

SOURCES OF INTERNATIONAL LAW

REMEMBER: There are multiple facets and interactions of customary international law – try to **analogize** with these:

- Constituent characteristics:
 - o State Practice (*Serdar Mohammed*, *Continental Shelf Cases*, *ILC Conclusions*)
 - o *Opinio Juris* (consideration of UN SC and GA resolutions)
- Customary international law and non-international humanitarian law (*Serdar Mohammed*)
- Customary international law and treaty law (*Continental Shelf Cases*, *USA v Nicaragua*)
- Customary international law and regional customary law (*Asylum Case*)
- Customary international law and general assembly resolutions (*Nicaragua v USA*, *Legality of the Use of Nuclear Weapons Advisory Opinion*)
- Customary international law and persistent objector (*Anglo-Norwegian Fisheries Case*)

ESSAY: Are any of the topics below ripe for an essay topic? The USA Comments to the Conclusions reached by the ILC re customary international law? Third-World Critiques of Customary International Law (TWAIL)? Persistent objector principle?

GENERAL PRINCIPLES

- **SET-UP:** As per **Article 38(1)** of the *International Court of Justice Statute (1945)*, there are **four sources** of international law:
 - (a) International conventions, whether general or particular, establishing rules expressly recognized by the contesting states (**treaties**);
 - (b) International custom, as evidence of a general practice accepted as law (**customary international law**);
 - (c) The general principles of law recognized by civilized nations (**e.g. Maxims of Equity and jus cogens**)
 - (d) Subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law (**academia and judgments**)
- **Note!** The ICJ Statute provides an accurate representation of the sources of international law as it is the principal judicial organ of the United Nations. However, there are other sources of international law (e.g. the Security Council of the UN making binding resolutions) that are not expressly listed in the article. It is important to keep this in mind.

TREATIES

- Recognized per **Article 38(1)(a)** of the *ICJ Statute*.
- Treaties are now the **most important** source of international law. They offer States a deliberate method by which to create binding international law.
 - o There is some debate, however, as to whether treaties are a source of law or a source of obligations.
 - o **Jus Cogens** can be considered to be a source of law that takes priority over treaties (*Nicaragua v USA ICJ 1986*)
- The *Vienna Convention on the Law of Treaties (1969)* contains provisions that deal with the creation and operation of treaties:
 - o **Article 6:** Every State possesses capacity to conclude treaties.
 - o **Article 26:** Every treaty in force is binding upon the parties to it and must be performed by them in good faith.
 - o **Article 34:** A treaty does not create either obligations or rights for a third state without its consent.

CUSTOMARY INTERNATIONAL LAW

- Recognized per **Article 38(1)(b)** of the *ICJ Statute*.
- Customary international law comprises of **two elements** (*North Sea Continental Shelf Cases 1969*); more recently affirmed in *International Law Commission UN GA Seventieth Session (2018)*.
 1. **State Practice**
 - State practice means any **act** or **statement** (and to an extent **omission**) by a State.
 - It includes physical acts, claims declarations *in abstracto* (e.g. General Assembly Resolutions), national laws, national judgments, and omissions.
 - Comparable contemporary examples can also be relevant (*Serdar Mohammed*) – (Kosovo, Somalia, Bosnia looked at in establishing whether power to detain was permissible in non-international armed conflict).
 - It can, in theory, also be created by the practice of international organizations by way of individual practice in those organizations.
 - See the geographical breadth, longevity, and widespread participation (i.e. 'general practice') – *ILC Conclusion 8* and *Continental Shelf Cases*.
 2. **Opinio Juris**
 - *Opinio juris* essentially means that states must act in compliance with the norm not merely out of convenience, habit, coincidence, or political expediency, but rather out of a sense of **legal obligation**.
 - In this way, state practice coupled with a sense of overarching obligation can be defined as *opinio juris*.
 - **Conclusion 10** of the *ILC (below)* states that the following may be considered **evidence** of *opinio juris*:
 - Public statements made on behalf of States
 - Official publications
 - Government legal opinions
 - Diplomatic correspondence

- Decisions of national courts
- Treaty provisions
- Conduct in connection with resolutions adopted by an IO or at an intergovernmental conference
 - The extent to which binding **SC Resolutions** can be considered reflective of *opinio juris* is contested. In Serdar Mohammed the UK Court of Appeal the Court shuns away from referring to SC resolutions as they would favour UK intervention.
 - This is particularly so as ‘decisions’ of the security council are **formally binding**.
 - Ditto for **GA Resolutions** – the Court in Nicaragua v USA acknowledges that resolutions can be invoked as a method of deducing *opinio juris*. See also Legality of the Threat or Use of Nuclear Weapons.
 - Note, though, C.f. Judge Shwebel takes a dissenting view (Nuclear Weapons).
 - Remember that most GA Resolutions are **not formally binding** (except budgetary questions, for example, per article 17 of the UNC). Therefore, Resolutions can be considered to be **evidence** to establish law.
 - See cases below.
- There are two further categories of *opinio juris* (Legality of the use of Nuclear Weapons [1996] ICJ (Advisory Opinion))
 - **Lex Lata**: settled principles of customary international law
 - **Lex Ferenda**: principles of legal custom that have not yet become customary international law per se

DEFINITIONAL NOTE! The **International Law Commission (ILC)** has established a series of **conclusions** that were put forward to the UN General Assembly concerning state practice and customary international law in 2018. The International Law Commission is a body of experts established by the UN GA in 1947, which assists the development and codification of international law. The ILC holds annual sessions in Geneva.

- The relevant document: International Law Commission – Identification of Customary International Law (Second Reading) 2018:
 - **Conclusion 4**: “The requirement of a general practice...refers primarily to the practice of States that contributes to the formation, or expression, of rules of customary international law”.
 - **Conclusion 8**: “The relevant practice must be **general**, meaning that it must be sufficiently **widespread** and **representative**, as well as consistent”. “Provided that the practice is general, no particular duration is required”.
 - This is reflective of the principles expressed in North Sea Continental Shelf Cases.
 - **Conclusion 10**:
 - (1) Evidence of acceptance as law (*opinio juris*) may take a **wide range** of forms.
 - (2) Forms of evidence of acceptance as law (*opinio juris*) include but are not limited to: public statements made on behalf of States; official publications; government legal opinions; diplomatic correspondence; decisions of national courts; treaty provisions; and conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference.
 - (3) **Failure to react** over time to a practice may serve as evidence of acceptance as law (*opinio juris*), provided that States were in a position to react and the circumstances called for some reaction.”
- The **United States** made comments on these conclusions:
 - **COME BACK TO THIS.**

INTERNATIONAL HUMANITARIAN LAW & ‘NON-INTERNATIONAL ARMED CONFLICT’:

- **Analogize?** In the case of Serdar Mohammed v Secretary of State for Defence [2015] (UK Court of Appeal) the UK Court considered the question of whether, per **international humanitarian law** (i.e. law of armed conflict) the UK had a right to **detain** in the context of a *non-international armed conflict*.
 - **FACTS**: British troops were stationed in Afghanistan in 2010 as part of a NATO peace-keeping mission. The crux of the mission was to maintain peace and security and prevent insurgency attacks by the Taliban and other insurgent movements. Serdar Mohammed was detained by the British troops from 7 April 2010 until 25 July 2010 – total of about 4 months. SM argues that the British forces were under arrangements with the Afghan army that they were not to detain people for more than 96 hours after capture. SM therefore argues that he was unlawfully detained during this period and claims damages.
 - **DECISION**: The UK did not have a valid basis to detain SM; nor should detention be allowed in non-international armed conflict.
 - “Whether brought as a public law claim or as a common law private law claim in tort, SM’s claim succeeds because the Secretary of State is **unable to show a lawful basis for the detention**”.
 - Essentially, there was not lawful basis as, per the arrangements made with the Afghans, the British troops were unable to detain for more than 96 hours.
 - “It was common ground that the conflict in Afghanistan was to be categorized as a **non-international armed conflict**... International humanitarian law has not reached the stage where it confers a right to detain in a non-international armed conflict as distinct from an international armed conflict”
 - This is the **most important point**: Neither treaties nor customary international law grant the authority to detain in a non-international armed conflict.
 - **Note**: The trial judge looked to the following to make his decision:
 - The **omission** from the *Geneva Conventions* of a power to detain in a non-international armed conflict.
 - A question was raised as to whether a positive power to detain was required, or whether an absence of prohibition was sufficient. The Court held that the “absence of prohibition equals authority” approach is considered outdated. They cite *Oppenheim’s International Law* – “freedom is derived from a legal right and not from an assertion of unlimited will”
 - The role of **domestic law** in a non-international armed conflict
 - Academic **commentaries**
 - The *UK Joint Service Manual* (i.e. **military agreement** or arrangement between parties).

- **NOTES:**
 - There are two sources of international humanitarian law: **treaties** and **customary international law**.

TREATIES & CUSTOMARY INTERNATIONAL LAW:

- It is important to remember that customary international law can be codified by treaty (*North Sea Continental Shelf Cases*).
 - Generally, you can look to whether States not party to a treaty behave in a certain way that is consistent with the relevant treaty. This is solid evidence of a treaty merely codifying existing customary international law (i.e. state practice).
- However, the two sources of law will occasionally come into **conflict** (*North Sea Continental Shelf Cases*); they can also operate **concurrently** (*Nicaragua v USA*).
- Participation of a party in a treaty *can* be evidence of state practice (*North Sea Continental Shelf Cases*).
- The **relationship between treaties and customary international law** is explored in the cases of:
 - ***Nicaragua v USA ICJ 1986* (Merits)**
 - **FACTS:** US had a reservation to the jurisdiction of the ICJ, excluding multilateral treaties from its jurisdiction (aka the *Vanderburg Reservation*). The relevant treaty was the Charter of the United Nations, particularly Article 2(4) on the non-use of Force. Nicaragua argues that Article 2(4) merely codifies existing customary international law on the use of force, which it claims the US had breached by mining Nicaraguan ports and providing support to the Contras.
 - **KEY QUESTION:** *Could there exist rules of customary international law concurrently with treaty-made rules on the prohibition on the use of force?*
 - Treaties can operate concurrently with customary international law, despite the overlap.
 - “The Court must satisfy itself that the existence of the rule in the *opinio juris* of States is confirmed by practice”.
 - The Court **held** that it is sufficient that the conduct of States should, in general, be consistent with rules of customary international law. Adherence need not be perfect or paramount. Breaches should be characterized as such, not as dismissing the law altogether or creating new law.
 - ***North Sea Continental Shelf Cases ICJ 1969***
 - **FACTS:** Germany, Denmark, and Netherlands submitted to the ICJ to delimitate the boundaries of their shared Continental Shelf. The ICJ had to determine what rules bound these States.
 - **KEY QUESTION:** *How can the delimitation of the continental shelf between the States (Germany and Denmark) be determined? Because there exists a treaty, even if not applicable in this dispute, how is **participation** in the treaty evidence of state practice?*
 - **ISSUES/HOLDINGS:**
 - There was a dispute over the delimitation of the States’ shared Continental Shelf. There was a treaty, but customary international law also came in to play.
 - **Analogize?** The ICJ **held** that the continental shelf between these States had to be decided according to customary international law because the relevant **treaty** (Continental Shelf Convention 1958) had **not entered into force** for all parties to the dispute.
 - **APPLY:** It is the case that a treaty rule may also become a rule of customary international law. In order to identify instances of where this has happened (i.e. state practice), we must look for **widespread participation** in the convention, the extent of the practice (i.e. **geographical breadth**) and the **length** of the practice.
 - This was not a case of customary international law. It is doubtful that the relevant provision was of a “norm-creating character” because it is a fall-back provision because of the absence of the agreement.
 - Isolating the motivations of the country acting in accordance with this treaty is difficult (whether they do it because of the treaty or because they deem it part of expected state practice).
 - Therefore, look to **whether other states not party to the treaty abide by the rules** and obligations of the treaty to understand what their motivations are.

REGIONAL CUSTOMARY INTERNATIONAL LAW:

- It may be possible for regions to create regional customs (*Asylum Case [1950] ICJ*)
- ***Asylum Case (Colombia v Peru) [1950] ICJ Rep 266***
 - **FACTS:** Following an unsuccessful coup in Peru in 1948, the leader of the rebel movement sought refuge and ‘diplomatic asylum’ in the Colombian embassy in Lima. The Peruvian government subsequently refused safe conduct for the rebel leader and the dispute was referred by agreement to the ICJ.
 - **ISSUE:** *Whether a ‘local custom’ existed in Latin American permitting one State to grant political asylum and thereby offer consequential protection to the asylum seeker.*
 - **HELD:** It is possible to create a regional custom, but there needs to be both **state practice** and **opinio juris** as per customary international law requirements.
 - In this case, such a regional custom did not exist as practice was inconsistent and even when that practice had been followed, it appeared to be for political expediency rather than for a belief that it was required by law (i.e. *opinio juris*).
 - The possibility to create local customary international law was affirmed in *Rights of Passage over Indian Territory Case (1960 ICJ)*.

GENERAL ASSEMBLY RESOLUTIONS AND CUSTOMARY INTERNATIONAL LAW:

- UN General Assembly Resolutions can impact customary international law. There are certain things to **note**:
 - We are concerned with GA Resolutions that are **couched in legal language** and give rise to particular legal principles, as opposed to non-legal resolutions.
 - GA resolutions can be defined differently (resolutions, declarations, etc.) – the official title of the document is not as important as the **language** that is employed in the document.

- On one hand, States may claim that they adopted and voted for these resolutions on the understanding that they were not binding legal obligations as per the Charter. On the other hand, it can be a very attractive form of international law-making.
- **Nicaragua v USA (1986) ICJ**
 - The Court looks at the text of General Assembly resolutions to note that both parties assented to the "Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations" which dealt expressly with the **use of force**. Acceptance of this resolution was **evidence** to establish that the non-use of force had become a principle of customary international law.
- **Legality of the Threat or Use of Nuclear Weapons [1996] ICJ (Advisory Opinion)**
 - **FACTS:** The advisory opinion was to consider the legality in international law of the use or the threat of the use of nuclear weapons.
 - **KEY QUESTION:** *Do GA Resolutions establish customary international law?*
 - Resolutions do not establish customary international law but may provide **evidence** of the current state of the law and provide valuable guidance as to the meaning and interpretation of legal texts.
 - They may also contribute to the **development** of customary international law.
 - **NOTES:**
 - There were a number of GA Resolutions which stated or were concerned with the unlawfulness of nuclear weapons. A number were adopted with negative votes and abstentions. Court therefore held that the emerging norms against the threat of nuclear weapons have not become *lex lata*
 - **Schwebel (dissenting)** was much more critical – General Assembly has no authority to declare international law. He was very concerned about the voting patterns of these resolutions. On one view, the nuclear power states are those most heavily affected, and therefore you need to have the five concurring votes of nuclear powers.
 - **Judge Weeramantry** thought that these GA resolutions did demonstrate *opinio juris*. Only 5/128 possess nuclear weapons, on this basis the 5 do not outweigh the opinion of the 128. Specially affected states are not necessarily the nuclear powers – the specially affected states could in fact be those that are most at risk.

CUSTOMARY INTERNATIONAL LAW AND PERSISTENT OBJECTORS

- There are two conditions for **persistent objectors** (*Anglo-Norwegian Fisheries Case*)
 1. State objects throughout the period during which the principle is being developed (pre *lex lata*)
 2. The principle of customary international law is established (*lex lata*), and the State objects after establishment.
- There is recognition that it is not up to the State to decide whether they ascribe to international norms; rather, it is a societal motivation from the people.
- **Anglo-Norwegian Fisheries Case (UK v Norway) 1951 ICJ**
 - **FACTS:** Concerned the measurement of Norway's territorial sea – where Norway's territorial sea began had implications on international fisheries in the area, including the UK. The smaller the area of territorial sea, the larger potential for fisheries from the UK to fish in these waters. Norwegian waters have fjords – drawing territorial sea is the straight baselines method (straight baseline) vs. indentation of coast. UK supported rule of general customary international law – baseline must follow low-water mark, and therefore Norway could not enclose the fjords.
 - **QUESTIONS:**
 - Norway acknowledges 10-mile rule – however, even if it was a rule of customary international law (though it was not acknowledging it) it is not applicable to Norway, because they have been a persistent objector, and no one has ever objected to their stance.
 - **QUOTE:** "...the ten-mile rule would appear to be inapplicable as against Norway inasmuch as she has **always opposed** any attempt to apply it to the Norwegian coast."
 - There is recognition that there can be persistent objectors, but this does not amount to opting out of rules that are already enforced in international law.
 - Another argument: **Acquiescence** (over a long period of time, could result in situation that States can no longer object the principle of international law).

GENERAL PRINCIPLES OF LAW

- Recognized per **Article 38(1)(c)** of the *ICJ Statute*.
- Principles of **equity** and **common/civil law** can have some overarching importance to the system of international law.
 - Examples include **acquiescence** and **estoppel**.
- **Barcelona Traction Case**

ACADEMIA AND JUDICIAL DECISIONS

- Recognized per **Article 38(1)(d)** of the *ICJ Statute*.
- **Article 59** of the *ICJ Statute* – "The decision of the Court has no binding force except between the parties and in respect of that particular case".
 - There is **no requirement of adherence to precedence** in the ICJ - it is nevertheless rare of the ICJ to depart from previous decisions it has made.
 - The ICJ frequently cites both **national** and **international decisions**.
- Writings of highly qualified scholars and publicists, particularly referenced in pleadings of States, but the Court itself does not reference to the writings of publicists in its decisions.
- **Article 38(2)** – "This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto."

THE LAW OF TREATIES

REMEMBER:

- If it seems that a party **negotiating a treaty** has acted in **bad faith** – look to CMATS treaty and **analogize!**
- There are potential marks in the *ad hoc* judgment of Charlesworth in Whaling Case (re the **evolutionary nature** of conventions – look to perhaps how this may come into play – particularly where the convention has changed somewhat since it came into effect, this might affect interpretation)
- If the hypothetical concerns a project for which there is a treaty obligation, and this project may have newly elucidated **environmental impacts**, this may be grounds for supervening impossibility of performance (per Judge Weeramantry's judgment in Danube Dam Case)
- **Note:** There are defenses applicable to breaches of international obligations – go to State Responsibility (Circumstances Precluding Wrongfulness).

GENERAL PRINCIPLES

- The relevant convention for treaties (except concerning state succession) is the **Vienna Convention on the Law of Treaties (1969)**
- There are four components to treaty analysis:
 1. *Is this a treaty?* **Defining** a treaty
 2. *Has this treaty been validly formally created?* **Formation** and application of treaties
 3. *How should this treaty be interpreted?* **Interpreting** a treaty
 4. *Are there any relevant reservations?* Identifying valid **reservations**
- Treaties can also be **terminated**, or treaty obligations **suspended**
 - Invalidity: By fraud, coercion, or corruption.
 - (a) Termination (Danube Dam Case)
 - Impossibility of performance
 - Material breach
 - Fundamental change of circumstances
 - Suspension:
- There can also be **state succession** to treaties
 - (b) Vienna Convention on the Succession of Treaties
 - (c) Advisory Opinion Genocide Convention (ICJ)

1. DEFINING TREATIES

- **SET-UP:** As per **Article 2(a)** of the **Vienna Convention on the Law of Treaties (1969)**, treaties are defined as:
 - “A treaty is 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 what its particular designation.
 - Therefore, there are **three** requirements of treaties:
 1. Concluded **between States**
 2. Must be **governed by International Law**
 3. Must be in **written form**
 - **Note:** If some of the requirements above are not met, the VCLT does not apply. However, this does not mean that the instrument is not binding at international law or domestic law (e.g. Peace Agreement in Sierra Leone).
 - This is so per **Article 3** of the **VCLT** – ““The fact that the present Convention does not apply to international agreements concluded between States and other subjects of international law . . . or to international agreements not in a written form, shall not affect: (a) the legal force of such agreements”
 - Therefore, international agreements can take many **non-conventional forms** (see below)
 - ✓ Letters and minutes of meetings (Qatar v Bahrain)
 - ✓ Joint communique (Cameroon v Nigeria)
 - ✓ (Nuclear Test Cases 1974) / ✗ (Bolivia v Chile 2018)
 - **TEST:** Based on the cases above, the following considerations must be had to determine whether a document is a binding international agreement, despite not formally satisfying the VCLT:
 - **Who** made the statements
 - Whether the State signaled an **intention to be bound** by the statements/documents
 - Consideration of the **text itself** to determine whether obligations are expressly stated
- **NON-CONVENTIONAL INTERNATIONAL AGREEMENTS:**
 - Despite Article 2(a), international agreements can take a non-conventional shape:
 - **Letters** between parties and **Minutes** of meetings:
 - Qatar v Bahrain (Case Concerning Maritime Delimitation and Territorial Questions) (1994 ICJ) Jurisdiction
 - **FACTS:** Concerned the delimitation of islands between Qatar and Bahrain. Several letters were sent between the heads of State, and the States agree that the letters do constitute an international agreement. However, a record of the minutes of negotiations is presented, and there is a dispute as to whether these **minutes** can be considered an international agreement – this is submitted to the ICJ.
 - **ISSUE:** *Can the minutes of the negotiations that took place between the representatives of States constitute a binding legal agreement?*
 - **HELD:** **Yes**, these minutes can be considered to constitute an international agreement creating rights and obligations.
 - The letters contained **minutes** of a meeting, which **did constitute an international agreement**.

- The Court further held that the **joint-communique** was an agreement to submit the matter to the ICJ, not merely an account of discussion between foreign ministers – so it did have some **binding legal implications** in that respect.
 - Therefore, it can be said that binding international agreements might not look like conventional treaties – there might be an **intention to be bound** through non-conventional means (e.g. through multiple or related instruments).
 - **TEST:** Therefore, we look to whether there **was an intention to be bound** in the legal instruments presented. The Court must also have regard to all the **actual terms** of the purported agreement as well as the particular circumstances in which it was drawn up.
 - In the present case, there was an intention from both parties to submit the matter to the ICJ.
- **Joint Communiqué** issued at the end of a meeting and signed by heads of state (*Cameroon v Nigeria*) 2002 ICJ
- **(Oral) Unilateral Statements** through state representatives
 - **Nuclear Test Cases (Australia v France and New Zealand v France) 1974 ICJ**
 - **FACTS:** Australia and NZ brought proceedings against France arising from nuclear tests conducted by France in the South Pacific. Before the ICJ heard the full merits, France had made a unilateral statement that they would cease nuclear testing in the Pacific.
 - **ISSUE:** *Does the unilateral statement made by French authorities constitute a binding legal obligation? Such that the ICJ does not have to hear the case...*
 - **HELD:** **Yes**, the statement can be considered to constitute a binding legal obligation.
 - One of the keystones of international law, cooperation and *pacta sunt servanda* is the requirement of **good faith** and **trust & confidence**. Therefore, States that make universal and unilateral declarations through delegated representatives are bound by those statements.
 - The Court considered **who** made the statements (i.e. the character and nature of the ministers making the statements) is relevant – here it was the foreign minister and **president** in a public address; therefore, it was a statement of the highest order.
 - It was made with the intention of being bound, which was a unilateral statement to the global community as a whole. This meant that this was a **unilateral undertaking to be bound**.
 - **Note:** The Australian ad-hoc judge (Barwick) dissented – dissented because he said that these were statements of policy rather than statements intended to create a binding legal obligation. In this way, this was a **controversial judgment**.
 - **Note:** It is very **rare** that the Court will find that a unilateral statement will bind a state (*Burkina Faso v Mali* 1986 ICJ).
 - **Analogize?** There have, however, been occasions where the ICJ has held that Australia's Attorney-General could bind Australia through his/her statements, even if this the AG is not a designated person to represent the state per **Article 7(2)** of the **VCLT** (per *East Timor v Australia* ICJ 2014).
 - **Obligation to Negotiate Access to the Pacific Ocean (Bolivia v Chile) 2018 ICJ**
 - **FACTS:** Chile and Bolivia are due to negotiate on each other's access to the Pacific Ocean (particularly Bolivia, as it is a landlocked country). They submit to the ICJ to see whether such an obligation to negotiation has ever been made. Bolivia submits that Chile made a number of written and unilateral statements, through **high-ranking** officials (i.e. president and foreign ministers).
 - **ISSUE:** *Can these **written and oral unilateral statements** be considered to constitute international legal agreements between the parties?*
 - **HELD:** **No**, these statements cannot be considered international legal agreements.
 - Court refers to the **Nuclear Tests Case**
 - The Court holds, however, that the **wording of the texts** do not suggest that Chile has undertaken a legal obligation to negotiate Bolivia's access to the Pacific Ocean, but that they are **willing** to enter into negotiations.
 - The Court also looks to the **intention** signalled by Chile – there is no evidence of an express intention on the part of Chile to assume an obligation to negotiate.
- **The Paris Agreement (2015)**
 - The Climate Change (COP15) agreement seems to satisfy all of the requirements of the **VCLT**, however the obligations are stated in rather **amorphous** terms – it seems more aspirational as opposed to legally-binding obligations. The procedural marks are, again, rather aspirational at this stage.
- **Memorandum of Understanding between Australia and Nauru on Development Cooperation Program (2017)**
 - Come back to this.

2. THE FORMATION AND APPLICATION OF TREATIES

- **FORMATION:** The **formal requirements** for treaty **formation** are listed in the following **VCLT Articles**:
 - **Article 11: CONSENT**
 - "The consent of a State to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed."
 - Therefore, consent can take **many forms**. Signature is, nevertheless, the most manifestly popular means of communicating consent.
 - **Article 12: SIGNATURE**
 1. The consent of a State to be **bound** by a treaty is expressed by the **signature** of its representative when (one of the following):
 - (a) the treaty provides that **signature** shall have that **effect**;

- (b) it is **otherwise established** that the negotiating States were agreed that signature should have that effect; **or**
 - (c) the **intention** of the State to give that **effect** to the signature appears from the full powers of its representative or was expressed during the negotiation.
- Signatures therefore depend on the *type* of agreement – some treaties are binding *only* upon signature.
 - Otherwise, signatures signify that a designated State delegate has agreed to the text, but this does not bind the State until the State has ratified the text domestically.
- **Article 14: RATIFICATION**
 - The process by which a treaty becomes binding as a matter of international law is referred to as **ratification**.
 - Ratification is accomplished differently according to a State's **domestic law**.
 - In **Australia** – it is part of the executive's prerogative powers per **Section 61** of the **Cth Constitution**.
- **Article 15: ACCESSION**
 - Essentially the same thing as ratification
- **ADOPTION**: Once a treaty has come about validly, it needs to satisfy **adoption requirements**, per **Article 9** of the **VCLT**
 - "The adoption of the text of a treaty takes place by the consent of all the States participating in its drawing up except as provided in paragraph 2"
 - "2. The adoption of the text of a treaty at an **international conference** takes place by the vote of **two thirds of the States** present and **voting**, unless by the same majority they shall decide to apply a different rule"
 - Essentially, this pertains to the process of accepting and consenting to the terms of the text.
- **ENTRY INTO FORCE**: Once a treaty has been adopted, it requires **entry into force**, which also requires States consenting to several **pre-ratification obligations**. This process is found in **Articles 18 & 24** of the **VCLT**:
 - **Article 18: Obligation not to defeat the object and purpose of a treaty prior to its entry into force**
 - "A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when:
 - (a) It has **signed the treaty** or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; **or**
 - (b) It has **expressed its consent** to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed."
 - Therefore, prior to ratifying the treaty, a State cannot act in any way that is antithetical or derogatory to the purpose of the treaty it has manifested its consent to (either by way of signature or otherwise).
 - (a) This is because treaties take a long time before when they are signed to officially enter into effect.
 - **NOTE**: There is debate as to whether there is an overarching **good faith requirement** during the **negotiation of treaties**. This was discussed in the **Treaty on Certain Maritime Arrangements in the Timor Sea ('CMATS Treaty')** a matter brought forward by Timor to both the ICJ and the Permanent Court of Arbitration (PCA).
 - **Analogize!** There was an allegation that Australia **did not act in good faith** while **negotiating a treaty** with Timor as Australia was allegedly engaging in espionage during the course of the negotiation phase of the treaty. Moreover, the Australian solicitors seized documents from the solicitors acting for Timor.
 - Timor sought that the **treaty be declared invalid** in light of Australia's display for *male fide* negotiations.
 - Arguments in support of good faith requirement during negotiations:
 - There are **private international law** principles that support good faith requirement during negotiations. For example, **Article 1.7(1)** of the **UNIDROIT Principles of International Commercial Contracts** states: parties must conform to **good faith and fair dealing** throughout the negotiation process.
 - In the **Nuclear Tests Case 1974 ICJ**, the Court held: an overarching principle of 'the creation' of legal obligations is the **principle of good faith**.
 - The **International Law Commission** stated in its commentaries to VCLT that there is a '**special consideration**' that good faith obligations exist during negotiations of treaties.
 - However, even if an overarching duty to act in good faith exists, can a treaty be **invalidated** as a result of a breach?
 - **Article 49** of the **VCLT** seems to support this in extreme breaches of good faith which constitute **fraudulent conduct**: "If a State has been induced to conclude a treaty by the fraudulent conduct of another negotiating State, the State may invoke the fraud as **invalidating its consent** to be bound by the treaty"
 - **Conclusion of Dispute**: Early in 2017, both states agreed to terminate the 2006 CMATS Treaty, a controversial treaty that was designed to distribute revenues derived from the lucrative but disputed Greater Sunrise field. This was followed by news that Timor-Leste would drop two international legal proceedings against Australia.
 - **Article 24: Entry into Force (Formalities)**
 1. A treaty enters into force in such manner and upon such date as it may provide or as the negotiating States may agree.
 2. Failing any such provision or agreement, a treaty enters into force as soon as consent to be bound by the treaty has been established for all the negotiating States.
 3. When the consent of a State to be bound by a treaty is established on a date after the treaty has come into force, the treaty enters into force for that State on that date, unless the treaty otherwise provides.
 4. The provisions of a treaty regulating the authentication of its text, the establishment of the consent of States to be bound by the treaty, the manner or date of its entry into force, reservations, the functions of the depositary and other matters arising necessarily before the entry into force of the treaty apply from the time of the adoption of its text.
 - Something here
 - **Article 26: Pacta Sunt Servanda**
 - "Every treaty in force is binding upon the parties to it and must be performed by them in good faith."
 - **Article 27: Internal Law and Observance of Treaties**
 - "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46"

APPLICATION:

- **Article 28: Non-Retroactivity of Treaties**
 - Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.
- Treaties and **third parties (Articles 34 – 38)**
 - **Basic Principle:** A treaty **cannot bind third parties (Article 34)**.
 - However, it is possible that a third party can accept an obligation under a treaty – and it is possible that a party to a treaty can implicate a third party (**Article 35**).
 - There also exists **dispositive treaties**.
 - For example, a boundary treaty between two states, provided there are no factors behind the negotiations which might negate it (i.e. fraud, coercion, necessary illegality, etc.), this boundary treaty should be regarded and accepted by the international community. An example of this is the **Hong Kong and China Border Treaty**.
 - **Article 36: Treaties providing for rights of third states**
 - 1. A right arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to accord that right either to the third State, or to a group of States to which it belongs, or to all States, and the third State assents thereto. Its assent shall be presumed so long as the contrary is not indicated, unless the treaty otherwise provides.
 - 2. A State exercising a right in accordance with paragraph 1 shall comply with the conditions for its exercise provided for in the treaty or established in conformity with the treaty.
 - **Article 37: Revocation or Modification of Obligations of Rights of Third States**
 - 1. When an obligation has arisen for a third State in conformity with article 35, the obligation may be revoked or modified only with the consent of the parties to the treaty and of the third State, unless it is established that they had otherwise agreed.
 - 2. When a right has arisen for a third State in conformity with article 36, the right may not be revoked or modified by the parties if it is established that the right was intended not to be revocable or subject to modification without the consent of the third State
 - **Article 38: Rules in a Treaty Becoming Binding on Third States Through International Custom**
 - Nothing in articles 34 to 37 precludes a rule set forth in a treaty from becoming binding upon a third State as a **customary rule of international law**, recognized as such.
 - **Article 53: Treaties conflicting with jus cogens**
 - A treaty is void if it conflicts with a peremptory norm of general international law.

3. TREATY INTERPRETATION

- Treaty interpretation is contained in **Articles 31-33** of the **VCLT**:
 - **Article 31: GENERAL RULE OF INTERPRETATION**
 - Main considerations of treaty interpretation
 - **Good Faith (31(1))**
 - **Ordinary Meaning** of the terms of the treaty (**31(1)**)
 - Regard to the **context** and the **object** and **purpose** of the treaty (**31(1)**)
 - Context comprises of:
 - **Preamble and annexes (31(2))**
 - **31(2)(a)** – any **agreement** which was made between all the parties in connection with the conclusion of the treaty
 - **31(2)(b)** – any **instrument** which was made by one or more parties with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
 - **31(3)(a)** – any **subsequent agreement** between the parties regarding the interpretation of the treaty or its application
 - **31(3)(b)** – any **subsequent practice** in the application of the treaty which establishes the agreement of the parties regarding its interpretation.
 - **31(3)(c)** – any relevant **rules of international law** applicable in the relations between the parties.
 - **31(4)** – A special meaning shall be given to a term if consented between the parties
 - **Article 32: SUPPLEMENTARY MEANS OF INTERPRETATION**
 - **Preparatory work (travaux préparatoire)** and the **circumstances surrounding the conclusion** of the treaty can be referred to in order to:
 - Confirm the meaning of a term after applying an **Article 31** interpretation
 - To determine the meaning when the application of **Article 31** either:
 - Leaves the meaning ambiguous or obscure
 - Leads to a result which is manifestly absurd or unreasonable
 - **Article 33:** Information about what to do when the treaties are authenticated in two or more languages... Basically both have the same authority.
- **ICJ CASE STUDY:** In this course, we looked to the practical application of treaty interpretation as per the case:
 - **Whaling in the Antarctic (Australia v Japan; NZ Intervening) ICJ 2014**
 - **FACTS:** The legality of the JARPA 2 Program and the jurisdiction of the ICJ to render a judgment on the matter. Both the jurisdiction and the merits were considered by the ICJ. We are concerned with the manner in which the Court interpreted the relevant convention, the *International Convention for the Regulation of Whaling* (ICRW), and whether Japan had, as a result, breached their obligations under the treaty as the whaling program was ‘for the purposes of scientific research’.