

INTERNATIONAL LAW: SOURCES, TREATIES, CIL

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Agenda

- Introduction
- Sources of international law
- Relationship between treaties and custom
- Treaties as primary source
- Actors in international law
- States as primary actors
- Non-state actors
- Discussion

Brainstorming

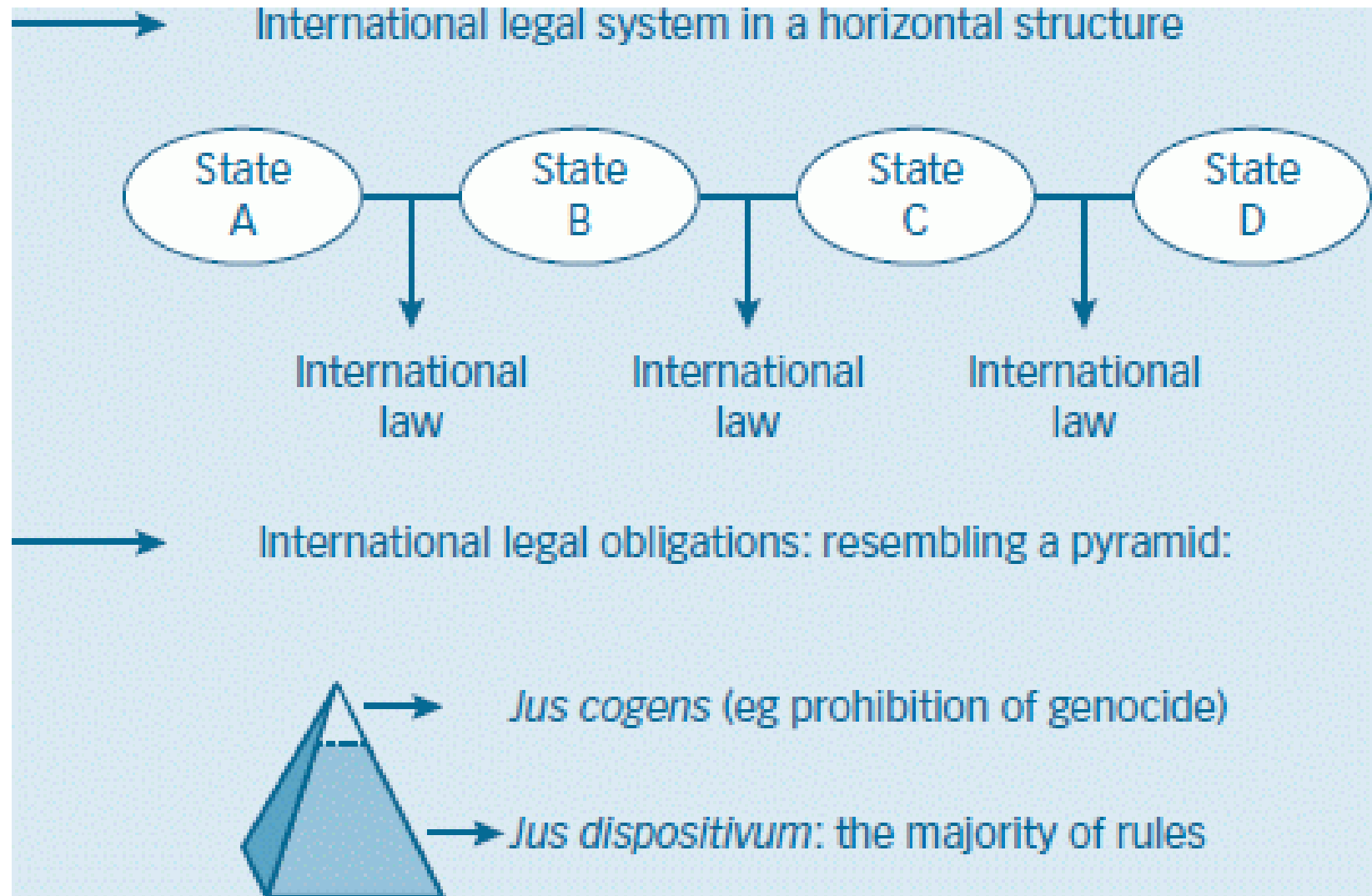
- *International law governs relations between states inter se*
 - ▣ *Lotus Case 1927*

- *It can be argued that international law does not exist in a world of power politics: a statement that is particularly true since the war in Iraq.*
- *Do you agree?*

Power Imbalances (int'l society)



Nature of int'l legal order



Underlying notions

□ **Sovereign authority**

- ▣ All states possess supreme legal authority within their own territory
- ▣ Exclusive exercise of jurisdiction therein

□ **Sovereign equality**

- ▣ All states have equal status within int'l legal system
 - Caveats: P5 Veto mechanism

Sources

- Lack of single legislature to create rules of IL binding upon everyone
- Formal sources
 - ▣ Process whereby a rule becomes identifiable
 - ▣ Legal rules derive their validity from
- Material source: evidence

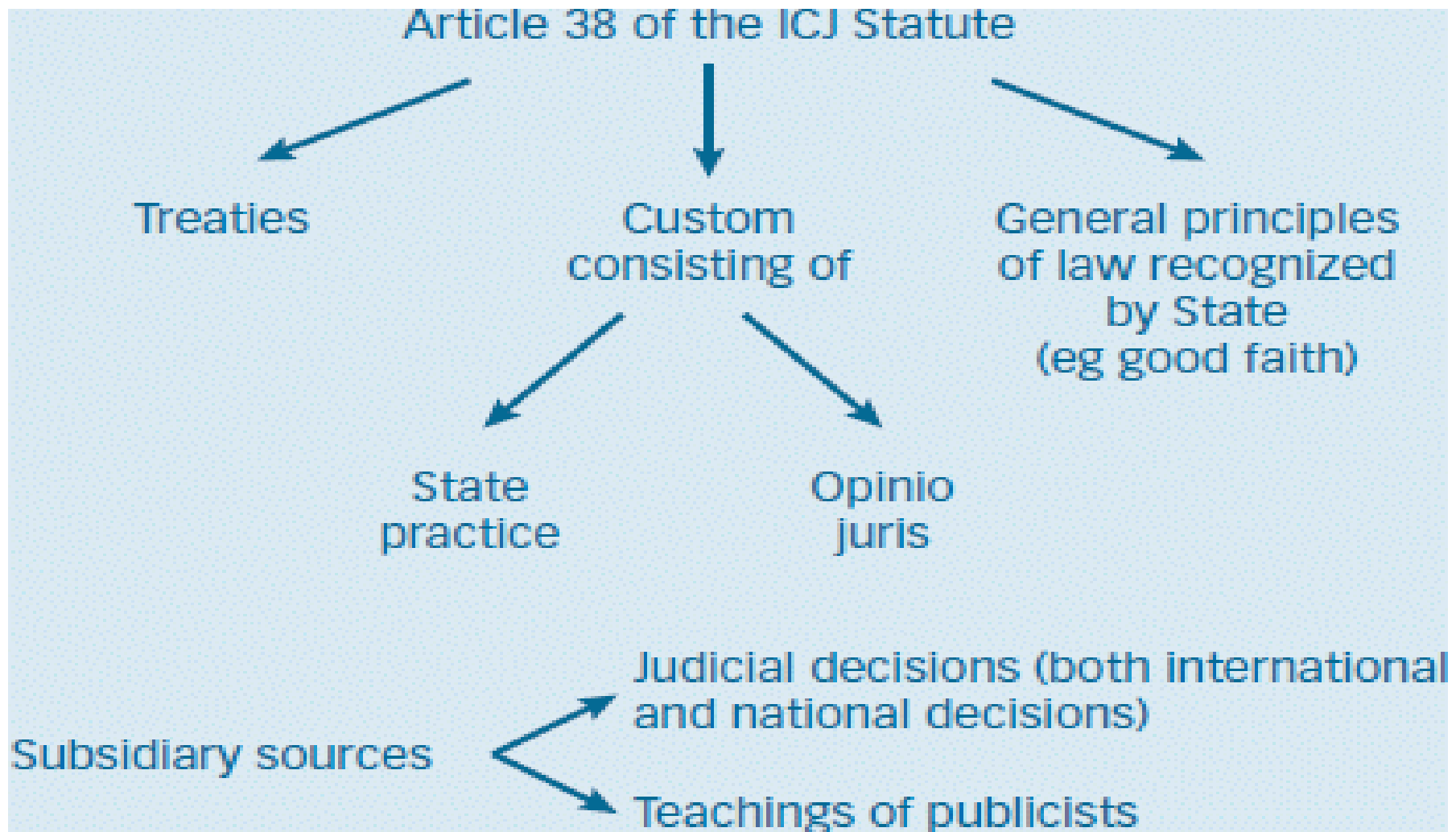
Art 38 of the ICJ Statute

(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 recognized by civilized nations;
- (d) 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.

Sources of IL



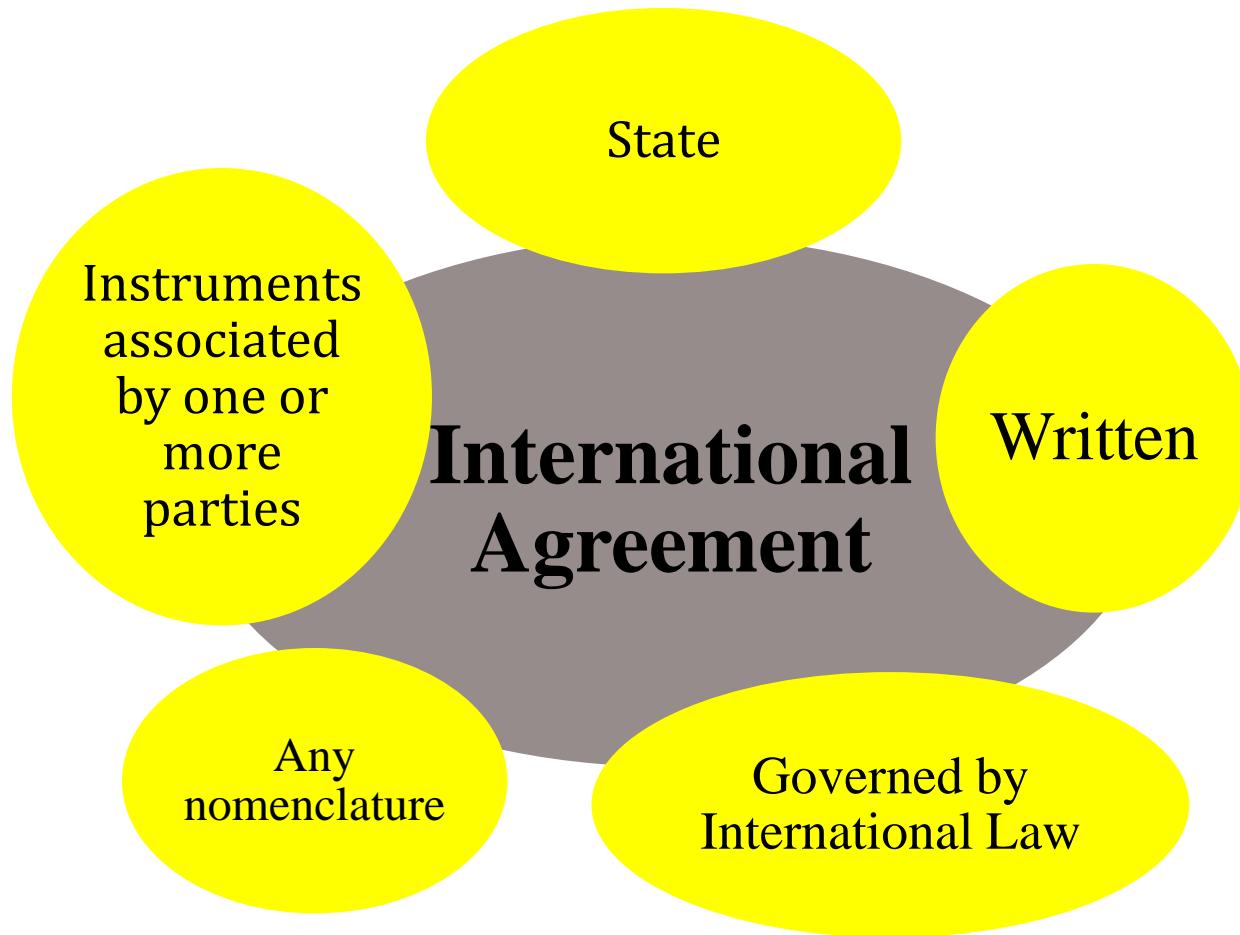
Art 38

- Art 38 does not state that it contains sources (this is usually inferred)
- Art 38 cannot itself create or provide validity of sources
- Sources herein are authoritative b/z they reflect state practice
- All UN members *ipso facto* parties to ICJ statute (art 93 of the Charter)
- Most authoritative statement as to sources

Primary and secondary sources

- Primary sources + law creating process
 - ▣ Treaty + custom + general principles
- Secondary (subsidiary) + law determining (meaning content)
 - ▣ Court decisions + academic writings

TREATY: VCLT art 2



Treaties

Article 2, VCLT

- ▣ An int'l agreement
- ▣ Between States
 - Headquarters Agreement between SAARC v Nepal (is a treaty?)
- ▣ In written form
- ▣ Governed by international law
- ▣ Embodied in single or two/ more related instruments
 - E.g., Transit Treaty + Protocol + Memorandum to Protocol + EOLs (six)
- ▣ Whatever its particular designation

Kinds of treaties

- Inter-departmental/governmental/state
- Bilateral/plurilateral/multilateral/supranational
- Contract treaties
 - ▣ Particular : e.g. for supply of cement
- Law-making treaties
 - ▣ General, indefinite, purpose
 - ▣ Rules of universal IL (e.g., UN Charter)
 - ▣ Laying down general principles (e.g., UNCLOS)

Supranational law/treaties

- Limiting state sovereignty by requiring states to transfer part of their judicial authority to a set of common tribunals through treaties.
- Unlike public international law, which depends on consensus (voluntary compliance) between sovereign states, supranational law depends on a partial transfer of sovereignty (conferral), enabling courts and institutions to enforce legal norms on both states and individuals.
- E.g., the EU law
- Member states have transferred part of their sovereignty to the EU, recognizing its legal order (in its own right) and jurisdiction over certain aspects of their national legal orders.
- E.g., under EU law, competence over fisheries is vested in the EU rather than individual member states.
- It is the EU that makes fishery treaties that govern fishing rights between EU vessels and those of non-member states, treating these treaties as international agreements akin to those made between two states governed by international law.
- Supranational law is not merely a law between member states (as in international law) but also law between EU bodies and citizens of the member states (who are also EU citizens).
- EU citizens enjoy rights directly from certain EU legal instruments.

Evolution of treaty law

- Oldest surviving treaty texts
 - ▣ 2100 BC, a solemn treaty (on boundary) b/n the rulers of Lagas and Umma (city states in Mesopotamia)
 - Inscribed on a stone block
 - ▣ 1000 years later, Ramesh II of Egypt and the King of the Hitties
 - Treaty concerning eternal peace and brotherhood
 - Territorial integrity, defensive alliance
- Oath (solemn affirmation) for entry into force
 - ▣ Respective gods
 - Curses
 - ▣ Religious rituals
 - Sacrifice of animals

Evolution...

- Modern treaty law from Vienna Congress 1815
 - ▣ First time, the idea that a treaty binding upon different states by the same terms constitutes a single instrument
 - ▣ Novelty of the mechanism of 'Final Act'
- Multilateral treaty making 1864-1914
- Rise of IOs and their role
- LON, UN role as depository and initiator of treaty negotiations (e.g., UNCLOS 1982)

Designation (what is in?)

- Convention
- Treaty (e.g. of peace, extradition)
- Agreement (e.g. cultural cooperation)
- MOU
- Charter
- Articles of Association
- Final Act
- Declaration
- Modus vivendi
- Protocol (Kyoto Protocol 1997 to 1992 FCCC)
- Optional Protocol (to ICCPR)
- Agreed Minutes
- Record of Discussion
- Exchange of Notes (Cameroon v Nigeria 2002)
- *Note verbale*
- *Pactum de contrahendo*

Designation

- Very solemn
 - ▣ Covenant, charter
- The average
 - ▣ Treaty, convention, pact, protocol
- The downright pedestrian
 - ▣ Agreed minutes, exchange of notes, MOU/agreement

Oral treaties

- Eastern Greenland 1933 Denmark v Norway
- M. Ihlen, the Norwegian Foreign Minister, had conversations with the Danish Minister on 14 July 1919, where Denmark suggested it would not oppose Norway's claim to Spitsbergen at the Paris Peace Conference if Norway did not oppose Denmark's claim to the whole of Greenland at that Conference.
- On 22 July 1919, Ihlen, in the course of further conversation with the Danish Minister, declared that 'the Norwegian Government would not make any difficulty' concerning the Danish claim.
 - ▣ **I told the Danish Minister today that the Norwegian Government would not make any difficulty in the settlement of this question.**
- These were the terms used as they were minuted by M. Ihlen for his Government's own purpose.

Eastern Greenland

□ Denmark

- Norway had recognized Danish sovereignty over the Island by the 'Ihlen Declaration' because the undertaking involved in the Declaration was binding and conclusive as Ihlen added no reservations or riders to it
- In any case, it was not a mere oral agreement, because its terms were fixed in writing by Ihlen himself.

Eastern Greenland

□ Norway

- ▣ The Declaration as mere diplomatic assurance of its benevolent attitude in subsequent negotiations
- ▣ Informal, confidential, and not meant to be binding
- ▣ Verbal declaration not internationally binding, especially when involving renunciation of national interests
- ▣ Ihlen could not bind Norway by such statement b/z IL attaches legal force only to those acts of foreign minister which fall within his constitutional competence
- ▣ Ihlen lacked requisite authority

Court's view

- A reply of this nature given by the Foreign Minister on behalf of his Government in response to a request by the diplomatic representative of a foreign Power, in regard to a question falling within his province, is binding upon the country to which the Minister belongs.
- It follows that as a result of the undertaking involved in the Ihlen declaration..., Norway is under an obligation to refrain from contesting Danish sovereignty over Greenland as a whole and a fortiori to refrain from occupying part of Greenland.

Example of oral agreement

- According to Anthony Aust, *Modern Treaty Law and Practice*
 - ▣ The 1992 settlement of a dispute b/n Denmark and Finland about the construction by Denmark of a bridge across the Great Belt in a telephone conversation between the Danish and Finish Prime Ministers.
 - ▣ In this conversation, Finland agreed to discontinue its case before the ICJ in exchange for a payment from Denmark, with no formal joint record of the agreement.

Is Minutes a Treaty?

- *Territorial Dispute (Qatar v Bahrain) 1994*
- During negotiations, the two states signed several documents, including two important ones in 1987 and 1990.
- The 1990 Doha Minutes comprised the minutes of the consultation between the two states, detailing their agreements, including a 1987 accord stating that if peaceful negotiations failed, either state could take the dispute to the ICJ.
- Qatar invoked this agreement and brought the case before the ICJ on 8 July 1991.
- Bahrain contested the Court's jurisdiction, arguing that the Doha Minutes did not constitute a treaty.

Territorial Dispute..

□ The Court's view:

- International agreements may take many forms and be given a diversity of names
- To ascertain whether an agreement of that kind has been concluded, 'the Court must have **regard above all to its actual terms and to the particular circumstances in which it was drawn up.**'
- The 1990 Minutes did not merely give an account of discussions and summarize points of agreement and disagreement.
- They enumerated the commitments to which the Parties have consented, and so create int'l rights and obligations for the Parties.
- Doha Minutes were more than just a simple record of a meeting and did hold legal significance, contrary to Bahrain's claims.
- They constitute an international agreement.

Joint communique??

- *Aegean Sea Continental Shelf* case (Turkey v Greece)
- The joint communiqué of Brussels of 3 1 May 1975:
 - ▣ In the course of their meeting the two Prime Ministers had an opportunity to give consideration to the problems which led to the existing situation as regards relations between their countries. They decided that those problems should be resolved peacefully by means of negotiations and as regards the continental shelf of the Aegean Sea by the International Court at The Hague. They defined the general lines on the basis of which the forthcoming meetings of the representatives of the two Governments would take place.
 - ▣ In that connection they decided to bring forward the date of the meeting of experts concerning the question of the continental shelf of the Aegean Sea and that of the experts on the question of air space.
- The Communiqué does not bear any signature or initials
- The Prime Ministers issued it directly to the press during a press conference held at the conclusion of their meeting on that date

Joint..

□ Greece:

- A joint communiqué may constitute such an agreement.
- To have this effect, it is necessary, and it is sufficient, for the communiqué to include-in addition to the customary forms, protestations of friendship, recital of major principles and declarations of intent-provisions of a treaty nature.
- The issue of joint communiqués as ‘a modern ritual which has acquired full status in international practice’.
- Particularly emphasized on the word ‘décidé’
- Obligation indicative of a mutual commitment on the part of the Prime Ministers to refer the dispute to the Court.
- The agreement embodied in the Communiqué is more than an undertaking to negotiate and directly confers jurisdiction on the Court.
- The two Governments thereby jointly and severally accepted the jurisdiction of the ICJ in the present matter, pursuant to art 36 (1)

Joint

□ Turkey:

- A joint communiqué does not amount to an agreement under international law
- If it were one, it would need to be ratified at least on the part of Turkey
- The intention was quite different, and that the Communiqué was ‘far from amounting to agreement by one State to submit to the jurisdiction of the Court upon the unilateral application of the other State
- There was no commitment to submit to the Court without a special agreement because the following paragraph said in this connection that:
 - the two Prime Ministers had decided to accelerate the meeting of the experts concerning the question of the continental shelf of the Aegean Sea.

Joint communiqué

- The Court:
- On the question of form, the Court need only observe that
 - ▣ It knows of no rule of international law which might preclude a joint communiqué from constituting an international agreement to submit a dispute to arbitration or judicial settlement (cf. arts 2, 3 and 11 of the VCLT)
- Accordingly, whether the Brussels Communiqué does or does not constitute such an agreement essentially depends **on the nature of the act or transaction to which the Communiqué gives expression; and it does not settle the question simply to refer to the form-a communiqué-in which that act or transaction is embodied.**
- Must have regard above all to its actual terms and to the particular circumstances in which it was drawn up.
- On the facts, the Joint communiqué did not constitute a binding agreement to unilaterally submit the dispute to the Court

Is this 'Convention' a treaty?

□ **Convention**

on

Economic, Social and Cultural Cooperation b/n Nepal and Monaco

- The parties will consider establishing a bilateral mechanism
- The mechanism may recommend specific areas for cooperation
- The mechanism will regularly report the outcomes of its meeting to the Finance Ministers of both countries
- Any difference under this Convention would be resolved through friendly dialogues
- The Convention will be governed by and interpreted in accordance with general principles of law including such of these principles as may have been applied by international tribunals

Is MOU a Treaty?

- *Maritime Delimitation in the Indian Ocean (Somalia v Kenya)* 2017
 - ▣ An MOU could, in fact, constitute a treaty if it is in the form of a treaty and intended to be bound.
 - ▣ The MOU in question was a binding international agreement because
 - it contained a provision regarding its entry into force (illustrating its binding nature)
 - Kenya had requested its registration under art 102 of the UN Charter unopposed by Somalia

Treaty v MOU

Treaty	MOU
Article	Paragraph
Agree, agreement, agreed	Decide, accept, approved, arrangement, understanding
Authentic, authoritative	Equally valid
Clause, conditions	Paragraph, provisions
Continue in force	Continue to have effect
Done	Signed
Enter into force	Come into effect, operation
Obligations	Commitments
Parties	Participants, governments
Preamble	Introduction
Rights	Benefits
Shall	Will
Terms	Provisions
Undertake, undertakings	Carry out, understandings

Name and form

- **E.g., Charter**
 - ▣ Treaties
 - *UN Charter*,
 - Charter of the Commonwealth of Independent States, 1993
 - ▣ Non-treaties
 - OSCE Charter of Paris of 1990
 - Russia-United States Charter of Partnership and Friendship of 1992
- **Declaration**
 - ▣ Non-binding statements
 - Rio Declaration of 1992
 - ▣ Treaties in the proper sense
 - Joint Declaration b/n UK and China on the Question of Hong Kong 1984
- Series of unilateral declarations can also have binding effects in certain circumstances

Not name but effect

- Aegean Sea Continental Shelf Case (1978)
 - ▣ Joint communique to submit dispute to arbitration/judicial settlement??
- Qatar v Bahrain (1994)
 - ▣ Status of 1990 Minutes as binding agreement despite alleged contrary intent
- Nuclear Test Cases (1974)
 - ▣ Unilateral declaration but binding why?
- Role of intent
 - ▣ Frontier Dispute case (1986)
 - intent key factor in depriving presidential 'quip' of legal effect

Not name but effect

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Written format is not required

- Oral consensus
- 1975 *Aegean sea case* (Joint Declaration)
- Art 3 VCLT: Not applicability of VCLT does not mean affecting the legal force of an int'l agreement
- Gentlemen's agreements?
- Non-binding agreements: soft law

Stages in Treaty Making

Bilateral

- ☐ Issue Identification
- ☐ Preliminary Study
- ☐ Draft Preparation
- ☐ Negotiation
- ☐ Initial Signature
- ☐ Definite Signature/
Ratification
- ☐ Entry into Force
- ☐ Deposition/ Registration
- ☐ Publication
- ☐ Review
- ☐ Expiration
- ☐ Termination

Multilateral

- ☐ Issue Identification
- ☐ Preliminary Study
- ☐ Draft Preparation
- ☐ Negotiation
- ☐ Adoption
- ☐ Signature
- ☐ Reservation/
Interpretative Declaration
- ☐ Ratification/ Accession
- ☐ Entry Into Force
- ☐ Deposition/ Registration
- ☐ Publication
- ☐ Periodic reporting (if any)
- ☐ Review
- ☐ Withdrawal of
Reservation/ Declaration
- ☐ Termination

Authority

- State has capacity (Federal Units???)
- Officials must possess authority (full powers)
 - ▣ Credentials versus full powers
- No full powers required
 - ▣ Big 3 (for all treaty related acts)
 - President + Prime Minister + Foreign Minister
 - ▣ Head of diplomatic mission (adopting text)
 - ▣ Representative accredited to IO or conference
 - Adopting text in the IO or conference
- *Ex post facto* authority (express and implied)

Consent to be bound

- Signature
 - ▣ Initial (may be final if so intended)
 - ▣ Ad referendum (to be confirmed later)
 - When so? In cases of definitive signature)
 - ▣ Simple signature (signature to be ratified)
 - ▣ Definitive/final signature
- Ratification
- Accession

Signatures

Signature	Example	Obligation
Adoption Authentication Final Act signature	Initialing adopted, authenticated text, Final Act	None
Simple (subject to ratification)		Yes (party after the date of ratification)
Definitive Full Signature	More likely bilateral Rarely in multilateral	Yes
Ad referendum (subject to later confirmation)		Yes (party from the original date)

Ratification, acceptance, approval

- When required?
 - ▣ Treaty so provides
 - ▣ Otherwise established that negotiating Ss so agreed
 - ▣ State signs 'subject to ratification'
 - ▣ Intention from full powers or as expressed during negotiations
- Duty to ratification?
- Deadline for ratification
- Acceptance, Approval (less formal than ratification)
 - ▣ E.g. in case of a treaty not requiring parliamentary ratification
 - ▣ But Nepal Treaty Act

Rationale of ratification

- Enabling legislation
- Constitutional requirement
- Thorough examination of implications
- Public opinion
- Historically, preventing diplomats exceeding authority
- Sovereignty: refraining from ratifying
- Curing any defects

Accession

- Accession (adhesion, adherence) when required?
- Is consent of all parties required for accession?
 - ▣ Prior consent
 - If the treaty so provides
 - If so was intention of negotiating states
 - ▣ Subsequent consent
- Can a treaty not yet in force be acceded to?

Interim obligation (Art 18 VCLT)

- Not to do act defeating the object and purpose
- Between signature and ratification
 - ▣ Until intention made clear not to become party
- Between consent and entry into force of the treaty
 - ▣ Provided eif is not unduly delayed
- Example: US decided to unsign Rome Statute in 2002
 - ▣ Its policy to sign bilateral agreements with state parties to ICC prohibiting them from transferring US citizens to ICC
 - ▣ This policy would definitely defeat the object and purpose of the Rome Statute
 - ▣ So, US preferred to get out of the Art 18 obligation

Terminologies

- Negotiating state
- Signatory state
- Contracting state: signifies consent but term applicable whether or not treaty is in force
- Party (both consent and cif)
- Third state/party
- Participant (used in MOU)
- Plenipotentiary
- Credentials v full powers

Invalidity

- ❑ Ultra vires
- ❑ Beyond specific restriction (but notification)
- ❑ Error as to fact and situation
- ❑ Fraud
- ❑ Corruption
- ❑ Coercion of a representative (void)
- ❑ Coercion of a state(void)
- ❑ Conflicting with existing jus cogens (void)

Observance, Application

- Observance

- *Pacta sunt servanda*
- Internal law and observance

- Application

- Non-retroactivity of treaties
- Territorial scope
- Successive treaties relating to the same subject

Ultra vires: brainstorming

- Nepal constitutional rule: Nepal cannot express consent to any boundary treaty unless it is first ratified by Legislature. But Foreign Minister expresses Nepal's consent to a boundary treaty, disregarding that rule
- OPMCM circular requires that any treaty which provides for ratification as the mode of consent must be so ratified before expressing Nepal's consent to the treaty. Nepal intends to participate in a multilateral double taxation agreement with the provision of 'signature subject to ratification'. Then, Nepal's representative expresses its consent to the agreement disregarding that legal provision.
- Can, in these cases, the violation of Nepal's internal law repudiate its consent?
- In *Land and Maritime Boundary Case*, Nigeria argued that Maroua Declaration of 1975 with Cameroon that was signed by the Nigerian Head of State was not valid since it had not been ratified by the Supreme Military Council, as the Nigerian constitution required
- But the Court rejected Nigerian's argument. What would be the reasons?

Treaties and third states

- In principle, treaties do not create either rights or obligations for third states
 - ▣ Obligations: express acceptance
 - ▣ Rights: assent may be presumed
- An example of treaties providing for rights to all states
 - ▣ 1936 Monteux Convention providing for the freedom of navigation on the Turkish Straits

Termination

- Consensual: e.g. by concluding an inconsistent treaty
- Material breach (violation of an essential provision)
- Supervening impossibility of performance
- Fundamental change of circumstance
 - ▣ Essential basis
 - ▣ Radically to transfer the extent of obligations
 - ▣ But not for boundary treaties, and by defaulter

Treaty as main source

- Treaties now an essential and ubiquitous instrument in int'l relations (VCLT preamble)
- Most direct source
- The only way that Ss can create IL consciously
- Treaties regulate practically every aspect of relations (int'l relations and law)
- Treaties occupy central position in int'l dispute settlement
 - ▣ Treaties have features in all cases decided by ICJ
- Particular importance in fields e.g. human rights, environment, trade
- Enhanced support for rule of law
 - ▣ “support for the rule of law would be enhanced if countries signed and ratified treaties

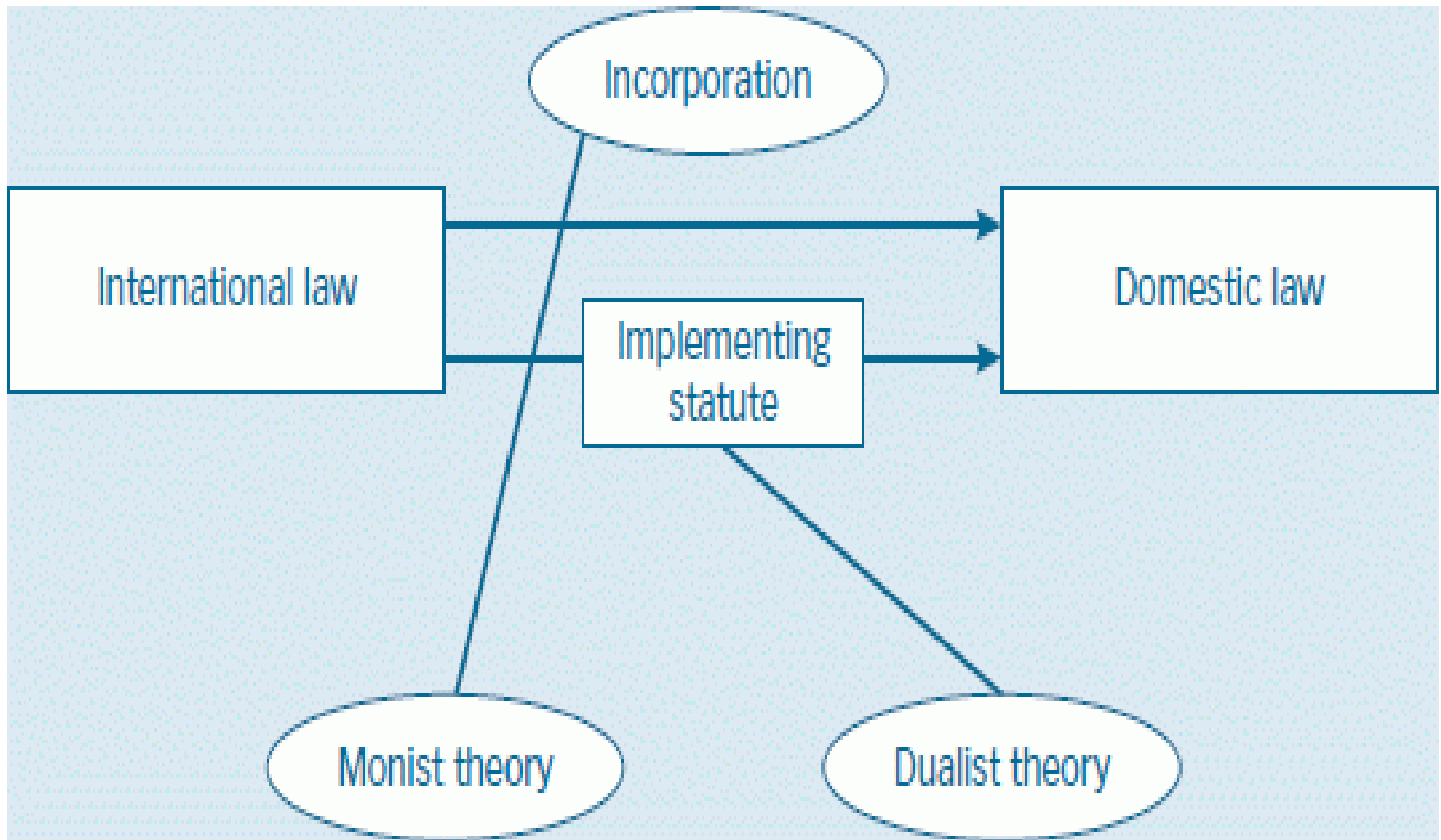
As main source

- Each state party to hundreds/thousands of treaties
 - ▣ The newest state South Sudan (2011); much older micro-state Monaco > 200
 - ▣ Signed two treaties with UN (on the very day of its birth)
 - ▣ During its first year, 5 multilateral, 4 new bilateral
 - ▣ Nepal (2025):
 - Multilateral 165 (party), 27 (signatory) (VCLT 22 May 1969) Bilateral: more ?????

Relevance of treaties

- Level of Cooperation
 - ▣ Naturally interdependent
 - ▣ IL facilitates cooperation
- Level of Co-existence
 - ▣ Interest in int'l stability
 - ▣ Mechanism of reciprocity
- Level of Conflict

Applying treaties in domestic sphere



Some issues for Nepal's treaty negotiators

- Treaties and concessions agreements
- Meaning and content of contractual agreements on financial and industrial matters
- MOUs and treaties
- Relationship between main text of a treaty and its annexes
- Ratification by way of gravity of the subject-matter or because of terminology?
- Anti-corruption, audit, procurement provision in treaties and constitutional, domestic law
- Provisional application of treaties with provisions inconsistent with national law
- Legal effect of section 9 of NTA

Customs

- *Int'l custom, as evidence of a general practice accepted as law*
- Two basic elements
- Objective: state practice: actual behavior of states/IOs
- Subjective: *Opinio juris* (a belief that such behavior is law)
- Usually not codified
- Lex lata (the law as it is) de lege ferenda (progressive development)

State practice

- External + internal acts (e.g., legal decisions + diplomatic correspondence + voting behavior at int'l conference/IO, + treaties + recognition

Elements of custom

- Duration: No rigidity + slow process+ take time
- Continuity and repetition (does a single act constitute practice: sometimes yes (instant custom))
- Consistent and uniform practice
 - ▣ No interruption in favour of other practice
 - ▣ Must not be uncertain and contradictory
 - ▣ Sufficient uniformity is needed
- Generality
 - ▣ Not accepted by every state
 - ▣ Enough/extensive practice: silence is acceptance

Important actors in the field

Opinio juris

- States will behave a certain way b/z they are convinced it is binding upon them to do so
- Opinio juris may be deduced from:
- Conclusion of treaties; attitudes during the process of passing certain GA resolutions, statements by state representatives

Major powers of the field

- No rule to be accepted by every state
- But a need for such rule to be accepted by the major powers of that field
- Influence of the UK on the development of the law of the sea (not practice by land-locked states)
- Impact of US, Russia and France on space law
- Impact of certain states on law on nuclear weapons
- Participation of especially affected states

Local, regional custom

- All Ss from that region must participate
- Silence does not mean implied acceptance
- Invoking states must prove it
- Persistent objector
- Failure to act against a customary rule/failure to object (acquiescence and acceptance)
- But objects from the very beginning + persistently

Asylum Case

- ❑ Failed rebellion in Peru in 1948- arrest warrant against a Peruvian national, Haya de la Torre- granted asylum by Columbia in its Lima-based Embassy- Columbia requested Peru to grant a safe-conduct for Torre from the territory of Peru- Peru refused.
- ❑ Columbia = a local or regional custom in the Latin American states allowed unilateral qualification of offenses and granting of asylum to the fugitives
- ❑ Columbia could not prove the existence of such a custom.
- ❑ But even if it could be supposed that such a custom existed between certain Latin American States only, it could not be invoked against Peru which, far from having by its attitude adhered to it, has on the contrary, repudiated it by refraining from ratifying the Montevideo Conventions of 1933 and 1939, which were the first to include a rule concerning the qualification of the offence in matters of diplomatic asylum.
- ❑ The claimed regional custom could not be proved due to uncertain and contradictory evidence (as evident from Peru's non-ratification of regional conventions on political asylum).

Exceptions to universal application of custom

- The persistent objector rule
- Asylum case (Peru's persistent objection to the customary rule on asylum)
- Full and partial
- Qualifications:
 - ▣ During formative stage + Express or implied (e.g., adopting a contrary practice) + publicly + persistent and consistent + burden of proof
- Subsequent objector
- Not applicable to jus cogens

Opinion about values of CIL

- Cannot be significant today b/z too clumsy, slow moving to accommodate the evolution
- Dynamic process of law creation + universal application

General principles of law (GPL)

- In any legal system: there may arise cases where there is no law covering that point or dispute
- In such a case: a rule may be deduced by analogy from existing rule OR it may be deduced from GPL
- B/z int'l is relatively an underdeveloped system
- Gaps fillers
- Principle of non-liquet

General principles

- Principles common to different legal systems
- Every violation of an undertaking involves an obligation to make reparation E.g., 1928 Chorzow Factory Case
- Estoppel (if a state consents impliedly (acquiesces) to a specific situation or an act, it shall lose its right to object to that situation in future
 - ▣ 1962 Temple of Preah Vihear case (Cambodia and Thailand) The ICJ awarded the ownership to Cambodia
 - ▣ A flag raised=a visit paid by an official

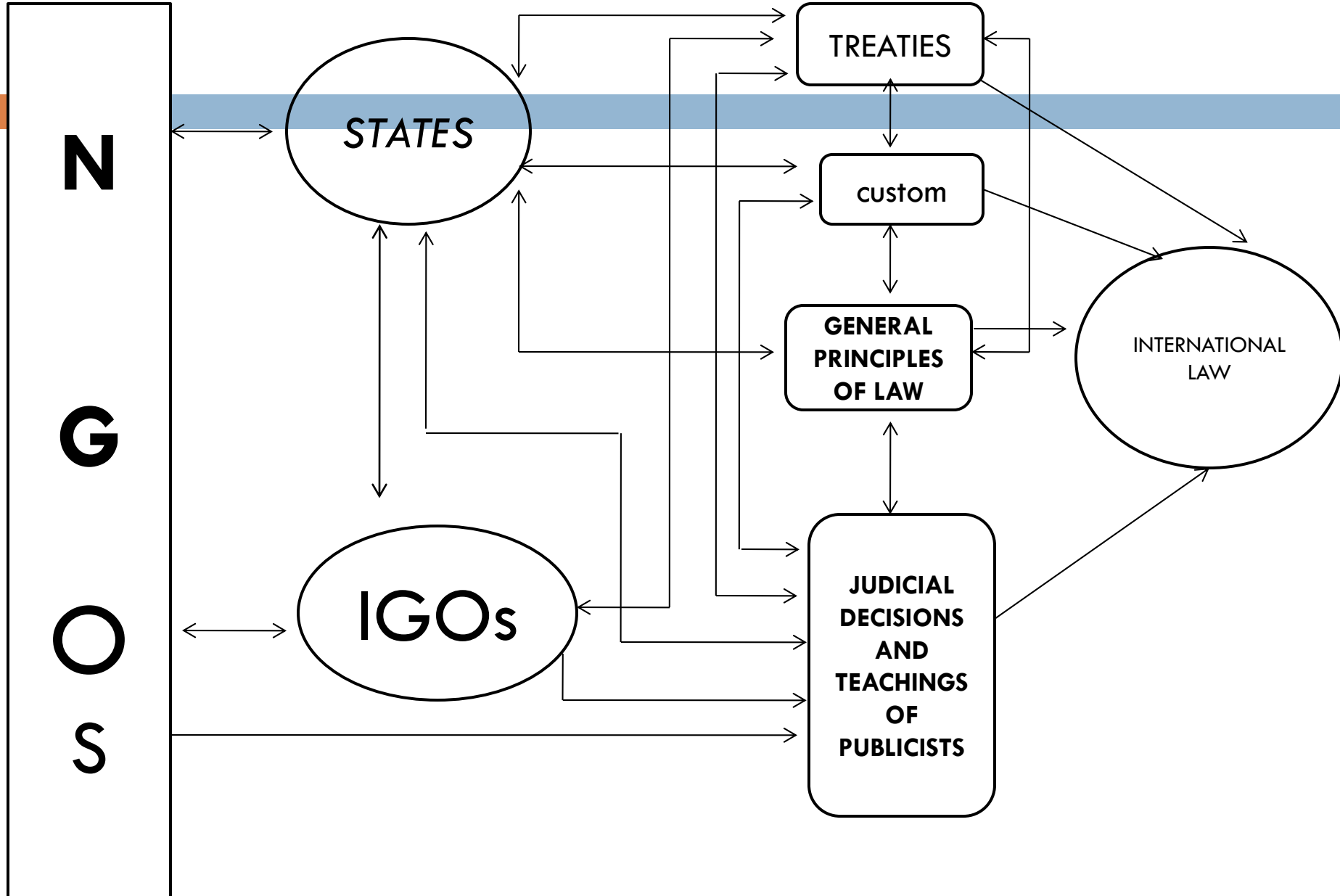
Judicial decisions

- Jurisprudence
- Decisions of both national and int'l courts
- Arbitral awards
- Determine the existence of legal rules
- Determine the substance/meaning of rules
- Formation of CIL
- Act of interpretation is a process of rule-making

Writing of Publicists

- ❑ Cannot create law directly
- ❑ All int'l courts refer doctrine in support of their positions/decisions/analysis
- ❑ Writing interpret the rules + suggest modification/suggest special provisions in treaties
- ❑ Indirect effect
- ❑ Includes books, articles, reports, separate opinions, dissenting opinions of judges of int'l courts

General Case (IL making)



Interaction between treaty and custom

- Cannot bind third parties without consent
- But third parties may be bound by the treaty rule if also reflected as a rule of CIL
 - ▣ E.g., Art 2(4) UN Charter also CIL (Nicaragua case 1986)
- Influence of treaty negotiations on CIL norm crystallization (e.g., development of EEZ concept during UNCLOS negotiations)

Relationship b/n custom and treaty

- Coexistence and mutual influence
- Treaty: Codify (e.g., VCDR), Crystalization (UNCLOS to crystalize EEZ), Generation (Genocide Convention)
- Giving rise to custom:
 - ▣ Fundamentally norm creating character
 - ▣ Widespread and representative participation (+especially affected states)
 - ▣ Virtually uniform subsequent state practice
 - ▣ E.g., Genocide Convention

Relationship...

- No inherent hierarchy b/n treaty and custom
- In practice, treaty may be modified or nullified by subsequent custom
- Custom (except *jus cogens*) can be modified by treaty
- Priority: Suggested rules
 - ▣ *Lex posterior derogate priori*: A later law supersedes a previous law.
 - ▣ *Lex posterior generalis not derogat priori speciali*: A later general law does not supersede an earlier special law.
 - ▣ *Lex specialis derogate generali*: A special law supersedes a general law.

Hierarchy of norms, obligations

Norms/rules

Rules of
jus
cogens

Rules
dispositivum

Obligations

Obligations
erga omnes

UN Charter
obligations

Obligations towards
certain Ss

Subjects of IL

□ *Reparation for Injuries*

- An entity must be capable of possessing international rights and duties; and must have 'the capacity to maintain its rights by bringing international claims
- Objective and qualified personality
- Original and Derivative

Main capacities

- Ability:
- to possess rights, and become subject to obligations (some or all), under international law;
- to bring and receive claims before international (and national) tribunals in order to vindicate such rights;
- to make valid international agreements;
- to enjoy the privileges and immunities (some or all) from national jurisdiction;
- to send and receive diplomatic missions;
- to impose punishments in the form of sanctions against violators of international law.

State and Non-state Actors

- States
- NSAs:
- The UN, the EU
- Individuals
- MNCs
- NGOs
- The ICRC

Why states primary, powerful subjects?

- Their sovereignty
- Their ability to enter into relations with other states on equal footing
- Central role in creating and enforcing international norms
- Possessing universal legal capacity:
 - ▣ The greatest range of international legal rights, duties and powers, unrestricted by the subject matter or time.
- They can also confer rights, impose obligations on NSAs (mainly via treaties).
- Continuing legal persons: their legal identity persists despite frequent changes in their governments
- Successive governments inherit the international responsibilities of their predecessors, ensuring legal continuity
- This continuity underscores the crucial role of states in maintaining global stability and cooperation

Friedmann's view:

- The world today organized on the basis of the co-existence of states.
- Fundamental changes will take place only through state action, whether affirmative or negative.
- States being the repositories of legitimated authority over peoples and territories.
- It is only in terms of state powers, prerogatives, jurisdictional limits and law-making capabilities that territorial limits and jurisdictions, responsibility for official actions, and many other questions of co-existence between nations can be determined.

Treaty Law

□ Municipal Law

- Constitution of Nepal
- Nepal Treaty Act 1990
- Rules of Parliament
- Treaty Manual
- Case-law

□ International Law

- Customary Law
- VCLT 1969 (cif 27 Jan 1980)
- Vienna Convention on Law of Treaties between States and IOs 1986 (not in force)
- Vienna Convention on Succession of States in respect of Treaties 1978 (cif 1996)
- General principles

Treaty law of Nepal

- Constitution of Nepal
- Nepal Treaty Act, 1990
- Treaty Manual
- Judicial Decisions (Precedents)

Constitution of Nepal

□ Article 51

- Enforcement of Treaties to which Nepal is a party
- Review treaties concluded in the past
- Make treaties, agreements based on equality and mutual interest

□ Schedule 5 – List of Federal Power

Treaty, Agreement, Extradition, MLA, Border

Constitution of Nepal...

□ Article 278

- Federation has authority to make treaties, agreements
- No treaty in detrimental to territorial integrity of Nepal
- Making treaty or agreement on matters falling within the list of Provincial power
 - ▣ GON must consult the concerned Province
- Provincial Cabinet, with the consent of GON
 - ▣ To make contractual agreements on financial and industrial matters

Constitution of Nepal...

□ Article 279

- Ratification, accession, acceptance , approval of treaties or agreements to which Nepal or GON is to be a party as provided in Federal Law
- No treaty or agreement concluded in detrimental to Nepal's territorial integrity

Treaties to be ratified by the Parliament

- Peace and friendship
- Defence and strategic alliance
- Boundaries of the State of Nepal
- Natural resources, and the distribution of their uses
- Formation and membership of IO
- Provision for ratification, accession within the treaty
- Any treaty contradictory to prevailing laws
- Any treaty GON finds appropriate

Implementation: monism and dualism

□ Monist

- **Some** treaties have status of law even in absence of implementing law
- In most monist Ss, some treaties require law
- Substantial variations among monist Ss as to which treaties require implementing law
- Prior legislative approval (for all or some)

□ Dualist

- **All** treaties require implementing law
- Executive concludes treaties without prior parliamentary approval
- Methods of incorporation:
 - ▣ Treaty text as annex of Act
 - ▣ Law authorizing govt to do all necessary to implement
 - ▣ Law authorizing govt to make regulations to implement

European community (monism)

- Community law: 4 principles
 - ▣ Direct applicability
 - ▣ Direct effect
 - ▣ Supremacy of Community law
 - ▣ Member state's liability for damage to individuals caused by breach of community law

Monism and Dualism

Monist states

- Austria, Chile, China, Columbia, Egypt, France, Germany, Japan, Mexico, Netherlands, Poland, Russia, South Africa, Switzerland, Thailand, US, NORDIC states

Dualist States

- Australia, Canada, India, Israel, UK

Monist States: variations

Prior parliamentary approval	<ul style="list-style-type: none">-All treaties require (Mexico, Columbia)-Default rule, but exceptions (Chile, Netherlands, South Africa, Switzerland)-Only for certain category of treaties	
Publication	<ul style="list-style-type: none">-No force until domestic publication (Egypt, France, Japan, Russia)-No need for publication in some Ss	
Hierarchical rank	<ul style="list-style-type: none">-At par with Act (Australia, Egypt, Germany, US)-Some treaties > Act but <Constitution (China, Japan, France)-Some higher than Constitution (Netherlands)-Some treaties having constitutional rank (Chile, Russia, Switzerland)	
Implementing law	<ul style="list-style-type: none">-Sometimes, implementing law enacted e.g. New York Convention Act in US	
Self, non-self		

3 types of treaty relationship

□ Horizontal: between Ss

▣ Domestic courts rarely apply horizontal treaties

- Group of Serbian citizens- sued Dutch govt-in Dutch court-allegation: govt violated Art 2(4) of UN Charter by supporting NATO bombing of Yugoslavia in 1999-Supreme Court held- plaintiff not entitled to invoke Art 2(4) in domestic court

□ Vertical: ICCPR, Vienna Convention on Diplomatic Relations

□ Transnational: New York Convention 1958, Hague Convention on Child Abduction, Convention for Unification of Certain Rules for Int'l Carriage by Air 1958

Clashing legal systems?

□ **Supremacy of national legal systems**

- ▣ State sovereignty principle
- ▣ Lotus rule
- ▣ Art 2(7) of UN Charter
- ▣ State consent rule
- ▣ Right to national self determination (domestic law making authority)
- ▣ Constitutional implications

□ **Normative priority of IL**

- ▣ Sovereignty not absolute concept (it is guaranteed by IL)
- ▣ Peremptory norms
- ▣ IL exists to serve higher purpose (achievement of respect for human dignity)
- ▣ Int'l responsibility

Third View: Anzilotti, Fitzmaurice

- **Different Subject Matter**
- **Theory of Coordination**
- Monist and dualist as theories of **confrontation**
- Both monism and dualism = IL and ML deal with same subject matters
- But this Theory denies this
- Their relation like between English law and French law
- Never contradict each other as systems of law

Practice in US

- Law not excuse for failure to perform promised duty
- Law may provide not to perform such duty
- But still liable for breach
- Dualism
- IL cannot override law of US
- Constitution + Act + Treaty = Supreme law of land
- So, federal common law + state law not as such

Practice in US

- Hierarchy of laws
- Constitution-Federal Statute (Act)+Treaty-State law
- *Conventional IL*
 - ▣ Treaty v. Constitution= Constitution prevails
 - ▣ Treaty v. Federal Act= Later in time prevails
 - ▣ Treaty v. State law= Treaty prevails
- *Customary IL*
 - ▣ CIL v. Treaty/Executive Agreements/Judicial law/legislation= CIL loses

Practice in US

- Treaties v. Executive Agreements (EAs)
 - ▣ No difference in terms of IL
 - ▣ But Ts to be submitted to Senate for consent but EAs not
 - ▣ But submission of EAs to Senate within 60 days for information
- EAs v. Constitution=Constitution wins
- EAs with same force as of Treaty

Practice in US

- In need of agreement, President has 3 options:
 - ▣ Treaty= crucial matters e.g. UN membership, NATO, extradition, tax, postal matters
 - ▣ EA =based on His sole power under constitution or shared power with congressional acquiescence
 - ▣ Either T or EA= but chooses fast track
 - E.g. on economic matters, NAFTA, GATT

Treaties

- Self-executing
 - ▣ Law not required to implement
- Non self-executing
 - ▣ Law required to implement
 - ▣ Treaties dealing with exclusive law making power (matters in the domain of Congress)
 - ▣ With contractual terms

Practice in Nepal

Constitution of Nepal, 2015

- Guiding principles
 - ▣ Int'l relations guided towards enhancing national dignity (Art 50(4))
- Political and governance policy (Art 51(b))
 - ▣ Implement int'l treaties, agreements joined by Nepal
- Int'l relations policy (Art 51(m))
 - ▣ Operate foreign policy: best interest of nation on basis of int'l law
 - ▣ Review past treaties, make treaties: equality and mutual interest

Nepal..

- Power to make treaties (Art 278):
 - ▣ Federation
 - ▣ In matters under State domain: consultation
 - With consent of Federation, state may conclude contractual agreements on financial & industrial matters
- Bases of exercise of judicial powers (Art 126)
 - ▣ Constitution
 - ▣ Law
 - ▣ Recognized principles of justice

Nepal..

- Nepal Treaty Act, 1991
- Section 9(1)
 - ▣ Inconsistency between ratified treaty and Nepal law
 - ▣ Treaty provision prevails as if law
- Section 9(2)
 - ▣ If treaty joined without parliamentary ratification
 - ▣ Inconsistency with Nepal law
 - ▣ GON to initiate process for making law promptly

Nepal..

- Whether monism or dualism?
- In some cases, enabling legislation
- E.g.
 - ▣ Privilege and Immunity Act, 2027
 - ▣ IFC Membership Act, 2022
 - ▣ IDA Membership Act, 2019
 - ▣ Breton Woods Agreements Act, 2018
- Is treaty a part of domestic law?
- Does 'law' include treaty provision (Interpretation of Law Act, 2010)?

Judicial Practice

Case	Rule
Hulas Chandra Golchha 2046	-Basis of Nepal law necessary for court to enforce treaty as a law
Bal Krishna Neupane 2049	-MOU is also a treaty
Chandra Kant Gnywali 2057	-Treaty provision cannot get precedence over constitutional provision
Gyan Raj Rai 2057	-Section 9(1) CANNOT authorize court to apply a treaty directly -Law and as of law are different
Raja Ram Dhakal 2060	-Treaties apply as if law -Section 9(1) and 9(2) -Make laws to implement Geneva Conventions

Judicial Practice

Case	Rule
Som Prasad Paneru v. GON 2063	<ul style="list-style-type: none">-Section 9(1)-No acts can be done contrary to CRC
Dinesh Kumar Sharma v. GON 2063	<ul style="list-style-type: none">-Treaties can apply as if law-But they are not law per se-Question of inconsistency b/n treaty and law cannot be settled under Art 88(1)
Rajendra Prasad Dhakal v. GON 2064	<ul style="list-style-type: none">-In view of Sec 9(1), state can't be immune from the obligation under the treaty-Court can have reference to principles and rules laid down by regional human rights bodies-Having regard to treaties as well
Janahit Protection Forum v. OPMCM 2065	<ul style="list-style-type: none">-Inconsistency between treaty and law cannot be determined under Art 107(1)

Judicial Practice

Case	Rule
Sapana Pradhan Malla 2066	<ul style="list-style-type: none">-By virtue of Section 9(1)-A treaty ratified by Parliament-Is directly applicable +-Higher in status than Nepal law
Saroj Rai 2066	<ul style="list-style-type: none">-By virtue of Section 9(1)-Nepal is compelled to enforce treaty as of law-Inconsistent law ipso facto invalid-Treaty provisions apply
Keshab Raj Aryal	<ul style="list-style-type: none">-Law cannot be made contrary to the Constitution as well as Convention joined by Nepal
Jyoti Paudel 2067	<ul style="list-style-type: none">-Observance of treaty in good faith-Make laws

Judicial Practice

Case	Rule
Hom Nath Adhikari 2071	<ul style="list-style-type: none">-Respondent's plea- CITES provisions cannot be enforced until domestic law is made-To enforce convention by making law is a convenient and usual thing-But to say that convention cannot be enforced b/c no domestic law has been made is another thing-Section 9(1)-Inconsistent law <i>ipso facto</i> invalid + Treaty applies-So treaty superior to other laws-CITES provisions apply despite otherwise provided in laws in force-CITES is law itself pursuant to Arts 1,156 of the Constitution and Section 9(1)

Judicial Trend?

- How is IL implemented in Nepal? How is Sec 9(1) interpreted?
- Can court jurisdiction be triggered solely by violation of treaty absent domestic law? Can court directly apply treaties?
- Do Sec 9(1) and (2) of Treaty Act suggest a hybrid model?
 - ▣ Is the same rule applicable vis-à-vis treaty and CIL?
- Whether judicial trend is towards monism/incorporation or dualism/transformation or mixed one?
- What happens if treaty and constitution are inconsistent?
 - ▣ Does Nepal law include constitution?
- Is there a void of jurisdiction to settle issue of inconsistency between domestic law and treaty?

Globalization

- ▣ Challenge to state authority
- ▣ Focus of IL shifted from concerns of State to that of individuals
- ▣ From state values (sovereignty) to human values as in law of human rights or environment
- ▣ Towards fragmentation of international law

Treaty v MOU

Treaty	MOU
Article	Paragraph
Agree, agreement, agreed	Decide, accept, approved, arrangement, understanding
Authentic, authoritative	Equally valid
Clause, conditions	Paragraph, provisions
Continue in force	Continue to have effect
Done	Signed
Enter into force	Come into effect, operation
Obligations	Commitments
Parties	Participants, governments
Preamble	Introduction
Rights	Benefits
Shall	Will
Terms	Provisions
Undertake, undertakings	Carry out, understandings

Some issues

- Treaties and concessions agreements
- Meaning and content of contractual agreements on financial and industrial matters
- MOUs and treaties
- Relationship between main text of a treaty and its annexes
- Ratification by way of gravity of the subject-matter or because of terminology?
- Anti-corruption, audit, procurement provision in treaties and constitutional, domestic law
- Provisional application of treaties with provisions inconsistent with national law
- Legal effect of section 9 of NTA

PLATO principles for good treaty practice

Jill Barrett and Robert Beckman, *Handbook on Good Treaty Practice* (Cambridge University Press, 2020)

- Professional
 - ▣ Expert work; flexibility with discretion; public service ethos
- Legal
 - ▣ Int'l/national law; layers' involved; legal/non-legal distinction (hard/soft treaty)
- Assured
 - ▣ Accuracy; authenticity; authority
- Transparent
 - ▣ Clear, communicated, authenticated, accessible
- Organized
 - ▣ Records management; SOPs; consistent, etc.

Can a state rely on its municipal law as an excuse to violate a treaty?

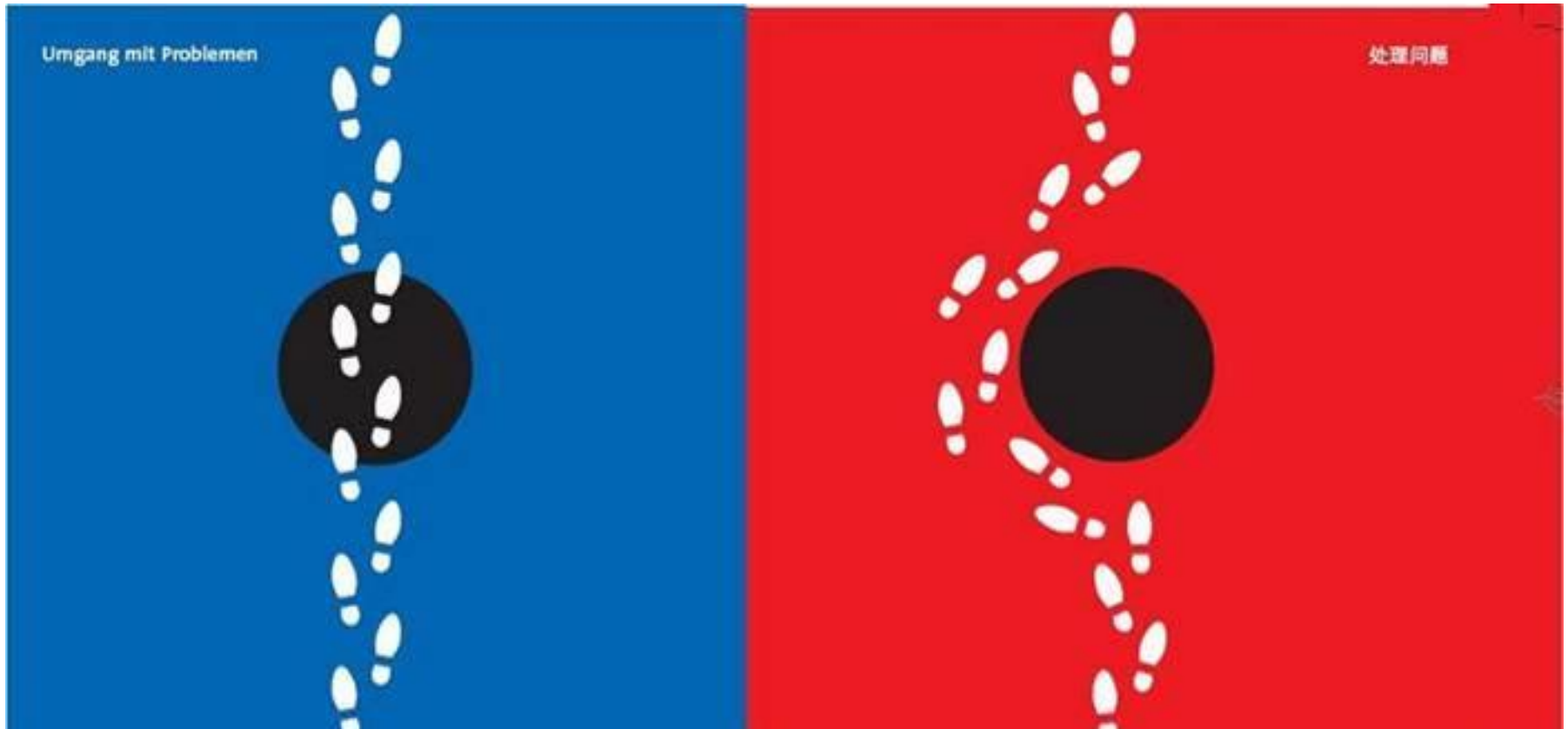
- a) ML always prevails over treaty
- b) Only law-making treaty prevails over ML
- c) Obligations under treaty prevail over ML
- d) Constitutional obligations always prevail over obligations under treaty

Not everyone can be
a great chef



But, everyone can
learn to cook

Handling of Problems



Western - American

Asian

END

*Experience is the name
everyone gives to their
mistakes*