PUBLIC INTERNATIONA LAW
PART-I

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Chapter I

Nature and Development of Public International Law

1.1. Definition of International Law

Before moving to definitions it is quite essential to differentiate between public international law and private international law. Private international law has very little in common with public international law and the major reason behind such dissimilarity is that private international law or conflict of laws is a domestic system of laws rather than an international one. Conflict of laws is not a system of law that regulates international affairs of states. It is an area of law that deals with cases containing foreign elements. It tries to resolve three questions; question of jurisdiction, question of choice of law and question of execution and enforcement of foreign judgment.

Obviously providing a perfect definition for public international law (hereinafter International law) is something difficult. But as far as public international law is concerned there are two types of definitions; (1) traditional and (2) contemporary definitions. The traditional definitions focused on the fact that international law governed interstate relations. They describe international law as a body of law that deals with interstate relations exclusively. It is called traditional because the underline assumption that states are the only actors under international law has presently changed. Though states were the only subject of international law in the past they are no longer the sole actors especially after the beginning of the 20th century. These new actors/subjects are individuals (in the 19th century individuals were thought to be under the exclusive jurisdiction of their state), intergovernmental organizations (organizations created by states but having distinct personality different from their creators). And because of this modern definitions have incorporated the roles of new actors. Different happenings of the 20th century, resulted in the rethinking of the antiquated definition of/assumptions about international law. Especially after the enactment of the UDHR (Universal Declaration of Human Rights) in the 1940s individuals started to enjoy rights, rights not emanating from domestic law but rather rights they got from international law. When the UN charter was adopted these expansion was further cemented, the charter starts by saying "we the peoples of the united nations". Thus the traditional definition had to be remodeled to give the perfect picture of public international law.

Traditional definition

International law is a law that governs the relation of sovereign states among each other.

The contemporary definitions on the other hand are characterized by being open ended. Because there are more and more new actors joining the frame. For example; Multi-national Corporations are still debatable actors (but the instructor thinks that the dust will soon settle on this topic as they have international responsibilities such as environmental pollution), Insurgent groups (international law has started imposing obligations on non-state armed groups on the case of IDP/internally displaced people/ according to an AU conventions). Thus if we provide a closed definition, due to the dynamic character of international law, the definition we have provided could easily be outdated.

The reason we have such expanded definition is because of; (1) expanding scope of international law (2) the coming into picture of new players. If we go back in time most international law scholars used to be regulating mechanisms of waging war (IHL) and also trying to define conditions that justify use of force. It also concentrated on the diplomatic relations and maintenance of international peace. These two elements formed the core of international law. But with the change of time the focus of international law expanded, especially during the 20th century. International law started to focus on additional issues such as transportation, environment, and regulation of inter-governmental organization, regulation of satellites, human right, refugee status, economic cooperation, trade, and investment.

Contemporary definition

"International law consists of rules and principles of general application dealing with the conduct of states, and of international organizations and with the relations inter se as well as some of the relations with persons whether natural or juridical."

Third restatement

From the above discussion one point we ought to understand is regardless of what has happened in the 20th century is that states still remain the most important actors of international law. International law is still dominated by states as they are the makers of international law. States form the fore fronts while non-state actors are secondary.

Yes, international organizations also engage in the process of law making (UN Security Council resolutions are binding) but their binding nature doesn't poses a general character (i.e. not always binding on other states).

1.2. Classification of International Law

International law can be classified into universal and regional. Naturally when we talk about international Law what comes to our mind are rules that apply universally. However in reality that is not the case, because we have regional international Law.

When we talk about universal international law we are talking about rules and principles binding on all states. E.g. the prohibition on the use of force. This principle is a principle that is included in the UN charter. However this principle is applicable on those non UN member states. This is so because of various justifications, but the most convincing of them all is that Article 51 of the United Nations Charter (Which prohibits the use of force) is a restatement of customary international Law. In other words what they are claiming is that article 51 and its contents already existed before the enactment of the charter.

There is also what is called general international law which is different from universal international law rules. General international law are rules and principles that apply to a large number of states but not each and every state. The reason why we have general international law rules than universal ones is that states as sovereign entities are allowed to have reservations or decide altogether not to join a treaty. In customary international law as well there is this principle known as persistent objector, where a state persistently objects to the application of a given customary international law rule during its development then that state has the right not to be bound by that customary international law rule. All these three (persistent objector, reservation and non-accession) are a reflection of a states exercise of its sovereignty.

Regional international Law is where a group of states linked either geographically or ideologically may recognize certain rules and principles applying only to them. Geographically we could mention AU laws, EU laws, while ideologically we could raise the Warsaw pact, NATO laws.

1.3. Characteristics of International Law

There are a number of unique feature of international law and these are;

International law is a horizontal decentralized legal system: *As opposed to municipal laws, which are vertical and centralized, international law are horizontal and decentralized. In municipal legal systems what we see is we have a central law making organ, a determining organ and an enforcing organ. In addition municipal legal systems are based on obedience, command and enforcement. For example with regards to the newly enacted FDRE state of emergency no subject could refuse to accept it, if s/he does we could see the consequences.*

However, in international law it is principles of reciprocity and consent that are an inherent part of the system. In principle all states are equal, therefore no state can override or bully the other. In theory, the principle of sovereign equality of state means that states are situated on a horizontal plane. In international law we don't have a strong enforcement mechanism. E.g. Ethiopia's refusal to implement the decision of the Ethio-Eritrea boundary commission. Such a scenario is unlikely to happen in a national legal system as there is an execution of judgment.

Self-help as a necessary tool: *Self-help is one of the best tools to enforce ones right which implies the lack of a centralized enforcement organ in international law. However we do not mean that use of force could be employed arbitrarily (i.e. there are exceptional circumstances of use of force/self-help/). The other mechanisms of self-help are;*

Retortion: is a lawful act which is designed to injure a wrong doing state. E.g. cutting of economic aid and ties, severance of diplomatic relations. These acts are legal because a country doesn't have an international obligation to lend aid nor to have diplomatic ties as they are purely based on consent and reciprocity.

Reprisal: These are acts which would normally have been illegal but will be rendered legal by the prior illegal act of the other state. E.g. a state nationalizes the property of the national of another state (this act by itself which is illegal) however if the other nation does a reprisal act it is not illegal. If evaluate n an individual bases the act is illegal but as a set it is a legal act.

Because international law is a weak system in terms of enforcement, some people assert that it is not a law at all. They look at international law and its attributes through the lens of domestic law and conclude that international law should not be considered as a law (especially the positivist school of thought). For positivist the law is the command of the sovereign backed by sanction. And on such note a law has a sovereign

(central law making organ) which commands (that shows vertical relationship) and whose command is backed by sanction (i·e· a strong enforcement mechanism)·

Q· Can't we regard the UN general assembly as a parliament and thus a sovereign?

General assembly: yes, it is the place where the principle of sovereign equality of the states is 100% guaranteed and respected (as Nauru and the US have equal voting power) but it is not the international parliament· Because the resolution of the general assembly are unfortunately not binding·

Security council: often regarded as the executive wing of the UN· In the security council we don't see equal representation of member states, as a security council membership is limited· Some countries have rotating membership status while other have permanent seat with veto powers· In principle the Security council has no power to enact binding decisions, however on peace and security matters, the resolutions of the council has a binding nature· Additionally, the effectiveness of the council is paralyzed by the use of veto powers·

International Court of Justice: is a court whose jurisdiction is based on the consent of the states·

But we should not conclude that international law is not a law· Even municipal laws, although usually complied with as they have a strong enforcement mechanism, aren't always adhered to or enforced strictly· The fact that there is poor enforcement mechanism doesn't mean that international law is fully devoid of enforcement mechanism· We should not use a comparison of municipal law with international law to decide whether it is a law or not· As there is a historical, functional and structural differences between these two set of systems· Additionally we shouldn't only rely on the definition given by the positivist·

Lecture 2

1.4. Scope of International Law

Over the years there has been an expansion in scope in international Law mainly caused by two reasons· First one was due to the emergence of new things which sought the attention of not a single state but different states in a coordinated fashion·

In olden time's international law focused on two areas, wars or the waging of wars and the regulation of diplomatic relation (as they were used to facilitate trade) between two countries· However, international laws changed during times and it now encompasses numerous elements· This expansion in scope could be attributed due to the advancement

of technology (rules that regulate the use of the high seas, and control of new territory/maritime technology), the increasing need for global and economic interdependence between countries (international trade, economics and finance, development and environmental issues).

The second reason is the emergence of new actors or subjects of international law in the form of international organizations individuals, multi-national companies and non-state armed groups. These necessitated the need in the readjustment in scope of international law, as it had to formulate new rules and principles that govern these entities.

"International law now covers vast and complex areas of transnational concern, including traditional topics, such as the position of states, state succession, state responsibility, peace and security, the laws of war, the law of treaties,64 the law of the sea, the law of international watercourses, and the conduct of diplomatic relations, as well as new topics, such as international organizations, economy and development, nuclear energy, air law and outer space activities, the use of the resources of the deep sea, the environment, communications, and, last but not least, the international protection of human rights."

From Peter Malanczuk Akehurst's Introduction to International Law

1.5. Theories

Where does international law get its binding force?

Command Theory

The main jurist behind this theory was Jean Austin. According to the command theory law comprised serious of commands/orders issued by a sovereign backed by sanctions/enforcements. He claimed that if any of the elements are lacking from the definition the command theory would not characterize a certain rules ore principles as a law.

Thus the supporters of this theory property that international law is not a law as it doesn't emanate from a sovereign (command of the sovereign element) and it lacks a strong enforcement mechanism (sanction element). For the jurists under this rank, international law is not a law rather it is a positive morality.

Criticism to command theory

- To begin with positive law doesn't describe national law properly let alone international law. Not all rules in a domestic legal system are backed by sanction there are these rules which are called permissive rules.
- These theory commits the fallacy of treating national law in the same manner as international law which is a wrong premise to begin with. The purpose, function, nature and structure of these two systems are completely different.
- The command theory misinterprets the function of international law. International law isn't there primarily to coerce states but rather enabling them to freely interact in a predictable and orderly fashion. This is true even in the cases of national law with the exception of laws like the criminal code.

Therefore, the theory cannot explain why states obey international law. Despite the lack of a sovereign power or sanction, states don't blatantly disobey it.

Consent/consensual Theory

The binding quality/nature of international law as well as its very existence as a law emanates from the consent of states. International law flows from the will and consent of states, no international law rule can be created without the consent of states which are going to be bound by it. Consent is the source of all international law obligations. But this assertion leads us to conclude that new states are not bound by preexisting international law rules (But is that so?).

According to the theory state consent may be given in different ways; expressly or impliedly. When we see states conclude treaties, we can observe that the state consent is given expressly. When a state accepts a certain customary international law we see a type of implied consent. This is because when a certain customary international law rule is developed, states do not seat together to form it. It is developed by state practice backed by opinio juris. By giving consent states voluntarily restrict their sovereign powers.

Yes the theory to some extent qualifies the reality of international relations related to treaties and conventions with a need for express consent (such as pacta sunt servanda) as well as implied consent in the case of customary law.

Criticism to Consent theory

- Why, would states be bound by self-imposed obligations all the time? Isn't it possible for states to assume obligations without their consent? Is consent necessary all the time? There are various international law rules which are not based on consent.
- Why is the principle of "pacta sunt servanda" itself binding on state themselves, have they expressed their consent to it?
- New countries that emerged after decolonization (in Africa and Asia) as well as secession (the former Yugoslavia, USSR) have continued to be governed by international law without giving their consent. This is more pertinent with regards to customary law. In the case of treaties there are two types of treaties; dispositive treaties which are territorial (boundary, watercourse) treaties are transferable.
- Some authors contend that consent is one method of creating binding international law rules but it is not the reason why international law is they are binding.

Natural Law theory

Natural law theory stands to the polar opposite of the command theory. The source or binding nature of international law, to the natural law theorists, is that it is in conformity with the principles of natural justice.

International law has very little support when it comes to justifying the binding nature of international law rules. Of course natural law sometimes correctly describes the nature and validity (in limited and exceptional circumstances) of some international law rules such as equity (justice, reasonableness are slightly shown under the ICJ statutes to be employed).Some scholars also try to justify their position by referring to natural law principles or superior moral principles.

Ius Cogens are types of international law rules that have superior validity. No country can set aside. E.g. Prohibition of acts leading to genocide

The other drawback of this theory is with the existence of different countries with diverse social, economic and cultural background, it is very difficult t find common acceptable moral principle.

Practical Necessity Theory

According to this theory "Ubis sossitas ubi ius", meaning law is necessary for any society to properly function and because it is necessary it is binding. As international law rules are practically necessary for the community of nations to operate peacefully and orderly. This is a very pragmatic theory.

Critics say that this theory commits a tautology (a circular definition), it says it is binding because it has to be binding or we need it in a binding form.

Deconstructionist Theory

International law has no legal objectivity, it's not a law in the first place because it can be used to justify any sort of international behavior or position (international law is whatever America says). But is that always true?

Realist Theory

The advocates of this theory claim that the real importance of international law lies not in its validity of its claim to be a law but on the impact (positive/negative) it makes on the day to day life of states. They believe that the usefulness of the law is necessary to determine the existence of a law.

Third World Approach/Theory

The international law system is an impartial system which supports the first world countries. It started gathering momentum after decolonization, where newly formed states claimed that they were playing on a turf and rules laid by first world nations.

1.6. Brief History of International law

International law, in a different form (with a limited scope and purpose), existed during ancient times. The Romans and even the Greeks before them knew about some international law rules like law of war, diplomatic relations.

However modern/contemporary international law is a relatively recent development. The rots of modern international law are found in European renaissance, the development of nation states (demarcating of boundary, claiming of sovereignty). Because the nation states that were formed had to interact and that new form of interaction necessitated a new form of interaction. The renaissance period was characterized by an array of technological findings (in sailing and navigation) like never before.

Hugo Grotius, who is credited for being the father of Modern International law. Among his contribution are the principle of the freedom of the high seas (all countries enjoy equal access to the high seas). He also developed international law regulating war (i.e. rules regarding the use of force/prevention as well as just war).

The other very critical moment when modern international law continued its development was before and after the Second World War. Before as the league of nation was created and its covenant prohibited the use of force and the PCIJ (Permanent Court of International Justice) was formed. After the war various other attempts were made with the creation of the UN, development of human rights and the signing of multiple conventions.

Lecture 3

Chapter II
Sources

Q. What is the difference between formal (legal) and material source of law?

When we are talking about formal sources we are talking about sources in the legal sense. We are referring to law making sources, we are referring procedure or methods by which rules become legally binding. We are talking about the requirements under which rules become binding.

On the other hand when we are talking about material sources we are talking about sources in the historical sense. Material sources tell were the law is to be found, while formal sources describe what the law is. The distinction between formal and material source of law underlines the distinction between delege lata and referenda. In Latin they these classification between de lege lata (meaning the law as it is/actual law) and de lege referenda (the law as it may be in the future/as it should be). In international law when we are talking about formal sources of law we are talking about de lege lata (the actual law) while when we say de lege referenda (it doesn't necessarily imply the law as it stands).

Q. What are the sources of international law?

It is article 38 of the statue of the ICJ (carbon copy of the statue of PCIJ) that is usually accepted as constituting the source of international law. However article 38 doesn't say the following are the sources of international law, rather it tries to give the court a

direction/guidance as to what sources it should consider when it disposes cases containing an international disagreement. It is dominantly used as the document leading to the possible sources of international law because there is no other document explaining better the sources of international law. However, this article is the perfect one but rather the better one. There are a number of criticisms pointed on article 38.

- *It doesn't list all sources of international law. Additional sources have evolved as sources of international law. E.g. resolutions of international organizations (security council resolutions passed under chapter seven are binding with respect of that matter, ILO's rule making power /tripartite law making power between states representative of employers and employees through trade unions).*
- *It includes aspects of sources which are not genuine sources. There are primary and secondary sources under article 38, judicial decisions and learned writers forming secondary sources. These subsidiary sources are regarded as non-genuine sources as they are used to elaborate the contents of the primary sources of law. But the instructor thinks that subsidiary sources are still crucial and relevant despite being second tier to primary sources.*
- *It doesn't provide hierarchy amongst the sources provided (with the exception of differentiating primary and secondary sources). But how about between (a), (b) and (c) one hand and (d) and (e) on the other hand.*

Generally we have five sources of international law; (1) treaty, (2) custom, (3) general principles of law, (4) judicial decisions and (5) teachings of reputable scholars.

2.1. Treaties

International conventions or treatise are the only way by which states create international law consciously or deliberately. So unlike customary international law, which develops sometimes without the knowledge of some states consent, treaties develop with the consent of the parties bound by it. Treaties are now the most important source of international law overtaking the previously dominant custom.

Treaties could be bilateral/particular/ or multilateral /general/. Once a treaty satisfies a formal requirement a treaty imposes obligations on states that are party to it. If a state party fails to abide by that treaty, that state will incur international obligations.

(a) Treaties bind only parties to them (principle of privity). A state is bound by treaties only vis a vis other state parties and not in relation to other non-

contracting states. However, there are exceptions to such principle, e.g. dispositive treaties (territorial treaties) bind new states that have seceded from the contracting state. This is so because these kind of treaties in their nature prescribe rules regarding common interests. The other exception is when a country which has not acceded to a treaty which has converted an existing customary international law rule is bond by rules within the treaty despite not being party to them. Logically this is the case because, the state is not being bound by a treaty it didn't consent to but rather by the preexisting customary international law rule applying to all states.

(b) There is a theoretical debate as to whether treaties impose legal obligations or not. There is a difference between mere obligations and legal obligations. The difference could be clearly dealt out in one phrase "are treaties laws?" do they create obligation or law. Because of these scholars have come up with two types of treaties; contract treaties and law making treaties. Contract treaties are usually bilateral treaties which impose or create obligations and only on state parties to those treaties. On the other hand multilateral treaties are usually regarded as law making treaties as they usually create obligations or law on parties to the treaty as well as to nonmember states (sometimes). But doesn't this contradict with privity of treaties? Yes, but most multilateral treaties usually codify preexisting customary international law rules which are binding (in principle) on all states.

2.2. Customary International Law

Customary international law is a law which has involved from practice or custom of states. So when we talk about customary international law we talk about the conduct or behavior of states. However the conduct by itself is not sufficient as the psychological element is equally necessary. Thus, customary international law rule is composed of two elements; the conduct element and opinion juris element. The conduct element is the material element which consists of actions or omissions of states (and now a days actions of non-state actors). Opinion juris ("accepted as law" under article 38 of the ICJ statutes) on the other hand is the psychological element which is the belief on part of states that acting or refraining to act in a certain manner is their legal duty. This element is very essential as it enables as to distinguish mere usage from legally binding custom. The two

elements have to be cumulatively satisfied for an act or omission to serve as a binding international custom. Courtesy acts are not binding custom.

Custom was the foundation stone on law of nations before the coming into picture of treaties. However presently customs have taken the forefront of modern international law. Custom is always available to fill the void of treaties. Custom enables international law to develop with the needs of time as they are flexible. The amendment of custom requires a formal process while the change in custom only requires a change in practice. But the problem with custom is that it has uncertainty and lack of speed in development (in principle it takes time).

Lecture 4

The state practice itself has sub elements, it has to fulfill some requirements. These requirements are consistency, uniformity, generality and duration. When we read article 38 (1) (b) of the statute of the ICJ it doesn't talk about any of these criteria, however these standards were developed by the ICJ and PCIJ in their previous decisions.

Consistency: the state practice in question must be reasonably consistent. That given state practice of different countries should follow the same path and there should be no contradictions. However the requirement should under no circumstances be interpreted as requiring a complete consistency, but rather a substantial consistency. Because if we require total consistency that would be a very difficult test to pass through. This rule of substantial consistency was laid down in the LOTUS CASE. In the Lotus case the PCIJ stated that state practice has to be substantially consistent, it also indicated that there is no requirement for complete or total consistency.

The Lotus case was a case brought before the Permanent Court of International Justice (PCIJ) in the year 1928. Two streamer ships collided on the high seas, one belonging to Turkey and the other to France, with casualties. One of the major issues involved in that case was the issue of jurisdiction. When Turkey apprehended (for voluntary man slaughter) the French guy who was in charge of Lotus (the French ship), France opposed claiming Turkey lacks criminal jurisdiction. In making this assertion France was heavily relying on customary international law "In almost all circumstances where an offence was committed in the high seas then the flag state is the only country that has jurisdiction over such criminal matters". Finally, the court did not accept France's assertion as a whole due to the non-fulfillment of opinio juris.

Uniformity: The uniformity standard was reflected in the North Sea Continental Shelf Cases. These were originally two cases between; Netherlands vs. Germany and Denmark vs. Germany which were later joined.

In the North Sea Continental Shelf Cases the issue was on how to delineate the continental shelf. In the law of the sea there is this notion or concept known as "continental shelf", which simply means part of the sea next to the coast of the state that is considered as the territorial waters of costal states. Germany had a different view of definition compared to the Netherlands and Denmark. ICJ suggested that state practice including that of states whose interests are specially affected had to be both extensive and virtually uniform.

However the criteria of virtual uniformity is a though one which can't be optimally full filled by various cases, thus the ICJ changed its stance in the 1984 Nicaragua case. The criteria of virtual uniformity was replaced by general uniformity. So under present international law, state practice doesn't have to be virtually uniform. The fact that there are minor inconsistencies or minor deviations doesn't bar the development of a given state practice from being a customary international law rule.

Q. What is the difference between consistency and uniformity?

When we are talking about consistency, the first action and the following action of a given state must not differ. However both criteria have similarity in that they don't want contradictions.

In another case, the Anglo-Norwegian fishery case, the ICJ emphasized that the degree of consistency required might vary based on the subject matter (such principle applies to uniformity as well as they are closely related). In the Anglo-Norwegian case the court decided that the degree of consistency and uniformity required is not necessarily the same for all state practices it differs from one subject matter/nature to another. For example regarding obligation imposing rules there has to be more consistent practice than rules imposing passive obligations. Generally in international law all kind of rules can be put into two baskets, rules that limit the sovereignty of states ("the do not's") and rules that allow sovereignty ("the do's"). The Anglo-Norwegian case decision said that normally when it comes to obligation imposing rules more consistency and uniformity is required. It was

also pointed out that an even higher level of consistent contrary state practice is required to change fundamental customary international law rules. On the other hand less fundamental rules require less consistency.

> The Nicaragua Case: (Nicaragua vs. USA) in this case it was aid that mere existence of new state practice doesn't mean development of a new rule. This is a very good test, an existence of a new contrary state practice doesn't imply existing rules are automatically changed. The conditions for changing an existing customary law becomes more vigorous compared to developing a new customary international law rule.

<u>Continuity & Repetition</u>: The basic rule with regards to continuity and repetition was based on the asylum case (decided by ICJ in 1950).

> Asylum Case: This was a case brought by Colombia against Peru. Colombia had a diplomatic mission in Lima, Peru. In Peru a coup had taken place and the leader of that coup, when he realized that the coup had failed, sought asylum inside Colombian embassy in Peru. Peru insisted that Colombia should hand over the guy because there is no international law rule that allows Colombia to try the person. On the other hand Colombia said that I can characterize the offence committed and try the Peruvian in Colombia. Thus, Colombia requested for Peru to allow the individual to fly and be tried in Bogota, Colombia. It is a landmark case as it talks about regional custom. Just as we have bilateral/regional treaty in this case it was acknowledged that there could be regional custom. The rule of diplomatic asylum developed mainly under the Latin American context. The court did not accept Colombia's argument but at the same time it asserted that Peru couldn't ask Colombia to and over the suspect. Interestingly, the right of Peru to refuse the flying out of this man created a deadlock (similar to the Julian Assange case).

The difference between diplomatic and territorial asylum is where the asylum is actually requested. In territorial asylum the asylum is requested within the territory of the receiving state. Contrastingly diplomatic asylum is requested in the embassy or ships carrying the flag of the receiving state.

The court declared that customary rule should be in accordance with a constant and uniform usage practiced by the states in question. Some authors argue that the principle of repetition and continuity is embedded in the principle of uniformity and consistency.

Generality: For a universal or a general customary international law rule to develop the practice must be fairly general. However, this requirement of generality doesn't apply or loses power when it comes to regional customs. By generality we mean that a significant amount of states need to support the practice for it to be a custom. By generality we don't mean that every state should support it (unanimity or universality) but rather general customary law. The degree of generality varies from case to case (the degree of generality is higher for rules limiting state sovereignty as compared to rules enhancing state sovereignty).

There are limitations on the requirement regarding generality. Special weight is given to the practice of "relevant" states. In relation to the subject matter the voices of some states could be louder than unconcerned states. If we are talking about rules governing maritime law, then the practice of costal states is more important than landlocked countries. If we are talking about state practice relating to outer space, obviously the practice of countries that are actively involved in such expeditions is important (China, Russia, USA...). This, however, by means asserts that some states are more powerful than others. International law theoretically considers all countries to be equal- the principle of "sovereign equality of states".

The theory of persistent objector is also considered as an exception to the rule of generality. When a state objects from the beginning to a particular practice or carries out a contrary practice, that state may not be bound. There are two important elements; (1) the objection has to be mounted from the onset, it has to be expressed initially and (2) the objection has to be persistent. In the Anglo-Norwegian fisheries case, when there was a dispute regarding the extent of territorial sea (as opposed to high seas) between the UK and Norway, UK claimed the existent of a certain customary international law rule which is binding on all states that Norway isn't accepting as a violator. ICJ concluded that Norway shouldn't be bound by that customary law as it was persistently objecting to this particular state practice to the extent that other countries should know or should have known.

The third exception is the existence of a local custom, such local custom doesn't require the existence of general support or generality.

Duration: duration as a requirement is different from repetition. As in duration we are talking about the amount of time that should lapse before a given practice becomes a customary international law rule. Malcom Shaw clams that duration is not the most important element of state practice, duration can be one requirement sometimes, but we should not always insist of the fulfillment of duration requirement. ICJ also accepted this requirement under different cases. In the North Sea continental shelf cases, ICJ stated that, (1) the length of time required differs from case to case (2) the passage of a brief time is not necessarily a bar to the formation of customary international law rule. Thus, he "Principle of Instant International Customary law" was born. Prof. Bin Cheng claimed that it is possible for a customary international law rule to develop instantly. In most cases a passage of time is required but ne can never rule out the instant development of an instant customary international law rule. This can be exemplified in the dynamic aspect of international outer space rules.

Opinio Juris Nececitatis: once we have ascertained the existence of state practice fulfilling a certain state practice we still have to look for the mental element. This is an important rule that distinguishes customary international law rule from usage. Unlike state practice it is extremely tough to prove opinion juris. It is the belief on part of states that acting or refraining to act in a certain manner is their legal duty.

Acquiescence is a rule which states that if a state remains silent or idle in the development of a certain customary international law rule, it would apply to it.

Lecture 5

2.3. General principles of law

From the reading of article 38, we could ascertain that general principles of law are primary sources of international law. However it is a known fact that treaties and custom supersede general principles of law. We say this because international law is a system which is primarily created by states. In both treaties (directly/direct expression of consent) and custom (indirectly/indirect expression of consent) states are involved in the creation. However, general principles are different, in the sense that they don't require the consent of states.

Q· When we are referring to general principles of law are we referring to principles of international law (such as "sovereign equality of states") or national law (such as "Res Judicata")?

Article 38 (1)(c) doesn't talk about such distinction or which one applies as a matter of fact, however most scholars agree, that it applies to both national and international law principles as a gap filling choice·

Exhaustion of local remedy is a general principle that originates from the national system but we see it being applied by various international tribunals, human right courts and commissions using this principle·

General principles of law seen from the lens of theories of law, especially with regards to recognition of general principles of law as sources doesn't go well with the positivist/command law approach·

2.4. Judicial decisions

When article 38(2) says that judicial decisions and teaching of scholars are to be seen as a subsidiary source it is sending a message that these cannot be considered as law creating sources but rather as law elucidating, determining or defining sources·

Article 59 of the statute of the ICJ confirms that judicial decisions are indeed not considered as law creating sources· The article deliberately excludes the principle of "stare decisis" from the international legal system· It provides that decisions of the ICJ are binding only on parties to that given case and only as regards the matter in question· Thus a contrario reading of Article 59 dictates that the principle of precedent is effectively excluded from the international legal system·

Purely seen from a legal point of view, the court doesn't have a law making power· But in practice what we see is the ICJ heavily relying on its decisions rendered previously· It does this for various reasons such as consistency and its attempt to influence the development of international law· However, states would love to preserve the law making power for themselves·

ICJ has two types of jurisdiction advisory jurisdiction and contentions jurisdiction· When ICJ gives decisions based on its contentious jurisdiction the decision would be binding on the parties to the case· In its contentious jurisdiction the court handles disputes· The advisory jurisdiction doesn't entertain disputes per se and opinions of the ICJ are not

legally binding· The advisory opinions despite not being binding has an influential character· Thus states usually prefer to abide by ICJ advisory opinion·

Q· When it says judicial decision is it referring to the ICJ or also other courts?

Generally the reference towards judicial decision is to different judicial and quasi-judicial bodies (such as ICC, ICTY, ICTR, US Supreme Court……)

2.5. Learned writers

The writing of the most highly qualified publicist is considered as the second form of subsidiary international law rule· Writing of scholars cannot create law but this can be used as law determining material source of law· During the formative stages of international law the role writers played was quite different from present perception· For example Hugo Grotius's book was not only considered a book, but was also regarded as a rule/law·

Not all writings qualify as subsidiary sources, they have to be writing of renowned and acknowledged writers· In the Spanish zone of Morocco case Judge Huber asserted that in most circumstances writers are politically motivated·

2.6. Other possible sources

We have said that the list under article 38 of the ICJ is incomplete from the outset· Resolutions of international organizations, such as general assembly resolutions· Yes they are non-binding, however they contribute towards the development of international law (both treaty law and custom) and clarify the content of an existing customary law· So shouldn't we consider such resolutions as secondary sources of international law rule? General assembly resolution on the definition of aggression passed in the year 1974 is a very powerful definition· Security Council resolution passed by the council under chapter seven are binding·

Soft law is a term of act used to describe two different notions· The first one is that soft law are rules of international law that do not stipulate concrete rights or obligations but which have normative value· They are legally binding but fail to provide clear obligations and rights· They are vague and quite flexible· Most rules under environmental law ("reparation obligation") is regarded as being soft law· Article 2 of the ICESCR states that "countries have obligation to take steps individually or through international assistance with the view of achieving economic development", but what does this mean in practical terms·

The second notion of soft law is de lege referenda, it doesn't have a normative value or impose legal obligation but it tells you the opinion of some countries or people what the law should be or may be in the future. It might shade some light of what the law would look like in the future, so soft law in the second notion might shape state behavior.

Lecture 6

2.7. Hierarchy of sources & *jus cogens*

Q. What happens when a treaty contradicts an existing custom? What happens when a treaty complements an existing custom?

When we talk about hierarchy of laws under international law we are normally talking about the position of treaties and custom. And we are talking about them under two situations when they complement/supplement and when they contradict.

When custom and treaty complement

This happens when there are parallel obligations imposed by both custom and treaty. Custom was the preexisting one and a treaty, which is complementary, comes after wards (that is normally the case under international law). Treaties reflect the consent of states to be bound by them in an equivocal manner. Additionally, the contents of treaties are more or less clear and certain in comparison with international custom. Thus as treaties have this advantage if you find a customary international law rule pre dating a given treaty, in principle, it should be a treaty that should take precedence as far as members to that treaty are concerned. This could be also explained in terms of the law that comes later prevailing over the law that came prior.

Rule No.1 when you have a treaty and custom complementing each other and when the treaty comes later in time as far as member states to that given treaty are concerned it is the treaty that governs their relations. But for non-member states it would be the customary rule which will bind them.

In the Nicaragua case, the ICJ provided another principle saying that custom doesn't cease to bind states even if the state has become a party to a treaty. Thus the decision have further qualified the rule by claiming that it is both custom and treaty that apply to the member state of a treaty. In the Nicaragua case, the United States which was a member of the UN charter that provides for the prohibition on the use of force (to

which the U·S· had reservations on the ICJ statute of the court having jurisdiction on the American obligation arising out of multilateral treaties such as the UN charter)· But the court concluded that America despite not being bound by the "prohibition on the use of force" under the charter is at the same time as one state of the world bound by customary international law rule regarding the prohibition on the use of force· Thus, in principle, when we have treaty and custom having the same/similar content, a treaty that comes at a later time prevails· However, as an exception, that doesn't totally displace the application of that customary international law rule·

Q· Why do we bother to put the two sources under a ladder if they both lead to similar conclusion?

We didn't say that the treaty and custom are identical but rather complementary· Thus there could be possibility for a difference in application·

The other exception relates to obligations erga omnes (Ius Cogens)· Ius cogens norms are fundamental norms of international law from which a state cannot derogate· Thus with respect to erga omnes norms or Ius cogens the principle under rule one doesn't apply, meaning a treaty coming at a letter time will not prevail· This is due to article 53 of the Vienna convention on the law of treaties which states that "a treaty is void if at the time of conclusion it conflicts with the peremptory norm of general public international law"· There is little consensus on the content/subject matter of ius cogens norms· Few of them regarding which there is consensus are prohibition of Genocide, prohibition on the use of force and self-determination (recently)·

<u>When Custom and Treaty contradict</u>

Here again we apply interpretation rules relating to time, the law that comes latter should apply better than the law that came out prior· The other rule of interpretation used is, specific rule prevails over general rule, custom or treaty imposing particular obligations prevail over one that imposes general obligation· This principles, however, is qualified by article 53 of the Vienna convention on the law of treaties·

Q· what do you do when a custom comes later to a treaty and they contradict?

The fact that states have concluded a treaty doesn't mean that there isn't going to be any change in the future· Practically countries have a perfect way of amending treaties· Theoretically, there is a chance where a custom could possibly amend a treaty· Practically,

however, it is almost impossible for an unclear and uncertain custom to replace a readymade, clear and certain treaty. The content of customary international law rule has to be very clear and strong state practice supported by a certain and unequivocal opinion juris for it to replace an already existing treaty.

Chapter III
International Law & Municipal Law

Under this chapter we will be talking about the interaction between national law and international law. The discussion becomes pertinent especially when these two laws contradict.

3.1. The Theories (Monism vs. Dualism)

Monism

Monism considers international law and national law as belonging to the same legal order and it treats them as different versions of a single body of law. They operate concurrently over the same subject matter according to the monist school of thought. As they operate concurrently, contradiction is a possibility. And when a conflict arises between the two international law prevails and international law is considered as having a higher position or a better standing in the ladder of hierarchy.

Dualist/Pluralist

Assumes that international law and municipal law are two separate legal systems which exist independently of each other. One deals with interstate relations and the other intra state matters. Thus for dualism if a person has a right under international law but not municipal law, courts would apply national law. Dualism emphasizes sovereignty so it tends to rely on positivist school. In cases where there is a contradiction between national law and international law the dualist law suggest that international law would prevail on international matters and national law would prevail under national law. A state's action could be unlawful under international law but it an still justify its action under its national law. For dualists states can enact national laws that contradict its international duty. In such cases the state will, of course, be held liable under international law but nationally it can justify its actions.

Lecture 7

3.2. The role of municipal rules in international law

Q· How do international courts treat national laws? When do they make use of national laws?

National laws are, sometimes, used as sources of international law· International law uses national law in determining the contents of a given international law rule· National law can clarify state practice to determine the contents of a given international law rule· International law uses national law as a law determining source· Sometimes the court is allowed to use general principles of law as primary source in the form of general principles of law· And when we were talking about the contents of this general principles we have said that sometimes this general principles could be national principles of law·

Secondly, international law sometimes leaves certain questions to be handled by national law· The question of nationality is a perfect example in such regard as international law uses nationality as a test to apply certain international law rules like refuge law· International law doesn't determine nationality but rather leaves it to national laws·

However, the general rule of international law provides that a state cannot plead a rule or a gap in their own national law as a defense to a claim under international law· During a state of emergency the right to life can never be derogated for the UN human Rights commission· But if the Ethiopian government kills individuals under the existing state of emergency and was called upon by the international community to justify its act, it can't claim/defend that it took the action because it is entitled to do so under its national laws· This general principle is applicable regardless of the state's adherence to monism or dualism· Normally if it had accepted monism it wouldn't have raised such argument as in monism when there is contradiction international law prevails· This rule is incorporated under Vienna convention (Article 27) on the law of treaties· This theory dictates that international law is always dominant or has the upper hand in the international setting·

So sometimes international law treats national law favorably by referring to it and at times opts for an uncompromising position·

A corollary to this principle is that states have to perform their obligation under international law in good faith· They have to do their level best to perform such duty· States have also the duty to conform their national laws to their international law obligations to which they have consented·

3.3. International law before municipal courts

Deferent states have different attitude towards the application of international law. Laws of developing countries, in the past, that are keen on emphasizing their sovereignty do not give primacy for international law over their own municipal laws. They usually adopt the dualist approach. A large body of international law developed before the Second World War, before the creation/ decolonization of these developing states and therefore they were adamant that these laws favored the westerners. Even during the cold war time Russia considered that international law was a tool of the westerners to spread their ideology.

This is however a general statement, to get the exact answer, how national law treats international law we have look at the constitutions and other relevant laws of each and every state. The prevailing approach, however, is the dualist model. States are relatively more inclined to maintain their sovereignty. States have criteria for incorporating international laws into their national system. When we talk about the role of international law before a national legal system we are talking about two things; (1) the issue of internal applicability of international law within the national legal system and, (2) the issue of hierarchy between national and international law, assuming that countries apply international law.

1/ Domestic application of international law there are two theories; the doctrine of incorporation and the doctrine of transformation. According to the doctrine of incorporation rules of international law become part of national law without the need for express adoption. International law automatically becomes part of national law (ipso facto) without needing any more actions. Once a state consents to be bound by a given international law rule (becomes a signatory state after fulfilling all the formality requirements), then that given international law rule would be considered s forming part of the national law.

The doctrine of transformation stipulate that rules of international law don't become part of national law until they have been expressly adopted by a state. If we are talking about a treaty the fact that a state has consented to be bound by a treaty through ratification doesn't automatically make that treaty part of the national law of that country s further formalities are required. The treaty or custom has to be expressly adopted. Based on the requirements of national law it could be enactment by the national legislature or publications. Between ratification or accession as the case may be and the

time when a given treaty is considered as part of the national legal system there is a process, prescribed by the national law.

2/ The second question concerns the issue of hierarchy. To answer this question we have to look at the constitutions and the internal law of the states. Some western countries consider international law as superior to their constitutions (the Netherlands). This position raises various theoretical questions such as the nature of the constitutional document. Other countries equate it with the constitution while some others put it below their constitution.

The Ethiopian Case

The dominant view looks to provide that international conventions are below the constitution but are equal with proclamations. Under article 9 of the constitution it states that international treaties ratified by Ethiopia form an integral part of the law of the land.

Tadele seboka claims that the status of international law should not be determined by municipal law. He calls such attempt a self-fulfilling prophecy. How can national law provide a fair assessment of what international law has with regards to the national legal system? This is a monist approach he holds as he is a human rights lawyer. He puts human rights conventions ratified by Ethiopia under the same line with the constitution.

- We take the supremacy close a little too far by also including treaties to be included under laws practices and decisions under the constitution.
- Does the fact that they have the same source imply that they have the same hierarchy?
- Doesn't article 9 place international conventions as integral part of the law of the land.

There are additional criteria's for the application of a treaty under Ethiopian law as publication is required, thus Ethiopia uses the doctrine of transformation according to ambassador Ibrahim Idris. In the case of UK the parliament has to ratify it and then it has to be published as a means of transformation. For custom there is no requirement of transformations.

Some scholars argue that the divide between monist and dualist has gradually faded especially with regards to human rights (it's becoming monist).

Chapter IV
The Subjects of International Law

4.1. International legal personality

The law will determines the nature and scope of personality and this holds true for international law as it holds true for national law. When we say subject of international law we will be talking about a body or entity that is capable of exercising and possessing rights and duties under international law. Thus it is international law that devotes the ability to act within the system of international law. International law defines the criteria and which at the end of the day. So when we talk about international legal personality we are talking about entities getting legal personality as being capable of having rights and duties and having the capacity to enforce it.

One distinguishing characteristic of modern international law is that more and more subjects are gaining personality under international law. Traditionally states where the only subjects of international law. After the end of the Second World War, new non-state actors of international law have joined the group. However, the orthodox positivist view still maintains that states are the only subjects of international law. This theory is an obsolete and outdated concept in the contemporary world. Nevertheless, despite the increased involvement of non-state actors in the international legal system states remain by far the most important legal actors/subject of international law. This is due to the existence of varying degree of personality.

In international law there are two types of personality; original personality and derived personality. When we say original personality we are referring to personality that entitles to all sets of rights and duties under international law and it is states and states only who are recognized as having international legal personality. Derived personality entitles subjects/actors to limited rights and duties plus (as the name itself indicates) is derived from the will and consent of states. If we take for example international organizations such as the UN, it was created by states. And even if it was created it could have been left with no legal personality. When we are talking about legal personality we are talking about legal personality that would be obtained because states consented for that

personality to be conferred on that entity. This tells us that legal personality under international law is relative. Its only states that have the totality of rights.

States as typical legal persons

1. Creation of statehood

Q. When does an entity qualify as a state? Do you think membership to the UN implies automatic statehood?

Only states could be members to the UN according to the UN charter. However since politics plays a huge role, there were times when countries who did not meet the requirements of statehood were admitted as members to the UN. Countries like Pakistan, India (India was admitted even before its independence from British rule) could be sited as examples to this. Membership alone doesn't imply automatic statehood, however currently being admitted into the UN is a strong evidence that that entity has acquired the status of statehood. This is due to two main reasons: one is the above requirement of members to be states and two is the element of recognition in being a UN member (when an overwhelming majority of UN members accept the entity as a state it shows something). If we look at history, Switzerland was there as a state for a long time, but Switzerland got admitted to the UN in 2002 fearing negative externalities of voting. Nevertheless, membership to the UN is a strong indicator of statehood but not an absolute one.

The starting point for the discussion of criteria of state hood is article 1 of the Montevideo convention on the rights and duties of states concluded in 1933. The specific article lists down the criteria of statehood.

> 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.
>
> *Extract from the Montevideo Convention, 1933, on the rights and duties of states*

A. *Permanent population*

Q. Do we consider people migrating from one territory to another as permanent population (Countries such as Afghanistan, Pakistan)?

When we say permanent population we are not here requiring a certain population to leave in a certain place without moving here and there. But one thing is important here,

these people have to identify themselves with a certain piece of land. For example the Borena Oromo's migrate to Kenyan territory but the always identify themselves as the Ethiopian Borena. Therefore there should be some population linked to a specific piece of land on a more or less permanent basis. It is not a requirement under international law that people should be living in a certain piece of land forever (it is rather more of a psychological attachment).

It is not clear whether the requirement here implies the population has to be indigenous. The current understanding is that there shouldn't be a requirement of indigenous population.

Q. Does size of the population matter?

NO! Countries like Tuvalu (9,893 people), San Marino (31,595), Liechtenstein are states regardless of the size of their population.

B. <u>Territory</u>

A defined territory is one of the requirements. Thus a state must have some definite physical existence that makes it clearly distinguishable from its neighbor. This requirement doesn't however indicate that the territories of a countries must be certain. It should be defined but not all of the countries territory should be clearly demarcated. For example Ethiopia has a defined territory but still have an uncertain issue of border demarcation with Sudan. Other examples could be the issue of Kashmir between India and Pakistan.

There must be some territory which must be undoubtable belongs to that entity. Similarly, an existing or emerging states territory being subsumed by another state doesn't lead the country losing its territory from losing its statehood status. For example, Kuwait was fully annexed by the Iraqi state led by Saddam Hussein in the 1990's, however Kuwait did not cease to be a UN member.

Size of the territory as well doesn't matter because we have countries such as Maldives Tuvalu, Liechtenstein, Nauru and other micro states are still recognized states as long as they fulfill the other criteria.

C. <u>Government</u>

In order for a state to function it must have a government. And not just any government but a functioning and effective government. Effective government implies a government having the capacity the power to administer at least certain part of the territory and

capable to discharge functions of a government. The executive members of the entity must be able to exercise effective control over a defined territory and a permanent population.

But international law doesn't require a state to have an absolute and an entirely dominant government. The government must be able to handle and administer the affairs of the country under the international arena. Absence of an effective government doesn't result in loss of statehood. Once a state is created the fact that a government has lost effective control doesn't deprive a state of its statehood. For example, The Federal government of Somalia controlled no territory in Somalia in 2006.

D. Capacity to enter into relations with other states

It is generally understood as implying independence. When a country is independent it would have the capacity to interact with other states. We are not talking about factual independence but rather legal independence (the fact that countries are economically dependent and thus receive aid doesn't imply that they are not states). For example Hong Kong is not legally independent as its part of China (because of a treaty between China and Britain).

Lecture 9

2. Recognition

Recognition is mainly a political act because in municipal laws (national legal system) there isn't a legal standard prescribe for the recognition of another state thus it is the political decision of the government. Therefore it is mainly the decision of the executive wing of the government and once it is extended it would have legal implications (that is why we study recognition and its legal effects). For Example under the FDRE constitution we don't have preconditions for the government to extend recognition or not. Malcom Shaw for example refers to recognition as a confusing mix of politics, international law and municipal law. It's an act when these three things interact

We should note here that recognition is a unilateral act as a principle (sometimes there could be multilateral recognition). Thus when states willingly agree to recognize a state it shouldn't depend on the recognition of other countries.

Recognition deals with a variety of factual situations. When we say recognition we are not only talking about recognition of states but rather also recognition of governments,

recognition of territorial claims, recognition of belligerent/insurgents, recognition of national liberation movements.

The legal effects of recognition are entirely different as regards to international law and municipal law. In the eyes of international law, when a country recognizes other state that is a confirmation state that it considers the recognizing entity as a state defined under international law. Recognizing a state is like giving a state a benediction/approval that it considers it as an international legal actor/person. For the recognizing state the recognized state can bring claims on international legal tribunals, can enjoy immunities. But the effect recognition produces internal is a bit different. The courts within the recognizing state will start to give value to the laws and decisions of the courts of the recognized country ("Rule of Reciprocity"). Additionally internally non-recognition implies that entities and persons from that country cannot bring claims in the state. This is also logical as the nationals of non-recognized states don't get the same rights of nationals of recognized states.

A. Recognition of states

Recognition of a state acknowledges that the entity in question fulfills the criteria of statehood. It is a sign of approval that the criteria of statehood has been achieved in the eyes of the recognizing state.

Legal effects of recognition of a state

There are two theories on the legal effects of recognition of a state. The first one is the constitutive theory of recognition while the second one is the declaratory theory of recognition. Usually, it's in the context of recognition of states however they also have some utility in terms of recognition of government.

The constitutive theory of recognition asserts that a states nor a government doesn't exist for the purpose of international law until it is recognized. For the proponents of the constitutive theory it is only after an entity is recognized that it will become an international legal subject. They claim recognition has a legal effect, it establishes a state, it has the effect of giving an entity the status of a state. In this case recognition is a necessary condition for the establishment or creation of state. Even if an entity has territory, population, government, capacity to enter into relations if it is not recognized it cannot be recognized as a state. For this theory recognition is an indispensable part or element of statehood.

The declaratory theory recognition holds that recognition has no legal effect. The existence of a state or government is a question of pure fact and recognition is merely an acknowledgement of this preexisting facts. There is an objective criteria and following this objective criteria if a state ticks all the boxes then that is it. Yes states recognize other states or governments but for the declaratory theory states do recognize other entities not to enable them to exist as a state but to rather to simply approve that all the requirements have been made. Recognition is a post facto benediction. Recognition amounts to acknowledgement of facts. An acknowledger doesn't decide it testifies. One segment (faction) of the declaratory theory states that if a state fulfills all the objective criteria then all the states are obliged to recognize. However this is not totally true as we have initially said that recognition is a unilateral act.

Q. When a country denies recognition does it necessarily mean, it (recognizing state) thinks that the entity has not fulfilled the criteria under the Montevideo convention?

Recognition is more of a political act than a legal act. The recognition of states are at times motivated by the political calculation of the recognizing state and vary rarely does it reflect the actual fulfillment of the criteria. For Example, China has refused to recognize Taiwan for political reasons rather than legal ones, similarly, African countries being economically influenced by China have refused to recognize Taiwan. Therefore, leaving the status of an entities statehood under the mercy of other states is unfair.

Generally speaking, the declarative theory is the most dominant theory of the two. Under Article 3 of the Montevideo convention it is clearly stated that the political existence of a state is independent of recognition by other countries.

There are times when the constitutive theory works perfectly but it is the declaratory theory that is dominant in the majority of the cases. In dubious cases where an entity has fulfilled the requirements, then recognition has a constitutive effect. However when the fact as to whether an entity has fulfilled a requirement or not is crystal clear, recognition has a declaratory effect. When Germany was divided into two East and West Germany, the creation of East Germany had disappointed many western states because they didn't expect Russia to establish such part as an independent sovereign entity. These countries thought the creation of East Germany was unlawful, so despite the country clearly fulfilling all the criteria they refused to accept or recognize East Germany. For

countries belonging to the socialist camp there was an easy recognition, however for the west East Germany did not exist for a long time. East Germany did not exist for a long time as western countries were no certain as to whether East Germany had truly fulfilled the criteria of statehood. East Germany came to be recognized as a state only after the extensive recognition of western states. Thus we can claim that here the recognitions had a constitutive effect. Thus it is in dubious cases that we see the importance of recognition. In dubious cases you should expect an overwhelming recognition to be considered a state. One of the criticisms of the constitutive theory is, how other states can decide the faith of another state to become the subject of international law, shouldn't it be international law itself? The other criticism is, how many states should give recognition for a country seeking recognition to be recognized? The constitutive theory doesn't provide an answer to this question. Palestine has over 135 recognitions but is it a state? If we follow the constitutive theory, an entity would remain a non-state entity having fulfilled all the criteria and consequently devoid of international legal rights and obligations. Therefore, does it mean it can use force (as it is not subject of international law)? Practically, that is not the case, as countries assert that it has to abide by the principles of international law despite not being an actor. For long the US did not want to recognize North Korea but still asserted that North Korea should not attack it (the pueblo incident).

B. Recognition of governments

Recognition of the government implies that the regime in question is in effective control of a state in the eyes of the recognizing state. When a new government comes into power in an existing state, by a violent/unlawful or a non-constitutional means the question of recognition of government arises. If there is a constitutional change of government there is no need for recognition of government.

States have often used recognition of government as a tool or instrument of policy. The US has often regarded recognition as a mark of approval (US has refused to recognize Hamas in 2006). Refusal to recognize a government sometimes is based on the belief that the government is not in effective control of the territory it claims to govern. There are also other reasons for non-recognition. The US has under various circumstances refused to recognize governments for reasons other than lack of effective control. This is a clear embodiment of the political and unilateral nature of recognitions.

In the past, recognition of government had the effect that the recognizing state approved/favored the recognized government. Because of this the doctrine of non-recognition evolved. The doctrine is also known as the Estrada Doctrine, after the secretary of foreign relations of Mexico. To avoid such misinterpretations that recognition of government implies approval of the regime, the theory of non-recognition dictated that states should never expressly recognize government. The simple commencement or continuance of relations is sufficient. The Estrada doctrine dictated that an express recognition of government should be withheld. So instead of the country recognizing the entity expressly it would starts diplomatic relations with it. But the problem with the Estrada principle was that, what replaced express recognition amounted to be implied recognition, which is hard to determine. International law considers some behaviors as implying recognition. For example when a new government comes into power, if the prime minster or president of that state formally send a congratulation message it should be regarded as an implied recognition.

Q. Does bilateral trade or non-trade treaties imply recognition?

In the case of multilateral treaties, it is very simple as the relationship is not one to one, it doesn't imply recognition. However in the case of bilateral treaties it is more contentious. Establishing commercial ties alone, however, wouldn't lead us to confirm the existence of an implied recognition.

"In international law the establishment of a full diplomatic relation is the only unequivocal act from which full recognition can be inferred" Malcom Shaw

The basic difference between the two (recognition of state and government) is that recognition of a government is made necessarily as the consequence of accepting statehood of an entity which the regime is governing. Recognition of a state can be accorded without accepting the regime with effective control. Recognition of government necessarily implies recognition of the state. However, when a country recognizes a state doesn't mean that it has extended recognition to the government.

Dejure and Defacto recognitions

The distinction between De jure and De facto recognitions usually arise in the case of recognition of government. It makes sense in the case of recognition of government. Recognition De facto implies that there is some doubt as to the long term viability of the government in question. Defacto recognition implies that the recognizing state has

some questions on the effective control of the government. It involves a hesitant assessment of the situation or an attitude of "wait and see". This is usually given to be followed by a de jure recognition. So when the doubts are sufficiently clear, when the recognizing state is satisfied that the government has effective control, it would issue a de jure recognition.

In theory a state can only be recognized de jure but there are few examples of states granted a de facto recognition. Indonesia before it finally attained independence from Dutch rule, it had gained some de facto recognition as a state. Defacto recognition applying to states is conceptually wrong because if it is after independence it has failed to fulfill one of the criteria under the Montevideo convention. But territorial claims could be given de facto recognition first and de jure recognition later. For example when Italy conquered Ethiopia, the UK had in 1936 given de facto recognition in relation to Italy's territorial claim, and changed into a de jure one in 1938 before being withdrawn in 1940.

Only a government recognized de jure may enter a claim to a property located in the recognizing state. Thus if a government is recognized de facto it cannot enter a claim to a property located in the recognized state. It is generally accepted that Defacto recognition of a government doesn't of itself include the exchange of diplomatic relations. Dolomitic relations do not exist during a de facto recognition period.

When recognition is granted by an express statement it should always probably be treated as a de jure recognition unless the recognizing state announces that it is only granting de facto recognition (the recognition has to be qualified to be a de facto one). When there is implied recognition it makes it difficult for us to tell whether it is de jure or de facto. There will often be uncertainty as to the intention of the recognizing state.

Premature Recognition: If a state gives premature recognition (of government) it would be an intervention in the internal affairs of the state which is unlawful. In the case of recognition of government it is a little complicated as to, when is the right time to recognize, as compared to recognition of a state. On the one hand international law doesn't give you a time frame when to recognize while still maintaining that precipitate/premature recognition are unlawful. For example the state of Biafra declared independence in 1960 and was recognized by some states. However, Nigeria ultimately won the civil war and recaptured Biafra.

Q· Does overdue recognition (when recognition happens long after the criteria for statehood has been full filled) cause a problem?

No! Because recognition is a unilateral act, a discretionary act of the recognizing entity·

Lecture 10

Conditional Recognition

Conditional recognition refers to the practice of making recognition subject to the fulfillment of certain conditions·

Q· How does international law consider conditional recognition? Is it lawful?

International law doesn't provide a prohibition on conditional recognition· We have said earlier that recognition is a unilateral act and states can exercise their discretion· Thus international law is neutral with regards to conditional recognition· However in practice conditional recognitions are not something you see being utilized every now and then· We could cite some instances such as the situation when the former Yugoslav republic disintegrated and new states emerged· Then the EU through a common body provided a list of criteria/conditions for member state to recognize the then newly found states· Some of the conditions were the good treatment of religious minorities, recognition of preexisting boundaries and others were among the criteria· But in any case when a breach of a particular condition happens that doesn't invalidate the recognition· So in terms of consequence international law doesn't consider the recognition once given as invalidated when that condition could not be met or fulfilled by the country that was recognized· It would just be dealt with as a breach of international duty·

Collective Recognition

This is a recognition by means of a collective decision· For example if members of the African Union collectively decide to recognize Somaliland, it would be regarded as a collective recognition· Once again international law doesn't take a position whether it is possible to recognize collectively or not·

We have seen collective recognition in the past but however they are even of lesser prevalence when compared to conditional recognition· This is due to the obvious reason that states are very reserved when asked to give away part of their sovereign rights (states power of recognitions)· Membership admission to the UN should not be construed as a collective recognition of the state· However admission to the UN is a strong proof for the fulfillment of the statehood criteria· Even in the above mentioned EU guidelines,

although it opted for a single and collective standard, finally it was an individual state decision.

Withdrawal of Recognition

Q. Is it possible to withdraw recognition of a state or recognition of a government once it has been given?

It depends on various factors. The first factor is what kind of recognition was granted in the first place, was it de jure or de facto. When a de facto "wait and see" recognition is given, the recognizing country has taken into account the possibility of withdrawing recognition, Thus a de fact recognition can be easily withdrawn. However a de jure recognition because it tends to be a more definitive step, it is difficult to withdraw. Nevertheless, it doesn't mean that de jure recognition can never be withdrawn. UK has for example withdrawn the 1938 de jure recognition of Italy's territorial claim over Ethiopia.

Q. Can recognition of state be withdrawn?

In the case of recognition of a state there is usually a de jure recognition. Unlike government the status of states doesn't change frequently. If a state has fulfilled all the requirement and become a state it is very unlikely for that state to lose its territory, population to the extent it loses its statehood. Thus withdrawal of recognition of states is impractical.

Withdrawal of recognition isn't a means of expressing a state's disapproval of the activities of the other. Under international system there is a way of doing this (self-help measures) such as severing of diplomatic relations.

Yes recognition has an important effect but not totally exclusionary. The fact that an entity is not recognized doesn't mean that; (1) it won't be bound by international law (it will be governed by the major rules of international law such as the non-use of force) and (2) the territory controlled by the entity won't be "terra nullus" (no one's land), other countries could have a claim over that territory.

Self determination

Self-determination has been argued by any as forming a separate criteria.

Q. Does it matter how a state achieved its separate existence? Is it important under international law the manner in which a state, having fulfilled the other criteria, achieved

independence? Should the independence follow a legal path? Should legal independence be presumed from factual independence or are they different?

If a given territory attaining factual independence is able to claim the right of self-determination was exercised it seems that under current international law, it would suffice to consider this entity as a state. If the way independence was gained followed the path of self-determination as recognized under international law in most cases international law regarded the out coming entity as a state.

Self-determination: Self-determination is people's right it is the right of the people as opposed to an individual right. International law recognizes two types of self-determination; internal and external self-determination. Internal self-determination refers to the right of self-governance while external self-determination refers to the right of secession. Obviously international law doesn't concern itself with the question of internal self-determination or self-governance. So external self-determination is what becomes important in international law.

Secession is a very sensitive issue. And there is a major principle under international law which is known as the territorial sovereignty of states. It cares about maintaining the territorial integrity of states.

Thus international law views external self-determination very cautiously, and this position is being reflected in different cases. The case of Katanga, Belgium supporting the Katanga secessionist movement deployed its troops. The UN decided that Belgium should go out of Zaire, a sovereign state. Recently (some fifteen years ago), the remaining supporters of the Katangese movement (who want to secede) brought a case against the DRC to the African commission of human and people's rights said that "under international law it is only when a state denies a given people a right to internal self-determination that external determination is recognized by international law".

The same criteria was applied by the Canadian Supreme Court, in the Quebec question for self-determination. Quebec is a French speaking state in Canada and unlike the other parts of Canada the Quebecois legal system is civil law as opposed to the common law legal system. These people claim that they have through time they have developed a unique identity and that they have their own territory and requested to break out from the Canadian federation. However, the court claimed that Quebec is exercising internal

self-determination as enshrined under the Canadian constitution and thus secession is not an option.

Generally, international law seems to evaluate each and every secessionist claim based on the criterion whether the people who requested the right to external self-determination are indeed denied internal self-determination. However, there is one major exception to this, international law did not attach any condition whatsoever to claims of external self-determination in the context of decolonization. So when countries in the 1960's were seeking independence, international law full heartedly supported their claims, and therefore even if a country during that time, attained independence by force against the will of the colonial power international law had no problem treating that entity as a state. This was so because self-determination was considered as an absolute right for people who were leaving under colonial control.

Even now, some human rights scholars argue that self-determination is available beyond the colonial situation without any qualifications. However this is not practical having viewed the current trend, because had there been no qualification for self -determination we would have a large set of countries seceding. Such a loose self-determination trend doesn't suit the forming states of international law. For example, For TPLF/EPRDF the question of Eritrea was a question of self-determination through decolonization. The idea behind this argument was that if Eritrea was an Ethiopian colony the solution is simple Eritrea should exercise external self-determination without any qualification. However if the premise is different we look at other criteria such as the permission of the nation's constitution.

International law, other than self-determination through decolonization, seems to accept lawful self-determination only because it is founded upon the principle of territorial integrity of states.

Q. What if the territory attained independence through unlawful means?

In the past international law refused to accept states that have attained independence through unlawful means. For example, the Turkish republic of Cyprus (northern part of Cyprus) that seceded from the Cyprus with the help of the Turkish troops in 1974. The UN general assembly by a resolution condoned Turkey's act and requested other countries not to recognize Turkish Cyprus. Another example could be Rhodesia (Zimbabwe), the

Smith government (white minority government that took over from British rule) wasn't accepted as a state by the international community. Because, it was against the principle of self-determination; a minority regime cannot establish a government and claim to rule the majority.

However there are some exceptions to this principle. Pakistan used to be part of India before seceding, India being angered by this started supporting a certain group within Pakistan. India sent troops to the east of Pakistan to support the secessionist movement and they finally managed to create Bangladesh. This was not in sync with international law or the existing trend but surprisingly, Bangladesh gained over 90 recognitions in three months plus it was admitted to the UN. Due to large number of recognition, the defect of Bangladesh in attaining self-determination was cured. However, most scholars argue that this is an exception and the general rule is that independence achieved through an unlawful means should lead to non-recognition or denial of the entities statehood.

Extinction of statehood

Q. Can a state be Extinct? Of course a government can be extinct, but can a state cease to exist?

Yes, a state can voluntary cease to exist. For example states could merge and form new a state like Germany in 1990, Yemen (South and North Yemen) and Czechoslovakia (Czech and Slovakia).

It's very impractical for states to involuntarily and physically disappear but we can't rule the possibility of involuntary extinction.

Lecture 11

Other Subjects of International Law

The reason why we talk about other subjects of international law is because there are two classes of subjects. States hold original personality and are the primary and universal subjects of international law while other subjects have derived personality. This also relates to the fact that we have discussed earlier with regards to the relative nature of personality. The relative notion of personality was properly explained by the ICJ itself in the reparations of the injury case in the year 1949; "the subject of law in any legal system are not necessarily identical in their nature and their extent of rights and the nature of their rights depend on the use of the community".

International organizations (IOS)

Also known as inter-governmental organizations are creations of states. They are entities established by sovereign states. A perfect example is the UN. International organizations are recent phenomenon and the first international organization emerged in 1815. However, the then entities weren't considered to have international legal personality. So the debate as to whether international organizations have legal personality or not started to surface after the Second World War.

Treaties setting up international organization, as does article 104 of the UN charter, often provide that the organizations shall enjoy in the territories of each of the member states such legal capacity as mainly necessary for the existence of the organizations and for them to exercise their functions and fulfillment of their objectives. The UN in this case holds legal personality, it enjoys personality under the municipal laws of the member states but it doesn't say anywhere in the charter that UN has international legal personality.

The possession of international legal personality enables the entity to be players in the international community to have the right to bring claims to enter into agreements, to enjoy immunities and privileges. So what article 104 of the UN charter does is recognize the fact that UN in this case has personality under municipal laws of the member states but the charter doesn't clearly state that UN has an international legal personality. It is very common for treaties establishing international organizations to contain personality under municipal laws but this was not the contention.

Nevertheless, it is generally agreed that the UN has at least some degree of legal personality. For example if we look at Article 43 of the charter, it empowers the UN to make certain type of treaties with certain states. It is though judicial interpretation mainly by the ICJ the world has come to recognize that the UN has indeed international legal personality. The leading judicial authority on the international legal personality of international organizations (not only the UN) is the advisory opinion of the ICJ in the reparations of injuries case suffered in the service of the UN.

> ***Reparations of injuries case:*** *is a landmark case by the ICJ when a UN mediator by the name Count Bernard was shot and killed in 1948 while in Israel trying to mediate between Palestine and Israel. The UN wanted to claim compensation (for both the UN*

and the families of Count Bernard) against Israel for not providing protection for the mediator. But the question arose whether the UN had international legal personality which could allow it to bring a claim against a sovereign state. The UN cannot bring a contentious case to the ICJ but only advisory opinions. The contentious jurisdictions of the ICJ are only open to sovereign states.

The court in its advisory opinion said that the UN had international legal personality in principle, since its functions were so important that the UN could not carry these duties unless it had some degree of international legal personality. The court went on to advise them the organizations capacity involved the type of claim mentioned in the case. It concluded that the un has implied powers if not expressed within the charter. The reparations case is important as it introduced the principle of specialty. The principle of specialty means that some entities that have international legal personality only have special powers they are not like states, who enjoy right and duties to the highest extent. So when states create international organizations, thy set them up for specific purposes and give them limited powers to them. Thus unlike states international organizations don't possess general competence but rather a special competence. The powers of the international organizations would be listed down under the establishing document, although the ICJ has maintained that there could be implied powers.

The ICJ advisory opinion on Nuclear weapons: *In this case the ICJ was asked if the world health organization had the mandate to prohibit sovereign states from carrying out nuclear tests. The court recognized that international organizations have international legal personality (even if a limited one).*

Thus, the contemporary question isn't whether international organizations have legal personality but rather the extent of their legal personality. The UN enters into treaties, carries out enforcement measures, deploys peace keeping troops...etc. However we should look at their constitutive document to see where the limits are.

Non-governmental organizations

They are not created by states, they are usually created by states. Recently the roles that non-governmental organizations play are huge (especially on human right organizations

such as amnesty international and human right watch have become increasingly active at the international stage). The activities of these NGO's are not limited to the territories within which they are set up. They contribute towards the development of international law. NGO's are given observer status in various international organizations such as the UN committee on Human Rights. They air out their concerns regarding to adoption of treaties and violations of preexisting treaties.

Q Are NGO's recognized to have legal personality?

Recent developments have shown that these entities have international legal personality. The rainbow warrior case is usually cited as a pertinent case.

> ***The rainbow warrior case:*** *In this case France finally accepted argument that an NGO can make claims against a sovereign state.*

Individuals

International law under the positivist influence regarded individuals the same was as municipal laws regarded animals. So if we strictly follow positivist approach, international law doesn't directly deal with individuals but through the intermediacy of states. Rights are not directly given to individuals by international law, international law has prescribed that individuals should get this rights only through legislations enacted by national states. But with regards to duties there is one simple exception, this is Piracy. Pirates are termed as "Hostis Human Generis" /enemy of human kind/ International law has long agreed that dealings with piracy has universality jurisdiction, ever since ancient time's piracy was considered as an international crime. International law has long had direct dealings with pirates. Universality jurisdiction indicates that whenever a pirate is involved in a crime of piracy any country can exercise jurisdiction over that individual. This principle existed since time immemorial.

This trend has changed currently, especially post Second World War. Many treaties confer rights under international law to individuals and companies. Treaties such as the ICCPR, ICESCR, and UN refugee conventions directly give rights to individuals and that sows that the status of individuals have changed. In relations to duties as well, the development of international criminal law has contributed to the idea that international law now regards individuals as international legal systems. We have seen different international legal

tribunals exercising their jurisdiction over various individuals in cases such as the Tokyo and Nuremburg trials as well as the ICTY and ICTR.

Multi-national Companies

MNC's are companies, whose activities are not bound within a single territory. If their operation is within the boundaries of a single state then it is no point in discussing international legal personality. The recent trend is that MNC's should be considered as having international legal personality. We are having more and more direct legal responsibility by MNC's on environmental issues.

Rebel Groups

Q. Why does international law concern itself with international law?

The reason why international law concerns itself with insurgent of dissident armed groups is because we see them exercising control over a territory. Plus for IHL rules to effectively work it was indispensable that rebel groups or insurgents movements should have some international law responsibility. States however don't want to formally recognize rebel groups.

One very important point is that under Article 10 of the draft article on state responsibility provide that an insurrection movement will be held if it becomes new government of state. For example EPRDF would be liable for the war crimes it has committed in the jungle after it attains power.

Chapter V
The Law of Treaties

Treaties have become the most important source of modern international law. States make treaties on every conceivable topic. They make treaties regarding trans-boundary water courses, outer space, trade communication...etc. Treaties are the only way through which states create a binding obligation in a deliberate and conscious way when compared with custom. The major advantage treaties have over custom are; one the obligations they create are mostly clear because they result from a deliberate and conscious act of states and two??????????????

Because of the emergence of treaties international law has developed a specific set of rules whose purpose is to regulate the creation, operation and termination of treaties. And it is this body of rules that we refer to as the law of treaties. Law of treaty is a body of law that deals with the substantive and procedural issues related to treaties.

6.1. Features of treaties

A treaty in international law is an instrument governed by international law. Thus this excludes treaties governed by national law. For example concession agreement signed between a country and an oil exploration company. Ethiopian government has signed a treaty on outsourcing of the Addis light rail system to a Chinese company, this is an international agreement governed by national law. This kind of agreements are subject to national law and therefore we treat them as international contract. Once a treaty that is governed by international law is created and enters into force, it creates legally binding obligations under international law between the parties.

There is no set nomenclature for treaties. There are a number of names that are used to refer to such type of agreements, such as covenants, charter, convention, protocol and statue. There are differences among these agreements but they are all used to refer to agreements governing international law.

A treaty may arise from a deliberation of conferences or from a formal bilateral negotiations or from an informal negotiations. Different happenings could result in a treaty as an outlet document. The great majority of treaties are made by and among states but other subjects of international law can also make treaties. For example the UN concluded a headquarters agreement with the US.

A discussion on the law of treaties should rely on the Geneva Convention on the law of treaties. This is a document that comprehensively deals with the issues of making, operation and termination of treaties. It was a specialized convention that came into force in 1997. The Vienna convention on the law of treaties define treaties under article 2 (1) /a/ defines treaty for the purposes of the convention as "an international agreement concluded between states in a written form and governed by international law whether embodied in a single instrument or two or more related documents and whatever its particular designation".

The treaty excludes;

- Agreements governed by municipal law (similar to the general international law on treaties)

- Agreements which don't create binding rights and obligation. (Conference reports, communiques don't tend to create binding obligations). This criteria flows from the first criteria of being governed by international law.

- Oral agreements (this is a major departure from general international law which considers oral agreements as treaties)
- Treaties between states and other subjects of international law (there is another Vienna convention which is deals with such agreements but it is yet to come into force)

Other special treaties have excluded other types of treaties. Treaties with regards to state succession. When non states are part of the treaty we should be cautious because the Vienna law of treaties still applies as between the member states within the framework of the treaty.

History of the Vienna Convention

The international law commission is the one that prepared the draft Vienna convention. The ILC is an entity created by a UN general assembly resolution, whose members are highly reputable scholars. Its tasks are the progressive development of international law and codification of already existing international law rules.

The drafts of the ILC such as the Vienna convention on the law of treaties have extensive normative value. Even the ICJ doesn't see this drafts as mere documents. This is due to the fact that the members of the ILC are highly reputable scholars.

Some of the rules within the convention are reflections of the existing customary international law. Because the convention has a wide acceptance some articles have managed to be part of the customary international law rules even after adoption. While other rules are still treaty obligations due to their contentious nature.

Article 4 of the Vienna convention applies only to treaties that were concluded after the adoption of the treaties. But the safe thing is that most of the rules have customary international law status.

Q. does international law attach any legal effects to unilateral declaration?

There are times when they have legal effects, this is when the state making the statement had clear intention to be bound by it. There is an interesting case in this regard known as the nuclear test cases.

The Nuclear test cases are cases between Australia and France and New Zealand and France. France was conducting an atmospheric nuclear test in the South Pacific Ocean and Australia and New Zealand opposed this French move by instituting a case at the ICJ. Before the ICJ judges went into the merit of the case the French foreign ministry

asserted that they will cease the operations. Then the court declared that France has lost the right by its own unilateral declaration.

Lecture 12

6.2. The making of treaties

Authority to conclude treaties

Treaties are agreements concluded among states and its national law that decides which government official or entity has the power to represents the state and enter into a binding legal agreement. That doesn't mean international law lacks rules to deal with this matter. Under Vienna convention on the law of treaties the general rule is that people who have full powers are the ones that can represent a state, enter into negotiations and sign/ratify/express consent to be bound by international law.

Full powers refers to a document originating from a state authorizing a person/representative to do acts relevant for the conclusion of a treaty on behalf of the state being represented. The Vienna convention provides us with an indicative list of who should be considered as having the power to represent the state.

The first category (principle) of representative are people who furnish full power. In the second category, because of state practice, there are times when other states can lawfully infer from what a representative of a given state does. So the law gives other countries the authority to assume, from what the representative does, that he is entitled to represent the state in conclusion of a treaty.

The third category is where the convention tries to fill the gap. Even when the representative doesn't furnish full power nor can be inferred from their act, there are such persons who are generally assumed to hold such powers to represent their countries in the conclusion. Such persons could be;

a) Head of states, Head of governments and Ministry of foreign affairs have the general power to conclude any treaty.
b) Heads of diplomatic missions, for the purpose of adopting the text, between the accrediting state and the state to which they are accredited to. For example the head of Ethiopian diplomatic mission to Kenya can represent Ethiopia on an Ethio-Kenyan treaty but not on an Ethio-Somalia treaty.
c) Representatives of the state to international conferences. Usually multilateral treaties are created at international conferences and countries send representatives

to head their respective delegation. These persons have the power to represent the country and sign conference outcome treaties.

Article 2. USE OF TERMS

1. For the purposes of the present Convention:

(c) "Full powers" means a document emanating from the competent authority of a State designating a person or persons to represent the State for negotiating, adopting or authenticating the text of a treaty, for expressing the consent of the State to be bound by a treaty, or for accomplishing any other act with respect to a treaty;

Article 7. FULL POWERS

1. A person is considered as representing a State for the purpose of adopting or authenticating the text of a treaty or for the purpose of expressing the consent of the State to be bound by a treaty if:

(a) He produces appropriate full powers; or

(b) It appears from the practice of the States concerned or from other circumstances that their intention was to consider that person as representing the State for such purposes and to dispense with full powers.

2. In virtue of their functions and without having to produce full powers, the following are considered as representing their State:

(a) Heads of State, Heads of Government and Ministers for Foreign Affairs, for the purpose of performing all acts relating to the conclusion of a treaty;

(b) Heads of diplomatic missions, for the purpose of adopting the text of a treaty between the accrediting State and the State to which they are accredited;

(c) Representatives accredited by States to an international conference or to an international organization or one of its organs, for the purpose of adopting the text of a treaty in that conference, organization or organ.

Noncompliance with national law cannot be a defense for not fulfilling international law obligations (under chapter3). If consent to be bound by a state was expressed through a representative in violation of what domestic law prescribes, the principle under international law is that, the state will continue to be bound by that treaty it concluded via a wrong representative. However there is an exception, if the violation of the rule

was so manifest that countries could reasonably be expected to cast it out and it is against internal law of fundamental importance.

> 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.

Process of Treaty Making

Once a treaty is drafted and agreed upon by authorized persons there are a number of steps that have to be passed before it becomes a legally binding document. After drafting is completed usually multilateral treaties will be adopted.

Adoption is the beginning test in treaty making process experts come together draft text of a given treaty and this is when we kick start the process. Adopting a treaty doesn't mean that the states will be bound by it. There are other steps that are required before a country becomes formally a member of a given treaty. Traditionally and principally unanimity (all states need to agree) was required to adopt a treaty text. However as an exception as provided under paragraph 2 of article 9, if the adoption is taking place in an international conference it would be adopted by a two third majority or by any new rule approved by a two third majority. The current trend is that an increasing number of multilateral treaties are now adopted and open for signature by means of the UN general assembly resolutions. That was the case with ICCPR and other human rights instrument.

> 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.

Before a convention becomes legally binding, consent to be bound by a treaty has to be expressed and the treaty has to enter into force.

The Vienna convention accepts multiple ways of expressing a state's consent to be bound by a treaty. When we talk about consent to be bound by a treaty we are not only talking about signature. The Vienna convention lists six modes of expressing to be bound by a treaty. If countries wish to agree on a different mode through which they will express their consent to be bound by a treaty they may decide on that.

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.

Traditionally, signature, ratification and accession are the most common ways of expressing consent. **Ratification** is a process whereby a state finally confirms that it consents/intends to be bound by a treaty that it has previously signed. So ratification always follows signature. Signature by its own may or may not be considered as an expression of consent to be bound. Historically, with the lack of modern communication and swift transportation, ratification was required to check/prevent diplomats exceeding their instructions or mandates. Since 1800 ratification was used to give the head of state time of thought plus the delay between signature and ratification gave a chance for public opinion to make its effect (reason developed by democratic European states). In modern settings the reason why we have ratification is because the constitutions of different countries require the consent of the legislature.

Q. How is ratification expressed?

Ratification occurs when instrument of ratification are exchanged between two states (bilateral treaties) or when a ratification document is deposited with a treaty depository (multilateral treaties). Sometimes performance of a treaty can constitute ratification.

International law recognizes the concept of passive recognition. A country having signed a treaty and before ratification if it does some measures in relation to the treaty there is a possibility that its acts could imply a tacit ratification. One of this measures is if a state successfully claims rights under an unratified treaty it would be stopped from alleging that it is not bound by the treaty. We have to be cautious about applying this concept as it might at time erode countries sovereignty.

Accession (adhesion/adherence): in the case of accession the acceding state did not take part in the negotiations which produced a given treaty. So when we talk about accession we are talking about a state which most likely did not sign the treaty and which was invited by the negotiating state to join (an already in force treaty or an inactive treaty). Ratification usually follows signature but in the case of accession we see the effect of signature and ratification combined.

Acceptance and approval are sometimes used but they are not common in the modern days. Approval and acceptance are not that different from ratification and accession, thus can be used interchangeably.

The fact that a state has expressed its consent to be bound by a treaty doesn't mean that it would be automatically be bound by the letters of the treaty. Because there is another stage called entry into force. A treaty normally enters into force as soon as negotiating states have expressed their consent to be bound by it. But negotiating states are at liberty to create a different rule for entry into force. Usually under multilateral treaties the treaty comes into force upon the ratification of adequate number (as prescribed under the treaty) of states. Even when the treaty comes into force it binds only those states that have expressed their consent to be bound by the treaty.

Article 18 talks about the obligations states have between signature and ratification. The rule is that signature alone, unless otherwise provided, doesn't represent consent to be bound by a treaty. However, a country that has signed but not ratified a treaty would have the obligation not to defeat the purposes or object of the treaty during the time before signature and ratification. Even after ratifying it there could be a time gap between the times when a country ratifies a treaty and when the treaty comes into force. The ratifying state has an obligation not to take measures that would defeat the purposes and object of the treaty.

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·

Article 12· CONSENT TO BE BOUND BY A TREATY EXPRESSED BY SIGNATURE

1· The consent of a State to be bound by a treaty is expressed by the signature of its representative when:

(a) The treaty provides that signature shall have that effect;

(b) It is otherwise established that the negotiating States were agreed that signature should have that effect; or

(c) The intention of the State to give that effect to the signature appears from the full powers of its representative or was expressed during the negotiation·

Article 13· CONSENT TO BE BOUND BY A TREATY EXPRESSED BY AN EXCHANGE OF INSTRUMENTS CONSTITUTING A TREATY

The consent of States to be bound by a treaty constituted by instruments ex changed between them is expressed by that exchange when:

(a) The instruments provide that their exchange shall have that effect; or

(b) It is otherwise established that those States were agreed that the exchange of instruments shall have that effect·

Article 14· CONSENT TO BE BOUND BY A TREATY EXPRESSED BY RATIFICATION, ACCEPTANCE OR APPROVAL

1· The consent of a State to be bound by a treaty is expressed by ratification when:

(a) The treaty provides for such consent to be expressed by means of ratification;

(b) It is otherwise established that the negotiating States were agreed that ratification should be required;

(c) The representative of the State has signed the treaty subject to ratification; or
(d) The intention of the State to sign the treaty subject to ratification appears from the full powers of its representative or was expressed during the negotiation.
2. The consent of a State to be bound by a treaty is expressed by acceptance or approval under conditions similar to those which apply to ratification.
Article 15. CONSENT TO BE BOUND BY A TREATY EXPRESSED BY ACCESSION
The consent of a State to be bound by a treaty is expressed by accession when:
(a) The treaty provides that such consent may be expressed by that State by means of accession;
(b) It is otherwise established that the negotiating States were agreed that such consent may be expressed by that State by means of accession; or
(c) All the parties have subsequently agreed that such consent may be expressed by that State by means of accession.
Article 16. EXCHANGE OR DEPOSIT OF INSTRUMENTS OF RATIFICATION, ACCEPTANCE, APPROVAL OR ACCESSION
Unless the treaty otherwise provides, instruments of ratification, acceptance, approval or accession establish the consent of a State to be bound by a treaty upon:
(a) Their exchange between the contracting States;
(b) Their deposit with the depositary; or
(c) Their notification to the contracting States or to the depositary, if so agreed

Lecture 13

6.3. Reservation and application of treaties

Reservations are defined under the Vienna conventions as unilateral statements that are made to either modify or totally exclude certain obligations of a treaty with respect to the country making the reservation. In principle, reservations are still unilateral statements thought there might be situations where acceptance of other countries might be required. Reservations are quite different from interpretative declarations. Interpretative declarations are usually common in human rights. Interpretative declarations are declarations made to clarify how a state understands its obligations.

In bilateral treaties if parties are not happy about the terms of a treaty, there are two options, they either try to renegotiate so as to try to convince each other or they drop the case altogether. If it is between two countries it is a requirement that they agree

on every detail of the treaty. But in multilateral treaties it is extremely difficult to become party to treaties having accepted all the rules. Countries may have reservation regarding certain topics. They may accept the major parts of the treaty but in most cases countries may have different opinions on peripheral matters of the treaty.

Q. So should we allow reservations or not?

Before the adoption of the Vienna law of treaties there was tension between proponents of reservation and opponents of making a reservation. Proponents of the right to make reservation asserted that by the right of making reservation it would become possible to bring on board as many countries as possible they were arguing on universal membership. Opponents of the right to make reservation believed that it is not the number of countries that are making reservation that matters but rather the creation of uniform legal obligation that should be given priority.

The league of nation practice/approach had what was called the unanimity principle that simply means a county that intends to make reservation with respect to a given multi-lateral treaty should have the consent of all other member states to the specific reservation made (unanimous approval of the reservation). If one or more country fails to give its consent on the reservation there will be no treaty at all between the country making the reservation and other countries. Securing unanimous approval is very difficult thus leading as to conclude that this theory supports the opponent's of the right of reservation (it's tantamount to saying no to reservations).

The League of Nations approach was heavily criticized, mainly by the pan American approach. They were opposed to the idea of making reservations permitted by unanimous approval by other countries. They believed it was a rule too rigid to govern. At the beginning of the 1950's when the genocide convention was being signed, many countries liked the idea of becoming a signatories to the convention. However many of them had certain reservations that lead to a deadlock, if the unanimity approach was to be applied. Thus, The UN requested for the advisory opinion of the ICJ on two questions;

(1) Whether a state can be a party to a convention when its reservation was objected by one or re party?

(2) If the court answers the first question affirmatively (there is a possibility that a reserving state can still continue to be a member state despite the

objections), what is the legal effects of the reservation on those that have accepted and rejected the reservation?

After analyzing state practice (as the Vienna convention was not I place) the court provided an answer on two questions as follows. It advised that it may be possible for a reserving country to continue being a state even when there are more objections.

The legal effects of making reservations where dealt with as follows;

1. As regards to those that have accepted the reservation and the reserving state, they will continue as parties to the treaty but their relationship would be modified by the reservation or their relationship will exclude the clause that was subject to reservations (if the reservation was to exclude a certain part of the treaty).
2. As regards to those countries that rejected the reservation and the reserving states, they will not be having any treaty relationship.

The ICJ in this advisory opinion abolished the unanimity approach but its position still gave enormous priority to consent of state when it comes to the one to one relationship between signatory states.

<u>Vienna convention on the law of treaties</u>

RULE I: Reservation is permitted unless (1) reservation against the whole treaty is prohibited, (2) reservation against a specific clause is prohibited and (3) the reservation is incompatible with the object and purpose of the treaty. Reservations are permitted in principle but there are these three exceptions. Whenever a state makes a prohibited reservation, the reservation would be considered as having not been made. So the Vienna convention penalizes states by making them parties to the treaty for entering a reservation that is not allowed.

SECTION 2. RESERVATIONS

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 falling under sub-paragraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty

RULE II: According to article 20 (1) the effect of reservations doesn't hinge upon acceptance by other states or countries. In fact we should not have acceptance or rejections at all because, that decision was made earlier when they decided not to prohibit reservation in the making of a treaty.

Rule III: By virtue of article 20(2) absolute unanimity is required in two circumstances; when it appears from the limited number of negotiating states and from object and purpose of the treaty that the treaty obligations are to be accepted in their entirety by all prospective members then a reservation requires acceptance by all states. In this case a state whose reservation is accepted unanimously would continue to be member with other countries on the terms of the reservation. On the other hand if even one country rejects the country making reservation is excluded from the treaty.

Rule IV: Under article 20(3) when a treaty is a constitutive act of an international organization, a state's reservation will become valid only if that competent organ of the organization has accepted the reservation.

Rule V: Under 20(4) if a reservation is not prohibited (rule I) or not covered under previous rules (rule II &III that require unanimity), acceptance of one's state reservation by another means the treaty comes into effect between the two countries based on the terms of the reservation and the reserving state becomes a part to the treaty. Rejection of a state's reservation by another doesn't prevent the entering into force of the treaty between the reserving state and the objecting state unless a contrary intention of the objecting state is there. (This is a deviation or a change from the Genocide case)

The Vienna convention gives primacy to whatever is provided in the specific treaty itself. Secondly, the fact that objection to a reservation doesn't stop the effect of a treaty means that the effect of acceptance and objection is the same. Reservations are tools that create mini treaties under the umbrella of one multilateral treaty (complex set of relations will be created). The Vienna convention model doesn't satisfy the human rights lawyers as they seek to create uniform legal obligations through the working of treaties. Nevertheless the above rules have achieved the status of customary international law.

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·

Q· To which approach does the Vienna convention incline?

6.4. Interpretation of treaties

Prior to the adoption of the Vienna convention, international law had various rules of interpretation·

Literal/textual approach: The concern here is in the actual texts or wording of the treaty· It concentrates on the literal meaning of the treaty· The terms of a treaty are to be understood and interpreted according to the natural or plain meaning of the treaty·

The intentions of the parties approach: This is more of a subjective approach as compared to the objective literal approach· According to these approach the terms of a treaty are to be interpreted according to the intention of the parties when the treaty was concluded· It tries to find out the intention of the treaty· There are problems associated with this theory; the first one is that the approach is based on the premise that there is always an underlying intentions at a time a treaty is concluded but that is not always true· The second problem is that it gives maximum latitude for people involved in interpreting treaties· It encourages judicial law making·

The Object/Purpose/teleological approach: According to this approach the terms of a treaty are to be interpreted so as to facilitate the attainment of the objectives of that given treaty· This is also partially a subjective approach as it asserts that terms used in a treaty are to be interpreted so as to facilitate the attainment of the objectives of the treaty·

The principle of effectiveness: According to this principle treaties have to be interpreted to give the treaty or that given clause some meaning· This approach opts for a term to have some effect than to be made void· This theory is related to the object approach as it is something that has object that can be given effect·

Vienna convention on interpretation of treaties

Article 31 (primary means of interpretation) of the Vienna convention tries to aspects of the approaches mentioned above· At first Article 31 (1) of the Vienna convention on the law of treaties gives us the impression that it supports the literal/textual approach but in the second phrase it incorporates the object approach· Another feature we see in the article is that it adds additional technique to be used in interpreting treaties· If you don't have an otherwise intention, the rule is that the words original meaning should be taken (Article 31(4))· Press releases, legislations accepted by the other party (article 31

(4) (b)) and previous agreements made by all the parties in connection with the treaty are to be regarded as important tools in understanding the context of the treaty.

SECTION 3. 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.

If using the different techniques under article 31, the judge was not capable of determining a given clause in a treaty there are supplementary means of interpretation that are allowed. The Vienna convention on the interpretation of treaties says that these supplementary means of interpretation are preparatory works and circumstance of conclusion of a treaty. We can use this supplementary means of interpretation if we want to clarify/confirm the meaning we reached at by using the primary means of interpretation

or if the use of those primary means of interpretation lead to ambiguity or obscurity or they lead to results manifestly absurd or unreasonable.

> 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.

Article 31 ad 32 are not believed to have attained customary international law status. There is still ongoing debate as to means to be used to interpret treaties. On the face of it the Vienna laws look sharp and perfect however they are open ended and provides no hierarchy as to the means (contextual or object). It doesn't give as a clear picture how to handle interpretation of treaties.

> Article 33. INTERPRETATION OF TREATIES AUTHENTICATED IN TWO OR MORE LANGUAGES
> 1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.
> 2. A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree.
> 3. The terms of the treaty are presumed to have the same meaning in each authentic text.
> 4. Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.

6.5. Application of Treaties

Territorial application of Treaties

Article 29· TERRITORIAL SCOPE OF TREATIES *Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory·*

In relation to the territorial application of treaties the rule is a treaty applies to a state party in its entire territory· Why does this rule become important? In the past when countries had colonies, as international law considered colonial territories as forming part of the colonial power, the rule had to be stated· Unless there is an otherwise intention a treaty in principle binds a state in respect of its entire territory· Previously they would put a colonial clause, saying it doesn't apply to a certain colony· The second reason is that there were countries that had federal state structures were asking if a treaty would apply to all parts of the federation· Under the current international law it is not even allowed for a state to say that a country will be bound by a treaty with the exception of part of its territory· However, exceptionally it may be allowed if it was clearly spelt out in the treaty·

Application of treaties to third parties

The rule we find under the Vienna convention is the rule of "Privity of contracts"· The principle is that a treaty doesn't create either rights or obligations on third states· Treaties create rights or impose obligations on state parties only· There is a strong international law argument supporting this position and that is consent of states is very important·

SECTION 4· TREATIES AND THIRD STATES *Article 34· GENERAL RULE REGARDING THIRD STATES* *A treaty does not create either obligations or rights for a third State without its consent·*

However there are some exceptions to this rule· If a state expressly accepts an obligation created by a treaty to which it is not a member, in writing then it is bound by it· The only thing that makes this an exception is the fact that the state is not formally a state member, otherwise even this exception is based on the principle of consent·

Article 35· TREATIES PROVIDING FOR OBLIGATIONS FOR THIRD STATES
An obligation arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to be the means of establishing the obligation and the third State expressly accepts that obligation in writing·

With regards to the forwarding of rights to third parties it is a bit different as its not express acceptance that is required but rather implicit assenting that is needed to enjoy the rights provided· In the case of obligation is not only that the state expresses its consent but also that it has to express it clearly and in writing· This is done so that it doesn't deviate from the basic pillar of international legal system, which is consent· In the case of rights the requirement is different, yes there should be consent however in international law recognition is given to implied consent·

Article 36· TREATIES PROVIDING FOR RIGHTS FOR THIRD STATES
1· A right arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to accord that right either to the third State, or to a group of States to which it belongs, or to all States, and the third State assents thereto· Its assent shall be presumed so long as the contrary is not indicated, unless the treaty otherwise provides·
2· A State exercising a right in accordance with paragraph 1 shall comply with the conditions for its exercise provided for in the treaty or established in conformity with the treaty·

The other exception relates to dispositive treaties· Dispositive treaties are treaties that create a legal regime valid for all countries (treaties that create erga omnious obligations)· When a dispositive treaty is created with regards to boundaries or watercourse, it is possible for the treaty to applying to non-state parties· The Vienna convention is silent in this regard but the Vienna convention on succession of states however expressly endorsed the principle that dispositive treaties create rights and obligation on non-state/third party states·
The last exception (if we can call it an exception) is when the provisions of the treaty in question have entered into a customary law or have attained customary international

law rules. This is barely an exception, it is not really the treaty provision that is applying to the third party state but rather the customary international law rule.

> Article 38. RULES IN A TREATY BECOMING BINDING ON THIRD STATES THROUGH INTERNATIONAL CUSTOM
> Nothing in articles 34 to 37 precludes a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law, recognized as such.

Lecture 15

Application of successive treaties

The issue here is when we have two or more treaties governing the same subject matter, when a treaty coming after another addresses the same subject matter, and the parties taking part in both treaties are the same. The question as to which treaty applies is of huge importance. Article 59 and 30 of the Vienna convention address these issues.

> Article 59. TERMINATION OR SUSPENSION OF THE OPERATION OF A TREATY IMPLIED BY CONCLUSION OF A LATER TREATY
> 1. A treaty shall be considered as terminated if all the parties to it conclude a later treaty relating to the same subject-matter and:
> (a) It appears from the later treaty or is otherwise established that the parties intended that the matter should be governed by that treaty; or
> (b) The provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time.
> 2. The earlier treaty shall be considered as only suspended in operation if it appears from the later treaty or is otherwise established that such was the intention of the parties.

Article 59 states that there are two tests to consider before concluding that a set of treaties are successive. The first one is that all parties of the first treaty are parties to the second treaty and the second one is that bot treaties deal with the same subject matter.

Once we have ascertained that a given set of treaties are successive ones we shall explore the effects of one on the other. The latter treaty shall be considered terminated; (1) if we can reasonably assumed from the later treaty that it should be the one governing and (2) if the provisions of the previous treaty are incompatible with the latter treaty so

much so that the two treaties cannot apply at the same time (if they are mutually exclusive).

However if the earlier treaty has not been terminated as per sub-article 1 since they are neither mutually exclusive nor seen from the intention of the parties to terminate, Article 30 applies.

> 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.

We have two major rules here under article 30. The first rule is that if all parties to the earlier treaty are parties to the latter treaty only those parts of the earlier treaty that are compatible to the latter treaty apply (article 30(3)). If there is a room for

compatibility the section of the earlier treaty that are compatible with the latter treaty apply.

If on the other hand the parties to the two are not the same or identical, another set of rules apply. With regards to the parties that are signatories to both treaties the rule under article 30(3) apply. In principle the latter rule applies and the second one gets terminated however, if the provisions of the earlier treaty are compatible with the latter treaty they apply. As regards to the states that are members of both treaties and those that are only members of the latter treaty, the latter treaty solely applies.

Nevertheless there is one major exception (article 30(1)) to these rules that is article 103 of the UN charter. It states" In the event of any contradiction/conflict between the obligation of state under the charter and any other international agreement the charter would prevail". It is the supremacy clause of the charter.

6.6. Invalidation and Termination of treaties

Q. What are the grounds of invalidation and termination of treaties?

> PART V. INVALIDITY, TERMINATION AND SUSPENSION OF THE OPERATION OF TREATIES
>
> SECTION 1. GENERAL PROVISIONS
>
> 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.

In principle only grounds of termination and invalidation recognized under the Vienna convention might lead to invalidation and termination. This article is trying to deny states from coming up with grounds of invalidation and termination.

<u>Invalidation</u>

> 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.

In principle a state cannot invoke its municipal law to invalidate its treaty obligation but there are exceptions to this. If the violation is manifest and if that very manifest violation relates to a fundamental national law like the constitution it can be a ground of invalidation. The ICJ has been consistently rejecting states defense of their violation by virtue of their municipal law. This is backed by the motive of not invalidating treaties by minor grounds such as contradiction with municipal law.

Article 47. SPECIFIC RESTRICTIONS ON AUTHORITY TO EXPRESSTHE CONSENT OF A STATE

If the authority of a representative to express the consent of a State to be bound by a particular treaty has been made subject to a specific restriction, his omission to observe that restriction may not be invoked as invalidating the consent expressed by him unless the restriction was notified to the other negotiating States prior to his expressing such consent.

Even when there is an express restriction on the full powers given to a state representative, as a rule such a restriction and the subsequent consent of the representative against it shall not be a ground for invalidation. Except when the restriction was notified to the negotiating state before the expression of such consent.

Article 48. ERROR

1. A State may invoke an error in a treaty as invalidating its consent to be bound by the treaty if the error relates to a fact or situation which was assumed by that State to exist at the time when the treaty was concluded and formed an essential basis of its consent to be bound by the treaty.

2. Paragraph 1 shall not apply if the State in question contributed by its own conduct to the error or if the circumstances were such as to put that State on notice of a possible error.

3. An error relating only to the wording of the text of a treaty does not affect its validity; article 79 then applies.

The principle is that error might vitiate consent if it relates to something fundamental, and thus should be a ground of invalidation. However errors related to the wording of a treaty cannot be a ground of invalidation by virtue of article 48(3). There are two exceptions to this rule. The first one is, if the state relying on that false information knew or should have known the existence of that fact it cannot invoke error as a ground for invalidation. The second exception is if the state had contributed to the error it cannot call for error as a ground of invalidation. This second exception is supported by the ICJ decision on the Temple case.

Temple of Preah Vihear Case (1962): the temple was a religious and tourist attraction site found on the boundary line between Cambodia and Thailand. In 1900 the two parties had agreed on joint map making body that delineated the boundary and in this map the temple was within the Cambodian borders. The court awarded Cambodia as the owner of that temple by rejecting Thailand's argument that there was an error in the map making and it wouldn't have agreed to the map had it known of such error. The court claimed that Thailand contributed to the mistake as it was the Thai experts that jointly with their Cambodian counterparts that drew the map (your experts participated and you should have known). In 1962 the Vienna convention did not enter into effect thus this rule (relating to error) was part of customary international law.

Article 49. FRAUD

If a State has been induced to conclude a treaty by the fraudulent conduct of another negotiating State, the State may invoke the fraud as invalidating its consent to be bound by the treaty.

Article 50. CORRUPTION OF A REPRESENTATIVE OF A STATE

If the expression of a State's consent to be bound by a treaty has been procured through the corruption of its representative directly or indirectly by another negotiating State, the State may invoke such corruption as invalidating its consent to be bound by the treaty.

Article 51. COERCION OF A REPRESENTATIVE OF A STATE

The expression of a State's consent to be bound by a treaty which has been procured by the coercion of its representative through acts or threats directed against him shall be without any legal effect.

Article 52. COERCION OF A STATE BY THE THREAT OR USE OF FORCE

A treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations.

Article 53. TREATIES CONFLICTING WITH A PEREMPTORY NORM OF GENERAL INTERNATIONAL LAW ("JUS COGENS")[VOID AB INITIO]

A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

Article 64. EMERGENCE OF A NEW PEREMPTORY NORM OF GENERAL INTERNATIONAL LAW ("JUS COGENS") [VOIDABLE]

If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.

Effects of Invalidity

Incases covered by articles 8, 51, 52 and 53 of the Vienna convention the consequence of invalidity is void ab initio. In cases covered by article 46-50 the consequence is probably voidable rather than void. Meaning it requires the states affected by it to claim/apply and seek the invalidation.

Termination

SECTION 3. TERMINATION AND SUSPENSION OF THE OPERATION OF TREATIES

Article 54. TERMINATION OF OR WITHDRAWAL FROM A TREATY UNDER ITS PROVISIONS OR BY CONSENT OF THE PARTIES

The termination of a treaty or the withdrawal of a party may take place:

(a) In conformity with the provisions of the treaty; or

(b) At any time by consent of all the parties after consultation with the other contracting States.

Article 55. REDUCTION OF THE PARTIES TO A MULTILATERAL TREATY BELOW THE, NUMBER NECESSARY FOR ITS ENTRY INTO FORCE

Unless the treaty otherwise provides, a multilateral treaty does not terminate by reason only of the fact that the number of the parties falls below the number necessary for its entry into force.

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 (i.e. treaty of alliance and certain type of commercial 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.

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.

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.

Article 62. FUNDAMENTAL CHANGE OF CIRCUMSTANCES (Riversic Stantibus)

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.