

# LAW5005 PUBLIC INTERNATIONAL LAW

## FINAL EXAM – NOTES GUIDE

Semester 2, 2015

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### WEEK ONE: NATURE OF PUBLIC INTERNATIONAL LAW

*Development, nature and scope of international law; introduction to the UN*

#### Page 1 WHAT IS INTERNATIONAL LAW?

##### a) A Working Definition

United Nations Charter

- Organs
  - General assembly
  - Security council
  - International Court of Justice (ICJ)

##### (b) Is International Law, Law?

- No legislature – no democratic election
- No compulsory court jurisdiction
- No police force
- New laws aren't binding without state consent
- Horizontal rather than vertical or hierarchical

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### WEEK TWO – SOURCES OF INTERNATIONAL LAW

*ICJ Statute; treaties; customary international law; judicial decisions; soft law; jus cogens*

#### Page 2 Sources of International Law: (a) Statute of the ICJ

##### 1945 Statute of the International Court of Justice

Article 38(1), the Court shall apply:

- International Conventions recognised by the disputing state
- International custom
- General principles of law recognised by civilised states
- As a subsidiary means, judicial decisions and writings of publicists

##### Case: SS Lotus

- The rules of international law emanate from the free will of states.
- International law leaves states a wide measure of discretion which is only limited in certain cases by prohibitive rules.

##### Case: Kosovo (Advisory Opinion)

- If there is no evidence of an international rule binding on all states, they are free to act unilaterally.

- Page 2**      Case: Arrest Warrant of 11 April 2000 (Congo v Belgium)
- The assertion of a universal criminal jurisdiction where agents act on behalf of the international community is a vertical notion of authority that contradicts the positivist horizontal system of the Lotus case.

- Page 3**      **Sources of International Law: (b) Treaties**  
The Vienna Convention on the Law of Treaties 1969
- VCLT now reflects custom, which imposes limits on treaty making
    - Under jus cogens, states cannot validly agree to derogate from peremptory norms (Art 53 VCLT)
    - States may not use coercion to force a state to enter a treaty

**Sources of International Law: (c) Customary International Law**

i) Constant and uniform usage, accepted as law

- State practice
- Opinio juris

- Page 4**      Case: North Sea Continental Shelf (FRG v Netherlands and Denmark)  
Customary law requirements:
- Norm-creating
  - Objective (state practice)
  - Subjective (opinio juris)

Consistency of State Practice:

Case: Nicaragua

- It is not necessary that state practice be perfectly universal or uniform, so long as states with relevant interests at risk have acceded (Nicaragua).
- The number of states acting consistently is not necessarily relevant.

Case: Legality of Nuclear Weapons (Advisory Opinion)

- Gradual evolution of opinio juris evident, however, on the facts the resolutions did not command clear support for prohibition.
- NB: In this case the relative influence of states was considered, but generally this has not been a feature (*Israeli Wall*; *Congo v Belgium*)

- Page 5**      *Discussion: considerations around opinio juris and problems in practice*

**ii) Customary International Law: Regional Custom**

Case: The Asylum Case

- Uniform usage is a requirement of local custom.
- Local custom is not applicable against constant objector.

**iii) Customary International Law: Evidence of State Practice**

Akehurst definition of state practice

- Page 6**      Case: Israeli Wall (Advisory Opinion)
- Multilateral treaties provide primary sources and evidence of custom.
  - Decisions of domestic courts were relevant to prove that certain conventions applied to that state.

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Case: Nicaragua

- Details what can be taken into account while establishing state practice and opinion juris.
- Where states have acted incompatibly with a recognised rule but have attempted to justify or excuse their action this seeks to confirm rather than weaken the rule – the exception proves the rule.
- Opinio juris may, though with due caution, be deduced from the attitude of states towards General Assembly resolutions.
- Implication is that even if state practice contradicts formal statements the latter should take priority

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**iv) Customary International Law: UN General Assembly Resolutions**

Recently, the ICJ has been more inclined to use General Assembly resolutions as evidence of custom, yet they have done so with little justification or explanation.

Cases that have relied heavily upon General Assembly resolutions include the *Nicaragua case* and the *Israeli Wall Advisory Opinion*

Case: Texaco v Libya

- To determine whether a resolution is normative or de lege ferenda:
  - The existence of legal language.
  - The intent
  - Whether the resolution was adopted unanimously and by which states

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**v) Customary International Law: Persistent Objectors?**

Where the rule is of a *jus cogens* character (fundamentally immoral), a protesting state cannot avoid the application of the law (*Namibia case*)

Case: Anglo-Norwegian Fisheries

- Customary international law cannot be imposed on a state if it can demonstrate status as a persistent objector.

Fisheries Jurisdiction

- Silence can be construed as consent.

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**Sources of International Law: (d) Other Sources of International Law**

**i) General Principles of Municipal Law**

This includes certain principles of procedure, the principle of good faith, the principle of res judicata etc.

Case: Diversion of Water from the Meuse

- General principle of equity can be seen to come from municipal law. "He who seeks equity must do equity,"

Examples of General Principles:

- A state may not take advantage of its own wrong (Chorzow Factory).
- A state may not use its territory to cause injury to the territory of another (Trail Smelter).
- The singular excludes the general (Abu Dhabi Arbitration).

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## ii) Judicial Decisions and Academic Writings

*Discussion: role of juristic writers in influencing judicial decisions*

The role of juristic writers is decreasing as primary sources of law become more available. There is also a worry that juristic writings are politically biased or based on scant evidence (Spanish Zones of Morocco Claims).

As the body of juristic writing increases, difference of opinion does so too and consensus becomes more difficult (Congo v Belgium)

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## iii) Soft Law

Many treaties rely on hortatory (moralistic) provisions, requiring cooperation of activities to encourage compliance, but fall a long way short of enforceable legal obligations.

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## WEEK THREE: INTERNATIONAL AND DOMESTIC LAW

*Monism and dualism; incorporation and transformation; influence on domestic law.*

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## (a) Practical Problems and Theoretical Considerations

*Discussion: theories of dualism and monism*

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Case: Libyan Arab Jamahiriya v UK (Lockerbie Case)

- Art 103 of the UN Charter claims that UN resolutions prevail over any other international agreement.
- Inability under domestic law to act is not a defence to non-compliance

## (b) Municipal Law in International Law

*Discussion: how municipal law influences international law*

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Case: The Alabama Arbitration

- International law is superior to domestic law in an international tribunal

Case: Arbitration between Sandline International and Papua New Guinea

- An agreement between a private party and a state is an international and not a domestic contract

## (c) Customary International Law in Municipal Law

### i) Incorporation or Transformation?

*Discussion: blurred lines of incorporation and transformation*

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*Discussion: the implementation of international law in domestic courts*

- Two questions to determine
  1. What is the precise content of the purported rule of Customary International Law?
  2. Have the necessary constitutional and legislative processes been met under which international law can be received into national law?

Trendtex Trading (UK)

- Customary law enters UK common law through incorporation.
- The UK domestic courts are not even bound by their own past decisions on the content of customary law. If the court today is satisfied that the rule of international law has changed it can give effect to that change.

Chow Hung Ching v R (Aust)

- Customary international law is not automatically incorporated into Australian domestic law.
- Latham J held more ambiguously, though it is not a part of our law “a universally recognised principle of international law would be applied in our courts”

Chung Chi Cheung v R (UK)

- Lord Atkin’s statement (obiter) seems to begin by supporting the doctrine of transformation, and ends by supporting incorporation. Indicative that although clear that CIL rule should be given effect in judicial decisions, the theoretical basis for doing so is murky at best.

**ii) Crimes under Customary International Law in Municipal Courts**

- No crime exists unless it is explicitly created by the state.
- Implementing legislation is required before the courts can exercise an extraterritorial jurisdiction in a criminal matter (*Pinochet*).

Case: Nulyarimma v Thompson (Aust)

- A statutory vesting of universal jurisdiction is essential to its exercise by an Australian court.
- Domestic courts face a policy issue in deciding whether to recognize and enforce a rule of CIL, therefore, it may depend on the nature of the specific rule in question.

R v Jones (UK)

- The term ‘crime’ in the UK means nothing beyond an offence against common law.
- A crime recognised as customary law may be assimilated into UK domestic law despite the absence of implementing legislation, however, assimilation was not automatic. R v Bow Street Metropolitan Stipendiary Magistrate; Ex parte

Pinochet Ugarte (No 3)

- Domestic UK courts did not have criminal extraterritorial jurisdiction regarding torture until the implementation of the Criminal Justice Act.
- Dissent: torture was an international crime at customary law and therefore, through incorporation, this custom was part of UK law.

**(d) Treaties and Resolutions of International Organisations in Municipal Law****i) The Treaty-making Process**

**Discussion:** Australian treaty-making processes have been subject to wide criticism for the lack of transparency and consultation between executive and legislative arms. (Constitutional powers, concerns, reforms, other proposals)

**Page 18**      **ii) Constitutional and Legislative Considerations**

- Civil law traditions
- Common law Traditions

**Page 19**      Case: The Parlement Belge

- Absent specific implementation of enabling legislation by parliament, the treaty gives no rights in the UK.

Self-Executing Treaties:

- Issues can arise in distinguishing between which treaties are self-executing and those that require transformation (e.g. South African Constitution Art 231)

**Discussion: Constitutional and Legislative Considerations in Australia**

- Australia has ratified most multilateral human rights treaties but in legislating, has made them benchmarks rather than justiciable rights
- In *Dietrich v R*, the High Court chastised the federal government for exposing the nation to the risk of censure by the UNHRC

**Page 20**      **Requirement of Enabling/Implementing Legislation**

Case: Minister for Immigration and Ethnic Affairs v Teoh

- Ratification creates an expectation that an administrative decision maker will take the treaty into account
- It was conceded that a legitimate expectation would not arise from an international convention where there was executive or statutory indication to the contrary.
- In response to this, the minister of foreign affairs and Attorney-General released a statement denying the ability for an international convention to give rise to a legitimate expectation.

Case: Re Minister; Ex Parte Lam

- Ground for creating a legitimate expectation in regards to conventions and treaties.

**Page 21**      Case: Simsek v Minister for Immigration and Ethnic Affairs

- Australia is only bound by a treaty or convention on the plane of municipal law if there is enabling legislation.

**Constitutional Power to Legislate on External Affairs (s 51(xxix))**

Case: Horta v The Commonwealth of Australia

- Laws regarding external affairs do not have to be consistent with, or relate to treaties that are consistent with international law.

Commonwealth v Tasmania

- The external affairs power was specifically intended to be ambiguous, and capable of expansion (almost unlimited expansion)
- But the law cannot constitute external affairs if it fails to carry into effect the purported international rule or if it is no more than a device to attract domestic legislative power.
- There is also a need for proportionality between purpose and means.

## **Page 22      Municipal Law and United Nations Security Council Resolutions**

### Case: Bradley v The Commonwealth (Aust)

- Unless there is legislative implementation, there is no authority for the Australian Commonwealth executive to implement the resolutions of the Security Council.
- Legislative approval of a charter in Australian Parliament is not sufficient.

### **iii) Statutory Interpretation and the Presumption of Consistency with International Law; Rebuttal by Clear and Unambiguous Statutory Language**

Discussion: it is contentious whether or not the Australian Constitution should be read in conformity with international law (Roach v Electoral Commissioner; Al-Kateb v Godwin).

### Case: Mortensen v Peters

- If a statute is clearly inconsistent with CIL in UK municipal legal system, language of statute prevails: legislation had unambiguously overridden the custom.

## **Page 23      Case: Polites v The Commonwealth**

- Unless a contrary intention appears, general words occurring in an Australian statute are to be read subject to the established rules of international law.
- But that presumption is rebutted by clear and unambiguous language contrary to rule of customary international law.

### Case: Coleman v Power

- Kirby: The courts should not impute a purpose of limiting rights unless clear language is used
- Gleeson: He argued that the principle would apply only where the statute in question was intended to give effect to international legal obligations.
- He concluded that a provision of an international convention could not control/influence the meaning of words in a statute that was enacted years before the convention existed.

## **Page 24      Case: Al-Kateb v Godwin**

- Indefinite detention is lawful if explicit language is used.
- Rules of international law are not binding on Australian courts, but that they can influence the understanding of the law.
- There's a difference between taking into account political, social and economic developments since 1900 in constitutional interpretation, on the one hand, and what he characterised as binding rules of international law on the other

## **Page 25      Case: Momcilovic v The Queen**

- Dialogue model of human rights protection, whereby courts can inform the government of deficiencies in the law, but cannot strike down legislation.

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## WEEK FOUR – PERSONALITY, STATEHOOD, RECOGNITION

*International legal personality; statehood; recognition*

### Page 26 a) International Legal Personality

**States: *Montevideo Convention on the Rights and Duties of States (1933)***

- A 'person' under international law should possess:
  - Permanent population
  - Defined territory
  - Government
  - Capacity to enter into relations with other states
- Agreement between 20 states. Appeared so sensible that other states came to accept – treaty that has helped to articulate current position

Considerations for statehood as per Montevideo convention:

- Population
- Territory
- Government
- Capacity to enter into relations with other states
- Self determination
- Minority groups
- Extinction of states
- Condominium

### Page 27 b) Recognition of States and Governments

*Discussion: recognition, declaratory and constitutive theory*

### Page 28 Case: East Timor

- If a duty of non-recognition is imposed in a UN resolution, a treaty is invalid.

#### **State practice and recognition**

States have adopted a distinction between de facto recognition, where the purported government or new state is in effective control of territory, and de jure recognition where the government or state is found to be entitled at law to recognition

#### Case: Luther Co v Sagor & Co

- De facto recognition has retroactive effect.

### Page 29 *Discussion: trends in recognition and criteria of statehood*

Effective control remains an important criteria for statehood (*Woodhouse Drake*).

- The criteria in *Republic of Somalia v Woodhouse Drake* were:
  - Whether the government was constitutional
  - The degree, nature and extent of administrative control over territory
  - Whether there were any dealings with the provisional government and if so, the nature and extent of dealings
  - International recognition afforded by the world community



Case: Sierra Leone Telecommunications Co v Barclays Bank

- Considerations for recognition of a minority rebel group
  - If a State continues to work with the ousted leader and seeks the restoration of the old regime
  - The minority group does not have effective control of the entire country
  - The minority group has been condemned by the State
  - UN sanctions against the group had been given force by the State's municipal legislation

**Discussion: discretion in approaches to recognition**

**ii) Recognition of International Organisations**

IOs will be recognised as having international personality when they:

- Have the capacity to sue and be sued
- Claim certain privileges and immunities from jurisdiction
- Make treaties and enter into relations with states

Case: Reparations for Injuries Suffered in the Service of the United Nations

- Recognition does not mean a body is a state.
- The subjects of international law are not necessarily identical in their nature or the extent of their rights

**Responsibility of International Organisations for Wrongful Acts**

IOs are responsible for tortious acts and breaches of contract governed by domestic laws. Distinction between the entity and the states that created it.

Case: Behrami v France (2007)

- State does not attract liability if actions directly attributable to an International Organisation.
- "The Convention cannot be interpreted in a manner which would subject acts and omissions of Contracting Parties which are covered by UNSC Resolutions . . . to the scrutiny of the Court."

**iii) International Corporations**

Transnational corporations have limited international personality. A TNC has specific international capacities through its ability to engage in contracts with states. This personhood does not exist to the same extent as the state (*Texaco v Libya*)

Corporations are not liable under customary international law and liability for international crimes lies with individuals (*Kiobel v Royal Dutch Petroleum*) – but see *Sarei v Rio Tinto* – contested area of law

**iv) Individuals and Non-Government Organisations**

**Discussion: individual international personality is largely dependent upon a capacity to enforce claims**

Case: Kadic v Karadzic (1995) US Court of Appeals, 2nd Circuit

- Not entitled to head of state immunity if no other country recognises them (thus treated as a private individual).
- Private individual can be liable for individual criminal responsibility in the context of civil proceedings.
- Alien Tort Claims Act applies to non-state and state actors.

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## WEEK FIVE – TITLE TO TERRITORY

*Methods of acquiring title to territory; extent of land and maritime territory*

### Page 33      **State Sovereignty over Territory**

*Discussion: history of state title to territory*

#### **Effective Occupation and Control**

Case: Island of Palmas (Netherlands v US)

- Mere discovery is insufficient.
- Continuous display of state functions is a flexible term, specifically in the case of isolated territory.
- Absence of protest by other states was influential

Eastern Greenland (Denmark v Norway)

- Continued display of authority involves two elements: the intention and will to act as sovereign and some actual exercise or display of sovereignty.
- Limited settlement can be countered by display of more comprehensive acts of occupation.

### Page 34      *Discussion: are opinio juris and state practice the same thing?*

#### **Title to territory**

Case: Western Sahara (Advisory Opinion)

- Occupation is not grounds for sovereignty if land is inhabited by tribes or people with social and political organization (not terra nullius)
- Contiguity title claims have no standing in international law
- Legal ties are not equivalent to established ties of territorial sovereignty
- Self-determination is an ultimate objective of UN Charter

Title to territory: evidential factors and other cases

- Recognition by other states is persuasive. Recognition by the competing state is powerful evidence of title (Temple of Preah Vihear)
- Lack of contestation or acquiescence to purported title is more passive but still valid evidence (Hondura Borders)
- Mere silence however can be ambiguous (Alaskan Boundary Dispute)
- The wishes and welfare of inhabitants, regional interests in stability, dominant geographic features, historic, ethnic and economic factors have variously played a role in the resolution of territorial disputes. E.g. in North Atlantic Fisheries economic interests peculiar to a region were considered.
- Inter-temporal law claims that the acts must be judged according to the law contemporaneous with them.

### Page 35      **Methods of claiming title to territory**

- Prescription
- Cession
- Accretion
- Conquest

#### **Contemporary Principles and Ideas**

*Discussion: Common Heritage and Joint Management of Resources (Outer Space, Antarctica)*

### Page 36      Cases: Title to Territory Common Heritage/Joint Management of Resources

Human Society International Inc v Kyodo Senpaku Kaisha Ltd (2008)

- Even though Australian Antarctic territory was only recognised by four countries, not including Japan, the sovereign claim was not capable of being questioned in the court and the act applied.

**Page 37**      Kosovo (Advisory Opinion)

- International law does not prohibit a unilateral declaration of independence by a minority group.
- Issue of positive entitlement undecided.
- Dissent: IL does not confer a right on minority groups to break away from territories.

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## WEEK SIX – LAW OF TREATIES

*How treaties are made, interpreted, applied, terminated; reservations to treaties.*

**Page 38**      **(a) Formation of Treaties: A Rose by any other Name?**

### **Vienna Convention on the Law of Treaties**

Articles 3-16: outline rules around treaties

(The *Vienna Convention on the Law of Treaties Between States and International Organisations* (1986) regulates treaties between states & IOs)

**Page 39**      **Law of Treaties Between States and International Organisations**

Case: Texaco v Libya

- Private entities/corporations do not have the capacity to make treaties, however, their contracts with states can be subject to international law

### **i) Effect of Unratified Treaties**

- Article 18: A state is obliged to refrain from acts which would defeat the object and purpose of the treaty unless it has made its intention clear not to become a party to the treaty.

### **(b) Reservations to Treaties**

- Article 19: A state make a reservation unless this is prohibited by the treaty or it is **incompatible with the object and purpose of the treaty**
- Article 20: A reservation expressly authorised by treaty does not require **acceptance**
- Article 21: A reservation with regard to another party **modifies the provisions** for relations between those parties but not for other parties
  - A **self-judging clause** is one in which states reserve to themselves the right to unilaterally declare such obligations non-binding
  - In the context of **human rights treaties**, reservations that are impermissible may be severed
  - States have attempted to add '**interpretive declarations**' onto their consent of the treaty.
- Article 22: A reservation may be **withdrawn** at any time and has legal effect only when other parties have notice of the withdrawal.
- Article 23: Any reservation, express acceptance, objection to or withdrawal of a reservation must be formulated **in writing**.

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### **(c) Effect and Performance of Treaties**

- Article 26: Every treaty in force is binding upon the parties and must be performed in **good faith** (pacta sunt servanda).
  - Fundamental principle of customary law, this was confirmed in the *Rainbow Warrior* case.
  - International tribunals continue to place heavy emphasis on the principle of good faith (*Gabcikovo-Nagymmaros*; *Nuclear Tests*).
- Article 27: A party may not invoke the provisions of its **internal law** as justification for its failure to perform a treaty.
- Article 28: Treaties do not bind parties for **past actions**.
- Article 29: Treaties are generally binding on parties in respect of their **entire territory including colonial or external territories**.
- Article 30: When a treaty specifies that it is subject to **an earlier or later treaty**, the provisions of the other treaty prevail.
- Article 34: A treaty does not create obligations or rights for a **third state** without its consent.
- Article 35: An **obligation for a non-party** may be created if it expressly accepts the obligation in writing.
- Article 36: A **right arises for a non-party** if the parties to the treaty intend the provision to accord that right and the state assents thereto.
- Article 38: Rules in treaty may become **binding on third states through custom**.
- Article 80 VCLT and Article 102 UN Charter: After treaties have entered into force, they must immediately be **registered with the UN**.

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**Discussion: Whaling in the Antarctic – do Japan's actions constitute an abuse of right or lack of good faith?**

#### (d) Treaty Interpretation

- Article 31: A treaty must be interpreted in **good faith**, according to the **ordinary meaning** of its terms in context in light of its **object & purpose**.
  - Courts may take into account any **subsequent agreements or practices** of the parties regarding treaty interpretations and any applicable rules of international law that may be relevant.
- Article 32: If the meaning is ambiguous or manifestly unreasonable, recourse may be had to **preparatory work** of the treaty
- According to the doctrine of **inter-temporal law**, a treaty should be interpreted according to the law applicable when it was concluded (*Namibia (Advisory Opinion)*).

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- **Discussions:**
  - While **'effectiveness'** is not included in the VLCT, it is incorporated under the notion of good faith.
  - It is presumed that Parliament intends to give effect to Australia's international legal obligations.

#### Case: Rocklea Spinning Mills Pty Ltd v Anti-Dumping Authority

- A treaty must be interpreted according to the meaning of its terms in their context and in light of its object and purpose.

#### Case: Povey v QANTAS Airways Limited

- A treaty must be interpreted according to the ordinary meaning of its terms

**(e) Validity of Treaties**

- Grounds for challenging the validity of a treaty include:
  - Manifest violations of internal law
  - Restrictions on the authority of the state representative
  - Error, fraud and corruption
  - Coercion
  - Conflict with a peremptory norm
- Article 44: Any right to denounce, withdraw from or suspend the operation of the treaty may be exercised only with respect to the **treaty as a whole**.
  - However, **clauses may be severed** where they are not essential to the consent of states and continued performance of the treaty would not be unjust.
- Article 45: A state cannot invalidate a treaty where **after learning the facts it has agreed** to for the treaty to remain in force or acquiesced in its validity.
- Article 46: **Conflict with internal law** is no excuse for invalidating a state's consent unless it is objectively evident that the violation is manifest.
- Article 47: If the **authority of the representative** of the state was subject to a restriction and this was not observed, it may not be used to invalidate consent
- Article 48: A state may invoke an **error** in a treaty as invalidating its consent

Case: Temple of Preah Vihear (Cambodia v Thailand)

The plea of error cannot invalidate consent if the party advancing it contributed by its own conduct to the error or could have avoided it.

- Article 49: If a state is induced to conclude a treaty by **fraud**, this may be invoked to invalidate consent.
- Article 50: If a state's consent has been acquired by **corruption** of the state representative, this may be invoked to invalidate consent.
- Article 51: If a state's representative has been **coerced** through acts or threats, the consent is void.
- Article 52: A treaty is void if its conclusion has been procured by **threat or use of force** in violation of UN Charter Art 2(4).
  - Acts of economic persuasion e.g. sanctions, do not yet constitute a form of coercion (Nicaragua Case (Merits)).
- Article 53: A treaty is void if, at the time of its conclusion, it **conflicts with a peremptory norm** e.g. aggression, torture, slave-trading, genocide, apartheid.
- Article 64: A new peremptory norm will render an existing treaty in conflict with that norm void.

**(f) Termination of Treaties**

A state may unilaterally terminate a treaty if there has been a:

- material breach
- supervening impossibility of performance
- fundamental change of circumstances.

**Discussion: what constitutes a material breach?**Case: Rainbow Warrior (NZ v France)

- A treaty will be terminated if one party undertakes action that negates the primary purpose of the agreement (material breach).
- Remedies: Since positive action was required under the treaty, termination of the treaty was not an appropriate remedy, however, specific performance could not be ordered since the obligations under the treaty had already ended. Instead condemnation and contribution to a joint fund was ordered.

**Discussion: what constitutes a supervening impossibility of performance?****Discussion: what constitutes a fundamental change of circumstances?**Case: Gabčíkovo-Nagymaros Dams Project (Hungary v Slovakia) ♥♥♥♥

- If there is not reference in a treaty to alternative forms of termination, only the limited grounds of the Vienna convention can apply to the termination.
- A fundamental change in circumstances must have been unforeseen and the circumstances must have been an essential basis of consent.
- The negative phrasing of article 62 implies that it should only be invoked in exceptional circumstances.

**(g) General Provisions on Invalidity, Termination and Suspension****i) Consequences**

- Article 69: If a treaty or provision is **invalid then it becomes void**, having no legal force.
- Article 70: If a treaty is **terminated** it will release the parties from their obligations but will not affect rights and obligations prior to termination
- Article 71: If a treaty was invalid because it **conflicted with a peremptory norm**, the parties shall eliminate, as far as possible, the consequences of any act performed under the treaty and bring their mutual obligations in line with the norm.
- Article 72: If a treaty is **suspended**, parties are released from their obligations but shall refrain from acts tending to obstruct the resumption of the treaty.
- Dispute Resolution (Articles 65-66)

**ii) Succession**

- Newly independent states emerging from existing states are not bound by the treaties of their predecessor (clean-slate principle) (Art 16 Convention of Succession regarded as custom)
- **Discussion: exceptions to succession rules**

**iii) Unilateral Undertakings**

**Discussion: the VCLT applies only to written documents not oral statements but the doctrine of unilateral acts has gained influence since the Nuclear Tests case.**

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## WEEK SEVEN – STATE JURISDICTION

*Kinds of jurisdiction; bases of jurisdiction; universality*

### Page 49 What is State jurisdiction?

- Rules of public international law which limit a State's civil jurisdiction
- Possible bases of civil jurisdiction
  - Common law: Presence of the defendant
  - Civil law : habitual residence / domicile
- Other grounds for asserting jurisdiction?
  - Presence of assets?
  - Nationality, domicile, or residence?
  - Subject-matter of the dispute?
- Akehurst's 'acid test' – presence or absence of diplomatic protests

### Page 50 Civil Jurisdiction

- Assumption of jurisdiction
- *In personam* (while defendant is in the state)
- Defendant has assets within the state
- Defendant's domicile or residence
- Subject matter by itself possibly insufficient to confer jurisdiction
- Akehurst's acid test of the limits of jurisdiction is the presence or absence of diplomatic protests.
- **Discussion: Alien Tort Statute (Alien Tort Claims Act) and jurisdiction**

#### Case: Sosa v Alvarez-Machain (Alien Tort Claims Act)

- An individual can sue under principles of contemporary international law but they must be "defined with specificity comparable to the features" of the time the claim occurred.

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#### Case: Kiobel v Royal Dutch Petroleum (Alien Tort Claims Act)

- Corporations are not liable at customary international law

#### Sarei v Rio Tinto (Alien Tort Claims Act)

- A corporation could be held liable under the ATCA for war crimes.

### Criminal jurisdiction: Types of jurisdiction

- Prescriptive jurisdiction
  - The state legislature's right to create, amend or repeal legislation
- Enforcement jurisdiction
  - The state's right to enforce this legislation through, for example, the police and public prosecutors, by investigating a crime and arresting a suspect
- Adjudicatory jurisdiction

### Page 52 i) Territorial Principle

- A state may exercise jurisdiction over all activities in its own territory.
  - Subjective territorial jurisdiction: initiated within its territory but completed outside its territory
  - Objective territorial jurisdiction: completed within its territory, even though it was initiated outside its territory
- 'Effects doctrine' – used by US to justify the extraterritorial reach of its antitrust legislation – but this is controversial

### Page 52 Cases: Territorial Principle of Jurisdiction

### SS Lotus

- International law leaves states a wide measure of discretion to assert jurisdiction which is only limited in certain cases by prohibitive rules
- Caution: fails to recognise the extent to which states may exercise their rights only relative to the rights of others.

### Bankovic v Belgium (ECHR, 2001)

- The suggested bases of such jurisdiction ... are, as a general rule, defined and limited by the territorial rights of the other relevant States.

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*Discussion: concurrent objective and subjective jurisdiction and geographical nexus*

### Case: R v Turnbull; ex parte Petroff

- If all elements necessary to constitute an offence against a law of the state exist and there is a geographical nexus between the state and the offence then the person is guilty of an offence against the law.

## **The Territorial Principle of Jurisdiction and Municipal Considerations**

### Case: R v Disun; R v Nurdin

- The general rule of international and municipal law is that a state possesses jurisdiction in virtue of its territorial sovereignty over the persons and property of foreigners found within its territory.
- There are limitations and exceptions to this rule.

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### R v Ward

- Under international law, the question of jurisdiction is to be determined by either: (either approach suffices)
  - (1) the place where the conduct causing death initiated (the initiatory theory) or
  - (2) the place where the consequences of that conduct occurred (the terminatory theory).

### **ii) Nationality Principle**

A state has competence to prosecute and punish its nationals solely on the basis of their nationality.

*Discussion: International law has left the grant of nationality to the domain of the State, including:*

- *Crimes at Sea*
- *Aircraft Hijacking*
- *Sex Offences Against Children Outside Australia*

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## **Nationality Principle: Extraterritorial Jurisdiction**

### Case: XYZ v The Commonwealth

- The assertion of extraterritorial jurisdiction is not contrary to the principles of international law, it may be covered under the nationality principle.
- The territorial principle is not the exclusive source of jurisdiction.



**iii) Protective (Security) Principle**

States may assert extraterritorial jurisdiction over non-nationals in order to protect their vital security interests, territorial integrity or political independence.

*Discussion: It is unclear what limitations are imposed on this principle.*

**Protective/Security Principle: Treason**

Case: Joyce v DPP

- No principle of comity (an association of nations for their mutual benefit) demands that a state should ignore the crime of treason committed against it outside its territory.

Case: R v Casement

- Conduct by a subject while outside state territory may constitute treason.

**Protective/Security Principle: Conspiracy**

Case: United States v Benitez

- A crime can fall under the protective principle if it has a potentially adverse effect upon the security or governmental functions of the nation.

Case: Liangsiriprasert v United States

- Crime has ceased to be largely local in origin and effect and a state will have jurisdiction if a crime committed elsewhere is intended to result in the commission of crimes locally.

**Genocide of the Jewish People**

Case: A-G (Israel) v Eichmann

- The protective principle “requires a linking point, a legal connection that links the punisher with the punished.”
- If a crime very deeply concerns the ‘vital interests’ of a state and concerns that state more than any other, it is likely to have jurisdiction under the protective principle.
- Lotus principle: shifts the onus of proof upon him who pleads against jurisdiction.

**iv) Passive Personality (Passive Nationality) Principle**

The passive personality principles grants a state jurisdiction over a non-national for acts taking place elsewhere if he or she injures nationals of the state.

*Discussion: problems with passive personality jurisdiction (including offences Against Australians)*

<b>Page 58</b>	<b>v) Universality Principle</b> Generally accepted crimes of universal jurisdiction are: <ul style="list-style-type: none"> <li>• Piracy, war crimes, slave trading, crimes against humanity and genocide.</li> <li>• Torture and terrorism are now also likely to attract universal jurisdiction.</li> </ul> <b>Issues with universality principle</b> <i>Piracy Jure Gentium</i> <i>Achille Lauro Incident and Maritime Terrorism</i>
<b>Page 59</b>	<i>Aircraft Hijacking</i>
	<i>State Torture</i>
<b>Page 60</b>	<i>War Crimes and Crimes Against Humanity</i>
	<b>Crimes Against Humanity</b>  <u>Case: The Prosecutor v Paul Bisengimana</u> <ul style="list-style-type: none"> <li>• <i>Crimes against humanity are crimes committed as part of a widespread or systematic attack against a civilian population on national, political, ethnic, racial or religious grounds.</i></li> </ul>
<b>Page 61</b>	<u>Case: Re W97/164 and Minister for Immigration and Multicultural Affairs</u> <ul style="list-style-type: none"> <li>• Crimes against humanity are not constituted by “isolated or random acts against individuals. There must be a systematic pattern of persecution aimed at members of an identifiable race or group.”</li> <li>• Crimes against humanity do not require link with armed conflict</li> </ul> <u>Case: Sryyy v Minister for Immigration and Multicultural and Indigenous Affairs</u> <ul style="list-style-type: none"> <li>• Conduct would only constitute CAH if taken place “as part of a widespread or systematic attack directed against any civilian population.”</li> <li>• Important that it is an “attack” as opposed to “pattern of persecution” or “policy of persecution”.</li> </ul>
	<b>Regulations: Crimes Against Humanity</b> <ul style="list-style-type: none"> <li>• War Crimes Act 1945 (Cth)</li> <li>• Geneva Conventions Act 1957 (Cth)</li> </ul>
<b>Page 62</b>	<ul style="list-style-type: none"> <li>• Criminal Code Act 1995 (Cth)</li> <li>• Gaps in Australian legislation</li> </ul> <b>Regulations: Genocide</b> <ul style="list-style-type: none"> <li>• Convention on the Prevention and Punishment of the Crime of Genocide 1948</li> <li>• Genocide Convention Act 1949 (Cth)</li> <li>• Criminal Code Act 1995 (Cth)</li> </ul>
<b>Page 63</b>	<u>Case: A-G (Israel) v Eichmann</u> <ul style="list-style-type: none"> <li>• The crime of genocide attracted universal jurisdiction.</li> <li>• Criterion for jurisdiction is whether crime threatens ‘the agreed vital interests of the universal community’</li> <li>• International character of crimes against humanity (in the wide meaning of the term) ‘not in doubt’.</li> <li>• CIL is a ‘developing, progressive system’ and has expanded to recognize crimes beyond piracy and war crimes</li> </ul>

**vi) A Duty to Prosecute or Extradite?**

Criminal Code Amendment (Suppression of Terrorist Bombings) Act 2002 (Cth). Australia ratified in 2002. Creates an offence relating to international terrorist activities using explosive or lethal devices.

Criminal Code gives expression to all 5 bases of jurisdiction:

1. Territorial – “Offence committed in Australia or on an Australian ship or aircraft”
2. Nationality – “Offender was an Australian citizen at time of the offence”
3. Protective (security) principle – “Offence was committed against an Australian government facility outside Australia or was intended to intimidate an Australian governmental institution”
4. Universality – “Offence committed on a ship, aircraft or territory of another state party to the Convention or by a national of another state party” (treaty variant of universality principle)
5. Passive personality / nationality – “Offence was committed against an Australian citizen”

***Discussion: Obligation to Prosecute or Extradite under Customary International Law***

Case (Genocide): Aerial Incident at Lockerbie (Libya v United States)

- At customary law, every state is at liberty to request extradition and every state is free to refuse it.
- This may be contrasted to treaty law which may impose an obligation

**vii) International Criminal Court and the Primacy of National Jurisdiction**

***Discussion: ICC jurisdiction and lack of official capacity***

**viii) Illegally Obtained Custody of Fugitive Offenders**

***Discussion: do human rights considerations override the interests of the state in prosecution?***

Case: The Prosecutor v Dragan Nikolic

- Where dealing with “universally condemned offences” courts seem to find in the special character of these offences a good reason for not setting aside jurisdiction.
- Jurisdiction over accused will be declined where accused is very seriously mistreated during abduction

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## WEEK EIGHT – IMMUNITY FROM STATE JURISDICTION

*State (sovereign) immunity; absolute and restrictive theories of immunity; immunity of officials.*

## WEEK NINE – IMMUNITY FROM DIPLOMATIC JURISDICTION

*Diplomatic immunity; rationale and extent of immunity; diplomatic inviolability*

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### Types of immunities:

- State immunity;
- Head of State immunity;
- Diplomatic immunity;
- Consular immunity;
- Immunities of international organisations;
- Entourage immunity.

*Discussion: history of state immunity*

### Differences between absolute or restrictive immunity

Trendtex Trading Corporation (Lord Denning, English Court of Appeal, 1977): The doctrine of absolute immunity had been replaced by the doctrine of restrictive immunity. This doctrine only gave immunity to 'governmental' or 'sovereign' acts. 'Commercial' acts were not protected by immunity.

### Purpose or nature?

Determine whether the act is a sovereign act or a commercial act by looking at the 'purpose' of the act, or the 'nature' of the act.

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### (a) Diplomatic Immunity and Inviolability

#### i) Rationale of Diplomatic Immunity

- Efficient Performance of the Functions of a Diplomatic Mission
- Object is to Benefit the Sending State not the Individual
- Residual Immunity for Acts Performed in the Exercise of Diplomatic Functions

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### Residual Immunity for Acts Performed in the Exercise of Diplomatic Functions

Case: Waiver of Georgian diplomat's immunity from criminal prosecution

Waiver of criminal immunity is distinct from waiver of civil immunity.

- No Immunity from Jurisdiction of the Sending State
- Procedural Immunity
  - Case: Dickinson v Del Solar  
Diplomatic immunity is not immunity from legal liability but immunity from suit (insurer will still be liable if insured has diplomatic immunity)

#### ii) Diplomatic Inviolability

The receiving state is bound to facilitate the acquisition of its territory of premises necessary for the mission.