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TOPIC 2: Sources of International Law

1. General Sources of Law – (ICJ Statute Article 38(1))

a. What sources of law does the ICJ/Judicial body have recourse to?

Article 38 of the ICJ Statute:

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 recognised 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

b. Treaties – international convention defined in *VCLT* as ‘an **international agreement concluded between states in written form** and governed by international law (*Vienna Convention on the Law of Treaties* (‘*VCLT*’) 1969) (*ICJ Statute Art 38 1(a)*)

c. Customary International Law – ‘international custom, as evidence of a general practice accepted as law’ (*ICJ Statute Art 38 1(b)*)

d. General Principles of Law – ‘general principles of law recognised by civilised nations’ (*ICJ Statute Art 38 1(c)*)

e. Judicial Decisions and the teachings of highly qualified publicists – ‘of the various nations, as subsidiary means for the determination of rules of law (*ICJ Statute Art 38 1(c)*)

f. Other considerations

- i. **Soft law** – category of international norms, principles, guidelines and recommendations that are not legally binding
 1. Often used in international relations – to promote cooperation, coordination and the development of shared practices and standards → may later harden into custom or become the basis of a treaty
- ii. **UNGA Resolutions** – generally not binding

2. Treaties

- a. **International Convention (VCLT 1969)** – ‘an international agreement concluded between states in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation’
- b. **Pacta Sunt Servanda** – Fundamental principle of treaty law that agreements must be kept
 - i. ‘Every treaty in force is binding upon the parties to it and **must be performed by them in good faith**’ (VCLT 1969 Art 26)
- c. **Between whom?** – Treaties can be either bilateral (between two parties) or multilateral (between more than two parties)

3. Customary International Law

- a. **Custom** – ‘international custom, as evidence of a general practice accepted as law’ (ICJ Statute Art 38 1(b))
 - i. Consider whether there is evidence of **STATE PRACTICE GENERATING CUSTOM** and further whether this conduct is accompanied by *opinio juris*
 1. Requires evidence of both ‘**extensive and virtually uniform**’ state practice that is accompanied by *opinio juris* (**North Sea Continental Shelf Case; Ure v The Commonwealth of Australia**)
 - ii. Must be a **recurring practice that is recognised and accepted by the community as a form of obligation**
 - iii. Over a sufficient period of time (although not necessary), **practice of states on a particular subject can become a source of binding obligations and be treated as such**
- b. **State Practice** – Body of **common, consistent and concordant practice of states** widespread enough to give rise to a customary rule: (**UK Fisheries, North Sea Continental Shelf Case, Asylum Case**)
 - i. **Test: per (North Sea Continental Shelf)**
 1. **Widespread**
 - a. Must be widespread e.g. number of parties (**North Sea Continental Shelf 1985**)
 - i. Requires existence of “constant and uniform” practice by all involved states with contradictory and fluctuating practice not establishing regional customary IL (**Asylum Case Colombia v Peru**)
 - ii. No need for rigorous conformity by all states (**Asylum Case Colombia v Peru**)
 - iii. Practice should be consistent with rules and in instances that State conduct is inconsistent with a given rule, it should **generally be treated as breaches of that rule and not as indications of the recognition of a new rule (Military and Paramilitary Activities in and against Nicaragua (‘Nicaragua’))**
 - iv. ‘Even without the passage of any considerable period of time, a very widespread and representative participation in the

convention might suffice of itself' (**North Sea Continental Shelf 1985**)

2. Representation

- a. Practice must be followed by states with a particular interest in the subject matter (**North Sea Continental Shelf 1985**)
- b. **Factors to consider:**
 - i. Geography
 - ii. Legal tradition
 - iii. Practice of affected states is especially important (**North Sea Continental Shelf 1985**)

3. Length of time

- a. Even **without the passage of any considerable period of time**, a very widespread and representative participation in the convention **might suffice of itself**, provided it included that of States whose interests were specifically affected (**North Sea Continental Shelf 1985**)

4. Lack of protest and/or acquiescence

- a. Time and lack of objection in dispute re navigational and related rights (**Costa Rica v Nicaragua**)
- b. UK had a presence, involvement and vested interest in Northern Sea, but nonetheless retained a prolonged abstention and general toleration to an obvious practice by Norway (**Anglo-Norwegian Fisheries Case**)

ii. Evidence:

1. How long has the practice been carried out? (**North Sea Continental Shelf 1985**)

- a. Practice can emerge over a short time period provided it's overwhelming, extensive and virtually uniform

2. Has the practice been consistent? (**Nicaragua v USA**)

3. How frequently is the custom accepted?

- a. Any **materials which demonstrate activities and views of states and state officials** (**International Law Commission non-exhaustive list (1950)**)

- i. Treaties,
- ii. Decisions of international and national courts
- iii. National legislation
- iv. Diplomatic correspondence
- v. Opinion of national legal advisors
- vi. Practice of international organisations

4. How many States respect it? How many have special interests?

- a. Factors to consider
 - i. Legislation
 - ii. Statements of officials
 - iii. Court decisions
 - iv. Voting records in international forums

iii. Burden:

1. Comprehensively proved (**Asylum Case**)

ICJ in Asylum Case

1. Colombia argued that regional custom of granting diplomatic asylum for political reasons could be evidenced in the practice of Latin American states
2. Triggered by Colombia granting asylum to Haya de la Torre who led an unsuccessful rebellion against the Peruvian government

- c. Opinio Juris** – belief that the conduct is legally required – is the second element needed for the establishment of a customary rule
- i. **Definition:** A psychological conviction of states that the particular practice is required as a matter of legal obligation, as distinct from comity or friendly relations (**North Sea Continental Shelf**)
 - ii. **Elements:**
 1. Is there evidence that the practice is **carried out due to a belief of legal obligation**, as opposed to **participating out of convenience or comradery** (**North Sea Continental Shelf**)
 - a. Forms of evidence: 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 organisation or at an intergovernmental conference (**ILC Report of Customary Law Conclusion 10**)
 2. **When a state acts in a way that is incompatible with a recognised rule, but defends its conduct by appealing to exceptions, this attitude confirms rather than weakens a finding of opinio juris**
 - iii. **Note:**
 1. Aforementioned evidence of extensive state practice gives rise to the rebuttable presumption that there is sufficient opinio juris and this criterion is likely satisfied
 - a. If state practice is **extensive**, this requirement is less stringent (**Nuclear Weapons**)
 - b. If **limited state practice**, opinio juris may be more important
- d. Persistent Objectors** – states will not be bound if they have, from the norm's inception, persistently objected to the rule (**Anglo-Norwegian Fisheries Case**)
- i. **Generally**, customary IL is binding on all states in acquiescence – even those who did not explicitly consent
 1. A new State is bound by rules which were well established before it became independent
 - ii. Customary IL does not bind states that openly and persistently object to the custom from the very beginning (**Anglo-Norwegian Fisheries Case**)
 1. **State must clearly and publicly express objection on consistent basis**
 - a. Cannot validly object to a rule once the rule has been established, and a subsequent objection has no legal effect
 2. **However**, subsequent objection can **potentially create a new rule** – initial state practice may violate the rule but, **if the conduct is supported by enough states, it may gradually become a new rule**
 3. Cannot object to the **erga omnes (towards all) obligations created by jus cogens rules as NO DEROGATION (exemption or relaxation of a rule or law) is permitted from them** (**Namibia Case**)
 - a. **Jus cogens are considered 'natural law' and unchangeable** (**VCLT Art 53**)

- ii. Applied by having regards to ‘**the features or terminology which are reminiscent of the rules and institutions of private law as an indication of policy and principles rather than as directly importing these rules and institutions**’ (*International Status of South-West Africa*)

b. Criteria

- i. Two criteria must be met for a general principle
 - 1. Must be **underlying principle rather than a specific rule**
 - 2. Must be **found in all countries**: civil, common, communist etc
- ii. **Defined as**: Unwritten legal norms of a wide-ranging character, recognised in the municipal laws of States, Transposable at the international level (*Ure v Commonwealth*)

5. Judicial decisions and Academic writings

- a. **Judicial decisions and academic writings** – looking at previous court decisions and writings of legal scholars to see how international law has been interpreted and applied in the past (*ICJ Statute Article 38(1)(d)*)
- b. **Subsidiary means** – Judicial decisions are **SUBSIDIARY MEANS** but can also be evidence of state practice of the formation of customary IL
 - i. **Decisions of domestic courts are also of value** – provide significant interpretations of important international issues such as the immunity of heads of state, or right to self-determination

6. Soft Law

- a. **Definition** – category of international norms, principles, guidelines and recommendations that are not legally binding
 - i. Often used in international relations – to **promote cooperation, coordination and the development of shared practices and standards** → may later harden into custom or become the basis of a treaty
 - 1. E.g. Declarations, resolutions, code of conduct and guidelines issued by the UN

7. United Nations Security Council

- a. **Formally Binding** – United Nations has legislative role to make **binding decisions** on issues concerning threat to international peace or security

8. United Nations General Assembly (UNGA) Resolutions

- a. **Not Formally Binding** – UNGA resolutions are recommendatory and generally not binding
 - i. Only binding with:
 - 1. Admission of new members
 - 2. Suspension of current members
 - 3. Adoption of UN budget evidence
 - ii. Although resolutions not binding, they have a **normative value** as evidence of state practice, and sometimes opinio juris either of existing CIL or contributing to its formation
- b. **Consider:**

- i. Political and legal motivations of states abstaining or voting against
- c. **UNGA Resolutions may:**
 - i. **Act as evidence of state intentions and practices** → help shape CIL
 - 1. Reflects the opinions and positions of the international community of various issues
 - 2. Endorsement of a state's widespread practice by the UNGA contribute to development of CIL
 - ii. **Act as evidence of the evolving constitutional capacities of the UN**
 - 1. Resolutions have the ability to **implement internal tasks** that create **financial and legal obligations on members**
 - 2. Articulate political aspirations and objectives (rather than just legal). For this reason, courts must be cautious is using GA resolutions as evidence of opinio juris

9. Unilateral Decisions

- a. **Definition** – An expression of a state's will that is made **without the need for a reciprocal act** by another state e.g. declarations, statements, promises and representations
- b. **Requirements to create a legal obligation** –
 - i. **An intention to undertake a legal obligation**
 - 1. The act must be a clear and specific manifestation of the state's intent
 - a. E.g. participating in negotiations or disarmament (**Nuclear Tests Case**)
 - ii. **Oral or written** (**North Sea Continental Shelf Case**)
 - iii. **Public** – uncertain, BUT should be communicated to the other party/parties concerned
 - 1. In **Nuclear Tests Case** NZ challenged France's nuclear testing program arguing it violated international obligations
 - a. France argued program was a unilateral act and thereby not subject to review by ICJ
 - b. **Held** – France's program was NOT a unilateral act but a series of actions subject to IL
 - i. *'Development, testing and deployment of nuclear weapons could not be considered as the unilateral act of the State, but as an activity that concerned the international community as a whole.'*
 - ii. There was a series of press conferences in addition to minutes (official announcements and statements – referred tests as being conducted 'for military purpose')
 - iv. **Principle of good faith** – refrain from acts that are detrimental to the rights of other states (**Nuclear Tests Case**)
- c. **Note:**
 - i. Courts will rarely find unilateral statements binding, especially if **indeterminate nature, no precise time-scale and not made to a specific party**

TOPIC 3: The Law of Treaties

1. General Treaties

- a. Formation** – Treaties are governed by the *VCLT*
 - i. Definition** – A treaty is defined as ‘an **international agreement** concluded **between States in written form** and **governed by international law**’ (***VCLT Art 2(a)***)
 - 1. Agreement between states**
 - a. No need for consideration
 - b. No need for intention to create legal relations
 - c. No need for nomenclature
 - 2. In writing**
 - a. Oral treaties not governed by *VCLT* – but not invalidated by *VCLT*
 - 3. Governed by international law**
 - a. Excludes commercial arrangements between governments under national laws
 - ii. Capacity** – Only **States, international organisations** and other **international entities** with **capacity** to enter into treaties may be parties (***VCLT Art 6***) under the ***VCLT***
 - 1. Representative** – will have **capacity to sign treaty if:** (***VCLT Art 7***)
 - a. Produces ‘appropriate full powers’ (***VCLT Art 7(1)***)
 - b. In virtue of their functions, are considered as representing their State (***VCLT Art 7(2)***)
 - i. Heads of state/Heads of government/Minister for foreign affairs (***VCLT Art 7(2)(a)***)
 - ii. Heads of diplomatic missions (***VCLT Art 7(2)(b)***)
 - iii. Accredited representatives (***VCLT Art 7(2)(c)***)
 - iv. Holders of technical ministerial portfolios
 - c. Or can be subsequently confirmed (***VCLT Art 8***)
 - iii. Conclusion** – two-step process of signature followed by ratification
- b. Entry into force** – a treaty enters into force generally (1) **when agreed** (when the treaty says it does) or (2) **If silent** there is a **presumption that it enters into force when all negotiating states have consented to be bound** (***VCLT Art 24(2)***)
- c. Reservations** – Unilateral statement which intends to modify the application of a treaty provision to the State (***VCLT Art 2(1)(d)***)
 - i. **Is it a reservation?**
 - ii. **If the reservation is not prohibited, is it permitted?**
 - iii. **Has the reservation been accepted?**
 - iv. **What is the effect of the reservation?**
- d. Interpretation**
 - i. **Ordinary meaning** – Text will be prime, meaning of terms may evolve to reflect the contemporary context (***VCLT Art 31(1)***)
 - ii. **Context** – Context can be used in interpreting meaning to text, relating to any treaty between parties (***VCLT Art 31(2)(d)***)
 - iii. **Subsequent agreement/practice and applicable international law** – subsequent agreement on interpretation or application, evidence from later subsequent practice which evinces an agreed interpretation, relevant rules of international law applicable to the parties

- iv. **Preparatory works** – If the treaty leaves an ambiguous or obscure meaning or leads to a result which is manifestly absurd or unreasonable
- v. **Limitations** – The more parties to a treaty, the more difficult it can be to apply the principles set out in Art 31 and 32 of the Vienna Convention

e. Validity of Treaties

f. Termination

2. Formation

a. **Formation** – Treaty is defined as ‘an international **agreement** concluded between States in **written form and governed by international law**’ (**VCLT Art 2(1)(a)**)

i. Note:

1. If the treaty is **concluded before 1980**, state that: ‘VCLT codified customary IL (**Nicaragua**) and its provisions can still be referenced as a reflection of international custom
2. If 1 state is **not a party to VCLT**: ‘Though XXX is not a party to the 1969 VCLT, principles of the VCLT would still apply **since it is largely considered to be a codification of customary IL** (**Nicaragua v USA, North Sea Continental Shelf Case**)

a. **Many VCLT provisions reflect customary international law, so can be applied to treaties outside its scope**

- i. Art 7 (Full powers)
- ii. Art 26 (Pacta Sunt Servanda – good faith)
- iii. Art 27 (Internal law and observance of treaties)
- iv. Art 31-32 (General rule of interpretation, Supplementary means of interpretation)
- v. Art 33 (Interpretation of treaties authenticated in 2 or more languages)
- vi. Art 60-62 (Termination or suspension of the operation of a treaty as a consequence of its breach, Supervening impossibility of performance, fundamental change of circumstances)
- vii. Art 65 (Procedure to be followed with respect to invalidity)
- viii. Art 67 (Instruments for declaring invalid, terminating, withdrawing from or suspending the operation of a treaty)

ii. Agreement between states (**VCLT Art 2(1)(a)**)

1. **VCLT only applies to treaties between states**

- a. **Does not apply to treaties with parties that are international organisations** → does not invalidate treaties signed by non-State parties (**VCLT Art 3**)
- b. **Corporations cannot enter into treaties** → recognised as ‘internationalised contracts’ (**Texaco v Libya**)

iii. In writing

1. Oral treaties are **not governed by the VCLT** → does not invalidate oral treaties (**VCLT Art 3**)

- iv. **Governed by International Law**
 - 1. A treaty is not formed if states choose to enter into an agreement that is **governed by domestic law** or that is a **political rather than legal agreement**
 - 2. **In determining whether an AGREEMENT IS INTENDED, look to subjective and objective test**
 - a. **Objective test:** Considers the **text of the agreement** to be the sole determinant (**follow this in exam usually**)
 - i. Look at **specific terms and the circumstances in which it was drawn up**. If drafted in very general language, they will not be binding (**Oil Platforms**)
 - 1. Do the terms merely record a meeting (account of discussion)? **Not binding**
 - 2. Do they enumerate the commitments to which Parties have consented? **Binding**
 - b. **Subjective test:** Considers the **parties' intentions** to be relevant
 - c. **ICJ** tends to follow the **objective approach** while other tribunals have favoured a more subjective test
 - v. **May be embodied (contained) in one or more instruments And Designation is irrelevant (e.g. Treaty, Agreement, Protocol, Charter, Act)**
 - 1. Joint communiqués, exchanges of letters and minutes of meetings can be treaties if they **create international rights and obligations and otherwise satisfy (VCLT Art 2 (1)(a))**
- b. **Capacity**
 - i. **Only States, international organisations and other international entities with capacity to enter into treaties may be parties under the VCLT (VCLT Art 6)**
 - 1. Colonial territories and elements of federal states may be able to undo *VCLT*
 - 2. IOs can enter under their own convention
 - 3. Natural and legal person cannot enter into treaties – although may be parties to a contract with a state or an international organisation where the applicable law is international law
 - 4. Corporations may not be parties to a treaty, although may be parties to contract with states under which international law is the applicable law
 - ii. **Representative** – a representative of a State has capacity to enter into treaties only where “**full powers**” are produced (**VCLT Article 7**),
 - 1. Produces ‘appropriate full powers’: (**VCLT Article 7(1)**) or
 - 2. In virtue of their functions and without having to produce full powers, are considered as representing their State (**VCLT Article 7(2)**)
 - a. Heads of state/government/minister for foreign affairs (**VCLT Article 7(2)(a)**)
 - b. Heads of diplomatic missions (**VCLT Article 7(2)(b)**)
 - c. Accredited representatives (**VCLT Article 7(2)(c)**)
 - d. Holders of technical ministerial portfolios (**Congo v Rwanda**)
 - 3. If a treaty is concluded by a person who does not fulfil the requirements of Article 7, the conclusion of the treaty **does not have legal effect, unless afterward confirmed by that State (VCLT Article 8)**

c. Concluding a treaty

- i. Usually (not always – check the treaty provisions), a two-step process of signature followed by ratification; Consent to be bound may be expressed by any means so agreed (VCLT Article 11)
 1. Adoption of text (VCLT Article 9)
 - a. By consent of all states involved in drawing up (VCLT Article 9(1))
 - b. Unless at a conference, where adoption occurs by two-thirds vote of present and voting (VCLT Article 9(2))
 2. Signature – Expresses consent to be bound by a treaty (VCLT Article 12)
 - a. Sufficient as consent and ratification for bilateral treaties (VCLT Article 12)
 - b. May choose to be bound in part (VCLT Article 17)
 3. Ratification – filing of documents with the depository giving consent to be bound (VCLT Article 14)
 - a. Usually signing is rarely sufficient to express a state's consent to be bound but this depends on what the treaty requires and intention of negotiating states
 - b. Until ratified state must refrain from acts undermining the object/purpose of the treaty until they signal they no longer wish to become a party (VCLT Article 18(a))
 - c. Accession for (a) when a non-party later joins and (b) other parties agree to this or (c) did in advance (VCLT Article 15)

3. Entry Into Force

a. Entry into force

- i. VCLT Article 24 is applied and VCLT Article 25 can be applied provisionally
- ii. A treaty enters into force generally -
 1. When agreed (when the treaty says it does) or
 2. If silent there is a presumption that it enters into force when all negotiating states have consented to be bound (VCLT Art 2(1)(a))

b. Obligations prior to entry – must refrain from undermining the object/purpose of the treaty, provided that such entry is not unduly delayed (VCLT Art 18(b))

- i. A State must not do anything which would affect its ability to fully comply with the treaty once it has entered into force
- ii. To determine the object/purpose, recourse may be had to preparatory work, the circumstances of its conclusion and, where appropriate, the subsequent practice of the parties (ILC Guide to Practice on Reservations to Treaties, Guideline 3.1.5.1)

c. Registration (UN Charter Article 103; VCLT Art 80)

- i. States must register treaties with the UN (to prevent secret diplomacy and promote availability of treaty texts)
- ii. Treaties not registered cannot be relied upon before UN organs (ICJ will ignore the treaty when litigating upon it) but are still binding regardless

d. Application

- i. If **consented before the treaty** is in force, a State is not bound until the treaty enters into force
- ii. If **consented after the treaty** is in force, a State is bound once its consent to be bound takes effect
- iii. Treaties binding only on parties to it:
 1. **Exception if parties intend to bind a 3rd party state**, and it consents: **(VCLT Article 35)**
 2. Obligations – **(VCLT Article 35)** and rights **(VCLT Art 36(1))** may rise for 3rd party state if it agrees and parties intend for it
 3. Rights and obligations for 3rd parties can only be revoked or modified with their consent **(VCLT Art 37)**
- iv. Treaties apply to the **entirety of a states' territory** (including overseas possessions) **(VCLT Art 29)**
- v. A treaty is binding only on parties to it. Treaties do not impose obligations or create rights for third states in the absence of their consent (*pacta tertiis nex nocent nec prosunt*)

e. Observance

- i. Every treaty in force is binding upon the parties to it and must be performed by them in **good faith** – '**pacta sunt servanda**' **(VCLT Art 26)**
- ii. Domestic law cannot excuse non-performance **(VCLT Art 27)**
- iii. Treaties **do not apply retrospectively** unless stated otherwise and there is an intention to apply retroactively (where events may be continuing) **(VCLT Art 28)**
- iv. International law of **countermeasures** permits proportionate retaliation in the case of minor breaches of a treaty **(Gabcikovo-Nagymaros)**

f. Amendment

- i. Straightforward for **bilateral treaties**.
- ii. Amendment of **multilateral treaties**
 1. Any proposal to amend a multilateral treaty as between all parties must be notified to all the contracting states, each one of which shall have the right to take part in – **(VCLT Art 40)**
 - a. The decision as to the action to be taken in regard to such proposal **(VCLT Art 40(2)(a))**
 - b. The negotiation and conclusion of any agreement for the amendment of the treaty **(VCLT Art 40(2)(b))**
- iii. Every State entitled to become a party to the treaty shall also be entitled to become a party to the treaty as amended **(VCLT Art 40(3))**
- iv. The amending agreement **does not bind any State** already a party to the treaty **which does not become a party to the amending agreement; article 30, paragraph 4 (b), applies in relation to such State (VCLT Art 40(4))**
 1. When the parties to the later treaty do not include all the parties to the earlier one:
 - a. As between a State party to both treaties and a State party to only one of the treaties, the **treaty to which both States are parties governs their mutual rights and obligations (VCLT Art 30(4)(b))**

- v. If there are successive treaties involving the same parties on the same subject-matter, the **earlier treaty still applies only to the extent that its provisions are compatible with those of the later treaty** (VCLT Art 30(3))

g. Succession

- i. **Defined** – Successor state that has become a sovereign state over a territory (and populace) that was previously under the sovereignty of another state
- ii. If there is a **succession of States** in respect of treaties (Vienna Convention on Succession of States in Respect of Treaties (1978))
 - 1. A *tabula rasa* approach is followed whereby a new State is not automatically bound by treaty obligations of its predecessor State, but must issue a notification of succession: (VCLT Arts (17)-(19), (22)-(23))
 - 2. Except for boundary treaties and other territorial regimes ((VCLT Art (11)-(12))
- iii. Succession of new states to treaties
 - 1. **Has the successor State consented?**
 - a. Successor state must explicitly establish its consent to the treaty ((Vienna Convention on Succession of States Art 10)
 - b. Agreement between predecessor and successor or unilateral declaration by successor is insufficient ((Vienna Convention on Succession of States Art (8)-(9)))
 - 2. **Is there automatic succession?**
 - a. HR treaties ((Application of the Genocide Convention 1996))
 - b. Boundary and use of territory treaties ((Art (11)-(12) Vienna Convention on Succession of States)

4. Reservation

a. Is it a reservation?

- i. A **reservation** is a **unilateral statement** which intends to **exclude or modify** the application of a treaty provision to the State (VCLT Art 2(1)(d))
- ii. An **interpretative declaration** is a statement on how the State will interpret a provision
 - 1. To determine if the statement is a reservation or interpretative declaration:
 - a. **Ascertain original intention** of those who drafted the declaration
 - b. **Cannot be 'too vague or broad for it to be possible to determine the exact scope or meaning'** (Belilos v Switzerland)
- iii. VCLT regime for reservation is **only relevant to multilateral treaties** – a reservation in a bilateral treaty is effectively a counteroffer, as in a contract
- iv. **Note:** consider the substantive context
 - 1. *XXX's declaration does not indicate that its acceptance of the [treaty name] was conditional on its declaration. Only provides that the concept should be interpreted as a principle of cooperation rather than customary law* (Belilos v Switzerland)

b. Is the reservation permitted?

- i. Reservations **must be made in writing** (VCLT Art 23(1)(a))
- ii. Reservations will be permitted by the treaty itself **unless:**
 - 1. **The reservation is expressly prohibited** by the treaty (VCLT Art 19(a))
 - 2. The treaty only **provides for specific reservations** (VCLT Art 19(b))

3. Or if it is **incompatible with the object and purpose of the treaty** (VCLT Art 19(c))

In this instance, XXX is likely to be inconsistent and impairs the raison d'être of the treaty which seeks to XXX

 - a. **Permissibility approach** – objective test on whether the reservation is consistent with the object + purpose of the treaty (Reservations to Genocide Convention (Advisory Opinion))
 - i. **Note:** Where a party accepts a reservation, it implies that the reservation is permissible and compatible with treaty
 - b. **Silence** is assumed to be **an acceptance of reservation** (VCLT Art 20(5))
 - c. **Impact:** Acceptance of reservation would result in **parties being bound to the treaty with provisions modified to the extent of the reservation** (VCLT Art 21(1)(a)) to the same extent for both parties (VCLT Art 21(1)(b))
4. **Lack of objection does not cure an incompatibility with the object and purpose**
 - a. Reservations **that offend jus cogens norms** would **not be compatible** with the object and purpose
 - b. Provisions **that represent customary IL** may not be subject to reservations
 - c. **States may not reserve rights that are contrary to human rights standards**

c. Effect of an Impermissible Reservation

- i. **Traditional view** – the impermissible reservation erases consent of the state to the entire treaty, and that State is not a party (ICJ Reservations to Genocide Convention (Advisory Opinion) (1951))
- ii. **Emerging view** (esp for human rights treaties) → the impermissible reservation is **null and void and may be severed, and the state remains bound by the treaty without the protection of the reservation** (ILC Guide to practice on Reservations to Treaties, Guideline 4.5.3)

d. Effect of a Permissible Reservation made by reserving state ('R')

- i. If State A **accepts the reservation** – the treaty is **modified as between R and A, as provided for in the reservation** (VCLT Art 21(1))
- ii. If State B **objects and says the treaty is not to apply as between R and B** –the reservation **does not preclude the entry into force of the treaty as between the objecting and reserving States unless a contrary intention is definitely expressed by the objecting State** (VCLT Art 20(4)(b))
- iii. If State C **objects but does not say the treaty is not to apply as between R and C** – the treaty **applies as between R and C, but 'the provisions to which the reservation relates do not apply...to the extent of the reservation'** (VCLT Art 21(3))

e. Acceptance of the reservation

- i. No acceptance required if reservation expressly authorised by treaty (VCLT Art 20(1))

- ii. **Acceptance by all parties** required if there are a **limited number of states** and application of the entire treaty is an essential condition of the parties' consent (**VCLT Art 20(2)**)
- iii. Reservations are accepted if **no objection is raised within 12 months or by the date it expressed its consent to be bound by the treaty** (**VCLT Art 20(5)**)

f. Effect of Permissible Reservations that are objected

- i. Parties that **accept** the reservation are bound by the treaty with respect to the reservation (**VCLT Art 20(4)(a)**)
- ii. Parties that **object** the reservation are bound to the treaty with the reserving state (**VCLT Art 20(4)(b)**) but
- iii. An act expressing a State's consent to be bound by the treaty and containing a reservation is effective as soon as at least one other contracting State has accepted the reservation (**VCLT Art 20(4)(c)**)
- iv. The reserving state is not protected by the reservation (**VCLT Art 21**)

g. Effect of Reservation

- i. A reservation established in accordance with Arts. 19, 20 and 23 (**VCLT Art 21**)
 - 1. Modifies the reserving State's obligations under the treaty to other parties, and (**VCLT Art 21(1)(a)**)
 - 2. Modifies other parties' obligations under the treaty to the reserving State (**VCLT Art 21(1)(b)**)
- ii. The reservation does not modify the provisions of the treaty for the other parties to the treaty as between them (**VCLT Art 21(2)**)
- iii. **Reservations to Genocide Convention (*Advisory Opinion*)**
 - 1. 'A State which has made...a reservation which has been objected to by one or more of the parties to the Convention but not by others, can be regarded as being a party to the Convention if the reservation is compatible with the object and purpose of the Convention'
 - 2. Effect of permissible/compatible reservation for
 - a. **A party to the treaty, that objects the reservation** - can consider the reserving State **not a party**
 - b. **A party to the treaty, that accepts the reservation** – can consider reserving State a party
 - 3. Legal effect of an objection to a reservation – made by:
 - a. **A State that has signed, but not ratified** – their objection only has legal effect upon ratification → until ratification, it only serves as a notice to the other State of the eventual attitude of the signatory party
 - b. **A State that is entitled to sign or accede, but has not done so** – objection has no legal effect

5. Interpretation

- a. **Ordinary Meaning** – A treaty should be interpreted **in good faith in accordance with the ordinary meaning** to be given to the terms of the treaty in their context and in the light of its object and purpose (**VCLT Art 31(1)**)
 - i. Primacy should be given to the **actual words** (textual approach), **intention of the parties** (subjective approach), or the **object and purpose of the treaty** (teleological approach) (**ILC Draft Articles on the Law of Treaties, with Commentaries**)

- ii. Difference between ‘territorial dispute’ and ‘dispute’ does not give the latter a more general effect (*Nicaragua v Colombia*)
- iii. Meaning of terms may evolve to reflect the contemporary context (*Costa Rica v Nicaragua*)

b. Context

- i. Context can be used in interpreting meaning to text, relating to any treaty between parties (*VCLT Art 31(2)*)
- ii. **Context includes** – text, preamble, annexes, agreements relating to the treaty, instruments accepted by all parties as relating to the treaty
 1. Can rely on preamble to confirm the interpretation of the ordinary meaning of the treaty under consideration (*Territorial Dispute Case; Whaling in the Antarctic*)

c. Subsequent agreement/practice and applicable international law (*VCLT Art 31(3)*)

- i. *Here the ordinary meaning is ambiguous as XXX...and thus allows for supplementary means of interpretation. The XXX action shows that there is XXX...meaning that States*
- ii. Together with context, there shall be taken into account (*VCLT Art 31(3)*) -
 1. **Subsequent agreement** between the parties regarding the interpretation of the treaty or the application of its provisions (*VCLT Art 31(3)(a)*);
 - a. In *Dispute regarding Navigational and Related Rights*, the ICJ recognised that where the **meaning of terms was likely to evolve over time** and **where the treaty has been entered into for a very long period** or is ‘of continuing duration,’ the **parties must be presumed**, as a general rule, to **have intended those terms to have an evolving meaning**’
 2. **Subsequent practice** in the application of the treaty which establishes the agreement of the parties regarding its interpretation (*VCLT Art 31(3)(b)*)
 3. **Any relevant rules of international law** applicable in the relations between the parties (*VCLT Art 31(3)(c)*)
- iii. Any subsequent agreement or subsequent practice between the parties is to be taken into account when interpreting a treaty (*VCLT Art 31(3)*)
 1. **ICJ confirmed that resolutions of international organisations can constitute such agreement or practice** (*Whaling in the Antarctic Case*)

d. Preparatory Works – If the treaty leaves an ambiguous or obscure meaning or leads to a result which is manifestly absurd or unreasonable, *travaux préparatoires* (preparatory works) can be referred to in assisting interpretations (*VCLT Art 32*)

- i. **Preparatory works include**
 1. Records of negotiation, successive drafts of the treaty, conference records, and statements made by parties
- e. **Limitations** – The more parties to a treaty, the more difficult it can be to apply the principles set out in Article 31 and 32 of the Vienna Convention
 - i. Inconsistency – Consistent ‘subsequent practice may be hard to find;
 - ii. Unclear – The initial object and purpose may be unclear
 - iii. Irrelevant – The original intentions of the parties may now be irrelevant

- iv. Does not reveal intentions – The *travaux préparatoires* may shed **no real light on the intention of the parties** which were not involved in the initial negotiations

6. Validity of Treaties

- a. **Generally** – A key principle of treaty law is that treaties must be performed in good faith (*pacta sunt servanda*) **(VCLT Art 26)**
- i. A failure of a State to fulfill its obligations under a treaty **may amount to a ‘material breach’** that triggers the rules of State Responsibility
- Under certain circumstances, a State may terminate the treaty:
 - VCLT provisions concerning the termination and suspension of treaties is part of customary IL **(Gabcikovo-Nagymaros)**
- b. **Invalid (grounds)** – treaty is void if its conclusion was procured by the **threat or use of force, if it violates jus cogens, or if it is ‘invalid’** → grounds listed in *VCLT* on which a treaty may be declared invalid (invalidity of a treaty flows from invalidity of a state’s consent to be bound, which can be **based on any of the following grounds**):
- i. **Internal Law (VCLT Art 46)**
- State’s consent to be bound can be **invalidated** if consent **manifestly violated a municipal law relating to the state’s competence to enter into treaties**
 - A violation is **manifest** if it would be **objectively evident** to any State conducting itself in the matter in accordance with normal practice and in good faith
 - In **Land and Maritime Boundary Between Cameroon and Nigeria** –
 - Nigerian President agreed to be bound by a treaty but Nigeria **argued treaty was invalid because it did not follow internal procedure** (treaty had to be first approved by Military counsel before President could bind Nigeria)
 - ICJ held** - although there was a **domestic limitation, it did not meet the ‘manifest’ threshold** because it [the internal procedure] had not been properly publicised, especially since heads of states are recognised in art 7 of *VCLT* as representing their state for the purpose of concluding treaties
 - there is **‘no general legal obligation** for States to keep themselves **informed of legislative and constitutional developments in other states States’**
- ii. **Error (VCLT Art 48)**
- A State may invoke an error in a treaty as invalidating its consent
 - The error must relate to -
 - A fact or situation **assumed by the State to exist at the time of treaty conclusion**
 - Formed an **‘essential basis’** of the State’s consent to be bound
 - State cannot plead error **where it was on notice of possible error or contributed to it**
 - In **Temple Preah Vihear**
 - Cambodia and Thailand both claimed sovereignty over the Temple of Preah Vihear

- b. Thailand argued that 1907 boundary map placed temple in Cambodia was incorrect because it did not follow watershed line agreed in a 1904 treaty
 - c. **ICJ held** – Thailand had received the map and had said nothing to suggest it was inaccurate – Thai authorities had ‘accepted it without any independent investigation and **cannot plead any error vitiating the reality of their consent**’
- iii. **Fraud (VCLT Art 49)**
 - 1. 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
- iv. **Corruption (VCLT Art 50)**
 - 1. If the expression of a State’s consent to be bound by a treaty has been **procured through the corruption of its representative directly or indirectly by another negotiating State**, the State may **invoke such corruption as invalidating its consent to be bound by the treaty**
- v. **Coercion of a state representative or state (VCLT Arts 51-52)**
 - 1. **Coercion of a representative of a State (VCLT Art 51)**
 - a. The expression of a State’s consent to be bound by a treaty which has been procured by the coercion of its representative through acts or threats directed against him shall be without any legal effect
 - 2. **Coercion of a State by threat of use or force (VCLT Art 52)**
 - a. A treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations
 - b. NB:
 - i. Threatening to withhold aid, trade and severing economic ties **does NOT** amount to coercion
 - ii. Coercion = **threat of use of force**
 - c. In **Nicaragua v Colombia**
 - i. N ratified treaty while under USA military occupation
 - ii. Invoked Art 52 saying treaty was void due to coercion – claiming influence of USA even after withdrawal of last US troops
 - iii. **ICJ held** – observed that for more than 50 years, even after USA occupation ended, N treated treaty as valid + acted consistently with the treaty + never contended that it was not bound by treaty
- vi. **Breach of good faith** – possible ground of invalidity (**not established**)
 - 1. Possible that breach of good faith by one negotiating party might render subsequent treaty invalid or void
 - 2. In **Timor-Leste v Australia**
 - a. Timor-Leste argued that treaty (2006 treaty on maritime arrangements) was procured in bad faith because Australia planted listening devices in T-L negotiating rooms allowing them to hear private discussions

- b. **Issue was settled before hearing so it is not determinable** – arguable that if Australia had been aware it would have taken advantage and the core of all the VCLT grounds of invalidity was tainted

7. Termination, Withdrawal and Suspension

- a. **Generally** – It is important to note when reading **VCLT Arts 54-63** whether each article permits
 - i. **Termination** – treaty ceases to exist
 - ii. **Denunciation or withdrawal** (terms are usually used interchangeably) – one party can denounce or withdraw from a treaty which, if multilateral, remains in existence for the other parties; or
 - iii. **Suspension** – the treaty remains on foot but its performance is suspended for a time
- b. **Termination by express or implied agreement**
 - i. Subject to the terms of a particular treaty, a treaty **will terminate**:
 - 1. In accordance with its provision, or **(VCLT Art 54(a))**
 - 2. By consent of all parties, or **(VCLT Art 54(b))**
 - 3. Where it is replaced by a later treaty between the same parties and on the same subject matter and **the later treaty is intended to supersede, or is incompatible with the earlier**
- c. **Suspension by express or implied agreement**
 - i. Treaty **may be suspended by all parties in regard either to all the parties or to a particular party – if the treaty so provides or if all parties agree**
 - 1. Operation of a treaty in regard to all parties or to a particular party may be suspended:
 - a. In conformity with the provisions of the treaty **(VCLT Art 57(a))**
 - b. At any time by consent of all the parties after consultation with the other contracting States **(VCLT Art 57(b))**
 - ii. Two or more parties to a multilateral treaty can agree to suspend the operation of a treaty as between themselves, if:
 - 1. It is expressly permitted by the treaty; **(VCLT Art 58(1)(a))** or
 - 2. It is not prohibited by the treaty and:
 - a. Provided **suspension will not affect the rights and obligations of the other parties** under the treaty, and **(VCLT Art 58(1)(b)(i))**
 - b. **Suspension is not incompatible with the object and purpose** of the treaty **(VCLT Art 58(1)(b)(ii))**
- d. **Denunciation or withdrawal by express or implied agreement**
 - i. A treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal **is not subject to denunciation or withdrawal unless (VCLT Art 56(1))** –
 - 1. Treaty permits it
 - 2. All parties consent
 - 3. **Parties intended the possibility of denunciation or withdrawal (VCLT Art 56(1)(a))**
 - 4. **Such a right can be inferred from nature of the treaty (VCLT Art 56(1)(a))**
 - ii. Unless specified, party denouncing or withdrawing from treaty under **VCLT Art 56(2)** must give 12 months notice

- iii. Denunciation or withdrawal of an individual party does not terminate a multilateral treaty, **which remains on foot between all the other parties**
- e. **Material Breach**
- i. **Defined** – Repudiation of the treaty that is not permitted under *VCLT*, or **violation of a provision which is essential to the accomplishment of the object and purpose of the treaty** (*VCLT Art 60*)
 - 1. **A material breach of a treaty consists in:**
 - a. A **repudiation of the treaty** not sanctioned by the present Convention; (*VCLT Art 60(3)(a)*) or;
 - b. The **violation of a provision essential to the accomplishment of the object or purpose of the treaty** (*VCLT Art 60(3)(b)*)
 - 2. *XXX state was in serious breach of a provision that was essential to the object and purpose of the treaty OR repudiation*
 - 3. *The purported breach was XXX. Though this was a breach of a term, it would fall short of a 'material breach' as it is not a violation of the main object of the treaty*
 - ii. **Consequences if found to be breach**
 - 1. **Bilateral treaty** – Material breach of bilateral treaty by one party entitles the other party to **invoke the breach as the ground of termination or suspension in whole or in part** (option by the wronged party is accepted as a sanction for securing the observance of treaties) (*VCLT Art 60(1)*)
 - 2. **Multilateral treaty** – Material breach of multilateral treaty by one party entitles:
 - a. The other parties **in unanimous agreement to suspend** operation of the treaty in whole or in part **or to terminate it either:**
 - i. In the relations between themselves and the defaulting state (*VCLT Art 60(2)(a)(i)*) or;
 - ii. As between all the parties (*VCLT Art 60(2)(a)(ii)*)
 - b. An individual state (specially affected or fundamental change in circumstance) can **suspend but not terminate the treaty** (*VCLT Art 60(2)(b)*)
 - 3. **Material breach involves**
 - a. **Repudiation of the treaty not sanctioned by the present Convention** (*VCLT Art 60(3)(a)*)
 - b. **Violation of a treaty provision that is essential to accomplishing the object/purpose of treaty** (*VCLT Art 60(3)(b)*)
 - iii. **Exceptions**
 - 1. Provision protecting the human person **cannot be suspended or terminated** (*VCLT Art 60(5)*)
 - a. Include prohibiting reprisals, contained in treaties of a humanitarian nature (such as those in the field of international humanitarian law)
- f. **Supervening Impossibility of performance**
- i. **Defined** – An object indispensable for the execution of the treaty has **permanently disappeared or been destroyed** (*VCLT Art 61*)
 - ii. **Elements required** –
 - 1. Where *impossibility arises* from the permanent disappearance of an object indispensable for the performance of the treaty

2. High threshold – e.g. if a drought permanently dries up a lake that states have agreed to share (**Gabcikovo-Nagymaros**)
3. Permanent disappearance/destruction of an object – e.g. submergence of island, drying up of dam (**VCLT Art 61(1)**)
- iii. If the impossibility is **temporary**, it may be invoked only as a ground for **suspending** the operation of the treaty (**VCLT Art 61(1)**)
- iv. Impossibility of performance **may not be invoked by a party as a ground for terminating, withdrawing from or suspending the operation of a treaty if the impossibility IS THE RESULT OF A BREACH BY THAT PARTY** either of an **obligation under the treaty** or of **any other international obligation** owed to any other party to the treaty (**VCLT Art 61(2)**); (**Gabcikovo-Nagymaros**)

g. Fundamental Change of Circumstances

- i. **Defined** – A fundamental change of circumstances **not foreseen by the parties**, may not be invoked as a ground for terminating or withdrawing **unless** (**VCLT Art 62(1)**) –
 1. The existence of those circumstances **was an essential basis of parties' consent to be bound by treaty**; and (**VCLT Art 62(1)(a)**)
 2. The effect of the change is **radically to transform the extent of obligations still to be performed under the treaty** (**VCLT Art 62(1)(b)**)
- ii. **Satisfied Conditions**
 1. **Unforeseen** – Change in circumstance was unforeseen (**VCLT Art 62(1)**)
 2. **Essential** – Circumstances at the time of consent were an **'essential basis for that consent'** (**VCLT Art 62(1)(a)**)
 3. **Radically transform** – The effect of the change must be to radically transform the extent of obligations still to be performed under the treaty - (**VCLT Art 62(1)(b)**)
 - a. Must increase burden to the extent of rendering performance essentially different – In **Fisheries Jurisdiction Case**
 - i. IL admits that a fundamental change in circumstances which determined the parties to accept a treaty, if it has **resulted in a radical transformation of the extent of the obligations imposed by it**, may afford the party ground for invoking termination or suspension of the treaty
 - ii. **Court noted – change in fishing techniques was irrelevant to the obligation to submit disputes to the Court, which remained the same**
 - b. Australia successfully suspended extradition treaty with Hong Kong based on fundamental change of circumstances when **China imposed its highly restrictive National Security Law on Hong Kong in 2020**
 - i. Can be inferred that Australia's consent to be bound was based on Criminal Justice System in place in Hong Kong which was overridden under the new law which created vaguely defined offences with severe penalties, and provided for suspects to be tried in Mainland China
- iii. **Exceptions**
 1. **Fundamental change may not be invoked to terminate/withdraw if –**

- a. **Treaty establishes a boundary** (e.g. land or sea boundary – boundaries are permanent) **(VCLT Art 62(2))**
- b. **Fundamental change is result of a breach by the party invoking it**, either of an obligation under the treaty or of any other international

ICJ in Gabcikovo-Nagymaros Project (Hungary v Slovakia)

- Applied this rule strictly and decided that the treaty between Hungary and Slovakia could not be terminated simply because both parties breached their obligations arising from it
- **ICJ:**
 - o This reciprocal wrongful conduct did not bring the Treaty to an end nor justify its termination. The Court would set a precedent with disturbing implications for treaty relations and the integrity of the rule pacta sunt servanda if it were to conclude that a treaty in force between States, which the parties have implemented in considerable measure and at great cost over a period of years, might be unilaterally set aside on grounds of reciprocal noncompliance
 - o All rules of VCLT concerning termination/suspension of treaties are custom
- 1. **‘State of Necessity’** – not a ground for termination → can only be invoked to dissolve State responsibility for breach of treaty
- 2. **‘Impossibility of performance’ (VCLT, Art 61)** → Hungary could not terminate on the basis that the joint project was no longer possible, since the impossibility of performance resulted from Hungary’s own failure to carry out works it was responsible for
- 3. **‘Fundamental change of circumstances’** → ICJ held the changes submitted to Hungary did not ‘radically transform the extent of the obligations still to be performed in order to accomplish the Project’
- 4. **‘Material Breach’** – only a material breach of the treaty itself...entitles the other party to rely on it as a ground for terminating... – ‘violation of other treaty rules or of rules of general international law may justify the taking of certain measures, including countermeasures, by the injured State, but it does not constitute a ground for termination under the law of treaties’

8. Consequence of Invalidity, Termination and Suspension

a. Where the Treaty is Invalid **(VCLT Art 69)**

- i. Treaty is void and has no legal force
- ii. If acts have been performed in reliance on such a treaty
 1. State can request that other states restore it to the position it would have been had it not been a party to the treaty **(VCLT Art 69(2)(a))**
 2. Prior acts done in good faith generally remain unaffected **(VCLT Art 69(2)(b))**
- iii. The party who did the fraud/corruption/coercion cannot request other parties to restore it to its original position **(VCLT Art 69(3))**

b. Where the Treaty is Invalid due to conflict with jus cogens **(VCLT Art 71)**

- i. Conflict with an existing norm
 1. The parties must try to eliminate, as far as possible, the consequences of any act which conflicts with the peremptory norm of general international law **(VCLT Art 71(1)(a))**
 2. The parties must bring their mutual relations into conformity with the norm **(VCLT Art 71(1)(b))**
- ii. Conflict with a new norm
 1. Releases the parties from future obligations to perform the treaty **(VCLT Art 71(2)(a))**
 2. Any existing rights/obligations may be maintained only to the extent that they comply with the norm **(VCLT Art 71(2)(b))**

c. Where the Treaty is terminated (VCLT Art 70)

- i. Parties are released from further obligations (VCLT Art 70(1)(a))
- ii. Existing rights and obligations are unaffected (VCLT Art 70(1)(b))

d. Where the Treaty is suspended (VCLT Art 72)

- i. Parties released from obligations during suspension (VCLT Art 72(1)(a))
- ii. Legal relations established by treaty otherwise unaffected (VCLT Art 72(1)(b))
- iii. Parties must not do anything obstructing resumption of the treaty during suspension (VCLT Art 72(2))
 - 1. I.e. treaty is still in force but there is no obligation to follow its provisions

TOPIC 4: International Law and Municipal Law

1. Generally

- a. Monism vs Dualism** – Theorists developed two theories of monism and dualism
 - i. **Monism** – International law and municipal law form part of singular legal system and are inseparable
 - ii. **Dualism** – Two legal orders are independent
- b. Separation of Powers**
 - i. Executive represents Australia international and has sole authority to enter into treaties in exercise of Crown's prerogative powers (**s 61 Australian Constitution**)
 - ii. Parliament has **power to implement treaties** in Australian law – central roles of courts include applying and interpreting legislation that gives effect to Australia's international legal obligations (**s 51 Australian Constitution**)
- c. Domestic law in International Law**
 - i. Municipal law provides evidence of state practice and opinio juris
 - ii. Can give rise to norms of customary international law and also be evidence of general principles of law
- d. International Law in Australian Law**
 - i. Most direct effects felt when treaties to which Australia is a party is implemented in Australian law by legislation, or when Australian courts draw upon norms of CIL to develop the Australian common law
- e. Treaties and Australian Law**
 - i. Commonwealth executive possesses exclusive power to enter into treaties on any subject matter in exercise of Crown prerogative powers
 - ii. In order to be given full domestic effect, treaties must be implemented into Australian law, and it is parliament which possesses exclusive (but not unlimited) power to do so through legislation
- f. Interpretation**

2. Monism vs Dualism

- a. Monism vs Dualism** – Theorists developed two theories of monism and dualism
 - i. **Monism** – only one legal system, of which both international and domestic law are part
 1. **Incorporation** – International law applies automatically in the domestic legal order without the need for express adoption by courts or legislature, and prevails over inconsistent domestic law
 2. **Several variants (to Incorporation):**
 - a. Courts to apply international law unless inconsistent with statute (i.e. apply international law over common law)
 - b. Courts to apply international law unless inconsistent with statute or common law
 - ii. **Dualism** – International law and municipal law exist as separate systems of law
 1. International law has no direct impact upon municipal law, and must be implemented through executive order, legislation, or judicial decision
 - a. **Transformation** – International law is not automatically part of domestic law - to apply domestically its norms must be adopted, implemented or transformed into domestic law

b. Several variants to Transformation

- i. Only legislation (Parliament) may implement;
- ii. Either legislation or court decisions may implement IL into domestic law

3. Domestic Law in International Law

a. Effect of Domestic Law in International Law

- i. Domestic law can be a source of IL
 1. Evidence of customary international law (state practice)
 2. General principles of law ‘of civilised nations’

b. Where domestic law is inconsistent or non-existent with domestic law –

- i. Internal law cannot be invoked as justification for failure to perform a treaty
(VCLT Art 27)

1. **Rule for international Crimes** - ‘*The characterisation of an act of a State as internationally wrongful is governed by international law*’ and that ‘[s]uch characterisation is not affected by the characterisation of the same act as lawful by internal law’ **(Articles on Responsibility of States for Internationally Wrongful Acts Art 3)**

a. In **Sandline International Inc v Papua New Guinea**

- i. PNG contracted Sandline to provide military services and did not make second instalment of payment
- ii. PNG argued that contract was illegal as it contrived s 200 of its constitution
- iii. **Tribunal found** – acts of a state will be regarded as such even if they are ultra vires or unlawful under the internal law of the state

2. **Rule of customary law** – **(Alabama Claims 1872)**

- a. US successfully claimed damages from Great Britain for breach of constructing Confederate vessels in British ports in violation of obligation of neutrality – with vessels used in the conflict
- ii. **Violations of internal law in the process of concluding a treaty cannot be invoked** by a State to invalidate its consent to be bound **unless** that violation was “**manifest and concerned a rule of its internal law of ‘fundamental importance’**” **(VCLT Art 46)**

4. How does International Law Influence Domestic Law

a. Effect of International Law on Domestic Law

- i. The most direct effects are felt **when treaties** to which Australia is a party are **implemented in Australian law by legislation, OR when Australian courts draw upon norms of customary international law** to develop the Australian common law
- ii. Australia will not normally ratify treaties **until legislation is in place** to ensure that Australia is not **in breach of the treaty provisions**
- iii. IL may also influence official policies, professional guidelines or codes

b. Customary International Law

- i. **Australia’s dominant approach**

1. Customary international law is a **source of domestic law**, but requires judicial decision or parliamentary enactment via legislation (**Chow Hung Ching v R 1949**)
 2. CIL has an important role in influencing the development of domestic law (**Mabo v Queensland (No 2)**) – especially when customary IL declares the existence of universal human values
 3. Australian national judges will develop the common law in a manner consistent with the clear international jus cogens prohibition against torture (**Habib v Commonwealth**)
- ii. **Is the rule of CIL defined?**
 1. CIL must be sufficiently certain and its existence clearly evinced before courts will apply it
 - iii. **Does it conflict with municipal statute?**
 1. If yes – influence of municipal law
 2. If no – continue
 - iv. **Is it a civil or criminal matter?**
 1. **Civil Matter** (‘soft’ transformation approach but not expressly endorsed)
 - a. **No automatic incorporation of custom**, but universally recognised principles of IL would be applied by courts (**Chow Hung Ching v R 1949**)
 - b. Common law must reflect universal norms (**Habib v Commonwealth**)
 2. **Criminal Matter (hard transformation)** – must be created by Statute, not courts
 - a. Crimes under public international law do not become part of Australian law in **the absence of implementing or adopting legislation** (**Nulyarimma v Thompson – Wilcox and Whitlam JJ**)
 - b. Uncertainty with common law – Merkel J dissenting – genocide is an offence under common law of Australia
- c. **Treaties**
- i. **Transformation approach** - Australia follows the hard transformation approach for treaties, whereby treaty **provisions do not become domestic law unless it has been implemented by the legislature** (**Dietrich v R 1992**)
 1. Like all treaties which Australia are party to, the UN Charter is not part of domestic law in respect of areas not legislated by parliament (**Bradley v Commonwealth**)
 - a. UN resolutions, although binding in international law, are not binding in Australian domestic law where they have not been incorporated by legislation
 - ii. The ‘hard’ transformation approach is a result of the **separation of powers doctrine**
 1. Treaty-making is for the executive, law-making is for the Parliament
 - a. Limited exceptions for peace treaties and maritime boundary agreements – they can have binding effect in domestic law even without legislation
 - iii. Is the treaty valid at the international level?
 1. Formation of the treaty
 2. Is the treaty applicable
 3. Is the treaty void

4. Has the treaty been terminated

d. Entry into treaty on International level

- i. The power to legislate treaty provisions is **contained in the external affairs power in s 51 (xxix) of the Constitution**, which provide the Commonwealth the right to **legislate with respect to relations between Australia and other countries**, matters physically external to Australia and to implement international law
- ii. **Executive power** (Governor general) enters into treaty – **s 61 Constitution**
- iii. **Bilateral treaties**
 1. **Signature**
 2. **Subsequent exchange of notes** stating the required **constitutional process is complete**
- iv. **Multilateral treaties**
 1. **Signature**
 - a. Indicates consent to be bound, but does not bind
 - b. Must refrain from acts that would defeat the object and purpose of the treaty before ratification (**VCLT Art 18**)
 2. **Subsequent ratification (or accession if no previous signature)**
 - a. Act that indicates the states' consent to be bound under PIL, following which documents of ratification will be filed with the UN repository
 - b. Often concurrent with signing as the Executive has the sole power to do both
- v. **Entry into force**
 1. Date specified by treaty
 2. By mutual consent of all parties
- vi. **No constitutional requirement for Parliamentary approval of treaty-making**
 1. However, only parliament may pass legislation implementing treaties in Australia

e. Entry into treaty on domestic level

- i. **Executive power signs treaty** (*Governor General*)
 1. Exclusive power - (**s 61 Constitution**)
 - a. Recognised by HCA as '**exclusive and unfettered**' (**Koowarta v Bjelke-Petersen 1982**)
 2. External affairs power will support legislation applicable to matters geographically external to Australia – only requirements per **Horta v Commonwealth**
 - a. Treaty must be **bona fide** (entered into in good faith)
 - b. The legislation **must create a regime sourced from the requirements of treaty itself** (cannot be used as a peg from which to hang otherwise ultra vires legislation)
 - c. The **legislation must be appropriate to the treaty**
 3. **Tabling**
 - a. Treaty laid before Parliament at least 15 sitting days prior to binding action (**response to "trick or Treaty?" Report of 1995**)
 - b. Exemption for urgent or sensitive treaties
 4. **Consultative**
 - a. Preparation of National Interest Analysis (NIA) – Strengths and weaknesses of the treaties

- b. JSCOT review – reviews treaties that the executive wants to enter into
 - c. Treaties Council (PM, Premiers, Chief Ministers)
 - ii. **Legislative power** (*Parliament*) to implement treaties
 - 1. **External affairs power allows legislation applicable to the following cases**
s 51 (xxix) Constitution
 - a. Relations **between Australia and other countries**
 - b. **Matters physically external** to Australia
 - c. Implementing international law
 - 2. Power is not absolute, but is very wide and with little constitutional limits
(Horta v Commonwealth 1994; Tasmania Dam Case 1983)
 - iii. **Ways of incorporation – legislative power**
 - 1. **Give the treaty the force of law**
 - a. Where treaty has been drafted with a view to **incorporating terms in domestic law** e.g. articles x through y of treaty have force in Australia
 - 2. **Translation of treaty provision into domestic law**
 - a. Rewording the treaty + including it in legislation
 - 3. **Use of regulations**
 - a. Saying that future **changes to a treaty may be affected by regulations** without further parliamentary involvement
 - 4. **Approving treaties** – formal Parliamentary approval but no longer required
 - iv. **Consequences**
 - 1. If treaty **not incorporated** → influence of municipal law
 - a. Individuals cannot rely on treaty rights in domestic courts unless implemented by legislation (cf: customary IL which is a ‘source’)
 - 2. Generally, the Executive will not become a party until there is domestic law to avoid breach
 - a. Illegality of international agreements does not affect their domestic standing **(Horta v Cth)**
 - 3. Unless there is legislative implementation, there is no authority for the Commonwealth executive to implement UNSC resolutions **(Bradley v Commonwealth)**
- f. **Interpretation**
 - i. **Statutory Interpretation – Polites Principle**
 - 1. Polites principle states the presumption that **legislation is intended to be in conformity with international law**, because **Parliament intends to give effect to Australia’s international legal obligations**
 - a. Encourages Australian Courts to **interpret legislation in conformity with Australia’s international legal obligations** (arising from custom or treaties)
 - b. The court will make **every effort possible to interpret legislation to avoid any breaches of the treaty provision**
 - c. It is **not absolute**
 - 2. **Polites principle is recognised in Statutory Interpretation** **(Polites v Commonwealth)**
 - a. Legislation...does not become invalid because it conflicts with a rule of international law, though **every effort should be made to construe**

Commonwealth statutes so as to avoid breaches of international law and of international comity (**Latham CK**)

3. Polites Principle is not recognised in Interpretation of Australian Constitution (**Al-Kateb v Godwin**)

- a. Court has never accepted that the Constitution contains an implication...that it should be interpreted to conform with the rules of international law...If the rule were applicable to a Constitution, it would operate as a restraint on the grants of power conferred' (**McHugh J (majority view)– rejected Polites Principle**)
- b. Whatever may have been possible in the world of 1945, the complete isolation of constitutional law from the dynamic impact of international law is not possible nor desirable today (**dissenting Kirby J – accepted Polites Principle**)