Public International law

CML 3231

Slides from Introduction through to Sources of International Law

Craig Forcese





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Public International Law

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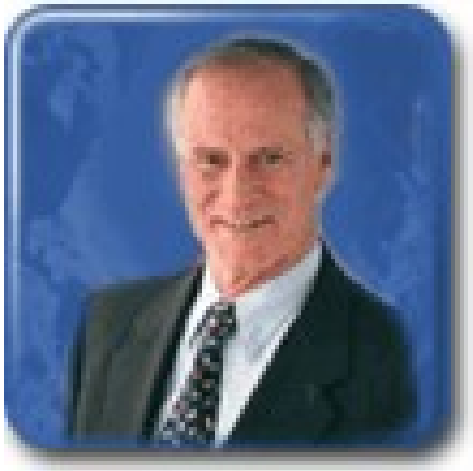
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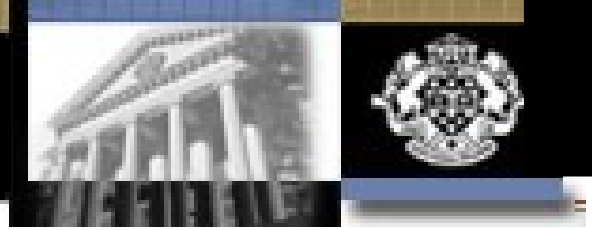








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Many International Legal issues in the Kazemi Case:

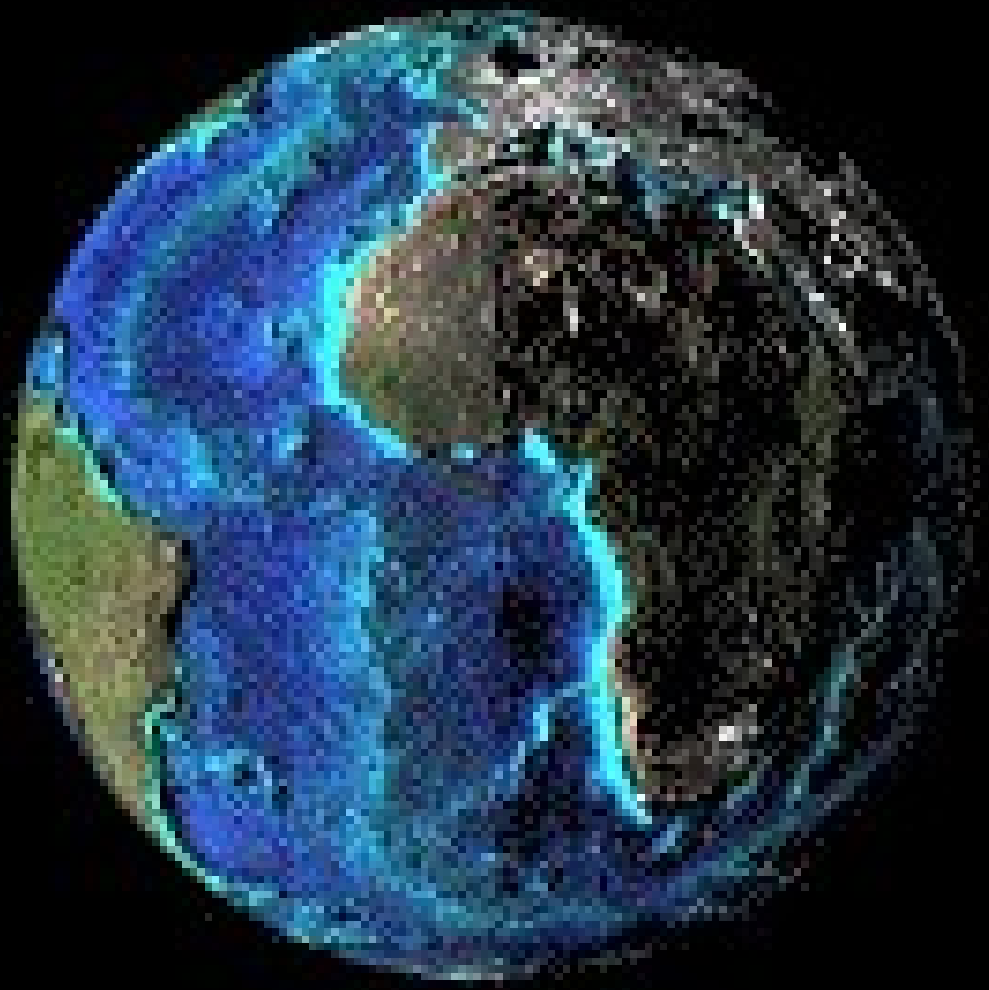
- Sovereignty
- State responsibility
- State protection of its nationals
- International human rights
- The role and law of international diplomacy
- Economic trade sanctions
- The United Nations and its agencies etc.

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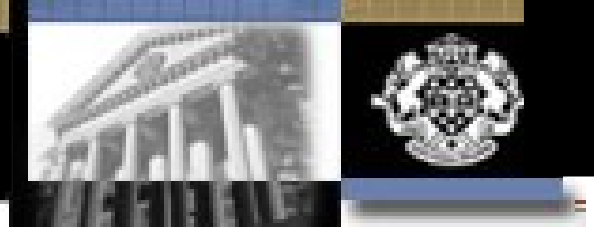
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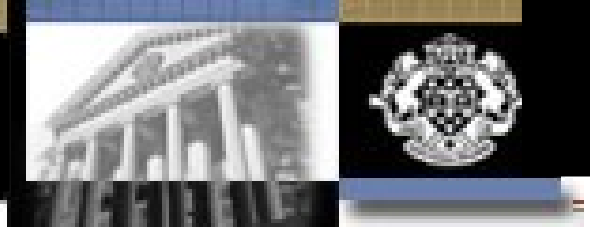
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Main webpage: www.cforcese.ca

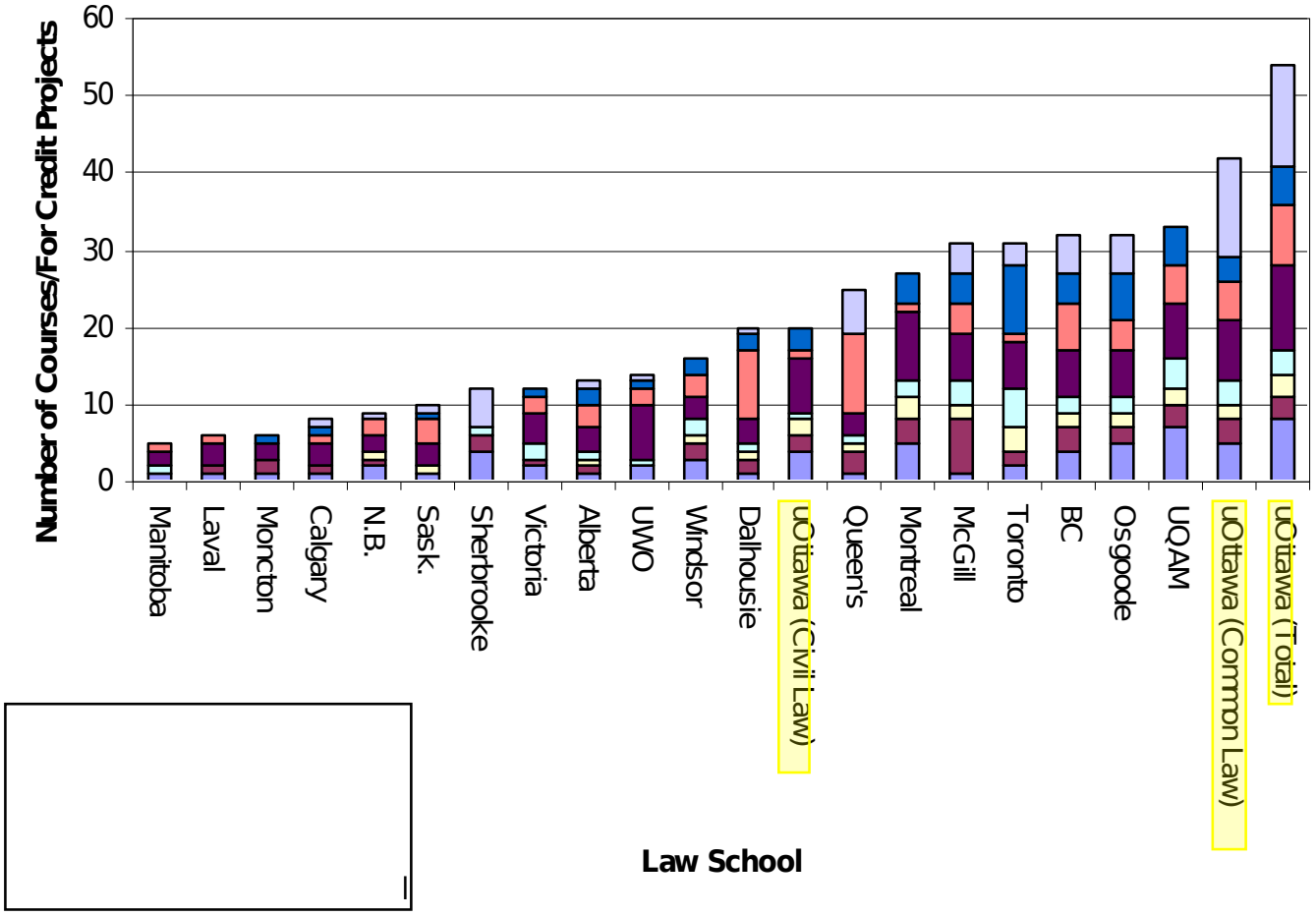
Course webpage:
www.lawofnations.ca

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Courses and For-Credit Projects in International Law (2005 CCIL Survey)





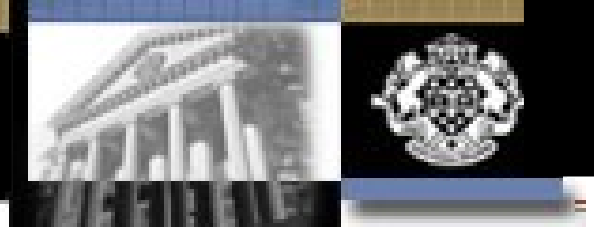


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Two major sections to the course:

1. “Procedural” – To whom does international law apply and how is it created?
2. “Substantive” – What is the content of international law?

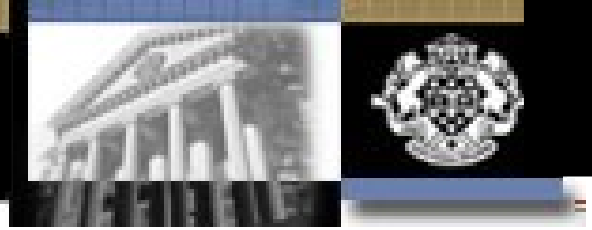
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Defining International Law "textually":

- "**International"**: "pertaining to the relations between nations"
  - "Nation": "a political state"
- "**Law"**: "body of rules, flowing from enactment or custom, regarded as binding"
- Therefore, textually, **"International Law"** is the body of rules flowing from formal "enactment" or from custom pertaining to the relations between political states and regarded as binding on those states

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Defining International Law

Implications of the “textual” definition for a discussion of International Law’s origins along the historical timeline:

- **Broadest definition too broad:**
  - International Law comprises the quasi-ritualistic habits of behaviour between different peoples that give some certainty to relations betwee[illegible]les



Pre-history

Historical Timeline

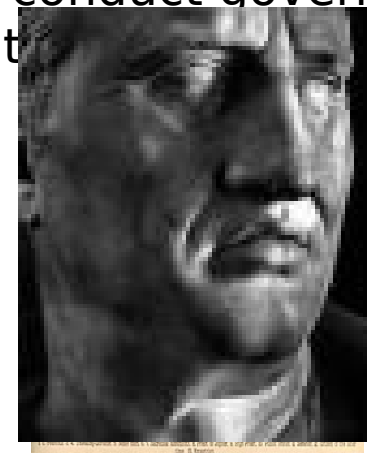
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Defining International Law

Implications of the "textual" definition for a discussion of International Law's origins along the historical timeline:

- **Slightly less broad definition still too broad:**
  - International Law is some sort of substantive code of conduct governing relations between different

Antiquity or perhaps the early Middle Ages



Roman conception of "world city state" ruled by natural law:

Cicero: "one eternal and unchangeable law will be valid for all nations and all times, and there will be one master and ruler, that is, God"

Historical Timeline

Defining International Law

Implications of the "textual" definition for a discussion of International Law's origins along the historical timeline:

- **Slightly less broad definition still too broad:**
  - International Law is some sort of substantive code of conduct governing the relations between different "peoples"

Antiquity or perhaps the early Middle Ages



Medieval Conception of "Natural Law":

Initially based on the divine, and then on human reason

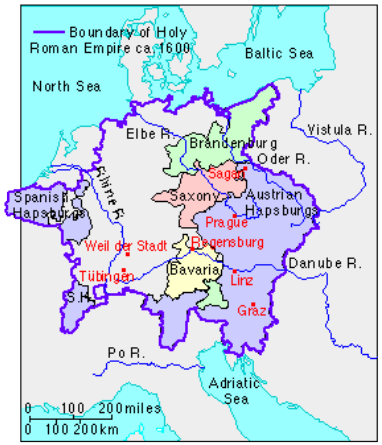
Defining International Law

Implications of the "textual" definition for a discussion of International Law's origins along the historical timeline:

- Pre-requisite for "textual" definition: **the state**
  - "State" is "the body politic as organized for supreme civil rule and government"

16th Century

Early Modernity





Historical Timeline

Defining International Law

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  - "State" is "the body politic as organized for supreme civil rule and government"

16th Century

Jean Bodin, *Six livres de la rėpublique*



Early Modernity

"Sovereignty":
- State (in form of monarch) is paramount over the people
- State is independent of foreign rule

Historical Timeline

Defining International Law

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  - "State" is "the body politic as organized for supreme civil ru

17th Century

Early Modernity

1625: Hugo Grotius, *On the Laws of War and Peace*



"Law of Nations": "the law which has received obligatory force from the will of all nations, or of many nations"

Historical Timeline

Defining International Law

Implications of the "textual" definition for a discussion of International Law's origins along the historical timeline:

- Pre-requisite for "textual" definition: **the state**
  - "State" is "the body politic as organized for supreme civil rule and government"
    - Core notion at the heart of the conception of the state at international law: sovereignty
      - Sovereignty:
        1. autonomy in foreign relations
        2. exclusive competence in internal affairs

Early Modernity

Historical Timeline

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Defining International Law

Implications of the "textual" definition for a discussion of International Law's origins along the historical timeline:

- Pre-requisite for "textual" definition: **the state**
  - "State" is "the body politic as organized for supreme civil rule and government"
    - Contradiction between "sovereignty" and a "law of nations"?
    - Why a system with this contra[illegible]?

Reformation and Wars of Religion

Early Modernity



Historical Timeline

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Reformation and Wars of Religion

Early Modernity

1618: Thirty Years War



Historical Timeline

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Reformation and Wars of Religion

Early Modernity

1618: Thirty Years War



1648: Treaty of Westphalia

Historical Timeline

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- Pre-requisite for "textual" definition: **the state**
  - "State" is "the body politic as organized for supreme civil rule and government"
    - Contradiction between "sovereignty" and a "law of nations"?
      - Why a system with this contradiction?
        - Resolving the contradiction: sovereign states, in their full exercise of sovereignty, enter into a contract with one another to limit their sovereignty

Early Modernity

1648: Treaty of Westphalia

Historical Timeline

Defining International Law

Implications of the "textual" definition for a discussion of International Law's origins along the historical timeline:

- Pre-requisite for "textual" definition: **the state**
  - **Classical conception of international law**: states consenting to rules governing international conduct
  - Positivist conception of international law:
    - empirical assessment of what states consent to, not a normative [illegible]n of what the law should

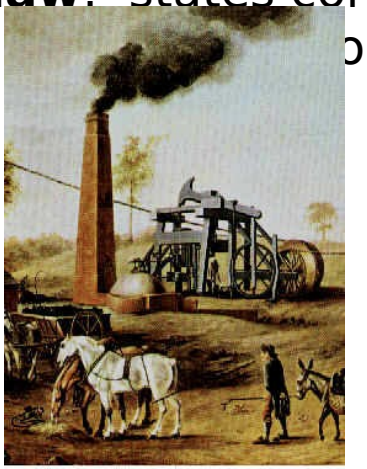


Dean Acheson: "The hell with international law. It's just a series of precedents and decisions that have been made in the past."

Defining International Law

Implications of the "textual" definition for a discussion of International Law's origins along the historical timeline:

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A later Newcomen engine, about 1820

19th Century

By this period, natural law mostly supplanted by positivist conception of consenting states

Historical Timeline

Defining International Law

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20h Century

Challenge to the "classical" conception?

Historical Timeline

Defining International Law

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American Exceptionalism
Woodrow Wilson's **Fourteen Points:** Emerging Notion of Self-Determination: a blow to the "classical" conception?

20h Century

Challenge to the "classical" conception?

Historical Timeline

Defining International Law

Implications of the "textual" definition for a discussion of International Law's origins along the historical timeline:

- Pre-requisite for "textual" definition: **the state**
  - **Classical conception of international law**: states consenting to rules governing national conduct



Non-European participation in International Law after WWI

20h Century

Challenge to the "classical" conception?

Historical Timeline

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Defining International Law

Implications of the "textual" definition for a discussion of International Law's origins along the historical timeline:

- Pre-requisite for "textual" definition: **the state**
  - **Classical conception of international law:** states consenting to rules governing international conduct
  - **United Nations:**
    - Built on the notion of sovereignty but with strong counter-sovereignty themes, such as human rights



End of WWII

Challenge to the "classical" conception?

Historical Timeline

Defining International Law

Implications of the "textual" definition for a discussion of International Law's origins along the historical timeline:

- Pre-requisite for "textual" definition: **the state**
  - **Classical conception of international law**: states consenting to rules governing
  - **Human Rights**:
    - international law that governs how a state treats *human beings*
    - a natural law-like vision that does not sit well with the "classical" conception



End of WWII

Challenge to the "classical" conception?

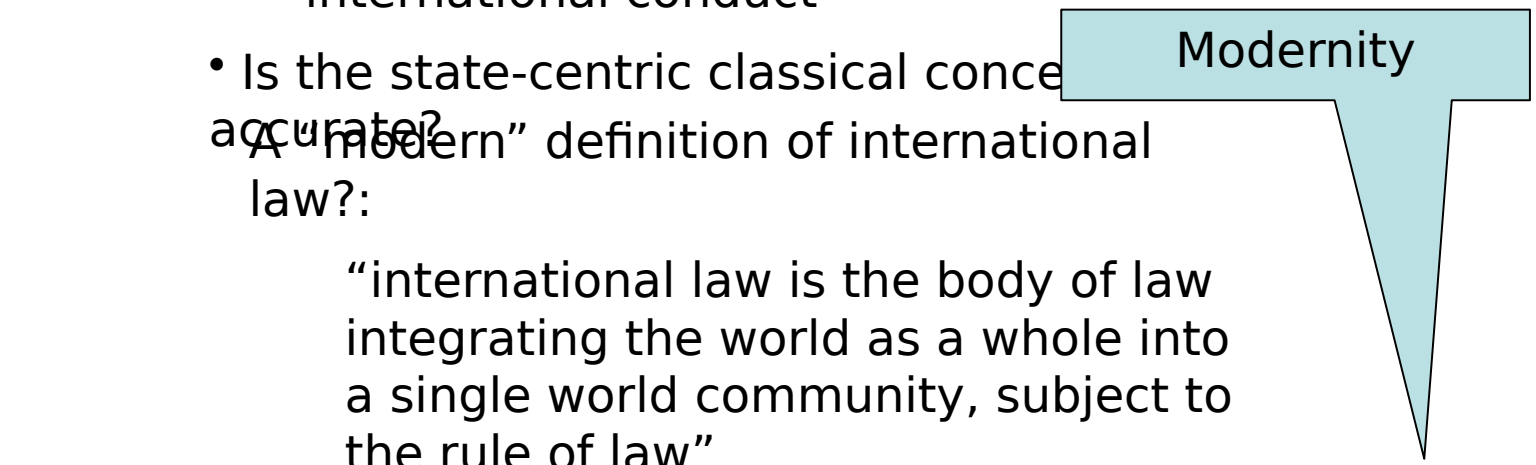
Historical Timeline

Defining International Law

Implications of the "textual" definition for a discussion of International Law's origins along the historical timeline:

- Pre-requisite for "textual" definition: **the state**
  - **Classical conception of international law**: states consenting to rules governing international conduct
- Is the state-centric classical conce
accurate?
- A "modern" definition of international law?:

  "international law is the body of law integrating the world as a whole into a single world community, subject to the rule of law"



Defining International Law

Implications of the “textual” definition for a discussion of International Law’s origins along the historical timeline:

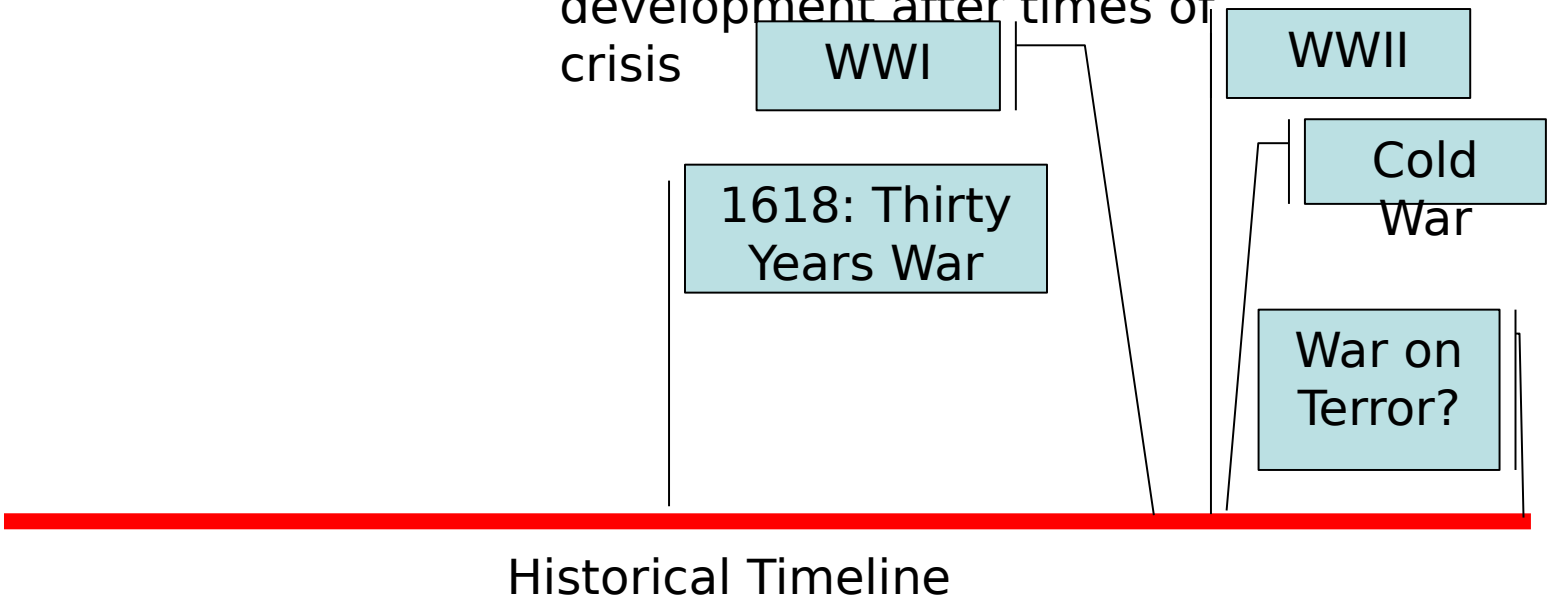
Summary on the definition of International Law:

- International law is the law of nations, and is therefore a system of rules regarded as binding on states in their mutual relations
- International law is also a body of law that increasingly regulates how states act within their zone of traditional sovereign authority

"Pseudo-theories" of International Law

First theoretical hypothesis:

1. **Evolution of International Law**
   - A pattern of "punctuated equilibrium"?
     - Slow evolution and then rapid development after times of crisis



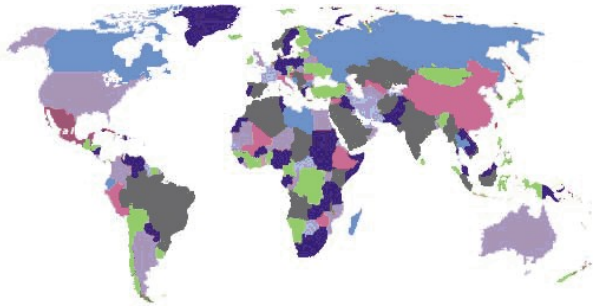
Relevance of International Law in International Politics

First question: What is international politics?

- Put simply, three different sorts of international politics
  1. The Politics of Empire
  2. The Politics of Feudalism
  3. The Politics of the Anarchic State System



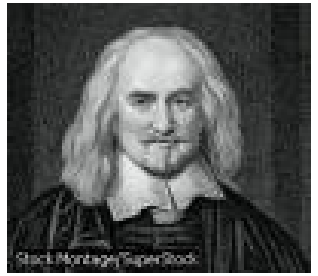




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Relevance of International Law in International Politics

First question: What is international politics?



- The Politics of the Anarchic State System
  - In a Hobbesian state of nature, life is “solitary, poor, nasty, brutish, and short.".
  - In the anarchic state system, there is no common ruler, and thus no common giver and enforcer of laws

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Relevance of International Law in International Politics



First question: What is international politics?

- The Politics of the Anarchic State System as Compared to the Domestic Political System

1. Political differences:

- Domestic politics: a single body – government – has a monopoly on the use of force
- International politics: no one body – or state – has a monopoly on the use of force
  - Produces a system of "self-help"



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Relevance of International Law in International Politics

First question: What is international politics?

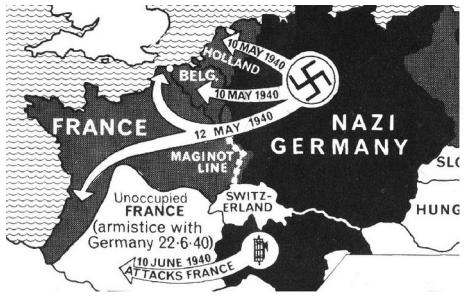
- The Politics of the Anarchic State System as Compared to the Domestic Political System

2. Social differences:

- Domestic politics: well-ordered sense of common community and values
- International politics: no common values or sense of community
  - Instead, the threat of use of force produces a focus on state survival







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Relevance of International Law in International Politics

First question: What is international politics?

- The Politics of the Anarchic State System as Compared to the Domestic Political System

3. Legal differences:

- Domestic politics: law is generally obeyed and there are sanctions levelled for violations
- International politics: laws (it is said) are often not obeyed, and there are no real enforcement mechanisms (at least against powerful states)



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Relevance of International Law in International Politics

Second question: How do international relations scholars explain international politics?

1. **Realists:**
   - Power politics lies at the core of international politics
   - States are all either in conflict or potentially in conflict
   - Pre-occupied with state security



Kennan



Kissinger

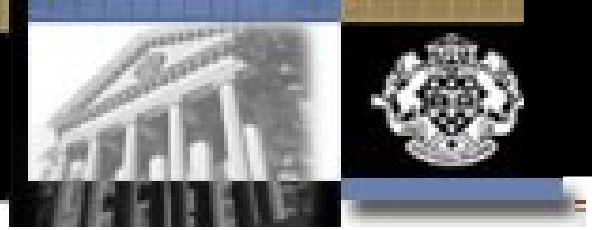
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Relevance of International Law in International Politics

Second question: How do international relations scholars explain international politics?

2. Liberals:

- Broadly speaking, argue that a global society exists alongside the anarchic state system, built on state interdependence and inter-connectedness and fostered by sub-state exchanges across borders



Relevance of International Law in International Politics

Second question: How do international relations scholars explain international politics?

- Evaluating the two views:
  - In favour of realism, historically international politics has been very much about power politics and the aggrandizement of state power
    - Order in international politics has been created by the assertion of power by Great Powers (hegemons)
  - In favour of liberalism:
    1. State goals are not simply about survival and the acquisition of power
       - Economic relations, for instance, have become elemental in international politics, and are often fostered by cooperation, not conflict

Relevance of International Law in International Politics

Second question: How do international relations scholars explain international politics?

- Evaluating the two views:
  - In favour of realism, historically international politics has been very much about power politics and the aggrandizement of state power
    - Order in international politics has been created by the assertion of power by Great Powers (hegemons)
  - In favour of liberalism:
    2. The implications of military power and consequences of use of force have changed:
       - Economic strength is not correlated always with military strength
       - Use of military force to settle dispute more difficult in era of nationalism and growing unease with force

Relevance of International Law in International Politics

Third question: Does international law matter in international politics?

Realists: Not really

Liberals: Yes

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Relevance of International Law in International Politics

Third question: Does international law matter in international politics?

Simple answer:

- Every day, in things as basic as international postal and telecommunications services, and international trade

Complex answer:

- International law matters because:
  1. the decision-making elites in all states acknowledge the existence of something called "international law"
  2. international law provides a language for diplomacy
  3. international law gives normative value to

Relevance of International Law

Third question: Does international law matter in international politics?



War in Iraq: U.S. Efforts to Justify Actions Using International Law

- Secretary of State Powell on Feb. 5, 2003
  - Iraq's non-compliance with Security Council Resolution 1441
  - Iraq could provide weapons to terrorists, placing the United States at grave risk

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Relevance of International Law

Third question: Does international law matter in international politics?

War in Iraq: U.S. Efforts to Justify Actions Using International Law

- Security Council Resolution 1441
  - Meaning of “material breach”
  - US view that SC 1441 could be used to justify action against Iraq

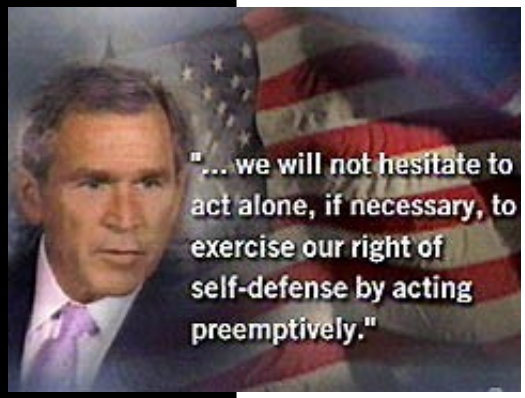
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Relevance of International Law



Third question: Does international law matter in international politics?

War in Iraq: U.S. Efforts to Justify Actions Using International Law

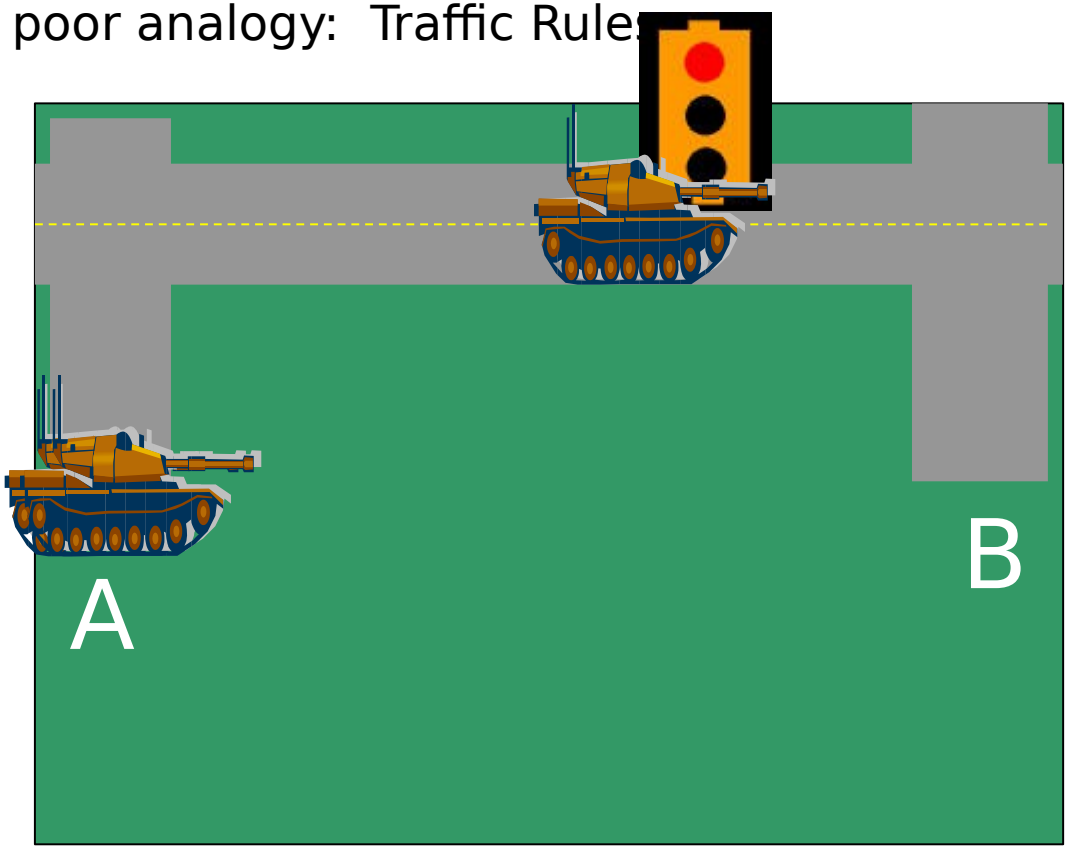


- Self-Defence Notion
  - Self-defense permissible in response to an actual attack or when such an attack imminent
  - US doctrine of pre-emptive self-defense: the "Bush Doctrine"
    - Consistent with international law?
    - Will it change international law?

Relevance of International Law

Third question: Does international law matter in international politics?

A poor analogy: Traffic Rules



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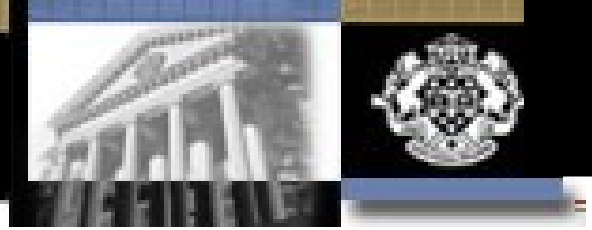
"Pseudo-theories" of International Law

Second theoretical hypothesis:

2. Functions of International Law

- Stabilizing Purpose: Creating a system faovuring deliberation and reason over raw power to smooth international relations

- Normative Purpose: Fostering a better way of international politics, by articulating shared values



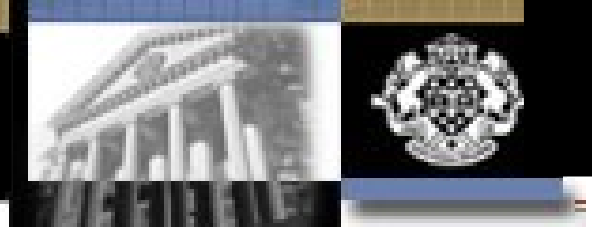
Sources of International Law

- International Law built on the notion of sovereign states
- The notion of sovereignty at the heart of International law is hostile to the notion of a supra-national entity making international law
- International Law typically (though not always) about looking for evidence of state consent (e.g., treaties)

The S.S. Lotus *(1927, P.C.I.J.):*

"The rules of law binding upon States … emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law… Restrictions upon the independence of States cannot therefore be presumed."

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Sources of International Law

Statute of the International Court of Justice, Article 38:

- The sources of international law that may be applied by the ICJ are:
  1. International conventions
  2. International custom
  3. General principles of law
  4. Judicial decisions and the teachings of the most highly qualified publicists

Sources of International Law: Treaties

Article 38 of the ICJ Statute:

"international conventions, whether general or particular, establishing rul[illegible]ized by the contesting states"

expressly recognized

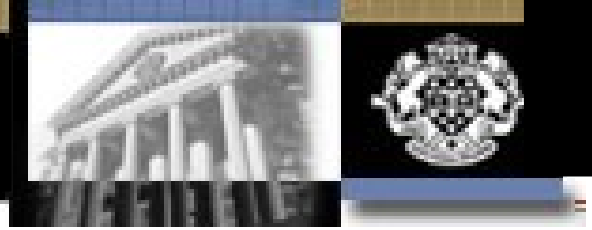
Treaties:

- Also called conventions, covenants, statutes, acts, charters, agreements, etc.
- Generally only binding on state parties (subject to certain exceptions)







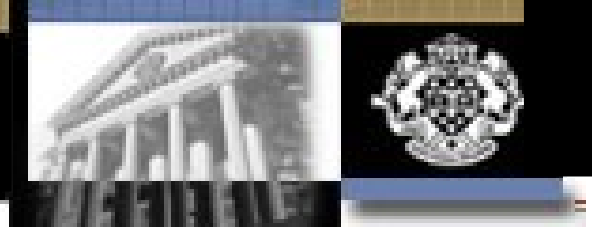


Sources of International Law: Treaties

Treaties: Issue 1: Preliminary Observations

- **Comment 1:** There is no magical form or format for a treaty; the focus is on intent to be bound
  - *Eastern Greenland Case*
  - *Qatar v. Bahrain Maritime Delimitation Case*
- **Comment 2:** The rules of treaty law in international law have evolved over time; concept of intertemporal law
  - *Passage over Indian Territory Case*
- **Comment 3:** An agreement between a state and a non-state actor (other than an international organization) will not be an international treaty
  - *Anglo-Iranian Oil Case*

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Sources of International Law: Treaties

Creating Treaties

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

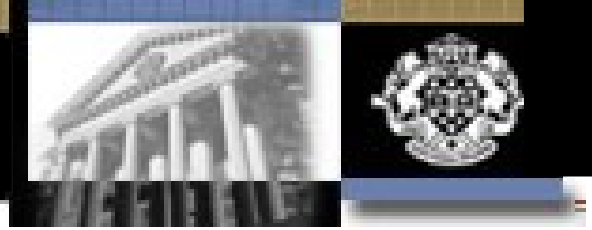
Article 2

A “treaty” is an international agreement concluded between states in written form and governed by international law

Article 6: Capacity of States to conclude treaties

Every State possesses capacity to conclude treaties

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Sources of International Law: Treaties

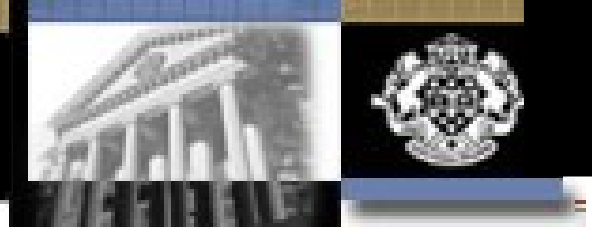
Creating Treaties

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

"Classic" Stages in Creating a Multilateral Treaty

1. Accrediting persons to conduct negotiations on behalf of each state
2. Negotiating the text
3. Adopting the text of a treaty
4. Authentication of that text and signature
5. Ratification, if necessary
6. Any accessions
7. Entry into force
8. Registration and publication

Process, of course, subject to



Sources of International Law: Treaties

Creating Treaties

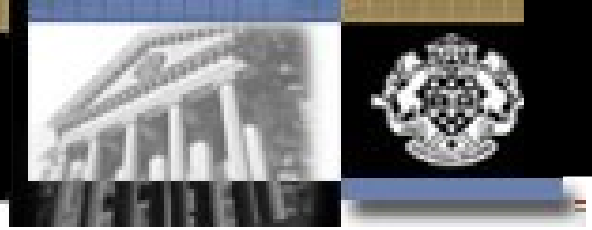
1. Accrediting persons to conduct negotiations on behalf of each state

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

Article 7: describes who can express (a) the intent to be bound on behalf of a state and represent the state for the (b) purpose of authenticating and (c) adopting the text

Concept of "Full powers"

Article 2: 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



Sources of International Law: Treaties

Creating Treaties

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

Article 7: describes who can express (a) the intent to be bound on behalf of a state and represent the state for the (b) purpose of authenticating and (c) adopting the text

Presumptive "Full powers"
Article 7:

(a) Heads of State, Heads of Government and Ministers for Foreign Affairs, for all purposes;

(b) representatives accredited by States, 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 an international conference, organization or organ, for the purpose of adopting the text of a treaty in that conference, organization or organ.

1. Accrediting persons to conduct negotiations on behalf of each state

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1. Accrediting persons to conduct negotiations on behalf of each state

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RECAP

Creating Treaties

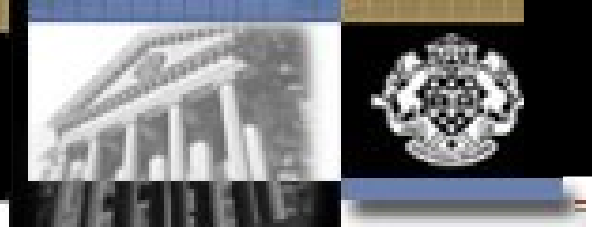
- **Vienna Convention on the Law of Treaties**

Example of a Canadian Full Powers Document

"I _____, Minister of Foreign Affairs in the Government of Canada, do hereby certify that _____is vested with Full Powers and Authority to sign, on behalf of the Government of Canada, the [Name of Treaty].

In witness thereof, I have signed and sealed these presents at, this ____ day of (month and year)

Minister of Foreign Affairs.



Sources of International Law: Treaties

False "Full Powers"

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

1. Article 46 – on domestic law competence to conclude treaties
2. Article 51 – coercion of representative
3. Article 50 – corruption of representative

1. Accrediting persons to conduct negotiations on behalf of each state

Sources of International Law: Treaties

Creating Treaties

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

No set formula

Complicated multilateral treaties usually negotiated, ultimately, in large diplomatic conferences

Example of the *Statute of Rome*, creating the International Criminal Court

2. Negotiating the text of the treaty

1989: United Nations General Assembly request to the International Law Commission completes its work on the draft Statute

1994: International Law Commission completes its work on the draft Statute

1995: the Ad Hoc Committee on the Establishment of an International Criminal Court meets twice

1996-98: Preparatory Committee on the Establishment of an International Criminal Court to prepare a widely acceptable consolidated draft text

1998: Rome diplomatic conference to adopt final text

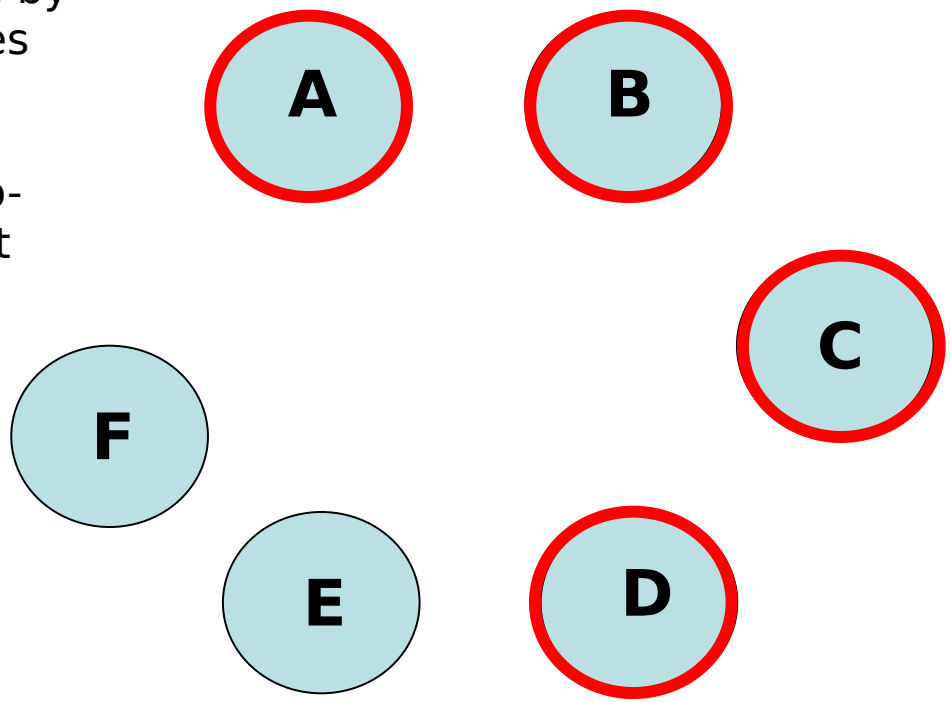
Historical Timeline

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Creating Treaties

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

Article 9: The adoption of the text of a treaty takes place by the consent of all the States *except* a treaty at an international conference is adopted 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



States favouring adoption

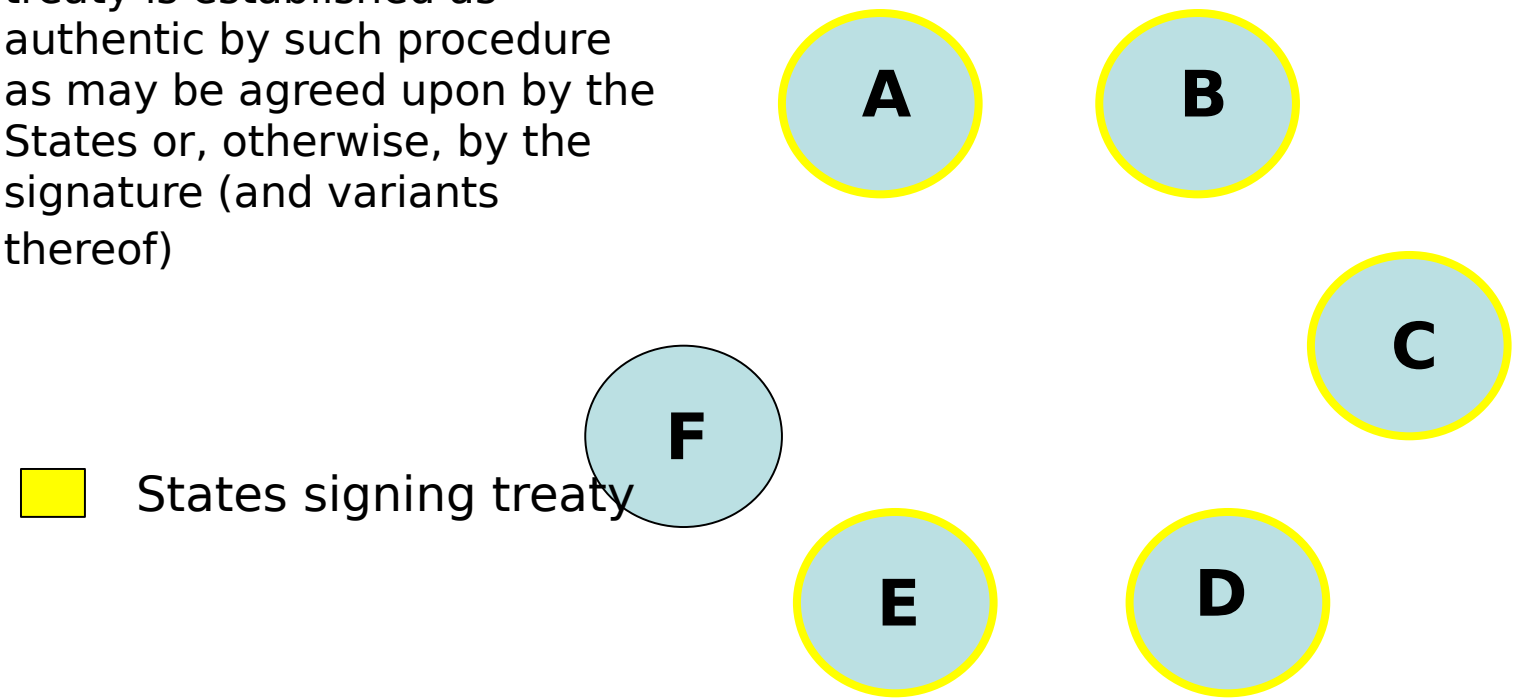
4 of 6 = 2/3 vote = adoption

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

Article 10: The text of a treaty is established as authentic by such procedure as may be agreed upon by the States or, otherwise, by the signature (and variants thereof)



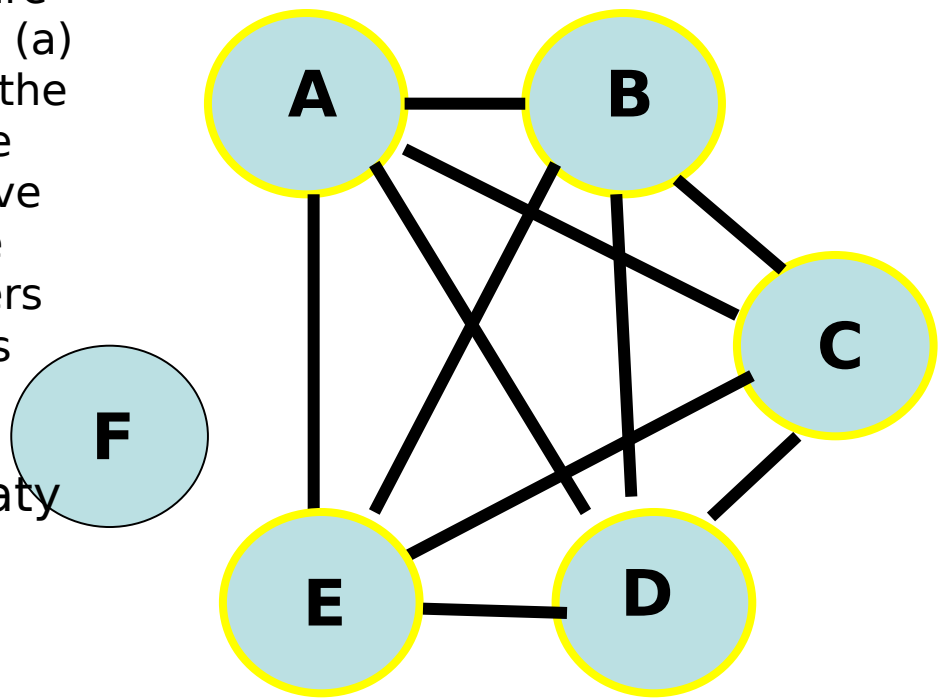
4. Authenticating and signing

Sources of International Law: Treaties

Creating Treaties

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

Article 12: A State consents to be bound by the signature of its representative when: (a) the treaty so provides; (b) the States so agreed; 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.



States signing treaty

Potential treaty relationship upon entry into force

Where signature suffices to signify intent to be bound

5. Ratification

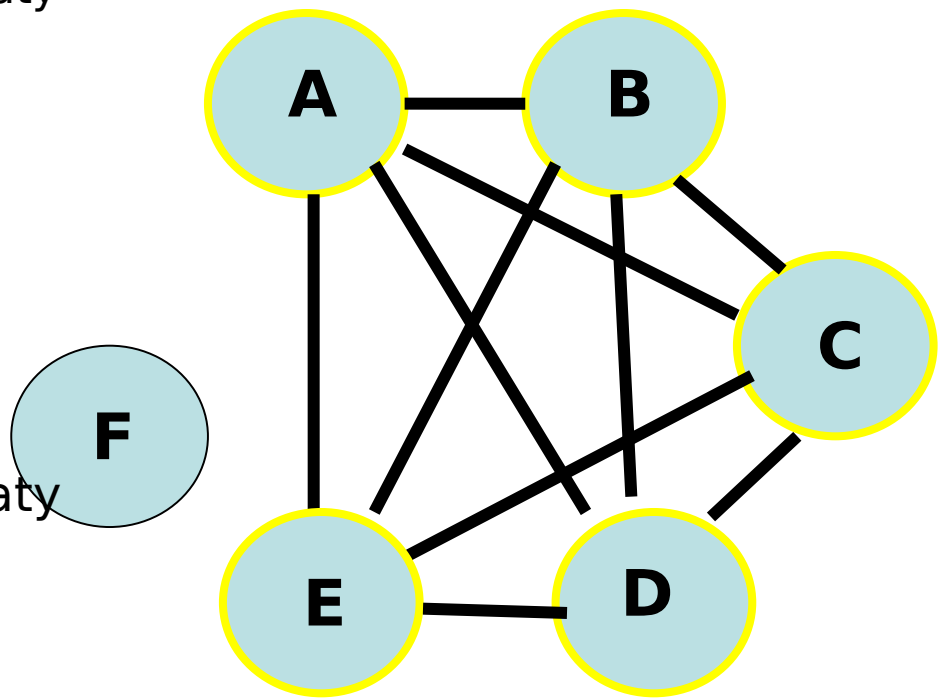
Sources of International Law: Treaties

Creating Treaties

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

Article 11: 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.

- In practice, multilateral conventions usually require "ratification"



States signing treaty

Potential treaty relationship upon entry into force

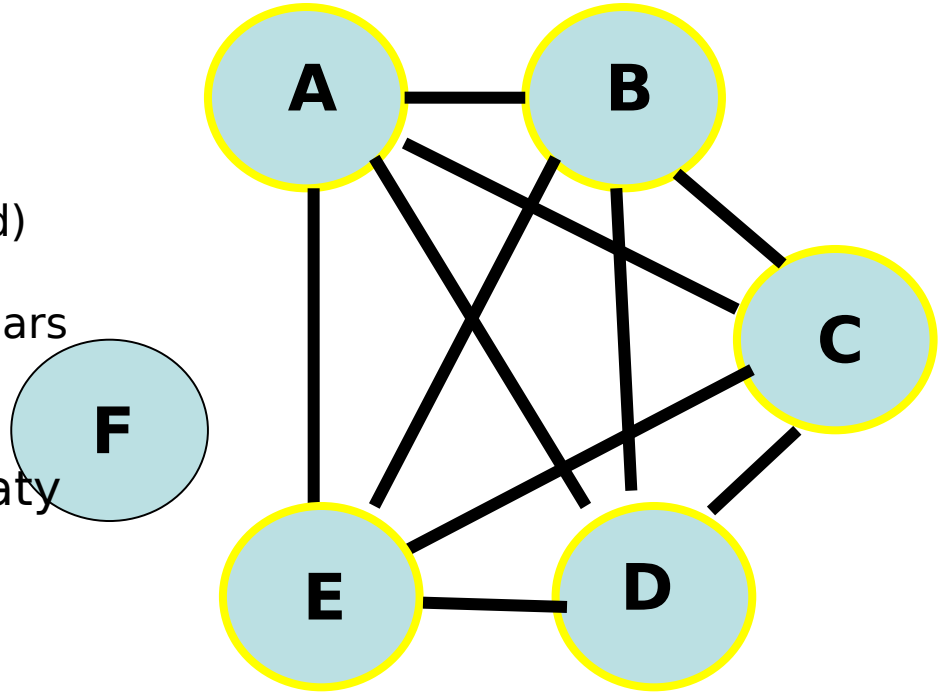
Where signature suffices to signify intent to be bound

Sources of International Law: Treaties

Creating Treaties

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

Article 14: The consent of a State to be bound by a treaty is expressed by ratification when: (a) the treaty so provides; (b) the States so agree; (c) treaty signed subject to ratification; or (d) intention to sign treaty subject to ratification appears from the full powers.



States signing treaty

Potential treaty relationship upon entry into force

Where signature suffices to signify intent to be bound

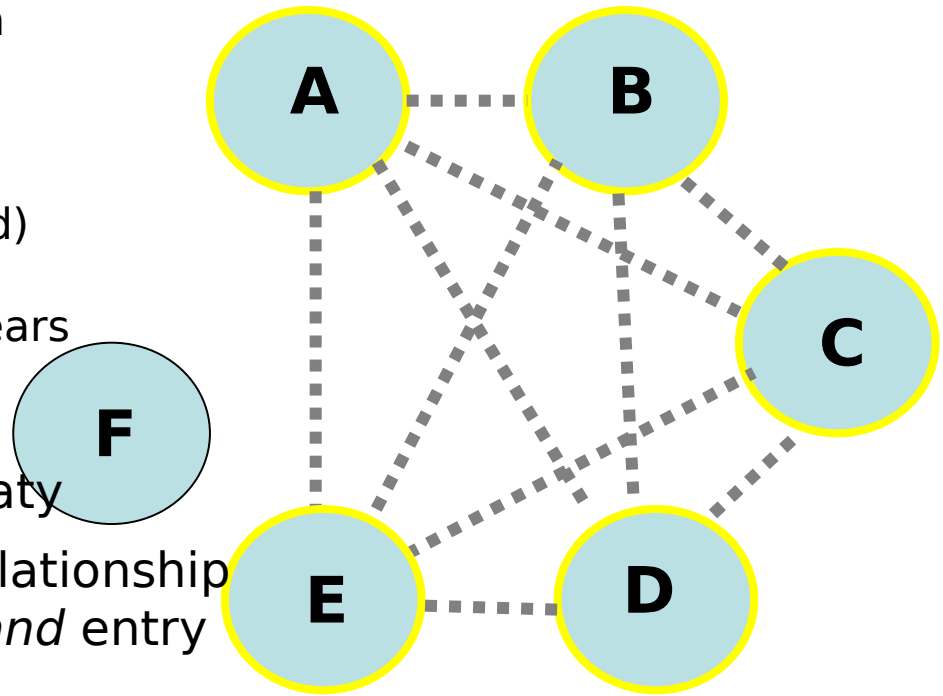
5. Ratification

Sources of International Law: Treaties

Creating Treaties

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

Article 14: The consent of a State to be bound by a treaty is expressed by ratification when: (a) the treaty so provides; (b) the States so agree; (c) treaty signed subject to ratification; or (d) intention to sign treaty subject to ratification appears from the full powers.



States signing treaty

Potential treaty relationship upon ratification *and* entry into force

Potential treaty relationship upon entry into force

Where ratification required to signify intent to be bound

Sources of International Law: Treaties

Creating Treaties

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

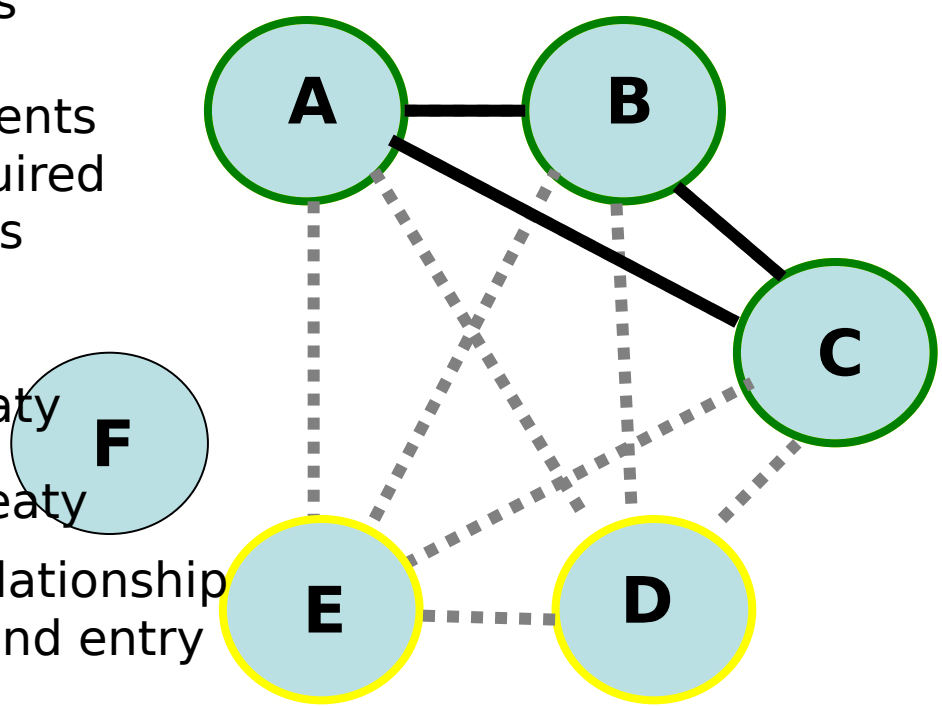
Concept of Ratification: some additional process determined by the constitutional requirements of individual states required before a treaty becomes binding on the state

States signing treaty

States ratifying treaty

Potential treaty relationship upon ratification and entry into force

Potential treaty relationship upon entry into force



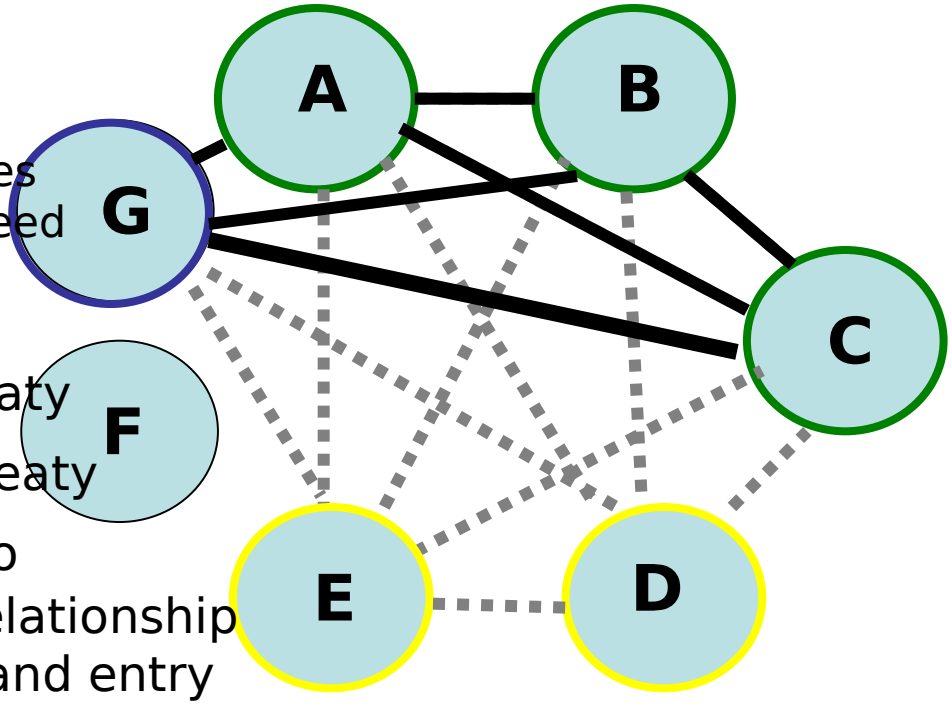
Where ratification required to signify intent to be bound

Sources of International Law: Treaties

Creating Treaties

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

Article 15: The consent of a State to be bound by a treaty is expressed by accession when: (a) the treaty so provides; (b) the States so agreed; or (c) all the parties have subsequently so agreed



States signing treaty

States ratifying treaty

States acceding to treaty

Potential treaty relationship upon ratification and entry into force

Potential treaty relationship upon entry

Where ratification required to signify intent to be bound

7. Entry into force

Sources of International Law: Treaties

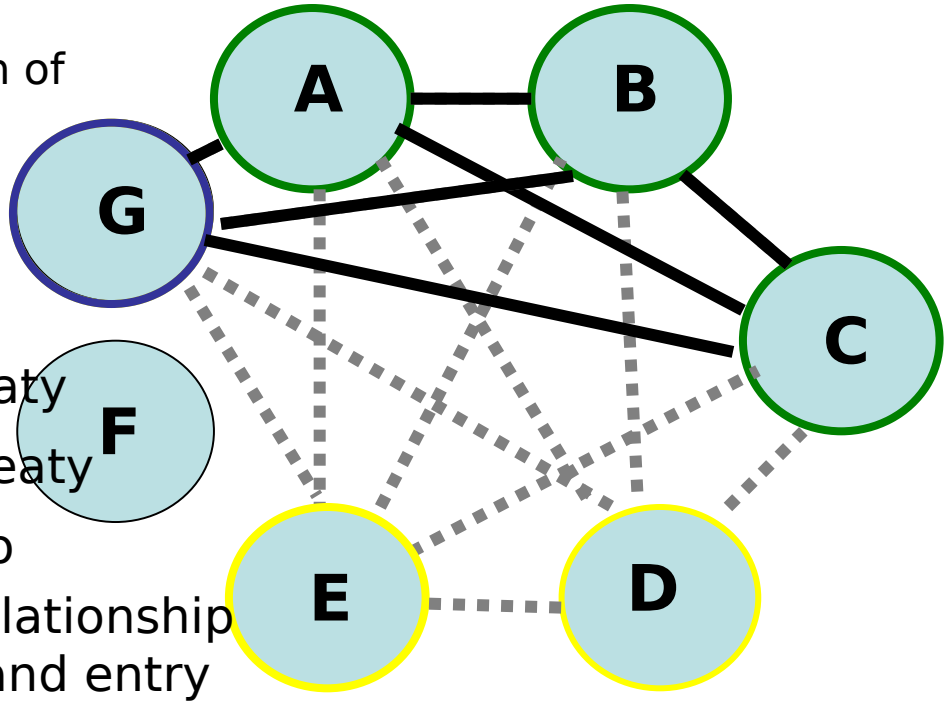
Creating Treaties

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

Obligations pending entry into force:

Article 25: May be provisional application of treaty

Article 18: Obligation of ratifying states not to defeat object and purpose



States signing treaty

States ratifying treaty

States acceding to treaty

Potential treaty relationship upon ratification and entry into force

Potential treaty relationship upon entry into force + Article 18(2)

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7. Entry into force

Sources of International Law: Treaties

Creating Treaties

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

Article 24: A treaty enters into force in such manner and upon such date as it may provide or as the negotiating States may agree. Otherwise, a treaty enters into force when all the negotiating states have consented to be bound

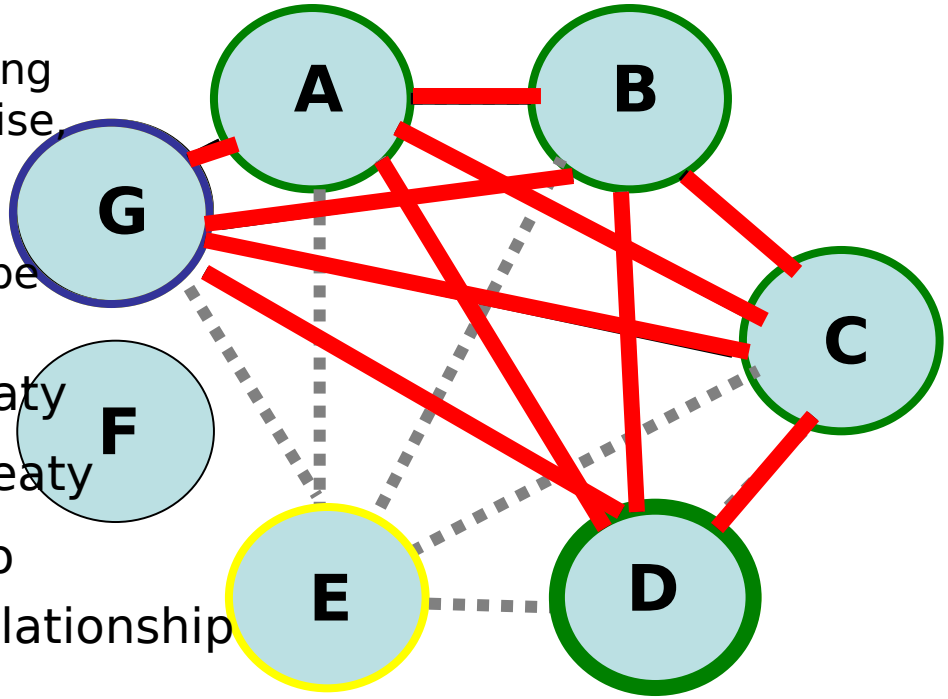
States signing treaty

States ratifying treaty

States acceding to treaty

Potential treaty relationship upon ratification

Treaty relationship



Assume that treaty requires 5 parties (I.e., ratifications or accessions) for entry into force

7. Entry into force

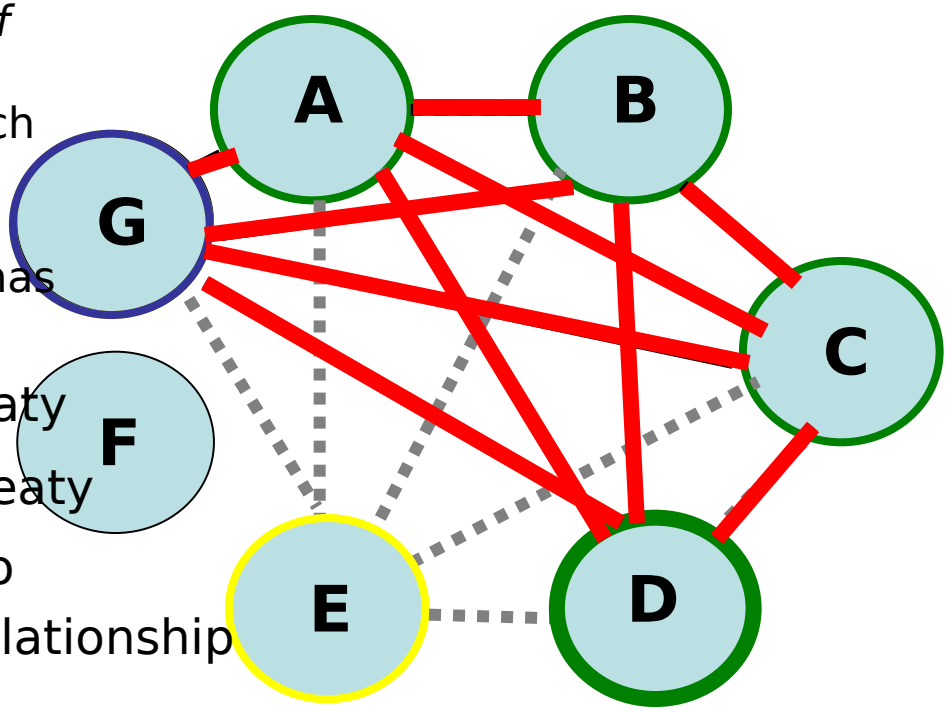
Sources of International Law: Treaties

Creating Treaties

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

In this scenario is country E bound by the treaty?

North Sea Continental Shelf Case: it is not lightly to be presumed that a State which has not carried out these [consent to be bound] formalities [in a treaty] ... has nevertheless somehow become bound in another way.



States signing treaty

States ratifying treaty

States acceding to treaty

Potential treaty relationship upon ratification

Treaty relationship

Assume that treaty requires 5 parties (I.e., ratifications or accessions) for entry into force

7. Entry into force

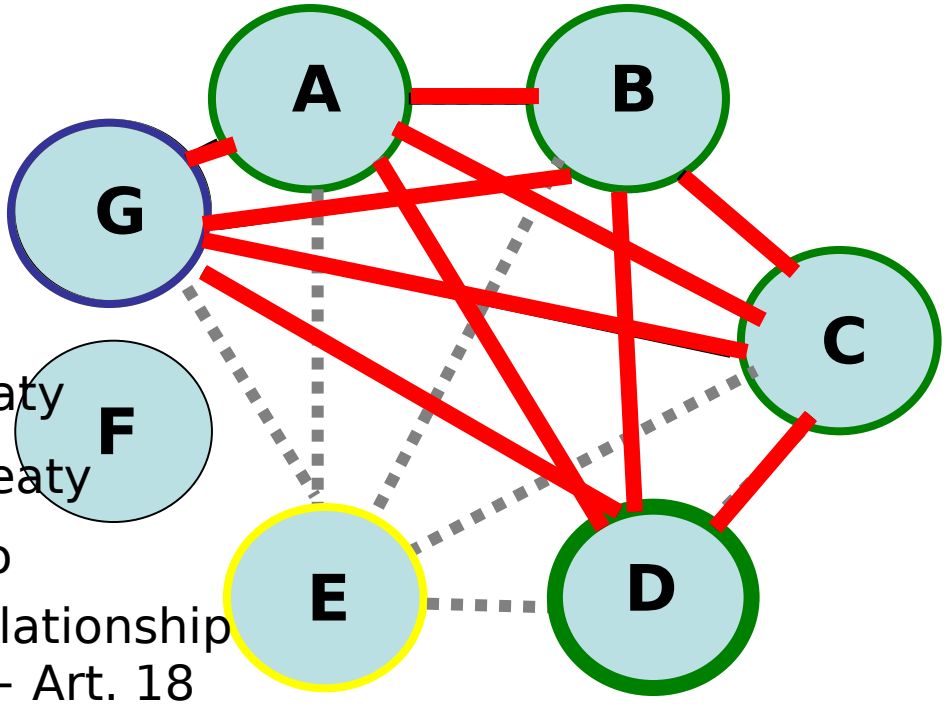
Sources of International Law: Treaties

Creating Treaties

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

What then is the "worth" of country E's signature?

Article 18: A signatory state is obliged to refrain from acts which would defeat the object and purpose of a treaty when until it shall have made its intention clear not to become a party to the t[illegible]ty



States signing treaty

States ratifying treaty

States acceding to treaty

Potential treaty relationship upon ratification + Art. 18 duties

Treaty relationship

Assume that treaty requires 5 parties (I.e., ratifications or accessions) for entry into force

Sources of International Law: Treaties

Creating Treaties

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

- Example of the *Statute of* Rome, creating the International Criminal Court



Article 125
Signature, ratification, acceptance, approval or accession

2. This Statute is subject to ratification, acceptance or approval by signatory States.

Sources of International Law: Treaties

Creating Treaties

- **Vienna Convention on the Law of Treaties**
- Example of the *Statute of* Rome, creating the International Criminal Court



Article 126
Entry into force

1. This Statute shall enter into force on the first day of the month after the 60th day following the date of the deposit of the 60th instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations.

Sources of International Law: Treaties

Creating Treaties

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



- Example of the *Statute of* Rome, creating the International Criminal Court
  - Bush Administration oppositio
    - Yet, between December 31, 2000 to May 6, 2002, it was under an Article 18 obligation



"This is to inform you, in connection with the Rome Statute of the International Criminal Court adopted on July 17, 1998, that the United States does not intend to become a party to the treaty. Accordingly, the United States has no legal obligations arising from its signature on December 31, 2000. The United States requests that its intention not to become a party, as expressed in this letter, be reflected in the depositary's status lists relating to this treaty."

7. Entry into force

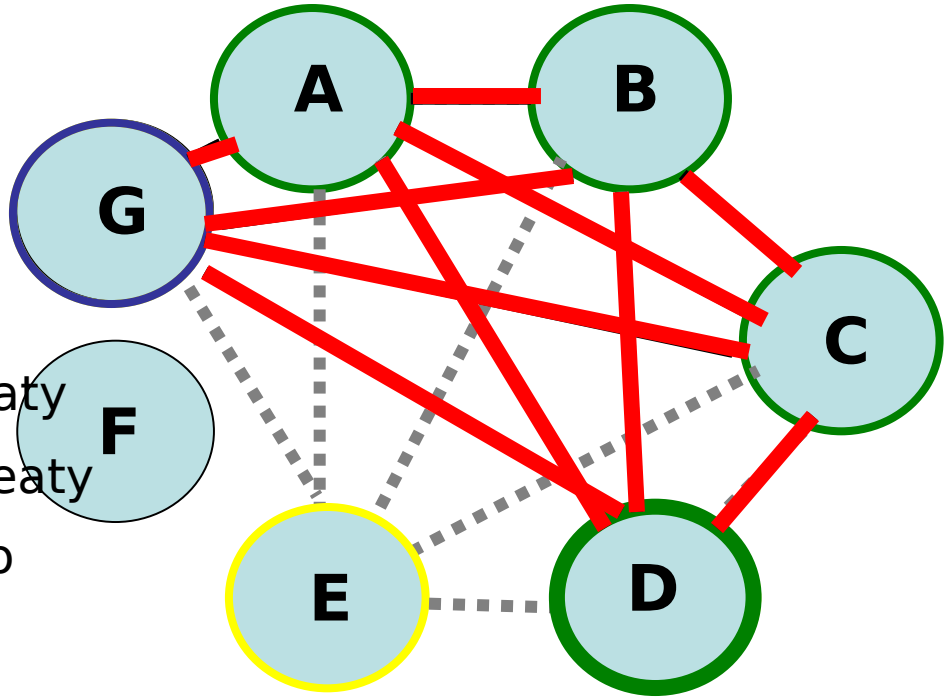
Sources of International Law: Treaties

Creating Treaties

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

So-called "withdrawing" of a signature

Article 18(a): "make its intention clear not to become a party to the treaty"



States signing treaty

States ratifying treaty

States acceding to treaty

Potential treaty relationship upon ratification + Article 18(1) obligations

Treaty relationship

Assume that treaty requires 5 parties (I.e., ratifications or accessions) for entry into force

7. Entry into force

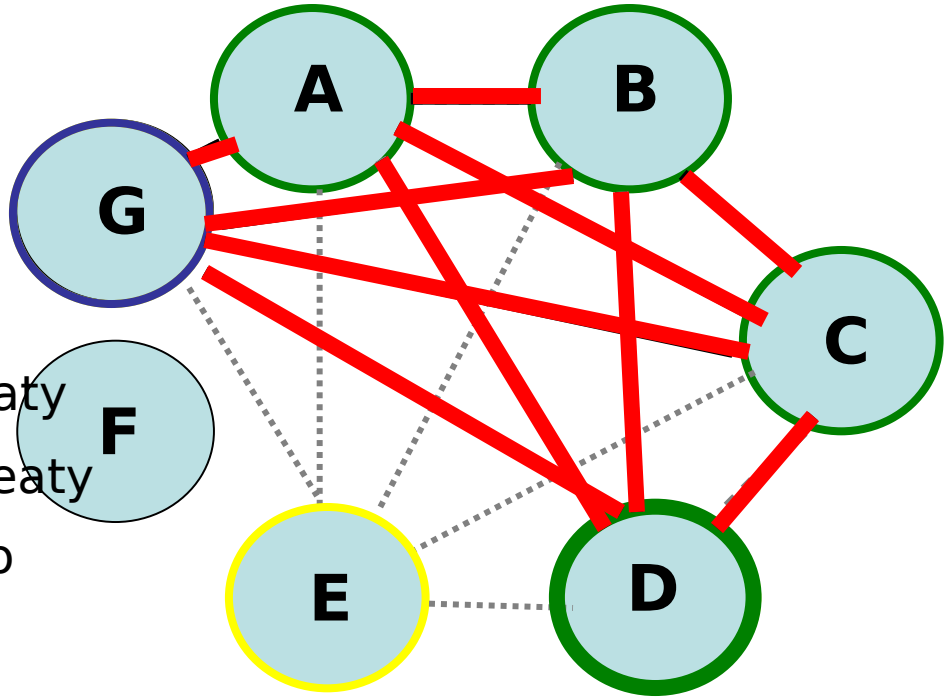
Sources of International Law: Treaties

Creating Treaties

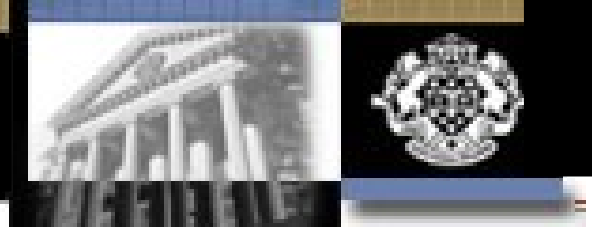
- **Vienna Convention on the Law of Treaties**

So-called "withdrawing" of a signature

Article 18(a): "make its intention clear not to become a party to the treaty"



Assume that treaty requires 5 parties (I.e., ratifications or accessions) for entry into force



Sources of International Law: Treaties

Creating Treaties

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

  Article 80: Treaties shall, after their entry into force, be transmitted to the Secretariat of the United Nations for registration or filing and recording, as the case may be, and for publication.

- **UN Charter**

  Article 103: Every treaty and every international agreement entered into by any Member of the United Nations … shall as soon as possible be registered with the Secretariat and published by it. No party to any such treaty or international agreement which has not been registered … may invoke that treaty or agreement before any organ of the United Nations

Sources of International Law: Treaties

Creating Treaties

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

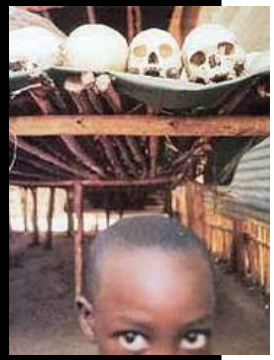
Reservations

- Derogation from a provision or provisions of the treaty
- Both consistent and inconsistent with the notion of state consent

Article 2: "reservation" me unilateral statement statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acce purports to exclude or to modify the legal effect exclude or to modify the legal effect of certain provisions of the treaty in their application to that State

Sources of International Law: Treaties

Creating Treaties



Reservations

- International Court of Justice, *Reservations to the Convention on Genocide Case* (1951)



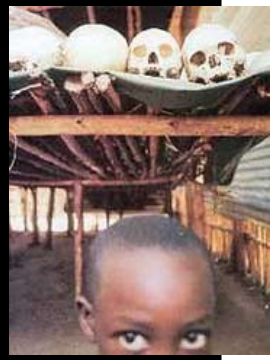
Example of reservations: Burma (Myanmar): Article 8 does not apply to it:

"Any Contracting Party may call upon the …United Nations to take such action under the Charter of the United Nations … for the prevention and suppression of acts of genocide or any of the other acts enumerated in article III."

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Sources of International Law: Treaties

Creating Treaties





Reservations

- International Court of Justice, *Reservations to the Convention on Genocide Case* (1951)

Question 1: Is a state party if its reservation is objected to?

- Yes, so long as the reservation is consistent with the object and purpose of the Convention

Question 2: What is the legal effect of the reservation?

- If a party objects, it is free to treat the reserving state as a non-party

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Sources of International Law: Treaties

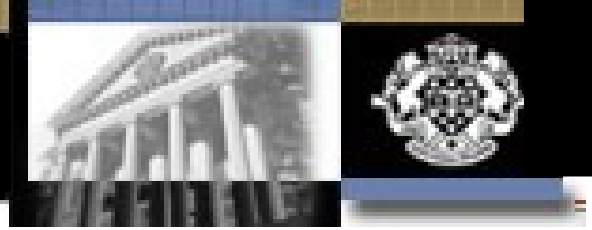
Creating Treaties

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

Article 19
Formulation of reservations

A State may … 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.



Sources of International Law: Treaties

Creating Treaties

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

- When is a reservation incompatible with the object and purpose of the treaty?
  - No single answer
    - Treaty may specify
    - May apply mathematical formula (e.g. International Convention on Elimination of All Forms of Racial Discrimination)
    - Note also concept of *jus cogens:* principles from which there can be no derogation (peremptory norms) (Article 53)

Sources of International Law: Treaties

Creating Treaties

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

Article 20
Acceptance of and objection to reservations

2. When it appears from the limited number of the negotiating States and the object and purpose of a treaty [requires] … consent of each one to be bound by the treaty, a reservation requires acceptance by all the parties.

4. (b) an objection 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

Sources of International Law: Treaties

Creating Treaties

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

Article 21
Legal effects of reservations and of objections to reservations

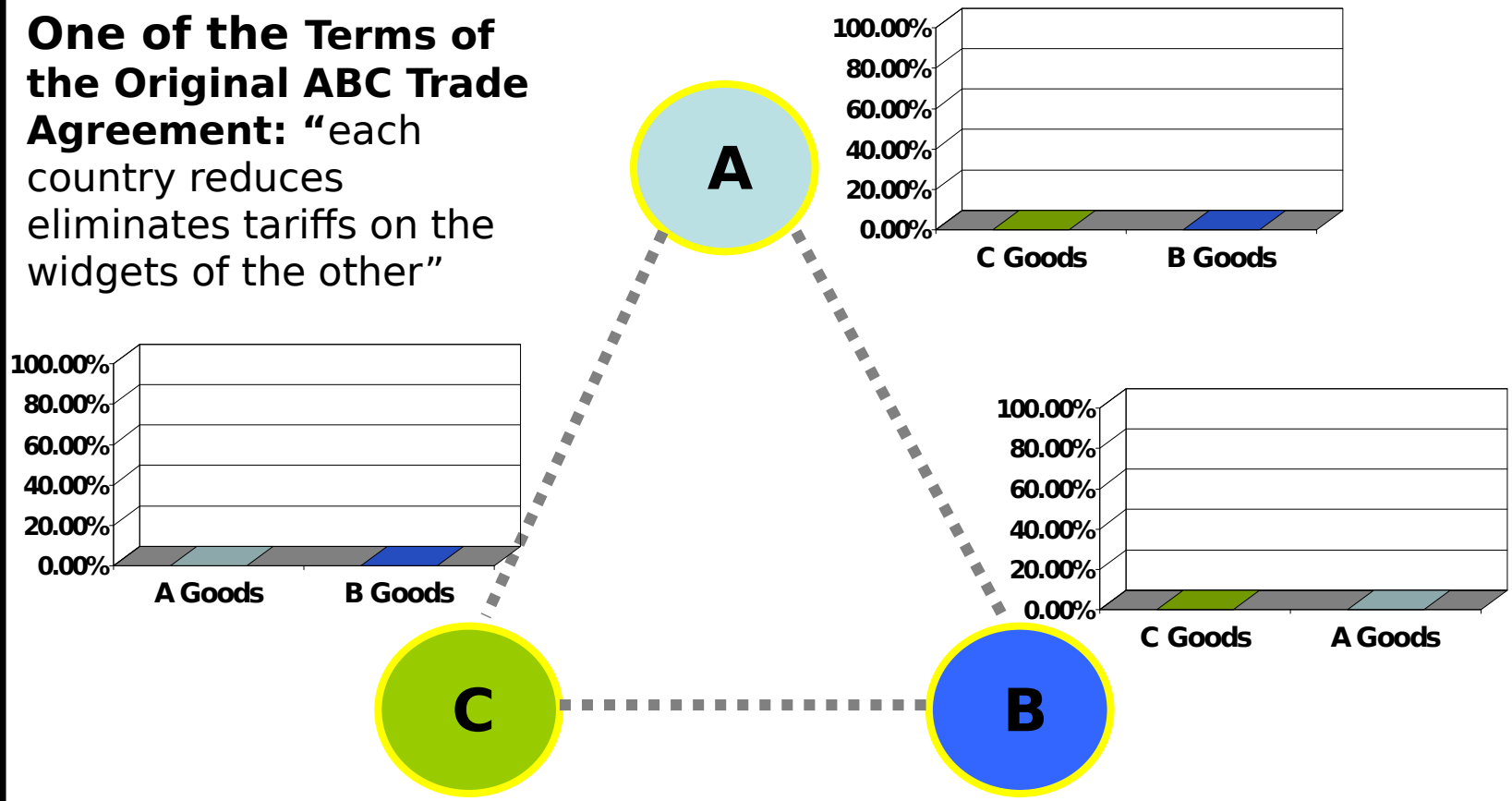
1. A reservation established with regard to another party in accordance with articles 19, 20 and 23:
   (a) modifies for the reserving State in its relations with that other party the provisions of the treaty to w to the extent of the reservation he extent of the reservation to the same extent
   (b) modifies those provisions to the same extent for that other party in its relations with the reserving St does not modify other parties
2. The reservation does not modify the provisions of

Sources of International Law: Treaties

Creating Treaties

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

One of the Terms of the Original ABC Trade Agreement: "each country reduces eliminates tariffs on the widgets of the other"



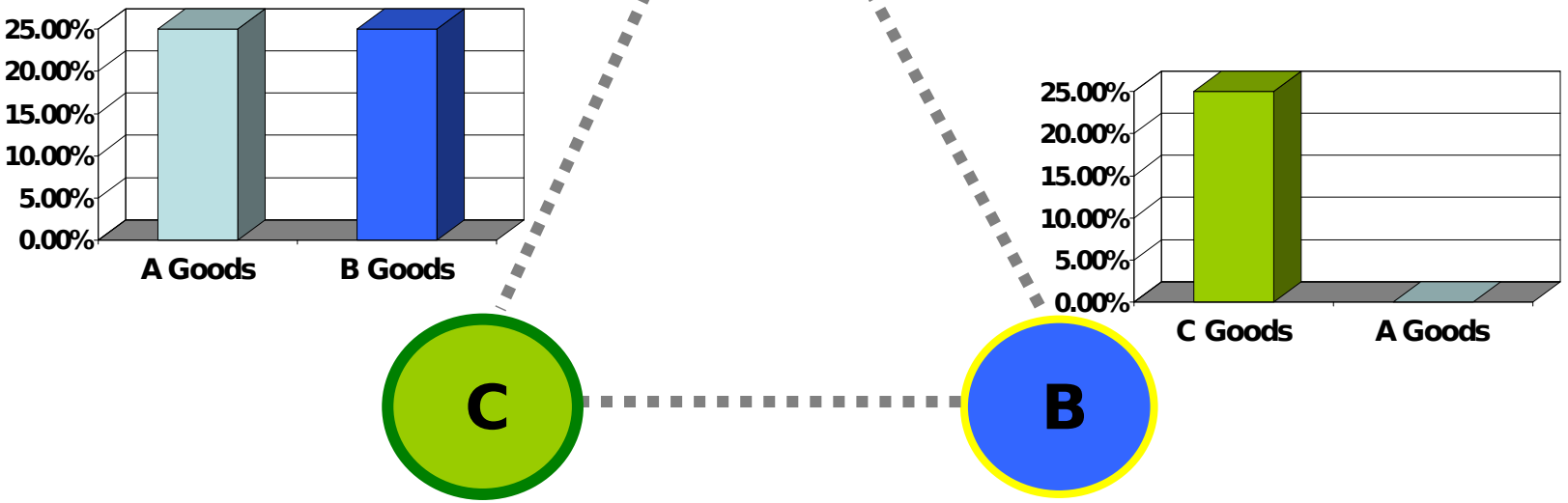
Assume that treaty enters into force when all three states ratify

Sources of International Law: Treaties

Creating Treaties

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

C Ratifies with a reservation: "the provision in relation to tariffs on widgets does not apply to us"



Assume that treaty enters into force when all three states ratify

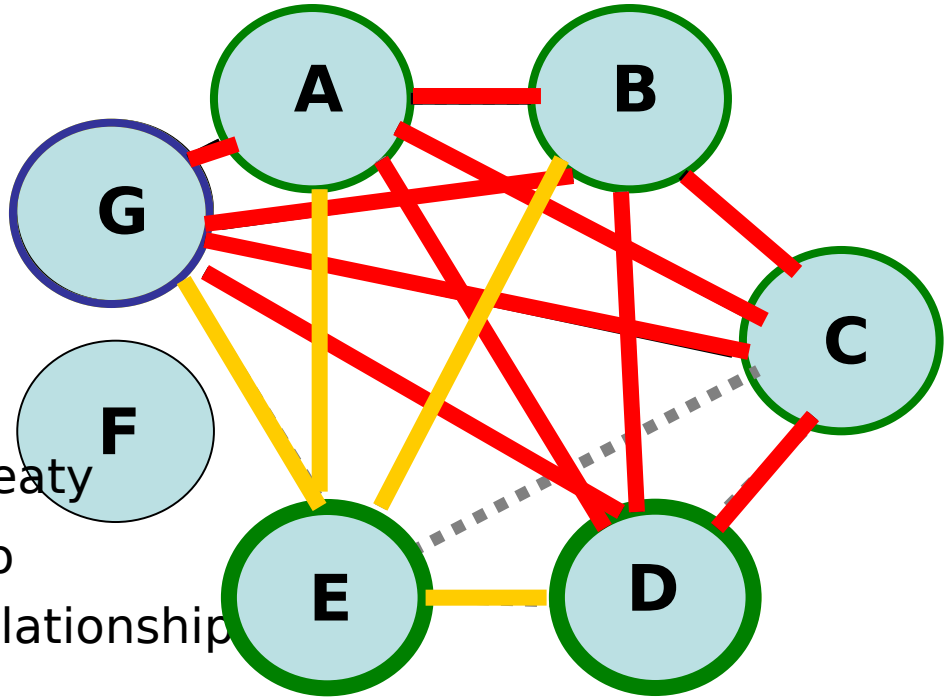
Sources of International Law: Treaties

Creating Treaties

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

E ratifies with reservation:

1. reserving states <u>are</u> bound to the treaty, but only as modified by their reservations in respect to non-reserving and non-objecting states



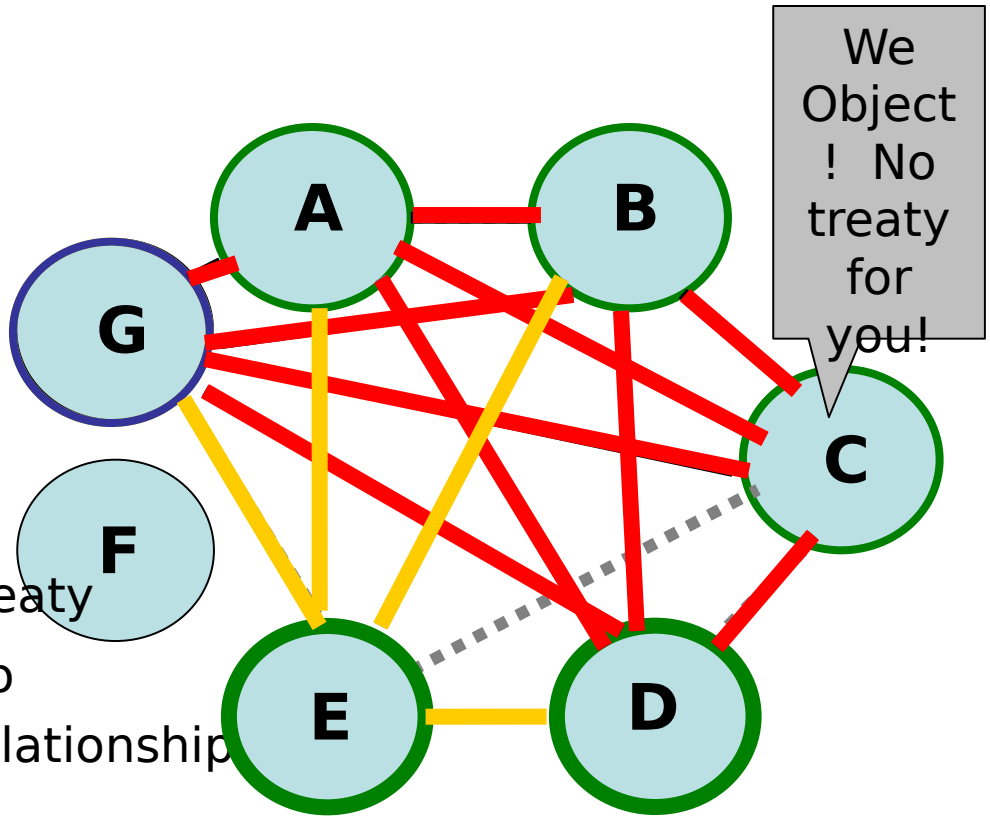
Sources of International Law: Treaties

Creating Treaties

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

E ratifies with reservation:

2. reserving states are not bound by the treaty at all in relation to states who object to the reservation and specify that treaty is not to enter into force between them



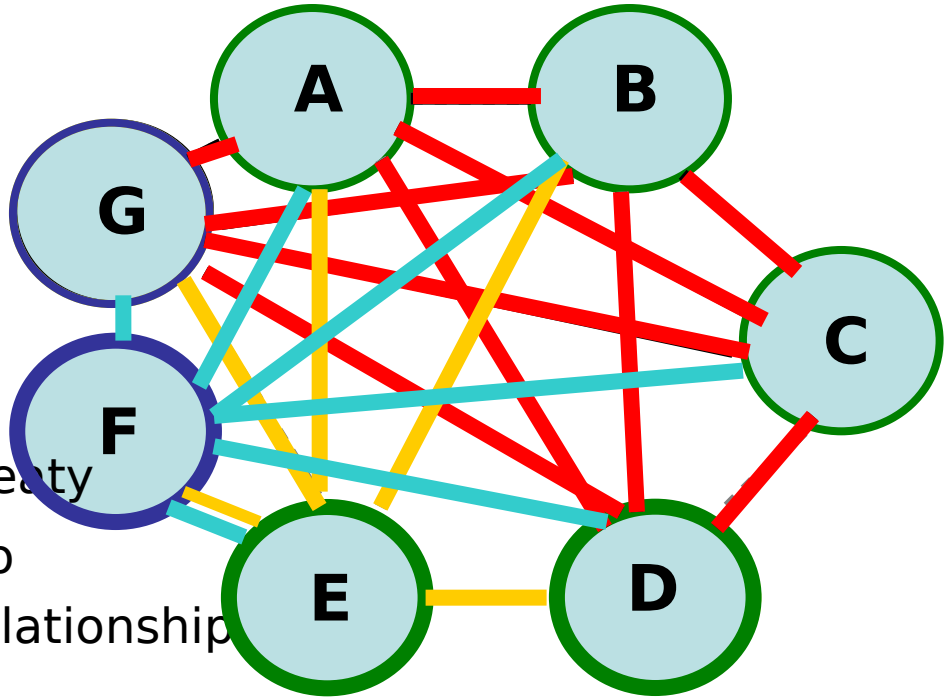
Sources of International Law: Treaties

Creating Treaties

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

F accedes with reservation:

3. reserving states are bound by the treaty in relation to <u>other reserving states</u>, as modified by <u>both</u> of the reservations between them.



States ratifying treaty

States acceding to treaty

Potential treaty relationship upon ratification

Full Treaty relationship

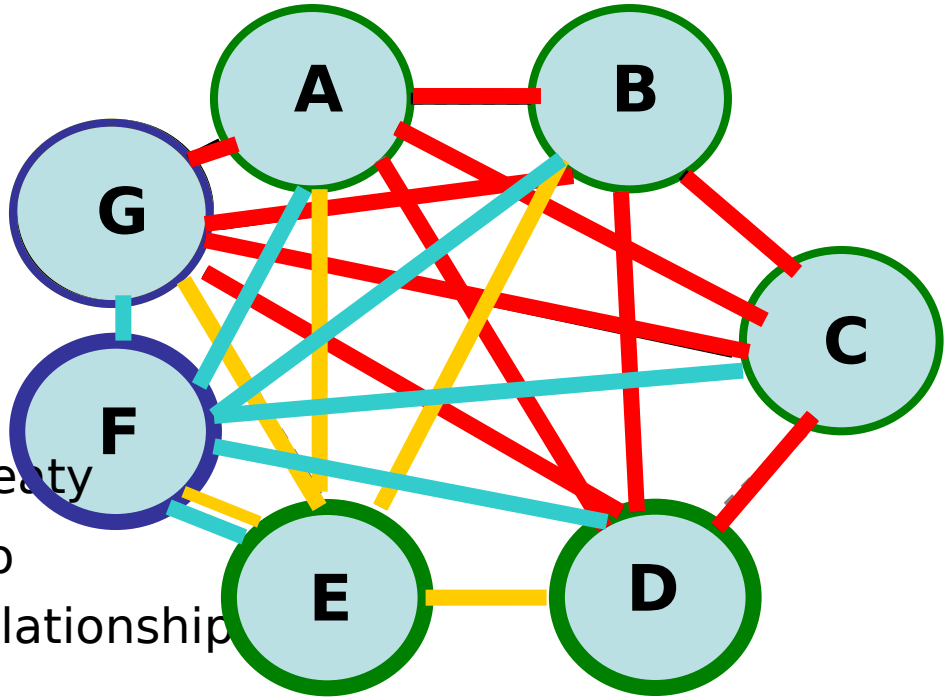
Treaty relationship changed by reservation

Sources of International Law: Treaties

Creating Treaties

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

4. Meanwhile, non-reserving states are bound by the terms of the original treaty



States ratifying treaty

States acceding to treaty

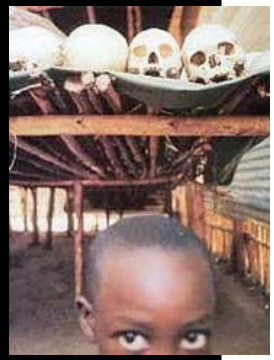
Potential treaty relationship upon ratification

Full Treaty relationship

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Sources of International Law: Treaties

Creating Treaties



Reservations

- Genocide Convention



Example of reservations: Burma (Myanmar): Article 8 does not apply to it:

"Any Contracting Party may call upon the …United Nations to take such action under the Charter of the United Nations … for the prevention and suppression of acts of genocide or any of the other acts enumerated in article III."

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Sources of International Law: Treaties

Legal Effect of Treaties

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

Pacta Sunt Servanda

Article 26
Pacta sunt servanda

Every treaty in force is binding upon the parties to it and must be performed by them in good faith.

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Legal Effect of Treaties

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

Internal Law

Article 27
Internal law and observance of treaties

A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.
…

Sources of International Law: Treaties

Legal Effect of Treaties

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

Application to Third Parties

Concept of *pacta tertiss nec nocent nec prosunt:*

Article 34: A treaty does not create either obligations or rights for a third State without its consent.

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Sources of International Law: Treaties

Legal Effect of Treaties

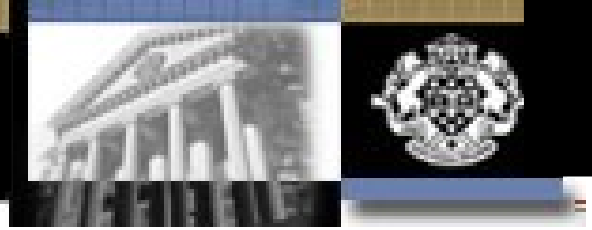
- **Vienna Convention on the Law of Treaties**

Application to Third Parties

Concept of *pacta tertiss nec nocent nec prosunt:*

Exceptions: Third Party States can have <u>rights</u>

- **Article 36:** 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 … and the third State assents thereto. Its assent shall be presumed so long as the contrary is not indicated, unless the treaty otherwise provides.



Sources of International Law: Treaties

Legal Effect of Treaties

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

Application to Third Parties

Concept of *pacta tertiss nec nocent nec prosunt:*

Exceptions: Third Party States can have <u>obligations</u>

- Where the treaty reflects customary international law
  - Concept of an obligation *erga omnes*: an obligation owed by a state to the international community

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Sources of International Law: Treaties

Legal Effect of Treaties

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

Application to Third Parties

Concept of *pacta tertiss nec nocent nec prosunt:*

Exceptions: Third Party States can have <u>obligations</u>

- Even where the principle does not reflect customary international law (and is a new legal principle), in limited circumstances third parties may be bound:

Article 35: a non-party can only be bou intend a treaty in terms of duties if, first, the parties to the trea expressly accepts duty to apply to the non-party and, second, the third party expressly accepts this obligation in writing

Sources of International Law: Treaties

Interpretation of Treaties

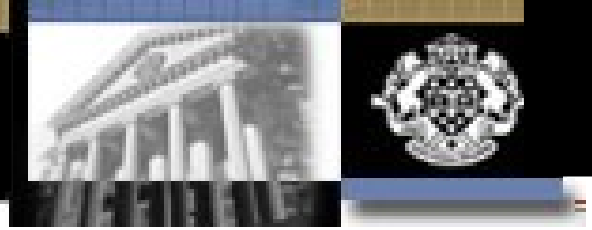
- **Vienna Convention on the Law of Treaties**

Good Faith, Ordinary Meaning

Article 31

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.

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Sources of International Law: Treaties

Interpretation of Treaties

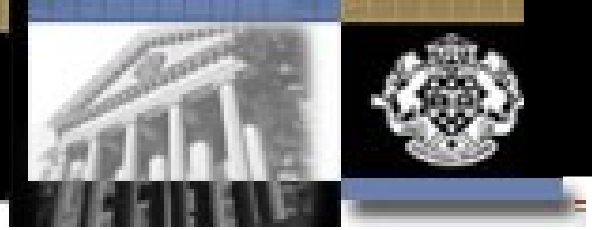
- **Vienna Convention on the Law of Treaties**

Where further assistance is required, may use *travaux preparatoires*:

Article 32

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty … 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

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Sources of International Law: Treaties

Invalidity and Termination of Treaties

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

1. Article 48 – error of fact
2. Article 49 – fraud
3. Article 52 – coercion in terms of use of force
4. Article 53 – conflict with preemptory norm

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Sources of International Law: Treaties

Invalidity and Termination of Treaties

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

Namibia Case (1971)



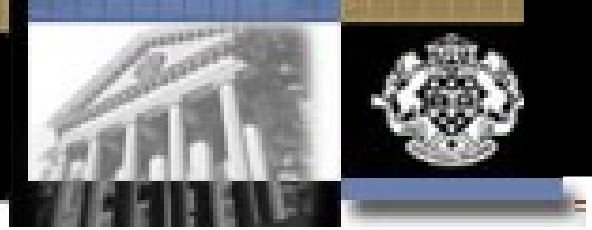
Material Breach

Article 60

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 ...

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.



Sources of International Law: Treaties

Invalidity and Termination of Treaties

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

Supervening Impossibility

Article 61

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.

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Fisheries Jurisdiction Case

Sources of International Law: Treaties

Invalidity and Termination of Treaties

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





Fundamental Changes (*rebus sic stantibus*)

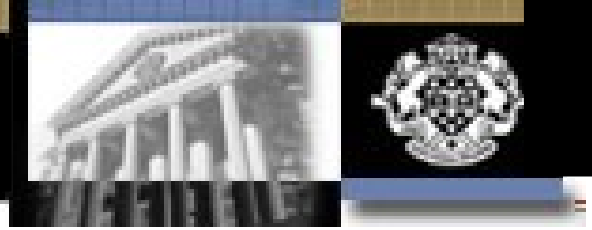
Article 62

A fundamental change of circumstances … 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.

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Reception of International Law

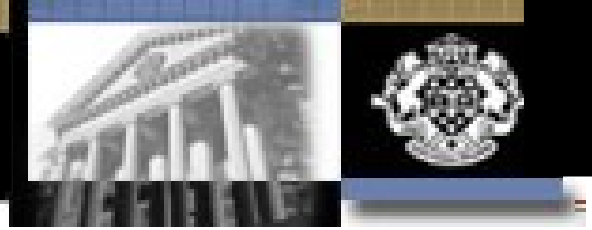
- **Definition of "reception" system**: A reception system is a means of determining how rules of public international law are applied, considered, or not, in domestic law
- **Where does the "reception" system come from**: Determined by the domestic law of each state
  - In Canada, our reception system is a creature of the common law

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Reception of International Law

- **Functioning of the "reception"**: Two classical approaches:
  - *Monist*: automatic "incorporation"
    - international law applies in the domestic jurisdiction immediately and directly, without any legislative or executive action
    - common in Europe (civil law jurisdictions)
  - *Dualist*: international law becomes domestic law only through what's known as a process of "transformation" or sometimes "implementation"

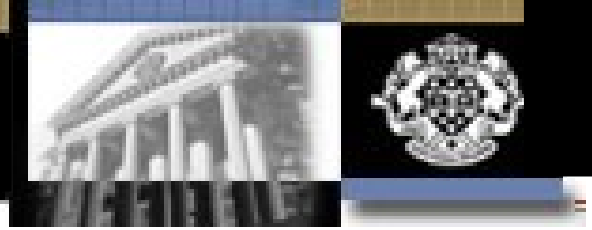
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Reception of International Law

- **Canada's approach to "reception"**: Hybrid model
  - *Customary international law*: monist-like incorporation into the common law of Canada
  - *Conventional international law*: traditionally very rigid dualist approach, requiring transformation by legislative act
- **Why Canada's approach?**: Constitutional reasons
  - Treaty making is federal executive power: a function of the royal prerogative
  - Thus, two constitutional objections to "self-executing" treaties:
    - Separation of powers between Parliament and executive

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Reception of International Law

- **New uncertainty about Canada's dualist approach to treaties**:
  - Informal incorporation via canons of statutory interpretation:
    1. Where a treaty is implemented by a statute, courts may look to the treaty to deal with any ambiguity in that statute: *National Corn Growers*

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Reception of International Law

- **New uncertainty about Canada's dualist approach to treaties**:
  - Informal incorporation via canons of statutory interpretation:
    2. Domestic law should be read, where possible, so as not to violate international law:

> **Driedger**: "The legislature is presumed to respect the values and principles enshrined in international law, both customary and conventional. These constitute a part of the legal context in which legislation is enacted and read. In so far as possible, therefore, interpretations that reflect these values and principles are preferred."

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Reception of International Law

- **New uncertainty about Canada's dualist approach to treaties**:
  - Informal incorporation via canons of statutory interpretation:
    2. Domestic law should be read, where possible, so as not to violate international law:

> *Bouzari* (Ont. SCJ): "Parliament and legislatures are presumed to respect the values and principles enshrined in international law, which constitutes part of the legal context within which legislation is enacted. However, if there is a conflict between Canadian legislation and a norm of international law, then the legislation continues in force."

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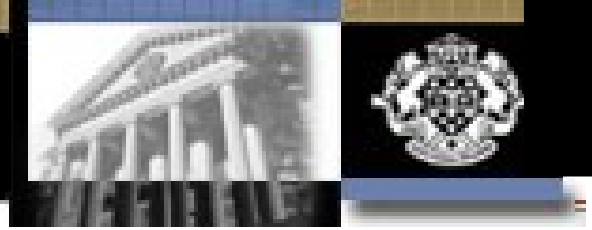
Reception of International Law

- **New uncertainty about Canada's dualist approach to treaties**:
  - Informal incorporation via canons of statutory interpretation:
    2. Domestic law should be read, where possible, so as not to violate international law:

> *Baker* (SCC): "the values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review"
>
> *Suresh* (SCC): "international law rejects deportation to torture … This is the norm which best informs the content of … s.7 of the Charter"

Reception of International Law

- **Reception under United States law:**
  - *Conventional international law*: US Constitution declares, *inter alia*, treaties "the supreme Law of the Land"
    - US courts are bound to give effect to the international agreements of the United States, *except* where these agreements are not self-executing
    - Agreement is not self-executing where:
      1. The agreement specifies
      2. The President or the Senate says so
      3. Self-execution barred by separation of powers



Sources of International Law

Customary International Law

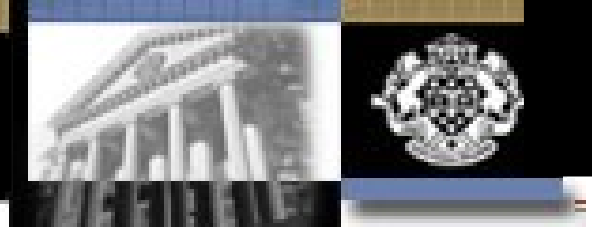
Definition:

Law that flows from state actions undertaken by states believing that these actions are legally obligatory

Two elements:

1. Consistent and general practice among states
2. Practice viewed as law by these states (*opinio juris*) accepted as law

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Sources of International Law

Customary International Law: State Practice

Two issues:

1. **Generality:** How many states need perform the action?

   There is no precise formula, but the action should be “general”, “widespread” or “settled”, particularly among the states involved in the relevant activity

2. **Uniformity:** How consistent must states be?

   Do not require perfect consistency. What is required is conduct generally consistent with the alleged rule of customary international law

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Sources of International Law

Customary International Law: State Practice

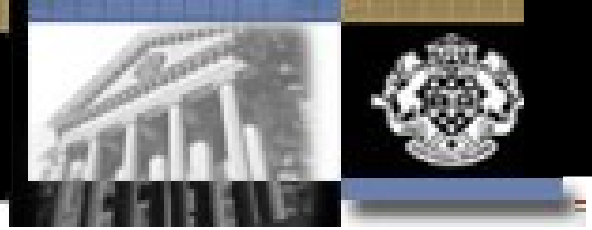
Example: *Military and Paramilitary Activities in and against Nicaragua*





US actions contravened customary international law:

- the practice of states in terms of applying the rule said to be customary international law need not be perfect
- if a state acts in violation of a rule and then tries to justify its conduct with reference to excuses and exceptions, this recognizes the general validity of the rule



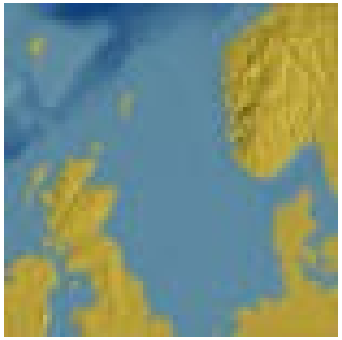
Sources of International Law

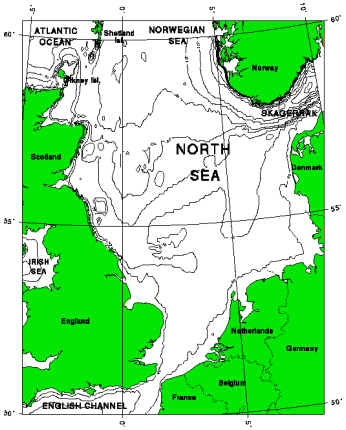
Customary International Law: *Opinio Juris*

- **A sense of legal obligation**:
  - a practice initially followed by states as a matter of courtesy or habit may become law when states generally come to believe that they are under a legal obligation to comply with it
- **Showing *opinio juris***:
  - Sometimes, where a practice is very widespread, *opinio juris* may be inferred from state acts or omissions
  - *opinio juris* often demonstrated by pointing to official statements, diplomatic correspondence, government press releases, submissions to national and international tribunals, speeches, votes the General Assembly, etc.

Sources of International Law

Customary International Law: *Opinio Juris*





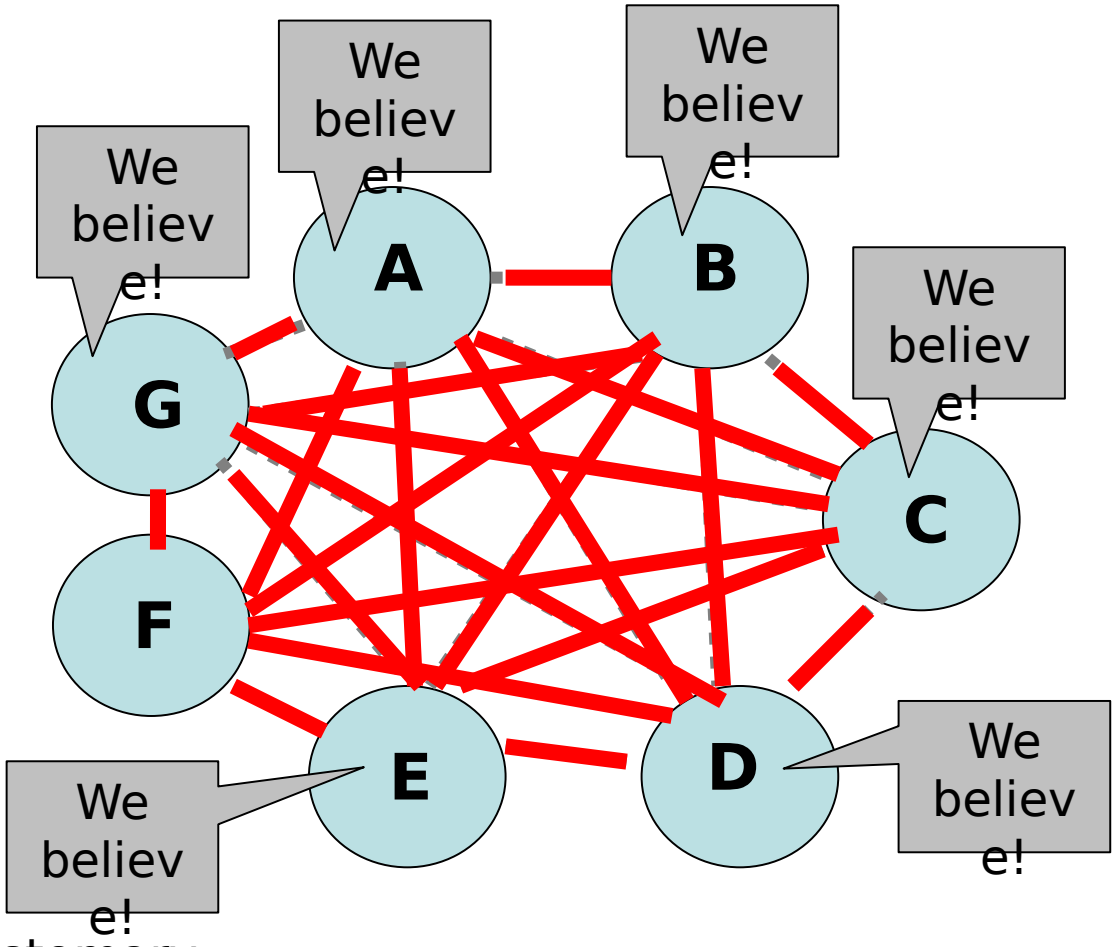
- *North Sea Continental Shelf Case*
  - The passage of only a short period of time was not necessarily a bar to the formation of a new rule of customary international law
    - However, in these circumstances, it was indispensable that State practice during that period, should have been both extensive and virtually uniform
  - The acts would also have to be motivated by a sense of legal duty, not out of considerations of courtesy, convenience or tradition

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Sources of International Law

Customary International Law: *"Tipping Point"*

- Pattern of state action with *opinio juris*
- At some point – the tipping point – the state action becomes sufficiently universal
- Then all states are bound (subject to 2 exceptions we will discuss)



State action

Crystallized customary law

Sources of International Law

Customary International Law

Is the *Universal Declaration of Human Rights* Customary International Law?



Eleanor Roosevelt:

"In giving our approval to the declaration today, it is of primary importance that we keep clearly in mind the basic character of the document. It is not a treaty; it is not an i It is not and does not purport to be a statement of law or of legal obligation. It is a declaration of basic principles of human rights and freedoms, to be stamped with the approval of the General Assembly by formal vote of its members, and to serve as a common standard of achievement for all peoples of all nations."

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Sources of International Law

Customary International Law

Is the *Universal Declaration of Human Rights* Customary International Law?



Today:

- Strong argument that some or even all of the UDHR is customary international law:
  - frequent reiteration of acceptance;
  - virtually universal participation of states in other international HR agreements;
  - the adoption of human rights principles by states in regional organizations;
  - general support by states for United Nations resolutions ;
  - action by states to conform their national law;
  - invocation of human rights principles in national policy, in diplomatic practice, in international organization activities, etc.

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Sources of International Law

Customary International Law

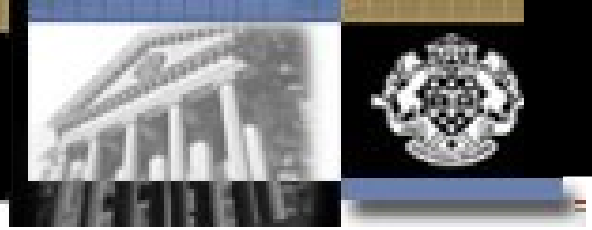
Is the *Universal Declaration of Human Rights* Customary International Law?



Statement 95/1 Notes For An Address By The Honourable Christine Stewart, Secretary Of State (Latin America And Africa), At The 10th Annual Consultation Between Non-Governmental Organizations And The Department Of Foreign Affairs And International Trade, Ottawa, Ontario, January 17, 1995:

"…Canada regards the principles of the Universal Declaration of Human Rights as customary international law nternational law binding on all governments"

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Sources of International Law

Customary International Law: **Impact of Dissent**

- Special rules for dissenters: Concept of Persistent Objector
  1. The state must have objected to the rule *in the course of its formation*
  2. The state must be *consistent in its objection*
  3. The state's objections *must be express*

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Sources of International Law

Customary International Law: **Impact of Dissent**

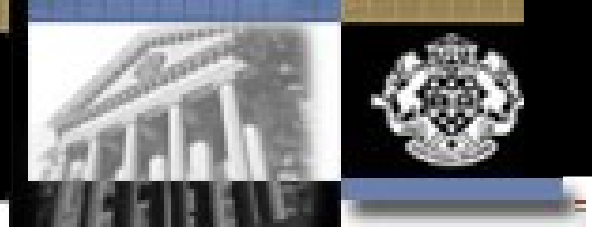
- Special rules for dissenters: Concept of Persistent Objector



Nuclear powers as persistent objectors?

Arguments in the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict Case* (1996)

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Sources of International Law

Customary International Law: **Regional Customary Law**

- Customary principles that apply within a region and not universally

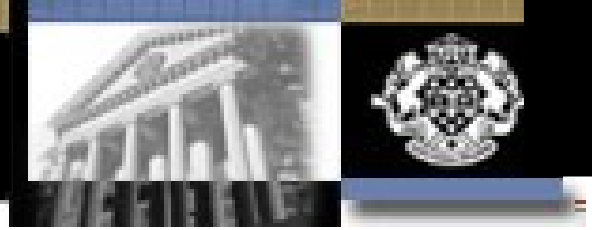
Rights of Passage Case:

- Long history of practice

Asylum Case

- Peru not shown to have accepted practice

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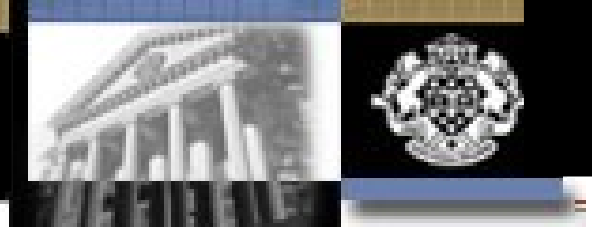


Sources of International Law

Customary International Law: Treaties and Customary Law

1. Conflicts between treaties and customary principles:
   - Treaties prevail (subject to *jus cogens* norms)
2. Treaties as a source of customary international law:
   - Codification of existing law (*lex lata*)
   - Crystallization of emerging law or a catalyst for new customary law (*lex ferenda*)

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Sources of International Law

Customary International Law: ***Jus Cogens*** and ***Erga Omnes***

- *Jus Cogens:*
  - Peremptory norms of international law that trump treaties (and customary practices) inconsistent with them
  - Natural law concept of a higher law
  - Examples likely include: piracy, use of force, bar on genocide, slavery or slave trade, and several other human rights principles, etc.

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Sources of International Law

Customary International Law: ***Jus Cogens*** and ***Erga Omnes***



- *Erga Omnes:*
  - A universal obligation all states owe the international community and all states have a legal interest in the protection of this right
    - *Israeli Wall Case*
      - All states under an obligation not to recognize the illegal situation created by the wall
      - All states under an obligation not to lend assistance in maintaining the situation created by the wall's construction

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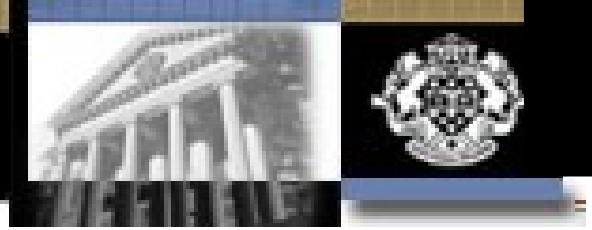
Sources of International Law

Other Sources

Statute of the International Court of Justice, Article 38:

- The sources of international law that may be applied by the ICJ are:
  1. International conventions
  2. International custom
  3. General principles of law
  4. Judicial decisions and the teachings of the most highly qualified publicists

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Sources of International Law

Other Sources: General Principles

ICJ Statute, Art. 38: "the general principles of law recognized by civilized nations"

- Debate over where these principles exist:
  1. Principles that a large number (majority?) of states apply in their domestic law?
     - Roughly the approach followed in the *South West Africa Case:*
       - "Nearly every legal system" has trust-like rules
  2. Principles that exist already in international law?
     - Approach that doesn't make much sense

Sources of International Law

Other Sources: Writing of Jurists and Publicists

ICJ Statute, Art. 38: "subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law".

Art. 59: "The decision of the Court has no binding force except between the parties and in respect of that particular case."

- These are a subsidiary means of determining the content of international law
  - Still, may prove very influential

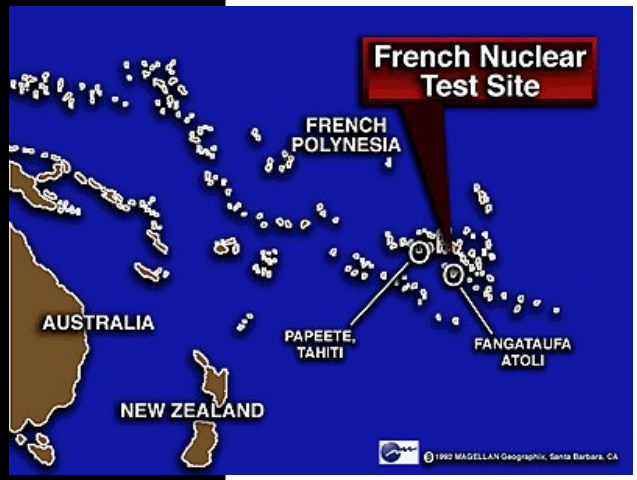
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Sources of International Law

Other Sources: Unilateral Declarations

Legal Effect of Unilateral Promises

Nuclear Test Cases



- where it is the intention of the state making the declaration that it should become bound according to its terms, the intention confers on the declaration the character of a legal undertaking

- the state is then obliged to follow a course of conduct consistent with the declaration

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