



The Law of the International Community: Subjects and Sources of International Law


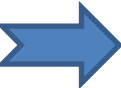
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4 – Sources: Custom

General features of the law-making function and of sources

No outside “legislator” is tolerated by States,
SO:

- In absence of a vertical structure, States perform the functions of the international legal order
- **Uti singuli**, they are the subjects of the legal order, rules are directed to them
- **Uti universi**, they perform the functions of the legal order

Law making: «spontaneously»  Custom
voluntarily  Treaties

General features of the law-making function and of sources

In the international legal order (as opposite to domestic legal orders):

- **General rules** (directed to all subjects of international law)
 - are of **customary** nature
 - are **not so many**
 - are **not written**
 - can be **derogated from** by treaties, exception made for **very few jus cogens rules**
- **Particular rules** (directed only to those subjects who have voluntarily subscribed them)
 - are **very abundant** (in comparison to general international law)
 - cover **very different subjects** (from bilateral commercial treaties to “codification” conventions on subjects of common, shared interest)
 - being capable of derogating from general international law (exception made for jus cogens), they are **the first rules to be looked for to ascertain which is the law applicable to a specific situation** (see art. 38 of the Statute of the ICJ)

General features of the law-making function and of sources

Statute of the International Court of Justice

Article 38

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.

(...)

General International Law

Though not very numerous, and necessarily not presenting a very detailed content because of their unwritten nature (never fixing exact time limits or complex procedures, for instance), **general international law rules are essential for the international legal order:**

- on **some general rules of structural nature, often named «structural principles»** (rules descending from the sovereign equality of States – such as immunity of States from other States' jurisdiction -, *consuetudo est servanda* and *pacta sunt servanda*) the modern characteristics of the international legal order are shaped

- general rules protect **individual interests of all States** (e.g. diplomatic protection of citizens), or of all States presenting certain features (e.g. coastal States) – **international law for co-existence**

- in recent years (after the II WW) a **set of fundamental values** of the International Community has emerged and a new category of general international rules – **jus cogens** – has come into being, enshrining those values (prohibition of the use of force if not for legitimate defence, prohibition of gross violations of human rights, prohibition to impede «external» self-determination of peoples).

Custom

All general international law rules are of customary nature

Custom normally is **not a deliberate lawmaking process**

«States, when participating in the norm-setting process, do not act for the primary purpose of laying down international rules. Their primary concern is to safeguard some economic, social, or political interests.

The gradual birth of a new international rule is the **side effect of States' conduct in international relations**. That is why Kelsen defined custom as «**unconscious and unintentional lawmaking**» and some Italian international lawyers (Giuliano, Ago, Barile) defined it as a «**spontaneous process**»»

(see Cassese)

How to determine the existence and content of customary rules

Elements of custom:

-**State practice** (diuturnitas)

«States practice, including that of States whose interests are specially affected, should (...) be both extensive and virtually uniform»

(see ICJ, *North Sea Continental Shelf Cases*)

-Corresponding views of States (***opinio juris*** or ***opinio necessitatis***)

Often **beginning as *opinio necessitatis*** (practice regarded as being imposed by social or economic or political needs), and becoming ***opinio juris*** (practice seen as dictated by international law) when the new customary rule has evolved

It is difficult to pinpoint exactly the moment when State practice is widespread enough to say that a new rule was born, since it is the result of a continuous process.

We cannot make without *opinio* (the so-called subjective element of practice) otherwise it is impossible to tell apart:

- violations from processes of modification of customary law;
- international rules from courtesy behaviours (comity)

How to identify and evaluate State practice?

Evidence of what a State does can be obtained from numerous sources:

- «**internal acts**» of the State, such as administrative acts, legislation, decision of domestic courts
- «**external acts**» of the State, such as treaty-making

but also **operative action and acquiescence or reaction** to another State's action (found out reading the newspapers, consulting historical records, listening to what governmental authorities are saying)

State practice is continued and repeated behaviour of States

How to identify and evaluate the *opinio juris* of States?

- Declarations
- Position taken in the assembly organs of the international organizations

BE CAREFUL:

- Decisions of international courts, such as the ICJ, do not concur directly to build up State practice and *opinio*, because they do not emanate from States, but they indirectly influence State practice
- While the adoption of a recommendation by the General Assembly of the UN *per se* is an act of the organization, the vote expressed by States in the adoption of the recommendation can be an element to infer the *opinio juris* of the States

Do customary rules need, at their birth, the support of all States?

No, otherwise also customary law, just like treaty law, would be based on voluntary consent and **we would not have general law** (custom would be the result of a tacit agreement)

The so called «**persistent objector**» doctrine (according to which a State is entitled to claim it is not bound by a new customary rule because it consistently opposed it before it ripened into a customary rule), mostly based on two *obiter dicta* of the ICJ (in the *Asylum* and *Fisheries* cases), is in contradiction with the non-voluntary nature of general law (see conclusion 15 2018 ILC Draft)

A different situation altogether is when a **group of States, representing one of the interests involved in developing the rule** (e.g., developing States, industrialized States on the upper part of international rivers...) opposes the birth of a customary rule or causes its modification or termination

Is it possible for customary rules to develop «**instantly**»?

Not literally. The threshold that needs to be attained before a legally binding custom can be created will depend both upon the nature of the alleged rule and the opposition it arouses.

Concurrence of the major powers in the particular field covered by the rule may precipitate the formation of a new customary rule; the same result cannot be obtained by the position of a great power alone (balance of powers, acquiescence/opposition)

Examples:

Quick birth of jus cogens because of accent on the *opinio juris* element

Quick – but not instant – birth of the exclusive economic zone (often referred to as «instant custom»)