

(1) THE NATURE OF PUBLIC INTERNATIONAL LAW (PIL)

DEFINING INTERNATIONAL LAW:

Binding regime of principles/rules that regulate relations among states, individuals, other non-state entities

<i>Public international law</i>	<i>Private international law</i>
Law agreed to by states to govern relationships between states	Domestic law that regulates dealings by individuals/organisations across borders

Charter of the United Nations, Art 2(1):

- *Principle of sovereign equality of states:*
 - o No state can compel another to submit to judicial settlement of a dispute between them
 - o No state is bound by a new international rule without the state's consent

Growth of international law (post-WWII):

- *Actors:* states (traditionally only applied to states), international organisations, individuals
- *Rise of positivism (stressed notion of state consent):* what states agreed expressly/through non-rejection
- e.g. use of force (*jus ad bellum, jus in bello*); acquisition of territory; state jurisdiction; diplomatic/other immunities; law of treaties; state responsibility; law of the sea; use of outer space; international criminal/human rights/environment/investment/trade law (WTO law)
 - o There is now no aspect of world politics that can be fully understood without some knowledge in international law (*Scott*)

IS INTERNATIONAL LAW REALLY LAW?

Answer depends on what is meant by 'law' (*Aust*):

<i>Austin</i>	<i>HLA Hart</i>
Enforceability is an essential characteristic of any system of law, properly so called	Law derives its strength from societal acceptance (rules binding), not enforceability
Not law properly so called	International law is law (states recognised international law as binding), but not a legal system

Enforcement argument (*Brierly, Hall, Henkin, Jessup, Morgenthau*):

<i>Argument</i>	<i>Counter-argument</i>
Fails to constrain states' behaviour (no centralised enforcement mechanism to compel compliance)	Most states comply with international obligations at most times (interest in complying, convenient to comply), without any compulsion (law habit)
	e.g. infringing upon rights of foreign diplomats residing in own state/disregarding obligations under commercial treaty may compromise the protection of own diplomatic representatives in foreign capitals/ability to form beneficial commercial treaties in the future
	Therefore, the issue of enforcement becomes acute
States can usually flout international law when desired and get away with it	Violations are more common in domestic law than in international law

Enforcement in the form of self-help (*Fitzmaurice*):

1. *Countermeasure:* act not involving use of armed force that is contrary to international law, but is rendered lawful as a proportionate response to another state's previous illegal act
2. *Acts of restoration:* unfriendly acts in response to lawful but unfriendly acts/unlawful acts

Verbal/disclosure argument (*D'Amato, Waldock*):

- Arguments dealing with international law are done expressly in language of law (legal reasoning, terms)
- Foreign officers treat questions of international law as legal questions
- Diplomatic controversies, judicial/arbitrarily proceedings make use of legal forms/methods
- Precedents/authorities are referenced in arguments

INTERNATIONAL LEGAL PERSONS:

- An actor’s capacity to exercise rights, duties, powers on the international plane
- Not an absolute concept, personality of international actors varies
- Expansion in international legal personality in UN charter era (individual capacity, responsibility)

States:

Dominant subjects of international law, despite recent developments in international law (*Triggs*)

<i>Statute of ICJ, Art 34(1)</i>	Only states can be parties in cases before the court
<i>Doctrine of diplomatic protection</i>	States can protect their nationals in cases of mistreatment by another state in breach of PIL

What is a state - 1933 Montevideo Convention on the Rights and Duties of States, Art 1:

<i>(a) Permanent population</i>	No lower limit to size of population
<i>(b) Defined territory</i>	No lower limit to size of territory
	Need sufficient consistency of territory (not defined/undisputed boundaries)
<i>(c) Government</i>	Effective government, independent from influence/control of other states
<i>(d) Capacity to enter into relations with other states</i>	Operate as a (factually + legally) independent entity globally, engage in legal relations with other entities under international law
	<i>State is still independent:</i> restrictions upon state’s liberty do not place it under another’s legal authority (<i>Anzilotti J in Austro-German Customs Union case</i>)

- An entity is not a state if it declines to be one (e.g. Taiwan pre-2000)
- New states are automatically bound by international law upon attaining statehood (accepted view)

Can states lost statehood?

Legally, failed states retain legal capacity, but, for all practical purposes, have lost the ability to exercise it:

1. Internal/endogenous issues (territorial aspect)
2. Internal collapse of law and order
3. Absence of bodies capable of representing state internationally/being influenced by other states

<i>Failed states</i>	Somalia is ungoverned, lawless (still a state)
	<i>Continuation of statehood:</i> statehood is permanent for the most part

<i>Submerged states</i>	Climate change threatens to deprive some states of criterion of territory (<i>Crawford</i>) e.g. Pacific microstates (unclear if they are still states)
	<i>Permanently submerged territory:</i> potential for the state to still maintain a claim to statehood

State sovereignty over territory, maritime zones, airspace:

Sovereignty in relation to territory:

‘Right to exercise therein, to the exclusion of any other state, the functions of a state’ (*Palmas case*)

Acquiring title to new territory:

1. *Cession:* voluntary transfer of territory between states
2. *Occupation:* territory must be uninhabited/terra nullius (*Western Sahara case*)
 - a. *Terra nullius:* no social, political organisation in territory
3. *Prescription:* longstanding position (stay at land for period of time), title prevails over title of original

- Territory cannot be acquired by mere discovery/by conquest
- Individuals without state jurisdiction cannot occupy land (must be acting on behalf of the state)

Western Sahara Case:

Decision	W could not be acquired by occupation (W was not terra nullius)
Principle	<i>Claim to sovereignty based upon continued display of authority (acquisition by prescription):</i> <ul style="list-style-type: none"> - Intention, will to act as sovereign + actual exercise/display of authority

Island of Palmas (Miangas) Case:

Facts	Spain discovered Palmas, transferred title to US
Decision	Palmas is a part of Netherlands' territory (acquired by continuous, open/public, peaceful display of State authority over a long period of time)
Principle	<p><i>Mere discovery is insufficient:</i></p> <ul style="list-style-type: none"> - Territorial sovereignty displayed at the time (e.g. placing flag) must continue to exist <ul style="list-style-type: none"> o Subsequent act of authority that is open, public - Title of peaceful, continuous display of state authority over land will prevail over title of acquisition of sovereignty not followed by actual display of state authority <p><i>Remote islands:</i></p> <ul style="list-style-type: none"> - Need not prove that government is on island for a certain period of time - Low level of activities over a period of time is sufficient for occupation, to give title

Maritime space:

1982 UN Convention on the Law of the Sea

1. <i>Territorial sea:</i> all coastal states entitled to a territorial sea (same rights over this as they do for land)
2. <i>Contiguous zone</i>
3. <i>Exclusive economic zone:</i> no sovereignty, resource rights over resources in EEZ
4. <i>High seas:</i> open to use by all states, unregulated, owned by mankind
5. <i>Continental shelf</i>
6. <i>Deep seabed:</i> managed by international sea bed organisation, regulated, owned by mankind

Airspace and outer space:

1967 Treaty on the Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and other Celestial Bodies

<i>Art 1</i>	States have sovereignty over airspace above their territory
<i>Art 2</i>	Outer space (moon, celestial bodies) is not subject to national appropriation by claim of sovereignty

Contemporary ideas (common heritage, joint management of resources, sustainable development):

Antarctica:

- Claimed by 7 states (Australia is the largest claimer at 42%)

1959 Antarctic Treaty

<i>Art 1</i>	Antarctica shall be used for peaceful purposes only, measures of a military nature are prohibited
<i>Art 2</i>	Use of military personnel/equipment for scientific research/other peaceful purposes is permitted

<i>Art 4</i>	Freezes territorial claims to Antarctica (neither endorses nor rejects existing claims)
	Prevents acts/activities by claimant states constituting a basis for asserting/supporting/denying a claim to territorial sovereignty over Antarctica

<i>Art 6</i>	Treaty does not affect the rights of any state under international law with regard to the high seas within the area to which the treaty applies
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States should cooperate in their research endeavours

1991 Environmental Protocol

<i>Art 2</i>	A natural reserve, devoted to peace, science
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Arctic:

- 8 States have clearly recognised territories within Arctic
- No solidary, overarching legal architecture for management of land/sea areas within Arctic region
- No fundamental disputes over Arctic sovereignty, no strong tradition of Arctic cooperation

Self-determination (*ius cogens rule – highest law*):

UN Charter Art 1(2), 1966 ICCPR Art 1, 1966 ICESCR Art 1

All peoples have the right of self-determination

East Timor Case

- *ius cogens rule*: highest law
- *erga omnes right*: obligations owed to all states, all peoples

Western Sahara Case:

Free, genuine expression of will
- Does not extend to claims for independence by minority groups in a non-colonial context

- Right to determine freely the political status, freely pursue economic, social, cultural development
- Immediate steps in non-independent territories, to transfer all powers to the inhabitants, without any conditions, in accordance with their freely expressed will, desire (enjoy independence, freedom)

Kosovo Advisory Opinion

- No prohibition of declarations of independence (in international law)
- Many new states have come into existence upon exercising the right to self-determination

Availability of the right does not mandate a particular/defined outcome:

- Need not involve creation of new/independent state, can involve lesser forms of increased autonomy
 - o Free association/integration with independent state, succession

Recognition of states and governments:

- Willingness to engage with the state as a member of the international community

States (international issue):

<i>Declaratory theory (largely prevails)</i>	<i>Constituent theory</i>
International recognition is irrelevant (recognition is a mere statement of fact, look at Montevideo criteria)	Recognition constitutes a new state

Stimson Doctrine of non-recognition:

- No recognition of the acquisition of territory/establishment of a new state if brought about by unlawful means (e.g. illegal use of force)
 - o Australia rejected this, recognised that East Timor in fact belonged to Indonesia (after Indonesia illegally invaded East Timor)

Governments (domestic issue):

- Unconstitutional change in government in a foreign state (e.g. popular revolution/military coup)
- *Australia no longer affords formal recognition to governments*
 - o Avoid giving seal of approval to undemocratic regimes
 - o Relations with new governments are determined on a case to case basis
 - o (Abolished former policy of routinely recognising new governments)

Sierra Leone Telecomm v Barclays Bank

Facts	S wholly owned by government (overthrown by coup), S had account with B, B refused to make payments requested as new government nominated different signatories
Issue	Whether it is the new government is the constitutional government of the state
Decision	No, had no control over nation outside capital (administrative affairs), civil unrest
Principle	<i>Recognition depends on:</i> <ul style="list-style-type: none"> - Is it the constitutional government of the state? - Degree, natural, stability of administrative control by new government over territory - Dealings of new government with other governments - Extent of international recognition of new government

Luther v Sagor

UK courts would not recognize/enforce the laws/other public acts of an unrecognized government

International organisations:

- States voluntarily agree through a treaty with its own international legal personalities from the states themselves

UN Charter:

Creates a system of collective security, control activities of all states threatening international peace/security

<i>Art 1</i>	Maintain international peace/security, develop friendly relations among states, achieve international cooperation in solving international issues, coordinate/harmonise actions to achieve such ends
<i>Art 43</i>	Members must make armed force available to security council (monopolise the use of force)

<i>Sovereign equality of members</i>	Non-intervention in domestic jurisdiction, prohibition on threat/use of force, states must fulfil their obligations in good faith/resolve disputes peacefully
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Gillian Triggs:

<ul style="list-style-type: none">- Catalyst for collective action, identify/promote world values, collective interests- Means of problem solving where a global response is required

UN Institutions:

Security Council (UNSC):

- 15 members, 10 non-permanent members (elected every 2 years, Australia is a current member)
 - o 5 permanent members with right of veto (Russia, China, USA, UK, France)
- Responsible for maintaining international peace/security [*Art 24(1)*]
- Decisions are binding on all UN members

General Assembly (UNGA):

- All UN members represented
- Consider, discuss, recommend [*Arts 10, 11*]
 - o Consider threats to international peace/security (not make recommendations for disputes under consideration by UNSC unless requested to do so by UNSC)
- Develop international law (sponsor, promote important treaties)
 - o *Sixth Committee (legal)*: aids UN's mandate of progressive development of international law

International Court of Justice (ICJ):

- 15 permanent members (elected every 9 years)
- *Statute of the ICJ* part of *UN Charter* (all members of UN are parties to *Statute of ICJ*)

Secretariat:

- Headed by UN Secretary General (appointed by UNGA on recommendation of UNSC)

Trusteeship Council:

- Supervise administration of other nations of non-self governing territories
- Largely unused body (process of self-determination)

Economic and Social Council (ECOSOC):

- 54 members elected (on basis of equitable geographic distribution) by UNGA
- Coordinate many activities of special activities

UN's legal personality:

- International legal personality, rights under international law
 - o UN has capacities, immunities within the territory of members as is necessary to exercise its functions/fulfil its duties
 - o Separate legal person, but it cannot exist in isolation of its members (cooperation of members is critical)

Reparations for Injuries Suffered in the Service of the UN Case:

Facts	
Issue	Whether UN could pursue a claim against Israel regarding Israel's negligent failure to protect a UN official from being killed by a private terrorist group
Principle	<p><i>Organisation's legal personality depends on purposes/functions specified/implied in constituent docs</i></p> <ol style="list-style-type: none">1. Achieving the aims of <i>UN Charter</i> requires UN to have an international legal personality2. <i>UN Charter</i> does not expressly provide that UN has capacity to include in claim, damage caused to agent (protection ensures agent's efficient/independent performance for UN) <p><i>UN does have legal personality</i></p> <ol style="list-style-type: none">1. Bring claims against members for breach of international obligations towards it2. Claims can include reparations from injury caused to it/agent<ol style="list-style-type: none">a. UN does not represent the agent in claims for reparations for injury to an agent (asserting own right to demand members to fulfil obligations towards UN)b. It is irrelevant if the agent possess the nationality of the defendant state <p><i>UN has a different legal personality (international rights/duties) to states</i></p> <ul style="list-style-type: none">- (e.g. UN does not have the right to acquire territory)

Responsibility of international organisations for intentionally wrongful acts:

Behrami v France:

Facts	<ul style="list-style-type: none">- Children killed/injured by bomb dropped, not cleared by NATO forces (UN's negligence)- UN outsources responsibility to member states (could be held responsible for negligence)
Decision	UN is responsible, as they had effective control over individuals (who were placed at the disposal of the UN by their governments)
Principle	International organisations may be responsible for wrongful acts, even when they are committed by the agents of the international organisations who are attached to states

Corporations:

- Personality under domestic law

Kiobel v Royal Dutch Petroleum:

Issue	Whether a corporation can be a person (Can you sue a corporation under the Act? Can a corporation ever commit a violation of international law?)
Principle	<ul style="list-style-type: none">- Corporations are not persons under international law- Corporations (unlike individuals) cannot be made liable for violations of international law<ul style="list-style-type: none">o International crimes are committed by individuals (not abstract entities/corporations)

Individuals:

Traditionally only regarded as mere objects of international law (with no independent legal existence)

- States responsible for actions their actions/entitled to protect them from actions by other states
- Development of the individual legal personality under international law:
 - o Individual personality is different from state personality (only states can bring action in ICJ)

1. Advent of international human rights law (rights)

Individuals can acquire directly rights under treaties (if intended by the contracting parties)

1966 ICCPR	Protect persons from mistreatment by own national state/other state which exercises jurisdiction over them
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2. International criminal law (responsibilities)

Obligations of international law bind individuals directly regardless of the law of their state
- Crimes against humanity = offence even if committed in line with their state's law

1998 Rome Statute of the International Criminal Court	Individual criminal responsibility for crimes against PIL (e.g. war crimes, crimes against humanity, genocide)
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Other non-state entities:

Non-governmental organisations:

1987 Montreal Protocol on Substances that Deplete the Ozone Layer, Art 11(5)	Any body/agency (international/national, governmental/non-governmental), qualified in fields relating to protecting the ozone layer may be represented, participate in a meeting of the parties (unless over 1/3 of the parties object)
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Indigenous groups:

2007 Declaration on the Rights of Indigenous Peoples, Art 3	Right to self-determination (right to freely determine their political status, freely pursue their economic, social, cultural development)
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(2) SOURCES OF PUBLIC INTERNATIONAL LAW

- Every legal order must have some mechanism to determine legal rules
 - o *HLA Hart*: rules of recognition (what do we recognise as legally relevant/irrelevant?)
 - o Define how legal norms are created, changed/abrogated

<i>Domestic law</i>	<i>International law</i>
Formal, material sources of law	No formal law-making, only material sources of law
Constitution, Acts of Parliament, Regulations, judgment of courts	Treaties, customary international law, general principles, judicial decisions, academic writings

<i>Formal source of law</i>	<i>Material source of law</i>
One from which a rule of law derives its force, validity	One from which is derived the matter of law (substance of the rule)
Rule is legally binding if it meets the requirements of a custom (formal source)	Substance of the rule is indicated by state practice (material source)

Accepted sources of PIL:

- No global legislature/court with jurisdiction over all states

Statue of the ICJ, Art 38(1):

- Generally regarded as a complete statement of the sources of IL (*Brennan J in Polyukhovich case*)

<ul style="list-style-type: none"> (a) International conventions (treaties) recognised by the disputing state (b) International customary law (c) General principles of law recognised by civilised states (d) Judicial decisions, writings of publicists (subsidiary means)

SS Lotus (France v Turkey)

Facts	F govt tried to prove existence of a rule that the flag state has exclusive jurisdiction over incidents on board its vessels on the high seas (writings of publicists; court decisions; conventions)
Decision	No such rule existed, T entitled to exercise criminal jurisdiction
Principle	<p><i>Territorial sovereignty:</i></p> <ul style="list-style-type: none"> - State cannot exercise powers in another state’s territory (need permissive rule to the contrary) - States can exercise jurisdiction in its own territory, in respect of cases relating to acts taken place abroad <p><i>Vessels on the high seas are subject to no authority except that of the state whose flag they fly:</i></p> <ul style="list-style-type: none"> - But, states can in their own territory exercise jurisdiction over acts occurred on board a foreign ship on the high seas - States can regard collisions that have effected their ship as having been committed in its territory, prosecute accordingly, the delinquent

TREATIES:

- Agreement between states/international organisations that is governed by law
 - o Multi-lateral (multiple states)/bi-lateral (two states)
- *Proliferation in modern international law*: treaties are the most important/main source of PIL
- Source of mere obligation (treaty contracts) vs. broader impact, establishing general standards (develop new customary international law)

1969 Vienna Convention on the Law of Treaties (VCLT), Art 2

Written agreement between states that is governed by international law

1969 Vienna Convention on the Law of Treaties (VCLT), Art 34:

Binding only upon parties to treaties, create no rights/obligations for third states without their consent

Effect of signing, but not ratifying a treaty (VCLT, Art 18):

States under the obligation to refrain from acts which would defeat the object, purpose of the treaty

Material source of law (not formal source of law):

- Act of sovereign will in concluding a treaty does not create a legally binding obligation
- Treaties indicate what legal obligation requires in a certain case (no legally binding obligation exists)
 - o Legal obligations exist independently
- Only 'law' that enters into treaty rights/obligations is derived from the principle of *pacta sunt servanda* (an antecedent general principle of law)
 - o Law is that the obligation must be carried out, but the obligation is not, in itself, law
 - o Treaty may reflect/lead to law, but in its inception, is not law

CUSTOMARY INTERNATIONAL LAW:

- International custom, as evidence of a general practice accepted as law [*Statute of ICJ, Art 38(1)(b)*]

<i>State practice (objective element)</i>	<i>Opinio juris (subjective element)</i>
Widespread practice by a sizeable number of states	Accepted as law, belief that practice is obligatory

Binds all states:

- Even those states that never expressly/impliedly consented to the customary rule
- Even those states whose practice/*opinio juris* did not contribute to the customary rule's emergence

North Sea Continental Shelf Cases (Germany v Denmark) (Germany v Netherlands)

A State's silence/absence of objection regarding a customary international rule is seen as acceptance

Anglo-Norwegian Fisheries case

Acquiescence cannot be established unless state has actual/constructive knowledge of the claim being made

Persistent objector state (narrow exception):

- State must object to the rule from its very emergence to its existence, maintain this objection consistently thereafter (e.g. continue issuing statements opposing the rule for a period of time)

Anglo-Norwegian Fisheries Case (UK v Norway)

Facts	Some states adopted 10 mile rule, other states adopted different limit
Issue	Is there a rule of custom prohibiting straight base lines over 10nm in length?
Decision	No customary norm, even if there was a customary norm, Norway was a persistent objector

Ius cogens:

- Proscribes conduct that is fundamentally unacceptable to the international community
 - o States cannot make a treaty contrary to the rule of *ius cogens*

Local/regional custom:

- Customary norm emerges as between a small group/two states

Establishment of regional customary law:

Asylum Case (Columbia v Peru)

Facts	<ul style="list-style-type: none">- C granted de la Torre asylum in its Embassy in Lima, Peru- P refused C's request to allow de la Torre to leave Peru- C invoked 'American international law in general' to allow C to qualify offence as political
Decision	No such regional customary norm existed
Principle	<p><i>Party relying on alleged regional custom must prove that the custom:</i></p> <ul style="list-style-type: none">- Is established in a manner that has become binding on the other party- Has constant, uniform usage as practiced by, accepted as law by the States in question<ul style="list-style-type: none">o <i>Usage:</i> treaties, international/national court decisions, national legislation, diplomatic correspondence, opinions of national legal advisers, practice of international organisations <p><i>Local/regional customs:</i></p> <ul style="list-style-type: none">- Amongst a group of states/2 states in their relations <i>inter se</i>, general customs can be binding upon the entire international community [Art 38(1)(b)]- May supplement/derogate from general customary international law (subject to rules of <i>ius cogens</i>)

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

Facts	<ul style="list-style-type: none">- UK forces arrested Iraqi nationals in Iraq, transferred into custody of Iraqi government- Iraqi nationals contended there is an evolving practice across Europe<ul style="list-style-type: none">o (No EU state returns a person to a nation in which they are at risk of death penalty)
Decision	Material in this case was not strong enough to establish a rule of regional custom
Principle	<p><i>Regional customary international law can exist (meet high threshold to establish rule as custom):</i></p> <ul style="list-style-type: none">- All states in region accept the rule- Constant, uniform usage practiced by the states in question

Requirements for establishing customary international law:

(1) Evidence of state practice:

- Any material which demonstrates choices, conduct of persons acting in their capacities as state officials/under instructions or control of state officials

Speeches by state officials/diplomatic, transcripts of parliamentary proceedings, domestic legislation, decisions of domestic courts/tribunals, diplomatic correspondence, historical records, press releases, communiqués, policy statements, reports of military/naval activities, comments by governments on the work of international bodies, voting records in international forums (e.g. UN General Assembly), official manuals issued to diplomats/armed forces, treaties

North Sea Continental Shelf Cases (Germany v Denmark) (Germany v Netherlands)

Facts	<ul style="list-style-type: none">- Disagreement over drawing lines delineating the North Sea Continental Shelves- N/D argued <i>Geneva Convention on the Continental Shelf</i>, Art 6 set out custom (G not a party)
Decision	Art 6 did not establish a customary rule (not of a fundamentally nor-creating character, limited widespread/representative participation in convention)

Nicaragua case:

Facts	<ul style="list-style-type: none">- N claimed US unlawfully engaged in military activities against it- US contended ICJ did not have jurisdiction
Decision (ICJ)	Norms relied upon by N (prohibition on use of force, state intervention) are part of customary international law, UN charter and custom have separate applicability

1. Provision is of a *fundamentally norm-creating character*

<i>North Sea Continental Shelf Cases</i>	Set out a clear rule in clear terms (no uncertainty/vagueness)
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2. *Consistency of practice over time*

<i>Nicaragua case</i>	State conduct inconsistent with a rule is treated as a breach of the rule (not as an indication of the recognition of a new rule)
	If a state acts in a way prima facie incompatible with rule but defends conduct (exceptions/justifications within rule), the conduct confirms rule (not weakens)

3. *Very widespread, representative participation in convention (reasonable number of the 194 states)*

- a. Custom cannot be solely practiced by developed/developing states
- b. Reasonably representative geographically (e.g. wealthy/less-wealthy states)

<i>North Sea Continental Shelf Cases</i>	Including states whose interests are specially affected
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<i>Nicaragua case</i>	Refer to the practice of states as a whole - It is not sufficient that only parties to the case share that view of what the law is
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4. *No precise length of time during which a practice must exist*

- a. Normally the practice needs to be over a *lengthy period*
 - i. *Need not be entirely uniform*: can have some defections/apparent breaches

<i>North Sea Continental Shelf Cases</i>	<i>Practice can be established as a norm very quickly/instantly</i> - State practice must be virtually extensive, uniform - Including states whose interests are specially affected
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North Sea Continental Shelf Cases

Treaty (multi-lateral) provision relates to custom, as the provision may:

1. Declare/codify custom at the time the provision is adopted;
2. Crystallise custom, states agree on provision to be adopted during treaty drafting process;
3. Become accepted, followed by states as custom in their practice after treaty's adoption (lead to progressive development of custom)

There are no grounds for holding that:

Customary international law is comprised of rules identical to those of treaty law, the latter 'supervenes' the former, so that customary international law has no further existence of its own

Nicaragua case:

Separate treatment/applicability of two rules of the same content (rule contained in a treaty parallels with rule of customary international law)

(2) *Opinio juris:*

North Sea Continental Shelf Cases (Germany v Denmark) (Germany v Netherlands)

- Consistent practice accompanied by a belief that the state practice is obligatory
 - o Frequency/habitual character of the acts ins not in itself enough
 - o *Difficult to establish*: reason underlying state's adoption/acceptance of practice is unclear

Nicaragua case:

- *Opinio juris* is presumed to exist if practice is uniform
 - o *Stricter approach (Nuclear Weapons case)*: constant, uniform practice, feeling of obligation

Notionally as important as state practice?

- *Opinio juris* is less important where there is extensive state practice
 - o Gives rise to rebuttable presumption that there is sufficient *opinio juris*
- *Opinio juris* is more important where there is limited state practice

UN General Assembly resolutions as evidence of customary international law:

- Recommendatory, not in and of themselves legally binding

Exceptions (legally binding on UN members):

<i>UN Charter, Art 4(2)</i>	Admission of new members
<i>UN Charter, Art 4(5)</i>	Suspension from membership
<i>UN Charter, Art 4(6)</i>	Expulsion from membership
<i>UN Charter, Art 4(17)</i>	UN budget

Influence on international law, development of customary international law:

- Affirm existing recognised customary norms
- Create new customary norms (evidence state practice, *opinion juris*)
- Authoritative interpretation of UN Charter

Flores v Southern Peru Copper Cooperation

Resolutions/declarations of international organisations are not proper sources of customary international law

- Merely aspirational, never intended to be binding on member states of UN

OTHER SOURCES OF INTERNATIONAL LAW:

General principles of law recognised by civilised nations:

- Use general principles to resolve a dispute where treaties/custom cannot be used (avoid *non liquet*)
 - o General principles recognised in legal systems of independent

Principles of equity:

Chorzow Factory case:

A party cannot take advantage of its own wrong

River Meuse case

When two parties have assumed an identical obligation, one party that has not performed the obligation cannot take advantage of the other party's similar non-performance of the obligation

Estoppel:

ARA Libertad (Argentina v Ghana):

Decision	G estopped from denying immunity of A's vessel, G freely accepted the vessel in its port + that it would have immunity in its port, reliance by A to its detriment
Principle	<i>Estopped is an accepted principle in international law:</i> <ol style="list-style-type: none">1. <i>Procedural</i>: consequences as to the possibility for a party to object to proceedings2. <i>Substantive</i>: barring contradictory legal positions taken by a party to the dispute