

Latin Glossary

- ***Erga omnes*** – ‘owed to all’ – obligation owed by all states so that any state may make a claim in the event of breach.
- ***Jus ad bellum*** – law regulating resort to armed force among states.
- ***Jus in bello*** – law regulating the ways and means of waging armed conflict; international humanitarian law.
- ***Jus cogens*** – A peremptory norm of customary international law which takes precedence over and nullifies any other inconsistent rule/principles.
- ***Jus gentium*** – concept of Roman law referring to general principles of law recognised or accepted by all nations.
- ***Opinio juris (sive necessitatis)*** – subjective element of customary international law; state’s belief that certain conduct required, permitted or prohibited by law.
- ***Pacta sunt servanda*** - general law principle that agreements must be complied with.
- ***Ultra vires*** – ‘beyond power’ – an authority which exceeds its lawful powers acts *ultra vires*.

WEEK ONE

International Law (IL) divided into Public IL and Private IL (aka conflict of laws).

Public International Law

- can be universal/general or regional
- no legislature, no system of courts (ICJ limited), no executive or governing entity
- does not fit Austin's positivist model – no sovereign issued commands backed by sanctions – relegated to 'positive morality' under this theory of jurisprudence
- primarily formulated by international agreements and customary rules.

Alternatives to coercion in IL

- maintenance of reciprocity
- rewards (eg: allegiances)
- self-help
- doctrine of consensus – demand for state consent > community acceptance

Values of IL

- aims for harmony
- regulation of disputes
- clarification/moderating claims and balancing interests
- sets out principles for state behaviour

United Nations – Principal Organs

- **General Assembly** – considers, discusses, makes recommendations - not legislative
- **Security Council** – instructs – 5 permanent and 10 rotating members (2yr terms)
- **Economic and Social Council** – 54 members for 3yr terms elected by Security Council. Initiates reports, makes recs prepares draft conventions
- **Trusteeship Council** – suspended in 1994
- **Secretariat** – departments and offices
- **ICJ** – 15 judges for a 9yr term. Judges elected by the GA and SC

WEEK TWO

Positivism – the rule of recognition provides validation and hierarchy for a set of primary rules to create a legal system.

The **Statute of the ICJ** is annexed to the Charter of the United Nations
Art 38(1) considered as providing a list of sources of international law generally:

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; (1. TREATIES)

b.) international custom, as evidence of a general practice accepted as law; (2. CUSTOM – general practices accepted as law)

c.) the general principles of law recognized by civilized nations; (3. GENERAL PRINCIPLES OF LAW)

d.) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Material Sources of IL – specify the content of a legal obligation or entitlement in a particular case – a source of obligation.

Formal Sources of IL – endow the obligation or entitlement with a legally binding character

Art 59 – decisions of ICJ do not create binding precedent (no *stare decisis*).

(1) TREATIES (material sources)

Agreement between two or more states / public international organisations. To regulate conduct according to its terms.

- a source of obligation and therefore a material source - the formal source is ***pacta sunt servanda***.
- Bilateral / Multilateral
- General = a widely adhered to multilateral treaty representing views of states as to substantive legal principles (legislative), potentially binding on non-party states in the sense of an obligation to comply with the customary norm the treaty may create.
- Particular = usually bilateral where the obligations are specific to the parties.
- Customary law of treaties is codified and developed by the **Vienna Convention of the Law of Treaties (VCLT)**.

(2) CUSTOM

Practice is considered a customary legal norm when:

- it is widespread
- non-observance results in sanction approved by the community (if public enforcement is absent, justifiable self-help is an alternative)

Elements of customary IL > Art 38 ICJ (formerly Permanent Court of International Justice)

(i) general practice (*usus*)

(ii) *opinio juris (sive necessitatis)* – state belief that a practice is required as a matter of legal right or obligation

Opinio juris transforms general practice into a rule of customary IL.

State Practice (*usus*)

Evidence = anything that demonstrates choices / conduct of state officials or persons under instruction by state officials.

Asylum Case (Colombia v Peru) (1950)

In order for a *usus* to constitute custom it must be: **constant** and **uniform practice**

Facts: Peru issued an arrest warrant for a Peruvian national that was granted asylum as a political refugee in Colombia's embassy in Lima. Colombia sought safe passage outside of Peru → rejected by Peru. Colombia relied on 'Latin American IL' rule permitting the state granting asylum to qualify a political offence. The ICJ held that it was not possible to make out constant and uniform practice with regard to the rule of qualification of the offence.

Anglo-Norwegian Fisheries Case (UK v Norway) (1951)

ICJ rejected UK argument that customary IL precluded drawing baselines longer than 10 miles across bays for the purpose of mapping the territorial sea area. State practice too inconsistent.

North Sea Continental Shelf Cases (Germany v Denmark, Germany v The Netherlands) ICJ Rep (1969)

Germany had separate agreements partially delimiting the continental sea shelves beneath the North Sea adjacent to their territories – the parties could not agree – dispute submitted to ICJ. The Court dismissed that Germany was entitled to a just and reasonable share. Held that to establish a new rule of customary IL, state practice, including that of states whose interests are affected, should have been both **extensive** and **virtually uniform** (occasional departure does not necessarily prevent emergence of a new rule).

The fewer instances of state practice said to support a new customary rule the more significant inconsistent state practice is. Greater weight is given to the attitudes of the affected states.

In the ***Nicaragua Case*** the ICJ stated that breaches of customary rules were not generally seen as indications of recognition of a new rule. Occasional departures from widespread and uniform practice will not deprive a rule of its customary character unless it is met with **protest** OR **justified** by reference to exceptions allegedly forming part of the rule.

- **Protests** weigh heavily against recognising a new rule.
- **Acquiescence** in the face of inconsistent conduct weighs heavily against recognition of a new rule. In the absence of protest against a new *usus* a state will usually be taken as having acquiesced, amounting to assent.
- **Persistent Objection** may result in a state not being bound by a customary IL rule. Rule: State must actively reject the practice (never acquiesce) and never have relied on the existence of such a rule for its own benefit. Although there is a view that any effect of this principle will be vitiated by a subsequent act that indicates acceptance. Scarce examples as it is difficult to maintain state decent -

Anglo-Norwegian Fisheries Case

Opinio Juris

- If general practice (*usus*) is the necessary objective element of customary IL – a belief that the practice is permitted/required/prohibited as a matter of legal right or obligation (*opinion juris*) is the subjective element.
- **Comity** – courtesy between states is *usus* however, it is not law due to the lack of *opinion juris*.
- Upheld by North Sea Continental Shelf case (para 77) – ICJ found no evidence that non-parties to the 1958 Geneva Convention on the Continental Shelf applying the boundary method did so believing themselves to be applying a mandatory rule of customary IL.

Treaties → Custom

A treaty may crystallise a customary rule already in the process of formation or influence international behaviour to an extent consistent and virtually uniform state practice emerges on its foundations.

North Sea Continental Shelf Cases

ICJ named three conditions for a treaty rule to generate customary IL:

1. fundamentally norm-creating character
2. widespread and representative participation in the treaty
3. extensive and virtually uniform adherence to treaty rule requirements.

In the **Nicaragua Case** the ICJ considered it necessary to search for separate evidence of opinion juris re: customary IL rule against the threat or use of force in int relations against the territorial integrity or political independence of any state, or in any other manner inconsistent with purposes of the UN.

Therefore, widespread and representative participation in a treaty is sufficient to establish general practice corresponding to the treaty rules, but separate evidence of opinion juris is required to prove the existence of those rules in customary IL.

Local Custom

Rights of Passage Case (Portugal v India) ICJ Rep (1960)

Portugal held enclaves of territory within India – Portugal claimed it had a right of passage to the territories and that India had interfered with that right. The ICJ held that a right of passage existed in regional custom. India's argument that practice between two states was not sufficient to form a local custom was rejected. The Court also held that there existed during the British and post-British periods a **constant** and **uniform practice** allowing free passage, continuing over 125yrs and unaffected by change in regime when India became independent.

However, Portugal had no right of passage of armed forces, armed police, arms and ammunition – passage of these categories could only take place with permission of the British authorities (*jus cogens* overrides local custom).

(3) GENERAL PRINCIPLES

Art 38(1) demonstrates that the ICJ is not authorised to proceed on the basis of non-legal considerations. Reinforced by 38(2) which provides separate authorisation to decide cases *ex aequo et bono* – with reference to non-legal conceptions of equity and fairness if the parties agree.