

General

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
- international conventions, whether general or particular, establishing rules expressly recognised by the contesting states;
 - international custom, as evidence of a general practice accepted as law;
 - the general principles of law recognised by civilised nations;
 - subject to the provisions of Art. 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.

☑ Rationale for sources

- “International law provides a normative framework for the conduct of interstate relations”.
- The “diffused character” of the sources sheds light on the decentralisation of international law-making.
- Hence the sources of the public international law articulate the rules of the system.
- International law operates on the general consent of the nations.
- Evidence of normative consensus among states and other relevant actors concerning particular rules or practices is all-important.

☑ Primary Sources

- International Conventions (treaties)
- Customary International Law
- General Principles of Law

☑ Secondary Sources (“evidence”)

- Judicial Decisions – compromise between common law system and civil law systems (which are much more code based)
- Teachings of most highly qualified publicists

International Conventions (Treaties)

- ☑ A treaty is defined 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. 2\(1\)\(a\), VCLT](#)

Customary International Law

- ☑ Custom consists of unwritten rules evinced from the generality and uniformity of the practice of States and is adhered to by such states out of a sense of legal obligation or *opinio juris*: [North Sea Continental Shelf Cases](#)
- State practice
 - Accept as law – *opinio juris*
- ☑ Custom can be universal, or local or regional: [Asylum case](#).

State practice

☑ What is the material source of custom / State practice?

- May come in the form of treaties, decisions of international and national courts, national legislation, opinions of national legal advisers, the practice of international organisations, policy statements, press releases, official manuals on legal questions, including manuals of military law, executive decisions and practices, comments by governments on work of the International Law Commission and diplomatic correspondence.
 - ▶ “In the present context, **State practice** of particular significance is to be found in the judgments of national courts faced with the question whether a foreign State is immune, the legislation of those States which have enacted statutes dealing with immunity, the claims to immunity advanced by States before foreign courts and the statements made by States, first in the course of the extensive study of the subject by the International Law Commission and then in the context of the adoption of the United Nations Convention: [Nicaragua \(Merits\) case](#).”

☑ General Standard

- The asserted rule must be of a “**fundamentally norm-creating character**”: [North Sea Continental Shelf Cases](#)
- Duration of practice:
 - ▶ Usually be over a “considerable period of time”, but **a shorter period is not a bar** if it is possible to show “**extensive and virtually uniform**” State practice, including **specially affected States**: [North Sea Continental Shelf Cases](#)
 - However, the passage of time can also be evidence of generality and uniformity.
- Consistency
 - ▶ “Constant and uniform usage”: [Asylum case](#).
 - A customary norm of international law arises in consequence of the **repeated** action of states.
- Generality
 - ▶ Must be general recognition of a rule/legal obligation: [North Sea Continental Shelf Cases](#)
 - It is not enough to look at the practice of the States in dispute: [Nicaragua \(Merits\) case](#).
 - You would need to have “**very widespread and representative participation in the convention** ... provided it included that of States **whose interests were specially affected**”: [North Sea Continental Shelf Cases](#)

- However, State practice **need not “be in absolute conformity”**: [Nicaragua \(Merits\) case](#).

Opinio Juris

- ☑ State practice “should have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved: [North Sea Continental Shelf Cases](#)
 - **Opinio juris** in this context is reflected in particular in the **assertion** by States claiming immunity that **international law accords them a right to such immunity from the jurisdiction of other States**; in the **acknowledgment**, by States granting immunity, that **international law imposes upon them an obligation to do so**; and, conversely, in the **assertion** by States in other cases of a right to exercise jurisdiction over foreign States”: [Nicaragua \(Merits\) case](#).
- ☑ Opinio juris cannot be in the strict sense considered a ‘legal obligation’, it **arises from mere belief**.

Treaty v Customary International Law

- ☑ Function of a treaty
 - Treaties can generally, but not always, serve as evidence of opinio juris.
- ☑ Can a rule in a treaty also be or become part of custom?
 - A treaty provision may relate to custom in one of three ways: [North Sea Continental Shelf Cases](#)
 - ▶ It may be declaratory of custom at the time that the provision is adopted;
 - The provisions of the treaty are the codification of customary international law, and thus will be bounding non-treaty party as well.
 - ▶ It may crystallise custom, as States agree on the provision to be adopted during the treaty drafting process.
 - The treaty is the final and decisive step in making the customary law.
 - ▶ The provision may come to be accepted and followed by States as custom in their practice after the treaty’s adoption.
 - The treaty develops the custom a little, but still no custom.
- ☑ Customary law operates independently of treaty law: [Nicaragua \(Merits\) case](#).
 - Discharge of obligation
 - ▶ Termination or suspension of a **treaty** on the ground of violation by the other party of a “provision essential to the accomplishment of the object or purpose of the treaty” **means exemption of the obligation of the other party**.
 - ▶ But in the domain of **customary international law**, the failure of the one State to apply the one rule **does not justify the other State in declining to apply the other rule**.
 - Methods of interpretation and application
 - ▶ The organs competent to verify the implementation of the treaty and the customary international law are different. Accordingly, the interpretation and the application may vary.
- ☑ Whether a treaty overrides a customary international law, depends on:
 - **If a treaty was entered into after a custom has been established**, it can be said that the treaty will govern as regards the parties who entered into it. This is so because, the State parties’ ratification of that treaty is an expression of their consent to be bound by such, and the principle of pacta sunt servanda should be observed.
 - **If a treaty was entered into before a custom develops**, the rules are not clear. It would seem that custom, being the latter intention, should prevail. This, however, would run counter to the very nature of a treaty. In the [North Sea Continental Shelf Cases](#), the court attempted to reconcile treaties with custom. In practice, therefore, the solution to this situation would be to reconcile custom with treaty provisions.

Persistent objector

- ☑ **General rule**: persistent objector occurs when the state, **from the very beginning**, has expressly objected to the applicability of the said customary behaviour to its own State: [Anglo-Norwegian Fisheries case](#)
- ☑ **Exceptions**: some rules of customary international law are rules of ius cogens, persistent objector is not a justification for violation of the ius cogens.

General Principles of Law

- ☑ A selective approach of international tribunals in choosing, editing and adapting elements from other legal systems “insofar as they are applicable to relations of State”.
- ☑ General principles that have been applied include the following:
 - Principles of equity: [Diversion of the River Meuse, PCIJ](#)
 - No State can profit from its own wrongs: [Chorzow Factory Case: Indemnity](#)
 - States owe reparation for wrongs: [Chorzow Factory Case: Merits](#)
 - Rules of procedural fairness, e.g. good faith / estoppel
 - Rules of evidence and judicial procedure, such as res judicata

Judicial Decisions

- ☑ Referred to in art. 38(1)(d), subsidiary means as not formal source of law/precedent but regarded **often as evidence of the law**.
- ☑ Where there is no stare decisis in international law?

- This is so because first, the ICJ **only derives its jurisdiction from the consent of the State**. Without this consent, the ICJ has no jurisdiction at all to determine the rights and obligations of States.
- [Art. 59 of the Statute of ICJ](#) expressly provides “the decision of the Court has no binding force except between the parties and in respect of that particular case.”
- ✓ Therefore, the effect of this would be that State-parties cannot oblige the court to decide on their case in the same manner that the Court decided in previous similar cases. At most, these decisions are highly persuasive but not binding upon the Courts.

UN Resolution

- ✓ As a general rule, UN Resolutions are NOT binding.
 - However, they serve as highly persuasive evidence of the States’ consent to the subject of the Resolution and may therefore be evidence of customary law.
- ✓ **Exception:** There are certain UN Resolutions that are binding, depending on the subject of the Resolution. When made under Art. VII of the UN Charter (Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression) of the Charter, resolutions are binding.

Soft Law

- ✓ “Soft law” consists of written instrument that spell out rules of conduct that are not intended to be legally binding, so that they are not subject to the law of treaties and do not generate the *opinio juris* required for them to be state practice contributing to custom.
- ✓ They have not, but are in the process of, achieving the status of custom. → Therefore, contribute to the customary law.
 - However, they are not really law, hence called soft law.
 - Examples include the [Helsinki Final Act 1975](#), the [Bonn Declaration on International Terrorism 1978](#); and the [Rio Declaration on Environmental and Development 1992](#).

Theories of Interaction

☑ Monism

- Public international law and municipal law one and the same system, hence international law can be applied directly within the domestic sphere.

☑ Dualism

- Public international law and municipal law are separate systems of law that operate independently (not affinity with positivist theories of law)
- In practice, pluralistic systems.

	Municipal Law	International Law
Source	<ul style="list-style-type: none"> • Custom grown up within the boundaries of the State concerned, and • Statutes enacted by law-making authority. 	<ul style="list-style-type: none"> • Custom grown up among States, and • Law-making treaties.
Social Relations	<ul style="list-style-type: none"> • State-person relations, and • Person-person (interpersonal) relations 	State – State relations
Substance	The law of the sovereign is over individuals.	The law is not over, but between states, and therefore is the weaker law

☑ Harmonisation

- Two separate orders, but neither superior. Judges should seek reconciliation of rules from both systems

Municipal Law in International Law

☑ Municipal Law as a Source of Customary International Law (State Practice)

- As evidence of state practice and opinio juris: [Statute of the ICJ, Art. 38\(1\)\(b\)](#)
- As evidence of general principles of law recognised by civilised nations: [Statute of the ICJ, Art. 38\(1\)\(c\)](#)

☑ It is a fundamental principle of international law that a state may not invoke absent or inconsistent provisions of its domestic law as a justification for failing to discharge its international legal obligations.

- [Alabama Claims Arbitration \(US/Great Britain\) 1872](#)
- [Art. 27 VCLT](#)

Customary International Law in Municipal Law

☑ Incorporation → monist position

- International law is automatically part of municipal law and remains so unless displaced.

☑ Transformation → dualist position

- International law only operates in municipal law when adopted by judicial decision, legislation or long-established common law custom: [Trendex Trading v Central Bank of Nigeria \(1977\)](#) → UK approach

☑ Problems with incorporation/transformation dichotomy

- Does not describe complex reality of international law's influence

Australian Law and Customary International Law

☑ Relationship between common law and international law

- International law is not as such part of the law of Australia: [Chung Chi Cheung v The King \(1939\)](#)
- International law is one of the sources of our law, and: [Chow Hung Ching v R \[1948\]](#)

☑ Incorporate & Transformation approach

❖ Incorporate & Transform international law to common law

- In terms of incorporation of international law, if the contemporary notion of the international law is not inconsistent with the domestic common law, the Court is free to adopt such rules: [Mabo case](#)
- However, if the international law is inconsistent with domestic common law
 - ▶ Generally speaking, Australian courts will not adopt an international law which is inconsistent with domestic common law unless legislation transforms the international law into domestic system: [Nulyarimma v Thompson \[1999\]](#)
 - There is no requirement for the common law to develop in accordance with the international law: [Western Australia v Ward \[2002\]](#), rationale is that international law itself is often vague and conflicting.
 - ▶ In addition, further two questions may be asked when the contemporary international law is inconsistent with the domestic common law system: [Mabo case](#)
 - Whether the common law is an essential doctrine of our legal system, and
 - Whether it is disproportionate to the benefit flowing from the overturning
- ✓ If the answer is YES, the common law system should not be overturned because the common law does not necessarily conform with international law.

✓ However, common law may be changed if the international law declares the existence of universal fundamental rights: [Mabo case](#)

❖ **Incorporate & transform international law to statute**

- When the statute is not ambiguous in itself, unincorporated international law should not be adopted in interpreting the statute: [Western Australia v Ward \[2002\]](#)
 - It is a matter for the Parliament to incorporate the international law, not the Court.
- When the statute is ambiguous, unincorporated international law may assist in determining the content of the common law: [Western Australia v Ward \[2002\]](#)

❖ **Incorporate & transform international law to Constitution**

- International law in regards of fundamental rights should be taken into consideration when interpreting a provision of the Constitution if the provision is not clear enough and the so considered fundamental rights do not conflict with the provision of the Constitution: [Newcrest Mining \(WA\) Ltd v Commonwealth](#).
 - Rationale is that international law is a legitimate and important influence on the development of the common law and constitutional law, therefore, when there is an ambiguity of the Constitution, it should be adopted as the fundamental rights is 'undergoing evolution'.
- If the provision of the Constitution is clear, no unincorporated international law and personal opinion should be adopted: [Newcrest Mining \(WA\) Ltd v Commonwealth](#).

☑ **Effect of incorporation and transformation**

- The rule of customary international law, once adopted or received into domestic law have the 'force of law' in the sense of being treated as having modified or altered the common law: [Nulyarimma v Thompson \[1999\]](#)

Australian Law and Treaties

☑ **The Australian position on transformation and incorporation of treaties is heavily influenced by Australia's constitutional structure.**

- The idea of separation of power. The power to conclude treaties differentiates from the power to make the treaty effective within the domestic law: [Tasmania Dam Case](#)
 - Power to enter into treaties is an executive prerogative power derived from s 61 of the Constitution.
 - The power was inherited from the Imperial Government when Australia acquired independence.
 - Power to implement treaties is an exclusively legislative power, especially related s 51(xxix) of the Constitution.
 - Therefore, whether an international Convention is effective within Australia depends on the Parliament's intention: [Badley v Commonwealth \[1973\]](#)
 - ✓ More often than not, **ratification of a convention does not directly affect Australian domestic law** unless and until implementing legislation is enacted: [Dietrich v R \[1992\]](#)

☑ **Legislation for treaties**

- Where a subject matter has become a matter of international concern, even in the absence of a treaty, Parliament has the power to make legislation under section 51(xxix) of the Australian Constitution: [Tasmania Dam Case](#)
- Any international obligation imposed upon Australia by a bona fide international treaty could form the basis for legislation enacted in reliance on s 51(xxix): [Tasmania Dam Case](#)
 - **Bona fide requirement:** Commonwealth Parliament would not be allowed to rely upon a treaty negotiated with the sole purpose of conferring power under s 51(xxix): [Horta v Commonwealth \[1994\]](#)
 - There must be a reasonable proportionality between the law and the purpose of discharging the obligation under the convention with respect to external affairs: [Tasmania Dam Case](#)
 - ➡ In terms of make legislation under s 51(xxix) for the purpose of discharging the obligation under the treaty, Parliament cannot depart from the provisions of the treaty and enact legislation which goes beyond the treaty or is inconsistent with the treaty: [Tasmania Dam Case](#)
 - However, s 51(xxix) can only be relied on when the treaty deals with a subject otherwise falling outside commonwealth legislative power. For example, defence treaties can be implemented pursuant to the defence power (s 51(vi))...: [George Winterton, <Limits to the use of the "treaty power">](#)
 - The treaty-implementation power in s 51(xxix) should not extend to treaties which are void under international law: [George Winterton, <Limits to the use of the "treaty power">](#)
- Effect of legislation
 - Where municipal legislation imports international agreement, conventions and treaties, those international instrument will have operative effect: [Project Blue Sky v Australian Broadcasting Authority \[1998\]](#)
 - Two categories of municipal laws should be considered:
 - ✓ Law based on international instruments and are clearly designed to give effect to international obligations
 - ✓ Law directed to take into account the provisions of named international instruments to which Australia is a party,
 - For example, provision requires that the peoples conduct in a manner consistent with various matter, including Australia's international obligations or agreements such as XXX convention.
 - This situation is [Project Blue Sky case](#).

- However, a provision like "XXX convention is approved" cannot be regarded as having binding effect of the treaty because it does not reveal any intention to make the Convention binding upon persons within Australia as part of the municipal law of this country: [Badley v Commonwealth \[1973\]](#)

☑ **Enforcement of treaties in domestic law**

- ❖ The **consistency principle**
 - ▶ Where a legislation is **ambiguous**, treaties may be used to interpret a legislation: [Minister of State for Immigration and Ethnic Affairs v Teoh \[1995\]](#)
 - In construing domestic legislation which is ambiguous, Courts will presume that Parliament intends to legislate in accordance with its international obligations: [Dietrich v R \[1992\]](#)
- ❖ The **legitimate influence principle**
 - Treaties, whether incorporated or unincorporated, may be used as a legitimate guide in developing the common law: [Minister of State for Immigration and Ethnic Affairs v Teoh \[1995\]](#)
 - ▶ However, due circumspection should be maintained in the following aspects
 - The nature of the relevant provision;
 - The extent to which it has been accepted by the international community;
 - The purpose which it is intended to serve;
 - Its relationship to the existing principles of our domestic law.
- ❖ The **legitimate expectation principle**
 - Unincorporated treaties can create legitimate expectation on the part of people. Though Government may negate the legitimate expectation, procedural fairness requires that the persons affected should be given notice and adequate opportunity to put arguments on the point [Minister of State for Immigration and Ethnic Affairs v Teoh \[1995\]](#)
 - ▶ Such an expectation cannot arise where there is either a statutory or executive indication to the contrary.

States in International Law

- ☑ Sovereign and equal under international law, and have full range of powers and responsibilities:
 - Can make international law (through treaties, practice, participation in international organisations/discussions);
 - Can enforce claims through international bodies – eg, art 34 of the [Statute of the International Court of Justice](#);
 - Be entitled to territorial integrity;
 - Are responsible for internationally wrongful acts;
 - States and their representatives are entitled to immunity from jurisdiction of other states or international organisations;
 - Doctrine of diplomatic protection.

Subject of International Law

- ☑ A subject of [international] law is an entity capable of possessing international rights and duties and having the capacity to maintain its rights by bringing international claims: [Crawford](#)
- ☑ Legal personality under public international law
 - States
 - Public International Organisations
 - Individuals
 - Other forms of international legal personality including indigenous people, minority groups, non-governmental organisations, corporations, European Union, etc.

States

Art. 1, [Montevideo Convention on Rights and Duties of States 1993](#)

The State as a person of international law should possess the following qualifications:

- (a) a permanent population
- (b) a defined territory;
- (c) government; and
- (d) capacity to enter into relations with other States.

Elements of State

- ☑ A permanent population
 - No minimum eg Vatican City (800), Nauru (<10,000).
 - But must be **permanent**
- ☑ A defined territory
 - A State may still be recognised as a legal person if the State's territory has a **sufficient consistency**, even though its boundaries have not yet been accurately delimited: [Deutsche Continental Gas-Gesellschaft v Polish State](#)
- ☑ Government
 - A state must have a practical identity i.e., an effective government exercising control over a defined territory; a “stable political organisation” of any kind: [Aaland Islands case 1920](#)
 - **But failed states still recognised as states:** A state may lose its de facto ability to exercise its legal capacity as a State.
 - Elements of a “**failed State**”, for example, Somalia in the 1990s ([Thurer](#))
 - Are associated with internal and endogenous problems;
 - A total or near total breakdown of structures guaranteeing law and order;
 - The absence of bodies capable of representing the State at the international level and of being influenced by the outside world.
- ☑ Independence
 - Independence is also described as sovereignty, i.e., the capacity to enter into relations with other States: [Austro-German Customs Union Case \(1931\)](#)
 - Not subject to control by any other state or external political power
 - Independence needs to be declared, (the entity declines to be one): [Taiwan issue](#).

Other Evidence

- ☑ Membership of international organisations which admit only states, particularly UN
- ☑ Widespread recognition or non-recognition by other states

Territory

- ☑ It is the fixed portion of the surface of the earth inhabited by the people of the State, where a State's legal authority can be exercised, normally exclusively
- ☑ Defines the boundaries of e.g., principle of non-intervention, core of prohibition on use of force under art 2(4) [UN Charter](#)

- ☑ Scope of territory – land, internal waters, territorial sea and airspace above, seabed and subsoil of territorial sea and all resources thereof.
- ☑ Territory can be acquired by discovery and occupation, prescription, cession, subjugation, accretion.
- ☑ Territory can be lost by abandonment or dereliction, cession, subjugation, prescription, erosion, revolution, natural cause.
 - Abandonment refers to a situation where a State is held to have surrendered its title, converting the territory to *res nullius*, before another State establishes its own title by way of lawful allocation or effective occupation.
 - ▶ The rule of *derelicto* requires an intention to abandon: [Clipperton Island Case](#)

Some important terms

- ☑ **Critical date**
 - When a dispute crystallises, i.e., the date on which the location of territorial sovereignty is decisive: [Minquiers and Ecrehos case](#)
- ☑ **Doctrine of intertemporal law**
 - The requirement that the title must be valid in accordance with the law in force at the time at which the title is claimed. This does not operate in vacuum.
- ☑ **Symbolic annexation**
 - A declaration or other act of sovereignty or an act of private person, **duly authorised, or subsequently ratified by a State**, intended to provide unequivocal evidence of the acquisition of sovereignty over a parcel of territory or an island.
- ☑ **Inchoate title**
 - Inchoate title: an imperfect title that needs to be “completed” and cannot prevail over a definite title.
 - ▶ Title by discovery alone is an inchoate title: [Island of Palmas case](#)
- ☑ The **continuous and peaceful display of State authority** in the period leading up to the “critical date” can defeat any other claim whatever its basis: [Island of Palmas case](#)
- ☑ **The title of contiguity**
 - A continuous mass has no basis in public international law as a basis of title: [Island of Palmas case](#)
 - ▶ However, might give rise to rebuttable presumption about the extent and scope of a title otherwise established **when the evidence of governmental activity in respect of the disputed area was sparse and inconclusive**: [Eritrea v Yemen](#)

Occupation

Terra nullius

- ☑ Occupation can only occur where the territory was **terra nullius** – land belonging to no-one – ie no previous sovereign.
 - **Terra nullius** means a territory belonging to no one. The following factors may be a factor that **the area was not terra nullius**: [Western Sahara Case](#)
 - ▶ State practice indicates that **a territory inhabited by tribes having a socio-political organisation**;
 - The taxation system
 - Whether there is a nomadic nature of the tribe?
 - ▶ **Lack of control** by the alleged State
 - Control **cannot be inferred from the mere allegiance of some** (not all) of the people in the area.
 - ▶ **Lack of common recognition** by the local people.
 - Whether the local people recognised the institution created by the alleged country?
 - Whether the local people recognised the leadership outside their local leader?
 - Silence may amount to acquiescence: [Pefra Branca case](#)
 - ▶ The alleged **State never treated its case as occupation, but merely “protection”**, i.e., the State lacked an intention to possess.
- ☑ If the island is uninhabited, physical occupation is not necessary. **Open authorised declaration is sufficient**: [Clipperton Island case](#)

No previous sovereignty

- ☑ Occupation requires both **possession** and **administration**.
 - **Possession** = some formal act e.g., planting flag or making proclamation, with intention to occupy
 - ▶ **Discovery alone is not sufficient to constitute occupation**. Discovery only creates an inchoate title, which cannot prevail over a definite title founded on **continuous and peaceful display of sovereignty** **at the time of the critical date**: [Island of Palmas case](#)
 - ▶ The **intention** and will to act as sovereign: [Eastern Greenland Case](#)
 - Estoppel and acquiescence may help to determine the sovereignty: [Eastern Greenland Case](#)
 - Whether the alleged State has treated its discovery as possession or merely protection: [Western Sahara Case](#)
 - In terms of **administration** = the exercise of a continuous and peaceful display of state authority
 - ❖ Actual exercise or display of a territorial sovereignty involves: [Island of Palmas case](#)
 - ▶ The exclusive right to display the activities of a State, i.e., jurisdiction and State functions
 - In [Minquiers and Ecrehos Case](#), “ordinary local administration” specifically referring to:
 - [Jersey courts exercising criminal jurisdiction](#) for nearly 100 years;
 - [Jersey law](#) requires the holding of inquests on corpses found in the area;
 - Houses built in the area were assessed for the [levying of taxes](#);
 - Licensing of fishing boats;
 - Real estate contracts relating to property in the area were registered in the public registry of deeds;
 - Jersey customs authorities established a custom house for the purpose of a census.
 - ▶ The corollary obligation to protect within the territory,
 - The rights of other States, in particular their right to integrity and inviolability, together with