70108
Public International Law
Final Exam Notes

0. Introduction to Public International Law

Lowe, V. International Law (Oxford: Oxford University Press 2007), pp 5-27

Scope & Nature:

- International law is the body of rules and principles that determine the rights and duties of States, primarily in respect of their dealings with other States and their Citizens.
- Characteristics of International Law
    - International lawyers focus on treaties and customary international laws, whereas municipal lawyers focus on statutes and reports of court decisions.
    - International tribunals are more flexible and pragmatic.

- International law is based upon the principle that all states are subject to international law and must comply with it.
    - To say that this is the 'antithesis of national sovereignty' is an oversimplification.
    - → International law seeks to secure the conditions that allow sovereign States to co-exist, and to enable each State to choose what kind of society will exist within its borders.
- It is a **Myth** that international law stems from the *Treaty of Westphalia in 1648.* Treaties, embassies, claims to jurisdiction or immunity and nationality go far beyond.

Changing Scope:

- Radical change occurred in the field of human rights.
- Classical IL dealt with relations between States, and that each state could/should/would look after the interests of its own citizens → This changed after WWII
- The way Nazi Germany & Communist Soviet Union treated their own citizens marked the inception of modern international human rights law.
    - "States could no longer remain indifferent to the mass slaughter of human beings."
    - "Treatment of people was pulled out of the sphere of the domestic jurisdiction of States- the sphere of internal affairs, in which no other State has the right to intervene- and Human Rights law was added to the cannon of international law."

International Actors

- Sovereign states, were the only actors entitled to appear on the stage of international law. This changed radically with the establishment of the League of Nations in 1920.

How it is invoked and applies

- The framework for the practise of international diplomacy, is the international legal system and its principles and concepts.

1. Sources of International Law and Relationship with National Law

Readings: ***Chapter 2: The sources of international Law***

- In order to enable the World Court to apply any asserted rule of international law it must show that it is a product of one, or more, of 3 law- creating process: treated, international customary law or the general principles of law recognised by civilised nations.
- This interpretation of paragraph 1 article 38 is strengthened by article 38 (2) which gives the court power to decide a case *ex aequo et Bono (Latin: 'according to the right and good')*
    - This power must itself test on a rule created by one of the three normal law creating processes, in this case, a treaty

Colombia v Peru

Facts: Peruvian gov issued for the arrest of a Peruvian national. Colombia granted him asylum in its Peruvian embassy in Lima. Colombia sought, and peru refused a safe conduct to allow him out of the country.

Issue: is Colombia, as they argued, as the state granting asylum, competent to qualify the offence for the purposes of the said asylum.

Argued: they were favoured on the basis of both treaty provisions and "American international law in general"

Held: Court cannot find that the Colombian government has proved the existence of such a custom. And even if they could suppose that such a customs existed between Latin American states it could not be invoked against Peru, as they have refrained from ratifying the Montevideo Contentions of 1933 & 1939

Federal Republic of Germany v Denmark and the Netherlands [1969]

Issue: requirements for the existence of a rule of customary international law.

Held: a treaty provision may relate to custom in one of 3 ways: may be a declaratory of custom at the time that the provision is adopted, may crystallise custom, as states agree on the provision to be adopted during the treaty drafting process; or the provision may come to be accepted and followed by states as customer in their practice after the treaty's adoption.

1. Introduction to Sources of Public International Law

What are the sources for public international law?

- Contemporary authoritative sources: article 38 of the statue of ICJ
    - International court responsible for resolving disputes.

ICJ Statute: Article 38

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 recognized by the contesting states;
    b. international custom, as evidence of a general practice accepted as law;
    c. the general principles of law recognized by civilized nations;
    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.
2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.

- Said to reflect customary international law
- ICJ is not a global constitution- but article 38 is widley recognised as an authoritative statement of international law. Said amongst scholars to be the foundation of contemporary international law.
    - Some scholars dispute this and argue that it is misleading (doesn't expressly take other materials)

1.1 Treaties: Definition

(Main form of international law)

- Treaties are the most straight-forward source of international law.

Currently more than 560 multi-lateral treaties.

- **Definitions**: Legal agreement between states that has an intention to create general legal relations governed by international law.
- **Terminology:**
  - 'Conventions', 'agreements', 'covenants', 'charters' etc…: as a matter of international law, they will all be considered to be treaties provided that there is an intention to be governed by international law.
- **Different Types of treaty:** Bilateral (2 parties) and Multilateral (3 or more parties)
- **Certain principle of interpretation:**
  - E.g. Binding only on parties to the treaty (*pacta sunt servanda)*
  - E.g. Must be conducted in good faith

Different Purposes of treaties:

- Agreed arrangement between two parties (contract)
  - eg China-Australia Free Trade Agreement (ChAFTA), entered into force 20 December 2015
- Establishing new normative regime
  - eg United Nations Framework Convention on Climate Change (UNFCCC), entered into force 21 March 1994 (opened for signature at Rio 1992)
- Constitution of an international organisation.
  - Treaty of the European Union, signed 7 February 1992

1.2 Customary International Law

(Second main sources of international law)

Definitions:

- CIL 'State practices recognised by the community at large as laying down patterns of conduct that have to be complied with' (Shaw 2014, 5)
  - 'requiring compliance' – states consider themselves to be bound or obliged to act in a certain way.
- International Law Commission Conclusions (2018): 'general practice that is accepted as law' (Concl 2)

2 Elements:

1. **State behaviour & practice (objective facts)**
   - Duration, consistency, repetition and generality
2. **Psychological or subjective belief (*opinion Juris)***
   - States feel bound or obliged to act in a certain way. Maxim: *opinion juris sive necessitatis*

Element 1: State behaviour & Practice

- ILC Conclusions, Part 3: A General Practice – tells us this. (provides broad definition)

Conclusion 4
Requirement of practice

1. The requirement of a general practice, as a constituent element of customary international law, refers primarily to the practice of States that contributes to the formation, or expression, of rules of customary international law.

2. In certain cases, the practice of international organizations also contributes to the formation, or expression, of rules of customary international law.

3. Conduct of other actors is not practice that contributes to the formation, or expression, of rules of customary international law, but may be relevant when assessing the practice referred to in paragraphs 1 and 2.

Conclusion 5
Conduct of the State as State practice

State practice consists of conduct of the State, whether in the exercise of its executive, legislative, judicial or other functions.

Conclusion 6
Forms of practice

1. Practice may take a wide range of forms. It includes both physical and verbal acts. It may, under certain circumstances, include inaction.

2. Forms of State practice include, but are not limited to: diplomatic acts and correspondence; conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference; conduct in connection with treaties; executive conduct, including operational conduct "on the ground"; legislative and administrative acts; and decisions of national courts.

3. There is no predetermined hierarchy among the various forms of practice.

Conclusion 7
Assessing a State's practice

1. Account is to be taken of all available practice of a particular State, which is to be assessed as a whole.

2. Where the practice of a particular State varies, the weight to be given to that practice may, depending on the circumstances, be reduced.

Asylum Case *(Colombia v Peru)* ICJ Reports 1950, p.266

Issue: Colombia argued that states in the region had provided safe passage in the past

Held: in favour of Peru. There is so much uncertainty in the practice, inconsistency on the different conventions of asylum, and the acceptance that in the past it was done so for political expediency. Therefore, it is not possible to establish an international customary rule.

- In order to establish a rule of customary international law there needs to be "constant and uniform usages, accepted as law".

North Sea Continental Shelf cases (*FR Germany v Denmark, FR Germany v The Netherlands)* ICJ Reports 1969, p.3 (H&S, pp. 20 – 26)

Facts*:* Germany had signed but not ratified the Geneva convention → not bound by the treaty. Germany argued

Geneva Convention on the Continental Shelf 1958, Article 6:

- Where the same continental shelf is adjacent to the territories of two or more States whose coasts are opposite each other, the boundary of the continental shelf appertaining to such States shall be determined by agreement between them.
- In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary is the median line, every point of which is equidistant from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured.

Key Legal Q: Was art 6 of Geneva Convention on the Continental Shelf 1958 a rule of CIL?

Held: In order for a treaty to generate a customary rule, it must be of 'a fundamentally norm creating character' (at [72]) → Article 6 cannot be seen as a 'fundamentally norm creating character'.

Summary of State Practice:

- Duration, Consistency, Repetition
- Number of states involved (Regional custom?)
- Status of the states in relation to the subject matter (ie. specially affected state?)
- Principles driven by case law are supported by ILC Conclusions, Part 3: A general Practice
- **In a nutshell, CIL = State practice + opinio juris**

Element 2: Opinio Juris

ILC Conclusions, **Part 7: Particular Customary International Law**

Conclusion 16
Particular customary international law

1. A rule of particular customary international law, whether regional, local or other, is a rule of customary international law that applies only among a limited number of States.

2. To determine the existence and content of a rule of particular customary international law, it is necessary to ascertain whether there is a general practice among the States concerned that is accepted by them as law (*opinio juris*) among themselves.

ILC Conclusions, **Part 4: Accepted as Law** (Opinio Juris)

Conclusion 9
Requirement of acceptance as law (*opinio juris*)

1. The requirement, as a constituent element of customary international law, that the general practice be accepted as law (*opinio juris*) means that the practice in question must be undertaken with a sense of legal right or obligation.

2. A general practice that is accepted as law (*opinio juris*) is to be distinguished from mere usage or habit.

Conclusion 10
Forms of evidence of acceptance as law (*opinio juris*)

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.

North Sea Continental Shelf cases (*FR Germany v Denmark, FR Germany v The Netherlands*) ICJ Reports 1969, p.3 (H&S, pp.20-26)ICJ

Held: 'Not only must the acts concerned amount to **settled practice**, but they must also be ... **evidence** of a **belief** that this practice is rendered obligatory by the existence of a rule of law requiring it [**subjective element**]. ... States concerned must ... feel that they are **conforming to what amounts to a legal obligation.** The frequency, or even habitual character of the act is not in itself enough.' (at [77])

Lotus Case *(France v Turkey) (1927)* PCIJ

Facts: Collision between Turkish and French visile. Turkish visile sunk and citizens died.

Held: In order for there to have existed a rule of customary international law which meant that Turkey was not allowed to commence criminal proceedings against French officer, there needed to be the existence of international customary law, but also, in the past states must have had a duty to abstain

- **Cannot reduce opinion juris** on the basis on **inaction or silence**, but rather states need to be conscious that they are under a legal obligation.

Anglo- Norweigian Fisheries case *(United Kingdom v Norway)* 1951

Facts: Case about territorial sea. Dispute around resources.

UK argued that 10mile rule was customary international law in determining base lines, and therefore Norway would be obliged to obey the rule. Norway asserted that they had adopted their rule from at least the 1860's.

Held: CIL does not bind a **persistent objector:** 'in any event the rule would appear to be inapplicable as against Norway insomuch as she had always opposed any attempt to apply it to the Norwegian coast'

- Norwegian system benefitted from 'general tolerance of foreign states'
- Rejected UK argument, it was not IC norm. But even if it had been, Norway had always opposed to apply the 10mile rule to the Norwegian coast.
- If a state persistently objects from the outset to a new international customary law, they will not be bound by that rule → Persistent objector rule. →ICJ conclusions reflect ILC Conclusions part 6: Persistent Objector rules. (Conclusion 15)

PCIJ held: 'only if such abstention were based on their being conscious of having a duty to abstain would it be possible to speak of an international custom. The alleged fact does not allow one to infer that state have been conscious of having such a duty' (at [76])

→ Key Principle: <u>Cannot presume opinio juris (and therefore custom)</u>

ILC Conclusions, **Part 6: Persistent Objector**

Conclusion 15
Persistent objector

1. Where a State has objected to a rule of customary international law while that rule was in the process of formation, the rule is not opposable to the State concerned for so long as it maintains its objection.

2. The objection must be clearly expressed, made known to other States, and maintained persistently.

3. The present draft conclusion is without prejudice to any question concerning peremptory norms of general international law (*jus cogens*).

General Principles of Law

(Third source referred to in ICJ Statute)

- Principles common to most or all national legal systems can be incorporated into international laws.
- Included in PCIJ/ICJ Statute as 'safety net' to cover problem of *non liquet* (no law within PIL)
- Limited in scope and use
    - E.g. Equitable principles, consent, good faith, reciprocity, estoppel, finality of judgement.

- **Judicial decisions**
    - Subsidiary source of PUL

    - Includes decisions of international and national courts and tribunals (e.g. WTO dispute panels, ICC)
    - ICJ Statute, art 59 – no doctrine of precedent. ICJ decision are binding on parties to that dispute only. → That being said, parties of the ICJ do closely examine previous descisions.
- **Writers**
    - Academics or scholars
    - Today: Jurists 'inject elements of coherence and order' into areas of PIL.

Soft Law

- **Not listed in Art 38, ICJ Statue**
- Refers to quasi- legal instruments
    - Non-binding
    - Shaw: 'soft law is not law', but may be used as an example on how to determine customary international law.
    - Yet still powerful with material effects (shaping behaviour, language, outcomes etc.)

- **Examples include:**
    - UNGHA Resolutions (Yet, see discussion in *Nicaragua & Nuclear Weapons cases)*
    - UN Human Rights Committees Views & General Comments
    - ILC Draft Articles or Conclusions
    - Statements, Principles, Codes of Conduct etc
    - Global Compacts
    - Action Plans
    - Millennium Development Goals

UN Security Council Resolutions

- UN Charter, **Chapter V: The security Council**
- Article 24(1): "In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf." …
- Article 25: "The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter."
    - UN security resolutions are binding on UN members even if they aren't listed as a source of international law in article 38 of UN statute.

Relationships between Treaty & Custom

- Hierarchy of sources and *jus cogen*
- Literally: 'compelling law'. Ie. a peremptory (absolute, irrefutable) norm to which no derogation is permitted.
- Recognised in article 53 of *Vienna Convention on Law of Treaties 1969* (ie treaty may be void if conflicts with jus cogens).

1.2 Relationship between International and National Law

Harris and Sivakumaran (8th edn), pp.59-63

1. International Law and Municipal Law

1.2 Municipal Law in International Law

- Rule that a state cannot rely upon its municipal law to avoid its international law obligations.
- There is both judicial and arbitral authority for this:
    - E.g. *Alabama Claims Arbitration* (*US v GB, Moore* (1872)): Tribunal rejected Britains argument that they were unable to interfere with the private construction and sailing of ships due to their constitutional laws which do not provide power to interfere.
    - e.g. 1969 Vienna Convention on the Law of Treaties: state may not invoke its punicipal law as justification for not complying with its treaty obligations. Non-compliance

Lecture 2

1. Relationship between Treaties and Customs

Case Concerning Military and Paramilitary Activities in and Against Nicaragua (*Nicaragua v. United States*) (Merits) ICJ Reports 1986, p.14 (H&S pp.731-741)

Facts: Whether US had breached international law in using force against Nicaragua. At the time Nicaragua was under left wing regime. In response US terminated economic aid on the grounds that the Nicaraguan government was supporting guerrilla fighters in El Salvador. US argued that Nicaragua allowed USSR Arms to pass through Nicaraguan ports in order to pass through to El Salvador. In 1984, US funded right wing militia to destabilise the government. Nicaragua brought proceedings before ICJ

Nicaragua argued: US was breaching its obligations under UN Charter and customary international law of non-interference.

US argued: acting in the collective self defense for El Salvador- that their actions were lawful.

❖ This case was settled in 2 ways:
    - 1) Judgement in regards to Jurisdiction and admissibility. 1984
        - ICJ held that they had jurisdiction. In response US refused to participate in proceedings.
    - **2) Merits 1986 (*focus for today)**

Question for the court: What source of international law applied?
    - US placed reservation on ICJ jurisdiction. Therefore, ICJ had to consider whether it could hear disputes arising under customary international law instead?

Held: It could. In terms of international law sources. Customary law can bind states, even if the content of a customary international law is identical found in a treaty. Could have parallel obligation in treaty law and CIL both of which could have their own applications.

Key points from judgment for purpose of sources:

- States can be bound by both treaty and CIL for same obligation (at least in case of jus cogens)
- *Identical norms retain a "separate existence" with "different methods of interpretation and application"* [178]
    - Even if an obligation is identical in customary international law and treaty law, these separate sources have different interpretation and applications.
- State practice need not be in absolute conformity / "complete consistency" with rule to constitute custom [186]
    - ie no need for "perfect" application
- The conduct of states should in general be consistent with customary rule
    - Inconsistent behaviour will be treated as a breach of IL, and not evidence of the establishment of a new norm.
- Opinio Juris can be found in General Assembly Resolutions, ILC statements etc
- Jus cogens is established in PIL

From this case: Treaty and international customary law can co-exist alongside each other.

1.2 Status of General Assembly Resolutions.

Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion), ICJ Reports 1996, p.226 (H&S, pp.794-801)

- Advisory opinion as GA as its authorised to do so under the UN Charter, referred a question to ICJ in order for that advice to inform US question.
- Question: **Were Nuclear Weapons legal?**
    - (7 votes in favour, 7 against, by the President's casting vote) – court was split, so president cast majority court.

ICJ advised: Court did not reach resounding conclusion

'Accordingly, in view of the present state of international law viewed as a whole, as examined above by the Court, and of the elements of fact at its disposal, the Court is led to observe that it **cannot reach a definitive conclusion** as to the legality or illegality of the use of nuclear weapons by a State in an **extreme circumstance of self-defence**, in which its very survival would be at stake'

- They could not decide whether nuclear weapons were legal or illegal
- so they concluded that they could not conclusively decide as to whether nuclear weapons are legal or illegal that there is a slim possibility that in extreme cases of self-defence it may legal.

'... General Assembly resolutions, even if they are **not binding, may sometimes have normative value.** They can, in certain circumstances, provide **evidence** important for establishing the existence of a rule or the emergence of an opinion juris. To establish whether this is true of a given General Assembly resolution, it is necessary to look at **its content and the conditions of its adop**tion; it is also necessary to see whether an opinion juris exists as to its normative character. Or a series of resolutions may show the gradual evolution of the opinion juris required for the establishment of a new rule.' (at [70])

- Not binding, but may sometimes, have normative value.
- Can provide evidence for establishing whether a rule of customary law exists.
- Whether there has been an emergence of necessary evidence of opinion juris.

1.3 Unilateral Statements

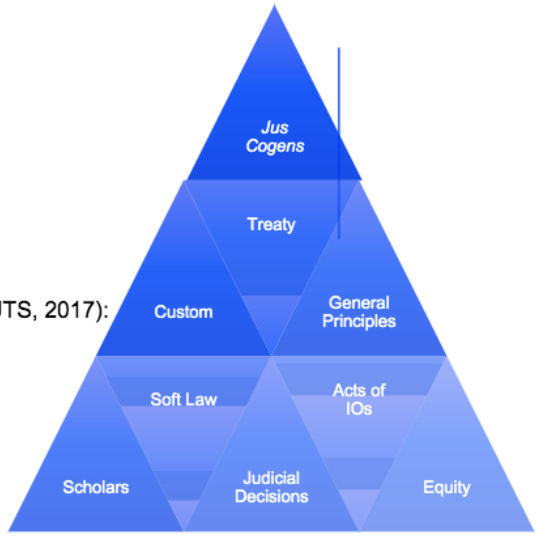
- Are they binding? See eg *Nuclear Tests Case* (*Australia v France*) 1974
- ILC Guiding Principles on Unilateral Declarations 2006:
    - Declarations [ie formal statements] publicly made and manifesting the will to be bound may have the effect of creating legal obligation.
- Need to consider:
    - Their content
    - All the factual circumstances
    - The reaction to the Statement

Hierarchy of Sources and Jus Cogens

- Literally: 'compelling law' i.e. a peremptory (absolute, irrefutable) norm to which no derogation is permitted
    - **Applies to principles of law that are so foundational that no state can be excluded from them.** → Binds all states, irrespective of whether a state has signed a treaty, in relation to that norm or irrespective of whether customary international law has applied to them.
- Examples of jus cogens:
    - Prohibition on the use of force, prohibition on slavery, prohibition on war crimes, prohibition on torture, prohibition on apartheid… etc.
    - Emerging recognition: obligation of non reformal has also reached status of jus cogens.
- No international treaty that sets out what is jus cogens or not.
- Recognised in art 53 of Vienna Convention on Law of Treaties 1969 (ie treaty may be void if conflicts with jus cogens)
    - But it doesn't tell us what exactly those jus cogens are. We need to look at state practise and opinion juris on what those jus cogens are.

Hierchy?

Taken from Dr Gabrielle Simm (UTS, 2017):



Debate on whether there is a hierarchy on international law.

- Jus Cogens are a concept that can apply to both obligation in both custom, treaty and general pricniples. Sits at apex because ideas of state consent are irrelevant with jus cogens.
- bottom can only inform the creation of those three primary sources of IL.

2. International Law in Municipal Law

Key Terminology:

- **Municipal Law / International Law**
  - **Municipal**: domestic laws (e.g. Australian law)
    - This binary is sometimes never so clean cut. E.g. Germany recognises international law as a source of domestic law, under article 1 of their constitution.
- **Monism / Dualism**
  - Theoretical discussion trying to understand whether international and domestic law are one or two systems of law.
    - If they are 1: what is the relationship within that system? If they are 2: which one takes priority?
  - 'This controversy turns on whether international law and internal law are **two separate legal orders, existing independently of one another**- and, if so, on what basis it can be said that either I superior to or supreme over the other; or whether they are **both part of the same order**, one or other of them being supreme over the other within that order. The first view if dualist view, the second monist'.
- **Incorporation / Transformation**
  - Two separate schools of thought.
  - **Incorporation doctrine:** idea that international law is automatically incorporated into English law and is considered to be part of English law, unless international law is in conflict with an act of parliament
    - Automatically becomes part of legal system (e.g. Germany)
  - **Transformation doctrine:** International law is not a part of English law, except in so far, as it has already been adopted or made a part of English law, through either the decision of judges or an act of parliament.
    - Positivist act on part of courts/ legislature to adopt international law into the legal system

– Lord Denning MR, *Trendex Trading Corporation* [1977]

'Monism and dualism might be described as theoretical approaches to understanding the relationship between international and domestic law, while incorporation and transformation relate more to the manner in which international law actually becomes a part of domestic law'

2.1 Australia and International Law

- Emergence of Australia's international legal personality
    - Key context: Historical evolution on key legal personalities.

Australian Constitutional Law

- Commonwealth Parliament has the power to make laws with respect to 'external affairs' (Australian Constitution, s 51(xxix))
    - This has been generally held to covers both **treaties and custom** (esp universal crimes)
    - Really role of executive under s61 Constitution to determine what treaties Australia will enter into and whether Australia will or will not ratify that convention.
    - → It is then the role of parliament to scrutinise the actions of the executive.
        - Since 1990's Parliament has done so through the establishment of the joint standing committee on treaties (JSCOT)
- JSCOT: created parliamentary process for reviewing potential treaty action that the executive proposes to enter into.
- **Domestic concern:** Does this allow the Commonwealth to unduly impinge upon state powers?
    - Eg **Tasmania Dam case (1983) 158 CLR** 1 – High Court confirmed that the commonwealth power around external affairs is indeed broad and capable of "unlimited expansion" given the range of subject matter capable of having international character.

Basic Principles

Treaties **do not form part** of Australian law unless incorporated through Commonwealth **legislation** (ie requires an act of the **legislature**= strong transformation approach)

- Australia has long adopted transformation approach to treaty law.
    - If the commonwealth executive signs a treaty as a matter of international law, and is bound under international law by the obligations in that treaty – that will NOT become a part of domestic law unless we have an act of parliament that incoprpoates those oblgiations ihtin domestic law.
- → Confirmed in ***Dietrich v The Queen* (1992) 177 CLR 292:** Did Australia sign ICCPR? Did article 14 create same rights in international law.
    - Issue: did Australia, having signed the ICCPR, which guarantee a right to justice and a fair trial, create same rights in international law
    - Held: Needed the act of transformation in order for interntional rights to become part of the domestic legal system.
- Treaties will become part of Australian law if that portion of the treaty is incorporated into Australian domestic law!!!
    - Only portion of the treaty that is incorporated through legislation to domestic law that becomes part of state law.
    - E.g. Executive (through diplomats) engage in process of adopting text of treaty → treaty is finalised → Australia decides whether or not to ratify it → once Australia ratifies it, Australia is bound as a matter of international law to the obligations of the treaty.

- Different ways to incorporate international treaty obligations
    - All or part of Treaty's content may be included in an Act;
    - The text of the Treaty may be added as a Schedule to existing legislation; or
    - Legislation can be enacted which states that a Treaty has force of law
- If only a portion of the Treaty is given legislative effect, the remainder is not enforceable under municipal law e.g. Tasmania Dams Case (1983) 158 CLR 1

- Treaties that have been ratified but not implemented do not create a cause of action in domestic courts
    - ie does not create 'justiciable rights for individuals' (*Minogue v Williams* (2000) 60 ALD 366)

- ***Minister for Immigration and Ethnic Affairs v* Teoh (1995) 183 CLR 273** (per Mason CJ and Deane J)
Facts: HC had to decide what weight to give treaties that Australia had ratified as a matter of international law, but had not yet incorporated into domestic law.
Question: Teoh, who had been issued a deportation order; Whether the decision maker had suffiently taken Australia's obligations udner the convention on the rights of the child into consideration.
HC Held: Where Treaties that have been ratified but not incorporated may **create legitimate expectations for individuals** that administrative decision-makers will inform themselves of Australia's treaty obligations and, in the absence of any contrary statutory or executive indication, act in conformity with these obligations.
    - HC left open possibility: Executive could, in individual instances, that in ratifying a treaty executive did not give rise to legitimate expectations of domestic law.
- Commonwealth tried to do this by making a statement that treaties ratified in international law does not give a legitimate expectation.
- YET see also ***Minister for Immigration and Ethnic Affairs; Ex Parte* Lam [2003] HCA 6**
    - HC said: *Teoh Case* should be given limited normative effect.
- NB: this does not necessarily mean that decision-makers must comply with these expectations!

2.2 International law and its influence on the Australian common law – Customary International Law

- Unsettled relationship
- In other common law countries (eg UK, Canada), courts have favoured incorporation approach for CIL
    - Courts can bring customary international norms into the domestic legal system.
- Key foundational Australian cases:
    - Polites v Commonwealth (1945) 70 CLR 60
    - Chow Hung Ching v The King (1948) 77 CLR 449
    - Nulyarimma v Thompson (1999) 96 FCR 153

***Nulyarimma v. Thompson* [1999] FCA 1192 (Rothwell et al, pp 197-201)**
Key Legal Question: Is genocide a crime under Australian law?
- Accepted that it was a *jus cogens* prohibition & crime under CIL.
- Yet no implementing legislation (at the time) in Australia

Court had to decide: Whether Australia law incorporated customary international law without such an implementing legislation.
FCA Majority (Wilcox & Whitlam JJ): Crime of genocide can only be introduced into Australian law by legislation. In absence of such legislation, genocide is not a crime under Australian law.
- Uncontroversial that genocide has the status of *jus cogens*. But at the time Australia did not have any domestic legislation.
    - It is a *jus cogen* – peremptory norm (states cannot derogate from that obligation).
- In addition, Whitlam J: Even if the crime of genocide could be recognised by the courts, such recognition may be inconsistent with existing legislation, (in particular looked at Cth criminal code).
- Merkel J (dissenting): Crime of genocide is part of Australian common law. Established a 6 part test.
    - Same approach to question of incorporation should be used for both customary crimes and norms of customary international law
    - YET:
        - On facts, not genocide
        - Even if facts made out, relief would not have been granted due to parliamentary privileges and implied freedom of political communication

From the case:
- Nulyarimma majority reasoning was followed in other 'genocide' cases:
    - Thorpe v Kennett [1999] VSC 442
    - Sumner v UK [2000] SASC 456

Since 1999, commonwealth has enacted implementing legislation pursuant to their obligations under the rome statute which established the ICC.

- NB: Cth Parliament has since passed International Criminal Court Act 2002 (Cth)and International Criminal Court (Consequential Amendments) Act 2002 (Cth) that gives effect to Rome Statute obligations and criminalises genocide under Australian law
- → Genocide is now a crime udner domestic law!!!

Influencing development of the common law

- Mabo: 'The common law does not necessarily conform with international law, but international law is a **legitimate and important influence** on the development of the common law' (per Brennan J)
    - Why he was able to say that Australian legal system could recognise native title.
- Note: 'cautious approach' of Mason CJ and Deane J in Teoh

Informing Presumptions of Statutory Interpretation

- I.e. Parliament intends to give effect to Australia's obligations under IL (incl both treaty & CIL)
    - 'If the language of the legislation is susceptible of a construction which is consistent with the terms of the international instrument and the obligations which it imposes on Australia, then that construction will prevail' (*Teoh*, per Mason CJ and Deane J)
- Confirmed in subsequent cases incl Al-Kateb v Godwin (2004) 219 CLR 562, despite McHugh J's critique

***Plaintiff M70/2011 v Minister of Immigration and Citizenship* [2011] HCA 32**

Facts: Challenge to bilateral agreement that Australia had entered into with Malaysia for the forceable removable of refugees from Australia to Malaysia.

Section 198A(3) of the Migration Act (Cth):

The Minister may: a) declare in writing that a specified country:

i. **provides access**, for persons seeking asylum, to effective procedures for assessing their need for protection; and
ii. **provides protection** for persons seeking asylum, pending determination of their refugee status; and
iii. **provides protection** to persons who are given refugee status, pending their voluntary repatriation to their country of origin or resettlement in another country; and
iv. **meets relevant human rights standards** in providing that protection;

P Argued (HC agreed): powers of Minister under s198A(3) was unlawful. As the necessary jurisidcitional facts to enliven the Minsiters powers did not exist.

HCA held (per Gummow, Hayne, Crennan & Bell JJ): In order to understand the requirements under s198A(3) we need to understand the words 'access and projection' asunder Australia's obligations.

- Turned to Australia's international obligations to rectify obligations in domestic legislation
- Malaysia was not a signatory to the Refugee Convention and also in domestic law, did not a formal status or process for recognising refugees.
- THEREFORE, the jurisdictional facts were not present so to enliven Minister powers under s198A(3)
    - Minister had acted unlawfully when specifying Malaysia as a specified country.

'Thus when s 198A(3)(a)(iii) speaks of a country that "provides protection to persons who are given refugee status, pending their voluntary repatriation to their country of origin or resettlement in another country" it refers to provision of protections of all of the kinds which parties to the Refugees Convention and the Refugees Protocol are bound to provide to such persons. Those protections include, but are not limited to, protection against refoulement. And because the protections contained in the Refugees Convention and the Refugees Protocol include according certain rights to those who are found to be refugees, the protections must be provided pursuant to a legal obligation to provide them.' (at [119])

2.1 Personality in International Law

1. Concept of Personality in International law

- Without such personality an entity would be a mere object of international law (e.g. environment- something that is regulated but does not have rights and duties under IL)

- Personality = means capacity.
  - Capacity to make law, to enter into treaties, to join international institutions and to have standing in international courts and tribunals.

***Reparation for Injuries Suffered in the Service of the United Nations Advisory Opinion*, ICJ Reports 1949, p.174 (H&S, pp.116-120)** → One of the first cases in which the ICJ what the status of the UN was.
Facts: Case involved assassination of a Swedish diplomatic appointed to act as the UN Ambassador to Israel/Palestine. Assassinated by paramilitary actors as an opposition to the UN presence in Jerusalem.
Issue: UN wanted to see if they can seek reparations for this injury (Assassination) from Israel (state in which Israel occurred). Because he was Swedish national, Sweden has a right to reparations- Did UN also have right to reparations → what is the status of the Un?
Held: Yes, UN does.
ICJ advised: 'The subjects of law in any legal system are **not necessarily identical** in their **nature** or in the **extent of their rights**, and their nature depends upon the needs of the community. Throughout its history, the development of international law has been influenced by the requirements of international life, and the **progressive increase in the collective activities of States** has already given rise to instances of action upon the international plane by **certain entities which are not States.**'

UNGA Resolution (3 December 1948): Submitted the following questions to the ICJ for an advisory opinion:

- Q 1: In the event that an agent of the UN in the performance of his official duties suffering injury in circumstances involving the responsibility of a State, has the UN, as an Organization, the capacity to bring an international claim against the responsible … government with a view of obtaining reparations due in respect to the damage caused (a) to the UN, (b) to the victim …
- Q 2: if so, how is action by the UN to be reconciled with such rights as may be possessed by the State of which the victim is a national?

2. States and Statehood

> Crawford: 'statehood is not simply a factual situation. It is a **legally circumscribed c**laim of right, specifically to the competence to govern a certain territory' (2006: 61).

- <u>Rights and Duties of States include:</u>
  - **Sovereign equality** of States (UN Charter, art 2(1))
  - Right to **peaceful co-existence** with other States (see eg UN Charter, art 2(4))
  - Obligation **not to intervene** in the domestic affairs of another state
  - Obligation to comply with **duties in good faith** under UN Charter, treaty law and custom
  - Enjoyment of rights and duties under the principle of **state responsibility**

** Membership to IOs considered **evidence of statehood**

2.1 Criteria for New States

- How do we know what a state is? → Contemporary starting point is: