

INTERNATIONAL LAW SUMMARY 2010



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Sources used

- class notes
- Blay, Piotrowicz and Tsamenyi, *Public International Law: An Australian Perspective*, 1997.

SAMPLE ONLY

SOURCES USED	2
INTRODUCTION TO INTERNATIONAL LAW.....	ERROR! BOOKMARK NOT DEFINED.
THE INTERNATIONAL COMMUNITY AND INTERNATIONAL LAW	ERROR! BOOKMARK NOT DEFINED.
THEORIES OF INTERNATIONAL LAW	ERROR! BOOKMARK NOT DEFINED.
<i>Naturalistic view</i>	<i>Error! Bookmark not defined.</i>
PERSONALITY AND RECOGNITION	ERROR! BOOKMARK NOT DEFINED.
<i>Statehood</i>	<i>Error! Bookmark not defined.</i>
<i>Other territorial entities</i>	<i>Error! Bookmark not defined.</i>
<i>International organisations</i>	<i>Error! Bookmark not defined.</i>
<i>Individuals</i>	<i>Error! Bookmark not defined.</i>
<i>Other international persons</i>	<i>Error! Bookmark not defined.</i>
LEGAL FOUNDATIONS (SOURCES) OF THE INTERNATIONAL LEGAL SYSTEM	ERROR! BOOKMARK NOT DEFINED.
BOOKMARK NOT DEFINED.	
TREATIES	ERROR! BOOKMARK NOT DEFINED.
CUSTOM	ERROR! BOOKMARK NOT DEFINED.
<i>Local custom</i>	<i>Error! Bookmark not defined.</i>
<i>Persistent objector</i>	<i>Error! Bookmark not defined.</i>
GENERAL PRINCIPLES OF LAW	ERROR! BOOKMARK NOT DEFINED.
JUDICIAL DECISIONS AND WRITINGS OF PUBLICISTS	ERROR! BOOKMARK NOT DEFINED.
RESOLUTIONS OF INTERNATIONAL ORGANISATIONS	ERROR! BOOKMARK NOT DEFINED.
SOFT LAW	ERROR! BOOKMARK NOT DEFINED.
AUSTRALIA & THE INTERNATIONAL LEGAL SYSTEM.....	ERROR! BOOKMARK NOT DEFINED.
DEFINED.	
INTERNATIONAL LAW AND NATIONAL LAW	ERROR! BOOKMARK NOT DEFINED.
COMMONWEALTH STATES	ERROR! BOOKMARK NOT DEFINED.
AUSTRALIAN INTERACTIONS WITH INTERNATIONAL LAW	ERROR! BOOKMARK NOT DEFINED.
THE LAW OF TREATIES	ERROR! BOOKMARK NOT DEFINED.
UNILATERAL STATEMENTS	ERROR! BOOKMARK NOT DEFINED.
VIENNA CONVENTION ON THE LAW OF TREATIES	ERROR! BOOKMARK NOT DEFINED.
FORMATION AND APPLICATION OF TREATIES	ERROR! BOOKMARK NOT DEFINED.
<i>Formation</i>	<i>Error! Bookmark not defined.</i>
<i>Entry into force</i>	<i>Error! Bookmark not defined.</i>
<i>Pacta sunt servanda</i>	<i>Error! Bookmark not defined.</i>
<i>Impact on third states</i>	<i>Error! Bookmark not defined.</i>
RESERVATIONS TO TREATIES	ERROR! BOOKMARK NOT DEFINED.
<i>General principles</i>	<i>Error! Bookmark not defined.</i>
<i>Legal effect of reservations</i>	<i>Error! Bookmark not defined.</i>
<i>Reservation to human rights treaties</i>	<i>Error! Bookmark not defined.</i>
INTERPRETATION OF TREATIES	ERROR! BOOKMARK NOT DEFINED.
INVALIDITY OF TREATIES	ERROR! BOOKMARK NOT DEFINED.
<i>General principles</i>	<i>Error! Bookmark not defined.</i>
<i>Error</i>	<i>Error! Bookmark not defined.</i>
<i>Procedure for invoking the invalidity of a treaty</i>	<i>Error! Bookmark not defined.</i>
TERMINATION OF TREATIES.....	ERROR! BOOKMARK NOT DEFINED.

Other aspects of termination **Error! Bookmark not defined.**

SOVEREIGNTY & POWERS OVER LAND (TERRITORY & JURISDICTION)/LAW OF THE SEA.....**ERROR! BOOKMARK NOT DEFINED.**

SOVEREIGNTY AND TERRITORY **ERROR! BOOKMARK NOT DEFINED.**
TRADITIONAL MEANS OF ACQUISITION OF TERRITORY **ERROR! BOOKMARK NOT DEFINED.**
 Occupation & prescription **Error! Bookmark not defined.**
 Cession **Error! Bookmark not defined.**
EFFECTIVE OCCUPATION **ERROR! BOOKMARK NOT DEFINED.**
CONSENT BY OTHER STATES..... **ERROR! BOOKMARK NOT DEFINED.**
 Consent by the other party to the dispute..... **Error! Bookmark not defined.**
LIMITATIONS ON SOVEREIGNTY OVER TERRITORY **ERROR! BOOKMARK NOT DEFINED.**
OTHER TERRITORY..... **ERROR! BOOKMARK NOT DEFINED.**
CHANGING PERCEPTIONS OF SOVEREIGNTY **ERROR! BOOKMARK NOT DEFINED.**

LAW OF THE SEA.....**ERROR! BOOKMARK NOT DEFINED.**

LAW OF THE SEA CONVENTION **ERROR! BOOKMARK NOT DEFINED.**
TERRITORIAL SEA AND THE CONTIGUOUS ZONE **ERROR! BOOKMARK NOT DEFINED.**
THE CONTINENTAL SHELF **ERROR! BOOKMARK NOT DEFINED.**
THE EXCLUSIVE ECONOMIC ZONE **ERROR! BOOKMARK NOT DEFINED.**
THE HIGH SEAS & RELATED MATTER **ERROR! BOOKMARK NOT DEFINED.**
THE DEEP SEA BED..... **ERROR! BOOKMARK NOT DEFINED.**
PEACEFUL SETTLEMENT OF DISPUTES..... **ERROR! BOOKMARK NOT DEFINED.**

SOVEREIGNTY & POWERS OVER LAND (TERRITORY & JURISDICTION)**ERROR! BOOKMARK NOT DEFINED.**

JURISDICTION **ERROR! BOOKMARK NOT DEFINED.**
TYPES OF JURISDICTION **ERROR! BOOKMARK NOT DEFINED.**
BASES OF JURISDICTION **ERROR! BOOKMARK NOT DEFINED.**
 Territoriality as a basis or jurisdiction **Error! Bookmark not defined.**
 Effects doctrine (or the objective territorial principle)..... **Error! Bookmark not defined.**
 Nationality **Error! Bookmark not defined.**
 Protective principle..... **Error! Bookmark not defined.**
 Passive Personality Principle **Error! Bookmark not defined.**
 Universal jurisdiction **Error! Bookmark not defined.**

INTERNATIONAL DISPUTE RESOLUTION/**ERROR! BOOKMARK NOT DEFINED.**

TORTIOUS OBLIGATIONS (STATE RESPONSIBILITY) **ERROR! BOOKMARK NOT DEFINED.**

SECURITY & USE OF FORCE.....**ERROR! BOOKMARK NOT DEFINED.**

PEACEFUL SETTLEMENT OF INT'L DISPUTES..... **ERROR! BOOKMARK NOT DEFINED.**
GENERAL OBLIGATIONS OF STATES..... **ERROR! BOOKMARK NOT DEFINED.**
SPECIFIC INT'L TRIBUNALS **ERROR! BOOKMARK NOT DEFINED.**
 Legality of Use of Force Case (Provisional Measures)..... **Error! Bookmark not defined.**
 Case Concerning Certain Phosphate Lands in Nauru (Nauru v Australia) **Error! Bookmark not defined.**
 Case Concerning East Timor (Portugal v Australia)..... **Error! Bookmark not defined.**

STATE RESPONSIBILITY.....ERROR! BOOKMARK NOT DEFINED.

THE NATURE OF STATE RESPONSIBILITY **ERROR! BOOKMARK NOT DEFINED.**
TREATMENT OF ALIENS **ERROR! BOOKMARK NOT DEFINED.**
NATIONALISATION/EXPROPRIATION OF NON-NATIONAL'S PROPERTY **ERROR! BOOKMARK NOT DEFINED.**

LEGAL FOUNDATIONS (SOURCES) OF THE INTERNATIONAL LEGAL SYSTEM

Rules of IL come from many different sources. The particular source can impact on the way it is interpreted & applied.

The doctrine of sources provides the objective standard of legal validation, providing the conditions to ascertain & validate legal prescriptions. Treaty & state practice are the two main sources of IL. Emphasis on observable 'positive' facts.

Doctrine of sources provided the methodology of IL. Sources to be used objectively & scientifically, so necessary to examine in full detail the practice & related legal convictions of the states.

Doctrine of sources is based on the positive manifestation of the wills of states. The theory appears realistic & practical, however there are significant deviations from the doctrine & its methodology in IL. Perhaps more of a myth than reality.

Treaties

Treaties are becoming the most important source of IL. A number of significant multilateral treaties shaping behaviour & the shape of the int'l legal system. Most of the law binding a state is in bilateral treaty.

Certain rules concerning the creation & operation of treaties: every state possesses the capacity to conclude treaties, every treaty in force is binding upon parties to it & must be performed in good faith, & a treaty does not create either obligations or rights for a third state w/out its consent. (Article 6, 26 & 34 of Vienna Convention on the Law of Treaties 1969)

The running order of s 38 of Statute of ICJ suggests that treaties take precedence over other sources that follow. But opposing view is that sources of IL are not hierarchical but necessarily complimentary & interrelated.

Note that only the states that create a treaty are bound by it, so the distinctions by Fitzmaurice may be immaterial. He does, however, clarify the purpose by which a source plays in the evolution of rules of IL.

Custom

Customary IL (CIL) derives from practice of states. State practice may give rise to CIL when that practice is uniform, consistent & general, & if it is coupled w/ the belief that the practice is obligatory rather than habitual. However there is debate as to why state practice can give rise to binding IL & whether state's continued objection can absolve it from the scope of the rule.

State practice = any act or statement by a state from which views of customary law can be inferred. Includes physical acts, claims, declarations (eg in resolutions of GA of UN, national laws, national judgments, & omissions. The number of states participating in the practice is more important than the frequency or duration of the practice.

North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark & the Netherlands)

Facts : Dispute over delimitation of their shared continental shelf.

Held: To determine if state practice has given rise to CIL, the acts concerned must amount to settled practice & they must also be carried out in a way that there is evidence of a belief that the practice is rendered obligatory by the existence of a rule of law requiring it. The states concerned must feel they are conforming to a legal obligation.

The Geneva Convention was not in its origins or inception declaratory of a mandatory rule of CIL, neither has it subsequently become respected as a rule. Nor has state practice provided the basis for such a rule.

Military & Paramilitary Activities in & against Nicaragua (Nicaragua v US)

Facts: Nicaragua complained of US military activity within its borders. US argued the ICJ had no jurisdiction b/t US had reservation against ICJ hearing disputes if they were based on a multilateral treaty (here, the UN Charter re non-use of force).

Nicaragua claimed that the complaint = based on CIL.

Held: The mere fact that states declare their recognition of certain rules is insufficient to be CIL. Where two states agree to incorporate a particular rule in a treaty, this makes the rule a legal one, binding on them, but in CIL, the shared views of the parties as to the content of the rule is not enough. The Ct must be satisfied that the existence of the rule in *opinio juris* (state belief in a legal obligation to comply) of states is confirmed in practice.



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