LAWS1023:
Public International Law

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Development, Nature and Scope of Public International Law

Topic 2

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 Commonwealth (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 16), 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'), whilst others form a more generalised source of law ('law-making treaties', especially those that contribute to the generation 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 presumption 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 consistently 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).

> [186] The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule. If a State acts in a way *prima facie* incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the 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 international 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
- A state cannot be a persistent objector to a *jus cogens* principle, following the International Law Commission's 2019 report, at Conclusion 14 of Chapter V

***International Law Commission 2019 Report* Chapter V Conclusion 14**

Rules of customary international law conflicting with a peremptory norm of general international law (*jus cogens*)

1. A rule of customary international law does not come into existence if it conflicts with a peremptory norm of general international law (*jus cogens*). This is without prejudice to the possible modification of a peremptory norm of general international law (*jus cogens*) by a subsequent norm of general international law having the same character.

2. A rule of customary international law not of a peremptory character ceases to exist if and to the extent that it conflicts with a new peremptory norm of general international law (*jus cogens*).

3. The persistent objector rule does not apply to peremptory norms of general international law (*jus cogens*).

***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 acquiescence 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.

> Pg. 175 | 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 resolution can be the spark that creates a new customary norm)
- 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 gradual evolution of the *opinio juris* required for the establishment of a new rule.

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.

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**

Summary of Facts: The case concerning maritime delimitation and territorial questions between Qatar and Bahrain was initiated when Qatar filed an application with the International Court of Justice (ICJ) on 8 July 1991, seeking resolution of disputes over sovereignty of the Hawar Islands, sovereign rights over the shoals of Dibal and Qit'at Jaradah, and the delimitation of maritime areas. The dispute, rooted in a long-standing conflict, saw mediation efforts by Saudi Arabia starting in 1976, culminating in key agreements: the 1987 exchanges of letters between the leaders of Qatar, Bahrain, and Saudi Arabia, and the 1990 Doha Minutes signed by their foreign ministers. These agreements aimed to refer the disputes to the ICJ. Bahrain contested the Court's jurisdiction, arguing the 1990 Minutes were not legally binding and did not permit unilateral referral by Qatar. After written and oral proceedings, the ICJ delivered its judgment on 1 July 1994, addressing jurisdiction and admissibility.

Issues and Principles: The primary issue was whether the Court had jurisdiction to hear the case based on the 1987 exchanges of letters and the 1990 Doha Minutes, and whether Qatar's application was admissible. Bahrain argued the Minutes were merely a record of

negotiations, not a binding agreement, and that unilateral referral was not permitted. The ICJ determined that both the 1987 letters and 1990 Minutes constituted international agreements with legal force, creating obligations to submit the dispute to the Court. A key principle was the interpretation of international agreements under the Vienna Convention on the Law of Treaties, emphasising their terms and context over subjective intent. The Court also addressed the scope of the dispute, noting Qatar's application covered only part of the agreed "Bahraini formula," and thus decided to allow both parties five months to submit the entire dispute, either jointly or separately, to ensure comprehensive resolution as intended by the agreements.

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".

> [43] When it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking, the State being thenceforth legally required to follow a course of conduct consistent with the declaration. An undertaking of this kind, if given publicly, and 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 organisations 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 6**

Capacity of States to conclude treaties

Every State possesses capacity to conclude treaties.

***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. Accession (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 requires 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 16)

- 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 26)
        - 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 25)
    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 26)

***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 involved 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 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 27)
- Subsequent agreement/practice and applicable international law
  - Under VCLT Art 31(3) (Page 27), 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 Antarctic Case* [2014] ICJ Rep 226 at [83]

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

Summary of Facts: This case was initiated when Australia filed an application with the International Court of Justice (ICJ) on May 31, 2010, alleging that Japan's Second Phase of its Japanese Whale Research Program under Special Permit in the Antarctic (JARPA II) violated the International Convention for the Regulation of Whaling (ICRW). Australia claimed that JARPA II, involving the lethal sampling of minke, fin, and humpback whales in the Southern Ocean, was not for scientific research as permitted under Article VIII of the ICRW, but rather constituted commercial whaling in breach of the Schedule's moratorium provisions. Japan defended JARPA II as a legitimate scientific program aimed at ecosystem monitoring and multi-species competition studies. New Zealand intervened under Article 63 of the ICJ Statute, supporting Australia's position. After written and oral proceedings, including expert testimony, the ICJ delivered its judgment on March 31, 2014, ruling by a 12-4 vote that JARPA II did not qualify as scientific research under Article VIII and that Japan had breached specific Schedule provisions.

Issues and Principles: The central issue was whether JARPA II's special permits for killing whales fell within Article VIII, paragraph 1, of the ICRW, which exempts whaling "for purposes of scientific research" from other Convention restrictions. Sub-issues included Japan's compliance with Schedule paragraphs 10(e) (zero catch limit for commercial whaling), 10(d) (factory ship moratorium), 7(b) (Southern Ocean Sanctuary), and 30 (permit review requirements). The ICJ first affirmed its jurisdiction, rejecting Japan's argument that Australia's reservation to maritime delimitation disputes applied, as no such dispute existed between the parties. On the merits, the Court interpreted Article VIII objectively, focusing on whether JARPA II's design and implementation were reasonable in relation to its stated scientific objectives, rather than adopting a specific definition of "scientific research." Key findings included: the significant expansion of lethal sampling from JARPA to JARPA II lacked justification; sample sizes (e.g., 850 minke whales annually) were not transparently derived or necessary for stated goals;

actual takes were far lower than targets without program adjustment; and non-lethal methods were underutilised. The Court concluded JARPA II was not "for purposes of scientific research," thus breaching Schedule provisions 10(e), 10(d), and 7(b) (for fin whales), but not 30, as Japan had submitted its initial plan for review. Remedies ordered Japan to revoke JARPA II permits and refrain from issuing new ones under that program. Principles applied included treaty interpretation under the Vienna Convention, emphasising objective assessment over subjective intent, and the duty of cooperation within the ICRW framework.

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.

1969 Vienna Convention on the Law of Treaties Article 79

1. Where, after the authentication of the text of a treaty, the signatory States and the contracting States are agreed that it contains an error, the error shall, unless they decide upon some other means of correction, be corrected:
   (a) by having the appropriate correction made in the text and causing the correction to be initialled by duly authorized representatives;
   (b) by executing or exchanging an instrument or instruments setting out the correction which it has been agreed to make; or
   (c) by executing a corrected text of the whole treaty by the same procedure as in the case of the original text.
2. Where the treaty is one for which there is a depositary, the latter shall notify the signatory States and the contracting States of the error and of the proposal to correct it and shall specify an appropriate time-limit within which objection to the proposed correction may be raised. If, on the expiry of the time-limit:
   (a) no objection has been raised, the depositary shall make and initial the correction in the text and shall execute a procès-verbal of the rectification of the text and communicate a copy of it to the parties and to the States entitled to become parties to the treaty;
   (b) an objection has been raised, the depositary shall communicate the objection to the signatory States and to the contracting States.
3. The rules in paragraphs I and 2 apply also where the text has been authenticated in two or more languages and it appears that there is a lack of concordance which the signatory States and the contracting States agree should be corrected.
4. The corrected text replaces the defective text ab initio, unless the signatory States and the contracting States otherwise decide.
5. The correction of the text of a treaty that has been registered shall be notified to the Secretariat of the United Nations.
6. Where an error is discovered in a certified copy of a treaty, the depositary shall execute a procès-verbal specifying the rectification and communicate a copy of it to the signatory States and to the contracting States.

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 execution 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 VCLT 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).

3.8 VCLT and Custom

- The table below outlines which VCLT provisions reflect or may reflect customary international law
- In this table, the following authorities are used:

Aust	Aust, Anthony, *Modern Treaty Law and Practice* (Cambridge University Press, 3rd ed, 2013)
Corten & Klein	Corten, Oliver, and Pierre Klein (eds), *The Vienna Conventions on the Law of Treaties: A Commentary* (Oxford University Press, 2011)
Dörr & Schmalenbach	Dörr, Oliver and Kirsten Schmalenbach (eds), Vienna Convention on the Law of Treaties, A Commentary (Springer-Verlag, 2018)
Hollis	Hollis, Duncan B (ed), *The Oxford Guide to Treaties* (Oxford University Press: Oxford, 2012)
Villiger	Villiger, Mark E, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhoff, 2009)

Table 3.4: Customary International Law Status of VCLT Articles

Article	Customary International Law?	Authority
1	N/A	Schmalenbach in Dörr & Schmalenbach, p. 94

Continued on next page

Article	Customary International Law?	Authority
2	Yes	Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Jurisdiction and Admissibility) [1994] ICJ Rep 112, para 23
2(1)(a)	Yes	Temple of Preah Vihear (Cambodia v Thailand) (Preliminary Objections) [1961] ICJ Rep 17, p. 31
2(1)(d)	Yes	Maritime Delimitation in the Indian Ocean (Somalia v. Kenya) (Judgement) [2017] ICJ Rep 3, para 42 Summary of Practice of the Secretary-General as Depository of Multilateral Treaties, prepared by the Treaty Section of the Office of Legal Affairs, UN, 1994, ST/LEG7/Rev.1, p. 49 para. 161 Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria: Equatorial Guinea intervening) (Judgment) ICJ Rep p.303, para. 263
3	N/A	Schmalenbach in Dörr & Schmalenbach, p. 56
4	N/A	Schmalenbach in Dörr & Schmalenbach, p. 94 Dopagne in Corten & Klein 2011, p. 80
5	Unlikely	Schmalenbach in Dörr & Schmalenbach, p. 99 H. Anderson in Corten & Klein, p. 103
6	Yes	Turp & Roch in Corten & Klein, p. 111 Schmalenbach in Dörr & Schmalenbach, p. 115
7	Partly	Hoffmeister in Dörr & Schmalenbach, p. 132 Maritime Delimitation in the Indian Ocean (Somalia v. Kenya) (Judgment) [2017] ICJ Rep, para 43
7(1)	Yes	Villiger, p. 146
7(2)(a)	Yes	Armed Activities on the Territory of the Congo (New Application: 2002) case (Democratic Republic of Congo v Rwanda), Jurisdiction and Admissibility, Judgment [2006] ICJ Reports 6, para. 46
7(2)(c)	"Progressive development"	Hoffmeister in Dörr & Schmalenbach, p. 133
8	Maybe	Angelet & Leidgens in Corten & Klein, p. 157 Hoffmeister in Dörr & Schmalenbach, p. 146
9(1)	Yes	Villiger, p.163 Hoffmeister in Dörr & Schmalenbach, p. 153
9(2)	Unclear	Aust, pp.79-80
10	Yes	Villiger, p. 171 Hoffmeister in Dörr & Schmalenbach, p. 165
11	"Some customary value"	Szurek in Corten & Klein, p. 192

Continued on next page

Article	Customary International Law?	Authority
		Land and Maritime Boundary (Cameroon v Nigeria) (Judgment) ICJ Rep 303, para 264
12	Yes in its entirety	Hoffmeister in Dörr & Schmalenbach, p. 183
12(1)(a)	Yes	Maritime Delimitation in the Indian Ocean (Somalia v. Kenya) (Judgment) [2017] ICJ Rep 1, para 45
12(1)(b)	Yes	Aust, p. 91
12(1)(c)	No	Van Assche in Corten & Klein, pp.216-217
12(2)(a)	Yes	Van Assche in Corten & Klein, pp.216-217
12(2)(b)	Maybe	Van Assche in Corten & Klein, pp.216-217 Aust p. 91
13	Yes	Van Assche in Corten & Klein, p. 257 Hoffmeister in Dörr & Schmalenbach, p. 195
14	Yes, but its actual content uncertain	Hoffmeister in Dörr & Schmalenbach, p. 203
15	Yes	Marchi in Corten & Klein, p. 334 Hoffmeister in Dörr & Schmalenbach 2018 pp. 219
16	Yes	Land and Maritime Boundary between Cameroon v Nigeria (Preliminary Objections), [1998], p.275, para. 31 Horchani, in Corten & Klein, p. 337 Hoffmeister in Dörr & Schmalenbach, p. 231
17	Yes	Hilling, in Corten & Klein, p. 364
18	Yes	Greece v Commission C-203/07 P [2008] ECR I-8161, para 64 Bradley in Hollis, pp. 212-213 Summary of Practice of the Secretary-General as Depository of Multilateral Treaties, prepared by the Treaty Section of the Office of Legal Affairs, UN, 1994, ST/LEG7/Rev.1, p.61, para. 204
19	Yes	European Commission on Human Rights, in Temelstasch case (1983) 5 EHRR 417, p. 432 Reservations to the Convention on Genocide (Advisory Opinion) ICJ Rep 15, p. 24
20	Yes	Müller in Corten & Klein, p. 495
20(4)	No	Walter in Dörr & Schmalenbach, p. 311
20(5)	No	Aust, p. 128
21(1)	Yes	Muller in Corten & Klein, p. 542
21(2)	Yes	Walter in Dörr & Schmalenbach, pp. 349
21(3)	No	Swaine in Hollis, p. 294

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Article	Customary International Law?	Authority
22	Yes	Corten & Klein 2011, p. 574 Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Rwanda), Jurisdiction and Admissibility, (Judgment) [2006] ICJ Rep 6, para 14
22(1)	Yes	Commentary on guideline 2.5.1, Report of the ILC to the General Assembly, 2003, A/58/10, p.199, para. 14 Walter in Dörr & Schmalenbach, p. 361
22(3)(a)	Yes	Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility, Judgment, ICJ Reports 2006 p.6, para. 41
23	Yes	Pellet and Schabs in Corten & Klein, p. 596
23(1) and (4)	Yes	Commentary on guideline 2.5.1, Report of the ILC to the General Assembly, 2003, A/58/10, p. 199, para. 14 Walter in Dörr & Schmalenbach, p. 380
23(2) and (3)	Yes	Walter in Dörr & Schmalenbach, p. 380
24	Yes	Land and Maritime Boundary between Cameroon and Nigeria (Preliminary Objections) [1998] ICJ Rep 275, para. 31 Krieger in Dörr & Schmalenbach, p. 425
25(1)	Yes	Villiger, p. 357
25(2)	Maybe	Mathy in Corten & Klein, pp.640-641
26	Binding as a general principle of IL	Gabcikovo-Nagymaros Projects Case (Hungary v Slovakia) ICJ Reports 1997 p.7, para. 142 Pulp Mills on the River Uruguay (Argentina v. Uruguay) (Judgment) ICJ Rep 135, para 145 Boustany & Didat in Corten & Klein, p. 705
27	Yes	Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France) (Judgment) [2008] ICJ Rep 177, para. 124 ELSI (United States v Italy) (Judgment) [1989] ICJ Rep 15 Fisheries Case (UK v Norway) [1951] ICJ Rep 116, 132 Questions relating to the Obligation to prosecute or extradite (Belgium v Senegal) (Judgment) [2012] ICJ Rep 423, para 100

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Article	Customary International Law?	Authority
28	Yes	Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia) (Judgment) [2015] ICJ Rep 3, para 95 Case of Janowiec and Others v Russia [2013], ECHR 1003, para 121
29	Likely yes	Karagiannis in Corten & Klein, p. 735 Council v Front Polisario [2013] ECJ C-104/16 P 973, para 95 von der Decken in Dörr & Schmalenbach, p. 522
30	Uncertain	Aust, p. 228 von der Decken in Dörr & Schmalenbach, p. 542 Orakhelashvili in Corten & Klein, p. 774
31	Yes	Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua) (Judgment) [2009] ICJ Rep 213, para. 47 Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), (Judgment) [2007] ICJ Rep 43, para. 160 Arbitral Award (Guinea-Bissau v Senegal) [1991] ICJ Rep 53, para 48 Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion) [2004] ICJ Rep 136, para. 94 Territorial Dispute (Libyan Arab Jamahiriya v Chad) (Judgment) ICJ Rep 83, para. 41 Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia) (Judgment) [2002] ICJ Rep 645, para. 37
32	Yes	Same as Article 31 Le Bouthillier in Corten & Klein, p. 846
33	Yes, especially 33(4)	LaGrand (Germany v. United States of America), (Judgment), ICJ Rep 466, para. 101 Dörr in Dörr & Schmalenbach, p. 63
34	Yes	Harris and Sivakumaran, Cases and Materials on International Law (8th ed, 2015) p. 687 David in Corten & Klein, pp.888-889 Proelss in Dörr & Schmalenbach, p. 657
35	Yes	Laly-Chevalier in Corten & Klein, p. 903

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Article	Customary International Law?	Authority
		Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast (Nicaragua v. Colombia) (Preliminary Objections) [2016] ICJ Rep 100, (Separate opinion of Judge Owada) p. 154, para 34
36(1)	Maybe	D'Argent in Corten & Klein, pp. 930-931 Proelss in Dörr & Schmalenbach, p.732
36(2)	Probably	D'Argent in Corten & Klein, p.944
37	Maybe	Gaja in Corten & Klein, p. 949
38	Maybe	Proelss in Dörr & Schmalenbach, p. 94
39	Maybe	Sands in Corten & Klein, p. 968 Von der Decken in Dörr & Schmalenbach, p. 761
40	Yes, but diverging opinions	Summary of Practice of the Secretary-General as Depository of Multilateral Treaties, prepared by the Treaty Section of the Office of Legal Affairs, UN, 1994, ST/LEG7/Rev.1, p.76, para. 252 von der Decken in Dörr & Schmalenbach, p. 769 Ardault and Dormoy in Corten & Klein, p. 980
41	Likely	Jadhav Case (India v. Pakistan) Provisional Measures, Order of 18 May 2017, [2017] ICJ Rep 231, Declaration of Judge Bhandari p. 5, para 12 Rignaux et al in Corten & Klein, p. 994
42	Yes	Gabčikovo-Nagymaros (Hungary v Slovakia) [1997] ICJ Rep 92, para. 100 von der Decken in Dörr & Schmalenbach, p. 794
43	Yes	Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States) (Merits) [1986] ICJ Rep 14, para 178 Tehran Hostages Case (United States v Iran) [1980] ICJ Rep 3, para 62 von der Decken in Dörr & Schmalenbach, p. 816
44	Yes	Falkowska in Corten & Klein, p. 1053
45	Yes	Certain Norwegian Loans (France v Norway) Separate Opinion of Judge Lauterpacht [1956] ICJ, pp 56-7 Maritime Delimitation in the Indian Ocean (Somalia v. Kenya) (Judgment) [2017] ICJ Rep 161, para 49
46	Yes	Von der Decken in Dörr & Schmalenbach, p. 828
47	Yes	Rensmann in Dörr & Schmalenbach, p. 866
48	Yes	Rensmann in Dörr & Schmalenbach, p. 878

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Article	Customary International Law?	Authority
		Phillips Petroleum Co v Iran Case No 39, (1982) 70 ILR 483 Joe Verhoeven, 'Invalidity of Treaties: Anything New in/under the Vienna Conventions' in Enzo Cannizzaro (ed), The Law of Treaties Beyond the Vienna Convention, (Oxford Scholarship Online 2011) pp.302-303
49	No	Rensmann in Dörr & Schmalenbach, p. 913
50	No	Rensmann in Dörr & Schmalenbach, p. 921 Cot in Corten & Klein, p. 1173
51	Yes	Distefano in Corten & Klein, p. 1185 Rensmann in Dörr & Schmalenbach, p. 934 Dubai-Sharjah Border Arbitration (1981) 91 ILR 543, 569
52	Yes	Fisheries Jurisdiction (United Kingdom v. Iceland) (Jurisdiction) ICJ Rep 3, para.24 Genocide Case (Further Requests for the Indication of Provisional Measures) (separate opinion Lauterpacht) [1993] ICJ Rep 407, para 100 Schmalenbach in Dörr & Schmalenbach, p. 959 Corten in Corten & Klein, p. 1204
53	Yes	Lagerwall in Corten & Klein, p. 1465 Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Rwanda) (Separate Opinion of Judge ad hoc Dugard) [2006] ICJ Rep 6, para. 8 Suy in Corten & Klein, p. 1226 Schmalenbach in Dörr & Schmalenbach, p. 966 Prosecutor v Morris Kallon and Brima Bazzy Kamara, (2004) case no. SCSL-2004-15 AR72 and no. SCSL-2004-16-AR72, paras 61-62
54(a)	Yes	Giegerich in Dörr & Schmalenbach, p. 1018 Chapaux in Corten & Klein, p. 1238
54(b)	Maybe	Chapaux in Corten & Klein, p. 1240-41
55	No	Chapaux in Corten & Klein, p.1247-48 Military and Paramilitary Activities in and against Nicaragua (Jurisdiction and Admissibility) [1984] ICJ Rep 392, para 60 Giegerich in Dörr & Schmalenbach, p. 1058

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Article	Customary International Law?	Authority
56(1)(a)	Yes	Giegerich in Dörr & Schmalenbach, p. 1063
56(2)	Yes but content uncertain	Giegerich in Dörr & Schmalenbach, p. 1077
57	No	Giegerich in Dörr & Schmalenbach, p. 1082
58(1)(a)	Yes	Giegerich in Dörr & Schmalenbach, p. 1084
58(1)(b)	Maybe	Giegerich in Dörr & Schmalenbach, p. 1084
58(2)	Yes	European Communities-Measures Affecting the Importation of Certain Poultry Products, WT/DS69/R (12 March 1998) (Report of the Panel), para 206
59	Yes	Giegerich in Dörr & Schmalenbach, p. 1128
60	Yes "in many respects"	Legal Consequences for the States of the Continued Presence of South Africa in Namibia (South West Africa) (Advisory Opinion) ICJ Rep 47, para 95 Gabčikovo-Nagymaros (Hungary v Slovakia) [1997] ICJ Rep 7, para 99, 109 Simma and Tams in Corten & Klein, pp. 1356-1357
61	Yes "in many respects"	Gabčikovo-Nagymaros (Hungary v Slovakia) [1997] ICJ Rep 92, p.7, paras. 99 and 102
62	Yes, "in many respects"	Fisheries Jurisdiction (United Kingdom v. Iceland) (Jurisdiction), ICJ Reports 1973 p.3, para. 36 Gabčikovo-Nagymaros (Hungary v Slovakia) [1997] ICJ Rep 92, para. 46 and 99 Shaw and Fournet in Corten & Klein, p. 1416-19
63	Yes	Giegerich in Dörr & Schmalenbach, p. 1197 United States Diplomatic and Consular Staff in Tehran (United States of America v Iran) (Merits) [1980] ICJ Rep 3, p.28, para. 54 Angelet in Corten & Klein, p. 1440
64	Yes	Gabčikovo-Nagymaros (Hungary v Slovakia) [1997] ICJ Rep 92, para 112 Schmalenbach in Dörr & Schmalenbach, p. 1206-7 Lagerwall in Corten & Klein, p. 1459 and 1465
65	Yes, "generally reflect[s] customary international law"	Fisheries Jurisdiction (United Kingdom v. Iceland) (Jurisdiction) ICJ Rep 3, para 44 Gabčikovo-Nagymaros (Hungary v Slovakia) [1997] ICJ Rep 92, para 109 Krieger in Dörr & Schmalenbach, p. 1213 Prost in Corten & Klein, p. 1490 and 1498
66	Mixed views	"[G]enerally reflect[s]" CIL: Gabčikovo-Nagymaros Project (Hungary/Slovakia) [1997] ICJ Rep 7, para 109

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Article	Customary International Law?	Authority
		Not CIL: Armed Activities Case (DRC v Rwanda) (Jurisdiction and Admissibility) [2006] ICJ Rep 6, para 125 Krieger in Dörr & Schmalenbach, p. 1234
67	Yes, "generally reflect[s] customary international law"	Gabčikovo-Nagymaros Project (Hungary/Slovakia) [1997] ICJ Rep 7, para 109 Tzanakopoulos in Corten & Klein, p. 1548-9
68	Yes, "in many respects"	Legal Consequences for the States of the Continued Presence of South Africa in Namibia (South West Africa) (Advisory Opinion) ICJ Rep 47, para. 94 Tzanakopoulos in Corten & Klein, p. 1565
70	Yes	Appeal Relating to the Jurisdiction of the ICAO Council (India v Pakistan) [1972] ICJ Rep 46, 54, para 16 Wittich in Dörr & Schmalenbach, p. 1299
71	Unclear	Crépeau, Côté and Rehaag in Corten & Klein, p. 1615 Wittich in Dörr & Schmalenbach, p. 1317
72	Unclear	Couveur and Espalie Berdud in Corten & Klein, p. 1628 Wittich in Dörr & Schmalenbach, p. 1326
73-75	Generally not CIL	Krieger in Dörr & Schmalenbach, p. 94 Angelet and Clave in Corten & Klein, p. 1678 Tomuschat in Corten & Klein, p. 1689
76 & 77	Yes	Tichy and Bittner in Dörr & Schmalenbach, p. 1410, 1414, 1416 Caflisch in Corten & Klein, p. 170 Ouguergouz, Villalpando & Morgan-Foster in Corten & Klein 2011, p. 1717
78 & 79	No progressive development	Tichy & Bittner in Dörr & Schmalenbach, p. 1433, 1439 Kolb in Corten & Klein , p. 1779, 1782
80	Yes	Klein in Corten & Klein , p. 1799
81-85	No	Final Provisions

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, the ICJ 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 justifications 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 retaliatory 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.

Starke J at Page 471	The Courts acknowledge the existence of a body of rules which nations accept amongst themselves. On any judicial issue they seek to ascertain what the relevant rule is, and, having found it, they will treat it as incorporated into the domestic law, so far as it is not inconsistent with rules enacted by statutes or finally declared by their tribunals." What then are the immunities of arms and military forces of other nations accepted by our courts? It is by no means easy to answer that question, for in modern times those immunities are settled by conventions between the nations

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.

Black CJ at [7]	I agree with Jagot J that the common law has evolved such that the authorities do not support the application of the act of state doctrine in the present case. If, however, the choice were finely balanced, the same conclusion should be reached. When the common law, in its development, confronts a choice properly open to it, the path chosen should not be in disconformity with moral choices made on behalf of the people by the Parliament reflecting and seeking to enforce universally accepted aspirations about the behaviour of people one to another.

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.

***Nulyarimanna 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 Court 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.

Wilcox J held that if domestic criminal law could be influenced by customary/international criminal law, it would lead to the position where international obligations have greater obligations than domestic consequences, sidelining domestic law and thus a state's independence to make its own criminal laws.

Wilcox J at [20]	If this were the position, 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.
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".

***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 57
- 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 57**

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 affect Australian law, as its provisions had not been legislated and thus 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 concerned 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.

Barwick CJ and Gibbs J at Page 582	Two matters were suggested as justifying an exercise of discretion in the defendants' favour. First, reliance was placed upon the resolutions of the Security Council to which reference has already been made. These resolutions are, in their terms, addressed to Member States who, by Art. 25 of the Charter, have agreed "to accept and carry out the decisions of the Security Council in accordance with the present Charter". However, resolutions of the Security Council neither form part of the law of the Commonwealth nor by their own force confer any power on the Executive Government of the Commonwealth which it would not otherwise possess. The Parliament has passed the Charter of the United Nations Act 1945 (Cth), s 3 of which provides that "The Charter of the United Nations (a copy of which is set out in the Schedule to this Act) is approved". That provision does not make the Charter itself binding on individuals within Australia as part of the law of the Commonwealth.

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 whatever 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)

***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 access 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 law 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 challenged 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 can 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 interpret 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.

From Latham CJ's statement (below), 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.

Latham CJ at Page 69	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.
Dixon J at Page 77	It is a rule of construction that, unless a contrary intention appear, general words occurring in a statute are to be read subject to the established rules of international law and not as intended to apply to persons or subjects which, according to those rules, a national law of the kind in question ought not to include.

- 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, which explicitly requires a referendum to amend it

***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. Note that McHugh J's position reflect that of the majority.

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".

- 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.

Topic 5

Personality, Statehood and Self-Determination

5.1 International Legal Personality

- International legal personality refers to the capacity of an actor to exercise rights, duties and powers on the international plane
- It is not an absolute concept, and the capacity of international actors varies, including aspects such as:
  - To be subject to some or all international obligations
  - To have the power to enter into treaties
  - To enjoy some or all immunities from jurisdictions of national courts
  - To make claims before international tribunals and committees
- Personality is not an absolute concept, but is akin to a spectrum (the capacity of intentional actors varies; e.g., the UN has a different capacity than a state)

5.1.1 States as International Legal Persons

- States are the central/principal subjects of international law
- Attributes of statehood include:
  - Plenary powers in the international sphere (external sovereignty)
  - Exclusive competence within their own territory (internal sovereignty)
  - Not subject to compulsory jurisdiction of international courts without consent/permission (this flows from the independent nature of states and the consensual nature of international law)
  - Enjoyment of equality (formally, but not necessarily substantively; formal equality is to be distinguished from relative equality in terms of size, economy, powers and global standing)
- States maintain complete external sovereignty on the international sphere

5.1.2 Other International Legal Persons

- International organisations
  - These are created by treaties agreed to by states, and many international organisations are conferred with a degree of personality and autonomy
  - International organisations do not possess general competence, but are instead governed by the principle of 'speciality' (i.e., they can only act within the limits of their powers as defined by their constitutive treaties) (*WHO Advisory Opinion* [1996] ICJ Rep 66)
  - International organisations may enter into treaties
  - International organisations may be responsible for wrongful acts, following *ILC Draft Articles on the Responsibility of International Organisations* (2011)
- Non-territorialised persons
  - Examples include the Holy See (the government of the Vatican, a *sui generis* entity)
    * It is treated as having international legal personality since the Middle Ages, independently of having any territorial existence
    * The Vatican also possesses a tiny territorial possession in Rome (the Vatican City); as a territory, it is regarded in international law as being a microstate (the Holy See and the Pope have a separate legal personality)

WHO Advisory Opinion [1996] ICJ Rep 66

This Advisory Opinion answered two similar advisory proceedings that examined the legality of the use of nuclear weapons. One was performed by the UN's request to the ICJ to examine this issue, with the ICJ holding that the general assembly did have capacity to request an advisory opinion. The other was requested by the WHO, but the ICJ rejected this quest.

The ICJ found that it could issue an advisory opinion only where the agency requesting it is:

- Duly authorised to request one (the WHO met this requirement)
- The question has to be of a legal character (the WHO's request met this requirement)
- The question must be within the scope of the agency's activities (the WHO's request did not meet this requirement, as the WHO was not competent to issue an advisory opinion on the legality of nuclear weapons)

The WHO had capacity to consider and respond to the health requests of nuclear weapons/hazardous activity, but their question was not on the health effects, but rather was on general questions of whether nuclear weapons could be lawfully used.

The ICJ held that when looking at an international organisation, it cannot be assumed that they have general competence; they are governed by the principle of speciality, and thus the powers that they possess are in the treaty that created them.

***Reparations for Injuries Case* [1949] ICJ Rep 174**

This decision of the ICJ deals generally with the character of international personality, and was a rather narrow case. The key question in this case was whether the UN could pursue a claim against Israel in relation to negligent failure to protect a UN official from being killed by a terrorist group in Jerusalem?

The ICJ held that the UN could seek compensation, as for this purpose the UN was an international legal person. The Court looked at the nature of international legal personality, explaining that the notion of personality and specifically the personality of the UN and other international organisations arises from the requirements/nature of international life. In order for the UN to perform the job that it was entrusted to by the *UN Charter*, it is necessary to enjoy and exercise certain functions and rights that set it apart as an international legal person. The Court does hold that the UN's international personality should not be exaggerated; the fact that it has international personality is not the same as saying that the UN is identical to a state or that its legal personality and rights and duties are the same as those of a state (in fact, it is a different degree of personality to that possessed by a state).

"[T]he development of international law has been influenced by the requirements of international life … the [UN is] exercising and enjoying, functions and rights which can only be explained on the basis of the possession of a large measure of international personality…Accordingly, the Court has come to the conclusion that the [UN] is an international person. That is not the same thing as saying that it is State, which it certainly is not, or that its legal personality and rights and duties are the same as those of a State."

If the UN is to discharge its functions, 'the attribution of international personality is indispensable'. The Court emphasised the functional indispensability of having personality in order for the UN to be able to perform the functions for which it was established.

- Individuals
  - Individuals have some degree of international personality, but it is very different from those of states and organisations
  - Individuals cannot enter into treaties
  - Individuals generally do not have standing before international courts, except in certain cases (e.g., human rights courts/tribunals)
  - Some areas of international law have conferred obligations upon individuals:
    * International criminal law ('crimes against international law are committed by men, not by abstract entities', following *Nuremberg Trial Judgement* (1947))
      - Prior to this, it was unclear as to whether individuals could be held liable for international crimes
      - These are the most serious crimes, and have a high threshold (e.g., crimes against humanity, genocide, etc.)

        - Official capacity is irrelevant; all individuals are equally liable in matters of international criminal law
    * Individual criminal law is outlined in the *Rome Statute of the International Criminal Court* (1998) Art 25, which refers to 'individual criminal responsibility'
  - International human rights law holds that all individuals are bearers of rights conferred by international law
  - There are multiple covenants on human rights (including civil, political, etc.)
- Corporations (?)
  - Corporations do not have international legal personality, but may be parties to contracts governed by international law ('internationalised' contracts), following *Texaco Overseas Petroleum Company v Libya* (1977) 53 ILR 389
  - As far as international law is concerned, corporations are not subjects of international law, but rather are objects of international law, and are not international people

***Texaco Overseas Petroleum Company v Libya* (1977) 53 ILR 389**

This case involved a dispute between Texaco (an oil company) and Libya, and the issue was whether the Libyan government had the right to nationalise the oil industry in Libya. The Libyan government had nationalised the oil industry, including Texaco's oil deposits, and Texaco was seeking compensation for this.

The arbitration was not covered by the law of Libya, but rather incorporated international law; i.e., it was a contract governed by PIL (an 'internationalised' contract). Whilst Texaco as a company was not an international person, it was a party to a contract under international law and so could avail the principles under PIL.

5.2 Statehood

- Statehood is formally defined by the *1933 Montevideo Convention on the Rights and Duties of States* in Article 1
- This was accepted as reflecting customary international law
- Whilst there were very few signatories to the convention (19 states), it is now accepted as a reflection of customary international law
- It is moreover evidence of customary international law; but it is binding only upon states that have signed
- The first three criteria are considered 'elastic'

***1933 Montevideo Convention on the Rights and Duties of States* Article 1**

The state as a person of international law should possess the following qualifications:

1. A permanent population

2. A defined territory
3. Government
4. Capacity to enter into relations with other states

5.2.1 The Montevideo Criteria for Statehood

5.2.1.1 Population

- There is no minimum number of people required to constitute a state (e.g., Nauru has less than 10,000 people but is still a state)
- The population must be permanent

5.2.1.2 Territority

- There is no minimum size of territory required to constitute a state (e.g., the Vatican City is a microstate, and Nauru has an area of 21 square kilometres)
- The boundaries do not need to be completely fixed/undisputed
- There must be a reasonably coherent territory that is effectively governed by the state

5.2.1.3 Government

- The state must have an organised and effective government (of any form, whether it be a dictatorship, monarchy, democracy, etc.)
- It is not the quality or the form of the government that matters, but rather whether it can effectively control the area

5.2.1.4 Capacity to Enter into Relations with Other States

- To be a state, an entity cannot be subject to the control of another state (i.e., independent from the legal authority of another state)
- So long as a state is not placed under the legal authority of another state, it remains an independent state, following *Customs Union Between Germany and Austria* (1931) PCIJ Series A/B No 41 (per Judge Anzilotti)

Customs Union Between Germany and Austria (1931) PCIJ Series A/B No 41

The PCIJ was asked to advise whether Austria, by entering into a customs union with Germany, was in violation of two treaties that sought to prevent Austria from being subsumed within the German Reich. The PCIJ held that Austria was not giving up political control, but was giving up immigration freedom and customs control. The PCIJ held that Austria was in breach of the treaties, but it was still a state as it was not under the complete legal authority of another state, and was still politically independent.

- The Montevideo criteria are…somewhat misleading and—as regards the capacity to enter into relations with other States—circular … [T]he central criterion for statehood, which sheds light on the criteria of government and capacity to enter into international relations, is a given territorial community's independence (Crawford, 2015)
- It is contentious as to whether other criteria should be imposed on statehood; for example, the *EC Declaration on New States in Eastern Eruope and Soviet Union* (1991) proposed:
  - Respect for the *UN Charter*
  - Respect for the rights of ethnic and national groups and minorities
  - Respect for borders
  - Commitment to peaceful dispute settlement
- Whilst these additional criteria are state practice, they aren't sufficient that they have become customary international law, and as such, the Montevideo criteria is still the most widely accepted definition of statehood

5.3 Recognition of States

- Recognition is the act by which one state acknowledges that an entity is a state
- There are two key theories on the legal effect of recognition:
  - **Constitutive theory**: recognition by other states is a precondition to statehood (i.e., a condition precedent)
  - **Declaratory theory**: recognition by other states does not create an entity's statehood, but merely acknowledges that the entity is a state (i.e., it is a condition subsequent; it makes life easier, but does not stop anyone)
- The declaratory theory is the dominant view in international law, and is the view of the ICJ; however, the practice of recognition may be important evidence for determining the existence of a state
- Recognition by a state of an entity as a state will often be accompanied a statement that addresses some of the Montevideo criteria, which tends to be helpful evidence of whether an entity is a state (but isn't enough in and of itself)
- If an entity emerges as a result of unlawfulness, the general importance of the principle of territorial integrity applies
  - International law contains no prohibition of declarations of independence, but other states should not recognise a unilateral seceding entity before it has acquired statehood, following *Kosovo Advisory Opinion* [2010] ICJ Rep 403
    * It is important to look at the powers of entities to declare independence
- International law does contain some scenarios where there is mandatory non-recognition of entities as states
  - The **Stimson Doctrine** holds that recognition of a state may not be extended when a state is created as a result of unlawful use of force/aggression

  - This arose from the creation of Manchukuo, which was a Japanese puppet state in China from 1932 to 1945; the then US Secretary of State declared that the US would not recognise the new Japanese puppet state that Japan purported to create in China
  - It is a core rule of international law that puppet states (artificial entities created by breaches of international law) will not be recognised as states

5.4 Recognition of Governments

- The recognition of governments is a completely separate issue from the recognition of states, and generally arises when there is a change of government within the state
- In the modern context, it only arises if there is an unconstitutional change in the government (e.g., a revolution or a military coup)
- It is usually the case that a new government is given legal recognition; it is very rare for such a question to arise
- Australia used to always recognise a change in government of another state (including by normal means such as an election) with a statement, but ceased this practice in 1988
- Presently, Australia has implied recognition; a new government will be recognised by Australia as legitimate, unless if there was a case before an Australian court to decide whether the foreign government's actions were legitimate, it is up to that court to determine whether the government was properly in control of that territory
- Recognition of a government in the modern era is moreover discerned from the actual relationship between Australia and the relevant state (continuing the theme of implied recognition)
- In the modern day, Australian courts and tribunals will examine several criteria, including the constitutionality of the new government, the control by the government over the territory, dealings on a government-to-government basis, and the extent of international recognition
- There are also statutory variations to the common law position
  - *Foreign Corporations (Application of Laws) Act 1989* (Cth) exemplifies how implied recognition works in terms of foreign corporations
    * s 7(2) holds that whether a body or person has been validly incorporated in a place outside Australia is to be determined by reference to the law applied in that place
    * s 9(1) holds that the application of this Act is not affected by the recognition or non-recognition, at any time, by Australia
  - s 7(2) provides clear directives (that the court is to look at the law applicable in the foreign place)
  - This Act asks if a foreign corporation is a corporation under their home place's law (i.e., it is a domestic law issue)

***Foreign Corporations (Application of Laws) Act 1989* (Cth)**

Section 7

Law applied in place of incorporation applicable law in determining questions relating to status of foreign corporation etc.

(1) The section applies in relation to the determination of a question arising under Australian law (including a question arising in a proceeding in an Australian court) where it is necessary to determine the question by reference to a system of law other than Australian law.

(2) Any question relating to whether a body or person has been validly incorporated in a place outside Australia is to be determined by reference to the law applied by the people in that place.

(3) Any question relating to:

(a) the status of a foreign corporation (including its identity as a legal entity and its legal capacity and powers); or

(b) the membership of a foreign corporation; or

(c) the shareholders of a foreign corporation having a share capital; or

(d) the officers of a foreign corporation; or

(e) the rights and liabilities of the members or officers of a foreign corporation, or the shareholders of a foreign corporation having a share capital, in relation to the corporation; or

(f) the existence, nature or extent of any other interest in a foreign corporation; or

(g) the internal management and proceedings of a foreign corporation; or

(h) the validity of a foreign corporation's dealings otherwise than with outsiders;

(4) A matter mentioned in subsection (2) or (3) is not to be taken, by implication, to limit any other matter mentioned in those subsections.

Section 9

Recognition or non - recognition irrelevant consideration in application of Act etc.

(1) It is the intention of the Parliament that the application of this Act is not to be affected by the recognition or non - recognition, at any time, by Australia:

(a) of a foreign state or place; or

(b) of the government of a foreign state or place; or

(c) that a place forms part of a foreign state; or

(d) of the entities created, organised or operating under the law applied by the people in a foreign state or place.

(2) Without limiting subsection (1), it is also the intention of the Parliament that the application of this Act is not to be affected by the presence or absence, at any time, of diplomatic relations between Australia and any foreign state or place.

5.5 Right to Self-Determination

- The right to self-determination refers to the rights of all peoples to determine freely their political status and to pursue their economic, social and cultural development, following *1966 ICCPR* and *1966 ICECSR* Common Art 1
- It has been held by Nicholson that these are rights accorded to 'peoples' rather than states
- Self-determination has been defined as "tje need to pay regard to the freely expressed will of peoples" at *Western Sahara Advisory Opinion* [1975] ICJ Rep 12 at [59]
- It is moreover accepted that it is a part of customary international law, and may well constitute a *jus cogens*
- The availability of the right does not necessarily equate to a specific outcome such as independence and secession (but a new state, free association or integration may all be legitimate expressions of the right); the mere fact of concluding that people have a right to self-determination does not equate to them having a right to independence and to cessate
- The law seeks to strike a balance between the right to elf-determination (one of the most central *jus cogens*) norms, and the principle of territorial integrity (which is also a *jus cogens* norm)
- In light of the question of 'what is a people?', it has been held that:
  - 'Self-determination is the collective right of 'peoples'. Various conditions or characteristics of 'peoples' have been put forward, including common historical tradition, racial or ethnic identity, cultural homogeneity, linguistic unity, religious or ideological affinity, territorial connection [particularly important for indigenous peoples], common economic life, and consisting of a certain minimum number. However, no permanent, universally acceptable list of criteria for a 'people' exists' (Joseph and Castan, 2013)
- The right to self-determination is subject to the principle of *uti possidetis juris* (respect for existing frontiers)
- If a new state has emerged from an area granted independence, they (the new entity) will possess the same borders/frontiers as they did prior to independence

***Burkina Faso/Mali* [1986] ICJ Rep 554**

This case concerned the border between Burkina Faso and Mali, which was a colonial border. The ICJ held that the principle of *uti possidetis juris* applies to the borders of states that have emerged from colonial rule. The ICJ held that the principle of *uti possidetis juris* is a principle of international law, and is a principle that is recognised by the UN General Assembly. By fixing the boundaries even when a new entity emerged, the principle was to prevent the independence and stability of new states being endangered by struggles challenging frontiers following the withdrawal of colonial power.

- In 1992 in Opinion No 3 (1992), Arbitration Commission, EC Conference on Yugoslavia, 'Can the internal boundaries between Croatia and Serbia and between Bosnia and

Hercegovina and Serbia be regarded as frontiers in terms of public international law?', it was held that the principle of *uti possidetis juris* generally can be applied when there is the breakup of a federal state into multiple component parts

***Chagos Islands Advisory Opinion* [2019] ICJ Rep 95**

The Chagos Archipelago has been administered by the UK since 1814 as part of the British colony of Mauritius. In 1965, the Chagos was detached from the territory of Mauritius and established as the British Indian Ocean Territory, with islanders displaced to enable the establishment of a US military facility on the largest island, Diego Garcia. Mauritius became independent in 1968 and was admitted to the UN. During the advisory proceedings, the International Court of Justice (ICJ) was tasked with determining whether the process of decolonisation of Mauritius was lawfully completed in 1968 and what international legal consequences stemmed from the continued UK administration of the Chagos. The ICJ found that the right to self-determination crystallised as a customary rule with the adoption of Resolution 1514(XV) in 1960, which has a declaratory character.

The ICJ ruling emphasised that peoples of non-self-governing territories are entitled to exercise their right to self-determination in relation to the territory as a whole, and any detachment by the administering power contrary to the will of the people of the territory is a breach of their right to self-determination. Consequently, non-self-governing territories, such as those under colonial occupation, may achieve self-governance through emergence as a sovereign independent state, free association with an independent state, or integration with an independent state, provided these options reflect the free and genuine will of the people concerned. Due to the unlawful detachment of the Chagos, the process of decolonisation was not lawfully completed when Mauritius became independent in 1968, rendering the continued UK administration of the Chagos a wrongful act that entails state responsibility. The UK must therefore end its administration as rapidly as possible.

Since respect for the right to self-determination is an obligation *erga omnes*, all states have a legal interest in protecting that right, and all UN members must cooperate with the UN to complete the decolonisation of Mauritius. This obligation *erga omnes* means that the responsibility to ensure self-determination is owed to the international community as a whole, and any state has standing to complain if this right is not respected, even if the state does not have a particular or special interest. For example, Australia can raise concerns regarding the Chagos, despite having no direct interest in the matter.

5.5.1 External Right to Self-Determination

- The external right to self-determination is the right by which certain peoples can choose to become independent (generally, people cannot do this)
- This applies in three scenarios:
    1. Peoples under colonial rule (i.e., colonies) and non-self-governing territories
    2. Peoples subject to alien subjugation, domination or exploitation
    3. (Possibly) peoples under oppression and blocked from meaningful self-determination ('remedial secession')

***Reference Re Secession of Quebec* (1988) 2 SCR 217**

This case concerned the secession of Quebec, which is culturally and linguistically diverse from Canada. International law does not specifically grant component parts of sovereign states the legal right to unilateral secession. Ordinarily, the right to self-determination is fulfilled through internal self-determination of a people's political, economic, social and cultural development. Moreover, the right to external self-determination arises only in most extreme cases (colonial domination, alien subjugation, domination or exploitation, possibly also where internal self-determination denied). In this instance, the population of Quebec were granted access to government.

- When a people expresses its choice about its status relative to the external world, there are three options:
    1. Emergence as a sovereign independent state
    2. Free association with an independent state (e.g., the Cook Islands, which is in free association with New Zealand)
    3. Integration with an independent state
- The right to self-determination is not the same as a power to establish a new state; the new entity must meet the Montevideo criteria for statehood (although these criteria tend to be applied less strictly)

5.5.2 Indigenous Peoples and the Right to Self-Determination

- This is an example of internal self-determination, which is the pursuit of development within the framework of an existing state (remedial secession may be available if this right is not respected)
- Distinctive characteristics of Indigenous peoples include:
    - Descent from populations inhabiting territory at the time of conquest
    - Retaining some of their own social, economic, cultural and political organisations
    - They self-identify as Indigenous peoples
- The *2007 UN Declaration on the Rights of Indigenous Peoples* states the following:

Article 3 "**Indigenous peoples have the right to self-determination.** By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."

Article 4 "Indigenous peoples, in exercising the right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions."

Article 46(1) "Nothing in this Declaration [authorises or encourages] any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent states."

- The *2017 Uluru Statement from the Heart* provides some important insight on this matter

- 'We seek constitutional reforms to empower our people and take a rightful place in our own country. When we have power over our destiny our children will flourish.'
- 'It captures our aspirations for a fair and truthful relationship with the people of Australia and a better future for our children based on justice and self-determination.'
- Despite the referendum outcome, Australia's indigenous people still have the inalienable right to self-determination

Topic 6

Title to Territory

6.1 Territory

- Territory is an essential element of statehood; it is within territory that a state's legal authority is exercised
- Sovereignty in relation to territory is "the right to exercise therein, to the exclusion of any other State, the functions of a State" – *Island of Palmas* (1928) (Judge Huber)
- States generally have complete authority over what happens within their territory, subject to international law
- "The basic legal concept of State sovereignty in customary international law, expressed in … Art 2(1), of the UN Charter, extends to the internal waters and territorial sea of every State and to the air space above its territory" – *Nicaragua* [1986] ICJ Rep 14
- There is a distinction between sovereignty (dominium) and jurisdiction (imperium)
  - For example, there are some areas (e.g., maritime areas) where states do not have sovereignty/ownership, but enjoy extensive jurisdictional rights (e.g., an exclusive economic zone (EEZ), where they have jurisdiction to regulate access to the zone, and access to the resources within it, but they do not have sovereignty over it)
  - It is only in some circumstances where jurisdiction can extend beyond areas of sovereignty

6.2 Modes of Acquiring Territory

6.2.1 Occupation

- Occupation is the formal act of intention and demonstration of effective control over territory
- The territory must be unoccupied (i.e., not subject to the sovereignty of another state)
- Territory may be acquired through occupation if it is *terra nullius* (i.e., no population, or if the territory is abandoned)
- This generally occurs through physical settlement, but only when the territory is uninhabited or abandoned (at which points it is considered *terra nullius*)

- Occupation is "an original means of peaceably acquiring sovereignty over territory" – *Western Sahara Advisory Opinion* [1975] ICJ Rep 162

***Western Sahara Advisory Opinion* [1975] ICJ Rep 162**

This case concerned a dispute over sovereignty to West Sahara, which was formerly a Spanish colony. It was claimed by both Morocco (on the basis of Spain's former colonisation), and by Mauritania. The ICJ was asked by the UNGA about the status of Western Sahara. It held that occupation was only valid if it was *terra nullius*.

In its Advisory Opinion, the ICJ noted at [80] that "territories inhabited by tribes or peoples having a social and political organization [are] not regarded as terrae nullius". Moreover, colonial occupation was often not of *terra nullius*, but through agreement with local rulers. Western Sahara was inhabited by nomadic peoples, who were nonetheless socially and politically organised. Moreover, there were no ties to Morocco or Mauritania so as would disrupt or upset decolonisation and self-determination.

From this case, it is held that there can only be a valid occupation if the territory is truly *terra nullius*. In this instance, it was an enormous territory inhabited by relatively few people, but the ICJ held that this was not necessarily problematic, nor that the peoples occupying in Western Sahara were nomadic. The tribes in Western Sahara were socially and politically organised, and did effectively occupy the territory. The ICJ also held that when Spain colonised Western Sahara, it did not argue that it was occupying Western Sahara. The Spanish King in 1884 instead stated that he was taking the area of Western Sahara under his protection on the basis of agreements entered into with local rulers, which does not indicate an occupation.

The process of self-determination remains incomplete (Western Sahara is often considered Africa's last colony), with completing claims by the Sahrawi Arab Democratic Republic (Polisario), and Morocco.

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

The question arising from this case was that when the British invaded Australia, did they acquire sovereignty over the land, but also acquire land rights that had the effect of extinguishing any pre-existing land rights held by the Indigenous occupants of Australia?

Brennan J at [41]	If the international law notion that inhabited land may be classified as terra nullius no longer commands general support, the doctrines of the common law which depend on the notion that native peoples may be "so low in the scale of social organization" that it is "idle to impute to such people some shadow of the rights known to our law" (In re Southern Rhodesia (1919) AC, at pp 233-234) can hardly be retained. If it were permissible in past centuries to keep the common law in step with international law, it is imperative in today's world that the common law should neither be nor be seen to be frozen in an age of racial discrimination.
Brennan J at [47]	The acquisition of territory is chiefly the province of international law; the acquisition of property is chiefly the province of the common law.

Deane and Gaudron JJ at [3]	[T]here are problems about the establishment of the Colony in so far as the international law of the time is concerned… contemporary international law would seem to have required a degree of actual occupation of a "discovered" territory over which sovereignty was claimed by settlement and it is scarcely arguable that the establishment by Phillip in 1788 of the penal camp at Sydney Cove constituted occupation of the vast areas of the hinterland of eastern Australia…However, in so far as the establishment of British sovereignty is concerned, those problems do not exist for the purposes of our domestic law.

Brennan J held that international law never regarded territory that was occupied as *terra nullius*. Consequently, the common law must disregard this fiction that Australia was *terra nullius* at the time of British colonisation.

Deane and Gaudron JJ held that whilst the prerogatives of the Crown to acquire territory were in question, from the perspective of domestic law, we cannot question whether the territory was lawfully acquired (as this was a power of the Crown at the time in the eyes of domestic law, and hence could not be questioned). The Court can be look at what happens with the common law, and that the acquisition of radical title over Australia by Britain did not have the effect of extinguishing, in all circumstances, pre-existing native title.

6.2.1.1 Intention to Occupy

- For an intention to occupy to be manifest:
  - There must be an expression of formal intent to claim possession of the land (e.g., the planting of a flag); this is known as *animus occupandi*
  - There must be a demonstration of effective control
  - Territory must be claimed by a state authority, not a private actor
    * If a private citizen holds state authority to claim territory, this is generally sufficient, but it needs to be done by a state organ
- Under Australian law, individuals may not acquire title in unoccupied land not claimed by a state, following *Ure v Commonwealth* [2016] FCAFC 8 (Page 3)
  - Private individuals cannot claim/acquire title in *terra nullius*

6.2.1.2 Effective Occupation

- For there to be effective occupation, there must be:
  - A continuous and peaceful display of state authority
  - A responsible authority that exercises governmental functions (*effectivités*)
  - Spatial extent (although not necessarily all territory), duration, continuity, and peacefulness are all relevant considerations
- It is not normally essential that a state has control over every exact area of land of their territory; this requirement tends to be relaxed especially in relation to remote/hard-to-access areas

***Clipperton Island Arbitration (France v Mexico)* 1932**

This case concerned a dispute between France and Mexico over the sovereignty of Clipperton Island, which was 1200km off the coast of Mexico. In 1897, a Mexican naval vessel landed and raised a flag, claiming success to title on the basis of Spanish discovery in 1836. However, Spain did not incorporate the island into its territory. A French naval officer on a private vessel claimed the uninhabited island in 1858 as French territory.

Mexico had not exercised sovereignty over the island before the arrival of the French sailors, and so the land was *territorium nullius*. On the other hand, France had "made known in clear and precise manner [its] intention to consider [the] island her territory".

It is generally the case that there must also be effective occupation in claiming the land, by establishing within the territory an organisation to give effect to laws (this was not considered here, however, due to the remoteness of the territory).

6.2.2 Cession

- Cession is the intentional transfer of sovereignty over territory from one state to another
- it is a consensual/voluntary process, and can be done for either a price or for free

6.2.3 Prescription

- Prescription is the acquisition of title to territory formerly occupied by another state through a peaceful exercise of sovereignty
- It bears a number of similarities to a doctrine of Roman law and aspects of common law, and is an idea of 'squatter's rights'
- In cases of possession, the other state has a valid title to territory, but is not actively asserting their right to that title, and so the possessing state eventually gains title by occupying it; it turns a possessory interest into a fully proprietary interest
- Prescription can also be considered as the legitimisation of a doubtful title through the passage of time (e.g., adverse possession and immemorial possession)
- There are a number of criteria for prescription:
  - *À titre de souverain* (in exercise of sovereign powers)
    - The possession has to be under state authority; it cannot be by a private actor
  - Peaceful possession
    - Prescription cannot be claimed when there was a conflict/war; this would instead be considered conquest, which is illegal under international law
  - Public
    - Prescription must be made publicly known
  - Uninterrupted
  - Endure for a length of time

- Acquiescence by the other state
  * This is a contested point
  * The original title holder must have acquiesced to the acquisition of title by the new owner
  * The original title holder may (meekly) protest to some extent, or otherwise stop asserting their title, which evinces an intention to surrender their title over the land

***Island of Palmas Case (Netherlands v US)* (1928)**

This case concerned a dispute between the Netherlands and the US over the sovereignty of Palmas Island, which was located between the Philippines and Indonesia. The US claimed title to the island on the basis of discovery, but the Netherlands claimed title on the basis of prescription. The Philippines ceded the island to the US after the 1898 Spanish-American war (an example of cession), but in 1906 the US discovered the Dutch flag flying on Palmas (the US thought they had title over the Philippines as it had been given to them by the Spaniards). The Netherlands claimed title n the basis of acts of state authority that they had exercised from 1677 onwards.

Judge Huber held that the island was part of the Netherlands. On the topic of Spain's apparent discovery, he he held that 'Discovery alone, without any subsequent act [of governmental authority], cannot ... prove sovereignty'. He also held that this was at most an 'incholate title that had to be perfected by effective occupation' (the title hadn't been matured enough to be sufficient). Thus, there was no Spanish occupation of the island, and the US could not claim title on the basis of discovery. The Netherlands had exercised effective occupation over the island, and so they had a valid title to it.

Judge Huber said that when it comes to working out the relevant manifestations of sovereignty, it is fair to acknowledge that sovereignty can take different forms according to the unique geographic and historical conditions within a particular place. Whilst the expression of sovereignty should be continuous in principle, some intermittence and discontinuity is acceptable.

Here, the Netherlands, particularly through the Dutch East India Company (an instrument of the Dutch state), had displayed state authority in a manner that was open, public, continuous and peaceful (despite it not being frequent and there being some gaps). There was no evidence that any display of authority by Spain or another power could counterbalance the manifestation of the sovereignty of the Netherlands. Moreover, the principle of **commonality** states the essential need to display state authority over state territory.

This case also raised a question of intertemporal law: should the law of the 16th century be applied (when Spain made the discovery), or the law of the 19th century be applied (when the territory was in dispute)? The earlier law may be relevant to the creation of rights, but the later law was relevant to the continued existence of rights (generally, the contemporaneous/earlier law should be applied). Under 19th century law, discovery alone was insufficient for the acquisition of title (the later law determines whether the rights continue to exist). It was held in the case that "a juridical fact (something legally relevant)

must be appreciated in light of the law contemporary with is, and not of the law in force at the time when a dispute ... falls to be settled ... [However] a distinction must be drawn between the creation of rights and the existence of rights".

6.2.4 Accretion and Avulsion

- Accretion is the gain of physical territory through natural processes
- Avulsion is the loss of physical territory through natural processes
- An example of accretion is when there is the formation of new land through volcanic activity, or the gradual deposit of sediment by a river
- An example of avulsion is when a river changes course, and the land on one side of the river is lost to another state (e.g., erosion)

6.2.5 Conquest

- Conquest is the forceful, unlawful acquisition of territory
- Under *Charter of the United Nations* Art 2(4), conquest is now illegal under international law (under this article, it is contrary to a *jus cogens* norm)

6.3 Contested Territorial Sovereignty

- The outcome in any case of contested territorial sovereignty is usually binary; either the state will have sovereignty over the territory or they will not have sovereignty

***Legal Status of Eastern Greenland (Norway v Denmark)* (1933) PCIJ**

In this case, Norway occupied Eastern Greenland in 1931, when Denmark claimed that it had sovereignty from the 1700s. Occupation generally involves intention and a will to act as a sovereign within a territory, as well as some actual display of some authority; additionally, the land has to be *terra nullius*. It is often the case that very little in way of an actual exercise of sovereignty is sufficient for a claim, provided that the opposing state cannot make out a superior claim, especially in cases of thinly populated or settled countries (there is a presumption that the original claimer has a superior title). Legislation is an obvious example of sovereign authority; if a parliament passes a law that applies to a piece of territory, it indicates sovereign authority.

The PCIJ held that there was a latent Danish claim that had never been challenged until 1921. There was additionally no dispute over Danish authority to Greenland until 1921. Hence, the PCIJ held that Denmark had displayed sufficient authority to confer a valid title.

***Case Concerning Sovereignty Over Pulau Ligitan and Pulau Spiadan (Indonesia v Malaysia)* [2002] ICJ Rep 625**

This case concerned a contest over the sovereignty of islands in Celebes sea (which is between the two countries). To resolve the dispute, the court looked to the extent to which the states have displayed effective authority (*effectivities*). In the case of small islands that are uninhabited or not permanently inhabited, *effectivities* will generally be scarce, as there is very little in the way of displaying a sovereign claim, but this is not fatal to establishing the claim.

The Court will only take into account activities before the dispute crystallised (the **critical date**), as any activities once the dispute has materialised will be self-serving in each country's interests. None of Indonesia's *effectivities* were legislative or of regulatory character, and did not constitute acts *à titre de souverain* (under sovereign authority); they had done certain things in relation to the islands, but they were not governmental and hence not under the cloak of sovereign authority.

Malaysia, on its own account and in respect of its predecessor sovereign Great Britain, had engaged in modest but diverse activities, including legislative, administrative and quasi-judicial acts (e.g., regulations for turtle egg collection, establishment of bird sanctuaries, and lighthouse). The judgement held that the sheer number of examples of Malaysia's activities ultimately accounted to a much stronger display of state authority as opposed to Indonesia's claims.

***Case Concerning Sovereignty Over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)* [2008] ICJ Rep 12**

This case concerned a dispute over islets at the entrance to Singapore Strait. Singapore claimed these islands on the basis of occupation, or that the title of the islets had subsequently passed to Singapore through the actions of the UK. Malaysia pointed to the actions of its predecessor state; Johor had original sovereignty over Pedra Branca/Pulau Batu Putch, but sovereignty had passed on the basis of conduct of the parties.

The UK and Singapore had installed and operated a lighthouse, investigated marine incidents, installed naval communications equipment, and had engaged in land reclamation, all of which were held to be *à titre de souverain* (i.e., all acts were done under state authority).

The court got involved in a balancing process. They found that whatever Malaysia's original title had been, that tile had been extinguished as a result of the UK and Singapore's activities, and that Malaysia did not respond to the UK and Singapore's conduct. As such, by 1980, sovereignty had passed to Singapore.

The key point from this case is to look at the nature and degree of the actual exercise of state authority over features prior to the crystallisation of the dispute.

6.4 Maritime Zones

- Maritime zones are governed by the *1982 UN Convention on the Law of the Seas* (UNCLOS)
- UNCLOS operates on a 'take it or leave it' basis; states can either accept the treaty in its entirety, or not at all

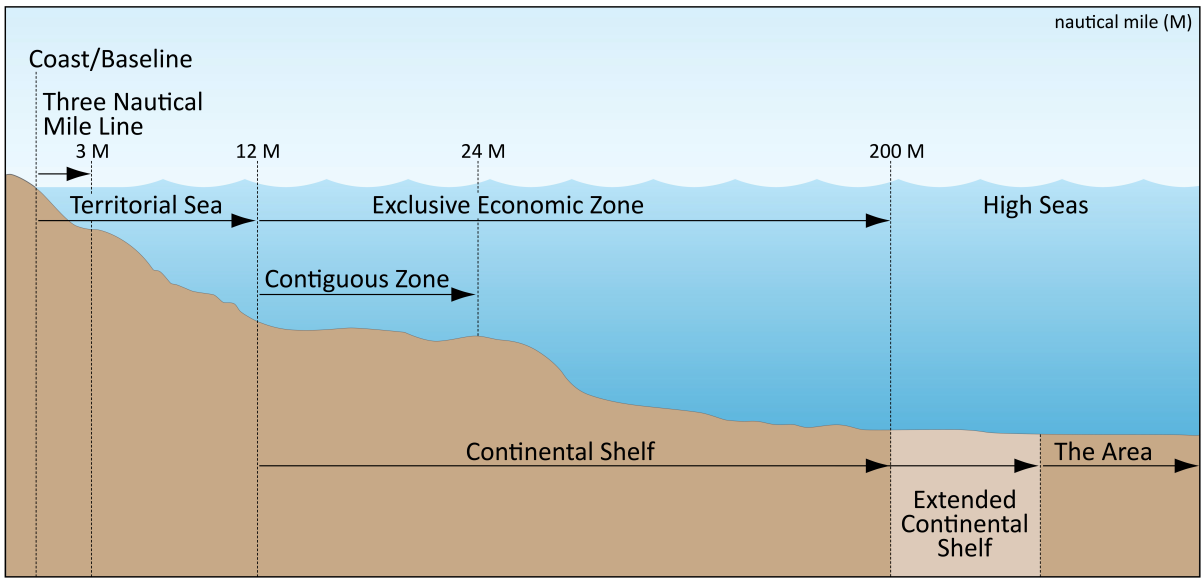

Figure 6.1: Maritime Zones as Defined in the UNCLOS

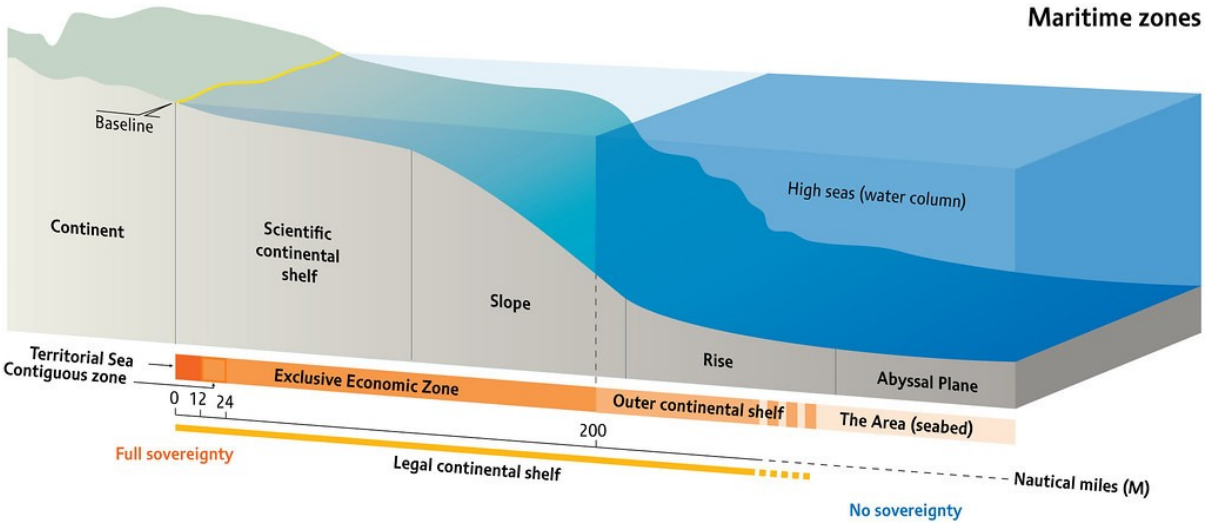

Figure 6.2: Maritime Zones as Defined in the UNCLOS (Alternative Representation)

- There are a number of different lines and zones that are important in international law
- Baselines

- Normal baselines follow the contours of the coast in all of its sinuosity, following *UNCLOS* Art 5 (these are the default baselines)
- Straight baselines, which are used in cases primarily where the coast is deeply indented/otherwise irregular, are special baselines that are drawn up upon dots along the coast, following *UNCLOS* Art 7
- Coastal baselines may take a combination of normal and straight baselines, depending on the complexity and geometry of the coast
- Baselines are necessary as a projection point for maritime zones

UNCLOS Articles 5, 7

Article 5

Normal baseline

Except where otherwise provided in this Convention, the normal baseline for measuring the breadth of the territorial sea is the low-water line along the coast as marked on large-scale charts officially recognized by the coastal State.

Article 7

Straight baselines

1. In localities where the coastline is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity, the method of straight baselines joining appropriate points may be employed in drawing the baseline from which the breadth of the territorial sea is measured.

2. Where because of the presence of a delta and other natural conditions the coastline is highly unstable, the appropriate points may be selected along the furthest seaward extent of the low-water line and, notwithstanding subsequent regression of the low-water line, the straight baselines shall remain effective until changed by the coastal State in accordance with this Convention.

3. The drawing of straight baselines must not depart to any appreciable extent from the general direction of the coast, and the sea areas lying within the lines must be sufficiently closely linked to the land domain to be subject to the regime of internal waters.

4. Straight baselines shall not be drawn to and from low-tide elevations, unless lighthouses or similar installations which are permanently above sea level have been built on them or except in instances where the drawing of baselines to and from such elevations has received general international recognition.

5. Where the method of straight baselines is applicable under paragraph 1, account may be taken, in determining particular baselines, of economic interests peculiar to the region concerned, the reality and the importance of which are clearly evidenced by long usage.

6. The system of straight baselines may not be applied by a State in such a manner as to cut off the territorial sea of another State from the high seas or an exclusive economic zone.

6.4.1 Maritime Zones

6.4.1.1 Territorial Sea

- The territorial sea is an inherent, non-claimable zone
- It extends 12 nautical miles from the baseline, following *UNCLOS* Art 3
- States have territorial sovereignty in this area; they own it, and have extensive authority
- There are very few exceptions to this authority - the most prevalent is the right of innocent passage

UNCLOS Articles 2-4

Article 2

Legal status of the territorial sea, of the air space over the territorial sea and of its bed and subsoil

1. The sovereignty of a coastal State extends, beyond its land territory and internal waters and, in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea.
2. This sovereignty extends to the air space over the territorial sea as well as to its bed and subsoil.
3. The sovereignty over the territorial sea is exercised subject to this Convention and to other rules of international law.

Article 3

Breadth of the territorial sea

Every State has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles, measured from baselines determined in accordance with this Convention.

Article 4

Outer limit of the territorial sea

The outer limit of the territorial sea is the line every point of which is at a distance from the nearest point of the baseline equal to the breadth of the territorial sea.

6.4.1.2 Contiguous Zone

- The contiguous zone is an enforcement zone for customs (the movement of goods), tax, immigration and quarantine laws
- It operates in the 12-24 nautical mile range from the baseline, right after the territorial sea, following *UNCLOS* Art 33(2)
- Coastal states can enforce the law against vessels only in the matters of customs, tax, immigration and quarantine

- The origins of this zone go back to the US Prohibition era, when people were attempting to smuggle alcohol into the US
- This is not a zone of sovereignty, but is rather a zone of enforcement jurisdiction

UNCLOS Article 33

Contiguous Zone

1. In a zone contiguous to its territorial sea, described as the contiguous zone, the coastal State may exercise the control necessary to:
   (a) prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea;
   (b) punish infringement of the above laws and regulations committed within its territory or territorial sea.
2. The contiguous zone may not extend beyond 24 nautical miles from the baselines from which the breadth of the territorial sea is measured.

6.4.1.3 Exclusive Economic Zone (EEZ)

- This is a creation of *UNCLOS*
- Coastal states have the right to claim up to 200 nautical miles from the baseline as their exclusive economic zone (per *UNCLOS* Art 57), in which they have rights to all of the living and non-living resources (including everything in the soil, subsoil, water column, etc.), and everything on the surface (e.g., renewable energy resources)
- This is the most important zone economically
- This is not a zone of sovereignty, but is merely a zone where a state has the rights over resources and the right to regulate them
  - For example, they cannot forbid foreign ships from passing through, but they can forbid foreign ships from fishing in the zone

UNCLOS Articles 55-58

Article 55

Specific legal regime of the exclusive economic zone

The exclusive economic zone is an area beyond and adjacent to the territorial sea, subject to the specific legal regime established in this Part, under which the rights and jurisdiction of the coastal State and the rights and freedoms of other States are governed by the relevant provisions of this Convention.

Article 56

Rights, jurisdiction and duties of the coastal State in the exclusive economic zone

1. In the exclusive economic zone, the coastal State has:

(a) sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds;

(b) jurisdiction as provided for in the relevant provisions of this Convention with regard to:

(i) the establishment and use of artificial islands, installations and structures;

(ii) marine scientific research;

(iii) the protection and preservation of the marine environment;

(c) other rights and duties provided for in this Convention.

2. In exercising its rights and performing its duties under this Convention in the exclusive economic zone, the coastal State shall have due regard to the rights and duties of other States and shall act in a manner compatible with the provisions of this Convention.

3. The rights set out in this article with respect to the seabed and subsoil shall be exercised in accordance with Part VI.

Article 57

Breadth of the exclusive economic zone

The exclusive economic zone shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured.

Article 58

Rights and duties of other States in the exclusive economic zone

1. In the exclusive economic zone, all States, whether coastal or land-locked, enjoy, subject to the relevant provisions of this Convention, the freedoms referred to in article 87 of navigation and overflight and of the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships, aircraft and submarine cables and pipelines, and compatible with the other provisions of this Convention.

2. Articles 88 to 115 and other pertinent rules of international law apply to the exclusive economic zone in so far as they are not incompatible with this Part.

3. In exercising their rights and performing their duties under this Convention in the exclusive economic zone, States shall have due regard to the rights and duties of the coastal State and shall comply with the laws and regulations adopted by the coastal State in accordance with the provisions of this Convention and other rules of international law in so far as they are not incompatible with this Part.

6.4.1.4 Continental Shelf

- The continental shelf is an inherent seabed resources zone, and a prolongation of a state's territory
- States have ownership of the resources on sea bed and the subsoil, and of any living resources that live on the seabed (e.g., crustaceans, sea snails, etc.)
- This overlaps to a significant extent with the EEZ

***UNCLOS* Articles 76-77**

Article 76

Definition of the continental shelf

1. The continental shelf of a coastal State comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance.

2. The continental shelf of a coastal State shall not extend beyond the limits provided for in paragraphs 4 to 6.

3. The continental margin comprises the submerged prolongation of the land mass of the coastal State, and consists of the seabed and subsoil of the shelf, the slope and the rise. It does not include the deep ocean floor with its oceanic ridges or the subsoil thereof.

4. (a) For the purposes of this Convention, the coastal State shall establish the outer edge of the continental margin wherever the margin extends beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured, by either:
   (i) a line delineated in accordance with paragraph 7 by reference to the outermost fixed points at each of which the thickness of sedimentary rocks is at least 1 per cent of the shortest distance from such point to the foot of the continental slope; or
   (ii) a line delineated in accordance with paragraph 7 by reference to fixed points not more than 60 nautical miles from the foot of the continental slope.

   (b) In the absence of evidence to the contrary, the foot of the continental slope shall be determined as the point of maximum change in the gradient at its base.

5. The fixed points comprising the line of the outer limits of the continental shelf on the seabed, drawn in accordance with paragraph 4 (a)(i) and (ii), either shall not exceed 350 nautical miles from the baselines from which the breadth of the territorial sea is measured or shall not exceed 100 nautical miles from the 2,500 metre isobath, which is a line connecting the depth of 2,500 metres.

6. Notwithstanding the provisions of paragraph 5, on submarine ridges, the outer limit of the continental shelf shall not exceed 350 nautical miles from the baselines from which the breadth of the territorial sea is measured. This paragraph does not apply to submarine elevations that are natural components of continental margin, such as its plateaux, rises, caps, banks and spurs.

7. The coastal State shall delineate the outer limits of its continental shelf, where that shelf extends beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured, by straight lines not exceeding 60 nautical miles in length, connecting fixed points, defined by coordinates of latitude and longitude.

8. Information on the limits of the continental shelf beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured shall be submitted by the coastal State to the Commission on the Limits of the Continental Shelf set up under Annex II on the basis of equitable geographical representation. The Commission shall make recommendations to coastal States on matters related to the establishment of the outer limits of their continental shelf. The limits of the shelf established by a coastal State on the basis of these recommendations shall be final and binding.

9. The coastal State shall deposit with the Secretary-General of the United Nations charts and relevant information, including geodetic data, permanently describing the outer limits of its continental shelf. The Secretary-General shall give due publicity thereto.

10. The provisions of this article are without prejudice to the question of delimitation of the continental shelf between States with opposite or adjacent coasts.

Article 77

Rights of coastal States over continental shelf

1. The coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources.

2. The rights referred to in paragraph 1 are exclusive in the sense that if the coastal State does not explore the continental shelf or exploit its natural resources, no one may undertake these activities without the express consent of the coastal State.

3. The rights of the coastal State over the continental shelf do not depend on occupation, effective or notional, or on any express proclamation.

4. The natural resources referred to in this Part consist of the mineral and other non-living resources of the seabed and subsoil together with living organisms belonging to sedentary species, that is to say, organisms which, at the harvestable stage, either are immobile on or under the seabed or are unable to move except in constant physical contact with the seabed or the subsoil.

6.4.1.5 High Seas

- These are areas of the sea that are not subject to the jurisdiction of any state, and are open to all states
- They cannot be claimed by any state, and are thus non-appropriable
- There are certain cardinal freedoms on the high seas that cannot be violated (e.g., navigation, freedom)

UNCLOS Articles 86-90

Article 86

Application of the provisions of this Part

The provisions of this Part apply to all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State. This article does not entail any abridgement of the freedoms enjoyed by all States in the exclusive economic zone in accordance with article 58.

Article 87

Freedom of the high seas

1. The high seas are open to all States, whether coastal or land-locked. Freedom of the high seas is exercised under the conditions laid down by this Convention and by other rules of international law. It comprises, inter alia, both for coastal and land-locked States:
   (a) freedom of navigation;
   (b) freedom of overflight;
   (c) freedom to lay submarine cables and pipelines, subject to Part VI;
   (d) freedom to construct artificial islands and other installations permitted under international law, subject to Part VI;
   (e) freedom of fishing, subject to the conditions laid down in section 2;
   (f) freedom of scientific research, subject to Parts VI and XIII.
2. These freedoms shall be exercised by all States with due regard for the interests of other States in their exercise of the freedom of the high seas, and also with due regard for the rights under this Convention with respect to activities in the Area.

Article 88

Reservation of the high seas for peaceful purposes

The high seas shall be reserved for peaceful purposes.

Article 89

Invalidity of claims of sovereignty over the high seas

No State may validly purport to subject any part of the high seas to its sovereignty.

Article 90

Right of navigation

Every State, whether coastal or land-locked, shall enjoy the right to sail ships flying its fag on the high seas.

6.4.1.6 Archipelagic Waters

- These were created under *UNCLOS* Part IV
- These are the waters within an archipelago
- All of these waters are held to be very similar to the territorial sea

***UNCLOS* Articles 46 - 49**

Article 46

Use of terms

For the purposes of this Convention:

(a) "archipelagic State" means a State constituted wholly by one or more archipelagos and may include other islands;

(b) "archipelago" means a group of islands, including parts of islands, interconnecting waters and other natural features which are so closely interrelated that such islands, waters and other natural features form an intrinsic geographical, economic and political entity, or which historically have been regarded as such.

Article 47

Archipelagic baselines

1. An archipelagic State may draw straight archipelagic baselines joining the outermost points of the outermost islands and drying reefs of the archipelago provided that within such baselines are included the main islands and an area in which the ratio of the area of the water to the area of the land,including atolls, is between 1 to 1 and 9 to 1.
2. The length of such baselines shall not exceed 100 nautical miles, except that up to 3 per cent of the total number of baselines enclosing any archipelago may exceed that length, up to a maximum length of 125 nautical miles.
3. The drawing of such baselines shall not depart to any appreciable extent from the general configuration of the archipelago.
4. Such baselines shall not be drawn to and from low-tide elevations, unless lighthouses or similar installations which are permanently above sea level have been built on them or where a low-tide elevation is situated wholly or partly at a distance not exceeding the breadth of the territorial sea from the nearest island.

5. The system of such baselines shall not be applied by an archipelagic State in such a manner as to cut off from the high seas or the exclusive economic zone the territorial sea of another State.

6. If a part of the archipelagic waters of an archipelagic State lies between two parts of an immediately adjacent neighbouring State, existing rights and all other legitimate interests which the latter State has traditionally exercised in such waters and all rights stipulated by agreement between those States shall continue and be respected.

7. For the purpose of computing the ratio of water to land under paragraph l, land areas may include waters lying within the fringing reefs of islands and atolls, including that part of a steep-sided oceanic plateau which is enclosed or nearly enclosed by a chain of limestone islands and drying reefs lying on the perimeter of the plateau.

8. The baselines drawn in accordance with this article shall be shown on charts of a scale or scales adequate for ascertaining their position. Alternatively, lists of geographical coordinates of points, specifying the geodetic datum, may be substituted.

9. The archipelagic State shall give due publicity to such charts or lists of geographical coordinates and shall deposit a copy of each such chart or list with the Secretary-General of the United Nations.

Article 48

Measurement of the breadth of the territorial sea, the contiguous zone, the exclusive economic zone and the continental shelf

The breadth of the territorial sea, the contiguous zone, the exclusive economic zone and the continental shelf shall be measured from archipelagic baselines drawn in accordance with article 47.

Article 49

Legal status of archipelagic waters, of the air space over archipelagic waters and of their bed and subsoil

1. The sovereignty of an archipelagic State extends to the waters enclosed by the archipelagic baselines drawn in accordance with article 47, described as archipelagic waters, regardless of their depth or distance from the coast.

2. This sovereignty extends to the air space over the archipelagic waters, as well as to their bed and subsoil, and the resources contained therein.

3. This sovereignty is exercised subject to this Part.

4. The regime of archipelagic sea lanes passage established in this Part shall not in other respects affect the status of the archipelagic waters, including the sea lanes, or the exercise by the archipelagic State of its sovereignty over such waters and their air space, bed and subsoil, and the resources contained therein.

6.4.1.7 Deep Seabed

- This is referred to as 'the Area' in the *UNCLOS*, and is considered as the common heritage of mankind
- Once an individual/ship leaves the continental shelf and enters the deep seabed, it cannot be appropriated by any state; it is instead vested in all people (i.e., they have a stake in it)
- The International Seabed Authority (established by *UNCLOS* and based in Jamaica) is responsible for the management of the deep seabed by issuing licences on an equitable basis to ensure all countries can access the resources in the deep sea
- The deep sea lies immediately below the high seas

***South China Sea Arbitration (Philippines v China)* [2016] PCA**

Prior to 2016, the Philippines challenged China's claim to the entirety of the South China Sea, and to China's assertion of maritime zones from particular features in the Sea. The Tribunal examining these issues was established under *UNCLOS*.

The first key issue was China's 'Nine-Dash Line', which was held to be incompatible with *UNCLOS*. This is because the zone extended very substantially beyond China's coastline, and well beyond the 200 nautical mile limit of the EEZ. The Tribunal held that the Nine-Dash Line was not a valid claim to maritime zones, and that China had no rights to the waters within the line. Moreover, as China was a party to *UNCLOS*, any historical claims were extinguished upon the signing of the treaty, and so historical maritime zones could not be argued.

Moreover, none of the maritime features in dispute were islands as defined in *UNCLOS*. The Tribunal held that none of the features were capable of generating an EEZ or continental shelf, and that they were all either rocks or low-tide elevations. As such, the Tribunal held that China had no rights to any maritime zones from these features. At most, they could generate a territorial sea, but not an EEZ or continental shelf. The Tribunal also held that China had violated the Philippines' rights in the EEZ, and that China had failed to protect the marine environment in the area.

6.5 Antarctica

- There are 7 claimants to territory in Antarctica: Argentina, Australia, Chile, France, New Zealand, Norway, and the UK
- Article 4 of the *1959 Antarctic Treaty* provides that no new claims to territory in Antarctica may be made, but that there is no renunciation of any existing claims (i.e., they are frozen whilst the treaty is in force)
- Whilst the treaty is in force, no acts conducted can constitute a basis for asserting, supporting or denying a claim to territorial sovereignty in Antarctica

***1959 Antarctic Treaty* Article 4**

1. Nothing contained in the present Treaty shall be interpreted as:
   (a) a renunciation by any Contracting Party of previously asserted rights of or claims to territorial sovereignty in Antarctica;
   (b) a renunciation or diminution by any Contracting Party of any basis of claim to territorial sovereignty in Antarctica which it may have whether as a result of its activities or those of its nationals in Antarctica, or otherwise;
   (c) prejudicing the position of any Contracting Party as regards its recognition or non-recognition of any other State's right of or claim or basis of claim to territorial sovereignty in Antarctica.
2. No acts or activities taking place while the present Treaty is in force shall constitute a basis for asserting, supporting or denying a claim to territorial sovereignty in Antarctica or create any rights of sovereignty in Antarctica. No new claim, or enlargement of an existing claim, to territorial sovereignty in Antarctica shall be asserted while the present Treaty is in force.

6.6 Airspace and Outer Space

6.6.1 Airspace

- A state has sovereignty over the airspace above its territory and territorial sea (*cujus est solum ejus est usque ad coelum*)
- Other states have the freedom of overflight over the contiguous zone, the EEZ, and high seas
- The boundary between national airspace and outer space is not clearly defined

6.6.2 Outer Space

- The *1967 Outer Space Treaty* Art 2 provides that outer space is not subject to national appropriation by any means
- Article 1 of this treaty additionally holds that outer space is the province of mankind
- There are 113 parties to this treaty

1967 Outer Space Treaty

Article 1

The exploration and use of outer space, including the moon and other celestial bodies, shall be carried out for the benefit and in the interests of all countries, irrespective of their degree of economic or scientific development, and shall be the province of all mankind.

Outer space, including the moon and other celestial bodies, shall be free for exploration

and use by all States without discrimination of any kind, on a basis of equality and in accordance with international law, and there shall be free access to all areas of celestial bodies.

There shall be freedom of scientific investigation in outer space, including the moon and other celestial bodies, and States shall facilitate and encourage international co-operation in such investigation.

Article 2

Outer space, including the moon and other celestial bodies, is not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means.

- The *1979 Moon Agreement* Art 11(1) provides that the moon and other celestial bodies are the common heritage of mankind
- There are only 18 parties to this treaty

***1979 Agreement Governing the Activities of States on the Moon and Other Celestial Bodies* Article 11**

1. The moon and its natural resources are the common heritage of mankind, which finds its expression in the provisions of this Agreement, in particular in paragraph 5 of this article.

2. The moon is not subject to national appropriation by any claim of sovereignty, by means of use or occupation, or by any other means.

3. Neither the surface nor the subsurface of the moon, nor any part thereof or natural resources in place, shall become property of any State, international intergovernmental or non- governmental organization, national organization or non-governmental entity or of any natural person. The placement of personnel, space vehicles, equipment, facilities, stations and installations on or below the surface of the moon, including structures connected with its surface or subsurface, shall not create a right of ownership over the surface or the subsurface of the moon or any areas thereof. The foregoing provisions are without prejudice to the international regime referred to in paragraph 5 of this article.

4. States Parties have the right to exploration and use of the moon without discrimination of any kind, on the basis of equality and in accordance with international law and the terms of this Agreement.

5. States Parties to this Agreement hereby undertake to establish an international regime, including appropriate procedures, to govern the exploitation of the natural resources of the moon as such exploitation is about to become feasible. This provision shall be implemented in accordance with article 18 of this Agreement.

6. In order to facilitate the establishment of the international regime referred to in paragraph 5 of this article, States Parties shall inform the Secretary-General of the United Nations as well as the public and the international scientific community, to

the greatest extent feasible and practicable, of any natural resources they may discover on the moon.

7. The main purposes of the international regime to be established shall include:

   (a) The orderly and safe development of the natural resources of the moon;

   (b) The rational management of those resources;

   (c) The expansion of opportunities in the use of those resources;

   (d) An equitable sharing by all States Parties in the benefits derived from those resources, whereby the interests and needs of the developing countries, as well as the efforts of those countries which have contributed either directly or indirectly to the exploration of the moon, shall be given special consideration.

8. All the activities with respect to the natural resources of the moon shall be carried out in a manner compatible with the purposes specified in paragraph 7 of this article and the provisions of article 6, paragraph 2, of this Agreement.

Topic 7

Jurisdiction

- State jurisdiction refers to the power or competence of a state to prescribe or enforce its laws
- State jurisdiction includes:
  - **Prescriptive jurisdiction**, which is the power to enact laws/assert jurisdiction by legislation (legislative power)
  - **Adjudicative jurisdiction**, which is the power to apply laws and decide disputes (judicial power)
  - **Enforcement jurisdiction**, which is the ability to enforce laws within a state's territory (executive power)
- Enforcement jurisdiction is almost always confined to a state's territory, but prescriptive jurisdiction is becoming increasingly extraterritorial
- The litmus test for the limits of state jurisdiction is **protest by other states**
- The rules around custom in relation to jurisdiction have been formed by states asserting jurisdiction, and by some states resisting/opposing jurisdiction

7.1 Civil Jurisdiction

- Civil jurisdiction refers to the exercise by states of power (prescriptive and adjudicative) over persons, matters or things in private disputes (e.g., torts, contracts, family law, etc.)
- International law places very few limits on the assertion of civil jurisdiction, taking a hands-off approach to the power of states
- This has resulted in many situations where states have been extravagant in exercising civil powers internationally
- For example, the *Alien Tort Claims Act 1789* (US) conferred jurisdiction on US federal courts in civil actions by non-nationals for violations of international law
  - Following a revitalisation of this law in the 1980s, it has now been interpreted restrictively by the US Supreme Court (see *Sosa v Alvare-Machain* (SCOTUS, 2004) and *Kiobel v Royal Dutch Petroleum* (SCOTUS, 2013))

  - In *Kiobel v Royal Dutch Petroleum*, Nigerian plaintiffs were injured by Royal Dutch Petroleum
  - In *Sosa v Alvare-Machain*, a Mexican national was kidnapped by US agents in Mexico and brought to the US for trial

7.2 Criminal Jurisdiction

- International law sets limits on the assertion of of criminal jurisdiction by states
- States can only assert criminal jurisdiction when they can establish that their jurisdiction is supported by one or more of the following principles:
  - Territorial principle
  - Nationality principle
  - Protective principle (also known as the security principle)
  - Passive personality principle (also known as the passive nationality principle)
  - Universality principle
- These principles are not mutually exclusive, and states can assert jurisdiction on the basis of more than one principle (e.g., a crime on the territory of one state committed against citizens of another state, which becomes so severe that it shocks all humans (a crime against humanity) would invoke the territorial principle, the nationality principle, the passive personality principle and the universality principle)
- If there is an overlap in jurisdiction, or there is otherwise concurrent jurisdiction, the state with the most significant connection to the crime will usually be the one to prosecute (generally, the state with custody has the first opportunity to prosecute)
  - To exercise jurisdiction, a state must have custody of the offender

7.2.1 Territorial Principle

- The territorial principle holds that states may exercise criminal jurisdiction where an element of a criminal offence takes place within its territory
  - Criminal laws are normally expressed to apply in the territories of a state
- This applies where an element of an offence occurs within the jurisdiction of a state, or where an effect of the offence was felt within the state's jurisdiction
- The territorial principle requires some sort of geographical nexus, but not necessarily that the entirety of an offence is committed within the territory of the forum asserting jurisdiction

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

This case involved the collision of two vessels on the high seas, one French and one Turkish. The collision had occurred as a result of the criminal negligence of the master of the watch on the French vessel. The Turkish courts asserted criminal jurisdiction over the

French master of the watch, and sought to prosecute him in the Turkish courts. France argued that Turkey could not exercise jurisdiction, instead arguing in favour of the customary rule of exclusive jurisdiction of the flag state over collisions on the high seas; i.e., that France, as the flag state of the offending vessel and of the master of the watch, had sole jurisdiction.

The PCIJ held that there was no such rule, and that Turkey was entitled to assert criminal jurisdiction. It did so on what is now a highly-contended basis that "anything which international law does not expressly prohibit, it permits" (i.e., a permissive view of state jurisdiction). This view is no longer subscribed to, as the prevailing view now is that states when asserting criminal jurisdiction need to identify valid basis for doing so (in this instance, the valid basis was held to be the territorial principle).

The PCIJ held that the territorial principle of jurisdiction meant that if at least one of the constituent elements of an offence took place in a state's territory, that is sufficient to enliven the territorial principle. Here, as some effects were felt in Turkey as a result of the damage to the Turkish vessel, the PCIJ held that as the vessel was akin to the floating territory of Turkey (this is not generally correct), the territorial principle was enlivened in manner that held that not all elements of the offence had to be in a state so long as some effect was felt by the state.

"The territoriality of all criminal law … is not an absolute principle." States may exercise jurisdiction on a territorial basis if 'if one of the constituent elements of the offence, and more especially its effects, have taken place there'. '[O]nce it is admitted that the effects of the offence were produced on the Turkish vessel, it becomes impossible to hold that there is a rule of international law which prohibits Turkey from prosecuting…' '… in this case, a prosecution may also be justified from the point of view of the so-called territorial principle' (this statement embodies the now-discredited 'floating territory' principle). Moreover, 'there is no rule of international law in regard to collision cases to the effect that criminal proceedings are exclusively within the jurisdiction of the State whose flag is flown.'

The rules created by this case around jurisdiction of vessels on the high seas has now been overturned by *UNCLOS* Art 97 (the exclusive flag state criminal jurisdiction for high seas collisions), which holds that if there is a collision in the high seas between two different nationalities, the victim vessel and thus state has no jurisdiction over the perpetrator vessel (which is exclusively under the jurisdiction of the flag vessel).

- The territory of a state is a nuanced issue
  - It is clear that vessels bearing a state's flag are not considered to be part of the territory of that state
  - Following *R v Turnbull; ex parte Petroff* (ACTSC, 1971), the grounds of an embassy remain part of the ACT's territory for the purposes of jurisdiction (but enforcement of that jurisdiction is a separate issue, due to diplomatic inviolability)
  - Following *R v Disun; R v Nardin* (WASC, 2003), the territory of a state includes its territorial seas

***R v Turnbull; ex parte Petroff* (ACTSC, 1971)**

Petroff and another defendant were charged under ACT law for attempted bombing of the USSR embassy in Canberra. The defendant argued that he did not commit a crime within the ACT (and thus within Australia), but rather did so within the USSR. The ACT Supreme Court held that "the premises of a foreign embassy are not outside the territory to which the criminal law applies", and as such, the criminal law of the ACT applied throughout the ACT; the missions of foreign states do not become foreign territory, despite being subject to inviolable protections.

***R v Disun; R v Nardin* (WASC, 2003)**

The MV Tampa, a Norwegian vessel, had rescued 400 asylum seekers from a sinking vessel in the Indian Ocean. They sought to enter the Australia territorial sea to offload the asylum seekers so that they could be offloaded, looked after and then make claims for protection. The defendants were subsequently charged with people-smuggling offences, as they had not been given the requisite permission but nonetheless still steered the ship into Australia's territorial waters.

In their defence, the defendants argued that they were arrested on a Norwegian vessel within the Australian territorial sea, and that this meant that they had been arrested on Norwegian territory. Consequently, they argued that they should be governed by extradition laws before they could be prosecuted. The Western Australian Supreme Court rejected this, holding that the territory of Australia included all of Australia's land territory and also its territorial sea. It is moreover a general rule of international law that a state possesses jurisdiction in virtue of its sovereignty over persons and property found in its territory.

- If a criminal offence has connections with several states, the territorial principle will be enlivened in those states, with two approaches taken to resolve this conflict:
  - **Subjective territorial jurisdiction** - this is the exercise of prescriptive jurisdiction by the state in which the criminal offence originated but was completed outside its territory (i.e., look at the start place of the offence)
  - **Objective territorial jurisdiction** - this is the exercise of prescriptive jurisdiction by the state in which the criminal offence is completed, even if the offence was initiated outside its territory (i.e., look at the end place of the offence)
- Following *Ward v R* (1980) 142 CLR 308, the High Court held that Victoria tended to follow objective territorial jurisdiction

***Ward v R* (1980) 142 CLR 308**

This was a case of murder, where the accused (Ward) was standing on of of the bank of the Murray River in Victoria, where he fired a gun and killed a victim who was standing by the water of the river. The High Court faced the factual issue of deciding whether the victim was in NSW or in Victoria at the time he was struck; upon closer examination, the High Court held that the victim was in NSW at the point he was killed. The High Court examined the relevant Victorian statute, and found that it adhered to the

objective/terminatory theory, and as such, the venue of the crime was where the act took effect upon the victim (which was NSW in this case).

- This is a principle that has been codified in NSW through *Crimes Act 1900* ss 10A, 10C, where the geographic nexus of a crime is within NSW if the offence was committed wholly or partly within NSW, or has an effect in NSW (i.e., was committed wholly outside NSW, but has a material effect in NSW)
  - s 10A holds that it will also apply to an offence beyond the territorial limits of NSW if there is a geographic nexus between the offence and the state
  - s 10C delineates how to determine if there is a geographic nexus

***Crimes Act 1900* ss 10A, 10C**

Application and effect of Part

(1) This Part applies to all offences.

(2) This Part extends, beyond the territorial limits of the State, the application of a law of the State that creates an offence if there is the nexus required by this Part between the State and the offence.

(3) If the law that creates an offence makes provision with respect to any geographical consideration concerning the offence, that provision prevails over any inconsistent provision of this Part.

(4) This Part is in addition to and does not derogate from any other basis on which the courts of the State may exercise criminal jurisdiction.

***Crimes Act 1900* s 10C**

Extension of offences if there is a geographical nexus

(1) If—

(a) all elements necessary to constitute an offence against a law of the State exist (disregarding geographical considerations), and

(b) a geographical nexus exists between the State and the offence,

the person alleged to have committed the offence is guilty of an offence against that law.

(2) A geographical nexus exists between the State and an offence if—

(a) the offence is committed wholly or partly in the State (whether or not the offence has any effect in the State), or

(b) the offence is committed wholly outside the State, but the offence has an effect in the State.

7.2.2 Nationality Principle

- The nationality principle refers to the application of criminal laws to nationals (i.e., citizens) of states
- Determining the nationality of a person is a matter left to municipal law; it is up to states to confer or rescind nationality (an individual cannot make a unilateral declaration of renunciation, for example), with international law setting very few limits on this matter
- An example of the nationality principle is *Criminal Code 1995* (Cth) Div. 272 ('Child Sex Offences Outside Australia'), which was challenged in *XYZ v Commonwealth* (2006) 227 CLR 532
  - In this case, Gleeson CJ held that "[t]he assertion of extra-territorial criminal jurisdiction is not, in itself, contrary to the principles of international law ... The territorial principle of legislative jurisdiction over crime is not the exclusive source of competence recognised by international law. Of primary relevance to the present case is the nationality principle, which covers conduct abroad by citizens or residents of a state"
  - In this case, the High Court considered whether the Div. 272 provisions were supported by the external affairs power
  - Gleeson CJ noted that there was no problem with the principle of extraterritorial jurisdiction; the relevant principle was the nationality principle, which applies to both citizens and residents of states (suggesting a broader application of this principle, rather than just states)

7.2.3 Protective (Security) Principle

- The protective (security) principle is concerned less with where an offence is committed (territorial) and who committed the offence (nationality), but rather with the nature of the offence, and whether it impairs some kind of fundamental/vital state security interest
- Jurisdiction is exercised over persons (including non-nationals) who have committed acts abroad prejudicial to the security of the state
- States can take action against nationals/non-nationals where the offence was serious enough to violate state security
- This is a controversial basis of state jurisdiction, and is generally limited to offences infringing vital state interests, and as such, is not invoked very often
- Examples include:
  - Genocide of the Jewish people - *A-G v Eichmann* (Dist Ct. of Jerusalem, 1961)
  - Attempted murder of government agents - *US v Benitez* (US Ct. of A for 11th Cir, 1984)
  - Propaganda - *Joyce v DPP* (HoL, 1946); *R v Casement* (1917) Eng Ct. of Crim. A.

A-G v Eichmann (Dist Ct. of Jerusalem, 1961)

Eichmann was abducted by the Israeli secret service from Buenos Aires, where he had been living under a different name. He was taken to Israel to face trial for carrying out the so-called Holocaust final solution in Nazi Germany. He faced trial in Israel, and was ultimately convicted. The Israeli prosecutors presented multiple bases upon which they asserted that Israel possessed jurisdiction:

- The character of the offence as involving genocide of the Jewish people (enlivening the universal principle of jurisdiction)
- Invoking jurisdiction to protect the very existence of the Jewish state of Israel (enlivening the protective principle)

US v Benitez (US Ct. of A for 11th Cir, 1984)

This case involved the attempted murder of two government agents, with the US authorities prosecuting a Colombian national. The Court justified this by saying that the crime would have potential ramifications for the broader security of the United States.

Joyce v DPP (HoL, 1946)

The defendant was born in the US, and had fraudulently obtained a UK passport by claiming he was born in Ireland. In 1939, when WW2 began, he moved to Germany and began to work for German radio services, broadcasting propaganda to the British people. He was tried for treason by the British authorities, which was controversial as it was unclear as to whether he had British nationality to begin with (he had acquired his British passport fraudulently). Jallett LJ proposed an alternate basis for jurisdiction, stating that "no principle of comity demands that a state should ignore the crime of treason committed against it outside its own territory…" This case is often cited in support of the protective principle.

R v Casement (1917) Eng Ct. of Crim. A.

This case involved a British subject who in Germany was trying to persuade British prisoners of war to give up their allegiance to Britain and join the German military. He was put on trial in the UK, and was convicted of treason. This case is often cited in support of the protective principle, and for its enablement of the prosecution of nationals and non-nationals where there has been some infringement of a vital state security interest

7.2.4 Passive Personality Principle

- The passive personality principle allows for criminal jurisdiction to be asserted anywhere in the world to citizens of a state, enabling the national state of the victim of an offence to assert jurisdiction over the offender
- The *SS Lotus Case* (1927) PCIJ expressly reserved the question as to whether this was a valid basis of jurisdiction

- Examples of this principle being exercised include
  - Taking hostages during the hijacking of an aircraft - *US v Yunis* (US Ct. of A for 11th Cir, 1991)
  - Harming Australians abroad - *Criminal Code 1995* (Cth) Div 115

US v Yunis (US Ct. of A for 11th Cir, 1991)

This case involved the defendant and four other men who boarded a Royal Jordanian flight in Beirut and then hijacked the flight. A number of passengers were American citizens, and two of them had been detained (but otherwise unharmed). On the basis of the passive personality principle, the US Court held that it had jurisdiction of this matter.

- Under *Criminal Code 1995* (Cth) Div 115, Australian nationals are protected by Australian criminal law as a national of Australia in the event that they are subject to harm abroad

Criminal Code 1995 (Cth) Div 115 - Harming Australians

115.1 Murder of an Australian citizen or a resident of Australia

(1) A person commits an offence if:

(a) the person engages in conduct outside Australia (whether before or after 1 October 2002 or the commencement of this Code); and

(b) the conduct causes the death of another person; and

(c) the other person is an Australian citizen or a resident of Australia; and

(d) the first-mentioned person intends to cause, or is reckless as to causing, the death of the Australian citizen or resident of Australia or any other person by the conduct; and

(e) if the conduct was engaged in before 1 October 2002—at the time the conduct was engaged in, the conduct constituted an offence against a law of the foreign country, or the part of the foreign country, in which the conduct was engaged.

Note: This section commenced on 1 October 2002.

(1A) If the conduct constituting an offence against subsection (1) was engaged in before 1 October 2002, the offence is punishable on conviction by:

(a) if, at the time the conduct was engaged in, the offence mentioned in paragraph (1)(e) was punishable on conviction by a term of imprisonment (other than imprisonment for life)—a maximum penalty of imprisonment for a term of not more than that term; or

(b) otherwise—a maximum penalty of imprisonment for life.

(1B) If the conduct constituting an offence against subsection (1) was engaged in on or after 1 October 2002, the offence is punishable on conviction by a maximum penalty of imprisonment for life.

(2) Absolute liability applies to paragraphs (1)(c) and (e).

(3) If:

(a) a person has been convicted or acquitted of an offence in respect of conduct under a law of a foreign country or a part of a foreign country; and

(b) the person engaged in the conduct before 1 October 2002;

the person cannot be convicted of an offence against this section in respect of that conduct.

115.2 Manslaughter of an Australian citizen or a resident of Australia

(1) A person commits an offence if:

(a) the person engages in conduct outside Australia (whether before or after 1 October 2002 or the commencement of this Code); and

(b) the conduct causes the death of another person; and

(c) the other person is an Australian citizen or a resident of Australia; and

(d) the first-mentioned person intends that the conduct will cause serious harm, or is reckless as to a risk that the conduct will cause serious harm, to the Australian citizen or resident of Australia or any other person; and

(e) if the conduct was engaged in before 1 October 2002—at the time the conduct was engaged in, the conduct constituted an offence against a law of the foreign country, or the part of the foreign country, in which the conduct was engaged.

Note: This section commenced on 1 October 2002.

(1A) If the conduct constituting an offence against subsection (1) was engaged in before 1 October 2002, the offence is punishable on conviction by:

(a) if, at the time the conduct was engaged in, the offence mentioned in paragraph (1)(e) was punishable on conviction by imprisonment for a term of less than 25 years—a maximum penalty of imprisonment for a term of not more than that term; or

(b) otherwise—a maximum penalty of imprisonment for a term of not more than 25 years.

(1B) If the conduct constituting an offence against subsection (1) was engaged in on or after 1 October 2002, the offence is punishable on conviction by a maximum penalty of imprisonment for a term of not more than 25 years.

(2) Absolute liability applies to paragraphs (1)(b), (c), and (e).

(3) If:

(a) a person has been convicted or acquitted of an offence in respect of conduct under a law of a foreign country or a part of a foreign country; and

(b) the person engaged in the conduct before 1 October 2002;

the person cannot be convicted of an offence against this section in respect of that conduct.

115.3 Intentionally causing serious harm to an Australian citizen or a resident of Australia

(1) A person commits an offence if:

(a) the person engages in conduct outside Australia; and

(b) the conduct causes serious harm to another person; and

(c) the other person is an Australian citizen or a resident of Australia; and

(d) the first-mentioned person intends to cause serious harm to the Australian citizen or resident of Australia or any other person by the conduct.

Penalty: Imprisonment for 20 years.

(2) Absolute liability applies to paragraph (1)(c).

115.4 Recklessly causing serious harm to an Australian citizen or a resident of Australia

(1) A person commits an offence if:

(a) the person engages in conduct outside Australia; and

(b) the conduct causes serious harm to another person; and

(c) the other person is an Australian citizen or a resident of Australia; and

(d) the first-mentioned person is reckless as to causing serious harm to the Australian citizen or resident of Australia or any other person by the conduct.

Penalty: Imprisonment for 15 years.

(2) Absolute liability applies to paragraph (1)(c).

115.5 Saving of other laws

This Division is not intended to exclude or limit the operation of any other law of the Commonwealth or of a State or Territory.

115.6 Bringing proceedings under this Division

(1) Proceedings for an offence under this Division must not be commenced without the Attorney-General's written consent.

(2) However, a person may be arrested, charged, remanded in custody, or released on bail, in connection with an offence under this Division before the necessary consent has been given.

115.7 Ministerial certificates relating to proceedings

(1) A Minister who administers one or more of the following Acts:

(a) the Australian Citizenship Act 2007;

(b) the Migration Act 1958;

(c) the Australian Passports Act 2005;

may issue a certificate stating that a person is or was an Australian citizen or a resident of Australia at a particular time.

(2) In any proceedings, a certificate under this section is *prima facie* evidence of the matters in the certificate.

115.8 Geographical Jurisdiction

Each offence against this Division applies:

(a) whether or not a result of the conduct constituting the alleged offence occurs in Australia; and

(b) if the alleged offence is an ancillary offence and the conduct to which the ancillary offence relates occurs outside Australia—whether or not the conduct constituting the ancillary offence occurs in Australia.

115.9 Meaning of *causes* death or harm

In this Division, a person's conduct causes death or harm if it substantially contributes to the death or harm.

7.2.5 Universality Principle

- The universality principle is the exercise of jurisdiction over particular offences because of their seriousness (e.g., genocide), or because they may otherwise go unpunished (e.g., piracy, crimes committed on the high seas, crimes beyond territorial jurisdiction)
- There is no need to establish a link or nexus between the offender or offence and the prosecuting state other than custody
- The basis of this is that it is the duty of the international community to repress the crimes to which it applies (because it is the type of crimes that can only effectively be dealt with in universal jurisdiction (e.g., piracy), or because they are particularly heinous (e.g., genocide))
  - The exercise of universal jurisdiction without custody (i.e., *in absentia*) is controversial; usually, custody is the only necessary link for a state to exercise their powers under the universality principle
- It is difficult to discern a coherent theory for those offences to which universal jurisdiction has applied; it has been developed on a case-by-case basis
- Crimes over which universal jurisdiction may be exercised include:
  - Piracy (attack on a vessel on the high seas for private ends)
  - Slavery (exercise of powers of ownership over persons)

- Genocide (certain acts including murder committed with intent to destroy in whole or in part, a national, ethnical, racial or religious group)
- War crimes (serious breaches of the laws of war, such as intentional attacks on civilians)
- Crimes against humanity (certain acts including murder committed as part of a widespread or systematic attack directed against any civilian population)
- Torture (state infliction of pain/suffering to obtain information)

7.2.5.1 Piracy and Marine Terrorism

- Piracy was the first offence over which universal jurisdiction was accepted to apply, as it has a functional aspect to it which enables for the law to be enforced against pirates, which is otherwise very difficult as it occurs beyond the jurisdiction of any state
- International law has come to view that any state with custody of the offending pirate can exercise jurisdiction over them
- Piracy can only be committed on the high seas; if it is conducted in the territorial seas, it would not be piracy and would likely be subject to the national law of where the sea is located
- Under *UNCLOS* Art 101, piracy is defined in Art 101(a)
- It requires two vessels (one of which is attacking the other), that such an attack takes place on the high seas, and that it is done for private ends (i.e., government ships cannot commit piracy)

UNCLOS Article 101

Definition of Piracy

Piracy consists of any of the following acts:

(a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:

  (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;

  (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;

(b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;

(c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).

US v Dire (Court of Appeal for the 4th Circuit, 2012)

This case involved the prosecution of Somali pirates, who attacked a vessel off the coast of Somalia on the high seas. Whilst the pirates thought they were attacking a merchant vessel, it was a US frigate disguised as a merchant ship. The US chased the pirates, arrested them and took them to the US for trial. The jurisdiction of the court was asserted on the basis of universality. Dire argued that there was no true offence of piracy having being committed here, but rather it was at most attempted piracy; there was no act of violence or degradation against the vessel, but rather an attempted act that was thwarted. The US Courts rejected this logic, holding that the *UNCLOS* definition of piracy was broad enough to involve attempted acts of piracy. This case held that actual robbery was *not* an essential element of piracy, and that attempted/frustrated robbery on the high seas constitutes piracy *jure gentium*.

- In the 1960s-1980s, it was clear that the law of piracy was not being applied to acts of marine terrorism

Achille Lauro Incident (1985)

In 1985, four armed men who claimed to represent the Palestinian Liberation Front took control of an Italian cruiseliner on the high seas. However, they had laid on board after boarding in Genova, rather than boarding the ship from another vessel on the high seas, preventing the definition of piracy from being enlivened. Moreover, they killed a Jewish-American prisoner by shooting him dead and pushing him over the side of the vessel, and did this to make a political point, rather than for a commercial advantage or to otherwise loot the ship. From this incident, it was evident that piracy did not apply to incidents that commenced purely on board one vessel.

- The *1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation* remedied the situation in the *Achille Lauro Incident* (1985), by establishing international criminal offences relating to the safety of maritime navigation, including the seizing of control of a ship by force
- Maritime terrorism and other terrorism are now the subject of a treaty-based system of quasi-universal jurisdiction; this is not true jurisdiction, as jurisdiction may only be exercised over crimes committed on the territory of parties or over nationals of parties to the convention
  - A sufficient number of states have ratified these conventions, providing a broad enough basis for states to take action against a whole host of terrorist attacks (e.g., financing terrorists, bombing, aircraft hijacks, etc.)
- These conventions require some sort of connection between the state party to the convention and the offender/the place of the offence
- "Unlike those offenses supporting universal jurisdiction under customary international law - that is, piracy, war crimes, and crimes against humanity - that now have fairly precise definitions and that have achieved universal condemnation, 'terrorism' is a term as loosely deployed as it is powerfully charged." - *US v Yousef* (2003) US ct of Ap, 2nd Circuit (contra *US v Yunis* (1991))

7.2.5.2 Genocide

- Genocide refers to the killing or other crimes with the intent to destroy, in part or in whole, a national, ethnical, racial or religious group
- Genocide requires an additional fault element (*dolus specialis*)
  - If there was a special intention to destroy a group that was manifest even through only one murder, that will amount to genocide, making it subject to universal jurisdiction

***A-G v Eichmann* (Dist Ct of Jerusalem, 1961)**

See the existing note for this case under the Protective Principle on Page 100.

"These crimes…are grave offences against the law of nations itself … international law, in the absence of an International [Criminal] Court, is in need of the judicial and legislative organs of every country to give effect to its criminal interdictions and bring the criminals to trial. The jurisdiction to try crimes under international law is universal." This case was held to have three bases for jurisdiction:

- Passive personality principle
- Protective principle
- Universality principle (the crimes committed were grave offences against the laws of natures themselves)

This case also demonstrated that the ICC has limitations, and continues to have salience today for national courts to take actions in cases of genocide.

***Nulyarimma v Thompson* (1999) FCAFC**

See the existing note for this case on Page 51.

The FCAFC was not prepared to accepted that genocide comprised part of Australian common law, but noted that the court did accept that genocide could be subject to universal jurisdiction and that it was up to each state to determine themselves how they will exercise that jurisdiction. Wilcox J noted that "[u]niversal jurisdiction conferred by the principles of international law is a component of sovereignty … and the way in which sovereignty is exercised will depend on each common law country's peculiar constitutional arrangements."

7.2.5.3 War Crimes and Crimes Against Humanity

- The *1945 Charter of the International Military Tribunal at Nuremberg*, created after the Second World War, defines crimes against peace (i.e., aggression), war crimes and crimes against humanity
- In Australia, Brennan J in *Polyukhovich v Commonwealth* (War Crimes Act Case) (1991) HCA at [33] held that "a law which vested in an Australian court a jurisdiction recognized

by international law as a universal jurisdiction is a law with respect to Australia's external affairs…international law recognizes a State to have universal jurisdiction to try suspected war criminals"

  - This case concerned the constitutionality of legislation passed in Australia that had retrospective effect vested in Australia's criminal jurisdiction with respect to crimes committed in Europe in WW2
  - Following Brennan J, the Court held that this legislation was valid, and that states have rights to exercise universal jurisdiction over war criminals

- Presently, the *Criminal Code 1995* (Cth) implements the *1998 Rome Statute of the International Criminal Court* into Australian law, which defines war crimes and crimes against humanity in more detail (the *War Crimes Act* is now repealed)

***Arrest Warrant (Democratic Republic of the Congo v Belgium)* (2002) ICJ**

This case addresses the immunity of foreign affairs ministers and the concept of universal jurisdiction over war crimes and crimes against humanity. The case arose when Belgium initiated a prosecution against the Foreign Affairs Minister of the Democratic Republic of the Congo, asserting universal jurisdiction *in absentia* despite the lack of any connection between Belgium and the offence; neither the offence nor the perpetrator had links to Belgium, and there were no Belgian victims involved. This represented a bold application of universal jurisdiction, as the accused was not in custody and had no ties to the prosecuting state.

The primary issue in the case was the immunity of the Congolese Foreign Affairs Minister, but a subsidiary question emerged: can a state exercise universal jurisdiction over an offence or offender with no connection to that state, particularly in absentia? The ICJ ultimately did not address this question directly, as it ruled that the minister was protected by immunity. However, the case sparked important discussions on universal jurisdiction in absentia through separate opinions by several judges. Judges Higgins, Kooijmans, and Buergenthal opined that "a State may choose to exercise a universal criminal jurisdiction in absentia [provided] certain safeguards are in place … [i.e. no violation of immunity, jurisdiction only over 'most heinous' crimes, including war crimes and crimes against humanity]". In contrast, Judge Guillaume expressed a more restrictive view, arguing that customary international law recognises only one true case of universal jurisdiction - piracy. These views, while influential, were not part of the court's official judgment but were expressed in separate opinions, highlighting the ongoing debate over the scope and application of universal jurisdiction in international law.

***Criminal Complaint against Donald Rumsfeld* (2007) German Prosecutor-General**

The case was brought before the German Prosecutor-General, targeting the former U.S. Secretary of Defense for alleged war crimes involving acts of torture during the Iraq War, specifically at Abu Ghraib prison in Iraq and Guantanamo Bay. The complaint accused Rumsfeld of responsibility for these acts, which were described as some of the most severe instances of torture within the U.S. prison system in Iraq. The prosecution was initiated in Germany, despite Rumsfeld neither being present in the country nor expected to be, raising questions about the application of universal jurisdiction over such crimes.

The German Prosecutor-General, however, decided not to proceed with the case and provided a detailed explanation for this decision. Under German law, prosecutors have the discretion to refuse to institute proceedings when the defendants and their acts lack any connection to Germany. The Prosecutor-General determined that the alleged wrongdoing had no link to Germany whatsoever, and thus, despite the technical ability to exercise universal jurisdiction over such war crimes, it was deemed more appropriate for the U.S. justice system to handle the matter. The Prosecutor-General emphasised that a "legitimizing domestic linkage" was necessary to justify German jurisdiction over crimes committed by foreigners against foreigners outside the country, a linkage that was absent in this case. This case highlights the permissive nature of universal jurisdiction, meaning it allows states to exercise jurisdiction over certain international crimes but does not mandate them to do so, although in some circumstances there may be an obligation to exercise such jurisdiction.

7.2.5.4 Torture

- Torture is defined in *1984 Convention Against Torture* Art 1(1)
- For the purposes of international law, torture refers to state torture (i.e., only at the hands of a state official)
- It is widely accepted that torture is subject to universal jurisdiction

1984 Convention Against Torture Article 1

1. For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.
2. This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.

Pinochet (No 3) (2000) HoL

Between 1973 and 1990, Pinochet oversaw a regime that violated the rights of people following a coup in 1973 that deposed the democratically-elected government. After leaving office, Pinochet in 1998 travelled to the UK for medical treatment, where he was made the subject of an extradition request by the Spanish government to face criminal charges in Spain. The UK courts had to determine if they had jurisdiction over Pinochet as a former head of state of Chile. In their judgement, the Law Lords noted that torture may attract universal jurisdiction. Lord Brown-Wilkinson stated that the "The jus cogens nature of the international crime of torture justifies states in taking universal jurisdiction over torture wherever committed. International law provides that offences jus cogens may

be punished by any state…"

- There have been attempts to invoke state torture against people who are absent from the forum exercising jurisdiction; different approaches are taken as to whether such jurisdiction can be maintained in absentia

***National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre* (2013) SA Const Court**

This case involved an investigation into alleged acts of torture committed in Zimbabwe by officials of the Zimbabwe state. The South African Constitutional Court held that "it would appear that the predominant international position is that presence of a suspect is required at a more advanced stage of criminal proceedings…". Moreover, they held that "the exercise of universal jurisdiction for purposes of the investigation of an international crime committed outside our territory, may occur in the absence of a suspect without offending our Constitution or international law."

7.2.6 Prosecution and Extradition

- A question arises whether there is a duty or prosecute or extradite a defendant relation to these severe crimes (*aut dedere aut judicare*?)
- Generally, there is an obligation to do so under several treaties (and potentially at customary international law)
- The adoption of a permissive jurisdiction means that if a crime can be identified, a state can assert jurisdiction over the offender
- There are some crimes subject to universal jurisdiction, which are subject to a mandatory requirement to exercise jurisdiction
  - If a state has custody of such a defendant, they must either prosecute them, or extradite them to a state where they will face prosecution (this is found arguably at customary international law, and is certainly a matter of treaty law in relation to a number of offences)

***Belgium v Senegal* (2012) ICJ**

Belgium accused Senegal of violating the *Convention Against Torture* by failing to prosecute or extradite the former President of Chad, who was accused of torture and present in Senegal. Senegal, as a party to the Convention, was bound by its obligations, particularly under Article 7, which mandates that states either prosecute or extradite individuals accused of torture to prevent them from escaping the consequences of their actions. Belgium, despite having no direct involvement in the matter, argued that Senegal's inaction contravened the Convention, and the Court agreed, emphasising that Article 7 serves as a critical mechanism to ensure suspects face accountability for their criminal responsibility.

The Court highlighted that Senegal was obligated to submit the case to its competent

authorities for prosecution within a reasonable time, or, if an extradition request was made, it could fulfill its obligation by extraditing the accused. However, Senegal failed to take either action in a timely manner, thereby breaching its duties under the Convention. This case underscores the importance of Article 7 as a core provision of the *Convention Against Torture*, designed to prevent impunity by ensuring that states actively address allegations of torture through prosecution or extradition.

7.3 Jurisdiction of the ICJ

- The *Rome Statute of the International Criminal Court* provides for the broad jurisdiction of the ICC, and has been broadly adopted (but not universally adopted)
- The ICJ maintains subject matter jurisdiction over genocide, war crimes, crimes against humanity, and aggression (including the planning of, preparation, initiation or execution of an act of aggression)
- Personal jurisdiction, governed by *Rome Statute of the International Criminal Court* Article 12, delineates which offenders can be subjected to the ICJ's jurisdiction; it has two general criteria:
  - The crime is committed in the territory of a party to the Statute, or by a national or a party (i.e., the offender is a national of the state)
  - The state is a party to the *Rome Statute of the International Criminal Court*

***Rome Statute of the International Criminal Court* Article 12**

Preconditions to the exercise of jurisdiction

1. A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5.
2. In the case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:
   (a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;
   (b) The State of which the person accused of the crime is a national.
3. If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9.

- Complementarity under *Rome Statute of the International Criminal Court* Art 17 refers to the notion that if a state cannot prosecute a crime, the ICC has jurisdiction to do so

- This echoes *A-G v Eichmann* (Dist Ct. of Jerusalem, 1961), and supports the notion that whilst states have primary responsibility for enforcing criminal law, the ICC is a fallback; i.e., it complements jurisdiction, rather than replacing it

***Rome Statute of the International Criminal Court* Article 17**

Issues of admissibility

1. Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:
   (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;
   (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;
   (c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3;
   (d) The case is not of sufficient gravity to justify further action by the Court.
2. In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:
   (a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5;
   (b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;
   (c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.
3. In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.

- Under *Rome Statute of the International Criminal Court* Art 25, individuals can be held responsible and liable for the commission of crimes

Rome Statute of the International Criminal Court **Article 25**

Individual Criminal Responsibility

1. The Court shall have jurisdiction over natural persons pursuant to this Statute.
2. A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute.
3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:
   (a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;
   (b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;
   (c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;
   (d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:
      (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
      (ii) Be made in the knowledge of the intention of the group to commit the crime;
   (e) In respect of the crime of genocide, directly and publicly incites others to commit genocide;
   (f) Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.

3 *bis*. In respect of the crime of aggression, the provisions of this article shall apply only to persons in a position effectively to exercise control over or to direct the political or military action of a State.

4. No provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law.

- Under *Rome Statute of the International Criminal Court* Art 27, the official capacity of a person shall not be a defence to the commission of a crime under the jurisdiction of the ICC (i.e., a cleaner and a head of state are equally liable for the commission of a crime)

- If the ICC has assumed jurisdiction over an individual who has committed a crime in a territory party to the *Rome Statute*, or of a national of a state party to the *Rome Statute*, immunity cannot be raised; individuals will be treated as the same, and cannot invoke their official status to escape individual criminal responsibility

***Rome Statute of the International Criminal Court* Article 27**

Irrelevance of official capacity

1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.

2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.

7.3.1 Relevance of Illegally Obtained Custody

- Sometimes, an individual may have been brought into custody in breach of the law of one or more jurisdictions

- There is a divergence of views as to whether illegally obtained custody renders the exercise of criminal jurisdiction by a domestic or international criminal court unlawful; there is moreover no consensus on this point, as various courts have taken different approaches

7.3.1.1 Domestic Courts

- *A-G v Eichmann (Dist Ct of Jerusalem, 1961)*
  - This case is a common law authority for the proposition that the illegality of arrest irrelevant, and in any event Argentina waived all claims to assert jurisdiction over Eichmann
  - Whilst this ordinarily would have comprised a breach of Argentine sovereignty, it was not an impediment to the Court exercising jurisdiction, as Argentina had later waived any claim concerning the violation of its sovereignty

- *State v Ebrahim (SupCTSA, 1992)*
  - In this case, a member of the ANC was abducted by South Africa from Swaziland
  - The SA court was held to have no jurisdiction over this member, serving to protect the rights of the individual and also to respect state sovereignty

- *Moti v R (2011, HCA)*
  - In this case, the HCA permanently stayed the prosecution of the former Attorney-General of the Solomon Islands, who had been removed unlawfully from Solomon Islands to Australia to face charges for child sex offences

- The former Attorney-General successfully raised illegality obtained custody
- He was now an Australian citizen, but had conducted sex offences in Vanuatu
- He had been removed to Australia in 2007, but this removal was unlawful under Solomon Islands law
- The HCA held that after stating that the end of criminal prosecution does not justify securing the presence of the accused, his prosecution had to be permanently stayed

7.3.1.2 International Criminal Courts

- 'Universally condemned offences are a matter of concern to the international community as a whole. … There is a legitimate expectation that those accused of these crimes will be brought to justice swiftly. Accountability for these crimes is a necessary condition for the achievement of international justice, which plays a critical role in the reconciliation and rebuilding based on the rule of law of countries and societies torn apart by international and internecine conflicts … This legitimate expectation needs to be weighed against the principle of State sovereignty and the fundamental human rights of the accused.' - *Prosecutor v Nikolić* (CITY Appeals Chamber, 2003)
  - This case involved unlawful prosecution in Bosnia, as the ICC had custody of an offender that was acquired unlawfully
  - The defendant challenged the ICC by claiming that his unlawful detention made the proceedings unlawful
  - This case holds that for more serious charges, the more likely that any irregularities in jurisdiction (in terms of custody of the offender) would be overlooked, in pursuit of justice