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TOPIC 2 SOURCES OF PUBLIC INTERNATIONAL LAW

Article 38(1) of the Statute of the International Court of Justice is generally regarded to provide a 'complete statement of the sources of international law' (*Ure v Commonwealth* at [14]).

- 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 by law
- c) **General principles of law** recognised by civilised 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

All sources of law are independent from each other and without clear hierarchy. Therefore, if a state is not party to a treaty or has made a reservation regarding a provision in a treaty, they can still be held responsible under CIL or another source of law (*Nicaragua (Merits)*).

The ICJ is still able to decide a case *ex aequo et bono* (according to the right and good - consideration of circumstances) if the parties agree thereto (*Art 38(2)*).

2.1 Treaties

The ***declaration*** is an international convention for the purposes of *Art 38(1)(a)* if it is evident that the parties intended to create binding legal obligations, irrespective of the nomenclature used.

Here, it is a **bilateral / multilateral** treaty as it is between **parties** with the intent of creating obligations of **XYZ**.

Treaties are regulated by the Vienna Convention on the Law of Treaties ('VCLT') 1969. Treaties are governed by the VCLT according to Art 2(1)(a) if it is 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.

- Here, the treaty is governed by the VCLT as **criteria met**
- Here, the treaty is not governed by the VCLT as it is **an oral agreement, and/or between a state and other entity ie an international organisation** (Art 3 VCLT). However, many relevant provisions of the VCLT are accepted as customary international law (ie status of oral arguments re *Denmark v Norway*).

**if necessary, other declarations for VCLT if states not parties / treaty preceded VCLT below*

A state must express the consent of the state to be bound, which may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed (VCLT Art 11). This consent was expressed by **representative** which is / is not seen as sufficient under Art 7 (VCLT).

- Heads of State, Heads of Government and Ministers for Foreign Affairs may perform all acts relating to the conclusion of a treaty
- Heads of diplomatic missions may adopt the text of a treaty between the accrediting state and the state to which they are accredited
- Representatives accredited by states to an international conference and organisation or its organ, for the purpose of adopting the text of a treaty in that conference, organisation or organ
- The representative produces appropriate 'full powers'

Entry into a treaty usually requires signature and ratification; signature itself is mostly insufficient (Arts 12 and 14 VCLT).

**If treaty in force based on facts, the state expresses consent to be bound by accession (Art 15 VCLT).*

If **state** has signed a treaty but not ratified it, the state must still refrain from acts which would defeat the object and purpose of the treaty (Art 18 VCLT). Note that this is not an obligation to give effect to the treaty itself, as parties may later unsign themselves.

The treaty will then enter into force when the treaty specifies, which is **xxx**.

As the facts are silent as to whether the treaty expressly provides when the treaty enters into force, there is a presumption that it enters into force when the state in question and all negotiating states have consented to be bound (Art 24(2) VCLT). **quick analyse**

As there treaty between **states** is most likely in force, it is binding on the parties and must be performed *pacta sunt servanda* (in good faith - recognised as a customary norm in *Nagymaros at 78[142]* and codified under VCLT Art 26).

**cont treaty discussion in 3.*

- If the reservation purports to *modify* the provision - neither the original or modified obligation applies between the reserving and objecting states (ILC Guide 4.3.6(3))

As the treaty doesn't otherwise provide, the reservation is considered to be accepted by a state if no objection is raised within 12 months (Art 20(5) VCLT). **analyse time**

Reservations modify or exclude the provision reciprocally between the reserving and accepting state (Republic of India v CCDM Holdings, at [67]).

3.2 Interpretation of treaties

If an Australian court is interpreting a treaty incorporated into or referred to in Australian law, the Court will apply the VCLT. **refer to DHI22 v Qatar Airways + analyse**

Accordingly, **international/Australian** courts are guided to interpret treaties in good faith with the 'ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose' (Art 31(1) VCLT). In doing so, the primary consideration is of the text, preamble, annexes, and agreements or other instruments emanating from the parties in connection with the treaty (Art 31(2) VCLT).

These elements should be regarded in context of subsequent agreements between the parties regarding the treaty interpretation, subsequent practice in the application of the treaty, and any relevant rules of international law applicable (Art 31(3) VCLT).

Under Art 31(3)(b), parties may intend that the content of provisions evolve, evidenced by subsequent practice, in which case the court should apply the current meaning (Costa Rica v Nicaragua at 242[64]). **analyse by ref to case - 'general terms'**

Under Art 31(3)(c), a treaty may be interpreted in the context of other obligations that state parties may have in international law, such as jus cogens norms (Oil Platforms).

Resolutions of international organisations may constitute agreement and practice if supported by the relevant parties to the dispute (Whaling in the Antarctic Case at [83]).

Preparatory work for the treaty may be used as supplementary means of interpretation when the interpretation according to Art 31(a) leaves the meaning ambiguous or obscure, or leads to a manifestly absurd or unreasonable result (Art 32 VCLT). Preparatory work includes records of negotiation, successive treaty drafts, conference records, and statements made by parties; as there can be competing or incomplete views, preparatory materials aren't seen as decisive (Aust, 2003).

3.3 Invalidity of treaties

Issue: **incident** could make the **treaty / state's consent to be bound to the treaty** invalid (VCLT Art 42(1)), thereby making the treaty void (VCLT Art 69).

If the treaty is silent on the issue of invalidity, only the rules of the VCLT will apply (Art 42 VCLT).

Absolute invalidity ab initio - if ground is established, treaty automatically vitiated

- If the treaty's conclusion was created by the **threat or use of force** contrary to the UN Charter. This includes **coercion** of a state representative (Art 51 VCLT), or if the treaty was procured by the **threat or use of force** against the state (Art 52 VCLT).
- If the treaty conflicts with an existing **peremptory jus cogens norm** of international law (Art 53) or a new norm which has emerged (Art 64 VCLT).

Subsequent/relative invalidity - state must invoke the ground to invalidate its consent to be bound, formally notify the other parties (Art 67 VCLT), and give at least three months notice of its intended action (Art 65 VCLT). If a party objects, the matter goes to dispute resolution (Arts 65-66 VCLT). A state may only withdraw or terminate with respect to the entire treaty, except if the treaty allows it (Art 44 VCLT).

If the state's consent involved a manifest violation of a **rule of internal law** which is of fundamental importance (Art 46 VCLT). This is a very limited exception from Art 27, as the internal law must be of 'manifest' importance and the state must have objectively publicised this law to the other states (Cameroon v Nigeria at 430).

- Re Art 27: States parties to a treaty may not invoke provisions of internal domestic law as a justification for failing to perform a treaty or breaching its obligations

If there is an **error of fact** regarding a fact or situation which existed at the time the treaty was concluded, which formed the essential basis of the state's consent to be bound (Art 48 VCLT). However, if the state contributed to the error, could have avoided the error, or was put on notice of the possible error, Art 48 cannot be pleaded (Cambodia v Thailand at 26-27).

- Lack of independent investigation insufficient to invoke (Cambodia v Thailand)

If a state is induced to conclude a treaty by the fraudulent conduct of another negotiating state (Art 49 VCLT). However, there have been no cases regarding this (Aust, 2003 at 276).

The arbitral proceedings between Timor Leste and Australia proposed the possibility for a breach of good faith as a ground of invalidity. However the case settled before sitting before the ICJ, and it is likely difficult that another ground of invalidity can be proved to exist beyond the VCLT.

3.4 Termination, suspension and withdrawal

Termination

A party may terminate a treaty in accordance with the provisions of the treaty (Art 54(a) VCLT) or by with the consent of all other parties to the treaty (Art 54(b) VCLT).

Suspension

A treaty may be suspended by all parties to that treaty if the treaty provides (Art 57(a) VCLT) or all parties agree (Art 57(b) VCLT).

- P's nationality or domiciles
- Subject matter

In Australia in particular, it is likely that Australian courts will only prosecute if there is a sufficiently close connection to justify that state in regulating the matter and perhaps to also override any competing rights of other states (Australia's 2013 amicus curiae - Rio Tinto v Sarei). *analyse*

7.1.2 Criminal jurisdiction

Since XX is a criminal offence, *analyse why*, *state* can only exercise criminal jurisdiction on a basis permitted by international law (Harvard Research Draft Articles Convention on Jurisdiction).

analyse connection

*note criminal jurisdiction where certain conduct is prohibited as a criminal offence, offenders prosecuted and punished.

*note bases for jurisdiction are not mutually exclusive > state can have jurisdiction on 2+ bases > no hierarchy

DISCLAIMER for principle choice

Whilst this principle has not been codified into international law, it reflects the nature of sovereignty itself, state practice, and the contribution of jurists (Harvard Draft Research Project 445).

Territorial principle

Issue: Which state can exercise criminal jurisdiction over *crime* committed against *victim* needs investigation.

As *offence* was committed wholly/party within *state*, *state why*, it can exercise criminal jurisdiction over the matter under the territorial principle (Lotus, [45]); this is an uncontroversial principle as it is integral to state sovereignty (Jurisdictional Immunities of the State at [57])

If an embassy:

Embassies are not on their representing state's territory, they are on the territory of the state they are present on (R v Turnbull at 441). However, although *host state* may assert prescriptive territorial jurisdiction for acts committed on the grounds of an embassy, it will be unable to enforce jurisdiction on the embassy's grounds without the sending state's consent (VCDR Art 32) due to diplomatic inviolability (VCDR Art 22(1)).

If at sea:

A state's territory includes its territorial sea, so will be under that state's jurisdiction as *analyse maritime law + distances* (R v Disun). The foreign ship is not a 'floating vessel of territory' (Lotus at 23).

If an inchoate offence eg conspiracy, attempt, incitement

The principle of territorial integrity applies to the *inchoate offence here* as *state* should be able to frustrate the commission of the contemplated crime by arresting and punishing the offenders (Liangsiriprasert v US at 250).

If offence has geographical connection with several states:

Any state where an element of an offence occurred may assert jurisdiction (Lotus).

There are two theories on territoriality:

1. **Subjective territorial jurisdiction:** exercise of prescriptive jurisdiction by the state in which the criminal offence originated but which was completed outside its territory (ie where offence originated)
2. **Objective territorial jurisdiction:** exercise of prescriptive jurisdiction by the state in which the criminal offence is completed, even if the offence was initiated outside its territory (ie where offence concluded)

Effects doctrine

analyse crime's effect within state

Although the offence was committed wholly outside **state**, its actual/possible effect within **state** may still entitle **state** to exercise territoriality-based jurisdiction (SS Lotus, 18 [45]) under the 'effects doctrine' (US v Neil, [15]).

However, this extension of territoriality-based jurisdiction seems analogous to the protective principle jurisdiction basis (e.g., Eichmann or Joyce v DPP). Both are used for acts committed outside the state's borders which have an effect within the state. Considering the contentiousness of the effects doctrine in international law – as it is mainly domestic legislation that has used this to extend territoriality jurisdiction expressly or by necessary implication like the NSW Crimes Act s 10C – **state** could also raise protective-based jurisdiction to "cover its bases".

go to protective principle

Nationality principle

Issue: Which state can exercise criminal jurisdiction over **crime** committed against **victim** needs investigation.

As **offender** is a **state A** national and the **crime** was committed by them in **state B's** territory, this raises the nationality principle (XYZ v Commonwealth at [4]). There is no restriction on the competence in international law of a state to prosecute its own nationals for acts done on foreign territory (XYZ v Commonwealth at [130]).

The nationality principle may only be applied when that state has a relevant law that prohibits the relevant extraterritorial conduct, for example Criminal Code 1995 (Cth), Division 272, 'Child Sex Offences Outside Australia'.

Determining nationality:

It is a matter for municipal law to determine nationality (Nottebohm), and the crimes abroad for which a state punishes its nationals for and the circumstances under which it will exercise jurisdiction are for each state to decide according to local needs and conditions (Harvard Draft Research Project 519).