Ateneo de Manila University

PUBLIC INTERNATIONAL LAW

International law (IL) – A system of norms that governs the relationship of States with other States; and States with other international organizations.

- We call it law and not a system because States ultimately believe it is binding. States ultimately consent to its binding power.
- Consent is at the heart of IL. It's not the consent of all, but it's a consent of the majority of affected states.

Municipal vs. International Law

1. **Dualist view** – International and municipal laws are two separate legal systems which exist independently or each other, each with its own lawmaking authority.
2. **Monist view** – Both international and municipal law form part of one single legal order.
    a. Kelsen: The ultimate source of the validity of all law derives from a basic rule (Grundnorm) of international law.
    b. International law merely legitimizes the existence of national legal systems, but it does not pre-determine, or set limits on, the validity or content of the rules that national legal systems enact.

Legal order		What prevails
Monist		IL, because of grundnorm
Dualist	International tribunal	IL
	Domestic tribunal	Domestic law

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.

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.

- Legal basis why treaties prevail over domestic law.

Articles on the Responsibility of States for Internationally Wrongful Act (ARSIWA)

Article 3
Characterization of an act of a State as internationally wrongful

The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law.

Article 32
Irrelevance of internal law

The responsible State may not rely on the provisions of its internal law as justification for failure to comply with its obligations under this part.

- Legal basis why custom prevails over domestic law.

Philippine Municipal and International Law

Constitutional provisions

Art. II, § 2

The Philippines renounces war as an instrument of national policy, adopts the generally accepted principles of international law as part of the law of the land and adheres to the policy of peace, equality, justice, freedom, cooperation, and amity with all nations.

Art. VII, § 21

No treaty or international agreement shall be valid and effective unless concurred in by at least two-thirds of all the Members of the Senate.

Art. VIII, § 4 (2)

All cases involving the constitutionality of a treaty, international or executive agreement, or law, which shall be heard by the Supreme Court *en banc*, and all other cases which under the Rules of Court are required to be heard *en banc*, including those involving the constitutionality, application, or operation of presidential decrees, proclamations, orders, instructions, ordinances, and other regulations, shall be decided with the concurrence of a majority of the Members who actually took part in the deliberations on the issues in the case and voted thereon.

Art. VIII, § 5 (2) (a)

The Supreme Court shall have the following powers:

[xxx]

(2) Review, revise, reverse, modify, or affirm on appeal or

certiorari, as the law or the Rules of Court may provide, final judgments and orders of lower courts in:

(a) All cases in which the constitutionality or validity of any treaty, international or executive agreement, law, presidential decree, proclamation, order, instruction, ordinance, or regulation is in question.

Source of international law	How adopted
Treaties	Doctrine of transformation (art. VII, § 18)
Custom and general principles of law	Doctrine of incorporation (art. II, § 2)
Judicial decisions and teachings of the most highly qualified publicists of the various nations	No need to adopt

Proving treaties–by judicial notice

Rule 129
What need not be proved

Section 1. Judicial notice, when mandatory. - A court shall take judicial notice, without the introduction of evidence, of the existence and territorial extent of states, their political history, forms of government and symbols of nationality, the law of nations, the admiralty and maritime courts of the world and their seals, the political constitution and history of the Philippines, official acts of the legislative, executive and judicial departments of the National Government of the Philippines, the laws of nature, the measure of time, and the geographical divisions.

Section 2. Judicial notice, when discretionary. - A court may take judicial notice of matters which are of public knowledge, or are capable of unquestionable demonstration, or ought to be known to judges because of their judicial functions.

Section 3. Judicial notice, when hearing necessary. - During the pre-trial and the trial, the court, motu proprio or upon motion, shall hear the parties on the propriety of taking judicial notice of any matter.

Before judgment or on appeal, the court, motu proprio or upon motion, may take judicial notice of any matter and shall hear the parties thereon if such matter is decisive of a material issue in the case.

Proving custom

Article 11. Customs which are contrary to law, public order or public policy shall not be countenanced.

Article 12. A custom must be proved as a fact, according to the rules of evidence.

How invoked or proven

Source of law	Manner of proof
Treaty	Judicial notice (R129.1)
Custom	Arts. 11-12, Civil Code
General principles of law	Judicial notice

Bayan Muna v. Romulo
[SCPH, 2011]

The categorization of subject matters that may be covered by international agreements mentioned in *Eastern Sea Trading* is not cast in stone. There are no hard and fast rules on the propriety of entering, on a given subject, into a treaty or an executive agreement as an instrument of international relations. The primary consideration in the choice of the form of agreement is the parties' intent and desire to craft an international agreement in the form they so wish to further their respective interests. Verily, the matter of form takes a back seat when it comes to effectiveness and binding effect of the enforcement of a treaty or an executive agreement, as the parties in either international agreement each labor under the *pacta sunt servanda* principle.

But over and above the foregoing considerations is the fact that–save for the situation and matters contemplated in Sec. 25, Art. XVIII of the Constitution–when a treaty is required, the Constitution does not classify any subject, like that involving political issues, to be in the form of, and ratified as, a treaty.

Commissioner of Customs v. Eastern Sea Trading
[SCPH, 1961; overruled 2011]

The right of the Executive to enter into binding agreements without the necessity of subsequent Congressional approval has been confirmed by long usage. From the earliest days of our history we have entered into executive agreements covering such subjects as commercial and consular relations, most-favored-nation rights, patent rights, trademark and copyright protection, postal and navigation arrangements and the settlement of claims. The validity of these has never been seriously questioned by our courts.

International agreements involving political issues or changes of national policy and those involving international arrangements of a permanent character usually take the form of treaties. But international agreements embodying adjustments of detail carrying out well-established national policies and traditions and those involving arrangements of a more or less temporary nature usually take the form of executive agreements.

What may be included in executive agreements

Eastern Sea Trading	**Bayan Muna v. Romulo** (controlling)
Executive agreements may only cover commercial and consular relations,	The primary consideration in the choice of the form of agreement is the parties'

most-favored-nation rights, patent rights, trademark and copyright protection, postal and navigation arrangements and the settlement of claims (*i.e.,* adjustments of detail carrying out policies).	intent and desire to craft an international agreement in the form they so wish to further their respective interests.

Principle of autolimitation

Tañada v. Angara
[SCPH, 1997]

A portion of sovereignty may be waived without violating the constitution, based on the rationale that the Philippines "adopts the generally accepted principles of international law as part of the law of the land, and adheres to the policy of … cooperation and amity with all the nations." By their inherent nature, treaties really limit or restrict the absoluteness of sovereignty. Nations may surrender some aspects of their state power in exchange for greater benefits granted by or derived from a convention or pact.

SC confusing incorporation and transformation

Reyes v. Bagatsing
[SCPH, 1983]

The Constitution "adopts the generally accepted principles of international law as part of the law of the land." To the extent that the Vienna Convention[1] is a restatement of the generally accepted principles of international law, it should be a part of the law of the land.

Executive agreements vs. treaties (in US plane)

BAYAN v. Zamora
[SCPH, 2000]

Section 25, Article XVIII disallows foreign military bases, troops, or facilities in the country, unless the following conditions are sufficiently met:

(a) it must be under a treaty;
(b) the treaty must be duly concurred in by the Senate and, when so required by congress, ratified by a majority of the votes cast by the people in a national referendum; and
(c) recognized as a treaty by the other contracting state.

In international law, there is no difference between treaties and executive agreements in their binding effect upon states concerned, as long as the negotiating functionaries have remained within their powers. International law continues to make no distinction between treaties and executive agreements: they are equally binding obligations upon nations.

President cannot be compelled to ratify a treaty, nor submit it for the Senate's concurrence

Pimentel v. Executive Secretary
[SCPH, 2005]

Petitioners' submission that the Philippines is bound under treaty law and international law to ratify the treaty which it has signed is without basis. The signature does not signify the final consent of the state to the treaty. It is the ratification that binds the state to the provisions thereof. Ratification is the act by which the provisions of a treaty are formally confirmed and approved by a State. By ratifying a treaty signed on its behalf, a state expresses its willingness to be bound by the provisions of such a treaty. After the treaty is signed by the state's representative, the President, being accountable to the people, is burdened with the responsibility and the duty to carefully study the contents of the treaty and ensure that they are not inimical to the interest of the state and its people. Thus, the President has the discretion even after the signing of the treaty by the Philippine representative whether or not to ratify the same.

It should be emphasized that under our Constitution, the power to ratify is vested in the President, subject to the concurrence of the Senate. The role of the Senate, however, is limited only to giving or withholding its consent, or concurrence, to the ratification. Hence, it is within the authority of the President to refuse to submit a treaty to the Senate or, having secured its consent for its ratification, refuse to ratify it. Although the refusal of a state to ratify a treaty which has been signed in its behalf is a serious step that should not be taken lightly, such a decision is within the competence of the President alone, which cannot be encroached by this Court via a writ of *mandamus*.

Constitution > Treaties (police power)

Lim v. Executive Secretary
[SCPH, 2002]

From the perspective of public international law, a treaty is favored over municipal law pursuant to the principle of *pacta sunt servanda*. Hence, "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith." Further, a party to a treaty is not allowed to "invoke the provisions of its internal law as justification for its failure to perform a treaty." Our Constitution espouses the opposing view. Witness our jurisdiction as stated in Section 5 of Article VIII, In *Ichong v. Hernandez*, we ruled that the provisions of a treaty are always subject to qualification or amendment by a subsequent law, or that it is subject to the police power of the State. The foregoing premises leave us no doubt that US forces are prohibited from engaging in an offensive war on Philippine territory.

'Recognized as a treaty' in the context of Art. XVIII, § 25.

Nicolas v. Sombillo
[SCPH, 2009]

The fact that the VFA was not submitted for advice and consent of the United States Senate does not detract from its status as a binding international agreement or treaty recognized by the said State. For this is a matter of internal United States law. Notice can be taken of the internationally known practice by the United States of submitting to its Senate for advice and consent

[1] The Vienna Convention on Diplomatic Relations is a treaty, which the Philippines ratified on Nov. 15, 1965.

agreements that are policymaking in nature, whereas those that carry out or further implement these policymaking agreements are merely submitted to Congress, under the provisions of the so-called Case–Zablocki Act, within sixty days from ratification.

It was not the intention of the framers of the 1987 Constitution, in adopting Article XVIII, Sec. 25, to require the other contracting State to convert their system to achieve alignment and parity with ours. It was simply required that the treaty be recognized as a treaty by the other contracting State. With that, it becomes for both parties a binding international obligation and the enforcement of that obligation is left to the normal recourse and processes under international law.

Treaty vs. statute

Sec'y of Justice v. Lantion
[SCPH, 2000, modified in 2021]

Under the doctrine of incorporation, rules of international law form part of the law of the land and no further legislative action is needed to make such rules applicable in the domestic sphere. The doctrine of incorporation is applied whenever municipal tribunals (or local courts) are confronted with situations in which there appears to be a conflict between a rule of international law and the provisions of the constitution or statute of the local state. Efforts should first be exerted to harmonize them, so as to give effect to both since it is to be presumed that municipal law was enacted with proper regard for the generally accepted principles of international law in observance of the Incorporation Clause. In a situation, however, where the conflict is irreconcilable and a choice has to be made between a rule of international law and municipal law, jurisprudence dictates that municipal law should be upheld by the municipal courts for the reason that such courts are organs of municipal law and are accordingly bound by it in all circumstances.

The fact that international law has been made part of the law of the land does not pertain to or imply the primacy of international law over national or municipal law in the municipal sphere. The doctrine of incorporation, as applied in most countries, decrees that rules of international law are given equal standing with, but are not superior to, national legislative enactments. Accordingly, the principle *lex posterior derogat priori takes effect*—a treaty may repeal a statute and a statute may repeal a treaty. In states where the constitution is the highest law of the land, such as the Republic of the Philippines, both statutes and treaties may be invalidated if they are in conflict with the constitution.

Treaty vs. statute–current guidelines

Pangilinan v. Cayetano ❤️
[SCPH, 2021]

As primary architect of foreign policy, the president enjoys a degree of leeway to withdraw from treaties. However, this leeway cannot go beyond the president's authority under the Constitution and the laws. In appropriate cases, legislative involvement is imperative. The president cannot unilaterally withdraw from a treaty if there is subsequent legislation which affirms and implements it.

Conversely, a treaty cannot amend a statute. When the president enters into a treaty that is inconsistent with a prior statute, the president may unilaterally withdraw from it, unless the prior statute is amended to be consistent with the treaty. A statute enjoys primacy over a treaty. It is passed by both the House of Representatives and the Senate, and is ultimately signed into law by the president. In contrast, a treaty is negotiated by the president, and legislative participation is limited to Senate concurrence. Thus, there is greater participation by the sovereign's democratically elected representatives in the enactment of statutes.

Thus, the president can withdraw from a treaty as a matter of policy in keeping with our legal system, if a treaty is unconstitutional or contrary to provisions of an existing prior statute. However, the president may not unilaterally withdraw from a treaty:

(a) when the Senate conditionally concurs, such that it requires concurrence also to withdraw; or
(b) when the withdrawal itself will be contrary to a statute, or to a legislative authority to negotiate and enter into a treaty, or an existing law which implements a treaty.

<u>Basis for the guidelines:</u>

1. Mirror principle – The Executive may terminate, without congressional participation, genuinely "sole" executive agreements that have lawfully been made without congressional input. But the President may not entirely exclude Congress from the withdrawal or termination process regarding congressional-executive agreements or treaties that were initially concluded with considerable legislative input.
2. *Youngstown Sheet & Tube Co. Framework* – Three categories of executive action as regards the necessity of concomitant legislative action:
    a. When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate
    b. When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain
    c. When the President takes measures incompatible with the expressed or implied will of Congress, his power is at his lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.

Sources of International Law

Definition: The medium through which the rules of international law are created and accepted as valid and binding.

Article 38, ICJ Statute ⭐

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
    a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
    b. international custom, as evidence of a general practice accepted as law;
    c. the general principles of law recognized by civilized nations;
    d. 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 bond*, if the parties agree thereto.

In short:
1. Treaties
2. International customs
3. General principles of law
4. Judicial decisions
5. Teachings of the most highly qualified publicists of the various nations

The *distinction* between sources of law in (1)–(3) and "subsidiary means" in (4-5) is that the former immediately create the rules of law, while the latter provide the evidence or describe the process of the creation of those rules.
- In the primary sources, there's no hierarchy, because they can coexist.
- The list is exhaustive!

Treaties

Article 2 (a), VCLT

"[T]reaty" 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.

- Terms used as a *synonym* of treaties are agreement, pact, convention, understanding, protocol, charter, statute, act, covenant, declaration, engagement, arrangement, accord, regulation, and provision. They all have the same legal weight.
- They all have the same legal weight.

Two types:
1. Law-making treaties
2. Contract treaties

International law requires no differentiation between treaties and their legal force on the preceding grounds.

Governing rules–The VCLT
- The 1969 Vienna Convention on the Law of Treaties (VCLT) came into force on Jan. 27, 1980. It has no retroactive effect (art. 4).
- Nevertheless, most of its provisions attempt to codify the customary laws relating to treaties.
- In any case, a treaty has to be concluded between states and governed by international law.
    - Thus, no agreement between a state and a private entity will fall within the scope of the VCLT.

Why define?
- To know which instruments have binding force and to be implemented in good faith (art. 26).
- Thus, verbal agreements, by the definition in art. 2(a), are *not* regulated by the VCLT, but may be regulated by customary international rules.
- The definition of a treaty is meant to deal with situations where the relevance of an instrument has to be clarified when one party denies its binding treaty status.

Maritime Delimitation and Territorial Questions Between Qatar and Bahrain
[ICJ, 1994]

FACTS: The territorial dispute between Bahrain and Qatar began with the 1932 discovery of oil by BAPCO and the subsequent 1936 formal complaint by Qatar regarding disputed lands. Although the British government initially ruled in favor of Bahrain in 1939, the withdrawal of British presence in 1971 left both newly independent nations to navigate the friction alone, particularly as Bahrain discovered further oil and gas resources near the Hawar Islands in 1980. Despite multiple mediation attempts by Saudi Arabia throughout the 1970s and 80s—including King Fahd's 1983 settlement framework—tensions escalated into a security crisis in 1986 when Qatar intervened to stop Bahraini construction on Fasht al-Dibal. This long-standing deadlock, which even the 1990 "Doha minutes" failed to fully resolve, ultimately led Qatar to unilaterally take the matter to the International Court of Justice in July 1991 to seek a definitive legal resolution. Bahrain maintains that the Minutes were no more than a simple record of negotiations; that accordingly they did not rank as an international agreement and could not. therefore, serve as a basis for the jurisdiction of the Court

ISSUE: Does the ICJ have jurisdiction?

HELD: YES. The Doha Minutes include a reaffirmation of obligations previously entered into. Accordingly, they do not merely give an account of discussions and summarize points of agreements and disagreements. They enumerate the **commitments to which the Parties have consented**. They thus **create rights and obligations in international law** for the parties. They constitute an international agreement.

- The principal point in *Qatar v. Bahrain* made is that the content and substance of an instrument must be

prioritized over its form or the ostensible intention of drafters (language > intent)
- Any instrument regulating the allocation of rights or obligations to states *is a treaty*.
- Any bilaterally arranged instrument can be an international treaty if its content reveals an agreement between its parties and if parties have not formed mutual understanding to the opposite effect.

Unilateral declarations

Legal Status of Eastern Greenland (Denmark v. Norway)
[PCIJ, 1933]

FACTS: This case concerned a dispute between Denmark and Norway over sovereignty in Eastern Greenland. During negotiations, Denmark had offered certain concessions on another matter (Spitzbergen) important to Norway. In this context, and after careful consideration, the Norwegian Foreign Minister had made the "Ihlen Declaration." What Denmark desired to obtain from Norway was that the latter should do nothing to obstruct the Danish plans in regard to Greenland. The Declaration which the Minister for Foreign Affairs gave on July 22, 1919, on behalf of the Norwegian Government: "I told the Danish Minister to-day that the Norwegian Government would not make any difficulty in the settlement of this question."

ISSUE: Was the Ilhen declaration an engagement that obliged Norway to refrain from occupying any part of Greenland?

HELD: YES. What Denmark desired to obtain from Norway was that the latter should do nothing to obstruct the Danish plans in regard to Greenland. It is beyond all dispute that a reply of this nature given by the Minister for Foreign Affairs on behalf of his Government in response to a request by the diplomatic representative of a foreign power, in regard to a question falling within his province, is binding upon the country to which the Minister belongs. The promise was **unconditional and definitive**. As a result of the undertaking involved in the Ihlen declaration, Norway is under an obligation to refrain from contesting Danish sovereignty over Greenland as a whole, and *a fortiori* to refrain from occupying a part of Greenland.

- Denmark's construction was positive (to do), but the court said it was a negative obligation (not to do).
- Ihlen's declaration was strictly construed based on the language used.

Nuclear Tests Case (Australia v. France)
[ICJ, 1974]

FACTS: On 9 May 1973, Australia and New Zealand each instituted proceedings against France concerning tests of nuclear weapons which France proposed to carry out in the atmosphere in the South Pacific region. France stated that it considered the Court manifestly to lack jurisdiction and refrained from appearing at the public hearings or filing any pleadings.

ISSUE: Does the ICJ have jurisdiction?

HELD: NO. The Applications of Australia and New Zealand no longer had any object and that it was therefore not called upon to give any decision thereon. 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 inter-national negotiations, is binding. Whether a statement is made orally or in writing makes no essential difference, for such statements made in particular circumstances may create commitments in international law. Thus interested States may take cognizance of unilateral declarations and place confidence in them, and are entitled to require that the obligation thus created be respected.

- Relations thus created could be analogous to rights and obligations arising under any international treaty, because awareness may well involve reliance on, or acknowledgement of, the legal position proposed to be created, and thus forms part of an agreement between the two relevant States.
- There can also be unilateral acts that constitute an offer to another State and depend on the latter's acceptance, whereupon a fully fledged treaty relationship between the relevant States would be established.
- Out of all unilateral acts, protest is the only one which does not create obligations in the way that treaties create obligations.
- Gulapa: Unilateral statements are strictly construed, because they create liabilities.

Elements of a unilateral declaration
1. Public
2. Intention to be bound
3. Official or authorized statements ("organ")
4. Unconditional

Conclusion and entry into force

Article 9
Adoption of the text

1. The adoption of the text of a treaty takes place by the consent of all the States participating in its drawing up except as provided in paragraph 2.

2. The adoption of the text of a treaty at an international conference takes place by the vote of two thirds of the States present and voting, unless by the same majority they shall decide to apply a different rule.

- The adoption of the treaty's text does not, by itself, create any obligations.
- A treaty does not come into force for States until they consent to be bound by it, and the expression

of such consent usually comes after the adoption of the text.

Consent to be bound by a treaty

Article 11
Means of expressing consent to be bound by a treaty

The consent of a State to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed.

How consent may be expressed

1. **Signature** – Traditionally one of the most frequent means of consent. Its effect depends on the authority granted to the diplomat or the intentions of the negotiating states.
    a. Per art. 12 (1), signature expresses consent if the treaty provides for it, if the states agreed it should have that effect, or if the full powers of the representative indicate such an intention.
2. **Ratification** – This is the formal process by which a State confirms its willingness to be bound, usually after the initial signature.
    a. It often involves the head of State approving the treaty. In some countries (like the US), this requires legislative approval.
    b. It strictly takes effect only when instruments of ratification are **exchanged** (between states) or **deposited** with a designated depositary (common for multilateral treaties).
    c. Per art. 14 (1), it is used when the treaty expressly requires it, when states agreed it was necessary, or when a representative signs subject to ratification.
3. **Accession** – Accession is the method used by a State to become a party to a treaty that it **did not participate in negotiating**.
4. **Acceptance**
5. **Approval**
6. **Exchange of instruments** – Mentioned in art. 11, this involves the physical exchange of the documents (the "instruments") that constitute the treaty between the parties to signal their mutual consent.

Treaty-making in PH jurisprudence

Pimentel v. Executive Secretary
[SCPH, 2005]

The usual steps in the treaty-making process are: negotiation, signature, ratification, and exchange of the instruments of ratification. The treaty may then be submitted for registration and publication under the UN Charter, although this step is not essential to the validity of the agreement as between the parties.

Negotiation may be undertaken directly by the head of state but he now usually assigns this task to his authorized representatives. These representatives are provided with credentials known as full powers, which they exhibit to the other negotiators at the start of the formal discussions. It is standard practice for one of the parties to submit a draft of the proposed treaty which, together with the counter-proposals, becomes the basis of the subsequent negotiations. The negotiations may be brief or protracted, depending on the issues involved, and may even "collapse" in case the parties are unable to come to an agreement on the points under consideration.

If and when the negotiators finally decide on the terms of the treaty, the same is opened for **signature**. This step is primarily intended as a means of authenticating the instrument and for the purpose of symbolizing the good faith of the parties; but, significantly, it does not indicate the final consent of the state in cases where ratification of the treaty is required. The document is ordinarily signed in accordance with the alternative, that is, each of the several negotiators is allowed to sign first on the copy which he will bring home to his own state.

Ratification, which is the next step, is the formal act by which a state confirms and accepts the provisions of a treaty concluded by its representatives. The purpose of ratification is to enable the contracting states to examine the treaty more closely and to give them an opportunity to refuse to be bound by it should they find it inimical to their interests. It is for this reason that most treaties are made subject to the scrutiny and consent of a department of the government other than that which negotiated them.

The last step in the treaty-making process is the **exchange of the instruments of ratification**, which usually also signifies the effectivity of the treaty unless a different date has been agreed upon by the parties. Where ratification is dispensed with and no effectivity clause is embodied in the treaty, the instrument is deemed effective upon its signature.

Entry into force

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.

- *General rule:* A treaty enters into force as soon as all the negotiating states have expressed their consent to be bound by it.
    - *Exception:* The negotiating states may insert an appropriate provision in the treaty itself (*e.g.,* entry into force on a fixed date, or a specified number of days or months after the last ratification).
- In case of multilateral agreements, a treaty often provides that it shall enter into force when it has been ratified by a specified number of states.
    - Still, when the minimum number of ratifications is reached, it does not enter into force for nonratifying states.

Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)
[ICJ, 2002]

FACTS: The Heads of State of Cameroon and Nigeria signed an agreement at Maroua for the partial delimitation of the maritime boundary between the two States ("Maroua Declaration"). By this declaration they agreed to extend the line of their maritime boundary, and accordingly adopted a boundary line defined by a series of points running from point 12 as referred to above to a point designated as G. British Admiralty Chart No. 3433, marked up accordingly, was likewise annexed to that Declaration. Nigeria denied the binding nature of the delimitation agreements referred to by Cameroon, in particular the Maroua Declaration, whose adoption, it claims, was never approved by the Supreme Military Council in contravention of Nigeria's constitutional requirements.

ISSUE: May Nigeria deny the validity of the Maroua Declaration?

HELD: NO. The Court considers that the Maroua Declaration constitutes an international agreement concluded between States in written form and tracing a boundary. Art. 46 (1), VCLT provides that "[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". The rules concerning the authority to sign treaties for a State are constitutional rules of fundamental importance. However, a limitation of a Head of State's capacity in this respect is not manifest in the sense of Art. 46 (2), unless at least properly publicized.

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.

- Acts that "defeat the object and purpose of a treaty" are not the same as violations of a treaty once it enters into force, and a much higher threshold is required to identify them.
- It has to be acts or conduct performed before the entry of the treaty into force, yet of the kind that would frustrate its operation after it would enter into force
- Art. 18 obligation comes to an end if the relevant State manifests its intention not to ratify the treaty it has signed

Registration

Article 102, UN Charter

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.

- Art. 102 was intended to prevent States entering into secret agreements without the knowledge of their nationals, and without the knowledge of other States, whose interests might be affected by such agreements.

Pacta sunt servanda

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.

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.

Exception to art. 27

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.

Gabcikovo-Nagymaros Project (Hungary v. Slovakia)
[ICJ, 2017]

FACTS: The case arose out of the signature, on 16 September 1977, by the Hungarian People's Republic and the Czechoslovak People's Republic, of a treaty concerning the construction and operation of the Gabcíkovo-Nagymaros system of locks in order to further the utilization of the natural resources of the Bratislava-Budapest section of the Danube river. It provided for the building of two series of locks, one at Gabcíkovo (in Czechoslovak territory) and the other at Nagymaros (in Hungarian territory), to constitute a single and indivisible operational system of works. As a result of intense criticism which the project had generated in Hungary, the Hungarian Government decided on 13 May 1989 to suspend the works at Nagymaros pending the completion of various studies. In October 1989, Hungary decided to not continue the work any further. Czechoslovakia also started investigating alternative solutions. One of them, an alternative solution subsequently known as "Variant C," entailed a unilateral diversion of the Danube by Czechoslovakia on its territory. The Hungarian Government transmitted to the Czechoslovak Government a note verbale unilaterally terminating the 1977 Treaty with effect from 25 May 1992.

ISSUE: May Czechoslovakia proceed with Variant C?

HELD: NO. It is true that Hungary, in concluding the 1977 Treaty, had agreed to the damming of the Danube and the diversion of its waters into the bypass canal. But it was only in the context of a joint operation and a sharing of its benefits that Hungary had given its consent. The suspension and withdrawal of that consent constituted a violation of Hungary's legal obligations, demonstrating, as it did, the refusal by Hungary of joint operation; but that cannot mean that Hungary forfeited its basic right to an equitable and reasonable sharing of the resources of an international watercourse. The Court accordingly concludes that Czechoslovakia, in putting Variant C into operation, was not applying the 1977 Treaty but, on the contrary, violated certain of its express provisions, and, in so doing, committed an internationally wrongful act. Variant C was not an approximate application of the treaty.

The Court is of the view, however, that although it has found that both Hungary and Czechoslovakia failed to comply with their obligations under the 1977 Treaty, this reciprocal wrongful conduct did not bring the Treaty to an end nor justify its termination. The Court would set a precedent with disturbing implications for treaty relations and the integrity of the rule *pucta 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. It would be otherwise, of course, if the parties decided to terminate the Treaty by mutual consent. But in this case, while Hungary purported to terminate the Treaty, Czechoslovakia consistently resisted this act and declared it to be without legal effect.

Reservations

Reservation is a unilateral statement ... 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 (*art. 2 (1) (d), VCLT*).

Elements and implications

1. Initially unilateral
2. It may be however phrased or named (content over title or form)
3. A reservation does not produce any inherent legal effect on its own–it merely purports to do so
4. A reservation aims at establishing a new *lex specialis* within the multilateral treaty regime (*i.e.,* the reserving State will be in a special position)

Validity or effect of reservations–Two approaches

1. Permissibility – The validity and effect of reservations depends on whether they are compatible with the criteria that govern the making of reservations.
2. Opposability – The effect of a reservation depends on whether it is accepted or rejected by the other States concerned.

Traditional rule

- A State could not make a reservation to a treaty unless the reservation was accepted by all the States which had signed or adhered to the treaty.

Reservations to the Genocide Convention
[ICJ, 1951]

QUESTIONS PRESENTED:

1. Can the reserving State be regarded as being a party to the Convention while still maintaining its reservation if the reservation is objected to by one or more of the parties to the Convention but not by others?
2. If the answer to Question 1 is in the affirmative, what is the effect of the reservation as between the reserving State and
    a. The parties which object to the reservation?
    b. Those which accept it?
3. What would be the legal effect as regards the answer to Question 1 if an objection to a reservation is made :
    a. By a signatory which has not yet ratified?
    b. By a State entitled to sign or accede but which has not yet done so?

HOLDING:

1. A State which has made and maintained a reservation which has been objected to by one or

more of the parties to the Convention but not by others, can be regarded as being a party to the Convention if the reservation is compatible with the object and purpose of the Convention; otherwise, that State cannot be regarded as being a party to the Convention.

2. -
   a. That if a party to the Convention objects to a reservation which it considers to be incompatible with the object and purpose of the Convention, it can in fact consider that the reserving State is not a party to the Convention;
   b. That if, on the other hand, a party accepts the reservation as being compatible with the object and purpose of the Convention it can in fact consider that the reserving State is a party to the Convention.
3. -
   a. That an objection to a reservation made by a signatory State which has not yet ratified the Convention can have the legal effect indicated in the reply to Question 1 only upon ratification. Until that moment it merely serves as a notice to the other State of the eventual attitude of the signatory State.
   b. That an objection to a reservation made by a State which is entitled to sign or accede but which has not yet done so, is without legal effect.

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.

General rule: Reservations can be made.

Except:

1. It's prohibited by the treaty
2. When only specified reservations may be made
3. The reservation is incompatible with the object and purpose of the treaty (*cf. Genocide Reservation*).

Reservations must follow art. 19 to have effect.

- Else, the reservation has no effect.
- Otherwise, the reservation will be assessed against arts. 20-22 (opposability)

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.

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.

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- Arts. 20-21 apply *only* to those reservations that have been validly made according to art. 19.
- Objective treaty obligations are simply not suited to the application of arts. 20-21.
    - With them, the matter ends with art. 19, as such treaty obligations cannot be fragmented and reservations to them cannot be made.
- The application of arts. 20 and 21 is *inherently unsuitable* for human rights and humanitarian treaties.
    - The compatibility of a reservation with the object and purpose of the Covenant must be established objectively, by reference to legal principles.

Breaking down art. 20–effect on entry into force

Case	Acceptance condition/s
Reservation is expressly authorized by the treaty (1)	No subsequent acceptance by other states is required
Limited negotiation pool where the treaty's "entirety" is an essential condition for consent (2)	The reservation requires acceptance by *all* parties
Constituent instrument of an international organization (3)	The reservation requires acceptance by the competent organ of that organization
Acceptance of a reservation by another contracting State (4a)	The reserving State becomes a party to the treaty in relation to the accepting State
Objection to a reservation by another contracting State (4b)	Does **not** preclude entry into force between the two States *unless the objecting State definitely expresses that intention*
Consent to be bound containing a reservation (4c)	Effective as soon as at least one other contracting State has accepted the reservation

** For nos. 2 and 4, silence/inaction for 12 months (or until consent to be bound is expressed, whichever is later), the reservation is considered tacitly accepted.*

Article 21 – legal effect of reservation

Situation	Effect
Reserving State vs. Accepting State	The treaty provisions are modified for the reserving State to the extent of the reservation
Accepting State vs. Reserving State	
Other Parties to the treaty (Third parties *inter se*)	The reservation does not modify the treaty for other parties in their relations with each other
Objecting State who does *not* oppose the treaty's entry into force	**The provisions to which the reservation relates do *not* apply between the two States *to the extent of the reservation***

Application of treaties

- Territorial scope (*ratione loci*) – A treaty is binding upon each party in respect of its entire territory (art. 29, VCLT).
- Temporal scope (*ratione temporis*) – A treaty can apply retroactively, but only if the contracting States clearly intend it to do so (art. 28, VCLT).
- Treaties and third States (*ratione personae*) – As a general rule, a treaty creates neither rights nor obligations for third States.

Interpretation 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.

- The rules aim at interpreting a treaty in a way that most accurately reflects the consent given to it by States-parties

- For instance, art. 31 (1) prioritizes the interpretation by reference to the plain and ordinary meaning of a treaty in the light of its object and purpose.
- This is to give relevance to the *principle of effectiveness* as a guiding principle.
- Thus, words contained in a treaty clause have to be understood in context
    - "Context" – Includes only elements agreed as between the parties; excluding unilateral agreements.

Whaling in the Antarctic (Australia v. Japan)
[ICJ, 2014]

FACTS: On 31 May 2010, Australia filed in the Registry of the Court an Application instituting proceedings against Japan in respect of a dispute concerning Japan's continued pursuit of a large-scale program of whaling under the Second Phase of its Japanese Whale Research Program under Special Permit in the Antarctic ('JARPA II')", in breach of obligations assumed by Japan under the International Convention for the Regulation of Whaling. The text in question was:

> *"Notwithstanding anything contained in this Convention any Contracting Government may grant to any of its nationals a special permit authorizing that national to kill, take and treat whales for purposes of scientific research subject to such restrictions as to number and subject to such other conditions as the Contracting Government thinks fit, and the killing, taking, and treating of whales in accordance with the provisions of this Article shall be exempt from the operation of this Convention. Each Contracting Government shall report at once to the Commission all such authorizations which it has granted. Each Contracting Government may at any time revoke any such special permit which it has granted."*

Australia asserts that Article VIII, paragraph 1, authorizes the granting of special permits to kill, take and treat whales only when non-lethal methods are not available, invoking the views of the experts it called, as well as certain IWC resolutions and Guidelines. Australia claims that IWC resolutions must inform the Court's interpretation of Article VIII because they comprise "subsequent agreement between the parties regarding the interpretation of the treaty" and "subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation", within the meaning of subparagraphs (a) and (b), respectively, of paragraph 3 of Article 31 of the Vienna Convention on the Law of Treaties.

ISSUE: May the IWC resolutions be used in interpreting Article VIII, paragraph 1 of the Convention?

HELD: NO. 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 (¶83). These recommendations, which take the form of resolutions, are not binding. However, when they are adopted by consensus or by a unanimous vote, they may be relevant for the interpretation of the Convention or its Schedule (¶43).

"Relevant rules of international law"

- It depends on what rules are concerned.
- If it's a rule that the treaty as *lex specialis* can legitimately derogate from, then it should *not* be taken into account.
- The definition of that term under general international law or any other treaty may inform the process of interpretation
    - If, of course, the word is defined in the treaty, then that prevails
- There may be rules of *jus cogens* which a treaty cannot validly derogate.
- In any case, the outcome as to the interpretation of a treaty is owed to the *relative hierarchical position* in which the relevant conventional or customary rules stand, and to determining whether the two rules or instruments would conflict with each other if the treaty were to be interpreted in a particular manner.

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.

- Preparatory work drafting a treaty has no major relevance in the process of interpretation
    - Only if art. 32 applies may the preparatory work be resorted to
- This is a high threshold requiring the fundamental unworkability of the interpretative outcome arrived at pursuant to art. 31.

Application of successive treaties relating to the same subject matter

Article 30 ⭐
Application of successive treaties relating to the same subject matter

1. Subject to Article 103 of the Charter of the United Nations, the rights and obligations of States

Parties to successive treaties relating to the same subject matter shall be determined in accordance with the following paragraphs.

2. When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.

3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.

4. When the parties to the later treaty do not include all the parties to the earlier one:
   a. as between States Parties to both treaties the same rule applies as in paragraph 3;
   b. as between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations;

5. Paragraph 4 is without prejudice to article 41, or to any question of the termination or suspension of the operation of a treaty under article 60 or to any question of responsibility which may arise for a State from the conclusion or application of a treaty the provisions of which are incompatible with its obligations towards another State under another treaty.

- The situation could that a party to a treaty subsequently enters into another treaty with the same subject matter, and the provisions of the two treaties are mutually inconsistent
- Art. 30 lays down the rules. However, it is subsidiary to specific treaties that contain clauses which determine the relationship of one particular treaty to other treaties
- The coherent pattern in the jurisprudence of international and national tribunal has endorsed the *primacy* of human rights treaty obligations over others

Invalidity and termination of treaties

Article 42

Validity and continuance in force of treaties

1. The validity of a treaty or of the consent of a State to be bound by a treaty may be impeached only through the application of the present Convention.
2. The termination of a treaty, its denunciation or the withdrawal of a party, may take place only as a result of the application of the provisions of the treaty or of the present Convention. The same rule applies to suspension of the operation of a treaty.

Grounds for invalidity:

1. Error or mistake (art. 48)
2. Fraud of another negotiating state (art. 49)
3. Corruption of its representative by another negotiating state (art. 50)
4. Void, if conflict with a *jus cogens* (art. 53)
5. Void, if subsequently becomes in conflict with a new peremptory norm of general international law (art. 64)
6. Consent has been procured by the coercion of its representative (art. 51)
7. If its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the UN Charter (art. 52)

Competence to conclude treaties under municipal law and its effect on the validity 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.

- Art. 46 is basically concerned with the relationship between the executive and the legislature within a State
- If a government of a State consent to a treaty, the burden of proving it has *not* validly consented lies on the party alleging invalidity
- There is no general legal obligation for States to keep themselves informed of legislative and constitutional developments in other States which are or may become important for the international relations of these states
- Art. 46 seems to be limited to cases where the constitutional rule in question is well-known and one party to the treaty knew that the other party was acting in breach of its own constitutional requirements

Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)
[ICJ, 2002]

Article 46. paragraph 1, of the Vienna Convention provides that "[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." It is true that the paragraph goes on to say "unless that violation was manifest and concerning a rule of its internal law of fundamental importance," while paragraph 2 of Article 46 pro- vides that "[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." The rules concerning the authority to sign treaties for a State are constitutional rules of fundamental importance. However, a limitation of a Head of State's capacity in this respect is not manifest in the sense of Article 46, paragraph 2, unless at least properly publicized. This is particularly so because Heads of State belong to the group of persons who, in accordance with Article 7, paragraph 2, of the Convention "[i]n virtue of their functions and without having to produce full powers" are considered as representing their State. Heads of State are considered as representing their State for the purpose of performing all acts relating to the conclusion of a treaty.

In this case the Head of State of Nigeria had in August 1974 stated in his letter to the Head of State of Cameroon that the views of the Joint Commission "must be subject to the agreement of the two Governments". However, in the following paragraph of that same letter, he further indicated: "It has always been my belief that we can, both, together re-examine the situation and reach an appropriate and acceptable decision on the matter." Contrary to Nigeria's contention, the Court considers that these two statements, read together, cannot be regarded as a specific warning to Cameroon that the Nigerian Government would riot be bound by any commitment entered into by the Head of State.

Termination of treaties

- A State cannot release itself from its treaty obligations whenever it feels like it
- Any treaty duly concluded and entered into force remains in force and binding for its parties, unless it has been validly terminated, or unless its provisions are superseded by those of another treaty (*see* art. 42 (2))
    - A notification of termination of a treaty can be withdrawn at any moment before the intended termination takes effect
    - A validly effected withdrawal does not affect treaty relations that have developed before withdrawal

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.

Two modes of withdrawal:

1. In accordance with the treaty itself
    a. Some treaties may contain provisions such as an automatic end after a certain time, or when a particular event occurs
    b. Other treaties merely give each party an option to withdraw, usually after giving a certain period of notice
2. By unanimous consent of all the contracting parties
    a. It may be implied.

If there's no provision on withdrawal

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.

- A right of denunciation or withdrawal can never be implied if the treaty contains an express provision concerning denunciation, withdrawal or termination

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.

Bilateral treaties

- Under art. 60 (1), termination does not take place automatically, and the injured party has to invoke it.
    - There's nothing to prevent the injured state from claiming compensation instead of invoking art. 60 (1)!
- A State invoking art. 60 has to demonstrate that "material breach" has already taken place and caused injury to it. Otherwise, the termination will be premature.

Gabcikovo-Nagymaros Project (Hungary v. Slovakia)
[ICJ, 2017]

ISSUE: Is Hungary entitled to terminate the 1977 Treaty on the ground that Czechoslovakia violated arts. 15, 19, and 20 as well as a number of other conventions and rules of general international law?

HELD: NO. That it is only a material breach of the treaty itself, by a State party to that treaty, which entitles the other party to rely on it as a ground for terminating the treaty. The violation of other treaty rules or of rules of general international law may justify the taking of certain measures, including countermeasures, by the injured State, but it does not constitute a ground for termination under the law of treaties.

ISSUE: Is Hungary entitled to terminate the 1977 Treaty on the ground that Czechoslovakia instituted Variant C?

HELD: NO. Czechoslovakia violated the Treaty only when it diverted the waters of the Danube into the bypass canal in October 1992. In constructing the works which would lead to the putting into operation of Variant C, Czechoslovakia did not act unlawfully. In the Court's view, therefore, the notification of termination by Hungary on 19 May 1992 was premature. No breach of the Treaty by Czechoslovakia had yet taken place and consequently Hungary was not entitled to invoke any such breach of the Treaty as a ground for terminating it when it did.

Multilateral treaties

- A material breach of a multilateral treaty by one of the parties entitle it to three possible remedies:
    - The other parties by UC suspend or terminate the treaty either between themselves and the defaulting state, or as among all parties
    - For the party affected by the breach to invoke it as a ground for suspending the treaty between itself and the defaulting state
    - For any party (other than the defaulting state) to invoke the breach to suspend the treaty 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
        - Example: Disarmament treaties
- Art. 60 (3) gives the definition of "material breach," but this is defective because it does not make clear that violation of an essential provision does not constitute a material breach unless it is a serious violation
    - But where a genuine material breach is involved, a State-party aggrieved through another party's breach has to have a choice as to whether:
        - terminate a treaty that is not yet inevitably dead or defunct, or
        - to strive for the reestablishment of the originally intended contractual balance between the parties
- Treaties relating to the protection of the human persons are not covered by art. 60 (*i.e.,* material breaches cannot be used for its termination)

Impossibility of performance

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.

- Art. 61 is very narrow in scope, relating to termination or suspension in consequence of the permanent or temporary disappearance or destruction of an object indispensable for its execution

- The impossibility must result from the permanent disappearance or destruction of an object indispensable for the treaty
    - But if the disappearance is caused by a breach, art. 61 cannot be invoked!

Rebus sic stantibus

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.

- A party is *not* bound to perform a treaty if there has been a fundamental change of circumstances since the treaty was concluded
    - This is not the same as saying that every treaty contains an implied term that it should remain in force only as long as circumstances remain the same as at the time of conclusion
- The rule applies only in the most exceptional circumstances

Fisheries Jurisdiction (UK v. Iceland)
[ICJ, 1973]

FACTS: The present case concerns a dispute between the Government of the United Kingdom and the Government of Iceland occasioned by the claim of the latter to extend its exclusive fisheries jurisdiction to a zone of 50 nautical miles around Iceland. In an exchange of notes, the parties agreed:

> *"The Icelandic Government will continue to work for the implementation of the Althing Resolution of May 5, 1959, regarding the extension of fisheries jurisdiction around Iceland, but shall give to the United Kingdom Government six months' notice of such extension, and, in case of a dispute in relation to such extension, the matter shall, at the request of either party, be referred to the International Court of Justice."*

In his letter of 29 May 1972 to the Registrar, the Minister for Foreign Affairs of Iceland refers to "the changed circumstances resulting from the ever-increasing exploitation of the fishery resources in the seas surrounding Iceland." In these statements the Government of Iceland is basing itself on the principle of termination of a treaty by reason of change of circumstances. Particularly, to the increased exploitation of the fishery resources in the seas surrounding Iceland and to the danger of still further exploitation because of an increase in the catching capacity of fishing fleets.

ISSUE: Was the 1961 Note terminated due to changed circumstances?

HELD: NO. International law admits that a fundamental change in the circumstances which determined the parties to accept a treaty, if it has resulted in a radical transformation of the extent of the obligations imposed by it, may, under certain conditions, afford the party affected a ground for invoking the termination or suspension of the treaty. One of the basic requirements embodied in art. 62 is that change of circumstances must have been a fundamental one. In order that a change of circumstances may give rise to a ground for invoking the termination of a treaty it is also necessary that it should have resulted in a radical transformation of the extent of the obligations still to be performed. The change must have increased the burden of the obligations to be executed to the extent of rendering the performance something essentially different from that originally undertaken. In this case, the alleged changes could not affect in the least the obligation to submit to the Court's jurisdiction, which is the only issue at the present stage of the proceedings. It follows that the apprehended dangers for the vital interests of Iceland, resulting from changes in fishing techniques, cannot constitute a fundamental change with respect to the lapse or subsistence of the compromissory clause establishing the Court's jurisdiction.

Gabcikovo-Nagymaros Project (Hungary v. Slovakia)
[ICJ, 2017]

The changed circumstances advanced by Hungary are, in the Court's view, not of such a nature, either individually or collectively, that their effect would radically transform the extent of the obligations still to be performed in order to accomplish the Project. A fundamental change of circumstances must have been unforeseen; the existence of the circumstances at the time of the Treaty's conclusion must have constituted an essential basis of the consent of the parties to be bound by the Treaty. The negative and conditional wording of Article 62 of the Vienna Convention on the Law of Treaties is a clear indication moreover that the stability of treaty relations requires that the plea of fundamental change of circumstances be applied only in exceptional cases.

Consequences of invalidity or termination of a treaty

- The consequences vary according to the nature of the cause of invalidity.

Cause of invalidity	Consequences
Coercion of a representative of a State (art. 51)	Void, and the expression of consent to be bound is "without legal effect"
Coercion of a State by the threat or use of force (art. 52)	
Treaties conflicting with a peremptory norm of general international law (*jus cogens*) (art. 53)	
Consent to be bound was in manifest violation and concerned a rule of its internal law of fundamental importance (art. 46)	The State may merely invoke the vitiating factor; the treaty is voidable; the treaty is valid until a State claims it is invalid
The representative to express the consent was unauthorized and the restriction was notified (art. 47)	In any case, the ground for invalidating the treaty is lost if, after becoming aware of the facts: a. It shall have expressly agreed that the treaty is valid or remains in force or continues in operation b. It must by reason of its conduct be considered as having acquiesced in the validity of the treaty or in its maintenance in force or in operation (art. 45)
Error relating to a fact or situation which was assumed by the state to exist at the time when the treaty was concluded and formed an essential basis of its consent (art. 48)	
Fraudulent conduct of another negotiating state (art. 49)	
Consent procured through the corruption of its representative by another negotiating state (art. 50).	

- A party challenging the validity of a treaty must notify the other parties to the treaty and give them time to make objections before it takes any action
- If objections are made, and if the resulting dispute is not settled within 12 months, art. 66 confers jurisdiction over the ICJ over disputes arising from art. 53 and confers jurisdiction over other disputes to a special conciliation commission
- Treaties void for conflict with *jus cogens* cannot be validated or acquiesced to
- Art. 71 provides for the unconditional and total voidness of treaties which contradict *jus cogens*, imposing on States-parties duties to
  - Eliminate as far as possible the consequences of any act performed in reliance on any provision which conflicts with the peremptory norm of general international law; and
  - Bring their mutual relations into conformity with the peremptory norm of general international law
- Depending on the type of invalidity in a treaty, it may become totally void, or some of its parts may remain valid (severability, art. 44)

Severability

Cause of invalidity	Severable?
Arts. 49 and 50	Yes, subject to art. 44 (3)
Arts. 51, 52, and 53 Art. 60 (material breach) Art. 56 (denunciation)	No

Requisites for severability

If the ground relates solely to particular causes, it may be invoked only with respect to those clauses where:

a. the said clauses are separable from the remainder of the treaty with regard to their application;
b. it appears from the treaty or is otherwise established that acceptance of those clauses was not an essential basis of the consent of the other party or parties to be bound by the treaty as a whole; <u>and</u>
c. continued performance of the remainder of the treaty would not be unjust (art. 44 (3), VCLT).

Consequences of termination of a treaty

Article 70

Consequences of the termination of a treaty

1. Unless the treaty otherwise provides or the parties otherwise agree, the termination of a treaty under its provisions or in accordance with the present Convention:
   a. releases the parties from any obligation further to perform the treaty;
   b. does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination.
2. If a State denounces or withdraws from a multilateral treaty, paragraph 1 applies in the relations between that State and each of the other parties to the treaty from the date when such denunciation or withdrawal takes effect

Article 71

Consequences of the invalidity of a treaty which conflicts with a peremptory norm of general international law

1. [xxx]
2. In the case of a treaty which becomes void and terminates under article 64, the termination of the treaty:
   a. releases the parties from any obligation further to perform the treaty;
   b. does not affect any right, obligation or

legal situation of the parties created through the execution of the treaty prior to its termination, provided that those rights, obligations or situations may thereafter be maintained only to the extent that their maintenance is not in itself in conflict with the new peremptory norm of general international law.

Consequences of suspension of a treaty

Article 72
Consequences of the suspension of the operation of a treaty

1. Unless the treaty otherwise provides or the parties otherwise agree, the suspension of the operation of a treaty under its provisions or in accordance with the present Convention:
    a. releases the parties between which the operation of the treaty is suspended from the obligation to perform the treaty in their mutual relations during the period of the suspension;
    b. does not otherwise affect the legal relations between the parties established by the treaty.
2. During the period of the suspension the parties shall refrain from acts tending to obstruct the resumption of the operation of the treaty.

Effect of outbreak of war or hostilities on a treaty

- The VCLT shall *not* prejudge any question that may arise regarding a treaty from the outbreak of hostilities between states (art. 73)
- Notably, termination grounds under the VCLT are defined exhaustively and war is not included among them.
    - War and armed conflict does not generically, let alone inevitably, amount to *rebus sic stantibus*, and it is not mentioned in art. 62
- The position is still that no positive rule enables States to terminate treaties just because war or hostilities have commenced
- The whole issue of the effect of armed conflicts on treaties should be seen through the prism of lawful countermeasures and belligerent rights that are available only to the State that is the victim of aggression

Custom

Definition: Evidence of a general practice of States accepted by law.

- *ICJ Statute:* International custom, as evidence of a general practice accepted as law

Distinction from treaty

- Treaty embodies expressly given consent
- Custom embodies consent *tacitly* given through:
    - State practice
    - Repetition of conduct
    - Accompanying legal conviction as to the legal nature of the underlying rule (*opinio juris*)

Nicaragua v. US
[ICJ, 1986]

FACTS: The dispute centered on activities of the United States government in relation to Nicaragua following the July 1979 fall of President Anastasio Somoza Debayle and the subsequent installation of a government by the Frente Sandinista de Liberación Nacional (FSLN). While initial U.S. attitudes toward the new government were favorable, relations soured by 1981 due to reports of Nicaraguan involvement in logistical support and arms provision for guerrillas in El Salvador. Opponents of the Nicaraguan government, known as "contras," formed irregular military forces to engage in armed opposition. The U.S. began providing the contras with significant multi-faceted support, including recruitment, training, arming, equipping, and financing. Nicaragua further alleged that U.S. personnel or those in their pay directly carried out military operations, including the mining of Nicaraguan ports in early 1984 and attacks on oil installations and naval bases. Additionally, the U.S. conducted high-altitude reconnaissance overflights and military maneuvers near Nicaragua's borders. The U.S. justified its actions by claiming it was acting in "collective self-defence" in response to Nicaraguan aggression against El Salvador, Honduras, and Costa Rica.

HELD: It is not to be expected that in the practice of States the application of the rules in question should have been perfect, in the sense that States should have refrained, with complete consistency, from the use of force or from intervention in each other's internal affairs. 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.

Elements of custom:

1. The objective element of "a general practice"
2. THe subjective element of being "accepted as law," or *opinio juris*

Customary law in municipal vs. international plane

- Domestic – Represent patterns of prevailing social attitude and consciousness, and thus bind individuals without their consent
- International – Custom binds states because they have consented to it

In any case, a **claimant State** which seeks to rely on a customary rule must prove that the rule has become binding on the defendant State. *How?*

- To show that the defendant State has recognized the rule in its own practice
- *Secondarily:* By showing that the rule is accepted by other States
    - In this case, the rule is binding on the defendant State, unless it can show that it has expressly and consistently rejected the rule since the earliest days of the rule's existence
    - Dissent expressed *after* the rule has become well established is too late to prevent the rule binding the dissenting State
- To **avoid being bound by the rule,** a State must **protest against the emergence of the rule persistently** (persistent objector).
    - Thus, the States must be sufficiently aware of the emergence of the new practice and law.
    - *Example:* Akehurst opines that the custom that because space powers launched rockets over other countries after 1957, and those other countries didn't complain, those countries effectively "agreed" (acquiesced) to a new law. However, you cannot agree with something that you don't know (*i.e.,* other states don't have the technological capacity to find out).
- The existence of custom does not turn on occasional consensus between the litigating States, but on the fulfillment of art. 38, ICJ Statute, as to the generality of State practice.
    - States are *not* in charge of the requirements as to how these rules are created.
    - States cannot create a customary rule without satisfying art. 38.

What happens to a brand-new country when it enters a world that already has established rules?

- When a new country is formed (*e.g.,* South Sudan or the states following the dissolution of the USSR), they find themselves in a system of Customary International Law (CIL) that was created long before they existed.
    - In traditional legal theory, a state is usually bound by CIL the moment it becomes a state.
    - In any case, it does not change how the rule was made in the first place

Customary rules on a bilateral basis

- It's possible, but the burden of proof is higher (*see Costa Rica v. Nicaragua*)

The range of relevant acts and practice

- State practice can consist not just of doing, or abstention from doing, certain things, but of views and positions that react to such conduct and form a view of it.
- It can be gathered from published material:
    - Newspaper reports of actions taken by States
- Statements made by government spokespersons to parliament, to the press, at international conferences and at meetings of international organizations
- A State's laws and judicial decisions
    - Because the legislature and the judiciary *form part* (organ) of a State just as much as the executive does
- The vast majority of material which would tend to throw light on a State's practice, however, is not always published (*e.g.,* correspondence with other States, and the legal officers' advice)
- Valuable evidence can also be found in the documentary sources produced by the UN

What States say and what States do

- State practice consists not only of what States do but also of what they say
- The beloved "real" acts become less frequent because international law, and the UN Charter in particular, place more and more restraints on States in this respect
- What formerly was confined to diplomatic notes is now often transmitted via new forms of communication

Positive acts and omissions

- State practice includes omissions–rules of IL forbid States to do certain acts
    - When proving this, one must look at what States *do* and what they *abstain* from doing
    - Even *silence* is relevant, because passiveness and inaction with respect to conduct and claims of other States can produce a binding effect creating legal obligations for the silent State on the grounds of acquiescence
- States which are *dissatisfied* with an existing rule of customary law may start following a new custom
    - But until the new custom is widely established, they may be denounced as law breakers by States following the existing custom

Anglo-Norweigian Fisheries Case
[ICJ, 1951]

FACTS: The dispute arose from the United Kingdom's challenge to the validity of the lines of delimitation of the Norwegian fisheries zone as established by the Royal Norwegian Decree of July 12, 1935. Historically, British fishermen had refrained from fishing in Norwegian coastal waters for a long period—from the early 17th century until 1906. When British trawlers equipped with powerful gear

reappeared off the coast of Eastern Finnmark, the Norwegian government took measures to specify prohibited fishing limits. Following several incidents, arrests of British vessels, and unsuccessful negotiations, the United Kingdom instituted proceedings, arguing that Norway used “unjustifiable base-lines” that did not follow the coastline. The coastal zone in question is characterized by a very "distinctive configuration" known as the “skjærgaard” (rock rampart), consisting of approximately 120,000 islands, islets, rocks, and reefs that form an extension of the mainland. Norway contended that its method of using straight base-lines was a "traditional system of delimitation" consistent with international law and necessitated by these unique geographic and economic realities.

ISSUE: Are the baselines in conformity with international law?

HELD: YES. Norway is exempt from this part of customary international law, because it is a persistent objector. The notoriety of the facts, the general toleration of the international community, Great Britain’s position in the North Sea, her own interest in the question, and her prolonged abstention would in any case warrant Norway’s enforcement of her system against the United Kingdom. In sum, the UK was bound by Norway's system because it had failed to protest for more than 60 years, despite being a major maritime power with a direct interest in the area. This passiveness created a binding effect based on acquiescence. Even before the dispute arose, this method had been consolidated by a constant and sufficiently long practice, in the face of which the attitude of governments bears witness to the fact that they did not consider it to be contrary to international law. Because the UK was a major maritime power with a direct interest in the area but failed to formally protest Norway's decrees for over sixty years, it was bound by Norway's practice once it crystallized into law.

Action within the domestic legal sphere

- A pattern of conduct adopted by States only *on the basis of their domestic laws* does *not* evidence the creation of customary rules on the subject matter of those domestic laws
  - Rationale: Every State legislates and amends legislation purely on a domestic plane and *not* in coordination with foreign States
- The mere existence of concordant laws does not prove the existence of a customary rule, for it may simply result from an identical view that States freely take and can change at any moment

Characteristics of state practice:

1. General
2. Uniformity
3. Duration

The element of generality

- General–though *not* necessarily universal–practice should include the conduct of *all* States which can participate in the formulation of the rule or whose interests are affected by it in any manner
- More evidence is required when the formation of general custom *opposable to all States* is concerned
  - In *Legality of Nuclear Weapons,* the ICJ could not ignore the practice referred to as policy of deterrence, to which an appreciable section of the international community has adhered for many years
  - On the one hand, this refers to the practice of certain nuclear weapons States and not to the practice of the international community at large.
  - On the other hand, the position and practice of both States who possess nuclear weapons and States that could be affected by their use should count in the equation
  - In effect, nuclear states alone could preclude the formation of such a rule via persistent objection
- To allow the majority to create a rule against the wishes of the minority would lead to insuperable difficulties and undermine the legitimacy of the lawmaking process
- If practice is <u>not general</u>, then *acquiescence* to it, or even *opinio juris* expressed in favor of it, <u>cannot</u> lead to the creation of a customary rule

Element of repetition

- There must be a degree of repetition over a period of time.
- Thus, the ICJ suggested that a customary rule must be based on “a constant and uniform usage.”
- To deduce the existence of customary rules, it is 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 <u>breaches</u> of that rule, not as indications of the recognition of a new rule (*Nicaragua v. US*)
- What this shows most crucially is the relevance of the position of States carrying out the relevant practice, and also of States that may be reacting to that practice
  - Short of evidence manifesting the *shared understanding of the relevant subject matter* as between the both categories of States, no custom can emerge
- Substantial inconsistencies in the practice can prevent the creation of a customary rule
  - But *minor inconsistencies* do not prevent the creation of a customary rule if, on the whole, <u>practice is consistent owing to its recurrence and duration</u>
  - In such cases the rule in question needs to be supported by a large amount of practice, in order to outweigh the conflicting practice in question
- Where there is no practice which goes against an alleged custom and the matter is not contested (no obvious disagreement), it seems that a relatively

small amount of practice is sufficient to establish the custom

- Provided that such practice is:
  - Notorious
  - Carried out with an intention to create or maintain the relevant legal rule
  - Meets *no significant opposition* from other States

Asylum Case (Colombia v. Peru)
[ICJ, 1950]

FACTS: In October 1948, a military rebellion broke out in Peru, which the government blamed on the American People's Revolutionary Alliance (APRA) and its leader, Víctor Raúl Haya de la Torre. While legal proceedings for "military rebellion" were initiated against him, Haya de la Torre went into hiding for three months before finally seeking diplomatic asylum in the Colombian Embassy in Lima on January 3, 1949. Colombia's Ambassador notified Peru of the asylum, qualified Haya de la Torre as a political refugee, and requested a safe-conduct for him to leave the country. Peru refused to provide the safe-conduct, arguing that Haya de la Torre was a common criminal and that Colombia had no right to unilaterally qualify the nature of his offense in a way that would bind Peru.

ISSUE: Does Columbia have a right to grant asylum based on the theory of diplomatic asylum?

HELD: NO. The Colombian Government has referred to a large number of particular cases in which diplomatic asylum was in fact granted and respected. But it has not shown that the alleged rule of unilateral and definitive qualification was invoked or–if in some cases it was in fact invoked–that it was, apart from conventional stipulations, exercised by the States granting asylum as a right appertaining to them and respected by the territorial States as a duty incumbent on them and not merely for reasons of political expediency. The facts brought to the knowledge of the Court disclose so much uncertainty and contradiction, so much fluctuation and discrepancy in the exercise of diplomatic asylum and in the official views expressed on various occasions, there has been so much inconsistency in the rapid succession of conventions on asylum, ratified by some States and rejected by others, and the practice has been so much influenced by considerations of political expediency in the various cases, that it is not possible to discern in all this any constant and uniform usage, accepted as law, with regard to the alleged rule of unilateral and definitive qualification of the offense.

Instant customary law

- The result is to reduce the relevance of the time factor in the formation of customary law
- Customary law may emerge even within a relatively short passage of time
- The reduction of the time element requirement is carefully balanced with a stronger emphasis on the scope and nature of State practice.

North Sea Continental Shelf cases
[ICJ, 1969]

FACTS: Germany, Denmark, and the Netherlands disputed the delimitation of their adjacent continental shelf areas in the North Sea, with Denmark and the Netherlands arguing that the equidistance method should be applied while Germany contended this would unfairly cut off its shelf due to its concave coastline.

ISSUE: Is the equidistance method applicable to Germany through customary international law?

HELD: NO. The essential point in this connection is that even if these instances of action by non-parties to the Convention were much more numerous than they in fact are, they would not, even in the aggregate, suffice in themselves to constitute the *opinio juris*; for, in order to achieve this result, two conditions must be fulfilled. Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as t o be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, Le., the existence of a subjective element, is implicit in the very notion of the opinio juris sive necessitatis. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency, or even habitual character of the acts is not in itself enough. There are many international acts, *e.g.,* in the field of ceremonial and protocol, which are performed almost invariably, but which are motivated only by considerations of courtesy, convenience or tradition, and not by any sense of legal duty.

Clearly, they were not applying the Convention. But from that no inference could justifiably be drawn that they believed themselves to be applying a mandatory rule of customary international law. There is not a shred of evidence that they did and, as has been seen, there is no lack of other reasons for using the equidistance method, so that acting, or agreeing to act in a certain way, does not of itself demonstrate anything of a juridical nature.

The psychological element in the formation of customary law (*opinio juris*)

- State practice alone does not suffice; it must be shown that it is accompanied by the conviction that it reflects a legal obligation
- When inferring rules from conduct, one should examine both what States do, but also ***why*** they do it.
  - Certain patterns of conduct, especially abstention or omission, failure to lodge protest or take reciprocal action, could be adopted by States out of political con-venience or calculation, or even administrative convenience
  - There are many international acts performed habitually, such as flag salutes greeting a foreign ship on the high seas, or in the field of ceremony and protocol, which are motivated solely by courtesy or tradition, “but not by any sense of legal duty”
    - Such behaviour is based merely on what is called comity or

courtoisie in the relations between States
- But this is not the same as a sense of legal obligation, and less an agreement to the creation or modification of rights

Definition of opinio juris: A conviction felt by States that a certain form of conduct is required, permitted by, or compatible with, international law.

- *Opinio juris* manifests that the process of creation of customary rules is based on State consent.

How to infer opinio juris?

- Indirectly, from States' **<u>actual behavior</u>, <u>positive acts</u> and <u>omissions</u>**
    - Official statements are not always required
- It is also necessary to examine not only what one State does or refrains from doing, but **also how other States react**
    - Because if a State's conduct provokes protests from others (*i.e.,* they believe conduct is illegal), the protests can deprive such conduct of any value as evidence of customary law
- In case of *<u>rules imposing duties</u>*, it is not enough to show that States have acted in the manner required and that other States have not protested that such acts are illegal. *It must also be proven that States regard the action as obligatory.*
    - Recognition of the obligatory character of particular conduct *can be proved* by **<u>pointing to an express acknowledgement of the obligation by the States concerned</u>**, or by **<u>showing that failure to act in the manner required by the alleged rule has been condemned as illegal by other States</u>** whose interests were affected
- If States are clearly divided on whether a certain conduct constitutes the expression of *opinio juris*, it is impossible to find that there is such *opinio juris*.
    - Example: Tension between nuclear weapons prohibition versus practice of nuclear deterrence.
- What matters is *not* what States believe, but what they say.
    - If some States claim that <u>something is law</u> *and* it is established that other <u>States do not challenge that claim</u> or conduct a different practice, then *their belief of its legal correctness could be presumed*, and a <u>new rule will come</u> into being, even though all the States concerned may realise that it is a departure from pre-existing rules.

S.S. Lotus case (France v. Turkey)
[PCIJ, 1927]

FACTS: On August 2, 1926, the French mail steamer Lotus, proceeding to Constantinople, collided with the Turkish collier Boz-Kourt on the high seas. The Boz-Kourt was cut in two and sank, resulting in the death of eight Turkish nationals. After rescuing 10 survivors, the Lotus arrived in Constantinople on August 3. At the time of the collision, the Lotus was under the watch of Lieutenant Demons, a French citizen, while Hassan Bey navigated the Boz-Kourt. Turkish police began an investigation on August 3. The following day, the captain of the Lotus submitted his master's report to the French Consulate-General and the harbor master. Turkish authorities requested Lieutenant Demons go ashore to give testimony. This examination delayed the Lotus and resulted in the arrest of Lieutenant Demons and Hassan Bey without prior notice to the French Consul-General. The preventive arrest ensured criminal prosecution for manslaughter filed by the Public Prosecutor of Stamboul based on victims' families' complaints. The Criminal Court of Stamboul first heard the case on August 28. The court rejected Lieutenant Demons' argument that Turkish courts lacked jurisdiction. On September 11, he requested bail, which was granted on September 13 at 6,000 Turkish pounds. The court sentenced Lieutenant Demons to 80 days' imprisonment and a fine of 22 pounds; Hassan Bey received a heavier penalty. France protested, arguing only French courts had jurisdiction over a French officer on a French vessel on the high seas. The dispute was submitted to the Permanent Court of International Justice (PCIJ) to determine if Turkey violated international law.

ISSUE: Does Turkey have jurisdiction?

HELD: YES. Turkey did not violate international law. The territoriality of criminal law is not an absolute principle of international law and by no means coincides with territorial sovereignty. No rule of international law grants exclusive jurisdiction to the flag State in cases of collision on the high seas. Since international law does not prohibit Turkey from exercising jurisdiction where the effects of the offense occurred—namely the sinking of the Turkish vessel and the death of Turkish nationals—Turkey was entitled to institute criminal proceedings against Lieutenant Demons. The first and foremost restriction imposed by international law upon a State is that—failing the existence of a permissive rule to the contrary—it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention.

Multilateral evidence of customary law

- Treaties can be evidence of customary law, but care must be taken when inferring rules of customary law from treaty provisions
    - Example: Extradition treaties often provide that political offenders shall not be extradited. However, the mere existence of similar/identical provisions in numerous bilateral treaties does not support the existence of a corresponding norm of customary law
- Multilateral treaties, however, may constitute evidence of customary law.

- If the treaty is intended to codify customary law, it can be quoted as evidence of customary law even against a State which is not a party to the treaty (*e.g.,* VCLT)
- Thus, a State *not* party to the relevant treaty is *not* bound by the treaty, but may be bound by customary law evidenced by the treaty.
    - But if there's no evidence that the treaty indeed reflects customary law, the non-party State can disregard the rule in the treaty.

- In some cases, treaty law and customary law can exist side by side.
    - In *Nicaragua*, the ICJ held that its jurisdiction was founded on the basis of customary law, the content of which it considered to be the same as that laid down in the UN Charter.
- The content of UN General Assembly (UNGA) resolutions may also state customary law.
    - It can be a forum through which State practice is displayed
    - It is just as possible to display and develop State practice in the General Assembly, especially in the voting process, as through individual correspondence between individual States or their foreign offices
        - Very often, the acts of such organs are merely the acts of the States represented in those organs
    - A UNGA resolution can be evidence of customary law, because it reflects the view of States voting for it; it could have the same value if it had been passed at a conference outside the UN, and, if many States vote against it, its value as evidence of customary law is correspondingly reduced to the circle of those States which actually voted for it.
    - In any case, it is the meeting of minds of States within the framework of the General Assembly (or a similar representative forum) that accounts for the emergence of relevant customary norms
    - A resolution must, at least, speak of the immediately applicable rights and obligations of States or illegality of particular acts/conduct
- The text and context of a resolution may be relevant for identifying whether the UNGA purports to create a new rule or change existing law.
    - Those voting in favor must be seen as making to other States an *offer* that existing law be changed
    - Thus, "no" votes have more significant (they don't want change)
- However, if the context says that the UNGA is declaring existing law, then States voting in favor should be seen as *re-stating what the law already law*.
    - Most "lawmaking" resolutions on non-intervention, use of force, or prosecution of core international crimes fall within this category
    - Negative votes have less significance
- The relevance of actual contrary practice is, at times, *neutralized* because it contradicts the obligations of dissenting States under treaties.
    - A practice based on violation of treaties cannot create a rule of customary law.
    - Nor could such practice consolidate a discrete customary rule on its own, because in each and every case, that State conduct potentially contributes to such practice, it entails illegal activities arising out of violation by relevant States of their treaty obligations.
    - This is yet another incidence of treaty and custom being separate sources of law.

General principles of law

"the general principles of law recognized by civilized nations"

Nature and concept

- This was inserted to provide a solution in cases where treaties and custom provided *no* guidance (gaps in treaty law and customary law)
- General principles of law are ones recognised in national legal systems and common to all or most national systems of law
- Some are based on *"natural justice,"* such as good faith, or *procedural rules*, such as the right to a fair hearing, or in *dubio pro reo*, and some are based on *substantive principles*, such as liability for fault and reparation
- However, principles of national law can be used to fill gaps in international law only if they are suited to the international context

C + GPL = GAPIL

Pangilinan v. Cayetano
[SCPH, 2021]

Article II, Section 2 of the Constitution declares that international custom and general principles of law are adopted as part of the law of the land. No further act is necessary to facilitate this. Generally accepted principles of international law refers to norms of general or customary international law which are binding on all states.

The Court thus subsumes within the rubric of generally accepted principles of international law <u>both</u> international custom and general principles of law, two distinct sources of international law recognized by the ICJ Statute.

Judicial decisions

- The ICJ may apply judicial decisions as subsidiary means for the determination of rules of law

    - However, <u>court decisions have no binding force except between the parties and in respect of the particular case</u> (art. 59, ICJ Statute)
- In other words, there is no *stare decisis* in IL
    - International courts are *not* obligated to follow previous decisions
- A functioning legal order requires consistent application of the law
    - Unlike domestic precedents, the law applied in earlier judicial decisions invoked in subsequent cases is *not* judicially created, but follows from treaty or customary rules
- There is no ultimate legal authority (*i.e.,* a supreme court) to resolve conflicts between and among tribunals
- Judgments of national courts are not covered by the provision
    - Their weight depends as elements of State practice under art. 38 (b)

Learned writers

- The ICJ Statute also directs the Court to apply the "teachings of most highly qualified publicists of the various nations, as subsidiary means"
    - "Publicists" = Learned writers
- The general position is that a rule cannot be created on the authority of writers, and the latter can be useful only if identifying the evidence of agreement between States as to the content of a legal rule
- The problem of identifying those "teachings" of writers which are the most authoritative is no longer likely to lead to easy universal acceptance of certain propositions on the authority of learned writers alone
    - The centre of gravity of international legal scholarship is currently located in Western Europe, North America, and Australasia, which reduces, if not eliminates, the possibility of the views from other parts of the world, such as Asia, Africa, or Latin America, being properly represented

Soft law

- Soft law, in the sense of guidelines of conduct, mostly arising in international economic law and international environmental law contains no binding norms of law
- The use of "soft law" instrumentality often facilitates consensus
- States may even decide to create international organisations with their own organs and structures to fulfil international tasks without accepting any legally binding obligations
- Such guidelines, although explicitly drafted as non-legal ones, may nevertheless in actual practice acquire considerable strength in structuring international conduct
    - And even reflect, initiate or consolidate that very practice of States through which CIL is built
- Their most important point from the legal perspective is that the distinction always needs to be drawn <u>***between binding and non-binding provisions***</u>
    - It is possible for an instrument initially or ostensibly intended as non-binding to include provisions regulating rights and obligations of States in a determinate manner.
    - Similarly, a binding treaty may also contain provisions that are merely programmatic and fall short of imposing on States specific rights and obligations

Equity

- A judge or arbitrator may not give a decision *ex aequo et bono* (a decision in which equity overrides all other rules) unless he has been expressly authorised to do so
    - This has never been used by the ICJ
    - The ICJ decides on the basis of equity *alone*–even if it's against with other sources of law
    - It's outside the law. Equity in GPL is *within* the law.
- The most prominent area in which equity is relevant is the application of equitable principles by the ICJ in the delimitation of maritime boundaries between States
- If States are reluctant to agree on a legal principle on a particular matter, they would be even less inclined to submit to the force of equitable considerations
    - When a third-party organ has to impose these on States, that becomes judicial legislation inimical to the consensual nature of international law
    - That is why equity is *not* endorsed in multiple areas

The hierarchy of norms and sources

- Overall, the hierarchy of sources works in the order stated in art. 38, ICJ Statute
- A treaty, when it comes into force, overrides customary law as between the parties to the treaty.
    - Thus, two or more States can derogate from customary law by concluding a treaty that has different content
- The **relationship between treaties and custom is subsumable within the *lex specialis derogat legi* priori (specific law prevails over general law) principle** (treaties-custom).
- Customary rules emerging after the conclusion of treaties cannot prevail over treaties

- **In terms of conflicts between rules arising under the same sources of international law and operating among the same States**, the **general maxim of *lex posterior derogat priori* (a later law repeals an earlier law) applies** (same source)
- In deciding possible conflicts between treaties and custom, one other principle must be observed, namely *lex posterior generalis non derogat legi priori speciali* (a later law, general in nature, does not repeal an earlier law which is more special in nature).
- However, these general rules of collision are themselves subject to the clauses that may be included in particular treaties
- Since the main function of general principles of law is to fill gaps in treaty law and customary law, **general principles of law are subordinate to treaties and custom**

Jus cogens

- States can renounce their rights under customary or conventional law unilaterally, or derogate from them by mutual agreement (*bilateralism*).
  - Exception: International *jus cogens*.
  - There's no legal system that could survive and operate without containing some fundamental rules of public policy which *cannot* be set aside or contracted out through bilateral agreements
- In IL, the function of public policy is performed by **peremptory norms of general international law, also known as *jus cogens***.

Article 53

A treaty[2] 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 gen- eral 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.

- A rule cannot become a peremptory norm unless it finds acceptance and recognition by the international community as a whole and therefore it cannot be a rule that the majority imposes on a significant minority of States
  - An overwhelming majority is required, cutting across cultural and ideological differences
  - The "international community of States as a whole" refers not to numbers of States that are for or against a particular rule, but to the ways in which the community as a whole speaks and expresses its legal judgment
- A rule of *jus cogens* can be derived from custom but *not* ordinarily from other sources.
  - Convergence and parallelism between conventional rules embodying objective obligations and *jus cogens* is confirmed in various areas.
- There is considerable agreement on the prohibition of the use of force, of genocide, slavery, of gross violations of the right of people to self-determination, and of racial discrimination, basic human rights, and basic principles of humanitarian law
  - Overall, a rule is peremptory not because a court has said it is, but because its very content makes it non-derogable, *i.e.* it is **not designed to regulate relations of States on a bilateral plane**. Human rights norms illustrate this pattern.
  - Human rights norms are stipulated in an objective manner, to protect individual human beings regardless of their nationality and, legally speaking, any human rights violation remains the affair of all States, giving them legal standing to raise the matter, regardless of the consensus of some States to the opposite effect
- Non-derogability of a peremptory rule is about the inherent characteristics of that rule
  - It is about States *not* being allowed to agree that it is derogable
  - The very rationale of nonderogability of a rule is that States should not be able to reach agreements contrary to such a rule
- The invalidating effect of *jus cogens* applies to treaties, unilateral declarations, and violations of *jus cogens* rules aimed at producing the modification of existing international legal rights, obligations and positions
  - There is a general duty on States ***not*** to recognize the consequences of a serious breach of peremptory norms, and *not to assist* in maintaining the situation created by that breach
- The problem of *jus cogens* is connected with the concept of *erga omnes* obligations.
  - Obligations *erga omnes* are concerned with the enforcement of *jus cogens* normas, the violation of which is deemed an offense against the State directly affected **and** all the members of the international community.
  - All *jus cogens* are *erga omnes* obligations, but *not* the reverse
    - *Erga omnes* gives basis for an *actio popularis*

[2] The reason why the conflict between custom and *jus cogens* is not mentioned is because the purpose of the Convention was to codify the law of treaties only.

Barcelona Traction (Belgium v. Spain)
[ICJ, 1970]

FACTS: The Barcelona Traction, Light and Power Company, Limited, was a holding company incorporated in Canada with subsidiaries operating in the Spanish electricity market. In 1948, after the Spanish government refused to authorize foreign currency transfers for debt servicing, a Spanish court declared the company bankrupt and ordered the seizure of its assets. These assets were eventually sold at a public auction in 1952 to a Spanish group, effectively displacing the original management and shareholders. The Belgian government filed a claim against Spain at the International Court of Justice, seeking reparation for Belgian nationals who allegedly held 88% of the company's shares and suffered significant financial loss. Spain contested the claim, arguing that Belgium lacked the legal standing to protect a company that was technically a Canadian entity. The States which the present case principally concerns are Belgium, the national State of the alleged shareholders, Spain, the State whose organs are alleged to have committed the unlawful acts complained of, and Canada, the State under whose laws Barcelona Traction was incorporated and in whose territory it has its registered office.

ISSUE: Does Belgium have standing?

HELD: NO. When a State admits into its territory foreign investments or foreign nationals, whether natural or juristic persons, it is bound to extend to them the protection of the law and assumes obligations concerning the treatment to be afforded them. These obligations, however, are neither absolute nor unqualified. In particular, an essential distinction should be drawn between the obligations of a State towards the inter- national community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*. Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimina- tion. Some of the corresponding rights of protection have entered into the body of general international law, others are conferred by international instruments of a universal or quasi-universal character. Obligations the performance of which is the subject of diplomatic protection are not of the same category. It cannot be held, when one such obligation in particular is in question, in a specific case, that al1 States have a legal interest in its observance. In order to bring a claim in respect of the breach of such an obligation, a State must first establish its right to do so.

East Timor (Portugal v. Australia)
[ICJ, 1995]

FACTS: In the 16th century, East Timor became a colony of Portugal, which remained there until its civil and military authorities withdrew to the island of Atauro in August 1975. On 7 December 1975, the armed forces of Indonesia intervened in East Timor, and by 17 July 1976, Indonesia enacted a law incorporating the Territory as part of its national territory. While the United Nations continued to treat East Timor as a non-self-governing territory and referred to Portugal as its "administering Power," Australia recognized Indonesia's incorporation of the territory *de facto* in 1978 and *de jure* in 1979. In February 1979, Australia and Indonesia began negotiations for the delimitation of the continental shelf in the "Timor Gap," which culminated in the conclusion of a Treaty on 11 December 1989. This Treaty created a "Zone of Cooperation" for the joint exploration and exploitation of resources, and Australia subsequently enacted internal legislative measures for its application in 1990. Consequently, Portugal filed an Application in 1991, maintaining that Australia had infringed upon the rights of the people of East Timor to self-determination and permanent sovereignty over its natural resources.

ISSUE: Does the ICJ have jurisdiction?

HELD: NO. Portugal puts forward an additional argument aiming to show that the principle formulated by the Court in the case concerning Monetary Gold Removed from Rome in 1943 is not applicable in the present case. It maintains, in effect, that the rights which Australia allegedly breached were rights *erga omnes* and that accordingly Portugal could require it, individually, to respect them regardless of whether or not another State had conducted itself in a similarly unlawful manner. In the Court's view, Portugal's assertion that the right of peoples to self-determination, as it evolved from the Charter and from United Nations practice, has an *erga omnes* character, is irreproachable. The principle of self-determination of peoples has been recognized by the United Nations Charter and in the jurisprudence of the Court; it is one of the essential principles of con- temporary international law. However, the Court considers that the *erga omnes* character of a norm and the rule of consent to jurisdiction are two different things. Whatever the nature of the obligations invoked, the Court could not rule on the lawfulness of the conduct of a State when its judgment would imply an evaluation of the lawfulness of the conduct of another State which is not a party to the case. Where this is so, the Court cannot act, even if the right in question is a right *erga omnes*.

Creation and recognition of States

Article 1

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

(a) a permanent population;
(b) a defined territory;
(c) government; and
(d) capacity to enter into relations with the other states.

- Akehurst: A State means an entity that functions through organised public authority and is not subjected to the authority of any other entity.

Factual requirements for statehood:

1. Territory
2. Population
3. Government
4. Independence

Territory

- Territory is the physical or geographical area, separated by borders from other areas, over which a State has sovereignty[3]
  - At least a **sufficiently** identifiable core territory (*e.g.,* seat of government)
- State is entitled to the integrity of its territory (UN Charter)
- The loss of effective control over part of its territory does not deprive the State of the authority to exercise sovereign regulatory powers over that part of territory
  - The State is equally sovereign with regard to any part of its territory whether it effectively controls it or not
- Absolute certainty about a State's frontiers is not required.
  - What matters is that a State controls a sufficiently identifiable core of territory.
  - States must control some core territory to establish statehood, but perfect delimitation of borders or control of their entire territory is not strictly required.
- State territory does not include protectorates and areas of dependency

Population

- There are no fixed requirements as to the size of State populations, but it must be **permanent**
  - Permanent doesn't have to be your own blood. One can be enough, because that person can adopt.
- Permanent population refers to the State permanently having a population, not necessarily to that population consisting of those who are a State's nationals or reside permanently within that State's territory
  - What is required is the existence of a permanent population of individuals who owe allegiance and obedience to that State
  - The essential factor is the existence of a common national legal system to which individuals are subjected

Government

- A State cannot come into existence unless it has a government
- Standard: Ability to exercise authority and exact obedience over its population
- The existence of a government implies the capacity to autonomously establish and maintain a legal order
  - It controls the population, *not* the territory
- Government should be able to function and exercise authority, not that all territory has to be under its effective control
- A State does not cease to exist when it is temporarily deprived of an effective government as a result of civil war or similar upheavals
  - Even when all of its territory is occupied by an enemy in wartime, the State continues to exist
- A State's international rights and obligations are not affected by a change of government
  - Treaties do not lose their binding force when a change in a State-party's domestic organisation occurs

Independence

- Two aspects of independence:
  - Internal: Independence is the right to exercise therein (territory), to the exclusion of any other State, the functions of a State
  - External: The ability to act independently in international relations
- In contrast, dependence status:
  - necessarily implies a relation between a superior State and an inferior or subject State; the relation between the State which can legally impose its will and the State which is legally compelled to submit to that will

Article 4

States are juridically equal, enjoy the same rights, and have equal capacity in their exercise. The rights of each one do not depend upon the power which it possesses to assure its exercise, but upon the simple fact of its existence as a person under international law.

Article 5

The fundamental rights of states are not susceptible of being affected in any manner whatsoever.

Attainment of independence

- It is possible that the State is created as a dependent State first
- There may be cases where the internal legal order of a State is not yet validly disrupted, but a secessionist entity or conquered territory does not in fact comply with that legal order
  - The mother State's legal order wouldn't recognize that change
  - Without such recognition, an entity aspiring to statehood is not independent in the eyes of IL
- The agreed grant of independence, devolution, secession or separation may take some time
  - Until the domestic constitutional link is severed between the mother State and aspirant entity in a way that is compatible with the mother State's constitutional law, that aspirant entity is not a State

[3] **Sovereignty** – the competence to exercise its exclusive authority within that territory and prohibit foreign governments from exercising their authority there.

        - The principal point of time for achieving independence in each case is when the mother State irrevocably commits itself to the severance of the public authority link with its particular territory and that territory thus becomes independent
    - Still, mandated territories could acquire or maintain some capacities on the international plane (*e.g.,* protectorate agreements)
    - In relation to trusteeship territories and "associated territories" that were placed under the control of the United Nations after the Second World War, their attainment of independence has been the ultimate goal
        - Not applicable anymore

Alienation of independence

- Statehood begins with its creation and ends with its extinction if a State alienates its independence
    - There is no rule of IL that a State cannot give up its sovereignty (*e.g.,* reunification of Germany)
- An independent State becomes a dependent State only if it enters into a legal commitment to act under the direction of, or to assign the management of its international relations to, another State
    - Not considered: Political alignment, strategic dependence, being under another State's influence, or integration frameworks (*e.g.,* EU)
- The independence of a State may be restricted, alienated, or compromised but not if there's a treaty prohibiting it
    - It ends a State or turn it into a dependent State
    - By contrast, restrictions upon a *State's liberty*, whether arising out of IL or contract, do not affect its independence.
- "Protectorate" and "suzerainty" are terms describing the dependence of one State on another State in the *legal sense*
    - The basic feature of a protectorate is that it retains control over its internal affairs, but agrees to let the protecting State exercise most of its international functions as its agent
    - The establishment of a protectorate does not abolish the separate statehood of the protected entity, which retains autonomy beyond what has been conceded to another State via treaty

Territorial units within States (federal states)

> **Article 2**
>
> The federal state shall constitute a sole person in the eyes of international law.

- Basic feature: Authority over internal affairs is divided by the constitution between the federal authorities and the member States of the federation, while foreign affairs are ordinarily handled solely by the federal authorities
- Though at times federal units are able to conclude treaties, that power derives solely from the federal constitution or legislation; and in the eyes of international law those treaties are made by the federal State, in the sense of art. 7 (1) (b), VCLT
    - Entities of federal States are deemed by international law to constitute organs of the federal State

Legal requirements for statehood

- Legal (as opposed to factual) requirements for statehood operate over and above the Montevideo Convention criteria
- It requires that the entity has the right under IL to own and administer the relevant territory and require obedience from its population
- It's important to have legal requirements because the lack of it may allow entities thus created using the factual transformation to claim statehood *owing just to their possession of territory, population and government*

Secession, separation, dissolution

- Legally valid methods of creating a State include *agreed and voluntary* secession from a State, dissolution of a State, unification or merger of States
- Secession differs from dissolution when the original composite State ceases to exist, and the maintenance and recognition of the new State's independence does *not* encroach on any State's preexisting right to territorial integrity
- Two semi-normative principles on secession:
    - Monarchical legitimacy
    - Effectiveness
- Current legal position: Only secession permitted and consented to by the territorial State complies with international law (Friendly Relations Declaration)

> **Accordance With International Law of the Unilateral Declaration of Independence of Kosovo**
> [ICJ, 2010]
>
> *FACTS:* The 2008 Kosovo declaration of independence was adopted on 17 February 2008 in a meeting of the Assembly of Kosovo.
>
> *ISSUE:* Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?
>
> *HELD:* YES. State practice during this period points clearly to the conclusion that international law contained no prohibition of declarations of independence. During the second half of the twentieth century, the international law of self-determination developed in such a way as to create a right to independence for the peoples of

non-self-governing territories and peoples subject to alien subjugation, domination and exploitation. The Court notes, however, that in all of those instances the Security Council was making a determination as regards the concrete situation existing at the time that those declarations of independence were made; the illegality attached to the declarations of independence thus stemmed not from the unilateral character of these declarations as such, but from the fact that they were, or would have been, connected with the unlawful use of force or other egregious violations of norms of general international law, in particular those of a peremptory character (*jus cogens*). In the context of Kosovo, the Security Council has never taken this position. Accordingly, it concludes that the declaration of independence of 17 February 2008 did not violate general international law.

UDIs

- There is no rule of international law which forbids secession from an existing State; nor is there any rule which forbids the mother State from crushing the secessionist movement
    - A secessionist entity has *no* standing under IL
    - Secession produces *no* immediate consequences under IL
- A unilateral declaration of independence (UDI) is neither prohibited nor unlawful under IL
    - This implies that a UDI *never* takes place or produces legal consequences under IL, but instead occurs *within the domestic realm of States*
- International law does *not* confer separate status or identity to the secessionist entity, *nor* does it acknowledge declarations of independence issued by such entities, or accord them any international legal effect
    - UDIs do not form the basis for valid secession, nor are they a valid step towards State creation

Public order limits on State creation

- A new State is not legally created if some fundamental illegality attends its creation (*i.e.,* in violation of *jus cogens*)
    - Example: Southern Rhodesia's creation was valid under the Montevideo convention, but its creation was a breach of the right to self-determination and through racial discrimination
- Nullity for contradicting *jus cogens* applies both to the acquisition of territory and the creation of States

The primacy of entitlement over effectiveness

- Sometimes, the legal requirements of statehood can also reinforce the statehood claim of the relevant entity
    - Entities gaining independence in the process of decolonization could lay valid claim to statehood even if their ties with their colonial powers had not formally come to an end
    - Example: India was admitted to the UN, though it only became independent in 1947
- A peace or transition process is merely a tool to realize statehood required by the right to self-determination, *not* a condition of the existence of that right
    - The principle of self-determination is essential leading to statehood as of right
    - Every people possesses the attributes of *national sovereignty* inherent in its existence as a people
- Any entity entitled to statehood on the basis of self-determination is entitled to the entirety of its territory.
    - This, despite the interim, illegal situation in which an entity is prevented from exercising its right to self-determination and from effectively assuming statehood

Situation in Palestine
[ICC, 2021]

FACTS: On 1 January 2015, the Government of The State of Palestine lodged a declaration under article 12(3) of the Rome Statute accepting the jurisdiction of the ICC over alleged crimes committed "in the occupied Palestinian territory, including East Jerusalem, since June 13, 2014." On 2 January 2015, The State of Palestine acceded to the Rome Statute by depositing its instrument of accession with the UN Secretary-General. The Rome Statute entered into force for The State of Palestine on 1 April 2015. On 22 May 2018, pursuant to articles 13 (a) and 14 of the Rome Statute, The State of Palestine referred to the Prosecutor the Situation since 13 June 2014, with no end date. However, given the complex legal and factual issues attaching to this situation, the Prosecutor announced that she would be making a request to Pre-Trial Chamber I for a ruling to clarify the territorial scope of the Court's jurisdiction in this Situation.

ISSUE: May the ICC exercise jurisdiction over Palestine?

HELD: YES. Regardless of Palestine's status under general international law, its accession to the Statute followed the correct and ordinary procedure, as provided under article 125(3) of the Statute. In this respect, in the view of the Chamber, once the conditions for accession pursuant to article 125 of the Statute have been fulfilled, the effect of articles 12(1), 125(3) and 126(2) of the Statute, taken together, is that the Statute automatically enters into force for a new State Party. By becoming a State Party, Palestine has agreed to subject itself to the terms of the Statute and, as such, all the provisions therein shall be applied to it in the same manner than to any other State Party. Based on the principle of the effectiveness, it would indeed be contradictory to allow an entity to accede to the Statute and become a State Party, but to limit the Statute's inherent effects over it. The Chamber also considers that the only manner of challenging the automatic entry into force of the Statute for an acceding State Party is through the settlement of a dispute by the Assembly of States Parties under article 119(2) of the Statute. This conclusion further entails that, in all other circumstances, the outcome of an

accession procedure is binding. The Chamber has no jurisdiction to review that procedure and to pronounce itself on the validity of the accession of a particular State Party would be ultra vires as regards its authority under the Rome Statute. It follows that the absence of such a power conferred upon the Chamber confirms the exclusion of an interpretation of '[t]he State on the territory of which the conduct in question occurred' in article 12(2)(a) of the Statute as referring to a State within the meaning of general international law. Such an interpretation would allow a chamber to review the outcome of an accession procedure through the backdoor on the basis of its view that an entity does not fulfil the requirements for statehood under general international law. Therefore, the reference to '[t]he State on the territory of which the conduct in question occurred' in article 12(2)(a) of the Statute cannot be taken to mean a State fulfilling the criteria for statehood under general international law. Such a construction would exceed the object and purpose of the Statute and, more specifically, the judicial functions of the Chamber to rule on the individual criminal responsibility of the persons brought before it. Moreover, this interpretation would also have the effect of rendering most of the provisions of the Statute, including article 12(1), inoperative for Palestine.

- A State emerging as a consequence of self-determination is entitled to territory to which its right to self-determination extends, whether or not it effectively controls all of that territory
    - The only reason why States under colonial or alien domination or occupation do not effectively control that to which they are entitled is that the colonial or occupying power obstructs them in doing so.
    - In such cases, considerations of effectiveness as such could hardly possess exclusive or even preponderant relevance.
    - It is the valid claim to statehood that rationalises the territorial reach of an entity; territorial possession does not determine statehood.

Identity and continuity of States

- The clarification of State identity issue requires inquiring into the roots of State creation, and could thus be consequential upon the initial legality of its creation, in line with statehood requirements
- Factors leading States to assert their identity with a previous State could include having the same name, bulk of territory, or the same constitutional form, or, more plausibly, some legal link to an older (and now factually defunct) State and the proof that it has survived legally even though it was treated as factually extinct
- State identity is not disrupted, even if State boundaries change or constitutional reform or revolution takes place
- The concept of identity serves the orderly development and continuity of relations between States
    - A State should not be able to change its political system and government and thus renege on commitments previously assumed

Germany

- Following the 1945 unconditional surrender, the Allied Powers assumed collective authority over Germany without formally annexing its territory, leaving German sovereignty in a state of abeyance. While the original intent was to preserve a single German State, the breakdown of consensus between the Western Allies and the Soviet Union led to the unilateral creation of the Federal Republic of Germany (FRG) in May 1949 and the German Democratic Republic (GDR) that October. These developments effectively breached the 1945 Potsdam arrangements, resulting in two independent states whose eventual reunification would require mutual consent rather than the simple restoration of the old German Reich.
- Legal and political debates persisted regarding which entity truly represented Germany. The FRG and Western powers initially claimed the FRG was the sole legitimate representative of the German people due to its democratic constitution, with West German courts even arguing a continuity of identity with the pre-war Reich. However, this claim was limited by the reality that the FRG held no authority in the East. As the Cold War progressed, the international community—including the Western powers—eventually moved toward recognizing the GDR as a sovereign entity, signaling the end of the Hallstein Doctrine and the acceptance of two distinct German states on the international stage.

Vietnam

- Following the 1945 declaration of independence by the Democratic Republic of Viet Nam (DRVN) under Ho Chi Minh, France attempted to maintain colonial influence by establishing a rival provisional government in South Vietnam. This "South Vietnam" entity was essentially a foreign-installed regime designed to counter the DRVN's national liberation movement. Although the DRVN held successful nationwide elections in 1946 and controlled the majority of the territory, the French-backed southern regime resisted unification, laying the groundwork for prolonged conflict.
- The 1954 Geneva Conference established a provisional military demarcation line rather than a permanent state boundary, with the explicit goal of reunifying the country through national elections in 1956. However, these elections were blocked by South Vietnam and the United States, leading to a breach of the Geneva accords and the introduction of U.S. troops. Legally, the DRVN maintained its status as the sole validly existing Vietnamese state throughout the conflict, eventually achieving the forceful reunification of the country in 1975 after defeating the foreign-backed southern regime.

China and Taiwan

- Following the 1949 communist victory in mainland

China, a complex legal dispute emerged regarding the representation of the Chinese State. While the nationalist government of Chiang Kai-shek retreated to Taiwan and continued to represent China at the United Nations until 1971, the People's Republic of China (PRC) was the effective governing power of the mainland throughout this period. Despite shifting Western diplomatic stances—such as the UK's temporary claim that Taiwan's status remained undetermined post-WWII—international declarations like those from Cairo and Potsdam affirmed that Taiwan was restored to China. The eventual 1971 UN resolution did not admit the PRC as a new member but rather recognized its representatives as the sole legitimate authorities of the existing Chinese State, leading to the departure of the nationalist representatives.

- Legally, Taiwan is considered a territory belonging to China rather than an independent state, currently functioning as a recalcitrant *de facto* autonomous regime that the PRC cannot factually control. While Taiwan participates in various international organizations and maintains unofficial economic relations, it does not formally claim statehood, and the PRC maintains that Taiwan is an inalienable part of its territory. This legal continuity is reflected in international treaty applications; for example, courts have held that civil aviation and carriage conventions applied to the PRC extend to Taiwan as part of the entire Chinese territory. Consequently, major powers like the UK and the US treat the issue not as a matter of two separate states, but as a dispute over which government legitimately represents the single entity of China.

North and South Korea

- Following the post-WWII departure of Japanese forces, Korea was split between rival communist and nationalist regimes in the north and south. Although the UN General Assembly initially recognized that holding separate elections in the south would hinder the goal of a single, independent Korean State, the UN Interim Committee ultimately proceeded with elections only in accessible southern areas. This decision effectively modified previous resolutions and laid the groundwork for formal partition, as the resulting government could realistically only claim to represent the southern portion of the peninsula rather than the entire Korean population.
- In 1948, the UN declared the Government of the Republic of Korea (ROK) as the only lawful government in the regions where elections were observed, noting it held jurisdiction over the majority of the Korean people. However, this declaration signaled the end of a unified Korean State; by establishing a government with authority limited to the south, the ROK effectively disclaimed jurisdiction over the north. Consequently, the Democratic People's Republic of Korea (DPRK) emerged by default as a separate sovereign state under international law, resulting in two distinct entities rather than a single represented nation.

The SFRY and its successors

- The dissolution of Yugoslavia sparked intense legal debates regarding state identity and succession. In 1992, Serbia and Montenegro formed the Federal Republic of Yugoslavia (FRY), claiming to be the sole legal successor to the former Socialist Federal Republic of Yugoslavia (SFRY). While the international community did not contest the FRY's statehood, it rejected the claim of automatic succession to the SFRY's United Nations membership. This distinction underscored a key principle in international law: a state's perception of its own identity does not guarantee automatic recognition of its predecessor's legal rights and institutional standing.
- The case of Macedonia further illustrates how identity—specifically names and symbols—can become a matter of international dispute. Greece initially blocked Macedonia's international integration, fearing that the name "Macedonia" and the use of the Star of Vergina implied territorial claims on the Greek province of the same name. This led to a unique legal situation where the two nations signed an Interim Accord as the First Party and Second Party without even acknowledging each other's official names. The ICJ later used this accord to rule against Greek obstructions of Macedonia's NATO bid, proving that states can be bound by legal obligations regardless of disputes over identity. The issue was finally resolved in 2018 with the Prespa Agreement, which formally established the name Republic of North Macedonia.

Evaluation

- The creation of government organs, including through democratic elections, on the *part* of the territory of the State is by definition an act *against* the unity and territorial integrity of the relevant State, preventing the united expression of the will of its population, and disrupting State unity
  - Thus, the rest of the territory are left with no choice other than pursuing their own future through their own arrangements
- By contrast, in the case of Vietnam, there was *never* a legal process of validly creating two independent states.
  - Thus, the reunification was a matter of North Vietnam's entitlement under general IL, while in Germany, it required an agreement between the two sovereign States.

Recognition of States and governments in IL

Article 3

The political existence of the state is independent of recognition by the other states. Even before recognition the state has the right to defend its integrity and independence, to provide for its conservation and prosperity, and consequently to organize itself as it sees fit, to legislate upon its interests, administer its services, and

to define the jurisdiction and competence of its courts.

The exercise of these rights has no other limitation than the exercise of the rights of other states according to international law.

- Recognition of a State can signify different things
- Recognition by a territorial State is essentially consent to secession and thus a valid method of State creation
- However, third State recognition, purporting to confer on them legitimacy, is more problematic
    - Recognizing States may be influenced more by political than legal considerations
- There is a distinction between the recognition of a State and the recognition of a government
    - The recognition of a State is to suggest that, in the opinion of the recognizing State, the entity recognised fulfils statehood requirements; and to manifest a willingness to deal with the new State as a member of the international community.
    - The recognition of a government implies that the government in question is deemed to represent the State in its external relations

Effect of recognition of States by other States

- Two theories:
    - **Constitutive theory** (Anzilotti and Kelsen) – A State does not exist for the purposes of IL until it is recognized by other States; recognition thus has a constitutive effect that it is a necessary condition for the "constituting" of the State concerned.
        - A peculiar position was formulated by Lauterpacht who, on the basis of the constitutive theory, argued that other States had an obligation to recognise an entity meeting the criteria of a State.
    - **Declaratory theory** – The existence of a State or government is a *pure question of fact*, and recognition merely acknowledges it
        - If an entity satisfies the requirements of a State objectively, it is a State
- The prevailing view today is that recognition is declaratory and does not create a State.
- If an entity does not fulfill the requirements for statehood, mere recognition will not make it a State, any more than the lack of recognition will abolish a validly established Statehood
- Recognition is *not* an element of, or precondition or requirement for, statehood of an entity that is being or not being recognized as state
- Recognition is *not* a lawmaking act, and its validity or opposability depends on its compatibility with IL
    - For instance, recognition can be legally faulty if it's premature
    - Premature recognition in such cases constitutes a violation of international law and of the rights of the mother State
    - Recognition is at times used as a political tool to legitimise intervention in the internal affairs of a State, including military intervention
- Intervention by third States in support of the insurgents or similar entities is prohibited
    - Traditionally, States have refrained from recognizing secessionary movements *until their victory has been assured*
    - Compare with: In the decolonization process, there were many examples of recognition of a territory as a new State while the colonial power was still in military control
- There were also instances where States have used recognition to show support for one side in civil wars of a secessionary character
- Recognition can also be faulty if it conflicts with a previously stated position and accepted commitment

Policies of not recognizing and the duty not to recognize

- The duty of nonrecognition applies to entities created in *breach of jus cogens*

Conditional recognition

- Conditions attached to recognition do not affect statehood any more than the recognition, or its lack, affects it

The legal consequences of recognition of States

In international law

- Recognition of another State does not lead to any obligation to establish full diplomatic relations, and *vice-versa*
    - Not being recognized as a State is no bar to all kinds of relations
- On treaties, there are two views:
    - States that do not wish to recognize another State object to the nonrecognized State's participation, or state that *no treaty relations* between them arise
    - Treaty relations between parties to a multilateral treaty arise out of the parties' consent to the treaty, not out of States-parties' mutual recognition
        - Especially with regard to human rights treaties, relations between parties could not be excluded on a unilateral or bilateral basis

In domestic law

- If State A recognizes State B, this usually entails that the courts of State A will apply the law of State B and give effect to its sovereign acts
- In the case of nonrecognition, national courts will not accept the right of the foreign State or government to sue or claim other rights of a governmental nature, but as regards private parties, the situation varies
- Judicial treatment of recognition could become that of the sovereign existence of the State and effectively overlap with that of statehood

Recognition of governments

- Relevance: If a State legally continues despite foreign occupation, and the government is in exile, recognition of government may intersect with statehood issues.
- The issue of recognition of governments arises when a government changes unconstitutionally.
- A government's status and legitimacy is determined by the domestic constitution, not by international recognition manifesting foreign States' positions
    - Recognition cannot make up for lost legitimacy
    - In such a case, foreign States and their nationals act on their own risk when dealing with unconstitutional yet effective governments
    - Furthermore, if IL were to confer decisive relevance to the recognition of a government which is effectively but illegitimately established, then the *international legitimacy of the government would depend on a foreign source*, foreign recognition, not the State's domestic constitution
- *Tinoco Doctrine:* A regime was the government because it was in effective control of the State
- *Tobar Doctrine*: Placed emphasis on the constitutionality of a government that is or is not recognized
- *Estrada Doctrine*: States should not formally announce the diplomatic recognition of foreign governments, as that could be perceived as a judgment on the legitimacy of said government, and such an action would imply a breach of state sovereignty
    - It merely substitutes implied recognition for express recognition
- *Non-inquiry Policy*: To avoid the use of recognition and instead concern the State with the question of whether it wishes to have diplomatic relations with the new government
- A government's internationally recognized status could in some cases be no more than manifestation of external forces taking sides in a civil war

"De-recognition"

- It is practiced out of the political drive to effect or accelerate regime changes in the rel- evant States, regardless of who is in effective control of the relevant State or who is the legitimate government under that State's constitution
- It amounts to interference in the domestic affairs of a State whose territory witnesses civil war or insurrection
- Premature recognition of governments amounts to an **internationally wrongful act** against a territorial State
    - If States are autonomous and independent, they have the right to determine the form and system of their own government, which is done precisely through the internal constitution and political process
    - Mutual independence of States makes the ***reliance on the domestic legitimacy*** of a government the most suitable and invariably lawful policy of recognition

De jure and de facto recognition of States and government

- De facto recognition – An entity is recognized owing to its factual existence or exercise of authority and control over a particular territory
    - The notion of de facto recognition of States is problematic, because it implies that a State is recognised because it in fact exists, and even if it is possibly not entitled to be a State
    - De facto recognition may thus involve denial that a lawfully established entity is a State according to law, or a claim that an illegal entity has some lawful basis of existence as a State because it in fact exists, and thus could subvert the doctrine of non-recognition
- De jure recognition – Recognition of the lawful existence of that government or State and, implicitly at least, refers to the State's ability to enjoy the legal authority that States and governments ordinarily enjoy
- When recognition is granted by an express statement, it should be treated as de jure recognition, unless the recognising State announces that it is granting only de facto recognition
- Recognition should only be deduced from acts which clearly show an intention to that effect
- The establishment of full diplomatic relations is probably the only unequivocal act from which full recognition can be inferred
- It is not impossible that a professed de facto recognition could effectively amount to de jure recognition, and the nature of underlying transactions must be assessed alongside the stated policy
    - Example: Carrying on with trade under a pre-*coup* treaty would not entail recognition of an unlawfully established government, but the conclusion of a new treaty would definitely entail such recognition

- A refusal to recognise foreign laws and decrees of a validly established State or lawful government, including for reasons of public policy, is fully in accordance with the premise that one State owes no duty of extraterritorial recognition of the other State's laws and decrees

Legal personality of non-State entities

When is a person a legal entity?

- An entity is a legal person, or a subject of the law, when it has a capacity to enter into legal relations and to have legal rights and duties.
- In IL, the key requirement is the capacity to enter into international legal transactions and thus take part in the process of the creation of international legal rules.
  - Those entities that have such capacity can determine the extent to which any other entity is permitted to operate within the realm of international law

States

- The legal personality of States is unlimited, and encompasses all international rights and obligations
- States are original and primary subjects of international law

International organizations

- An organization set up by agreement between two or more States as an entity separate from the member States who have created it.
  - They are established by the treaty which States have concluded to constitute them and to accord them rights and duties to achieve their specific tasks.
- They possess a will of their own.
  - The process of their will-formation takes place through the decision-making procedures in the plenary and limited participation organs.
- The will of the organizations is not the same as the combined or cumulative will of their members.
  - For instance, an independent role is envisaged for the UN Secretary-General
- They are bound by:
  - customary international law
  - any treaty establishing them
  - any treaties they choose to enter into
- These sources of law determine the scope of the organizations' powers (*vires*)
  - The extent and limits of *vires* increases with the fact that some powers delegated to international organisations enable them to exercise discretion and to bind member States through their decisions
- When States create an international organization they set it up for designated purposes
  - The scope of institutional powers thus varies from organization to organization
- All international organizations are in all circumstances bound by *jus cogens*, which cannot be contracted out by their constituent instruments of members' agreements
  - An organization's decision against *jus cogens* would be null and void.

Characteristics of supranational organizations (EU)[4]

1. The decision-making organs of the organisation are composed of persons who are not government representatives
2. They have the authority to adopt binding acts that have direct legal effect on individuals and companies within member States
3. The constituent treaty of the organization and the measures adopted by its organs form a new legal order

Belligerents and insurgents

- Characteristic to insurgents is that they control some territory and aspire either to become the effective new government of the State or to secede from it
- Insurgents can be *recognized* as belligerents
  - But states do not have an obligation to recognize any fighting unit as belligerent or insurgent
  - Nor does the applicability of the law of internal armed conflicts to the conduct of a State fighting insurgents depend on the recognition of insurgency or belligerency
  - Recognition of belligerents or insurgents is *not* needed for the observance of neutrality, because of the principle of non-intervention
- In other cases, the recognition of belligerency may entail an equal treatment of the government and insurgents with regard to trade, or recognition of administrative and judicial acts enacted by insurgent authorities
  - Such may be an internationally wrongful act against the State's government, because such recognition amount to concession to insurgents of prerogatives that ordinarily ought to be exercised by the State
  - Because in effect, recognition of belligerency or insurgency hardly differs from their recognition as a State or as a government
- Still under IL, territory controlled by rebels/insurgents remains under the sovereignty of the State
- **The international status of national liberation movements does not primarily rest on the control of territory, but rather on international recognition of their political goals of freedom from colonial domination, racist oppression, or alien occupation.**
  - The reason for this is that, as people entitled to self-determination are entitled to

[4] The EU legal framework reflects the principle of delegation.

establish a State in their territory, a national liberation movement is potentially at least seen as the entity that would be forming that new State's government

Other relevant international entities

- Some entities are conventionally denoted as *sui generis*:
    - Vatican
    - International Committee of the Red Cross
    - Sovereign Order of Malta

Individuals and companies

- Many rules of international law exist for the benefit of individuals and companies, but this does not provide them legal personality (only a limited one)
- Treaties conferring rights to individuals or companies give them access to an international tribunal to enforce those rights
- Under human rights treaties, individuals have access to dispute settlement procedures as are consented to by States-parties
    - Under customary law, the claim of a national of State X against State Y is a claim belonging to State X
    - It is up to State X whether it wants to pursue the claim diplomatically or in an international forum
    - Compensation is paid to State X and IL does not demand that State X pays any of it to the injured individual
- Individuals and companies cannot participate in treaty-making or creation of rules of CIL
- Individuals can be tried before international criminal tribunals, but they do not become international legal persons
    - Instead, arrangements of international criminal justice are means whereby States agree to discharge their obligations to prosecute international crimes
    - This only means that States are obliged to ensure that individuals within their jurisdiction comply with the Tribunal's requests, not that these duties are directly addressed to an individual

Nongovernmental organizations (NGOs)

- International law provides no criteria for defining a non-governmental organisation (NGO) except that, whether for profit or non-profit, it should:
    - Not form part of State apparatus or exercise governmental authority, and
    - Its activities should not be controlled by a State
- Intergovernmental organizations may agree to grant NGOs a certain consultative or observer status and thereby a *limited* international status, but this does not make them a subject of IL

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