

**COMMONWEALTH SEMINAR ON
LANDLOCKED STATES IN AFRICA**

PART II

Maseru, Lesotho

November 28 - December 1, 2005

**AN EXAMINATION OF
TREATY LAW**

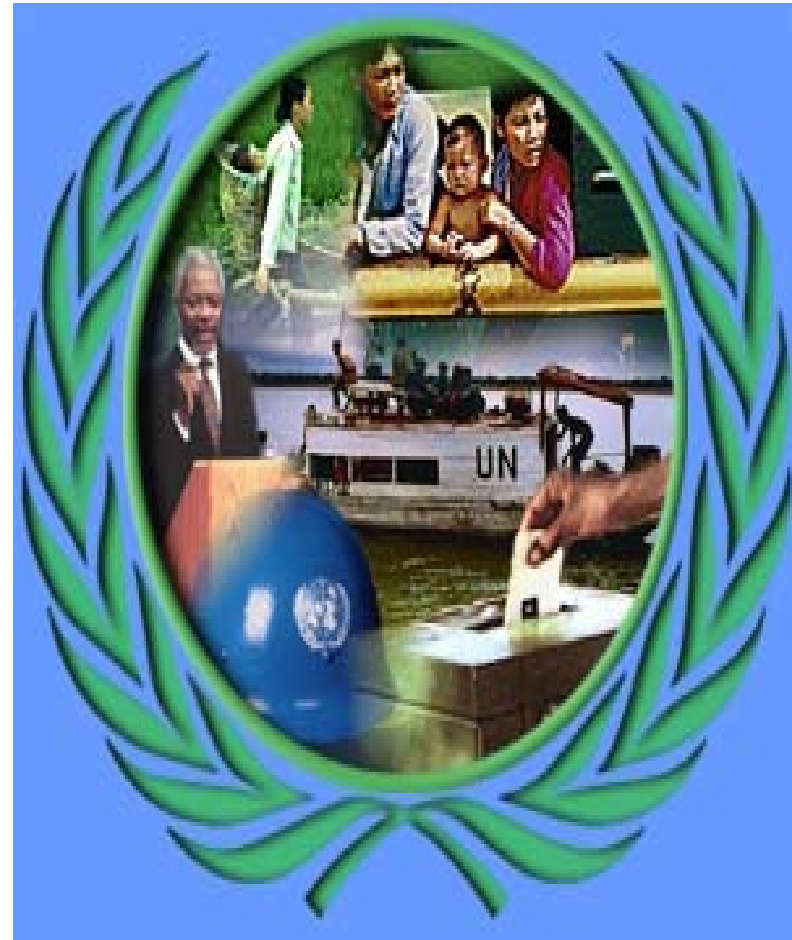
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The background of the image is a classic marbled paper pattern, often used in book covers. It features a complex, organic design with swirling, vein-like patterns in shades of light beige, cream, and pale brown. The overall effect is textured and elegant.

INTERNATIONAL LAW

INTERNATIONAL LAW

- **INTERNATIONAL LAW** can be defined as the body of law which regulates the relationship between international entities
- These entities include States and International Organisations



FATHERS OF INTERNATIONAL LAW

- The Dominican professor of theology **Francisco de Vitoria** is generally recognized as the founder of modern international law. Vitoria is considered a significant contributor to just war theory.



FATHERS OF INTERNATIONAL LAW

- The French monk **Emeric Cruce** (1590–1648) developed the idea of representatives of all countries meeting in one place to discuss their conflicts to avoid war and create peace. He suggested this in his *The New Cyneas* (1623). Venice was the selected city where the representatives should meet. He suggested that the Pope should preside over the meeting. He believed that international organizations are crucial to solve international disputes.



FATHERS OF INTERNATIONAL LAW

- **Hugo Grotius** (1583-1645) a Dutch humanist and jurist is considered central to the development of international law.
- In France, he developed his ideas on international law with his *Mare Liberum* (Latin for "Free seas"), in which he challenged the claims and attempts of England, Spain, and Portugal to rule portions of the oceans and seas. His book *De Jure Belli ac Pacis* (The Law of War and Peace) became the first definitive text on international law in Europe. He further developed the just war theory.



JUST WAR

- CRITERIA FOR A JUST WAR:
- It can be to repel an invasion.
- It can be to punish an insult to God.
- There has to be a just cause (one of the two mentioned above).
- It has to be declared by the proper authorities.
- It must possess moral intention.
- It must have a chance of success.
- It must abstain from brutal practices.
- Its end result must be proportional to the means used.



PEACEFUL ORDER OF STATES

- After World War I, the world's nations espoused an international body. U.S. President Woodrow Wilson suggested a "League of Nations", though the United States did not join it due to its own politics. When World War II broke out, the League of Nations was at an end.



PEACEFUL ORDER OF STATES

- Simultaneously the United Nations was being formed. On January 1, 1942, US President Franklin D. Roosevelt issued the "Declaration by United Nations" on behalf of 26 nations. Before the end of the war, representatives of 50 nations met in San Francisco to draw up the charter for an international body to replace the League of Nations.
- On October 24, 1945, the United Nations officially came into existence, spawning the growth of international law.





**SOURCES OF
INTERNATIONAL
LAW**

INTERNATIONAL COURT OF JUSTICE

- Article 38(1) of the Statute of the International Court of Justice (ICJ) is generally recognized as the definitive statement addressing the **Sources of International Law**:
- The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
 - a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
 - b) international custom, as evidence of a general practice accepted as law;

INTERNATIONAL COURT OF JUSTICE

- c) the general principles of the law recognized by civilized nations;
- d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of various nations, as subsidiary means for determination of rules of law.



INTERNATIONAL COURT OF JUSTICE

- The **ICJ** is the principal judicial organ of the United Nations Established in 1946. Its main functions are to settle disputes submitted to it by States and to give advisory opinions on legal questions submitted to it by the General Assembly or Security Council, or by such specialized agencies as may be authorized to do so by the General Assembly in accordance with the UN Charter. The Statute of the ICJ is the main constitutional document constituting and regulating the Court.

INTERNATIONAL COURT OF JUSTICE

- The seat of the Court is in the Peace Palace, -The Hague, the Netherlands. It is composed of fifteen judges elected by the UN General Assembly and the UN Security Council. Judges serve for nine years and may be re-elected. No two may be nationals of the same country. One-third of the Court is elected every three years.



INTERNATIONAL COURT OF JUSTICE

- There are two distinct types of cases upon which the Court may rule:
- **contentious issues between States** in which the Court produces binding rulings between States that agree, or have previously agreed, to submit to the ruling of the Court
- **advisory opinions**, which provide reasoned, but non-binding, rulings on properly submitted questions of international law, usually at the request of the United Nations General Assembly. Advisory opinions do not have to concern particular controversies between States, though they often do.

OTHER INTERNATIONAL TRIBUNALS

- As the dictates of world peace realise that specialisation is integral, it seems that perhaps the ICJ is not enough.
 - Many treaties now have their discrete tribunals such as the **International Tribunal for the Law of the Sea (ITLOS)**
- ITLOS – Situated in the Free and Hanseatic City of Hamburg, Germany

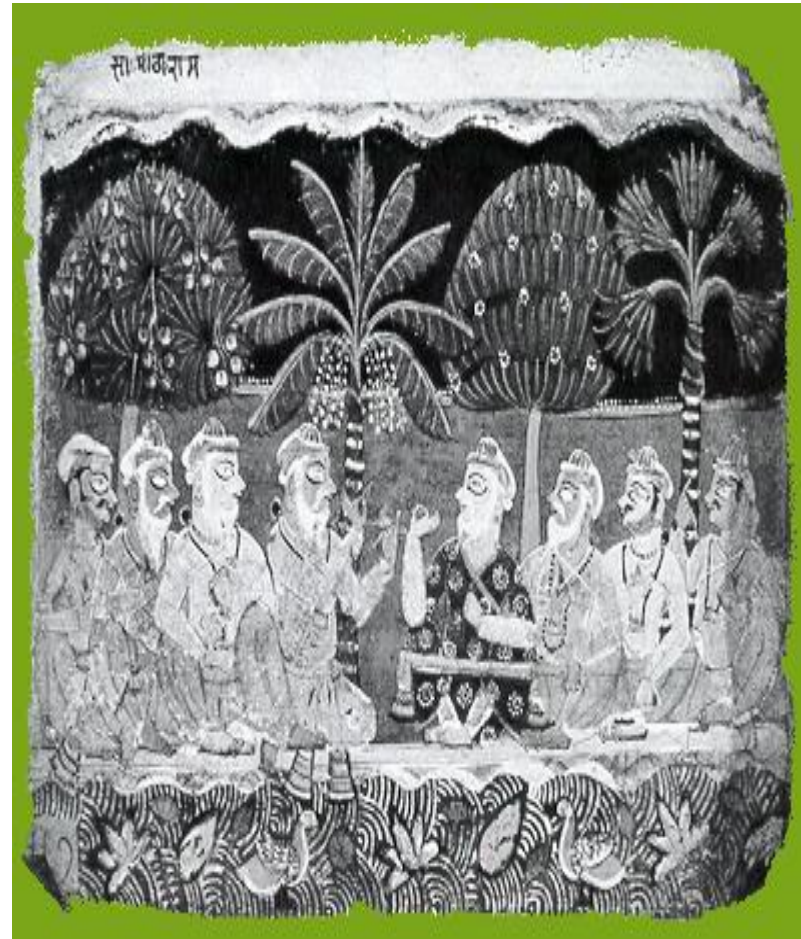


SOURCES OF INTERNATIONAL LAW

- **JUS COGENS**
- *Jus cogens* ("compelling law") is a principle of international law considered so fundamental that it overrides all other sources of international law, including even the Charter of the United Nations. Rules of *jus cogens* generally require or forbid the State to do particular acts or respect certain rights. However, some define criminal offences which the State must enforce against individuals. Generally included on lists of such norms are prohibitions on waging aggressive war, war crimes, crimes against humanity, piracy, genocide, slavery and torture.
- (Article 53 of the Vienna Convention on the Law of Treaties – (**VCOLT**)).

SOURCES OF INTERNATIONAL LAW

- **CUSTOMS**
- Derived from the consistent practice of States accompanied by *opinio juris* (a legal obligation is required by States). Customary international law is differentiated from acts of comity (civility) by the presence of *opinio juris*.
- In some instances, acts of comity have developed into customary international law, i.e. diplomatic immunity.



Hindu Ancient Council

SOURCES OF INTERNATIONAL LAW

- **GENERAL**

- The scope of general principles is unclear and controversial but may include such legal principles that are common to a large number of systems of municipal law. It has been suggested that general principles are to be resorted to in order to prevent a *non-liquet* (when a judgement is not clear) in international litigation.
- The principle that a State cannot take advantage of its own wrong is regarded as a general principle of law.

SOURCES OF INTERNATIONAL LAW

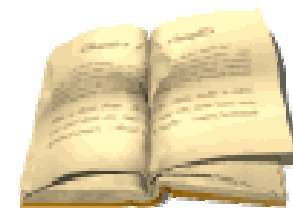
- **SUBSIDIARY MEANS OF INTERPRETATION**

- The decisions of international and municipal courts and the publications of academics can be referred to, not as a source of law as such, but as a means of interpreting the law established in other sources. The ICJ does not refer to domestic decisions although it does invoke its previous case-law.
- There is no rule of *stare decisis* in international law.
- The ICJ will often consider the publications of the International Law Commission as authoritative statements on international law. Often they will consider General Assembly resolutions as indicative of customary international law

**TREATIES AS A
SOURCE OF
INTERNATIONAL
LAW**

SOURCES OF INTERNATIONAL LAW

- **TREATIES**
- Also known as **International Conventions**. Treaties are a deliberate method of creating law. Treaties can also be known as **Charters, Covenants, General Acts, Declarations, International Agreements, Pacts, Protocols and Statutes**. They all refer to the process where States legally bind themselves to written agreements that obligate them to act in a particular way or to create a particular norm for behaviour.



SOURCES OF INTERNATIONAL LAW

- **TREATIES** have gradually displaced much customary international law. This development is similar to the replacement of customary or common law by codified law in municipal legal settings, but customary international law continues to play a significant role in International law.



SOURCES OF INTERNATIONAL LAW

- **AGREEMENTS** can be in the form of general law-making treaties, such as the **UNLOS**, or specific contracts between States such as a bilateral arrangement pursuant to a treaty. Some treaties are the result of codifying existing customary law, such as ***Jus ad Bellum*** (rules conducting "just war"). However, codified versions of customary law may be legally binding even on States that are not parties to the treaty, as existing practice in customary law can be found to already obligate these States (a notable example is the ***VCOLT and UNCLOS*** of which the United States is not a party).

ORIGIN OF TREATIES

- Through the ages a code developed for the relations and conduct between nations. Even when nations were at war, envoys were often considered immune to violence. The first formal attempts in this direction, which over time have developed into the current international law, stem from the era of the Renaissance in Europe. In the Middle Ages it had been considered the obligation of the Church to mediate in international disputes.



ORIGIN OF TREATIES

- There was the gradual acceptance that nations have the right to self-govern and to live in peace and possess their land. In the 16th and 17th centuries the Church lost its direct influence in international affairs, as Catholic and Protestant powers emerged and struggled for dominance and survival.



ORIGIN OF TREATIES

- At the beginning of the 17th century, several generalizations could be made about the political situation:
- Self-governing, autonomous States existed.
- Almost all of them were governed by monarchs.
 - **The Peace of Westphalia is often cited as being the birth of the modern nation-States, establishing States as sovereigns answering to no-one within its own borders.**
- Land, wealth, and trading rights were often the topics of wars between States.
- International law possibly developed to deal with the new States arising, and the lack of influence of the Pope and the Catholic church which gave rise to the need for new generally-accepted codes in Europe.

VIENNA CONVENTION ON THE LAW OF TREATIES

- The 1969 VCOLT is the authoritative treaty on the international law of treaties, establishing the procedures by which treaties are adopted, interpreted, and invalidated. It is considered mostly a codification of already existing and binding customary law on treaties.
- It is not therefore viewed as a change in existing international law. This means that unlike most treaties, the VCOLT could arguably be binding to even non-parties.

VCOLT

- There is a *Vienna Convention on the Law of Treaties between States*, and on the *Law of Treaties between States and International Organizations or between International Organizations*.



INTERNATIONAL SEABED AUTHORITY

TREATY IMPLEMENTATION

- Treaties may be seen as 'self-executing' or non self executing depending on the legal system of the State. Civil law systems are the former while common law systems are the latter and require 'implementing legislation'- a change in the domestic law to fulfill treaty obligations.
- **Article 18** requires that a State is
 - “obliged to refrain from acts which would defeat the object and purpose of any treaty”
 - This reinforces the maxim
 - ***“pacta sunt servanda”***
 - ***“Let the Agreement Stand”***

**ENABLING A
TREATY BY
NATIONAL
LAW**

IMPLEMENTING TREATY OBLIGATIONS AT HOME



After the fanfare of the international
Conference, the treaty signing should
have effect on national soil

IMPLEMENTING TREATY OBLIGATIONS AT HOME

**Prepare and pass
enabling
legislation**

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graph LR; A[Prepare and pass enabling legislation] --> B[Sign, ratify, accede etc to int'l instrument]
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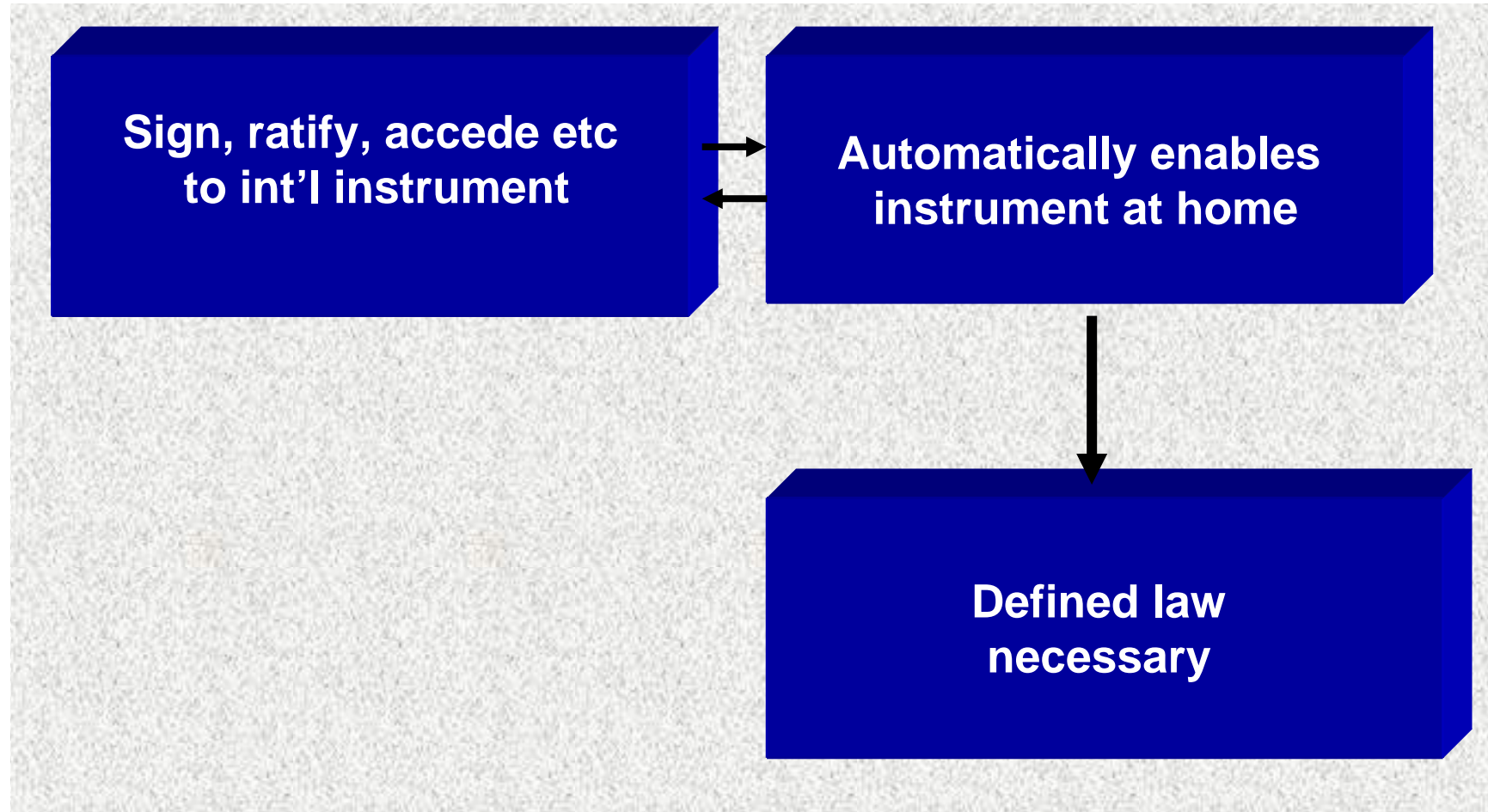
**Sign, ratify, accede etc
to int'l instrument**

IMPLEMENTING TREATY OBLIGATIONS AT HOME

Sign, ratify, accede etc
to int'l instrument

Automatically enables
instrument at home

Defined law
necessary



INVALIDATION OF A TREATY

- **Articles 46-53** of the **VCOLT** set out the only ways that treaties can be invalidated-considered unenforceable and void under international law. A treaty will be invalidated due to either the circumstances by which a State party joined the treaty, or due to the content of the treaty itself. Invalidation is separate from withdrawal, suspension, or termination.



INVALIDATION OF A TREATY

- **ULTRA VIRES TREATIES**
- A party's consent to a treaty is invalid if it was given by an agent or body without power to do so under that State's domestic law. A strong presumption exists internationally that a head of State has acted within his proper authority.
- Consent is also invalid if it is given by a representative who ignored restrictions he is subject to by his sovereign during the negotiations, if the other parties to the treaty were notified of those restrictions prior to his signing.



INVALIDATION OF A TREATY

- **MISUNDERSTANDING, FRAUD, CORRUPTION, COERCION**
- A State's consent may be invalidated if there was an erroneous understanding of a fact or situation at the time of conclusion, which formed the "essential basis" of the State's consent. Consent will not be invalidated if the misunderstanding was due to the State's own conduct, or if the truth should have been evident.



Weapons Inspectors



Bush and Blair



Italy's Berlusconi



France's Chirac

COALITION OF THE WILLING?

INVALIDATION OF A TREATY



- Consent will also be invalidated if it was induced by the fraudulent conduct of another party, or by the direct or indirect "corruption" of its representative by another party to the treaty. Coercion of either a representative, or the State itself through the threat or use of force, if used to obtain the consent of that State to a treaty, will invalidate that consent

INVALIDATION OF A TREATY

- **PEREMPTORY NORMS**
- A treaty is null and void if it is in violation of a peremptory norm. These norms, unlike other principles of customary law, are recognized as permitting no violations and so cannot be altered through treaty obligations. These are limited to such universally accepted prohibitions as those against genocide, slavery, torture, and piracy.
- No State can legally assume an obligation to commit or permit such acts

RESERVATIONS TO TREATIES

- Reservations can be qualifications or denials of specific obligations, or the insistence upon particular interpretations of treaty language. These must be included at the time of signing or ratification--a party cannot add a reservation after it has already joined a treaty.
- Some treaties expressly forbid all reservations or just specific ones. Treaties may also expressly authorize certain reservations. Otherwise, reservations may be permitted to the extent that they are not inconsistent with the goal and purpose of the treaty. Though the allowance of reservations means that not all parties to a treaty will be bound under the same precise obligations, States will often nevertheless consent to reservations to gain as many parties to the treaty as possible for the sake of a general goal.
- If a reservation is considered unacceptable, the reserving party may be excluded from the treaty, or the reservation may be considered severable from the party's ratification, meaning that the reservation is ignored but the party is still bound under the treaty.

MULTILATERAL AND BILATERAL TREATIES

- A ***multilateral treaty*** has several parties, and establishes rights and obligations between each party and every other party. Multilateral treaties are often, but not always, open to any State; others are regional –eg a multilateral agreement with the landlocked subregional grouping – Botswana, Lesotho and Swaziland (“on the one part”) and South Africa (“on the other part”) for the formation of a corridor to the sea.
- ***Bilateral treaties*** by contrast are negotiated between a limited number of states, most commonly only two, establishing legal rights and obligations between those two states only. It is possible however for a bilateral treaty to have more than two parties – such as eg between COMESA and South Africa. The parties would be divided into two groups, South Africa (“on the one part”) and COMESA and its member states (“on the other part”).

ENDING TREATY OBLIGATIONS

- **WITHDRAWAL**

- Treaties are not necessarily permanently binding upon the signatory parties. Many treaties expressly allow a State to withdraw as long as it follows certain procedures of notification, whereas some forbid withdrawal. Other treaties are silent on the issue, and so if a State attempts withdrawal through its own unilateral denunciation of the treaty, a determination must be made regarding whether permitting withdrawal is contrary to the original intent of the parties or to the nature of the treaty.
- If a State party's withdrawal is successful, its obligations under that treaty are considered terminated, including a bilateral treaty. When a State withdraws from a multi-lateral treaty, that treaty will still otherwise remain in force between the other parties.

ENDING TREATY OBLIGATIONS

- **SUSPENSION AND TERMINATION**

- If a party has materially violated, or breached, its treaty obligations, the other parties may invoke this breach as grounds for temporarily suspending their obligations to that party under the treaty. A material breach may also be invoked as grounds for permanently terminating the treaty itself.
- A treaty breach does not automatically suspend or terminate treaty relations, however. The issue must be presented to an international tribunal or arbitrator (usually specified in the treaty itself) to legally establish that a sufficiently serious breach has in fact occurred. Otherwise, a party that prematurely and perhaps wrongfully suspends or terminates its own obligations due to an alleged breach itself runs the risk of being held liable for breach. Additionally, parties may choose to overlook treaty breaches while still maintaining their own obligations towards the party in breach.

ENDING TREATY OBLIGATIONS

- **SELF TERMINATION**

- Treaties sometimes include provisions for self-termination, meaning that the treaty is automatically terminated if certain defined conditions are met. Some treaties are intended by the parties to be only temporarily binding and are set to expire on a given date. Other treaties may terminate if a defined event occurs if the treaty is meant to exist only under certain conditions or in the absence thereof.
- A party may claim that a treaty should be terminated, even absent an express provision, if there has been a fundamental change in circumstances. Such a change is sufficient if it was unforeseen, if it undermined the “essential basis” of consent by a party, if it radically transforms the extent of obligations between the parties, and if the obligations are still to be performed. A party cannot base this claim on change brought about by its own breach of the treaty.

A

TREATY REGISTRY

CREATING A TREATY REGISTRY

- The need for a State to keep up to date and follow the obligations arising from treaties require a State to formalise its treaty keeping and documentation arrangements.
- This indicates the logistics and the manner in which treaties are to be housed.

CREATING A TREATY REGISTRY

- There will be the need for the physical location of the documents.
- It is suggested that a dedicated area be identified



CREATING A TREATY REGISTRY

- A physical register may be kept to denote, *inter alia*, the following:
 - Date of signing
 - Date of Ratification/Accession
 - Any Reservations noted
 - Date of Withdrawal or Termination if applicable

CREATING A TREATY REGISTRY

- A register may also be kept electronically
- As the registry expands, the need for dedicated officers become apparent



THE END

