International Law CANS

**The Nature of International Law**

**Does International Law Exist?**

**Anxieties about International Law:**

* International Law is **ANTI-DEMOCRATIC** – there is potential to force a country to act in a way its citizens do not want
* International Law focuses on **COUNTRIES**, not **INDIVIDUALS**
  + Country, or **STATE**, is a grouping/entity
  + The idea of having international law power vested in a STATE while the citizens have democratic rights to make law is a loaded one
* Lack of Enforcement – International Law cannot, in the large scope of things, compel a state to do anything it does not want
* International Law does not meet the same criteria of Domestic Law
* Because there is no enforcement, International Law is deprived of the Status of Law in the public conscience
* There is **NO COURT OF COMPULSORY JURISDICTION**
  + ICJ = International Court of Justice
  + Court of Compulsory Jurisdiction is a **PERMANENT** court of jurisdiction for permanent members
  + In International Law, **JURISDICTION IS BASED ON CONSENT**
    - Courts only have jurisdiction where States have consented to it
    - States can pick and choose what they want to consent to
* Powerful States at times blatantly breach International Law
* There are few opportunities in International Law for individuals to bring claims
  + International Law is based primarily on **STATES**
  + Individuals cannot present their cases, only States
    - The state can present/raise a case/complaint on **BEHALF** of a citizen if the complaint can be raised to a level of State vs. State
* International Law only creates obligations for States through **CONSENT**
  + Unlike domestic law, where subjects do not have to consent to the laws
  + Subjects in domestic law = Individuals/Citizens – individuals are automatically bound to domestic laws, regardless of consenting to them
* International Law is Anti-Democratic amongst States
  + Each state is held to the same standard
  + A state like Nauru or Liechtenstein will have the same vote as China – potentially not democratic in the sense of **REPRESENTATIVE**
* There is NO International police force
  + If someone violates International Law and a complaint is brought against them to the ICJ, assuming they have **CONSENTED** to ICJ jurisdiction on the matter, and they lose at trial and refuse to comply with the ICJ mandate, the only recourse for the ICJ is to refer the issue to the UN Security Council
    - **ISSUE** – What if the country is one of the Great Powers (permanent 5) or important to one of the P5?
      * There is no International police force to monitor International Law or enforce it, and what enforcement measures do exist via the UN, they favour the powerful states

**Responses to Anxieties/Criticisms of International Law:**

* Is National Law dependent on the State any less than International?
  + What is there to force the Government, in a democratic state, to do anything the National court decides?
    - **NOTHING** – BUT they still adhere to it, out of **RESPECT** for the system
    - This is a **CULTURAL** phenomenon
    - This phenomenon is also prevalent in **INTERNATIONAL LAW**
  + Most states apply most International law most of the time
    - This functions in the same way as domestic law, as long as there is a cultural respect for the way of law
  + There are examples of blatant breaches in International Law – **BUT** there are blatant breaches in domestic law as well
* Is National Law more effective?
  + Criminal Law and Coups D’Etat
  + There have been **MANY** unconstitutional regime changes, meaning a collapse of the legal system of failure of the legal system to protect its values
    - Sheer number of collapses of legal systems in **DOMESTIC** systems is much more than in Public International Law
    - Domestic systems collapse quite readily, but do we denounce the effectiveness of domestic law due to their susceptibility to collapse? **NO**
* Is enforcement necessary to a conception of law?
  + The Utopian Response
  + This is the weakest argument that International Law is in fact, Law
    - Example – smoking marijuana is illegal in the Netherlands, but it isn’t prosecuted – BUT it is still illegal
* International Law is, in any event, enforced
  + Iranian hostages case
  + 1979: a bunch of US citizens are taken hostage by a rebel group, but the Iranian government will not do anything about it and claims to be happy about it
    - The **STATE** is now responsible, since they will not do anything
    - The US at this point has a series of options:
      * US goes to ICJ and states that there has been a violation of International Law – they want to seize 13 billion dollars of Iranian property in Swiss bank accounts, take the interest off it, and do this until hostages are returned
      * The idea that a court can do this is based on the idea of **COUNTERMEASURES** – a type of **ENFORCEMENT**
        + One state can respond to a violation of its rights by violating the rights of the violator state

Part of what makes PIL, Law

* International Law as Official Language
  + When officials from States write to officials of other States, the language they use is the language of International Law
  + Ideas and principles are derived from International Law
    - Sovereignty, Recognition, etc
* Consent is **NOT** essential to the existence of International Legal obligations
  + This is prevalent within New States **(POST-DECOLONISATION)**
  + International Law is made up of **TREATIES**, **CUSTOM** and more
    - Treaties = **CONTRACTS**; Custom = **PRACTICE**
  + Point about consent breaks down due to the new states emerging – they declare they are not bound by the old customs since they were not even around when they were made – **BUT THEY ARE STILL BOUND**

**If International Law is NOT Law, what is it?**

* It is **POWER** – an instrument, or tool of **POWER**
  + Koskenniemi: States use International Law for INSTRUMENTAL purposes – if it is not law, it is even more an Instrumentalisation
    - **INTERNATIONAL LAW IS AN INSTRUMENT OF POWER FOR STATES**

**Characteristics of the “INTERNATIONAL COMMUNITY|**

**International Legal Subjects**

* International Law and the World Community are **UNIQUE** from other legal structures
* Most of International Law rules aim at regulating the behaviour of **STATES**, not individuals
  + States are the **PRINCIPAL ACTORS** on the International scene
  + States are **LEGAL ENTITIES**
  + States own and control their own separate territory
  + States are held together by political, economic, cultural, ethnic or religious links
* Within States, **INDIVIDUALS** are the principal legal subjects
  + Public corporations, private associations are **SECONDARY** subjects
* International Community, **STATES** are the primary subjects – Individuals play a limited role
  + While States are legal entities, they can only operate through individuals acting as State Officials
  + Individuals act as **STATE AGENTS** or **OFFICIALS** – **TOOLS** of the structures to which they belong
  + The International instrument is brought into being **BY** individuals and implemented **BY** individuals, yet they are not the primary subjects of it
  + **FICTITIOUS PERSON** – manifested in a conspicuous form in International Law
    - **Individuals engage in transactions or perform acts NOT in their personal capacity, but of behalf of collectives or a multitude of individuals**
* International Community consists of **SOVEREIGN** and **INDEPENDENT** States with human beings playing a lesser role
  + Due to the history and forming of the first modern states in Europe
  + Such a constant and salient feature of the world community – most individuals now belong to at least one state – World population of 6 billion people is divided amongst nearly 200 states
  + Without the protection of a State, human beings are likely to endure **MORE** suffering and hardship than what is likely to be their lot in the normal course of events

**Decentralized Authority**

* Developments of the current National Legal systems resulted from the emergence within the state community of a group of individuals who succeeded in wielding effective power
  + This group considered it convenient to create a special structure aimed at institutionalizing power and crystallizing the relationships between the ruling group and their fellow members
  + A common pattern evolved in all modern states when creating the institutional apparatus
    - Use of **FORCE** by members of the community was forbidden, except for emergency situations such as self-defence = **MONOPOLIZATION OF LAWFUL COERCION BY THE STATE**
    - Central organs acting on behalf of the whole community were responsible for the **THREE MAIN FUNCTIONS TYPICAL OF ANY LEGAL SYSTEM**: *Law Making, Law Determination and Law Enforcement*
      * Monarch and an assembly (parliament, etc) held the power to create and modify law, courts ascertained breaches of law and special bodies of professionals (police officers) were law enforcers
      * Power behind these three functions had to be exercised in the interest of the **STATE** and not in the self-interest of the individuals – vested with a power but also a legal duty to make the law, establish if it had been breached, and to enforce it
* **CONTRAST IN INTERNATIONAL COMMUNITY** – No state or group of States has managed to hold the lasting power required to impose its will on the whole world community – power is fragmented and dispersed amongst states
  + Political and military alliances have occasionally been set up or a strong convergence of interests between two or more members (states) of the community has evolved – **HOWEVER** these have not hardened into a permanent power structure
  + Relations between the States comprising the international community remain largely **HORIZONTAL** – no vertical structure has yet crystallized, like in domestic systems
  + This is an **UNSATISFACTORY** **SITUATION** – most components of national structures and of the international community (individuals, groups, associations, state-like entities, multinational corporations, transnational organizations, multinational financial structures, media networks etc) are so closely intertwined **ACROSS** national borders that they make up the phenomenon of “globalization”
    - Global governance capable of settling all the problems that globalization may entail DOES NOT YET EXIST – there is a relative ANARCHY that still prevails at the level of central management
* The **HORIZONTAL** Structure: No rules are in place discharging the three functions of the legal system (law making, determination and enforcement) nor for entrusting them to any particular body or member of the international community – **ALL THREE FUNCTIONS ARE DECENTRALIZED**
  + Each state, acting together with other states under the impulse of overriding economic, political or other factors, tries to set new legal standards or to change them
    - Deliberately – via **TREATIES** – contractual stipulations entered into by two or more States, and only binding upon the contracting parties
    - Unwittingly – **CUSTOMARY** **LAW** – general rules evolved through a spontaneous process and binding upon all international legal subjects
  + Each state must determine for itself how to settle disputes or to impel compliance with the law – whether to settle disagreements peacefully or enforce the law unilaterally or collectively
  + Each state has the power of **AUTO**-**INTERPRETATION** of legal rules: Power that necessarily follows from the **ABSENCE** of courts endowed with **GENERAL** **AND** **COMPULSORY JURISDICTION**
* Traditional International Law refers to the law which came into being and governed International relations between the Peace of Westphalia of 1648 and WWI
  + Resort to force was **LAWFUL** both to enforce a right and to protect economic, political or other interests – this greatly favoured the **STATES** themselves – Improvements have been made in the present international system (**MODERN**) such as the ban on force by individual states
* Responsibility for violations of rules governing the behaviour of States does **NOT** fall upon the transgressor (the individual) but on the group to which he belongs (the State)
  + This is another deviation from domestic legal systems
  + Notion of Individual Responsibility = he who commits a wrong shall suffer the consequences
    - **EXCEPTIONS** to this notion: **VICARIOUS** **RESPONSIBILITY** – someone bears responsibility for actions performed by another person with whom the former has special ties (parent/child etc)
    - **THIS EXCEPTION BECOMES THE RULE IN THE INTERNATIONAL SYSTEM**
      * If a state official breaks International Law, the wronged State is allowed to “take revenge” against the **WHOLE** **COMMUNITY** to which that state official belongs, even though the community has neither carried out nor ordered the infraction
        + Victim state can claim payment of money, or can resort to countermeasures

**Collective Responsibility**

* **COLLECTIVE RESPONSIBILITY**
  + Means both that the whole state community is **LIABLE** for any breach of International Law committed by a state official and that the whole state community may suffer from the consequences of the wrongful act
  + **EXAMPLE**: Corfu 1923 - Italian members of the International Commission charged by the Conference of Ambassadors (responsible for implementation of peace treaties) were killed at Zepi, in Greek territory at the hands of unknown terrorists - Italy asked Greece to formally apologize, hold a religious ceremony, pay honour to the Italian flag, conduct a serious inquiry into the deaths, inflict the death penalty on the culprits and pay 50 million lire - Greece said it was unjust that Italy charged Greece with responsibility for the murders - dismissed the inquiries re: criminal inquiry, death penalty and payment - the next day Mussolini ordered Italian ships to bombard Corfu - Italian troops occupied the island to force Greece to comply with the terms, with civilian casualties - Conference of Ambassadors found that Greece had been negligent in pursuing the perpetrators of the crime, ordered the compensation to be paid
    - Greek civilians and the Greek treasury bore the brunt of the consequences for the murders, even though it was never determined if Greeks were responsible
      * **THIS IS AN EXAMPLE OF COLLECTIVE RESPONSIBILITY**
      * Collective Responsibility is typical of **PRIMITIVE** and **RUDIMENTARY** legal systems
* The law governing the international community is typical of societies, with the aggravating circumstance that unlike primitive communities (which are highly integrated, with all the ensuing benefits), the world community is largely based on non-integration of its subjects, from the viewpoint of their social interrelations
* Two trends have significantly altered the traditional picture:
  + **A NEW CLASS** of state responsibility has emerged for gross violations of fundamental rules enshrining essential values (aggravated responsibility) – *Jus Cogens*
  + Previously, the only category of individuals criminally liable under International Law was pirates, since the end of the 19th century **INDIVIDUAL RESPONSIBILITY** has gradually evolved
    - Serious offences committed by state officials in exceptional circumstances, such as war crimes, should entail the **PERSONAL** **LIABILITY** of their authors in addition to the possible international responsibility of the state to which they belonged
      * Category of **WAR CRIMES** was expanded after WWII and further categories were added: crimes against peace and crimes against humanity
        + BUT! REGARDLESS OF MOMENTOUS ADVANCES IN RESPONSIBILITY, COLLECTIVE RESPONSIBILITY REMAINS THE RULE

**Domestic Implementation**

* International rules to be applied by States within their own legal systems generally need to be incorporated into National Law – **DOMESTIC IMPLEMENTATION**
  + The international community is composed of **SOVEREIGN** states, each eager to control its own subjects
    - When international rules need to be applied within a state – **IT SHOULD BECOME MUNICIPAL LAW**
    - **EXAMPLE**: There is an international rule forbidding the use of certain categories of weapons (chemical or bacteriological) – In order for it to take effect, the Minister of Defence and Military Commanders of a state must be under a **NATIONAL OBLIGATION** to comply with the rule, become cognizant of the scope of the rule, and to take all necessary measures to implement it
    - **EXAMPLE**: Article 29 of the Vienna Convention of 1961: The person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention. The receiving State shall treat him with due respect and shall take all appropriate steps to prevent any attack on his person, freedom or dignity
      * This obliges the enforcement agencies of a state to refrain from arresting or detaining foreign diplomats and to take all necessary measure to prevent undue attacks to them
  + Most international rules cannot work without the constant help, cooperation and support of national legal systems
  + International Law is like a field marshal who can only give orders to generals – solely through the generals that his orders can reach the troops – if the generals do not transmit them to the soldiers in the field, he will lose the battle

**Freedom of Action**

* Freedom of Action: In **NATIONAL** legal systems the primary legal subjects – **INDIVIDUALS** – enjoy great freedom in their private transactions – they can variously enter into agreements with other persons or refrain from doing so, they can setup companies, create associations, etc
  + However, broad contractual freedom is **NOT** unfettered: Central authorities usually place legal restraints upon them – one cannot make private transactions which are contrary to public order and morals, as the contracts will be null and void
  + **EXAMPLE**: a contract to hand over to someone else a next of kin for purposes of prostitution is **ILLEGAL** and **VOID**
    - Each domestic system contains a **CORE OF VALUES** that members of the community **CANNOT** disregard, even when engaging in private contracts
    - **IN CONTRAST**: subjects of the international community enjoy wide-ranging freedom of action – In the Traditional System, freedom was untrammelled – some restrictions have been established with the Modern system
      * **TRADITIONAL SYSTEM**: *laissez-faire system* – states had great freedom as to their internal setup – world community could not “poke its nose” into how a state organized its political system – all states were free to establish an authoritarian power structure or to uphold democratic principles – parliament, monarch, dictatorship, etc – **THIS WAS ALL THE PRIVATE BUSINESS OF EACH COUNTRY**
        + States were completely free to decide upon the tenor and scope of their national legislation
        + States also enjoyed complete freedom in regards to their foreign policy – up to the state to decide whether or not to enter into international agreements - free to choose their partners and contents of agreements - could shape their international relations as desired - could recognize a new state or withhold recognition - free to enter into alliance or refrain - even authorized to use as much force as they wished an on any grounds they chose - could engage in war or resort to force just short of war because their legal rights had been violated, or because they considered it politically and economically expedient to forcibly attack another state (example: to occupy and annex part of another state or to set up a subservient government)
        + States could also intervene in the domestic and international affairs of other members of the world community by political pressure or by threatening force
        + Freedom in the economic field was even greater
        + Lack of legal restraints even allowed states to agree to extinguish themselves - agreements could be made where one was incorporated into another, or they could merge, or one could agree to cede a portion of territory - *No imperative rule prohibited self-mutilation or self-destruction*
        + Development in this way - no state or group of states proved capable of wielding permanent control over the world community to impose a set of standards of behaviour to govern the action of members - necessary to fall back on **NEGATIVE** regulation - leaving all members free to act as they liked, provided they did not grossly and consistently trespass on the freedom of other members

*This approach could only favour the Great Powers - in practice international law was modelled in such a way as to legitimize, codify and protect their interests*

* + - * **MODERN SYSTEM** – unrestricted freedom of traditional system has undergone qualifications since WWI – Three factors are responsible:
        + Ever-expanding scope of the network of international treaties - most states are now party to a very large number of treaties impinging upon their domestic legal systems - most members of the world community are bound to obey a number of obligations that greatly restrict their latitude in regards to their own internal system and their freedom in the international sphere - also, many are parties to international organizations, to treaties of alliance, etc - Commitments of Treaty get in the way of the old freedoms: political, economic, diplomatic, military and psychological factors in the way
        + Increasing number of legal restrictions on the right to use force have been put in place: Covenant of the League of Nations of 1919 placed considerable restrains on a number of states – Paris Pact reinforced and extended them to a larger group of states in 1928 – became **RADICAL** and **SWEEPING** in 1945 when the UN Charter **REQUIRED** members to refrain from using or threatening to use any sort of military force, with or without the label of WAR

Ban on force has now become a **PRINCIPLE** encompassing the **ENTIRE** international community – resulting limitation on state freedom is unfortunately beset with loopholes, which chiefly affect the enforcement mechanisms

* + - * + In the 1960s a **CUSTOMARY RULE** evolved in the international community: Certain **GENERAL NORMS** have greater legal force than other rules – a state **CANNOT** derogate from them through international agreements

A SET OF PEREMPTORY NORMS CALLED *JUS COGENS*

States are now duty-bound to refrain from entering into agreements providing for one of the activities prohibited by peremptory norms – if they do so, agreements will be null and void, such as in **DOMESTIC** systems

**Principle of Effectiveness**

* International Law takes account of existing power relationships and endeavours to translate them into legal rules: **LARGELY BASED ON THE PRINCIPLE OF EFFECTIVENESS**: *only those claims and situations which are effective can produce legal consequences*
  + A situation is effective if it is **SOLIDLY IMPLANTED** in real life
    - If a new state emerges from secession, it will be able to claim international status **ONLY** after it is apparent that it undisputedly controls a specific territory and the human community living there
    - If civil strife breaks out within a state, the rebels or insurgents cannot claim international rights and duties unless they exercise **EFFECTIVE** authority over a part of the territory concerned
    - In the case of a military occupation of a foreign territory, the occupying power cannot claim rights and privileges deriving from the international law of warfare until the territory is actually placed under that power’s authority and it is in a position to assert itself
      * The PRINCIPLE OF EFFECTIVENESS permeates the entire body of rules making up International Law
        + Traditional System: legal fictions had no place on the international scene – new situations were not recognized as legally valid unless they could be seen to rest on a firm and protracted display of authority – **FORCE** was the principal source of **LEGITIMACY**
* Why has **FORCE** played such an overriding role in the world community?
  + Power has always been diffused and a superior authority capable of legitimizing new situations has **NOT** emerged, nor have states evolved a core of legally binding principles serving this purpose (they are too divided to do so) – **CONSEQUENCE** = legal rules must of necessity rely upon force as the sole standard by which new facts and events are to be legally appraised
    - Modern System: Since WWI a number of states have attempted to make “legality” prevail over sheer force or authority – main impetus is the Stimson doctrine of 1932 – suggested withholding legitimacy from certain situations which, although effective, offended values that were increasingly regarded as fundamental

**Community Obligations and Community Rights**

* International Community is a **HORIZONTAL** structure with a lack of strong political, ideological and economic links between members – they are all **SELF-SERVING STATES**
  + Reciprocal Obligations – **SYNALLAGMATIC** rules – international rules confer rights or impose obligations on **PAIRS OF STATES** only – each state has a right or an obligation to **ONE OTHER STATE ONLY**
    - In the case of customary rules – they may confer on each member of the international community rights *erga omnes* – towards all other states – However, in concrete application boils down to standards applying to pairs of states
      * Examples such as the rule on sovereignty (each state can claim from all other states full respect for its territorial integrity and political independence) and that on the free use of the high seas (each state is entitled to enjoy freedom of navigation, fishing and overflight, as well as freedom to lay submarine cables and pipelines in all parts of the sea which are not under the jurisdiction of a coastal state)
        + As soon as one of these norms is violated, the ensuing legal relationship links only the aggrieved state and the offending party

The *erga omnes* character of the substantive rights **IS NOT** accompanied by a **PROCEDURAL RIGHT** **OF ENFORCEMENT** belonging to all the members of the international community

Once a state has infringed the sovereignty of another state, it is for the **VICTIM** to claim reparation – no other state can intervene on the victim’s behalf

* + - Same situation exists for international treaties – a treaty on international trade providing for the establishment of a certain customs duty on a particular good confers on each contracting party the right to demand of all the other contracting parties fulfilment of that obligation – as soon as it is breached the victim is entitled to claim reparation, but the issue is **ONLY BETWEEN THE PAIR OF STATES, NOT EVERY PARTY TO THE TREATY**
  + This is **UNLIKE DOMESTIC SYSTEMS** – in serious breaches, such as criminal offences, a representative for the **ENTIRE** community (crown counsel, etc) can initiate legal proceedings **REGARDLESS** of the attitude or action of the injured party – in international community the reaction to a wrong ultimately depends on whether the victim is stronger than or at least as strong as the culpable state: **RESPECT FOR LAW IS MADE DEPENDENT ON POWER**
    - One of the only exceptions to this network of legal rights and obligations is the general rule on **PIRACY** – every state is authorized to seize and capture pirates on the high seas, regardless of nationality or whether or not they had attacked a ship or threatened to do so – this rule granted a right to all states unconnected to actual damage – in exercise, states did not act on behalf of the world community for a collective protection – acted merely to safeguard self or joint interests
  + Modern System – traditional rules based on **RECIPROCITY** still constitute the bulk of international law – there are still new rules in place, however
    - A number of treaties came into place after the World Wars and provide obligations that are incumbent upon each state towards all other contracting parties and are in no way reciprocal
      * This has evolved due to an emergence of new values that the international community has come to regard as worthy of special protection
        + Conditions of Workers – International Labour Organization
        + Better safeguards against genocide and other egregious violations of human rights
        + Sweeping ban on all forms of aggression

**NEW VALUES** – resulted in numerous treaties and international customary rules

* Community Obligations:
* Are obligations protecting fundamental values (such as peace, human rights, self-determination of peoples, protection of environment)
* Are obligations *erga omnes* - towards all member states of the international community
* Are attended by a correlative **RIGHT** that belongs to any state and may be exercised by any other contracting state, whether or not it has been materially or morally injured by the violation
  + The **RIGHT** is exercised on behalf of the whole international community to safeguard fundamental values of the community
    - **COMMUNITY RIGHTS** - *bonum commune totius orbis* - common good for the whole world
      * Emergence in modern times of the notions of community obligations and rights translates into positive law ideas
        + Still relatively rare, however - prime example of the typical feature of the international community of the huge gap between the normative level and implementation
* Article 1 of the four Geneva Conventions of 1949 and Article 1.1 of the 1977 First Additional Protocol updating the 1949 Convention with respect to international armed conflicts - these provisions stipulate that each contracting state undertakes to respect the Conventions "in all circumstances" and assumes the obligation "to ensure respect" for these instruments "in all circumstances"
  + Not a substantive legal provision - does not lay down a specific obligation - does not provide for a specific conduct with regard to a specific matter - not a **PRIMARY** rule - instead lays down a general obligation relating to **HOW** all the specific obligations laid down in the Conventions must be fulfilled by each specific contracting State both as regards its own compliance with those obligations and compliance by other contracting states
    - An adjective provision - sets a **SECONDARY** rule - concerning the modalities of fulfilment of obligations contained in primary rules
      * Article 1 = each contracting state is bound to abide by all the provisions of the Conventions regardless of any misbehaviour of another state party - provides that primary rules are not subject to the principle of reciprocity - a contracting party may not disregard a provision if another state breaches that provision to the detriment of the former state
        + Each state party is bound to ensure respect for the Conventions by any other contracting state

The obligation incumbent upon each contracting state to comply with the provisions operates towards all the other contracting states

Any state party has a **LEGAL CLAIM** to compliance with the Conventions by any other state party - any contracting state, faced with violations of the Conventions by a belligerent party may take action and demand cessation of the breach

* + - * + = Community obligations and Community rights
* Geneva Conventions of 1949 set up an innovative legal system that departed from the traditional principles governing international relations essentially geared to self-interest and enshrined the principle of community protection of universal values
  + Each state party to the Conventions, even if it was not involved in or directly affected by an armed conflict, was granted a **LEGAL ENTITLEMENT** to demand observance of Convention provisions, in that they enshrine respect for fundamental humanitarian values - the common interest in compliance with humanitarian treat rules was thus recognized and translated into a legal mechanism
    - **ENFORCEMENT** - big issue - not specified how legal entitlement could be exercised at the interstate level
      * Conventions set up a universally oriented mechanism, but did not coherently take the further step of envisaging the establishment of centralized processes capable of activating and vindicating the community interest
      * Everything was left to each individual contracting state, both at the interstate level and the national level
        + Back to reciprocity/bilateralism and national self-interest
* Coexistence of the Old and New patterns - every legal system undergoes constant change, for law must steadily adjust itself to new realities
  + Sometimes results in old and new institutions living together - as a rule, however, fresh pieces of the legal fabric supplant outmoded ones so as to eliminate the most glaring inconsistencies
  + International Community - two systems of law, TRADITIONAL and MODERN, live side by side (Grotian vs. Kantian)
    - Traditional (groatian) - statist vision of international relations - characterized by cooperation and regulated intercourse among sovereign states, each pursuing its own interests
    - Modern (Kantian) - based on universalist or cosmopolitan outlook - which sees at work in international politics a potential community of mankind - stress on the element of "trans-national solidarity"
  + New institutions within the modern system have not uprooted or supplanted the Traditional - they have been superimposed instead

**What is International Law For? – KOSKENNIEMI**

* The objective of International Law appear differently depending on one’s standpoint
  + States use International Law to **FURTHER THEIR OWN INTERESTS**
    - But it also appears as a standard of criticism and means of controlling those in powerful positions
  + **INTERNATIONAL LAW DOES TWO THINGS**:
    - It is a vehicle/instrument through which States pursue their own agendas
    - It also gives us a language of CRITICISM and a means of holding States to **STANDARDS**
  + **INSTRUMENTALISM AND FORMALISM**
    - Connotes two opposite sensibilities of what it means to be an international lawyer
      * Instrumentalism: States using International Law as an **INSTRUMENT**
        + To further their own agendas - **POLITICAL**
      * Formalism: Formal standards and rules to RESTRICT instrumentalism
        + Rules **ON PAPER – CHARTERS, TREATIES**, etc
        + **FORMAL LAW, BLACK AND WHITE**

But! There are “interpretations” of the Formalities and ways to get around them – sometimes alternative interpretations of the **FORMAL LAW** will be used in an effort to turn it back to Instrumentalism

* + What is International Law **FOR**?
    - Invokes popular aspirations about **PEACE**, **JUSTICE** and **HUMAN RIGHTS**
    - Acts as a platform for an International political community
      * **EXAMPLE**: Sports team – without international law, you have no team, you have only individual players. International law (based on common aspirations) makes the team – even though each player has its own agenda, it can be better served within the team
    - Both sides are instrumental
      * One side is using International Law as a language to further its own interests, while the other side is using it as a language to further competing interests: **LANGUAGE OF CRITICISM**

**Peace, Justice and Human Rights**

* *‘Such notions provide an acceptable response to the question “what is international law for?” precisely because of their ability to gloss over existing disagreement about political choices and distributional priorities’*
  + **NOTIONS = PEACE, JUSTICE and HUMAN RIGHTS**
  + **GLOSS OVER** = these terms are **SO VAGUE**, that everyone can agree on them
    - As soon as you try to make them more precise, you won’t have consensus on what International law really is

**Objectives of International Law**

* *‘Because those preferences differ, the answer to the question in the title can only either remain controversial or be formulated in such broad terms as to contain the controversy within itself – in which case it is hard to see how it could be used to resolve it’*
  + Ideas between states of what these principles are = **DIVERGENT**
  + Principles must be kept broad to avoid controversy between them

**Western Domination**

* *‘Hard to justify the attention given and the resources used to the ‘fight against terrorism’ in the aftermath of the attacks on New York and Washington in September 2001 in which nearly 3000 people lost their lives, while simultaneously six million children under five years old die annually of malnutrition by causes that could be prevented by existing economical and technical resources’*
  + Example of International law as **INSTRUMENTALISM**
    - Powerful States use it to further their own agenda
    - **FORMALIST** opposition – International Law provides a language with which to focus on the issue of the children dying

**Weakness of Formalism**

* *‘Few International lawyers think of their craft as the application of pre-existing formal rules or great objectives. What rules are applied, and how, which interpretive principles are used and whether to invoke the rule or the exception – including many other techniques – all point to pragmatic weighing of conflicting considerations in particular cases’*
  + What does this mean for Formalism?
    - Hypocritical – Formalism is **ONLY** invoked when it **ALSO SERVES SELF-INTERESTS**
    - Formalism is just an argumentative technique
    - The use of formalism is **ALSO** instrumentalism
      * Tremendously empowering of us, the people that speak this language of formalism – we suddenly speak a language that the great powers are using to further their own interests

**Benefits of Employing International Law**

* *‘International Law describes individuals and group claimants of rights of beneficiaries of entitlements, and in so doing provides them with an identity that they may assert against the homogenizing pull of society’s dominant elements’*
  + Gives resistance to the pull of assimilation, of the minorities being grouped into the majorities, of having the dominant elements overshadow the rest
    - Using International Law gives those minorities a language to use to have a **VOICE** to resist the homogenizing effect
* *‘To be able to say that some act is an “aggression” or that the deprivation of a benefit is a human rights violation is to lift a private grievance to the level of a public law violation, of concern not only to the victim but to the community’*
  + “I think Guantanamo is a bad idea” = private claim/grievance – International Law does not care
  + “I think Guantanamo is a war crime” = lifted to a level of public International Law
* *‘To make those claims as legal claims (instead of moral aspirations or political programmes) is to imagine – and thus to create – the international world as a set of public institutions within which public authorities should use their power in roughly predictable ways and with public accountability to the community at large’*

**Sources of International Law: Custom and Treaty**

**Sources of International Law**

**What are the Sources of International Law?**

* Article 38 of the Statute of the International Court of Justice:
  + The Court, whose function is to decide in accordance with International Law such disputes as are submitted to it, shall apply:
    - International Conventions, whether general or particular, establishing rules expressly recognized by the contesting states
    - International Custom, as evidence of a general practice accepted as law
    - The general principles of law recognized by civilized nations
    - Subject to the provisions of article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law
  + **CONVENTION**: Treaty = **CONTRACT BETWEEN STATES**
  + **CUSTOM**: General State Practice
  + **CIVILIZED NATIONS**: Reflective of the PAST of International Law, the Western dominance typical with **TRADITIONAL** International Law
  + **HIGHLY QUALIFIED PUBLICISTS**: Anti-democratic system in a way, none of them are elected into positions of power – what gives them authority? They don’t represent anything or anybody

**CUSTOM as a Source of International Law**

* There are **TWO** constitutive elements of **CUSTOM**
  + General Practice and a **BELIEF** that it is Law
    - **USUS** – *OBJECTIVE EVIDENCE OF STATE PRACTICE*
    - **OPINIO JURIS** *– SUBJECTIVE INDICATION THAT STATES CONSIDERED THEMSELVES LEGALLY BOUND*
  + *State Practice* – What is it, and how is it determined?
    - Statements and expressions during negotiations, discussions in the General Assembly, voting patents, public statements, judicial decisions, etc
      * **WHAT IS THE STATE THINKING ABOUT WHAT IT IS DOING**
      * Has to be **EXTENSIVE** and **VIRTUALLY UNIFORM**
  + *Belief*: When these countries are making these statements and expressions, **ARE THEY TAKING THESE POSITIONS BECAUSE THEY BELIEVED IT WAS THE LAW** – They had to do this because they were **LEGALLY BOUND**
* Degree of practice necessary to be considered **CUSTOM**
  + *“State practice, including that of states whose interests are specifically affected, should be both extensive and virtually uniform”* = **NORTH SEA CONTINENTAL SHELF CASE**
* Custom as **UNCONSCIOUS AND UNINTENTIONAL LAWMAKING**
  + States already believe they are following what is law
* **CRYSTALLIZATION OF CUSTOM**
  + Point Zero = **NO PRACTICE, NO CUSTOM**
  + States begin acting in a certain way, stating it is their **STATE PRACTICE**
  + Other states join in because they either want to or they **BELIEVE it is CUSTOM**
  + At some point this **CRYSTALLIZES** into customary International Law
* If you are the first state to do something, **BEACUSE** you believe it to be International Law, you are wrong! – No extensive or virtually uniform practice at that point
* **CASSESE**: “*usually, a practice evolves among certain states under the impulse off economic, political or military demands. At this stage the practice may thus be regarded as being imposed by social or economic or political needs (*opinion necessitas)*. If it does not encounter strong and consistent opposition from other states but is increasingly accepted, or acquiesced in, a customary rule gradually crystallizes. At this later stage, it may be held that the practice is dictated by International Law* (opinion juris).*”*
* Practice has to come from those who are **AFFECTED**
  + Cannot have landlocked countries talking about law regarding the continental shelf, or a place like Nauru or Liechtenstein talking about regulation of satellites
  + Brings about the idea of “Instant Custom” – example: law of space – Russia and the USA are the ONLY states with the technology available to go into space, therefore the customs and practices they were abiding by become **INSTANTLY CUSTOM**
* **CUSTOM WAS MUCH MORE PREFERENTIAL IN THE TRADITIONAL SYSTEM**
  + Practical Reasons: 19th century especially – other alternative to formulating law is **TREATY** and in order to do that, you had to **TRAVEL** to meet
  + Lesser states were more ideologically uniform
* Regional Custom: What is it and what implications does it have for our theory of custom?
  + In Custom – must always ask **CUSTOM BETWEEN WHOM**? **– GLOBAL OR REGIONAL**
    - Custom between States 9as few as two) that are linked in some way, are **NOT** **NECESSARILY GLOBAL** (could be South Pacific custom, for example)
* Relationship **BETWEEN CUSTOM AND TREATY**
  + Custom and Treaty COEXIST even on the SAME ISSUE
  + Signing a Treaty is **EVIDENCE OF STATE PRACTICE**, and can go towards forming Custom
    - There are **THREE** effects of Treaty on Custom:
      * **DECLARATORY EFFECT:**
        + Writing down what is **ALREADY** custom, declaring it and codifying it into treaty

Even though a country didn’t sign the treaty, if it was simply declaring an already established custom, it is still binding

* + - * **CRYSTALLIZING EFFECT:**
        + Pushes it over the line into law – Something that is an EMERGING **CUSTOM – MAKES IT LAW**
      * **GENERATING EFFECT:**
        + In some instances, participation in a new treaty can be so widespread that the treaty itself becomes binding on everyone – it becomes extensive and virtually uniform state practice

Also true of UN General Assembly resolutions – if voting was unanimous, etc

* **US Justice Cardozo**: *“international custom has at times, like the common law within states, a twilight existence during which it is hardly distinguishable from morality or justice, till at length the imprimatur of a court attests its jural quality”*
  + Controversial: He is saying basically “you have to have a court case to determine it’s custom before it’s actually custom”
    - But! This is not reality – things can be established in custom **BEFORE** a court deems is to be so

**Treaty as a Source of International Law**

* There are **THREE** things required to establish **BINDING TREATY OBLIGATIONS**:
  + AGREEMENT, SIGNATURE, RATIFICATION
    - A state is **NOT BOUND** to a treaty until it is **RATIFIED**
      * There are different procedures for ratification in different states
* In some countries, International Law is **DIRECT** – anything put into International Law is directly put into the domestic legal system – in others there is still some legislative implementation processes before it will be law in the domestic system
  + Different Ratification processes in these two instances:
    - Direct system, it has to be **DEMOCRATIC, REPRESENTATIVE** – since it will become binding law on **ALL** citizens
    - Indirect system, only the executive is involved in the legislative process of ratifying and making it domestic law
  + Binding law governing Treaties in International Law is **CUSTOM**
    - If you are not a party to the treaty, what do you rely on when entering into treaty agreements/negotiations? **CUSTOM**
      * It is an extensive and virtually uniform **STATE PRACTICE** and **BELIEF** that **TREATIES** are **BINDING** in International Law
  + Reservations in Treaties
    - Multilateral Treaty – multiple parties – If a state wants to enter into the treaty , but does not agree with certain clauses, it can make a **RESERVATION**
    - Reservations have to be accepted by **ALL SIGNING PARTIES** in order for the reserving state to be accepted into the treaty
    - In practice, reservations essentially give a **VETO** to all other parties
    - Bilateral Treaty – two parties - reservations basically amount to a proposal for a new text to be drawn up
  + New law governing Reservations in Treaties
    - Articles 19 and 20 of the Vienna Convention on the Law of Treaties
      * Reservations can now be **APPENDED** to treaties at the time of ratification **UNLESS** they are expressly contrary to the nature of the treaty itself (incompatible) or are prohibited by the treaty
      * ISSUE: Who gets to interpret whether a reservation is compatible with the object and purpose of a treaty? What problems does this create?
  + Treaty Interpretation
    - Article 31.1 VCLT: “a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of their object and purpose”
    - Article 32 VCLT: “recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd of unreasonable

**NORTH SEA CONTINENTAL SHELF CASE: APPLICATION AND EXAMPLE OF SOURCES**

* Hugely important in International Law – big in developing **SOURCES** of International Law
* Federal Republic of Germany vs. Denmark and the Netherlands – 1969
* Article 6 of the Convention on the Continental Shelf says that if there are two countries separated by a sea, the boundary between them should be calculated as the point equidistant from both coastlines
  + **EQUIDISTANCE PRINCIPLE**
  + Boundary is important because a country can only drill for oil in the seabed within their territory
  + North Sea is surrounded by Norway, UK, Netherlands, Germany, Belgium and Denmark, and has a lot of oil near the middle
  + Germany felt that due to their coastline being concave (as opposed to Denmark/Netherlands with convex coastlines) they were getting less seabed than what they thought was fair due to the equidistance principle
  + **EQUIDISTANCE vs. JUST AND EQUITABLE SHARE**
  + Germany went to ICJ and asked for a ruling on how to draw the boundary
  + Germany **HAD NOT RATIFIED** the Convention, so ICJ decided they weren’t bound to it
  + Denmark and Netherlands argued that the **EQUIDISTANCE PRINCIPLE** was not only codified in the Convention of the Continental Shelf, but that it was already **CRYSTALLIZED INTO CUSTOMARY INTERNATIONAL LAW**
  + Central Issue: *Another and shorter way of formulating the question would be to ask whether, in any delimitation of these areas, the Federal Republic is under a legal obligation to accept the application of the equidistance-special circumstances principle*
  + ICJ found that the equidistance principle was still relatively new, so it did not constitute **CUSTOMARY INTERNATIONAL LAW** at that point
    - Boundary should be redrawn on **EQUITABLE PRINCIPLES, NOT** equidistance

**Sources of International Law: Other Sources and Hierarchy**

**Other Sources of International Law**

**Unilateral Acts**

* Unilateral Acts are **PROMISES – PROMISORY ESTOPPEL** on an **INTERNATIONAL LEVEL**
* Not many examples available of Unilateral Acts (North Sea Continental Shelf Case)
* We are led to believe that Unilateral Acts create International Legal obligations
* ICJ Creates and decides upon Unilateral Acts
  + How can the ICJ create Unilateral Acts, since they are not listed in Article 38 of the ICJ Statute?
  + **BEST** way of looking at Unilateral Acts is not as if the ICJ just invented some new area of law, but that Unilateral Acts are a species of **GENERAL PRINCIPLES** of International Law

**Binding Decisions of International Organizations**

* International Organizations may issue regulations, directives, decisions etc that become legally binding to all **MEMBERS**
* **TREATY LAW** gives these Organizations power to create laws (UN Charter, etc)
* Examples: EU – European Council of Ministers; UN – Provisions in the UN Charter allow the UN to create legally binding decisions via the SC and the GA
* States leave the not-so-fundamental issues to International Organizations, and thus they cover fairly limited areas – Example: International Civil Aviation Organization

**Judicial Decisions based on Equitable Principles**

* Equity as distinct from Law
  + Judicial Decisions come from the ICJ – they can do what they think is **RIGHT**, **FAIR** and **JUST** regardless of the actual **LAW**
    - States can come to the ICJ with a dispute and tell the Court to give their **FAIR** decision, not based on standing law or non-existent law
  + This concept has **NEVER BEEN USED** – Most states will instead use **ARBITRATION** as an equitable process instead of the ICJ – you can **PICK** the judges in arbitration – States want to control the process as much as possible
* Once you have chosen to abide by the Equitable route, whether by ICJ or arbitration, the conclusions and decisions are **LEGALLY BINDING** and are thus a source of International Law
* Two uses of Equity:
  + When there is **NO EXISTING LAW** – Judges will decide what is fair
  + Where Courts will **READ IN PRINCIPLES OF EQUITY** – Existing law is **INTERPRETED** based on Equitable Principles

**General Principles of Law**

* Fill in gaps left behind by other sources of International Law
  + There is **NO CENTRAL LAWMAKING BODY** in International Law like in Domestic Systems
  + Concept of **NON-LIQUET** = “*it is not clear*” – **THERE IS NO LAW – LAW DOES NOT EXIST**
    - Facts do not give rise to a situation that International Law can clearly deal with
    - EXAMPLE: Regulation of Outer Space **BEFORE** Russia and **USA** were going up
    - EXAMPLE: North Sea Continental Shelf Case
      * Always a temptation **NOT** to resort to **NON-LIQUET** – desire is instead to **EXTRAPOLATE** from existing law
* International law is **CONSTANTLY** attempting to differentiate itself from International Politics
  + General Principles: Fill in Gaps and **AVOID** Non-Liquet
  + EXAMPLE: Geneva Conventions = rules on what you can and cannot do during war
    - 20 or so of these rules are on war crimes – if you violate one of these 20, you must be prosecuted – they are deemed **GRAVE** **BREACHES**
    - Convention has **NO** provisions for intention requirements for the grave breaches
      * Non-Liquet? **NO** – take a general survey of intention requirements in law around the world in **DOMESTIC** systems and use these **GENERAL** **PRINCIPLES** to decide what intention requirements should be
  + EXAMPLE: Defences, such as **DURESS** – if you look at sources of International Law, duress does not appear – therefore, look to **GENERAL PRINCIPLES** – duress is a defence in practically every country – **ALL** countries recognize this fact, therefore International Law should as well
* **GAPS IN INTERNATIONAL LAW** – Caused by the fact that International Law does not move fast enough to keep up with politics and domestic law making and there is no central lawmaking body
* North Sea Continental Shelf Case: *“where there is no central lawmaking body, treaty law tends to regulate only the specific matters of concern to the relevant contracting parties, and customary rules normally come into being slowly and by definition cannot address all the interests and concerns of States”*
* Two possibilities for General Principles as a source of International Law:
  + Principles derived from Public International Law
  + Principles derived from Municipal Legal Systems
* Two competing origins for General Principles:
  + Human conscience and Positivism
* **CASSESE**: *“In this community, general principles constitute both the backbone of the body of law governing international dealings and the potent cement that binds together the various and often disparate cogs and wheels of the normative framework of the community”*

**Quasi-Sources of International Law**

* Decisions of International and Domestic Courts
  + **DOCTRINE OF PRECEDENT**
    - It is **NOT** really legally binding, but Judges can use facts from other decisions to make their own legally binding decisions
    - A **TOOL** that lawyers and Judges use to reach a particular conclusion
    - There is **NO** Formal **DOCTRINE OF PRECEDENT** in International Law
      * When there is a decision in the ICJ between 2 states, only those states are affected
      * In **REALITY** and **PRACTICALITY** – previous decisions **DO HAVE** an influence and a role in creating International Law
        + **HENCE IT IS A QUASI-SOURCE**
      * Decisions are still very important, even if between only 2 states, when you consider Unilateral Acts
    - No doctrine of precedent in International Law, nonetheless, these decisions by international judicial bodies are **HIGHLY** influential
    - It is merely a **FORM OF ARGUMENT** but is **ALSO** exists in International Law
  + Domestic Courts have no authority to create International Law, but they can sometimes intervene and have influence in decisions
    - EXAMPLE: Guantanamo – US Supreme Court – US tortures **UNLAWFUL** **COMBATANTS** which are not protected under the Geneva Convention – ICRC says that it is not allowed under additional protocol 1 – US says they are not bound since they did not ratify it – ICRC says it is **CUSTOMARY** law – US gov claims it is not – **US SUPREME COURT says YES IT IS OBVIOUSLY CUSTOM**
* Soft Law
  + **NOT LEGALLY BINDING**
  + Declarations, etc made by academics usually of what **SHOULD** be law
    - These are eventually cited by International Courts and Organizations that are in agreement with the declarations – eventually someone will claim it as **CUSTOM**
  + VERY common in the realm of Human Rights Law
    - **NOT** binding but can potentially create state practice down the road and thus can lead to **CUSTOMARY** **LAW**

**Hierarchy of Sources of International Law**

**Issues in Hierarchy**

* Are all rules in International Law equal? There are many sources of International Law – which prevail in which situations?
* Some laws are contradictory
* There is **NO CONSTITUTION** in International Law, no **SINGLE DOCUMENT**
* If there are any documents which attempt to do this, it is **EXTRAPOLATED** from many different sources – EXAMPLE: UN Charter as a source **AND** a compilation of other sources
* Is there anything entrenched in International Law? Any **CONCRETE** principles? **YES – JUS COGENS**

**Jus Cogens**

* **JUS COGENS are PEREMPTORY NORMS**
* Some ideas are SO fundamental in International Law, that you **CANNOT** create treaties to violate them – **MOSTLY HUMAN RIGHTS FUNDAMENTALS**
* Conflicting Sources of International Law has always been a big issue, and as such there has been a big push for a more **ENTRENCHED** and **ENSHRINED** group of principles that **CANNOT BE VIOLATED IN INTERNATIONAL LAW UNDER ANY CIRCUMSTANCES**
  + **JUS COGENS** is the answer to this desire
  + Article 53 of the VCLT (Vienna Convention on the Law of Treaties):
    - *A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character*
      * = **CODIFICATION OF JUS COGENS/PEREMPTORY NORMS**
  + Idea of Jus Cogens was brought about by socialist states and colonised states worried about slavery and use of force – worried about power politics forcing them into signing treaties which allowed these actions
  + Development of Jus Cogens was an effort to push these fundamentals as part of a counter western-dominated system
    - Developing Countries: majority of UN GA after the 1960s – want Jus Cogens to favour their own agendas
    - Socialist Countries: peaceful coexistence between east/west – Jus Cogens is a way of keeping the “virus of capitalism” away from their countires BY LAW
  + Still have to look at ***OPINIO JURIS*** and state practice to identify if principles are actually **JUS COGENS**
    - Identifying Jus Cogens is a huge problem – State practice does not always reflect fundamental principles – **EVERYBODY TORTURES**, but it is still agreed upon to be Jus Cogens
  + **CONTROVERSIAL**!
    - Restricts **FREEDOM OF TREATY**
    - Attempts to create a Hierarchical order within the International realm
      * **COMPROMISE** – western states agreed to the idea of Jus Cogens as long as there was some mechanism for judicial determination of peremptory norms set up – since no general agreement existed on the list of specific rules having peremptory character, there needed to be an impartial judicial body to establish, in case of dispute, whether or not an alleged peremptory rule did in fact belong to Jus Cogens
    - **NO CONCRETE LIST OF JUS COGENS because IT CANNOT BE DECIDED JUST WHAT THEY ARE**
      * VCLT Article 53 is **INTENTIONALLY VAGUE** – anything more specific would not be agreed upon by the states
      * Anyone who **INVOKES** these principles must be willing to go to the ICJ to have it decided upon
  + Legal Effects/Consequences of Jus Cogens:
    - Assist in the interpretation of norms
    - Create a deterrent effect
    - Impact on recognition of states
    - Reservations in Treaties – cannot make a reservation in contradiction to Jus Cogens rules
    - Extradition Treaties
    - Immunities

**Conflicting Sources of International Law**

* When sources of International Law conflict, there are tools available to determine preference
  + ***LEX POSTERIO*** – Newer law prevails over Older law
  + ***LEX SPECIALIS*** – concept of **SPECIAL** law prevails over the more **GENERAL** law
    - EXAMPLE: Human Rights Law specifies the right to life, but the Law of War specifies the right to shoot to kill soldiers
      * Plainly **CONFLICTUAL LAWS** – **BUT** the right to shoot to kill soldiers is more **SPECIFIC** – it prevails **WITHIN PERAMETERS** – specifies a group of people and a time
  + ***LEX SUPERIOR*** – idea that one sort of legislation will prevail over another – a sort of hierarchy in International Law
    - EXAMPLE: Supreme Courts prevail over regional courts, etc

**Subjects of International Law: States**

**States as Subjects of International Law**

**What is a Subject of International Law?**

* Any entity that is bound by International Law
* Concept of **SUBJECT** delineates who can **CREATE** International Law and who is **BOUND** by International Law, and who is not
  + There is a whole series of **ENTITLEMENTS** that flow from being a subject of International Law

**Why are States important in International Law?**

* States were the **FIRST** and **ONLY** subjects of International Law
  + After the Peace of Westphalia in 1648, instead of a realm of kingdoms and princehoods, a new system of **STATEHOOD** emerged
  + Countries, not Kingdoms – each country shall be **SOVEREIGN** and will be able to **CREATE** International Law obligations and be BOUND by them
* *“International Law is mainly to do with States and, where it is to do with something else, it is because States have chosen to make it so...” – Warbrick*
* In Traditional system, International Law was **EXCLUSIVELY** about States and the relationships between States, although there is now a shift away from the focus of States on individuals, corporations, etc
* It is still **FUNDAMENTALLY** between states – but sometimes when the focus is not on states, it is only because the States have willed it so
* States are still at the top of the hierarchy of Subjects – still the focal point in International Law – still the repository of International Law when determining the law, or the substance of it

**What does Equality of States mean?**

* State practice of each country matters as much as others
  + Nauru’s state practice matters as much in International Law as China’s
  + Nauru has the same sovereign rights and obligations of any other Country
* Statehood is important – **LOTS** of power comes from being recognized as a State
* *“all States may participate in the law-making processes of International Law, all States may make the initial determination about whether their rights have been violated and, if so, about what action to take to restore legality, and all States will bear international responsibility for failure to comply with their international obligations” – Warbrick*
* Statehood and Equality of States means **THREE** things for States:
  + Ability to **PARTICIPATE** in and **CREATE** International Law
  + Ability to **DETERMINE** if rights have been **VIOLATED**
  + Responsibility for failure to comply with obligations
* Equality in International Law as a State **DOES NOT** mean Political Equality
  + Equality in this sense is highly limited – legally formal sense of equality regarding a very specific content

**Self-Determination**

* *“all peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development” – ICCPR Article 1.1*
* Notion of Self-Determination highly important in the efforts of Decolonization
  + Colonized peoples sought Independence because they wanted to be **SELF-DETERMINING**
  + Big Problem – **DEFINING “PEOPLES**” – who are they?
  + **EXAMPLE**: Rwanda – in order to prosecute Genocide, you have to prove that killing took part to destroy, in all or in part, a racial or ethnic group – actually very difficult to prove that the Tutsi were an ethnic delineation – Tutsi was in fact a **STATUS** – you could move between Hutu and Tutsi in one lifetime
* In the 1960s there was a process whereby the Colonized states wanted Independence via Self-Determination (India, Tanzania, Congo, Algeria, etc)
* **SELF-DETERMINATION IS A JUS COGENS RIGHT!!** – It is so fundamental to be able to govern ourselves as people

***UTI POSSIDETIS***

* *Uti Possidetis* is a doctrine in Public International Law in which borders that existed during Colonialism are kept as they were when states become Independent
* “Uti Possidetis is a general principle, which is logically connected with the phenomenon of obtaining independence, wherever it occurs. Its obvious purpose is to prevent the independence and stability of new states being endangered by fratricidal struggles provoked by the challenging of frontiers following the withdrawal of the administering power” – ICJ, Burkina-Faso v. Mali
  + **EXAMPLE**: Borders drawn in Africa during colonization were completely arbitrary – **COUNTRIES DID NOT REFLECT THE STATUS OF “PEOPLES”**
    - Uti Possidetis was used to establish the frontiers in Africa after decolonization – ensuring frontiers followed the original boundaries of the old colonial territories – **PRINCIPLE OF STABILITY OF BORDERS** – done in order to **AVOID** border wars and disputes – This is the **LEGACY** of Colonialism
* **UTI POSSIDETIS IS A POLICY DECISION TO FAVOUR PEACE OVER SELF-DETERMINATION**
* **CRITICISM OF UTI POSSIDETIS**: When a developing country comes into International Law, they come into all of the previously established rules, including Uti Possidetis, but they **DID NOT CONSENT** in the creation of application of these laws

**Commonly Accepted Definition of a STATE**

* Montevideo Convention on Rights and Duties of States – 1933 – Article 1:
  + *The State as a person of International Law should possess the following qualifications:*
    - *A permanent population*
    - *A defined territory*
    - *A government; and*
    - *Capacity to enter into relations with other states*
* **PROBLEMS**: How are these things defined? What is a permanent population, what defines the territory, what if the borders are controversial, what is a government, what about states without a government, can one man with a gun claiming power be a government?

**How do States Emerge?**

* Civil War
* Disintegration
* Decolonization
  + **EXAMPLE**: Namibia – previously under Apartheid South African Rule, suddenly its own State after Decolonization
* Unification
  + Two different possibilities of Unification:
    - Two states disappear, and one brand new state emerges
    - One state disappears and another state takes over the whole territory
      * **EXAMPLE**: Germany after the fall of the Berlin Wall
* Secession from a Larger State
  + **EXAMPLE**: Kosovo, Quebec (attempts)
* Consent – kind of like a happy divorce
  + **EXAMPLE**: Separation of Czechoslovakia into Slovakia and Czech Republic
* Forcible Separation of an Existing State
* Reduction of an Existing State
  + **EXAMPLE**: USSR and Russia
* Amalgamation of Two States
  + **EXAMPLE**: Federal Republic of Germany and GDR

**Identification of States and Governments**

* Identification of States and Governments is done through the **DOCTRINE OF RECOGNITION**
  + **Example**: “We, Canada, recognize Kosovo as a State”
* There are **TWO COMPETING THEORIES** of Recognition:
  + Theory 1 = **DECLARATORY THEORY**
    - One country is recognizing a situation that **ALREADY EXISTS** because the recognized state has already jumped through the 4 steps to become a state via the **MONTEVIDEO** Convention – it is just a **DECLARATION** of what is already fact
  + Theory 2 = **CONSTITUTIVE THEORY**
    - The act of recognition actually **CONSTITUTES** the statehood of the recognized state – what makes the new state a state is that it has been recognized by others, **REGARDLESS** of the Montevideo Convention

**Premature Recognition**

* *“To recognize on part of the territory of an established State, another State- say Quebec in Canada or Scotland in the UK – would be an act of unlawful intervention” – Warbrick*
* Essentially, to prematurely recognize a state is to threaten the sovereignty of another
  + **EXAMPLE**: Chechnya in Russia – as of yet, no state has recognized Chechnya as a state – if Chechnya were recognized, and assuming they were not their own people (this is where it becomes premature, before it can be fully proved by the Montevideo Convention that they are a state), recognizing them would then give them part of Russian territory, which would be encroaching on the sovereignty of Russia – **THE STATE THAT RECOGNIZED CHECHNYA WOULD BE VIOLATING RUSSIAN SOVEREIGNTY**

**Recognition of Governments vs. Recognition of States**

* There is no difference – if you recognize the government, you recognize the state
* USA has tried to make a difference, with the Wilson Doctrine of recognition
  + Recognize the state, but not the government – refusing to acknowledge or deal with a government they don’t approve of (non-democratic)
* In reality, there is no difference **IN LAW**

**Estrada Doctrine and Wilson Doctrine of Recognition**

* Estrada Doctrine – named after the Mexican politician
  + Recognition or non-recognition based on **GOVERNMENT** is in fact “rude” – it will interfere with the domestic affairs of other countries – will violate sovereignty
  + Estrada Doctrine is basically not talking about the government, only if the Montevideo criteria is met – Mexico will recognize **REGARDLESS** of government structure
* Wilson Doctrine – named after President Wilson of the USA
  + USA will not recognize anyone that comes into power through **EXTRA-CONSTITUTIONAL MEANS**
    - Dictatorships/Military Coups
    - This doctrine is in an effort to promote democratic processes in foreign countries, but it is contrary to International Law in that a doctrine of refusing to recognize dictatorships goes against facilitation of interacting with each other – this doctrine creates **COMPARTMENTALIZATION** of states

**Consequences of Recognition**

* Differences between recognition and non-recognition (what a state can do/have if they have been recognized by other states)
  + Have standing in foreign courts
  + State immunity
  + Power to enact laws recognized overseas – **IMPORTANT**
  + Participation in International Organizations
  + States can be reduced or amalgamated due to recognition
    - **EXAMPLE**: USSR/Russia (reduction); Fed. Rep of Germany/GDR (amalgamation)

**Failed States and their Implications for International Law**

* **EXAMPLES**: Somalia, Congo, etc
* There is **NO GOVERNMENT** – **ANARCHY** – There is no entity that is able to control anything
* There is no precise definition of what a Failed State is, but the term is often used to try and justify **FOREIGN INTERVENTION** – the term Failed State is tremendously pregnant with politics
* This is not really a topic in International Law – it is a term brandished around without necessarily having a correlation with International Law
* Does a **COLLAPSED** government equal a failed state?
  + EXAMPLE: Somalia
  + Does Somalia suddenly stop becoming a state when the government collapses?
    - No longer satisfies Montevideo Convention criteria
    - Problems of this on an international plane – partly because there is nobody to speak to within the country on international issues – there is nobody issuing passports, etc – How do Somalis travel, what about Somali property?
      * **EXAMPLE**: Property on a UK ship (Woodhouse) owned by Government of Somalia – when the government collapses, 3 groups come forward saying they represent the government of Somalia and claim the goods – **COURT SAYS NO – THERE IS NO GOVERNMENT** – goods are held until a static government can be proven in power
* Filed States are a form of **POLITICS** due to Intervention
  + Not necessarily any correlation to International Law
  + Much better term in International Law would be **FAILED GOVERNMENTS**
    - **CONTINUITY OF STATEHOOD**
      * **THE STATE DOES NOT FAIL, THE GOVERNMENT DOES**
        + If the state disappeared, it would just be free territory, which would bring about huge issues
* **STATES DO NOT FAIL, GOVERNMENTS FAIL!! – STATES STILL EXIST**

**Subjects of International Law: Non-State Actors**

**Reparation for Injuries Suffered in the Service of the United Nations CASE**

* **FOUNDATION CASE** in **SUBJECTS** of International Law
* Fundamental and **TERRIFYINGLY RADICAL**
  + Radically changing the TYPE of entity that can be recognized as a subject of International Law
* Traditional view of Subjects of International Law:
  + **STATES = ONLY** Subjects of International Law
  + “*Since the Law of Nations is a law between States only and exclusively, Sates only and exclusively are subjects of the Laws of Nations” – Oppenheim, 1905*
    - This traditional view is beneficial to **STATES** – favours **SOVEREIGNTY**
* Reparations Case – 1949 ICJ Decision – Post WWII influence
  + WWII taught that having states exclusively as the subjects of International law is bad
  + ICJ Decision – no longer going to have a system that gives states **SOLE POWER**
    - Sometimes **STATES GO INSANE** – “moral insanity of states”
    - ICJ wants a system that has many more checks and balances on states and control of the power of states
      * **TWO WAYS** to **MINIMIZE** the power of States:
        + **CREATE INTERNATIONAL INSTITUTIONS** that aren’t weak like the League of Nations and won’t just be puppet organizations without power

Give these Institutions **LEGAL PERSONALITY**

**SAME** footing as states

**WILL BE EQUAL TO STATES AS SUBJECTS**

* Case Details:
  + Injuries to UN employees during their service, the UN wants to be able to claim reparations from the various states involved in the injuries
  + **HUGE ISSUE** behind this idea – how should the international system be governed post WWII? New structures need to be put into place to prevent it from happening again
* Questions the ICJ was asked to consider – **ISSUES IN THE CASE**:
  + *In the event of an agent of the United Nations in the performance of his duties suffering injury in circumstances involving the responsibility of a state, has the United Nations, as an organization, the capacity to bring an international claim against the responsible de jure or de facto government with a view to obtaining the reparation due in respect to the damage caused a) to the United Nations and b) to the victim or to persons entitled through him?*
  + *In the event of an affirmative reply on b), how is action by the United Nations to be reconciled with such rights as may be possessed by the state of which the victim is a national?*
    - *B)* is the controversial part – this question is asking if the UN is equal to states in the fact that they can represent their “nationals”
      * Does a violation of a UN employee’s rights constitute a violation of the UN’s rights?
* Court’s Definition of Personality:
  + *“The subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends on the needs of the community”*
    - **IMPORTANT** – previously, States were the **ONLY** subjects of International Law and **THEY WERE ALL EQUAL**
      * Now, Subjects are no longer necessarily identical or equal
      * Shift from an absolute concept of subjects to a **RELATIVE** concept of subjects
        + **Whether you have “legal personality” is RELATIVE and what “legal personality” MEANS is RELATIVE to the needs of the community**
  + *“The Organization (UN) was intended to exercise and enjoy, and is in fact exercising and enjoying, functions and rights which can only be explained on the bases of the possession of a large measure of international personality and the capacity to operate on an international plane”*
    - Concept of **INTENTION** of the **ORGANIZATION**
  + *“This is not the same thing as saying that it is a state, which it certainly is not, or that its legal personality and rights and duties are the same as those of a state... it does not even imply that all its rights and duties must be upon the international plane, any more than all the rights and duties of a state must be upon that plane”*
    - Domestic Law is not on the International Plane
    - Criticism of this new decision: states said that these organizations do not need to be elevated to International Subject (**LEGAL PERSONALITY**) because there are already systems in place for them in **DOMESTIC** law – no need to change the whole structure of International Law
  + *“what it does mean is that it is a subject of International Law and capable of possessing international rights and duties, and that it has capacity to maintain its rights by bringing international claims”*
    - Even though the UN is not the same as a state, **IT IS STILL AN INTERNATIONAL SUBJECT**, and still has international rights and duties – **ONE OF WHICH IS TO BRING THIS CLAIM FORWARD TO THE COURTS**
* Court’s Position on UN’s Ability to Make Claims:
  + Does it matter if the state concerned is a member of the United Nations?
    - If the state is not a member of the UN, do they not recognize the Organization as a Subject of International Law? – Dilemma!
    - Non member states never consented, recognized or **INTENDED** anything for or from this particular entity
  + *“As the claim is based on an international obligation on the part of the member held responsible by the organization, the member cannot contend that this obligation is governed by municipal law, and the organization is justified in giving its claim the character of an international claim”*
    - States that member states are obviously bound to their international obligations towards the UN as well as other sates
* UN’s Ability to Claim Damages:
  + *“the charter does not expressly confer upon the Organization the capacity to include, in its claim for reparation, damage caused to the victim or to persons entitled through him... under International Law, the UN Organization must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties”*
    - **IMPLICIT OR INCIDENTAL POWER**
      * Criticism: This is **NOT ESSENTIAL** to the duties of the UN
      * Previously UN would have had two other options: Municipal Law in the offending country itself, or the state to whom the person is a national could bring claims
        + State responsibility to pursue claims – Not the UN
* UN’s Ability to Make Claims against Non Member Groups:
  + *“On this point, the Court’s opinion is that fifty states, representing the vast majority of the members of the International community, had the power, in conformity with International Law, to bring into being an entity possessing OBJECTIVE INTERNATIONAL PERSONALITY, and not merely personality recognized by them alone, together with capacity to bring international claims... Accordingly, the Court arrives at the conclusion that an AFFIRMATIVE ANSWER should be given to A and B* ***WHETHER OR NOT THE DEFENDANT STATE IS A MEMBER OF THE UNITED NATIONS”***
    - To be a subject of International Law, recognition from all states is not necessary, but from a majority
    - A subject of International Law can potentially create International Law obligations and enjoy rights – **REGARDLESS** of whether the opposing party **RECOGNIZES**
* **ICJ TEST ON WHAT MAKES AN INTERNATIONAL SUBJECT:**
  + **INTENTION OF STATES**
    - What matters is what was intended and by whom
    - Intention can be inferred from various elements:
      * Decisions of the principal organs of the organization must not be taken unanimously but can be adopted by a majority vote – may be spelled out in the charter or statute of the organization such as Article 4.1 of the 1998 Statute of the International Criminal Court: “the court shall have international legal personality. It shall also have such legal capacity as may be necessary for the exercise of its functions and the fulfillment of its purposes”
      * States still have the final say – they determine the level of international personality by what they INTEND for the organization they create
* Court’s Reconciliation of Rights of States of the Victims vs. Rights of the UN:
  + **NON-LIQUET – NO LAW ON THIS SUBJECT YET**
    - Question: If person A is injured, is there not a conflict between the UN to seek reparations as well as the country to which A is a national?
      * *“There is no rule of law which assigns priority to the one or to the other, or which compels wither the state or the Organization to refrain from bringing”*
    - Court’s principles on what governs this situation:
      * *“The Court sees no reason why the parties concerned should not find solutions inspired by goodwill and common sense...”*

**Other Non-State Subjects**

* Human-Beings – International Human Rights and Criminal Law
* Companies – International Centre for the Settlement of Investment Disputes
* Peoples – Self-Determination – Permanent sovereignty over natural resources
* Indigenous Peoples – Territorial Rights
* NGO’s
* SUI GENERIS Entities
  + International Subjects that have come to acquire a legal personality on the account of specific historic circumstances
    - Holy See
    - Sovereign Order of Malta
    - International Committee of the Red Cross
* Jurists – Leading Scholars, etc
* Insurgents – Recognition of Belligerency
  + Relations between the parent state and the insurgents must amount to war in the sense of international law – must be military forces acting in accordance with the rules and customs of war (flags of truce, cartels, exchange of prisoners, etc) – to justify a recognition of belligerency there must be, above all, a de facto political organization of the insurgents sufficient in character and resources to constitute it, if left to itself, a state among nations capable of discharging the duties of a state, and of meeting the just responsibilities it may incur as such toward other powers in the discharge of its national duties

***REPARATIONS CASE: CHANGED THE CONCEPT OF SUBJECTHOOD IN INTERNATIONAL LAW FROM AN ABSOLUTE CONCEPT OF IT BEING ONLY STATES TO A RELATIVE CONCEPT WITH LOTS OF DIFFERENT ENTITIES WITH DIFFERING LEVELS OF SUBJECTHOOD***

**Jurisdiction and Immunities: National Courts**

**Immunities**

* Immunity **PROTECTS** a subject from **PROSECUTION**
  + Different from Jurisdiction – Jurisdiction refers to what kinds of law and where a Court can prosecute – Immunity means that even if a Court **HAS** jurisdiction on the crime and the place, the subject is **IMMUNE** from that prosecution due to their position – can be a state, a state official, etc
* State Immunity: Al-Adsani v. UK Case (1992)
  + Al-Adsani, a dual British and Kuwaiti National, was held responsible for the circulation of sexual videotapes of the Kuwaiti “Sheikh” after the Gulf War (during which Al-Adsani served in the Kuwaiti Air Force) – he was tortured by Kuwaiti government officials including the Sheikh – upon returning to the UK, he instituted civil proceedings for compensation against the Kuwaiti government and Sheikh
    - UK Courts decided that the Sheikh was granted Immunity from civil suits by the State Immunity Act of 1978, even for torture
    - Al-Adsani took the case all the way to the UN Court of Human Rights, bringing complaint against the UK for not protecting him from torture and not allowing him access to Courts (they wouldn’t let him appeal his previous complaint to the House of Lords)
    - UN Court: Vote of 9 to 8 – upheld the Immunity – granting State Immunity from civil proceedings pursues the legitimate aim of complying with international law
    - **DISSENTING OPINION**: Torture, as a **JUS COGENS PEREMPTORY NORM** overrides any other rule, including that of State Immunity

**Jurisdiction**

* Court’s Jurisdiction is a question of National Law
  + International Law is not as specific
  + States distrust one another
* Problems with the concept of Universal Jurisdiction:
  + Tit for Tat – Not Peaceful – Floodgates argument (everyone will prosecute everything)
  + Highly Political – power politics and struggles will overcome Justice
  + Law used to undermine State Sovereignty
  + “Lawfare” – the use of law to undermine state security

**Arrest Warrant Case: Arrest Warrant of April 11, 2000 – YERODIA**

* Democratic Republic of the Congo v. Belgium – ICJ Feb 2002
* 1993 Belgium’s parliament voted for a “law of Universal Jurisdiction” allowing the Belgium government to judge people accused of war crimes, crimes against humanity or genocide
* Under this law of Universal Jurisdiction, Belgium issued an Arrest Warrant for Yerodia, the then Minister of Foreign Affairs of the Democratic People’s Republic of Congo
  + DRC brought Belgium to the ICJ to argue the legitimacy and legality of the Arrest Warrant, saying Belgium did not have Jurisdiction
* *“the Congo contended that Belgium had violated the principle that a State may not exercise its authority on the territory of another state, as laid down in Article 2.1 of the UN Charter, as well as the diplomatic immunity of the Minister of Foreign Affairs of a sovereign state, as recognized by jurisprudence of the Court and following from Article 41, paragraph 2 of the Vienna Convention of 18 April 1961 on Diplomatic Relations – ICJ Arrest Warrant Case*
* *`by issuing and internationally circulating the arrest warrant, Belgium committed a violation in regard to the DRC of the rule of customary international law concerning the absolute inviolability and immunity from criminal process of incumbent foreign ministers; in so doing, it violated the principle of sovereign equality among States” – ICJ Arrest Warrant Case*
* In the Jurisdictional section of the ICJ judgement, the Court cites a great deal of precedent
  + Precedent enforces **CUSTOM** and adds **LEGITIMACY** to the judgement
* The issue of **UNIVERSAL JURISDICTION** in the Arrest Warrant Case:
  + *The Congo, for its part, states that its interest in bringing these proceedings is to obtain a finding by the Court that it has been the victim of an internationally wrongful act, the question whether this case involves the exercise of an excessive* ***UNIVERSAL******JURISDICTION*** *being in this connection only a secondary consideration” – ICJ*
* **NON ULTRA PETITA**: When a Court answers a question that they have not been asked
* Two **TREATIES** governing **IMMUNITIES OF INDIVIDUALS**:
  + Vienna Convention of Diplomatic Relations of 1961
  + Vienna Convention on Consular Affairs of 1963
    - Peripherally relevant, but neither treaty specifically talks about Ministers of Foreign Affairs
  + *“These Conventions [the Vienna Convention on Diplomatic Relations of 1961 and the Vienna Convention on Consular Affairs of 1963] provide useful guidance on certain aspects of the questions of immunities. They do not, however, contain any provision specifically defining the immunities enjoyed by Ministers of Foreign Affairs. It is consequently on the basis of customary International Law that the Court must decide the questions relating to the immunities of such Ministers raised in the present case” – ICJ*
* Court decisions on **IMMUNIITIES** OF **FOREIGN MINISTERS**:
  + *“The Court accordingly concludes that the functions of a Minister for Foreign Affairs are such that, throughout the duration of his or her office, he or she when abroad enjoys full immunity from criminal jurisdiction and inviolability” – ICJ*
    - What are the **FUNCTIONS** of a Minister of Foreign Affairs?
      * *“In the performance of these functions, he or she is frequently required to travel internationally, and thus must be in a position freely to do so whenever the need should arise”*
  + Is the Court inventing this immunity?
    - ICJ is making decisions that fundamentally change the scope of International Law
    - If it’s General Principles of Law – where is the evidence of the domestic state practice for any states? – No state practice is mentioned
    - If it’s Customary International Law, which the Court says the decision must rely upon – where is the evidence of state practice and Opinio Juris? – Court does not talk at all about Opinio Juris
    - Distinction between **INSTRUMENTALIST** approach which the ICJ adopts and **FORMAL ANALYSIS** of the sources of International Law
      * This decision **DOES NOT** satisfy the nature of Custom
* Belgium: Argument regarding **DISTINCTION** that must be made when considering immunity of a Minister of Foreign Affairs
  + Distinction between **PRIVATE AND PUBLIC** – was the crime a private act, or done in an official capacity?
  + Distinction of **TIME** – did the crime occur when the person was in office, before or after?
* **YOU CAN BE RESPONSIBLE FOR PRIVATE ACTS EVEN IF YOU ENJOY IMMUNIT**Y – but what is the distinction?
* Belgium: Argument on **EXCEPTIONS** to the rules on Immunities
  + *“The Court has also examined the rules concerning the immunity or criminal responsibility of persons having an official capacity contained in the legal instruments creating international criminal tribunals... It finds that these rules likewise do not enable it to conclude that any such an exception exists in customary international law in regard to national courts” – ICJ*
  + Argument 1: Public/Private distinction
  + Argument 2: Time the crime was committed relative to time in office
  + Argument 3: International Courts can apply these laws, therefore domestic courts should be able to as well
* **YERODIA AS A CONTROVERSIAL CASE:**
  + Yerodia gets full immunity from the Belgian courts for acts committed **BEFORE AND DURING** his time in office, as well as for **PUBLIC AND PRIVATE ACTS**
    - International law basically protecting Yeroida when he committed crimes against Humanity
      * Protection from **NATIONAL** Courts – Stems from the concept that he would not be able to fulfill his official capacity (do his job) if a national court could arrest and try him for something
        + Gladiator Example: before war, you send your emissary to talk to the other side, he gets sent back without his head
        + How can a Minister such as Yerodia do his job and represent his country if he can’t go somewhere or if a trial gets in the way?

**THIS IS THE REASONING FOR GIVING HIM IMMUNITY FOR THINGS HE DID BEFORE HE WAS IN OFFICE**

* ICJ gave **FOUR REASONS** why their Judgement **DID NOT LEAD TO TOTAL IMPUNITY**
  + Ministers of Foreign Affairs can be tried within their own countries
    - Tied to **TRANSITIONAL JUSTICE**
    - In reality **NOT** going to happen **UNLESS** there is a massive change in government
      * Maybe only 5 examples in all of history
  + Waiver of Immunity – State is able to waive the immunity of their Foreign Minister
    - **STATE OWNS THE IMMUNITY OF ITS OFFICIALS**
      * It is the **STATES** that we are concerned about, not the individual – Immunity is an effort to **PRESERVE RIGHTS for STATES TO COMMUNICATE WITH EACH OTHER**
    - Technically an option, but not very practical – States will realistically not waive the immunity of their officials
  + “*Provided that it has jurisdiction under international law, a court of one state may try a FORMER Minister of Foreign Affairs of another state in respect of acts committed PRIOR or SUBSEQUENT to his or her period of office, as well as in respect of acts committed during that period of office in a private capacity”*
    - ICJ makes two points here: Yerodia can be tried for acts committed **BEFORE** he was in office or **AFTER** he was in office – **AND** he can be tried for acts committed **DURING** his period in office if they were in a **PRIVATE** capacity
      * **FORMER MINISTER** – provided he has left office, a Minister can be prosecuted for things he did in a **PRIVATE** capacity **WHILE** in office, or anything he did **BEFORE** or **AFTER** his time in office, whether **PUBLIC OR PRIVATE**
  + *“An incumbent or former Minister of Foreign Affairs may be subject to criminal proceedings before* ***CERTAIN INTERNATIONAL CRIMINAL COURTS****” - ICJ*
    - Belgium does **NOT** have the right to try Yerodia **WHILE HE IS IN OFFICE, but INTERNATIONAL CRIMINAL COURTS DO!!**
      * “Certain” international Courts – ICJ doesn’t answer this question, but International courts will have to decide this issue of **JURISDICTION** themselves
* Before this case, there was a belief that immunity was **PROHIBITED** for International **JUS** **COGENS** crimes, but here the ICJ is saying that is **WRONG**
  + **A STATE OFFICIAL CAN HAVE IMMUNITY FOR INTERNATIONAL CRIMES, EVEN JUS COGENS CRIMES, FROM NATIONAL COURTS**
    - Surprising that the issue of Jus Cogens does not feature more in this decision
* What is **PRIVATE** capacity? **COURT DOES NOT SAY!!** – very hard distinction to make in practice
* **MAGNITUDE OF THIS DECISION:**
  + Even for International Crimes, a state official (in this case, Minister of Foreign Affairs) gets **IMMUNITY** – If the crimes were perpetrated **BEFORE** or **DURING** the time in office – this immunity is given **IRRESPECTIVE** of whether they were committed in a **PUBLIC** or **PRIVATE** capacity
    - Irrespective of all these concerns, the **FUNCTIONAL CONCERN** is that the people who represent state that need to speak to each other need to be able to do that – avoid the gladiator example
      * **THIS CONCERN OVERRIDES EVERYTHING ELSE**

**Jurisdiction and Immunities: International Courts**

**Prosecutor vs. Charles Taylor (Liberia)**

* Facts of the Case:
  + Charles Taylor, former president of Liberia, was indicted by the Special Court for Sierra Leone for War Crimes – the indictment was unsealed while he was in Ghana, but he was not arrested. He resigned from presidency and went into exile, but was eventually arrested and brought to trial at the SCSL – the case is about the legality of the indictment
* Taylor’s Defence:
  + In customary International law, Charles Taylor has an immunity – **YERODIA** case is precedent to this fact – In **YERODIA**, ICJ determined it was customary International Law
    - Otherwise, the SCSL would have to look at state practice and opinio juris
  + The Special Court of Sierra Leone does not have jurisdiction over Charles Taylor since it is not an International Court – **YERODIA** case is precedent again – only International Courts have jurisdiction over international criminal cases
  + “*Exceptionally, a state may prosecute acts committed on the territory of another state by a foreigner but only where the perpetrator is present on the territory of the prosecuting state” – Taylor’s Defence*
    - Defence means to say that it is possible to indict someone only if they are on the territory of the state doing the indicting – limiting universal jurisdiction, otherwise you’d have states issuing indictments all over the place
* Prosecution’s Rebuttal:
  + Charles Taylor has **NO** immunity from the Special Court of Sierra Leone since it is an **INTERNATIONAL COURT** and in customary International Law, he can be tried for crimes
    - ICJ in Arrest Warrant case makes this clear
  + *“The lack of Chapter VII powers does not affect the Special Court’s jurisdiction over Heads of States. The International Criminal Court (ICC), which does not have Chapter VII powers, explicitly denies immunity to Heads of State for international crimes”*
    - Ad hoc courts/tribunals are created by the UN Security Council
    - Chapter VII rights – allows the Security Council to issue binding decisions on all member states of the United Nations and establish measures to respond to threats of international peace and security
    - International Criminal Tribunals – highly controversial when the first one was established in 1993 – end of the Cold War – it would not have been possible to have one during the Cold War, as either side would have vetoed
    - International Ad Hoc Tribunals are VERY much international (Rwanda, Yugoslavia) because they are created by Chapter VII Powers
    - ICC is established by **TREATY** – different in creation from Ad Hoc tribunals of the Security Council
      * Key aspect of this argument:
        + There is an explicit provision in the Ad Hoc tribunals stating that heads of state enjoy **NO** immunity for international crimes – as the tribunals are issued by Chapter VII powers, they take precedence over treaty and custom
        + There is **ALSO** a provision in the ICC Statute stating that heads of state enjoy **NO** immunity for international law – this is binding on all member states and it takes precedence over custom or general principles since it is treaty law

**YERODIA/ARREST WARRANT** – ICJ says that the above rules are **ONLY** for International Courts

* Is the question of Immunity a question of Jurisdiction?
  + *“Professor Shaw succinctly put it when he wrote that: ‘the principle of jurisdictional immunity asserts that in particular situations a court is prevented from exercising its jurisdiction that it possesses.’ In that sense, it cannot be rightly said that the question of immunity raised by the Applicant does not raise a serious issue relating to jurisdiction”*
  + Immunity and Jurisdiction – different ideas with some level of overlap
* Special Court for Sierra Leone:
  + *“The Special Court is established by the Agreement between the United Nations and Sierra Leone which was entered into pursuant to Resolution 1315 (2000) of the Security Council for the sole purpose of prosecuting persons who bear the greatest responsibility”*
  + *“The Agreement between the United Nations and Sierra Leone is thus an agreement between all members of the United Nations and Sierra Leone. This fact makes the Agreement an expression of the* ***WILL OF THE INTERNATIONAL COMMUNITY****. The Special Court established in such circumstances is* ***TRULY INTERNATIONAL****.”*
  + *“The Special Court cannot ignore whatever the Statute directs or permits or empowers it to do unless such provisions are void as being in conflict with a peremptory norm of general international law”*
    - Special Court is concluding that a violation of a **JUS COGENS PEREMPTORY NORM** is necessary to override the immunity provisions in its statute
  + Distinction between immunities applicable before international courts and immunities applicable in domestic courts:
    - *“A reason for the distinction... between national courts and international courts, though not immediately evident, would appear due to the fact that the principle that one sovereign state does not adjudicate on the conduct of another sate; the principle of state immunity derives from the quality of sovereign states and therefore has no relevance to international criminal tribunals which are not organs of a state but derive their mandate from the international community”*
      * Sovereignty overrides domestic courts
* Ultimate Decision:
  + Special Court of Sierra Leone is an **INTERNATIONAL** court, and going off the Arrest Warrant case, has jurisdiction over heads of state for international crimes
  + Immunity is **NOT** enjoyed when in violation of peremptory norms
  + Charles Taylor can be tried by the court
* **FRAGMENTATION**: the idea of what happens to Public International Law when there is a horizontal system where everything is **EQUAL** – confusion, inconsistency – especially when different court reach different decisions
  + Despite the fact that there is no hierarchy, international lawyers focus on the Arrest Warrant and Charles Taylor cases to avoid dissonance

**The United Nations**

**Structure of the United Nations**

* General Assembly (GA) made up of all the Member States
  + **ONE SEAT AND ONE VOTE PER STATE**
* **NOT A LEGISLATURE**
  + GA passes **RESOLUTIONS** that are **NOT** legally binding
  + Majority of states in the UN are **SMALL** and **POWERLESS**
    - If it was a legislature, the small powerless states would overwhelm the Great Powers by sheer numbers, since every state has one vote
      * Powerful states would withdraw their support of the UN unless they maintained their power
        + Like the League of Nations
        + BUT! UN is grounded on the idea that it will be **EFFECTIVE** where the League of Nations was not

This is where the **SECURITY COUNCIL** comes in

SC gives the Great Power states a position on an altar and tells them “you have responsibility and you get to decide these issues”

SC gives the Great Powers unfettered responsibility over **PEACE** AND **SECURITY**

* Principles of the UN Charter:
  + **PROHIBITION ON THE USE OF FORCE**
    - Deeply idealistic – this is Post WWII idealism at work (think of it as the same as the prohibition on marijuana)
    - One of the key provisions of the UN Charter is based on this principle
      * **INVADING COUNTRIES IS ILLEGAL**
  + Equality of States and Sovereignty
  + UN Charter says very little about Human Rights
    - **PREDATES THE UDHR** (Universal Declaration of Human Rights)
    - Conceptions of **SOVEREIGNTY** were still very entrenched at the time the UN Charter was realized and the idea of subjects of International Law were still **ONLY STATES**
* The impact of **COLONISATION** on the UN Charter
  + Who colonised? **EUROPE**
  + Who were the biggest powers after WWII? **USA** and **USSR**
    - Neither of the two biggest powers was interested in colonialism
  + Colonialism brings about an **ECONOMIC AND TRADE IMBALANCE**
    - States that had colonies would have very cheap resources and labour, which would lead to an imbalance in worldwide economy
      * **ECONOMIC DISPARITY LEADS TO WAR**
    - USSR very sceptical about legitimacy of colonialism
  + UN Charter – **VERY KEY POINT** – implementation of gradual transition from colonialism to **TRUSTEESHIP** to Independence

**The UN Charter:**

* Preamble: **VERY IMPORTANT** – **TO SAVE SUCCEEDING GENERATIONS FROM THE SCOURGE OF WAR**
  + Very indicative of the times in which the UN Charter was created
  + Reaffirms the faith in fundamental human rights which was a **NEW IDEA AT THIS TIME**
  + Equal rights of **MEN AND WOMEN** – also revolutionary
  + Nations **LARGE AND SMALL** – Idealism
  + To promote social progress and better standards of life in larger freedom
    - Very important part of the Charter – large part of the document is focused on this aspect
    - **TO PREVENT ECONOMIC AND SOCIAL DISPARITY WHICH CAN LEAD TO WAR**
* The biggest worry of the UN is **WAR**
  + Most of the conditions and roles of the UN and its Charter are to PREVENT WAR
* Prohibition on the use of force is all-encompassing in the Charter, except for two principle exceptions:
  + Self-defence and Security Council approved force (Chapter VII powers)
* To maintain International Peace and Security
* To develop friendly relations among nations
  + Britain and France not too keen on including self-determination, as it is basically an end to their colonialism – but the USA and USSR want it, so due to the power situation, they basically had to go along with it

**The UN Charter: CHAPTER 1:**

* Article 1 = **PURPOSES** of the UN
* Article 2 = **PRINCIPLES** of the UN
* Article 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*
* Article 2.3 = International Law as a mechanism of **DISPUTE RESOLUTION**
  + *All members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered*
* Article 2.7 = **VERY IMPORTANT**: *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 VII*
  + **SOVEREIGNTY – MUST RESPECT SOVEREIGNTY**
  + Sovereignty **WITH EXCEPTIONS!!** - Security Council can override sovereignty
    - Before the UN Charter, it was Sovereignty **WITHOUT** exceptions
    - Chapter VII and Article 2.7 = part of a growing trend of International Law post 1945 saying “Sovereignty with actually quite a few exceptions”

**The UN Charter: Chapter 4:**

* The General Assembly
  + Can consider and approve **BUDGETS**
  + Each member of the GA has to pay dues based on GE per capita
    - Japan pays a lot, like the US – Japan, as consequence, wants more power in the Security Council
  + Article 12.1 = *While the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests*
    - General Assembly is behind SC in power hierarchy in the UN
    - General Assembly **MUST** defer and **CANNOT** even discuss or make recommendations when the SC is discussing an issue
  + **IMPORTANCE OF THE GENERAL ASSEMBLY:**
    - Creates a **FORUM** for states

**The UN Charter: Chapter 5:**

* The Security Council
  + 15 members total: 5 permanent, 10 rotating – voted in every 2 years by the GA
  + **PERMANENT MEMBERS** = USA, UK, Russia, France, China
  + Competence is “limited” to the maintenance of **PEACE AND SECURITY**
    - SC’s mandate is clear, but they are very powerful
  + 9 votes are required to pass a resolution on the SC
  + **VETO POWER** – held by the **PERMANENT FIVE –** even if there are enough votes for a particular resolution, if ONE of the permanent members votes NO, the resolution is quashed
    - **VETO POWER IS POWER TO DESTROY, NOT CREATE**
      * Can only be used to **DENY** a resolution
      * Abstaining does not count as a **NO** vote

**The United Nations: The Security Council and Collective Security**

**The Security Council**

* Primary responsibility is to **INTERNATIONAL PEACE AND SECURITY**
  + Security Council gives **SPECIFIC** power to **SPECIFIC** people on **SPECIFIC** issues
  + **SC IS SUPER ANXIOUS ABOUT WAR**
* **SHALL ACT IN ACCORDANCE WITH THE PURPOSES AND PRINCPLES OF THE UNITED NATIONS**
  + Articles 1 and 2 of the Charter respectively
    - This is one of the **LIMITATIONS** on the power of the SC
    - SC cannot make resolutions contrary to the **NATURE OF THE UN**
* Members of the UN agree to accept and carry out the decisions of the SC in accordance witht he present charter
  + **ONCE THE SC PASSES A RESOLUTION, IT IS BINDING AS A MATTER OF INTERNATIONAL LAW**
* Article 27 = key article on **VOTING**
  + Key structural element of the Security Council
  + Decisions on procedural matters must be made by an affirmative vote by **NINE** members
  + All OTHER matters shall be made by an affirmative vote of **NINE** members **INCLUDING** **THE CONCURRING VOTES OF THE PERMANENT MEMBERS**
    - Veto power is not an issue in **PROCEDURAL** matters, but it can be used for all other matters the SC deals with
    - **THERE IS NO MENTION OF A VETO POWER IN THE UN CHARTER** 
      * Article 27 – “**CONCURRING** **VOTES**” is the basis of the Veto power
        + Stipulates that **ALL FIVE PERMANENT MEMBERS** have to concur
* Security Council can create **SUBSIDIARY ORGANS** “as it deems necessary for the performance of its functions”
  + **MUCH OF THE POWER OF THE SECURITY COUNCIL IS CARRIED OUT BY SUBSIDIARY ORGANS**
* Article 31 = **PARTICIPATION**
  + *Any member of the United Nations which is not a member of the Security Council may participate,* ***WITHOUT VOTE,*** *in the discussion of any question brought before the Security Council whenever the latter considers that the interests of the Member are specially affected*

**Collective Security – SC Roles and Powers**

* There are **REGIONAL** arrangements in place as a part of the effort towards Collective Security
  + **NATO**, Warsaw Pact, etc
* Chapter 6 of the UN Charter = Recommendations by the Security Council
  + **NOT LEGALLY BINDING**
* Chapter 7 of the UN Charter = Security Council powers and resolutions
  + **LEGALLY BINDING ON ALL MEMBER STATES**
  + Article 39 – *The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security*
  + **SECURITY COUNCIL DETERMINES IF THERE IS A THREAT TO PEACE AND SECURITY**
    - SC has very broad scope of determining what constitutes a threat to peace and security – very little objective elements
      * **EXAMPLE**: Just before beginning of WWII, there was a situation between Britain and Germany where German members of government were held in immigration when travelling through Britain for 4.5 hours – nearly sparked a war! War eventually evolved
        + Today we would see this and think “there is no way that is a threat to international peace and security – it’s no big deal|
        + BUT! In **CONTEXT** of the political environment at the time – it is potentially a threat to international peace and security
        + **POINT OF EXAMPLE: WHAT CONSTITUTES A THREAT TO INTERNATIONAL PEACE AND SECURITY IS VERY CONTEXTUAL**

No list exists of what constitutes a threat because it is very context-specific

* Security Council has the ability to create **SUBSIDIARY ORGANS** – some are investigative in nature with goals to help determine if there is a viable threat
  + EXAMPLE: to determine if a certain country has nuclear weapons
  + EXAMPLE: assessing if sanctions have been complied with – finding out if anyone has been selling weapons to a certain group of people if an arms embargo has been placed upon them
    - Subsidiary organs are used in these cases to investigate the situation
  + Power of subsidiary organs is derivative of Article 29
  + **MUCH OF THE POWER OF THE SC IS CARRIED OUT BY SUBSIDIARY ORGANS**
    - EXAMPLE: International Criminal Tribunal for Rwanda – a subsidiary organ of the Security Council
      * In this and the Yugoslavia tribunal, defence’s first tactic was to claim that the security council does not have power to make a tribunal – it is not in the charter – and they claim there is no threat to international peace and security – the genocide is over!
        + Rwandan tribunal exists today! Is there still a threat? Tribunal continues until JUSTICE is done – tremendous debatable proposition, but alas there it is!
        + UN Argument – Tribunals are a part of Article 41 powers:

“MAY INCLUDE” – just a **RECOMMENDATION** of what it may include, CAN include other things such as tribunals, as long as they don’t use armed force, because that would need to be provided for under Article 42

* Article 33 of the UN Charter: the Function of the Charter is to deal with DISPUTES AND CONFLICTS
  + 33.1 *The parties to any disputes, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.*
  + 33.2 *The Security Council shall, when it deems necessary, call upon the parties to settle their dispute by such means*
    - **BASIC CHAPTER 6 POWERS**
* Article 34 of the UN Charter: Security Council may investigate any dispute or any situation which MAY LEAD to international friction or give rise to a dispute
* Article 35 of the Un Charter: **ANY MEMBER STATE CAN BRING ANY DISPUTE**, or any situation of the nature referred to in Article 34, to the attention of the SC or the GA
* **CHAPTER 7 POWERS – BINDING IN INTERNATIONAL LAW – WHY?**
  + Article 103 of the UN Charter is VERY IMPORTANT:
    - *In the event of a conflict between the obligations of the members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations UNDER THE PRESENT CHARTER SHALL PREVAIL*
    - **UN CHARTER TRUMPS TREATIES AND CUSTOM**
    - Resolutions passed by the Security Council are BINDING on ALL Member States and TRUMP TREATIES AND CUSTOM
* Article 43 of the UN Charter: THE UN ARMY – STILLBORN

**Exceptions to the Prohibition on the Use of Force**

* Legality of use of force is either a TRIANGLE, a SQUARE, etc
* DEFINITELY a triangle
  + Top of the Triangle = **PROHIBITION ON THE USE OF FORCE** (Article 2.4)
    - First Exception – SC authorization of force under Chapter 7
    - Second Exception – Self-Defence (Article 51)
      * Inherent right of individual or collective self-defence if an armed attack occurs against a member state until the SC has taken measures necessary to maintain international peace and security
        + Can defend yourself **UNTIL THE SC HAS A CHANCE TO REACT**

Fairly idealistic – SC doesn’t always come to the rescue

Armed attack is necessary before you have LEGAL GROUNDS to defend yourself – THREAT of an attack is not enough, in LAW

* + - Third POSSIBLE Exception – Uniting for Peace
    - Fourth POSSIBLE Exception – Humanitarian Intervention

**Unilateral Acts of Force: Self-Defence**

**Self-Defence and the UN Charter**

* Article 51 of the UN Charter:
  + *Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security*
  + Right to Self-Defence until the Security Council takes measures
  + States are **REQUIRED THE INFORM THE SECURITY COUNCIL AS SOON AS THEY TAKE ACTIONS TO DEFEND THEMSELVES**
    - This funnels everything through the SC and ensures effectiveness

**Nicaragua vs. USA – ICJ Case 1986**

* Facts: USA brought military action against Nicaragua by funding and arming a guerrilla militia called the Contras, and attacked the odd military base themselves
  + Nicaragua brought the complaint to the ICJ, USA claimed **COLLECTIVE SELF-DEFENCE** on behalf of El Salvador
  + Court found **IN FAVOUR OF NICARAGUA**
* Issue: Military **SUPPORT** vs. Use of Force?
  + Does assistance = use of force? Or does it fall in the category of self-defence?
    - One extreme of ASSISTANCE:
      * Statements of MORAL support – no use of force
    - Other extreme of ASSISTANCE:
      * Complete PROXY WAR – use of force through an intermediary
* PROXY WAR = complete control an dependence of a rebel group on ANOTHER state’s army
  + Nicaragua – Contras are a PROXY GROUP – taking orders from US military, being trained and funded by them
* **PROXY WAR IS STILL CONSIDERED A USE OF FORCE – STILL INVADING**
  + Yes, the Contras may be from Nicaragua, but they are acting as a PROXY ARMY for the USA
* DISTINCTION – what is the test to determine when using a PROXY army becomes USE OF FORCE on the part of the foreign state?
  + **EFFECTIVE CONTROL**: commanding SPECIFIC military operations IN ADDITION to providing support (weapons, logistics, training, funding, etc)
  + **OVERALL CONTROL**: generic relationship between the military group and the foreign state
    - ICJ says this distinction must be made, and must be very specific
    - **EVERY SINGLE MISSION** has to be coordinated, supported and directed by the foreign state
* USA Defence: Collective self-defence on behalf of El Salvador
  + Overarching spectre behind this case = **COLD WAR** – Superpowers supporting proxy wars against each other via puppet states
  + The entire Cold War was escalating self-defence – collective self-defence between blocs
  + *“According to the United States, the reason for this change of attitude was reports of involvement of the Government of Nicaragua in logistical support, including provision of arms, for guerrillas in El Salvador*”
* **PRINCPLE SOURCE OF LAW GOVERNING THE USE OF FORCE IN INTERNATIONAL LAW:**
  + **UN CHARTER**
  + Issue: US had not given the ICJ jurisdiction over UN CHARTER claims
  + *“In the judgement of 26 November 1984 the Court however also declared that one objection advanced by the United States, that concerning the exclusion from the United States acceptance of jurisdiction under the optional clause of disputes arising under multilateral treaty, raised a question concerning matters of substance relating to the merits of the case”*
    - ICJ needs to be given consent by the parties involved in order to have jurisdiction – one way to do this is both parties simply go to the ICJ together to have them deal with the dispute
    - Another regime is where a state can sign up to the ICJ for ALL issues – another state can ONLY bring action against that state if they are ALSO signed up for all issues
      * **RECIPROCAL REGIME OF JURISDICTION**
        + Most states sign on to all issues, with a few **RESERVATIONS**
  + USA and Nicaragua had both signed up to all issues in the ICJ – but USA had made a reservation which said that no cases based on the UN Charter could be brought to the ICJ against them
  + If this case is going to work for Nicaragua, the prohibition on the use of force has to be CUSTOMARY International Law
    - Nicaragua CANNOT use Article 2.4 of the Charter, due to the reservation of the USA – BUT! Can say that customary international law basically reflects 2.4
    - USA Defence – custom can’t parallel treaty – UN Charter is a treaty – Article 2.4 is where prohibition on the use of force is codified, so the Court cannot go through some backdoor of custom to get jurisdiction on the same thing
  + This case is **VERY IMPORTANT** due to its discussion **on TREATY PROVISIONS** and **CUSTOMARY LAW** and **SOURCES** of treaty and customary law
  + *“The existence of identical rules in International Treaty Law and customary law has been clearly recognized by the Court in the North Sea Continental Shelf Cases”*
    - = **ICJ SOURCE FOR RELATIONSHIP BETWEEN TREATY AND CUSTOM**
    - The Court uses a key phrase to describe the **TEST FOR CUSTOM**:
      * *“It is not to be expected that in the practice of States the application of the rules in question should have been perfect, in the sense that States should have refrained, with complete consistency, from the use of force or from intervention in each other’s internal affairs... 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 that rules, not as indiciations of the recognition of a new rule”*
    - Custom can exist **PARALLEL** to treaty and places a premium on States protesting the use of force
    - There is a vision of customary law based on **PROTEST** and **OBJECTION** by states
    - Power Politics: this hands, yet again, greater power to powerful **nations** in the construction and maintenance of international norms – states are much less likely to protest against the actions of one of the great powers – **NO STATES PROTESTED TO US INVASION OF IRAQ**
      * States do not like to protest much – proven by the fact that states can protest and bring other states to adjudication for human rights violations, but this has **ONLY HAPPENED** ONCE – the protesting state’s own violations will then come to light, and **EVERY STATE VIOLATES HUMAN RIGHTS**
    - There are difficulties for customary law in things like use of force and torture – both are prohibited by customary law, but how is customary law determined? Through Opinio Juris and state practice – **EVERYONE IS DOING IT THOUGH**
* Court’s Decision:
  + *“The Court thus finds that both Parties take the view that the principles as to the use of force incorporated in the UN Charter correspond, in essentials, to those found in customary international law”*
    - Potentially opening Pandora’s box – state practice can undermine UN Charter?
* **DOCTRINAL ELEMENTS OF SELF-DEFENCE AS PER NICARAGUA VS. USA**
  + Armed Attack
  + Necessity
  + Proportionality
    - There must be an armed attack, there must be a necessity for response, and the response must be proportional to the attack
    - Idea of an armed attack is problematic with the advances in technology – one armed attack might be all it takes to wipe out a state with nuclear weapons
    - Attempts to define the nature of the harm is very problematic
      * What is US and UK put sanctions on Iraq, and half a million people die each year from treatable diseases... is force as self-defence justified?
      * BUT if armed attack is put too broadly, the exception would swallow the rule
* **DOCTRINAL ELEMENTS FOR COLLECTIVE SELF-DEFENCE AS PER NICARAGUA VS. USA**
  + US had assumed role of POLICING without the permission of the other sates
    - Costa Rica, Guatemala NEVER asked for US help – only El Salvador asked, and that was RETROACTIVELY
  + Difference between domestic and international rules – in domestic, if two people are fighting, a third party does not need to be asked to intervene before they can – in international law, a government HAS TO ASK FOR HELP
  + *“there is no rule permitting the exercise of collective self-defence in the absence of a REQUEST by the state which regards itself as the victim of an armed attack”*
    - Normally, because governments will still be functioning, whereas one person getting beat up might not have the capacity to ask for help
    - BUT! – What if the government has been toppled? What if there is a puppet regime? What if there is a collapse?
      * Puppet government = a government that has been put in by the foreign state in order to invite them to intervene

**Legality of the 2003 War on Iraq**

**The Revival Argument**

* Reasoning for the US to invade Iraq
  + Weapons of Mass Destruction
    - Self-Defence (which may include collective self-defence)
  + Saddam Hussein/Oppressive Regime
    - To avert overwhelming humanitarian catastrophe – Humanitarian Intervention
  + Natural Resources
    - Oil
    - Invading a country and stealing its natural resources is a WAR CRIME for the country that sends in its troops, as well as the companies involved
  + Subterfuge to divert attention from September 11th
    - Used Sept 11 as a **JUSTIFICATION** to invade Iraq for the war on terrorism
* **LEGAL BASIS** forwarded BY the USA for the war on Iraq
  + When USA tried to get a SC resolution to invade Iraq, France (behind closed doors) stated they would exercise their veto power, so the resolution would fail
  + US then fell back on a **PREVIOUS SC RESOLUTION** saying it was **ALREADY** authorized – after the first Gulf War
  + Trilogy of SC RESOLUTIONS:
    - 678, 687 and 1441
  + Resolution 678 – legalization by the SC for the Gulf War when Iraq invade Kuwait
    - Article 2.7 of the UN Charter – Sovereignty WITH CHAPTER VII EXCEPTIONS
    - SC issued 678 allowing the use of force and troops
      * Issue: WHOSE TROOPS? – UN Army does not exist! SC must designate which National Forces have the authority to go as part of the resolution
    - Called back to Resolution 660
    - *Mindful of its duties and responsibilities under the Charter of the UN for the maintenance and preservation of international peace and security”*
    - Acting under Chapter VII of the UN Charter
    - *To use all necessary means to uphold and implement resolution 660*
    - *Authorizes Member States*
    - *Requests all states to provide appropriate support for the actions undertaken*
      * **EFFECTIVELY MOBILIZES THE WHOLE WORLD**
    - *Requests the states concerned to keep the SC regularly informed*
    - *Allow Iraq one final opportunity as a pause of goodwill, to do so*
    - *Unless Iraq on or before 15 January 1991 fully implements... the resolutions*
    - **NO DESIGNATION OF WHICH MEMBER STATES WILL SUPPLY TROOPS**
      * Process after this of trying to build a **COALITION**
      * Very controversial – the Coalition force was predominantly a puppet force for the United States
      * Failure to designate in precise terms leads to problems
  + Resolution 687 – AFTER Iraq lost the Gulf War
    - *Welcoming the restoration to Kuwait of its sovereignty, independence and territorial integrity and the return of its legitimate Government*
    - *Affirming the commitment of all Member States to the sovereignty, territorial integrity and political independence of Kuwait and Iraq, and nothing the intention expressed by the member states...*
    - *Conscious also of the statements of Iraq threatening to use chemical and biological weapons... grave consequences for Iraq*
      * **WE’RE COMING BACK IN IF YOU USE THESE WEAPONS**
    - Provisions regarding weapons of mass destruction, terrorism, nuclear weapons, ballistic missiles, stockpiling weapons
    - Article 33 = *“declares that, upon official notification by Iraq to the Secretary-General and to the Security Council of its acceptance of the above provisions, a formal cease-fire is effective between Iraq and Kuwait and the Member States cooperating with Kuwait in accordance with Resolution 678”*
  + Resolution 1441 (2002)
    - 678 is mentioned
    - *Deploring the fact that Iraq has not provided an accurate, full, final and complete disclosure, as required by resolution 687, or all aspects of its programmes to develop weapons of mass destruction and ballistic missiles with a range greater than one hundred and fifty kilometres, and of all holding of such weapons, their components and production facilities and locations, as well as all other nuclear programmes, including any which it claims are for purposes not related to nuclear weapons-usable material*
      * **RESOLUTION 687 was a CONDITIONAL CEASE FIRE**
    - Acting under Chapter VII... decides that Iraq has been and remains in MATERIAL BREACH of its obligations under relevant resolutions, including resolution 687, decides... a final opportunity to comply with 687
    - Article 12 = *decides to convene immediately upon receipt of a report in accordance with paragraphs 4 or 11 above, in order to consider the situation and the need for full compliance with all of the relevant Council resolutions in order to secure international peace and security*
* **US ARGUMENT: Resolution 678 was authorization to USE FORCE, Resolution 687 was a CONDITIONAL CEASE FIRE, 1441 is CONFIRMATION that 687 has not been followed, so it is LEGAL to go BACK TO 678 – REVIVING 678 = REVIVAL ARGUMENT**
  + Resolutions in GENERAL:
    - WHY forces are going (which UN Charter rules they are upholding), WHO can go (which state’s forces) and WHAT Iraq could possibly do to avoid the use of force (a warning)
  + LACK of UN ARMY! – the original resolution of the Gulf War did not include a UN army, so the 2003 argument now becomes “can the US intervene... can the Brits intervene...” instead of “can the UN army intervene”

**The British Attorney General’s Opinion**

* AG identified three potential bases for use of force (in general terms):
  + Self-Defence (may include collective self-defence)
  + Exceptionally, to avert overwhelming humanitarian catastrophe; and
  + Authorisation by the Security Council acting under Chapter VII of the UN Charter
* AG’s position about Self-Defence relating to this case is that there can **be NO JUSTIFICATION** based on self-defence since an attack or threat is **NOT IMMINENT**
* AG reviews SC Resolutions 678 and 1441
* **MAIN ISSUE**: Who gets to decide whether there was an ongoing breach?
  + 678 authorizes force, 687 is a conditional cease-fire, 1441 says Iraq is in breach of its cease-fire, US can create a coalition to go back in = US REVIVAL ARGUMENT
    - CRITICISM: 1441 says that the SC will **CONVENE TO CONSIDER** the findings regarding compliance
      * US RESPONSE: happy to convene, thinks everyone wants to consider the findings, but IT DOES NOT REQUIRE ANOTHER RESOLUTION – language of CONSIDERING is considerably less than DECIDING – US WOULD HAVE VETOED 1441 OTHERWISE
* **LEGALITY OF THE INVASION COMES DOWN TO INTERPRETATION OF PARAGRAPH 12 OF RESOLUTION 1441 – US says NO need for another resolution, other states say YES another resolution is necessary before force can be used**
  + Two possible interpretations of requirement for DISCUSSION in 1441:
    - Giving a final warning to Iraq and then SC would have another meeting that would simply be conversation, NO LEGAL SIGNIFICANCE – US interpretation
      * Vs
    - Giving a final warning, and afterwards SC would get together to DECIDE whether or not to use force – LEGAL SIGNIFICANCE – other states’ interpretation
      * 13 years after 678, things have changed, and there needs to be another resolution
* Negotiating history of 1441 and its impact on the case:
  + *Indeed the omission is especially important as the French and Russians made proposals to include an express requirement for a further decision, but these were rejected precisely to avoid being tied to the need to obtain a second resolution”*
    - **US SAID THEY WOULD VETO IF ANOTHER RESOLUTION WAS REQUIRED**
  + *We have very little hard evidence of this beyond a couple of telegrams recording admissions by French negotiators that they knew the US would not accept a resolution which required a further council decision”*
    - **LANGUAGE OF PARAGRAPH 12 WAS A POLITICAL COMPROMISE**
  + *Two other council members, Mexico and Ireland, made clear that in their view a further decision of the Council was required before the use of force would be authorized*
    - To the extent that there is any ambiguity, it would be assumed that it would be interpreted as it would be in the UN Charter, and since the UN Charter specifically prohibits use of force and is aimed directly at preventing war, the ambiguity should be interpreted as requiring another resolution
* **SECURITY COUNCIL RESOLUTIONS ON USE OF FORCE**
  + Need to have a FINISH date or time –there needs to be an end to it in the ORIGINAL resolution or else the SC has to pass ANOTHER resolution to STOP the use of force, and any permanent power can VETO the resolution to cease fire
  + **ONCE SOMETHING IS OPENED, IT HAS NO END UNTIL THERE IS A SUBSEQUENT RESOLUTION TO CLOSE IT, UNLESS THE END IS SPECIFIED IN THE ORIGINAL RESOLUTION**

**Human Rights: Sources and Enforcement**

**Human Rights: Introduction**

* Human Rights is one of the fundamental building blocks of public International Law
* Scepticism of Human Rights as a matter of International Law:
  + Human Rights impede states in dealing with troubles and threats in their own countries
  + Human Rights force states to do things they don’t want to do
  + Sovereignty issues: telling states how to conduct their domestic affairs
  + Article 2.7 of the UN Charter: **SOVEREIGNTY** – Human Rights issues are an affront to sovereignty
  + Human Rights as part of **CULTURAL IMPERIALISM**
    - States, particularly Russia and the US – telling the rest of the world “these are the building blocks on which your societies must be based”
* Human Rights represent a **FUNDAMENTAL STATEMENT OF HUMAN ENTITLEMENT** – reaches across ALL ASPECTS of International Law
* **FUNCTION OF HUMAN RIGHTS**:
  + To protect Humans, Individuals from STATES
  + This is why Human Rights is the concern of International Law
  + “sometimes states go insane”
    - Radical proposition: we need to be protected from our own government
* WWII and Human Rights:
  + Difference between German conduct (holocaust) and the US use of the atomic bomb
  + A major aspect of the holocaust involved German treatment of its OWN nationals
  + Outrage stemmed from how Germany treated their own people
    - Gypsies, homosexuals, mentally insane, jews: all eliminated, regardless of being German Nationals
    - **CONCLUSION: people must be protected against THEIR OWN STATE because SOMETIMES STATES GO INSANE**
  + Sometimes states attempt to achieve a particular agenda by using people as a means to an end
    - Hitler = extreme example = “better for Germany culture in the long run if we had an Aryan race”
* HUMAN RIGHTS is a reaction to entirely UTILITARIAN ideas that states try to implement at the cost of human suffering
  + EXAMPLE: financially pragmatic for a country if they killed off all the mentally disabled, but the idea is abhorrent
* Human Rights are **INTERNATIONAL**
  + Universality and Fundamentalism – **TRANSCENDS NATIONALITY**
  + Should not be disparities because Human Rights are so intrinsic – cannot say that some people are worth more or less than others
  + **UNIFORMITY**
* Power Disparities and Human Rights
  + Most Western countries make their commodities in China – why? CHEAP LABOUR – weaker labour laws in place – people in Western countries would not work for the same rates – economic competition
  + In economic terms, this is a RACE TO THE BOTTOM – competitive environment of “let’s go to the place where we can exploit people the most and get our goods made the cheapest and people will buy them because they want to save money. Let’s go to places to get our resources where people are most desperate and our commodities will be more economical”
    - Most extreme form of this is SLAVERY
    - The biggest economy in the world was founded on SLAVERY – labour was FREE
  + Human Rights are important within these power disparities because it brings up the baseline – it’s impossible to change that the world is radically dissimilar, but it can bring up the BOTTOM in the race to the bottom – get rid of slavery and child labour, etc – race to the bottom will still exist, but it won’t go as low
  + **PART OF THE RATIONALE OF HUMAN RIGHTS IS TO IMPROVE BASELINE STANDARDS OF LIFE WORLDWIDE**
* Human Rights Conventions and Treaties
  + States sign to gain popularity with their own people – basically a commitment to treat their own people properly
  + US and Somalia are the only two countries that have yet to sign the Treaty on the Rights of the Child
    - Source of embarrassment for the US?
    - Concern within government, even powerful governments, about criticism regarding human rights – no country wants to be embarrassed on these grounds
  + Economic self-interest – particularly true after WWII and still true
    - If a state wishes to raise the standard of living in their own country, other countries have to simultaneously raise their standards of living or else it becomes too expensive for a state to do so alone
    - A state will become relatively poorer as a result if they are the only state trying to preserve basic human values
  + Something slightly odd about Human Rights treaties vs. Other types of treaties
    - Human Rights treaties DO NOT have a particularly strong RECIPROCAL basis between states that sign them
      * Reciprocity = “if you do X, we will do Y = agreement” – a bargain or commitment to particular standards, etc
    - Human Rights treaties are cast in NEGATIVE language
      * The government MAY NOT do this, and this, etc
    - Entities that enjoy the rights in these treaties are human beings, not governments – another difference
      * Subjects of International law – not just STATES like it used to be
      * Idea of Sovereignty USED to be “do not tell countries how to deal with their own people”
        + This is NO LONGER THE CASE – the subjects of International Law changed after WWII
        + Sense of sovereignty is DILUTED – sometimes STATES GO INSANE – international community does not want to give such an entrenched notion of sovereignty to states because it can result in tremendous human suffering a la WWII
  + Consequences of Treaties on Sovereignty and Subjects of International Law
    - Human Rights ushers in a NEW PARADIGM where SOVEREIGNTY IS LESS STAUNCH
      * CRITICISM: States sigh the treaties, so it is still the states making the decisions
      * States are still the fundamental building block – Warbrick quote above
    - States are committing to not do something to their people, this does not necessarily make the people all-powerful
    - The willingness of states to pass human rights conventions which govern issues that are primarily internal is SOMETHING VERY NE
* Human Rights and the UN Charter
  + Central reasoning behind the UN Charter: NO WAR!!
    - Are Human Rights violations a basis for war?
      * Humanitarian Intervention: seems like the international community will tolerate a lot in the means of Human Rights violations before they’ll do anything to stop it
      * If one country attacks another, that is a threat to international peace and security – the UN Charter matters here
        + DOMESTIC Human Rights violations matter less
  + BUT! – Articles 1 and 2 of the UN Charter talk a lot about Human Rights
    - One of the things it talks about is ECONOMIC rights, etc
    - Rights to food, education and development, etc
      * WHY? ECONOMIC AND SOCIAL DISPARITIES LEAD TO WAR, WHICH IS WHAT THE UN WANTS TO AVOID
* The Three Principal Texts of Human Rights Law: UDHR, ICCPR, ICESCR

**Human Rights: Sources**

* UDHR: The Universal Declaration of Human Rights
  + Adopted in 1949 – NOT A TREATY
  + Written by Eleanor Roosevelt, amongst others
  + It is a DECLARATION – NOT A TREATY – of fundamental universal values
  + **VERY IMPORTANT DOCUMENT**
  + In 1949 it was NOT BINDING – BUT!! Now it can be argued to be **CUSTOMARY INTERNATIONAL LAW**
    - CRITICISM: A declaration written by two people is hardly a source of international law
    - RESPONSE: Do states adopt the Declaration in any form? Do they do it out a believed legal obligation? STATE PRACTICE AND OPINIO JURIS
      * Look at General Assembly Resolutions and State Practice
* Other Human Rights treaties before and after the BIG THREE:
  + CEDAW: Convention on the Elimination of Discrimination Against Women
    - Adopted in 1979 by the UN General Assembly as an International bill of rights for women
    - US is the ONLY developed country that has not ratified CEDAW
    - Many others have ratified it with reservations
    - What makes this a **HUMAN RIGHT**?
      * Women are historically DEEPLY discriminated against
      * In 1949 when the UDHR talks about equality of women, it was utterly **ASPIRATIONAL**
    - This is an aspirational idea but it does not necessarily realize current reality
      * Possible to get countries to commit to equality between men and women when there is probably very little equality – essentially countries saying “we promise to change” – the extent to which they actually intend to do so is debatable
  + Veritable explosion of Human Rights treaties after WWII
    - Genocide Convention
    - Convention on the Rights of Child
    - Convention on the Elimination of Racial Discrimination
      * **CRITICISM**: These discriminations are so rampant, how can a treaty stamp them out?
      * **RESPONSE**: These ideas are ASPIRATIONS – things the international community WANTS to put in place and Treaties and Conventions are INSTRUMENTS towards making this happen
* ICCPR: International Covenant on Civil and Political Rights
  + Adopted in 1966 – came into effect 1976 – took 10 years to get enough ratifications and thus bring it into force
  + Role of the General Assembly in the creation of the ICCPR:
    - GA decides on the final text
    - Draws the line and puts an end to negotiations when they believe they have the text that will get the most signatures
    - If a state has issues with a certain article after that point, they can make a reservation
  + Human Rights are the foundation of **FREEDOM, JUSTICE and PEACE** in the world
    - Is a legal concept really the foundation of freedom, justice and peace in the world?
    - Recognizing that these rights derive from the **INHERENT DIGNITY OF THE HUMAN PERSON is NATURAL LAW**
  + Article 1 = All peoples have the right to self-determination
    - Anti-colonialism
  + Article 4 = some Human Rights can be taken away but Derogation is not allowed from :
    - Article 6 = Right to Life – what about war and the death penalty?
    - Article 7 = No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. No scientific and medical experiments
    - Article 8 (paras 1 and 2) = No slavery or servitude – forced labour is okay where there is no concept of ownership – example: Conscription is forced labour
    - Article 11 = No imprisonment for inability to fulfil contractual obligations
    - Article 15 = No one shall be held guilty for an offense they committed before a law was passed
    - Article 16 = Everyone should have the right everywhere of recognition as a person before the law
    - Article 18 = Right to freedom of thought, conscience and religion
  + Article 9 = Right to liberty and security of person – reasons for arrest, fair and speedy trials
    - UN Human Rights Committee says article 9 is not to be derogated from, particularly the Habeus Corpus provision
  + Article 10 = If deprived of liberty, a person must be treated with respect
  + Article 12 = Freedom of movement within a territory and to leave a country
  + Article 13 = A person can only be expelled from a territory in a decision according to law
  + Article 14 = All persons are equal before courts
  + Article 17 = No one shall be subjected to arbitrary or unlawful interference with his privacy, family home or correspondence
  + Article 19 = Right to hold opinions
  + Article 20 = Any propaganda for WAR shall be prohibited by law
    - Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law
  + Article 21 = The right to peaceful assembly shall be recognized
  + Article 22 = Right to freedom of Association
  + Article 25 = Right to Democracy
* ICESCR: International Covenant on Economic, Social and Cultural Rights
  + US takes the view that economic, social and cultural rights were not really rights but merely desirable social goals and therefore should not be the object of binding treaties
  + Obligation of means: a state must use as much of its resources possible to ensure the full realization of the goals presented here
  + Article 4 = The States party to the present Covenant recognize that, in the enjoyment of those rights provided by the state in conformity with the present covenant, the state may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society
  + Article 7 = Right to work, women guaranteed right to work of man’s jobs
  + Article 8 = Right to create trade unions
  + Article 9 = Protection of family and pregnant persons
  + Article 13 = Right to education, full development of human personality
    - ICCPR and ICESCR are very much interwoven and correlate with each other
      * EXAMPLE: What good is the Right to Life if you are prevented from the economic means to have food?
      * BUT! Why then, two separate conventions and a distinction?
        + They represent competing ideologies

ICCPR is the manifestation of the US ideologies which oppose healthcare and the right to food

1 in 8 people in the US are starving – the world’s largest economy is the result of slavery

* + - * Are economic, cultural and social rights easily judged? – can you enforce these rights? If there is no recourse to the failure to provide these rights, are they really rights?

**Human Rights: Enforcement**

* Idea of enforcing Human Rights brings forth a weird concept: the goal of Human Rights law is to protect the people from States, but the task of policing this goes to States!
  + This creates an anomaly where the state is the perpetrator and the judge
  + Creates a desire for **THIRD PARTY ADJUDICATION** – where someone other than the state would get a shot at adjudicating whether or not this is a Human Rights violation (most likely an international system)

**The Laws of War**

* In-class Video Examples:
  + US marines shooting already injured man
    - Only relevant question: **IS HE INCAPACITATED**?
      * Once someone is incapacitated, it is **ILLEGAL** to destroy the life
        + The purpose of war is NOT to destroy at all costs, just to diminish military capacity
        + It does not matter who the person is – army regular, insurgent, terrorist, civilian etc – Once a person does not pose a military threat they should not be killed
  + Lawrence of Arabia clip
    - Declaring **NO QUARTER, NO PRISONERS OF WAR** at the outset of war is a violation and illegal
    - Killing someone who is surrendering or has already surrendered is a violation of the laws of armed conflict and illegal
  + Guided Bomb on ~30 individuals in Fallujah, Iraq – April 2004
    - Decision to bomb was made seconds after the sightings of the individuals on the street by an F-16 pilot
    - If they were Iraqi soldiers there is no issue, but was that known at the time?
      * **Must be a presumption of civilian status**
* Geneva Conventions:
  + Laws of Armed Conflict – what you cannot do to prisoners, combatants, civilians etc, and what you MUST do as well
  + Geneva Convention is the only thing that every state has signed and ratified
* There are at least 660 rules applicable in the Law of Armed Conflict, but only about 25 of them constitute War Crimes – the rest are dealt with as state to state relationships and violations are dealt with on those levels – **ONLY THE 25 RULES THAT COUNT AS WAR CRIMES CAN BE CHARGED TO INDIVIDUALS**
* Problems with the Laws of Armed Conflict
  + Principle of Distinction:
    - How do you determine civilians apart from combatants?
  + Civilians taking part in hostilities
    - Direct participation
  + Collateral Damage
    - Is it proportional to the military necessity?
    - Unless each event is investigated carefully, it will not be known if there was a war crime or not – also, how do you determine if a target is valuable enough to mitigate potential civilian casualties?
* Rape as Warfare
  + EXAMPLE: Rape in the Congo
  + Before Yugoslavia, rape was prosecuted as torture, not as a war crime
  + The Rule of War attempt to protect VULNERABLE groups like women, children, the elderly etc
  + In most conflict rape becomes endemic – in Congo rape is used as a METHOD OF WARFARE – belief that destroying women also destroys the men who are related to them
  + **SOME TYPES OF WARFARE MUST BE FORBIDDEN EVEN IF THEY ARE SUCCESSFUL BECAUSE THEY CREATE TREMENDOUS SUFFERING AND INSTRUMENTALISE HUMAN BEINGS**
    - Military necessity can never override tremendous suffering such as widespread systematic rape
* The role of **LAW** in **WAR**
  + War is such a terrible thing that the more horrendous acts that unfortunately accompany it need to be stopped
  + There is a need for **MINIMUM HUMANITARIAN STANDARDS** even in armed conflict
  + LAW IN WAR = Restrictions on HOW you fight, not IF you fight
  + Offers protection to soldiers and civilians alike from unfair acts
    - CRITICISM: war is by definition the breakdown of all types of law – there is a whole series of laws that aim to prevent war, but if war breaks out then the system of law is already broken – it is unrealistic to think that laws will help now – **WAR IS INHERENTLY DYSFUNCTIONAL, CHAOTIC AND ANARCHIC**
    - **CRITICISM**: By making Laws of War it is in effect LEGITIMIZING war
  + Changing nature of war – there needs to be rules to keep up
    - Less combatants killed, more civilians
    - Total war
    - Broadening of battlefields
    - Asymmetrical warfare
* Historical Origins to the Law of War
  + Customary Origins:
    - Functionality
    - Codes of Chivalry
    - Religious and Ethical Beliefs
  + Principal Codifications
    - Liber Code 1864
    - Geneva Convention 1864 – Wounded and Sick
    - Hague Conventions 1907 – Conduct of Hostilities
    - Geneva Conventions 1929 – Wounded and Sick, Prisoners of War
    - Geneva Conventions 1949 – Wounded, Sick and Shipwrecked, Prisoners of War and Civilians – all states are party
    - Additional Protocols I and II 1979
    - Weapons Conventions
* Structure of the Laws of War
  + International Armed Conflicts
    - Quantity of Law is much greater
    - Prisoner of War status is granted
    - Occupation becomes an issue
    - Grave beaches regime
  + Non-International Armed Conflict
    - A more limited set of rules
    - Hors de Combat status
    - Greater relevance of Human Rights obligations, since it is a state’s own people they are fighting against
    - Increasing relevance of customary international humanitarian law, including the development of war crimes in non-international conflicts

**Principles of the Laws of War**

* Principle of HUMANITY
  + Persons Hors de Combat and those who do not take a direct part in hostilities are entitled to respect for their *lives and their moral and physical integrity*. They shall in all circumstances be protected and treated humanely without any adverse distinction
  + It is FORBIDDEN to kill or injure an enemy who surrenders or who is Hors de Combat
  + The *wounded and sick shall be collected and cared for* by the party to the conflict which has them in its power. Protection also covers medical personnel, establishments, transports and equipment. The emblem of the red cross or the red crescent is the sign of such protection and must be respected
  + Captured combatants and civilians under the authority of an adverse party are entitled to respect for their *lives, dignity, personal rights and convictions*. They shall be protected against all acts of violence and reprisals. They shall have the right to *correspond with their families* and to receive relief.
  + Everyone shall be entitled to benefit from *fundamental judicial guarantees*. No one shall be held responsible for an act he has not committed. No one shall be subjected to *physical or mental torture, corporal punishment or cruel or degrading treatment.*
  + Parties to a conflict and members of their armed forces do not have an unlimited choice of methods and means of warfare. It is prohibited to employ weapons or methods of warfare of a nature to *cause unnecessary losses or excessive suffering*
    - Non-detectable fragments
    - Blinding Lasers
    - Chemical Weapons
* Principle of **MILITARY NECESSITY**
  + *“That the only legitimate object which States should endeavour to accomplish during war is TO WEAKEN THE MILITARY FORCES OF THE ENEMY” – St. Petersburg Declaration 1868*
  + Targeting: *Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objects are limited to those objects which by their NATURE, LOCATION, PURPOSE OR USE make AN EFFECTIVE CONTRIBUTION TO MILITARY ACTION, and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, OFFERS A DEFINITE MILITARY ADVANTAGE – Geneva Conventions Additional Protocol I – Article 52.2*
* Principle of **NEUTRALITY**
  + Distinction between *Jus in bellum* and *Jus ad bellum*
  + Neutral as to what? – Neutral between the Parties of the conflict
    - There is a problematic attitude in War of “You started the fight, why should we have to agree to your rules?”
      * BUT! There is tremendous disagreement regarding who starts a war – there is never consensus – even Hitler said the invasion of Poland was in self-defence! And the Japanese argue that the Dutch started the war in the Pacific!
  + Therefore: the idea that the laws of warfare should only apply to whoever started the conflict, WILL NOT WORK
    - **SOLUTION: LAWS OF WAR ARE NEUTRAL! THEY ARE UNILATERAL AND APPLY TO ALL PARTIES**
  + UN Charter – Article 2.4 prohibits invading another country – thus according to the UN Charter it DOES matter who started the war – but laws of warfare say it doesn’t?
    - BUT! All of the questions about Use of Force in the UN Charter are JUS AD BELLUM – outside of the conflict – UN Charter focuses on WHEN YOU CAN GO TO WAR – WHEN IS IT LEGAL TO START HOSTILITIES
    - However, once you are IN war, the UN Charter no longer really applies – there is a series of laws that apply to EVERYONE involved in the fight – they are FUNCTIONAL LAWS
      * International Community can deal with the problem of who started the hostilities AFTER they’re over
      * **LAWS OF WAR ARE CONCERNED WITH PREVENTING INJUSTICE TOWARDS HUMANITY ACROSS THE BOARD WHILE OTHER BODIES CAN DEAL WITH WHO STARTED THE FIGHT**
* Principle of Distinction
  + Basic Rule: Article 48 – Additional Protocol I – *In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times* ***DISTINGUISH BETWEEN THE CIVILIAN POPULATION AND COMBATANTS AND BETWEEN CIVILIAN OBJECTS AND MILITARY OBJECTIVES*** *and accordingly shall direct their operations only against military objectives*
  + Article 51.4 and 51.5 – Additional Protocol I:
    - *Indiscriminate attacks are prohibited. Indiscriminate attacks are:*
      * *Those which are not directed at a specific military objective*
      * *Those which employ a method or means of combat which cannot be directed at a specific military objective*
      * *Those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol*
      * *And consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction*
    - *Among others, the following types of attacks are to be considered as indiscriminate:*
      * *An attack by bombardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects*
  + Distinction between **MILITARY** objectives and **CIVILIANS**
  + Relates to people and property
    - Distinction of people:
      * Civilians vs. Combatants
        + But! Sometimes civilians take up arms
        + No sharp division between military and civilian in all cases
        + **PRESUMPTION OF CIVILIAN STATUS**
  + The idea that you have to distinguish between those people that are taking up arms against you and those people that are not
  + Law of War determines whether you can blow up a certain building
    - Need legal advice before you can make decisions
    - Can destroy/take military goods but you CANNOT do it to non-military property
    - BUT! How do you know if something is a military target?
      * Tanks, bridges, telecommunications facilities, etc
      * **CAN YOU MAKE A DEFINITIVE LIST? – NO**
      * It is interpretive – there is a test to determine what it is
        + Additional Protocol 1 – Section 2: *OBJECTS WHICH BY THEIR NATURE, LOCATION, PURPOSE OR USE*

Anything can be a military object, if by its nature, location, purpose or use its destruction leads to a definite military advantage

* + - * + There is no set category of military targets – it depends on how it is being used, and if its destruction or occupation grants a distinct military advantage

Schools, hospitals, cultural property etc CAN BE DESTROYED depending on the CIRCUMSTANCES

There are specific protocols re: warnings that must be followed in these cases, but it is not steadfastly illegal to destroy these sorts of targets

* + If some people within a larger group are hostile, but it cannot be determined who they are specifically, it is ILLEGAL to simply kill the entire group
    - Problematic in asymmetrical warfare – can’t use the asymmetry of force
    - This causes tension in the Principle of Distinction
  + UNDERLYING PRINCIPLES AND IDEAS BEHIND DISTINCTION:
    - Humanity and Military Necessity
      * Two competing principles
      * **HUMANITY AND MILITARY NECESSITY ARE AT THE TOP OF THE HIERARCHY OF INTERNATIONAL LAW OF WAR**
* Principle of PROPORTIONALITY
  + Article 57.2 – Additional Protocol I:
    - *With respect to attacks, the following precautions shall be taken:*
      * *Those who plan or decide upon an attack shall:...*
      * *Refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be EXCESSIVE in relation to the concrete and direct military advantage anticipated*
  + A weighing that takes place between two different value systems – two different principles – humanity and military necessity
    - Focuses on the nature of victims or object of destruction
    - EXAMPLE: in Iraq, one of the initial targets in the 2003 war was the power grid, which supplied 40% of its energy to military forces – upon its destruction, military forces were severely inhibited, particularly the ability to launch anti-aircraft missiles – BUT! 60% of the power went to water irrigation and other things necessary to the population
      * Destroying one thing has DUAL CONSEQUENCES – can work with people too, such as doctors
        + THIS IS THE FOCUS OF PROPORTIONALITY – WAS THE CIVILIAN SUFFERING PROPORTIONATE TO THE MILITARY VALUE?
  + Idea of OTHER MEANS
    - There are specific rules in war which dictate that the means that are the LEAST DAMAGING to civilian populations and property must be used
      * EXAMPLE: If a choice exists between a sniper and a bomb, the sniper MUST be chosen
  + Different Location and Time
    - Before a military operation is to be carried out, if there is fear of civilian suffering, the question must be asked: “Is this the only time that this certain target is available to be captured/destroyed”
      * Specific rules in place specify that the TIME and LOCATION that MINIMIZE CIVILIAN DAMAGE MUST BE CHOSEN
  + Evacuation
    - If a target is going to be attacked that will have a humanitarian impact, WARNINGS must be issued ahead of time to give the civilians time to EVACUATE
* Principles of **HUMANITY** AND **MILITARY NECESSITY** and how they **COEXIST**
  + Humanity dictates that the purpose of war is to incapacitate the fighting ability of the enemy, NOT to destroy a population or level cities
  + Military Necessity dictates that as long as the goal is to incapacitate the fighting ability of the enemy, almost anything goes
  + DISTINCTION comes into play – It is possible to destroy military objectives, regardless of what they are, AS LONG AS IT IS BEING USED FOR MILITARY PURPOSES
    - Military Necessity allows this!
      * BUT! Once a target or soldiers have lost their fighting ability, HUMANITY dictates that further military action is not allowed
        + Once a soldier has lost his fighting ability, it is the duty of the other side’s forces to SAVE THEM – take them prisoner and exchange them back after the war
  + HUMANITY dictates that soldiers get to go home after a war
    - **IF THEY CANNOT FIGHT, YOU CANNOT KILL THEM**
  + Laws of Warfare dictate that armies must go out and collect enemy dead and wounded
    - The information of who has died must be sent along to the enemy side IN THE **INTEREST OF HUMANITY** – details of people who have died or been wounded in combat and who are prisoners
      * This is for the families of the soldiers – HUMANITY
      * BUT! There are exceptions – military necessity can perhaps dictate that it is not smart to disclose the death of a certain person

**Sources of Laws of Warfare**

* Geneva Conventions of 1949
  + In popular discussion, Geneva Conventions are the most referenced
  + Belief that the Laws of Warfare are synonymous with the Geneva Conventions is FALSE – laws of warfare are much more broad than the Conventions alone
* Hague Regulations of 1899 and 1907 and Geneva Conventions of 1949
  + Two principal TREATY sources of Laws of Warfare
  + Traditional distinction is that 1907 Hague Regulations were about CONDUCT OF HOSTILITIES whereas the Geneva Conventions are about PROTECTION OF CIVILIANS
* Liber Code of 1864
  + This was a codification, writing down of Laws of Warfare that were ALREADY CUSTOM
  + Liber wrote these for the purposes of the US Civil War – he had sons fighting on OPPOSITE sides of the conflict, so he wanted to make sure there was codification of the laws of war and treatment of soldiers etc
* Geneva Convention of 1929
  + Based primarily on treatment of POWs
* Geneva Conventions ADDITIONAL PROTOCOLS of 1977
  + Protocol I = applies to INTERNATIONAL armed conflicts
  + Protocol II = applies to NON-INTERNATIONAL armed conflicts
    - After WWII – the intense sovereignty argument was no longer applicable
    - Until Protocol II there was only ONE article in the Geneva Conventions – Common Article 3 (common because it appeared in all the Geneva Conventions) – that mentioned non-international conflicts
      * Only covered basic agreements for all types of conflicts: cannot torture, cannot kill surrendered soldiers, cannot rape, etc
  + Protocol II – furthered the protection of victims in NON-INTERNATIONAL conflicts
* There are a large number of other treaties and conventions governing the Law of Warfare
  + Hague, Geneva and Liber are the PRINCIPAL sources
  + Other treaties include use of certain weapons, landmines, etc
    - There is a treaty prohibiting a weapon that explodes and sends shards of glass upon explosion – like a land mine – the shards of glass are UNDETECTABLE by XRAY – the idea behind the weapon is that they will cause an enormous amount of pain because doctors will not be able to find the glass to remove it
      * These weapons are banned across the board because they produce UNNNECESSARY SUFFERING THAT OUTWEIGHS THE MILITARY NECESSITY
        + **This is the dynamic between MILITARY NECESSITY and HUMANITY: HUMANITY STEPS IN TO ENSURE THERE IS NOT A DISPROPORTIONATE AMOUNT OF HUMAN SUFFERING**
* Despite all of the treaties, **MUCH OF INTERNATIONAL LAW OF WARFARE IS CUSTOMARY**

**INTERNATIONAL CRIMINAL LAW: War Crimes and Crimes against Humanity**

**War Crimes**

* **DOCTRINAL ELEMENTS OF WAR CRIMES**:
  + Existence of an Armed Conflict – International or Non-International
    - One of the things that make War Crimes most distinct is that they MUST HAPPEN DURING A WAR
      * Brings about the issue of determining an Armed Conflict
        + How do you distinguish an armed conflict from a terrorist act or a riot? Was 9-11 a War Crime? Are the gross humanitarian violations in Zimbabwe War Crimes?
    - Can be International or Non-International
      * Traditionally, was only used for International armed conflict
        + Slowly, more focus on NON-INTERNATIONAL armed conflict as being eligible for War Crimes, REGARDLESS OF SOVEREIGNTY
    - International armed conflict = armed conflict BETWEEN STATES
    - Non-International armed conflict = defined IN THE NEGATIVE: any armed conflict that is not international – Civil Wars, etc
      * What about PROXY WARS? – make the distinction very difficult
  + Nexus Requirement – a link between the CONFLICT and the CRIME
    - There needs to be a link between the war and the crime
    - When war breaks out, crime rate in a society SKYROCKETS
    - There needs to be some sort of legal device that distinguishes war crimes from normal crimes, or else anyone who commits a crime during a war would be a war criminal
      * ANYONE CAN COMMIT A WAR CRIME – making the division that “only soldiers can commit war crimes” does not work – CIVILIANS CAN COMMIT WAR CRIMES, BUSINESSES CAN COMMIT WAR CRIMES, etc
  + Victims are Protected
    - If a victim is considered protected by law (certain qualifications must be met), you cannot kill them
      * Cannot kill a **WOUNDED** or **INCAPACITATED** soldier
      * Cannot kill a **POW**
      * Cannot kill a **CIVILIAN**
    - If the victim is NOT protected, it is not a war crime
    - Cannot attack people are **PROTECTED** by the laws of war
    - Distinguishing when attacks are legitimate
      * **Distinction is PROTECTED STATUS**
  + Elements of the Specific War Crime are Established
    - There is criteria that must be met for each individual war crime
* Different Geneses of War Crimes
  + There is a core of infringements whose violations are PROSECUTABLE BY CRIMINAL LAW TO **INDIVIDUALS**
    - EXAMPLE: not giving a prisoner of war his regulated amount of soap is NOT a war crime and is not prosecutable by criminal law – it is a violation of public international law amounting from the Geneva Conventions, and compensation can be found in ways OTHER than criminal law
  + SHIFT – from War Crimes being acts of STATES only to becoming an INDIVIDUAL offense
    - This in reaction to WWII
      * Nuremberg Trials – made it possible to prosecute individuals for the most egregious international crimes – STEP AWAY FROM SOVEREIGNTY
        + *International Crimes are not committed by abstract entities, they are committed by men* – Nuremberg
    - A radical departure from the status of Public International Law
  + **WAR CRIMES ARE PERPETRATED BY MEN, NOT STATES**
    - Controversial attitude – this shift took place in a criminal court in Nuremberg AFTER the crimes were committed
  + Hague Regulations of 1907 – one of the core treaties/agreements behind the laws of war
    - BUT! Nothing in the Hague Regulations talks about War Crimes
      * Nuremberg CHANGES THAT – takes the provisions of the Hague Regulations and MAKES THEM CRIMINAL, WHEN THE TREATY ITSELF DOES NOT – controversial! Can this body of law (Hague) create individual criminal responsibility?
    - After WWII, states ran with this trend – part of a BRAND NEW WORLD that wasn’t going to suffer the same catastrophes
  + Geneva Conventions of 1949
    - Attempt to create a new body of law to MIRROR this trend
    - Included a whole new section of GRAVE BREACHES that are prosecutable by criminal law
      * 10 violations out of 660 in the Geneva Conventions that deal with **INDIVIDUAL CRIMINAL RESPONSIBILITY**
  + These are two main sources for War Crimes in INTERNATIONAL conflicts
    - No provisions for non-international conflicts
    - Geneva Convention has common article 3, but does not create liability for war crimes in non-international conflicts out of it
* Sources of War Crime Law
  + ICC Statute (Rome Statute)
  + Grave Breaches of Geneva 1949
  + Nuremberg/Hague Regulations
  + Customary International Law
    - Rome Statute lays out what are currently considered to be War Crimes
      * Sources of this statute are Geneva, Hague and Custom
        + Example: prohibition on the use of child soldiers – does not appear in Geneva or Hague, but is considered customary international law
* **IN ORDER TO DETERMINE IF THERE IS A WAR CRIME, MUST GO THROUGH THE 4 STAGE PROCESS: EXISTENCE OF ARMED CONFLICT, NEXUS LINK OF CRIME TO CONFLICT, PROTECTED STATUS OF VICTIMS, ELEMENTS OF THE SPECIFIC CRIME** (can be found in ICC statute)

**Crimes against Humanity**

* Benefit of Crimes against Humanity vs. War Crimes – ALLOWS BYPASS OF SOVEREIGNTY
* War crimes can cover all the offences outside of a country, but what about the things that happen within it? Example: WWII – Germans rounding up their OWN people and exterminating them
  + **CRIMES AGAINST HUMANITY ARE INTIMATELY LINKED WITH SOVEREIGNTY**
  + Must be able to hold people accountable
* Armenian Genocide: the Laws of Humanity
  + During the Armenian Genocide, there were a lot of statements in the West that these particular events violated fundamental precepts of humanity, and there would be accountability
  + We would not have to discuss humanity in this context if there were POSITIVE obligations between states
    - Why do we even talk about humanity? SOVEREIGNTY
      * Even in a world where we are willing to say “you deal with your domestic situation however you want” there is still something about genocide that “shocks the conscience of humanity” and makes it difficult to bear
* Crimes against Humanity stems from the idea of SOVEREIGNTY TO A POINT – cannot just slaughter people because that becomes an affront to humans everywhere
* Treaty of Sevres – never actually signed
* Treaty of Lausanne
* Nuremberg and the Problem of Sovereignty:
  + No Crime Without Law – Nuremberg CREATED THE LAW
    - Defence would claim that Nuremberg could not prosecute without laws
      * Also claim SOVEREIGNTY – cannot be held accountable for domestic issues
      * International law is about STATES – cannot prosecute people!
  + RADICAL SHIFT in the structure of public international law by holding INDIVIDUALS accountable
  + Three problems with Crimes against Humanity at Nuremberg
    - Sovereignty
    - No Crime Without Law
    - Individual Accountability
      * **ALL NEW RADICAL SHIFTS IN PUBLIC INTERNATIONAL LAW**
      * **NUREMBERG SET THESE THINGS IN MOTION**
* Modern Definitions of Crimes against Humanity
  + ICTY Statute – follows Nuremberg
  + ICTR Statute
  + ICC Rome Statute which includes the specific elements of each crime that need to be established before a case can be made
    - ICTY – International Criminal Tribunal for the Former Yugoslavia:
      * *The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed IN ARMED CONFLICT whether international or internal in character, and directed against any civilian population:*
        + *Murder, extermination, enslavement, deportation, imprisonment, torture, rape, persecutions on political, racial and religious grounds*
      * Elements that must be proved:
        + **IN ARMED CONFLICT!** – very important

Inserted by the US in 1945 during Nuremberg – US insisted on including this element because they did not want to be prosecuted for their own persecution of blacks in the south – lynchings were still occurring all the time in 1945 – armed conflict provision fits Germany, but not the US

* + - * + **CIVILIAN POPULATION** – very contentious

Implies a sizeable amount of people

THRESHOLD REQUIREMENT

Still into Sovereignty – it is still a good thing, not giving international courts jurisdiction for human rights violations against one or two people

Concept that it is a particular group, and it is a MASSIVE violation

Does civilian population mean that there are no fighters within the population? Does the ENTIRE population need to be civilian? – technically NO, but it is not a very clear definition

* + - ICTR – International Criminal Tribunal for Rwanda:
      * *The International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds:* (this part is called the CHAPEAU, with specific crimes listed underneath)
        + *Murder, etc...*
        + ELEMENTS THAT DIFFER FROM ICTY:

Armed conflict has been REMOVED

Reference to **WIDESPREAD OR SYSTEMATIC ATTACK**

National, Political, Ethnic, Racial or Religious Grounds

* + - * + If a murder was linked to a systematic or widespread attack against a civilian population, the perpetrator can be held liable for a crime against humanity, even just for the one murder, as long as it was linked

WIDESPREAD means EXTENSIVE

SYSTEMATIC means PLANNED

Treated as disjunctive – can have a situation that is systematic, but not necessarily widespread

Why did armed conflict element disappear?

Tartic decision of ICTY reviewed the ICTY Statute and decided that there is no longer an armed conflict requirement – it is purely jurisdictional

Consequences of getting rid of the armed conflict element makes lots of things available for prosecution – think KKK, etc

* + - ICC Rome Statute:
      * NEW CRIMES: Apartheid, enforced disappearance of persons, etc
        + Changed to *“persecution against any identifiable group or collectively on political, racial, national, ethnic, cultural, religious, GENDER as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the court*

Cannot be prosecuted for crimes against humanity for targeting homosexuals – paragraph 3 does NOT include sexual orientation

* + - * + Elements of crimes are DEFINED
* **DOCTRINAL ELEMENTS OF CRIMES AGAINST HUMANITY**
  + Is there an attack?
  + Is it Widespread or Systematic?
  + Civilian Population
  + The Nexus Link – between the attack and the widespread or systematic crimes
    - Crime must be linked to the CHAPEAU
  + One of the underlying crimes listed under the CHAPEAU
* EXAMPLES:
  + Russian War in Chechnya
    - Russian Argument – SAME ARGUMENT IN ALL OF THESE SITUATIONS
      * They weren’t civilians, they were fighters!
        + Crossover between laws of war and crimes against humanity
        + Crimes against humanity CAN ONLY BE PERPETRATED AGAINST CIVILIAN POPULATIONS – in order to determine what that is, you have to go to laws of war
      * Raises issue of Civilian Population, or just Hors de Combat?
    - Stalingrad in WWII – Russians would kill Russian soldiers who were retreating
      * Is that a crime against humanity?
* WHY DO WE HAVE CRIMES AGAINST HUMANITY IN LAW?
  + To do something about **SOVEREIGNTY**
  + No War Crimes for NON-international conflicts until Tartic decision (1995?) which says it is possible to prosecute war crimes for non-international conflicts
    - Does this undermine purpose of crimes against humanity?
    - NO – Crimes against Humanity have a THRESHOLD REQUIREMENT – MASS CRIMES that must be WIDESPREAD AND SYSTEMATIC
      * War crimes are not necessarily MASS crimes but they must happen during war= essential difference
  + **WE NOW HAVE A SITUATION IN LAW WHERE WAR CRIMES AND CRIMES AGAINST HUMANITY CO-EXIST**
    - Crimes against Humanity when there is no war
    - War Crimes when there’s no widespread attack

**State Responsibility: Attributing Responsibility**

**State Responsibility**

* If a state can be held accountable for an attack or action, or if liability is to an individual or group of individuals separate from the state
  + EXAMPLE: Are the 9-11 attacks a violation of International Law?
    - Big question is whether a STATE can be attributed responsibility for the attacks
    - It is an obvious violation of International Humanitarian Law, since it is an attack on a CIVILIANS
    - BUT! Was AFGHANISTAN responsible for Al Qaeda’s attacks?
  + Three levels in Criminal Law:
    - Whether the particular harm can bet ATTRIBUTABLE to the person
    - If there is any **JUSTIFICATION** for the offense
    - Capacity of the person to be prosecuted or is there an excuse
* It is important to have means to determine if a STATE is responsible
  + What state is responsible for what conduct, do they have any justifications for the violation, and can they be prosecuted for it?
* EXAMPLE: Nicaragua vs. US – is the US responsible for the actions of the Contras?
* Laws on State Responsibility determine RESPONSIBILITY, what counts as possible JUSTIFICATIONS, and when the state has the CAPACITY TO BE PROSECUTED
* International Law Commission: populated by luminaries/grandfathers of international law who tend to be VERY conservative – the work they produce is influential
  + ILC document: Responsibility of States for Internationally Wrongful Acts
    - These are still draft articles – have not yet been approved because there is deep disagreement
      * What then, is the legal value? Is this a source of international law?
      * It is just a report, not a treaty
      * Can this be considered customary international law? Probably, but you would have to look at it bit by bit – cannot just say the whole thing is
        + **Test for custom is STATE PRACTICE (North Sea Continental Shelf Case: UNIFORM AND CONSISTENT PRACTICE OF STATES)**
        + Look at International Court statements, General Assembly Resolutions and as much state practice as possible
    - Structure of the ILC Draft: (REPLICATE IN EXAM)
      * Wrongful Act is ATTRIBUTABLE
      * Constitutes a BREACH of International Obligation
      * JUSTIFICATIONS (chapter 5)
        + EXAMPLE: Was the Use of Force by the Coalition in Oct 2001 (attack on Afghanistan) lawful?

Touches on Self-Defence, but underneath is the question of whether Afghanistan was RESPONSIBLE for the attack and the role of the SECURITY COUNCIL

* + - Article 3 = key point is countries are afraid that International law will override Domestic Law – this article says that when there is a clash, International Law DOES override Domestic Law – HOWEVER, International Law draws itself from Domestic law (state practice – custom, etc)
    - Article 7 = What if your soldiers go too far? If soldiers are told to destroy a bridge, and instead destroy the bridge and the entire neighbouring town – STILL STATE’S RESPONSIBILITY
    - Article 8 = Standard of EFFECTIVE control – SPECIFIC CONTROL AND A COMPLETE RELATIONSHIP OF DEPENDENCE AND CONTROL
      * Use for Nicaragua vs. US, Bosnia/Serbia/Srebrenica – proxy wars!
    - Article 9 = Warlords – as in Somalia – can bind the State, even if they are not really the true government
    - Article 11 = IF A STATE ACKNOWLEDGES AND ADOPTS THE CONDUCT IT WILL BE HELD RESPONSIBLE - think Iranian hostages case 1979 where Iran not only did not do anything to help the hostages, they claimed to be happy about the action
* **THREE ELEMENTS OF STATE RESPONSIBILITY**
  + Attribution
  + Breach
  + Justification or Reasons precluding Wrongfulness
    - Three provisions for State Responsibility
      * Possible Exam Question: Why are there 3 provisions, how do they relate, what do they all do?
  + Attribution:
    - Rules are quite broad and onerous
    - 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 of it by that obligation, regardless of its origin or character
      * Regardless of its origin or character refers to the obligation and means that derive from ANY source – treaties, customary law, general principles, etc
    - Article 14 – Continuing Character – Example: forcible disappearance, occupation – CONTINUOUSLY violating article 2.4, etc
  + Circumstances precluding Wrongfulness
    - Valid consent by a state to the commission of a given act by another state PRECLUDES the WRONGFULNESS of that act in relation to the former state
      * “Yes, we did this, yes it was us but it is JUSTIFIED – we had CONSENT”
    - Self-Defence
      * JUSTIFICATIONS – COUNTERMEASURE
    - Article 23 – Force Majeure
      * Wrongful act is precluded if the act is due to FORCE MAJEURE – a natural disaster
        + Occurrence of an irresistible force or of an unforeseen event, beyond the control of the state, making it materially impossible in the circumstances to perform the obligation

EXAMPLE: having to land or enter North Korean waters at sea due to a huge storm

* + - Article 24 – Distress
    - Article 25 – Necessity
    - Article 26 – IMPORTANT: All of the above justifications to wrongful acts by a state (consent, self-defence, force majeure, distress, necessity) are INVALID if the wrongful act is that of a peremptory norm, or JUS COGENS international law
      * **BASICALLY – A STATE CANNOT USE ANY OF THESE DEFENCES TO JUSTIFY TORTURE, GENOCIDE, ETC**

**State Responsibility: Genocide Case – SREBRENICA – Bosnia and Herzegovina vs. Serbia and Montenegro**

* ICJ Case – CIVIL COURT, not Criminal – does not prosecute criminally – cannot put individuals in jail – issues ADVISORY opinions – has function of ADJUDICATING DISPUTES BETWEEN STATES IN A CIVIL SENSE
  + Dealing in many instances with the **STATE RESPONSIBILITY ACT**
    - SO! What is a genocide case doing in the ICJ? The ICTY (only 500 metres away from the ICJ) is prosecuting individuals criminally on the exact same facts
      * Breach aspect is also identical
    - BUT! Different rules of ATTRIBUTION to a criminal and civil trial
  + Both the ICJ and the ICTY get the LAW OF GENOCDE from Public International Law – in that sense the two bodies are talking about the same legal issues
    - FEAR OF FRAGMENTATION – no hierarchy between these two courts – fear that they will interpret the law in different ways
    - ICTY – very boldly – said that what happened in Srebrenica WAS GENOCIDE
      * What happens if the ICJ does or does not follow this conclusion?
* Source of Law upon which the court bases itself for determining the definition of Genocide:
  + Genocide Convention Articles 1, 2, and 3
    - Article 1 = *The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish*
    - Article 2 = *In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:*
      * *Killing members of the group*
      * *Causing serious bodily or mental harm to members of the group*
      * *Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part*
      * *Imposing measures intended to prevent births within the group*
      * *Forcibly transferring children of the group to another group*
    - Article 3 = *The following acts shall be punishable:*
      * *Genocide*
      * *Conspiracy to commit Genocide*
      * *Direct and public incitement to commit Genocide*
      * *Attempt to commit Genocide*
      * *Complicity in Genocide*
* Three-pronged structure for determining state responsibility (attribution, breach, justification) – ICJ goes about establishing ATTRIBUTION first
* ICJ does NOT use ILC Articles on State Responsibility as a definitive source of law
  + ICJ is NOT bound by ILC articles – aggregation of power to themselves – it is not the ILC that gets to decide these things, it’s the ICJ and Customary Law
    - BUT! ILC’s work is REFLECTIVE of this principle on state responsibility
* First aspect of Attribution = State Organs
  + *“The court therefore finds that the acts of genocide at Srebrenica cannot be attributed to the Respondent as having been committed by its organs or by persons or entities wholly dependent upon it, and thus do not on this basis entail the Respondent’s international responsibility”*
    - **NO ATTRIBUTION**
* Second aspect of Attribution = Effective Control
  + *“In light of the information available to it, the Court finds that the Respondent exercised effective control over the operation in the course of which these massacres, which constituted the crime of genocide, were perpetrated”*
    - Serbia had control over the overarching campaign, but NOT the specific operations – NO EFFECTIVE CONTROL – VRS had too much autonomy
    - **NO ATTRIBUTION**
* Third aspect of Attribution = Complicity
  + Represents an overlap between the terms of the Genocide Convention and the Articles on State Responsibility
  + Principles rules of attribution (State organs, effective control) are NOT proven, so they go to another aspect of COMPLICITY
    - *“There is no doubt that ‘complicity’ in the sense of Article III, paragraph (e) of the Convention, includes the provision of means to enable or facilitate the commission of the crime; it is thus on this aspect that the Court must focus. In this respect, it is noteworthy that, although “complicity”, as such, is not a notion which exists in the current terminology of the law of international responsibility, it is similar to a category found among the customary rules constituting the law of State responsibility, that of the ‘aid or assistance’ furnished by one state for the commission of a wrongful act by another state”*
      * **NO COMPLICITY** – weapons were given to the VRS by Serbia, but BROADLY and with no specific intent for this act
* At this point, Bosnia has WON on the Genocide point – the ICJ agrees that the acts in Srebrenica were Genocide, but Bosnia has yet to successfully ATTRIBUTE it to the Serbian government
  + **SO! = FAILURE TO PREVENT OR PUNISH GENOCIDE**
* Final grounds for assessing Serbia’s liability – Enough evidence that Serbia should have known a genocide was possible and should have done something to prevent it or to punish it (as opposed to harbouring criminals wanted in this case, etc)

**Srebrenica – Relevant Evidence (for background purposes only)**

* Questions of evidence ultimately decide the case - what can and cannot be proved and on what burden of proof
  + Srebrenica - strategically vital to ensure a pure "serbland" - to unite Serbia after the dissolution of Yugoslavia
    - SC declared Srebrenica a non-military zone - peacekeepers were put in place
      * BBC documentary - death in Yugoslavia
    - Significant amount of population capture
      * Column of approx 13000 men tried to break through the Serb forces knowing they'd get massacred
        + Two groups - A = captured, B = men trying to escape
      * Group A underwent a screening process, separating men and women apparently to "identify those who committed war crimes"
        + Photo evidence shows burning of identity records of those men that were separated

'why burn their identity records if you're going to prosecute them for war crimes'

* + - * + Satellite photo of people in a football field

Mass grave in the football field found after these photos

* + - Dutch peacekeepers taken hostage
    - Famous UN communique - wrong form!
  + Men and women were separated, taken to different places in buses and executed - witnesses said you would be in a bus, only to see the bus in front of you pull over and be executed, etc
    - Seems like good evidence, but... Problems?
      * Who took the satellite photos? Obviously a big country with big spy technology - taken BEFORE the massacre
        + Legitimacy and importance of humanitarian intervention.. They KNEW what was happening, obviously
        + Duty in the genocide convention to "prevent or punish"

Many countries failed to prevent or punish, not just Serbia

* + - Found two things from exhumations of the mass graves
      * Blindfolds and hands tied behind backs
        + They were obviously HORS DE COMBAT

Defence says that it was a war, people die all the time - military fight - BUT - evidence proves they were hors de combat - blindfolded or arms bound, and satellite imagery - not a fight, they've been bussed there and rounded up

* Bosnia is trying to say that Serbia is responsible for the genocide, done by the VRS - Bosnian rebel group that was pro-Serb and anti-Muslim
  + 6000 men and boys executed amongst groups a and b - all Muslims
    - Question of ATTRIBUTION and BREACH
      * Attribution - ICJ will have to deal with the rules of state responsibility to determine this
      * Major issue on BREACH - is what happened in Srebrenica actually a genocide?
        + ICTY says yes, but is that right? Undoubtedly a crime against humanity and a war crime, but can it be elevated to genocide?
        + Genocide = destruction in whole or in part of any ethnic, racial or religious group

INTENT to destroy in whole or in part a group

Actual number killed not important

* + - * + Part of the argument AGAINST genocide in this case - how can you intend to destroy an ethnic group if you spare the women? They weren't killed, just deported
        + Definition by the ICTY of genocide in terms of breach is highly controversial - how ICTY got to genocide is highly debatable in law - very great anxiety that the ICJ would not follow the decision

**Peaceful Resolution of Disputes – The International Court of Justice**

**Jurisdiction**

* In most Domestic systems, lower courts have limited jurisdiction over a small geographic area or only on certain subjects – higher courts have extended jurisdiction including the right to review the lower court’s decisions and issue directives to them
  + Think Queen’s Bench and Supreme Court of Canada
* International Court of Justice is given a pre-eminent status but its rulings are NO MORE AUTHORITATIVE than other International Courts

**International Court of Justice**

* Established in 1945 by UN Charter – predecessor was the Permanent Court of International Justice of the League of Nations – ONLY HAS JURISDICTION OVER CIVIL CASES
* Only STATES can bring cases before the ICJ, even though states are not the only subjects of International Law – ALL 192 MEMBERS OF THE UN ARE SUBJECT TO THE ICJ as per article 93
* 3 or 5 judges hear cases, but there are 15 judges total, plus 2 ad hoc judges
  + EXAMPLE: If Canada brings a case against Nauru and neither have judges on the ICJ, then both get to appoint ad hoc judges – If only one state does so, then you end up with 16 judges and the possibility of a tie – in the event of a tie, the Presiding Judge gets to decide the tie
* NOT an appellate court
* Judges are appointed for terms of 9 years
* Judges very seldom vote against their own country
  + Why not have very neutral judges from very neutral and impartial countries?
  + We want the states talking and communicating, not fighting, so give them their judges
  + Only way to make the ICJ effective is to give each state the possibility of a judge – states will not come to the ICJ unless they have some sort of control over the decision
* TWO TYPES OF CASES IN THE ICJ
  + Advisory Opinions and Adjudication of Disputes
* **SECURITY COUNCIL CAN VETO ICJ DECISIONS**
* ICJ says Nuclear Weapons are ILLEGAL
  + Indiscriminate weapons – always destroy civilians
  + If the ICJ made that decision, it would be irrelevant – cannot make it happen
  + Advisory opinion makes GESTURES towards the difficulty of nuclear weapons but that they cannot answer the decision definitively
  + ICJ is cognizant of the constitutional arrangement in which it exists – structurally we do not have a court of COMPULSARY jurisdiction – states are so reticent about the state of international affairs and so vested in political means that they won’t give it compulsory jurisdiction
* FIVE BASES UPON WHICH THE ICJ CAN ENJOY JURISDICTION:
  + Special Agreement
    - North Sea Continental Shelf Case – BOTH STATES AGREE TO COURT JURISDICTION to get help to resolve a dispute
  + Compromissory Clause
    - Set out in a TREATY that says if there is a dispute about a particular issue, than any signatory of the TREATY can take any other signatory to the ICJ – Genocide Convention is a good example because it has a compromissory clause
  + Forum Prorogatum
    - Invitation from one state to consent to the jurisdiction of the ICJ – already filed the brief publicly and the idea is to dare or shame the other country into consenting
  + Optional Clause
    - Each country reserves certain things, so it makes it difficult sometimes to determine if the ICJ has jurisdiction – If you reserve something you cannot take another country to court over the same thing you’ve reserved, even if they didn’t make the same reservation
  + Advisory Opinion
    - Article 96 – The GA or SC and other organs of the UN and specialized agencies cans ask the ICJ for an advisory opinion on any legal question