LAWS1023:
Public International Law

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Development, Nature and Scope of Public International Law

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Sources of Public International Law

- In contrast to domestic systems of law, the sources of public international law are often more challenging to ascertain, as there is a wide variety of material sources, and limited machinery for formal law-making (e.g., there's no global legislature, no global court with universal compulsory jurisdiction, and a lack of precedent)
- The source doctrine in international law is state-centric, and hinges on states consenting to be bound by the sources of international law
- The International Court of Justice (ICJ) is the primary judicial organ of the United Nations, with the *Statute of the International Court of Justice* forming an integral part of the *Charter of the United Nations*

***Charter of the United Nations* Art 92**

The International Court of Justice shall be the principal judicial organ of the United Nations. It shall function in accordance with the annexed Statute, which is based upon the Statute of the Permanent Court of International Justice and forms an integral part of the present Charter.

- The accepted sources of public international law are set out in Article 38(1) of the *Statute of the International Court of Justice*

***Statute of the International Court of Justice* Art 38**

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
    a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
    b. international custom, as evidence of a general practice accepted as law;
    c. the general principles of law recognized by civilized nations;
    d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.
2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et*

bono, if the parties agree thereto.

- There is an emphasis on state consent to be bound to the jurisdiction of the ICJ
- There is no clear hierarchy governing which facet or source is to be applied first (e.g., treaties do not always trump international conventions)
  - However, the sources in art 38(1)(d) (judicial decisions and the writings of publicists) are 'subsidiary' rather than direct sources
- States always remain the primary actors in the application of international law
- Art 38(1) is 'generally regarded as a complete statement of the sources of international law' in Australia, following *Ure v Commonwealth* (2016) 329 ALR 452

***Ure v Commonwealth* (2016) 329 ALR 452**

This case involved two highly remote islands (Elizabeth Reef and Middleton Reef) in the southwest Pacific Ocean, around 80 nautical miles north of Lord Howe Island. In 1970, Mr Ure erected a sign on the bridge of a ship wrecked on Middleton Reef above the high-tide mark, and claimed title to the islands.

10 years later, his son brought proceedings against the Comonwealth (Mr Ure had died), the question for determination on the assumed facts (including the assumed fact that, in 1970, the islands were unoccupied and constituted terra nullius in respect of which no state had claimed sovereignty) was whether, under public international law, there existed a rule that an individual may acquire proprietary title in unoccupied land not claimed by any sovereign state.

The Federal Court examined the sources of the aforementioned rule. At paragraph [15], it was held that "Australian courts have accepted that Art[icle] 38(1) [of the *Statute of the International Court of Justice* 1945] sets out the sources of international law: *Polyukhovich v. The Commonwealth* (1991) 172 CLR 501 at 559 per Brennan J … ." The Court held that a rule of customary international law requires proof of both (following *North Sea Continental Shelf Cases (FRG v Denmark; FRG v The Netherlands)* at [29] - [31]):

- "Extensive and virtually uniform" state practice
- *Opinio juris* (a belief by states that state practice is rendered obligatory on it)

Whilst the plaintiff attempted to show evidence of state practice supporting their rule, this was rejected by the Court, which held that the rule was not a general principle of law recognised in municipal legal systems within the meaning of Art 38(1)(c). The plaintiff's appeal was dismissed.

2.1 Treaties

- Under Art 38(1)(a) of the *Statute of the International Court of Justice*, 'conventions' (embodying all binding international agreements) are a source of public international law (e.g., treaties, protocols, statutes, charters, covenants, etc.)

- The law of treaties is governed in the 1969 *Vienna Convention on the Law of Treaties* (VLCT) (see Topic 3 on page 15), and now constitutes the most voluminous source of PIL (due to a rapid increase in the number of treaties in the 20th and 21st centuries)
- Treaties can be either bilateral (between two states) or multilateral (between more than two states)
- Some treaties may be a mere source of obligation (often known as 'treaty contracts'), wiilst others form a more generalised source of law ('law-making treaties', especially those that contribute to the geneeration of customary law, such as the *Charter of the United Nations*)
  - Some treaties, such as the *Universal Declaration of Human Rights*, can adopt a constitutional tone

2.2 International Custom

- Under Art 38(1)(b) of the *Statute of the International Court of Justice*, international custom can be evidence of a general practice accepted as law, and comprises two components:
  - An objective element ('general practice')
  - A subjective or psychological element ('accepted as law'), known as *opinio juris sive necessitatis* (the belief that the practice is obligatory)
    * This is often shortened to *opinio juris*
- Customary international law binds all states, even if they have not participated in its creation (with the very narrow exception of the 'persistent objector')
- Certain customary norms are *jus cogens*, which are peremptory norms from which no derogation is permitted

2.2.1 Elements of Custom

- Evidence of state practice
  - This constitutes any material which demonstrates the activities and views of states and state officials (e.g., legislation, statements of officials, court decisions, voting records in international forums, etc.)
- Requirements for practice to generate custom, which include
  - Consistency of the practice over time
  - The practice being widespread
  - The practice being representative of multiple states (including the states most likely being affected)
  - Having developed over a lengthy period (but customary norms may still emerge rapidly if there is an overwhelming practice of it)
  - The practice does not need to be entirely uniform
- Practice must be accompanied by *opinio juris*

  - *Opinio juris* refers to the belief that the state practice is obligatory
  - This is notionally as important as state practice, and the two are often weighed on a sliding scale:
    * If there is extensive state practice, then *opinio juris* tends to be less important (which gives rise to a rebuttable presumtion that there is sufficient *opinio juris*)
    * If there is limited state practice, then *opinio juris* may be more important

- Treaties may codify custom in order to reduce ambiguity

***North Sea Continental Shelf Cases (Germany v Denmark; Germany v Netherlands)* [1969] ICJ Rep 3**

ICJ Summary: These cases concerned the delimitation of the continental shelf of the North Sea as between Denmark and the Federal Republic of Germany, and as between the Netherlands and the Federal Republic, and were submitted to the Court by Special Agreement. The Parties asked the Court to state the principles and rules of international law applicable, and undertook thereafter to carry out the delimitations on that basis. By an Order of 26 April 1968 the Court, having found Denmark and the Netherlands to be in the same interest, joined the proceedings in the two cases. In its Judgment, delivered on 20 February 1969, the Court found that the boundary lines in question were to be drawn by agreement between the Parties and in accordance with equitable principles in such a way as to leave to each Party those areas of the continental shelf which constituted the natural prolongation of its land territory under the sea, and it indicated certain factors to be taken into consideration for that purpose. The Court rejected the contention that the delimitations in question had to be carried out in accordance with the principle of equidistance as defined in the 1958 Geneva Convention on the Continental Shelf. The Court took account of the fact that the Federal Republic had not ratified that Convention, and held that the equidistance principle was not inherent in the basic concept of continental shelf rights, and that this principle was not a rule of customary international law.

In this case, the ICJ held that treaty norms could become custom (but not in this instance), and that treaty provisions may become customary norm/customary international law (however, this was also not made out in this instance). Additionally, a short time frame is not a bar to establishing custom, but the practice needs to be extensive and virtually uniform (this was not the case here).

***Military and Paramilitary Activities in and against Nicaragua* [1986] ICJ Rep 14**

ICJ Summary: On 9 April 1984 Nicaragua filed an Application instituting proceedings against the United States of America, together with a Request for the indication of provisional measures concerning a dispute relating to responsibility for military and paramilitary activities in and against Nicaragua. On 10 May 1984 the Court made an Order indicating provisional measures. One of these measures required the United States immediately to cease and refrain from any action restricting access to Nicaraguan ports, and, in particular, the laying of mines. The Court also indicated that the right to sovereignty and to political independence possessed by Nicaragua, like any other State, should be fully respected and should not be jeopardized by activities contrary to the

principle prohibiting the threat or use of force and to the principle of non-intervention in matters within the domestic jurisdiction of a State. The Court also decided in the aforementioned Order that the proceedings would first be addressed to the questions of the jurisdiction of the Court and of the admissibility of the Nicaraguan Application. Just before the closure of the written proceedings in this phase, El Salvador filed a declaration of intervention in the case under Article 63 of the Statute, requesting permission to claim that the Court lacked jurisdiction to entertain Nicaragua's Application. In its Order dated 4 October 1984, the Court decided that El Salvador's declaration of intervention was inadmissible inasmuch as it related to the jurisdictional phase of the proceedings.

After hearing argument from both Parties in the course of public hearings held from 8 to 18 October 1984, on 26 November 1984 the Court delivered a Judgment stating that it possessed jurisdiction to deal with the case and that Nicaragua's Application was admissible. In particular, it held that the Nicaraguan declaration of 1929 was valid and that Nicaragua was therefore entitled to invoke the United States declaration of 1946 as a basis of the Court's jurisdiction (Article 36, paragraphs 2 and 5, of the Statute). The subsequent proceedings took place in the absence of the United States, which announced on 18 January 1985 that it "intends not to participate in any further proceedings in connection with this case". From 12 to 20 September 1985, the Court heard oral argument by Nicaragua and the testimony of the five witnesses it had called. On 27 June 1986, the Court delivered its Judgment on the merits. The findings included a rejection of the justification of collective self-defence advanced by the United States concerning the military or paramilitary activities in or against Nicaragua, and a statement that the United States had violated the obligations imposed by customary international law not to intervene in the affairs of another State, not to use force against another State, not to infringe the sovereignty of another State, and not to interrupt peaceful maritime commerce. The Court also found that the United States had violated certain obligations arising from a bilateral Treaty of Friendship, Commerce and Navigation of 1956, and that it had committed acts such to deprive that treaty of its object and purpose.

It decided that the United States was under a duty immediately to cease and to refrain from all acts constituting breaches of its legal obligations, and that it must make reparation for all injury caused to Nicaragua by the breaches of obligations under customary international law and the 1956 Treaty, the amount of that reparation to be fixed in subsequent proceedings if the Parties were unable to reach agreement. The Court subsequently fixed, by an Order, time-limits for the filing of written pleadings by the Parties on the matter of the form and amount of reparation, and the Memorial of Nicaragua was filed on 29 March 1988, while the United States maintained its refusal to take part in the case. In September 1991, Nicaragua informed the Court, inter alia, that it did not wish to continue the proceedings. The United States told the Court that it welcomed the discontinuance and, by an Order of the President dated 26 September 1991, the case was removed from the Court's List.

In this case, the ICJ affirmed that to give rise to a custom, state practice does not need to be "perfect, in the Sense that States should have refrained, with complete consistency, from the use of force of from intervention in each other's internal affairs". Here, the norms relied upon by Nicaragua were part of customary international law, which had a

separate applicability to the *Charter of the United Nations*. Additionally, if a treaty gives rise to custom, the custom exists independently of the treaty. Moreover, if it has been pointed out that there has been a number of instances of states contravening a treaty, the courts have held that there does not need to be cosnsitently correct conduct from the states to affirm the custom, and that some variation in practice is acceptable, especially when these variations are treated as breaches of the rule rather than emergence of a new rule (thereby affirming the existing rule).

***Nicaragua v Colombia* [2023] ICJ Rep 413**

The Court addressed Nicaragua's request to define the maritime boundary in areas beyond the 2012 Judgment's limits, focusing on two key legal questions posed in its October 4, 2022 Order. The primary question was whether, under customary international law, a State's entitlement to an extended continental shelf beyond 200 nautical miles could extend within 200 nautical miles of another State's baselines. The Court concluded that it could not, based on the interrelationship between the exclusive economic zone and continental shelf regimes under customary law, as reflected in UNCLOS, and widespread State practice showing opinio juris against such overlap. Consequently, the Court rejected Nicaragua's submissions for delimiting overlapping continental shelf areas with Colombia's mainland and islands (San Andrés, Providencia, Serranilla, Bajo Nuevo, and Serrana), finding no overlapping entitlements to delimit, thus rendering the second question on criteria for outer limits unnecessary to address. The decision, supported by a majority of thirteen to four votes on key points, reaffirmed Colombia's maritime entitlements within 200 nautical miles and upheld the 2012 Judgment's findings, dismissing Nicaragua's claims without needing further proceedings.

Even though Colombia is not a party to the *UN Convention on the Law of the Sea*, the ICJ held it still provided key evidence of custom, even though Colombia wasn't a party to it. The practices under it were "indicative of *opinio juris*", even if such practice may have been motivated in part by considerations other than a sense of legal obligation".

2.2.2 Regional Customary International Law

***Asylum Case (Colombia v Peru)* [1950] ICJ Rep 226**

Colombia granted de la Torre (who was the head of an unsuccessful revolutionary group in Peru) political asylum in the Colombian Embassy in Lima, Peru. Colombia invoked 'American international law' to allow it to grant political asylum (referring to the Americas as a continent, not the United States); this supposed custom was that a unilateral decision to hold something was politically motivated was sufficient. The ICJ held that there was insufficient evidence of such regional customary norm, as such a practice had too much contradiction and fluctuation to be a regional standard. The ICJ concluded that regional standards need a higher standard of stability and continuity to apply as international law.

***R (app. Al-Saadoon v Sec. of Defence)* [2010] 1 All ER 271**

In this case, there was a serious risk that the plaintiff would face death at the hands of the Iraqi system if they were deported. The question at hand was whether an obligation of non-refoulement (non-return) to countries where the death penalty available as a rule of regional customary international law in Europe? There is a concept of regional customary international law that bound the UK and other states in the Council of Europe that prevented a European state from transferring a person to a third state where the death penalty was a possibility. The English Court of Appeal found that this had not been established in this instance by the materials cited (including the European Union Charter of Fundamental Rights). The Court accepted that there could be such a rule of regional customary international law, but on the evidence presented, this rule had not been established, and the relevant elements invoked by the claimants did not establish this rule of regional custom.

2.2.3 Persistent Objection

- This is a fairly narrow doctrine under customary interntional law
- States which consistently object to the emergence of a rule of custom from its earliest point of gestation will not be bound by this custom should the rule emerge; otherwise, they will be bound to it

***Anglo Norwegian Fisheries Case (UK v Norway)* [1951] ICJ Rep 116**

To determine its coastal baselines, Norway drew a system of straight baselines. The UK objected to Norway's straight baselines, as Norway had suddenly closed the waters that were open to British fishing vessels (the regular practice was to not have a system of straight baselines). The question before the ICJ was whether there was a rule of custom prohibiting baselines more than 10 nautical miles in length. The ICJ held that there was no such rule, but even it did exist, Norway was a persistent objector (and so even if it did exist, it wouldn't apply to Norway). Accordingly, the UK lost.

2.3 General Principles of Law

- Under Art 38(1)(c) of the *Statute of the International Court of Justice*, general principles of law recognised by civilised nations form a source of public international law
- The objective of including the general principles of law is to avoid the *non liquet* (the situation where 'it is not clear')
- This includes general principles of both international law and municipal law
- Examples of this include *res judicata* (the principle of finality, holding that once a case is decided, it is final and cannot be relitigated), the principle that a breach of an obligation is accompanied by an obligation to make reparations, and the principles of acquiesence and estoppel

***Bay of Bengal (Bangladesh/Myanmar)* [2012] ILTOS 12**

This judgement by the International Tribunal for the Law of the Sea addressed the delineation of maritime zones (territorial sea, exclusive economic zone (EEZ), and continental shelf) between the two states. The Tribunal, affirming its jurisdiction under the *United Nations Convention on the Law of the Sea* (UNCLOS), rejected Bangladesh's claim that the 1974 and 2008 Agreed Minutes constituted a binding agreement for the territorial sea, finding them non-binding due to their conditional nature and lack of formal approval, resulting in there being no estoppel. It delimited the territorial sea using equidistance adjusted for St. Martin's Island, and for the EEZ and continental shelf within 200 nautical miles (nm), it applied a provisional equidistance line adjusted for Bangladesh's concave coast to avoid a cut-off effect. The Tribunal also asserted jurisdiction over the continental shelf beyond 200 nm, delimiting it based on geological entitlement and equity, resulting in a single maritime boundary, though creating a "grey area" where Bangladesh's continental shelf overlapped Myanmar's EEZ, which it left unresolved for future negotiation.

Regarding Article 38(1)(c), the ITLOS Judgment implicitly engaged such principles, particularly equity, in its delimitation process. While the Judgment primarily applied UNCLOS provisions (Articles 15, 74, 83, and 76), the Tribunal's adjustment of the equidistance line to achieve an "equitable solution", notably to mitigate the cut-off effect of Bangladesh's concave coast, reflects the general principle of equity, a concept widely accepted across legal systems and frequently invoked in maritime delimitation (e.g., *North Sea Continental Shelf* cases). The dissenting opinion of Judge Lucky explicitly references Article 38 in the context of Articles 74 and 83, advocating the angle-bisector method over equidistance to ensure fairness, underscoring equity *infra legem* as a method to interpret and apply the law justly. Thus, the Judgment's reliance on equity to balance the parties' rights demonstrates how general principles under Article 38(1)(c) supplement treaty law in achieving a fair outcome specific to this case.

[124] The Tribunal observes that, in international law, a situation of estoppel exists when a State, by its conduct, has created the appearance of a particular situation and another State, relying on such conduct in good faith, has acted or abstained from an action to its detriment. The effect of the notion of estoppel is that a State is precluded, by its conduct, from asserting that it did not agree to, or recognize, a certain situation.

[125] In the view of the Tribunal, the evidence submitted by Bangladesh to demonstrate that the Parties have administered their waters in accordance with the limits set forth in the 1974 Agreed Minutes is not conclusive. There is no indication that Myanmar's conduct caused Bangladesh to change its position to its detriment or suffer some prejudice in reliance on such conduct. For these reasons, the Tribunal finds that Bangladesh's claim of estoppel cannot be upheld.

***Chagos Marine Protected Area Arbitration (Mauritius v United Kingdom)* (2015) XXXI RIAA 359**

The arbitral tribunal, constituted under Annex VII of the United Nations Convention on the Law of the Sea (UNCLOS), addressed a dispute between Mauritius and the United

Kingdom (UK) concerning the UK's establishment of a Marine Protected Area (MPA) around the Chagos Archipelago on 1 April 2010. Mauritius argued that the UK, as the administering power of the British Indian Ocean Territory (BIOT), lacked the authority to unilaterally declare the MPA, violating UNCLOS and international law by disregarding Mauritius' rights, including fishing rights and the UK's undertakings to return the Archipelago and share resource benefits when no longer needed for defense purposes. The Tribunal found it lacked jurisdiction over Mauritius' sovereignty claims (First and Second Submissions) and a related dispute (Third Submission), but unanimously asserted jurisdiction over the Fourth Submission, concluding that the UK breached Articles 2(3), 56(2), and 194(4) of UNCLOS due to insufficient consultation and failure to balance Mauritius' rights, rendering the MPA's declaration incompatible with the Convention. The Tribunal emphasised procedural inadequacies rather than the MPA's environmental merits, urging further negotiations, and ordered costs to be borne equally by the parties.

Here, the Tribunal's interpretation of UNCLOS provisions, such as Article 2(3), relied on general principles like good faith and due regard, which are widely accepted across legal systems and reflect fundamental norms ensuring equitable conduct between states. These principles, derived from domestic legal traditions and adapted to the international context, served to evaluate the UK's obligations to consult and balance Mauritius' rights, demonstrating their role as a gap-filling mechanism where treaty or customary rules are ambiguous or silent. The Tribunal's reference to good faith in Article 2(3) and the balancing requirement in Article 56(2) underscores how general principles, as per Article 38(1)(c), provide a flexible yet authoritative basis for resolving disputes, reinforcing the coherence and fairness of international legal obligations beyond specific treaty terms.

[438] Further to this jurisprudence, estoppel may be invoked where (a) a State has made clear and consistent representations, by word, conduct, or silence; (b) such representations were made through an agent authorized to speak for the State with respect to the matter in question; (c) the State invoking estoppel was induced by such representations to act to its detriment, to suffer a prejudice, or to convey a benefit upon the representing State; and (d) such reliance was legitimate, as the representation was one on which that State was entitled to rely.

2.4 Judicial Decisions and the Teaching of Publicists

- Under Art 38(1)(d) of the *Statute of the International Court of Justice*, judicial decisions taken at both a domestic and an international level, and the teaching of publicists can be considered as sources of public international law
- However, these are 'subsidiary means' for the determination of rules of law, and are treated as having lesser significance than other sources
- Publicists generally constitute academics who are distinguished in the field, and probably have been dead for a long period of time
- Decisions taken by the ICJ do not constitute binding precedent in future decisions, and remain merely persuasive, following Art 59 of the *Statute of the International Court of Justice*

- It has been held that these other sources are "resorted to by judicial tribunals not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is", per *The Paquete Habana* 175 US 677 (1900)

Statute of the International Court of Justice Art 59

The decision of the Court has no binding force except between the parties and in respect of that particular case.

The Paquete Habana 175 US 677 (1900) (United State Supreme Court)

The U.S. Supreme Court reviewed the capture of two Spanish fishing vessels, the Paquete Habana and the Lola, by U.S. naval forces during the Spanish-American War. Both vessels, owned by Spanish subjects in Havana and crewed by Cuban fishermen, were engaged in coast fishing off Cuba and Yucatan, carrying live fish caught by their crews. Captured in April 1898 near Havana by U.S. blockading ships, they were unarmed, unaware of the war or blockade, and made no attempt to resist or aid the enemy. The District Court for the Southern District of Florida condemned them as prizes of war on May 30, 1898, selling them for $490 and $800, respectively, asserting no legal exemption existed without a treaty or proclamation. The Supreme Court reversed this, finding their capture unlawful under international law, which exempts coast fishing vessels pursuing a peaceful trade from war prizes, and ordered restitution with compensatory damages.

This decision illustrates how customary international law integrates with other legal sources when treaties or domestic acts are absent. It ruled that the exemption of coast fishing vessels is an established rule of customary international law, derived from the consistent practice and *opinio juris* of civilised nations, evidenced by historical treaties (e.g., 1521 Charles V-Francis I treaty), state practice (e.g., U.S. in the Mexican War), and jurists' writings. Absent a controlling treaty, executive order, or statute (none of which existed here), the Court relied on this custom, distinguishing it from the non-binding UNGA resolutions in the 1996 ICJ Nuclear Weapons case, which lacked sufficient state practice to form custom. The decision aligns with treaty-based exemptions, but asserts judicial authority to enforce customary norms directly. This case therefore underscores custom's enforceability in U.S. courts, complementing treaties and executive discretion in wartime.

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> International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations, and, as evidence of these, to the works of jurists and commentators who by years of labor, research, and experience have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.

2.4.1 United Nations General Assembly Resolutions

- The United Nations General Assembly (UNGA) is the plenary body of the UN, generating a large amount of documents, of which the most important are the UNGA Resolutions, since:
  - All UN members have a seat and can thus contribute to the formation of these resolutions
  - The UNGA has many different capacities, and can adopt different decisions (however, these are recommendatory, and not legally binding)
  - The UNGA has generally influenced PIL as it is a great forum for state practice and *opinio juris*
- Decisions of the UNGA are not binding, except in the key areas of admission of member states, suspension of member states, and matters related to the UN budget (if these wre not binding, the UN would not be able to function)
- These resolutions provide evidence on the state of customary international law, as it is a great forum to evidence what states are doing
- The UNGA can also be far more responsive than the traditional case-by-case process of implementing customary international law, and ultimately serves to advance the norms of international law
- UNGA resolutions can influence international law in three main ways:
  1. Interpreting the *Charter of the United Nations*
  2. Affirming recognised customary norms (this is done by a resolution of the UNGA)
  3. Influencing the creation of new customary norms (e.g., a resoltion can be the spark that creates a new customary norm)

2.4.2 UN Security Council

- The UN Security Council can adopt a direct role in international law making (e.g., following the September 11 attacks, Resolution 1373 was deemed a form of 'international legislation')
- However, the UN Security Council has limited law-making capacity, and can adopt certain binding resolutions, but these may have expedited impacts
  - Under art 25 of the *Charter of the United Nations*, these resolutions are only binding on members of the UN

***Charter of the United Nations* Art 25**

The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.

- Furthermore, it has been held in *Legality of the Threat or Use of Nuclear Weapons* [1996] ICJ Rep 254 that UNGA resolutions may "sometimes have normative value" (at [70]), and can provide "evidence important for the establishing the existence of a rule or the emergence of a *opinio juris*" (at [70])

- Such evidence can include:
  - The voting records of the UNGA
  - Transcripts of what was said on the floor of the UNGA
  - Margins of the votes undertaken in the UNGA

***Legality of the Threat or Use of Nuclear Weapons* [1996] ICJ Rep 254**

The Court was asked whether the threat or use of nuclear weapons was permitted under international law. They found no specific authorisation or comprehensive prohibition of nuclear weapons in customary or conventional international law. It ruled that any such threat or use must comply with the UN Charter, prohibiting unlawful force (Article 2(4)) and regulating self-defense (Article 51), and international humanitarian law (IHL), which requires distinguishing between combatants and civilians and avoiding unnecessary suffering. While the Court concluded that nuclear weapons' indiscriminate effects would "generally" violate IHL, it could not definitively rule on their legality in extreme self-defense scenarios threatening a state's survival. It unanimously affirmed an obligation under Article VI of the Non-Proliferation Treaty (NPT) to pursue nuclear disarmament in good faith.

The ICJ clarified the role of UNGA resolutions in international law, particularly in the context of nuclear weapons. **Resolutions are not legally binding on their own but may have normative value as evidence of customary law if supported by state practice and *opinio juris* ([70]-[73]).** The Court found that these resolutions, despite large majorities, did not establish a customary prohibition due to opposition from nuclear states, abstentions, and the lack of consistent practice, reflecting a divide between emerging *opinio juris* and the deterrence policy adhered to by some states. They signal deep concern and a desire for a ban, but alone, they fall short of creating a legal rule.

The ICJ's analysis underscores that **UNGA resolutions complement, rather than independently create, binding norms**. Their significance depends on content, adoption conditions, and state acceptance, but in this case, they did not overcome the absence of universal consensus ([70] - [71]). In contrast, the NPT's Article VI imposes a clear legal duty on its 182 parties to negotiate disarmament, reinforced by UNGA resolutions but distinct in its binding force ([99] - [103]). Thus, while UNGA resolutions highlight an evolving legal consciousness and support treaty obligations, they were insufficient in 1996 to resolve the legality of nuclear weapons definitively, illustrating the Court's cautious approach to law-making based solely on such instruments.

> [70] The Court notes that General Assembly resolutions, even if they are not binding, may sometimes have normative value. They can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*. To establish whether this is true of a given General Assembly resolution, it is necessary to look at its content and the conditions of its adoption; it is also necessary to see whether an *opinio juris* exists as to its normative character. Or a series of resolutions may show the gradua1 evolution of the *opinio juris* required for the establishment of a new rule.

2.5 Soft Law

- Soft law refers to rules that are binding but vague, and/or 'rules' that are clear but not binding
- They serve as a convenient encompassment of a variety of non-legally binding instruments used in contemporary international relation
- Whilst soft law instruments are not in and of themselves legally binding, they can articular standards or norms that will, over time, become concrete and be transformed into international law
- They can also be used to interpret other sources of international law (e.g., treaty or custom)
- An example is the precautionary principle, which is central to international environmental law:
  - These constitute cost-effective measures to protect the environment, with their implementation to not be delayed whilst there is uncertainty to their efficacy (i.e., protect the environment now rather than wait for complete certainty)
  - This was articulated in 1992 in the United Nations General Assembly, and can now be found in different areas of international law (an example of soft law becoming hard law over time)

Topic 3

The Law of Treaties

3.1 Defining Treaties

- A treaty refers to a binding agreement between states (or international organisations) that is governed by international law
- They perform various functions, including:
  - Transferring territory (like conveyance)
  - Bargaining (like contracts)
  - Setting out general international law (like legislation)
  - Creating international organisation (like articles of association)
  - Establishing new legal orders (like constitutions)
- The primary treaty on treaties (but not the only one) is the *1969 Vienna Convention on the Law of Treaties* (VCLT), which was based on the work of the International Law Commission[1], and is mostly declaratory of customary international law
  - The VCLT was signed in 1969, but entered into force in 1980, and so only applies to treaties concluded after 1980; however, many of its provisions can apply to treaties concluded before 1980 as a matter of general international law
  - Most provisions within the VCLT are customary, which can be helpful in resolving disputes as not all states are party to the VCLT, but its core rules nonetheless apply to them as a matter of custom
- VCLT Art 2(1)(a) defines what a treaty is (an international agreement between States, in either a singular instrument or in multiple instruments, and in any form whatsoever, as long as it is written)

***1969 Vienna Convention on the Law of Treaties* Article 2**

Use of Terms

1. For the purposes of the present Convention:

[1] A body within the United Nations tasked with the codification and progressive development of public international law

(a) "treaty" means 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) "ratification", "acceptance", "approval" and 'accession" mean in each case the international act so named whereby a State establishes on the international plane its consent to be bound by a treaty;

(c) "full powers" means a document emanating from the competent authority of a State designating a person or persons to represent the State for negotiating, adopting or authenticating the text of a treaty, for expressing the consent of the State to be bound by a treaty, or for accomplishing any other act with respect to a treaty;

(d) "reservation" means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State;

(e) "negotiating State" means a State which took part in the drawing up and adoption of the text of the treaty;

(f) "contracting State" means a State which has consented to be bound by the treaty, whether or not the treaty has entered into force;

(g) "party" means a State which has consented to be bound by the treaty and for which the treaty is in force;

(h) "third State" means a State not a party to the treaty;

(i) "international organization" means an intergovernmental organization.

2. The provisions of paragraph 1 regarding the use of terms in the present Convention are without prejudice to the use of those terms or to the meanings which may be given to them in the internal law of any State.

- Under Art 3 of the VCLT, the definition given in Art 2(1)(a) does not affect agreements between states and other subjects of international law, or between those other subjects (i.e., it only affects agreements between states)
  - However, equivalent norms of custom, or another treaty, may apply to the treaties not covered within the scope of the VCLT
- The VCLT additionally does not apply to non-written treaties on the text of Art 3
  - However, it does not foreclose the possibility of an oral agreement/treaty, and as much of the VCLT is custom, the rules set out in it will still apply to oral agreements/treaties, but which of those rules falls into that scope is vague

***1969 Vienna Convention on the Law of Treaties* Article 3**

International agreements not within the scope of the present Convention

The fact that the present Convention does not apply to international agreements concluded between States and other subjects of international law or between such other subjects of international law, or to international agreements not in written form, shall not affect:

(a) the legal force of such agreements;

(b) the application to them of any of the rules set forth in the present Convention to which they would be subject under international law independently of the Convention;

(c) the application of the Convention to the relations of States as between themselves under international agreements to which other subjects of international law are also parties.

***Legal Status of Eastern Greenland (Denmark v Norway)* (1993) PCIJ Series A/B, No 53**

In this case, the Permanent Court of International Justice held that Norway was bound by an oral undertaking given to Denmark that it would not oppose its claim to sovereignty over Greenland. The Court held that "as a result of the undertaking [by the Norwegian Foreign Minister], Norway is under an obligation to refrain from contesting Danish sovereignty over Greenland as a whole, and *a fortiori* to refrain from occupying a part of Greenland".

- Treaties are very flexible, and may be embodied in one or several instruments (e.g., an exchange of notes (which is more than one instrument) can constitute a treaty), and there are no requirements as to the form of the treaty
  - The key consideration is the objective intention of the parties (which can be discern from the text of the treaty)

***Maritime Delimitation and Territorial Questions (Qatar v Bahrain)* (1994) ICJ Rep 112**

In this case, the International Court of Justice held that an exchange of letters between the Emir of Qatar and the Ruler of Bahrain constituted a treaty, and that the exchange of letters was a valid means of concluding a treaty.

"The Minutes are not the simple record of a meeting … They enumerate the commitments to which the Parties have consented … They constitute an international agreement".

- Unilateral declarations made by a party may have binding effect

***Nuclear Test Cases (Australia v France)* (1974) ICJ Rep 253**

In this case, the International Court of Justice held that a unilateral declaration by France that it would not conduct nuclear tests in the atmosphere was binding on France, and that the declaration was a unilateral act having legal effect.

"An undertaking … if given publicly with an intent to be bound, even though not made

within the context of international negotiations, is binding".

- There is no requirement that a treaty needs to involve 'consideration' (i.e., a promise, price, detriment or forbearance given as a value for a promise); this results in the potential for treaties to be one-sided

3.2 Entry into a Treaty

- Only states, international organisation and other international entities with capacity to enter into treaties (i.e., international persons) may be parties to a treaty
- Under Art 7 of the VCLT, Heads of State, Heads of Government and Ministers of Foreign Affairs have the capacity to conclude treaties without producing "full powers"
  - "Full powers" refers to a document or a set of documents evidencing authority for the bearing/undersigned individual to act on behalf of the state and thereby enter into treaties
  - Since a state does not have any physical existence, it has to act through a representative (which can be one of the above individuals, or another individual who has produced full powers)

***1969 Vienna Convention on the Law of Treaties* Article 7**

Full Powers

1. A person is considered as representing a State for the purpose of adopting or authenticating the text of a treaty or for the purpose of expressing the consent of the State to be bound by a treaty if:
   (a) he produces appropriate full powers; or
   (b) it appears from the practice of the States concerned or from other circumstances that their intention was to consider that person as representing the State for such purposes and to dispense with full powers.
2. In virtue of their functions and without having to produce full powers, the following are considered as representing their State:
   (a) Heads of State, Heads of Government and Ministers for Foreign Affairs, for the purpose of performing all acts relating to the conclusion of a treaty;
   (b) heads of diplomatic missions, for the purpose of adopting the text of a treaty between the accrediting State and the State to which they are accredited;
   (c) representatives accredited by States to an international conference or to an international organization or one of its organs, for the purpose of adopting the text of a treaty in that conference, organization or organ.

- Entry into a treaty is a two-step process, entailing:

1. Signature (which is when a state expresses a willingness to continue the treaty-making process, **but is not bound by the treaty at this point**)
2. Ratification (which indicates that the state consents to be bound by the treaty once it has been ratified)
3. Acession (this only arises when a state becomes party to a treaty already negotiated and signed by other states, and has the same legal effect as ratification)

- There is a period of time between signature and ratification, which allows states to implement the provisions of the treaty into their domestic law, and for the state to prepare for the treaty to be given effect
- Signature is not sufficient for a state to be bound; they must have either ratified or acceded to the treaty
- A treaty enters into force when the relevant provisions in the treaty addressing this point have been satisfied
  - If the treaty is silent on this point, it will enter into force when all the parties have consented to be bound by the treaty, following Art 24(2) of the *1969 Vienna Convention on the Law of Treaties*
    * However, a treaty will almost always include a provision on when it will enter into force
  - A treaty enters into force for a specific party when it has consented to be bound, and when the treaty has entered into force generally

***1969 Vienna Convention on the Law of Treaties* Article 24**

Entry into force

1. A treaty enters into force in such manner and upon such date as it may provide or as the negotiating States may agree.
2. Failing any such provision or agreement, a treaty enters into force as soon as consent to be bound by the treaty has been established for all the negotiating States.
3. When the consent of a State to be bound by a treaty is established on a date after the treaty has come into force, the treaty enters into force for that State on that date, unless the treaty otherwise provides.
4. The provisions of a treaty regulating the authentication of its text, the establishment of the consent of States to be bound by the treaty, the manner or date of its entry into force, reservations, the functions of the depositary and other matters arising necessarily before the entry into force of the treaty apply from the time of the adoption of its text.

3.3 Registration and Application of Treaties

- In order to be recognised as binding instruments before UN organisations, they must be registered with the UN, following Art 102 of the *Charter of the United Nations*

  - This is a position reinforced in Art 80 of the *1969 Vienna Convention on the Law of Treaties*

  - This is not a requirement for the treaty to be binding, but is a requirement for the treaty to be recognised by the UN

- The principle of *pacta sunt servanda*, following *1969 Vienna Convention on the Law of Treaties* Art 26, requires that "every treaty in force is binding upon the parties to it, and must be performed by them in good faith"
- Under Art 27 of the VCLT, a party may not invoke the provisions of its internal law (i.e., domestic law) as justification for its failure to perform a treaty

  - This is subject to Art 46 of the *1969 Vienna Convention on the Law of Treaties*, which allows a party to invoke its internal law as a justification for its failure to perform a treaty if the other party was aware of that law, and the law is not contrary to the treaty

***Charter of the United Nations* Article 102**

1. Every treaty and every international agreement entered into by any Member of the United Nations after the present Charter comes into force shall as soon as possible be registered with the Secretariat and published by it.

2. No party to any such treaty or international agreement which has not been registered in accordance with the provisions of paragraph 1 of this Article may invoke that treaty or agreement before any organ of the United Nations.

***1969 Vienna Convention on the Law of Treaties* Article 80**

Registration and publication of treaties

1. Treaties shall, after their entry into force, be transmitted to the Secretariat of the United Nations for registration or filing and recording, as the case may be, and for publication.

2. The designation of a depositary shall constitute authorization for it to perform the acts specified in the preceding paragraph.

***1969 Vienna Convention on the Law of Treaties* Article 26**

"Pacta sunt servanda"

Every treaty in force is binding upon the parties to it and must be performed by them in good faith.

***1969 Vienna Convention on the Law of Treaties* Article 27**

Internal law and observance of treaties

A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46.

***1969 Vienna Convention on the Law of Treaties* Article 46**

Provisions of internal law regarding competence to conclude treaties

1. A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.
2. 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.

- Under Art 18 of the *1969 Vienna Convention on the Law of Treaties*, a state is obliged to refrain from acts that would defeat the object and purpose of a treaty (e.g., if a treaty reuires objects to be returned, then Art 18 prohibits the state from destroying those objects during the transfer process)
- When states have signed a treaty that has not yet been ratified, they must not undermine the spirit of the treaty in this intermediary phase
- Under Art 34 of the *1969 Vienna Convention on the Law of Treaties*, treaties do not impose obligations or create rights for third states in the absence of their consent (*pacta tertiss nex nocent nec prosunt*)

***1969 Vienna Convention on the Law of Treaties* Article 18**

Obligation not to defeat the object and purpose of a treaty prior to its entry into force

A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when:

(a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or

(b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.

***1969 Vienna Convention on the Law of Treaties* Article 34**

General rule regarding third States

A treaty does not create either obligations or rights for a third State without its consent.

3.4 Reservations to Treaties

- If a state agrees to the general principles of a treaty, but does not agree with a specific provision or a set of provisions, they can enact a reservation when signing the treaty
- This has the effect of the reserving state and the states with whom the reservation was made being bound to the extent which they agreed to, and the reserved provisions not applying between those states (but still applying between the other states)
- A reservation is defined in Art 2(1)(d) of the *1969 Vienna Convention on the Law of Treaties* (on Page 15)
- Reservations can be made by a state at any stage of the treaty-making procedure
- Reservations are different from an 'interpretative declaration', which is a statement made by a state to clarify its understanding of a treaty, but does not affect the legal effect of the treaty
  - States can use interpretative declarations to clarify their understanding of a treaty, but they cannot use them to change the legal effect of the treaty
- The rules of reservation prescribed under the VCLT apply only to multilateral treaties (as a reservation to a bilateral treaty is effectively a counter-offer)

3.4.1 Permissibility

- The default position taken under Art 19 of the VCLT is that reservations are permissible, unless they are explicitly prohibited by the treaty or the reservation is incompatible with the object and purpose of the treaty

***1969 Vienna Convention on the Law of Treaties* Article 19**

Formulation of reservations

A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless:

(a) the reservation is prohibited by the treaty;

(b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or

(c) in cases not failing under subparagraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.

- Under the *ILC Guide to Practice on Reservations*, the test for incompatibility of a reservation is whether "a reservation is incompatible with the object and purpose of the treaty if it affects an essential element of the treaty that is necessary to its general tenor, in such a way that the reservation impairs the *raison d'être* [the most important reason] of the treaty"
- If a reservation is impermissible, the traditional view is that the impermissible reservation vitiates the consent of the state to the treaty as a whole, and results in the state not being a party to the treaty, following *Reservations to Genocide Convention* [1951] ICJ Rep 15

- The emerging view, especially for human rights treaties, is that the offending reservation is null and void, and may be severed, with the state bound by the treaty without the protection of the reservation (unless consent to be bound is conditional on the reservation)
  - This will cut out/sever the reservation, and will bind a state without the protection of their reservation

3.4.2 Acceptance and Objection

- If a treaty expressly allows for reservations, then no acceptance of a reservation is required by the other parties
- Acceptance by all parties will be required if a treaty has a small number of parties, and the application of the treaty in its entirety is an essential condition of signing
- In all other cases:
  - Acceptance by the other contracting state(s) of the reservation results in the reserving state being bound by the treaty (with the reservation incorporated); and
  - Objection to a reservation does not prevent entry into force of a treaty between the objecting state and the reserving state, unless the objecting state says otherwise

***1969 Vienna Convention on the Law of Treaties* Article 20**

Acceptance of and objection to reservations

1. A reservation expressly authorized by a treaty does not require any subsequent acceptance by the other contracting States unless the treaty so provides.
2. When it appears from the limited number of the negotiating States and the object and purpose of a treaty that the application of the treaty in its entirety between all the parties is an essential condition of the consent of each one to be bound by the treaty, a reservation requires acceptance by all the parties.
3. When a treaty is a constituent instrument of an international organization and unless it otherwise provides, a reservation requires the acceptance of the competent organ of that organization.
4. In cases not falling under the preceding paragraphs and unless the treaty otherwise provides:
   (a) acceptance by another contracting State of a reservation constitutes the reserving State a party to the treaty in relation to that other State if or when the treaty is in force for those States;
   (b) an objection by another contracting State to a 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;
   (c) 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.

5. For the purposes of paragraphs 2 and 4 and unless the treaty otherwise provides, a reservation is considered to have been accepted by a State if it shall have raised no objection to the reservation by the end of a period of twelve months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty, whichever is later.

3.4.3 Legal Effect

- Three scenarios can arise when a permissible reservation is made:

1. If state A accepts state R's reservation, then the treaty is modified between A and R (but only between A and R) to the extent of the reservation (VCLT Art 21(1) and (2)) (Page 24)
   - Other parties will not be bound by this reservation; it acts like a side agreement with R along the lines of the reservation
2. If state B objects to state R's reservation and says the treaty is not to apply, then there is no treaty between them at all (VCLT Art 20(4)(b)) (Page 23)
3. If state C objects to state R's reservation but does not say that treaty is not to apply, then treaty applies but 'the provisions to which the reservation relates do not apply … to the extent of the reservation' (VCLT Art 21(3)) (Page 24)

***1969 Vienna Convention on the Law of Treaties* Article 21**

Legal effects of reservations and of objections to reservations

1. A reservation established with regard to another party in accordance with articles 19, 20 and 23:
   (a) modifies for the reserving State in its relations with that other party the provisions of the treaty to which the reservation relates to the extent of the reservation; and
   (b) modifies those provisions to the same extent for that other party in its relations with the reserving State.
2. The reservation does not modify the provisions of the treaty for the other parties to the treaty inter se.
3. When a State objecting to a reservation has not opposed the entry into force of the treaty between itself and the reserving State, the provisions to which the reservation relates do not apply as between the two States to the extent of the reservation.

***Republic of India v CCDM Holdings, LLC* [2025 FCAFC 2]**

This case ivolved India having entered a reservation to a Convention, with a question arising as to whether the reservation applied only in Indian proceedings, or whether it also applied to proceedings in Australia. Whilst it is rare for a reservation issue to come up in a domestic court, the Full Federal Court explained and applied the provisions of the

VCLT on reservations in an enforcement of judgements case concerning foreign state immunity; the Court also referred to the *ILC Guide to Practice on Reservations to Treaties* in its reasoning at [63] to [70]. At [63], the Court emphasised the reciprocal effect of reservations, holding that "the effect of a reservation is that between the reserving and accepting state…the reservation modifies the provision of the treaty to the extent of the reservation for each party reciprocally (see Art 21(1)(a) and (b) of the Vienna Convention)". This case reinforces the idea of reciprocity whereby if a reservation is made, it applies to both states (i.e., it removes the particular provision for both states, not just one state).

3.5 Interpretation of Treaties

- There are several conceptual approaches to treaty interpretation:
  - Formalist/Textual (formal adherence to the terms of the treaty)
  - Restrictive (deference to state sovereignty)
  - Teleological (to give effect to the object and purpose of the treaty)
  - Effectiveness (to ensure the treaty regime remains as effective as possible)
  - Originalist (to focus on the original purpose of the treaty))
- The Australian courts will apply the VCLT when interpreting a treaty that has been incorporated into Australian law
  - In the example of *DHI22 v Qatar Airways* [2024] FCA 348, the Court found that a claim in relation to invasive medical examinations was not addressed by the Montreal Convention (as these were not an 'accident' within the meaning of the Convention)
  - This case dealt with the liability of carriers for accidents that occur on board an aircraft
- To ensure national uniformity in treaty interpretation for treaties incorporated into legislation, the courts do not apply the rules of statutory interpretation but instead apply the VCLT

3.5.1 Key Rules of Treaty Interpretation

***1969 Vienna Convention on the Law of Treaties* Article 31**

General rule of interpretation

1. A treaty shall 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.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
   (a) any agreement relating to the treaty which was made between all the parties

in connection with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

- Good faith
  - The requirement of good faith is enshrined in Art 31(1) of the VCLT (Page 25)
- Subsequent agreement/practice and applicable international law
  - Under VCLT Art 31(3) (Page 25), any subsequent agreement or practice between the parties is to be taken into account when interpreting a treaty
  - The resolutions of internal organisations can be taken into account as subsequent agreement/practice if this position is supported by all parties, following *Whaling in the Antartic Case* [2014] ICJ Rep 226 at [83]

***Whaling in the Antarctic Case* [2014] ICJ Rep 226**

This case concerned Japan's whaling program for Minke whales around Antarctica, which Australia challenged. Australia was successful in getting the ICJ to hold that Japan's program amounted to commercial whaling, which is prohibited under the treaty for Antarctica.

[83] Article VIII expressly contemplates the use of lethal methods, and the Court is of the view that Australia and New Zealand overstate the legal significance of the recommendatory resolutions and Guidelines on which they rely. First, many IWC resolutions were adopted without the support of all States parties to the Convention and, in particular, without the concurrence of Japan. Thus, such instruments cannot be regarded as subsequent agreement to an interpretation of Article VIII, nor as subsequent practice establishing an agreement of the parties regarding the interpretation of the treaty within the meaning of subparagraphs (a) and (b), respectively, of paragraph (3) of Article 31 of the Vienna Convention on the Law of Treaties.

> Secondly, as a matter of substance, the relevant resolutions and Guidelines that have been approved by consensus call upon States parties to take into account whether research objectives can practically and scientifically be achieved by using non-lethal research methods, but they do not establish a requirement that lethal methods be used only when other methods are not available.
> The Court however observes that the States parties to the ICRW have a duty to co-operate with the IWC and the Scientific Committee and thus should give due regard to recommendations calling for an assessment of the feasibility of non-lethal alternatives. The Court will return to this point when it considers the Parties' arguments regarding JARPA II (see paragraph 137).

***1969 Vienna Convention on the Law of Treaties* Article 32**

Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable.

- Supplementary means of interpretation
  - This is governed by Art 32 of the VCLT
  - Supplementary means of preparation include what is known as the preparatory works (*travaux préparatoires*), which can include notes of discussions taken prior to signing/ratification of the treaty
  - This is somewhat of a last-resort measure, and is generally used when the reader is scratching their head as to the meaning of the treaty

3.6 Invalidity of Treaties

3.6.1 Void

***1969 Vienna Convention on the Law of Treaties* Article 51**

Coercion of a representative of a State

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.

***1969 Vienna Convention on the Law of Treaties* Article 52**

Coercion of a State by the threat or use of force

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.

***1969 Vienna Convention on the Law of Treaties* Article 53**

Treaties conflicting with a peremptory norm of general international law ("jus cogens")

A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

***1969 Vienna Convention on the Law of Treaties* Article 64**

Emergence of a new peremptory norm of general international law ("jus cogens")

If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.

3.6.2 Invalid

***1969 Vienna Convention on the Law of Treaties* Article 46**

Provisions of internal law regarding competence to conclude treaties

1. A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.

2. 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.

***1969 Vienna Convention on the Law of Treaties* Article 47**

Specific restrictions on authority to express the consent of a State

If the authority of a representative to express the consent of a State to be bound by a particular treaty has been made subject to a specific restriction, his omission to observe that restriction may not be invoked as invalidating the consent expressed by him unless the restriction was notified to the other negotiating States prior to his expressing such

consent.

***1969 Vienna Convention on the Law of Treaties* Article 48**

Error

1. A State may invoke an error in a treaty as invalidating its consent to be bound by the treaty if the error relates to a fact or situation which was assumed by that State to exist at the time when the treaty was concluded and formed an essential basis of its consent to be bound by the treaty.
2. Paragraph 1 shall not apply if the State in question contributed by its own conduct to the error or if the circumstances were such as to put that State on notice of a possible error.
3. An error relating only to the wording of the text of a treaty does not affect its validity; article 79 then applies.

***1969 Vienna Convention on the Law of Treaties* Article 49**

Fraud

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.

3.7 Termination, Withdrawal and Suspension

- Termination of a treaty refers to it ceasing to exist
- Denunciation/withdrawal refers to when a party withdraws from a treaty (if it is multilateral, it will continue to exist for other parties)
- Suspension refers to the treaty remaining on foot, but its performance has been suspended/stopped for some period of time
- Internal grounds for termination, withdrawal and suspension stem from the treaty itself or the will of the parties (the required steps are spelled out in the treaty itself)
- External grounds for termination, withdrawal and suspension stem from external factors (e.g., material breach)

3.7.1 Express or Implied Agreement

- Under Arts 54 and 57 of the VCLT, a treaty can be terminated or suspended by agreement of the parties
- This is consistent with the consensual basis of international law

***1969 Vienna Convention on the Law of Treaties* Article 54**

Termination of or withdrawal from a treaty under its provisions or by consent of the parties

The termination of a treaty or the withdrawal of a party may take place:

(a) in conformity with the provisions of the treaty; or

(b) at any time by consent of all the parties after consultation with the other contracting States.

***1969 Vienna Convention on the Law of Treaties* Article 57**

Suspension of the operation of a treaty under its provisions or by consent of the parties

The operation of a treaty in regard to all the parties or to a particular party may be suspended:

(a) in conformity with the provisions of the treaty; or

(b) at any time by consent of all the parties after consultation with the other contracting States.

3.7.2 Denunciation/Withdrawal

- A party may denounce/withdrawal from a treaty if the treaty itself permits it, if all of the parties consent to the denouncement/withdrawal, or if the right to denounce/withdrawal can be implied from the nature of the treaty
- Under Art 56 of the VCLT, a party must give at least 12 months' notice of its intention to denounce/withdrawal from a treaty

***1969 Vienna Convention on the Law of Treaties* Article 56**

Denunciation of or withdrawal from a treaty containing no provision regarding termination, denunciation or withdrawal

1. 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:

   (a) it is established that the parties intended to admit the possibility of denunciation or withdrawal; or

   (b) a right of denunciation or withdrawal may be implied by the nature of the treaty.

2. A party shall give not less than twelve months' notice of its intention to denounce or withdraw from a treaty under paragraph 1.

3.7.3 Material Breach

- If a state breaches a treaty, it commits an internationally wrongful act (see Topic 10)
- Serious breaches can have consequences under the law of treaties
- A material breach is an impermissible repudiation of the treaty or violation of a provision essential for achieving the object and purpose of the treaty, following VCLT Art 60
- If there has been a material breach, the other parties in the treaty can suspend or terminate the treaty, if they wish to do so

***1969 Vienna Convention on the Law of Treaties* Article 60**

Termination or suspension of the operation of a treaty as a consequence of its breach

1. A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part.
2. A material breach of a multilateral treaty by one of the parties entitles:
   (a) the other parties by unanimous agreement to suspend the operation of the treaty in whole or in part or to terminate it either:
      (i) in the relations between themselves and the defaulting State; or
      (ii) as between all the parties;
   (b) a party specially affected by the breach to invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State;
   (c) any party other than the defaulting State to invoke the breach as a ground for suspending the operation of the treaty in whole or in part with respect to itself if the treaty is of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations under the treaty.
3. A material breach of a treaty, for the purposes of this article, consists in:
   (a) a repudiation of the treaty not sanctioned by the present Convention; or
   (b) the violation of a provision essential to the accomplishment of the object or purpose of the treaty.
4. The foregoing paragraphs are without prejudice to any provision in the treaty applicable in the event of a breach.
5. Paragraphs 1 to 3 do not apply to provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties.

3.7.4 Impossibility

- A state may terminate or withdraw from a treaty if its performance has become impossible because 'an object indispensable for the secution of the treaty' has permanently disappeared or been destroyed, following VCLT Art 61

***1969 Vienna Convention on the Law of Treaties* Article 61**

Supervening impossibility of performance

1. A party may invoke the impossibility of performing a treaty as a ground for terminating or withdrawing from it if the impossibility results from the permanent disappearance or destruction of an object indispensable for the execution of the treaty. If the impossibility is temporary, it may be invoked only as a ground for suspending the operation of the treaty.

2. 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.

3.7.5 Fundamental Change of Circumstances

- A state may suspend/terminate, or withdraw, from a treaty if there has been a fundamental change of circumstances since the treaty was concluded, following VCLT Art 62

- For this to happen, three requirements need to be satisfied:
  - The circumstances at the conclusion of the treaty must have been an essential basis of consent
  - The change must not have been foreseen
  - The change must radically transform the extent of the obligations still to be performed

- International courts are very reluctant to find that impossibility and/or fundamental change of circumstances have been made out (i.e., these have a very high threshold and consequently a very limited scope)

***1969 Vienna Convention on the Law of Treaties* Article 62**

Fundamental change of circumstances

1. A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless:

   (a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and

(b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty.

2. A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty:

   (a) if the treaty establishes a boundary; or

   (b) if the fundamental change is the result of a breach by the party invoking it either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.

3. If, under the foregoing paragraphs, a party may invoke a fundamental change of circumstances as a ground for terminating or withdrawing from a treaty it may also invoke the change as a ground for suspending the operation of the treaty.

***Gabčíkovo-Nagymaros Case* [1997] ICJ Rep 7**

This case involved questions of treaty law, state responsibility, succession of states (new states succeed to their obligation of their parent states, e.g., Soviet Union → Russia), and international environmental law. It arose from disagreement over a joint project between Hungary and Czechoslovakia to construct a series of locks and dams along a shared stretch of the Danube (under a 1977 Treaty). Hungary suspended work on the project after environmental protests were conducted by civil society. Czechoslovakia investigated a unilateral alternative ('Variant C'), resulting in Hungary seeking to terminate the 1977 Treaty.

The rules of the VCLT concerning the termination and suspension of treaties were considered by virtue of being part of customary international law (the VLCT itself was not applicable as the parties joined it after the 1977 Treaty; later treaties cannot be applied to earlier treaties). The 1977 Treaty contained no provision concerning termination, and therefore it could only be terminated according to limited grounds set out in VCLT.

Performance was not impossible (and in any event impossibility cannot be invoked by party which itself breaches treaty). Hungary's argument was that it could not comply with the terms of the treaty without severely damaging the surrounding environment. The plea of fundamental change of circumstances can only be applied in exceptional circumstances, and there were none here; the court refused to apply art 62, as there were no radical changes to the obligations of the parties. Hungary was not entitled to invoke Slovakia's breach of treaty for terminating, as at that time no breach had yet taken place. Slovakia adopted Variant C because of Hungary's breach; Hungary by its own conduct had prejudiced its right to terminate the treaty. Although both Hungary and Slovakia failed to comply with the treaty, this reciprocal conduct did not bring 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 non-compliance.' The Court is very reluctant to declare the treaty as ineffective,

emphasising the centrality of *pacta sunt servanda*. Thus, this case shows that treaties are very hard to get out of (when drafting treaties, it is wise to include provisions for breach and change of circumstance, as external measures are hard to invoke).

Topic 4

International Law and Australian Law

4.1 Role of International Law in Domestic Law

- Domestic law can be taken as a source of public international law, as evidence of custom and/or the general principles of public international law
- International law may recognise institutions of domestic law that have an important/extensive role in international law (e.g., in the case of *Barcelona Traction (Belgium v Spain)* [1970] ICJ Rep 3, th eICJ recognised that corporations can be recognised within international law)
- States cannot invoke absent/inconsistent domestic law as an excuse for failing to meet their obligations under international law
  - In *Alabama Claims Arbitration (US/Britain)* (1872), it was held that Britain could not "justify itself for a failure in due diligence on the plea of insufficiency of the legal means of action which it possessed"
    * Here, the US was successful in pursuing compensation for Britain's failure to perform its obligations as a neutral party during the civil war, by claiming Britain had failed to stop the construction of Confederate ports
    * Britain claimed that they did not have executive permission to do so
    * The court held that in matters of international law, the British government cannot justify itself by reference to insufficient or absence of domestic law
  - In *Sandline Arbitration* (1998), Papua New Guinea (PNG) could not rely on internal law to support their plea that an international contract was invalid
    * This case was a commercial arbitration between PNG and Sandline (which was a mercenary company). The government of PNG entered into a$36m contract for Sandline to supply mercenaries to assist the PNG defence forces in their fight against the boganville revolutionary army
    * PNG made a payment of $18m, but declined to make the second half of the payment, claiming that the agreement had been reached contrary to the PNG constitution (i.e., they didn't have approval from Parliament for the hiring of external military forces)
    * The tribunal held that the contract was governed by international law, and applied the principle that a state cannot rely on its own internal laws for the basis that the claim was wrong/illegal

    * This case reinforces the principle that a state cannot cite inconsistent/absent domestic law to escape their obligations

- In an Australian Court, public international law, like Australian law, cannot be proved law by expert evidence, following *ACCC v PT Garuda (No 9)* [2013] FCA 323
  - Generally, to refer to the law of another country, expert evidence can be called upon to give context and content of the other country's law
  - This is not the case for international law, as it is treated as being the same as Australian law for the purposes of interpreting it

***Australian Competition and Consumer Commission v PT Garuda (No 9)* [2013] FCA 323**

This case concerned the ACCC's claim that PT Garuda had engaged in price fixing in relation to air cargo services. The ACCC sought to rely on expert evidence to prove the existence of public international law, which the court rejected.

The court held that public international law, like Australian law, cannot be proved by expert evidence. This is because the court is the ultimate arbiter of the law, and so it is the court's responsibility to determine the law, rather than an expert witness.

Perram J at [31]	In truth, opinion evidence is not receivable on an issue of domestic law because the law is not a matter for proof or disproof. It is for this reason, as pointed out in Cross on Evidence at [3075], that a judge is not obliged to accept a proposition of law agreed upon by the parties: cf *Damberg v Damberg* (2001) 52 NSWLR 492 at [149]

4.2 Monism and Dualism

- **Monism** refers to the idea that international law and domestic law are part of a single legal system, and that international law is automatically incorporated into domestic law
- Incorporation refers to the notion that international law is automatically a part of domestic law, and there are several variations of this notion:
  (a) The courts are to apply international law unless it is inconsistent with statute (i.e., apply international law over common law)
  (b) The courts are to apply international law unless it is inconsistent with statute or common law
- It is relatively rare to find a state that automatically accepts international law; it is much more likely that the process of incorporation will be mediated by the courts
- **Dualism** refers to the notion that there are two independent systems of law; international law has no direct impact upon municipal law, and must be implemented into domestic law through executive order, legislation or judicial decision (i.e., the opposite of monism)
  - If there is an interaction between domestic and international law, it mus tbe governed by either international law or domestic law; they cannot just freely interact

- Transformation refers to the notion that international law must be transformed into domestic law before it can be applied, and has several variations:
  (a) Only legislation may implement the provisions of international law
  (b) Legislation or court decisions may implement the provisions of international law

4.3 Customary International Law in Australian Law

- In Australia, the automatic incorporation of customary international law has been rejected
  - There is no clear authority on this, but it can be said to a high degree of confidence that the Courts are not happy with custom becoming an automatic part of Australian common law
- However, custom can influence courts, and be a source of common law, which is known as the soft transformation approach
  - This approach has not been clearly endorsed by the courts (i.e., the notion that custom may be adopted by the courts, and not exclusively left to the parliament to implement)
- This is in contrast to the UK, where they are more open to the incorporation approach with the exception for international crimes
- The case of *Trendex Trading* [1977] QB 529, which was a case involving foreign state immunity, approached this issue
  - This case concerned a contract for the purchase of cement by the Nigerian government; the terms of the contract were governed by English law and gave jurisdiction to the courts of England and Wales
  - The case looked at the extent to which the rules of immunity under international law could apply in English common law
  - The shipments of concrete were clogging up the port of Lagos
  - The Central Bank of Nigeria cancelled these contracts, and Trendex sued the Central Bank of Nigeria under the contract, and the Court found that the bank was separate from the state, and could not claim immunity
  - This case demonstrated that when the rules of international law had changed, the UK courts were justified in applying these new rules
  - Per Lord Denning MR at page 544, "[i]ntl. law does change: and the courts have applied the changes without…any Act of Parliament. In a sense, the doctrine of incorporation admits to the reality of international law"
- Likewise, the recent example of *Law Debenture Trust v Ukraine* [2023] UKSC 11 held that it was English, and not international, law which was to be applied to ascertain whether the defence of duress applies to an English contractual dispute
  - The facts of this case relate to a loan made by Russia to Ukraine (who, at the time of writing, remain engaged in armed conflict)

  - As part of this conflict, Ukraine stopped paying moneys owed under this loan, and raised various jusifications for doing so, under both English contract law and under PIL
  - Ukraine claimed economic and military duress as to being forced into the threat, arguing that they could rely on the doctrine of countermeasures, which allowed for them to take retalitatory measures against Russia in response to Russia's 2014 annexation of Crimea
  - The Court held thtat the relationship between domestic and international law was far more complex than as suggested in *Trendex*
  - The UK Supreme Court adopted PIL as a source of law, so long as it was not inconsistent with English law
  - At [204], the court held that "It seems preferable, therefore, to regard customary international law not as automatically a part of the common law but as a source of the common law on which courts in this jurisdiction may draw as appropriate."

- The cases of *Chow Hung Ching v R* (1949) 77 CLR 449 and *Mabo v Queensland (No 2)* (1992) 175 CLR 1 provide some insight into the influence of public international law in Australian law
- Additionally, in *Habib v Commonwealth* (2010) 183 FCR 62, for some claims surrounding fundamental human rights, the common law should reflect universal norms

Chow Hung Ching v R (1949) 77 CLR 449

This was a pivotal case concerning Chinese army labourers who had been convicted of assault in Papua New Guinea (which was then under Australian UN mandate), with the central question being whether they enjoyed immunity as 'visiting armed forces'. The Chinese government claimed that the labourers were immune from prosecution under international law, as they were part of the Chinese army. The HCA held that no immunity applied as they were in PNG as civilians, not in their capacity as members of the military forces of China. Generally, when foreign armed forces are present in a country, they are protected by a status of forces treaty, which affords them certain types of immunities.

Latham CJ at Page 462	International law is not as such part of the law of Australia (*Chung Chi Cheung v. The King*, and see *Polites v. The Commonwealth*), but a universally recognized principle of international law would be applied by our courts: *West Rand Central Gold Mining Co. v. The King*.
Dixon J at Page 477	The theory of Blackstone (automatic incorporation) is 'regarded as without foundation' and the 'true view' is that of Brierly 'that international law is not part, but is one of the sources' of Australian law. The immunity of foreign armed forces held to be part of the common law.

This case held that the common law can be developed by regard to customary international law where it is not inconsistent with domestic law (i.e., it opens up potential for development, but does not automatically give it status). Here, there was no relevant treaty, and so the issue was of common law and of customary international law

***Mabo v Queensland (No 2)* (1992) 175 CLR 1**

This was a landmark case that recognised the native title of Indigenous Australians to the lands of Australia. Additionally, it provides some insight into the influence of public international law. In it, the High Court rejects the automatic inclusion of international law in the Australian legal system, but holds that it is still a good influence. This is particularly the case when referring to aspects of international law that touch on universal human values (e.g., areas like international human rights law may be more amenable to being relevant in terms of incorporating international law).

Brennan J at Page 42	"The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human values."

***Habib v Commonwealth* (2010) 183 FCR 62**

This case was a civil claim for torture committed overseas. Habib was an Australian citizen, and was accused of being involved in various terrorist offences for which he was never proven to have committed. He was kept in detention overseas; moreover, the Australian authorities knew he was being detained and was being seriously mistreated. He brought a civil claim for tort against the Australian government seeking damages for what he alleged was torture. Ordinary, this is a type of case that is hard to win in an Australian Court as they will not decide on matters that happened by other governments in their country. However, Black CJ of the federal court held that the foreign act of state doctrine must yield when we are looking at a case involving torture (which is one of the most serious international crimes) - i.e., the doctrine could be modified to take note of the international prohibition of torture. The overarching principle of this case is that in a civil claim for torture (or any serious crime forbidden under international norms), the common law of state doctrine should reflect universal norms.

4.3.1 Criminal Law and Customary International Law

- The courts have held that customary/international criminal law established by custom can **never** be part of the Australian common law, following *Nulyarimanna v Thompson* (1999) 165 ALR 621, and *R v Jones* [2006] 1 All ER 741

***1948 Convention on the Prevention and Punishment of the Crime of Genocide* Article 2**

In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

(a) Killing members of the group;

(b) Causing serious bodily or mental harm to members of the group;

(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(d) Imposing measures intended to prevent births within the group;

(e) Forcibly transferring children of the group to another group.

Nulyarimma v Thompson (1999) 165 ALR 621

This case questioned whether genocide was an offence under criminal law (this case was decided before Australia became a party to the 1998 Rome Statute of the International Criminal Cort and implemented the Statute in legislation). At the time, Australia was a party to the genocide convention, but it was yet to implement the crime of genocide as a matter of legislation.

A number of indigenous people had argued that the Commonwealth had committed genocide against their people (by extinguishing their native title, and failing to apply for UNESCO for their lands). They alleged that Commonwealth ministers and certain others had committed genocide by:

(a) Adopting laws and policies that extinguished native title; and

(b) Not applying for World Heritage listing of certain Indigenous lands

The Court held that genocide was not part of Australian common law, and so it never decided. Wilcox J and Whitlam J held that a *jus cogens* prohibition of genocide was not automatically part of Australian common law, and that criminal offences must be created by statute, not by the courts. Moreover, it is for Australian parliaments to create criminal law, not for the common law to decide criminal law. Wilcox J held that if custom could create common law crime, 'it would lead to the curious result that an international obligation incurred pursuant to customary law has greater domestic consequences than an obligation incurred, expressly and voluntarily, by Australia signing and ratifying an international convention'. It is a point of the treaty process in Australia that mere ratification isn't sufficient to make it law; it must be placed into legislation by parliament. Merkel J (dissenting) held that the offence of genocide is an offence under Australian common law, and that the Australian approach is the 'common law adoption approach'; a rule of international law is to be adopted by a court so long as it is not inconsistent with legislation or public policy.

R v Jones [2006] 2 All ER 741

In 2003, Margaret Jones and others broke into a RAF base, and caused damage to fuel tankers and bomb trailers at the beginning of the second Iraq war. They were subsequently charged with conspiracy to cause criminal damage contrary to the UK's *Criminal Law Act 1967*. The defendant sought to rely on the legal justification that she had acted to impede the commission of the customary international law crime of aggression by the UK and the US (i.e., they should not be culpable because they broke the law to prevent the worse crime of aggression).

The House of Lords held that whilst the crime of aggression was part of customary international law, it was not a crime under English law in the absence of any specific

statutory authority saying otherwise - no such authority existed. Lord Bingham held that automatic incorporation of common law crimes would unjustifiably usurp the legislature. Likewise, Lord Mance held that 'even crimes under public international law can no longer be, if they ever were, the subject of any automatic reception or recognition in domestic law by the courts'. Moreover, Lord Hoffman held that new domestic offences 'should not creep into existence as a result of an international consensus to which only the executive of this country is a party', emphasising the concerns surrounding the separation of powers.

4.4 Treaties in Australian Law

- The power to enter into treaties is an exclusively Executive prerogative power under s 61 of the Constitution
  - This power was inherited from the UK Imperial government, who initially negotiated and entered into treaties on Australia's behalf
  - From 1926, Australia began to enter into treaties on its own behalf
- "The federal executive, though the Crown's representative, possessed exclusive and unfettered treaty-making power" - *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 at [215], per Stephen J

Constitution s 61

The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth.

- The power to implement treaties is a legislative power, and is vested in the Parliament under s 51(xxix) of the Constitution ("The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to: ... external affairs")
- The provisions of a treaty do not form part of Australian law, unless they have been implemented by statute, which was determined in *Dietrich v R* [1992] HCA 37
- The same principle applies to implementing the resolutions of international organisations (such as those of the United Nations' Security Council), following *Bradley v Commonwealth* (1973) 128 CLR 557
- This approach arises as a result of the separation of powers doctrine (treaty-making is for the Executive, law-making is for the Parliament); there are limited exceptions for peace treaties and maritime boundary agreements, although these have never been tested

Dietrich v R [1992] HCA 37

In this case, the accused made an argument that he was entitled to publicly-funded legal representation in a criminal case under art 14 of the *International Covenant on Civil and Political Rights* (of which Australia was a party). The High Court held that this was not the

case, as the ratification of the covenant as an executive act did not have any effect on Australian law, since its provisions had not been legislated and therefore implemented by the Parliament, following Brennan CJ, and Mason and McHugh JJ. **The Court held that the provisions of a treaty do not form part of Australian law unless they have been implemented by statute.**

***Bradley v Commonwealth* (1973) 128 CLR 557**

In this case, the executive was concered about the activities of a place in Crows Nest known as the Rhodesian Information Centre, which was an agent of the illegal Southern Rhodesian regime. The UN Security Council passed a binding resolution on all members, requiring them not to recognise the illegal Rhodesian regime, and to take action against them in their own jurisdictions. In line with this, the Australian government shut down all communications to this centre, but as the resolution had not been implemented in Australian law, it was found that the government did not have any legislative authority to do what it had done.

4.5 Treaty Making Process

- Australia can enter into two different types of treaties:
  - Bilateral treaties, which enter into force for Australia after
    1. Signature
    2. Subsequent exchange of notes stating that the constitutional process is completed
  - Multilateral treaties, which enter into force for Australia after
    1. Signature
    2. Subsequent ratification (or accession if there was no previous signature)
  - This process for multilateral treaties allows for the Commonwealth to implement any legislation to allow for the treaty's provisions to be enlivened in domestic law (i.e., sign → prepare domestic law for the treaty's provisions → ratify)
- There is no constitutional requirement for the Parliament to be involved in the treaty-making process
  - However, only Parliament can pass legislation to implement treaties
  - The Commonwealth can enter into any treaty that it wishes to, but it cannot implement the treaty without the Parliament's approval
- As a matter of policy, since 1996 Parliament has been consulted on the treaty-making process
  - However, they are not given a veto, but rather are provided a capacity to provide input into this process
  - This was the result of the 1995 report of the Senate Legal and Constitutional References Committee ('Trick or Treaty?')

  - It is now 'required' that all proposed treaty actions are tabled in Parliament at least 15 sitting days prior to any binding action being undertaken (with exemptions for urgent or sensitive treaties)

- To implement a treaty, a National Interest Analysis (NIA) must be prepared, which is akin to an explanatory memoranda for a treaty, and outlines why Australia has entered into a treaty
- The treaty should also be reviewed by the Joint Standing Committee on Treaties (JSCOT), which is a parliamentary committee that reviews Australia's participation in treaties

4.6 Implementing Treaties

4.6.1 Constitutional Considerations

- The constitution enables the executive to enter into treaties as part of the 'external affairs' provision in s 51(xxix) of the *Constitution*
  - This provision governs the relations between Australia and other countries/international organisations, matters external to Australia, and the implementation of international law (including custom, treaties, international recommendations, etc.)
- The Commonwealth parliament does not have plenary power to legislate on wahtever it wants to, but only to legislate with respect to matters conferred on it by the *Constitution* (s 51)
- The external affairs power will support legislation applicable to matters geographically external to Australia

***Horta v Commonwealth* (1994) 181 CLR 183**

In 1995, Indonesia invaded East Timor, and remained in occupation of it until the early 2000s; this occupation was held to be unlawful as a matter of PIL. However, this did not stop Australia from accepting Indonesia sovereignty over East Timor, and subsequently, Australia concluded a treaty with Indonesia which allowed for them to acccess oil in the Timor Gap. The plaintiff argued that the law implementing the 1989 Timor Gap Treaty was invalid as the treaty itself was void (by virtue of recognising Indonesia's unlawful occupation of East Timor). THe High Court said that they do not have to address that issue, as there is an element of the external affairs power that says that they have to only look at whether the law applies geographically externally to Australia; the la applied to the Timor sea, which was valid. Moreover, even if the treaty was void as a matter of PIL, that didn't undermine or impugn the character of this law as one with respect to external affairs.

Per Curiam, 'the area of the Timor Gap and the exploration...and exploitation of, petroleum resources ... [are] matters ... geographically external to Australia. There is an obvious and substantial nexus between each of them and Australia' '[E]ven if the Treaty were void or unlawful under international law ... the [impugned Acts] would not thereby be deprived of their character as laws with respect to "External Affairs"'. Moreover, this

case leaves unresolved the question as to whether the executive can enter into treaties that are unlawful; the HCA did not deal with it as they held that it was still lawful in a way.

- It has been reinforced that the external affairs power will support legislation that implements treaties in Australian law

***Koowarta v Bjelke-Petersen* (1982) 153 CLR 168**

The Aboriginal Land Fund Commission had entered into a contract to purchase a pastoral lease in Queensland. The Queensland government refused to consent to the transfer as the purchaser was Aboriginal. The Commission sued under the *Racial Discrimination Act 1975* (Cth), and the Queensland government challeneged the validity of the legislation. The Court found that the Act was valid as it implements the *1969 International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)*. Mason J held that a law implementing custom would be a law with respect to external affairs, indeed 'any matter which has 'become the topic of international debate, discussion and negotiation constitutes an external affair before Australia enters a treaty relating to it'.

***Commonwealth v Tasmania* (1983) 158 CLR 1**

This case concerned the validity of the *World Heritage Conservation Act 1983* (Cth), which implemented the *1972 Convention Concerning the Protection of the World Cultural and Natural Heritage*. The majority of the Court held that most of the legislation was valid in respect to external affairs and the external affairs power; Tasmania had challenged the validity of the legislation. The majority additionally held that the Commonwealth can legislate to implement a treaty, but that power is not unlimited.

Deane J held that the law under s 51(xxix) of the *Constitution* must carry into effect treaty obligations, and be reasonably considered to be appropriate and adapted to achieving this objective (i.e., reasonable proportionality between the designated object and the means for achieving it). That is, the legislation must bear some relation to the treaty, and must be reasonably appropriate and adapted to achieving the objective of the treaty.

4.6.2 Legislative Concerns

- Australia will generally not ratify a treaty until the legislation to domestically implement the provisions of the treaty is in place
- Legislation will be needed to implement a treaty if the treaty creates rights for or imposes obligations upon individuals; however, it will not be very detailed as often there is existing legislation or common law at the state or federal levels that allows Australia to comply with the terms of the treaties
- Existing legislation acn often be used to make the necessary regulations to implement international provisions
  - For example, the *Charter of the United Nations Act 1945* (Cth) was used to implement UNSC resolutions dealing with sanctions and the listing of terrorist organisations

and the subsequent freezing of assets; generally, this legislation is used to implement UNSC regulations (i.e., it is delegation legislation)

- Legislation may 'give a treaty the force of law'
  - This generally occurs where the treaty has been drafted with domestic incorporation in mind (e.g., the *Diplomatic Privileges and Immunities Act 1967* (Cth) s 7, which holds that the Vienna Convention on Diplomatic Relations is to have force of law)
- Generally, there is the translation of treaty provisions into domestic legislation
  - This is the most common practice
  - It avoids uncertainty by directly translating the terms of the treaty into Australian law
  - It may refer to terms of a treaty (e.g., *Migration Act 1958* (Cth) s 4 refers to the definition of a 'refugee')
- If legislation 'approves' a treaty, it is not binding
  - This merely notes that the terms of the treaty are acceptable to Australia, but does not implement them (i.e., it is not sufficient to be binding)
  - The mere approval of Parliament does not give a treaty the force of law, as discussed in *Bradley v Commonwealth (1973) 128 CLR 557* (which discussed the *Charter of the UN Act 1945* (Cth))
  - The practice of approving the provisions of treaties has since lapsed

4.7 Statutory Interpretation and International Law

- There are several scenarios where international law can be used to interpret domestic law
- International law can be used as extrinsic material when interpreting legislation which refers to a treaty, following the *Acts Interpretation Act 1901* (Cth) ss 15AB(1) and (2)(d)
- International law can be used to interpretate a legislative provision that incorporates a treaty provision (here, the rules of treaty interpretation (i.e., the VCLT) are applied, rather than the rules of statutory interpretation)
- If its language permits, a legislative provision is interpreted to avoid placing Australia in breach of its international obligations, following the Polites principle

***Acts Interpretation Act 1901* (Cth) s 15AB(1)-(2)**

(1) Subject to subsection (3), in the interpretation of a provision of an Act, if any material not forming part of the Act is capable of assisting in the ascertainment of the meaning of the provision, consideration may be given to that material:

(a) to confirm that the meaning of the provision is the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act; or

(b) to determine the meaning of the provision when:

(i) the provision is ambiguous or obscure; or

(ii) the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act leads to a result that is manifestly absurd or is unreasonable.

(2) Without limiting the generality of subsection (1), the material that may be considered in accordance with that subsection in the interpretation of a provision of an Act includes:

(a) all matters not forming part of the Act that are set out in the document containing the text of the Act as printed by the Government Printer;

(b) any relevant report of a Royal Commission, Law Reform Commission, committee of inquiry or other similar body that was laid before either House of the Parliament before the time when the provision was enacted;

(c) any relevant report of a committee of the Parliament or of either House of the Parliament that was made to the Parliament or that House of the Parliament before the time when the provision was enacted;

(d) any treaty or other international agreement that is referred to in the Act;

(e) any explanatory memorandum relating to the Bill containing the provision, or any other relevant document, that was laid before, or furnished to the members of, either House of the Parliament by a Minister before the time when the provision was enacted;

(f) the speech made to a House of the Parliament by a Minister on the occasion of the moving by that Minister of a motion that the Bill containing the provision be read a second time in that House;

(g) any document (whether or not a document to which a preceding paragraph applies) that is declared by the Act to be a relevant document for the purposes of this section; and

(h) any relevant material in the Journals of the Senate, in the Votes and Proceedings of the House of Representatives or in any official record of debates in the Parliament or either House of the Parliament.

4.7.1 Polites Principle

- The Polites principle refers to the presumption that Parliament intends to give effect to Australia's obligations under international law (following *Polites v Commonwealth* (1945) 70 CLR 60)

***Polites v Commonwealth* (1945) 70 CLR 60**

In this case, Mr Polites (a Greek national), was given notice under regulations requiring him to serve in the Australian Defence Force (i.e., a situation where a foreign national was being conscripted, which is explicitly prohibited by international law). This case resulted in the High Court reviewing the legislation, and held that the legislation was valid. This was despite an established rule of international law that aliens may not be required to serve in armed forces.

Latham CJ stated, at page 69 of the judgement, that "It must be held that legislation otherwise within the power of the Commonwealth Parliament 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." From this, it is the case that the Commonwealth parliament can still pass legislation that is inconsistent with public international law, but every effort should be made to avoid this where possible.

- The Polites principle does not apply for constitutional interpretation, following *Al-Kateb v Godwin* (2004) 208 ALR 124, as it would violate s 128 of the Constitution otherwise
  - s 128 of the Constitution requires a referendum to amend the constitution; to allow the constitution to be modified under the Polites principle would violate this requirement

Al-Kateb v Godwin (2004) 219 CLR 562

This case concerned whether a stateless Palestinian man could be subject to indefinite detention as a result of a lack of a state to which he could be deported to. Whilst this case has been overturned, the discussion between Kirby J and McHugh J is still relevant, especially in the context of the Polites principle.

Kirby J at [175]	Whatever may have been possible in the world of 1945, the complete isolation of constitutional law from the dynamic impact of international law is neither possible nor desirable today. That is why national courts, and especially national constitutional courts such as this, have a duty, so far as possible, to interpret their constitutional texts in a way that is generally harmonious with the basic principles of international law, including as that law states human rights and fundamental freedoms.
McHugh J at [66]	"This 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's position reflected that of the majority of the HCA
- The majority held that the constitution is fundamentally different from statute, and so it is not to be interpreted in a way to conform to the rules of public international law, as to do so would violate the independence of the constitution under s 128

Australian Constitution s 128

This Constitution shall not be altered except in the following manner:

The proposed law for the alteration thereof must be passed by an absolute majority of each House of the Parliament, and not less than two nor more than six months after its passage through both Houses the proposed law shall be submitted in each State and Territory to the electors qualified to vote for the election of members of the House of

Representatives.

But if either House passes any such proposed law by an absolute majority, and the other House rejects or fails to pass it, or passes it with any amendment to which the first-mentioned House will not agree, and if after an interval of three months the first-mentioned House in the same or the next session again passes the proposed law by an absolute majority with or without any amendment which has been made or agreed to by the other House, and such other House rejects or fails to pass it or passes it with any amendment to which the first-mentioned House will not agree, the Governor-General may submit the proposed law as last proposed by the first-mentioned House, and either with or without any amendments subsequently agreed to by both Houses, to the electors in each State and Territory qualified to vote for the election of the House of Representatives.

When a proposed law is submitted to the electors the vote shall be taken in such manner as the Parliament prescribes. But until the qualification of electors of members of the House of Representatives becomes uniform throughout the Commonwealth, only one-half the electors voting for and against the proposed law shall be counted in any State in which adult suffrage prevails.

And if in a majority of the States a majority of the electors voting approve the proposed law, and if a majority of all the electors voting also approve the proposed law, it shall be presented to the Governor-General for the Queen's assent.

No alteration diminishing the proportionate representation of any State in either House of the Parliament, or the minimum number of representatives of a State in the House of Representatives, or increasing, diminishing, or otherwise altering the limits of the State, or in any manner affecting the provisions of the Constitution in relation thereto, shall become law unless the majority of the electors voting in that State approve the proposed law.

In this section, Territory means any territory referred to in section one hundred and twenty-two of this Constitution in respect of which there is in force a law allowing its representation in the House of Representatives.

Appendix A

Scaffolds

A.1 Development, Nature and Scope of Public International Law

A.2 Sources of Public International Law

A.3 The Law of Treaties

1. Was there a treaty involved?
    - A treaty refers to "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" - Art 2(1)(a) of the *1969 Vienna Convention on the Law of Treaties* (Page 15)
2. Does the *1969 Vienna Convention on the Law of Treaties* apply?
    (a) Was the treaty between two or more states? - VCLT Art 3 (Page 16)
    (b) Was the treaty in writing? - VCLT Art 3 (Page 16)
3. Was the treaty valid?
4. Did the states involved enter into the treaty?
    (a) Was the party entering into the treaty a state, international organisation or an international entity with capacity to enter into a treaty?
    (b) Has the individual representing the party produced full powers evincing their authority to enter into the treaty?
        i. Heads of State, Heads of Government and Ministers of Foreign Affairs are taken to have the capacity to conclude treaties without producing full powers - VCLT Art 7 (Page 18)
    (c) Was the treaty signed by the party?
        - Upon signing a treaty, the state expresses a willingness to continue the treaty-making process and agrees with the treaty in principle
        - However, the signature does not bind the state to the treaty at this point in time

(d) If the treaty is a new treaty, was it ratified by the party?

- Upon ratification, the state is bound by the terms of the treaty

(e) If the treaty is an existing one, was it ascended to by the party?

- Ascension only arises when a state becomes a party to a treaty already in force (i.e., already negotiated and signed by other states)
- This has the same legal effect as ratification, and is binding upon the state

5. Was the treaty in force?

- A treaty enters into force when the relevant provisions in the treaty addressing this point are satisfied
- If the treaty is silent on this point, it will enter into force when all parties have consented to being bound by it – VCLT Art 24(2) (Page 19)
- If a party signs a treaty after its formation, it will be binding upon that state on the day that consent to being bound is established – VCLT Art 24(3) (Page 19)

6. Was there any reservation to the treaty?

7. Are there grounds to terminate, withdraw or suspend the treaty?

A.4 International Law and Australian Law