

PART 1 - checklists

Course breakdown

- 1) Nature + customary international law
- 2) Law of treaties + other sources of international law
- 3) Sovereignty and territory
- 4) Maritime jurisdiction
- 5) State responsibilities and remedies
- 6) Jurisdiction + international fact finding (*essay)
- 7) Use of force (*jus ad bellum*)
- 8) International law in Australia
- 9) Human rights and diplomatic protection
- 10) Law of armed conflict (*jus in bello*)
- 11) International criminal law (*essay)

CUSTOMARY INTERNATIONAL LAW

- 1) **State:** Customary international law is one of the sources of international law: ICJ Statute Art 38(1)(b)
- 2) **Element 1:** State practice – what States do
 - a. **State:** State practice does not need to be universally consistent, but rather generally consistent: Nicaragua
 - b. **Observe:** Actual conduct
 - i. Domestic laws
 - ii. International acts
 - iii. Signature, accession, ratification of treaties
 - c. **Or:** Statements
 - i. Official speeches
 - ii. Diplomatic correspondence
 - iii. Public comments
 - iv. Press releases
 - d. **Also:** Look for contrary State practice
 - i. Is there an objection?
 1. If not = the rule could be weakened
 2. If so = the rule could be strengthened
- 3) **Element 2:** *Opinio juris* – what States believe they must do
 - a. **State:** States must also believe that they are obliged by law to act in a certain way: North Sea Continental Shelf; Nicaragua; SS Lotus
 - b. **Observe:** Statements of legal obligation
 - i. Support for UN resolutions or declarations
 - ii. Diplomatic correspondence
 - iii. Military and diplomatic instructions and manuals
 - iv. Ratification of conventions
 - v. Work of International Law Commission
 - vi. Domestic explanations
 1. Parliamentary statements
 2. Court judgments
- 4) **Consider exceptions**
 - a. Has the State persistently objected? Anglo-Norwegian Fisheries
 - i. Must object while rule is still forming
 - ii. Must maintain objection
 - b. Is there a regional or local custom in the area? Right of Passage case
- 5) **Remember:** Treaties may either:
 - a. Codify CIL
 - b. Crystallise CIL

LAW OF TREATIES

- 1) **State:** International treaties are a major source of international law: ICJ Statute Art 38(1)(a)
- 2) **If relevant:** Were the obligations were taken outside of the treaty?
 - a. Oral undertakings are still binding: Legal Status of Eastern Greenland
 - b. Writings of uncertain intent may be binding: Qatar v Bahrain
 - i. Unless they are a 'general flourish': Aegean Sea Continental Shelf
- 3) **State:** The relevant legislation is the Vienna Convention on the Law of Treaties
- 4) **Consider:** Does the VCLT apply?
 - a. Before or after 27 January 1980?
 - b. Are the States party to the treaty?
 - i. If not satisfied, then CIL applies
- 5) **Consider:** Party status – has the treaty been signed, ratified or acceded?
 - a. If ratified, State will be bound: Art 14
 - b. If signed, then the State will not fully be bound: Art 12
 - i. **However:** The State must 'refrain from acts that would defeat the object and purpose of the treaty': Art 18
 - ii. **Unless:** That State has made it clear that they do not intend to become party to the treaty
 - c. If acceded, State will be bound: Art 18
- 6) **If necessary:** Consider procedural effects of a treaty
 - a. Art 24: Entry into force is specified in the treaty
 - b. Art 34: Will not bind 3rd parties
 - i. Art 35: Unless there is express consent
 - ii. Art 36: Where a right arises for a 3rd party, there is a presumption of consent; but the presumption is rebuttable
 - c. Art 27: ***Treaty obligations cannot be avoided on the basis of domestic law***
 - d. Art 28: Obligations are prospective only
 - e. Art 29: Applies to all territory of a State, unless specified otherwise
 - f. Art 30: Supersedes obligations under earlier treaties between the same parties
- 7) **State:** Art 26: *Pacta sunt servanda* – performing treaty obligations in good faith
- 8) **Analyse:** The treaty
 - a. **State:** The treaty should be interpreted using the general rule of interpretation: Art 31(1). This is a unitary approach: Golder v United Kingdom
 - i. Good faith (overall attitude)
 - ii. Ordinary meaning
 - iii. Object and purpose
 - iv. Context
 1. Art 31(2): Agreements by the parties in relation to the treaty can help determine context
 - v. **If necessary:** Consider:
 1. Subsequent agreement and practice between the parties: Art 31(3)
 2. Special meaning has been given by the parties: Art 31(4)
 - b. **If necessary:** Is there still ambiguity, or is the result manifestly absurd or unreasonable?
 - i. Art 32: Supplementary materials
 1. *Travaux preparatoires* – records of negotiation
 - c. If not ratified, this is CIL

- 9) **Consider:** Are there reservations?
- a. **State:** Art 19: Reservations are permissible, unless:
 - i. The treaty prohibits it: Art 19(a)
 - ii. Only specified reservations, which do not include relevant reservation: Art 19(b)
 - iii. ***The reservation is incompatible with the object and purpose of the treaty:*** Art 19(c); Reservations to the Convention on the Prevention and Punishment of the Crime of genocide Advisory Opinion
 - b. **Consider:** Once proposed, other States may accept or reject: Art 20(4)
 - c. **Consider:** Legal effects of reservation
 - i. If accepted, both parties can rely on reservation: Art 21(1)
 - ii. If rejected, the provision containing the reservation is excised: Art 21(3)
 1. CIL + general principles of law then apply: English Channel Arbitration
 - iii. This does not modify the provisions of the treaty for other parties: Art 21(2)
 - d. **Also:** Reservations may be withdrawn: Art 22
- 10) **Consider:** Is the treaty invalid?
- a. Was State's consent to be bound by the treaty invalid?
 - i. Requires prompt action upon becoming aware: Art 45(b)
 - ii. **State:** Will only apply in limited circumstances
 1. Manifest violation of a provision of internal law of fundamental importance: Art 46(1)
 2. Violation by representative of restriction of authority notified to other negotiating States: Art 47
 3. Error of fact forming an essential basis of consent to be bound: Art 48
 4. Fraud: Art 49
 5. Corruption: Art 50
 6. Coercion of a representative: Art 51
 7. Coercion of a State by illegal use of force: Art 52
 8. Breach
 - b. Does the treaty violate a *jus cogens* obligation?
 - i. If on conclusion of treaty, it will be void immediately: Art 53
 - ii. If later rule emerges, will become void then: Art 64
 - iii. Some examples:
 1. Ban on the use of force
 2. Acts criminal under international law
 3. Slavery, piracy, genocide
 4. Barcelona Traction: Aggression, racial discrimination and self-determination (also East Timor Case; Israeli Wall Opinion)
 5. Torture
 6. Apartheid
 - c. Does the treaty violate an *erga omnes* obligation?
 - i. **State:** These are rights that States owe to the international community as a whole: Barcelona Traction
 1. Such as environmental protection
- 11) **Consider:** Termination and suspension
- a. By consent: Art 54 (termination); Art 57 (suspension)

- b. Unilateral declaration or withdrawal: Art 42 (termination); Art 56 (suspension)
 - i. Very rare
- c. Material breach
 - i. Repudiation
 - ii. Violation of principle essential to the object and purpose: Art 60
 - iii. Impossibility: Art 61
 - 1. Must result from the permanent disappearance or destruction of an object indispensable for the execution of the treaty: Art 61(1)
 - 2. Cannot be used where party seeking to terminate has violated an obligation: Art 61(2)
- d. Fundamental change of circumstances: Art 62
 - i. Must not be foreseen by parties at time of treaty: Art 62(1)
 - ii. Must form an essential basis of the treaty: Art 62(1)(a)
 - iii. Must radically transform the extent of the obligations still to be performed under the treaty: Art 62(1)(b)
 - 1. Very limited: The Fisheries Jurisdiction case; Gabcikovo-Nagymaros project case

OTHER SOURCES OF INTERNATIONAL LAW

- 1) **State:** The general principles of law as recognised by civilised nations is a source of international law: ICJ Statute Art 38(1)(c)
- 2) **Examples**
 - a. A Court must have jurisdiction to hear a case, which it may determine for itself
 - b. No-one should be a judge in their own cause
 - c. A breach of the law involves an obligation to make reparation
 - d. Parties to a contract should act honestly and in good faith
 - e. Estoppel
 - f. *Res judicata*
 - g. No party can take advantage of their own wrong
- 3) **Consider:** Subsidiary sources of law
 - a. **State:** Judicial decisions and teachings of the most learned publicists are a source of international law: ICJ Statute Art 38(1)(d)
 - i. **State:** Although no common law precedent, judicial decisions are frequently referred to and can assist in the development of CIL
- 4) **Consider:** Soft law
 - a. **State:** Not a formal source of law, but can generate hard law through evolution into custom, or assistance with statutory interpretation
 - i. UN General Comment 24 is an example

SOVEREIGNTY AND TERRITORY

- 1) **State:** Between independent States, respect for territorial sovereignty is an essential foundation of international relations: Corfu Channel case
- 2) **If relevant:** Determine whether the State has gained title to the territory
 - a. Exercising authority
 - i. Occupation
 - ii. Prescription
 - b. Cession
 - c. Accretion
- 3) **Determine:** Whether the elements of statehood are satisfied
 - a. **State:** Statehood is important, as the UN is based on the principle of sovereign equality of all members: UN Charter Art 2(1)
 - b. **State:** The elements of statehood are laid out in the Montevideo Convention on the Rights and Duties of States. These are reflective of CIL
 - i. Permanent population
 1. Need not be large, only permanent (E.g. Vatican City, Tuvalu)
 - ii. Defined territory (*essential attribute*)
 1. Boundaries do not need to be definite, there must be 'sufficient consistency': Deutsche Continental Gas-Gesellschaft v Polish State
 2. Does not need to be large (Vatican City)
 - iii. Government (*essential attribute*)
 1. Effective control over a defined territory: Aaland Island case
 2. Independent government: Customs regime between Germany and Austria
 - iv. Capacity to enter relations
- 4) **Consider:** Recognition by other States
 - a. **State:** There are two theories: Declaratory and constructive
 - i. Declaratory theory = recognition not relevant: Montevideo Convention Art 2
 - ii. Constructive theory = recognition can be relevant: Tinoco Arbitration
- 5) **If there has been a change in Government**
 - a. That was constitutionally legitimate = acceptable
 - b. That was constitutionally illegitimate = test of effective control:
 - i. Control and authority over all or nearly all of the national territory
 - ii. The obedience of the bulk of the population
 - iii. Of a permanent character

SELF-DETERMINATION

- 1) **State:** The concept of self-determination is raised in the UN Charter Arts 1(2) and 55
- 2) **State:** The General Assembly passed resolutions clarifying self-determination. This is reflective of CIL: Namibia advisory opinion
 - a. The right of peoples to freely determine their political status and freely pursue their economic, social and cultural development'
- 3) **Determine:** Whether the elements of self-determination are satisfied
 - a. Trust or Non-Self-Governing Territories or all other territories which have not yet gained independence? GA Resolution 1514
 - b. Geographically separate? GA Resolution 1541
 - c. Distinct ethnically or culturally? GA Resolution 1541
 - d. Any subsidiary matters?
 - i. Administrative, political, juridical, economic or historical factors showing the territory is arbitrarily placed in a position of subordination to the metropolitan State
 - e. Consider limitations
 - i. Must not permit partial or total destruction of national unity
 - f. **Remember:** Very rare in post-colonial world
- 4) **Alternatively:** Is there an internal right of self-determination?
 - a. **State:** GA Resolution 47/135 discusses minority rights
 - b. Determinative factors could include (Final Report for UNESCO):
 - i. Common historical tradition
 - ii. Racial or ethnic identity
 - iii. Cultural homogeneity
 - iv. Linguistic unity
 - v. Religious or ideological affinity
 - vi. Territorial connection
 - vii. Common economic life
- 5) **Consider:** Consequences if self-determination is permitted
 - a. **State:** A sovereign and independent State is established, which allows free association with an independent State and emergence into any other political status: Friendly Relations Declaration

MARITIME JURISDICTION

- 1) **State:** The law covering maritime jurisdiction is UNCLOS III, which is largely reflective of CIL
- 2) **State:** Which area the activity is taking place in
 - a. Landward side of the baseline = internal waters: Art 8(1)
 - b. 12NM from baseline = territorial sea: Art 2(1)
 - c. 12-24NM from baseline = contiguous zone: Art 33(1)
 - d. 200NM from baseline = EEZ: Arts 55-75
 - e. Beyond = High seas: Art 86
 - f. Straits used for international navigation: Art 37
 - g. Archipelagic sea lanes: Art 46(b)
 - h. Island: Art 121(1) and (2)
 - i. Naturally formed area of land, surrounded by water, above water at high tide
 - ii. Must be capable of sustaining habitation or an economic life of its own
 - i. Rock: Art 121(3)
- 3) **If internal waters**
 - a. Innocent passage:
 - i. Not permitted, unless under distress where there is imminent peril
 - b. Other rights of passage:
 - i. Neither submarines nor aircraft may pass, unless under distress
 - c. There is a right to commence hot pursuit: Art 111. All must be satisfied:
 - i. A good reason to pursue: Art 111(1)
 - ii. Not interrupted: Art 111(3)
 - iii. Signal the other vessel to stop: Art 111(4)
 1. Contentious whether it needs to be heard
 - iv. Using a military or other Government vessel: Art 111(5)
 - v. Cannot have reached another State's territorial sea: Art 111(3)
 - d. Other rights and duties: warships may enter if given permission, but must comply with regulations
- 4) **If territorial sea**
 - a. Innocent passage: cannot be prevented: Art 17
 - i. But, must be continuous and expeditious: Art 18(2)
 - ii. Also, can be limited where passage is not innocent: Art 25(1)
 1. Can involve the use of force, but this must not go beyond what is reasonable and necessary: M/V Saiga
 - iii. Or suspended, where security is at risk: Art 25(3)
 1. Passing State's prohibitions: Art 19
 - a. No threat or use of force
 - b. No exercise or practice with weapons
 - c. No collection of intelligence
 - d. No breaches of local regulations customs, health
 - e. No fishing
 - f. No research or survey activities
 - g. No and serious pollution
 - h. No launching, landing or taking on board any aircraft
 - i. No launching, landing or taking on board any military device
 - b. Other rights of passage:

- i. Submarines must travel on the surface with their flag: Art 20
 - ii. Aircraft may only pass with permission
 - c. There is a right to commence hot pursuit: Art 111. All must be satisfied:
 - i. A good reason to pursue: Art 111(1)
 - ii. Not interrupted: Art 111(3)
 - iii. Signal the other vessel to stop: Art 111(4)
 - 1. Contentious whether it needs to be heard
 - iv. Using a military or other Government vessel: Art 111(5)
 - v. Cannot have reached another State's territorial sea: Art 111(3)
 - d. Other rights and duties:
 - i. Cannot hamper innocent passage: Art 24
- 5) **If contiguous zone**
- a. Innocent passage: permitted
 - b. Other rights of passage:
 - i. Submarines = free navigation
 - ii. Aircraft = free navigation
 - c. There is a right to commence hot pursuit: Art 111. All must be satisfied:
 - i. A good reason to pursue: Art 111(1)
 - ii. Not interrupted: Art 111(3)
 - iii. Signal the other vessel to stop: Art 111(4)
 - 1. Contentious whether it needs to be heard
 - iv. Using a military or other Government vessel: Art 111(5)
 - v. Cannot have reached another State's territorial sea: Art 111(3)
 - d. Other rights and duties:
 - i. Coastal State can prevent infringement of fiscal, immigration, sanitary or customs laws: Art 33(1)
- 6) **If EEZ**
- a. Innocent passage: permitted
 - b. Other rights of passage:
 - i. Submarines = free navigation
 - ii. Aircraft = free navigation
 - c. There is a right to commence hot pursuit: Art 111(2). All must be satisfied:
 - i. A good reason to pursue: Art 111(1)
 - ii. Not interrupted: Art 111(3)
 - iii. Signal the other vessel to stop: Art 111(4)
 - 1. Contentious whether it needs to be heard
 - iv. Using a military or other Government vessel: Art 111(5)
 - v. Cannot have reached another State's territorial sea: Art 111(3)
 - d. Other rights and duties:
 - i. Sovereign rights over exploration, exploitation, conservation, management, marine scientific research, oil, gas, living resources, pollution control
 - ii. May conduct military exercises in other State's EEZ
- 7) **If high seas**
- a. Innocent passage: High seas freedoms
 - b. Other rights of passage: High seas freedoms
 - c. There is no right to commence hot pursuit
 - i. But hot pursuit can be continued through the high seas
 - d. Other rights and duties:
 - i. Duty to preserve marine environment: Art 192