Dear Members,

Welcome to the International Law Commission (ILC) at UFRGSMUN 2005. We are looking forward to seeing you in November, when you will be able to discuss two matters of great relevance on international law: the always important issue of the sources of international law and the cutting edge topic of general guidelines concerning peace treaties.

As scholars, you shall act with accuracy while discussing the proposed topics, since the ILC is a very technical committee. This demands a strong preparation regarding the proposed topics, which will allow you to effectively discuss the themes and enrich the debates. It is also necessary to keep in mind that this committee is very peculiar, as it is concerned with the development of international law itself. As a consequence, as members, you shall appreciate the topics independent of your own governments view.

Five students compose this year’s ILC staff: Alexandra Pretto, Joyce Copstein Wainberg, Karen Cristina Mallmann, Lucas Lixinski and Viviane Grosser. Alexandra Pretto is in her last year at UFRGS Law School. Although her participation in Model United Nations is not extensive, she is the only staff member that has already joined ILC’s meetings' simulation, as she was an ILC Assistant in UFRGSMUN 2004. Instigated by last year's success and maintaining an interest in International Law institutes and main concepts, she is delighted to once again join this Commission.

Joyce attends her sixth semester at UFRGS Law School. She is also in her second semester of Pontifícia Universidade Católica’s Social Communication School (PUCRS), with emphasis on Journalism. She first participated in UFRGSMUN as a delegate of the United Nations Commission on Human Rights (UNCHR) in 2003. Last year, she joined the UFRGSMUN Staff as the Research Assistant for UNCHR.
Karen Cristina Mallmann is currently in her eighth semester at UFRGS Law School. She also studies Economics at PUCRS. She is very interested in international law and affairs, and, although she has not had much experience with the matter, her interest and enthusiasm led her to participate with the UFRGSMUN Staff this year.

Lucas Lixinski is currently in his last year at UFRGS Law School. He has participated in UFRGSMUN Staff since its first year, first in the Secretariat, then as the UNCHR Director, and this year in the ILC. He has been to Model UN Conferences as a delegate twice: to the sixth Americas Model United Nations (AMUN) as a representative of the United Kingdom in the UNCHR, and to the 2005 National Model United Nations (NMUN), in New York, as a representative of Mali in the General Assembly Legal Committee, the latter due to the partnership between UFRGS and Pace University. He has participated in the 2004 Philip C. Jessup International Law Moot Court Competition. Furthermore, he is very interested in international law and international human rights law. He apologizes to the Members of this commission in advance for not being present at the conference, for he will be clerking at the Inter-American Court of Human Rights in San Jose, Costa Rica, during UFRGSMUN. He will graduate by December this year.

Viviane is currently in her eighth semester at UFRGS Law School. She has participated on UFRGSMUN Staff in 2004 as Registrar of the International Court of Justice. She also participated in the 2005 Philip C. Jessup International Law Moot Court Competition and she maintains a great interest in Public International Law.

We would like to thank Prof. Catherine Tinker, from Pace University, for her academic support, comments and corrections to Topic A, and Lisa Jamhoury for the English revision to Topic B.

We hope you all enjoy reading this Study Guide as much as we have enjoyed making it for you, esteemed Members. As soon as possible, please join our e-group by sending an e-mail to ilc_ufrgsmun2005-subscribe@yahooogroups.com. Apart from that, we are immediately available to all of you to answer any questions via the e-mail addresses provided below. We make our best wishes for an enriching and enjoyable conference.

See you in November!

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INTRODUCTION

ILC’s General Background

The effort to promote codification and development of international law initiated with the League of Nations in 1924, when a resolution of its Assembly created a standing organ called the Committee of Experts for the Progressive Codification of International Law. With the creation of the UN and the extinction of the League, the General Assembly, concerned about discharging its responsibilities under article 13, paragraph 1.a, of the UN Charter, established the ILC by resolution 174 (II), on 21 November 1947.

This commission was created with the task of promoting the progressive development of international law and its codification. According to article 1, paragraph 2, of the Statute of the ILC, its primary concern is with public international law, but there is also a possibility granted by the Statute of entering the field of private international law. The proposals for the progressive development of international law are formally referred to the Commission by the General Assembly or by Members of the UN and other authorized agencies. The commission itself, nevertheless, may select topics for codification, though the priority lies with the requests of the General Assembly to deal with any question.

Considering its scope, the Statute of the Commission makes a distinction, for convenience, between progressive development, as meaning “the preparation of draft conventions on subjects which have not yet been regulated by international law or in regard to which the law has not yet been sufficiently developed in the practice of States,” and codification, as meaning “the more precise formulation and systematization of rules of international law in fields where there already has been extensive State practice and precedent and doctrine” (article 15 of the ILC Statute). When the commission is engaged in the progressive development of any branch of law, the Statute sets as the goal of this work the completion of an international convention.

The Statute therefore establishes that the Commission prepares a draft convention that will be submitted to the General Assembly, which will decide what further steps to take.
in order to bring about the conclusion of an international convention. When the Commission is concerned with codification—meaning the precise formulation and systematization of existing customary law—there are two possibilities for the conclusion of its work: (1) the publication of its report; (2) a resolution by the General Assembly taking note of or adopting the report, pursuant to article 23, paragraph 1 of the Statute.

The methodology for both types of work—draft convention and report—is the same, starting with the designation of a Special Rapporteur for each topic. For that, a plan of work is formulated and Governments are requested to furnish elements of relevant law. The Special Rapporteur then submits reports, based on which the Commission adopts a provisional draft, usually by means of articles, with commentaries. The provisional draft is submitted to the General Assembly and also to Governments so that they can formulate written observations.

The Special Rapporteur then studies the replies received, together with the comments made in the debates of the Sixth Committee of the General Assembly—the Legal Committee, which is in charge of international law—and finally submits a report recommending changes in the original draft. At last, the Commission adopts a final draft—on the basis of that report and the comments—which is submitted to the General Assembly for approval, with a recommendation for further action.

Regarding its members, the Commission is currently composed of 34 members—elected by the General Assembly for five-year terms. Members sit in their individual capacity, not as representatives of their Governments. In the election process, relevance must be given to the people who possess the qualifications required, such as recognized competence in international law, pursuant to article 2 of the Statute. The Commission should also assure representation of the main forms of civilization and of the principal legal systems of the world.

Most of the Commission’s work involves the preparation of draft articles on topics of international law. When the drafts on a particular topic are completed, the General Assembly usually convenes an international conference of plenipotentiaries to incorporate the draft articles into a convention, which is then opened for signature to States. Turning the draft articles into a convention consolidates the success of the work of those renowned scholars, whose appointment is to enrich international law despite the political interests of their own countries.
Current Sources of International Law: Towards a Revision of Article 38 of the International Court of Justice Statute.

By Viviane Pereira Grosser, Alexandra Pretto and Lucas Lixinski.

1. HISTORICAL BACKGROUND

The topic of Sources of International Law is intrinsically related to the concept of international law and, consequently, to its evolution. One is not able to speak of the origins of international law without knowing accurately what international law is and how it is transformed continually. Hence, in order to introduce this issue of sources in the International Law Commission Agenda, an idea of how the concept of international law evolved to reach its current status seems of great relevance. It is very important to keep in mind this remarkable connection between sources of International Law and its present context, as we pursue a brief excursion through the history of international law.

International Law was inaugurated by a clear founding moment, in a precise year – 1648 – and location – Westphalia. In the canonical interpretation, this time and place gave birth to international law, since it fundamentally broke with the norm of hierarchical relations between peoples, grounded on imperial legitimacy, and allowed the emergence, by the mutual recognition of some European sovereigns, of the notion of sovereign equality. The Peace of Westphalia might be understood as the trigger of a process of moving from a

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1 Rosalyn Higgins in the second chapter of her General Course identifies the topic of sources of international law with the question “what is international law?”. She associates directly the matter of sources and the questions of where the substance of International Law can be found with what constitutes International Law. The author concludes succinctly: “It is really all about the provenance of norms”. For more, see HIGGINS, Rosalyn. Problems & Process. International Law and How We Use it. Oxford, Clarendon Press, 2001, p. 17.

vertical order to a horizontal one based on State consent. What is seen since then is a continuous attempt to deepen and expand the horizontality at that point started.  

International Law was understood throughout the eighteenth century to be a branch of natural law (and as a result binding upon all nations), but in the nineteenth and twentieth centuries this understanding changed so as to conceive international law no longer as a result of superior rules, but rather of treaties and custom. Through the centuries, and noticeably in the past 60 years, the classical view of international law as the Law of Peace and War (ius belli ac Pacis, as stated by Grotius) was superseded.

Another turning point for the idea of international law was April 28, 1919, when the League of Nations was created by the Versailles Peace Conference as the first international organization with a universal role. The Statute of the Permanent Court of International Justice (hereinafter PCIJ), the main judicial organ of the League, codified in article 38 the traditional sources of international law applied by this Court in its decisions. The League of Nations, however, did not have among its members the United States of America, for example, and the occurrence of World War II was considered its failure as an institution. It was then replaced by the United Nations in 1945 at the end of World War II, and, as a consequence, the International Court of Justice (hereinafter ICJ), the main judicial organ of the United Nations, also known as the World Court, came to succeed the aforementioned Court. The ICJ, in Article 38 of its Statute, has substantially repeated the traditional sources codified by the PCIJ statute.

It is important to note that, although the enunciation of the sources of international law has not changed, with the transformation of international institutions, new roles have then emerged for international law, going beyond the mere preservation of sovereignty. One reason for this general process of revision of international law was awareness about the "universal" and "multicultural" character of the international community: this community or society had become worldwide.

By abandoning its classical view, International Law has entered a new era – this contemporaneous moment of its evolution – as the Law of cooperation and solidarity. In this very sense it is commonly said that the state-sovereignty-oriented approach of

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7 PEREIRA; QUADROS, Manual de Direito Internacional Público..., p. 660.
9 PEREIRA; QUADROS, Manual de Direito Internacional Público..., p. 660-661.
international law has been gradually supplanted by a human-being-oriented approach, under which the Roman Law maxim *hominum causa omne jus constitutum est* (all law is created for the benefit of human beings) has gained a firm foothold in the international community.\(^{10}\)

### 2. STATEMENT OF THE ISSUE

#### 2.1. Definition of Sources of International Law

The idea of sources of international law, once again, is deeply connected to the concept of international law. First of all, it is because, by definition the expression *sources*, taken in its general meaning, refers to the place from which something comes or is obtained. A source of international law in this sense is something able to originate international law.\(^{11}\) And, second of all, it is due to the close relation that international law, more than any other field of law, establishes with social and political evolution.\(^{12}\)

The apparently simple question that emerges in this context is: in the current time, what is able to originate International Law? To answer this question, we are first called upon to reflect on what a source of law is.

Sources of law are frequently classified into two categories: material and formal\(^{13}\) sources. Authors differ both on the definition\(^{14}\) and relevance of this classification to international law. PELLET stresses that in international law the interest in these two kinds of sources may vary according to time and doctrinal positions. He considers that, nowadays, a combination of both perspectives is being sought as a matter of facilitating the transformation of international law. As a consequence, with the direct contribution of

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\(^{11}\) For more, see HIGGINS, *Problems & Process…*, p. 17. See also, *supra* note 1.


\(^{14}\) According to DINH; DAILLIER; PELLET, *Direito Internacional Público…*, p. 101-102, material sources of law constitute the sociological grounds of rules, such as its political, moral and economic bases; they are considered to be direct reflections of the international structure and of the dominant ideologies. Under this system of comprehension, the content of law is a direct result of the material sources. Formal sources would correspond to the elaboration processes of law, which include all the different techniques that authorize a rule to be considered as making part of positive law; they are the ways of formulating and introducing the material sources’ content in positive law. PEREIRA; QUADROS, *Manual de Direito Internacional Público…*, p. 151 much more succinctly defines material sources as the reasons why the norm appears and formal sources as the law-making processes by which International Law norms come into sight, in which sense they are to be considered as a norm revelation process. See also BROWNLIE, *Principles of Public International Law…*, p. 3.
the actors in the international scenario, this stiff distinction between formal and material sources is not so relevant anymore.\textsuperscript{15}

It is clear today that International Courts are called upon to consider rules that are still being formed, and whose reach cannot be appreciated based solely on the extent recognized by the formal sources of law. In this sense, most authors support that, more than the proper formal source, what must be observed is the law-making process as a whole.\textsuperscript{16}

Although there is no doubt that, theoretically, the formal sources are the only ones by which rules may become positive law, it is impossible to cover the growing importance of material sources as participants in the process of emergence of positive law, as material sources are receiving direct consideration by international law. Despite their inability to alone originate a rule of law, the material sources influence the juridical process that turns formal sources into reality.\textsuperscript{17}

\textbf{2.2. Article 38 of the Statute of The International Court of Justice}

Article 38 of the ICJ Statute, as a picture of a state of affairs recalling the beginning of the 20\textsuperscript{th} century, reveals itself to be insufficiently dynamic for the current era.\textsuperscript{18} Moreover, according to doctrine, Article 38 has always been subject to criticism.\textsuperscript{19} First, for its

\begin{footnotesize}
\begin{itemize}
  \item[DINH; DAILLIER; PELLET, \textit{Direito Internacional Público}..., p. 101.]
  \item[DINH; DAILLIER; PELLET, \textit{Direito Internacional Público}..., p. 102. According to HIGGINS, \textit{Problems & Process}..., p. 18-19, International Law can be regarded by two opposite perspectives: either as rules or as process. The author affiliates herself with the second perception, which comprehends International Law as “a process of decision-making, with appropriate reliance on past trends of decision-making in the light of current context and desired outcomes”.
  \item[In this sense, the authors suggest that non-binding resolutions must be taken into consideration in order to comprehend the contemporary process of creation of a conventional or consuetudinary rule (DINH; DAILLIER; PELLET, \textit{Direito Internacional Público}..., p. 101-102). Alluding to the variety of material sources, Brownlie demonstrates the many possibilities of evidencing the existence of consensus among states in what concerns particular rules or practices by giving the pertinent and elucidating example of an unratified treaty or report of the International Law Commission to the General Assembly that, despite its lack of binding force either in the law of treaties or otherwise, stand as important instruments on the threshold of a consensus or to the confront of States in a significant way (BROWNIE, \textit{Principles of Public International Law}..., p. 3-4).
  \item[Article 38 of the PCIJ statute was substantially repeated by article 38 of the Statute of the International Court of Justice, which contains the following:
    \begin{itemize}
      \item[1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
        \begin{itemize}
          \item[a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;]
          \item[b. international custom, as evidence of a general practice accepted as law;]
          \item[c. the general principles of law recognized by civilized nations;]
          \item[d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.
        \end{itemize}
      \item[2. This provision shall not prejudice the power of the Court to decide a case \textit{ex aequo et bono}, if the parties agree thereto.”]
    \end{itemize}
  \item[BROWNIE, \textit{Principles of Public International Law}..., p. 5, dissents on that opinion arguing that Article 38 is generally regarded as a complete statement of the sources of International Law. The author makes an accurate observation that the referred article itself does not mention the expression “sources” nor can it be, if looked at closely, regarded as a straightforward enumeration of sources.
\end{itemize}
\end{footnotesize}
ambiguous formulations and also for not conferring an exhaustive list of the formal sources of contemporaneous international law, as it does not make any reference to important sources such as, for example, the unilateral acts of states and the decisions taken by international organizations. And, finally, by the way it enumerates the sources and by the order in which they were disposed, as well as by not defining them. Concerning the enumeration, it seems of great use to stress that it is merely exemplificative.

As far as the order given to the sources is concerned, unanimity cannot be reached in the doctrine. BROWNLIE stresses that a system of priority in the application of the sources of Article 38 depends simply on the order according to which they were disposed (“a” to “d”), and to the reference to “subsidiary means”. PEREIRA and QUADROS agree that the Article 38 enumeration does not entail a rigorous hierarchy. PELLET, DAILLIER and DINH, in a very coherent way, state the inexistence of a hierarchy of the formal sources of international law. To these authors, norms and sources, although commonly used with equivalent meanings, are not identical concepts. By norm one must understand the substance, the content of a rule elaborated under the procedural requirements of a formal source of law. Formal sources, as techniques of norm elaboration, have no aprioristic reason to prevail one over another. Since the same norm can be originated by different sources of law, there is no explanation why treaties should prevail over custom, for instance. Although formal sources are not submitted to a hierarchy, it does not mean a hierarchy among norms does not exist. It indicates only that this hierarchy is not and cannot be deducted from these norms’ grounds (from the way they were originated, i.e., formal sources). So, a hierarchy could result from other characteristics, such as chronological position of the norm.

Even so, if a hierarchal order is admitted, no doubt rests that ius cogens norms are always at the top of that order. Below it there are all the other norms. So if the norm in case is

20 DINH; DAILLIER; PELLET, Direito Internacional Público..., p. 103. The matter concerning how binding unilateral (non-consent based) acts of states should be, like France’s in the ICJ decision on nuclear testing (Nuclear Tests case (New Zealand vs. France), ICJ, 1974, 253), is considered a question of particular interest to the International Law Commission, say NICOLAIDIS and TONG, Diversity or Cacophony?..., p. 1361.
21 PEREIRA; QUADROS, Manual de Direito Internacional Público..., p. 152.
22 BROWNLIE, Principles of Public International Law..., p. 5.
23 PEREIRA; QUADROS, Manual de Direito Internacional Público..., p. 286.
24 DINH; DAILLIER; PELLET, Direito Internacional Público..., p. 103-104.
25 DINH; DAILLIER; PELLET, Direito Internacional Público..., p. 104-105.
27 Article 53 of the Convention on the Law of Treaties, 1969, defines ius cogens as a peremptory 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 international law having the same character”. Pursuant to Shaw, the concept of this peremptory norm “is based upon an acceptance of fundamental and superior values within the system and in some respects is akin to the notion of public order or public policy in domestic legal orders”. In: SHAW, International Law. 5th Edition. Cambridge, Cambridge University Press, p. 117. BROWNLIE, Principles of Public International Law. 6th Edition. New York, Oxford University Press, p. 3-4.
considered *ius cogens*, it does not really matter which is its formal source (if customary, conventional or other). So the question is how formal sources are ordered when they are not *ius cogens*. Natural law proponents recognize general principles of law in the first place, above treaties and customary norms, which are usually taken by doctrine to be the two most relevant sources. Thus, these two sources would be in the same hierarchical level, being able, theoretically, to displace one another mutually. Treaties can easily be displaced by custom, when their rules do not correspond to practice anymore. Custom, if not *ius cogens*, can also be displaced by a treaty, but only if this treaty is signed by all the states once bound by the *opinio iuris* related to the practice that generated the respective custom. So, as debatable, that hierarchical parity is altered. In practical terms, the power of custom might be possibly considered superior to the power of treaties, since treaties do not always displace the former. This is a question that should be addressed by the ILC in discussing the topic.

2.3. Treaties

2.3.1. Treaties As Primary Sources Of International Law: General Considerations

Treaties constitute a primary source of international law, since they require the express consent of the parties, being defined as an international agreement concluded by two or more States in order to codify a variety of issues. They are commonly known as Conventions, International Agreements, General Acts, Pacts, Protocols, Charters, Statutes, Declarations, Covenants, among other names. They are considered as a source of international law in the context of its ‘law-making’ perspective, for in such agreements “States elaborate their perception of international law upon any given topic or establish new rules to guide them for the future in their international conduct”. Therefore, they

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28 PEREIRA; QUADROS, *Manual de Direito Internacional Público*..., p. 287. remind that treaties, custom and general principles of law will only occupy the same place in an hierarchical order when the former two are considered to be *ius cogens*. The consequences of the adoption of such a position can be illustrated by the case of a nullity of a treaty celebrated in violation of a general principle of law. The major doctrine, although, recognizes general principles of law coming in consideration after treaties and custom.

29 PEREIRA; QUADROS, *Manual de Direito Internacional Público*..., p. 286-287. According to BROWNLIE, *Principles of Public International Law*..., p. 5, treaties can be displaced or amended by a subsequent custom, where such effects are recognized by the subsequent conducts of the parties.


33 The ‘law-making’ treaties, therefore, would be considered sources of international law, once they would represent the collective purpose. Treaty-contracts differently are not considered to be law-making instruments in themselves, since they regulate concrete and limited topics within a small number of members. See SHAW, *International Law*...,p. 90-92. Another classification divides treaties into bilateral and multilateral instruments. Since, art. 38, paragraph 1, “a” of the ICJ statute comprehends general and particular conventions both bilateral and multilateral treaties would be contemplated within the sources of
The most important instrument, that “constitutes the basic framework for any discussion of the nature and characteristics of treaties”\(^{38}\), is the Vienna Convention on the Law of Treaties of 1969, which defines a treaty as “an international agreement concluded between States in written format and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation”.\(^{39}\) There are no specific requirements of form in order to create a treaty, the essential element being the intention of the parties to be bound by its provisions.\(^{40}\) As a pragmatic instrument, the convention has abandoned abstract classifications, such as the “law-making treaties” and the “treaty-contract”.\(^{41}\) Others have mentioned that the Convention is more likely to represent a progressive development of international law than a codification of it. Part V, covering articles 42 to 72, would be evidence of that position.

\subsection*{2.4. International Custom}

\subsubsection*{2.4.1. Elements of Customary International Law}

Article 38, ‘b’ of the Statute of the International Court of Justice defines custom “as evidence of a general practice accepted as law”. It has two basic elements, therefore: State
practice and *opinio iuris sive necessitatis*. Practice by itself is not evidence of the existence of custom, and that is why the norm must also be accepted as law, in order to fulfill the requirements for such rule.\(^{42}\) The ICJ has made reference to such elements in the *Libya/Malta* case, contending that the substance of customary law is to be “looked for primarily in the actual practice and *opinio iuris* of states”.\(^{43}\)

The material element, State practice, is reflected in the “performance of state activities and the convergence of practices”.\(^{44}\) The practice must be uniform and consistent. The uniformity does not need to be complete, although it has to be substantial.\(^{45}\) In order to be uniform and consistent, the practice must be continuous. Once the consistency and generality of a practice is proven, no particular duration is demanded, since “in international law there is no rigid time element and it will depend upon the circumstances of the case and the nature of the usage in question”.\(^{46}\) Nevertheless, the passage of time is an important part of the evidence of generality and consistency of a particular practice.\(^{47}\)

Regarding the element of legal compulsion — *opinio iuris* — it is necessary to determine that States act in such a manner because they recognize it as a *legal obligation*.\(^{48}\) Some writers highlight the role of *opinio iuris* in the formulation of customary rules. Bin Cheng, for instance, considers that repetition is not necessary as long as *opinio iuris* could be clearly established, creating the possibility of ‘instant’ customary law.\(^{49}\) The difficulty remains in determining until which point the role of State practice could be diminished — in relation to *opinio iuris* — for the formation of a customary rule, so as to create an instant obligation for States.\(^{50}\)\(^{51}\)

### 2.4.2. The Difficulty of Proof and the Dynamics of Customary Rules

Despite State practice being considered as the generality and uniformity of a certain attitude by States, there is still not a clear understanding of what is, in fact, such practice. This uncertainty has great relevance concerning the matter of proof. The question is whether State practice covers every kind of behavior, or if it is restricted to positive actions.\(^{52}\) And for that, it is questionable whether speeches, informal documents and

\(^{42}\) HIGGINS, Rosalyn. Problems & Process..., p. 18.

\(^{43}\) *Case concerning the Continental Shelf (Libyan Arab Jamahiriya/Malta)*, ICJ, 1985, p. 29-30.

\(^{44}\) SHAW, *International Law*..., p. 70.

\(^{45}\) BROWNLIE, *Principles of Public International Law*, 5\(^{th}\) edition..., p. 5.

\(^{46}\) SHAW, *International Law*..., p. 72.

\(^{47}\) BROWNLIE, *Principles of Public International Law*..., p. 5.


\(^{49}\) TRINDADE, Princípios do Direito Internacional Contemporâneo..., p. 9; see also CHENG, Bin. *General Principles of Law as Applied by International Courts and Tribunals*, 1958, 155.

\(^{50}\) In new areas of international law, custom can be established quickly due to the newness of the situations involved, due to the lack of contrary rules or due to the necessity to have some regulation in international relations. This is the case of space law. For a changing notion of customary international law in environmental issues, see HUNTER; SALZMAN; ZAELKE. *International Environmental Law and Policy*, 2\(^{nd}\) edition. New York: Foundation Press, 2002, p. 313.

\(^{51}\) *Lotus* case (Turkey vs. France), PCIJ., Series A, No. 10, 1927, p. 28.

\(^{52}\) SHAW, *International Law*..., p. 77.
statements by governmental authorities could be proof of such a practice, or if this proof would be restricted to what states actually do.  

The second element of customary international rules - *opinio iuris* - is a necessary element, since it recognizes the distinction between obligation and usage.  

Without the psychological element, practice remains practice, lacking its obligatory character.  

The essential problem nevertheless is basically one of proof. In many cases the International Court of Justice adopts a determined approach, assuming the existence of an *opinio iuris* based on the evidence of a general practice, or even based on determinations of the Court itself or of other international tribunals. In other cases, however, the ICJ has called for more positive evidence that such practice was recognized as valid by a state.

It is difficult to discover the necessary *opinio iuris*, since the reason underlying a State’s adoption or acceptance of a certain practice is not clear.  

Justice Tanaka in his dissenting opinion in the North Sea Continental Shelf cases has properly stated that the duration of time required for the generation of customary law cannot be determined mathematically or decided uniformly.

2.4.3. Relationship between Custom and the Vienna Convention on the Law of Treaties

The cornerstone of international law is the consent of States. The principle of ‘*pacta sunt servanda*” provides the obligatoriness of the agreements celebrated within the international community. Both treaties and customary law are built upon this support and, therefore, maintain a constant and dynamic dialogue.

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53 As for instance, Brownlie mentions as elements of material proof, diplomatic correspondence, policy statements, press releases, the opinions of official legal advisers, executive decisions and practices, and even comments by governments on drafts produced by the International Law Commission, among others. See Brownlie, *Principles of Public International Law...*, p. 5.


56 BROWNLIE, *Principles of Public International Law...*, p. 7; see Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada / United States of America), ICJ, 1984, p. 299. “[...] together with a set of customary rules whose presence in the opinio juris of States can be tested by induction based on the analysis of a sufficiently extensive and convincing practice, and not by deduction from preconceived ideas.”

57 North Sea Continental Shelf cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. The Netherlands), ICJ, 1969, p. 3.


59 North Sea Continental Shelf cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. The Netherlands), ICJ reports 1969, Diss. Op. Justice Tanaka. According to Justice Tanaka, “There is no other way than to ascertain the existence of *opinio iuris* from the fact of the external existence of a certain custom and its necessity felt in the international community, rather than to seek evidence as to the subjective motives for each example of State practices, which is something which is impossible of achievement...”

60 MELLO, *Curso de Dereito Internacional Público...*, p. 140.
Treaties usually bind only their parties, having no effect upon non-member States. Nevertheless, they can become binding on non-parties where they reflect customary international law. It is possible for a provision in a treaty to provide a rule of customary international law, if some necessary conditions are fulfilled. In a different sense, treaties can be a codification of a pre-existent custom and bind non-member States as well.

Despite having the same basis in the consent of States, the dialogue between treaties’ provisions and customary international law is a difficult subject. The International Court of Justice, for instance, has stressed the need to primarily look for “the actual practice and *opinio iuris* of States, even though multilateral conventions may have an important role to play in recording and defining rules deriving from custom, or indeed in developing them”.

The difficulty of the question remains in considering the elements of customary international law, state practice and *opinio iuris*, since in some fields, such as human rights, the possibility has been argued of general treaty provisions generating customary rules without the requirement of demonstrating *opinio iuris* and resorting only to a short passage of time. The matter of treaties as a reflection or as a source of customary rules is connected to the understanding of such elements, which are developed further, for example, considering the relationship between treaties and custom, in the Vienna Convention on the Law of Treaties of 1969.

### 2.5. GENERAL PRINCIPLES OF LAW

#### 2.5.1. General Considerations

General principles of law are a source within article 38(c) of the Statute of the International Court of Justice. They encompass a subsidiary law-creating process, since they come into operation only when treaty obligations and applicable rules of customary international law are absent. Its inclusion was a confirmation of a general practice, among arbitral decisions, contributing to the configuration of a third historical source of

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63 *Case Concerning the Continental Shelf* (Libyan Arab Jamahiriya / Malta), ICJ, 1985, p. 29-30.
64 SHAW, *International Law*…, p. 91.
65 See, for instance, *Fabiam* case (France vs Venezuela), in which the arbitrator has resorted to municipal law on the question of the responsibility of States for acts of its agents committed in the exercise of their functions. BROWNLIE, *Principles of Public International Law*…, p. 17.
66 See, for instance, *Fabiam* case (France vs Venezuela), in which the arbitrator has resorted to municipal law on the question of the responsibility of States for acts of its agents committed in the exercise of their functions. BROWNLIE, *Principles of Public International Law*…, p. 17.
international law more recent than the aforementioned ones. Its inclusion within the sources of art. 38 of the Statute of the International Court of Justice aims to fill the gaps in international law as well as to avoid a possible non liquet’ in cases in which there are no obligations stipulated in treaties or existent in international custom. General principles of law constitute a ‘reservoir of principles’ that can be applied by a judge in an international dispute when appropriate in the context of inter-State relations.

Although reference to general principles includes principles common to the legal systems of several States, some believe the subject concerns the principles of international law. Nevertheless, Verdross carefully distinguishes the latter from general principles of law, since principles of international law in a strict sense are those necessarily recognized by customary international law, while the former do not need to be. Moreover, some difficulties still arise, as for instance, the uncertainty whether general principle of law must be shared by all States or simply determined by the majority of them. As a possibility overcoming such difficulties, Akehurst suggests that international tribunals apply only the general principles of law common to the litigants, without the need to inquire if such principles exist in the municipal law of other States.

Waldock believes that the practice of the Court seems to treat the “common law”, which is present in Article 38(b) and (c), as a single corpus of law. It considers that paragraph (c) adds to this corpus – whose preeminence falls under customary international law – flexible elements, enabling the Court to provide completeness to customary law and also to extend it as far as possible.

2.6. Subsidiary Sources

2.6.1. Decisions of International and High National Courts

Article 38(d) of the Statute of the ICJ refers to judicial decisions and to the teaching of publicists as subsidiary sources of law. According to Schwarzenberger, “If the dicta of courts or the propositions of writers on international law all happen to go in one direction,

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68 TRINDADE, Princípios do Direito Internacional Contemporâneo..., p. 17.  
69 MELLO, Curso de Direito Internacional Público..., p. 220.  
70 HARRIS, Cases and Materials on International Law..., p. 47.  
71 SCHWARZENBERGER, A Manual on International Law..., p. 29. In order to qualify as a general principle of law, “[i]t must be, first, a general principle of law as distinct from a legal rule of more limited significance. Secondly, it must be recognized by civilized nations as a distinct from barbarous or savage communities. Thirdly, it must be shared, in substance, by a fair number of civilized nations, and it is arguable that these must include at least the principal legal systems of the world”  
72 VERDROSS, Derecho Internacional Publico..., p. 130.  
73 TRINDADE, Princípios do Direito Internacional Contemporâneo..., p. 18.  
75 HARRIS, Cases and Materials on International Law..., p. 48.
they represent valuable evidence which may greatly assist in clearing up uncertainties […]".\textsuperscript{76}

The decisions of international courts and tribunals, although binding only upon the litigants and only regarding the subject-matter of the conflict, pursuant to art. 59 of the Statute of the ICJ, are quoted as authoritative decisions.\textsuperscript{77} The International Court of Justice decisions, for instance, sometimes go beyond merely interpreting the law, as occurred in the \textit{Anglo-Norwegian Fisheries} case\textsuperscript{78}, in the \textit{Reparations} case\textsuperscript{79} and in the \textit{Nottebohm} case.\textsuperscript{80} The expression \textit{judicial decision} also encompasses international arbitral awards and the decisions of national courts.\textsuperscript{81} Arbitral awards have been extremely significant for the development of international law, such as the \textit{Island Palmas} case\textsuperscript{82} and decisions of national courts have been also important in determining the application of international law in municipal law. Sometimes, such rulings can provide an important contribution to international law debates.\textsuperscript{83} Notwithstanding, Brownlie highlights that “the value of these decisions varies considerably, and many present a narrow national outlook or rest on a very inadequate use of the sources”.\textsuperscript{84}

\textbf{2.7. Teaching of Publicists}

Another auxiliary source indicated by article 38(d) of the Statute of the ICJ is the reference to the ‘teaching of the most highly qualified publicists of the various nations’. Such writings generally constitute evidence of law, although some writers may have a formative influence, such as Grotius, considered the father of the law of nations.\textsuperscript{85} The contribution of writers was very important in the formative period of international law.\textsuperscript{86} Moreover, the writers of one country usually reflect their national perception of international law and for that the resort to such teachings should not be so emphatic as to compromise the fidelity of the rules of international relations.\textsuperscript{87}

Some consider the work of the International Law Commission to reflect doctrine, being included, therefore, as an auxiliary source of law. Due to the importance of the works of

\textsuperscript{76} SCHWARZENBERGER, \textit{A Manual on International Law}…, p. 31.
\textsuperscript{77} SHAW, \textit{International Law}…, p. 103.
\textsuperscript{78} Anglo-Norwegian Fisheries Case. ICJ Reports, 1951, p. 116. Concerning the criteria for the recognition of baselines from which to measure the territorial sea, later adopted in 1958 Geneva Conventions on the Territorial Sea and Contiguous Zone.
\textsuperscript{79} Reparations Case, ICJ Reports, 1949, p. 174.
\textsuperscript{80} See also TRINDADE, \textit{Princípios do Direito Internacional Contemporâneo}…, p. 20.
\textsuperscript{81} SHAW, \textit{International Law}…, p. 104.
\textsuperscript{82} Island Palmas case (Netherlands v. U.S), R.I.A.A. 829, 1928.
\textsuperscript{83} TRINDADE, \textit{Princípios do Direito Internacional Contemporâneo}…, p. 20.
\textsuperscript{84} BROWNLIE, \textit{Principles of Public International Law}…, p. 23.
\textsuperscript{87} TRINDADE, \textit{Princípios do Direito Internacional Contemporâneo}…, p. 21.
This Commission of the United Nations reflecting the thoughts of a quasi-diplomatic body of international legal experts, not too far apart from the reality of United Nations political organs as well as other international organizations, it has been suggested that its importance goes beyond doctrine. Independent scholars whose actions are committed to the progressive codification of customary law and the development of international law compose the International Law Commission; this allows it to represent a scientific examination of the interests of States.

2.8. Resolutions of International Organizations

2.8.1. The Binding Character of Resolutions

With the expansion and evolution of international law, new sources have arisen. Resolutions of international organizations have been mentioned as a formal source of international law, with a detached law-making role. As a subject of international law, with capacity to enter into agreements, such entities have law-making powers themselves, which are granted by the States parties to the convention establishing the organization. And for that reason, international law became not only a realm for States, but also for international organizations, providing dynamism to the international community.

As an example, recalling the scope of the United Nations, much has been discussed about the resolutions of the General Assembly and also the resolutions of the Security Council. General Assembly resolutions have no binding character, but the effect of contributing to the formation of custom. United Nations Security Council resolutions, on the other hand, have binding effect on member States, exercising, therefore, what some call “international legislation”. In the South West Africa case, the ICJ reviewed the distinction between the character of resolutions from both the Security Council and the General Assembly. As mentioned by Justice Ammoun in his separate opinion in the

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88 MAARTEN BOS. Procurar fonte. Mencionado por TRINDADE, Princípios do Direito Internacional Contemporâneo...p. 21.
89 TRINDADE, Princípios do Direito Internacional Contemporâneo...p. 21.
90 MELLO, Curso de Direito Internacional Público..., p. 217.
91 The legal personality of such entities, as distinct from its members, had already been recognized by the World Court in reparations case, in which it was stated that “(...) the progressive increase in the collective activities of States has already given rise to instances of action upon the international plane by certain entities which are not state”. Those organizations formulate rules that are binding upon member States, even if there was not any ratification by them. See Reparations case, ICJ reports 1949, p. 178-179.
92 BROWNLE, Principles of Public International Law... p. 677-678.
93 HIGGINS, Problems & Process..., p. 23; see also HARRIS, Cases and Materials on International Law..., p. 63
Barcelona Traction case, resolutions of international organizations are sources of international law of ever-increasing importance.  

2.8.2. Resolutions as Evidence of International Custom

Resolutions can also represent evidence of international custom, as for instance, what may occur with General Assembly resolutions. These resolutions may furnish evidence of one of the elements required for the formation of a customary rule – state practice and opinio iuris. If a resolution has been adopted unanimously or by a true consensus, as is the rule in the United Nations, it carries an important weight as “interpretations of the Charter, statements of law or quasi-judicial determinations”. To strengthen its consideration as evidence of customary law, it is important to have votes, for instance, from States from all economic and legal systems and not only support from a specific group, with other groups opposing it.

Moreover, Justice Tanaka in his dissenting opinion in the South West Africa Cases mentioned that the repetition and recitation of resolutions – an accumulation of them – could result in the creation of a rule of customary international law, since it reflects continuity. Resolutions can provide evidence of State practice or even evidence of the psychological element of custom, opinio iuris. It is possible to identify a specific subject, which reflects opinio juris when some resolutions of international entities upon specific topics of a more general consensus are considered, as for instance, questions involving decolonization, self-determination and sovereignty over natural resources.

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97 See SHAW, International Law…, p. 108. “The Assembly has produced a great number of highly important resolutions and declarations and it was inevitable that these should have some impact upon the direction adopted by modern international law. The way states vote in the General Assembly and the explanations given upon such occasions constitute evidence of state practice and state understanding as to the law.”
99 Case concerning Military and Paramilitary activities in and against Nicaragua (Nicaragua v. U.S), ICJ, 1986, p. 99-100. The World Court in this case has mentioned the possibility of deducing opinio iuris from the circumstances surrounding the adoption and application of a resolution of the General Assembly. Pursuant to this Court, “opinio juris may, though with all due caution, be deduced from, inter alia, the attitude of the Parties [i.e. the US and Nicaragua] and the attitude of States towards certain General Assembly resolutions (…)”. SLOAN. General Assembly Resolutions Revisited. 58 B.Y.I.L. 39, 1987. In HARRIS, Cases and Materials on International Law…, p. 59.
100 South West Africa cases (Ethiopia v. South Africa; Liberia v. South Africa), ICJ, 1966, p. 262, Diss. Op. Justice Tanaka. “What is required for customary international law is the repetition of the same practice; accordingly, in this case resolutions, declarations, etc, on the same matter in the same, or diverse, organizations must take place repeatedly (…). This collective, cumulative and organic process of custom-generation can be characterized as the middle way between legislation by convention and the traditional process of custom making, and can be seen to have an important role from the view point of the development of international law”.
101 TRINDADE, Princípios do Direito Internacional Contemporâneo…, p. 27.
The resolutions of international organizations, if not considered a new source of international law, just be considered at least a contribution to the formation of customary rules, furnishing indications of practice by States as well as of *opinio iuris.*

2.9. Unilateral Declarations

2.9.1. Unilateral Declarations as Binding upon the Declaring State

In the *Nuclear Tests* case, the French Government had carried out atmospheric tests of nuclear devices that caused some radioactive fall-out to be deposited on New Zealand territory. A French authority had made statements on behalf of his government regarding the end of atmospheric testing, which were held to be binding upon that State. The ICJ recognized the possibility of such declarations, by way of unilateral acts, to have the effect of creating legal obligations. The ICJ stated that

“Declarations of this kind may be, and often are, very specific. When it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking, the State being thenceforth legally required to follow a course of conduct consistent with the declaration. An undertaking of this kind, if given publicly, and with an intent to be bound, even though not made within the context of international negotiations, is binding.”

Unilateral declarations of States have been considered a source of international law by the doctrine. They are not within the sources enumerated by the Statute of the ICJ, although they are considered to create rules binding upon the declaring State. In certain situations, unilateral declarations of states, made by a relevant official, may create an international legal obligation. Those acts may result from recognition or protest, whose statement intends to have legal consequences. States will only be bound by such unilateral acts if they evidence their intention to be bound.

Unilateral declarations, therefore, have already been recognized as a source of legal obligations, binding upon the declaring State. Nevertheless, some requirements are essential in order to give such effect to them, as for instance publicity, the restrictive

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103 TRINDADE, *Princípios do Direito Internacional Contemporâneo...*, p. 30
104 The atmospheric tests of nuclear devices carried out by France has entailed the release into the atmosphere, and the consequent dissipation, of measurable quantities of radio-active matter. Those tests have caused some fall-out of this kind to be deposited on New Zealand territory.
interpretation of the statement and the intention of the State to be bound by it, which is an essential element, as formulated by the International Court of Justice itself.\textsuperscript{109}

2.9.2. Unilateral Declarations as Evidence of Custom

Unilateral acts can also furnish evidence of a particular view taken by States in specific questions, contributing to the formation of customary rules.\textsuperscript{110} Continuous actions by States may provide evidence of a certain practice of theirs regarding a specific matter. For instance, such acts have influenced the Law of the Sea, since the notions of contiguous zone and territorial sea were formed by unilateral acts of regulations by each State rather than by multilateral treaties. This is also what happened to the extension of the territorial sea to a limit of 200 miles based on ‘internal’ unilateral acts, accepted without protest by other States and subsequently recognized as customary international law.\textsuperscript{111}

3. PROPOSED SOLUTIONS

From all the above, some proposals for change in the current sources of international law can be drawn. These include, but are not limited to, the revision of article 38, so as to increase the list of sources there embodied or the reinterpretation of the already existing list, which can either prevent or complement the work of expansion. The above mentioned proposals have several implications. The revision of art. 38, for example, can be inserted in the larger ongoing process of UN Charter Reform, since the ICJ Statute is related to the UN Charter, as a constitutive document of the international tribunal of the UN System, but it has the disadvantages of facing a very complicated and difficult political process on its own. As to the reinterpretation of the existing sources, it can be done through a report presented to the General Assembly or through a proposal for a resolution by the General Assembly providing for these interpretive guidelines. A classic example of a GA Resolution performing this role is GA Resolution 6525, which is an interpretation of the principles enshrined in article 2 of the Charter, concerning the relations between States. If such task is undertaken by this Commission, an implication to be considered is whether such a resolution of the GA will prevent the process of amending the ICJ Statute by, for example, trying to include the new sources within the scope of old ones, or whether it will actually complement the amendment process.

\textsuperscript{110} SHAW, International Law…, p. 115.
\textsuperscript{111} TRINDADE, Princípios do Direito Internacional Contemporâneo…, p. 26.
4. QUESTIONS TO PONDER

Once the role to be performed by the ILC of UFRGSMUN in dealing with this topic is determined by its own Members, there are some questions the members are asked to bear in mind during their debates:

A. Is it necessary, or advantageous, weighing the factors for and against, to amend the ICJ Statute? Members should always bear in mind that the ILC is not empowered to be a direct actor in the process of amendment; it is only entitled to prepare a legal draft to be considered in the larger political fora. Therefore, has the time come for the politicization of the debate about sources?

B. If we are to pursue the idea of proposing the amendment of the ICJ Statute, what should this amendment look like? Is the ILC proposing the insertion of any new source of international law? If yes, which one(s)? What other changes in the language of article 38 do the members deem necessary so as to reflect the new reality of international law?

C. Is the debate about the hierarchy of sources to be enshrined in the proposed amendment? In what way?

D. If the members decide that it is not the proper time, or even that it is not the role of the ILC, to propose the amendment of article 38, what is the action to be taken by this Commission? If the proposal for an “interpretive guidelines” document in the form of a resolution is pursued, what action, if any, will be taken in regard to the new sources of international law?

All these are very delicate questions, each carrying implications that further the mandate of the ILC and the brief limits of this debate document. The members are thus asked to sensibly consider each of the topics above and its implications, and prepare their comments to contribute to effective change in traditional understandings of international law, to reflect an ever-changing international society.

5. REFERENCES

5.1. Books and Articles


5.2 International Decisions

Anglo-Norwegian Fisheries Case. ICJ Reports, 1951, p. 116.


Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada / United States of America), ICJ, 1984.


Case Concerning the Continental Shelf (Libyan Arab Jamahiriya / MALTA), ICJ, 1985.


Norwegian Loans case, ICJ reports, 1957.

Island of Palmas case (Netherlands v. U.S), R.I.A.A. 829.

Lotus case (Turkey vs. France), PCIJ., Series A, No. 10, 1927.


Nuclear Tests case (New Zealand vs. France), ICJ, 1974.

Reparations case, ICJ reports 1949.

“It is now widely seen that peace should be more than the mere absence of war: it should be a positive force that counters violence as a means of resolving the problems of human society. Justice should not only aim at controlling the negative traits in human nature, it should work to promote a sense of fairness, compassion and universal brotherhood.”

Daw Aung San Suu Kyi, Nobel Peace prize winner

1. INTRODUCTION

Considered the fundamental problem of any international relations theory, war is said to be the way by which States, ultimately, resolve their conflicts. Thus, despite the efforts of the UN and international law, armed combats are still the way through which countries often try to resolve issues—that should be discussed diplomatically—before a legal solution can be achieved.

Peace treaties are the legal texts through which this solution can be perpetuated. They can be understood, then, as a very peculiar kind of instrument—the political, diplomatic and legal solution that is implemented when international politics, the diplomacy and law themselves are not able to prevent the combats.

Oppenheim defines peace treaties as the documents on which parties assume the compromise to make everything as possible to assure a determinate object to each other.\textsuperscript{114} The main purpose of these treaties is to bring closure to a state of war that exists between two or more parties and, furthermore, to re-establish relations of friendship and commerce, which are essential to the well-being of the populations of the warring states and the international community as a whole. Their contents usually verse on territorial, military, commercial and compensation matters, but a peace treaty may also embrace subjects such as right of passage, processes for solving future disputes and access to natural resources and to religious places.

However, the transmission of negotiations on termination of warfare and the formulation of peace treaties are still long and fragile processes that demand the support of international law.

\section*{2. HISTORICAL BACKGROUND}

Peace treaties have been established since wars between States became part of human reality. It is believed that the first treaty ever signed was the \textit{Peace of Callias}, in Ancient Greece. The Peace was negotiated by an Athenian politician; and it embraced political, territorial and economic issues.\textsuperscript{115}

Also mentionable are the treaties of Münster and Osnabrück, better known as \textit{Peace of Westphalia}, that ended the Thirty Years War. The treaties were signed in 1648 and incorporated the \textit{Peace of Augsburg} (1555) and the \textit{Peace of Prague} (1635). The \textit{Peace of Westphalia} is considered the event that gave birth to international law. The main difficulty of the Thirty Years War was the religious conflict between Protestants and Catholics, but there were also territorial matters approached by the Peace.

In the early 1920s, the signature of a series of treaties officially ended World War I and created the League of Nations—whose purpose was to avoid further conflicts between nations that could lead to another world war. The victorious Allies signed one treaty with

\textsuperscript{115} It is said that the peace was established around 449 B.C., ceasing the hostilities between Persia and the Delian League (led by Athens), and ending the Persian Wars. Wikipedia Website. Available at: http://www.wikipedia.org. Last accessed: 29 May 2005.
each one of the conquered: Treaty of Versailles (1919) with Germany, Treaty of Saint-Germain (1919) with Austria, Treaty of Neuilly (1919) with Bulgaria, Treaty of Trianon (1920) with Hungry and Treaty of Sèvres with the Ottoman Empire (1920).

The results, as we know, were disastrous: the Treaty of Sèvres, which imposed a great territorial loss to Turkey, led to another conflict, the Greko-Turkish War (1919 – 1922). The war started when the Greeks attempted to incorporate the territories assigned to them by the Treaty of Sèvres and ended with the Treaty of Lausanne (1923), which offered better terms to Turkey. The Treaty of Versailles is also understood as a cause of a war–World War II. The Treaty was viewed as a humiliation to Germany. BURNS writes that the so-called peace, settled in the various conferences undertaken in 1919 and 1920, was more imposed than negotiated. Instead of being an agreement between defeaters and defeated, it intended to assume the character of “a sentence imposed by a tribunal.” The author adds that no German or Austrian was admitted to the conferences until the documents were completed and ready to receive the signatures of the guilty parties. People were led to believe that the enemies should be treated as criminals.

The terms of the Treaty of Versailles were formulated by one party only, the Allies. According to the afore mentioned author, in April 1919 Germany was ordered to send a delegation to Versailles to be acquainted with those terms. After one week of being kept in virtual prison in a hotel, the delegation was told that Germany had three weeks to decide if the country would sign the Treaty.

Twenty years later, the world would watch the beginning of another World War and the consequent frustration of the League of Nations’ purpose. The first important document in World War II was the Atlantic Charter (1941), followed by the Declaration by United Nations (1942). In the subsequent years, the Allies held significant conferences and, in 1945, the representatives of the United States of America, the United Kingdom and the Union of Soviet Socialist Republics gathered in Potsdam to decide on provisions regarding the end of the War. As known, the World War II episode culminated with the creation of the United Nations, which officially came into existence with the ratification of the UN Charter by a majority of countries, on October 24, 1945.

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118 BURNS, História da Civilização Ocidental..., p. 864.
119 In the Charter, the Allies formulated their war and peace objectives. At first, it was signed only by USA president Roosevelt and United Kingdom prime-minister Churchill. However, it assumed a greater significance in 1942, when forty nations signed the Declaration by the United Nations and affirmed their adherence to the Charter. BURNS, História da Civilização Ocidental..., p. 958.
121 The allies had gathered in Cairo and in Tehran in 1943 and in Yalta in 1945. BURNS, História da Civilização Ocidental..., pp. 958-960.
122 http://www.un.org/
Established in 1947, the ILC has engaged on the Law of Treaties since the beginning of its activities. In 1969, after holding two sessions of the Conference on the Law of Treaties, the ILC adopted the Vienna Convention on the Law of Treaties\(^\text{123}\) (Vienna Convention hereinafter), which entered into force in 1980. Ratified by 35 parties,\(^\text{124}\) the Convention is considered “a comprehensive code of the main areas of the law of treaties.”\(^\text{125}\) However, it did not approach important matters such as the celebration of treaties between States and international organizations or two or more organizations, State succession, and how state of war affects treaties in general. The first two matters have already been regulated by posterior Vienna Conventions;\(^\text{126}\) the latter is still uncertain.\(^\text{127}\)

Peace in the Middle East has been one of the most relevant issues since the establishment of Israel, in 1948, until present day. The first States to achieve a peace treaty in the region were Israel and Egypt. In 1978, the countries had negotiated for twelve days in Camp David,\(^\text{128}\) US, before signing the *Camp David Accords*. Witnessed by US President Jimmy Carter, the agreements led to *Israel-Egypt Peace Treaty*, signed on March 26, 1979 in Washington.\(^\text{129}\) The document established mutual recognition of the countries and the withdrawal of Israel military forces from occupied territories, among others. It is important to note that the treaty clearly expresses the termination of the state of war, which had been generated by the Six-Day War (1967):\(^\text{130}\)

> “1. The state of war between the Parties will be terminated and peace will be established between them upon the exchange of instruments of ratification of this Treaty.”\(^\text{131}\)

\(^{123}\) In 1966, the ILC had a set of 75 draft articles involving the Law of Treaties, which worked as a basis to the United Nations Conference on the Law of Treaties, convened pursuant to General Assembly resolutions 2166 (XXI) of 1966 and 2287 of 1967. The Conference completed the activities related to the Vienna Convention, adopting 85 articles and annexes.

\(^{124}\) The Convention has also been signed by other 45 parties. It is important to remark that there is a duty of good faith from States towards agreements signed but not ratified, and therefore one could argue that this Convention’s provisions can to some extent have effects upon these 45 States.


\(^{126}\) The ILC adopted the *Vienna Convention on Succession of States in respect of Treaties* in 1978 and the *Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations* in 1986.

\(^{127}\) According to RODAS, although there are no absolute rules concerning the effects of war on treaties, there are a few guiding principles. One must verify the compatibility of the treaty’s provisions with the state of war, the parties’ intention to apply the treaty in time of peace and in time of war, as well as its political character. Some admit as classic rule the extinction of bilateral treaties between belligerent enemies and the suspension of multilateral treaties on which they may be parties. RODAS, João Grandino. *Tratados Internacionais*. São Paulo: Editora Revista dos Tribunais, 1991, p. 24.

\(^{128}\) Camp David is the popular name of the Naval Support Facility Thurmont, the mountain retreat of the President of the United States of America.


\(^{130}\) The War was fought between Israel and Egypt, Jordan and Syria.

On the same day as the Treaty’s signature, Israel and the US concluded the *Israel-US Memorandum of Agreement*, by which “the US spelled out its commitments to Israel in case the treaty is violated, the role of the UN and the future supply of military and economic aid to Israel.”\(^{132}\)

The document also determines that “[t]he Parties will apply between them the provisions of the Charter of the United Nations and the principles of international law governing relations among states in times of peace.”\(^{133}\) As for other nations in the region, the treaty establishes in its preamble that it is urgently necessary to achieve “a just, comprehensive and lasting peace in the Middle East in accordance with Security Council Resolutions 242 and 338.”\(^{134}\)

In order to establish the mentioned lasting peace between Israel and Arab countries, bilateral negotiations were conducted between Israel and Lebanon, Syria, Jordan and the Palestinians. Soon after signing the *Washington Declaration*, in July, 1994, Israel and Jordan reached the *Israel-Jordan Peace Treaty*, on October 26\(^{th}\) of the same year. The treaty included provisions of different natures: among others, it delimited boundaries, established mutual recognition, regulated access to places with historical and religious significance, and “outlined a number of areas in which negotiations would continue.”\(^{135}\) Once again, the operative part established the application of the UN Charter and principles of international law between the countries and the preamble expressed the desire of achieving peace in the Middle East, mentioning Security Council Resolutions 242 and 338.\(^{136}\)

Yet, hostilities in the Middle East are still part of the XXI century’s reality. Since the 1990s, various negotiations have been conducted with the purpose of reaching a peace treaty between Israel and the Palestinians, but none has fully succeeded. Signed in 1993 after intense behind-the-scenes contact between Israeli and Palestinian negotiators,\(^{137}\) the *Oslo Accords*\(^{138}\) are considered a landmark in that process. Since then, other agreements\(^{139}\) have been achieved; furthermore, on April 30, 2003, the US presented a

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\(^{132}\) http://www.mfa.gov.il/

\(^{133}\) Israel-Egypt Peace Treaty, art. III.

\(^{134}\) Israel-Egypt Peace Treaty, Preamble.


\(^{136}\) Resolutions 242 and 338 were adopted by the Security Council in the following months of Six-Day War and in the later stages of Yom Kippur War (1973).

\(^{137}\) http://www.mfa.gov.il/

\(^{138}\) The Accords, whose actual name is *Declaration of Principles*, were achieved in Oslo, Norway, on August 20, 1993. The signature took place in Washington, USA in September 13 of the same year. http://www.wikipedia.org

\(^{139}\) The Oslo Accords included an Interim Agreement, whose implementation was accomplished in three stages: the Gaza-Jericho Agreement (May 1994), the Agreement on Preparatory Transfer of Powers and Responsibilities (August 1994), and the Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip (September 1995). Other important steps in peace negotiations were the agreement on Temporary International Presence in Hebron (1996), the Protocol Concerning the Redeployment in Hebron (1997), the Wye Memorandum (1998), the Sharm el-Sheikh Memorandum (1999) and the Camp David
Road Map for the solution to the conflict to Israel and the Palestinians. The parties now strive to implement this Road Map and the long desired lasting peace.

3. STATEMENT OF THE ISSUE

Worldwide long-lasting conflicts and the failure of efforts in the direction of warfare termination indicate that international law still needs to go a long way on war matters. In spite of their significance, little has been done in regard to peace treaties. The present lack of a greater regulation on this subject makes the peacemaking process harder and longer, creating insecurity for both the involved countries’ populations and the international community in general.

However, if, on one side, direct and specific rules on peace treaties would help to clarify the procedures regarding the end of hostilities, on the other side, a too specific regulation can excessively limit the parties’ freedom to contract and muddle the process. It is desirable to develop more specific guidelines to war termination, but it is also essential to observe that wars are very case sensitive and cannot be molded into overly restrictive rules. Nevertheless, there are some specific issues that deserve our attention.

3.1. Effects

The definition of the peace treaty’s effects is the primary issue to be dealt with. In current day, contracting parties usually enunciate the treaty’s objectives—e.g. the termination of the state of war—in its preamble, which helps to identify the agreement as a peace treaty. However, these objectives only have normative force if included in the operative part. A codification of the minimum effects of peace treaties would fulfill this gap, hopefully leaving no doubts as to the significance of the peace.

Another point to be clarified is related to the effects of peace treaties on previous treaties signed by involved parties—either between themselves or with other states, but regarding issues related to the peace. As seen, treaties may be understood as suspended during wartime—though there are no specific rules on that subject—but their status is not

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Summit’s Trilateral Agreement (2000). http://www.mfa.gov.il/140 On the First Gulf Persian War (1980-1988), the Brazilian newspaper Folha de São Paulo affirmed that relations between Iran and Iraq have continued tenses in the 12 years that followed the cease-fire, and a formal peace treaty still has not been signed. The newspaper also wrote that both countries still have not set all prisoners of war free and accuse each other of sheltering armed opposition groups. Folha de São Paulo Website. Available at: http://www1.folha.uol.com.br/folha/mundo/ult94u8810.shl. Last accessed: 9 March 2005.
141 BRONWLIE explains that “[h]ostile relations do not automatically terminate treaties between the parties to a conflict. Many treaties, including the Charter of the United Nations, are intended to be no less binding in
known after termination of war and restoration of peace. This may be a considerable problem, especially when the previous treaties’ contents go against the contents in the current one.\textsuperscript{142} The situation is also uncertain when posterior treaties—that may or may not be \textit{peace} treaties—verse in contradiction of a peace treaty’s provisions.

### 3.2. Reservations\textsuperscript{143}

Reservations to treaties—as well as objections to reservations—are regulated by section 2 of the \textit{Vienna Convention}.\textsuperscript{144} A reservation can be formulated unless contracting States object or the treaty otherwise provides. Moreover, article 19 prevents the formulation of reservations which are “incompatible with the object and purpose of the treaty”;\textsuperscript{145} this provision was reiterated by the Commission in 1990 decade.\textsuperscript{146}

Reservations are not made in bilateral treaties, for it would be against the logic of such treaties to conclude negotiations without agreement on all provisions. They might happen, though, in multilateral agreements. It is possible that reservations are not admitted at all, when the treaty expressly vetoes them. Treaties can also prohibit specified reservations or admit them only to certain articles. Due to the importance of the subjects that might become part of a peace treaty, it may be necessary to determine what type of reservations—if any—would be “incompatible with the object and purpose of the treaty” (in the extremely rare cases of multilateral peace treaties), and what others—again, if any—should be permitted in order not to threaten the parties’ freedom of contract.

### 3.3 Humanitarian Law

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\textsuperscript{142} In 1967, eight Arab States signed the Khartoum Resolutions, in which they adopted the dictum of “no peace with Israel, no recognition of Israel, no negotiations with it”. Later, as seen, two of those States would sign peace treaties with Israel, but none of the treaties ever mentioned the Resolutions.

\textsuperscript{143} Reservations are defined by the \textit{Vienna Convention on the Law of Treaties} as “a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State”. \textit{Vienna Convention on the Law of Treaties}, art. 2, “d”.

\textsuperscript{144} RODAS considers that the \textit{Vienna Convention on the Law of Treaties} has adopted a very liberal position relatively to reservations, prioritizing the generalization of the participation in the treaty, even in detriment of its integrity. RODAS, João Grandino, \textit{Tratados Internacionais}, pp. 18-19.

\textsuperscript{145} \textit{Vienna Convention on the Law of Treaties}, art. 19, “c”.

\textsuperscript{146} \url{http://www.mfa.gov.il/}

\url{http://www.un.org/law/ilc/reports/1997/chap5.htm}
Defined as the sub-branch of international law whose purpose is to protect the human being in armed conflicts, the Humanitarian Law of Geneva Conventions applies to prisoners of war and the civil population affected by hostilities—which includes refugees and stateless persons—among others. These groups have special rights in wartime. According to MELLO, no treaty or accord between the belligerent can diminish the rights fixed in the 1949 Convention. Furthermore, the denominated special accords are actually only able to establish greater rights to these people; however, they continue to deserve attention during the conflict’s termination.

When moving towards the end of hostilities, parties must come to an agreement concerning prisoners of war (POW), refugees and stateless persons, always focusing on the respect and implementation of their rights. That agreement might be included in a peace treaty and is likely to verse on the repatriation, re-settling and nationality of each one of the aforementioned groups. When there are occupied territories involved in the conflict, the application of the fourth Geneva Convention ceases only one year after the termination of military operations. Parties are free to conclude agreements on those matters, once again, “as long as the established rights and protection are not diminished.”

3.4. Witnesses and Mediators

Traditionally, international conflicts are mediated by organizations and States not involved in the dispute; moreover, treaties may be witnessed by representatives of those States. This practice is especially important in cases of warfare, which are very delicate. The participation of third parties in peace processes facilitates the course of negotiations.

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147 MELLO, Celso D. de Albuquerque. Direitos Humanos e Conflitos Armados, p. 137.
148 According to MELLO, not to extend or to limit a conflict’s effects on civilians is to fight against the denominated total war, that is, to try to humanize war. MELLO, Celso D. de Albuquerque. Direitos Humanos e Conflitos Armados, p. 281.
149 The four Geneva Conventions are the following: For the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; For the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; Relative to the Treatment of Prisoners of War and Relative to the Protection of Civilian Persons in Time of War.
150 MELLO, Celso D. de Albuquerque. Direitos Humanos e Conflitos Armados, p. 278.
151 Regarding the political discussion on POW repatriation, MELLO writes that the major issue is to know if the detainer Power has the duty of repatriating the prisoner in its power. The author mentions that in innumerous conflicts after 1945, various prisoners have manifested their will of staying in the detainer Power’s territory or in a third state, and so the ‘absolut duty’ of the detainer Power of repatriation might be limited in individual cases due to ‘humanitary reasons’. MELLO, Celso D. de Albuquerque. Direitos Humanos e Conflitos Armados, p. 287.
152 MELLO, Celso D. de Albuquerque. Direitos Humanos e Conflitos Armados, p. 296.
153 “It was not until 1920 that an international instrument was adopted which provided that it should not be considered unfriendly for a desinterested third country to call attention to any situation the continuance of which might endanger the peace. And it was not until 1945 that this principle was supplemented by empowering the Secretary-General of the United Nations to call the attention of the Security Council to any matter that might threaten international peace and security”. WAINHOUSE, David W. International Peace Observation: A History and Forecast. Baltimore: John Hopkins Press, 1966, p. v.
154 E.g. USA president Jimmy Carter on Israel-Egypt Peace Treaty (see Historical Background)
by providing calmer judgments to allay the conflict. Furthermore, it serves as a control of eventual abuses—e.g. the imposition of parts or the entirety of a treaty, as seen in World War I.

Since peace negotiations are developed in various stages, there are usually several States that act as intermediaries. The neutrality of those States, however, has been questioned, as countries rely more and more on political and commercial pacts and advantages within the international community. This issue can be better handled if the mediator is not a State, but an international organization, such as the UN.

Pursuant to articles 11, 12 and 99 of the UN Charter, the General Assembly, Secretary General and Security Council can work on peace settlement through a process called Peace-observation, which may engage in conciliating or mediating the conflict. It is the Security Council, though, as the primary organ responsible for “the maintenance of international peace and security,” that is more likely to continue to have an increasing role in peacemaking. Article 33 of the UN Charter sets peaceful means to conclude disputes that may disturb international peace and security. It also establishes that “[t]he Security Council shall, when it deems necessary, call upon the parties to settle their dispute by such means.” As mentioned, the body has produced resolutions that turned into guidelines for important peace treaties’ signatures, an activity which is still performed today.

It is important to mention that the participation of a third party—either by a country or the UN—shall take care not to be too invasive and not to interfere in the parties’ freedom of contract.

156 On the first South American-Arab Countries Summit, that took place in Brazil on May 2005, the Brazilian newspaper Folha de São Paulo wrote that the country’s hesitations on condemning arab terrorism go against its traditions, and that commercial interests and the goal of conquering a seat in a likely new UN Security Council should not lead Brazil to forget its principles. Folha de São Paulo Newspaper, 1 June 2005.
157 It is said that mainly economical and political reasons have conducted to disappearance of neutrality, and the wish not to reduce the flood of international commerce, as well as the appearance of powers with really universal interests, have led this institution to decadence. MELLO, Celso D. de Albuquerque. Direitos Humanos e Conflitos Armados, p. 398.
159 Peace observation is an international device that came into use after World War I to denote international action to deter, discourage, prevent, or terminate threatened or actual hostilities. The concept may be closely allied to or may include other responsibilities such as efforts to settle a dispute, for example, mediation or conciliation, or action based on the use of force to maintain law and order, and to supress or prevent the spread of hostilities, for example, peace-keeping”. WAINHOUSE, David W. International Peace Observation..., p. 2.
162 The Security Council has adopted several resolutions on the Middle East situation. Among them are resolutions 242 and 338, mentioned by Israel-Egypt Peace Treaty and Israel-Jordan Peace Treaty (see “Historical Background”).
4. QUESTIONS TO PONDER

The ILC is now called upon to discuss how peace treaties can be regulated, and which—if any—should be their minimum contents. From the examined matters, the Commission is asked to produce a report on the legal aspects of termination of warfare, bearing in mind that this report shall not verse about the *jus in bello*, or “justice in war,”164 but about the legal ending of armed international conflicts. Thus, there are some questions which members are required to observe:

A. How will the effects of the peace treaties be determined? Should there be any formal requisite for recognizing and considering a peace treaty as so? If yes, which ones?

B. What are the effects of a peace treaty on previous treaties? To what extent, if any, are Peace signatures able to revoke parts or the entirety of previous treaties signed between parties involved in the conflict? Are they able to defeat provisions of agreements involving States not parties to the conflict?

C. If ILC members are not going to establish revocation, how do they plan to deal with conflicting provisions in two or more treaties when one of them is a peace treaty?

D. How must reservations be dealt with? Shall multilateral peace treaties prohibit some kinds of reservations, permit only specified ones or not admit reservations at all?

E. How can peace treaties approach humanitarian matters—mainly POW, refugees and stateless persons?

F. How must the mediation of a conflict be conducted? Members must reflect on the cases in which a third State might participate in the negotiation process and on the ones in which a UN interference may be required.

It is important to note that the issues presented here can engender broad debates, including historical, social and political topics, which go beyond the ILC scope. However, by reflecting on these topics and keeping a strictly legal discussion that may go further than the questions above, ILC members will be performing a role of great importance in International Law and peace-building history.

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5. REFERENCES

5.1. Books and Articles


5.2. Other Documents


Geneva Conventions of 1949: For the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; For the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; Relative to the Treatment of Prisoners of War and Relative to the Protection of Civilian Persons in Time of War.


### 5.3 Recommended Websites


http://www.kinghussein.gov.jo

http://www.mfa.gov.il/


http://www.un.org/


http://www.wikipedia.org

http://www1.folha.uol.com.br/folha/mundo/ult94u8810.shl