

# **Chapter 3**

## **International Organizations, Other International Actors and Sources of Law**

# Part A

## International Organizations and Other International Actors

### Introduction

- The ***ideal and prototypical*** international organization is the ***United Nations (UN)***.
- The ***League of Nations*** was the predecessor of the United Nations.
- The ineffectiveness of the League was proven in 1935 when ***Italy invaded Ethiopia*** in blatant violation of the ***Covenant of the League***.

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- *The UN is modeled on the League of Nations and carries forward the League's intent to prevent wars among States.*
- But, the ***UN is not the only international organization.***
- ***There are a great deal of international organizations in the world.***

- ***Most*** of these international organizations were created to address ***specific problems*** in ***interstate cooperation***.
- ***For example***, the coordination of international mail is accomplished through the ***Universal Postal Union***, established in 1865.
- Commercial airplanes can pass over international borders and land at airports in other countries by virtue of the coordinating efforts of the ***International Civil Aviation Organization***.

- There are ***hundreds of international organizations*** such as, the ***World Trade Organization (WTO)***, the ***International Monetary Fund (IMF)***, ***World Bank (WB)***, the ***World Health Organization (WHO)***, and the ***International Telecommunication Union (ITU)*** and others...

- Other international organizations are ***more political*** in nature and have ***a wider scope***.
- This is true of the ***UN*** as well as for the many ***regional organizations*** like the ***Organization of American States (OAS), League of Arab States, the African Union (AU)*** and ***various regional organizations***.

# Characteristics of International Organizations

- In our previous class discussion, we have said that there are ***two main actors in international law***. These are:
  - **States** (***The Primary Actors***) and
  - **International Organizations, NGO's, Multi-National Corporations** and **Individuals** (***The Secondary Actors***).

- It is ***important to know*** the main ***characteristics*** of International organizations.
- This is important because ***international organizations have attained a special status in international law*** that other organizations like NGOs and corporations do not have.
- ***So, what are the characteristics***

- **First**, International organization is an organization, ***typically established by treaty***, whose members are **States or other international organizations.**

- **Second, the treaty** that establishes an international organization usually **serves as a constitution** for that organization.
- For example, the **UN Charter, i.e., the founding instrument of UN**, serves as a **constitution** for the United Nations.
- So, **the Charter** sets out the **fundamental structure, its organs, powers, objectives and rules** of the United Nations.

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- The treaty that established the **AU** is called, “***The Constitutive Act of the African Union***”. For the **League of Nations**, it was “***The Covenant of the League***”.
- ***Third***, When the UN or the AU or the WTO meets to make a decision, ***it is not individuals who sit and vote for their interests*** there but rather ***representatives of States who speak in favor of State interests.***

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- **Fourth, Like States, international organizations can enter into treaties.**
- For instance, ***The UN*** has entered a treaty with the ***U.S.A*** to establish the ***UN headquarters in New York.***

- Likewise, ***the African Union*** has concluded an agreement with the ***government of Ethiopia*** concerning its headquarter in Addis Ababa (***Headquarter Agreement***).
- So, like states ***international organizations can enter in to treaty*** with ***states*** or ***other international organizations***.
- However, even if ***NGO's, individuals, corporations*** are ***actors*** in international law, they ***cannot enter in to treaties***.

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- **Fifthly**, Like States, ***international organizations enjoy certain privileges and immunities***, as for example those enjoyed by **UN diplomats** traveling abroad on **UN business**.

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- **Lastly**, Like States, ***international organizations can sue and be sued in national and international tribunals.***

# States Vs. International Organizations

- ***So, if international organizations have all these characteristics, are they equal with States?***
- ***The Answer is No.*** Under international law, ***states have “more power and sovereignty” than international organizations.***
- ***First, International organizations are the “creation of States”,*** and their powers are limited to the powers that the constituting States have given them.

- **Second, States have privileges and immunities that are general/absolute**, whereas ***international organizations have only such privileges and immunities*** as are necessary to carry out the ***organization's functions***.

- An international organization cannot invoke “***sovereign immunity***”- ***immunity from liability in foreign courts in cases involving official acts***- because an ***international organization is not a sovereign***.
- ***Third, only States can appear before the International Court of Justice in contentious cases***, but not international organization.

- ***Previously, under the traditional international law, only States had legal personality in the international system.***
- But now, ***international organizations have legal personality too.***
- ***Why the modern/contemporary international law gave legal personality to international organizations?***
- *If they have no legal personality, international organizations cannot achieve their goal and end.*

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- This issue was properly discussed in one advisory opinion forwarded by the ICJ concerning the question, ***“whether International Organizations like UN have legal personality or not”***.

## **READING ASSIGNMENT!**

- ❑ Read the advisory opinion of the ICJ on:
  - ***“Reparation for Injuries Suffered in the Service of the United***

# **The Structure of the United Nations**

- ***The UN Charter acts as a constitution for the UN, setting out its separate organs, defining the roles of these organs, and clarifying the relationship between the UN and its Member States.***
- ***The entire UN Charter must be understood “in light of its object and purpose.”***

- Member States have to act in a way consistent with the object and purposes of the UN.
- ***But what are the object and purpose of the UN?***
- ***READ THE UN CHARTER- CHAPTER I, Article 1, “PURPOSES AND PRINCIPLES”.***
- *The first purpose of the UN is “**to maintain international peace and security**”.*

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- The second purpose is ***“to develop friendly relations among nations...”***
- The third purpose is ***“to achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character and in promoting... human rights”.***

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- The fourth and final purpose of UN is  
***“to be a center for harmonizing  
the actions of nations...”***

# General points about UN relations with Member States

- The first and perhaps most interesting question is, ***Can the UN force a Member State to do something?***
- In general, ***so long as the UN is acting in accordance with the Charter, the Members States are supposed to cooperate.***

- Member States are committed to **“give the UN every-assistance in any action it takes in accordance with the present Charter...”** [Read Article 2(5) of the UN Charter]
- At the same time, **the UN has consented not to intervene “in internal matters of any state...,”** (Article 2(7))
- **But, exceptionally UN can intervene in internal matters of member states under Chapter 7 of the Charter.** [Chapter 7, Article 39 of the UN Charter]

- The UN Charter contains a ***“supremacy clause”*** under ***Article 103*** of the UN Charter.
- The UN Charter provisions are ***“SUPREME” over any other treaty obligation*** that a Member State may have.
- If there is any contradiction between ***any treaty obligation of members*** and the ***UN Charter*** the

➤ **Article 103 of the UN Charter**

- *In the event of **a conflict** between the **obligations of the Members of the United Nations under the present Charter** and **their obligations under any other international agreement**, their obligations under the **present Charter shall prevail**.*

# Organs of the United Nations

➤ *There are six principal organs of the UN. These are:*

## 1- The General Assembly (GA)

- It is just like a ***“world parliament”***.
- But it is a Parliament with ***little or no legislative power***.
- General Assembly adopts ***Resolutions concerning “several issues”***.
- ***The resolutions of the GA are not binding.***

- ***GA resolutions*** are like ***recommendations to Member States.***
- However, ***GA resolutions*** express the overall ***opinion of the international community*** and may ***“form the basis for customary law”***.
- As a “legislature” ***the GA’s scope is “general”- it may discuss and make recommendations on “any matter”***.  
*[Read Article 10 of the UN Charter]*

- Also, ***the GA may be an advisor to the Security Council*** [Read Article 10 of the charter].
- ***If the Security Council has taken up a matter already, the GA cannot comment to the Security Council on that matter.*** [Article 12]
- ***All States are members of the GA, and each State has one vote.***  
[Read Article 18 of the UN Charter]

- For ***“important questions”***, ***two-thirds*** of the members present must vote in favor.
- For ***“other questions”***, ***a simple majority*** will prevail.
- There are also ***subsidiary bodies within the GA*** with similar procedures, for example the ***UN Human Rights Council***, composed of ***47 member states*** elected by

## 2. The Security Council (SC)

- The Security Council is the ***“realpolitik” of the Great Powers*** in the UN.
- ***The SC***, compared to the GA, has ***more power***, but it is exercised within ***a narrower scope***.
- ***Maintaining international peace and security is Security Council’s “primary responsibility.” [Read Article 24 of the Charter]***
- The specific powers granted to the

- The SC passes both ***non-binding*** and ***binding resolutions***.
- The binding resolutions may be passed only when the SC is taking action ***“for the maintenance of international peace and security”***.
- Therefore, the resolutions of UNSC passed ***under Chapter 7*** of the UN Charter are ***binding***.
- Where as, the resolutions of UNSC passed ***under Chapter 6*** of the UN Charter are ***non binding***.

- The SC consists of **15 members- 5 permanent members** and **10 non-permanent**, rotating members with two-year terms.
- The **5 permanent members** are *France, Britain, U.S.A, China, and Russia*.
- The seat of the **10 non-permanent** members of the SC are distributed by region as follows: *three to Africa, two to Asia, two to Latin America, two to Western Europe, and one to Eastern Europe*.

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- ***The permanent members have a veto power over all resolutions concerning “non-procedural matters”.***
- Decisions of the SC on ***procedural matters*** shall be made by ***an affirmative vote of nine members.*** [Read Article 27(2) of the Charter]

- Decisions of the SC on ***all other matters (non procedural matters) shall be made by an affirmative vote of nine members*** including the ***concurring votes of the permanent members***.  
*[Read Article 27(23)]*
- In such case, ***one of the permanent member of the SC can veto (block)*** the decision of the UNSC.
- ***Abstentions*** by permanent members or even ***failure to vote*** due to absence from a meeting ***will not amount Veto***.

# 3. The Secretariat

- The Secretariat is composed of ***all the administrative staffs of the UN*** and ***headed by the “Secretary-General”***.
- The ***UN Secretariat employs about 14,000 people***, all of whom are located at UN Headquarters in ***New York*** and at other UN offices (***such as in Geneva***).
- In addition, there are about ***17,000 people assigned to the secretariats of the various UN subsidiary organs***.

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- ***The Secretary-General*** serves as ***a spokesman for the UN.***
- He shall be ***the chief administrative officer*** of the Organization *[Article 97 of the Charter]*.
- The Secretary-General may ***“bring to the attention of the SC any matter which in his opinion may threaten the maintenance of international peace and security”***. *[Art. 99 of the UN Charter]*

- In the performance of their duties, ***the Secretary General and the staff shall not seek or receive instructions from any government or from any other authority*** external to the Organization.  
*[Article 100(1) of the Charter].*
- They shall refrain from any action which might reflect on their position as ***international officials responsible only to the Organization.***
- Concerning the composition, powers and appointment of the secretariat, **Read Chapter XII, (Article 97-101) of the UN Charter.**

## 4. The International Court of Justice (ICJ)

- ***The ICJ is the principal judicial organ of the UN.***
- ***The ICJ serves like a “world-court”.***
- The ICJ functions under ***its own statute*** which is ***“an integral part” of the Charter*** and is ***annexed to it.***  
*[Read Article 92 of the Charter]*
- ***The Court has fifteen judges all from different States.***
- ***The judges*** are elected by the ***GA and SC.***

- *Two types of cases come before the ICJ.*
  - ❑ ***Contentious cases between States***
  - ❑ ***Requests for advisory opinions*** from organs of the UN or from specialized agencies.
- ***In the exercise of contentious cases, ICJ has to decide in accordance with international law, disputes of legal nature that are submitted to it by states.***

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- ***International legal dispute*** can be defined as ***question of law*** or ***fact, clash of legal views*** or ***interests***.
- ***“States must consent” to the jurisdiction of the ICJ*** in contentious cases, either ***“at the time the dispute arises”*** or ***“beforehand by a separate treaty”***.

- States also may accept the jurisdiction of the ***ICJ “generally”, or for a “specified category” of cases.***
- In fact, the ***ICJ has been underused and under utilized*** by State parties.
- From 1946 to 1996, ***only one hundred cases came before the Court.***

## 5. The Economic and Social Council

- ***The ECOSOC*** functions like “***a Mini General***” ***Assembly*** with a special focus on ***economic, social, and humanitarian issues***.
- ***The ECOSOC*** may ***make or initiate studies and reports*** with respect to ***international economic, social, cultural, educational, health, and related matters*** and may make ***recommendations*** with respect to any such matters to the ***GA***, to the ***Members of the UN***, and to the ***specialized agencies*** concerned.

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- It may make ***recommendations*** for the purpose of promoting respect for, and observance of, ***human rights and fundamental freedoms for all.***
- Like the GA, it has ***subsidiary organs.***
- For example, ***the UN Environment Program (UNEP)*** is a subsidiary organ of *the ECOSOC*.
- In ECOSOC, each member has ***one vote and a simple majority will prevail.***
- ***For further understanding on the ECOSOC, read Chapter X, (Article 61-72 of the Charter).***

## 6. The Trusteeship Council

- ***The Trusteeship Council*** was created **to monitor those colonies** placed under the administrative authority of another State following World War II.
- For example, ***Italian Somaliland was a trust territory*** that was later merged with Somalia.
- The Trusteeship Council was composed of the ***five permanent members of the SC.***
- It ***suspended its operations*** with the independence of the last trust territory in ***1994. Which state was the last trust territory?***

# Problems in the UN System

- Generally, the ***UN has many problems*** in practice. Some of the problems are:
  1. There is some ***confusion as to the respective areas of authority*** between ***the SC*** and ***the GA***.
  2. There is some question as to ***whether the ICJ can review the activities of the SC and GA and pass judgment on them***.

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- In theory, ***the SC is a body whose powers are limited by the Charter.***
- In practice, however, ***the SC has incredible discretion when deciding:***

***A. Whether a situation poses a threat to international peace and security, and***

***B. What actions it will take in response to the threat.***

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- Moreover, ***the SC also established international tribunals*** to prosecute war criminals in **Rwanda (ICTR)** and the **former Yugoslavia (ICTY)** and set out the procedures for these tribunals.
- ***Can the UN SC establish a court or a tribunal according to the UN Charter?***

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- One of the other challenging issue is, ***what If the Security Council acts beyond its authority in the Charter, what can a member state do?***
- ***Can the ICJ review the actions of UNSC and the other organs of the UN?***
- In domestic law, we have the concept of ***“judicial review” if the executive or legislative power act beyond its power.***
- ***What about in the UN?***

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- In the first place, ***the jurisdiction of the ICJ in contentious cases does not extend to international organizations.***
- ***Only states can appear before the ICJ for contentious cases.***
- So, a ***Member State cannot sue the UN*** (or one of the ***UN organs***) ***directly.***
- Also, ***giving the ICJ the power of judicial review would change the power structure of the UN.***

# The African Union

- The predecessor of the African Union was the ***Organization for the African Unity (OAU), which is founded on 1963 in Addis Ababa.***
- ***May 26 - 2001***, marked the turning of a new page in the history of the African continent.
- On this date, ***the Constitutive Act of the African Union entered into force***, and the OAU has transformed in to the brand new ***“African Union (AU)”***.

- **QUESTION- WHAT DO YOU THINK ARE THE REASONS FOR THE TRANSFORMATION OF THE OAU TO THE AU?**
- There are many reasons for the ***transformation of OAU to AU.***
- ***First, OAU has achieved its mission of decolonization*** of Africa from the European powers.

- ***Second, Africa became increasingly marginalized*** and struggled to define its place and role ***in the new global system after the end of the cold war.***
- ***Third, The great powers increasingly declined to assume leading roles*** in promoting ***peace and development*** in Africa.
- ***Fourth,*** the need to bring ***economic integration and development*** in Africa.

- ***Fifth, the need to avoid unconstitutional change of government such as coups d'états, to foster democratization and human rights in Africa.***
- ***Articles 3 and 4 of the Constitutive Act of the African Union (CA) define, respectively, the “objectives” and “principles” of the Union.***

- **Promoting *sustainable development, good governance, social justice, gender equality, and good health, realization of human right* are some of *the objectives of the AU.***
- The Constitutive Act of the AU ***reaffirms two important principles.***
  - 1. The principles of sovereignty &***
  - 2. Non- intervention in internal matters of member states.***

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- More importantly, **Article 4(H) of the Constitutive Act** expressly provides for that **“AU has a right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity.”**

# **The Organs and Institutions of the African Union**

- The main organs of the African Union are:
  - 1. The Assembly of the Union (Supreme organ),***
  - 2. The Executive Council,***
  - 3. The Pan-African Parliament,***
  - 4. The Court of Justice of the Union,***
  - 5. The Commission,***
  - 6. The Permanent Representatives Committee,***
  - 7. The African Peace and Security Council,***

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- 8. The specialized technical committees,**
- 9. The Economic, Social and Cultural Council,**
- 10. The financial institutions (African Central Bank, the African Monetary Fund, and the African Investment Bank).**

- **QUESTION-** What do you think are some the challenges of the African Union?
- **ANSWER-** Read additional materials!

# Other International Actors: NGOs, Corporations, and Individuals

- As we have seen, *the State is the primary actor in international law.*
- But also, *international organizations and “other international actors” are also secondary actors in international law.*
- ***Other international actors*** in international law includes ***international non-government organizations (NGOs), multi national corporations, sporting federations, organized religions, regional governments, and international terrorists and individuals.***

- In general, ***these non-state actors do not have the status of legal persons at the international level.***
- ***[Unlike states and international organization, they have no legal personality]. So, they cannot have rights and duties under international law.***
- ***However, they play a very***

# International NGO's

- ***International NGOs***, for instance, ***attend international law-making conferences as “observers”*** – even ***present their views*** in some cases.
- ***They also lobby government*** attention to particular issues and sometimes ***push the government to “propose a treaty” or “enter in to a treaty”***.
- In addition, ***some NGO's may act like a “watchdog”, by exposing non-compliance of states with international law.***

- Under **Article 71 of the UN Charter**, **ECOSOC** may arrange **meeting to consult with NGOs** in order to gain **expert opinion** and hear the views of certain **interest groups**.
- **NGOs may not submit briefs directly to international dispute settlement bodies like the ICJ or WTO dispute settlement body.**
- Rather, **the home states of the NGO's often represent the NGO's** and submit their brief.

# Corporations

- ***International Corporations*** are also equally involved in international relations.
- ***Corporations enter agreements with host States*** that give ***special privileges*** to the corporation under national laws.
- ***For example***, if Ethiopia unjustly harmed some foreign corporations in its territory, this would be ***a wrong*** to the foreigner's home State, which could then sue Ethiopia for ***redress***.

# Individuals

- ***Three new areas of international law*** give greater standing to ***individuals*** in the international arena – these are ***human rights law***, ***international humanitarian law (law of war)***, and ***international criminal law***.
- ***A person who suffers a human rights violation may have an action against the offending State in some international court.***

- Moreover, ***a person who commits an atrocity such as genocide*** may be brought to justice and sentenced before an ***International Criminal Court***.
- ***Similarly, International Humanitarian Law directly applies to terrorists.***
- ***In such cases, international law is acting directly on individuals,***

# **Part B**

## **Sources of International Law**

# **Main topics for discussion**

- Sources of International Law
- Hierarchy of Sources in International Law
- Customary Law (State Practice + *Opinio Juris*)
- Local and Regional Customs
- Which States are bound by Custom?
- Treaties and General Assembly Resolutions as Evidence of Customs

# Background Principles and the Hierarchy of Sources in International Law

## Introduction

- Custom is now ***losing its status as a strong source*** of international law.
- In fact, some scholars have predicted the ***approaching death of international custom.***
- At least it is agreed ***now*** that ***treaties are a stronger source of international law than custom.***

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- however, it is ***international custom*** that provides ***the basis for all treaty law.***
- ***The principle pacta sunt servanda-*** that a State must abide by its treaty obligations is ***an international custom.***
- From the ***principle of sovereignty*** to the ***treatment of foreign emissaries,*** the international system is founded on ***customs.***
- ***It seems criticizing customary law is criticizing the entire international system.***

- ***As Oppenheim says, “Custom is the oldest and the original source of international law as well as of law in general.”***
- Like the ***customs of a particular people, customs of states*** derive from ***long established practices*** that have attained ***the status of accepted norms.***
- ***International customary law binds all states*** irrespective of their consent to specific rules.

- ***“International law is made chiefly in one of two ways:***

***1. Through agreements between states - ‘treaties’- or***

***2. Through practice by states that fulfills certain requirements- ‘customary international law’***

- Therefore, ***If there is a treaty provision on point, you will have to show that the parties concerned have signed that treaty.***
- ***If a custom applies, you will have to prove that the custom exists.***
- Moreover, there are ***two additional sources of international law.***

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- Fortunately, ***the ICJ statute contains a clear list of the sources of international law.***
- ***Article 38 of the Statute of the ICJ*** mentioned the sources of International law.
- Let us read Article 38 of the ICJ Statute in order to know ***the sources of international law.***

**Article 38(1)-** The Court, whose function it is to decide in accordance with international law..., 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. 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*

2. This provision shall not prejudice the power of the Court to decide a case **ex aequo et bono**, if the parties agree thereto.

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- Therefore, according to this Article, there are ***4 sources of international law.***
- First, ***“conventions”*** in paragraph 1(A) means ***“treaties.”***
- Second, ***international custom***, in paragraph 1(B) as will be explained shortly, must be a ***“general practice”*** and must be ***“accepted as law.”***

- Third, paragraph 1(C) refers to “**general principles of law.**” After treaties and customs, this is a third source of international law.
- “**General principles of law**” does *not* mean “**general principles of international law**” such as sovereignty, territorial integrity.
- Rather, **General principles of law** refers to **principles common to the national laws of all States** that, **by derivation, may be used in international proceedings.**

- Typically, “***general principles of law***” are ***logical or procedural rules that cannot be found in international treaties or customs*** but are ***necessary to fill in the gaps in international cases.***
- Can you give some examples of **General Principles of Laws common to national laws of all states?**

- Examples of General Principles of Law are:
  - ***The principle of “good faith”,***
  - ***The principle that “wrongdoers must provide redress”,***
  - ***The principle that “one cannot profit from one’s own wrong”,***
  - ***The principle that say “one should not be a judge in one’s own cause”,***

- It should be noted that ***it is not necessary to establish that the general principles come from nations that are “civilized.”***
- The international community today does not like to make the distinction between ***“civilized” and “uncivilized”*** with its obvious ***colonial pretensions.***

- ***The fourth source*** of international law is ***“judicial decisions and the teachings of the most highly qualified publicists...”***
- It should be noted that this source is only ***“subsidiary means.”***
- In other words, ***the first three sources are binding sources of international law***, and the ***fourth source is not binding but rather persuasive as “evidence”*** of international law.

- In other words, ***International Conventions (Treaties), Custom and General Principles of Law are binding sources*** of international law.
- However, ***judicial decisions and the teachings of the most highly qualified publicist are not binding sources*** under international law.

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- **N.B.**- As stated in **Article 59**, of the ICJ Statute, ***“The decision of the Court has no binding force except between the parties and in respect of that particular case.”***
- This affirms that ***previous ICJ decisions are not binding on subsequent cases; there is no stare decisis or precedent system*** in international law.

- ***“Judicial decisions”*** includes decisions by permanently established international tribunals like the ***ICJ*** or ***the African Commission on Human and People’s Rights***, ***decisions by ad hoc arbitral panels***, and even decisions ***by national courts***.
- ***“Teachings”*** means simply writings by ***respected scholars*** in the field of international law.

- As it is stated in Article 38(2), ***ICJ may decide a case “ex aequo et bono” when the parties agree.***
- In such a case, ***the Court may make its decision without any reference to any principles of international law at all.***

# Hierarchy of Sources of International Law

- The question of the hierarchy of sources is ***more complex than appears at first sight.***
- What happens ***if a rule derived from one source of international law conflicts with a rule derived from another source?***
- Which prevails over the other?
- ***International law is not as clear as domestic law*** in listing the hierarchy of laws.

- ***Is there an order of application of the sources listed in Article 38 of the Statute of the ICJ?***
- ***Or are the sources of international law in Article 38 of the ICJ Statute listed in order of their importance?***
- Especially, ***the relationship between treaties and custom*** is particularly difficult.
- The question of ***priority as between custom and treaty*** law is more complex.

- Clearly ***a treaty, when it first comes into force, overrides customary law as between the parties to the treaty.***
- One of the main reasons why ***states make treaties is because they regard the relevant rules of customary law as inadequate.***
- ***Thus, two or more states can derogate from customary law by concluding a treaty*** with different obligations.

- ***Treaties are usually formulated to replace or codify existing custom.***
- ***For instance, the Vienna Convention on the Law of Treaties is the codification of many existing customary laws on treaties.***
- ***Furthermore, treaties can transform to custom.***

- ***But treaties can come to an end through “desuetude or disuse”- a term used to describe the situation in which ***the treaty is consistently ignored by one or more parties***, with the acquiescence of the other party or parties.***
- ***In other words, treaties in turn may themselves fall out of use and be replaced by new customary rules.***

- ***So, as a general rule, treaties and custom are of equal status, authority and hierarchy.***
  - ***So, where the same rule appears both in a treaty and a custom, there is no presumption that the latter is subsumed by the former.***
  - ***The two may “co-exist”.***
- 
- ❑ ***Question- What if there is contradiction between custom and treaty?***
  - ❑ ***Which one of the two will prevail?***

- ***Both are equal in hierarchy and authority. So, apply the following 3 rules of interpretations.***

- 1. The later in time prevails.*** This conforms to the general maxim of ***lex posterior derogat legi priori*** ***(A later law repeals an earlier law)***.
- 2. lex posterior generalis non derogat priori speciali*** ***(A later law, general in nature, does not repeal an earlier law which is more special in nature)*** and
- 3. lex specialis derogat legi generali*** ***(A special law prevails over a general law)***.

## **The hierarchy of general principles of law.**

- Since the main function of ***general principles of law is to fill gaps in treaty law and customary law, it would appear that general principles of law are subordinate to treaties and custom.***
- That is, ***treaties and custom prevail over general principles of***

## **The hierarchy of judicial decisions and writers**

- **Judicial decisions and learned writings** are described in **Article 38(1) (D)** as **‘subsidiary means for the determination of rules of law’**, **which suggests that they are subordinate to the other three sources listed: treaties, custom and general principles of law.**
- **Judicial decisions** usually carry more weight than **learned writings**.
- **But there is no hard and fast rule**; much depends on “the quality of the reasoning” which **the judge** or **writer employs**.

- ***In sum, the sources of international law are not arranged in a strict hierarchical order.***
  - ***Supplementing each other, in practice, they are often applied side by side.***
- ***However, if there is a clear conflict:***
- 1. Most of the time, treaties prevail over custom, but apply the 3 rules of interpretations.***
  - 2. Treaties and customs prevails over general principles and the subsidiary sources such as judicial decisions and writings.***

## **Example on hierarchy of sources in international law dispute.**

- Imagine that Sudan has invaded Ethiopia as a result of border dispute between the two.
- Assume you have before you, the UN Charter, a Treaty of Friendship between Sudan Ethiopia signed on 2008, an international custom, a law book and article by a famous scholar, and a past decision by the ICJ on similar cases.

- Considering these materials, **your first argument will be based on the treaties (You have 2 treaties) and the custom. You have to apply both the treaties and custom side by side.**
- First, you will start with the relevant provisions in **the UN Charter** because you know that the UN Charter contains a **“Supremacy Clause”** giving it priority over all other treaty obligations.

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- **Second**, you may point to provisions in the **Treaty of Friendship** that do not conflict with the Charter.
- If this treaty of friendship is contradictory with the UN Charter, it will not be applicable because the UN Charter will prevail before it.

- **However, if there is a contradiction between the treaties and the custom, apply the various rules of interpretations.**
- In addition, ***custom*** may be helpful if it is determined that ***the treaty provisions cannot be applied*** because of some ***limit to their applicability***, or ***if one of the parties to the dispute did not sign*** the relevant treaty.

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- **Finally, the law book and review article and ICJ decision** will be helpful in arguing a particular interpretation of the relevant law or in clarifying any remaining ambiguities. ***[I.e., subsidiary and persuasive in determination of the rules].***

- Concerning **the hierarchy of sources of international law**, it is said that :

➤ ***Treaty and custom are primary source,***

➤ ***General principles of law comes next &***

➤ ***Judicial decisions and writing of teachings of international law comes as a last resort.***

- **Nonetheless, the rule is not so simple!**
- There are some ***customs having “a higher order that must come first in authority before any treaty provisions”.***
- ***Customs of a higher order*** have been described by scholars as ***“axiomatic”*** or ***“constitutional”*** or ***“fundamental customs.”***

- These “**customs of higher order**” are treated differently from **other customs**.
- In the first place, ***it is not necessary to prove that they exist. (They are assumed!)***
- In the second place, ***they stand somewhat above any treaty in the international system.***
- ***So, what are these customs of a higher order?***

- **The first such principle is “State Sovereignty”.**
- Many ***other background principles can be derived from sovereignty*** such as;
  - A. The equality of States,***
  - B. Consent as a basis for international obligation,***
  - C. The right to territorial integrity.***

- ***The second custom*** with highest order is ***pacta sunt servanda*** is also a background principle of international law.
- It means simply that ***international agreements and treaties must be observed in good faith.***
- The other principle, as elaborated on in the ***Libya-Chad Case***, is ***the stability of international borders.***

- Another category of higher order customs exists called ***“jus cogens” or “Peremptory norms”***.
- These ***“jus cogens” or “peremptory norms”*** are fundamental for ***moral reasons***.
- ***Again***, in the hierarchy of international laws, ***peremptory norms are at the top, they are over other customs and any treaty law***.

- **Possible examples of jus cogens or peremptory norms include-**

- 1. The prohibition on the use of force,**
- 2. The principle of self-determination,**
- 3. The prohibition against genocide,**
- 4. The prohibition against torture,**
- 5. The prohibition against slavery,**
- 6. The prohibition against piracy &**
- 7. The prohibition against apartheid.**

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- The international community reacts to such things as ***colonialism or slavery or genocide with such shock and horror, with such unanimous disapproval***, that it seems clear that the norm prohibiting them has become ***peremptory or jus cogens***.
- ***Nonetheless, there is no clear test to determine whether a norm has become peremptory.***

- ***It is not clear how these customs of a higher order relate to one another.***
- For instance- There are conflicts between ***State sovereignty*** and ***jus cogens*** norms like the ***prohibition against torture***. If a sovereign State wants to torture its citizens, who can say no?
- The same applies for ***Territorial integrity Vs. self determination.***
- The resolution of such conflicts is ***a long and complex matter*** that you may consider on your own.

# Customary Law: State Practice and Opinio Juris

- International customs are like an ***invisible set of rules.***
- The “***fundamental***” ***customs*** just discussed at least are ***clear and well-accepted.***
- ***Other customs, however, are more elusive.***

- Thus, for those customs that are ***not “axiomatic” or “fundamental”, it is necessary first to prove conclusively that they exist.***
- Most litigation concerning custom will focus on this issue of ***whether the custom exists or not.***
- Unfortunately, ***it is hard to prove that a custom exists.***

- Two elements must be proven in order to prove the existence of custom.

**1. State practice** and  
**2. Opinio juris.**

- **“State Practice”** indicates the **State’s overt behavior.**
- It refers to **general and consistent practice by states.**

- ***“Opinio juris”*** means the ***State’s belief that the practice is required as a matter of international law.***
- It means that ***the practice is followed out of a belief of legal obligation.***
- These criteria, though perhaps clear in definition, have been ***confusing in application.***

# Part A: State Practice

- A State's practice is ***what the State does over and over again. It is a general and consistent practice by states.***
- ***Actions***, repeated with some ***regularity***, give rise to expectations, and ***expectations shared by most States*** may become ***international legal obligations***.
- ***But, what actions are important to show "State practice"?***

➤ **Examples of actions include:**

- ❑ ***Official statements of policy***  
made by governments;
- ❑ ***Implementation of policy;***
- ❑ ***Other governmental acts like warfare and treaty-making; diplomatic correspondence; and decisions of national tribunals, among others.***

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- However, these “**actions**” may be **inactions as well.**
- ***If a State does not object*** to a practice that affects its interests, ***its inaction amounts to state practice.***
- There are ***three questions of concern*** for showing ***State practice.***

- 1. First, how many States engage in the practice** (i.e. how general and widespread is the practice)?
- 2. Second, are there any inconsistencies** (States engaging in contrary practice)?
- 3. Third, how long has the practice been on going?**

- So, ***if a practice is very widespread*** it may be deemed a custom ***despite a few strong inconsistencies.***
- ***No hard and fast rule exists stating that, for example, exactly 50, 60, 100 States must engage*** in a practice in order to show the generality of that practice.
- Certainly, ***a simple majority of States is not enough.***

- The ICJ has stated, rather vaguely, that a “***very widespread and representative participation***” is required for State practice.
- Most international tribunals are ***selective when sampling State practice.***
- In other words, ***courts do not look at the practices of all States in the world but rather focus on the***

- There are ***several approaches to making selections of States*** and ***establishing generality.***
- First, the court may focus on the practices of so-called “***specially-affected***” ***States.***
- If the emerging custom concerns the ***high seas***, for example, then the court will focus on ***coastal States*** with significant ***maritime activities.***

- Second, a court may select ***States from different geographic regions*** in order to have “***representatives***” from different parts of the world. (for instance picking ***one state from each continent***)
- Finally, a court may select States practices from States in ***different categories of economic development***. (for instance, ***developed and developing nations on the issue of naturalization of natural resources***).

## Part B: **Opinio Juris**

- To have custom, States must not only exhibit a certain practice; ***they must also believe that the practice is legally required.***
- In short, ***opinio juris*** is the expression by a State that it is ***following some practice because the State thinks that the practice is required as a matter of international law***

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- This is the second criteria for custom, the so-called ***“subjective” element.***
- At first glance this element appears ***hopelessly confusing.***
- ***How do we know what a State thinks or believes?***
- ***Indeed, how can a State “think” at all?***

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- ***Thoughts and beliefs of states have to be inferred from statements and actions.***
- In other words, with ***opinio juris*** we are looking for an added element that makes the State practice more serious and worthy of consideration as an international law.

# Local and Regional Customs

- ***General customs***, once established, ***will apply to every State in the world.***
- However, customary law may develop in ***a particular region or locality*** and apply only to the States in that region or locality.
- Presumably, ***local and regional customs*** must be ***proven*** in the same way that general customs are proven – ***by showing State practice and opinio juris.***

- Since there are ***fewer States involved at the regional and local level, greater amount of uniformity/consistency in practice may be required to prove the existence of local custom.***
- For example, let us say that there are **200 States** in the world.
- ***If 4 States engage in an inconsistent practice,*** this may not affect the creation of international customary law, because ***98% of the States concerned engage in the custom.***

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- However, let us say that there ***are 10 States in a particular region.***
- ***If 4 States engage in an inconsistent practice, then you have only 60% conformity.***
- Obviously, ***it will be hard to establish a local or regional custom based on 60% conformity*** of state practice.

# Which States Are Bound by Custom?

- *If a custom is general, all States in the world are bound by it.*
- If a custom is *regional or local*, only ***States in that region or locality*** will be bound by it.
- *What will happen to those States in the world (or in the pertinent region or locality) that do not practice a particular custom?*
- *What about new States? Will they be bound by pre-existing customs that they have not participated in or consented to?*

- The short answer is that ***States that say and do nothing during the time when a custom is developing will be bound by that custom.***
- ***Saying and doing nothing is a type of tacit consent to the custom*** on the part of States.
- ***The same applies to new States.***

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- ***Sometimes States object to emerging customs.***
- Unfortunately for the State concerned, ***one objection to a new rule will not prevent that rule from becoming customary law.***

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- ***The only way that a State can get out of a general/local custom is by objecting to that custom loudly and continuously during the process of the formation of the custom.***
- A State that does this may obtain ***“persistent objector status.”***

- It should be noted that ***there are really two requirements to obtain persistent objector status.***

***1. First, the State must object when the custom is in the process of forming,***

***2. Second, the objection must be “clear” and “persistent.”***

- ***One mild objection*** to an emerging custom probably ***will not be enough.***
- Commonly, ***a State will object in regular public statements or refuse to sign a certain treaty*** that supports the custom.
- ***After a custom has formed, any conduct contrary to the rule is a violation of international law***

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- ***Interestingly, if violations continue they may give rise to a new rule of custom.***
- ***It is strange that violating the law is a way of making new law.***
- ***But this is the way customary law is.***

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**THE END!**  
**THANKS FOR YOUR**  
**ATTENTION!**