The sources of international law

Statute of the International Court of Justice, 1946
Article 38

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
    a. **International conventions**, whether general or particular, establishing rules expressly recognized by the contesting states
    b. International **custom**, as **evidence** of a general practice accepted as law
    c. The general principles of law recognized by civilized **nations**
    d. Subject to the provisions of Article 59, **judicial decisions** and the teachings of the most highly qualified publicists of the various nations, subsidiary means for the determination of rules of law (evidence of international law)

[in practice a] and b) are the most important, but it is unwise to think in terms of a hierarchy from a) to d) in all cases]

2. This provision shall not prejudice the power of the Court to decide a case ex aequo et bono (in equity and good conscience/in justice and fairness), if the parties agree thereto.

Three law-creating processes: **treaties, international customary law, or the general principles of law recognised by civilised nations.**

Formal sources of law: methods for the creation of rules of general application which are legally binding on their addressees.
Material sources of law: provide evidence of the existence of rules which, when established, are binding and of general application.

International law works on the basis that the general consent or acceptance of states can create rules of general application. The definition of custom in international law is essentially a statement of this principle (Brownlie).

Custom

A general practice accepted as law
Customary international law

- customary rules grew up by common, tacit consent of states
- states dealing with each other needed some rules of international conduct
- single usages became habitual, then obligatory
- **gradually turned into custom over time as a feeling of legal requirement grew up (opinio juris)**
- when a usage turns into custom: wherever and as soon as a certain frequently adopted international conduct of States is considered legally necessary or legally right, the rule, which may be abstracted from such conduct, is a rule of customary international law (a usage is a general rule which does not reflect a legal obligation)

examples:
art 28. VCLT 1969: a treaty does not bind a state re any act or fact before the treaty came into force for that state
art. 27 VCLT: a state cannot rely on its domestic law to justify breach of a treaty (Questions relating to the Obligation to prosecute or extradite (Belgium v Senegal) ICJ 20 July 2012)

The two requirements for customary international law:

- **state practice** (constant and uniform usage): material, objective element—repeated acts by states.
    - *complete uniformity of practice is not required, but substantial uniformity is. Provided the consistency and generality of a practice are established, the formation of a customary rule requires no particular duration.*
    - *Generality of practice: complete consistency is not required. Often the real problem is to distinguish mere abstention from protest by a number of states in the fact of a practice*

followed by others.

- **opinio juris sive necessitatis** [an opinion of law or necessity] (accepted as law): subjective, psychological element—a state's belief that it is obliged by law to act in a particular way

Lotus case

[A collision between a French vessel and a Turkish vessel on the high seas. Turkey charged the officer on watch of the Lotus (Demons), who is a French national, of manslaughter, and sentenced him to 80 days of imprisonment and a fine. The French government protested, demanding the release of Demons or the transfer of his case to the French Courts.]

The PICJ held that Turkey, by instituting criminal proceedings against Demons, did not violate international law.

France alleged that the flag State of a vessel would have exclusive jurisdiction over offences committed on board the ship in high seas. The PCIJ disagreed, and held that both countries have jurisdictions (concurrent jurisdiction). A ship in the high seas is assimilated to the territory of the flag State. The offence produced its effects on the Turkish vessel, and Turkish criminal law applies, even in regard to offences committed there by foreigners.

Important dictum: opinio juris is **reflected in acts of States (Nicaragua Case) or in omissions (Lotus)** in so far as those acts or omissions are done following a belief that the said State is obligated by law to act or refrain from acting in a particular way (have to be conscious of the existence of such a duty)

In Lotus the Court was not ready to accept continuous conduct as evidence of a legal duty and required a high standard of proof of *opinio juris*.

Brownlie argues that the PCIJ in act misjudged the consequences of absence of protest and the significance of fairly general abstention from prosecutions by states other than a flag state.
(The subsequent Geneva Convention on the High Seas of 1958 was to **adopt the rule which the PCIJ had rejected**—a rare example of a treaty overruling a decision of a court on a point of custom)

Nicaragua Case (Merits) (Nicaragua v US)

Rationale: even a treaty and CIL has identical content, they operate separately, and reservation as to the former does not affect the effect of the latter.

In order for there to be a CIL, the court must be satisfied that the existence of the rule in the opinio juris of States is confirmed by practice. 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 (no need to be absolutely rigorous conformity). If a State acts in a way prima faice incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, the significance of that attitude is to confirm rather than to weaken the rule.

Whether the response to the attack is lawful depends on observance of the criteria of the necessity and the proportionality of the measures taken in self-defence.

Requirement of a request by the State which is the victim of the alleged attack is additional to the requirement that such a State should have declared itself to have been attacked.

If self-defence is advanced as a justification for measures which would otherwise be in breach both of the principle of CIL and of that contained in the Charter, it is to be expected that the conditions of the Charter should be respected.

Principle of non-intervention: a prohibited intervention must be one bearing on matters n which each States is permitted, by the principle of State sovereignty, to decide freely.

Acts constituting a breach of the customary principle of non-intervention will also, if they directly or indirectly involve the use of force, constitute a breach of the principle of non-use of force in international relations.

North Sea Continental Shelf (ICJ, 1969)

[Denmark and the Netherlands argued that the equidistance-special circumstances method of delimiting the continental shelf had become accepted as law by the date of the Convention on the Continental Shelf, 1958]

But the Court declined to presume the existence of opinio iuris based on the practice as at that date. Nor did it accept that the subsequent practice of states based on the Convention had produced a customary rule.

In Nicaragua (ICJ, 1986) the Court insisted that '... for a new customary rule to be formed, not only must the acts concerned "amount to a settled practice", but they must be accompanied by the opinio juris sive necessitatus'.

Likewise, in Diallo (Guinea v DR of Congo) (ICJ, 2007) the Court took the more exacting approach to custom and to the requirement of opinio iuris: 'The fact that ... various international agreements ... have

established special legal regimes ... is not sufficient to show that there has been a change in the customary rules; it could show the contrary'.

The choice of approach appears to depend on the character of the issues – that is, the **state of the law** may be a primary point in contention – and on the discretion of the Court. The approach may depend on whether practice is largely treaty-based (in which case opinio iuris is sufficient to expand application of the treaty norms as custom), or whether the law on the question is still developing.

The term 'general international law' should not be taken to require universal acceptance of a rule by all subjects of international law. Certain rules may have less than universal acceptance, yet still form part of international law.

Onus lies on the state arguing for the existence of a custom (Asylum case; Nuclear Weapons advisory opinion)

1) What is state practice

"This cannot be established by citing cases where coastal States have made extensive claims, but have not maintained their claims by the actual assertion of sovereignty over trespassing foreign ships (Judge Read in Anglo-Norwegian Fisheries)

What constitute state practice?

Eg (from ILC's non-exhaustive list 1950) **treaties**, decisions of international and national **courts**, **national legislation**, diplomatic correspondence, opinions of national **legal advisers**, and the **practice of international organisations**

~ Brownlie adds policy statements, press releases, official manuals on legal questions (eg of military law), **executive decisions and practices**, orders to naval forces, and comments by governments on ILC drafts

"any act or statement by a State from which views about customary law can be inferred; it includes physical acts, claims, declarations in abstracto (such as General Assembly resolutions), national laws, national judgments and omissions" [Akehurst, in Harris p52]

Jurisdictional Immunities of the State (Germany v Italy; Greece intervening)

2) Constant and uniform usage

"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" (North Sea)

Asylum case (Colombia/Peru) (1950)

argument was whether there was a CIL rule permitting state granting asylum (Colombia) the sole right to characterise asylee's offence as political or not

Facts: Peruvian authorities issued an arrest warrant for a Peruvian national, who had been granted political asylum by Colombia, and was in the Colombian Embassy. He had been leader of the Peruvian opposition party, involved in an unsuccessful military coup. Peru rejected Colombia's request for safe passage for the person on grounds that a common and not protected offence had been committed. Colombia argued that there was a rule of "American international law" that allowed state granting asylum to qualify (define) offence for purposes of asylum.

Held: Colombian government must prove that the rule invoked by it is in accordance with a constant and uniform usage practised by the state in question.

Colombia failed to show that the alleged rule was invoked, or if it was invoked that it was as a legal right, and not merely for reasons of political incumbency (practice varies, fail to show any constant and uniform usage, accepted as law)

Even if there was a customary rule as asserted, it could not be invoked against Peru which has repudiated it by not ratifying the 1933 and 1939 Montevideo Conventions (which were the first to include a rule concerning the qualification of the offence in matters of diplomatic asylum)

It may be possible for a customary norm to emerge as between a small group of states (even as small as two)

R (on the application of Al-Saadoon) v Secretary of State for Defence

(a national court decision dealing with regional customary law)

Facts: the claimants were Iraqis arrested by British forces in Iraq. The claimants applied for judicial review of the decision of the UK Secretary of State to transfer the claimants into the custody of the Iraqi government to face trial in the Iraqi Higher Tribunal for war crimes (the murder of two British

servicemen)

3) **Instant custom**
"Although the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of 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" (North Sea)

4) **opinio juris**
"Over half the States concerned were or shortly became parties to the Geneva Convention, and were therefore **presumably,** so far as they were concerned, **acting actually or potentially in the application of the Convention.** From their action no inference could legitimately be drawn as to the existence of a rule of customary international law in favour of the equidistance principle" (**North Sea**)

5) **treaty and custom**
- declaration of existing custom
- crystallisation of new custom (a state which does not become a party to a treaty might find itself indirectly affected by the norms contained in the treaty—unless it objects persistently
- development of future custom

6) **persistent objector**
persistent objector to new customary rule will not be bound by it (unless jus cogens (peremptory norm)) [evidence of objection must be clear, and there is a rebuttable presumption of acceptance]
eg. **Anglo-Norwegian Fisheries case (UK v Norway)**
- UK failed to protest at Norwegian use of straight baselines
- Norway consistently objected to any limit on the length of such baselines

7) regional/local custom
8) changing customary law
9) soft law

Treaties

Definition: Vienna Convention on the Law of Treaties 1969 (VCLT) Art 2
- an international agreement
- between states (or between state and an international organisation, or between IOs)
- in writing
- governed by international law

Once in force for the parties, a treaty is legally binding on the parties and any breach will be a violation of international law

Treaty v Customary international law
- a treaty binds only those states that are parties to the treaty
- customary international law binds all states (subject to exceptions)

Treaties as such are a source of obligation and not a source of rules of general application. Treaties may, however, form an important material source in that they may be reflective of, or come to embody, customary international law.

North Sea Continental Shelf

Court rejected Denmark and Netherland's argument that the delimitation had to be carried out in conformity with Article 6 of the 1958 Geneva Convention on the Continental Shelf for two reasons:
- Germany had not ratified the Convention and was therefore not bound by it
- The equidistance principle set out in Art 6 was not a rule of customary international law

For a treaty provision to also be or become CIL:
- treaty provision must be of a fundamentally norm-creating character
- must be widespread and representative participation in the treaty
- passage of short period of time not necessarily a bar
- but in that time state practice should have been extensive and virtually uniform (including that of

states whose interests were specially affected)
- must be general recognition of a rule/legal obligation

See also dissenting opinion of Judge Tanaka:
- significance of ratifications/practice varies. Eg. Large maritime state v small land-locked state
- ascertaining opino juris from external existence of custom

The court provided that the basic principle was that it should be the object of agreement between the states concerned and that such agreement must be arrived at in accordance with equitable principles.

The notion of the continental shelf is now defined in the 1982 LOS Convention, Art 76

Under art 83(1) of the LOS Convention:

" The delimitation of the continental shelf between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, in order to achieve an equitable solution.

~ Dispute Regarding Navigational and Related Rights (Costa Rica v Nicaragua) 13 July 2009

Costa Rican subsistence fishing rights: time + lack of protest by Nicaragua = customary right

inconsistency with previous jurisprudence pointed out in separate opinion of Judge Sepulveda-Amor (paras 20-36)

~ Military and Paramilitary Activities (Nicaragua v USA) (1986)

customary rule can co-exist with treaty rule

no need for "absolutely rigorous conformity" of state practice

need for conduct **generally consistent** with the rule

Court relied heavily on GA Resolutions as evidence of state practice and opinio juris

Custom can be universal, or local or regional

~ Asylum case (Colombia/Peru) (1950)

is there evidence of a regional custom?

is the custom invoked binding on the other party?

~ Right of Passage case (Portugal v India) 1960 (regional custom)

"constant and uniform practice ... accepted as law by the parties" as to free passage between Portuguese enclaves

Some customary norms may be practiced only within a particular region, creating a "local" customary law. Two countries are sufficient.

When considering the formation of bilateral custom, general formulae concerning custom will not supplant the need for case-by-case analysis.

As a general rule, the requirements of duration, consistency, and generality of practice, as well as opinio iuris, means that customary law is often outpaced by specific treaties. But this is not always the case. In the long term, customary law may be called on to mould and even modify treaty texts which cannot realistically be amended.

General principles of law

"The general principles referred to were those which were accepted by all nations in foro domestico (in a domestic court), such as certain principles of procedures, the principle of good faith, and the principle of res judicata, etc." (Lord Phillimore)

What are general principles?

- international law recruits certain principles from municipal law
- eg rules of procedure, good faith, res judicata [an issue decided by a court may not be reopened], ex injuria jus non oritur [no benefit can be received from an illegal act], unjust enrichment, estoppel
- Chorzow Factory case 1927 [the right to receive compensation]
- Equity as part of the international system
- Diversion of Water from the Meuse case (Netherlands v Belgium) (1937), opinion of Judge Hudson

Subsidiary means

1) judicial decisions
2) scholarly writings
3) resolutions of international orginisations
   - terms
   - intent
   - vote

- subsequent practice

"Subsidiary means of determination of rules of law"

- Not sources of law but "subsidiary means of determination of rules of law" – art 38(1)(d):
- **Judicial decisions**
- can be decisions of ICJ, other international courts and tribunals, domestic courts, arbitral tribunals
- **Note ICJ statute art. 59,** but many examples of ICJ

developing new rules of IL:

- Reparation case1949: UN has international legal personality
- Reservations case1950: rules on reservations to multilateral treaties
- Nuclear Tests case1974:effect of a unilateral act
- Anglo-Norwegian Fisheries case1951: drawing of straight baselines
- Notteböhm case1955: principle of real and effective nationality

- **"Teachings of the most highly qualified publicists"**

One problem is that writers will tend to reflect national or other **prejudices.**

Another problem is that many 'publicists' see their role as being to propagate **'new and better**' views rather than presenting the existing law.

Resolutions of UN General Assembly

Even when resolutions are framed as general principles, they can provide a basis for the progressive development of the law and, even, for the speedy consolidation of customary rules.

Some issues

How does new CIL evolve? De lege ferenda (with a view to future law)

The role of UNGA resolutions:

- can have binding effect: Namibia advisory opinion
- but generally not legally binding
- accepted as evidence of state practice and opino juris either of existing CIL or contributing to its formation. Eg. In Nicaragua case 1986, Nuclear Weapons opinion 1996
- some argue they can create "instant customary law"
- considerations apply to UNGA and any other IO of universal membership

Soft law can mean:

- non-binding instruments, eg GA resolutions, codes of conduct
- binding but vaguely worded or inchoate instruments. Eg. World Heritage Convention 1972

Jus cogens (peremptory norms)

Peremptory norms of international law from which no derogation is permitted

A body of supreme or "constitutional" principles

Originated in treaty law: a treaty provision that violates a jus cogens norm is void

No definition but includes eg. Prohibitions of aggression (use or threat of force), slavery, genocide, apartheid, torture, piracy and the right to self-determination

For purposes of the Vienna Convention, a peremptory norm of general international law is defined as a "norm accepted and recognized by the international community of states as a whole as a norm form which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character"

The effect of unilateral acts

Unilateral acts can bind a state

Declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations.

Public declaration, intention to be bound, even though not made within the context of international negotiation, is binding. Subsequent acceptance or even reply or reaction from other States is not 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.

It is from the actual **substance** of these statements, and from the **circumstances** attending their making, that the legal implications of the unilateral act must be deduced.

Nuclear Test cases: declaration by French president, was there an intention to give a legal undertaking when the statement was being made?