

Statute of the International Court of Justice

- Article 38: sources of international law
 - custom and treaties
 - general principles
 - e.g., *pacta sunt servanda* (“agreements must be kept”)

Vienna Convention on the Law of Treaties

- Treaty making
 - drafting
 - signature
 - ratification
 - entry into force
- Interpretation of treaties
 - intentionalist vs. textualist
 - Article 31: “A treaty shall be interpreted in good faith in accordance with the **ordinary meaning** to be given to the terms of the treaty in their context and in the light of its **object and purpose.**”
- Alteration or termination of treaties

Treaty Law

Change of circumstances

Fisheries Jurisdiction case (ICJ, 1974)

In order that a change of circumstances may give rise to a ground for invoking the termination of a treaty it is also necessary that it should have resulted in a **radical transformation of the extent of the obligations** still to be performed. The change must have increased the burden of the obligations to be executed to the extent of rendering the performance **something essentially different from that originally undertaken**.

Customary International Law

- ICJ Statute, Article 38
 - “international custom, as evidence of a general practice accepted as law”
- *opinio juris sive necessitatis*
 - “*opinion of law or necessity*”
- what counts as law?
- when is it law?
- when is it not law?

Customary Law

What counts?

North Sea Continental Shelf case (ICJ, 1969)

State practice, including that of states whose interests are specifically affected, should have been both **extensive and virtually uniform** in the sense of the provision invoked, and should moreover have occurred in such a way as to show general **recognition that a rule of law or legal obligation is involved**.

Nicaragua (ICJ, 1986)

The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule. In order to deduce the existence of customary rules, the Court deems it sufficient that the **conduct of States should, in general, be consistent with such rules**, and that instances of State **conduct inconsistent** with a given rule should generally have been **treated as breaches of that rule**....

When is it law?

Paquete Habana (U.S. Supreme Court, 1900)

[T]he period of a hundred years which has since elapsed is amply sufficient to have enabled what originally may have rested in custom or **comity, courtesy or concession**, to grow, by the general assent of civilized nations, into a **settled rule** of international law. As well said by Sir James Mackintosh: “In the present century, a slow and silent, but very substantial, mitigation has taken place in the practice of war, and in proportion as that mitigated practice has received the sanction of time, it is **raised from the rank of mere usage and becomes part of the law of nations.**”

When is it not law?

Lotus case (PCIJ, 1927)

It would merely show that States had often, in practice, abstained from instituting criminal proceedings, and not that they recognized themselves as being obliged to do so; for **only if such abstention were based on their being conscious of having a duty to abstain** would it be possible to speak of an international custom.

Fisheries case (ICJ, 1951)

[T]he ten-mile rule has not acquired the authority of a general rule of international law. In any event, the ten-mile rule would appear to be inapplicable as against Norway inasmuch as she had **always opposed any attempt to apply it** to the Norwegian coast

Peremptory Rules

- *jus cogens* – “compelling law”
- *erga omnes* – “toward all”

Subsidiary Sources of Law

- judicial decisions
- “teachings of the most highly qualified publicists”

Jus Cogens Rules

Vienna Convention on the Law of Treaties (1969)

Art. 53. A **peremptory norm** of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which **no derogation** is permitted.... A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of international law.”

Art. 64: If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates...



Obligations *Erga Omnes*

Barcelona Traction case (1970)

An essential distinction should be drawn between the obligations of a State **towards the international community as a whole**, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the **concern of all States**. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.

Such obligations derive, for example, in contemporary international law, from the outlawing of acts of **aggression**, and of **genocide**, as also from the principles and rules concerning the basic rights of the human person, including protection from **slavery** and **racial discrimination**.



Sources of International Law

