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# INTERNATIONAL LAW

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## **CSS- International Law Notes**



# NOTES OF INTERNATIONAL LAW

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by  
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## CONTENTS

| TOPIC  | PAGE NO |
|--|---------|
| 1. Brief History Of International Law              | (2)     |
| 2. Nature and Development of International Law     | (3)     |
| 3. International Law as Inter-State Law            | (3)     |
| 4. Why do we need a system of I.L?                 | (3)     |
| 5. Is it Really Law?                               | (3)     |
| 6. Subjects of International Law                   | (3)     |
| 7. Sources of International Law                    | (8)     |
| 8. Responsibility & State Responsibility           | (10)    |
| 9. Peaceful Settlements                            | (14)    |
| 10. The Structure of the International Law System  | (15)    |
| 11. Judicial Body- International Court of Justice  | (15)    |
| 12. International Criminal Law                     | (16)    |
| 13. Disarmament                                    | (17)    |
| 14. What Are Human Rights? Human Rights Defined    | (18)    |
| 15. LAW OF TREATIES                                | (20)    |
| 16. LAW OF THE SEA                                 | (30)    |
| 17. Customary International Law                    | (32)    |
| 18. International Law and Municipal law            | (35)    |
| 19. Title to Territory -Mode of Acquisition        | (37)    |
| 20. Immunity from Jurisdiction                     | (38)    |
| 21. Legal Regulation of the Use of Force by States | (39)    |

## Brief History Of International Law

- Modern international law generally recognised as having its genesis in the Middle Ages in Western Europe - where, at the time, process of decentralisation leading away from Roman Catholic Church and Holy Roman Empire towards the Reformation and rise of Nation-States
- Thirty Years of War (1618-1648) came to an end with Treaty of Westphalia (significant event for international law) - treaty based on recognition of community of independent and equal "sovereign" entities
- "Natural law", given universalist empire and Church, initially theological (including divine revelation as one of its sources) - however by time of Hugo Grotius (1583-1645) natural law adopting a rationalist approach, being seen to derive from universal reason
- Independence and equality of States translated into need for consent - clear tension between natural law and notion of consent
- "Positivism" challenged natural law in 18-19C - means complete preoccupation with practice and thus consent of States in law creation
  - (a) State only bound by rules it consents to
  - (b) If international law did not prohibit conduct, State free to act
- Majority judgment in Lotus was strongly positivist

France v Turkey "The Lotus Case" (PCIJ, 1927)

Facts:

- Collision between a French and a Turkish ship on the high seas - 8 Turks died
- French officer, Demons, was prosecuted and sentenced to 80 days in prison and fined \$22
- France claimed Turkey had impermissibly exercised jurisdiction over Demons

Held:

- Turkey had not violated international law
  - Unless a rule prohibited certain conduct, then Turkey was free to do so
- "The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed"

First World War and Aftermath

- Treaty of Westphalia did not outlaw use of force - commitment to co-existence was therefore qualified
- After WWI States created League of Nations in 1920 - renounced war as instrument of national policy in 1928: Kellogg-Briand Pact, Art 1
- Treaty of Versailles established International Labour Organisation (ILO) and PCIJ
- League failed to censure Italy and Japan for acts of aggression against Ethiopia and China respectively

After Second World War

50 States signed UN Charter on 26 June 1945

Art 2(4) prohibits use of force; unless authorised by SC

Charter refers to human rights and fundamental freedoms: Arts 1, 55, 56, 62, 68 and 76

Cold War

Political and ideological rivalry between East and West had significant effect on content and application of international law

Sustained process of decolonisation - increased size and diversity of international community

Since end of cold war - seen rise of power of non-governmental entities and reduction of freedom of States to set national policy

## Nature and Development of International Law

### Sovereignty

Art 2(1) states UN "...is based on the principle of sovereign equality of all its members"

Art 2(7) - nothing in charter authorises UN to intervene in "domestic jurisdiction" of a State - subject to SC's power under Chapter VII

"Sovereignty" can be "unpacked" (Prof. Henkin):

1. Independence
2. Equality - equal in status, person-hood, legal capacity, rights, duties and responsibilities (although can agree to give some States preferred status, e.g. permanent SC members)
3. Autonomy
4. States as persons
5. Territorial integrity and authority
6. Impermeability

## International Law as Inter-State Law

Previously accepted that States were the sole and exclusive subjects of international law: Oppenheim 1905

State to be distinguished from a government

"International law... is a construct of norms, standards, principles, institutions and procedures. The purposes of international law, like those of.. [municipal law], are to establish and maintain order and enhance reliable expectations, to protect "persons", their property and other interests, to further other values": Prof. Louis Henkin

## Why do we need a system of I.L?

regulates conduct

acceptance by States (if law is codified it poses the fact that States will conform to "binding rules")

produces actions which are "unlawful/illegal" rather than "immoral" - more objective than subjective

encourages co-operation among States

facilitates joint responses to illegal actions

influences options taken by States for action

allows for imposition of "western value"? - certain standards in Human Rights that are universal norms.

### Inadequacies of Traditional Definition

International organisations now subjects and not just objects

"States and the principal subjects of international law": Oppenheim 1992

Third Restatement: international law concerned with "the conduct of States and of international organisations, and with their relations inter se, as well as some of their relations with person, whether natural or juridical" &sect;101 - possible supplemented by noting international law also concerns relations between natural/juridical persons

## Is it Really Law?

Some argue it is not law, just international morality - e.g. John Austin (19C English lawyer); not positive law - duties imposed are enforced by moral sanctions: "by fear on the part of nations... of provoking general hostility, and incurring probable evils, in case they shall violate maxims generally received and respected"

Prof. Hart - primitive legal system, lacking secondary rules (rules of recognition, change and adjudication)

## Subjects of International Law

From the Peace of Westphalia (1648) till the creation of the United Nations system, it was considered that the 'State' was the sole subject of international law: that international law only applied as between States. States, as *the subjects* of international law had international personality which meant that they had the right to have their claims respected internationally.

The International Court of Justice, in its 1949 *Reparations of Injuries* Advisory Opinion, confirmed that other entities could be subjects of international law. Though it made plain that while **States** possess all the rights and duties on the international plane, that other entities such as **Inter-Governmental Organizations**, as well as **the Individual**, and Multi-National Corporations, might possess rights and duties which States would ascribe to them.

### The State

Reference is ordinarily made to Article 1 of the 1933 Montevideo Convention on the Rights and Duties of States as being indicative of the criteria required to be established as a State in international law:

The state as a subject of international law should possess the following qualifications:

- a) a permanent population;
- b) a defined territory;
- c) government; and
- d) capacity to enter into relations with the other states.

### Population and Territory



Vatican City, established by the 1929 Lateran treaties, is the smallest State in the world consisting of 106 acres; there are only 200 citizens and it is represented by its government -- the 'Holy See' -- in international relations.

Despite its limited size (**territory**) and non-perpetuating citizenship (**population**) Vatican City has an effective government and is recognized by more than 150 States, making it a full-fledged member of the community of States.

### Recognition - The "Turkish Republic of Northern Cyprus"



In law, a State must fulfill two objective and two subjective criteria. It must have a population and territory. But beyond these, it must meet the subjective assessments of other States as to whether it has effective control over that population and territory by means of a **government**, and the ability to **carry out international relations**. This final criterium is manifested through other States 'recognizing' a new State as becoming a member of

the club of States.

The issue of 'recognition' as an attribute of the State was at the heart of a visit to the so-called Turkish Republic of Northern Cyprus in November 2003. Although this entity has a population, territory and a government asserting effective control, no other State beyond Turkey recognizes this 'State', which came into being as a result of an invasion by Turkish forces in 1974. As such, the vast majority of the international community does not recognize it as State.

### Inter-Governmental Organizations



Inter-Governmental Organizations are entities that are constituted by States, have States as their members and are based on a constitutive treaty. In the 1949 *Reparations of Injuries* case, the International Court of Justice recognized that the United Nations (like other IGOs) has 'functional personality'; that is: legal personality to the extent required to carry out the

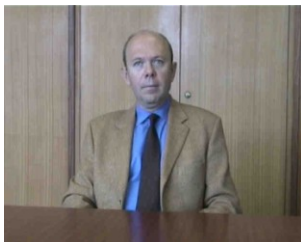
tasks which States have assigned to it.



### The African Union

The Legal Counsel of the African Union, Mr. Ben Kioko sat down for an interview at the Headquarters of the African Union in Addis Ababa, Ethiopia, in January 2004. He explained the main differences between the African Union and its predecessor the Organization of African Unity .

Mr. Kioko went on to speak about the different organs established under the African Union, including the Peace and Security Council, the Pan-African Parliament, the African Court on Human and Peoples' Rights, the Court of Justice and finally the Economic and Social Council. Mr. Kioko concluded his interview by explaining the functions of his role as Legal Counsel and the work that his Office undertakes.



### World Health Organization

The Legal Counsel of the World Health Organization, Gian Luca Burci, considers the WHO and its relationship to international law. He considers the role of the WHO's Assembly with regard to law-creation, reservations, the move within the WHO to establish an Anti-tobacco treaty and how it emerged. Mr. Burci concludes his interview by considering a typical week in his working life.

## The Individual

As a subject of international law, the individual has both rights and obligations. Rights are manifest in International Human Rights Law, while obligations are generally encompassed within International Criminal Law.

### Subjects of International Law-Detailed Reading

#### Personality, Statehood and Recognition

Capacity implies personality, but always it is capacity to do those particular acts. Therefore "personality" as a term is only short-hand for the proposition that an entity is endowed by international law with legal capacity.

#### Subjects of International Law

'Subject' is entity recognised as having rights and obligations  
Traditionally only States were seen as subjects, other entities were merely 'objects' - e.g. a claim for diplomatic protection of a national could only be brought by a State - however they still remain the principal subjects and have full complement of rights and obligations

#### What is a State?

Art 1 Montevideo Convention on Rights and Duties of States (1933) (regional American treaty; 16 parties): '[t]he State as a person of international law should possess the following qualifications:

- (a) a permanent population;
- (b) a defined territory;
- (c) government; and
- (d) capacity to enter relations with other States [i.e. not subordinated to another State, e.g. Japanese controlled Manchukuo in 1930s]."

Generally recognised that this definition is codification of customary law: Harris

Might be possible to add further criteria:

(a) Non-use of illegal force

US Secretary of State said in 1932 that they would not recognise any situation resulting from an unlawful use of force, e.g. Manchukuo (although State practice during League of Nations mixed, e.g. UK recognised Italian control of Ethiopia in 1930s)

Turkey invaded northern Cyprus in 1974 (following a coup) and in 1983 declared Turkish Republic of Northern Cyprus - UN SC called on States not to recognise

(b) Denial of self-determination

White minority government in British colony of Southern Rhodesia (now Zimbabwe) declared independence - UN SC called on States not to recognise "this illegal, racist, minority regime"; none did

1970-80s South Africa, implementing apartheid, created and recognised 4 independent entities ("homelands") - GA resolution rejected independence and declared it invalid

## **Independence**

Independence as a requirement of statehood means, to some extent, factual, as well as legal, independence from other states. Although it is accepted that states may influence the policies and conduct of another state, there may come a point, where factual dependence by one state upon another is so great that it is really no more than a "puppet" state and will not be treated as meeting the requirement of independence.

Austro-German Customs Union Case (PCIJ, 1931) - advisory opinion

Held: the conception of independence, regarded as the normal characteristic of States as subjects of international law, cannot be better defined than by comparing it with the exceptional and, to some extent, abnormal class of States known as dependent States".

These are State subject to the authority of one or more States.... It follows that the legal conception of independence has nothing to do with a State's subordination to international law or with the numerous and constantly increasing states of de facto dependence which characterize the relation of one country to other countries.

North Atlantic Coast Fisheries Case (PCIJ, 1910)

Held: rejected a US submission in the following terms: "...to hold that the US, the grantee of the fishing right, has a voice under the treaty granting the right in reparation of fishing legislation, involves recognition of a right in that country to participate in the internal legislation of GB and her colonies and to that extent would reduce these countries to a state of dependence..."

## **Self-determination**

Has a long history in international relations as a reason for the cession of territory from one state to another for the use of plebiscites to establish the wishes of the inhabitants in this connection.

Declaration on the Granting of independence to Colonial territories and People 1960  
this resolution "solemnly proclaims the necessity of bringing to a speedy and unconditional end colonialism in all its forms and manifestations."

2. All persons have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

3. Inadequacy of political, economic, social or educational preparedness should never serve as a pretext for delaying independence.

4. All armed action or repressive measures of all kinds directed against dependent peoples shall cease in order to enable them to exercise peacefully and freely their right to complete independence, and the integrity of their national territory shall be respected.

5. Immediate steps shall be taken, in Trust and Non-Self-Governing Territories or all other territories which have not yet attained independence, to transfer all powers to the peoples of those territories, without any conditions or reservations, in accordance with their freely expressed will and desire, without any distinction as to race, creed or colour, in order to enable them to enjoy complete independence and freedom.

Western Sahara Case (ICJ, 1975)

Held:

the principle of self-determination as a right of peoples and its application for the purpose of bringing all colonial situations to a speedy end, were enunciated in the declaration (above)...

the above provisions, in particular art 2, thus confirm and emphasize that the application of the right of self-determination requires a free and genuine expression of the will of the peoples concerned.

### **Relevance of Recognition**

Distinction between recognition of government and recognition of a State

Can confer certain benefits under foreign municipal law - e.g. immunity from suit (in Australia see Foreign States Immunities Act 1985 (Cth)), diplomatic representatives protected from action etc

Different levels of recognition exist - de facto and then de jure (according to law)

Territorial claims can also be recognised (e.g. Australia's de jure recognition of Indonesia's annexation of East Timor)

Even if entities, such as Taiwan, are not States, they still has certain rights/obligations - e.g. Taiwan has entered treaties

### **Recognition and Statehood**

1. "Constitutive theory" (defunct) - recognition necessary to establish statehood

Not supported by State practice or judicial decisions

Difficulty if divided recognition; also need to acknowledge that political considerations largely determine whether an entity is recognised

Collective Recognition:

If an entity is admitted into the UN there is little debate as to the entity's status (Art 4 Charter membership open to "peace-loving State"; requires recommendation from SC and 2/3 vote from current members of the UN)

European collective recognition following break up of Socialist Republic of Yugoslavia based on certain criteria - significant in establishing statehood of Slovenia, Croatia, Bosnia and Macedonia

2. "Declarative theory" - mere acknowledgment entity meets criteria

### **International Organisations as Subjects**

International organisations can and do have limited legal personality - in certain circumstances they can enter treaties and make claims, their employees may receive diplomatic privileges

Reparations for Injuries Suffered in the Service of the UN - Advisory Opinion (ICJ, 1949)

Facts:

Concerned a claim proposed to be made by the UN against Israel (who was not at that time a member) for death of Count Bernadotte (Swedish) who was UN truce negotiator in Israel in 1948

Held:

Court, having regard to the purposes of the UN, accepted that the UN could claim against non-UN member for direct injury to itself, and for injury suffered by its agents Member-States responsible for clothing organisation with international legal personality - community of States had power to create an entity that had "objective international personality"

Rights and duties not the same as a State, rather were dependant upon its "purposes and functions as specified in its constituent documents and developed practice"

Court did not rule on possibility of Sweden making a claim on behalf of injured national UN could make a claim on behalf of employee's family (because otherwise an employee might not act contrary to interests of his State of nationality) - a right of "functional protection"

Difficult question as to whether an organisation has legal personality where it has been constituted by a small number of States - For example, the EU has 15 members; Art 210 Treaty of Rome declares that it has legal personality; Observer status in the GA, participates in conferences and is party to treaties with non-EU States - however



according to Harris, it does not have international legal personality

### Human Beings

Diplomatic protection - allow State to protect, by international claim, its nationals and corporations injured by the internationally wrongful acts of another State

Two typical situations:

Injury at hands of non-governmental entities (e.g. revolutionaries - State could be liable for not stopping violence or for a denial of justice)

Direct governmental conduct (natural resources and nationalisation, e.g. former colonial States in the 1960s arguing against international minimum standard)

Traditionally conceived as a right of the State of nationality of the victim

States can only protect their own nationals (effective link doctrine applies: Nottebohm Decision) - this is difficult in human rights cases, because the offending State is usually the State of nationality (argument that human rights are obligations erga omnes:

Barcelona Traction; Case Concerning East Timor

Injured national must exhaust local remedies, but not ones that are "obviously ineffective": (Ambatielos Arbitration); for example the rule does not apply if you have to overturn a finding of fact where the local law would not allow that (Finnish Shipowners case), or where there has been excessive delays - but if statute of limitations has expired then the rule would preclude a claim

#### Ambatielos Arbitration

Facts:

Greece brought claim against UK in relation to a contractual claim against Greek national who had agreed to buy ships from the UK

Greek national did not call key witness at trial and on appeal leave was not granted to admit the evidence of the witness; the appeal was discontinued

Held:

It was the failure to call the witness at trial that rendered the remedy ineffective - claim dismissed

Local remedies rule only applies to diplomatic protection

## Sources of International Law

What are the sources of international law? That is: how is international law created?

Typically, one would point to Article 38 of the Statute of the International Court of Justice, as Judge, and current President of the International Court of Justice, Rosalyn Higgins does below.



[Judge Rosalyn Higgins](#) here [introduces the sources](#) of international law.

### Article 38(1)(a) -- Treaties - As a Source of I.L

"International conventions, whether general or particular, establishing rules expressly recognized by the contesting states;"



#### Reservations to Treaties

Thomas Buergenthal, Judge at the International Court of Justice, speaks about [reservations to treaties](#).

### Article 38(1)(b) -- Custom - As a Source of I.L

"international custom, as evidence of a general practice accepted as law;"



#### Local Custom and the *Passage over India Case*

On location, your host, Jean Allain, [discusses the notion of a local or bilateral custom](#) and how it manifested itself in the *Passage over Indian Territory* case.

### Article 38(1)(c) -- General Principles- As a Source of I.L

"the general principles of law recognized by civilized nations;"

### Article 38(1)(b) -- As subsidiary means: judicial decisions and scholarship- As a Source of I.L

"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. "

### Sources of International Law – Further Reading

#### Art 38 Statute of ICJ

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

- (a) international conventions, whether general or particular, establishing rules expressly recognised by the contesting states;
- (b) international custom, as evidence of a general practice accepted as law;
- (c) the general principles of law recognised by civilised [word is a remnant of PCIJ statute, now redundant] nations;
- (d) subject to the provisions of Article 59 [decisions only binding on parties], 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.

This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereon.

- There is no hierarchy of the sources (with the possible exception of (d)) - hierarchy rejected when original PCIJ statute was drafted

#### Treaties

- 1648-1919 (231 volumes); League of Nations, 27 years (205 volumes); UNTS (2003 volumes by 1998)

- ILC drafted 2 treaties on treaties: Vienna Convention on the Law of Treaties (VCLT) and Vienna Convention on the Law of Treaties between States and International Organizations or between International Organisations (not yet in force)

- "Treaty" define in VCLT as:

"an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments whatever its particular designation" (Art 2)

Can also be oral - but not covered by VCLT

Process of binding yourself to the treaty is determined by the parties (usually bilateral only signature; multilateral 2 step process)

- Only parties to a treaty can derive obligations or rights under it: Arts 34-38 VCLT

- The exception is "objective" regimes and border treaties: Aaland Island case (expert commission) - Finland held bound by a treaty between Russia, Great Britain and France

(signed after the Crimean War) - Russia had agreed to demilitarise Aaland Island in the Baltic; Finland who later acquired sovereignty held to be bound

- Treaty can affect the development of customary international law
- States can agree to modify customary rule by entering into a treaty - but cannot alter rule of ius cogens, otherwise is void (Arts 53, 64 VCLT; Art 53 defines as "... a norm accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted")

## Responsibility & State Responsibility

Professor James Crawford, Whewell Professor of International Law, University of Cambridge, introduces the concept of:

Responsibility

Watch Video in Mobile



### State Responsibility

Professor James Crawford, Whewell Professor of International Law, University of Cambridge, acted as Special Rapporteur on State Responsibility from 1997 to 2001 and guided the International Law Commission towards successful completion of its work on State responsibility.

### STATE RESPONSIBILITY- Detailed Reading

A state may incur liability if it violate a rule of customary international law or ignore its obligation under a treaty.

However, to make a state responsible, Art 2 of Draft Articles (DA) put 2 requirements:

#### **1) THE WRONGFUL CONDUCT IN QUESTION MUST BE ATTRIBUTABLE TO THE STATE**

State cannot act on its own. State Organs shall represent the State in any matters.

**Art 4 DA** provides that the *conduct* of any state organ shall be considered an act of that state under international law whether the organ exercises legislative, executive or judiciary function. An organ includes any person or entity.

*Conduct* in Art 4 DA means action or omission. E.g.:

**Diplomatic and Consular Staff case:** Iran was responsible because of omission to act when it should have done so.

**Corfu Channel case:** Albanian was responsible because it should have known about presence of mines in its territorial waters and failed to inform the 3rd state about it.

#### **a) Wrongful conduct of judiciary attributable to the state**

Judicial organ can be the cause of state responsibility because of 'denial of justice'.

**Janes Claim case:** Mexico failed to arrest and punish an offender which caused death to an American citizen. ICJ held that this is 'a denial of justice' and Mexico should be liable.

### **b) Wrongful conduct of the executive attributable to the state**

e.g. conduct of police, army, gov officers

**Massey claim case:** a US citizen who was working in Mexico was killed. Mexican authority failed to punish the offender. Mexico is liable and should pay damages to US.

Does the state be responsible if wrongful conduct committed by its organ *when off duty*?

No. A state would only be attributable to such wrongful conduct *when it is committed on duty*. If committed off duty, it cannot be attributable to the State.

**Mallen case:** A consul has been attacked by American police officer 2 times. 1st attack was when he was off duty. 2nd attack he *showed his badge to assert his official capacity*. US was responsible for the 2nd attack.

A state may also be liable for *de facto* State organs i.e. public corporations or private company performing element of governmental authority

**SEDCO case:** there was a seizure of vehicle. The claimant argued that a state owned company took it. However, argument was rejected because there was *no proof* to show that government directed it to be seized.

**Foremost Tehran Inc v Iran case:** Iranian company did not pay dividends to shareholders. The conduct was attributable to Iran because it had been influenced by Government representatives on the board of directors.

### **Ultra vires conduct cannot be a defense to exclude state responsibility**

Refer Art 7 DA

**US v Mexico:** Mexican soldiers ignored their orders and attacked on a house where Americans was seeking refuge. It was held Mexico liable.

**Conduct of private persons may be attributable to State in 2 circumstances if [Art 8 DA]:**

a) It was carried out *on instructions of the State*

b) It was *under direction or control of State*

However, what is the degree of control that State need to exercise over the persons?

2 views:

i) According to **Nicaragua case**, State needs to exercise *effective control*. Control by State is effective when, for example:

1. State finances the persons
2. State coordinates the conduct of such persons
3. State issued specific instruction to such persons

ii) According to **Prosecutor v Tadic**, State only need to exercise *overall control*. State does not necessarily need issue instructions concerning each specific action.

## **2) THE CONDUCT MUST CONSTITUTE A BREACH OF AN INTERNATIONAL LEGAL OBLIGATION**

**Art 12 DA:** A State is in breach of its obligation when any act of the State does not conform to its obligation.

### **DEFENCES [Art 20-27 DA)**

- a) Consent [Art 20 DA]
- b) self-defense [Art 21 DA]
- c) countermeasures [Art 22 DA]
- d) *force majeure* [Art 23 DA]

There must be unforeseen circumstances to perform the obligation.

**Rainbow Warrior:** New Zealand argued that French breached its obligation because French failed to seek consent of NZ before removing NZ's soldiers from the island. French said that NZ soldiers were sick and need medical attention, so it was a *force majeure*. It was held that this situation does not suffice to amount to *force majeure*.

- e) Distress [Art 24 DA]
- f) Necessity [Art 25 DA]

### **NATIONALITY OF CLAIM**

Every state has the right to protect its nationals. However, it is up to the state whether to take up the claim or not.

**Nottebohm:** a state's right to extend diplomatic protection to its individual is not unlimited.

However, according to Art 1 of Hague Convention, **there must be a genuine link between the State and the national.**

#### **Nottebohm case:**

Mr. N was born in Germany & had German nationality until his naturalisation with Liechtenstein. Later he went to Guatemala and resided & conducts business there. L sued GU for unlawfully expelled and seized property of Mr N who had been neutralised by L. Court said that for the claim to succeed, a genuine link between L and Mr N must be proven.

Court said that for a genuine link to exist, **there must be dominant nationality.** Here, Mr. N's link with L is not dominant.

### **EXHAUSTION OF LOCAL REMEDIES**

Art 44 (b) DA: responsibility of a state cannot be invoked if local remedies still available.

This principle was confirmed in **ELSI case** and **Interhandel Case**.

However, there is no need to exhaust all local remedies in the following situations:

1. The remedies are ineffective in municipal law
2. Remedies in municipal law are futile
3. There are already judicial precedents, which will be followed in your case & does not favour you
4. There has been an unreasonable delay
5. Local processes are biased against the individual

6. The injury is to the state itself
7. The local remedies requirement has been waived

### **State Responsibility- Case Study**

ILC working since 1955 on codifying/progressively developing principles of State responsibility - finally adopted Articles and commentary last year; noted by the GA 12 December 2001

Rules of attribution, for example:

States responsible for actions of legislative, executive and judicial organs and actions of federal sub-units: Art 4

Responsible even for ultra vires acts of government officials: Art 7

Responsible for acts of private individuals in certain circumstances: Arts 8, 11

Not responsible for acts of insurrectionist movement, unless successful: Art 10

Principles of reparation: Arts 34-39

Defences: Arts 20-27

Some obligations appear to reflect position under customary law (e.g. necessity, referred to in *Gabc&iacute;kovo*; Commentary referred to in separate opinion of Judges Higgins, Kooijmans and Buergethal in *Arrest Warrant Case* (ICJ, 2002))

States acts will always have a + or - effect on the other states which will only be a breach if it is a breach of international obligation or of international rules.

Breach by a state of a binding international obligation owed to another state ('international wrong') through an act or omission gives rise to

- international responsibility

- international liability (must compensate the injured state - 'reparation', but damage not necessary) *Chorz&acute;w Factory* (PCIJ, 1928)

Can be:

- direct international wrong (by breach of a treaty)

- indirect international wrong (damage suffered by claiming states national)

What is the correct basis for determining liability:

- strict/absolute liability (risk or objective theory liability)

- fault liability (subjective theory of liability) *Corfu Channel Case*, *Agriculture Case* (Sri Lanka)

- can also be applied when injury to 'aliens' (exercise of diplomatic immunity) *Janes case?*

There are defences to this:

- legislative countermeasures:

*Air Services Agreement Case*

Held:

if a situation arises which, in one State's view, results in violation of an international obligation by another State, the first state is entitled, within the limits set by the general rules of I.L pertaining to the use of armed forces, to affirm its rights through counter-measures.

Must have some equivalence with the alleged breach. - must be proportionate.

When does State responsibility arise?

- unlawful act (amounting to breach of international obligation (obligation at the time of the act) - objective

- imputable to state - subjective, assimilates actions of official (and other individuals) to the state itself.

- As long as the organ is acting as that organ of the state, even if it was acting ultra vires.

*Rainbow Warriors Case*

- Private person: question of circumstances - acting for state with authority

- Revolutionaries/insurrection movements: are eventually successful, when there is a

new government, and/or new state. (retrospective exception to 'obligation at the time of the act') When they're not successful, when seeking to overthrow another state - Nicaragua Case, when they don't have the necessary degree of control.

### Peaceful Settlements

Rosalyn Higgins, President of the International Court of Justice introduces the subject of:

The Peaceful Settlement of International Disputes



### Adjudication -- International Courts

Judge Higgins of the International Court of Justice



Judge Rosalyn Higgins speaks about the nomination process of judges to the International Court of Justice and goes on to speak about the history of the World Court -- i.e.: Permanent Court of Justice (1920 -1946) and the International Court of Justice (1945) -- the law which is applicable before it (ie: sources found at Art. 38 of the Statute of the ICJ), and its jurisdiction (see Article 36 of the Statute).

Judge Higgins then speaks about procedural issues, the judges and their background, the daily functioning of the Court, and finally the value of a judgement rendered by the Court.



### Judge Thomas Buergenthal of the International Court of Justice

Judge Buergenthal, considers the International Court of Justice, its jurisdiction and the collegiality within the Court; he then considers the manner in which the judgements of the Court may be enforced.



### Issues of jurisdiction in the *Passage over India* Case

On location, your host Jean Allain considers issues of jurisdiction which arose during the preliminary phase of the *Passage over Indian Territory* case.

### Adjudication -- Quasi-Judicial Bodies



Appellate Body -- WTO Dispute Settlement Panel

Professor Georges Abi-Saab, Member of the Appellate Body and former Chair, introduces himself, speaks of his time at the Graduate Institute of Graduate Studies, then considers dispute settlement within the World Trade Organization (WTO) and the

relationship between the WTO and International law.

## **The Structure of the International Law System**

### **Institutional structures and powers**

#### **Legislative Structures**

General Assembly

Art 17 (UN Charter) - approve budget for organisation (majority vote)

Arts 10, 16 - power to discuss and recommend

Art 18 - majority vote

IMF, World Bank, WTO, ILO, WHO - do not operate on 50% + 1 basis, respect wishes of dissenting States

European Parliament (EU)

International Law Commission (ILC) - created in 1946 (GA) - made up of international experts - codify and progressively develop international law

International legislation - closest thing is universal/near universal adherence to treaty

#### **Executive**

UN SC - 15 States, 5 permanent (US, UK, France, Russia and China) and 10 elected to serve for 2 years (Art 23: regard must be had to equitable geographical distribution)

Art 27 non-procedural votes require majority of 9 and no veto

SC can authorise use of force against States: Chapter VII - power appears to be linked to existence of a threat to peace, breach of the peace or an act of aggression (Art 39)

(although ICJ has ruled that it has no power to overturn or quash decisions of the SC, although possibly it can review the legality the decision)

Art 25: members agree to accept and carry out decisions of SC

Art 24(2): SC to act in accordance with purposes and principles of UN

UN Economic and Social Council (ECOSOC)

Examines certain economic, social, cultural, health issues - particularly human rights  
Cannot make binding decisions

54 States, elected for 3 years by GA

9 functional commissions (notably, Commission on Human Rights and Commission on Sustainable Development) and 5 regional commissions

Coordinates activities of UN specialised agencies (WHO, FAO, UNESCO, ILO etc)

Developed consultative arrangements with over 1,600 NGOs

Secretary General and UN Secretariat

SG is "chief administrative officer" (Art 97) - can bring matters to the attention of the SC (Art 99); secure negotiated solutions to conflict ("good offices" role)

SG appointed for 5 year renewable term on recommendation of SC

Regional Executives

EU Council

European Commission

## **Judicial Body- International Court of Justice**

Operates in Hague, Kingdom of the Netherlands, in the "Peace Palace"

15 (plus possible 2 ad hoc) judges sitting in individual capacity; nine year term; no more than one national: Art 3; nominated by Permanent Court of Arbitration, SC and GA then vote

UN Charter - see Chapter XIV (Arts 92-96); Art 36(3)

Art 92: principal judicial organ of UN

Functions in accordance with statute

Members undertake to comply with decisions to which they are a party: Art 94(1); Also Art 59 Statute - "[t]he decisions of the Court has no binding force except between the parties and in respect of that particular case"



Judgements can be enforced by SC: Art 94(2)

Power to issue advisory opinions

Power to hear contentious cases only relates to disputes between States: Art 34(1) Statute  
GA and SC can request advisory opinions (e.g. SC obtained in South West Africa case (ICJ, 1976) when South Africa refused to hand over control of Namibia to UN)

15 specialised agencies can seek opinions on legal questions "arising within the scope of [their] activities": Art 96(2) - WHO not entitled to opinion on legality of nuclear weapons because not within activities (ICJ Rep 1996, 66) (GA however later received one: Legality of the Threat or Use of Nuclear Weapons Case (ICJ, 1996))

Contentious jurisdiction depends on consent

(a) Art 36(1) - particular dispute, or particular type of dispute, referred to the court (by compromise, clause in treaty etc)

For example:

Optional Protocol to Vienna Convention on Consular Relations - 1998-9 US executed Paraguayan and German nationals notwithstanding ICJ decided it was competent to determine the disputes arising under the Protocol

cf. FRY's unsuccessful attempt to argue Art IX of Genocide Convention gave ICJ jurisdiction to hear claim against US during 1999 NATO bombing campaign - US had made reservation to Art IX at time of ratification

(b) Art 36(2) - "Optional Clause" - agree in advance to submit to jurisdiction of court (about 60/190 States have accepted) - can be conditional

Portugal used against Australia in relation to Australia's entry into Timor Gap Treaty with Indonesia: East Timor Case (ICJ, 1995)

Court will not allow a claim that will necessarily involve determination of the conduct of a non-consenting third party: "Monetary Gold principle": Monetary Gold Removed from Rome (ICJ, 1954)

Australia relied on this successfully in East Timor case because Indonesia had not accepted jurisdiction

Argument rejected in Case Concerning Certain Phosphate Lands in Nauru (ICJ, 1992) because claims against Australia could be separated from those against NZ and UK (case subsequently settled for \$107m)

### Other International Judicial Bodies

SC created ad hoc International Criminal Tribunals in Rwanda and former Yugoslavia - jurisdiction limited geographically and temporally

European Court of Justice (of the EU)

European Court of Human Rights (of the Council of Europe) - individuals can bring claims

Inter-American Court of Human Rights

## International Criminal Law

Professor Willam Schabas introduces, and considers elements of:

### International Criminal Law



### President of the International Criminal Court (ICC)

Phillippe Kirsch, President of the International Criminal Court, sat down for an interview in September 2005 in which he introduced himself, and went on to give the historical background of the creation of the International Criminal Court.

President Kirsch then went on to explain how the Court

functions, its structure, and finally gave a status report of the Court's activities as of 2005.



### **1994 ILC Draft Statute for an International Criminal Court**

James Crawford, Whewell Professor of International Law, University of Cambridge, considers his time at the UN International Law Commission as part of the Working Group on an International Criminal Court and the drafting of the 1994 Draft Statute for an International Criminal Court.

The 1994 ILC Draft was source of the drafting process which ultimately led to the 1998 Rome Diplomatic Conference and the creation of the International Criminal Court.



### **President of the Rwanda Tribunal (ICTR)**

Judge Navanethem Pillay, President of the International Criminal Court for Rwanda Tribunal (1999 - 2003) and later Judge of the International Criminal Court introduced herself and explains why the Rwanda Tribunal was established.

Judge Pillay speaks about the legacy which the ICTR will leave in respect to the evolution of international jurisprudence, and discusses the means by which the ICTR will finish its work.

Judge of the International Criminal Court

Judge Pillay (elected in 2003) speaks of the history of the ICC, its jurisdiction and her role as an Appellant Judge, and the process of being elected a judge of the ICC. Judge Pillay was then asked to consider what the largest challenge is to the success of the International Criminal Court.



### **Judge of the Yugoslav Tribunal (ICTY)**

Judge Patrick Robinson, trial judge at the International Tribunal for the former Yugoslavia speaks of his extensive international legal career, including the Sixth Committee of the UN General Assembly and the Inter-American Commission on Human Rights.

Judge Robinson then considers the ICTY, its applicable law and his time presiding over the Milosevic Trial.



### **Humanitarian Law before International Courts**

James Stewart, formerly with the Prosecutor's Office at the ICTY and ICTR explains that the rule of IHL will only truly develop when they are applied by international courts.

This video is taken from the ICRC website. See other videos on the ICRC website regarding Accountability.

## **Disarmament**

What role does international law play in issues of disarmament? Consider the following video clips of eminent persons in the field, discussing issues of weapons of mass destruction, and the international organizations which seek to limit their numbers and use.



### **Pugwash Conference – Nobel Peace Prize winner**

Noble Peace Prize Laureate Joseph Rotblat introduces himself, the Pugwash Conference and discusses the winning of the

Noble Prize. Professor Rotblat then considers international security in the pre- and post-nuclear age, during the Cold War, and after.

Professor Rotblat considers the role of international law as it relates to nuclear weapons and the relevance of the Advisory Opinion of the International Court of Justice on the *Use or Threat of Use of Nuclear Weapons*



### **Organization for the Prohibition of Chemical Weapons**

Lisa Tabassi, Legal Officer in the Technical Secretariat of the Organization for the Prohibition of Chemical Weapons (OPCW) located in the Hague, speaks of the history of the banning of chemical weapons through to the establishment of the 1993 Chemical Weapons Convention (CWC).

Ms. Tabassi, introduces the function of the OPCW, and goes on to explain the obligations of States Party to incorporate the CWC within their domestic legal system. Ms. Tabassi then goes on to explain what a chemical weapon is, their possible use by non-State actors, and a day in the life of a Legal Officer at the OPCW.



### **Nuclear Test Ban Treaty Organization**

Peter Hulsroj, Legal Advisor to the Preparatory Commission for the Comprehensive Nuclear-Test-Ban Treaty Organizations (CTBTO) speaks about his Organization and his role as the legal advisor in an organization dedicated to non-proliferation.

Mr. Hulsroj considers the role of an inter-governmental organization which has been established before its treaty has come into force; the obligations this creates on States which have signed (but not ratified) the treaty and the relationship between the CTBTO and its arms-length relationship with the United Nations.

## **What Are Human Rights? Human Rights Defined + Mobile Vid Clips**

While some dictionaries define the word right as “a privilege,” when used in the context of “human rights,” we are talking about something more basic.\*

Every person is entitled to certain fundamental rights, simply by the fact of being human. These are called “human rights” rather than a privilege (which can be taken away at someone’s whim).

They are “rights” because they are things you are allowed to be, to do or to have. These rights are there for your protection against people who might want to harm or hurt you. They are also there to help us get along with each other and live in peace.

Many people know something about their rights. Generally they know they have the right to food and a safe place to stay. They know they have a right to be paid for the work they do. But there are many other rights.

When human rights are not well known by people, abuses such as discrimination, intolerance, injustice, oppression and slavery can arise.

Born out of the atrocities and enormous loss of life during World War II, the United Nations Universal Declaration of Human Rights was signed in 1948 to provide a common understanding of what everyone’s rights are. It forms the basis for a world built on freedom, justice and peace.

## United Nations-Universal Declaration of Human Rights

### **Simplified Version**

This simplified version of the 30 Articles of the Universal Declaration of Human Rights has been created especially for young people.

- 1. We Are All Born Free & Equal.** We are all born free. We all have our own thoughts and ideas. We should all be treated in the same way.
- 2. Don't Discriminate.** These rights belong to everybody, whatever our differences.
- 3. The Right to Life.** We all have the right to life, and to live in freedom and safety.
- 4. No Slavery.** Nobody has any right to make us a slave. We cannot make anyone our slave.
- 5. No Torture.** Nobody has any right to hurt us or to torture us.
- 6. You Have Rights No Matter Where You Go.** I am a person just like you!
- 7. We're All Equal Before the Law.** The law is the same for everyone. It must treat us all fairly.
- 8. Your Human Rights Are Protected by Law.** We can all ask for the law to help us when we are not treated fairly.
- 9. No Unfair Detainment.** Nobody has the right to put us in prison without good reason and keep us there, or to send us away from our country.
- 10. The Right to Trial.** If we are put on trial this should be in public. The people who try us should not let anyone tell them what to do.
- 11. We're Always Innocent Till Proven Guilty.** Nobody should be blamed for doing something until it is proven. When people say we did a bad thing we have the right to show it is not true.
- 12. The Right to Privacy.** Nobody should try to harm our good name. Nobody has the right to come into our home, open our letters, or bother us or our family without a good reason.
- 13. Freedom to Move.** We all have the right to go where we want in our own country and to travel as we wish.
- 14. The Right to Seek a Safe Place to Live.** If we are frightened of being badly treated in our own country, we all have the right to run away to another country to be safe.
- 15. Right to a Nationality.** We all have the right to belong to a country.
- 16. Marriage and Family.** Every grown-up has the right to marry and have a family if they want to. Men and women have the same rights when they are married, and when they are separated.
- 17. The Right to Your Own Things.** Everyone has the right to own things or share them. Nobody should take our things from us without a good reason.
- 18. Freedom of Thought.** We all have the right to believe in what we want to believe, to have a religion, or to change it if we want.
- 19. Freedom of Expression.** We all have the right to make up our own minds, to think what we like, to say what we think, and to share our ideas with other people.

**20. The Right to Public Assembly.** We all have the right to meet our friends and to work together in peace to defend our rights. Nobody can make us join a group if we don't want to.

**21. The Right to Democracy.** We all have the right to take part in the government of our country. Every grown-up should be allowed to choose their own leaders.

**22. Social Security.** We all have the right to affordable housing, medicine, education, and childcare, enough money to live on and medical help if we are ill or old.

**23. Workers' Rights.** Every grown-up has the right to do a job, to a fair wage for their work, and to join a trade union.

**24. The Right to Play.** We all have the right to rest from work and to relax.

**25. Food and Shelter for All.** We all have the right to a good life. Mothers and children, people who are old, unemployed or disabled, and all people have the right to be cared for.

**26. The Right to Education.** Education is a right. Primary school should be free. We should learn about the United Nations and how to get on with others. Our parents can choose what we learn.

**27. Copyright.** Copyright is a special law that protects one's own artistic creations and writings; others cannot make copies without permission. We all have the right to our own way of life and to enjoy the good things that art, science and learning bring.

**28. A Fair and Free World.** There must be proper order so we can all enjoy rights and freedoms in our own country and all over the world.

**29. Responsibility.** We have a duty to other people, and we should protect their rights and freedoms.

**30. No One Can Take Away Your Human Rights.**

## LAW OF TREATIES

Art. 38(1) (a) ICJ Statute: In deciding disputes regarding international law, the court shall refer to *international covenants [treaties]*...

### Definition of treaty

Refer Art. 2 of VCLT

“treaty' means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation; “

### ELEMENTS TO MAKE A VALID TREATY (ART 2 OF VCLT):

#### 1) Treaty must have international character

The treaty is to be concluded by an *international legal person* who has capacity to enter into treaty.

Who is an international legal person who can conclude treaties?

a) States (Art 6 VCLT), which includes Head of States, Head of Gov, and Minister of Foreign Affairs (refer to Art 7 VCLT)

b) International organization (in **Anglo-Iranian Oil Company case**, ICJ held that contract between the company and Iranian government was not a treaty because there is no privity of contract).

#### 2) In written form

Oral form of agreement is also acceptable (Eastern Greenland case)

#### 3) Governed by international law

International law governs all treaties whether or not they are within the scope of VCLT

#### 4) Embodied in single or 2 instruments

Treaties may be several forms:

- a) Conventions
- b) Agreements
- c) Protocols
- d) Charter
- e) Exchange of notes

There are less formal agreements such as exchange of notes (letters). States may send letters to each other and agree on certain things. *If the letters intended to be a treaty, it is customary to **expressly state** that it shall constitute an agreement between our Governments.*

In the case of **Qatar and Bahrain**, exchange of notes that was done by parties conferred jurisdiction to ICJ to hear the dispute.

#### 5) There is an intention to create legal relation

This element is not expressly mentioned in Art 2 VCLT. But, it is very important because without intention, an instrument will not be a treaty.

#### **What are the effects of Unilateral Statements (only 1 party enter into treaty)?**

If the state made such declaration with intention to be bound, *a state may be bound by such unilateral statement.*

In **Legal Status of Eastern Greenland case**, Norway made unilateral statement that it won't create difficulties in respect of Danish's claim over Eastern Greenland. ICJ held that Norway is bound by this unilateral statement.

This was confirmed again by ICJ in **Nuclear Test cases**.

Once the text is adopted, **THE NEGOTIATING PARTIES MUST GIVE CONSENT TO BE BOUND BY A TREATY**

The methods of giving consent are provided under **Art 11 - 16 VCLT**

#### **WHAT IF A STATE MAKES RESERVATION TO ONE OF TERMS IN THE TREATY?**

Refer to Art 19 - 23 VCLT.

If the Treaty allows reservation, then can reserve. But, if do not allow, cannot.

Art 120 Rome Statute: No reservation may be made to the statute of ICC.

**What if there are no provisions stating about reservation in that Treaty? Are states not allowed to make reservation?**

ICJ in the case of **Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide** answered this question. If there are no provisions stating about reservation, it does not automatically mean that you cannot reserve. But, *you need to look at the purpose of the Treaty*. Your reservation cannot defeat the purpose and object of the Treaty, otherwise, you are not a party to the Treaty.

### **ENTRY INTO FORCE**

A treaty does not enter into force until certain number of States ratified it. For example, Art 308 of UNCLOS provides:

*"This convention shall enter into force 12 months after the date of deposit of the 16th ratification"*

### **REGISTRATION AND PUBLICATION OF TREATY**

Every treaty needs to be registered with UN, ~refer to Art 102 UN Charter & Art 80 VCLT

### **APPLICATION OF A TREATY**

#### **A) Upon its Parties**

Art 26 VCLT: every treaty in force is binding upon its parties and must be performed in good faith

Art 27 VCLT: a party may not invoke the provision of internal law as justification for its failure to perform a treaty

#### **B) Successive Treaties on the same subject matter**

Art 30 VLCT: If there are 2 same treaties concluded on the same matter, the one concluded later will prevail.

However, if the provision of an ordinary treaty is in conflict with UN Charter, **Art 30 VCLT & Art 103 UN Charter** provides that UN Charter prevails.

#### **C) Application of a Treaty upon 3rd States**

Art 34 VCLT: 3rd party states are not bound by the Treaty without its consent.

However, Art 35-38 VCLT states that there are exceptions where 3rd party states may be bound.

### **INVALIDATION OF TREATIES**

There are several grounds which a Treaty may be invalid:

a) Violation of fundamental domestic law (Art 46 VCLT)

A state may invoke Art 46 if:

1. the violated internal law was related to competence to conclude Treaty

(The person who ratified the Treaty was not capable of doing it.)

1. the violation was manifest and other party must be aware of it
2. the violation concerned a rule of fundamental importance

b) Error (Art 48 VCLT)

That State may have erred in entering the Treaty due to some misunderstanding. However, error does not make the Treaty automatically void. The mistaken party may invoke the error as invalidating its consent.

c) Fraud Art 49 VCLT

d) Corruption Art 50 VCLT

e) Coercion Art 51 VCLT

f) Coercion by threat or use of force Art 52

Art 2 (4) UN Charter provides use of force is prohibited. Force means 'military force'.

g) Treaty conflicting with *jus cogens*, e.g.

1. A treaty allowing an unlawful use of force
2. A treaty which allow parties to commit crimes under International law
3. A treaty which allows genocide, piracy or slavery

### TERMINATION OF TREATY

~refer to Art 54-60 VCLT

A Treaty may be terminated automatically by 3 ways:

a) Art 61 VCLT -supervening impossibility of performance

b) Art 62 VCLT - there is a fundamental change of circumstances

c) Art 64 VCLT - emergence of a new *jus cogens*.

### CONSEQUENCES OF INVALIDITY OR TERMINATION OF TREATY

Refer Art 69 – 71 VCLT

### **The Law of Treaties--- Case Studies**

Bilateral treaties - e.g. settle boundary disputes, provide for transfer of territory (e.g. UK/China in respect of Hong Kong)

Multilateral treaties - can have constitutional features, e.g. UN Charter; can set out legal rules by codifying and progressively developing international law

Vienna Convention on the Law of Treaties (VCLT)

Not retrospective: Art 4 (note however that some rules will be customary)

Treaty was considered at a conference in 1968-1969; 79 States voted for its adoption, 1



against, 19 abstentions; Australia acceded 13 June 1974  
Came into force 27 January 1980; as at 15 February 2002 there were 94 State parties

#### Important Features

Basic principle is that promises are binding ("pacta sunt servanda") and must be performed in good faith: Art 26

VCLT only applies to treaties between States: Art 1; (However, VCLT will apply between States even if there is a non-State party: Art 3(c); note also that the ILC has drafted separate treaty, not yet in force, in relation to treaty making involving international organisations)

#### Application of VCLT

Treaty defined as:

"...an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation...": Art 2

VCLT does not apply to oral agreements, however they can still exist (Art 3)

For example:

Eastern Greenland Case (PCIJ, 1933)

Facts:

Dispute between Denmark and Norway over Eastern Greenland

Danish Minister agreed not to object to Norway's claim over the island Spitzbergen if, in return, Norway did not contest Denmark's claim over Eastern Greenland

On 22 July 1919 Norwegian Foreign Minister said "the Norwegian Government would not make any difficulty" concerning Denmark's claim

Held:

Statement of 22 July binding on Norway

"The Court considers it beyond all dispute that a reply of this nature given by the Minister of Foreign Affairs on behalf of his Government in response to a request by the Diplomatic representative of a foreign power, in regard to a question falling within his province, is binding upon the country to which the Minister belongs..."

[C.f. Nuclear Test Cases (unilateral statement)]

"Governed by international law" requires an intention to create legal relations, but does not require 'consideration'

Agreements between States may be governed by municipal law, e.g. contracts for the sale of goods (in this context there can be problems with sovereign immunity)

#### Entry into Treaties

##### (a) Australian Rules

Entered into by the executive arm of the government

Government has adopted a policy of 'consultation', including tabling the treaty in both Houses, preparation of a national interest analysis, establishment of joint parliamentary standing committee etc

Under s51(xxix) constitution (external affairs power)

Parliament can only implement the treaty into Oz law

##### (b) International Rules

A person is able to authenticate a text if:

They produce "full powers" (defined in Art 2(1)(c) ~ document of designation emanating from a competent authority that evidences an intention to be bound by the acts of the nominated person): Art 7(1)(a)

It is apparent from developed practice or from the circumstances that they are authorised to do so: Art 7(1)(b)

They are a Head of State, Head of Government or Minister of Foreign Affairs: Art 7(2)(a); or

They are the head of a diplomatic mission in the relevant State: Art 7(2)(b)

An unauthorised representative cannot bind a State unless the State later confirms: Art 8

If a representative appears to be authorised then it does not matter that they were

irregularly authorised under their municipal law (Art 27: cannot invoke internal law to justify failure to perform treaty) unless "the violation was manifest and concerned a rule of its internal law of fundamental importance": Art 46(1) ("manifest" means "objectively evident to any State" operating under "normal practice and in good faith": Art 46(2))  
If authority of representative is subject to a condition, then authority is not invalidated when representative acts ultra vires unless the condition was known to the other party:  
Art 47

### **Process of Treaty Making**

A treaty can define the process - e.g. signature (see Art 12), exchange of instruments (see Art 13), ratification, acceptance, approval or accession: Art 11

Where 2 step process, the second step is vital to the final assumption of legal responsibility (although the first also imports certain obligations: Art 18 below)

4 different ways for multilateral treaties to become binding: ratification, acceptance, approval or accession - it is the point where a State "establishes on the international plane its consent to be bound": Art 2(1)(b)

'Accession' is a single step process for States to sign-on after the expiry of the period for signature

consensus/majority vote to text (final act)

signature - obligation of good faith not to defeat 'object and purpose' Art 18 Nuclear Test Case (ICJ, 1974)

ratification - subsequent act of conformation by States

accession - consent by non-signatory to be bound

reservation

only multilateral treaties

unilateral statement purporting to exclude/modify part of the treaty

effect on relationship of parties?

Cannot be incompatible with object and purpose Art 19

Reciprocity applied where there is reservation.

Nuclear Test Case (ICJ, 1974)

Held:

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.

The rule pacta sunt servanda is based on good faith.

### **Treaty into Force**

A treaty can specify when it is to come into force: Art 24(1)

Failing agreement, treaty comes into force as soon as consent to be bound is established for all the negotiating States: Art 24(2)

Unless the treaty otherwise provides, a treaty comes into force for any subsequent parties on the date they consent: Art 24(3)

If a State has entered into a treaty that does not yet bind it, the State must "refrain from acts which would defeat the object and purpose" of the treaty: Art 18

### **Reservations**

Reservation defined 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": Art 2(d)

The old rule was that all States had to agree to a reservation before it was valid; this is no longer the case.

For example:

Reservations to the Convention on Genocide (ICJ, 1951)

Facts:

Genocide Convention did not expressly exclude reservations

GA referred a question as to the effect of reservations/objections to the ICJ

Held:

A State that made a reservation could remain a party to the treaty provided it was compatible with the treaty's "object and purpose" (even if other States objected to the reservation) see Art 19

A State that objects to a reservation (as against object and purpose) can consider that party not a party to the treaty/convention and vice versa for a party who does not object to the reservation

An objection may be from a signatory State which has not yet ratified the treaty - can have legal effect if no.1 is satisfied, but an objection from a State that has not signed or accede has no legal effect.

"Interpretative declarations" may or may not be reservations - substance and not form that matters

Belilos v Switzerland (European Court of Human Rights (EctHR), 1988)

Switzerland had incorrectly described a reservation to the ECHR (that prohibited reservations) as a "interpretative declaration"

Court held that Switzerland remained a party to ECHR without being able to rely on its reservation

Effect on relationships between parties:

Eg:

Art1Art2Art3Art4Art5Art6

A+++++

B+- res++++

C++ accp++++

D++ obj++++

E++ str obj++++

ABCDE are all bound by all 6 articles.

AB -> Bound by 1, 3-6 articles of treaty

BC -> Bound by 1, 3-6 articles of treaty

BD -> same result

BE -> because E objected to the reservation because it is against the object and purpose of the treaty B and E have no relationship under the treaty.

### **Process for making reservations:**

State can make reservation unless the treaty provides otherwise or is incompatible with the object and purpose (Art 19); Other States can accept the reservation, or object to it; All communications must be in writing (Art 23(1))

A reservation expressly authorised by a treaty does not require subsequent acceptance by the other contracting States: Art 20(1), unless:

Apparent from limited number of negotiating States and object/purpose that application of entire treaty is an "essential condition of the consent of each one" - then reservation requires acceptance by all the parties: Art 20(2)

Treaty is constituent instrument of international organisation - requires acceptance of organ of organisation: Art 20(3)

### **Additional rules relating to reservations:**

If a State accepts another State's reservation, then the second State is a party vis-à-vis the first State if and when the treaty is in force for those States: Art 20(4)(a)

If a State objects to a reservation of another State, then it does not preclude the treaty operating between the two States unless that intention is "definitely expressed" by the first State: Art 20(4)(b)

When a State communicates an intention to be bound by the treaty, containing a reservation, it is "effective" as soon as a least one State accepts the reservation: Art 20(4)(c)

A reservation is treaty as accepted by a State (unless the treaty otherwise provides) if no objection is raised within 12 months after it was notified of the reservation, or the date it expressed consent to be bound, whichever is later: Art 20(5)

A State can withdraw a reservation or objection (unless the treaty otherwise provides) at any time (and without requiring consent for the other parties): Art 22(1)-(2) (withdrawal becomes operative only when notice is received: Art (3)(a)-(b))

Where a State expresses a reservation at the time of signing, it must confirm when consent to be bound is communicated (this is the date from which it becomes operative): Art 23(2)

#### **Legal effects of reservations and objections:**

A reservation modifies the operation of the treaty vis-à-vis the reserving State and the other parties (i.e. the reservation operates in both directions): Art 21(1)

Where a State has objected to a State's reservation, the provisions to which the reservation relates do not operate between the two States at all: Art 21(3)

#### **Issues regarding reservation:**

Reservations to human rights treaties are controversial, e.g.

Congo's reservation to Art 11 ICCPR (no imprisonment for debt)

Kuwait's reservation to Art 25(b) ICCPR (universal and equal suffrage)

Human Rights Committee has expressed the view that reservations contrary to object and purpose of ICCPR can be severed - US has rejected this position

#### **Inconsistent Treaty Obligations**

UN Charter prevails over other inconsistent treaties: Art 103 Charter

Art 30 VCLT deals with other treaties, but is expressly subject to Art 103 Charter

If the parties to the inconsistent treaties are the same, and the earlier treaty has not been terminated or suspended, then the earlier only applies to the extent that its provisions are compatible: Art 30(3)

Where the parties are different, then:

As between parties to both treaties, rule in Art 30(3) applies: Art 30(4)(a)

As between a party of both and a party of one, the common treaty governs the relationship: Art 30(4)(b)

Art 30(4) is without prejudice to Arts 41 (agreement to modify multilateral treaties between certain parties) and 60 (termination/suspension of operation of treaty because of a breach) or questions of responsibility that may arise for entering into incompatible treaties: Art 30(5)

#### **Termination or Suspension**

Treaty considered terminated if parties enter into another treaty on the same subject and it appears that the later is to prevail or the later provisions "are so far incompatible" that both could not be applied together: Art 59(1)

Treaty considered suspended if that intention appears from the later treaty or is otherwise established: Art 59(2)

#### **Treaty Interpretation**

Treaties are to be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose": Art 31(1)

To establish context, can examine: text, preamble, annexes, any collateral agreement, instruments agreed to be made for the purpose of the treaty: Art 31(2)

Can also examine: any subsequent agreement as to interpretation/application of provisions, subsequent practice and relevant rules of international law: Art 31(3)

If the parties intend to give a term a special meaning then it shall be interpreted accordingly: Art 31(4)

Recourse can be had to supplementary means of interpretation (such as preparatory work, circumstances of conclusion) to confirm an interpretation resulting from Art 31, or resolve an ambiguous, obscure, absurd or unreasonable interpretation under Art 31: Art 32

ECtHR has held that Arts 31-33 VCLT represent "generally accepted principles of international law": *Golder v UK*

#### **Other interpretative principles that may apply:**

Possibly the class rule and express inclusions rule: Brownlie

A rule applied in international judicial decisions (but not contained in VCLT) is that

where a treaty limits sovereignty, it should be interpreted restrictively - possible that principle may be limited to territorial questions: Harris  
Suggested that treaties should be interpreted consistently with human rights norms: Valticos and Potobsky  
Effectiveness principle (provision always interpreted so as to have some effective operation) not expressly included in VCLT, but possible that sufficiently encompassed in "good faith"/"ordinary meaning"  
Teleological approach (interpretation always consistent with object and purpose) possibly beneficial in the context of international organisations, but not always the case

### **Language Differences**

Where a treaty is authenticated in 2 or more languages, each is equally authoritative (unless otherwise provided) (Art 33(1)) and are presumed to have the same meaning: Art 33(3)

Where difference in meaning between authentic texts (that cannot be resolved by Arts 31/32) "the meaning that best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted": Art 33(4)

Art 33 probably reflects position under customary law: Golder, cf. Henkin

### **Treaties and Third States**

A treaty does not create obligations or rights for third States without their consent: Art 34

#### **Amendment of Treaties**

Consent of State is always paramount, however parties can agree differently: see Art 40(1)

Parties are entitled to be involved in negotiation/conclusion of any amendment and are entitled to become a party to the treaty as amended: Art 40(2),(3)

Amendment does not bind any State that does not become party to the amendment: Art 40(4)

Any State that subsequently becomes a party to the treaty shall, unless otherwise intended, become a party to the amended treaty (but will be deemed a party to the unamended treaty vis-à-vis those States not party to the amendment): Art 40(5)

Two or more parties to a treaty can modify it as between themselves if:

The treaty allows for the modification: Art 41(1)(a); or

The modification is not prohibited and

(a) Does not affect enjoyment of other parties of rights/obligations

(b) Does not relate to a provision, derogation from which is incompatible with object/purpose of treaty as a whole: Art 41(1)(b)

### **Avoidance of Treaty Obligations**

VCLT allow for avoidance in different manners, depending on the particular issue at hand (e.g. treaty void; State election or entitlement to terminate or suspend)

Treaties can only be impeached under Part V of VCLT (i.e. it is a code): Art 42(1)

#### **Grounds for avoiding a treaty:**

Where the State's consent has been expressed 'manifestly' in violation of an internal law of 'fundamental importance' regarding competence to conclude treaties: Art 46 (see above)

Representative in breach of restriction placed on the representative's authority where the other parties had been notified of the restriction (i.e. representative acting ultra vires): Art 47 (see above)

Error as to a 'fact or situation' assumed by the State to exist and which formed an 'essential basis' of its consent - grounds for invalidating consent (unless the party contributed to the error or was put on notice; also excludes error as to the wording of the treaty): Art 48

Fraudulent conduct - grounds for invalidating consent: Art 49

Corruption of a State's representative - grounds for invalidating consent: Art 50

Coercion of a State's representative by acts or threats - treaty without legal effect (Art 51) or coercion by the threat or use of force in violation of principles of UN Charter - treaty void: Art 52

For example Czechoslovakia signing a treaty with Nazi Germany to establish a German

protectorate over Bohemia and Moravia (also consider NATO's ultimatum to Yugoslavia in 1999)

As to treaties made in the aftermath of WWII see Art 107 Charter

VCLT is without prejudice to any obligations that arise for an aggressor State in consequence of measures taken against it pursuant to the UN Charter: Art 75

Soviet doctrine of 'unequal' treaties being unenforceable is not incorporated into Art 52

**A provision that offends a rule of ius cogens:**

The entire treaty (see Art 44(5)) is void if, at time of conclusion, offends a peremptory norm of international law (defined as ~ a norm accepted and recognised as one from which no derogation is permitted): Art 53

If a new peremptory norm emerges, all existing treaties that conflict with the norm are void and terminate: Art 64

By consent: Art 54

When a treaty contains no provision regarding termination and does not provide for denunciation or withdrawal, then it is not subject to denunciation or withdrawal unless:

(a) Parties intended it

(b) Can be implied by nature of treaty [e.g. Alliance treaty between Indonesia and Australia denounced 1999 during crisis in East Timor]: Art 56(1)

Must give notice of at least 12 months when acting under Art 56(1): Art 56(2)

HR Committee of the view that State parties cannot denounce the ICCPR: General Comment 26

**'Material breach' of the treaty:** Art 60

Defined as repudiation not sanctioned by VCLT or violation of a provision "essential to the accomplishment of the object or purpose of the treaty": Art 60(3)

**When the treaty is a multilateral treaty:**

(a) All parties can unanimously agree to suspend (in whole or part) or terminate in relation to the defaulting State or as between all of parties

(b) Specially affected parties can suspend operation of treaty (in whole or part) as between themselves and the defaulting State

(c) Any other party (other than defaulting) can suspend operation of treaty (in whole or part) if treaty of such a character that a breach of the relevant provision "radically changes the positions of every party with respect to further performance" [e.g. a disarmament treaty]: Art 60(2)

**Treaty itself can regulate breaches:** Art 60(4)

Arts 60(1)-(3) do not apply to treaties of a humanitarian character: Art 60(5)

Art 60 is, in many respects, codification of custom: Legal Consequences for States of the Continued Presence of South Africa in Namibia Notwithstanding Security Council Resolution 276 (ICJ, 1971); also see Gabčíkovo Nagymaros Project Decisions (ICJ, ~1998) - Art 60-62 in many respects codification

Impossibility resulting from "disappearance or destruction of an object indispensable for the execution of the treaty": Art 61

Can terminate or withdraw if permanent; can suspend if temporary: Art 61(1)

Cannot invoke if impossibility caused by breach of obligation under the treaty or under international law: Art 61(2)

Fundamental change in circumstances: Art 62

Grounds for termination/withdrawal/suspension if original conditions were essential basis of consent and the change radically transformed the extent of the obligations: Art 62(1),(3)

Cannot be relied on with respect to boundary treaties, or if change precipitated by a breach of an obligation under the treaty or under international law: Art 62(2)

Art 62 in many respects can be considered codification of custom: Fisheries Jurisdiction Case (ICJ, 1974)

Legal Consequences for States of the Continued Presence of South Africa in Namibia Notwithstanding Security Council Resolution 276 (ICJ, 1971)

Held: With regards to the rules laid down by the VCLT concerning termination and Art 60, only a material breach of a treaty justifies termination.... The silence of a treaty as to

the existence of such a right cannot be interpreted as implying the exclusion of a right which has its source outside of the treaty, in general I.L., and is dependent on the occurrence of circumstances which are not normally envisaged when a treaty is concluded - the court treated Art 60 as stating CIL "in many [unidentified] respects"

Fisheries Jurisdiction Case (ICJ, 1974)

Held: the change must have increased the burden of obligation to be executed to the extent of rendering the performance something essentially different from that originally undertaken.

### **Consequences of Invalidity, Termination or Suspension**

See Arts 69-72

A treaty that is invalid is void: Art 69(1)

Where acts have been performed each party "may require any other party to establish as far as possible in their mutual relations the position that would have existed if the acts had not been performed" but acts in good faith are not rendered unlawful only by reason of the invalidity: Art 69(2) (doesn't apply to fraud, corruption, coercion etc: Art 69(3))

Termination releases the parties from any obligation further to perform but does not affect the legal situation prior to the termination: Art 70(1)

Customary law continues to operate: Art 43

As to the separability of treaty provisions, see Art 44

State loses the right to invoke a ground of invalidation, termination, withdrawal or suspension if it agrees the treaty is valid or acquiesces in its validity or its maintenance in force or operation: Art 45

### **Mechanisms for Settlement of Disputes**

1. Compulsory system before the ICJ concerning alleged breaches of rules of ius cogens: Art 66(a)

2. Quasi-compulsory system of arbitration for all other disputes arising out of Part V (Arts 42-72) (however determinations are not binding): Art 66(b)

### **Registration and Publication of Treaties**

Every treaty to be registered with the Secretariat and published by it (otherwise cannot use the agreement before any organ of the UN): Art 102 Charter; also see Art 80 VCLT  
Underlying principle is that secret alliances do not contribute to international peace and security

## **LAW OF THE SEA**

General treaty for law of the sea is UNCLOS.

The sea consists of several zones:

### **a) TERRITORIAL SEA**

It is an area of the sea that is near to coast.

**Art 2 UNCLOS:** Coastal state can exercise sovereignty over its territorial sea.

**Art 3:** The limit of territorial sea extends up to *12 nautical miles* measured from **baselines**.

What is baseline?

It refers to the starting place to calculate the breadth of territorial waters and other zones.

There are 2 types of baselines:

a) Normal baseline [**Art 5**]

b) Straight baseline [Art 7]

Does the coastal State have rights over its territorial sea?

Yes. This was agreed by **Art 2** and **Nicaragua case**. The rights of coastal State include:

1. Right to fish & exploit resources from seabed
2. Right to enjoy air space above its territorial waters
3. Right to transport goods and passengers
4. Right to conduct marine research

Although coastal State have rights, it has to give right of innocent passage through its territorial sea.

**Art 17:** Ships of all states shall enjoy right of *innocent passage*.

*Innocent passage* means navigation through the territorial area for the purpose of proceeding to other internal waters.

**Art 19:** passage is **not innocent** if it causes prejudice to peace or security of coastal state.

When foreign ships pass territorial waters, it must abide by the coastal state's municipal law. If municipal law is breached, it shall be tried under that municipal law.

**PP v Narogne:** Thai fishermen were on a vessel which was then at sea about 3 miles off the Malaysian coast. There were fishing equipment on board the vessel. They were arrested by Malaysian Naval Authority for breaching its national laws. It was held that the passage by fishermen was not innocent passage.

The coastal state has civil jurisdiction [**Art 28**] and criminal jurisdiction [**Art 27**] over ships in passage of its territorial waters.

However, warships, naval vessels and government operated for non-commercial purposes are immune from any interference from coastal state [**Art 32**]. If it causes damage to coastal state during its passage, the flag State (passer-by ship) shall bear international responsibility.

**b) CONTIGUOUS ZONE**

It is a sea zone which does not extend 24 nautical miles.

A coastal state may exercise the control over its contiguous zone. Refer **Art 33**

**c) EXCLUSIVE ECONOMIC ZONE (EEZ)**

It is the ocean area beyond territorial sea and out to 200 nautical miles. EEZ is also defined in **Art 55**.

The coastal state can exercise its rights over its EEZ. Such rights are laid down in **Art 56, 60, 61 and 62**.

[**Art 73**]: Coastal state may enforce jurisdiction over foreign ships including arresting and bringing them to national courts to ensure compliance with its national laws.

Rights and Duties of other states in the EEZ of a Coastal state are stated under **Art 58, 88 - 115, 246 of UNCLOS**

[**Art 246**]: Scientific research cannot be carried out by other states in a coastal State's EEZ. That right is reserved for that coastal state.

**d) CONTINENTAL SHELF**



Refer to **Art 76-85 UNCLOS**

### **e) THE HIGH SEAS**

**Art 86** defines high seas as all parts of sea except internal waters, territorial sea and EEZ.

It is open to all States and free for enjoyment of all. Refer to **Art 87-97 UNCLOS** for rights of States in the high seas.

According to **Lotus case**, vessels on high seas are subject to no authority except that of the flag state.

The crime of piracy is prohibited and now recognized as international crime. Refer to **Art 100-110 UNCLOS** for details.

The right of hot pursuit [Art 111 UNCLOS]

This right is designed to prevent a foreign ship that has violated laws of a coastal state to avoid arrest by escaping to high seas.

Hot pursuit can start in any sea zones in that coastal state & can extend to high seas.

#### **Are there limitations for this right?**

Yes. There are 2 limitations:

1. Hot pursuit is limited once the foreign ship entered territorial waters of a 3rd coastal state / other states.
2. Hot pursuit should not cause sinking of ships. According to **Art 293 UNCLOS**, use of force should be avoided. But if need to use force, it should be reasonable **only to effect boarding, searching seizing and bringing the suspected ship into port.**

In **I'm Alone case**, a British ship named I'm Alone smuggled prohibited liquor into US. When I'm Alone was chased, it fled to high seas. US pursued and fired at it. The I'm Alone ship sunk and caused loss of 1 crew. It was held that US coast guard *may use reasonable force but intentional sinking is not allowed.*

**Red Crusader case** also held that direct firing of solid shot to the Red crusader *exceeded the legitimate use of armed force.*

**Art 111 (4) UNCLOS**: jurisdiction of a coastal state may be extended. if boats from a mother ship acted illegally within a zone while mother ship is lying outside the zone, coastal state may exercise jurisdiction on that mother ship.

### **Customary International Law**

1. General and consistent State practice (where inconsistent conduct treated as a breach, and not a new rule): Nicaragua Merits
  - Generality required - not absolute "rigorous conformity": 186 Nicaragua
  - No mathematical formula - almost always need at least 2/3 of States, but depends
  - Practice of States specially affected can be particularly significant: North Sea Continental Shelf Cases
  - Usually look to long history of State practice - however a rule can develop quickly

Asylum Case (ICJ, 1950)

Facts: After an unsuccessful rebellion in Peru, Haya de la Torre had a warrant out against him. Was granted asylum by Columbia but Peru refused a safe conduct out of the country.

Held:

- Must prove that the rule invoked by it is in accordance with a constant and uniform

usage practiced by the States in question, and that this usage is the expression of a right appertaining to the State granting asylum and a duty incumbent on the territorial state...

North Sea Continental Shelf Cases (ICJ, 1969)

Facts:

- Dispute between Germany/Denmark and Germany/Netherlands as to division of North Sea Continental Shelf
- Denmark and Netherlands wanted "equidistance" principle to apply - argued was customary rule because referred to in Art 6(2) 1958 Geneva Convention on Continental Shelf ("determined by agreement...[or failing that, unless another boundary is justified by] principle of equidistance")
- Germany only a signatory, not a party like the other countries

Held:

- ICJ recognised that Art 6(2) could have:
  - (a) codified previous customary position - rejected
  - (b) crystallised customary law - rejected
  - (c) caused subsequent development of a new customary rule
- Because only 10 years had passed would have to show "both extensive and virtually uniform" State practice that showed a "general recognition that a rule of law or legal obligation is involved" (inverse relation between length of time and consistency of practice required: Prof. Higgins)
- Equidistance not a customary rule
- Important issues raised:
  - Art 6(2) not of a "fundamental norm-creating character" - only applied in absence of agreement and where no special circumstances; States could make reservations
  - Practice of States specially affected of particular relevance; and whether "representative"

Doubted that practice of treaty parties relevant to investigation of whether a rule is customary: c.f. Judge Jennings in Nicaragua (Merits) Decision (not as important when treaty has near-universal adherence)

2. Sense of legal obligation (opinio juris)

- Majority in North Sea, following Lotus, required direct proof of opinio juris; minority said it could be inferred

North Sea Continental Shelf Cases (ICJ, 1969)

Held:

- Elements necessary for customary law:
  - The provision be of a fundamentally norm-creating character - forming the basis of a general rule.
  - A very widespread and representative participation in the convention might suffice of itself.

A short period of time is not necessary - as long as it is both extensive and uniform in the sense and should have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved.

- Acts must be a settled practice, but the states must also believe that the practice is an obligation!!!! - opinio juris.

Persistent Objector:

- State can exempt itself from customary rule by being a "persistent objector"
- Must communicate at the time the rule comes into existence

Anglo-Norwegian Fisheries Case (ICJ,1951)

Facts:

- UK dissatisfied with method used by Norway to delimit the boundaries of its territorial sea - base line drawn as a straight line between outermost points of coast
- UK conceded that could draw a base line across a bay less than 10 miles wide
- UK argued that for bays wider than 10 miles, base line would have to follow shape of bay

Held:

- 10 mile bay closing rule was not customary; even if it was "...the 10 mile rule would

appear to be inapplicable as against Norway as she has always opposed any attempt to apply it to the Norwegian coast"

- Debatable whether rule applies to creation of *ius cogens*
- New States cannot object to standing customary rules

Regional and Local Custom:

- Asylum Case (ICJ, 1950) (Peruvian coup leader sought refuge in Colombian Embassy) - Court recognised possibility of regional custom, but Colombia had not demonstrated that such custom existed in relation to asylum - required "constant and uniform usage" - in any case, Peru had been a persistent objector
- Rights of Passage Case (Portugal v India) (ICJ, 1960) (Right of Portugal to access enclaves in India; authorisation had previously been required to move troops or ammunition; India denied a request in 1954 following civil unrest in enclave) - there is "no reason why long continued practice between two States accepted by them as regulating their relations should not form the basis of mutual rights and obligations between the two States" (however, India not in breach)

Unilateral Assumption of Obligations:

- Nuclear Test Cases (ICJ, 1974) (Australia and New Zealand challenged France's atmospheric nuclear tests near Mururoa Atoll) - actions dismissed because France had made binding unilateral undertakings not to conduct the tests in the future (significantly the statements by the French President); Court required that statements were accompanied by intention to create legal obligations

Conceptual Problems with Customary Law:

- Collecting evidence of State practice (e.g. US lawyers generally do not regard statements, require positive action: D'Amato, 1971)
- ICJ believes words can constitute State practice: Nicaragua (Merits) Decision (implicit that State can be drawn from GA resolutions); Nuclear Weapons Advisory Opinion
- Proof of *opinio juris* problematic
- Some GA resolutions drafted as "de lege lata" ("the law as it is") (as opposed to "de lege ferenda" ("the law as it ought to be")) - can be evidence of State practice and *opinio juris*

Nuclear Weapons Advisory Opinion (ICJ, 1996)

Facts:

- GA submitted the question "Is the threat or use of nuclear weapons in any circumstances permitted under international law?"

Held:

- [(1) Use of nuclear weapons would be contrary to international humanitarian law (2) Could not conclude definitely whether threat or use would be unlawful in extreme circumstance of self defence if survival of State was at risk]
- Court had regard to GA resolutions when deciding if use of nuclear weapons was contrary to customary international law because "even if they are not binding they have normative value. They can in certain circumstances provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*." - look at content and conditions of adoption
- Some resolutions proffered that nuclear weapons "should be prohibited"

- Nicaragua (Merits) Case - Justifications for a breach of a rule that appeal to the exceptions of the rule go to support the rule rather than weaken it

General Principles of Law

- Very positive approach - principles need to be recognised
- Requires some degree of commonality be identified amongst the different legal systems (however tribunals rarely look beyond common law, Roman law and Germanic legal systems)
- Refers to "principles" not rules - requires determination of the general underlying principles
- Often used for procedural matters rather than substantive causes of action; some procedural uses include:
- Breach of Treaty term implied obligation to pay reparation: *Chorzów Factory*

(PCIJ, 1928)

- Circumstantial evidence admissible in the ICJ: Corfu Channel Case (ICJ, 1949)
- Some substantive uses include:
  - Estoppel or acquiescence: Temple Case (ICJ, 1962) (Thailand, then Siam, had accepted a map that depicted an ancient temple not to be within its territory, but then later disputed Cambodia's claim for the temple)
  - Principles of equity under Art 38 could be considered through the freedom of the court as part of I.L - because of ex aequo et bono (what is fair and right) "one who seeks equity, must do equity": River Meuse Case (PCIJ, 1937) (Judge Hudson applied the principle to an alleged breach of a treaty - Netherlands was found to be guilty of same conduct (canal building altering flow of River Meuse) that it was accusing Belgium of committing)
  - Argued that general principles will avoid "non liquet" (gap in the law), but see Nuclear Weapons Advisory Opinion (majority unable to rule on point of self defence)
  - Argued that general principles can be found in an international context, particularly in relation to human rights: Profs. Alston and Simmaa

**Concerns about Equity:**

- Concern that its use will undermine the authority of the Court
- Judge Gros in Gulf of Maine Case (ICJ, 1984) "...equity left, without any objective elements of control, to the wisdom of the reminds us that equity was once measured by 'the Chancellor's foot'; I doubt that international justice can long survive an equity measured by the judge's eye."
- Source for applying equity in certain cases is often confused; e.g. in North Sea Continental Shelf Cases majority concluded that international law required the 3 States to reach an agreement in accordance with equitable principles

**Subsidiary Sources Art 38(1)(d)**

- Decisions of the ICJ only bind the parties (Art 59 Statute) and there is no concept of binding precedent (although past judgments highly persuasive)
- Only a subsidiary source
- Work of the ILC can fall under this category - e.g. ILC Articles on State Responsibility referred to in Gabčíkovo Nagymaros Project Case (ICJ, ~1998) (admittedly however both parties agreed to the reference)

**Soft Law**

- Instruments that are not strictly binding
- Examples:
  - "Gleneagles Agreement on sporting contacts with South Africa" between Commonwealth Governments as a reaction to apartheid - had no formal legal consequences
  - Helsinki Final Act (1975) between West and Soviet Bloc as to cooperation in relation to certain security, economic and social issues
  - Instruments can contain provisions that are merely aspiration or "hortatory" - this can mean that they are non-justiciable or non-self-executing
  - UDHR initially a soft law instrument in 1948 - there is now an argument that some of the human rights have achieved customary status, or that they are an authoritative interpretation of the Arts 55/56 of the UN Charter

**International Law and Municipal law**

**Monism v Dualism**

the distinction between the monist and dualist approaches to the reception of I.L into domestic law.

Monist - one system includes both I.L and M.L, incorporation theory, that is, I.L is automatically domestic law.

Dualist - I.L and M.L are two different laws and are never in conflict, transformation theory, something has to be done for it to become domestic law.

In OZ, we have the separation of powers approach, we can't use incorporation approach because the executive would be using the power of the legislature. Teoh (HC): even though the treaty had not been implemented it had been ratified which gave rise to

"legitimate expectation"

Harmonisation: look at it on a case-by-case basis. In some circumstances I.L should be incorporated or ratified eg: Human Rights, while others to stop uncertainty. I.L should have to be implemented to be binding.

National Law with International Sphere

Primacy of I.L in international tribunals

State cannot plead its national law as justification of violation of I.L

State cannot invoke domestic law to breach treaty

Art 27 - VCLT

But there is use of domestic law concepts in I.L including:

Art 38 (1)(c) ICJ Statute

Nationality of a person: diplomatic protection - only for their own nationals. Nottebohm case

Nottebohm case (ICJ, 19xx)

Facts: Liechtenstein instituted proceedings against Guatemala, seeking a declaration by the Court that in 1943 Guatemala had unlawfully expelled, and seized the property of, Mr Nottebohm, who had been naturalised under the laws of Liechtenstein. Nottebohm was born in Germany in 1881 and had German nationality until his naturalisation by Liechtenstein. In 1905 he went to Guatemala, where he resided and conducted his business activities until 1943, although he occasionally went to Germany, and a few times to Liechtenstein, on holiday. He visited Liechtenstein in October 1939, one month after the outbreak of the Second World War, and applied there for naturalisation. Guatemala's main objection was that Liechtenstein's claim was inadmissible, as Liechtenstein could not extend diplomatic protection to Nottebohm in a claim against Guatemala. The Court upheld Guatemala's objection.

Held:

State cannot claim that the rules it has thus laid down are entitled to recognition by another State unless it has acted in conformity with this general aim of making the legal bond of nationality accord with the individual's genuine connection with the State which assumes the defence of its citizens by means of protection as against other States. According to the practice of States, to arbitral and judicial decisions and to the opinions of writers, nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties.

Exchange of Greek and Turkish Populations Case (PCIJ, 1925)

With regards to art 18 of the Treaty of Lausanne 1923

Held: this clause... merely lays stress on a principle which is self-evident according to which a state which has contracted valid international obligations is bound to make in its legislation such modifications as may be necessary to ensure the fulfilment of the obligations undertaken - Advisory Opinion

Brazilian Loans Case (PCIJ, 1929)

Held:

Court is bound to apply municipal law when circumstances so require

Court is required to obtain this knowledge from evidence furnished by the parties or any research the court thinks fit to undertake - interprets in conformity to the law. It will then apply the law as it would be in that country.

### **International Law in Municipal Law**

R v Keyn (CCC, 1876)

Cockburn CJ: to be binding, the law must have received the assent of the nations who are to be bound by it. This assent may be express, as by treaty or the acknowledged concurrence of governments, or may be implied from established usage. ... the assent is

doubtless sufficient to give the power of parliament legislation in a matter otherwise within the sphere of international law...such legislation, whether consistent with the general law of nations or not, would be binding on the tribunals of this country - leaving the question of its consistency with international law to be determined between the governments of the respective nations p0 can of course admit of no doubt.

Thai - Europe v Pakistan (WLR, 1975)

Lord Scarman: I think that it is important to realise that a rule of international law, once incorporated into our law by decisions of a competent court, is not an inference of fact but a rule of law. It therefore becomes part of our municipal law and the doctrine of stare decisis applies as much as to that as to a rule of law with a strictly municipal provenance.

Trendex Case (QB, 1977)

Lord Shaw: What is imputable is the principle of English law that the law of nations must be applied in the courts of England. The rule of stare decisis operates to preclude a court from overriding a decision which binds it in regard to a particular rule of (international) law, it does not prevent a court from applying a rule which did not exist when the earlier decision was made if the new rule has had the effect in international law of extinguishing the old rule...

### **Title to Territory -Mode of Acquisition**

Conquest: previously the use of force could be used to acquire land. Since 1945 and the banning of the use of force, has inturn made 'illegal' the use of force for territory. The treaty of Paris also bans war. Sometimes the use of force for self-defence to take over parts of territory as a part of its self-defence, however States (international community) do not support such claims. Eg: Isreal and "occupied territory" - does not allow you to acquire territory.

Prescription: someone has title already -> someone else comes along and uses effective control over the land and creates a stronger title - Palmers Case

Occupation: acquire something that was terra nullius, discovery (title not strong) have to do something else to show some form of effective control.

Cession: "contractual" passing of the title of territory. That is one State agrees to pass title to territory to another State eg: Alaska from Russia to USA. Palmers Case, nemo dat rule applies, done by treaty - VCLT applies.

Accretion/ Avulsion: Accretion - a change of the land over time will cause a change to the boundary. Avulsion - natural change that is almost instant eg: volcano, this does not cause for acquisition of territory.

Island Palmers case (1928)

Facts: Spain discovered; got an inchoate title of the land 1898, US found out the Dutch were there running the joint. Court looked at the critical date 1898, applied nemo dat rule.

Held: because USA had the weaker title from Spain, the court found the Netherlands had exercised sovereignty (effective control) which is a stronger title than the USA title.

Clipperton Island Case (1932)

Facts: France found an island but didn't land, however they publicly published and stated that France had sovereignty. Mexico came along and said this is ours.

Held: The court found that France had a stronger title. They had done more by publicly proclaiming the land as theirs.

## State Jurisdiction

The right of a State to control activities of person/corporations etc.

What is the reach and enforcement capabilities of a State's domestic law?

Exclusive territorial jurisdiction to enforce.

Power over all persons, property and events within a State's territory.

Flows from existence of a State as an individual 'legal' person at I.L

Exclusive power can be waived (eg: diplomatic immunity)

BUT: States can exercise jurisdiction in its own territory for acts which take place in another State's territory.

No matter where event occurs

Irrespective of nationality of object of jurisdiction

But can it be enforced?

### Territoriality Principle

States have jurisdiction within their territory

Why:

Effects of the crime

Evidence

If no territoriality then confusion about what law applies

Witnesses

Deter criminals

2 types of territorial Jurisdiction: Lotus Case (PCIJ, 1927)

1. the moment of commission of the offence is in a State

2. if on constituent element and its effects is in a State.

There is a subjective element where part of it, one element is overseas, but the completion of the offence is in the territory that has jurisdiction.

### Nationality Principle

jurisdiction based on the nationality of the accused.

Who is a national?:

Determined by the domestic laws of a country

Individual - Nottenbohm Case

Company - Barcelona Traction Case

Barcelona Traction Case (ICJ, 1970)

Facts: Company was established under Canadian law in connection with the development of electricity supplies in Spain. The company was bankrupted. The shares were owned by Belgium nationals.

Held:

When a State admits into its territory foreign investments or foreign nationals, whether natural or juristic persons, it is bound to extend to them the protection of the law and assumes obligations concerning the treatment to be afforded them.

Need to prove: 1. that the defendant State had broken an obligation towards the national State in respect of its nationals. And 2. that only the party to whom an international obligation is due can bring a claim in respect of its breach.

It is clear from what has been said above that Barcelona Traction was never reduced to a position of impotence such that it could not have approached its national State, Canada, to ask for its diplomatic protection, and that, as far as appeared to the court, there was nothing to prevent Canada from continuing to grant its diplomatic protection to Barcelona Traction if it had considered that it should do so.

### Passive Personality Principle

Jurisdiction based on the nationality of the victim.

### Universal Jurisdiction

Jurisdiction is claimed on the basis of the nature of the offence.

Right to assert jurisdiction in domestic courts as long as the state has the offence in domestic law

As long as the state has custody and the crime was one at international law then there is jurisdiction.

### **Flag State**

Essentially customary law.

Lotus Case - flag state jurisdiction, insufficient opinion juris.

### **Extradition and Jurisdiction**

Breaches of I.L are separate from whether a state has jurisdiction - still a grey area of law.

Kidnapping might not affect the jurisdiction but the court may find not to use its' discretion to use jurisdiction in trying the person.

## **Immunity from Jurisdiction**

Immunity does not mean you don't have jurisdiction, what it does mean is that you cannot enforce that jurisdiction upon certain people.

1. one state has certain immunities within the courts of another state
2. restrictions on the enforceability of actual judgements
3. diplomatic immunity.

### **State Immunity**

immunity from jurisdiction/immunity from execution

arises from:

nature/entity of parties

subject matter involved

General rationale

'equality, independence and dignity' of states

Common law

Doctrine of absolute immunity

Doctrine of restrictive immunity

Usually if the State acts like a state immunity applies. Subject to the acts of the State:

Acts jure imperii - acts are of a sovereign nature

Acts jure gestionis - acts are of a non sovereign nature eg: commercial.

Look at the 'nature' of the Acts.

### **Nation Legislation**

Generally apply restrictive immunity

Burden of proof on plaintiff (when immunity is argued)

Commercial transactions

Use of a separate entity (apart of the State)

### **Immunity from Execution**

What type of assets can be used for execution

Where?

State property

Commercial property

### **Diplomatic Immunity**

International law

VC on Diplomatic Relations 1961

VC on Cons Relations 1936

Domestic law

Diplomatic Privilege and immunity Act 1967 (Cth)

### **Immunities for Heads of State**

Rationale

- head of state is the State

- protect the dignity of the state

International Crimes



## **Legal Regulation of the Use of Force by States**

The League Covenant in the year 1919, standing against the customary law, appeared to provide qualifications on the right to resort to war which were exceptional. The general presumption was that war was still a right of sovereign states although signatories to the Covenant were bound by that instrument to submit to certain procedures of peaceful settlement. Resort to war in violation of the Covenant was illegal but the content of the illegality was prima facie the violation of a treaty obligation. Moreover, the Covenant was a legal instrument with a special character: it was concerned with the machinery of and procedures for peaceful settlement of disputes.

### **Use of Force**

General Treaty for the Renunciation of War 1928

Art 1 parties condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with one another.

Art 2 settlement or solution of all disputes of any nature or of any origin, which may arise, shall never be sought except by pacific means.

### **UN Charter**

Art 2(4) All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state or in any other manner inconsistent with the purpose of the UN.

Although "members" - customary rule applying to all states Nicaragua (Merits) case (ICJ, 1986)

Prohibits armed force, not political pressure

Nicaragua (merits) Case (ICJ, 1986)

Held: the concept of an armed attack includes the despatch by one State of armed bands into the territory of another State, the supply of arms and other support to such bands cannot be equated with armed attack. Nevertheless, such activities may well constitute a breach of the principle of the non-use of force and intervention in the internal affairs of a State, that is, a form of conduct which is certainly wrongful, but is of lesser gravity than an armed attack.

Assisting, with supply of arms and training is direct violation of CIL, but funding is not.

### **Intervention**

Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty 1965

No state has a right to intervene directly or indirectly, in the internal or external affairs of any other state. Art 1

No State may use or encourage the use of economic, political or any other type of measures to coerce another state. Art 2

The use of force to deprive national identity is a violation of inalienable rights and of the principle of non-intervention. Art 3

Every state has an inalienable right to choose its political, economic and cultural systems without interference. Art 5

### **Right to Self-defence**

The Caroline Case

Anticipatory self-defence: must be shown

that admonition or remonstrance to the person was impracticable, or would have been unavailing

that day-light could not be waited for

there could be no attempt at discrimination between the innocent and guilty

it would not have been enough to seize and detain the vessel

but there was necessity, present and inevitable, for attacking in the darkness of the

night.

**Proportionality:**

Legitimate defence implies the adoption of measures proportionate to the seriousness of the attack and justified by the seriousness of the danger - League of Nations 1927

Art 51 UN Charter - right to self-defence

**Armed Attack**

Not every such use of force is "armed force" and does not include "assistance to rebels in the form of provision of weapons or logistical or other support" - Nicaragua (Merits) Case

**Collective self-defence**

Before collective self-defence is allowed, one State must declare itself a victim of an armed attack and ask for assistance from another State, but the second state does not need a threat to its national security for it to act - Nicaragua (Merits) Case

Security Council

Self-defence is temporary - until the security council acts.

Collective Mechanisms of the UN

Security council

Under chapter 7 of the UN Charter - actual threat

SC may act for maintaining international peace and security Art 34

Recommends appropriate procedures or methods Art 36 in Art 33

Make own recommendations for the settlement of disputes in accordance with Arts 37 , 38

use of Art 43 forces

measures not involving the use of force Art 41

provisional measures

measure to maintain/restore peace and security (no IL breach needed)

General Assembly

Secondary responsibility of peace and security

Regional organisations (eg NATO)

Peace keeping forces