

Custom in international law

- Introduction
 - The importance of customary international law
 - The two elements: state practice and opinio juris
ICJ Statute art. 38: “as evidence of a general practice accepted as law”
 - Is customary law vague?

Practice – objective element

- How wide-spread?
- Consistency
- How long-lasting?
- What constitutes evidence of state practice?
 - Practice of states
 - Practice of IOs

Opinio juris – subjective element

- Is this a mandatory requirement?
- What constitutes evidence of opinio juris?
 - New ways to express state opinions
 - The distinction between practice and opinio juris
- Different requirements in different fields?
- Persistent objector

Customary international law and treaties

- To what extent are treaties codification of customary law?
- To what extent can treaties exempt from rules of customary law?
- To what extent can customary law exempt from treaties?
- To what extent does customary law contribute to the interpretation of treaties?

General principles, erga omnes, jus cogens

- General principles of law
- Erga omnes
 - Erga omnes inter partes
 - Erga omnes customary law
- Jus cogens

Customary international law in practice

- Declaration on Friendly relations
- Declaration on Human Rights
- Rio Declaration on Environment and Development
- ICRC study on international humanitarian law
- State responsibility

Pulp Mills ICJ 2010)

204. It is the opinion of the Court that in order for the Parties properly to comply with their obligations under Article 41 of(a) and (b) of the 1975 Statute, they **must**, for the purposes of protecting and preserving the aquatic environment with respect to activities which may be liable to cause transboundary harm, carry out an **environmental impact assessment**. As the Court has observed in the case concerning the *Dispute Regarding Navigational and Related Rights*, “there are situations in which the parties’ intent upon conclusion of the treaty was, or may be presumed to have been, to give the terms used – or some of them – a meaning or content capable of **evolving**, not one fixed once and for all, so as to make allowance for, among other things, developments in international law” (*Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, Judgment of 13 July 2009, para. 64).

In this sense, the obligation to protect and preserve, under Article 41 (a) of the Statute, has to be interpreted in accordance with **a practice, which in recent years has gained so much acceptance among States** that it may now be considered a **requirement under general international law** to undertake an **environmental impact assessment** where there is a **risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource**. Moreover, **due diligence, and the duty of vigilance and prevention** which it implies, would not be considered to have been exercised, if a party planning works liable to affect the régime of the river or the quality of its waters did not undertake an environmental impact assessment on the potential effects of such works.

Case study No 3

- What is the function of the 'exhaustion of local remedies' in international law, and what is its content?
- What is the function of 'complementarity' in international criminal law, and what is its content?