

Chapter Two

The Source of IL

Every Legal system have some criteria by which legal norms or laws are recognized. In other word, it must have reasonably clear source of law. Generally speaking, those sources of law are either law creating or law identifying. In Ethiopia, for example, the passage of a bill via parliament is the primary means by which law is created and whether any alleged rule is a legal rule can be determined by reference to the legal gazette of the state.

Similarly, even though IL ***does not*** possess the formal institutions responsible for law creation (law making body), there are recognized and accepted method by which legal rules which comes to existence, as well as several ways in which the precise content of legal rules can be identified. These are the source of IL.

The traditional starting point for a discussion of the sources of IL is Article 38 of the Statute of International Court of Justice (ICJ).

this provides that:

- 1) The court, whose function is to decide in accordance with IL 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;
 - 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.
2. This provision ***shall not*** prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.

- It is immediately apparent that Art 38 ***does not***, in terms, purport to a list of the source of IL. Rather, it is a direction to the court authorizing it to consider various materials when deciding disputes submitted to it.
- Moreover, it ***does not*** even provide a complete list of matters which the court in fact consider when determining the rights and duties of state. For instance, Art 38 makes ***no*** reference to ***resolution of the UNGA or to diplomatic correspondence, publications of international organizations, the activities of non state actors or the many other materials which may reflect current IL.***

Type of sources of IL

1. **Material source of IL:** This refers from where the law drives the ***substance and content*** of the legal obligations. In this sense, state practice, , the practice of international organizations, the practice of non state actors, judicial decisions, resolution of the UNGA, the writing of jurists can be considered as material source IL.

2. Formal source of IL: this implies from where the law drives its validity and binding force. In other words, it is a process by which a legal rule comes into existence and being authoritative. Custom, treaty and general principles of law can be consider as formal sources of IL.

❖ **International conventions/treaties** are the most important source of IL and it is the only way states can consciously create IL. Treaties are the means by which state can create certain and specific obligations. Treaties may be bilateral (between two states) or multilateral (among many states) and they are the outcome of long and difficult negotiations. The precise rules dealing with the creation of treaty will discuss in chapter Five.

❖ **International Customary Law/ICL**, is the oldest and the original source of IL as well as of law in general. It is a law which has evolved from the practice/customs of states. It is the foundation stone of the modern IL. The custom/practice of states to qualify as **ICL**,

There must be states practice and the practice must be a “general and consistent” and such practice must be “accepted as law.” by those states. These are treated as two separate, but cumulative requirements to have ICL.

✓ **General principles of law:** it refers to principles common to the *national* laws of all States that, by derivation, may be used in international proceedings. 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 of estoppels concerning evidence, fairness. “General principles of law” ***does not*** mean general principles of *IL* such as ***sovereignty or pacta sunt servanda***.

✓ **Judicial decisions and the teachings of the most highly qualified publicists...** are the other source of *IL* and it should be noted that these source are only “subsidiary means.” In other words, the first ***three*** sources are binding sources of *IL*, and the fourth source ***is not binding but rather persuasive as “evidence” of IL.***

Regarding to judicial decisions **Article 59** of the statute of ICJ states that the decision of the Court ***has no binding force*** except between the parties and in respect of that particular case. Thus, ICJ decisions ***are not binding on subsequent cases***; there is no *stare decisis* in IL.

Moreover, Article 38 (2) states that 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.

2.1 International Customary Law/ICL

As noted before, **ICL** is both the oldest source and the one which generates rules binding on all states. It is the foundational stone of the modern law of nations. **ICL** is unwritten source, but it is a law which has evolved from the custom of states. Although in the contemporary international system treaty has replaced custom as the primary source of IL, a great part of rules which govern state and other international legal person today still comes from **ICL**.

It is generally accepted that the sources of IL are listed in Article 38 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.

- In short, if an international lawyer has a treaty provision on point, he or she should argue the treaty provision first and foremost. If there is a custom on point as well, that may be helpful as a secondary argument. For example, imagine that you are faced with a question concerning the use of force by one State against another State. ***You have to look the UN Charter, a Treaty of Friendship and Commerce, an international custom, a law review article by a famous scholar, and a past decision by the ICJ.***
- In other word, your first argument will be based on the treaties. Thus, 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. Second, you may point to provisions in the Treaty of Friendship that do not conflict with the Charter. Custom may be helpful if it is determined that the treaty provisions ***cannot*** be applied because of some limit to their applicability contained in the treaty itself or because one of the parties to the dispute did ***not sign the relevant treaty***.

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

Elements of ICL

When we say that ICL has evolved from the practice of states that is exactly what we mean. The activities of states in international arena may give rise to binding law. However, it ***is not*** mean that all acts or omissions of states that can give rise to ICL and there are certain conditions which must be fulfilled before states practice crystallizes into law.

These may be described conveniently as element of ICL and they derive mainly from a series of decisions of Permanent Court of Justice and its successor, ICJ. The principal among others: ***The North Sea Continental Shelf Cases, The Lotus Cases, the Anglo Norwegian Fisheries case and Nicaragua Vs USA and many other precedents could be mentioned.*** It should be emphasized, however, that these criteria ***are not*** absolute or exclusive and the weight to be given to each factor will depend on the subject matter of the rule which is in dispute.

1 State Practice

Here the question is what does meant by state practice? and from where and how to find custom?

Indeed, it difficult to define what state practice is in complete manner. But as a guideline, state practice include, but is not limited to, actual activities, (actions and omissions), ***statement made in respect of concrete situations, dispute, statement of legal principle made in abstract, such as those preceding the adoption of a resolution in the GA, national legislation, and the practice of IOs and documentary record of practice.***

In fact, some scholars argue that any activity of the state can amount to state practice for the purpose of identifying the content of the legal rule:

- **Consistency of practice/ constant and uniform action/inaction.** state practice must be reasonably consistent. Which means the consistency practice **does not** have to be total instead substantial state practice is enough. In addition, the degree of consistency requirement may vary according to the subject matter of the rule in dispute.
- **Generality of practice:** in order for a universal norm of customary law to develop the practice of state must be fairly general and it must be common to a significant number of state. In other words, not all states need to participate before a general practice can become law. It is, of course, impossible to determine exactly how many state must participate in a particular practice, for IL **is not** concerned the percentages, **nor does** it operate by way of majority vote.

Again the degree of generality requirement will vary with the subject matter, so that an onerous customary

Duration of practice in this regard the ICJ ***has not*** made any clear guidelines on the time required for consistence and general state practice to mature into CIL. Indeed, it would be strange if there was a precise rule about how long a practice must continue before it could become law because the process of customary law creation inherently fluid. The continental shelf cases suggest that the length of time needed will vary from subject to subject and, further, that the passage of only a brief period of time ***is not*** necessarily a bar to the formation of ICL.

2 The element of *Opinio juris* meaning “a belief in legal obligation”

It is ***not enough*** for the formation of ICL that there is general, uniform and consistent state practice. In order to this state's practices constitute law, state ***must recognize/endorse it as binding upon them as law***. To put in other way, state practice must be accompanied by a belief that such practice is obligatory, rather than merely convenient or habitual. This belief in the obligatory nature of the practice is called the opinion juris.

Thus, there must be some criteria by which we can distinguish state practice amounting to law from other kinds of state activities, such as acts of **comity or friendship**. In the Lotus case, PCIJ emphasized that *Opinio Juris* was an essential element in the formation of Customary law.

Yet, while it is easy enough to understand the need for *opinio juris*, **it is not** easy to see how it can be established in practice. On this point, a majority of the court in the North Sea Continental Shelf Cases said that the “***the frequency or even habitual character***” of a practice ***is not enough to establish opinio juris***. Thus, it seems that *opinio juris* **cannot** be inferred from the fact of practice alone because it is a distinct requirement which has to be independently and positively established.

Whether treaties and declarations constitute state practice or opinio juris is also controversial

Here there are ***three*** important 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)? What if there is some inconsistencies in the practice of state?***
- ***Third, how long has the practice been on going? For how many years?***

These questions are interrelated and interdependent each other. Strong evidence in favor of a custom on any one of the above questions will render the other questions less important. For example, if a certain state practice is very widespread it may be deemed a custom despite a few strong inconsistencies or a state practice that has been ongoing for the last 200

Here what important thing is that, there is no hard and fast rule exists to address the above questions. In practice courts may follow different approaches. For instance, in order to show the generality of a particular practice courts may follow different approaches, these includes:

- A court may focus on the practices of so-called “specially-affected” States. For instance, if the custom concerns the high seas, then the court will focus on coastal states with significant maritime activities or if the custom relates to the use of nuclear weapons, then the practices of States with nuclear weapons will be of particular interest.
- A court may select states from different geographic regions in order to have “representatives” from different parts of the world. Thus the court may look at State practices from one State from each continent of the world. Finally, a court may select states practices from states in different categories of economic development.
- NB. Courts have at times dispensed with the generality requirement altogether and have concentrated on the practices of the particular litigants in the case on hand.

Hierarchical relations between norms of IL

- Indeed, neither Article 38 of the ICJ Statute nor positivist doctrine draws hierarchical distinctions among customary norms. However, international tribunals and writers have done so under various headings. The ICJ has referred to ***“fundamental principles of IL” as a category differentiated from ordinary custom or treaty norms.***
- ***Some writers have described principles such as sovereign equality, political independence, and territorial integrity as axiomatic or constitutional in character.*** Accordingly, such constitutional law, ***“did not result from practice...; they were implicit, inherent in Statehood in a State System.***
- In other words, these principles as “authoritative by virtue of the inherent necessities of a pluralist society” and, such “rules of necessity” are considered as akin to “entrenched” constitutional rules that ***cannot*** be ***set aside*** by majorities whether through practice or agreements.

- ***There are certain norms of international law 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. ***pacta sunt servanda*** is also a background principle of IL. It means simply that international agreements must be observed in good faith.
- Finally, there are certain principles that can be derived

Another category of higher order customs exists called “***jus cogens***” or ***peremptory norms***.

In the hierarchy of ILs, peremptory norms are at the top, taking **precedence over other customs** and **over treaty law**. Unluckily, ***no one agrees as to what international norms are peremptory. How many States have to agree that a practice is horrible and shocking before this practice is prohibited according to peremptory norms? How these fundamental principles relate to one another or to other ILs? It is not clear***

Although general IL have defined *rules of jus cogens*, or peremptory norms in Article 53 of the VCLT1969 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 IL having the same character.*** However, there is ***no*** general agreement as to which rules have this character.

The ILC [in its work on the Law of Treaties] regarded the law of the UN Charter concerning the prohibition of the use of force as a conspicuous example of such a rule.

Moreover, even though the Commission refrained from giving any more examples of rules of ***jus cogens***, it did record that in this context mention had additionally been made of the ***the principle of self-determination, and the prohibition against genocide, torture, slavery, piracy, and apartheid.***

In the suppression of which every state is called upon to cooperate; the observance of human rights, the equality of states and the principle of self-determination. The full content of the category of ***jus cogens*** remains to be worked out in the practice of states and in the jurisprudence of international tribunals.

Regarding the operation and effect of rules of *jus cogens* in areas other than that of treaties are similarly unclear.

Local and Regional Customs

In principle **General customs**, once established, will apply to every State in the world. However, there are customary laws that 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 established by showing ***State practice and opinio juris***.

There are some problems with the theory of local and regional customs. First, such a custom may affect the rights of States outside the region incidentally. For example assume that the regional custom is to give exclusive national control over high seas to the state adjacent to those seas. The sea, previously a common and open to all States inside and outside the region, is now the exclusive property of one of the states in the region and only the other states in the region have tacitly consented to this.

Along the same lines, it is clear that if the local or regional practice conflicts directly with an international custom of general applicability, then the local or **regional practice cannot be a custom.** Since relatively there are fewer states involved at the regional and local level, a greater amount of uniformity in practice may be required.

Which States Are Bound by Custom?

In principle, if a custom is general, all States in the world are bound by it and 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?

To address the above question is that States that ***say and do nothing during the time when a custom is developing will be bound by that custom.*** “silence amount to acceptance”

The same applies to new States. They will be bound by all customs in existence at the time of State formation. In other word, States are bound to customs even when they do not consent to those customs. This is seen most clearly in the situation when old customs are imposed on newly emerging States. This is unusual in IL.

Usually most lawyers 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. “silence amount to acceptance”***

Sometimes, however; 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.

So what happens to the State that objects?

The objecting State can get out of a general custom. By objecting to the emerging custom ***loudly and continuously*** during the process of its formation State can get out of the general custom.

To put in simple, a dissenting state which indicates its dissent from a practice while the custom is still in a state of development ***is not bound by that rule of law even after it matures***. A State that does this may obtain “**persistent objector status.**”

In order to obtain persistent objector status; the state shall fulfill the following conditions:

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

➤ The objection must be ***clear and “persistent.”*** Meaning a mere objection to an emerging custom probably ***will not*** be enough. Commonly, a State will object the emerging customary rules in regular public statements or refuse to sign a certain treaty that supports the emerging custom or make a conspicuous reservation to the treaty to preserve its rights.

How Does Customary Law Change?

It is inherent in what has been said already that in order for a new customary law to develop in place of an existing customary, there must be sufficient state practice contrary to the existing rule supported by *opinio juris*.

Indeed, after a customary rule has formed, any conduct contrary to the rule is a violation of IL. Interestingly, if violations continue in persistently it 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.

- This contrary State practice, however; continued and sustained criticism, then it is clear evidence that **no replacement rule of customary law is emerging.**
- On the other hand, it will be very difficult to establish that a rule of ***jus cogens*** has been changed by contrary state practice. As rules of jus cogens are fundamental rules of customary law that not even a treaty can contradict. For example, the customary prohibition of the use of aggressive force and the prohibition of genocide. In short, though in theory rules of jus cogens can be changed, it is difficult to imagine how in normal circumstances any contrary practice will be accepted as emergence of a new rule.

The relationship between Customary and Treaty Law

As noted before, they are the two major sources of IL and they are both necessary components of International order. Usually, they serve different purpose and quite complementary. A treaty may codify custom or may lead to the development of new customary law via the impetus it gives to state practice. This overlap causes no problems when treaty and custom are complementary but difficulty can arise if treaty and customary law stipulate contradictory or dissimilar obligations.

❖ Where Customary and treaty law are complementary

Where Customary and treaty law stipulate the same or similar legal obligation there are few problems. Parties to the treaty will be bound by the treaty law non-parties will be bound by customary law.

More importantly, customary law does not cease to bind a state even if it is a party to a treaty stipulating the same obligation. Thus the state is bound by both the customary and treaty law. (read the Nicaragua Case)

❖ **Where Customary and treaty law are conflict**

Where Customary and treaty law are conflict, there is some disagreement as to the effect this has on the legal relations of the parties to a dispute.

- ✓ If the treaty is later in time than custom, subject to the operation of the rules of ***jus cojens (Article 53 of VCLT)***, *the treaty law will prevail*. This is because treaties represent a deliberate and conscious act of law creation. Parties to the treaty will be governed by the terms of the treaty, while the relations of ***non-parties will be governed by customary law***.
- ✓ Where on contrary customary law has been developed subsequent to the adoption of a treaty, the position is ***unclear***. Because the customary law later in time than the treaty, it might be thought that this should prevail, especially as non parties to the treaty will bound by the new custom. However, this cuts against the certainty and vitality of obligations freely and deliberately undertaken in a treaty.

In practice, it is likely that sub sequent custom can modify treaty obligation for state parties to the treaty only in very exceptional circumstances, when there is manifest consensus among the parties.