Transnational Law Winter 2017

### Key historical and contemporary moments in IL

Early intl Law developments – bilateral treaties re colonization, territory borders

May 1666 France and Iroquois Indians treaty – first Indigenous/Europe treaty

Late 1700s/early 1800s 7 years war 1756-1763, US Declaration of Independence 1776

Intra state conflicts, moving from sovereign rule to independence and democracy, re shaping of political systems, challenges to colonial rule

1920 League of Nations Result of Paris Peace Conference, predecessor to UN

First attempt to create permanent inter-state org to aim for intl

Cooperation and peace

1931 Statute of Westminster Britain’s colonies granted independence

1945 United Nations Charter of UN created, post WWII

Decolonization rapidly occurring in many nations, incl Africa

Nuremberg Trials – trials of professions who aided/abetted Nazis

1946 Intl Court of Justice

Post 1950 Formalized multilateral trade arises

Rights based instruments – women, children, Indigenous, anti- discrimination documents (agreements/conventions)

Social and Political dimensions: human trafficking, smuggling, terrorism

**Core elements of IL**

* Consensual and voluntary
* Regulate community values and norms across state borders
* Public vs private international law
* Public more expansive – covers all areas of law regulated on a state by state basis
* Public – the central core is the body of rules and principles that determine the rights and duties of states, in dealings with other states, as well as citizens of their and other states, and determines what is a state.
* State – effective (independent?) government, population, laws, territory with definable boundaries, capacity to enter into international relations (recognition as a state) ***Montevido Convention 1930s defined requirements for statehood***

**Who IL applies to**

* State-to-state relations
* State-to-individual relations
* Individuals and corporate actors
* International organizations (ie EU)
* Non-state actors (ie NGOs)

**Effectiveness of IL – why do states comply with it?**

* It is ***necessary –*** trade, economics, security, human rights
* It provides a ***framework*** for cooperation – gives a system, process, method, and substantive foundation for states to cooperate and coexist
* It allows states to develop law to ***suit their interests –*** a states own interests can evolve over time and create tensions, agreements that once were advantageous or beneficial can change and now they may not want to be bound to the agreement
* States are inherently ***interdependent –*** states are inevitably dependent on one another for economy, trade, security, relational interdependence
* It ***provides benefits*** and has the ability to result in ***negative repercussions*** for reluctant or ‘dfficult’ actors – fear isn’t the only motivator (Lowe) but

**Customary IL**

* Again voluntary, cooperative and consensual
* Customs recognized by widely accepted practice or unwritten rule that everyone understands is a rule
* Defined by extent to which the practice is recognized already by states

# An Introduction to Transnational Law

## Jan Klabbers “International Law”

### Introduction

* Ability to travel abroad, send mail, watch foreign tv exists b/c of broad network of rules called IL
* IL is rules on trade, environmental protection, shipping, refuges protection
* Existence of international relations entails existence of IL
* Public intl law regulates relations between states

### International Legal System

* No overarching authority – most noteworthy characteristic of IL
* No law coming from a single sovereign
* IL binds on states as a matter of morality, not as a matter of law (John Austin)
* “almost all nations observe almost all principles of intl law and almost all of their obligations almost all of the time” Louis Henkin
* Reciprocity – states follow IL b/c they create them, and they are keen to follow IL so that other states will follow them (to their benefit) – think of social contract on a universal level. Also if I violate a treaty, so might they, and that might harm me.
* Legitimacy – a rule that is perceived as useful and created in proper manner may be seen as legitimate and thereby get more compliance
* Few states – hard to not follow as will get known as a ‘pariah state’ – cant hide from other states – other states not going to go away
* Sanctions for violations have negative effect

**How does IL govern?**

* No compulsory jurisdiction or single overarching authority – no *teeth* in the way that domestic courts have. Is it all moral or ethical agreeance? (Or lack of agreeance?)
* Political enforcement ie sanctions
* Political and social arrangments
* Discursive power of international law claims

# Introduction to Public International Law

## Vaughan Lowe, “The Ambit of International Law” in International Law Oxford: Oxford University Press, 2007 1-33

### The Scope and Nature of International Law

* Central core of IL is described as the body of rules and principles that determine the rights and duties of States, primarily in respect of their dealings with other States and the citizens of other States and that determine what is a state
* International law proceeds from the opposite of sovereignty, based on the principle that all States are subject to international law and must comply with it.
* A formalized account of practices and principles which spring spontaneously and inevitably from the coexistence of distinct communities or which result from conscious efforts of States to co-operate in dealing with certain problems.
* The Westphalia thesis: **the Treaty of Westphalia in 1648 is said to have created the system of modern nation States**. But the strength and continuity of international law flows not from its conceptual basis but from its routine incorporation within the daily life of governments.
* Cooperation of states is necessary and needs a framework. In order to cooperate, states must commit to agreements, treat them as binding, not just policy that can be abandoned
* IL consists of treaties, customary intl law, tribunals, intl courts, conventions, agreements

**International Actors and Intl Orgs**

* Intl institutions have competences that extend beyond adjuciation and rule making, include the monitoring of compliance with the law and the formulation of policy
* Sovereign states were initially the only actors in IL
* International orgs joined in as non-state actors

### Why do People comply with International Law?

* Internal sovereignty – courts and government are subject to the laws of the State, no superior governmental authority is recognized
* International law has no legislature, no police, no compulsory system of courts
  + IL is not imposed on states against their will by an external legislature. Rules of IL mostly arise either from treaties or from customary international law.
  + IL is made by states to serve their interests, so it is likely that it will be in their interest to comply with it. Compliance is caution.
  + Governments are repeat players in international relations. Each decision they take must make sense not only in isolation in the short term but also in the long term

### Why Should People comply with International Law?

* Rejection of the idea that there was a natural order that entitled rulers to rule and obliged subjects to submit
* Authority of IL derived from the fact that states had consented to be bound by its rules = the positivist approach
  + States are bound by rules of IL because they have signed up to them
* Rules of IL are those regularities in international behaviour that are regarded by the community of States as being so important that they do not accept that each State is entitled to decide freely for itself whether or not to comply with the rule.

# Sources of Public International Law

## Gib Van Ert, “Sources of International Law”

* Only those rules promulgated by authorities recognized as possessing law-making power and according to accepted procedures and forms enjoy the obligatoriness as binding or legal

### Article 38 of the Statute of the International Court of Justice 1945

* Declaratory of the sources firmly established in state practice
* Direction as to what the court may consider when decided cases, does not necessarily exclude other matters which may give rise to international rights and obligations
* **Article 38(1) is an important statement of the sources of international law:** 
  + intl conventions (treaties) establishing rules expressly recognized by the contending states
  + intl customs as evidence of a general practice accepted as law,
  + general principles of law recognized by civilized nations,
  + judicial decisions and writings of pre-eminent authors

### Treaties (Intl conventions, covenants, declarations, etc)

* The most significant law-making instruments in IL
* Defined in the Vienna Convention on the Law of Treaties 1969
* Article 2(1): “an international agreement concluded between States in written form and governed by IL, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation”
* Written agreement, creates intentional legal obligations, states enter voluntarily and have an intention for the treaty to have that legal character.
  + – no state may be bound without its consent
  + Means of expressing consent: signature and ratification
* Name of the treaty is of no significance
* Rules cannot arise and a treaty cannot be created unless the parties possess an intent to create legal relations
* The term “state” need not necessarily exclude entities which enjoy less than full international personality – member states of federations may be international persons for some purposes
* Non-state entities with international legal personality also have treaty making capacity

**Customs / Customary IL**

* How do we know what it is? - Revealed by state practice
* Must have the following:

1. Must be a generally accepted practice by states (not universal, not never broken, just generally settled practice of states)
2. States undertake that practice b/c they perceive they have a legal obligation to do so. State considers its behaviour to be required by law = *opinion juris* – motivated by a sense of obligation (rather than courtesy or morality)

* Once it is found to be customary IL, it is binding on all states (not voluntary, not by consent) with two exceptions:
  + Not binding on states that have persistently objected to it from its inception and during its formation
  + Regional or local custom
* A treaty may be declaratory of, or come to represent, customary IL

### Premptory norms (*jus cogens norms*)

* “accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general IL having the same character”
* Those unwritten rules or practices of customary IL from which no derogation may be permitted. Do we have any? Debatable. Prohibitions against slavery, genocide, piracy, crimes against humanity, etc. Serious deprivations of human rights.
* VCLT article 53: a treaty will be void “if, at the time of its conclusion, it conflicts with a peremptory norm of general international law”
* States may not make treaties in breach of certain fundamental norms of international law
* Test: same as the test for custom plus the norm in question if considered by states as non-derogable (impossible to displace by treaty or acquiescence)

### General Principles

* Of domestic law to decide matters not contemplated in treaty or customary law
* Allow courts to look for domestic laws that might fill gaps in existing IL

### Subsidiary means

* Important caveat in article 59 of the ICJ Statue: “the decision of the court has no binding force except between the parties and in respect of that particular case”
* In principle, there **is no doctrine of precedent** in IL
* Decisions considered may derive from a variety of forums (may consider domestic courts)
* Writings of scholars referred to not as sources but as evidence of law

### Unilateral statements

* Will not occur unless it is the intention of the declaring state to be bound by the statement according to its terms
* Requirement of good faith

### *Erga omnes* obligations

* For all the world – one owed to the international community as a whole
* All peremptory norms are obligations *erga omnes*, not all obligations *erga omnes*  are peremptory norms

### Soft law instruments

* Really not law at all, may be used as evidence of new or developing IL
* Reflect aims or goals that are desirable for developing law
* Policy documents, things that set the basis for future development of law

### International organizations

* Some have or may have law-making power

**Lecture Notes Jan 17 2017**

**Forums – Disputes, Interpretation, Implementation of IL**

* Intl Court of Justice –
  + states are the only parties that can come to this court
  + jurisdiction operates by consent
  + disputing states must agree to bring the dispute to the court
  + or a treaty must direct disputes to be handled in the court
  + if a state does not want to participate, they will not be a party to a dispute in the Intl Court of Justice
  + ICJ can provide advisory opinions (like a reference) Questions put forward by general assembly of UN for an advisory opinion
* Specialist courts and tribunals – ad hoc tribunals, European court of justice. Individuals can go to those courts after they have exhausted their domestic functions
* Intl arbitration tribunals
* Treaty bodies – can oversee the treaty, can require states to submit reports on compliance, can issue general comments (interpretive documents about their treaty, relied on by dispute resolution bodies)
* Domestic courts – Can interpret and apply law that is derived from intl treaties, human rights laws, immigration laws, etc. Can also draw on IL to interpret their laws in harmony with international principles.

State consent as a basis for IL

* central and foundational underpinning of how we talk about IL and the way we suppose it works in intl community
* treaties and custom – states consent to, create, develop themselves
* only bound to the ILs that they consent to by signing on to a treaty or exhibiting the customary practice
* in line with this core basis of IL of state consent:
  + case about 2 ships
  + how foundational the notion of consent is
  + Turkey decides to prosecute a French national in intl court
  + France objects
  + question to court: is turkeys conduct prohibited by IL?
  + Discussion focuses on formulation of question – why was it formulated that way?
  + Why not formulate question on whether the conduct was permitted by IL?
  + **If questions are based on prohibition, that suggests that unless IL has specifically prohibited it, the state must do as it pleases otherwise – anything not prohibited – doesn’t affect all state conduct, just the specific action in question. Also reflects and affirms consent b/c in order to comply with the prohibition in IL it must have consented to the prohibition initially. Values state sovereignty to otherwise do as it pleases.**
  + Absent these *jus cogens norms*, states are the authors themselves

## Jan Klabbers, International Law (Oxford University Press, 2013), excerpt: “The Making of International Law” pp 21-24.

* IL is consent based – states are sovereign, no authority above them, so they must consent to IL or it would be authoritarian
* No treaty on the correct ways and processes for making IL
* Traditional account of IL that is based on **state consent**

**Lecture January 31, 2017**

**Treaties in IL**

* Bilateral vs Multilateral treaties
* ‘Treaty contracts’ vs Law-making / codification treaties
* The rapid growth of treaty making:
  + The advent of the UN
  + Clarity and speed
  + Positivist conception of international law and the importance of ‘consent’

**Defining a Treaty**

* “An international agreement concluded between states in written form and governed by international law, whether embodied in a single instrument or two or more related instruments and whatever its particular designation.” (*Vienna Convention*)
* 4 key elements:
  + An international agreement;
  + Between subjects of international law;
  + Formed with the intent to create binding obligations;
  + Governed by international law.

**The Making of a Treaty**

* IL is at its core based on consent.
* They make the rules that they then consent to be bound by
* Preserves the autonomy of the state as the subject of IL.

1. The presentation of full powers during negotiations
2. Adoption of a text
   1. General assembly has to vote to adopt text
   2. Parties who were present for full drafting adopt it
3. Authentication of a text
4. Formal expression to be bound – where states consent to be bound to treaty
   1. Signature – states can become signatories to a treaty, denotes political support and intent to be bound by treaty at future date.
   2. Ratification – adopted by parties
   3. Accession
5. Coming into force – after triggering events (getting enough signatures as parties)

**Signatory** – signed on to treaty but not yet bound

* Is in political support of the treaty and willing to continue its engagement with the treaty process
* This intent is codified as a “signature submitted to the qualifying international body with oversight of the treaty or the authoritative body defined by the treaty.

**Party** – signed on and has ratified it and is now bound

**Reservations**

* Enable a state to opt-out of certain provisions
* Cannot make a reservation about a core or central provision
* Permissibility depends on its compatibility with the terms, object and purpose of the treaty overall

**Withdrawal**

* Unilateral act by which a nation that is a party to a treaty ends its membership in that treaty
* Treaties nowadays have more opportunity to withdraw consent of parties as treaties are based on consent to be bound
* Treaty may expressly allow or forbid withdrawal / denunciation
* Some treaties will expressly forbid withdrawal
* The termination of a multilateral agreement occurs when the treaty ceases to exist for all States parties
* If silent on ability to withdraw, must look to *Vienna Convention* art 56: creates rebuttable presumption against withdrawal.

**UN Smuggling of Migrants exercise**

How do states ratify this protocol?

* 21-3 process of ratifications : instrument of ratification submitted to the UN Secretary General

How are reservations addressed?

* 20-3. Can make reservations of only paragraph 2 of this article may at any time withdraw that reservation by notification to the Secretary-General of the United Nations.

Can states withdraw from this protocol if they have signed/ratified it?

* 24-1 1. A State Party may denounce this Protocol by written notification to the Secretary-General of the United Nations. Such denunciation shall become effective one year after the date of receipt of the notification by the Secretary-General.

What is required for the protocol to enter into force?

* 22-1 enters into force on the 90th day after the date of deposit of forty instruments of ratification, acceptance

**Discussion exercise**

Identify the various principles and elements of treaties that we have discussed today that:

1. **Support the traditional consent based account of IL**
   * Ability to make reservations to provisions (that aren’t core provisions) to “personalize” the treaty to fit their individual needs – provides more space for states to tailor to their needs and interests and only tailor to those aspects that align with their interests or motivations
   * Formal process of signing and ratifying show that parties clearly want to become a party to the treaty.
   * Option to withdraw as provided. State isn’t bound by its own prior decisions, let alone the rest of the intl community.
2. **Diverge from or undermine the traditional consent-based account of IL**

* Silence creates a presumption that you cannot withdraw from treaty
* Reservations cant be made for core provisions

**Making of Customary Law**

**Elements of Customary International Law**

1. There must be a consistent and **generally accepted or settled** practice among states, and
2. The practice must be accepted as **law** – **as obligatory in nature** – by the international community.

**Generally accepted practice**

* **What is “practice”?** Define subject of the rule and the content of the rule by which these states are already governing themselves in that subject. What are the states already doing?
* **Whose practice matters**? Those states most affected by customary rule are those whose practice matters most. We can have regional customary IL. See Klabbers text.
* **How many instances / what period of time?** No generally defined answer. Contextual analysis. Not impossible for small number of instances over short period of time considered customary.

**Accepted as Law**

* **The practice is done because it reflects a *legal obligation*.** Understanding why states do this practice – b/c the states believe it is law. Might also be done for other reasons other than legal obligations (social customs etc)
* **Evidence: speech; conduct; legislative acts; soft-law instruments**. Have states codified these conduct? This demonstrates they are considering it as customary IL with legal obligations. Content of soft-law instruments may provide supporting evidence that states do engage in a practice out of legal obligation. How do states talk about the practice? Do they vocally protest the practice? Or do they talk about it like they accept it as customary IL.
* **Toleration of and deviation from the practice.** Do states talk negatively about or not tolerate others that deviate from the practice? That would provide evidence if they object to other states deviating from the practice.

**Illustration of CIL Determination in Practice**

* *Paquete Habana*: illustration of general approach to CIL
* *Nicaragua*: illustration of speech vs conduct question; impact of human right norms
  + *Demonstrates role of speech and conduct in defining customary IL*
  + ICJ concerned with whether state practice that supports use of force in another states territory means there is no customary prohibition against use of force even where states uphold a prohibition against use of force
* Illustrate use of principles in analysis
* Illustrate evidence courts will look to in determining CIL
* Illustration of “permissive” foundations of international law

**Exceptions: The Persistent Objector**

* A “persistent objector” state will not be bound by the customary international law.
  + If they actively object, don’t participate, they are not bound
  + Klabbers text talk about Norway v UK – doesn’t define what a persistent objector is b/c the analysis of who is a persistent objector is contextual. Norway used a new unorthodox method of measuring coastlines. UK did not actively respond to or object to the declarations.
* Highly fact-specific inquiry: How many objections? What form of objection? What events led up to and followed formation of custom?
* Not applicable to *jus cogens* norms.

**Group Discussion**

* Consider the relationship between customary international law, and the traditional state consent-based account of international law
* Identify aspects of CIL and its legal principles that support, this account, and others that depart from this account.
  + Persistent objector rule ensures that states that don’t consent won’t be bound so affirms primacy of state consent by providing a mechanism to ensure that only states that consent are bound by it – functions similarly to withdrawing from treaties
  + Notion of group based notion of consent – principles to CIL – doesn’t need universal acceptance, just general acceptance. Can be a majority support of states to meet threshold as custom.
* Discuss why and how CIL both supports and departs from this account.

## John Currie, “The Law of Treaties”

* *Vienna Convention on the Law of Treaties*, 1969 – came into force in 1980 – most of its substantive provisions are widely considered either to reflect the pre-existing customary IL or treaties or to have become customary IL since it came into force. Even non-parties can be considered bound. Quasi-constitutional.
* The *Vienna Convention* defines a treaty as an international agreement concluded between States in written form and governed by IL, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.
* Excludes certain agreements which are nevertheless considered full-fledged treaties as a matter of customary IL.
* Specific focus on certain types of treaties is without prejudice to the legal force of, or application of the general law of treaties to, other types of treaties.

**General working definition has four principal elements:**

1. **An international agreement**
   * Participatory sources of IL
2. **Between subjects of IL**
   * Nature of IL subjects – capacity to enter into legal relations with other international legal subjects. Corporations, individuals and non-governmental organizations are generally ineligible to enter into treaty relations
   * If it is determined that a party to an agreement does not possess the international legal personality necessary to conclude binding treaties, it will follow logically that the agreement under consideration is not in fact a treaty.
3. **Formed with the intent to create binding legal obligations**

* States frequently enter into agreements, reach understandings, and even sign accords without any intent or expectation that such acts will produce legally binding obligations at IL.
  + The only way a treaty can be distinguished from such a non-binding agreement is to search for the parties’ intent on the matter.
    - Formality is not sufficient.
    - The ordinary practice is a key circumstance against which purported evidence of the parties’ intent to become bound by an agreement is to be evaluated.
    - Departure from the usual formalities may very well be taken as evidence of a lack of intent to be bound by a treaty.
    - Whether or not a treaty exists depends above all on the mutual intent of the parties to enter into binding treaty relations, and only secondarily – as an evidential matter – on the form in which that intent is expressed.

1. **Governed by IL**
   * Parties must intend that the agreement itself should be subject to the law of treaties with respect to such matters as its validity, application, interpretation and enforceability
   * General law of state responsibility should there be a failure by any party to fulfill its obligations under the treaty

### Form and Intention to be Bound

* Oral treaties are permissible at customary IL and are governed by the same substantive rules. General law of treaties imposes virtually no restrictions of form
* No rule of IL precluded a joint communiqué from constituting a binding international treaty. Whether it does depends not on its form but on the nature of the act or transaction to which it gives expression. The court must have regard above all to its actual terms and to the particular circumstances in which it was drawn up
* Where the terms and even the nature of the document are vague, the prior positions of the parties can shed light on the document’s intent
* Subsequent conduct of the parties
* Whether a particular document constitutes a treaty depends upon the nature of the act or transaction to which it gives expression. Determined by the terms of the document, positions of the parties in prior and subsequent negotiations.
* **The ultimate test** = **whether the document, its terms, and the behaviour of the parties both prior and subsequent to issuing the document, together evidence an intent by the parties to commit to its terms.**
* Individual intentions of the persons signing may not be relevant to the existence of a binding agreement, depending on the circumstances. Where such circumstances include agreement by the states themselves as to their mutual rights and obligations, intent to enter into binding legal obligations is to be gleaned from objective outward manifestations and behaviours.
* States are hesitant to interpret the absence of any conduct at all as evidence of an intent to be bound. Intent must be manifested in some way. Purely passive behaviour is likely not to furnish the requisite evidence of intent to be bound by a proposed treaty.

# Customary International Law

## Jan Klabbers, “Customary International Law” International Law (Cambridge University Press, 2013) pp 26-34 (ebook).

Article 38 ICJ statute deines customary law as evidence of a general practice accepted as law.

**Customary IL is composed of 2 requirements:**

1. There must be a consistent and general international practice among states
2. The practice must be accepted as law by the international community, subject element, *opinion juris (accepted as law)*

Both elements are required and have their own complications and the precise relationship between them is problematic as well.

**Where something is of a *jus cogens* nature they cannot be derogated from. Cannot opt out period. Prohibitions against piracy, genocide, slavery, etc. Where it is qualified as jus cogens norm. They cant claim to not know it, but they may not follow it.**

* Customary rules binding on all are founded in the unilateral acts of individual states
* Living growing law, grounded in the practices and sanctioning expectations of nation-state officials and changing as their demands and expectations are changed by the exigencies of new interests and technology and by other continually evolving conditions in the world arena
* Difficult to establish whether the behaviour of states reflects a common practice out of convenience or a sense of legal obligation.
* Proof of *opinio juris* is rarely displayed in explicit acceptance of one state’s claims by others; rather it is shown by their tolerance of that state’s conduct.

## Sources of Public International Law: Customary International Law Readings Jan Klabbers, International Law (Cambridge University Press, 2013), excerpt: “Customary International Law” 26-34 (ebook).

Add info here….

**Lecture Notes February 7, 2017**

Justice in IL at its core IL is concerned with justice

* IL reflects justice through jus cogens norms, itl human rights, principle of self determination and its relationship to sovereignty
* Justice ideals sit at odds with institutional and structural power of IL
* Understanding these ideals help us learn how to create a more egalitarian intl community to pursue justice
* Its impossible to separate the historical and modern IL from politics, social contexts, ideologies.
* To truly understand IL we have to understand law in its context (including the powers and hierarchies)
* We need to understand the pluralistic purpose and efficacy of IL – different actors have different ideologies
* Rules that are equal to all on paper don’t always translate as equal in reality b/c of powers and hierarchies of nations
* Existing rules and processes of IL can be built on to build substantive equality amongst states.

## The Political Dimensions of International Law Readings Jose E. Alvarez, “The New Treaty Makers” (2002) 25 Boston College International and Comparative Law Review 213-234.

**Impact of IOs in the contemporary treaty-making process**

* **Are the UN and IOs a challenge to the centrality and primacy of state consent and sovereignty?**
  + Advent of the UN and IOs have had a significant impact on the development of IL
  + IOs are participating more, not to displace the centrality of states, but to open up room for more actors in IL
  + Treay-making process core of IL
* **How are IOs influencing treaty-making process?**
  + **Expanding the diversity of actors** – by expanding the seats around the table - including IOs in the process as well as NGOs having space to be involved in treaty-making, experts, scholars, less powerful govts taking bigger roles.
  + **Expanding the choice of venue** – providing choice of organizational venue – instead of negotiating on one state’s soil or another, the UN provides a variety of neutral central venues that are part of the intl community. Impacts the substance of the treaty making, increases the number of treaties being made.
  + **Redistributing power and state-decision making processes** – through the expansion of actors or venues, IOs impact on state power by   
    1) existence of IOs especially UN operates with goal of redistributing power between powerful and less powerful states (one state / one vote on UN General Assembly).   
    2) holding specific expertise to effect when are where treaty negotiations take place – IOS play active role in early seedlings of development of IL, conceive idea of new treaty and implement to bring about a treaty   
    3) increasing volume of info available to treaty parties in developing treaties – Ios build expertise and then distribute it to states means that power is redistributed by giving all parties more detailed info then they ight otherwise get on their own. Reduces the relationship of power and knowledge – evens out the knowledge despite the power differentials between states.
* **What mechanisms are IOs developing in pursuit of this impact on treaties?**
  + **Through the use of treaty making conferences** – most multilateral treaties happen after decisionto make a treaty, conference convened, often with draft text, may have been written by expert body or IO already, operate on basis of consensus – flexible negotiations, doesn’t require full unanimity. Rely on clear rules and processes that nation states know what to expect and occur under the auspice of the IO that knows the information already. Draft text brings together parties to take an active role in the negotiations to conclude a treaty.
  + **Expert treaty-making bodies** – operate in specific area of law, involved in further drafts, operate similarly to conferences
  + **Managerial forms of trety-making** – IO attempts to secure ongoing supervisory role in relation to intl treaty so it is involved centrally in the ongoing administration, monitoring and enforcement of the treaty and its terms. Ie in human rights there are several bodies that are created to have power authority and legitimacy to oversee compliance of member states with these treaties.
  + **Institutional mechanisms for “treaty making with strings attached”** – a unique mechanism – ILO best example of this – constitution incoproartes rigid sturcutres that produce treaties at regular intervals – strings attached to partyship to Intl Labour Organization ILO (UN agency dealing with labour issues and intl labour standards) under its constitution that requires them to bring new conventions to their legislatures for ratification, require members to report on their adherence to the treaties.
* Political power insulates some nation states from adhering to treaties… not shamed in public in the way that smaller less powerful states may be.

**VIDEO CLIPS**

UN Charter deals with issues of ending war, social progress, social welfare, expression of UNs attempt to advance cause of justice.

More deeply the bodies that have the power to create binding decisions = Security Council == decisions have to be complied with. UN exists within a structure of power, the most powerful nations…?

Security council made up of key power nations. China France Russia UK US permanent

Non-permanent 10 positions for 2 year terms

**Connection of IL and power – he started by thinking IL was an expression of justice, but the more he works in IL the more he realizes the dimension of power defeats the aspirations of IL to achieve justice.**

* + Relationship between power and justice in IL – justice is hard to enforce without power. Justice is an end goal of IL but enacting or exercising that justice is difficult or impossible in a system where there are few concrete tools to enforce the justice.
    - If we accept Alvarez’s argument that the UN helps to distribute power between nations that are wealthy and those that aren’t – does it actually create full equality between nations yet? Maybe not.
    - Power means the key power players ideologies are the ones that get put forward – Security council has 5 key positions (allies after world war II) have a bigger voice and occupy a bigger space in the Intl arena, have more power to direct and lead the development of IL, at the expense of less powerful nations
  + How emerging human rights norms and jus cogens norms might challenge the structural power of IL?

**Relationship of IL and imperialism, in historic form and how it continues to play a role, if unacknowledged in IL today:**

Conventional story or narrative of imperialism, decolonization and IL

* Imperialism impacted IL character
* Conventionally the major texts put imperialism as a thing in the past.
* IL promoted imperialism but when it came to UN it promoted decolonization.
* Imperialism concluded with the process of decolonization
* IL was created by the encounter between the west and non-west. Western world lacked sovereignty so it had to be provided.
* Treaty of Versailles
* States that imperialism died when decolonization occurred, advent of UN, project of decolonization, Treaty of Versailles, all states were equal and sovereign.
* Positivist understanding of law that law is a set of rules on paper that doesn’t actively shape events or peoples or choices

**A critical perspective or story of this history and relationship between two views of imperialism and sovereignty**

* Sovereignty is about excluding the non western world
* Imperialism has had a fundamental impact on the underling aspects of IL.
* Imperialism still exists in a context that Western nations
* IL can be used as a weapon in excluding the non-Western world or negate the possibility that nations were already sovereign before they were colonized
* IL continues to have an underlying relationship to imperialism by the continued relative power btwn nation states.
* Wealthy and powerful states were the colonizers. Less wealthy were colonized, less developed, former colonies.

**How does the continuing role of imperialism and power shape IL, and how does it subordinate developing states and former colonies through the structures and policies of the UN.**

* Lasting impact of imperialism on contemporary IL
* Acquisition of
* States might become sovereign but they are brought into Intl system in a manner that ensures their economic interests are outside their control
* Colonies are important to the West – provide markets and raw materials
* Economic law is based on **this** premise
* Many of the institutions created before UN, world trade org, continue to maintain same hierarchy, driven by major shareholders, articulating idea and model of political economy that ensures these countries remain subordinate
* If unequal system is greater it distorts all doctrines that have potential like human rights. Human rights itself becomes a mechanism in which hierarchies are reproduced

**What space is there then for IL to be an expression of or vehicle for justice?**

* What elements of IL are not changed by hierarchy?
  + Jus cogens norms – generally accepted practices
  + Bilateral treaties more than multilateral treaties?
  + African nations working together African Union, makes them more power as a unit
  + Nation states being identified
* Its not the structures that we have created (ie UN) are failures: we just have to acknowledge the problems that imperialism and colonialism have on the structures and actors, then we cannot make them better.
* Despite the power issues there is a developing body of jus cogens norms that proetect people from egregious human rights norms. Just b/c they are broken laws doesn’t mean they aren’t valid laws.

# Indigenous Peoples Readings

## Asbjørn Eide, “The Indigenous Peoples, the Working Group on Indigenous Populations and the Adoption of the UN Declaration on the Rights of Indigenous Peoples” in Claire Charters and Rodolfo Stavenhagen, eds, Making the Declaration Work: the United Nations Declaration on the Rights of Indigenous Peoples (Copenhagen: IWGIA, 2009) 32-45.

Fill me in

## Issues related to treatment of indigenous people were considered in early natural law and thological thinking. However there was still much brutality from European colonizers.

From Napoleonic wars to WWII - IL was considered to derive from state consent and state practice and to deal exclusively with relations between states. Nobody cared about what was happening inside the sovereign states. Treatment of Indigenous people was internal affiars.

IL began to develop protection for minorities but indigenous people had no protection under IL, and no mechanism or procedure to address the intl community.

**UN Charter adoption** – included protection of human rights as a UN purpose.

**Working Group on Indigenous Populations (WGIP)**

* Established by the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities (the Sub-Commission)
* Established at a time when international efforts to protect human rights had gained significant momentum, in 1982
* First time that indigenous issues were to become an exclusive agenda item of an international human rights body
* Included indigenous representatives as observers

## UN Declaration on the Rights of Indigenous Peoples, A/Res/61/295, 2 October 2007 (available online).

UNDRIP: http://www.un.org/esa/socdev/unpfii/documents/DRIPS\_en.pdf

Article 8 (2) - mechanisms for prevention of, and redress for, (b) any action which has the aim or effect of dispossessing them of their lands, territories or resources

Article 18 - participate in decision-making

Article 32 - free prior and informed consent re resource projects

Provisions of UNDRIP that might apply

Case study re Site C dam

Enshrines rights that "constitute the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world"

Right to self-determination (Art 3)

Right to autonomy and self-government (Art 4)

Right "to maintain and strengthen their distinct political, legal, economic, social and cultural institutions" (Art 5)

Legal recognition over territories (Art 26)

Does not override treaties and agreements between indigenous peoples and states (Art 37(2))

Overview of UNDRIP

As a general rule, GA resolutions don't have the force of law -- but there could be an exception? Is this such an exception>?

Has come into force by General Assembly resolution

Uses imperative language - appears to create concrete obligations

Reference to establishment or ceding of power to Permanent Forum on Indigenous Issues (i.e. treaty creates monitoring body)

What appears to give it force of international law?

No provisions for signature and ratification -- that's how states signify clearly that they are consenting to obligations in a treaty

No provisions for denunciation and withdrawal -- although not all treaties have these.

No entry into force provision (i.e. agreement becomes international law when a certain number of parties ratify it)

International agreement

Governs subjects of international law

Created with intention of creating binding obligations - Does it appear to be in the minds of the state representatives that this creates legal obligations - procedural requirements generally signify this intention

Governed by international law

Four defining features of what is a treaty - Vienna Convention - none of them explicitly require these procedural elements

Does it have the status of a treaty?

Several states made a record of their objection, including Canada

Question about the status of the declaration

UNDRIP illustrates some of the basic rules of treaty-making -- since some of these don't seem to have followed

Why? Maybe value in having a highly accepted soft law instrument, versus having a binding treaty that no one signs and has no force.

Official position: this is not a treaty, does not have force of international law

UN Declaration on the Rights of Indigenous Peoples

Traditional approach: Sovereignty as fundamental organizing principle of international law - Advent of UN and UN Charter - one of the purposes is legitimate concern to monitor how governments treat their own citizens -- so no longer only concerned with state-to-state relationship

Part of a broader shift in international law from state-to-state relations towards state/subject relations

Purpose was to focus exclusively on indigenous populations worldwide, make recommendations to commission on Human Rights

Begins to draft Declaration in 1985

Wide array of populations and contexts

Begins with Working Group on Indigenous Populations - 5 experts and indigenous advisors - this structure was imposed on the working group (this was how all working groups were formed)

Initial draft submitted to Subcommission on discrimination and protection of minorities -- approved by Subcommission in 1993 - then sent to Commission on Human

Rights

Second working group established consisting of experts and over 100 indigenous organizations -- facilitated greater access and participation by indigenous peoples

1994-2006 - draft declaration "lingers"

Then Human Rights Commission was abolished, and Human Rights Council created

2006: Human Rights Council adopts draft declaration

2007: General Assembly adopts Declaration

Universal Decal ration on Human Rights - focusses on relation between states and people -- but UNDRIP no longer takes for granted the question of who should govern whom

"Indigenous peoples feel a need to have a bargaining position from which a reciprocal trust can develop between the indigenous and others in society … little confidence in the governments that rule over them … subsequent governments retract and undermine the concessions previously made … governments can change, so even can constitutions. This is why they insisted on an internationally recognized right to self-determination.

## Brenda L Gunn, “Overcoming Obstacles to Implementing the UN Declaration on the Rights of Indigenous Peoples in Canada” (2013) 31 Windsor Y B Access Just 147- 174

* 2007 General Assembly UN resolution on UNDRIP, Canada votes against
* 2012 Canada removes objector status to UNDRIP – cited as “aspirational document”
* 2016 Canada states it’s a “full supporter” of UNDRIP – removes all qualifications and “aspirational” label
* 2016 Doubts arise about implementation of UNDRIP in Canada
* 2017 PM announces working group on laws and policies affecting Indigenous peoples, to include UNDRIP review.

**UNDRIP Review:**

* Developed over 30 years, adopted by GA UN Resolution in 2007. Major milestone. Effective implementation is where the next big struggle lies. Implementation is the test of states to demonstrate respect and fulfillment, and can be seen as Cdn govt’s commitment to reconciliation.
* Remedial instrument, major turning point for the promotion of Indigenous peoples’ rights, incl their human rights.
* **Scope**: Broad and covers almost all aspect of Indigenous peoples lives:  
  Self determination, autonomy, self-govt over internal affairs, all human rights both individual and collective
  + Culture
  + Religious and linguistic identity
  + Education, public information and employment
  + Participation in decision making and free, prior and informed consent
  + Economic and social rights
  + Property rights – to land, territories and resources
  + Rights regarding treaties and other agreements
* Grounds the rights of indigenous people and obligations of states. Does create bin
* **Aims to enhance cooperative and harmonious relationships between states and Indigenous peoples, based on principles of justice, democracy, respect for human rights, non discrimination and good faith” pg 158-159**

**Canada’s reception:**

* Refers to it as an aspirational instrument but does not change Cdn law.
* Diminishes the significance of the Declaration, calls it subordinate to Cdn law, don’t want it to inform interpretations of Cdn law
* Academic views of narrow significance in Cdn law
* Cannot affect or solve the day-to-day problems facing Indigenous communities
* “In Canada there is a general ignorance of IL and its application in Canada, including amongst the judiciary and legal profession”
* Only true impediment to implementing the Declaration is the issue of political will.
* Challenge of financial implications of fulfilling the rights set out in the UN Declaration because many States have limited resources to undertake the work to promote the rights of Indigenous peoples.

**Overcoming obstacles to full Implementation of the UN Declaration**

**Status of UN Declaration as an international instrument:**

* Legal significance of a declaration:
  + As a resolution of the GA, the UN Declaration is a recommendation by the GA. GA resolutions can inspire the development of or sharpen existing customary practices.
  + **Declaration does not create binding legal obligations on a state.**
  + However soft law is still forceful. Cannot be dismissed. A big declaration is the Universal Declaration on Human Rights – forceful and important regardless of its formal legal status.
  + Declaration is an “element of good faith commitment, evidencing in some cases a desire to influence state practice or expressing some measure of law-making intention and progressive development” p 160
  + Respect of the Declaration represents an essential prerequisite in order for States to comply with some of the obligations provided for by the UN Charter pg 161
  + Formal and solemn instrument, suitable to rare occasions when principles of great and lasting importance are being enunciated”.
  + UNDRIP considered customary IL despite Canada’s objection to that status – customary IL would be binding on Canada – must take seriously the obligations contained to fulfill the intl obligations
  + Provides strong moral authority to the standards contained and increases the need to implement it.
* Communicates “a strong expectation that Members of the intl community will abide by it”
* Crystallization of norms (over time) into customary IL.
* Expectation that state practice will abide by rights and obligations in a Declaration, crystalizes as customary IL through use and implementation by states.

**Application of Customary IL in Canada**

* **Presumption of conformity**: allows courts to use soft-law, ungratified treaties, and other intl legal materials in interpreting domestic law.
  + UN Declaration can be used to interpret Cdn law incl s 35(1) of constitution
  + Providing interpretation of domestic law supported by intl declarations is not a new practice
  + Preumes cdn law will be interpreted consistent with intl obligations
  + Where an ambiguity exists or clarification is needed in domestic law, the presumption of conformity permits intl standards such as those articulated within UNDRIP to interpret Cdn laws.
  + Intl norms should be used in the purposive and contextual approach to interpreting Ab and treaty rights protected under s 35
  + Additional benefit: aligning normative approach to interpreting intl human rights

**Application of Intl Treaties in Canada**

* UNDRIP is not legally binding but has effect in Canada. “As a declaration there is a strong expectation that Canada will work to uphold the rights and domestically implement the standards contained within it” pg 173
* Intl treaties are binding if Canada has signed and ratified the treaty and the treaty is entered into force by passing legislation
* Canada has not taken steps to transform ratified intl human rights treaties, but rather claims “most human rights treaties are ratified by Canada on the basis that the existing domestic laws and programs already conform with a treat’s obligations so now new legislation is required” p 166 **– However this statement can appear as a treaty being unimplemented, and leads to the conclusion that these treaties are part of Cdn law**
* Move from binding / non-binding characterization to a focus on the persuasiveness of the document / obligation.
* **Adoptionist approach:** Courts already adopt customary IL provided there is no express conflict in Cdn law, confirmed in R v Hape.
* While Canada objected to the Declaration, or contest the precise scope of certain rights, acceptance of these norms can be seen through the recent endorsement of the UN Declaration.

**Other actions to overcome obstacles and Implement UNDRIP (values of implementation)**

* Informing public opinion
  + Public support can be gained through greater public awareness, understanding
* Influencing public policy
* Guiding future jurisprudence

**Implementation gaps**

* Failure to enact secondary legislation to give effect to pertinent constitutional provisions or principles
* Bureaucratic inertia or ignorance
* Willful disregard or corruption on the part of public officials
* Uncoordinated and conflicting govt policies
* Inadequate monitoring procedures
* Insufficient indigenous consultation and participation in decision-making processes

**Implementation Barriers**

* No legal barriers to implementing UNDRIP in Canada 🡪 major problem lack of political will
* Public education will not satisfy the rights set out enough.
* Lack of understanding of the declarations status as an international instrument.
* Failure to appreciate international law and its application in Canada.
* Full implementation of the UN Declaration will require govts to review existing laws and policies to ensure compliance with the standards set out in the Declaration.
* Indigenous communities can implement the UN Declaration is to ensure that their own laws and policies meet the standards set out in the Declaration.
* Narrow conception of equality and concern for recognizing special rights
* Financial constraints

**Recommendations**

* Increase understanding of character and status of UNDRIP as IL
* Increase understanding the application of UNDRIP as IL in Canada
* Increase education and awareness of the Declaration and its substantive content
* Review existing laws in Canada and consider legal reform to clarify scope of rights for Indigenous people. Not sufficient to merely ensure laws reflect UNDRIP standards, because “even where there is adequate protection of indigenous people s right sand there are well-established laws to combat discrimination, appropriate admin measures may not be in place to ensure their application in practice” pg 170 – so national plans should include necessary admin measures and regulations to give effect to the laws and acknowledge and address ongoing institutional discrimination where Indigenous peoples issues have generally been ignored, including “objectives, priorities, budgets, administration, capacity building, evaluation, feedback and coordination” pg 171
* Endorsement and application of Declaration and its substantive content by Indigenous communities and govt
* Use Declaration (test it) in substantive legal arguments before courts. Citing it in domestic courts!! Lawyers may need to provide background on intl laws application in Canada and the relevance of the UN Declaration when citing the UN Declaration in pleadings and in court. The more it is cited the more it is considered in judicial decisions. Courts need to be encouraged to take a flexible and generous approach to interpreting the UN Declaration in domestic pleadings, the Cdn courts have opportunity to consider UN Declaration’s application in the domestic context.
* **“In Canada, the UN Declaration can be used to provide greater understanding of the scope of the existing affirmation and recognition of Ab and treaty rights within the Cdn constitution. While greater education of all sectors of Cdn society is necessary to increase political will for full implementation there are many steps Indigenous peoples can take to begin implementing the UN Declaration at a local level” pg 174**

# Jus Cogens and other Sources of International Law

## Hugh M. Kindred et al., “National Application of International Law” International Law, Chiefly as Interpreted and Applied in Canada, 7th ed. (Toronto: Emond Montgomery Publications, 2006) excerpt: “National Application of International Law” 244-253

**Jus cogens in Canadian Law**

* A peremptory norm of IL that cannot be contradicted, commands obedience by all levels of government
* *Vienna Convention* article 53 defines a peremptory norm as a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general IL having the same character.
* Develop over time and by general consensus
* Compelling indicia that prohibition of torture is a peremptory norm:
  + Great number of multilateral instruments that explicitly prohibit torture
  + No state has ever legalized torture or admitted to its deliberate practice and governments accused of practicing torture regularly deny their involvement, placing responsibility on individual state agents or groups outside the government’s control
  + A number of international authorities state that the prohibition on torture is an established peremptory norm
* Do not exclude the possibility that in exceptional circumstances deportation to face torture may be justified either as a consequence of the balancing process mandated by s 7 of the Charter or under s 1.
* Bouzari v Islamic Republic of Iran
* States do not accord a civil remedy for torture committed abroad by foreign states. The peremptory norm does not encompass the civil remedy.

## Suresh v Canada (Minister of Citizenship and Immigration) 1-6 42-99

* How courts use customary IL and jus cogens laws in domestic courts
  + Deportation proceedings against appellant due to associated with terrorist organization
  + Deportation contested on basis that appellant will face torture if returned to Sri Lanka
  + Recognized in Canada as a convention refugee in 1991, applied for landed immigrant status
  + 1995 – detained and deportation proceedings start to send hi to Sri Lanka as member of a terrorist organization
  + Suresh applied for new deportation hearing under Immigration Act, allowed
* **Legal claim**:
  + Charter challenge 🡪 if deported to country of substantial risk to him, violates s 7 rights.

**Issues**:

* **Intl perspective:** Inquiry into principles of fundamental justice informed also by INTL LAW and jus cogens norms. Canada has international obligations from intl human rights law.
  + Court utilizes many IL sources to help understand the scope content and status of the issue in IL itself. All of this helps create a clear picture that can be applied to the import and consequences of the Cdn legal context.
  + Must consider the international context of the Charter and justified infringements
  + Intl treaty norms are not binding unless enacted by Canada
  + However the courts may be informed by IL in understanding the constitution
  + Look to IL as evidence of principles of fundamental justice
  + Prohibition on torture is a peremptory norm – developed over time and by general consensus of the intl community. Prohibition of torture is a peremptory norm: included in numerous multilateral instruments, is not part of any known domestic practice, and is considered by many academics to be an emerging norm.
* **Canadian perspective:** Principles of fundamental justice found in our legal system: contextual approach, takes into account nature of the decision to be made – balancing danger to deportee to risk of torture of deportee
  + Cdns reject torture – no death penalty – torture seen as fundamentally unjust
  + Intl norms informs our constitutional norms
  + Charter opposes torture, cruel and unusual punishment “to outrage standards of decency”
  + Cannot pretend that Canada would be an “involuntary intermediary” as Federal CA stated – without Canada’s action there would be no torture
  + Cdn jurisprudence will usually come down against expelling a person to face torture
  + *Barring extraordinary circumstances deportation to toruture will generally violate the principles of fundamental justice protected by s 7 of the Charter*
  + Standard to be applied in reviewing ministerial decision to deport; whether the [Charter](http://www.canlii.org/en/ca/laws/stat/schedule-b-to-the-canada-act-1982-uk-1982-c-11/latest/schedule-b-to-the-canada-act-1982-uk-1982-c-11.html) precludes deportation to a country where the refugee faces torture or death; whether deportation on the basis of mere membership in an alleged terrorist organization unjustifiably infringes the [Charter](http://www.canlii.org/en/ca/laws/stat/schedule-b-to-the-canada-act-1982-uk-1982-c-11/latest/schedule-b-to-the-canada-act-1982-uk-1982-c-11.html) rights of free expression and free association; whether “terrorism” and “danger to the security of Canada” are unconstitutionally vague; and whether the deportation scheme contains adequate procedural safeguards to ensure that refugees are not expelled to a risk of torture or death.
  + **Parliamentary supremacy** - Parliament can deal with terrorism through new laws and new approaches – cannot violate Suresh’s rights by deporting him to risk of torture.
  + **Challenge to meaning of “danger to the security of Canada” 🡪 too vague??** 
    - Courts must consider the level of “danger to the security of Canada”, interpret flexibly, but either way demands proof of a potentially serious threat.
    - Difficulty in balancing risk of a terrorist attack from an individual, with the risk to undermining Canadian democratic values of rule of law, liberty, and fundamental justice.
    - We are satisfied that the term “danger to the security of Canada”, defined as here suggested, gives those who might come within the ambit of the provision fair notice of the consequences of their conduct, while adequately limiting law enforcement discretion.  We hold, therefore, that the term is not unconstitutionally vague.

**Application of Cdn and IL to Immigration Act**

* **Broad Lens**
  + Informs the overall approach when considering intl issues. Domestic examination not enough – must consider in the IL context and within the framework of fundamental justice expressed in the Charter. Need to understand the intl perspective in order to understand the Act and the Charter.
* **Narrow lens**
  + Narrow lens that zooms in on particular aspects of IL that inform the specific question at issue in the Cdn context
  + Examines definition of torture, status of whether Canada can deport to a country that may experience torture.
    - Court spends time: Has it attained jus cogens character?
    - Analysis: Yes it’s a just cogens norm 🡪 must be followed and therefore Cdn govt can never do this under any circumstances 🡪 no justification for Canada to deport someone to a country where they would face torture
  + Section 53 of Immigration Act permits deportation to country where torture may be experienced like where threat to national security (otherwise wouldn’t be allowed). Does this violate s. 7? If so, and if not saved by s 1, would be unconstitutional. Court does not strike down the law
* **Why does the court have to consider IL?**
  + **Presumption of conformity**: one of the reasons why court is insistent that we include analysis of IL is that we always presume conformity, so it is required that those be considered in interpreting domestic laws.
  + The govt intends to reflect the intl obligations and norms that Canada has signed on to.
* **What tensions or cautions might we identify, particularly where there aren’t domestic laws giving effect to the intl instruments?**
  + **How the approach of the court may but up against parliamentary supremacy 🡪 IL requires domestic express enactment to give effect to IL 🡪 so to engage in IL exercise outside of domestic law may be more than is appropriate or challenge the notion of parliamentary supremacy**
  + We don’t have a consistent approach in Canada for implementing IL obligations: often govt feels obligations already met through domestic laws so presumption of conformity becomes a necessary exercise for courts to engage with when they are looking at domestic legal questions

**CONCLUSION:**

* SCC finds that deportation to face torture is generally unconstitutional against s 7 of Charter and that some of the procedures followed in Suresh’s case did not meet constitutional standards
* S 53 does not violate s 7 but s 7 does require Minister to balance considerations. 🡪 New hearing ordered
  + **Minister must balance relevant factors in the case, must conform to the principles of fundamental justice under s 7, and should decline to deport refugees on the evidence that there is a substantial risk of torture 🡪 leaves door open that there may be other circumstances in another case that does allow deportation despite risk of torture**
  + Court is clear that decision is based on domestic law and constitutional framework, notwithstanding the influence of IL (not b/c of Article 3 of CAT but b/c of section 7 of Charter!)
  + Multiple treaties that Canada has signed on and ratified substantiating that Canada cannot be deported.
  + No express legislation by govt to NOT uphold these international treaties.
  + **Intl Covenant on Civil and Political Rights** – prohibits torture and extradition to a state where they may experience torture. **Article 20** ICCPR also intended to include prohibition on deportation to torture.
  + **UN Convention Against Torture – Article 3** – prevents extradition to a state where they may experience torture. Background documents to the convention against torture also considered to shed more light on purpose of CAT to exclude extradition to state where torture may occur
  + **Problem comes in with Refugee Convention** - Permits deportation where an individual poses a danger to national security HOWEVER **Article 33** – prevents expelling a refugee to life or freedom threatened.

# The Reception of Public International Law in Canada

## Gib Van Ert, Using International Law in Canadian Courts, 2nd ed. (Toronto: Irwin Law, 2008) excerpt: Chapter 1, ss. 1.1 and 1.2, pp3-11 (ebook).

**Monist systems** – IL is incorporated immediately into part of domestic legal system. No domestic statute is required to be passed. Goal: domestic and IL operate as one integrated system.

**Dualist systems** – Require implementation of IL into domestic system through some kind of positive action – through exec or legislative branch of govt. No automatic incorporation of IL into domestic system.

**Canada has both systems**

* Treaties require domestic implementation (dualist)
* Customary IL is directly incorporated (monist) – no express action required as usually already part of existing state practice.
* May be exceptions if there is existing law or express legislative intent that conflicts with customary IL

**Why treat customary IL and treaties differently?**

* Canada has usually already consented to customary IL so no need for formal adoption
* Treaties require power of state to accept treaties and change laws to meet treaties

**Rationales behind Canada’s reception system**

Principle: Respect for IL

* states consent in creation to IL rules, their participation in the intl community and
* **INTL COMMITY**
* If you agree to it, you ought to uphold it in your domestic law, and must respect the sovereignty and respect for other states in the intl community
* Pacta sunt servanda – agreements must be kept – IL principle

Principle: Self-govt – competing principle of the reception system under constant threat from the principl of respect for IL and might succumb to it were it not for the balance which the reception system strikes between the 2 principles.

* Assertion of sovereignty – state and parliamentary
* Illustrates how IL may be seen as a coercive force on states as it can curtail or alter the domestic govt
* In Canada, there is a tension in mediating the sovereignty vs coercive force of IL. Dualist system in Canada requires specific action to implement IL in domestic law.

Balancing the Canadian reception system requires commitment to both respect for IL and the principle of self govt.

* however 2 principles are at odds with each other.
* Self govt means states have ultimate veto
* “Judicial decisions that threaten the balance of the 2 principles jeopardize the entire system, turning a functioning whole into a muddled assortment of scattered parts”.

Presumption of conformity – default principle

* we presume that Canada attempts to meet IL and customary IL unless expressly stated otherwise.
* So Courts will adopt an interpretation of a domestic statute that conforms to the obligations set out in the treaty unless parliament has made it clear it is deviating from that obligation
* Courts will use treaty text, background documents, and softlaw/other docs when interpreting IL
* Other documents can shed light on how the treaty should be incorporated (model laws, etc)
* General assembly resolutions, advisory opinions, guiding principles, research papers, etc
* None are binding, but all important aids to interpreting domestic law esp where it is derived from or linked to a particular IL obligation that Canada has signed on to.

## Hugh Kindred, “The Use and Abuse of International Law Sources by Canadian Courts: Searching for a Principled Approach”

**Is IL binding within Canada? yes**

* Both customary and conventional international rules must be obeyed, each state is left to determine for itself how the obligations will be fulfilled. (state sovereignty – right of every state to establish its own internal social, political, and constitutional organization, subject to the restraints of IL standards)
* **Canadian Constitution is silent on how to determine the impact of IL within Canadian law – fallen to the courts**
* International obligations on Canada are applicable by the courts only to the extent that they are laws of Canada.

**Why treat customary and conventional IL differently?**

* **Treaties and customs are both equally obligatory according to their terms p 7 however courts and commentators say that while customary intl law is directly applicable, t**reaty provisions must be transformed by some legislative act in order to become enforceable by courts as Cdn law.
* Two reasons to justify the differing regard for intl obligations:
  + Parliamentary supremacy – does not demand all Cdn laws be legislated. Neither domestic common law nor intl customary law is found in legislation, yet both are operable as soon as ascertained. No Cdn law, whether statutory, code, common law, or intl in origin, may stand in force if the appropriate legislature passes leg that contradicts it. Ultimate power of leg to control body of Cdn law.
  + Fed/prov division of powers – customary intl law may interfere with prov authority [by an assertion of federal implementation??]
  + Courts filter Cdn laws through constitutional principles, striking down those that are ultra vires. Pg 8
* **If customary IL can be adopted w/o transformative action, why shouldn’t treaties?**
  + Prov or fed leg could legislate to overrule or vary the operation of IL so why not just accept it?
  + Absence of explicit provisions in the Constirution so Canadas participation in IL and relations progressively developed during canadas Patriation from UK. “In exercise of Canadian sovereignty however the court could nudge the continuing development of the foreign relations law of Canada along a more productive path”

**Is legislative transformation of conventional IL really necessary?**

* Not all conventional IL need to be implemented (if they do not affect the rights and duties of persons within the reach of Canadian laws – ie peace treaties, defense pacts, and other agreements of foreign relations).
* Govt may implement treaty previsions by executive action (orders in council, regulatory directives) which may be enough to give domestic effect to provisions BUT they require statutory authority – there has to be enabling legislation that grants appropriate reg power to the minister to implement the actions.

**How should different intl legal sources be employed?**

* Governments may implement treaty provisions by executive action.
* The exercise of the treaty implementing power must be manifest in the implementing legislation and not be left to inference (Laskin) – severely limits the occasions when treaty provisions can be said to have been implemented
* By virtue of the general power of s 91
* Incorporated into the text of the legislation but without reference to their international source.
* SCC would assume a statute is implementing legislation if its language is redolent of the treaty’s provisions. Courts will assume a statute is implementing legislation if its language reflects an international obligation. **Starting presumption – similarity signals implementation.**
* Legislative history and other extrinsic evidence to demonstrate the intention to take account of international treaty provisions even though they are not mentioned.
* Implementation may now be a passive act
* Parliament is presumed not to intend to legislate contrary to international treaties or general principles of international law – where the legislation is clear one need not and should not look to IL.
* Contextual approach – inclusiveness of the methodology – total or entire context of the statute in question demands the courts have recourse to any and all relevant IL sources
* Implicit implementation of ratified treaty provisions in the presence of legislation that applies the same rights and fulfills the same obligations
* Spirit and values underlying a relevant ratified treaty as aids in the interpretation of related statutes and delegated administrative powers, in addition to rights under the Charter

**Araya v Nevsun**

**Summary of case:**

* Substantive claims: the Ps base their legal action on CIL and jus cogens prohibitions against forced labour, toruture, slavery, cruel inhuman or degrading treatment and crimes against humanity para 43
* Procedural aspect of case: preliminary hearing to strike out / dismiss claims of Ps action.
* Not deciding anything on substantive merits, no weighing of evidence or merits of Ps case
* Whether the facts as pleaded would have a chance of success or would meet the threshold for a trial.
* High threshold for D to show there would be no chance of success at trial.

**Parties arguments:**

Defendant Nevsun

* CIL does not give rise to a private cause of action
* CIL does not impose obligations on corporations (only on state actors and IOs, Nevsun is not a subject of IL)

Plaintiffs arguments:

* Absence of legislation does not preclude possibility of incorporating CIL directly into CL
* Absence of a doctrine of immunity may enable to application of CIL to corporations

**Main questions:**

1. **What is the status of CIL in its own right in Cdn law?**
   1. **Can CIL form the basis for a lawsuit without pointing to a specific Canadian legislation - has never been decided in Canada? NOT SURE**
      1. Court clarifies that breaches of IL cannot be used as a basis for claim
      2. Relies on *Kazemi* – what was at issue was the conflict between domestic leg and CIL – the conflicting legislation could be resolved by the rules of supremacy of domestic legislation which rebuts the presumption of conformity
      3. IL cannot e used to support an interpretation that is not permitted by the words of the statute. Likewise the presumption of conformity does not overthrow clear legislative intent (para 452)
      4. D hasn’t established that there is no chance of success, itd be up to a trial judge whether CIL can be used on its own merits in a legal claim.
   2. **In the alternative, does the absence of legislation, in this context, evidence an intention not to allow such claims?**
      1. Nevsun argues that the absence of legislation is evidence that govt does not intend to allow such claims – b/c Parliament took express action in other contexts relating to jus cogens and CIL; and b/c of parliaments assumed knowledge of legislation in other countries (the US) that would permit the kind of claims the Ps seek to advance **then we can infer an intention not to allow these claims**
      2. **Court – EXPRESS DEROGATION must exist in order to rebut the presumption of conformity – inference are not sufficient**
   3. Paras 434-438 good summary of CIL and jus cogens
   4. Judge begins from assumption that prohibitions on slavery, forced labour, torture and crimes against humanity are jus cogens norms
      1. Defines CIL, how we define it, what its application is once it is identified
   5. Cdn approach to CIL in Cdn jurisprudence – **presumption of conformity** - our approach is one of adoption, incorporated into CL of Canada without need for domestic law, therefore “absent an express derogation, courts may lookt to prohibitive rules of CIL to aid in the interpretation of Cdn law and the development of the CL” para 440
2. **Can CL apply to corporations?**
   1. Nevsun argues corporations are not subjects of IL and so cannot be bound by them
      1. Incompatible with intl efforts to legislate liability, if corps were subject of IL then they wouldn’t need to be regulated domestically
      2. Corporate liability incompatible with IL being focused on state practice
      3. Corps don’t use treaties
   2. Based on traditional/historical rues, this seems accurate, right?
      1. Yes, subjects of IL are generally limited to nation states, and maybe to IOs, but not to persons, entities, etc
      2. BUT Nevsun adopts the traditional PERMISSIVE approach to IL – **unless there is express recognition of applicability, CIL is not binding on corporations**
      3. Ps argue for a PROHIBITIVE approach – that **absent a prohibition or or immunity the law presumptively applies**. (Suggesting that corporations might be subjects of just cogens norms absent prohibitions) – these are obligations owed to humanity as a whole
      4. **What would it mean to affirm with certainty that corporations cant be held liable for breaches of jus cogens norms?**
         1. Court includes discussing transnational companies, their power and influence approaching and sometimes exceeding that of the states in which they operate but without the public law responsibilities of statehood. This has created a challenge for the intl community as it seeks to develop remedies for harms arising out of the involvement of such companies in human rights abuses.
         2. Corporations may be working in states where human rights violations are rampant and extreme, so we cannot rely entirely on the domestic legal regimes to offer remedy protection punishment for human rights violations, and that currently depending on where the corporation is incorporated, so we might need the IL community and individual states to discuss the corporate liability for behaviour conducted outside their domestic areas be monitored, punished.
      5. **Court doesn’t decide one ay or the other, just that there isn’t NO chance of success so they put it ahead to trial.**
3. **There are many ways in which we can achieve objectives of ensuring corporations which commit human rights abuses – IL can adapt over time to ensure**