Customary International Law

- “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 nations derive from long established practices that have attained the status of accepted norms. In a sense, both types of customs are socially enforced, and a violation is cause for general shock and scorn rather than immediate punishment by a government authority.

Sources and hierarchy of international law

Statute of the ICJ (Art 38) [mandatory Vs persuasive]

The Court, whose function it is to decide in accordance with international law such disputes as are submitted to it, shall apply:

A. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

B. international custom, as evidence of a general practice accepted as law;

C. the general principles of law recognized by civilized nations; principles common to the *national* laws of all States that, by derivation, may be used in international proceedings. Typically, "general principles of law" of this sort 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. Examples include good faith, wrongdoers must provide redress, one cannot profit from one's own wrong, one should not be a judge in one's own cause, and principles concerning evidence.

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

- It is generally accepted that the sources of international law are listed in the ICJ statute in *order of importance*. That is, conventions (treaties) will take precedence over custom, and custom will take precedence over general principles of civilized nations. This is a rule based on logic. Treaties tend to be more specific and clearer than customs, and certainly treaties are a better expression of the consent of States. (The same can be said of customs in relation to general principles of nations.) Nonetheless, the rule is not so simple.
- There are customs of a ***higher order*** like State sovereignty and *pacta sunt servanda* and *jus cogens* norms, that to a certain degree *must* come first in authority before treaty provisions.
- This is true because these customs form the basis for the international system and of all treaty law. In addition, treaty provisions may be interpreted according to rules of international custom, which would seem to place these two sources – at least in this context – on an equal footing.

- ***Certain customs are of a higher order***. They have been described by scholars as **"axiomatic" or "constitutional" or "fundamental**." These are the background principles of the international system and they are treated differently from other customs.
- In the first place, it is ***not necessary to prove*** that they exist. It is assumed.
- Second, in fitting with their "constitutional" status, they stand somewhat ***above other laws*** in the international system.
- ***The first such principle is State sovereignty***. Many other background principles can be derived from sovereignty: the equality of States, consent as a basis for international obligation, and the right to territorial integrity. (Another principle that can be derived from sovereignty will be examined below in the *Lotus* case.)
- As explained previously, ***pacta sunt servanda is also a background principle of international law***. It means simply that international agreements must be observed in good faith. Finally, there are certain principles that can be derived from the concern of the international community with peace and security. One such principle, 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 are not "constitutional" principles but rather are fundamental for other reasons – ***for moral reasons***. Unfortunately, no one agrees as to what international norms are peremptory. Possible examples include the prohibition on the use of force, the principle of self-determination, and the prohibition against genocide, torture, slavery, piracy, and *apartheid*. 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.

[R]ules of *jus cogens*, or peremptory norms of general international law…have been defined in Article 53 of the Vienna Convention on the Law of Treaties 1969…as norms 'accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character'…

Customary Law: State Practice and Opinio Juris

Unfortunately, it is hard to prove that a custom exists. Two elements must be proven – State practice and *opinio juris*.

"Practice" indicates the State's overt behavior where as *opinio juris* means the State's belief that the practice is required as a matter of international law. State practice refers to general and consistent practice by states, while *opinio juris* means that the practice is followed out of a belief of legal obligation.

Part A: State Practice

- A State's practice is what the State does over and over again. Actions, repeated with some regularity, give rise to expectations, and expectations shared by most States may become international legal obligations. 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.
- These actions may be internal or external, meaning that they may be actions undertaken with respect to that State's own territory and citizens or actions undertaken against or in cooperation with other States at the international level. These "actions" may be inactions as well, as when a State does not object to a practice that affects its interests.

- *There are three questions of concern for showing State practice.*
- *First, how many States engage in this practice (i.e. how general and widespread is the practice)?*
- *Second, are there any inconsistencies (States engaging in contrary practice)?*
- *Third, how long has the practice been on going? These questions are interrelated. Strong evidence in favor of a custom on any one of the three questions will render the other questions less important. So if a practice is very widespread it may be deemed a custom despite a few strong inconsistencies. Furthermore, a practice that has been on going for the last 500 years may require less of a showing of generality and consistency in order to be a custom.*

Part B: Opinio Juris.

- *Opinio Juris* is like a State's official stamp that converts that State's casual practice into a binding rule. 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. This is the second criteria for custom, the so-called "subjective" element.

Local and Regional Customs

- General customs, once established, will apply to every State in the world. Some have argued, however, that 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*. The process of showing State practice and *opinio juris* may be slightly different, however, in the case of local and regional customs.

Which States Are Bound by Custom?

Non practicing states and new states?

Tacit consent and presumption of acceptance of that rule

- 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. The question arises, what will happen to those States in the world (or in the pertinent region or locality) ***that do not practice a particular custom***? Will they be bound by that custom? If so, the State will be bound to a law without its consent. ***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. The same applies to new States. They will be bound by all customs in existence at the time of State formation. This is unusual in international law. Usually we think of States as sovereign and independent and thus only bound when they consent. Some argue that saying and doing nothing is a type of **tacit consent** on the part of States. Others say that there is a "presumption of acceptance of a rule" with customary law such that we look not for a State's acceptance but rather for the lack of an objection.

- This is seen most clearly in the situation when old customs are imposed on newly emerging States. How can we apply the concept of tacit consent or presumption of acceptance to a new State that simply did not exist when the custom was forming? A State not in formation at the time the custom is forming cannot be said to "consent" to the custom. In fact, the new States that emerged from colonialism argued just that. These States said that they should not be bound by customs that they played no part in creating and that were established by the colonial powers from which they had achieved independence. ***In practice, however, these States were obliged to accept the obligations imposed by custom along with the benefits enjoyed under customary law***. (This demonstrates the rather subtle power of the international system to coerce minority dissenters. A new State that wants to "join in the game," so-to-speak, must accept the basic rules of the game.)

- 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. The student should remember that State practice and *opinio juris* need not be uniformly consistent and in support of the emerging rule. **So what happens to the State that objects?**
- The only way that a State can get out of a general 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***." According to the U.S. Restatement of International Law, "a dissenting state which indicates its dissent from a practice while the law is still in a state of development is not bound by that rule of law even after it matures." It should be noted that there are really two requirements to obtain persistent objector status. ***First, the State must object when the custom is in the process of forming***. The moment that the emerging rule becomes a custom, all objections will be useless. (In short, a State cannot object to an already-formed custom and claim that the custom does not apply to it.) ***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 or make a conspicuous reservation to the treaty to preserve its rights.
- After a rule of custom has formed, any conduct contrary to the rule is a violation of international law. 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. Customs, after all, are the socially-acceptable forms of behavior. When behaviors change, customs change as well.

Treaties and General Assembly Resolutions as Evidence of Customs

- The general rules of custom formation are as have been explained already, but some specific attention needs to be given to treaties and acts of the United Nations as evidence of custom. These types of evidence of customary law are tricky, as will be seen.
- Treaties, of course, are binding in their own right on State parties to the treaty. Cases may arise, however, when we want to apply the principles in the treaty to States that are not party to the treaty or to situations not specifically contemplated by the treaty. This is possible through customary law.

Customary law co-exists with treaty law.

- First, the treaty may restate an already existing international custom. State parties to such a treaty make no additional commitments beyond what they already owe to all other States.
- Second, the treaty may crystallize an emerging international custom. That is, the treaty may be the final recognition of a custom that was previously just in the development stages. In this case the treaty and custom become binding at the same time – the treaty for its signatories and the custom for every State in the world.
- Finally, the treaty may be so well-respected that it gives rise to customary laws through subsequent practice. Here the principles in the treaty apply at first only to the State parties to the treaty. Through time a custom develops and the principles become binding on every State.

- A treaty may be used as evidence of custom along with other things like domestic court decisions and policy documents, as indicated already in this text. Sometimes, however, the treaty may be the *only* evidence of the custom. Is one treaty enough to support a rule of customary law that will apply to all States? The ICJ has responded that, yes, in certain situations one treaty may be enough to establish a custom.
- But the Court provided an alternative analysis too that can be used in cases in which a treaty alone is being used to prove a custom. Two elements are required in this alternative analysis: (1) the treaty provision must be of a "norm-creating" character (meant to apply generally), and (2) there must be "a very widespread and representative participation in the convention" including States whose interests are "specially affected."