FINAL EXAM NOTES

Red = Important

Green = Legislation

Blue = Not as important

Highlight = Signposting

TOPIC ONE: Sources of International Law

1. Whether the International Court of Justice can take an item into consideration when performing its functions is limited by Art 38(1) of the Statute of International Court of Justice.
2. Art 38(1) provides that '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.
    i. Art 38.2 provides that the Court can decide a case ex aeuqo et bono. This means the court can ignore rules which are the product of any of the above three law creating agencies and to substitute itself as a law creating agency
3. There is no order of application: the Court is not required to consider 38.1(a) before 38.1(b).

Source One: Customs

4. As per the Lotus Case: France v Turkey (1927) and the Asylum Case, to prove that there is a custom, two elements must be demonstrated. The first is the objective

element state compliance with the custom. The second element is of opinio juris, that compliance with the custom is based on the psychological or subjective belief that the custom is law.

i. See Identification of Customary International Law. Text of draft conclusions provisionally adopted by the ILC Drafting Committee, UN Doc.A/71/10 (2016) ('draft ILC Conclusions') - ILC Draft Conclusion 2 and 3

5. Treaty and Customs:

i. In the Nicargua (Merits) Case (1986), it was found that a customary international law applied even when there was a treaty provision existing between the parties that covered the same ground. The court found that if a treaty provision parallels a rule of customary international law, two rules of the same content are subject to seperate treatment and have a seperate existence. Where two States agree to incorporate a particular rule in a treaty, their agreement suffices to make that rule a legal one, binding upon them; but in the field of customary international law, the shared view of the Parties as to the content of what they regard as the rule is not enough. The opinion juris may be found through the attitude of the Parties and the attitudes of the States towards certain General Assembly resolution. GA's may have normative value and may indicate a rule or the emergence of opinion juris.

6. International Organisation

ILC Draft conclusion 12: Resolutions of international organizations and intergovernmental conferences

1. A resolution adopted by an international organization or at an intergovernmental conference cannot, of itself, create a rule of customary international law.
2. A resolution adopted by an international organization or at an intergovernmental conference may provide evidence for establishing the existence and content of a rule of customary international law, or contribute to its development.
3. A provision in a resolution adopted by an international organization or at an intergovernmental conference may reflect a rule of customary international law if it is established that the provision corresponds to a general practice that is accepted as law (opinio juris).

Element One

7. Element One: State Compliance
    i. While the state practice does not have to be perfect or complete or in rigorous conformity (Nicaragua Merits Case), it must be demonstrated that there is 'constant and uniform usage' practice by States (Asylum Case (1950): Colombia v Peru)
        a. It will not be met where the parties are acting out of political expediency. In the Asylum Case (1950): Colombia v Peru, Colombia gave asylum to a person who had begun a rebellion in Peru and was being chased by the Peruvian government. The asylum was given in Colombia's embassy in Peru. Colombia wished to safely move the person from the embassy in Peru into Colombia, but Peru refused. Colombia brought the case to the Court to rule that Colombia should be able to qualify the offence for asylum on the basis treaty provisions and 'american international law in general'. It was held that Colombia could not show that the right to asylum was exercised by States as a right appertaining to them and respected by the territorial State as a duty incumbent on them and not merely for reasons of political expediency.
        b. ILC Draft conclusion 8: The practice must be general: (1). The relevant practice must be general, meaning that it must be sufficiently widespread and representative, as well as consistent; (*2) Provided that the practice is general, no particular duration is required.*
    ii. Usage is not merely relating to the words or claims by States to actual assertion of sovereignty, it requires actual practice or action on it (Anglo-Norwegian Fisheries Case, Judge Read).
        a. Practice is broadly defined in Conclusion 6, ILC Drafting Ctee 2018 to include "a wide range of forms. It includes both physical and verbal acts. It may, under certain circumstances, include inaction. Forms of State practice include, but are

not limited to: diplomatic acts and correspondence; conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference; conduct in connection with treaties; executive conduct, including operational conduct “on the ground”; legislative and administrative acts; and decisions of national courts.”

iii. Art 38(1) allows the ICJ to take into account local customs that exist, even if they derogate from the general customary international law.

a. In Anglo-Norwegian Fisheries Case (UK v Norway): Delimitation of the Territorial Sea, there was an issue regarding the measure of baseline delimitation used by Norway. British challenged it. Norway claimed that such was required for fishing. The 10 mile rule argued by UK has not accepted authority as a general rule of international law because some States have adopted a different limits, including Norway. The Court accepted Norway's argument that: Rules of international law take into account the diversity of facts geographically and therefore conceded drawn baselined adapted to the special conditions of the region. Norway did not interfere or infringe the general law: it is an adaptation rendered necessary by local conditions.

iv. Treaties as a Source of Custom:

a. In the North Sea Continental Shelf Case, the Court’s held that a treaty may come to be accepted and followed by states as custom in their practice after the treaty is adopted (provided that the treaty provisions are of a fundamentally norm creating character), or it may crystallise custom. This requires that the provision in the Convention itself be fundamentally of a norm-creating character to form the basis of a general rule of law.

a. The facts involved there were treaties made between Germany and Denmark , and Germany and The Netherlands relating to drawing lines limiting the continental shelve.
b. The Court accepted that even though the Danish and Dutch claim was based on the Geneva Convention, even if the Convention did not apply specifically, IT IS POSSIBLE the rule had become part of the general corpus of international law such that it can become binding on countries who are not even part of the Convention.
c. State practice especially by those whose interest are affects, should have been both extensive and virtually uniform, but the passage of short time is not necessarily a bar.

Element Two

8. Element Two: Opinio Juris
   i. North Sea Continental Shelf Cases: The states concerned must feel that they are conforming to what amounts to a legal obligation. Frequency or habitual character is not in itself enough.
   ii. ILC Draft conclusion 9: (1) The requirement, as a constituent element of customary international law, that the general practice be accepted as law (*opinio juris*) means that the practice in question must be undertaken with a sense of legal right or obligation. (2) A general practice that is accepted as law (*opinio juris*) is to be distinguished from mere usage or habit.
   iii. Acquiescence: 'silence or absence of protest in circumstances which generally call for a positive reaction'
      a. In the Lotus Case, it was held that acquiescence could only give rise to the recognition of a custom if it was based on a conscious duty to abstain and on the full knowledge of the custom. States had actually to be aware that they

were not acting a particular way because they were under definite obligation not to act that way.

iv. Evidence of Opinio Juris

a. Conclusion 10, ILC Drafting Ctee 2018: Forms of evidence of acceptance as law (opinio juris) include, but are not limited to: public statements made on behalf of States; official publications; government legal opinions; diplomatic correspondence; decisions of national courts; treaty provisions; and conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference.

v. What if States have protested a Practice?

a. It is unlikely that a few dissidents to a practice can prevent the practice from being a custom (Justice Tanaka, dissenting opinion in South West Africa cases). CIL WILL apply to subsequent objectors (who did not object when the law was being made but object when it is being applied)

b. Exception: Persistent Objector

(I) ILC Draft conclusion 15: *Persistent objector (*1) Where a State has objected to a rule of customary international law while that rule was in the process of formation, the rule is not opposable to the State concerned for so long as it maintains its objection. (2) The objection must be clearly expressed, made known to other States, and maintained persistently.

(II) However, a persistent objector cannot escape being bound by a new customary rule that has the character of jus cogens (VCLT Art 53).

Source Two: Treaties

9. Treaties are a source of obligation not law. Treaty may be an instrument where the law is conveniently stated but is not itself law - only evidence of law not a formal source.

10. A treaty is void if it conflicts with jus cogens (VCLT, art 53)
11. Definition of a treaty (art 2 Vienna Convention on the Law of Treaties (VCLT)): Treaty is an international agreement concluded between states in written form and governed by international law whether in one instrument or more.
12. Binding only on parties to the treaty (art 26 VCLT) but states can make reservations to certain obligations
13. Art 38(1)(a): For the treaty to be recognised by ICJ, the State party to the dispute have to be a party to the creation "recognised by contesting state'.

Source Three: General Principles of Law

14. Art 38(1)(c) allows the ICJ to take into account 'the general principles of law recognized by civilized nations'.
    i. Does Art 38(1)(c) include 'natural law':
        a. It is unclear, with legitimate arguments on both sides.
        b. ICJ applied general principle that a party cannot take advantage of its own wrong in Chorzow Factory Case

Source Four: Judicial Decisions

15. The principles of stare decisis does not apply in international law but decisions can be persuasive though. The decisions are held to have quasi-legislative value, despite not being binding except between the parts in respect of the particular case (Asylum Case).

Source Five: Writings

16. Under s 38(1)(d), the teachings of the most highly qualified publicists are assigned the same subsidiary status, whatever that may be, as judicial decisions.
17. Texts used to discover what the law is, not as a source of actual rules

ILC Draft conclusion 14 *Teachings*

> Teachings of the most highly qualified publicists of the various nations may serve as a subsidiary means for the determination of rules of customary international law.

Source Six: Unilateral Acts of States

18. Nuclear Tests Case (Australia v France): It is well recognised that declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of create legal obligations. If the declaration has the intention that the State wishes to be bound by it, the declaration has a legal undertaking, and is binding.
    i. Obligation to negotiate access to the Pacific Ocean (Bolivia v Chile): It is well established in international law that written and oral declarations made by representatives of States which evidence a clear intention to accept obligations vis-à-vis another State may generate legal effects, without requiring reciprocal undertakings from that other State”
19. Unilateral acts by a person representing the State accepting legal obligations are recognised in international law.
    i. In Denmark v Norway (Legal Status of Eastern Greenland Case) the court held that a declaration made by Norwegian Foreign Minister recognising Danish Sovereignty over Greenland was not enforceable, because of the words used in the declaration, but it was recognised that Foreign Ministers are competent to act on behalf of the Stat.

20. Unilateral Statements:

i. ILC Guiding Principles on Unilateral Declarations 2006:

a. Declarations made by an authority vested with power to bind state (who?)

b. Intention to bind state

c. Concerning a specific matter

d. Formulated in a public manner

ii. Obligation to negotiate access to the Pacific Ocean (Bolivia v Chile):

a. A unilateral declaration is required to be made by an authority vested with the power to bind the State, with the intention of binding that State, concerning a specific matter and formulated in a public manner.

b. One must "examine its actual content as well as the circumstances in which it was made"

c. The wording of these texts does not suggest that Chile has undertaken a legal obligation to negotiate Bolivia's sovereign access to the Pacific Ocean. The Court notes that Chile's declarations and other unilateral acts on which Bolivia relies are expressed, not in terms of undertaking a legal obligation, but of willingness to enter into negotiations on the issue of Bolivia's sovereign access to the Pacific Ocean.

TOPIC TWO: International Law and Municipal Law

Transformation vs Incorporation Approaches

1. These approaches relate to the reception of international law in the municipal level. In Trendex Trading Corporation v Central Bank of Nigeria (1977), Lord Denning described that 'incorporation' refers to the approach that rules of international law are believed to be automatically considered a part of municipal law unless they conflict with statute. 'Transformation' was described as the approach that rules of international law are not be considered part of the municipal law unless they have been explicitly adopted and made part by judicial decision or statute or custom.
    i. In Australia, the transformation approach is accepted and finds favour (Nulyarimma v Thompson - 'Ratification of a convention does not directly affect Australian domestic law unless and until implementing legislation is enacted. This seems to be the position even where the ratification has received parliamentary approval, as in the case of the Genocide Convention'. In that respect, while the Commonwealth Parliament enacted the Genocide Convention Act 1949 (Cth) to indicate Australian ratification of the Genocide Convention, no laws were enacted at that time making genocide a crime under Australian law.)

Implementing Treaties

2. In some instances, it will be necessary, if a treaty is to be given full effect, that measures are taken to implement the treaty into municipal law. The power to enter

into treaties arises from s 61 prerogative power, and the power to give effect to the treaties arises from s 51(xxix) external affairs power.

3. Where no implementation occurs, in Dietrich v R CJ Mason and McHugh J found that ratification itself as an executive effect has no direct legal effect upon domestic law; the rights and obligations contained in the ICCPR are not incorporated into Australian law unless and until specific legislation is passed implementing the provisions. However, Australian judges may look to an international treaty which Australia has ratified as an aid to the explication and development of the common law.
    i. presume that Parliament intended to legislate in accordance with its international obligations.
    ii. The decision in Dietrich suggested that while a treaty that had not been incorporated by way of municipal legislation had no direct effect, it was not totally irrelevant and that in line with views expressed in other decisions the treaty may have an influence upon the development of the common law.

4. Rights and Obligations under treaties which have not been implemented
    i. Doctrine of Legitimate Expectation: When Australia ratifies but not implement a treaty, it means that individuals subject to a government decision have a legitimate expectation that government officials will have regard to it.
        a. In Minister for Immigration v Teoh, the court acknowledged that a treaty which has not been incorporated into our municipal law cannot operate as a direct source of individual rights and obligations under that law. But the court noted that the fact that the Convention has not been incorporated into Australian law does not mean that its ratification holds no significance for Australian law. Ratification of a convention is a positive statement by the executive government of this country to the world and to the Australian people that the

executive government and its agencies will act in accordance with the Convention. The provisions of an international convention to which Australia is a party, especially one which declares universal fundamental rights, may be used by the courts as a legitimate guide in developing the common law.

b. The doctrine was heavily criticised by the court in Re Minister for Immigration and Multicultural Affairs; Ex Parte Lam, however the doctrine has not been overturned.

c. Minister for Immigration v SZSSJ: Legitimate expectation is rolled into the procedural fairness.

5. Implementing Treaties in Australia:

i. Note: Plaintiff M70/2011 v Minister for Immigration: Where an Act is giving effect to a treaty, the wording of the Act is to be interpreted consistently with the legislation.

ii. Method 1 - Giving the treaty force of law:

a. One method of implementation is simply to give the treaty the force of law in Australia. This method might be used where the treaty itself has been drafted with an eye to its incorporation into domestic law. However, giving a treaty the force of law is not a preferred method. The language of most international agreements is not suited to simple transportation into Australian law.

iii. Method 2 - Legislation approving treaties:

a. While there have been many occasions on which Parliament has passed legislation approving multilateral and bilateral treaties, the practice has not been consistent.

iv. Method 3 - Use of the language in domestic law:
    a. The more common practice is to translate the relevant provisions of international law into traditional legislative language and thus to avoid the uncertainty inherent in the drafting of many treaty provisions.
v. Method 4 - A new statutory regime:
    a. A completely new statutory regime wilt normally be created where the subject area covered by the treaty has not previously been the subject of Commonwealth legislation or where there is a desire to emphasise the importance of a treaty and Australia's commitment to it.
vi. Method 5 - No reference to a treaty:
    a. Legislation may be enacted in order to enable Australia to join a treaty, but the legislation may make no reference to the treaty.
vii. Method 6 - Use of regulations rather than statute:
    a. Reference has already been made to the use of regulations under a variety of Commonwealth Acts to give effect to sanctions imposed by the United Nations Security Council. That example illustrates the utility of regulations where the domestic action necessary to ensure compliance with an international obligation is urgent. Regulations avoid the inevitable delay in passage of a statute through Parliament and are more easily changed if the international obligation changes.

6. Challenging the Legislation that gives effect to the Treaty:
    i. Treaty implementation by way of a statute will also often raise issues as to the scope of the constitutional power of the State to enact such a statute. In Australia, the constitutional debate in this area has principally focused on the extent of the

operation of s 51(xxix) of the Commonwealth Constitution dealing with 'external affairs'.

   a. Note: Legislative power of the Cth is not constrained by International obligations (Polites v Commonwealth)

ii. In the Tasmanian Dam Case, it was held that:

   a. The extent of the Parliament's power to legislate so as to carry into effect a treaty will, of course, depend on the nature of the particular treaty, whether its provisions are declaratory of international law, whether they impose obligations or provide benefits and, if so, what the nature of these obligations or benefits are, and whether they are specific or general or involve significant elements of discretion and value judgment on the part of the contracting parties.

   b. Implicit in the requirement that a law be capable of being reasonably considered to be appropriate and adapted to achieving what is said to provide it with the character of a law with respect to external affairs is a need for there to be a reasonable proportionality between the designated purpose or object and the means which the law embodies for achieving or procuring it.

   c. The fact that a subject becomes part of external affairs does not mean that the subject becomes, as it were, a separate, plenary head of legislative power.

   d. It does not mean that there must be any rigid adherence to the terms of the treaty.

Customary law and common law

7. Chow Hung Ching v R: Customary international law is not as such part of the law of Australia but a universally recognised principle of international law would be applied by our courts