

Public International Law

Chapter 4- International Customary Law

4.1. Custom

- Main topics for discussion
 - Background Principles and the 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 to Customs

- 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.

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- **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.

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- As one international law scholar puts it, “International law is made chiefly in one of two ways:
 - Through agreements between states – ‘treaties’ – or
 - Through practice by states that fulfills certain requirements – ‘customary international law’

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- 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 International Court of Justice** 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;

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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, as will be explained shortly, must be a “general practice” and must be “accepted as law.”

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- 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 .
- 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.

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- 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 domestic laws of all states?**

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- 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”,

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- 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.

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- 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.

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- 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.
- They are simply, persuasive and

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- NOTE- 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* in international law.

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- **“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.

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- The ICJ may decide a case “**ex aequo et bono**” *when the parties agree*.
- In such a case, the Court may make its decision without reference to any principles of law at all.
- It is generally accepted that the sources of international law are listed in the ICJ statute in *order of importance*.

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- That is, conventions (treaties) will take precedence over custom, and custom will take precedence over general principles of law.
- **Why?** 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.)

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- In general, if an international lawyer has a treaty provision on point, he or she should argue that treaty provision first and foremost.
- If there is a custom on point as well, that may be helpful as a secondary argument.
- Let us see one example to understand hierarchy of sources in international law dispute.

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EXAMPLE-

- Imagine that you are faced with a question concerning the use of force by one State against another State.
- Assume you are a judge in ICJ.
- Assume you have before you the UN Charter, a Treaty of Friendship and Commerce, an international custom, a law book and article by a famous scholar, and a past decision by the ICJ.

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- Considering these materials, your first argument will be based on the treaties. (you have 2 treaties)
- 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.

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- **Thirdly, 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.
- Thus, Customs constitutes a default law –since custom applies to every dispute when a treaty provision does not apply or doesn't provide a sufficiently clear answer to settle the dispute.

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- **Finally**, the law book review article and ICJ decision will be helpful in arguing a particular interpretation of the relevant law or in clarifying any remaining ambiguities.

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- Concerning the hierarchy of sources of international law, it is said that :
 - Treaty is the primary source,
 - Custom comes after treaty, and
 - Judicial decisions and writing of teachings of international law comes as a last resort.

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

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- 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?**

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

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- 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.***

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- 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 over treaty law.*

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- Possible examples of jus cogens or peremptory norms include-
 - ✓ *The prohibition on **the use of force**,*
 - ✓ *The principle of **self-determination**,*
 - ✓ *The prohibition against **genocide**,*
 - ✓ *The prohibition against **torture**,*
 - ✓ *The prohibition against **slavery**,*
 - ✓ *The prohibition against **piracy**, and*
 - ✓ *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 test to determine whether a norm has become peremptory.

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- 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?

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- 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.

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- 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.

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- 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.

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- **“*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.
- 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"?**

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- **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.

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- 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?

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- So, if a practice is very widespread it may be deemed a custom despite a few strong inconsistencies.
- No hard 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.

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- 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 practices of certain select States.

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

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- 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 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.
- 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*.

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- Since there are fewer States involved at the regional and local level, greater amount of uniformity in practice may be required.
- For example, let us say that there are 200 States in the world.
- If two States engage in an inconsistent practice, this may not affect the creation of international customary law, because 99% of the States concerned engage in the custom.

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- However, let us say that there are 5 States in a particular region.
- If two 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?

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- 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.
- Saying and doing nothing is a type of *tacit* consent to the custom on the

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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 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.”

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- 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.”

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- 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.