# PUBLIC INTERNATIONAL LAW

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# UNIT 2. Creation and enforcement of international legal standards

# 2.1. The process of creation of International Law

- I. GENERAL FEATURES

**A) Article 38.1 of the ICJ Statute expresses:**

1. The Court, whose function 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;

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.

3 main elements to take into account:

1. Formal sources of international law: treaties, custom and general principles of IL

2. Subsidiary resources for the determination of legal rules: judicial decisions (even ADR) and teachings of Scholars.

3. Decisions *ex aequo et bono*

1. The formal sources of International Law

Considerations on the article 38 of the ICJ Statute.

- All the United Nations Member States are parties on the ICJ Statute

- If one State that does not form part of the United Nations becomes into a new Member *(see unit 7),* automatically it shall be enforced the ICJ Statute.

- The Statute was an inspiration taken from the Permanent International Court of Justice of the League of Nations whose Committee of jurists prepared basing on the international treaties as well as the arbitration agreements.

Essentially the ICJ function is to solve the States disputes applying the International Law.

So, it could be affirmed that:

1. The article 38 of the ICJ Statute expresses the basic consensus of the States about the formal sources of the International Law.

2. Thus, there is an agreement in the International Community on these topics:

- The International Treaties.

- The International Custom.

- General Principles of Law recognized by civilized nations.

- The article 38 of ICJ Statute does not establish a hierarchical criteria but it does establish a material hierarchy:

**- ius cogens**

**- mandatory obligations of the UN**

**- General legal criteria:**

***- lex specialis derogat generalis***

***- lex posterior derogat prius***

2. The subsidiary means: Judicial Decisions and the Doctrine.

- They contribute to the development of the International Law

- Their duty is to identify and interprete the International Law.

a) Judicial Decisions

It is formed by the Decisions taken from the International Courts through:

—> Litigation of the parties:

- International Courts: Judgement…

- ADR: Arbitration award

—> Advisory: advisory opinions such as the ICJ’s

- The ICJ cannot create rules acting as a global policymaker.

- The mission of the ICJ is to determine the existence or not of principles and legal rules.

- Judicial Decisions —> It is a really essential element in order to determine and interprete the international legal rules.

b) The Doctrine

- It is the work of International Law Scholars which can be accessed to find out about the existence and interpretation of international standards.

—> It is a subsidiary mean of IL

- Doctrine can be individual or collective:

Individual: IL Professors' publications. For instance, books, journal articles, papers…

Collective: It refers to the works of scientific institutes such as *Institut de Droit Internacional, International Law Association, Hispano-luso-americano Institute of International Law.*

- Codification and the work of International Law Comission:

- It’s a source analogous to the writings of publicists, and at least authoritative, is the work of IL Commission, including its articles and commentaries, reports, and secretariat memoranda.

- IL Comission  deals with the codification and progressive development of IL. Its work on various topics, notably the law of the sea, has provided the basis for successful conferences of plenipotentiaries and for the resulting multilateral conventions.

3. Equity in the Jurisprudence of the International Court and decisions *ex aequo et bono*

- Article 38(2) of the Statute provides for the power of the ICJ to decide a dispute ex aequo et bono if the parties agree.

- Equity: it refers to considerations of fairness and reasonableness often necessary for the enforcement of style rules of law. Equity is not itself a source of law, yet it may be an important factor in the process of decision-making.

- The parties of a dispute may authorize the Court to decide on the same matter under international law, applying criteria of equity and acting to the best of their knowledge and understanding.

The Court will not solve the case applying the rules usually enforced in IL, just only according to the equitable criteria of the Court.

**VIP:** This possibility only exists when both parties to the dispute are in agreement to ask the Court to decide ex aequo et bo.

VIP!

Decisions *ex aequo et bono* have never been taken in the practice of the ICJ nor in the arbitral jurisprudence, at least with a *ratio decidendi value* in the arbitral awards.

So, the international judge cannot be inspired by Equity to dictate a judgement, without being bound by the law in force, EXCEPT if all parties give him the express and clear authorization to this purpose.

- According to the 1969 ICJ ruling on the delimitation of the North Sea Continental Shelf:

*“Whatever the reasoning of the court, its decisions must be fair by definition and in this sense equitable. In addition to a Court ruling on justice or the law, it is a matter of objective justification of its decisions beyond the rules, but within the rules”*

Types of Equity

- **equitat infra legem:** A norm admits several interpretations and the judges consider the one that is fairer to the particular case. The judges do not need the authorization of the parties (this is not the purpose of Article 38.2).

- **equitat contra legem:** What judges consider to be fair in a specific case which is contrary to a norm in force. Art. 38.2: possible if the shares authorize to the ICJ.

- **equitat praeter legem:** Judges choose an interpretation beyond what is established by law.

**B) Processes of creation of international standards and obligations not provided for in article 38 of the ICJ Statute.**

1. Unilateral Acts

The conduct of governments may not be addressed towards the formation of agreements but still be capable of creating legal effects. The formation of customary rules and the law of recognition are two of the more prominent categories concerned with the “unilateral acts” of States.

They have an autonomous normative character by which the obligation of the author State arises, without leading to a compensation, acceptance, response or reaction by other States.

The unilateral act of the State does not produce obligatory effects by itself but depends on the possible impact of a possible “harmful” action.

Most unilateral acts produce other legal effects, that are always predetermined by customary law.

Unilateral acts can be either almost contractual.

However, in other cases, unilateral acts and declarations by States may produce legal effects independently or by themselves, without their binding nature depending on the reaction of other States.

**Formal Unilateral Declaration** *(Promise)* is a unilateral declaration by which a State undertakes to behave in a certain manner.

- This obligation is assumed independently of any reciprocal undertaking by other States. It is a clear intention to accept obligations vis-à-vis certain other states by public declaration which is not an offer or otherwise dependent on reciprocal undertakings from its addresses

- Example: in the *Nuclear Tests* cases the International Court held that France was legally bound by publicly given undertakings, made at the highest level of government to cease carrying out atmospheric nuclear tests. Upon France's declaration in this topic, the State had assumed an obligation to cease atmospheric nuclear tests.

Withdrawal of unilateral commitments.– The principle 10 of the International Law Comission provides:

“A unilateral declaration that has created legal obligations for the State making the declaration cannot be revoked arbitrarly. In assessing wether a revocation would be arbitrary, consideration should be given to: (…)

b) The extent to which those to whom the obligations are owed have relied on such obligations

- Evidence of inconsistent rights.- Unilateral declaration involve, in principle at least, concessions which are intentional, public, coherent and conclusive issues. However acts of aquiescence and official statements may have probative value as admissions of rights inconsistent with the claims of the declarant, such acts individually not being inclusive.

- Opposable situations.- Once a dispute is already known to exist, the other party may damage its case seriously by recognition or acquiescence. Recognition or implied consent may have the result of conceding as lawful the rights claimed. Here acquiescence involves an acceptance of the legal basis of the opponent's claim, which can perhaps be more readily proved than in the case of a state faced by an undoubted usurper.

- Requirements of acquiescence:

    1. Notoriety of the facts and claims

    2. Prolonged tolerance by the state(s) whose interests are specially affected

    3. General toleration by the international community

# ESTOPPEL

The Court recognizes the possibility of application of the Doctrine of Estoppel in international law when:

1) There is a unilateral behavior by a State (declarations made by States in order to generate credibility for other States).

2) A reaction from one or more other States that modifies their position is based on these declarations.

3) These elements come together. A situation of estoppel is produced and the State that made the unilateral declaration is obliged and can no longer be arrested.

So, The essence of estoppel is the element of conduct which causes the other party, in reliance on such conduct, detrimentally to change its position or to suffer some perjudice.

ATTENTION: Estoppel in municipal law is regarded with great caution, and the ‘principle’ has no particular coherence in international law, its incidence and effects not being uniform.

## RELATION BETWEEN UNILATERAL ACTS AND ESTOPPEL

Clarification between unilateral acts and estoppel: These two figures were imported from two different legal systems. One belongs to the civil law tradition (unilateral acts) and the other one comes from common law (estoppel).

Both figures are shading each other, but the differences between them rest on the intention and on the publicity which is a requirement of the unilateral acts.

## DISTINCTION BETWEEN ACQUIESCENCE AND ESTOPPEL

Acquiescence is not subject to the requirement of detrimental reliance but is a promise implied in the context of the lapse of time, i.e., acquiescence is equivalent to tacit recognition while estoppel is linked to the idea of preclusion.

## 2. Mandatory resolutions from the International Organizations

The resolutions of the organizations are not usually legally binding and they are mere recommendations to the Member States.

However, some of the normative acts of international organizations are binding decisions and constitute a particular procedure for the creation of international obligations that are becoming increasingly important in a progressively institutionalized international society.

Examples: Resolutions of the Security Council, EU Treaties, Regulations, Directives and other acts…

## 3. Soft law procedures

They are those normative acts that do not have a formally obligatory character but that conform a diluted or soft commitment that conducts the States to adjust their domestic systems.

In the case of a breach of a soft-law rule, the offending State will not have to assume its international responsibility because there is practically no violation of an obligation on its part.

## II. INTERNATIONAL CUSTOM

It is a traditional source of international law that, despite having a relatively primitive character, continues to play an important role in the process of creating the rules of this order.

A) Concept and elements of the international custom

Article 38 ICJ refers to “international custom, as evidence of a general practice accepted as law” = it is an expression of a conduct generally followed by the subjects of international law with the conviction that it responds to a legal requirement.

These are basic standards that have historically constituted the main support of the General International Law.

It is made up of two elements: the material or practical element and the subject element or legal opinion.

**1. The material element: The practice.**

= use, repetition of acts, "precedents". Actions or omissions. (Omission: difficult to be proved...). With frequency, repetition in time and contingency uniformity.

ICJ Judgment June 27, 1986: Military and Paramilitary Activities in and against Nicaragua: "The Court does not believe that because a rule is customarily established, the corresponding practice must be strictly in accordance with that rule. It seems to be enough with the existence of customary rules that should be deduced from the fact that States conform to them in a general way and that they deal in the same way with behavior that does not conform to the rule as a violation of it and not as a manifestation of the recognition of a new rule".

**2. The subject element: the legal opinion.**

= Conviction of obligatory. The acts that constitute the precedents must, therefore, be based on the conviction of the States that these acts are not carried out for free, nor for reasons of courtesy, convenience or tradition, but rather that they conform to a legal obligation.

The International Court of Justice has been particularly rigorous in this respect, asserting that, when the parties agree on a specific standard, it does not exempt the Court from ensuring that there is a legal opinion on its obligatory nature in international customary law.

B) Mandatory training and effectiveness of the general cost.

The formation of a general or universal costum requires that precedents are widely spread and that there is a conviction of deep obligation.

The customary rules are the result of the general consensus, not of the consent, expressed or implied, of a particular State... Not of the specific consent of the defendant; what the Court must determine in itself, as stated in article 38 of the Statute, is certain practice; generally accepted as law".

Prof. Jiménez de Aréchaga

Exception: The persistent objector.

It is possible for a state to prevent a person in training from being forced to behave as a persistent objector.

The State that behaves as a persistent objector cannot prevent the customary rule from being formed among other States, but the cost thus formed will not be legally opposable.

C) The particular costum: regional or local

The cost can also be formed in a smaller geographical space.

- The existence of this type of cost is governed by the same basic guidelines that we have examined with respect to the universal cost and requires, therefore, the confluence of the material element (practice) and the spiritual element (opinion)

ATTENTION!

The State that invokes the existence of a regional or local cost must support the burden of proof that this cost actually exists and that links the party against whom it is invoked to have contributed to the formation of this cost.

D) The interaction of costum with other sources of international law.

The treaties can be at the base of the formation of the costum either:

1. By means of a declared effect of a pre-existing customary rule

2. By means of a crystallizing effect of a customary standard in advanced formation or

3. By means of a generator effect.

## III. THE GENERAL PRINCIPLES OF LAW RECOGNIZED BY CIVILIZED NATIONS

### A) Common principles of domestic law

Article 38 of the Statute of the International Court of Justice

"The general principles of law recognized by civilized nations.

Case law has referred to these principles as the rules common to most legislation

These are common rules of internal law that can be applied by international courts.

B) Specific principles of international law

It is configured in external forum, i.e., in the scope of the relations of the States with other subjects of International Law.

There is a movement of authors who deny the recognition of these principles, but the CPJI affirmed:

*"The Court considers that, in its general acceptance, the meaning of the expression "principles of international law" means international law as it is in force among all the nations that form part of the international community".*

*Lotus Case. Judgment of September 7, 1927.*

# IV. CODIFICATION AND THE WORK OF THE INTERNATIONAL LAW

Codification involves the comprehensive setting down of the lex lata and the approval of the resulting text by a law-determining agency. The process has been carried out historically at international conferences, beginning with the First and Second Hague Peace Conferences of 1899 and 1907.

A) Modalities of the codification process

The codification has normally a global or universal scope, since it tries to give written and systematic form to the customary rules that govern the international community.

## B) The work of codification in the UN.

Resolution 1744 (II) of 1947, of the General Assembly approved the Statute of the International Law Commission (ILC), as the body in charge of the codification mission.

Although the ILC was initially composed of 17 members, Resolution 36/39, approved by the General Assembly on November 18, 1981, increased the number of members to 34, with the following distribution:

8 from Africa,

7 from Asia,

3 from eastern Europe,

6 from Latin America,

8 from western Europe or others

2 rotary diaphragms".

The members of the ILC are elected by the General Assembly for a period of five years and are part of the same group as independent experts and not as representatives of the government of which they are nationals. The Commission meets in an annual period of sessions, which normally lasts for seven days.

# Process...

The codification process begins with the choice of the topic to be coded by the General Assembly or by the ILC itself, under its supervision. Then a speaker or "Special Rapporteur" presents successive reports on the topic; the reports are debated by the Commission in order to approve an advance draft of articles, with their respective comments, which will be communicated to the Governments.

Taking into account the observations of the Special Rapporteurs, the Commission prepares a draft of defined articles that will be submitted to the General Assembly with one of the following recommendations:

a) no action be taken;

b) to take note of the report or to approve it by means of a resolution;

c) the recommendation of the project to the Member States in order to reach an agreement

d) to convene a conference to conclude a convention (Statute, Article 23).

The General Assembly adopts the solution it considers most appropriate, without necessarily limiting itself to the proposals of the ILC.

The codification process, although it has certain inherent limitations, has had a considerable impact on the evolution of contemporary international law.