between these States, other States have adopted a different limit. Consequently, the ten-mile rule has not acquired the authority of a general rule of international law. In any event, the ten-mile rule would appear to be inapplicable as against Norway inasmuch as she has always opposed any attempt to apply it to the Norwegian coast.”*

Treaties and Custom

- State participation in a treaty can be evidence of a state practice
- A treaty can also modify existing customs, crystallise emerging customs, or law down a rule that becomes customary
- In order for a treaty to become custom it must be of a *“fundamentally norm-creating character”* (At [72] of **North Sea Continental Shelf**). It must also be accompanied by relevant state practice and opinio juris, from parties AND non-parties to the treaty.
- Behaviour of non-parties is the most relevant. States that re parties might simply be acting in accordance with their obligations, actions which *“no inference could legitimately be drawn as to the existence of a rule of customary law”* (at [76] NSCS)
- When a customary norm is codified in a treaty it is NOT subsumed. *“even if a treaty norm and a customary norm relevant to the present dispute were to have exactly the same content, this would not be a reason for the Court to take the view that the operation of the treaty process must necessarily deprive the customary norm of its separate applicability”* (At [175] of **Nicaragua**)
- A customary rule can be derogated from by agreement e.g. if two states agree that a particular customary rule would not apply ([72] of NSCS)

Jus Cogens

- There is one source of law that DOES claim hierarchical supremacy over those in art 38 of the ICJ Statute
- Jus cogens are ‘compelling law’ – peremptory norms of international law from which no derogation is permitted.
- First enunciated in art 53 of the VCLT
- Among other rules on the law of treaties, a treaty is invalid if its object and execution infringers on a rule of international law that is jus cogens
- E.g. certain activities that no state can agree to such as slavery, piracy
- Still debate as to what norms have jus cogens status. Some include, torture, genocide, war crimes, apartheid, right to self-determination etc.
- Only a new jus cogens can modify an old jus cogens

General Principles of Law

- The ICJ can also consider general principles of law recognised by civilised nations
- Used to address matters in the absence of treaty or customary law
- Case law suggests GPL are those commonly applied in domestic legal systems

- Certain legal principles that are common in domestic judicial systems and transposable at the international level:
 - Doctrine of finality, *res judicata* (Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v Colombia) at [58])
 - Principle that a breach of an obligation also involved an obligation to make reparation
 - Rules of procedure etc.
- Difficult to prove the existence of GPL, so are used sparingly

Judicial Decisions + Academic Writing (Secondary Importance)

- Art 59 of the ICJ Statute provides that *'the decision of the Court has no binding force except between the parties and in respect of that particular case'*
- No *stare decisis*, however in practice, the ICJ considers previous decisions and take steps to clarify if and why a different conclusion is reached
- The judicial decisions referred to in art38 include ICJ decisions and other international courts/tribunals
- The authors that ICJ cites tend to not be current writers, but scholars from previous generations who were responsible for landmark publications on international law.
- The work of the International Law Commission (ILC) is more authoritative and influential in ICJ decision making

Unilateral Declarations

- In certain circumstances, unilateral declarations made by a state can bind that state.
- In **Nuclear Test (Australia v France)**, Aus and NZ applied to the ICJ to compel France to cease nuclear testing in the Pacific. Before the case began, the President of France publicly declared it would not undertake any more tests. At [43]: *"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 the 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... In these circumstances, 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 the declaration to take effect, since such a requirement would be inconsistent with the strictly unilateral nature of the juridical act by which the pronouncement by the state was made. At [45]: With regard to the question of form, it should be observed that this is not a domain in which international law imposes any special or strict requirements."*

Soft Law

- Soft law is any provision or instrument that provides instruction or guidance on a particular course of action but does not create formal legal obligations.
- Resolutions of international organisations such as the General Assembly can influence and shape state behaviour despite having no legally binding status
- Codes of conduct from organisations such as the Red Cross can also influence international actions.

TOPIC 03

THE LAW OF TREATIES

- Treaties are agreements between states and/or international organisations. They can be bilateral, multilateral, global, regional, of limited duration or perpetual.
- An obligation can exist both in customary international law and in treaty.
- The main rules for the laws of treaties are contained in the VCLT, 1969 *Vienna Convention on the Law of Treaties*

VCLT

- The VCLT applies unless the treaty provides otherwise
- Oral agreements, agreements between states and non-state entities, or between non-state entities are treaties but are not covered by the VCLT
- Agreements NOT intended to create international legal obligations are also outside the scope.
- The VCLT only applies to treaties concluded after the VCLT came into force. However, provisions do reflect customary international law which would apply to treaties outside of the VCLT scope.
- Art 2(1)(a) defines a treaty as '*an international agreement 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*'

An International Agreement between States

- Art 6, every state possesses capacity to conclude treaties
- Difficulty arises when statehood is contested, however under the 'all states' clause, contested states can enter

Governed by International Law

- To be a treaty it must be governed by international law
- An agreement based on domestic law, or a political rather than legal agreement such as a memorandum of understanding, is not a treaty.
- This test of intention to be legally binding is either objective or subjective:
 - The ICJ takes an objective approach based on the text of the agreement (*Pulp Mills on the River Uruguay (Argentina v Uruguay)* at [128])
 - Other tribunals favour a more subjective approach. In the *South China Sea Arbitration* at [213], the Arbitral Tribunal decided it was necessary to consider the text, but also the circumstances of its adoption and the subsequent conduct of the parties.

Whatever its Particular Designation

- The name is irrelevant. Treaties can be called covenants, conventions, protocols, agreements and pacts.
- Even exchanges of letters and meeting minutes can be treaties if they create international rights and obligations and meet the requirements of art 2: *Maritime Delimitation and Territorial Questions (n33)* at [24]-[25]

Treaty Negotiation and Conclusion

- Addressed in art 7 – 19 of the VCLT
- Art 7 - A state representative must be authorised to adopt the text or express consent of the state to be bound
- Art 7(2) – Heads of state, foreign ministers and ambassadors are assumed to be authorised
- Art 7 – Others must produce 'full powers', formal documents showing their authority unless states dispense with this requirement
- Art 8 – An unauthorised act can be subsequently authorised
- Art 9 – The treaty is adopted by consensus or a relevant majority.
- Art 10 – The text is authenticated, certifying the texts as correct and authentic

- Art 80(1) – transmitted to the UN Secretariat for registration and publication (to avoid secret treaties, however failure to register does not invalidate it, however registration is a good indication of the intention to be binding: *Maritime Delimitation in the Indian Ocean* (n16) at [42])
- A multilateral treaty is concluded when the later of the text is adopted or is opened for signature. A bilateral treaty is concluded when signed by both states.

Expressing Consent to be Bound

- Art 11 – States can express their consent to be bound *'by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed'*.
- A multilateral is usually open for signature for 12-18 months, during which states can sign at the nominated place.
- If the treaty provides that signature is subject to ratification, acceptance or approval, a signature alone is not sufficient to bind the state.
 - There is no obligation to ratify, however a signature has some limited legal effect under art18 of the VCLT
- Ratification can be days or years after signing, with the time period being used to ensure that domestic laws and policies are congruent.
- A multilateral treaty can also be open for accession, where states can accede to it at any time.
- Art 16 – Unless the treaty provides differently, the instruments of ratification, accession or approval establish the consent to be bound on exchange, on deposit with the depositary, or when the depositary or the contracting states are notified.

Entry into Force

- Art 24(1) – enters into force in the manner and at the date provided or agreed upon.
- If a state consented to be bound before it comes into force, they are bound when it comes into force. If a state consent after it comes into force, it is bound when its consent takes effect unless the treaty provides different.

Reservations to Treaties

- A state may want to be a party but dislike or not want to comply with certain provisions.
- It can seek to exclude or modify the provision by submitting a reservation
- Art 2 – A reservation is *'a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in the application to the State'*
- A reservation can only be made when a state is consenting to be bound, not at a later date.
- Only applicable to multilateral treaties, in a bilateral treaty it would just be negotiations.

Reservation vs interpretative declaration

- An interpretative declaration is a statement declaring how a state interprets a particular provision.
- Given the sometimes-general language of multilateral treaties, some states feel the need to clarify their understand of certain provisions.
- The 'name' of the statement is not indicative of its true effect.
- Australia submitted a 'declaration' when ratifying the *Rome Statute of the International Criminal Court*, however it was more of a reservation, as it asserted that the Australian Attorney-General maintained complete discretion as to whether to surrender an accused to the Court.
- Australia submitted a truer declaration to the *Ottawa Convention on Anti-Personnel Mines*, since military cooperation with the USA who was not a party to the treaty meant they assisted in the use or development of mines. Australia declared that *'military activity conducted in combination with the armed forces of States not party to the Convention which engage in activity prohibited under the Convention would not, by itself, be considered to be in violation of the Convention'*.

When a Reservation is Allowed

- Art 19 VCLT – Reservation allowed unless prohibited by the treaty itself, either expressly or implied (through specification that only certain reservations may be made), or if it is incompatible with the object and purpose of the treaty.
- Allowance of reservations explained in *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion)*

At 21: *A multilateral convention is the result of an agreement freely concluded upon its clauses and consequently none of the contracting parties is entitled to frustrate or impair, by means of unilateral decisions or particular agreements, the purpose and raison d'être of the convention.*

At 24: Reservations are permitted if they are compatible with the object and purpose of the treaty. Each state that objects to the reservation should assess it on that basis.

At 26: *As no State can be bound by a reservation to which it has not consented, it necessarily follows that each State objecting to it will or will not, on the basis of its individual appraisal within the limits of the criterion of the object and purpose stated above, consider the reserving State to be a party to the Convention.*

- Art 20(1) – If reservations are expressly permitted, acceptance by other parties is not necessary.
- Art 20(2) – Acceptance by all states required when there is a small number of parties, and the object/purpose indicate that the application of the treaty in its entirety is essential (e.g. regional treaties on water use).
- When the treaty is larger: Art 20(4)(a) – acceptance by another contracting state makes the reserving party a party to the treaty in relation to the accepting state.

Effect of Reservations

- Art 21 sets out the effect of reservations. This only relates to permissible reservations, not impermissible ones which do not comply with art 19.
- Where a permissible reservation is made by R
 - If State A accepts, the treaty is modified between R and A (art 21(1))
 - If State B objects and says the treaty is not to apply between R and B, there is no treaty between R and B (art 20(4)(b))
 - If State C objects but does not say the treaty is not to apply between R and C, the treaty applies between R and C, HOWEVER *'the provisions to which the reservation relates do not apply...to the extent of the reservation'*
- The effect of the third option is that sometimes the reservation will not apply.
 - When a reservation purports to exclude a provision, the effect is the provision will not apply between the reserving and objecting states. The same practical effect as if the objector had accepted the reservation.
 - When a reservation purports to modify a provision, then neither the original or the modified provision applies between the reserving and objecting states.

Legal Effects of a Treaty

Obligation not to defeat the object/purpose prior to entry into force

- Art 18 – a state *'must not, therefore, do anything that would prevent it from being able to fully comply with the treaty once it has entered into force'*
- Applies to states that have signed or expressed consent to be bound. Obligation applies before the treaty becomes binding on the state.
- Obligation ceases when a state makes clear its intention not to become a party, 'unsinging', or when the entry into force of the treaty is unduly delayed.

Obligations after the treaty comes into force

- Art 26 – Once a treaty is into force it is binding and must be performed in good faith (*pacta sunt servanda*)
- *Gabcikovo-Nagymaros Project* at [114]: *This reciprocal wrongful conduct did not bring the Treaty to an end nor justify its termination. The Court would set a precedent with disturbing implications for*