INTERNATIONAL LAW CAN

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1. CRITIQUES OF INTERNATIONAL LAW

Skepticism about IL

* **Is it really law?** “Is law possible in a global society that is horizontal in organization and that contains no legislature, no executive authority, and only a rudimentary judiciary typically without compulsory jurisdiction?”
* International lawyers have tended to be in the position of trying to justify the **legitimacy** and **reality** of IL
* “**Almost all nations observe almost all principles of IL and almost all of their obligations almost all of the time**.” *(Louis Henkin*)
  + *Henkin & Jessup* seek a focus on what IL does do: IL works because binding norms empirically exist and are complied with. (e.g. cross-border trade)
  + *Toupe & Berne*: Yes, sure, but to focus on the mundane ignores situations where there is a real public desire for IL to work, but where it often fails to shape state behavior, such as in the use of military force.

Anxieties about IL

* IL is **ANTI-DEMOCRATIC** – there is potential to force a state to act in a way its citizens do not want / IL power vested in a STATE while the citizens have democratic rights
* IL focuses on **STATES**, not **INDIVIDUALS** - few opportunities in IL for individuals to bring claims
* **LACK OF ENFORCEMENT** / no international police force – IL cannot, in the large scope of things, compel a state to do anything it does not want.
* There is **NO COURT OF COMPULSORY JURISDICTION.** - in IL, jurisdiction is based on consent.
* Powerful states at times blatantly breach IL
* IL only creates **OBLIGATIONS** for states **THROUGH CONSENT**
* IL is **ANTI-DEMOCRATIC AMONG STATES** – states are held to the same standard – small states have same vote as large ones: not representative

2. INTERNATIONAL LEGAL PERSONS

Until the 20th C, the **prevailing view** was that **only states** could possess international legal personality.

As a result of **changes in the last C** (notably in the areas of HR, IHR, and intl economic law), **non-state actors** **such as international organizations and even individuals have attained some measure of ILP**. But they do not possess the same rights and duties as states. IL has recognized that some non-state entities have the capacity to maintain legal relations, but **states** **remain the principal subjects of IL**.

1. States
2. Inter-governmental Organizations
3. Non-Governmental Organizations
4. Transnational Corporations
5. People (Individuals; Peoples seeking Self-Determination)

# 1. STATES AND STATEHOOD

## Statehood – International Legal HISTORY

The idea of the nation-state is intertwined with the idea of IL itself:

**Beginnings of modern international law** are often traced back to the **1648 Peace of Westphalia**

* Represented an end to the aspirations of *“universalism*”
* PoW = establishment of separate, sovereign nation states in Europe, each able to define its own identity, religion, cultural aspirations, etc.

**BUT** Anthony Anghie’s landmark book *Imperialism, Sovereignty and the Making of International Law* (2005) **challenged the notion of international law emerging in an “intra-European” encounter**.

* Anghie says statehood did not emerge out of an “intra-Eureopean” encounter. Rather IL/sovereignty was formed in the colonial encounter and continues to be marked by this origin.
* We defined sovereignty as something the new world lacked.

## Statehood – International Legal THEORY: Natural 🡪 Positive 🡪 “Neo-natural” Law

1. Early scholars of IL saw stated conduct as restrained by the idea of **natural law**
   1. *Francisco de* *Vittoria*: NL imposes obligations on both the Spanish & the peoples of Americas.
   2. *Francisco Suarez and Hugo Grotius* (sometimes called the father of IL) assumed the existence of a normative code – a set of rights & duties that set limits to state conduct
2. **🡪** Later scholars were influenced by positivism and moved towards what was regarded as a more scientific way of thinking about the law: **Positive Law**
   1. *Vattel*: All *effective* law emerges from the freely expressed will of states (compare to *Grotius*)
3. 🡪 Many commentators saw a return to a kind of **“neo-natural law”** in the emergence of IHRL and sweeping prohibitions on the use of force that characterized IL following WWII.
   1. Many people take issue with this view
   2. We seem to be trying to strike a balance between a naturalist and purely positivist approach (i.e. the idea that HR originates in dignity, and in respect for the ecosphere – there are limits)

Much of IL continues to operate as though the positivist model still held, focusing on what treaties/customs a state is bound by when we are dealing with HR.

## WHAT ARE STATES? (13-18)

## In view of *Article 4 of the UN Charter*, all members of the UN may be presumed to be states.

**Policy:** But if a state is not a member of the UN, how should this affect our view of statehood?

#### Montevideo Convention on the Rights and Duties of States, 1933

(US & 15 Latin American states are parties; seen as reflecting **custom**)

**Odd** that we always go back to this when only 13-15 state parties; and it wasn’t about defining statehood, but about defining the rights and duties of states.

**Art 1:** The state as a person of IL should possess the following qualifications:

1. A **permanent population**;
   1. Size of the population does not matter
2. A **defined territory**;
   1. Size of territory does not matter
3. **Government** (this element is subject to the most interpretation / wiggle room); and
   1. Qualitative aspect: Assumption is that a state requires a gov with actual control over the territory (does not preclude existence of a state that experiences conflict within its territory)
   2. IL has really struggled with the question of when a state **ceases** to exist. What happens in the case of so-called “failed states” (gov experiences such a breakdown in its authority / jurisdiction over the territory that arguably nothing is left) / see “State Succession”
   3. Civil strife can act to obscure an entity’s transformation into a state (Finlnd, ***Aaland Islands***)
4. **Capacity** to enter into relations with other states.
   1. Both a prerequisite and a consequence of statehood (Some question as to which)
   2. **Independence** can be seen as **implicit** in the requirement of having the capacity to enter into inter-state relations. **Also sometimes listed as a separate requirement** (see below)

e) **Independence is also a necessary component** for statehood.

* **IL has shied away from what independence might mean**, & has left that to the political scientists
  + The claimant to statehood must be able, through its government, to exercise its self-determination, free of the authority, though not necessarily the influence, of any other state.
  + **Independence** is a necessary component of statehood, whereas **sovereignty** is a legal right flowing from statehood.
  + ***Austro-German Customs Union Case* (1931) Advisory Opinion, PCIJ**
    - **PCIJ**: Independence = continued existence of the state within her present frontiers as a separate State with sole right of decision in economic, political, etc matters
    - **Alternative view by J Anzilotti (separate opinion)**: Independence is “really no more than the normal condition of States according to IL”

Once the status of statehood is achieved, the state has a legal right to its continuance *(Island of Palmas)*.

**Politics:***To a large extent, whether or not you are a state seems to be whether other states accept your claim. Shows* ***artificiality of the idea of statehood****. Focus on the idea of equality, but should a small country like Monaco really count as much as Russia or China?*

**Sub-National Units**: IL assumes the State “speaks with one voice”. There is a debate about whether sub-national units should have some degree of international capacity (more democratic) – e.g. Canada: treaty-making power is federal, but treaty-implementing power is divided according to ss 91& 92 of the CA 1867

## Sovereignty & Equality (33-38)

Sovereignty and equality are the **foundations of the classic system of international law**.

#### UN Charter, Article 2(1)

“The Organization is based on the principle of the sovereign equality of all its Members.”

Sovereign equality entails a State’s: *(Island of Palmas; UN Charter arts 2(4), 2(7), Decl on Friendly Relations)*

**RIGHT**  to exclusive control over its territory and domestic affairs; and

**CORROLATIVE DUTY** not to intervene in their domestic affairs of another state.

#### Island of Palmas Case (Netherlands v US) (1928)

**F**: Netherlands v US referred Q of territorial sovereignty over Palmas.

**C:** Neth had good title as they had continually and peacefully occupied the island since before 1700. Spain could not transfer to the US more right to the island than it itself possessed.

**Sole Arbitrator HUBER:** The necessary corollary duty to exclusive control of a state’s own territory, permanent population, and other aspects of domestic affairs it the duty not to intervene with the exclusive domestic jurisdiction of other states.

#### Declaration on Principles of IL Concerning FRIENDLY RELATIONS and Co-operation among States in Accordance with the Charter of the United Nations (1970) UNGA

Picture of statehood and sovereignty based on:

* + Equality
  + **Imperative of Non-intervention** – reciprocity
    - **Focus on limiting the use of force** – coming out of the Cold War Era there is an implicit awareness that the consequences of conflict are unthinkable
    - However, there is recognition of the use of force provisions in the *UN Charter* and recognition that sometimes states are subordinate to larger international organizations
  + **Exhortation to the ideal of cooperation despite difference** (for peace & security & other aims)

**Perhaps today the international community would put less emphasis on the duty of non-intervention, and more emphasis on international organizations** due to shifts in our conceptions of sovereignty and statehood resulting from core values in the international community:

* **Sustainability** / environmental protection
* Justice for **individuals** (In 1970 doc, more focus on self-determ. of peoples. Now, **HR** discourse has somewhat altered the meaning of sovereignty: It is sometimes ok to get involved in other states)
* **R2P**: If the state fails to exercise its primary responsibility to protect its citizenry, and it reaches a level of severity that shocks the conscience of the community, the international community has to get involved (Responding to prevent worsening; use of force as last resort; rebuilding).

UN Charter, Article 2

**Article 2:** The Organization and its Members, in pursuit of the Purposes stated in Article 1, **shall act in accordance** with the following Principles.

1. The Organization is **based on the principle of the sovereign equality** of all its Members.
2. All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfill in good faith the obligations assumed by them in accordance with the present Charter.
3. All Members shall **settle their international disputes by peaceful means** in such a manner that international peace and security, and justice, are not endangered.
4. All Members shall **refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state**, or in any other manner inconsistent with the Purposes of the United Nations.
5. All Members shall give the United Nations every assistance in any action it takes in accordance with the present Charter, and shall refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action.
6. The Organization shall ensure that states which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security.
7. **Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction** of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter Vll.

# 2. INTER-GOVERNMENTAL ORGANIZATIONS (IGOs)

There are a vast and intricate web of international organizations that serve a variety of functions, ranging from purely facilitative of inter-state cooperation to a broader quasi-regulatory or supervisory role.

Questions about the workings of IGOs: transparency, accountability, legitimacy, efficacy

## IGOs – Legal Personality

* Since IGOs are created by agreement between states, their **degree of international personality depends on constitution** – **the organization must have the powers required by its functions:**
  + ***Reparations Case [1949] Advisory Opinion, ICJ***
    - **F:** Swedish national and UN mediator in Palestine was killed in Jerusalem, which was in Israeli possession. Israel was not yet a member of the UN. GA asked ICJ for opinion about legal capacity of UN to commence action for compensation against Israel.
    - **C:** Nothing that precludes the UN from bringing a diplomatic protection claim on behalf of employee
    - **ICJ:** The powers must be understood in light of the purposes:The UN could not carry out the intentions of its founders if it was devoid of international personality. My entrusting certain functions to the UN, with the attendant rights and duties, its Members have clothed it with the competence required to enable those functions to be effectively discharged.
    - **Unusual case because ICJ pronounces on legal personality of UN (while ICJ is an organ of the UN)**
    - **Court seems to say that a similar examination to that in the *Reparations Case* could be done in terms of other IGOs too:** “The subjects of law in any legal system… their nature depends upon the needs of the Community.”
      * (This might be an ambitious reading, but valid question)
  + ***Namibia Case (p 48) [1971] Advisory Opinion, ICJ – specific to Security Council***
    - The Security Council has law-making authority
    - Their resolutions create binding legal obligations on UN members

## United Nations

**Legal Personality of United Nations**

* **UN has some international legal capacity,** even with regard to non-member states; for example, it can make claims at IL against other ILPs, even non-member states. (***Reparations Case***).

**UN also has domestic legal capacity within member states** as may be necessary for the exercise of its functions and the fulfillment of its purposes. *[UN Charter, Art 104]*

**Purposes of the UN *(UN Charter, Art 1)***

* 1.1 To maintain **international peace and security**, and to that end: to take effective **collective measures** for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;
* 1.2 To develop friendly relations among nations based on respect for the principle of **equal rights** and **self-determination of peoples**, and to take other appropriate measures to strengthen universal peace;
* 1.3 To achieve **international co-operation** in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging **respect for human rights and for fundamental freedoms** for all without distinction as to race, sex, language, or religion; and
* 1.4 To be a centre for harmonizing the actions of nations in the attainment of these common ends.

**Principles of the UN: equality, sovereignty, non-interference, peace, co-operation *(Art 2)***

**Article 2:** The Organization and its Members, in pursuit of the Purposes stated in Article 1, **shall act in accordance** with the following Principles.

* 2.1 The Organization is **based on the principle of the sovereign equality** of all its Members.
* 2.2 All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfill in good faith the obligations assumed by them in accordance with the present Charter.
* 2.3 All Members shall **settle their international disputes by peaceful means** in such a manner that international peace and security, and justice, are not endangered.
* 2.4 All Members shall **refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state**, or in any other manner inconsistent with the Purposes of the United Nations.
* 2.5 All Members shall give the United Nations every assistance in any action it takes in accordance with the present Charter, and shall refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action.
* 2.6 The Organization shall ensure that states which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security.
* **2.7 Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction** of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter Vll.

**Membership**

Open to all other “peace-loving states” that: *UN Charter, Art 4*

* Accept the obligations contained in the *UN Charter*; AND
* “in the judgment of the Organization, are able and willing to carry out these obligations.”

Exercise of rights and privileges of membership can be suspended *(Art 5)*, and Members can be expelled for persistent violation of principles contained in the *Charter (Art 6)*.

**Structure: Six principal organs** *(Art 7)*

1. **General Assembly** *(Chapter IV: Arts 9-22)*
   1. General deliberative branch of the UN – passes Resolutions that are NOT LEGALLY BINDING
   2. 1 state, 1 vote
   3. Under *Art 22*, UNGA has est’d a number of subsidiary organs of a permanent nature for pursuing special purposes: ILC; UNICEF; UNDP; UNEP
   4. Some declarations of the UNGA have been hugely influential in driving IL (e.g. *UDHR*, 1948)
2. **Security Council** *(Chapter V: Arts 23-32)*
   1. Primary responsibility for the **maintenance of international peace & security** *[24(1)]*
   2. Membership: 15 members, of which 5 are permanent (China; France; Russian Fed; UK; US)
      1. The 5 permanent members played a dominant role in international affairs when the *UN Charter* was drafted, and the ones that actually won the war.
      2. Discourse around UN reform revolves around SC: (1) Do away with permanent membership; (2) Make it representative of regions, and have rotating regional seats
      3. Reality: Very difficult to achieve politically – amending UN would take momentum
   3. Members of UN have legally binding obligation to carry out decisions of SC *[25]*
   4. Voting
      1. on *procedure* requires 9 affirmative votes
      2. on *all other matters* requires 9, including permanent members
      3. Abstention by a permanent members represents support (In Gulf War, Chinese abstention as sufficient to represent support)
      4. Represents **balance to the GA**: While sovereign equality rules at the GA, sovereign equality is tempered at the SC; membership on SC not just a matter of formal status but may reflect their practical/financial contributions to the UN as well.
   5. Powers
      1. irt peaceful settlement of disputes *(Chapter VI)* – makes NON-BINDING reccs
      2. wrt threats to the peace, breaches of peace, and acts of aggression
         1. “Threat to the peace” not defined in the *Charter* - increasingly seen as referring to gross HR violations. SC willing to say this is a threat to intl peace & security.
   6. **Potentially limitless mandate**: Can take action anytime there is a threat to international peace and security *[39, 41, 42]*
      1. ***Namibia case:*** The Charter endows the SC with **significant powers**, of which the specifically enumerated ones are only illustrations. The SC has law-making ability – its resolutions create binding obligations on UN Members.
3. **Secretariat**
   1. Face of the organization: made up of Secretary General and his/her staff
   2. Sec Gen appointed by GA upon recc of SC **– “c**hief admin officer of the Organization”
4. **Trusteeship Council (Suspended operation 1 November 1994)** 
   1. Created to oversee process of trust territories becoming independent states after colonialism
5. **Economic and Social Council (ECOSOC)**
   1. Can consider “international economic, social, cultural, health, and related matters” – reccs to GA, UN members, or specialized agencies
   2. Mandated to set up commissions in economic & social fields and for the promotion of HRs etc (Human Rights Commission, replaced by HR Council under auth of GA; Econ. Commissions for each region; Commission on Sustainable Development; Commission on Status of Women.)
6. **International Court of Justice**
   1. “Principal judicial organ of the UN”; all members of UN are parties to Statute of the ICJ.
   2. UN members undertake to comply with decisions of ICJ.
   3. ICJ does not have power of “judicial review” over decisions of other UN organs
      1. The concern is that a JR power would upset the balance among the organs
      2. But some people have argued in order to have a meaningful and principled division of responsibility & power within UN system, ICJ should have JR power over other organs
      3. *Hinted at in the* ***Namibia case*** *–* 
         1. There is a principled relationship between the organs, and discussion of how the UN Charter sees their role.

# 3. NON-GOVERNMENTAL ORGANIZATIONS (NGOs)

* Traditional view (still technically correct) is that NGOs have **no international personality**.
* Yet ***Art 71 of the UN Charter***recognizes the status of NGOs at IL by providing that ECOSOC can grant them **consultative status.** This avenue for participation allows NGOs to contribute as part of the international law-making process (*UN Conference on Envt & Dev, 1992; Rome Statute*)
  + Provides certain privileges, although it does not give NGOs a “vote.” (though some would argue it doesn’t even give them a voice)
* Some NGOs are extremely influential within the international system and in the development of international law.
  + International Committee of the Red Cross drove the development of IHL
  + Save the Children in relation to children’s rights
* Others are very influential and involved in how the law is implemented.

**NGOs: status or effectiveness?**

“[A]lthough the UN system has indeed opened up to civil society voices over the past decade, it has generally failed to move from episodic participation to meaningful involvement of civil society actors in global political process.” ~Nancy McKeon, (2009) – *food politics*

* She highlights that ***personality* isn’t necessary for *impact****…* But what is being hinted at in this quote is that **there may be sth. *beyond effectiveness* we should be concerned about: *legitimacy****.*
* Debate between **pragmatists** (is it working) and the **idealists** (are these organizations being listened to with respect and paid attention to?)
* McKeon: both **abstract** (how should we conceptualize the relationship between UN and NGOs) and **concrete** (how does this affect farmers groups etc)

# 4. TRANSNATIONAL CORPORATIONS

**Distinguish between government / intergovernmental / non-governmental corporations.**

Holder & Brenan have offered a threefold classification

1. *Government corporations*
   1. Apart from implications of status for such questions as sovereign immunity, there may be occasions on which such entities “engage in international transactions at the behest of government policy.”
2. *Intergovernmental corporations*
   1. May give rise to international law implications through the agreements that establish them
3. *Non-governmental corporations*
   1. The importance of private corporate activities to the international legal system is yet to be accommodated in legal theory, which still equates them with the individual.

While **legally**, they are equivalent to *individuals,* **practically**, their power may be equal to *states*.

## International legal personality

* Traditional approach to legal personality would deny transnational corporations full status as subjects of international law, but their actual status is more nuanced than this:
* The **ability of corps to bring claims before international tribunals**, even though it may be dependent on interstate obligations, nonetheless constitutes a significant example of these entities being **accorded some level of legal status under international law**.
  + E.g. under *NAFTA*, corps are able to seek recompense from foreign govs for breach of their right to unhindered, cross-border trade through *NAFTA’s* private dispute-settlement mech.

As yet there is **no body of law to regulate transnational corporations** – large uncertainties surround their nationality, the law governing their agreements with foreign governments, and their amenability to the jurisdiction of national authorities extraterritorially.

## Human Rights

* In 2003, the **UN Sub-Commission on the Promotion and Protection of HR** approved the *Norms on the Responsibilities of Transnational Corps and Other Business Enterprises* with Regard to HR
  + which sets out a general obligation for states and corps in Art 1
  + However, the norms are unclear as to how corporations could be directly liable under IL for any breaches of these obligations, beyond implying that such a possibility exists.
  + **Substantial work on implementation will be required before the imposition of responsibilities on corps matches their current ability to seek enforcement of rights**
* **DA: *IMBALANCE OR ENFORCEABILITY OF RIGHTS AND DUTIES!!*** *(NAFTA vs HR)*
* **Policy:** In arguing for the extension of HR duties to corps, it is not essential that they come with the *full* range of rights and responsibilities: *could have the right to sue and be sued*, the ability to assert a right, and the acceptance of legal responsibility in judicial forums, *but not have the status of a party* to intergovernmental forums and international instruments

**UN Global Compact**

* “The UN Global Compact is not a regulatory instrument, but rather a **voluntary initiative** that relies on public accountability, transparency and disclosure to complement regulation and to provide a space for innovation and collective action.”
* Corps sign on to show their respect for 10 principles that “enjoy universal consensus” in four areas:
  + Human Rights
  + Labour standards
  + Environment
  + Anti-corruption
* The **principles are extraordinarily broad and general**. Talking about the protection of the 4 core areas in a very generic way. Nobody could conceivable take issue with the principles in the way they are formulated – the Global Compact is supposed to represent a *partnership* in which the public authority of the UN and the private resources of corps can be harnessed together in order to achieve certain ends (and thy specifically reference the MDGs). Also supposed to be reporting requirements that demonstrate how the corps are seeking to integrate those principles into their business practices.
* Note just how much it **ends up being *window-dressing*** – where corps can point to this, without living up to those obligations in a meaningful way.
* The Global Compact has been subject to **enormous critique. But** at the same time it has **created some form of a standard** that has allowed civil society groups and sub/national regulatory agencies to use as an **advocacy tool**. Transparency and reporting requirements.

**Ruggie Framework - “Protect, Respect and Remedy”**

Framework developed by Secretary-General’s Special Representative for Business and Human Rights, John Ruggie. In basic terms, based on the guiding principles of protect, respect and remedy:

* + **States** have an obligation to ***protect*** against human rights abuses within their territory
  + **Business enterprises** have a responsibility to ***respect*** human rights.
  + There need to be **appropriate and effective *remedies*** in case of breach.
* Ruggie was careful about making this a process that was very **broad-based, participatory, and** **consultative**. Both corps and non-corps took part in that process.
  + - **Considerable criticism**: That drawing upon such a sharp distinction between *state* resp to protect and *business* responsibility to respect, is somehow absolving corporations of responsibility. **Critique that the process allowed for co-opting by corporate interests**
    - **However,** scholars have found that **involving corporate actors** in the process of articulating and formulating the guiding principles was **necessary** in order to have legitimacy with them.

# 5. PEOPLE (individuals; peoples seeking self-determination)

## 1. Individuals

* The traditional view until the 20th C was that individuals have **no legal personality**
* **However**, now accepted that **individuals can have both rights and obligations** under IL
  + **Rights:** 
    - Early in the 20th C, the *procedural capacity* of the individual was recognized (e.g. *Danzig Railway Officials’ Case* (1928), Advisory Opinion, PCIJ)
    - There has been a dramatic development of IHRL since WWII, but there are still problems with implementation – from seeing people as just ***objects*** of IL to seeing them as ***subjects*** of IL
    - Although states still are the only ones with standing in contentious proceedings before the ICJ, individuals have attained standing before some intl bodies especially in the area of HR.
  + **Obligations**
    - Individuals have had legal status in the area of *obligations* for a longer period of time
    - Especially since the war crimes trials after WWII, it is w/o controversy that individuals can be prosecuted for criminal violations of IL (war crimes; crimes against peace and security; crimes against humanity)
      * These intl offences may be prosecuted before intl tribunals (as at Nuremberg & Tokyo in the 1940s and more recently by the ICTY/ICTR); ICC; national courts.

## 2. Peoples seeking self-determination (casebook 71+)

All people have the **right to self-determination** (*UN Charter Art 1(2), 55; Art 1 of ICCPR/ICESCR; Decl on the Granting of Independence to Colonial Countries and Peoples; Decl on Friendly Relations – 5th principle; ; Regarded as* ***customary*** *law [Western Sahara [1979] paras 54-59, East Timor Judgment [1995] para 29, Wall Opinion [2004], paras 88, 118, 122, 155])*

**WHO GETS IT?**

* Traditional approach: **confined to decolonization** of non-self-governing territories
  + Rationale for emphasis on territorial integrity: By retaining colonial boundaries, you would minimize chances for inter-state conflict, & be able to move on w/ econ. & social developmt
    - Rationale has received much criticism.(eg M Mutua “Why we Draw the Map of Africa”)
* 1960 ***Decl’n on the Granting of Independence to Colonial Countries and Peoples (GA Res 1514)***
  + **Any attempt to disrupt territorial integrity is incompatible with the principles and purposes of the *UN Charter***
* 🡪 1970 ***Declaration on Friendly Relations***
  + **So long as the state represents all the people in its territory** (State conducting itself in compliance with principle of equal rights and self-determination) it is **entitled to respect for its national integrity.** 
    - The flip-side is that if not representing all the people, not entitled to that respect.
* Recent developments indicate at least **some acceptance of notion that "peoples" should be understood more broadly:**

**The right of people to self-determination is today a right *erga omnes***

*Wall Opinion, 2004* at paras 88, 155

*East Timor Judgment, 1995 at para 29*

***UN Declaration on the Rights of Indigenous Peoples***, adopted by the UNGA on 13 Sept 2007. Australia, Canada, NZ and US voted against, but by end of 2010, all 4 had expressed support.

* + **Indigenous peoples enjoy a right to self-determination; It is recognized at IL; and is not limited or restricted to what national governments give.**
  + We have really seen normative progress in this area to a greater extent than in most other areas: *This document is a real expansion of the right to self-determination and what it entails*

#### Reference re Secession of Quebec (1998) SCC

* + **I 1:** Does IL give the gov of QB the right to effect secession of QB from Canada unilaterally?
  + **I 2:** Is there a right to self-determ under IL that would give the gov of QB right to secede?
* **SCC – Interpreted the right to self-determ to mean primarily internal self-determination**
  + IL contains neither a right of unilateral secession nor the explicit denial of such a right.
  + Right of a people to self-determination is a widely recognized binding norm in IL
  + Threshold step: is the group seeking self-determination “a people”?
    - Clear that “a people” may include only a portion of the pop. of an existing state.
    - Quebec population may be a “people”, but unnecessary to explore here.
* Heart of the court’s analysis: We can draw a **distinction between the right to internal and external** (right to seek out a state of your own) **self-determination**
  + Right to self-determination is normally fulfilled through internal self-determination within the framework of an existing state.

State entitled to IL protection of its territorial integrity if it reps the whole of the ppl

within its territory on basis of equality & w/o discrim, & respects principles of S-D

* + **Right to external self-determ arises in only the most extreme of cases, where the ppl in question have been denied the ability to exert internally their right to S-D:** *[138]*
    - 1. Situations of former colonies
    - 2. Where a people is oppressed, for example under foreign military occupation.
    - 3. Where a definable group is denied meaningful access to government to pursue their political, economic, social and cultural development.
* **A:** Such exceptional circs are manifestly inapplicable to Quebec under existing conditions.
* **Do you agree that the right to self-determ. should be limited in the way the SCC set out?**
  + Some argue that if we really believe in the right of peoples to govern themselves and determine their own destiny, then that has to include the right to secede.
    - say the court took a timid approach to the right to self-determination.
  + Remember though the idea that territorial integrity is not respected at all costs, but only when the state is deserving of that respect.
  + **Is this a political issue that the ct should not be deciding?** There is arguably an important legal component: The Ct is setting out a kind of threshold, giving the broad principles.
  + **Is this approach unnecessarily rigid and narrow?** Is there a good reason to say pursuit of identity and destiny is fine but does not require everyone to be a state. Practical implications:
    - SCC at Para 127 - the IL principle of self-determ has evolved within a framework of respect for the territorial sovereignty of existing states. The various docs supporting the existence of a people’s right to self-determ also contain parallel stmts supportive of the conclusion that the exercise of such a right must be sufficiently *limited* to prevent threats to an existing state’s territorial integrity or the stability of relations between sovereign states. (*Decl on Friendly Relations, Vienna Declaration, Declaration on the Occasion of the Fiftieth Anniversary of the UN*)

3. CREATION & ASCERTAINMENT OF IL

# SOURCES OF LAW

## Starting point: Art 38 of the ICJ Statute

#### Article 38 of the Statute of the ICJ - often cited as an authoritative enumeration of the sources of IL

The Court is directed to apply:

1. Three sources (*no hierarchy among them*) – **hard law (*lex lata*)**

a. international **conventions** ***[38(1)(a)]*** establishing rules expressly recognized by the contesting states.

b. international **custom**: ***[38(1)(b)]*** as evidence of a general practice accepted as law.

c. **general principles of law** recognized by civilized nations: ***[38(1)(c)]***

(At that stage, the idea was that any legal system would have developed some standard of fairness, etc.) There was much debate around this category, because some wanted to include under general principles the law of nature “of civilized nations” – there was an attempt to limit this area of law.

2. Subsidiary means of determining rules of law ***[38(1)(d)]***

**a**. **Judicial Decisions**:

1. ICJ Decisions have no binding force except as between the parties: ***ICJ St Art 59****.*

(Intl law does not necessarily operate with the “like cases shall be decided alike” principle – part of the reason is that each situation is so specific to the circumstances, and you cannot uphold this principle meaningfully in IL)

2. However, the Court strives to maintain “jurisprudential consistency.”

3. Their decisions can be very persuasive, but level of persuasiveness varies.

**b. Writings of "most highly qualified publicists"** (incl legal commentaries)

1. Scholarly writings are recognized as equivalent to judicial decisions in the *ICJ Statute*, but in practical terms do not carry the same weight.
2. In the early period of the development of international law, the writings of publicists played extremely influential role. (e.g. Grotius, Vattel).

3. Decide a case *ex aequo et bono* (“in justice and fairness”, or “according to what is just and good*”)* at the request of the parties***: [38(2)]***

(This has never been used) – The idea was that the ICJ would never say “we don’t have jurisdiction” and that parties could request outcome. But countries are unlikely to try this – more likely to appoint some sort of commission

*Statute of the ICJ* reflects a **distinction between law-creating and law-determining** processes.

* States create law --- Other entities/bodies play a role in determining what the rules of law are.
* **The rule of law binding on states emanate from their own free will** as expressed in conventions or usages (***Steamship Lotus, (1927) PCIJ***)

**Relationship between the different sources**

1. No hierarchy between the three sources.
2. Tendency is to minimize the conflict between sources; **if there is a clear inconsistency**, a more recent norm will prevail over an earlier norm (***lex posterior*)** and/or a more specific norm will prevail over a general norm (***lex specialis*)**
3. **The same principle may exist simultaneously in custom and treaty**

a. Treaties often codify customary law (e.g. *VCLT*)

b. Treaty codification process does not destroy customary norm.

c. [Treaties may lay down an aspirational norm and lead to the development of custom]

* In ***Nicaragua v US (ICJ)*** – the Court held that **despite the US’ reservation to *Art 2(4) of the UN Charter***, the prohibition on the use of force exists in customary law as well, and so they **can make a decision based on the US’ customary law obligations**.

## Soft Law (not included in Article 38)

**Distinction between hard law and soft law**

1. **Rules that emanate from law-creating processes listed in Article 38 are sometimes referred to as “hard law”** (or ***lex lata***- law as it is.)
   1. ***Lex ferenda:*** In contrast, the term ***lex ferenda*** (**law as it ought to be**) refers to norms that have not yet attained the status of settled law.
      1. *Lex ferenda* is a **useful term for recognizing the fluidity and dynamic of international law in the formation of custom**. It is not the same as the term “soft law”.
   2. **SOFT LAW:** The term **“soft law”** is used to describe instruments that are not legally binding per se, though they can be influential in the conduct of international relations by states and may also lead to the development of new international law.
      1. These instruments can be very significant/important, and states treat them as important!
         1. eg *Helsinki Accords*
         2. eg *OECD Guidelines for Multinational Enterprises*
         3. eg *United Nations Declaration on the Rights of Indigenous Peoples*

## *Jus Cogens* (not included in Article 38)

1. *Jus cogens* are the peremptory norms of international law.
   1. A peremptory norm is defined in the ***VCLT Art. 53*** as one “accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.”
   2. States can affect the development of even *jus cogens* norms provided there is sufficient state practice etc.
   3. Cannot be changed except by a subsequent norm of a similar character
2. **Some uncertainty about what may belong in this category:**
   1. Norms of fundamental importance to international order, e.g. prohibition on the use of force as in *UN Charter art* 2.
   2. Norms that may be regarded as necessary elements for the existence and operation of the intl legal system, e.g. *pacta* *sunt* *servanda*, the principle that treaty obligations are binding.
   3. Norms that have become so widely and deeply imbedded in international law that they may be regarded as inviolable, e.g. freedom of the high seas.
   4. Norms that protect fundamental aspects of human dignity, e.g. prohibitions against slavery, genocide and torture.

# TREATIES

## Treaties Generally

##### Nature of Treaties

1. **Essential features** (by custom & convention)
   1. **intention** of parties to create binding obligations
   2. **agreement** to be governed by international law
2. Binding force of treaties: ***Pacta sunt servand****a* (agreements shall be observed).
3. Treaties are **generally based on reciprocity of obligs**; (unilateral decl’ns & HR treaties are not)
   1. But **UNILATERAL DECLARATION of intent may create international obligations under unusual circumstances** - high standard articulated by the ICJ in *Nuclear Test Cases*.
      1. Canada and other states have indicated that unilateral declarations of policy or intention should not normally be construed as giving rise to international obligations.

#### Nuclear Test Cases (Australia v France; New Zealand v France) [1974] ICJ

**ICJ:** The criteria that need to be satisfied for a unilateral declaration to be binding:

* **Be alert to** **the circs** attending the making of the unilateral declaration:
  + History of the dispute – one statement wouldn’t set aside many years of trouble
  + In contrast, in ***Nuclear Tests***, France had been getting a lot of criticism for the nuclear testing. So that can lend support to binding nature of stmt that they would stop nuclear tests.
  + Purposes or potential purposes for making the statement
* **Go through the pieces with the aim to ascertain whether there was an INTENTION TO BE BOUND:**
  + **1. Public statement**
  + **2. Made by a competent authority**
  + **3. Intention to be bound** 
    - Reliance? (part of the circumstances that may go to intention to be bound?)
    - Good faith / trust & confidence tie into reliance as well.
    - “When States make statements by which their freedom of action is to be limited, a restrictive interpretation is called for.” [para 44]
  + **Precise & clear**
    - (If extreme or ridiculous (using hyperbole), less likely that it indicates an intention to be bound because it goes to reliance and good faith)
  + **Freely made**

#### Vienna Convention on the Law of Treaties (VCLT) (1969; in force 1980)

1. = Law-making treaty laying down the fundamental principles of contemporary treaty law
2. Although it doesn’t erase customary law, and some areas were seen as innovations rather than mere codifications, **always** turn here first.
   1. The *VCLT* does not apply retroactively, but in most instances it is codifying custom. Some areas in the treaty are more contentious, so with respect to treaties that were concluded before the VCLT came into force in 1980, you need to look more into custom

3. **When does the vclt apply?? scope:**

1. Applies only to “treaties between states” [Article 1]
2. To be “treaty”, whatever particular designation: [Article 2a]
   1. must be an international agreement concluded between States
   2. must be in written form
   3. must be governed by international law – contextual / look at text itself.
      1. States can opt out of the *VCLT*. However, remember that a rule may exist in more than one source at the same time. You can opt out of custom but you cannot opt out of *jus cogens*. So problems may arise if you opt out of a provision of the treaty that may be *jus cogens* at the same time (e.g. *pacta sunt servanda*)
3. Every state has capacity to conclude treaties [6]
4. Agreements not covered by VCLT—either made with non-state parties (IGOs for example) or made in non-written from – may still be binding IL agreements (treaties).

## Treaty-Making: Conclusion and Entry into Force (113+) *(Part II, VCLT)*

**Conclusion of a treaty**

Formalities of treaty-making required by Convention (see casebook p. 120)

1. State rep must have “full powers” to give consent of his or her state ***[7]***
2. Preliminary matters must be settled; for example, there needs to be agreement upon steps required to express consent to treaty ***[11-16]***

**Ratification**

A. Ratification involves formal confirmation by a State of its agreement to take on binding legal obligations, defined in *Article 2(b)* as “international act... whereby a State establishes on the international plane its consent to be bound by a treaty.”

1. Only necessary where treaty expressly requires it; usually required for multilateral treaties
2. Ratification processes are an **internal constitutional matter** for each country and frequently differ between countries. In Canada, ratification is exercised by the Executive – no req. for Parl. approval

**Publication and registration**

***Article 80*** ***of VCLT*** and ***Article 102 of UN Charter*** both require that international agreements be registered with the U.N. Secretariat.

**Entry into force – not a terribly controversial part of the VCLT**

A. The time at which the treaty has binding legal effect **depends on intention** of the parties. Failing such agreement, enters into force as soon as consent to be bound by the treaty has been established for all negotiating states. ***[24]*** E.g.:

1. on ratification or some time thereafter

2. on signature if ratification is unnecessary

3. exchange of notes: date of second note

4. multilateral treaty: date of certain number of ratifications (usually after the passage of some period of time)

B. Exceptionally, parties may indicate treaty may operate provisionally prior to entry into force or retroactively ***[25, 28]*** (retroactivity is the exception in IL)

1. A state that has expressed its consent to be bound by a treaty is obliged to refrain from acts which would defeat the object and purpose of the treaty. ***[18]***

* E.g. When US signed *Rome Statute for ICC*, they felt that the members of its armed forces could be targeted by political prosecutions, so after having signed under some pressure, they started to go into a process of negotiating bilateral agreements with other states that they would not turn over US military personnel to ICC… saying that if they didn’t, they would withdraw aid or other assistance. US withdrew signature, the assumption was that they did so because they didn’t want allegations made that they were acting in a manner inconsistent with the object and purpose of the treaty.

**RESERVATIONS – (balancing act between state consent and flexibility) – CONTROVERSIAL**

**Shift in law of reservations:** Prior to 1950s, needed unanimous acceptance for a valid reservation. Law has shifted since the *Genocide Reservations case*. Despite the fact that the ILC’s work on reservations in the VCLT involved an element of progressive development, the VCLT provisions on reservations still probably reflects custom now: The default rule is that you can have a reservation without unanimous acceptance as long as it is consistent with the object and purpose of the treaty.

***Reservations to the Convention on Genocide Case, 1951 Adv Op*** (casebook p 124),

* **C: Even if some states object to the reservation, the State that made the reservation is a party to the *GC* if the res is compatible with the object and purpose of the *GC*.**
* **ICJ:** As a matter of principle, no reservation is valid unless it was accepted by all the contracting parties without exception
* However, specifically in the case of the ***Genocide Convention*, more flexible application** of the principle because
  + The **object & purpose** of *GC (*to safeguard existence of certain human groups) imply that it was the intention of the GA that there be **maximum participation**.
  + Not a party if reservation inconsistent with the object and purpose of the treaty
  + A state cannot be bound without its consentand therefore no reservation is effective against any State without its agreement thereto
* The courts decision in this case was **controversial** because the basis of reservations was seen to be consent – Traditionally, all states had to consent if one wanted a reservation. The ICJ normally says what the law ***is***(not what it *should/could be*)
  + ILC said this should not be a state by state thing – should be that if 2/3 of states agree to reservation, you’re in. If not, you’re out. But ICJ did not go that way.
* **The idea of absolute integrity of conventions, requiring unanimity of acceptance before a state making a reservation could be admitted as a contracting party, was losing ground** (the majority of UN members favour greater flexibility).

**DEFINITION:**

Defined ***[2(d)]*** as a “unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving, or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State.”

1. declaration which is external to text of a treaty.

2. “Modify” slightly unclear; always used in sense of **restricting**/**limiting** obligs under treaty

*Distinction between reservations and* ***“interpretative declarations”*** (defined as “a unilateral statement, however phrased or named, made by a State… whereby that State purports to specify or clarify the meaning or scope attributed by the declarant to a treaty or to certain of its provisions.”).

* In a subsequent dispute, interpretive declarations may not be used in interpreting the treaty, but may be used in the subsequent finding of CIL (e.g. UNCJISP in *Jurisdictional Immunities* case)
* These can be controversial, because a state can question why they should be affected by another state’s understanding of meaning from its own national law

**PROCEDURAL REQUIREMENTS:**

* + - 1. **Reservations must be made in writing; and**
      2. **Must be communicated** to the contracting states. ***[23(1)]***

**PERMISSIBILITY: Is the reservation allowed?**:

#### General rule in VCLT is that reservations are allowed unless:

a. Reservations prohibited by the treaty ***[19(a)]***

b. Treaty provides only specified reservations may be made ***[19(b)]***

c. Reservation incompatible with object and purpose of treaty ***[19(c)]***

(*Reservations to the Convention on Genocide Case* test)

* Who determines if the reservation is incompatible with the object and purpose of the treaty?

**OPPOSABILITY**: **Can the reservation be invoked against another state?** (only DEFAULT rules)

#### VCLT gives other states range of options (unless reservations are explicitly allowed).

States can object to reservation, and object to entry into force, or not object to entry into force, or say nothing about entry into force which leaves it to enter into force.

1. If a reservation is expressly authorized by a treaty, it does not require acceptance by other contracting States (i.e. no point in objecting) ***[20(1)]***

2. Reservations to restricted multilateral treaty require acceptance by all parties ***[20(2)];*** reservations to constituent instrument of an intl organization require acceptance by competent organ ***[20(3)]***

3. **In cases not falling under** ***20(1)(2) or (3):***

a. Express or tacit acceptance of a reservation by another contracting State constitutes the reserving State a party to the treaty in relation to that other State if or when the treaty is in force for those States. ***[20(4)(a)]***

(Tacit acceptance assumed if no objection raised within a specified period ***[20(5)]).***

b. An objection to a reservation by another contracting State does not preclude entry into force of the treaty as between the objecting and reserving States unless a contrary intention is definitely expressed by the objecting State. ***[20(4)(b)]***

I.e. onus is on objecting state to proclaim that treaty is not in force as well.

c. **Entry into force:** An act expressing a State’s consent to be bound by the treaty and containing a reservation is effective as soon as at least one other contracting State has accepted the reservation. ***[20(4)(c)]***

**Legal effect of a reservation**

1. If the state accepts the reservation, modifies for the reserving party in its relations with that other party the provisions of the treaty to which the reservation relates to the extent of the reservation ***[21(1)(a)]***

2. Modifies those provisions to the same extent for that other party in its relations with the reserving State ***[21(1)(b)].* (reciprocity)**

3. Does not modify relations between other parties ***[21(2)]***

4. **When a state objecting to a reservation has not opposed entry into force of the treaty as between itself and the reserving state, provisions to which the reservation relates do not apply as between the two states to the extent of the reservation**. ***[21(3)]***

* **This has the same practical outcome as when a state accepts a reservation. Either way, the reserving state is not bound by the respective provision in the treaty.**
* **Debate**: Some observers say the unmodified treaty provision should apply. Others say no, because of the idea of “consent” – reserving sates should only take on obligations as modified by the treaty. Should the integrity of the treaty override the idea of consent?

You can see why many treaties simply say no reservations. It causes problems. How do you know when a treaty has entered into force, if some states have entered reservations and the others have opposed? No definitive answer on whether it is contrary to object and purpose of treaty, etc.

## Application and Interpretation of Treaties *(Part III, VCLT)*

***Pacta Sunt Servanda***

A. General rule regarding legal effect: **parties to a treaty must perform it in good faith** ***[Art. 26]***

B. **Internal law is no justification** for failure to perform a treaty ***[Art. 27]***

--**Subject to** ***Article 46*** (invalidity due to violation of internal law regarding competence to conclude treaties), but invocation of the latter is itself subject to strict standard.

C. Default rule – treaties are non-retroactive ***(Art. 28)***

**Third states (i.e. states not parties to a treaty)**

A. ***At customary law***: **rights or obligations for third states not lightly presumed**; intent must be clear, and consent required on the part of the state.

See ***Free Zones Case*** (1932: PCIJ)***,*** p. 131:   
“The question of the existence of a right acquired under an instrument drawn between other states is therefore one to be decided in each particular case: it must be ascertained whether the states which have stipulated in favour of a third state meant to create for that state an actual right which the latter has accepted as such.”

B. ***VCLT***: **No imposition/grant of rights or obligations for third state without consent** [***Art. 34].***

**Subject to** ***Articles 35-37*** (possible exceptions) and ***Art. 38*** (rules re: customary law).

1. **Obligations** in third parties ***[Art. 35]* 🡪 Consent is required**

* 1. Parties must intend to establish obligation
  2. Third party must accept in writing

2. **Rights** in third parties ***[Art. 36]* 🡪 Consent assumed unless contradicted**

1. Parties must intend to establish right [***36(1)];*** may exist for one state, a group of states or all states.
2. Assent assumed unless contradicted ***[36(1)]***
3. Treaty may require explicit assent [***36(1)]***
4. Third state shall comply w/ conditions for exercise of right ***[36(2)]***

3. VCLT does not preclude treaty from becoming binding upon third State as CIL ***[38]***

**Interpretation of Treaties**

A. Theoretical approaches to interpretation

1. **Three major schools of thought**, (described on p. 135):

a “Objective” or “textual” approach: focus on “ordinary meaning” of treaty language

b. “Subjective” approach (or intentions / founding fathers approach): look to intention of the parties in entering into the treaty

c. “Teleological” approach: look to object and purpose of the treaty (presumably going beyond what parties may have intended)

2. Major differences revolve around issue of what material is brought into interpretation process; second and third approaches involve looking to extrinsic evidence including past treaties, past practice, *travaux préparatoires* (preparatory work of a treaty)

B. ***At customary law*, general preference for “objective” approach**: treaty strictly construed according to the ordinary meaning of the language.

* Good example of this is found in the ***Interpretation of Peace Treaties Case* (1950: ICJ**), (see p. 132-134). Classic statement of the Court’s role: **“It is the duty of the Court to interpret the Treaties, not to revise them.**”
  + There is no doubt they are acting in a manner inconsistent with their treaty obligations by refusing to name a representative, but that does not justify stepping outside the *plain language* of the treaty, which says that the Sec Gen can only step in to name a Third Commissioner when the parties don’t agree. Even though this may be a preferable outcome, this does not justify stepping outside the plain language of the treaty.

C. ***VCLT approach*** **to treaty interpretation**

1. General rule in ***31(1):*** a treaty **to be interpreted in good faith in accordance with the ordinary meaning** to be given to its terms **in their context** and **in the light of the treaty’s object and purpose.**

1. One scholar has said that the approach is not to attempt to describe process of interp. itself “but rather assess relative value or weight to be attributed to materials.”

2. **Look to** (more or less in this order):

a. ***Ordinary meaning***: Certain customary law presumptions presumably still apply—e.g. meaning at time of formulation (intertemporal principle).

b. ***Special meaning*** ***[31(4)]***

i. Special meaning for a term if parties so intended

ii. Burden of proof lies with party seeking to invoke special meaning

c. ***Context***: always focusing on agreement itself

i. The entire agreement: text, preamble and annexes ***[31(2)]***

ii. Agreement relating to treaty made between all parties in connection w/ conclusion of the treaty ***[31(2)(a)]***

iii. Instrumnt made by one or more parties in connxn with conclusion of the treaty & accepted by other parties as an instrument related to the treaty ***[31(2)(b)]***

d. ***Object and purpose***: nature of agreement itself rather than only intention of the parties

e. ***Subsequent agreements and practice***: to be taken into account along with context ***[31(3)]***

i. subsequent agreements between parties regarding interpretation of treaty or application of its provisions

ii. subsequent practice in applying the treaty which establishes agreement of parties regarding its interpretation

f. ***Relevant rules of international law*** applicable in relations between the parties. ***[31(3)]***

g. ***Supplementary means*** (including *travaux préparatoires*)—can be used in order to **confirm** the meaning resulting from application of ***Article 31***, **OR** to **determine** meaning when the interpretation according to ***Article 31*** either:

i. leaves the meaning ambiguous or obscure ***[32(a)];*** or

ii. leads to a result which is manifestly absurd or unreasonable ***[32(b)]***

## Amendment and Modification *(Part IV)*

Generally: in the area of modification and amendment of treaties, ***the provisions in Part IV of the VCLT—Articles 39-41—represent a departure from the traditional customary law rule*** that a treaty may not be changed without the consent of all the parties.

**Amendment:** formal agreement of a treaty intended to alter its provisions with respect to all the parties.

1. General rule is that treaty may be amended by agreement between parties ***(Article 39);*** same article also provides that rules in Part II concerning conclusion and entry into force of treaties apply to amending agreements unless treaty itself provides otherwise.

2. Default rules regarding amending of multilateral treaties are found in ***Article 40.*** You should note in particular:

a. Basic requirement of notification to all contracting States, any and all of which are entitled to participate in negotiation/conclusion of any amending agreement.

b. Amending agreement does is not binding on parties to the original agreement who do not become parties to the amending agreement.

3. In sum: parties may unanimously agree to amend ***[39];*** if one party does not agree:

a. Other parties may amend as between themselves

b. Treaty continues as before with party disagreeing ***[40(4)]***

c. Amendments may not prejudice existing rights and obligations of dissenters ***[41]***

d. State becoming party after amendment is party to amended treaty, and to non-amended treaty with regard to dissenters ***[40(5)]***

**Modification**: agreement between certain parties intended to alter certain provs btwn themselves alone.

***Article 41*** sets out **when modification of multilateral treaty allowed** between 2 or more parties:

1 Modification must not be prohibited by the treaty

2 Rights & obligations of other parties must not be affected

3 Must be compatible with object and purpose of the treaty as a whole.

## Invalidity, Termination and Suspension of the Operation of Treaties *(Part V)*

A. Generally—validity of a treaty may not be impeached except by the application of the VCLT, and **termination, denunciation or withdrawal from a treaty takes place only in accordance with the treaty itself or provisions of VCLT*. [Art. 42]***

B. Keep in mind ***Part V of VCLT*** is controversial—runs counter to fundamental norm of *pacta sunt servanda*. (by allowing states wiggle room to escape from commitments - Western states especially very skeptical of the idea that *jus cogens* would invalidate a treaty… because of its effect on hard-fought agreements and the stability of treaties)

**Invalidity of Treaties**

A. “Invalidity of a treaty” is used to cover both situations where, by virtue of VCLT, a treaty is rendered **void *ab initio*** and those situations where it is **voidable** (State entitled to invoke a particular ground as invalidating its consent to be bound by the treaty).

B. ***Articles 46-50***: grounds which a State may invoke as invalidating its consent to be bound by a treaty (grounds that make the treaty **voidable**).

1. ***46:*** **manifest violation of provision of internal law concerning competence to conclude treaties** (note that provision must be a rule of “fundamental importance.”)

2. ***47:*** **restriction on authority to express the consent of the State** (which was notified to other negotiating States prior to the expression of consent)

3. ***48:*** **error**

4. ***49:*** **fraud**

5. ***50:*** **corruption of a representative of a State** by another negotiating state

C. ***Articles 51-53:*** These three could be said to be offences against public policy—concept of absolute nullity denies legal effect to any treaty procured or concluded by such means or in defiance of such a norm (grounds that render the treaty **void *ab initio***).

1. ***Article 51:*** expression of State’s consent to be bound by a Treaty procured by **coercion** **of its representative.**

2. ***Articles 52:*** **coercion of a state by threat or use of force**

3. ***Article 53:*** **conflict with a norm of *jus cogens***.

**Termination and suspension**

Generally, termination/suspension as a result of:

1. **The terms of the treaty itself** ***[54/57]***
   1. Termination usually results from application of the treaty’s own provisions. Wide variety of arrangements, (eg supposed to be for fixed term or terminate at particular point)
   2. Under the ***VCLT***, **if a treaty does not address denunciation or withdrawal, it is not subject to denunciation or withdrawal unless**:
      1. It is established that parties intended to admit the possibility ***[56(1)(a)]***
      2. Right of withdrawal may be implied from nature of treaty ***[56(1)(b)]***
      3. If either of these cases, w/d must be on at least 12 months’ notice ***[56(2)]***
2. **Consent of the parties** ***[54/57]***
   1. May be terminated/suspended **by consent** of all the parties after consultation with the other contracting States (***Art. 54/57*** wrt termination/suspension).
   2. TACIT termination if all parties conclude a **later treaty relating to same subject matter** and it appears the parties intended the matter should be governed by that treaty, or is so far incompatible with earlier one that cannot be applied at the same time. ***[Art. 59]***
      1. Must consider the effect of ***Article 30*** (“Application of successive treaties relating to the same subject matter”) – when not terminated or suspended under art 59, and all parties to earlier treaty are also parties to a later treaty relating to the same subject matter, earlier applies only to extent of compatibility with later one.
   3. ***Art. 58*** – Two or more parties to a multilateral treaty can agree to suspend operation temporarily between themselves if (a) provided for by treaty; or (b) not prohibited by treaty *and* does not affect rights and obligations of others *and* is not incompatible with the object and purpose.
3. **Operation of general rules of international law - CONTROVERSIAL**

Note high standard for terminating treaty, on basis of *pacta*!! ***Gabcikovo-Nagymoros***

**[ICJ prefers termination or suspension by agreement.]**

**Note: The articles below are controversial because they are unilateral:**

1. **Material Breach:** violation of a provision essential to the object or purpose of the treaty ***[60]***
2. **Definition:** Material breach is
   1. A repudiation of the treaty not sanctioned by the Convention ***[60(3)(a)],*** **or**
   2. Violation of a provision essential to the object or purpose of the treaty ***[60(3)(b)]***
3. **Effects of material breach**
   1. Bilateral treaty: material breach by a party entitles other to terminate or suspend treaty in whole or in part ***[60(1)]***
   2. Multilateral treaty: material breach by one of the parties entitles:
      1. Other parties by unanimous agreement suspend the treaty between
         1. themselves & defaulter ***[60(2)(a)(i)]***
         2. all parties ***[60(2)(a)(ii)]***
      2. A party specially affected by breach to suspend treaty between itself and the defaulter ***[60(2)(b)]***
      3. Any party to suspend the treaty with regard to itself if the breach radically changes the position of every party ***[60(2)(c)]***
4. Without prejudice to treaty provisions regarding breach ***[60(4)]***
5. \*No termination for breach of provisions relating to protection of the human person in treaties of humanitarian character ***[60(5)]***
   1. This is seen as reflecting ***customary*** rule re: breach of treaty protecting human person, mentioned by ICJ in ***1971 Namibia Case***)
6. **Supervening impossibility of performance**: destruction / disappearance of indispensable object (must make performance *impossible*) ***[Art. 61]***
7. Impossibility of performance may be invoked to:
   1. terminate treaty if it results from permanent destruction or disappearance of an object essential for execution ***[61(1)]***
   2. suspend treaty if the impossibility is temporary ***[61(1)]***
8. Impossibility may not be invoked if the impossibility is the result of a breach by that party ***[60(2)]***
9. **Fundamental change of circs** **(*rebus sic stantibus*):** (extraordinarily high std!) ***[62]***
10. Fundamental change in circumstances may **not** be invoked unless
    1. the circumstances were an essential basis of the parties to be bound to the treaty ***[62(1)(a)],*** ***and***
    2. the change radically transforms the obligations still to be performed under the treaty ***[62(1)(b)]***
11. Fundamental change may not be invoked where
    1. The treaty establishes a boundary ***[62(2)(a)]***
    2. Fundamental change in question is the result of breach by the party seeking to invoke it ***[62(2)(b)]***
12. Fundamental change is also a ground for suspending a treaty ***[62(3)]***
13. Difficult argument to make; high standard.

d. **Emergence of a new peremptory norm** that conflicts with the treaty ***[Art. 64]***

Note that a multilateral treaty does **not terminate due to number of parties falling below** ratification point, unless treaty otherwise provides ***[55]***

Also note that even if established, a state of necessity is not a ground for terminating a treaty, but to exonerate a state from Responsibility who has failed to implement a treaty. As soon as the state of necessity ceases to exist, the duty to comply with treaty obligations revivies. ***[Gabcikovo Nagymoros]***

**Consequences of the Invalidity, Termination or Suspension of the Operation of Treaties**

A. **Consequences of invalidity**

1 **Generally**: Invalid treaty is void ***[69(1)]***

a. Parties may require other parties to establish previous position ***[69(2)(a)]***

b. Acts in good faith before invalidity invoked are not rendered unlawful ***[69(2)(b)]***

2. Consequences of invalidity due to **original conflict with *peremptory norm*** ***[71(1)]***

i. Parties shall eliminate consequences of acts in conflict with *jus cogens* ***[71(1)(a)]***

ii. Bring mutual relations into conformity with the peremptory norm ***[71(1)(b)]***

B. **Consequences of termination**: unless the treaty otherwise provides or the parties otherwise agree:

1. **Generally**: Terminated treaty:

a. releases the parties from any further obligation to perform the treaty. ***[70(1)(a)]***

b. Termination does not affect any right, obligation, or legal situation of the parties created through the execution of the treaty prior to its termination ***[70(1)(b)]***

2. Treaty becomes void and terminates **through new peremptory norm** ***[71(2)]***

i. Releases parties from obligation to perform treaty ***[71(2)(a)]***

ii. Does not affect rights created through the execution of the treaty prior to termination if they do not conflict with *jus cogens* ***[71(2)(b)]***

# CUSTOMARY INTERNATIONAL LAW

## Requirements of Customary Law

1. **Consistent & general** **practice** among states (objective element)

2. **Acceptance as law** by states: *opinio* *juris* (subjective element)

**1. State practice**

1. Need not take place over a long period of time; short period may be offset by uniformity of practice (***North Sea***).

1. Practice need not be universal (***Fisheries Judgment*, ICJ 1951**), but should represent majority of states, and certainly the great majority of interested or particularly affected states (***North Sea***–majority of states with coast lines of more interest than landlocked states)
2. Similarly, while practice must be consistent, it need not be completely uniform.

***Nicaragua* case**, ICJ noted: “The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule. In order to deduce the existence of customary rules, the Court deems it sufficient that **the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of the rule, not as indications of the recognition of a new rule.”** (p. 163)

* How breaches are treated – condemned by other states / accepted as status quo / attempt to justify, etc. (eg *Nicaragua* – States use force all the time, but when they do, they try to justify it)

4. **Evidence of state practice:** actions of state officials and organs. Some examples:

a. executive actions

b. legislation

c. judicial actions

d. enforcement actions

**2. *Opinio juris***

1. **Generally accepted view: High standard:** ***North Sea Continental Shelf Cases***: State must intend to ‘obey’ principle as custom, not merely be doing it for the sake of convenience (must be legal obligation involved)

2. **Dissents in *North Sea Continental Shelf Cases* support a Lower standard:** If too high a threshold, will prevent the establishment of norms as custom.

a. Judge Tanaka: Rather than seek evidence as to the subjective motives for each example of State practice, just need to look at practice. 🡪 *Very extreme stance. Not such a mainstream view.*

b. Judge Sorensen: **A sufficient density of state** **practice should create a** ***presumption*** **of *opinio* *juris*:** (cites Sir Hersch Lauterpacht, 1958).

1. **It appears that some organizations have adopted Sorensen’s view**
   1. **ICRC**’s codification of IHL applied “sufficient density of state practice” approach.
   2. **ILA** (Intl Law Association) – which has no legal personality as contrasted with the ILC) – has adopted a position that Sorensen was correct in its final report on the formation of CIL (a sufficient density of state practice could inf act suffice to establish a customary norm)
2. **Will be crucial to see how the ILC deals with *opinio juris* in its study of CIL.**

3. **Evidence of *opinio* *juris*:** all indications of the attitudes of states vis-à-vis their practices.

a. May be found/reflected in all aspects of state practice mentioned above

b. Statements made by govt officials (Heads of State, Heads of Government, government ministers)

c. In certain circumstances, stance taken within intl organizations (e.g. voting on GA Resolutions).

## Development of Custom from Treaties

North Sea Continental Shelf Cases

**F:** Because of configuration of coastline, Den & Neth argued for equidistant principle, which would leave the Fed Republic of Germany with a pie-shaped portion of the continental shelf (not an equitable portion). Den/Neth argued that the *1958 Geneva Convention* crystallized the equidistance principle as a customary norm at the time of its adoption (that it achieved the level of acceptance required).

***A norm embodied in a treaty can be said to form part of CIL in the following 4 cases:***

**1. Treaty expressly embodies existing customary norm**; or

**2. Process of definition and consolidation during treaty preparation/negotiation crystallizes the doctrine as custom**; or

a. Denmark/Netherlands: Argued that the work of the International Law Commission and the Conference crystallized equidistance rule into customary law at adoption of 1958 Convention.

b. ICJ makes no pronouncement as to validity of this contention as a general matter.

c. However, it does not apply in this case because:

i. The ILC proposed the delimitation rule with considerable hesitation (at most *de lege ferenda* and not *de lege lata* – the laws that ought to be, not the laws that is); **and**

ii. States can explicitly make reservations with regard to the delimitation provision.

**3. Customary rule comes into being as a result of widespread acceptance of Convention**

*[This is conceptually troubling for some, because it says we can go beyond the states that have actually consented to the treaty. Part of the reason for this is that custom does not require unanimity, but widespread practice]*

a. Process is one of the recognized methods by which new customary rules are formed.

**b. Requirements would be:**

i. The provision is of a **fundamentally norm-creating character** (ie primary, not secondary obligation; not one that has significant amounts of waffle room (ie by allowing reservations on the matter) – this is a matter of interpretation in part)**; and**

* + **A:** Not the case here because:
    - Secondary obligation: Primary obligation in *1958 GC* is to effect delimitation by agmt (Only in absence of agmt, should be resolved by equidistance principle
    - If there are special circumstances the equidistance method need not be used.
    - It is explicitly possible to make reservations with regard to Article 6.

ii. There is **widespread and representative participation** in Convention **including States whose interests are specially affected.**

* + **A**: Not, the case here, because no. of ratifications, though respectable, is hardly sufficient.
  + “That non-ratification may sometimes be due to factors other than active disapproval of the convention… can hardly constitute a basis on which positive acceptance of its principles can be implied.” (para. 73, p. 155)

**4. Customary rule comes into being because of subsequent state practice.**

a. Passage of short period of time since convention does not preclude this.

b. **Requirements:**

i. State practice is **extensive and virtually uniform** (not absolutely but close)**; and**

* + Note: ***Baxter paradox*:** When you have a lot of states participating in a treaty, you have less and less states to provide state practice foundation
  + Note: **“extensive and virtually uniform” seems to be a higher standard that “general and consistent”** state practice that is generally invoked. If the court intended that, it seems to have good reason: **Where there is a big treaty and lots of states have signed on, it should be possible for states who choose not to sign on and follow the rules to express their disagreement with respect to a rule of custom**.

ii. There is **general recognition that a legal obligation is involved**.

b. **A:**

i. 15 examples of application of the equidistance principle may be sufficient

ii. BUT there is no evidence that states felt compelled to draw their boundaries in accordance with this principle; i.e. that the States concerned believed they were applying a mandatory rule of customary law.

## The Problem of the Persistent Objector

1. The general rule is that custom binds all States regardless of whether they participated in the formation of the norm; seemingly inconsistent with fundamental notion of State consent.
2. However, there is an exception that preserves the appearance of consent: **a State or number of States may “opt out” of a customary norm if it openly and consistently objects to the application of the norm throughout the period of its crystallization into custom.**
3. Recognized by the ICJ in Anglo-Norwegian Fisheries Case (‘51) (Quoted in Sorensen’s dissent in N Sea)

## Regional or special customary law

A. Possibility of there being regional or special custom recognized by ICJ in ***Right of Passage Over Indian Territory Case* (1960)**: “no reason why long continued practice between two States accepted by them as regulating their relations should not form the basis of mutual rights and obligations.” (p. 165)

B. However, appears to be **subject to a high standard of proof** (***Asylum Case* ICJ 1950**). In contrast to general custom, regional or special custom appears to require consent from **all parties!!!**

# GENERAL PRINCIPLES OF LAW

## A. Municipal law generally

1. Municipal law provisions are the source of “policy & principles”. **Should look at justifications for particular provisions of municipal law and inquire as to whether such reasoning is applicable within the international context.**

2. *International Status of South West Africa Case* (separate opinion of Sr Arnold McNair): Use of general principles of law to determine meaning of “sacred trust of civilization.” Points out that they are dealing with “new legal institution,” object and terminology of which are reminiscent of private law rules and institutions. Private law rules are obviously relevant BUT cannot be simply imported into international law “lock, stock and barrel.”

## B. Equity

1. Nature and legal basis

a. **Means general principles of justice**, as distinguished from common law notions of equity.

b. **Included in "general principles of law"**

***Diversion of Water from the Meuse Case* (1937: PCIJ)** (Separate opinion of J Hudson): the principles of equity have been considered to constitute a part of international law; “sharp division between law and equity should find no place in international jurisprudence.” (p. 171) – [what they were applying there was basically the clean hands doctrine]

**2. Principles of equity can be used internationally to:**

a. **adapt law to a particular case:** *intra legem*:

Court may choose **interpretation** which most accords with equity:

***Continental Shelf* *(Tunisia v. Libya)* (1982: ICJ):** the legal concept of equity is a general principle directly applicable as law. In applying international law, the court may choose from among several possible interpretations that interpretation which accords with equity.

b. **fill in gaps in the law**: *praeter legem*:

***e.g.: North Sea Cont’l Shelf Cases***: In the **absence of a mandatory rule** of CIL, the **parties were directed to effect the delimitation in accordance with equitable principles.**

c. Verify a result by resort to equitable principles **: (*Gulf of Maine Case* (1984: ICJ))**

**3**. Principles of equity **cannot** **be a reason to refuse to apply an unjust law**: *contra legem*

**4.** Court need not be making decision *ex aequo et bono* to apply equity **(*N Sea Cont’l Shelf Cases*)**

# OTHER SOURCES

## Law-making through International Organizations

**A. International Law Commission**

1. Created by General Assembly in 1947 pursuant to powers granted in *Charter Article 13(1)(a),* which authorizes General Assembly to initiate studies and make recommendations for the purpose of “encouraging **progressive** **development** and **codification** of international law.”

2. Influence

a. Has no law-making power per se; law-determining and recommendatory functions.

b. Degree of influence tends to vary according to subject matter; but in some instances highly influential (e.g. work on law of treaties leading up to *Vienna Convention*)

c. **Alternative (minority) view**: is that the ILC may be responsible for a new kind of IL:

*North Sea Continental Shelf Cases* (Judge Ad Hoc Sorensen dissenting): it is necessary to take account of the fact that the Geneva Convention on the Continental Shelf arose out of UN work of codification and progressive development under Art. 13 of the Charter. “[A] convention adopted as part of the combined process of codification and progressive development may well constitute, or come to constitute, the decisive evidence of generally accepted new rules of international law… The word ‘custom,’ with its traditional connotations, may not even be an adequate expression for the purpose of describing this particular source of law.” (p. 162)

**B. Resolutions of the General Assembly**

1. Legal effect is not great per se

a. Binding power over budgetary and administrative matters [17].

b. All other matters, power limited to making recommendations [10-16]. And even that power is limited if the situation is one in which the Security Council is exercising its powers under the Charter [Article 12].

2. **BUT can be means of determining what the law is; has evidentiary value re: State intentions.**

a. e.g. In ***Western Sahara Case***, ICJ made extensive use of GA resolutions in course of establishing and applying the principle of self-determination of peoples.

b. **Repeated resolutions** **may be evidence of *opinio* *juris***:

***Nicaragua (1986, ICJ****)* saying GA resolutions are very important: The *opinio juris* as to the binding character of the abstention from the use of force

“The effect of consent to the text of such resolutions… may be understood as an acceptance of the validity of the rule… declared by the resolution by themselves. The principle of non-use of force, for example, may thus be regarded as [CIL].”

**But see more cautious stmt in *Legality of Threat or Use of Nuclear Weapons* (1996 ICJ):**

“The Court notes that [GA] resolutions, even if they are not binding, may sometimes have normative value. **They can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio* *juris*. To establish whether this is true of a given General Assembly resolution, it is necessary to look at its content and the conditions of its adoption**; it is also necessary to see whether an *opinio* *juris* exists as to its normative character. Or a series of resolutions may show the gradual evolution of the *opinio juris* required for the establishment of a new rule.” (Para. 70, p. 178)

b. Some have argued that a unanimous resolution may create instant customary law if it reflects *opinio juris* **and** there is the requisite state practice.

c. The view of developed States has tended to be that resolutions do not create international law, but may contribute to its evolution.

**3. Law-determining & progressive development value—at least in some contexts, e.g. interpretations of the Charter—is undisputed.**

**C. Security Council Resolutions**

1. **Binding on all Member States of the UN**: under Article 25, Members “agree to accept and carry out the decisions of the SC in accordance with the present Charter.”
2. How to determine whether a resolution is binding:

***Namibia*** ***case:*** “The language of a resolution of the Security Council should be carefully analyzed before a conclusion can be made as to its binding effect. In view of the nature of the power under Article 25, whether they have been in fact exercised is to be determined in each case, having regard to the terms of the resolution to be interpreted, the discussion leading to it, the Charter provisions invoked and, in general, all circumstances that might assist in determining the legal consequences of the resolution of the Security Council.” (para. 114, p. 52)

1. Phrase “in accordance with the present Charter” appears to limit the SC's general “law-making” power. However, more recently the Security Council has used broad “thematic” resolutions such as SCR 1325 on Women, Peace and Security which, *inter alia*:

* ***Urges*** Member States to ensure increased representation of women at all decision-making levels in national, regional and international institutions and mechanisms for the prevention, management, and resolution of conflict.

According to Edward Luck,

“The Council’s thematic resolutions and, more often, Presidential statements, have provided it, as well as the UN’s larger membership, with sort of a normative compass to guide their exploration of new substantive territory. At the same time, however, the Council’s excursion into what could reasonably be characterized as norm building or codification of legal standards has raised legitimate questions about trespassing on territory reserved for the General Assembly or other larger, more representative bodies.”

(Edward C. Luck, *UN Security Council: Practice and Promise,* 2006, p. 131)

**D. International Organizations generally:** In accordance with the general rules regarding international legal personality, must look to mandate/constitution of the organization to determine its authority (on that subject and over those parties, and in terms of persuasiveness).

4. INTER-STATE RELATIONS

# STATE SUCCESSION

**Not the same as state CONTINUITY**: State continues to exist whatever changes in its internal gov occur.

* **Changes in gov, regardless of their character, do not affect the intl responsibilities of the state**

***Tinoco Arbitration - GB v Costa Rica (1923) RIAA***

* + - **F:** Revolutionary change of gov in Costa Rica. Complicated by fact that Tinoco actually went so far as to hold elections and proclaim a new constitution.
    - GB brought claim on behalf of its nationals, arguing that the Tinoco regime was *de facto* and *de jure* gov of Costa Rica for substantial period during which no other gov to challenge its auth. Succeeding gov could not avoid responsibilities for acts of T. regime.
    - CR invoked internal law to argue that obligations undertaken by T. regime were void
    - **Arbitrator** cited scholars**:** “Though the gov changes, the nation remainds, with rights and obligations unimpaired...”; “The legality or constitutional legitimacy of a *de facto* gov is without importance internationally so far as the matter of representing the state is concerned.”
* **Justification: Predictability, certainty, clarity**: A presumption regarding the validity of the acts of *de facto* governments serves the useful purpose of minimizing the instability caused by frequent changes in government. **But should this still hold?**

**State SUCCESSION concerns the legal consequences that follow when one state replaces another**, e.g.:

1. Total or partial absorption of one state by another (e.g. former German Democratic Republic was absorbed into the Federal Republic of Germany)

2. Independence of one state from another (e.g. Timor-Leste from Indonesia)

3. Dismemberment of existing state (existing state breaks apart) (e.g. former Yugoslavia becoming known as Serbia and Montenegro).

**Succession to:**

* + - 1. **Legal Obligations**
         1. **Customary law**: binds new states
         2. **Treaty law**:

**In practice**, issue tends to be dealt with through negotiation prior to sep/ indep. If not, *VCSSRT* for states that have signed on, & default rule of *tabula rasa* for others.

**Default rule: *tabula rasa*** – state starts out with a “clean slate”

Exceptions: boundary treaties & treaties concerning partic parts of territory

***Vienna Convention on Success of States in Respect of Treaties*** – 22 parties

In some areas it does codify custom: e.g. def of succession of states as replacement of one State by another in the resp for the IR of the territory

Intl community took little interest, perhaps because ILC erred too much on side of progressive development of law instead of pure codification.

**Acute controversy regarding Art 34 (p 95) which provides that when a new state comes into existence through separation, it is bound by all treaties in force for its predecessor. –** *Art 34* does not codify custom.

* + - 1. **Public Property:** Devolves to new state
      2. **Debts**:
         1. Localized debts – new sovereign takes on in full
         2. National debts – no clear rule at international law

# RECOGNITION

**There is NO ACCEPTED DUTY TO RECOGNIZE**

* But, some scholars have argued states cannot arbitrarily withhold recognition: Whether recognition of a state that has fulfilled the requirements of statehood is a duty or discretion depends on one’s conceptual view of the effect of an act of recognition.
  + Recognitions opens the way to full interstate relations, by bringing into play a whole body of international rules and bolstering the authority of a newly recognized state, as it is acknowledged to hold all the rights at IL of sovereign equal to other (recognizing) states.

**BOTH STATES AND GOVERNMENTS CAN BE RECOGNIZED** (for a long time, was just recognition of govs)

Recognition of States

**The notion that recognition should be extended only to States is called the *Estrada doctrine***, after Mexican diplomat who proposed it.

* *Estrada* was the Mexican government official who said in the 1930s that recognition of governments is an infringement of state sovereignty – allows for arbitrariness and assertion of own political and economic interests under the guise of recognition.
* Mexico said they would henceforth recognize states instead, so this is known by his name.

MOST COUNTRIES recognize STATES ONLY, not governments

CANADA recognized governments up until 1988,

but decided to **switch to recognition of States** because this was the more widespread practice

MOST SCHOLARS would now say recognition is a matter of recognition of states.

Recognition of Governments

a. **Criteria:**

i. Effective control over territory, reasonable prospect of permanency

ii. Political considerations as well; Canadian interests taken into account

b. **Recognition should not be too early**

i. Recognition reserved after coup d'etat until determination of extent and stability of authority of new government

ii. Delay while lawful government has reasonable chance of reasserting authority

**NO SET FORM** for recognition, **but** **intention to recognize must be clear and unambiguous**.

1. **Explicit** recognition, e.g.: Direct communication to head of state; Statement in parliament

2. **Implied** recognition, e.g.: Exchange of diplomatic representatives; Conclusion of bilateral treaty

**X**: Joint participation in a multilateral treaty or an intl organization **does not** amount to recognition.

## Theories of Recognition

**Recognition has both constitutive and declaratory aspects:**

1. Constitutive in that it enables the new state to have full access to the rights and duties of statehood
   1. **Constitutive theory = recognition *creates* personality**
   2. States become subjects by the will of the intl community. Unrecognized states in legal limbo
2. Declaratory in that it recognizes a state that already exists
   1. **Declaratory theory = recognition *acknowledges already-existing personality***of the state
   2. Statehood exists prior to recognition, and so do rights and duties
   3. ***Tinoco* provides strong support for a declaratory theory*:*** Recognition does not create rights & obligations for a state. Simply allows a state to claim those rights or have those obligations enforced against it.
      1. **F:** Costa Rica said how can you not recognize us at the time and then sue us for obligations taken on by regime?
      2. **Arbitration:** All the non-recognition meant was that UK couldn’t bring a claim against CR at the time (procedural hurdle to enforcement of rights and obligations). As soon as the const gov was est’d and GB recognized that gov, UK wasn’t precluded from bringing a claim,

**Disintegration of Yugoslavia** (pp 26-28)

In the midst of the war, Slovenia, Croatia, Bosnia-Herzegovina, and Macedonia sought international recognition as independent states and admitted to UN membership.

The European Community issued *“Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union” (1991)*

1. EC confirms attachment to principle of self-determination, and affirms “readiness to recognize, subject to the normal standards of international practice and the political realities in each case, those new States which... have constituted themselves on a democratic basis, have accepted the appropriate international obligations, and have committed themselves in good faith to a peaceful process and to negotiations.” [p. 26]

2. **Common approach to recognition of these new states requires *inter alia*:**

**a. Respect for rule of law, democracy, human rights**

**b. Respect for the inviolability of all frontiers**

3. Will not recognize entities which are result of aggression

4. Will take account effect of recognition on neighbouring States.

5. Does this represent a new trend in relation to recognition?

*i.e. A trend of* ***recognition based on normative rather than factual criteria*** *– If yes, it could be argued that this takes us in the direction of recognizing new governments rather than states. Recognizing new govs in this way would open up all sorts of difficult and political issues. Perhaps a simpler and better way to deal with it is through IR – e.g. by removing your ambassador or international diplomats.* –Arguably, it is more pragmatic for other states to recognize the STATE but not to recognize illegitimate governments.

6. Should this represent a new trend in relation to recognition?

*Respect for self-determination a good thing perhaps. On the other hand, the introduction of human rights criteria into the determination of recognition of a state allows for more leverage by other states in terms of making the decision based on political objectives*

**Kosovo**

#### Advisory Opinion on Kosovo, ICJ

* **Not a lot of consensus in this area – lots of debate**
* **The ICJ itself seems to see these issues as governed, but not necessarily determined by IL** (ie territorial integrity does not necessarily apply in intra-state relations so does not necessarily forbid secession; right to self-determination does not necessarily give a right to secession)
* The issue of territorial integrity is particularly important (SCC’s *Secession Ref* has been influential)
* The only part where there does seem to be some consensus is the right to secede “only in extreme circumstances” (ie akin to alienation, subjugation, etc, where no right to internal self-determination)

**GA’s question:** Is the unilateral declaration of independence by Kosovo in accordance with international law?

**ICJ: The scope of the principle of TERRITORIAL INTEGRITY is confined to the sphere of relations between states!** [80]

* **Self-determination**: Widely varying views presented regarding the extent of the right to self-determination and the existence of any right of “remedial secession”. (Canada’s *Secession Reference* cited for idea that a right to secede only arises in exceptional circumstances!).
* **Not necessary to determine questions** on self-determ or whether a right to secede arose in Kosovo. [82] Also not necessary to determine whether IL conferred a positive entitlement on Kosovo to unilaterally declare its independence in order to answer whether declaration of independence violated IL. [51, 56]
  + **Not satisfactory** to just answer whether it is illegal but not whether they have a right to do it. Perhaps a signal that the Ct didn’t want to touch it. Perhaps GA’s fault for not posing question in a way that the Ct could give a meaningful response.

Canadian recognition of Kosovo (“Canada Joins International Recognition of Kosovo”, March 18, 2008)

* Recognizes Kosovo “in this context”
  + The development of Kosovo into a democratic, multi-ethnic state that fully respects human rights is essential for peace, political stability and economic progress in the Balkans
* Under the unique circs of Kosovo, the decision does not constitute any kind of precedent. There are some attributes of Kosovo that are unique, but not necessarily so unique compared to other separationist movements such as Catalonia, Quebec, etc.

## International Effects of Recognition

It is **generally assumed that a state has all rights and duties regardless of recognition** (which to a large extent assumes that recognition is declaratory) **BUT non-recognition does impair capacity to pursue rights and duties**. (without intl recognition, a state will be very restricted in what it can do)

**Legal consequences of recognition:** enables a state to access the international community & full range of processes for the protection of its rights. (***Tinoco***)

**Legal consequences of non-recognition** (***Tinoco***)

1. Does not affect capacity for rights & duties

2. State not recognizing cannot bring claim at that time.

3. BUT upon recognition, can bring retroactive claim.

# STATE IMMUNITIES (290-98; s 6.1 of Canada’s SIA; 305; 311-31)

Customary law of Sovereign Immunity(from *jurisdiction*, not from liability)

Jurisprudential basis of immunity:

**SOVEREIGN EQUALITY** of states & notion of **RECIPROCITY**

1. Immunity is seen as the logical outgrowth of the nature of the international system.

2. Is there an implicit assumption that immunity should evolve to reflect changes in that system?

Immunity attaches to:

1. **government**

2. **government organs** (determine whether it is a government organ by looking at functions and control of an entity)

3. **leader of gov, ministers, officials and agents of the state in relation to their official acts**

4. **public corporations independently created but operating in effect as government organs**

5. **state owned property**. (supposed to be immune but there are some questions about that as well)

Immunity from jurisdiction is shrinking: ***Absolute vs restrictive***

1. **Absolute immunity**: any and all acts of the sovereign enjoy immunity from the jurisdiction of courts of another State.

2. **Restrictive immunity** doctrine came out of growth in state commercial activity: Immunity should be enjoyed only for acts of govt’l nature (*jure imperii*) not for commercial acts (*jure gestionis*).

* Found increasing acceptance around the world, although Canadian courts continued to apply absolute immunity.

3. **More recently**, there have been **suggestions that limitations on immunity should extend beyond commercial area to encompass human rights** concerns such as torture.

## CANADA

#### State Immunity Act, RSC 1982 (Canadian)

* Seen as enacting developments in customary international law, partly in response to unwillingness of courts to accept restrictive theory.

**States and state property are immune from jurisdiction** of Cdn cts [3(1)] **except** as provided in the Act:

1. Where a state waives immunity by submitting to the jurisdiction of the court [4(1)]
   1. *Note its property* is still immune from attachment/enforcement. (p 290)
2. **In proceedings relating to commercial activity** [5] (codifying restrictive immunity)
   1. See below – what constitutes a commercial activity? Nature test or Purpose test?

3. In proceedings relating to **death or personal injury *occurring in Canada*** [6(a)]

4. In proceedings relating to damage to or loss of property *occurring in Canada* [6(b)]

5. In proceedings against a (listed) State for its support of terrorism on or after 1 Jan 1985 [6.1 ] (*new)*

BUT NOTE the new exception removes state immunity only when the state in question has been placed on a list established by Cabinet on the basis that there are reasonable grounds to believe that it has supported or currently supports terrorism.

It isn’t the COURT but CABINET (executive) that determines whether there are reasonable grounds to believe a given state has supported terrorism. (Current list: Syria & Iran). **Controversial:**

* Exec branch makes findings of ‘fact’ based on politic. rationale rather than judicial interp.
* Differentiating between ‘friendly’ nations and others
* Why not create exception to immunity for victims of torture?
* 1985 date specifically chosen because of Air India bombing

Immunity may be restricted by regulation if a State limits Canada's immunities [15]; **reflects the importance of reciprocity in immunities area.**

## COMMERCIAL ACTIVITY exception

What constitutes a commercial activity? 2 methods:

1. **Nature**: focus on act itself (e.g. is it a contract?) By this standard, much more likely for something to be characterized as commercial.

2. **Purpose**: inquiry into why the activity is being carried out; more likely to result in immunity.

B. **US and UK** look to nature of the act; *e.g. U.S. Foreign Sovereign Immunities Act of 1976 [1603(3)]*

C. **United Nations Convention on the Jurisdictional Immunities of States and Their Property**, *Article 2(2):* In determining whether a contract or transaction is a “commercial transaction”, reference should be made primarily to the nature of the contract or transaction, but its purpose should also be taken into account if the parties to the contract or transaction have so agreed, or if, in the practice of the State of the forum, that purpose is relevant to determining the non-commercial character of the contract or transaction. (p. 297)

* Nature is preferred but exceptions where purpose enters into the analysis

D. **Canada**:

1. Purpose preferred prior to *State Immunity Act*
   1. e.g. 1971 Supreme Court of Canada decision in *Congo* v. *Venne*: Court said hiring him to build the building was not a commercial “purpose” – it was govtl for the Congo to participate in this intl exhibition. Did not accept argument that it was commercial because anyone could have hired him to build the building.
2. **The Cdn commercial activity exception in the *State Immunity Act* requires a court to consider the entire context, which in addition to the nature of the act, may sometimes include its purpose** *(Re Canada Labour Code; Kuwait Airways*)
   1. *SIA* seemed to indicate that *nature* should be the test; “commercial activity” is defined as “any particular transaction, act or conduct or any regular course of conduct that by reason of its nature is of a commercial character.” [2]
   2. But *USA* v. *Public Service Alliance of Canada* (Re *Canada Labour Code*) [1992] S.C.R. 3:
      1. **F:** First time SCC considered State Immunity Act; case involved an attempt by Canadian civilian employees at a U.S. naval base to get union certification before the Canada Labour Relations Board. U.S. Dept of Navy objected to proceedings and claimed benefits of state immunity under s. 3 of SIA. A.G. of Canada also argued Board lacked jurisdiction.
      2. **La Forest J.,** writing for the majority, held that commercial activity exception to immunity was inapplicable. La Forest J. notes that it is difficult to “distinguish in a principled manner between the nature and purpose of employment relationships,” (p. 311). Goes on to say, “Nature and purpose are interrelated, and it is impossible to determine the former without considering the latter.” Rejects view that wording of Canadian SIA precludes inquiry into purpose of the activity. Perhaps not always necessary, but not precluded: **“if consideration of purpose is helpful in determining the nature of an activity, then such considerations should be and are allowed under the Act.”** (p. 312)
      3. Cory J. in dissent, acknowledges that understanding nature of activity requires taking into account its context, which will often require consideration of its purpose.
      4. Importance of case is that it involved a rejection on the part of **both majority and dissenting judges** of the rigid “nature alone” inquiry regarding commercial activity; **emphasizes importance of contextualized inquiry.**
   3. In *Kuwait Airways Corp. v. Iraq* (2010 SCC 40), LeBel J. states that La Forest J. in *Re Canada Labour Code* “made it clear that the Canadian commercial activity exception requires a court to consider the entire context, which includes not only the nature of the act, but also its purpose.” (para. 31)

## PERSONAL INJURY exception (S. 6(a))

**The scope of the exception in 6(a) is “limited to instances where mental distress and emotional upset were linked to a physical injury**.” (p. 324)

* *Schreiber v Canada (AG),* [2002] 3 SCR 269
  + Amnesty International intervened in support of a broad interpretation of the personal injury exception, arguing that “the right to the protection of mental integrity and to compensation for its violation has risen to the level of a peremptory norm of international law which prevails over the doctrine of sovereign immunity.” (p. 324)
    - Based on idea that state is not entitled to immunity where breaches *jus cogens*
    - NB: Amnesty and other HR NGOs are concerned about the concept of immunity anyway because they feel that immunity leads to impunity
  + LeBel J. states that “[s]ome forms of incarceration may conceivably constitute international human rights violations, such as an inordinately long sentence, or abusive conditions. However, incarceration is a lawful part of the Canadian justice system. Without evidence of physical harm, to find that lawful incarceration amounts to compensable mental injury would be to find that every prisoner who is incarcerated by the Canadian penal system is entitled to receive damages from the state. [**floodgates argument]** Mental injury may be compensable in some form at international law, but neither the intervener nor any other party has established that a peremptory norm of international law has now come into existence which would completely oust the doctrine of state immunity and allow domestic courts to entertain claims in the circumstances of this case.” (p. 324-325)

**State does not receive immunity if the injury occurs in Canada.** The personal injury exception does not extend to physical injury suffered outside Canada even if its effects continue to be experienced in Canada.

* ***Bouzari v Iran, (2004) Ont CA***
  + **F:** Mr. Bouzari had been tortured in Iran by agents of its government; argued that his suffering continued in Canada and thus constituted injury occurring in Canada.
  + **Ont CA** held that the State Immunity Act requires that the physical breach of personal integrity giving rise to claims take place in Canada.

**Whether or not IL requires Canada to permit a civil remedy for torture abroad by a foreign state, Canada has legislated in a manner that does not do so.**

* ***Bouzari v Iran, (2004) Ont CA***
  + Appellant argued that SIA must be read in conformity with Canada’s public international law obligations, which require it to permit a civil remedy against a foreign state for torture committed abroad. SIA must therefore be interpreted to provide an exception to immunity for such a claim.
  + Ont CA: “Even if Canada’s international law obligations required that Canada permit a civil remedy for torture abroad by a foreign state, Canada has legislated in a manner that does not do so. Section 3 of the SIA accords complete state immunity except as provided by the SIA…. [N]one of the relevant exceptions in the SIA permits a civil claim against a foreign state for torture committed abroad. **Canada has clearly legislated so as not to create this exception to state immunity whether it has an international law obligation to do so or not**.” (p. 329; emphasis added)
* ***Jurisdictional Immunities Case - Germany v Italy (2010) ICJ:*** backs this up: **No exception to state immunity** for violations of *jus cogens* – must go through diplomatic avenues.
* More recently, the Quebec Court of Appeal followed this reasoning in *Islamic Republic of Iran c. Hashemi* 2012 QCCA 1449.
* **Note that in *Kuwait Airways*, LeBel J. refused to weigh in on this:**  
  … [T]he *SIA* represents a clear rejection of the view that the immunity of foreign states is absolute.  It reflects a recognition that there are now exceptions to the principle of state immunity and in so doing reflects the evolution of that principle at the international level.  But I need not determine here whether the *SIA* is exhaustive in this respect or whether the evolution of international law and of the common law has led to the development of new exceptions to the principles of immunity from jurisdiction and immunity from execution. It will suffice to determine whether the commercial activity exception applies in the case at bar. (Para. 24)

# DIPLOMATIC IMMUNITY

***Vienna Convention on Diplomatic Relations***

A. “Diplomatic immunity,” like state immunity, constitutes immunity from **jurisdiction** rather than immunity from **liability**.

B. **Justification** for diplomatic immunity, as stated in the *Preamble* to Vienna Convention on Diplomatic Relations, “the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing states.”

C. **Scope** of diplomatic immunity

1. Article 29: Inviolability of the person of a diplomatic agent: includes immunity from any form of arrest and detention.

2. Article 30: Private residence of a diplomatic agent shall enjoy same inviolability and protection as premises of a diplomatic mission.

3. Article 31: Complete immunity from criminal jurisdiction. Immunity from civil and administrative jurisdiction with minor exceptions.

While this may appear to represent a form of “restrictive” diplomatic immunity, you should keep in mind Article 32(3), which provides that even in cases coming under the exceptions to immunity, no measures of execution can be taken unless this can be done without infringing the inviolability of the diplomat's person or of his/her residence.)

D. **Waiver** of immunity

1. Privilege enjoyed by the sending state rather than the individual concerned. As such, can be waived by that state: Article 32(1). – does not require individual’s consent

2. However, waiver must be express: 32(2); separate waiver required in respect of execution of the judgment: 32(4).

E. **Importance of reciprocity** reflected in Section 4 of *Foreign Missions and International Organization Act*, which permits extension or withdrawal of privileges and immunities at discretion of the Minister of Foreign Affairs.

F. Note that **consular officials** also enjoy a form of immunity, although it is limited to acts performed in the course of their consular functions (known as “functional immunity.”) *(Vienna Convention on Consular Relations)*

Why do you need diplomatic immunity? Is it ‘fair’? Linked to state immunity.

* Diplomats are subject to all kinds of extra rules. But at the same time, certain crimes seem hard to justify ‘immunizing’!
* On the other hand, prison conditions vary widely and have different procedural safeguards. In some cases, the diplomat could be subject to woefully inadequate procedures, in some cases very tough ones – and subject to prison standards we would consider inadequate or substandard in Canada!
* Diplomats in Canada who break the law may still be subject to their own systems:
  + E.g. Russian diplomat who killed Cdn woman while driving drunk (*Knyazev*, 2002). He was subsequently fired by the Russian Foreign Ministry and charged with involuntary manslaughter under the Russian Criminal Code. He was sentenced to four years to be served in a penal colony - a type of low-security labour camp most commonly located in Siberia or Russia's far north. (Canadian police officer testified at the trial)

5. STATE JURISDICTION OVER TERRITORY

# THEORY

**Generally, there are 4 legal regimes in relation to territory:**

A. **Sovereignty** (land, sub-surface and air space, adjoining waters).

B. ***Res communis*** (“the commons”)

1. Shared by all states; cannot be lawfully appropriated by any state.

2. Resources can be utilized by any state (e.g. high seas open to all states)

3. Some have argued this concept has led to ‘tragedy of the commons’ (e.g. overexploitation of fish)

4. Outer space is subject to *res communis*, but arguably the moon and other celestial bodies are NOT

C. ***Res nullius*** (“no person’s land”)

1. Unclaimed territory, subject to lawful appropriation by any state.

2. No part of globe is now *res nullius*.

D. **“Common Heritage of Mankind”** (a term of art) – collective ownership

1. Originally applied to deep seabed; later to moon and celestial bodies

2. Decisions regarding resource exploitation to be made collectively; resources to be utilized in the interests of the international community as a whole, with special attention to the needs of the least developed states. (concern was that these resources would otherwise be treated as a mass landgrab of the colonial race)

3. Very idealistic doctrine. Product of its time, but this doctrine has since been torn to shreds

4. Must be distinguished from “common concern of humankind.” (used in environmental movement)

# LAND

**Traditionally, land could be acquired in a number of ways:**

1. **Occupation**: if land was *res nullius* and thus capable of lawful appropriation and state can show effective control. (no longer relevant).

2. **Cession**: transfer of sovereignty over particular piece of land from one state to another.

3. **Prescription**: land acquired through peaceful occupation over substantial period of time, with knowledge of and without protest from original sovereign.

4. **Conquest**: land acquired through use of force

* No longer permissible, but principle of inter-temporality applies, so can’t reject previous acquisitions that took place through conquest when it was permissible.

5. **Accretion**: land is enlarged through gradual operation of natural forces – more likely to result in *loss* of land today. Avulsion (short term dramatic increase) is NOT necessarily seen as giving increased jurisdiction over land.

(Only really cession, prescription, and accretion that could result in the acquisition of land today.)

But for the most part, jurisdiction over land is set in international law.

# MARINE ZONES

***United Nations Convention on the Law of the Sea (UNCLOS), 1982***

***Drawing Baselines***

A. Normal baseline is low water mark [5]

B. Straight baselines may be used where coastline is deeply indented or fringed by coastal archipelago (following the approach in 1951 ICJ decision in the *Anglo-Norwegian Fisheries Case)* [7(1)]

***Territorial Sea***

Distinction between territorial sea and internal waters.

1. Internal waters (rivers, lakes, etc.); **landward** **of baselines** of territorial sea. [Article 8] Coastal state has full sovereignty.

2. **Territorial sea** is area seaward of baselines.

a. Extends **12 nautical miles (n.m.) from baselines** [3]

b. Includes airspace, sea bed & subsoil [2(2)]

c. Coastal state has **sovereignty over the territorial sea, subject to right of innocent passage** (others can go through the territorial sea solely for the purpose of getting from point A to point B – not for purpose of accessing the coast) [17]

***Contiguous Zone***

A. Extends **24 n.m. from baselines** [33(2)]

B. **Jurisdiction exercised only on a functional/protective basis**; coastal state may exercise authority necessary to:

1. Prevent infringements of customs, immigration, fiscal or sanitary laws within territorial sea [33(1)(a)]

2. Punish infringement of these laws within territorial sea or territory [33(1)(b)]

***Exclusive Economic Zone (EEZ) –*** most recent addition

A. **Not extending beyond 200 n.m. from baseline** [57]; **overlaps with contiguous zone** [55]

B **Limited sovereign rights** on the part of the coastal state, **mainly for the purposes of resource exploitation and conservation** [56(1)(a)]

C. Process of negotiation of ***UNCLOS*** helped expedite and consolidate the understanding that it was now **custom** (quite apart from the Convention itself) that states had jurisdiction up to 200 n.m. – that was common understanding by 1982 when the Convention was finalized.

***Continental Shelf***

A. No less than 200 n.m [76(1)]; if continental shelf extends beyond that, up to but no more than 350 n.m. [76(5) & (6)]

B. Coastal state enjoys **sovereign rights for purposes of exploring and exploiting natural resources of the continental shelf** [77(1)]

C. If continental shelf extends beyond 200 n.m.:

* coastal state to submit information to international body that shall make recommendations on establishment of outer limits. [76(8)]
* State must pay a portion of revenues from exploitation of non-living resources [82(1)]

***Deep Seabed – these provisions have been more contested***

A. Definition: seabed and ocean floor beyond the limits of national jurisdiction [1].

B. Legal regime: **common heritage of mankind** [136] **But 1994 Agreement…**

C. **Highly controversial**;

* US refused to ratify, in part because it viewed the CHM as socialist form of collective ownership
* led to modification of regime by UN General Assembly Resolution adopted on July 28, 1994, "Agreement relating to the Implementation of Part XI of the UNCLOS".
  + Part XI seen as outdated notion of solidarity and cooperation, and really what we should be doing is allowing for free enterprise to govern the seabed. It was seen as a triumph for those who saw the deep seabed and CHM in UNCLOS as being overly idealistic. (For example, landlocked countries would have been given special recognition under this regime.)
  + **We have not moved away from CHM. Its significance has been modified by the 1994 agreement.** At some point will have significant implications for the international community.

***High Seas***

A. Definition: all parts of the sea not in EEZ, territorial sea or internal waters of a State [86]

B. **Freedom of navigation, overflight, cable laying, artificial islands, fishing** [87] – all states have the right to engage in these types of activities on the high seas. (The EEZ itself was the biggest challenge to this, as it took what would have been jurisdiction up to 3 (originally) or 12 n.m. (TZ) and took it out to 200 n.m. covering areas that would have been the high seas)

* Limited exceptions to freedom of navigation, including piracy and slavery.

C. **Flag state has exclusive jurisdiction,** save as provided in Convention or by treaty [92(1)]

D. **Right of hot pursuit** – coastal state can pursue a vessel and assert jurisdiction on the high seas. Where it starts depends on the type of jurisdiction the state intends to assert (if immigration violation, hot pursuit has to start in the CZ. From the EEZ, it would have to be related to resource exploitation).

1. Justification: continuation of coastal state jurisdiction out onto the high seas.

2. Coastal state must have "good reason to believe" the ship has violated its laws and regulations [111]

3. Right ends when ship enters territorial sea of another state [111(3)]

# Airspace and outer space

## Airspace

A. Airspace is **subject to the sovereignty of the State.**

B. **Regulated by treaty** (e.g. Chicago Convention on International Civil Aviation, p. 469)

## Outer Space

1967 *Outer Space Treaty* provides that **outer space is not subject to national appropriation** (thinking about outer space as the **commons** – can go for resources but not subject to national appropriation)

Later *Moon Treaty* applies “**common heritage of mankind**” regime – decisions to be made collectively and resources to be utilized for international community as a whole.

Idea is that instead of there being a race for space (colonizing the moon or planets), the moon should be subject to a CHM regime. Again, like Antarctica, people argue that this comes down to technological capacity, and that when exploiting the resources is possible, the CHM regime will no longer apply.

# THE ARTIC AND ANTARCTICA

The Arctic is really quite old-fashioned power politics (states making claims, largely on the basis of resources they may be able to extract/claim, whereas in Antarctica, claims dealt with completely differently, on the Antarctic Treaty regime:

## The Arctic

A. Claims to the Arctic based on surrounding land areas: Canada, Greenland (Denmark), Norway, Russian Federation, and the United States are all making claims. (Map: <http://www.dur.ac.uk/resources/ibru/arctic.pdf>)

B. Applicable international legal regime is primarily the law of the sea.

C. **Recent controversy concerning Russian claims** (A lot of focus has been on Russia, since they conducted exploration in which they dropped the titanium flag and said it was Russian territory. Russia submitted its claim in 2001, and was sent back to revise its submissions and resubmit. Should resubmit shortly. Canada is also in the process of preparing its claim, and a number of other claims have been made.)

D. As some of those areas become more accessible to shipping, there will likely be challenges to the jurisdictional claims that have been made.

## Antarctica

A. Again, number of different national claims (p 465)

B. **Specific treaty regime**: the ***1959 Antarctic Treaty***

1. **Suspends determination of national claims to sovereignty**. (because of great concern for preserving Antarctica!)

2. Article IV(2) rules out new claims (or expansion of existing claims).

3. Treaty provides that continent is to be used for peaceful purposes only.

* Treaty regime treats Antarctica as **beyond the normal jurisdictional ways of thinking**.
  + Some argue that the reason Antarctica is so unique in this way is that our technological capacities don’t really allow for exploiting the resources there.
  + But that was the case with the deep seabed as well, and yet the idea of the deep seabed being CHM was very controversial
* There was a **suggestion to do away with *Antarctic Treaty*, and make Antarctica CHM**. But that was rejected because the *Antarctic Treaty* has been working (suspending national self-interest in the interests of protecting the area), while there have been criticisms of the idea of CHM.
* Still, the real challenges are not coming from activities on Antarctica itself, but from what states are doing in their own territories over which they have jurisdiction 🡪 climate change has the most detrimental effects on Antarctica.

6. STATE JURISDICTION OVER PERSONS

Types of jurisdiction:

|  |  |
| --- | --- |
| **Prescriptive Jurisdiction**  (also referred to as **subject matter jurisdiction** or **jurisdiction over the offence)** | **Enforcement jurisdiction**  (also referred toas **jurisdiction over the person**) |
| = Power of a state to prescribe a rule of law (legislate in respect of a particular activity / subject matter) | = Power of a state to enforce its laws (in a particular situation) |

**In order to validly prescribe and enforce its laws, whether civil or criminal, a state must have jurisdiction over both the subject matter and the person involved.**

# SUBJECT MATTER JURISDICTION

## Scope of Jurisdiction Generally – really talking about criminal jurisdiction

A. Most rules dealing with jurisdiction over persons at IL address criminal matters (sometimes also regulatory matters); (rules relating to civil cases tend to be covered by private international law.)

B. **Generally**

1. **International law does not impose significant restrictions on the ability of States to exercise jurisdiction: Sovereignty requires jurisdiction unless a mandatory rule of IL prohibits it:**

***Steamship Lotus (PCIJ)*** –

**F:** Claim by France against Turkey, because Turkey was exercising jurisdiction over collision that had happened between two ships at sea. France says Turkey needs to demonstrate a permissive rule of IL that will enable it to take jurisdiction in the circumstances of this case.

**PCIJ**: restrictions on the **sovereignty** of states should not lightly be presumed. Should ask if there is a mandatory rule of IL that *prohibits* Turkey from taking jurisdiction in this case.

If sovereignty is the key, should this also affect our view of jurisdiction over persons, or should jurisdiction be even more robust as we begin to focus on inter-dependence of states.

**2. No clear rule on principles of jurisdiction**

a. Anglo-American tradition favours **territorial principle** (states should think of themselves as islands, and it is the territory that sets the boundaries of jurisdiction)

b. Continental European States tend to favour the **nationality principle** (states ought to and do assert jurisdiction over their nationals, in part because when it is not an island, and people can easily hop over border, state shouldn’t be deprived of asserting prescriptive jurisdiction over them.

**3. Jurisdiction may be concurrent** (multiple states can assert jurisdiction over a particular event)

a. No principle in international law governing priority of jurisdiction

b. Considerations of comity may be paramount.

## Bases of Criminal Jurisdiction

There are at least six bases upon which claims to prescriptive or enforcement jurisdiction may be founded:

**1. Territorial Principle**

1. State in whose territory a crime was committed has jurisdiction. (territory includes the land mass, internal waters & their beds, territorial sea & its subsoil, & air space above all the former; and for certain functional ends to the 200 nm EEZ and continental shelf)
2. Canada’s position is basically a territorial one: *CC s 6(2):* No person shall be convicted of an offence committed outside Canada.
3. Problem that arises: in factual circumstances cases involving multiple jurisdictions, where exactly is a crime committed? 🡪 See discussion of “Scope of Territorial Jurisdiction” below.

**There are 5 possible different applications of the territorial principle**. An act may be deemed to be committed in the place:

1. Where act begins (subjective test)

2. Where act ends (objective test)

3. Where act has effects (discussed by PCIJ in *Steamship Lotus*– incident began outside Turkish territory, jurisdxn, & control, but effects were felt on territory of Turkey. Even though author of offence was on the French ship, effects produced on Turkish vessel so can take jurisdxn)

1. Where any element of the offence occurs
2. Where the State has a reasonable and legitimate interest in taking jurisdiction, compared with other states
3. Canadian courts will take jurisdiction where a significant portion of the activities have taken place in Canada 🡪 **“Real and substantial link”** test:

***Libman v. R (1985) SCC*** – La Forest J for majority **articulated legitimate interest test** and why states respect each other’s jurisdiction:

* 1. There may have been a time that the best way to respect was to limit jurisdictions. But now we are coming to **a time of inter-dependence**, and the **best way is to embrace jurisdiction**, and only to step back in a situation where another state has a stronger claim. *What we should be asking is: Is this an incidental link to the activity? Or is it a real one?*
  2. **Comity** could influence a decision as to whether the exercise of jurisdiction is appropriate.
  3. Idea that in our world today, we’re all our brothers’ keepers, and this should be our approach to jurisdiction.
  4. This is not necessarily consistent with, but an alternative to the approach taken by the PCIJ in the 1920s in the *Steamship Lotus* (if nothing prohibits it, it is allowed)*.*

**2. Nationality Principle** (or the “active nationality” principle) – many civil law countries

a. State of nationality of offender has jurisdiction.

b. *In Canadian practice, reserved for serious crimes*, e.g. treason or things that threaten essential state interests; *More recently*, Canada has begun to make more use of this principle toward combating various kinds of international and transnational crimes of international concern, such as *sex tourism*

* On the one hand we’re all our brothers’ keeper. States ought to address cases of this kind.
* On the other hand, the combination of the use of territorial and nationality principles may create parallel concurrent jurisdiction and therefore potential double jeopardy. So, the use of the nationality principle is better confined to the most serious offences.
* In addition, there have been concerns about the fact that all the witnesses are in the other state - challenging in terms of prosecution. Primary motivation is most likely deterrence.

1. Canadian assertion of jurisdiction over Cdn companies in other countries based on this principle

**3. Passive Personality Principle**

a. State of nationality of the victim of an offence can take jurisdiction.

b. **Highly controversial** – seen as it should be a last resort e.g. ***Steamship Lotus,* Judge Moore in dissent** criticizes because a country may punish foreigners for alleged violations, of laws to which they were not subject.

c. Applied in certain multilateral conventions, relating to e.g. internationally protected persons.

d. Limited examples of this in the ***Criminal Code:*** where victims are internationally protected persons; sections dealing with hostage taking; ***Crimes Against Humanity & War Crimes Act***

These provisions reflect the **acceptance by the international community of wide bases of criminal jurisdiction to combat international crime**.

**4. Protective Principle**

a. State has jurisdiction over acts harming (or might threaten to harm) its essential interests (can also be essential economic interests – variety of ways in which it can be framed)

b. Almost invariably used in conjunction with other basis of jurisdiction / Can &other countries have not favoured this principle when unaccompanied by other factors such as nationality. (eg. Often see protective principle alongside passive personality principle, each buttressing the other. We can take jurisdiction over our national victims, because it also threatens our essential interests… especially easy to make that connection if the victims were targeted *because* they were nationals of that state e.g. Israel example)

**5. Universal Principle**: 3 interpretations of this principle have been put forward by states:

a. **Broadest interpretation**: Any state has jurisdiction over any offence anywhere (by virtue of the fact of the ***Steamship Lotus***principle: if nothing prohibits it, it is allowed. Assumption being that there is some consensus on what ought to be the subject of criminal prohibition)

Very broad: Leaves door open to – for example – states that have apostacy (giving up one’s religion) as a crime to be able to prosecute people in other jurisdictions for doing so.

b. Any state can take jurisdiction over certain very serious crimes of an international nature, regardless of where they occurred. *Universal jurisdiction*: Any state may, as a matter of CIL, prosecute any individual for these crimes, regardless of where they were committed or the individual’s nationality. This applies to such crimes as piracy, slavery, genocide, war crimes, crimes against humanity, and torture.

c. **Narrowest interpretation** a subset of the second and most common: A state can take jurisdiction over serious crimes of an international nature if and only if the accused is present in its territory. (interesting bcos it conflates the requirements of prescriptive and enforcement jurisdiction – assumes that universality requires some kind of nexus to the state seeking to assert jurisdiction, and that link comes only if the individual is actually present within the territory of the state… can’t simply issue a warrant for someone regardless of where they happen to be)

d. Canada uses the latter two bases, though in a limited fashion, in the *Criminal Code.*

**6. By Agreement**

1. A State may be allowed by another State to exercise jurisdiction within the latter’s territory.
2. For example, Status of Forces Agreements (allowing a State to apply its own laws to its troops stationed within another State’s territory).

# EXTRATERRITORIAL ASSERTIONS OF JURISDICTION (566)

Conflicts between states regarding what may be regarded as "extraterritorial jurisdiction" (i.e. laws aimed at regulating the behaviour of non-nationals outside of the territory of the state) can be viewed as an inevitable outcome of the increase in transnational activity.

**Three** **trends** (at 567):

1. Increasing extension of jurisdiction as a result of growing recognition of interdependence of states that erodes traditional notions of territoriality. The resulting problem is a conflict of concurrent jurisdiction over transnational events.

2. Use of national legislation to penalize foreign individuals and companies for activities that are considered legal in the jurisdiction in which they are located, but are considered by the legislating state to be problematic in terms of environmental or human rights impacts. (ie Canada seeks to penalize a company from the US for environmental practices in Indonesia that do not meet the standards of Canada). Few examples of this type of legislation yet exist.

3. Defensive measures taken by states to protect their interests and nationals from exercise of extraterritorial jurisdiction by other states.

While extraterritorial assertions of jurisdiction have frequently called forth both diplomatic and legal reactions from affective states, the modern global economy is as yet regulated by the decentralized legal system that is international law. Thus, only nation states can exercise any authority over multinational enterprises in their transnational operations. At times, extraterritorial jurisdiction may be necessary to reach international drug trafficking, organized crime, corrupt business practices, etc.

7. STATE RESPONSIBILITY

# CAN THE STATE BRING THE CLAIM?

## Can the State bring a claim on behalf of an individual?

***Draft Articles on Diplomatic Protection***, 2006) (“DP”)

**When a State brings a claim on behalf of an individual, certain procedural reqs must be met:**

**1. Link of nationality** is generally reqd for a State to bring an intl claim on behalf of an indiv. [DP 3]

**Justification**: by taking up claim of one of its nationals, “a State is in reality asserting its own rights— right to ensure, in the person of its subjects, respect for the rules of international law.” (***Mavrommatis***, p. 708)

**2. Exhaustion of Local Remedies & Waiver of Claims**

* An intl claim **cannot be brought until an individual has exhausted local remedies**. [DP 14]
  + “Local remedies” are defined in Article 14(2) as “legal remedies which are open to an injured person before the judicial or administrative courts or bodies, whether ordinary or special, of the State alleged to be responsible for causing the injury.
  + **Justification**: the State alleged to have breached an international obligation “has the right to demand that full advantage shall have been taken of all local remedies before the matters in dispute are taken on the international level by the State of which the persons alleged to have been injured are nationals.” (***Ambatielos* Arbitration**, p. 711)
* **Exceptions: Local** remedies do not need to be exhausted where: DP 15

1. There is undue delay in the remedial process which is attributable to the State alleged to be responsible.

2. There was no relevant connection between the injured person and the State alleged to be responsible at the date of injury.

## Can the State invoke the responsibility of another state?

An “**injured State”** is entitled to invoke the responsibility of another State if the obligation breached is **owed to**: [42]

1. that **State individually**, or
2. a **group of States** (including the injured State) or the international community as a whole, **IF** the breach:
   1. specially affects that State, **or**
   2. radically changes the position of all the other States to which the obligation is owed with respect to the further performance of the obligation.

Any State **other than an injured State** is entitled to invoke the responsibility of another State if: [48]

1. the obligation breached is owed to a group of States (including that State) and is established for the protection of a collective interest of the group, **or**
2. the obligation breached is owed to the international community as a whole:

In cases such as these, a State can claim cessation of the wrongful act and reparation “in the interest of the injured State or of the beneficiaries of the obligation breached.” [48(2)(b)]

WHAT IS REQUIRED TO INVOKE RESPONSIBILITY?

***Articles on Responsibility of States for Internationally Wrongful Acts, 2004* (codified by ILC)**

Articles 1-3 codify customary rules:

A. **Every internationally wrongful act of a State entails international responsibility** [1]

B. **An internationally wrongful act is an action or omission that:**

**1. Is attributable to the State under international law [2(a)] AND**

**2. Constitutes a breach of an international obligation of the State [2(b)]**

C. Characterization of act by internal law not determinative of its characterization at international law [3]

D. Older versions of Articles included a distinction between crimes and delicts [torts]. Always highly controversial; the ILC decided to set aside the issue and omit the distinction from the 2001 Articles. (But see Articles 40 and 41 dealing with serious breaches of *jus* *cogens*)

## Is proof of fault or negligence necessary? (basis of responsibility)

A. A distinction is sometimes drawn between subjective and objective responsibility.

1. **Subjective** responsibility: State (or its organ) willfully or negligently failed to fulfill its intl obligs.

2. **Objective** responsibility: State (or its organ) failed to fulfill its international obligations; no inquiry into fault or *mala fides*.

B. This distinction is **not reflected in the Articles.**

**The basis for state responsibility is neither fault nor damage but rather the breach of an international obligation**. That being said, the nature of many substantive international obligs will invite an assessment of the mental state of the actor to determine whether the behavior was in conformity with a given obligation.

It is necessary to look at the **nature of the particular legal obligation in question** rather than attempting to delineate a standard in the abstract*. (see examples of when fault is required at pp 640-41).*

🡪This approach is reflected in **Article 12:** **“There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required by that obligation, regardless of its origin or character.”**

***Corfu Channel case (UK v Albania), [1949] ICJ (p 637)***

Not necessary that Albania laid the mines. Ct was to examine whether it was established by means of indirect evidence that Albania had knowledge of minelaying in her territorial waters.

The obligation on Albanian authorities was to notifying for the benefit of shipping in general, and in warning the approaching British warships. Their obligations were based on certain general and well-recognized principles, namely: elementary considerations of humanity; the principle of the freedom of maritime communication, and **every state’s obligation not to allow [knowingly] its territory to be used contrary to the rights of other states.**

* Knowingly does not appear in the official French version of the court. This mistake of translation has given rise to distinct theories in the francophone and Anglophone communities)
* **Judge Krylov’s Dissent: I do not find any evidence of *culpable* negligence**

# IS THE ACT ATTRIBUTABLE TO THE STATE? [2(a)]

## (a) Acts of the State

**An “act of the State” for the purposes of State responsibility encompasses:**

1. Conduct of State organs [4] (when something is an organ requires some interpretation/argument)

2. Conduct of a person or entity exercising elements of governmental authority **if** [5]

a. The person or entity is empowered by the law of that State to exercise that authority [5] AND

b. The person or entity is acting in that capacity in the particular instance.

1. Conduct of organs placed at the disposal of a State by another State **if** the organ is acting in the exercise of elements of governmental authority of the State at whose disposal it is placed. [6]
   1. Act attributed to state who takes the organ. But could be dual in some circs.

**A State is responsible for acts of its organ or of persons/entities empowered to exercise governmental authority** **even if the organ, person or entity exceeds its authority or contravenes instructions** [7]

(Justification: If we allow a sliding/contextual standard, states could always say they’re not responsible when a person does something wrong, arguing it is not consistent with their law)

**BUT** the organ, person or entity **must have acted “in their official capacity**”. (i.e. not be off duty)

***TH Youmans Claim*** *(US v Mexico) (1926), General Claims Commission, RIAA*

**F:** Mexican troops on duty had been called in to protect foreign nationals against a mob rioting. The Mexican soldiers in uniform and in presence of commander, turned around and shot at the building where the Americans were holed up, resulting in death of father of Mr. Youmans who was bringing the claim.

**Arbitrator**: **Despite the fact that the soldiers were acting contrary to instructions,** the conduct is attributed to state because they were acting in an official capacity. If they had been part of the mob, without uniforms or commanding officer, no state resp. But they were acting in an official capacity.

Applying rule to the facts is more complicated: “Acting in an official capacity” is a *contextual analysis*

* In *Yeager v Iran (1987)*, the US Claims Tribunal found that bribes taken by a state airline employee were not imputable to the state, while theft carried out by revolutionary guards performing customs duties were imputable to the state.

## (b) Acts of Private Persons

The conduct of a person or group of persons can be attributed to the State **if**:

**A. The person or group** **is in fact**: [8]

1. **Acting on the instructions of the State in carrying out the conduct OR** *(straightforward)*

2. **is under the direction or control of the State in carrying out the conduct**. *(more amorphous std)*

**ICJ has confirmed that the standard is one of “effective control”** *(2008 Case Concerning*

*Application of Genocide Convention*, confirmed *Nicaragua* standard)

a. formulation of article 8 inspired by ***Nicaragua* case [1985] ICJ**: **ICJ** set out **very high standard**. “General control” insufficient; need to show that U.S. had “**effective control** of the military or paramilitary operations in the course of which the alleged violations were committed” (p. 653).

b. This standard was adopted by the ECHR in ***Loizidou v Turkey***

b. **1999 *Tadic* case: - ICTY Appeals Chamber explicitly rejected *Nicaragua* std**. (Had to decide whether Serbia exercised control over the activities of the Bosnian Serbs) Appeals Chamber of the ICTY applies a test of “***overall* *control*** going beyond the mere financing and equipping of such forces and involving also participation in the planning and supervision of military operations.” (p. 654) 🡪 then will be deemed to have acted when those entities act. (Here the threshold was passed or met) – **said *Nicaragua* test was too high a standard**. **ICJ revisited in 2007… (below**)

c. **2007 *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide*** (Bosnia and Herzegovina v. Serbia and Montenegro): **ICJ reaffirmed *Nicaragua* std** of effective control; **explicitly rejected *Tadic* approach**. “[T]he ‘overall control’ test is unsuitable, for it stretches too far, almost to breaking point, the connection which must exist between the conduct of a State’s organs and its international responsibility.” (para. 406)

(The ICJ didn’t necessarily say *Tadic* was wrong approach there: whether IHL applied. What they said was you couldn’t take the *Tadic* approach and apply it in circumstances of this kind. It could still at least be **argued that *effective* control is too high a standard**)

**B. The person or group of persons is in fact exercising elements of governmental authority**: [9]

1. **In the absence or default of the official authorities AND**

**2. In circumstances such as to call for the exercise of those elements of authority.**

(e.g. natural disaster, and particular region is cut off from the rest of the country: People who step in to exercise what amounts to governmental authority will trigger the intl responsibility of the state.)

(Interesting and odd provision. It was more designed to deal with situations of internal conflict, so that foreign states aren’t left without recourse. State responsibility ought to be engaged, but has to be circumstance where there is some legitimate basis for that authority to be exercised)

## (c) Acts of Insurgents

**The conduct of an insurrectional or other movement can be attributed to a State in only 2 circs** [10]:

1. An insurrectional movement **becomes the new government of the State**. [10(1)] 🡪 responsible for acts prior to overthrowing the gov

2. A movement, insurrectional or other, **succeeds in establishing a new State** in part of the territory of a pre-existing State or in a territory under its administration shall be considered an act of the new State under IL [10(2)]

**\*** Also still responsible for the acts of the previous government (state *continuity*)

***\* Note of caution! Don’t forget to look to arts 4-9 and what state is doing when looking at insurgents!***

State responsibility can arise independently of attribution (or adoption), if a State fails to fulfill its obligs.

* Art 10 is w/o prejudice to the attribution to the State of conduct by virtue of articles 4 to 9.” [10(3)]
* Don’t just look to relationship to insurrectional movement – look to what state is doing.
* E.g. state may need to step in to investigate and prosecute the murder of a foreign national, even if the state did not take part in or adopt a part in the murder. (ie in *Tehran Case*, Iran did not step in to help the embassy – not taking seriously its responsibilities)

**See adoption of conduct** (below)

## (d) Acts of International Organizations

**Mere fact of membership in an intl organization or the fact that the organization is present on its territory will not lead to the attribution** of the acts of that org to a member State. (ie acts of UN not automatically attributed to CAN purely on basis of UN membership)

* International organizations can possess international legal personality distinct from its member states *(Reparations Case, [1949] ICJ)*

The principles of state responsibility are not necessarily identical to those relating to the responsibility of international organizations. The ILC adopted separate “*Draft articles on the responsibility of international organizations*” in 2011.

In my opinion, states should not be able to shield themselves from liability by acting as part of UN missions. There should be state responsibility when states send their forces somewhere. Each state is responsible for the ways in which it supports the UN. The casebook mentions an incident in 1993 when the Canadian armed forces were in Somalia as part of a UNITAF peace enforcement mission. One night, 2 Cdn soldiers caught a 16-year old civilian breaking into their compound, tortured, and killed him. I would arge that an international claim should be directed against both Canada and the US (who were in command) and the UN who authorized the mission.

## ADOPTION OF CONDUCT BY A STATE

Conduct which is not attributable to the State shall be considered an act of the State **if and to the extent that** the State acknowledges and **adopts the conduct in question as its own**. [11]

***US Diplomatic and Consular Staff in Tehran Case, [1980] ICJ*** – codified in article 11

**ICJ:** The seizure of the American embassy and hostages was not directly imputable to the state of Iran in the absence of evidence that the actions of the “militants” were taken on the orders of gov officials. As to the seizure, Iran could only be responsible indirectly for failure to take appropriate steps to ensure the security of the embassy and its staff. However, when the gov, approved the continued occupation of the embassy, the “militants” became, in legal effect, agents of Iran for whose acts the government became directly responsible.

---Look also subsequent to act committed to see if responsibility arises.

# WAS THERE A BREACH OF AN INTERNATIONAL OBLIGATION? [2(b)]

….

# ARE THERE CIRCUMSTANCES PRECLUDING WRONGFULNESS?

In certain narrowly defined circumstances, a State alleged to have breached an international obligation can raise certain "defences" or justifications:

1. **Consent** [**20**]

2. **Self-defence** (in conformity with the *UN Charter*) [**21**]

3. **Countermeasures** (dealt with below) [**22**]

4. ***Force majeure*** (irresistible force or unforeseen event) [**23**]

5. **Distress** [**24**]

6. **Necessity** [**25**] – *This is customary law (Gabcikovo Nagymoros)*

a. Note the **high standard** reflected in the wording: “Necessity may not be invoked… unless”

b. Act is the only way for a State to safeguard an essential interest against a grave and imminent peril

c. Act does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.

d. Does not apply if:

i. Obligation in question excludes the possibility of invoking necessity

ii. State has contributed to the situation of necessity.

***Gabcikovo Nagymoros (Hungary/Slovakia) [1997] ICJ***

**A:** - Breaching the contract is not the only way for Hungary to safeguard the interest, because the treaty allows for give and take in negotiated arrangements to deal with such probs arising

-Can’t be seen as imminent because of the lack of certainty and the degree of control Hungary may have)

* Also court points to Hungary not having clean hands.

**ICJ:**

* Article 25 on necessity is **customary law.**
* The Court willapproach these requirements in a **strict** way - the requirement of “the **only way”** is something it is going to take very seriously.
* It is not just a subjective standard. It is not solely up to the state to determine whether this state exists. Some degree of subjectivity can be part of the analysis, but has to have some **objective basis** and be able to persuade outside objective observer of the reality of the threat and that there is a limited way of responding to it.
* A problem that is longer term can still satisfy the “grave and *imminent* peril” standard as long as it is certain

Article 26 implies (though it doesn’t specifically state) that these justifications/defences could not be invoked with regard to an obligation arising out of a ***jus cogens*** norm (a peremptory norm of general international law).

The fact that a State can invoke a **circumstance precluding wrongfulness does not affect**:

1. The **obligation to comply** with the obligation if and to the extent that the **circumstance** precluding wrongfulness **no longer exists**. [27(a)]

2. The possibility of providing compensation for any material loss caused by the act in question. [27(b)]

## Countermeasures

**Definition**: a countermeasure is an act that would itself be internationally wrongful if it were not a response to a previous wrongful act.

* Distinguish from retortion: an unfriendly act that is lawful (e.g. suspension of diplomatic relations or foreign aid.)

**Requirements for countermeasures** in the ***ILC Articles on State responsibility***:

1. **Substantive requirement of proportionality**:
   1. “Countermeasures must be commensurate with the injury suffered, taking into account the gravity of the [IWA] and the rights in question.” [***51***]
2. **Procedural requirements**:
   1. demand for fulfillment of obligations;
   2. notification of decision to take countermeasures, and offer to negotiate. [***52***]
3. CM must not be taken / must be suspended immediately if the IWA has ceased, and the dispute is pending before a court/tribunal which has the authority to make binding decisions. [52(3)]

Delicate balance between saying CM should never be resorted to and are never justified, and saying they are okay because it is an aspect of state sovereignty to resort to measures of this kind when a state has been wronged.

# CONSEQUENCES OF INTERNATIONAL RESPONSIBILITY

**Consequences of a breach of an international obligation**

1. Responsible State must **cease conduct** that constitutes breach if it is continuing, and offer assurances and guarantees of non-repetition. [**30**]
2. Responsible State is under an obligation to **MAKE FULL REPARATION** for injury caused by the internationally wrongful act. [**31**]
   1. Purpose: “reparation must, as far as possible, **wipe out all the consequences** of the illegal act and reestablish the situation which would... have existed if that act had not been committed.” ***Chorzow Factory*** *(Indemnity) Case* (1928: PCIJ)
   2. Forms of reparation [**34**]: Full reparation for injury caused shall take the form of restitution, compensation, and satisfaction, either singly or in combination:

a. **Restitution** (re-establishment of the situation which existed before the wrongful act was committed) is the preferred remedy, where possible. [**35**]

b. **Compensation** for the damage caused. (Terminology varies; sometimes referred to as “indemnity” or “damages,” and the broader term “reparation” is occasionally used in this specific sense). [**36**]

c. **Satisfaction**: for injuries of moral or non-material nature (e.g. affront to sovereignty). [**37**]

8. PEACEFUL SETTLEMENT OF INT’L DISPUTES

# Generally

A. **Peaceful** settlement of disputes is a requirement of international law

B. Distinction can be drawn between **“diplomatic” and “adjudicative”** means of dispute settlement

C. Mechanisms can be seen as lying at different points along a **continuum** of both **third-party involvement and “binding” character**

D. **Adjudicative means**:

1. ARBITRATION: Leading to binding settlement of a dispute on the basis of law. Differs from judicial settlement in that, as a rule, parties have competence to appoint arbitrators, determine the procedure, and indicate the applicable law as they see fit. (plays a significant role in international dispute resolution). (e.g. see ***Ambatielos* Arbitration**, p. 711)

2. JUDICIAL SETTLEMENT: our focus is on the ICJ. The law that is applied is international law.

(There are other intl judicial bodies including the International Tribunal for the Law of the Sea)

# The International Court of Justice

## Judges of the Court (p 373)

Composition of the Court:

* 15 members [Article 3] **elected by the GA and the Security Council** [Articles 4-8 and 10-12].
  + Therefore mirrors some of the compromises of representation of the UN system – the overall composition of the Court has changed over the years to reflect the development of regional representation with the UN system. By informal understanding, the permanent members of the Security Council each have a national as a judge on the Court. I think this raises serious about the court’s **legitimacy.**
* Body as a whole should represent main forms of civilization and legal systems [9].
* Only one judge of each **nationality**
  + Each party to dispute may appoint a J of its nationality if one is not already on the bench [31]
  + The judge of that nationality generally writes a judgment reflecting the interests of that state. Perhaps that is not a bad thing – even if you don’t read the submissions of that state, you can read the separate opinion of that judge and get a sense of their interests and perspectives)

## Parties before the Court

* **Only states** can be parties before the court [34(1)]. Court is not open to every state automatically. A state may qualify in any one of three ways (Statute Article 35 and Charter Article 93), but in almost all cases it is because they are members of the UN and therefore parties to the Statute of the ICJ (the other 2 ways are accepted the provisions of the ICJ Statute; or accepting jurisdiction of the Court in a particular case)
* **International organizations cannot be parties** in contentious cases, but the General Assembly and certain other United Nations bodies may request information relevant to the case (Charter 96(2), reflected in Article 34(2) of Court's Statute).

## Jurisdiction of the Court

* **Unlimited as to subject matter** [36(1)]
* Jurisdxn over States based on **voluntary acceptance**, which generally takes place in one of 3 ways:

1. By **special agreement** [36(1)]; i.e. parties agree to submit a particular dispute to the Court
2. By **treaty provision** [36(1)]; i.e. treaty pursuant to which the parties agree to submit disputes arising out of that treaty to the ICJ (referred to as a *compromissory clause* – this can be contentious, where a state says the issue doesn’t really fall within the treaty).

3. By way of an **acceptance of the Court's compulsory jurisdictio**n under ***Article 36(2)*** (sometimes referred to as the “optional clause”)—i.e. a state accepts the compulsory jurisdiction of the Court **in relation to any other State accepting the same obligation** (can be limited to subject matter or time period) (reciprocity is critical; Court only has jurisdiction over common ground between the two declarations).

* As of 2005, only 59 stated had accepted the court’s compulsory jurisdiction under article 36(2), as compared with 190 members of the UN. Nevertheless, there is an upward trend, and these states represent a diversity of regions.

**RESTRICTIONS ON ACCEPTANCE OF JURISDICTION: Many of the declarations that have been made** **are subject to significant restrictions**, such as with regard to subject matter or time frame.

* **\*\*\*PRINCIPLE OF RECIPROCITY: THE COURT ONLY HAS JURISDICTION OVER THE COMMON GROUND IN THE 2 DECLARATIONS** (e.g. Canada’s restriction in its 36(2) decl for matters relating to conservation and maintenance in the NAFO Regulatory area means that they can’t bring a claim against someone else in that subject area either). Also, restrictions on matters within domestic jurisdiction mean everything within other state’s domestic jurisdiction is also outside the jurisdiction of the Court.
* **e.g. Restrictions as to matters within domestic jurisdiction**

i. **Canada**: disputes with regard to questions which as determined by **by international law fall exclusively** within the jurisdiction of Canada

ii. **India**: disputes in regard to matters which are **essentially** within the domestic jurisdiction of the Republic of India – (“essentially”: is more flexible / more a matter of interpretation)

iii. **Mexico**: disputes arising from matters that, **in the opinion of the Mexican Government**, are within the domestic jurisdiction of the United States of Mexico –

* self-judging clause: **How is that consistent with the idea that you are *submitting* to the jurisdiction of an international body?** See below (Ct. makes decision on the opinion of the Mexican gov…) Question remains as to validity of these clauses.

**Note that the Court has final word on whether or not it has jurisdiction** (***Article 36(6)*** ***Statute***)

* CONSENT does not mean a State actually consents each time a case comes before the Court. Rather, **CONSENT is on a more general basis, and when a specific case comes up, the Court has the jurisdiction to decide if consent has been given**.
  + **Domestic matters:** Court will ask if this is a **good faith** interpretation of whether/not it is a domestic matter. – interpret relatively restrictively but has to be some sense that state interpreting in good faith.
  + **Self-judging clause:** Article 36(6) would seem to suggest that a self-judging clause is not actually self-judging. *The Court doesn’t ask for views of the gov, but looks at their approach and practice, and whether the gov has treated these matters as domestic matters or not.*
    - However, note that in the *Norwegian Loans* case, one of the judges said that this is just lip service – *pretending to submit to the Court’s jurisdiction but not actually submitting*. So a **question remains as to the validity of these clauses**.

**Court’s approach to interpreting restrictions:**

***Fisheries Jurisdiction case, Spain v Canada, [1998] ICJ:***

**F:** Canada’s declaration of compulsory jurisdiction precluded “disputes arising out of or concerning conservation and management measures taken by Canada with respect to vessels fishing in the NAFO Regulatory Area…” Canada arrested Spanish fishing trawler and charged its mater. Spain alleged Canada had violated principle of the freedom of the high seas, but Canada said its declaration did not give the Court jurisdiction.

**I:** How should the Court approach the interpretation of declarations made under 36(2) accepting the Court’s jurisdiction as a general matter?

**C:** The dispute came within the terms of the reservation in Canada’s declaration and therefore the Court did not have jurisdiction.

**Majority: *Conservative Approach: Approach to interpretation to make sure it gives effect to the state’s intentions in imposing those restrictions.*** The interpretation of 36(2) declarations are directed to establishing whether mutual **consent** has been given to the jurisdiction of the Court, and so there is no reason to interpret them restrictively. The Court will interpret the words of a declaration in a natural and reasonable way, having due regard to the intention of the State concerned at the time it accepted the compulsory jurisdiction of the Court. The intention of the reserving state may be deduced not only from the text of the relevant clause, but also from the context in which the clause is to be read, and an examination of the evidence regarding the circumstances of its preparation and the purposes intended to be served.

**Dissent: VP Weeramantry:** The purpose of a 36(2) declaration is to subscribe to the jurisdiction of the Court, in all matters other than those specifically excepted. **Policy:** It is the court’s mission to uphold the integrity of its jurisdiction so far as has been entrusted to it by the optional clause system. Within that protected area, it is important that the ROL should prevail. The majority’s approach applies the principle of consent too literally, thus resulting in a progressive diminution of the hard-won area of international jurisdiction that has been entrusted to the custody of the Court. The interests of justice are best served by taking a broader view of jurisdiction, to afford the Court the basis for building up a growing body of jurisprudence, and for increasing the Confidence of States in the reach and value of international adjudication. **C:** Until more facts know, Ct cannot reject Spain’s application.

* I agree with the Majority in this case. If the court interprets the reservations restrictively, to expand their own jurisdiction, states are less likely to submit to the compulsory jurisdiction of the Court. The majority’s decision is more honest in its application of the requirement of *consent*.

\*Note it is possible that either party could change their 36(2) declarations at any time!

[*Perhaps we would have more effective IL if it were not based on consent. Canada has immunized itself from scrutiny more than once by replacing its 36(2) decl’n. Given the current intl system based on sovereignty, this is not likely to change. Perhaps this is safer though, than having all-powerful auths*]

**Effect of judgment on Third parties may preclude Court from exercising jurisdiction:**

In certain rare instances Court may be precluded from exercising jurisdiction over a dispute in which two parties have accepted its jurisdiction because of the effect of the judgment on third parties; e.g. ***Case Concerning* *East Timor* *(Portugal v. Australia)***, in which Court held that “Indonesia's rights and obligations would... constitute the very subject-matter of such a judgment made in the absence of that State's consent.” And therefore the Court found it could not exercise jurisdiction.

## Decisions of the Court in Contentious Cases

* Usually all 15 members sit.
* Formation of chambers [26, 29]

1. At the request of the parties (e.g. ***Case Concerning Delimitation of the Maritime Boundary in the* *Gulf of Maine Area (Canada/United States of America***))
2. For particular categories of disputes: creation of chamber for environmental disputes in 1993.

* Court may make orders for provisional measures to preserve the rights of a party, prior to decision on the merits [***41***].
  + Std: proof of “irreparable prejudice to the rights in issue” (*Aegean Sea, [1976] ICJ*)

## Advisory Opinions

* The Court is empowered to give advisory opinions on legal questions put to it by the General Assembly, the Security Council and such other organs and specialized agencies of the United Nations as are authorized by the General Assembly “on legal questions arising within the scope of their activities.” (***Charter Article 96*** and ***Statute Article 65***) (list of organizations at p 395)
* Advisory opinions might be said to allow the court to step outside its arguably rather narrow dispute-resolution function and instead look to the future development of international law. However, the Court has been reluctant to embrace that approach to advisory opinions. The Court has insisted that it “states the existing law and does not legislate. [ie The ICJ is not in the business of changing the law]. This is so even if, in stating and applying the law, the Court necessarily has to specify its scope and sometimes note its general trend.” *(Advisory Opinion on the Legality of the Use of Nuclear Weapons).*

9. LIMITATIONS ON THE USE OF FORCE

# Prohibition of the use of force

A. **Traditional view:** states had right to use force to resolve at least certain kinds of international disputes (i.e. those affecting essential state interests).

B. In the **20th century**, there were a number of attempts to limit the legal freedom of the sovereign state to pursue war as the ultimate instrument of national policy.

1. *Covenant of the League of Nations*: condemnation of “external aggression” against “territorial integrity and existing political independence” of League members.

2. *1928 Kellogg-Briand Pact* (General Treaty for the Renunciation of War); Parties condemn “recourse to war for solution of international controversies, and renounce is as an instrument of national policy in their relations with one another.” (direct reverse of the traditional position)

3. This trend culminated in the ***Charter of the United Nations*** (both the *Covenant of the League of Nations* and the *Kellogg-Briand Pact* had a significant impact on the *UN Charter*): formalized renunciation of non-defensive claims to use force to resolve international disputes. Reflected in ***Article 2(4):*** all Members of the UN “shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”

Is this all rhetoric, or do we really expect that force will not be used to resolve disputes? The answer lies somewhere inbtwn. Force is often resorted to, but states attempt to fall w/in these justifications…

# Justifications for the use of force

* 1. The **Right of self-defence**
  2. **Defence of Nationals**
  3. **Invitation**
  4. **Collective Measures** Pursuant to the UN (Security Council)
  5. **Humanitarian Intervention** – only legitimate if carried out under the auspices of an international body
     1. Preferably SC or international organization, but occasionally a regional organization.
     2. Attempts to intervene can be stymied by members of the SC (e.g. Syria)

## The Right to Self-Defence

A. At CIL: subject to **requirements of necessity and proportionality**. *The Caroline (1837)* (p. 1138)

1. **Necessity**: need to act in self-defence must be “instant, overwhelming, leaving no choice of means, and no moment for deliberation.”

2. **Proportionality**: act taken in self-defence must not be “unreasonable or excessive,” as “the act, justified by the necessity of self-defence, must be limited by that necessity, & kept clearly within it.”

The issue is not generally about what the requirements are, but about interpretation / whether reqs met.

B. The customary right to self-defence was preserved in ***U.N. Charter Article 51***, which states that nothing in Charter impairs the “**inherent** right of individual or collective self-defence if an armed attack occurs... until the Security Council has taken measures necessary to maintain international peace and security.”

* It remains subject to **debate**
  + whether a customary right to anticipatory self-defence has survived the advent of the Charter and its Article 51.
  + Does right of self-defence end when Security Council takes action on the matter?

**C. Have developments in the last few years changed the parameters of the right of self-defence?**

1. **Preventive self-defence**
   1. The legality of preventive war was forcefully rejected by the IMT in the *Nuremberg War Crimes Trials*
   2. However, in the aftermath of Sept 11, the debate on whether purely preventive measures may be taken in self-defence has been reignited.
   3. The *National Security Strategy of the US* in 2002 asserted a new doctrine of preventive self-defence: stated that the US will act preemptively where necessary even if uncertainty remains as to the time and place of the enemy’s attack. The Strategy suggests *inter alia* that the concept of “imminent threat” must be adapted in the light of contemporary threats (including acts of terror and potentially weapons of mass destruction).
   4. The 2004 UN *Report of the High-level Panel on Threats, Challenges and Change*, said that if a state wishes to act in anticipatory self-defence not just preemptively (against an imminent or proximate threat) but preventively (against a non-imminent or non-proximate one, the state should put their proposed action to the Security Council. The concerns about the preventive use of military force in the case of self-defence under Art 51 are not applicable in the case of collective action authorized under Chapter VII. Preventive self-defence can be taken but only by the Security council any time it deems there is a threat to intl peace and security.
      1. I agree with the UN report that “in a world full of perceived potential threats, the risk to global order and the norm of non-intervention on which it continues to be based is simply too great” to allow unilateral preventive action to be legal. “Allowing one to act is to allow all.”
      2. **So it appears the legality has probably not changed – the US’ intervention in Iraq in 2003** – assuming it was an application of the newly asserted doctrine of preventive self-defence – was likely a violation of IL.
2. **Self-defence against non-state actors / What constitutes an “armed attack”?**
   1. ICJ in *Nicaragua* held that although sending armed bands or groups whose conduct is so grave as to amount to an armed attack by regular forces, mere assistance to or support of irregulars did not amount to an “armed attack”& thus would not give rise to a right to use force in self-defence.
   2. How has Sept 11 affected the question of whether attacks by non-state actors amount to armed attacks in the meaning of article 51 of the UN Charter? Under what circumstances can terrorist attacks be attributed to a state? Do the narrow criteria in the *Nicaragua* case still hold?
   3. UN SC has determined that the Taliban regime in Afghanistan had allowed terrorist orgs, incl Al-Qaida to operate training camps in Afghanistan, and was providing safe have to Osama bin Laden. In 2001, the UNSC adopted resolutions recognizing states’ right to individual and collective self-defence and requiring states to take a broad range of actions to suppress terrorism. In 2001, US sent letter to SC President, reporting that it had initiated military actions in Afghanistan in the exercise of its right of individual and collective self-defence.
   4. **It appears that through the UN resolutions (representing state agreement) the law may be shifting such that mere assistance or support of irregulars can amount to an “armed attack” by a state, giving rise to a rise to self-defence.**

## Defence of Nationals

A. Subject to same requirements of necessity and proportionality.

B. More controversial, but accepted in certain circumstances. In the case of the Entebbe raid in 1976 (when Israel used force to free Israeli hostages being held in Uganda), the U.S. representative on the Security Council stated that “the assessment of the legality of Israeli actions depends heavily on **the unusual circumstances of this specific case**.”

## Invitation

A. Always accepted at international law that a state could intervene militarily within a state at the request of the government of that state. Requirements:

* + 1. Request from the government of the state intervened in;
    2. The requesting gov must be in control of the country and must be the lawful government;
    3. The invitation must be genuine and voluntary and no untoward pressure must have been put on it that would vitiate the agreement; and
    4. The invitation must have emanated from a person with the authority to make it.

B. Difficulties arise where a government is not seen as exercising effective control. Can another state intervene to bolster a government that would otherwise be unable to keep itself in power? It seems that to assist another state in quelling a revolution or other serious unrest is legitimate as long as the government that has issued the invitation is not suppressing a self-determination movement. It may strengthen the move to intervene if the insurgents are already receiving outside support.

## Collective Measures Pursuant to the U.N. Charter

A. The Charter sets out system by which force will be exercised collectively rather than by single state.

B. Security Council actions under Chapter VII

* 24: [UN] members confer on the SC primary responsibility for the maint. of intl peace & security
* 25: [UN members agree to accept & carry out the decisions of the SC in accordance with the Charter]
* \*\*\*Under Article 39, Security Council has **power to determine existence of any threat to the peace, breach of the peace, or act of aggression** **and shall make recommendations** or decide on measures to be taken to maintain or restore international peace and security.
  + **Note that** threat to the peace, breach of peace, or act of aggression **not defined in *Charter***
* Article 40: S.C. can take provisional measures in order to prevent aggravation of a situation before making any decision under Article 39.
* Article 41: measures *not involving the use of armed force*. Use of the words **“call upon”** makes SC decisions under this provision **mandatory**, especially when read in conjunction with Art. 25 (UN members agree to carry out decisions of SC)
* Article 42: measures *involving force*, if Security Council considers that Article 41 measures “*would be inadequate* or *have proved to be inadequate*.” No explicit reference to power to call upon members of U.N. to apply such measures. The view generally taken is that a State is NOT obliged to take part in military operations under A42 unless it has concluded a “special agreement” under A43. In other words, the SC cannot “order” a state to take part in a military enforcement action.
* Article 43: arrangements for making forces available to SC to take action under Chapter VII.
* Article 51: inherent right of individual or collective self-defence if armed attack occurs “***until the SC has taken measure necessary to maintain int'l peace and security***.”

3. Chapter VII relied upon to authorize collective response to North Korean invasion of South Korea, in 1950 (only because of absence of Soviet representative).

4. Thereafter, because of lack of consensus among permanent members of the Security Council, not relied upon again in this fashion until Iraq's invasion of Kuwait on August 2, 1990.

## Humanitarian Intervention

A. Tied in to concept of “gross breach of international law”: in situations where the government of a state has shown blatant disregard for the rights of its citizens, and treated them in a clearly inhumane fashion, another state or states may take action to remedy the situation.

B. **Has always been controversial** because of concerns over misuse of the doctrine by states acting unilaterally. Concerns ameliorated somewhat (though not entirely) by the move towards collective action through the United Nations or regional organizations.

**Responsibility to Protect (R2P)**

Question that has posed more recently: can there be said to be a duty of humanitarian intervention? Concept of the **“responsibility to protect,” introduced in** *report of the International Commission on Intervention and State Sovereignty*(established by the Canadian government in 2000).

As the ICISS put it, “This report is about the so-called ‘right of humanitarian intervention’: the question of when, if ever, it is appropriate for states for take coercive— and in particular military— action against another state for the purpose of protecting people at risk in that other state.”

1. State sovereignty implies responsibility, and the primary responsibility for the protection of its people lies with the state itself.
2. Where a population is suffering serious harm, as a result of internal war, insurgency, repression or state failure, and the state in question is unwilling or unable to halt or avert it, the principle of non-intervention yields to the international responsibility to protect.
3. **THE RESPONSIBILITY TO PROTECT** embraces three specific responsibilities:
4. **The responsibility to prevent**: to address both the root causes and direct causes of internal conflict and other man-made crises putting populations at risk. (ie environmental issues)
5. **The responsibility to react**: to respond to situations of compelling human need with appropriate measures, which may include coercive measures like sanctions and international prosecution, and in extreme cases military intervention.
   1. The Commission gave very concrete details as to how a military intervention could be carried out in a justifiable fashion. All kinds of critiques of *R2P* – some say it doesn’t go far enough, others say it goes too far.
6. **The responsibility to rebuild**: to provide, particularly after a military intervention, full assistance with recovery, reconstruction and reconciliation, addressing the causes of the harm the intervention was designed to halt or avert.
7. Seems to have been recognized during 2005 World Summit (High Level Plenary Meeting of the 60th Session of the GA), but note that this seems to be limited to action through the Security Council:
8. “Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing & crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate & necessary means.”
9. “In this context, we are prepared to take collective action, in a timely and decisive manner, **through the Security Council**, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity.”
10. Fact sheet setting out the World Summit outcome describes this as follows:  
    Clear and unambiguous acceptance by all governments of the **collective international responsibility to protect** populations from genocide, war crimes, ethnic cleansing and crimes against humanity. Willingness to take timely and decisive collective action for this purpose, **through the Security Council,** when peaceful means prove inadequate and national authorities are manifestly failing to do it.
    1. One of the reasons the NATO Kosovo intervention happened was the inability of the Security Council to respond because of Russia’s insistence on using its veto. **Everyone agrees the SC is the best body to take action in that situation – the big question is what happens when they don’t…**

**Legality of Humanitarian Intervention**

Some different approaches that are now a matter of opinion (legitimate disagreement on these issues):

* + 1. Some say IL does not condone intervention by a group of states;
    2. Others say IL does condone because groups need to be able to react to humanitarian need;
    3. Other position is that it is illegal (under IL) but legitimate (justified under standards of international morality or justice that transcend or bypass the actual legal framework)

Do we always wait for the Security Council? Do we always wait for a powerful state / groups of states to be able to react? Given that we are unlikely to get to situation where all situations of compelling need are responded to, should we not respond to any situations of human need?

On the other hand, there can be other reasons such as economic reasons and political alliances for intervention, rather than purely humanitarian ones.

10. HUMAN RIGHTS

# A. INTRODUCTION

## Conceptual importance of human rights:

1. Emphasis on HR perhaps the most distinctive feature of IL since the end of WWII
2. Represents a departure from the “state-centricity” of the traditional system

## Development of HR norms

1. **1945: Origins of modern IHRL generally traced to the adoption of the *U.N. Charter***
   1. *UN Charter* proclaims as one of the purposes of the Organization the achievement of international cooperation in “promoting and encouraging respect for human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.” [***Article 1(3)***]
2. **1948: UN General Assembly adopted the *Universal Declaration of Human Rights (UDHR)*** –
   1. …purporting to set forth “a common standard of achievement for all peoples and all nations,” and thus elaborate upon the norms in the Charter.
   2. *UDHR* is the quintessential example of a non-legally binding document that has had enormous impact. It was seen as the first attempt to flesh out and articulate what it is the *Charter* was going on about when it said the protection of HR was one of the primary purposes of the UN itself.
3. **1966: Two covenants embodying human rights norms opened for signature (entered into force in 1976)**
   1. *International Covenant on Civil and Political Rights* (ICCPR)
   2. *International Covenant on Economic, Social and Cultural Rights* (ICESCR)
4. **International human rights law has also developed** through the conclusion of a large number of international agreements dealing either with:
   1. **Specific rights**, e.g.:

i. *Convention on the Elimination of All Forms of Racial Discrimination* (CERD) (1965).

ii. *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT) (1984).

iii. *International Convention for the Protection of All Persons from Enforced Disappearance* (2006).

b. **Rights of specific groups**, e.g.:

i. *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW) (1979).

ii. *Convention on the Rights of the Child* (CRC) (1989).

iii. *Convention on the Rights of Persons with Disabilities* (2006)

5. In addition to agreements of global scope, number of **regional human rights instruments** have been concluded. (been very active in articulating / carving out a way of thinking about HR that is particular to certain regions)

a. Europe: *The European Convention for the Protection of Human Rights and Fundamental Freedoms* (1950).

b. The Americas: *The American Convention on Human Rights* (1969). – KM: some people in the region saying it is too activist. What happens when a regional institution starts pushing the envelope too far and the state starts pushing back?

c. Africa: *The African Charter of Human and People's Rights* (1981).

## Special Nature of Human Rights

Human rights differ from classic international law because they **seek to govern the relations of a state and individuals, rather than interstate relations**

*One of the main impacts of IHRL is to bring* ***international scrutiny to matters that would traditionally have been regarded as being purely domestic*** *concerns.* Human rights have carved a significant exception to the principle of non-intervention in the internal affairs of other states (as affirmed in article 2(7) of the *UN Charter*), placing issues of respect for fundamental HR (such as those in ***Toonen***) squarely within the confines of international concern.

#### Toonen v Australia (1994) UN HRCommittee

**F:** Claim by Australian national saying that Tazmania’s criminal prohibition on same-sex activity violated his right to privacy under *Art 17 of the ICCPR*.

**Committee:**

1. For the purposes of Art. 17, moral issues are not exclusively a matter of domestic concern.
2. HRC’s General Comment on article 17 says interference provided for by law should be… reasonable. Committee interprets “reasonableness” requirement in its own General Comment to mean proportional to the end sought and necessary in the circumstances of any given case.
3. ICCPR prohibition on discrimination on the basis of “sex” encompasses discrimination on the basis of sexual orientation
   1. [Committee taking pretty *activist stance* in terms of its interpretation of the Covenant]
   2. [Most likely the parties would not have agreed to having sexual orientation as a ground in the 1960s, yet the Committee is interpreting according to their *mandate* under the treaty itself]
   3. [Committee interpreting the Covenant *in light of changing understanding* of what is appropriate, and taking a *robust* approach to protections that should be applied]

#### Case Concerning Reservations to the Convention on Genocide

**ICJ:** Put forward the idea that: In human rights treaties, “the contracting States do not have any interest of their own; they merely have, one and all, a common interest, namely the accomplishment of those high purposes which are the *raison d’etre* of the convention.”

#### Advisory Opinion on the Effect of Reservations on the Entry into Force of the American Convention on HR

*The link between this common interest and the interplay of rights and obligations was further articulated:*

**Inter-American Court of Human Rights:**

* Modern HR treaties are not multilateral treaties of the traditional type – their object & purpose is the protection of the basic rights of individual human beings irrespective of nationality.
* Human rights impose on states obligations *erga omnes*.

One obstacle standing in the way of expanding the reach of human rights to cover violations by **non-state actors**, not only in the private sphere but also in the public sphere by insurgent or terrorist groups, is the fact that state responsibility stands as the central pillar of human rights law. – All norms articulated in terms of state responsibility, with an **extremely limited role for individual criminal responsibility.**

*States must not only refrain**from direct human rights violations, but must also take active steps to bolster their capacity to* ***ensure the “free and full exercise of human rights.”***

#### Velasquez Rodriguez Case (1988) Inter-Am Ct HR

**F:** A number of students disappeared in Honduras after seven armed men dressed in civilian clothing abducted them. The petitioners could not categorically prove the involvement of State agents.

**Inter-Am Ct HR:**

1. *Art. 1(1) of the Am. Convention on HR* requires the State to “respect” and “**ensure**” rights
   1. “The obligation to ensure the free and full exercise of human rights … also requires the govt to conduct itself so as to effectively ensure the free and full exercise of these rights…
      1. (reasonable steps to prevent; carry out serious investigations of violations; identify those responsible; impose appropriate punishment; ensure victim compensation.)

Language of “**ENSURE”** rights is also found in the ***ICCPR*** *Art. 2(1)* as well as most HR treaties.

# B. HUMAN RIGHTS STANDARDS

There are two main ways in which rights have been classified: GENERATIONS and HIERARCHIES of rights.

## 1. Generations of Rights (proposed by Karel Vasak)

Three generations of rights:

1. **First generation: Liberty**
   1. Comprises civil and political rights, which protect the individual against state interference
   2. Said to be framed in negative terms (“right against” or “freedom from”) – imposing on the state a duty to refrain from acting in an injurious manner
   3. Includes those listed in *UDHR arts 2-21*, such as the right to life, the right to be free from torture, the right not to be the object of discrimination, liberty, due process, etc.
   4. Most directly inspired by Western philosophy – were presented as fundamental by Western states during the drafting of the UDHR and the two Covenants. Grounded in the idea of individual liberty – human rights acting as a shield against abusive intrusions of the state.
2. **Second generation: Equality**
   1. Comprises economic, social, and cultural rights, which represent claims by individuals for an equitable share of economic and social resources.
   2. Said to be framed in positive terms (“right to”) – imposing active duties on the state
   3. Includes those listed in *UDHR arts 22-27*, such as the right to social security, the right to work, and the right to education
   4. Were promoted mainly by the East Bloc and developing countries, as elements needed to stem the excesses of free-market economies and capitalism and to ensure equality of all participants.
3. **Third generation: Fraternity**
   1. Collective or universal solidarity human rights
   2. They represent collective claims to the sharing of global power and wealth
   3. *UDHR* allude to such a right when it entrenches a right to a social and international legal order in which other rights can be realized (*art 28*
   4. Put forward most forcefully by developing states
   5. Was the subject of debate in the 1970s and 80s.
      1. Right to environment
      2. Right to peace – phrased this way to extend legal prohibition on use of force to individual level, but that is conceptually difficult
      3. Right to development was first raised in the 60s in relation to the concept of permanent sovereignty over nature resources, and also part of the package of ideas which formed the proposals for a “New International Economic Order” in the 1970s; was recognized by the GA in a *Resolution on the Right to Development* in 1986.
         1. Hugely contentious because many developed industrial states (US esp) say it is basically an attempt to hijack the HR agenda in order to pursue certain political ends that developing countries have in relation to intl economic law.
         2. Has achieved some interesting artics in the context of IEL: right to dvlpmtlly sound and sustainable development as fundamental aspect of envt. Sust.
         3. Critics say it does not fit comfortably in HR law itself – is the answer to say it doesn’t fit, or to expand the parameters of HR law to try and expand it?

**Ordering of rights hotly debated because:**

1. Seems to imply a priority of first- over second-, and second- over third- generation rights
2. Different conceptions of rights contain the potential for challenging the legitimacy and supremacy not only of other conceptions, but of the political-social systems with which they are associated.
3. First generation rights are presented as negative, cost-free, immediate, apolitical, and justiciable, whereas second- and third-generation rights would be positive, resource-driven, progressive, political, and non-justiciable.
   1. **BUT** a rigid compartmentalization of HRs obscures the interdependence (often the realization of a right is necessarily linked to rights of other generations) and permeability (most rights overlap the boundaries of the generation with which they are associated) of HRs
      1. This is supported by the *Vienna Declaration and Programme of Action*, adopted by the World Conference on Human Rights in 1993, which holds that “all human rights are universal, indivisible, interdependent and interrelated.”

## 2. Hierarchies of Rights

Asks what is the **relative priority** to be assigned to various rights. There has been a **widespread rejection of a “hierarchy of rights**” in favour of the **“indivisibility and interdependence”** of all human rights (*Vienna Declaration and Programme of Action*) – all HR contribute to a life of dignity. The ESC rights are necessary to protect the C&P rights, and vice versa.

* The idea that some human rights ought to be considered as *superior* to others is at odds with the general structure of IL where, as a rule, no set priority exists among norms.
* Meron: Rather than grapple with rationalizing HR law making and distinguishing between rights and claims, some commentators are resorting increasingly to superior rights in the hope that no state will dare ignore them. Thus, hierarchical terms contribute to the unnecessary mystification of HRs, rather than their greater clarity.
* **There is officially no hierarchy, but people do tend to do so without using explicit terms.**

Examples of the types of hierarchies that have been suggested:

1. Frequently overlaps with notion of generations.

* Debate goes back to the very originals of IHRL.
  + In its early origins, the East-West debate: with the Western states asserting the primacy of civil and political rights while the socialist states upheld the priority of economic and social rights. In each case, states appeared to emphasize sets of rights that were closely tied in with their political and philosophical traditions.
  + East-West divided followed by North-South divide, focusing on the tension between human rights and the imperatives of the development process.
* Existence of two separate covenants appeared to reflect an inability on the part of the international community to articulate a unified and indivisible set of rights pertaining to the human person.

1. Another basis for hierarchy: privileging non-derogable rights in times of emergency

* However, there are wide variations in the lists of non-derogable rights in different treaties, and some rights that would otherwise be seen as basic, such as due process, are not included in the list of some treaties, including the ICCPR. The *travaux preparatoires* of HR treaties do not reveal that any priority was to be given to non-derogable rights.

1. The one explicit ranking of norms in IL is the concept of *jus cogens* (incorporated into *Art. 53 of the VCLT*):

* but there is no consensus on which norms ought to be considered *jus cogens*.
* Although there is a tension because *jus cogens* norms can’t be changed except by subsequent norms of a similar character, even *jus cogens* do not have a higher status, because HR are indivisible and interrelated. Some may be pre-conditions to other norms (e.g. *pacta sunt servanda*) rather than higher norms of the intl community.

1. ICJ in *Barcelona Traction* referred to “*basic* rights of the human person” as generating *erga omnes* obligations;
2. ILC in DARSWIA refers to “*fundamental* human rights” as a limit to countermeasures;

## Treaty Rights

1. ***The two Covenants, ICCPR and the ICESCR***, along with the ***UDHR,*** constitute the centerpiece of the international HR system.
   1. While ***ICCPR*** language in much more clear “gov shall / shall not” language:
      1. Provides for the creation of an 18-member Human Rights Committee, to hear petitions from individuals or states alleging a breach of the Covenant by any state that has accepted the competence of the Committee.
      2. Every party to the ICCPR must present periodic reports on their progress in implementing the rights recognized therein.
      3. The Committee may from time to time adopt ***general comments*** on the content or meaning of rights entrenched in the ***Covenant***.
   2. The ***ICESCR*** is largely based on the idea of **progressive realization**, dependent largely on the resources a state has available to it
      1. This doesn’t mean no obligations on them at all – The Committee has said there are clear obligations on states, it’s just that they often have to do with ***steps*** that have been taken to meet the goals **rather than the result**.
   3. The Covenants represent concrete and binding translations of the non-binding principles found in the UDHR.
   4. Conversely, they include rights *not* mentioned in the *UDHR*, like the right to self-determination. Some of the variations are direct consequences of the growth and diversification of the community of states between 1948 and 1966.

B. **Reservations, Limitations and Derogations**

1. **Reservations** are very common in relation to human rights treaties.
   1. **Test for permissibility:** whether it is consistent with the object and purpose of the treaty.
   2. Usually dealt with on a state-by-state basis, but consider ***CERD Article 20(2):***
      1. A reservation incompatible with the object and purpose of this Convention shall not be permitted, nor shall a reservation the effect of which would inhibit the operation of any of the bodies established by this Convention be allowed. A reservation shall be considered incompatible or inhibitive if at least two thirds of the States Parties… object to it.
   3. Though in other areas states hesitate before making reservations because they produce a reciprocal effect, this is not the case in human rights treaties because treaties create obligations *erga omnes* with very little role for reciprocity. – thus states have used reservations rather liberally in human rights treaties.
   4. Some treaties (like the CAT) mention that reservations must be compatible with the object and purpose of the treaty. This limited is now accepted as a ***customary limitation*** to the making of reservations, so that any reservation incompatible with the object and purpose of a treaty is *ipso facto* invalid (***VLCT Art. 19(c)***)
      1. Question of how to define the object and purpose of a treaty. Possible link between non-derogable rights and reservations (Inter-Amer Ct of HR in its advisory opinion on *Restrictions to the Death Penalty*; UNHRCommittee General Comment 24(52), 1994)
      2. The UNHRC also proposed a general rule that treaty provisions codifying custom cannot be the object of reservations. This has been criticized. Both non-derogable rights and HRs also contained in custom have been the object of many reservations.
      3. Some states make very *general* limitations – e.g. US reservation to article 7 of the ICCPR.
   5. Ways to deal with general reservations or reservations that other states do not agree with:
      1. The Committee has challenged the validity of such general reservations (and the specific US one) and many other state parties have challenged them too.
         1. Some states have said the Committee does not have the authority to pronounce on compatibility of reservations with object and purpose of a treaty.
      2. The alternative is to rely on objections to reservations by other states parties, **but** the effect of such objections is not clear under ***art 21 of the VCLT.***
      3. Another difficult question is the effect of invalid reservations. – still a party?
2. **Limitations** are restrictions incorporated into the language of a particular treaty provision.
   1. Limitation clauses in the treaty definition of a right
      1. E.g**. *Article 14(1) of the ICCPR*** provides in part that “The press and the public may be excluded from all or part of a trial for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice…”
      2. E.g. ***art 18(3) of ICCPR*** – freedom of religion subject to limitations.
   2. General limitation clauses apply to ALL rights in a given instrument
      1. E.g. ***art 29(2) of the UDHR / art. 1 of the Canadian Charter***
   3. **Tests**: Treaty bodies have devised principles that provide guidance on what limitations are permissible under a given instrument.
      1. **E**.g. ***Toonen* (HR Committee)*:*** The State of Tasmania argued that the criminal provisions were justified on public health and moral grounds. The HRCommittee considered the limitation to be arbitrary using a test based on the legitimacy of the aims and proportionality of measures adopted.
      2. **Similar tests have been used wrt other HR instruments**, sometimes encapsulated in the notion of a “margin of appreciation”. (MOA: e.g. *Brannigan & McBride v UK*)

3. **Derogations** are permitted in exceptional circumstances & must be officially proclaimed. (high std)

1. E.g. ***Article 4 of the ICCPR*** provides: “In time of **public emergency** **which threatens the life of the nation** and the existence of which is **officially proclaimed**, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant **to the extent strictly required by the exigencies of the situation**, provided that such measures are **not inconsistent with their other obligations under international law** and **do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.**” (avoids all reference to war)
2. E.g. ***Art. 15 of ECHR*** – “In time of war or other public emergency threatening the life of the nation…”
3. E.g. ***Art 27 of the ACHR*** – allows for derogation in “time of war, public danger, or other emergencythat threatens the independence or security of a State Party”
4. ***Implied derogation clauses*** in HR treaties that do not include derogation provisions: e.g. ILO has stated the treaties adopted under its aegis have an implied right to suspend some rights in times of emergency. / on the contrary, the African Commission on Human and Peoples’ Rights refused arguments by Chad that there is an implied derogation clause in the *ACHPR.*
   1. **Policy question:** What is the significance of the silence of the ***ICESCR*** in this resepct?

Typically, certain rights are non-derogable.

E.g. in case of ***ICCPR, Article 4(2)***provides that no derogation is permitted from the following articles: 6 (right to life), 7 (prohibition against torture), 8 (paragraphs 1, prohibition against slavery, and 2, prohibition against servitude), 11 (prohibition against imprisonment for inability to fulfill a contractual obligation), 15 (prohibition against finding someone guilty of a criminal offence if conduct did not constitute an offence at time it occurred), 16 (right to recognition as a person before the law) and 18 (freedom of thought, conscience and religion).

States parties to several HR instruments are bound to comply with the highest common denominator of non-derogable rights.

Wide MOA for states:

***Brannigan & McBride v UK (1993) ECtHR***

**F:** 2 applicants alleged their right to be “brought promptly before a judge” under *ECHR art 5(3)* had been breached. The UK had given notice of a state of emergency in Northern Ireland.

**A:** Art 15 of ***ECHR*** requires emergency measures not be inconsistent with “other obligations under IL”, so must be officially proclaimed iaw requirements of ***ICCPR***. A public emergency existed at the time & the state “officially proclaimed” the public emergency. The Brit Gov was within its MOA wrt derogation.

**C:** Since UK satisfies requirements of art 15 of ECHR, applicants cannot complain about violation of Art 5(3).

**ECtHR:** **Wide MOA** because the national authorities are in a better position to decide **both** on the presence of such an emergency **and** on the nature and scope of derogations necessary to avert it.

Role of the Court:Rule on whether inter alia the States have gone beyond the extent strictly required by the exigencies of the crisis. Ct should exercise supervision over domestic MOA by giving appropriate weight to such relevant factors as the nature of the rights affected, the circumstances leading to, and the duration of, the emergency situation.

**Policy: Perhaps derogations clauses are not a necessary and useful part of human rights.** Note J Makarczyk’s dissent pointed out that the notion of a state of emergency lends itself easily to abuse and that derogation clauses call into question the legitimacy of new Contracting Parties.

Despite the MOA that States enjoy as to the qualification of emergency (***Brannigan & McBride****)*, IL poses conditions as to the nature and extent of the derogatory measures:

1. ***The Wall Opinion* (ICJ):** It is not sufficient that such restrictions be directed to the ends authorized; they must also be necessary for the attainment of those ends.
2. **C:** The information did not support a finding that the measures adopted by Israel were strictly required by the exigencies of the situation.
3. **HRCommittee:** They must conform to the principle of proportionality and must be the least intrusive instrument amongs those which might achieve the desired result.

## Customary Human Rights

A. There is consensus that certain human rights have passed into customary international law.

B. Human Rights Committee set up pursuant to the Optional Protocol to the ICCPR has identified a number of customary norms (see p. 885, Note 1), including:

1. Prohibition against slavery

2. Prohibition against torture or cruel, inhuman, or degrading treatment or punishment.

3. Right not to be arbitrarily deprived of life

4. Right not to be arbitrarily arrested and detained

5. Presumption of innocence

6. Freedom of thought, conscience and religion

**[*Deb: While I understand the critiques of a hierarchy of rights, I note that the norms identified by the HR Committee as customary line up very closely with the non-derogable norms under the ICCPR. While the fact that they are customary only really indicates that they are more widely accepted, could the combination of finding they are both customary and non-derogable indicate that the HR Committee thinks of them as higher status?]***

## Universality of Human Rights and the Challenge of Cultural Diversity

A. **Philosophical foundation of human rights is the notion of human dignity**: human rights norms both flow from and are intended to safeguard human dignity.

1. ***Preamble to the*** ***UDHR*** refers to the “dignity and worth of the human person;” ***Article 1*** proclaims, “All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience…”

2. ***The Covenants*** provide that human rights “derive from the inherent dignity of the human person.”

B. **Are human rights universal, or** is the concept (and content) of human rights **culturally specific?**

1. Some have argued that the concept of human rights is of Western origin, and cannot be applied outside of that unique cultural and philosophical context.

2. Frequently invoked along with traditional doctrines regarding state sovereignty and the doctrine of non-interference in the internal affairs of states; controversial for that very reason.

C. Notion of **universality is seen as critical to the existence and legitimacy of the international human rights system**; at the same time, there has been an increased appreciation and understanding of the need to **contextualize** rights in order to give them coherence/meaning within particular contexts.

## Collective Rights and Self-Determination

1. **Distinction between “collective” rights** (rights of “peoples”) **and “group” rights** (most often used to refer to rights of minorities).
   1. Rights of groups *per se* tend not to be recognized; instead, rights of individual members of such groups are protected.
      1. E.g. ***Article 27 of the ICCPR*** provides that persons belonging to ethnic, religious or linguistic minorities “shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.”
2. **Rights of peoples**
   1. ***Article 1 of both Covenants*** asserts that “all peoples” have the right of **self-determination**.
      1. Two aspects:
         1. Right of peoples to “freely determine their political status.”
         2. Right of peoples to “freely pursue their economic, social and cultural development.”
      2. Right to self-determination is **controversial**;
         1. Viewed by many as “political” and its inclusion regarded as a means of appeasing the Third World.
   2. Various rights of peoples recognized in ***African Charter of Human and People's Rights***, including rights to peace, development and environment.
3. **Rights of indigenous peoples**
   1. Use of **terminology**: for a long time, within the U.N. system, the term used was “indigenous populations” or “indigenous people” (with no “s”)
   2. **Prevailing view was** that indigenous groups within national borders did not enjoy the right of self-determination, although they did have certain other rights under international law.
   3. ***United Nations Declaration on the Rights of Indigenous Peoples***
      1. ***Article 3*** of the Declaration provides that “indigenous peoples have the **right to self-determination.** By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”
      2. The wording is somewhat ambiguous: is this limited to a right to “internal” self-determination?
         1. ***Article 4*** provides, “Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.”
      3. ***Article 46(1)*** was added to final version of Declaration: “Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.”
         1. ***46(2)*** – limited general limitation – only by such limitations as are determined by law and in accordance with international human rights obligations. Shall be non-discriminatory and strictly necessary solely for the purpose of security due recognition and respect for rights and freedoms of others… and just in a democratic society
         2. ***46(3)*** – The provisions set forth in this declaration shall be interpreted in accordance with the principles of justice, democracy, respect for HRs, equality, non-discrimination, good governance and good faith.
      4. **Note breadth of the other provisions** of the Declaration.
         1. Includes range of general human rights guarantees (both civil & political and economic, social & cultural) applicable to individuals as well as collective rights specifically relevant to indigenous peoples.
            1. 18 – Right to participate in decision-making in matters that would affect their rights…
            2. 19 – States shall consult and cooperate in good faith… to obtain their free, prior and informed consent before adopting and implementing legislative measures that may affect them
            3. 20 – Right to maintain and develop their political, economic and social systems…

Just and fair redress where deprived of means of subsistence and development

* + - * 1. 21 – Improvement of their economic and social conditions
      1. Note in particular provisions regarding land and resources.
         1. 25 – Right to maintain and strengthen distinctive spiritual relationship with their owned/occupied and used lands, territories, waters, etc.
         2. 26 – Right to the lands, territories, and resources which they have traditionally owned, occupied or otherwise used or acquired…
         3. 27 – Due recognition to their laws, traditions, customs and land tenure systems; and to recognize & adjudicate their rights to land, territories…
         4. 28 – Right to redress for taken/occupied/used lands without FPIC
         5. 29 – Right to the conservation and protection of the environment
         6. 32 – Right to determine and develop priorities for development of lands / States shall consult and cooperate in good faith and obtain FPIC of any project affecting their lands or territories and other resources; States shall provide effective mechanisms for just and fair redress to mitigate adverse environmental, economic, social, cultural or spiritual impact of any such activities.
    1. **Status of the Declaration: Very great support, but non-legally binding.**
       1. Adopted by the General Assembly on 13 September 2007
          1. Vote was 144 states in favour, 4 states against (Australia, Canada, New Zealand and the United States) and 11 abstentions (Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, Russian Federation, Samoa and Ukraine).
          2. By end of 2010, all four states that voted against had expressed support for the Declaration;

**Canada** did this on 12 November 2010. The “Statement on Support on the United Nations Declaration on the Rights of Indigenous Peoples” asserts:

*The Declaration is an* ***aspirational document*** *which speaks to the individual and collective rights of Indigenous peoples, taking into account their specific cultural, social and economic circumstances. Although the Declaration is a* ***non-legally binding document that does not reflect customary international law nor change Canadian laws****, our endorsement gives us the opportunity to reiterate our commitment to continue working in partnership with Aboriginal peoples in creating a better Canada.*

* + - 1. Many commentators characterize large parts of the Declaration as reflecting **customary international law**.
    1. Institutional mechanisms for the protection of indigenous peoples’ rights
       1. UN Permanent Forum on Indigenous Issues: advisory body to the Economic and Social Council with a “mandate to discuss indigenous issues related to economic and social development, culture, the environment, education, health and human rights.” Operating since 2002.
       2. Special Rapporteur on the Rights of Indigenous Peoples
       3. Expert Mechanism on the Rights of Indigenous Peoples

11. INTERNATIONAL CRIMINAL LAW

# INTRODUCTION

## What is International Criminal Law?

A. ICL as been referred to as a product of “**the convergence of two disciplines**:

1. the **penal aspects of international law** and

2. the **international aspects of national criminal law**.”(p. 727)

B. Body of norms dealing with “international crimes” (“offences prescribed at customary and/or conventional international law.”) (p. 727)

C. While this field has a long history, it has gained enormous momentum over the past fifteen years, in no small measure because of the Tribunals for the former Yugoslavia and Rwanda. International criminal law is seen by many as part of a quest for “world order” and the “international rule of law”. For that reason, the ICC may well have a symbolic importance that extends far beyond its jurisdictional scope.

## Development of International Criminal Law

**Background**

A. Usually begins with the treatment of piracy.

1. The pirate was referred to as *hostis humani generis* (the enemy of all humankind). Outside the jurisdiction of any state—and all states viewed as having not only a right but a duty to prosecute.

2. International cooperation in relation to piracy is of long-standing, with examples going back to the twelfth century.

B. While piracy itself, in the Western world at least, was eventually eradicated through the growing strength of naval forces, its role as a legal “model” was significant. For example, efforts to combat the slave trade largely involved a slow process of negotiating bilateral treaties which involved an agreement to treat slave traders as pirates, lying outside the protection of any state.

C. Conduct of armed conflict long-regarded as being subject to limitations, but dramatic development following World War II.

**Individual Responsibility After World War II**

A. At the end of the Second World War, an International Military Tribunal was established by the London Agreement among the four Allied powers (US, France, UK, USSR).

B. Purpose: to try “war criminals whose offenses have no particular geographical location whether they be accused individually or in their capacity as members of organizations or groups or in both capacities”.

C. Original indictment presented to the Tribunal on October 5, 1945; charged German defendants under Article VI of the Charter of the International Military Tribunal with committing “crimes against the peace, war crimes and crimes against humanity.”

1. Crimes against peace: war of aggression or in violation of international treaties

2. War crimes: violation of the laws or customs of war

3. Crimes against humanity: inhumane acts against civilian populations or persecutions on

political, racial or religious grounds.

D. While Nuremberg was criticized by some as representing “victor’s justice”, it is taken to have confirmed the principle that individuals have obligations under international law and can in fact be held accountable for crimes against international law. “Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.” (p. 731)

## International Humanitarian Law

***1949 Geneva Conventions*** elaborate obligations under international humanitarian law; largely regarded as reflecting custom. Four Conventions covering treatment of:

1. Wounded soldiers: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field

2. Sick and shipwrecked sailors: Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea.

3. Prisoners of war: Convention (III) relative to the Treatment of Prisoners of War.

4. Civilians: Convention (IV) relative to the Protection of Civilian Persons in Time of War.

**Further developed in two *1977 Protocols******to the Geneva Conventions*:**

1. ***Protocol I*** expands some of the protections of the 1949 Conventions and extends their application to wars of national liberation.

2. ***Protocol II*** deals with non-international armed conflicts, defined in Article 1 as situations in which the armed forces of a state are in conflict with “dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerned military operations.” Does not apply to “situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature.”

## Multilateral Conventions Specifying International Crimes

A. Development of the ***1948 Convention on the Prevention and Punishment of the Crime of Genocide*** added genocide to the list of “crimes against international law”. Notable features:

1.Genocide “whether committed in time of peace or in time of war, is a crime under international law.” I.e. clarified that this was not necessarily linked to the laws of war. ***[1]***

2. Broad definition of genocide in ***[2****]*

3. State immunity clearly ruled out **[4]**

B. ***Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment***

1. Each State Party required to take effective measure to prevent acts of torture in any territory under its jurisdiction. ***[1]***

2. Each State Party required to ensure that all acts of torture are offences under its criminal law. ***[4]***

3. Also required to take jurisdiction in a number of enumerated instances ***[5]***

C. **Beginning in the 1960s, concerns about international terrorism, focusing in particular on attacks against aircraft, led to the development of a number of treaties**. Some noteworthy examples:

1. *1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft*

*2. 1971 Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation*

*3. 1977 Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons including Diplomatic Agents*

*4. 1997 International Convention for the Suppression of Terrorist Bombings*

*5. 1999 International Convention for the Suppression of the Financing of Terrorism*

*6. 2005 International Convention for the Suppression of Acts of Nuclear Terrorism*

4. Recent example: *2010 Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation.* (Note: a useful set of summaries of the various multilateral treaties on terrorism is available at <http://www.un.org/terrorism/instruments.shtml>.)

5. A comprehensive convention on terrorism has been under negotiation since 2000.

# Who Prosecutes International Crimes?

## Number of Possibilities:

1. State where **crime occurred** (uncontroversial).

2. State of **nationality of the perpetrator** (uncontroversial)

3. State of **nationality of the victim**(s) (passive personality; as noted in section on Jurisdiction over Persons, generally seen as controversial, although in fact many of the terrorism regimes allow for it).

4. **Third state** (on basis of some form of universal jurisdiction)

a. Piracy classic example of a crime subject to universal jurisdiction.

b. Geneva Conventions require all parties to take jurisdiction over persons committing “grave breaches” of the Conventions, defined as certain acts (e.g. willful killing, torture or inhuman treatment) committed against persons or property protected by the Conventions.

c. The Convention Against Torture and many of the anti-terrorism instruments mentioned above include an “extradite or prosecute” obligation that requires parties to establish jurisdiction over offences if they choose not to extradite to another state.

4. **“Hybrid” or “mixed” tribunal** with both domestic and international elements (e.g. Special Court for Sierra Leone; Extraordinary Chambers in the Courts of Cambodia)

5. **International tribunal** (Nuremberg, Tokyo, Tribunals for Former Yugoslavia and Rwanda; ICC). E.g., pursuant to the *Genocide Convention*, genocide is subject to the jurisdiction of the State within whose territory the act was committed or by “such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.”

# ICTR / ICTY

Established by the Security Council **pursuant to its powers under Chapter VII of the U.N. Charter.**

**Jurisdictional basis of ICTY:**

1. Universality Principle

February 9, 1993 first interim report of the Commission of Experts on War Crimes in the Former Yugoslavia to the President of the Security Council.

a. The report concluded that “[j]urisdiction for war crimes is governed by the **universality** principle” and, “**hence, is vested in all States, whether parties to the conflict or not.**”

b. It also asserted that **“the principle of universality can also apply to genocide as well as to other crimes against humanity**.” (Note that this represented a move beyond the provisions of the Genocide Convention itself.)

2**. ICTY has jurisdiction over:**

a. Grave breaches of the 1949 Geneva Conventions

b. Violations of the laws and customs of war

c. Genocide

d,. Crimes against humanity.

**Jurisdictional basis of ICTR:** jurisdiction is somewhat different because this was not an international conflict. Thus, jurisdiction is confined to:

a. Genocide

b. Crimes against humanity

c. Violations of Article 3 common to the 1949 Geneva Conventions (which deals with standards applicable to internal conflicts)

d. Violations of Article 4 of Additional Protocol II (which covers “fundamental guarantees” in the context of internal armed conflict)

# International Criminal Court: KEY ISSUES

## A. Complementarity:

The court “shall be complementary to national criminal jurisdictions.” ***[Rome Statute, Art 1]***

* The idea is that national courts have the primary responsibility to take jurisdiction over individuals that have committed these crimes. ICC takes jurisdiction where the states are unable or unwilling.
* This **goes to the question of admissibility,** and is elaborated in Articles ***17-19***.
* **Big debate**:
  + Rationale for complementarity:
    - RESPECT FOR STATE SOVEREIGNTY (fundamental principle of IL)
    - EFFICIENCY (ICC cannot cover all major crimes – states need to take responsibility)
    - ACCOUNTABILITY (encourage state action in order to truly increase accountability in the intl arena)
  + Arguments against complementarity:
    - If we are talking about the most serious crimes of international concern, ***[5]*** shouldn’t those crimes be dealt with on the international level rather than domestically?
    - By relying upon states that in many cases are emerging from conflict situations and don’t have a lot of capacity or willpower to pursue these people, greater chances of sham trials and/or breaches of justice in terms of putting them on trial

## B. Relationship with United Nations

1. Possibilities that were contemplated:

1. Court as a principal organ of the U.N. (would require *Charter* amendment, widely seen as too cumbersome)
2. Court as U.N. subsidiary body, established through resolution of General Assembly or Security Council.
3. Court as independent international organization
4. Court as a U.N. treaty body.

2. **Decision to make Court independent treaty-based institution.** Agreement on relationship with UN adopted in **2004**. (Close substantive relationship between ICC and UN because of authority of Security Council to refer and block cases **but is independent of UN**)

***Article 2*** provides that the Court shall be brought into a relationship with the U.N. through a later agreement approved by the Assembly of States Parties and concluded by the President of the Court on its behalf. **Reflects view that Court ought to be connected with UN, but that it should have an independent legal foundation**.

## C. Crimes within the jurisdiction of the court

1. Pursuant to ***Article 5***, the Court’s jurisdiction “shall be **limited to the most serious crimes of concern to the international community as a whole.**”

2. ***Crimes listed in Article 5:***

1. The crime of **genocide** ***[5(a); 6]***
2. **Crimes against humanity**: ***[5(b); 7]***
   * 1. a wide range of acts “committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack”
        1. can take place during peace time as well.
3. **War crimes** ***[5(c); 8]***
   * 1. Long and detailed definition - but note Art 8 specifies that the Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.”
        1. **Policy:** Does this restrict the Court’s jurisdiction?
4. **The crime of aggression** ***[5(d); 5.2]***
   * 1. Article 5(2) provides that aggression would be subject to definition and elaboration regarding conditions for exercise of jurisdiction.
        1. In 2010, a Review Conference decided by consensus to amend the Rome Statute to allow the ICC to take jurisdiction over aggression.
     2. **Definition**: “crime of aggression” means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its **character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations**. “Act of aggression” means the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations.
        1. **High** **threshold**: Of a character, gravity and scale that would constitute a manifest violation of the UN Charter. In order to say somebody is individually criminally responsible for the crime of aggression, it has to be of a very serious nature.
        2. **History/policy:** States were very concerned about this because they do resort to armed force. They do provide justifications but there is not always consensus that those justifications should be accepted.
        3. Aggression is a **broader more policy-oriented decision,** so it had to be framed in this way so that not every soldier who goes to war is guilty of the offence
     3. **No jurisdiction by ICC over crime of aggression until 2017 at least**
        1. Some uncertainty regarding conditions for exercise of jurisdiction, due to unusual approach adopted by the Review Conference. Whether there will be jurisdiction after 2017 is an open question. The reasons we may not get enough support by 2017 are to do with the individual/state concerns above, along with very clear political interests.

3. **Much more limited jurisdiction than had been suggested in the ILC Draft Statute**, which had included “crimes, established under or pursuant to the treaty provisions listed in the Annex, which, having regard to the conduct alleged, constitute exceptionally serious crimes of international concern.”

a. Among the treaties in the Annex were:

1. 1971 Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (along with other treaties relating to hijacking/attacks on internationally protected persons).
2. Convention against Torture
3. 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances

b. Criteria for inclusion of a treaty in the Annex:

1. Crimes defined by the treaty; and
2. Treaty recognized international concern in relation to the crime by means of either an “extradite or prosecute” requirement or by making provision for trial by an international tribunal, or both.
3. **Future Development:** The crimes in listed in Article 5 could be expanded in the future by the Review Conference ***[123]***
   1. Proposals for expansion did not receive sufficient support to go forward in 2010.

## D. Exercise of the Court’s jurisdiction

1. A State which becomes a Party to the Statute “thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5.” ***[12(1)]***

2. **“Triggers” for the Court’s jurisdiction:** “The Court may exercise its jurisdiction with respect to a crime referred to in article 5” if: ***[13]***

1. ***[a]* A State Party refers a situation** in which one or more of such crimes appears to have been committed *to the Prosecutor* (in accordance with article ***14***);

-Only if the State on whose territory the conduct occurred (or the State of registration of a vessel or aircraft on which it occurred) or the State of which the person accused is a national either is a State Party or accepts the jurisdiction of the Court. ***[12(2)]***

-Requirement of notification

1. ***[b]* The Security Council, acting under *Chapter VII of the Charter*, refers a situation** in which one or more of such crimes appears to have been committed to the Prosecutor;

-It does not matter if the if the State is a Party or accepts jurisdiction! ***[12(2)]***

-No requirement of notification

1. ***[c]* The Prosecutor has initiated an investigation** in respect of such a crime (in accordance with article ***15***.) ***proprio motu*** *= on his/her own account)*

-Only if the State on whose territory the conduct occurred (or the State of registration of a vessel or aircraft on which it occurred) or the State of which the person accused is a national either is a State Party or accepts the jurisdiction of the Court. ***[12(2)]***

-Requirement of notification

3. **REQUIREMENT OF NOTIFICATION:** (nuts & bolts of complementarity)

In cases arising under Article 13(a) or (c), (again, except in the case of a referral by the Security Council), ***Article 18*** provides that the Prosecutor has to notify all States Parties and all States which would “normally exercise jurisdiction over the crimes concerned.”

* A State can then request the Prosecutor to allow that State to deal with the matter
* Prosecutor must do so unless he/she applies to the Pre-Trial Chamber to authorize the investigation.

**Tied to requirements for admissibility in *Article 17*;** A case is inadmissible where:

* + The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;
  + The case has been investigated and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;

4. Note also that ***Article 16*** provides that the **Security Council can** request the Court to **defer** a particular investigation or prosecution; this freezes the process for **12 months**. Can be renewed by the Security council under the same conditions.

-**Policy:** Intended to give Security Council some flexibility to address threats to international peace & security.

***[Deb: I do not see how it is independent from the Security Council at all!]***

**Effect on Third States** – see 804-05 on the US position towards the ICC (specifically article 12)

* Effect of the ICC on States not party to the Rome Statute: *Art 12 of the Rome Statute* = that even where alleged core crimes are committed on the territory of a non-party state, by nations of that state or of another non-party state, the ICC has jurisdxn if there is a referral of the sitn by the SC.
  + Major concern because of the position of the U.S. (see 804-05)
    - US fears not assuaged by art 17 on complementarity (because that would require them to genuinely investigate and prosecute)
    - 2 lines of action by US
      * 1. Negotiated a growing series of bilateral treaties (Article 98(2) Agreements) that provide US personnel will not be surrendered to the ICC
        + **[*Deb: Does this really fit within the spirit of Art. 98(2) – how would the ICC interpret such a bilateral treaty?]***
      * 2. Sought SC Resolution 1422 under *Statute Art 16* whereby SC sought 12 month hold on any cases that arise involving officials from a contributing state not a party to the Rome Statute over acts or omissions relating to a UN established or authorized operation.
        + *[US pushed through by letting it be known that w/o passage of the res’ns it would veto the renewal of certain peacekeeping ops]*

## Operation of the ICC

1. Four situations have been referred to the ICC by States Parties to the Rome Statute: Uganda in 2003; Democratic Republic of Congo (DRC) in 2004; Central African Republic in 2005, and Mali in 2012.
2. Two situations have been referred to the ICC by the Security Council: Darfur, Sudan in 2005 and Libya in 2011.
3. Two situations in which Prosecutor has sought authorization to open an investigation: authorization granted for Kenya in 2010 and for Côte d’Ivoire in 2011.
4. Office of the Prosecutor is conducting preliminary examinations in situations including Afghanistan, Colombia, Georgia, Guinea, Honduras, Korea and Nigeria.

* *These countries are all in Africa, and there has been considerable controversy and debate about that. Idea that it is being used in a way that is problematic and differentiates between different regimes in situations of human rights abuses.*
* *[Deb: This is not only a critique of the ICC, but of international criminal law as a discipline – that it is so focused on Africans and Asians (e.g. the Extraordinary Chambers in the Courts of Cambodia)]*
* *Question of whether too many resources are going into reacting, when those resources could be going to preventing. The emphasis on international criminal law in the past few years has really focused on the reactive capacity of the international legal system, rather than the preventive capacity and rebuilding capacity, which arguably are just as important and perhaps even more so.*