PUBLIC INTERNATIONAL LAW

1. Nature of International Law

It is self-regulatory by nature.
There are different categories of “subjects” of international law, but the main subject is the sovereign state.

2. International Legal Subjects: States

Subjects of International Law
The subjects of international law have legal personality. Int’l law itself determines who shall have legal personality, and not all entities possess the same personality.

As a result of changes in the last century, notably in the areas of human rights, international humanitarian law, and international economic law, non-state actors such as int’l organizations and even individuals have attained some measure of international legal personality. But, they do not possess the same rights and duties as states.

States and Statehood
There is a shift now away from a purely power-oriented notion of statehood. As long as there is fait-accompli on the ground, we will recognize. There is a strong normative component: there must be human rights, protection of minorities, etc, before recognition takes place.

Four Attributes of Statehood
- territory (even if borders are unsettled)
- population
- government (effective – it governs the territory)
- capacity to enter into relations with other states

[see p. 14 of Montevideo]

Note: capacity is a nebulous concept. It is in some ways a function of being recognized as a sovereign state by other states, and in other ways it is a de facto function of having the other three attributes.

Montevideo Convention On the Rights and Duties of States (1939)

The best-known formula for setting out the basic characteristics of statehood.

Note: There is no centralized legal process to assess these factual circumstances. However, consideration must be given to the process under the UN Charter for admission of new members and the practice of recognition of new states on a bilateral basis.

- Permanent population.
  There is no minimum requirement. Canada recognized Naura, which had a population of 8421. It is not necessary that the population possess the nationality of the new state. Nationality is dependent on statehood and not the other way around.

- Territory.
  No minimum requirement. There is also no requirement of territorial unity, and a state may come into being and continue to exist despite border disputes (ex – Israel).

- Government.
  This is central, and is concomitant with independence. There must be governmental capacity to exercise power over an area of territory and population.

- Capacity to Enter into Relations with Other States.
  This is both a prerequisite and a consequence of statehood because, until other states accept the existence of the new state, it is prevented from entering into diplomatic relations even if it is capable and willing to do so. Necessarily, capacity is dependent on an effective and independent government.

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Austro-German Customs Union Case [1931] Advisory Opinion, PCIJ

This was a request from the Council of the League of Nations for an advisory opinion from the PCIJ concerning the meaning of the word independence. Austria and Germany established a free-trade customs union, and the court was asked if was in accordance with the 1919 Treaty of St. Germaine and Protocol 1 of Geneva 1922, of which article 88 (Germaine) provided that the independence of Austria was inalienable except with the consent of the League of Nations. In the absence of such consent, Austria undertook to abstain from any act that might compromise its independence either directly or indirectly.

Issue: Does the union violate Austria’s independence?
Held: NO. But, it is incompatible with both the protocol of 1922 and the Treaty of St. Germaine.

Independence of Austria = continued existence with present borders of a separate state with the sole right of decision in all matters economic, political, financial etc.

○ Compare to dependent states, which are subject to the authority of the superior state
○ restrictions on a state’s liberty following from IL or contracted engagements do not affect its independence.

Ratio: Independence refers to the legal independence of a state to act as sovereign within its borders.

Recognition

Two basic theories:

● The state appears only when it is constituted (a state is not a state unless it is recognized by other states.
  Recognition constitutes statehood)
● Declaratory (recognition is merely recognizing after the fact a reality that exists on the ground)

In the current decentralized system of int’l law, there is no single organ having collective authority to determine claims for admission by new states and governments.
It has been described as the “free act by which one or more States acknowledge the existence on a definite territory of a human society politically organized, independent of any other existing State, and capable of observing the obligations of international law, and by which they manifest therefore their intention to consider it a member of the international community.”

Recognition is not limited to states. It is also applied to new governments, to states in a condition of belligerency, to organized and effective insurgents, and more loosely to the territorial claims of states.

The recognition of a state and of a government is not the same thing. A recognized government cannot exist in the absence of a recognized state. Typically, a new state will be recognized and at the same time the regime that established it will be recognized as the governments.
Most often, the matter of uppermost concern is that to do about a new regime in a recognized state that comes to power by revolutionary means.
Note: Unconstitutional changes in gov’t, alterations to the name, and even the limited movement of territorial boundaries do not effect the continuation of recognition.

Williams and de Mestral, “Theories of Recognition”
What is the actual effect of recognition? Two conflicting theories.

● Constitutive Theory – recognition has a constitutive effect → only through this act is an international personality conferred and not the process by which they (state and gov’t) were factually formed. States are only established by the will of the international community
  ● Two problems: is an unrecog’d state bound by international law? What if a state is only recog’d by some and not others.
● Declaratory Theory or the Evidentiary Theory – recognition is only formal acceptance of an already existing

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situation – factual situation that produces legal constitution of the entities and recognition does not have to be awaited for this purpose. Majority opinion supports this theory. Majority of laws are still binding on unrecog’ed states or gov’ts. In reality both are partially true – it is declaratory based on factual qualifications and it is constitutive as it brings the state into the vacuum of international relations as an equal.

**Canadian Practice of Recognition**

From a 1971 letter written by the Secretary of State for External Affairs:

"the Canadian Government must first be satisfied that any entity claiming statehood meets the basic requirements of int’l law, that is, an independent government wielding effective authority over a definite territory. When these conditions appear to be fulfilled, the timing of recognition is determined in accordance with Canadian national interests, given the political and economic consequences of recognition. Once granted, state recognition survives changes in governments, unless it is explicitly withdrawn..."

There are three principle methods of according recognition to governments:

- **Express Recognition (The first Canadian approach -73)**
  
  Every time an unconstitutional change in government occurs in a foreign state, a review of generally accepted recognition criteria is done, and an express statement according or withholding recognition is made.

- **Tacit Recognition (The second Canadian approach 73-88)**
  
  When an unconstitutional change in government occurs, relations are maintained on a business as usual basis. No statement on recognition is issued and Canada’s position vis-à-vis the new regime is inferred from the nature of our relations with it.

- **Recognition of States Approach (The current Canadian approach 88 onward…)**
  
  **The Estrada Doctrine**: In 1930 Mexico declared that it would no longer issues statements of recognition of governments, because this practice was insulting and offended the sovereignty of nations. It would confine itself to recognizing states only.
  
  The disadvantage of the Estrada doctrine is that there will inevitably be situations where a government may wish to make an express statement either according or withholding recognition. Strict application of the Estrada doctrine will not allow this freedom.

***Exam Alert: Why is it advantageous to states to avoid according recognition to foreign governments? (p. 24)***

**Disintegration of Yugoslavia**

Before 1991, the Socialist Federal Republic of Yugoslavia (SFRY) was composed of six republics: Slovenia, Croatia, Serbia, Bosnia-Herzegovina, Montenegro, and Macedonia.

Then, in 1991 nationalist movements emerged. Slovenia and Croatia unilaterally declared their independence, and subsequently Bosnia-Herzegovina and Macedonia did the same. The central Yugoslav authorities called out the armies. A ferocious war ensued pitting regular and irregular “national” forces against one another.

In the midst of all this chaos, Slovenia, Croatia, Bosnia-Herzegovina, and Macedonia sought recognition and admittance to the UN.

Generally each state recognizes a new state on a one-for-one basis, but the real test of nationhood is membership in the UN (as per Akhavan)

The European Community issued certain guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union. They set forth certain criteria. They don't go the Montevideo convention. They look to criteria which are not about factual evidence, but legitimacy of recognition:

- respect for the provisions of the Charter of the United Nations and the commitments subscribed to in the Final Act of Helsinki an in the Charter of Paris especially with regard to the rules of law, democracy and human rights;
- guarantees for the rights of ethnic and national groups and minorities in accordance with the commitments subscribed to in the framework of the CSCE;
- acceptance of all relevant commitments with regard to disarmament and nuclear non-proliferation as well as to security and regional stability;
- commitment to settle by agreement, including where appropriate by recourse to arbitration, all questions concerning
State succession and regional disputes.

Some important themes: rule of law, democracy, human rights, respect for rights of minorities, etc.
This doesn’t apply Montevideo at all, and on the contrary, most of these states hardly qualified under Montevideo.
The international community recognized them (Macedonia a bit later)…there were many details about what happened next.
This is all on page 27.
Note: Kosovo is not likely to become a member of the UN for a very long time. It's likely to be a ward of the EU for awhile
(nato troops, foreign aid).

International Effects of Recognition
The principal measure of status is admittance to the full range of int’l processes for the protection of a state’s rights and
duties. Diplomatic relations, treaties, etc…
Non-recognition doesn’t affect the existence of rights and duties, but recognition makes it much easier to protect and
exercise them.

An unrecognized regime within a recognized state:

Tinoco Arbitration: Great Britain v. Costa Rica

In 1914 Tinoco overthrew the government of Costa Rica. He assumed power, called an election, and established a new
constitution. In 1919 he retired and went to Europe on account of poor health. His government fell a month later and
subsequently passed a law nullifying many of the obligations assumed by the Tinoco regime toward foreigners (on the
grounds that the government was unconstitutional), including RBC and other British nationals. Britain brought this claim
on account of the alleged mistreatment of its nationals. The sole arbitrator considered the status of the Tinoco government.

- The arbiter found the state is always bound by the obligations of the previous government—regardless of its
  constitutionality (i.e. de facto governments’ responsibilities are passed on, regardless of their de jure status)
- but, the obligations were not upheld because the obligations contracted were contrary to the Constitution of Costa Rica
  at the time they were made
- Legitimacy of the gov’t is without importance in international law – probably would not be made today.

Note: The British claim was ultimately rejected because the obligations undertaken by the Tinoco government toward RBC
and the other foreigners were held to be unvalid under the law in existence at the time – that is, the constitution and laws of
Costa Rica under the Tinoco regime.

Sovereignty and Equality
Sovereignty and equality (dual cornerstone concepts of PIL) have certain corresponding rights, such as exclusive control
over its territory and permanent population, and duties, such as the duty not to intervene in the affairs of other states.
Sovereignty includes independence in regard to a territory and the right to exercise therein, to the exclusion of any other
State.
(Just a theory)

Note: What is the source of the legal constraint on a state to mind its own business and not to interfere in the affairs of any
other state?

Island of Palma Case: Netherlands v. United States [1928] page 33 text

This case is the major authority on title to territory. In the 1898 Treaty of Paris, Spain ceded the Philippines to the US. In
1906 a US official of the US found a Dutch flag flying there. The Netherlands and the US referred the question of territorial
sovereignty over Palmas to arbitration.
 Holding: The Netherlands had good title as they had continually and peacefully occupied the island since before 1700.
Spain could not transfer to the US more right to the island that it itself possessed.

Charter of the United Nations – articles 1 and 2 see documentary supplement
Article 2.4 is very important. In the context of WWII it was a revolutionary concept (before, war was an extension of what

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politics couldn't achieve). We don't believe that *might makes right* anymore. This is a function of the notion that all states have equal sovereignty.

**Article 2.7** – nothing shall authorize the UN to intervene in ... domestic jurisdiction. But what is in the domestic jurisdiction? (Note...is financing an election by a foreign state considered an intervention?)

**Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation among States in Accordance with the Charter of the United Nations**

See documentary supplement

The declaration originated in 1961 as an initiative by the then Soviet Union to codify the “principles of peaceful co-existence” in international law. In the ICJ decision *Military Activities In and Against Nicaragua* the Court held that the adoption of the Declaration by states “affords an indication of their *opinion juris* as to customary international law on the question of the less grave forms of the use of force.”

**Federal States**

Do federated entities have standing in international law? **No.** They are subordinate to the sovereign state, except for when they are given certain powers by their domestic legal system. It's the constitution of the state which gives them their powers. **In Canada:** we have a measure of delegation (division of powers). Provinces will sometimes negotiate agreements with neighboring states in the US regarding things that fall in provincial jurisdiction and it is convenient.

In the case of Quebec there has been certain delegation of powers: the province of Quebec has specific agreements with France for educational exchanges, for example. It's an extension of powers that were given by the domestic constitution. International law doesn't recognize them as having special powers.

**Note:** Federal treaty-making power has come into collision with the division of powers. In the days when int'l treaties were uncommon, it wasn’t much of a problem, but now most topics are regulated through a host of international treaties. There are a number of problems. They Feds might accidentally usurp the provincial power. But, in the other case, we see the problem if the Feds have to first gain the consent of all provinces before it can negotiate a treaty. (Perhaps nothing would get done).

**State Continuity:** a state continues to exist regardless of changes of government until it is extinguished by absorption into another state or dissolution.

**State Succession:** concerns the legal consequences that follow when one state replaces another. Examples of succession: total absorption of one state by another; partial absorption; independence of one state from another; merger of two existing states; dismemberment of one state into distinct parts.

*To what extent are the existing rights and obligations of the predecessor state extinguished and to what extent does the successor state take up those rights and obligations?* See Tinoco Arbitration.

**Changes of Government and State Continuity**

The new government inherits the rights and obligations of the persisting state and its acts bind the state.

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<thead>
<tr>
<th>Tinoco Arbitration: Great Britain v. Costa Rica [1923] page 88 text</th>
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<tr>
<td>The State is bound by engagements entered into by governments that have ceased to exist; the restored government is generally liable for the acts of the usurper.</td>
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<td><strong>Holding:</strong> The British claim was ultimately rejected because the obligations undertaken by the Tinoco government toward the Royal Bank and the others...were held to be invalid under the law in existence at the time: the constitution and laws of Costa Rica under the Tinoco regime.</td>
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<td>From S.A. Williams, “International Legal Effects of Secession by Quebec”[1991] page 90 text</td>
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<td>In summary, Quebec would not be bound under customary int’l law by the treaty obligations entered into by Canada. This stands to reason, as it is a basic principle of treaty-law that treaties bind State parties only, and is analogous to the general</td>
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principle of privity in domestic contract law. Even if the new State was prepared to accept the obligations, other existing States it is argued “are not bound to accept a new party, as it were, by operation of law.

**Note:**

**Succession To Treaties**

- **Personal Treaties** (based on the premise that the parties will continue unchanged)
  - The original state will continue to be a party
  - New state will have to rejoin ex. NATO – the other members may or may not allow the new state to join

- **Territorial Treaties** (also called Real Treaties) (concerning rights of transit over territory)
  - These remain binding for whichever state controls the territory concerned
  - Ex. Case Concerning the Gabčíkovo-Nagymaros Project: Hungary v. Slovakia
    - Hungary tried to say it was no longer bound b/c the treaty was with Czechoslovakia
    - They were bound b/c it was essentially a territorial treaty – linked to the river
  - ILC drafted the Vienna Convention on Succession of States in Respect of Treaties - purports to codify customary law → not widely accepted by the int’l community
  - not consistent with practice, therefore customary law continues to govern, which also favours non devolution except for (i) customary international law (ii) localized treaties concerning territory and (ii) international boundary treaties

**Succession to Public Property**

- Generally, seceding states succeeds public property (including debts, rights, and interests) situated in its territory.

**Succession to Public Debts**

- Custom: inherit only localized debt. (i.e. building a local airport)
- National debt could be divided according to a plethora of formulas
- in QC/Canada, succession would require successful negotiation in this area because the status in international law is indeterminate.

In Yugoslavia there was a combination of territorial debts and debts prorated based on GDP → enforced by international creditors who wouldn’t do business with new states otherwise

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**Vienna Convention on Succession of States in Respect of Treaties**

*See text page 92*

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**3. International Legal Subjects: International Organizations**

**International Personality of an Int’l Organization:** Does the practice of states demonstrate their readiness to permit this candidate to exercise any specific legal capacity on the international plane?

- It must be recognized by other subjects of the international legal system. We're saying in effect that it has such personality because it is recognized as having that status by other states.

**Intergovernmental Organizations:**

IGO – inter-governmental organization (UN)
NGO – non-governmental organization (Greenpeace)

*NGOs are started by people, IGOs are started by states.*

**Intergovernmental Organizations** are created by states. They will create a treaty that sets out the powers of the organization. For example, although the ICJ has international personality, it has much more limited rights and obligations than states.

*IGOs have a broad range of characteristics:*

- **OSCE** (Organization for Security and Cooperation in Europe – but not just Europe) doesn't have extensive decision making powers, but is more a forum where states can resolve problems, etc. The principle function is coordinating.

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EU is an international organization that is the closest thing we have to a superstate. UN is the preeminent IGO and the closest thing to “world government.”

The United Nations
Almost 190 states are part of it and many have emerged in the decolonization period. Every state has one vote.

Organisation of the UN
- Key parts of the UN (SC, GA, Econ. and Social Council, ICJ, Secretariat, Trusteeship Council)
- Secretariat is composed of SG and his staff – supposed to be merely implementing will of member states. But, not really the case as the office has grown and is extremely important at this time.
- Peace keeping is central – (Congo – where there is move away from peace keeping to peacemaking , East Timor, some in Bosnia, Eritrea-Ethiopia) Peacemaking more prevalent in post-Rwanda where “there was no peace to be made” so UN pulled out.

Powers and capacities have expanded significantly. In 1945, would not have been imagined that these powers would have been exercised.
- With these powers comes accountability – Sierra Leon and UN peacekeepers w/ child prostitution, Oil for Food scandal.
- Move to reform Office of Internal Oversight to ensure accountability.

Trusteeship Council
Largely defunct as last trusteeship ended in 1994

Composition of GA
Art 9 – all members of the UN

Powers and Functions of GA
Art 10 – Any matters under the charter, make recommendations to SC. It is not a legislature.
- Eg. Resolution 1514 – codification of pre-existing customary law and norms. Will of sovereign states is made manifest. GA has quasi-legislative power but not as we would understand in a domestic regime.

Powers of Security Council
Art 36 – Recommend appropriate procedures
Art 39 (part of Chapter VII) - determine existence of any threat to the peace, or an act of agression…..decide what measures shall be taken in accordance with Arts 41 and 42 to maintain or restore international peace and security.

Actions of SC
Binding on member states – Art 25 – Agree to accept and carry out decisions of SC
Note: Art 103 – Obligation of charter prevails over other international obligations

Composition of SC

Complex relation b/n the GA and SC
GA is more representative but the SC has more power.
- Purse strings technically held by the GA Art 17 – so in effect the GA can control the SC b/c it controls the budget
  - Peacekeeping is often funded in a different manner.
  - Poorer countries still see sending peacekeepers as a money-making measure

The SC is the most controversial part. Bypassing the council is the litmus test for whether there is respect for the UN, and whether there is sufficient unanimity among the major powers. If they're not in agreement, unilateralism is likely to prevail.

Charter of the United Nations Articles 1, 2, 7-32, 55-105
see documentary supplement

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UN Charter art 104
...the organization shall enjoy in the territory of each of its members such legal capacity as may be necessary for the exercise of its functions and the fulfillment of its purposes.

The Namibia Case [1970] page 48 text
With resolution 2145, the UN GA terminated South Africa’s mandate, and the SC called upon South Africa to withdraw from Namibia. South Africa failed to do this, so the SC passed resolution 276 [1970] in which it declared that South Africa’s presence in Namibia was illegal and its actions there were invalid.

- Only a material breach of a treaty justifies termination → a) a repudiation of the treaty not sanctioned by the present convention; or b) the violation of a provision essential to the accomplishment of the object or purpose of the treaty.
- Basis of South Africa’s control over the area was based on a mandate and did not constitute sovereignty over the area. If the mandate lapsed b/c of violations to the object or purpose of the treaty, the authority over the territory is said to have lapsed as well.
- Nature of breach - the actions of SA were designed to destroy the national unity and territorial integrity of Namibia through the establishment of Bantustans are contrary to the provisions of the UN charter.
- When the SC adopts a decision it is for all member states to comply with that decision – even those on the SC who voted against it and those members of the UN who are not represented on the SC SA must withdraw from the territory and, until that point, remains responsible for its obligations and responsibilities to Namibia under international law. Physical control of a territory, and not sovereignty or legitimacy of title, is the basis of State liability for acts affecting other states. South Africa owed duties to other nations.

The Reparations Case [1949] ICJ page 58 text
In 1948 a Swedish national and UN mediator in Palestine was killed in Jerusalem, which was in Israeli possession. At the time, Israel was not yet a member of the UN. Before commencing an action for compensation against Israel, the GA asked the ICJ for an opinion about the legal capacity of the organization to bring the claim. A critical question was whether the UN has legal personality.

Holding: the UN has legal personality, but LP is unique and limited to a functional approach.

- Could not carry out the intentions of its founders if it was devoid of international personality.
- The UN has privileges and immunities within territories of its members → practice has confirmed its status as an international personality
- still not co-equal to states or a superstate, it’s personality is unique
- but, it is a subject of international law, capable of possessing rights and duties, and capable of maintaining its rights by bringing international claims
- Can recover in the name of the victim because it must (a) be able to assure safety of its agents and (b) it must be able to do so without relying on a state’s exercise of diplomatic rights in order to maintain its truly international character (Art 100)
- all of this is implied by the provisions of the Charter
- Can it bring a claim against a non-member government?
- Yes, because it has objective international personality, independent of its 50 member states (seems a little strange though – agreement between states effects non-contracting parties)

There can be concurrent claims with member states → conflict between Sweden and UN in bringing claim should be resolved via political goodwill with the recognition of Sweden’s duty to render assistant to the UN under Art 2(5)

Note: The doctrine of “inherent and implied powers.” Its powers are not expressly provided in the Charter, but the UN must be presumed to have those powers that are necessary to the performance of its duties.


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It recommends structural changes to the UN. In the text, we see that the secretary general had organized a high-level panel prior to the world summit which made recommendations to restructure the UN to reflect the realities of the present-day world. The majority of the recommendations were rejected. On the essential issues (particularly the restructuring of the Security Council) the document ignores the recommendations. This document should give us a sense of what is on the mind of the heads of states. The main point: east/west divisions have now been replaced by north/south divisions. One set of issues is all focused on development. There is a focus on improving trade relations, increasing technology and dealing with poverty in developing countries. The so-called north is more concerned with terrorism, democracy, and the environment. These are the fault lines in the deliberations of the UN. This is where ideas differ regarding where the priorities of the UN should be.

4. International Legal Subjects: Peoples

Until the 20th century the prevailing view was that only states possessed true international legal personality. However, especially in the area of protection of human rights, the individual has attained standing before some international bodies (not the ICJ).

Peoples go to the foundation of the notion of statehood. (A state needs a population)

In the Westphalian tradition, the basic premise was of ethnic homogeneity. Two possible positions: assimilation or exclusion (ex: France (no indigenous minorities) or the holocaust)

Peoples seeking self-determination
A peoples’ right to choose how they want to be governed
The ability to assert such a right in law depends on the standing that is accorded to its claimants at international law. It must be considered as to whether principle of self-determination has achieved the status of a rule of customary international law.

- This is an assertion of collective rights – under the UN charter (in which self-determination is referred to but not defined) this right has been used as the basis for the decolonization of dependent territories during the 1960’s and 70’s

Charter of the UN Articles 1(2), 55, 73
See documentary supplement

Declaration on the Granting of Independence to Colonial Countries and Peoples [1960] UN GA page 72 text
*mentions self-determination. It’s a fundamental element of human rights. (which is conceived as a collective right) If people don’t have self-determination they don’t have individual rights yet.
“All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”
Note: paragraph 3 goes back to the League of Nations mandate
This resolution goes beyond non self-governing territories to encompass all peoples under colonial rule.

Elements of a Nation

Objective Elements: language, history, culture, religion, ethnicity
Subjective Elements: people must see themselves as different
- question → does the majority have to recognize them as a unique group as well?
  - Yes: should prevent people from claiming rights on a superficial basis
  - No: May limit legitimate efforts through ignorance, politics, etc.

The old idea: A nation needs some sort of ethnic distinctiveness and to be geographically separate...

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There has been a rush to self-determination (which is understandable because of treatment under colonial rule), but this rush has led to internal violence on many occasions.

### Western Sahara Case [1975] ICJ Advisory Opinion page 73 text

WS has been colony of Spain since 1884. Pop mostly nomads. B/c of res. 1514 and specific request of res 2229, Spain consulted neighbouring Mauritania and Morocco to determine procedures for holding a referendum. Both countries claimed territory based on “historic title” that predated Spain’s acquisition. Advisory opinion sought as to the status of the territory.

Spain and Portugal were the first European Imperial powers to colonize the Americas and the last to leave. In the case of Spanish and Portuguese possessions of Africa, in 75 when the governments were toppled and a less militaristic government took shape, the territories were eventually relinquished.

Here is a reflection of how international law evolved and was transformed because of peoples and self-determination.

**Holding:** It is up to the people of the WS to decide. Ancient ties to the territory are secondary.

Declaration (listed above) and res 1514 confirm and emphasize that the application of this right requires a free and genuine expression of will of the peoples concerned.

There is now a normative component to the notion of statehood that involves self-determination.

It can take different forms:

- Emergence as a sovereign independent State
- Free association with an independent State; or
- Integration with and independent State

(see page 74 para 57)

Note: The second opinion of Dillard J. (page 75). The last paragraph is important: he explains that the right of self-determination is for the people to determine the destiny of the territory, and not the territory to determine the destiny of the people.

WS was never terra nullius as there were people on the territory who had some form of organization.

### Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory [2004] ICJ page 76 text

The Court was requested by the GA to render an advisory opinion on “the legal consequences arising from the construction of the wall being built by Israel, the occupying power, in the Occupied Palestinian Territory.” The Court found that the construction of the wall was contrary to international law, and Israel was obligated to cease construction and make reparations for damages, and that other states were obligated not to recognize or assist in “maintaining the situation” of illegality.

The Court would observe that the obligations violated by Israel include certain obligations *erga omnes*, which by their very nature concern all states. In the view of the importance of the rights involved, all States can be held to have a legal interest in their protection. Israel violated the obligation to respect the right of the Palestinian people to self-determination.

**Note:** see page 78 point 4. The principle of self-determination does not only refer to peoples in colonial or neo-colonial situations; it can be properly extended to cases of functional domination and discrimination.

In the preceding cases the Court was clearly of the view that the right of peoples to self-determination is a firmly established principle of international law, and in the *East Timor* case [1995] the Court referred to the principle of self-determination as “one of the essential principles of international law.”

In *East Timor* and the *Palestinian Territory* (above) cases, the Court stated that the right to self-determination was an obligation *erga omnes*, thus binding on all states, and one in which all states have a legal interest.

### Reference Re: Secession of Quebec [1998] SCC page 79 text

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**Issue:** Question 2. Does IL give the National Assembly the right to affect the secession of QC from Canada unilaterally? Is there a right of self-determination granting such a power?

1. Secession at international law

   – SCC → IL doesn’t grant component parts legal rights to secede unilaterally from ‘parent’ country
   (a) some argue that it is not specifically prohibited and therefore inferentially permitted
   (b) Implied duty of states to recognize the right to self-determination
      (a) denial of this right is implicit in the importance placed on territorial integrity and in the exceptional circumstances for self-determination to be legally exercises
      (b) clearly a principle of IL. Hard to define ‘peoples’ but not necessary here because QC is neither (i) a colonial or oppressed people (ii) subject to alien subjugation nor (iii) denied access to meaningful exercise of its right to self-determination internally
   → self determination can only be exercised if the people are internally oppressed

2. secession, if successful in streets, could lead to a new state, but that would not retroactively confer a legal right on QC to secede
   - international recognition, essential for a new state, is likely to consider the legality and legitimacy of secession having regard to the conduct of both QC and Canada
   - Succession must take place as a democratic negotiation

Note that right to self-determination in many international covenants is not to be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent states conducting themselves in compliance with the principle of equal rights and self-determination of peoples …(Vienna Declaration and Program of Action [1993])

- The Court decided they could not unilaterally secede.

There is some apprehension about recognizing the rights of peoples outside of questions of territory except in extreme situations.

**Problems with Right to Self-Determination**

- The possibility for infinite subdivision of the individual & “overlapping communities” → Charles Taylor
- Pushed to the extreme, people-hood leads to exclusion, even ethnic cleansing…
- Characteristics change over time – identity must be constantly reassessed
- The Right to Self-Determination is the only legal element of “peopledom”, but no international actor has obligations to enforce this premise → right with no real remedy

**5. International Legal Subjects: Corporations and NGOs**

These do not possess even the limited legal personality of their inter-governmental cousins. However, they do have an influence on the creation and application of International Law.

**Non-Governmental Organizations**

NGOs exist in every field of human activity. Many of the larger NGOs also make and apply rules and standards for their fields of concern that are accepted generally as the international norms of conduct in those areas of endeavor.

- NGOs place in IL has been based on Art 71 of the UN Charter – consultative status can be given to NGOs which allows them access and participation in the creation and application of IL. see page 66 text

What sorts of NGOs have some quasi-law making capacity?

- IOC – Olympic committee – laws and rules for international competitions. Exercise regulatory functions
- UN Conference on Environment and Development (UNCED) [1992] hundreds of NGOs staged a complete alternative conference to the formal meetings of government representatives, and contributed to the development of the legal texts.

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What about the Red Cross?
- Foremost example of the NGO and its influence.
- One of the most influential actors – starting in 1859 with the human slaughter that took place in Solferino – was originally an expression of *noblesse oblige* hearing of appalling conditions of war. Bourgeois class horrified with state of life of other classes.
- Level of IHL linked with ICRC – private org leading the way.
- Under Geneva Convention – promote respect for IHL – visiting prisoners of war, etc.
- ICRC has international legal personality according to the Simic case – as its mandate was conferred upon it by the international community.
- Rights and responsibilities given by Geneva Conventions – what powers are necessary for the exercise of its functions – e.g. immunity.
- *What is basis for the ICRC's legal rights when they approach a state?* – Unique NGO which has been created through multilateral treaty – unique place. Same cannot be said about other NGO’s.

1998 Rome Conference – ICC statute
- NGO’s had unprecedented level of influence
- Not within the UN system

Is this a good thing -
If there is no democratic space, do not NGOs become the only form of popular expression?
- Proliferation of NGOs shows the increasing importance of international law.
- Even conservative groups have entered the fray – influence is seen.

Transnational Corporations
The multi-national involvement of private corporations has been the focus of international attention for many years. Their activities carry them across State frontiers, yet they are not international in the traditional sense of being intergovernmental.
As yet there is no certain body of transnational law by which to regulate these corporations.

Prosecutor v. Simic et al [1999] International Criminal Tribunal for the Former Yugoslavia online

<table>
<thead>
<tr>
<th>Decision on the Prosecution Motion under Rule 73 for a ruling concerning the testimony of a witness</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Facts</strong>: Simic and other D on trial for their lives. A former employer (local staff of ICRC) wants to testify. The ICRC claims that they do not want former employee to testify <em>b/c they have immunity</em></td>
</tr>
<tr>
<td>The Prosecution emphasises that the witness took the initiative to contact the Prosecution and is willing to give evidence before the International Tribunal. The Prosecution states that it understands the ICRC’s concern to be that national authorities might deny ICRC personnel access to places where persons protected by the Geneva Conventions are located if they think that these ICRC personnel might subsequently testify in criminal proceedings about what they have seen and heard in those places. Although sympathetic to the ICRC concerns, the Prosecution reiterates its view that the ICRC does not enjoy, as a matter of law, any immunity or privilege that would enable it, unilaterally, to prevent any of its former employees from testifying. It is the ICRC’s general position that the testimony of a former ICRC employee would involve a violation of principles of international humanitarian law concerning the role of the ICRC and its mandate under the Geneva Conventions.</td>
</tr>
<tr>
<td><strong>Issue</strong>: Does the ICRC have international legal personality? Do it and its employees have immunity? “In the Trial Chamber’s view, the issue to be considered is whether the ICRC has a relevant and genuine confidentiality interest such that the testimony of a former employee, who obtained the Information while performing official duties, should not be admitted.”</td>
</tr>
<tr>
<td><strong>Held</strong>: Employee of the ICRC has immunity and cannot be forced to testify</td>
</tr>
<tr>
<td><strong>Reasoning</strong>: It is conceded by both sides and the court agrees that the ICRC has an international legal personality.</td>
</tr>
</tbody>
</table>
- The International Tribunal’s Rules may be affected by customary international law, and that there may be instances |
where the discretionary power to admit any relevant evidence with probative value may not be exercised where the admission of such evidence is prohibited by a rule of customary international law.

- the ICRC, an independent humanitarian organization, enjoys a special status in international law, based on the mandate conferred upon it by the international community. The Trial Chamber notes that the functions and tasks of the ICRC are directly derived from international law, that is, the Geneva Conventions and Additional Protocols. Another task of the ICRC, under its Statute, is to promote the development, implementation, dissemination and application of international humanitarian law.

- The fundamental principles on which the ICRC relies in the performance of its mandate are the principles of humanity, impartiality, neutrality, independence, voluntary service, unity, and universality.

- The three principles of impartiality, neutrality and independence have been described as “derivative principles, whose purpose is to assure the Red Cross of the confidence of all parties, which is indispensable to it. Neutrality and impartiality are means enabling the ICRC to carry out its functions. According to these principles, the ICRC may not be involved in any controversy between parties to a conflict.

- the ICRC needs to have access to camps, prisons and places of detention, and in order to perform these functions it must have a relationship of trust and confidence with governments or the warring parties. Also, effect on the safety of its delegates and staff in the field as well as the safety of the victims.

\[\Rightarrow\text{Requirement of impartiality and confidentiality sufficient to shield ICRC delegates form testimony}\]

\[\Rightarrow\text{No question of balancing with wish for justice arises – customary law binds so no balancing is at issue.}\]

**Akhavan**

- This case was brought on by a member of the prosecution that was convinced she could take on the ICRC under art. 7. The outcome was that despite the cautious words of the dissent who advocated a pragmatic, balancing of interests approach, the majority affirmed the ICRC’s special status and gave them absolute immunity.

- The result – the ICRC was able to legislate that immunity through statute.

**Transnational Corporations**

The multi-national involvement of private corporations has been the focus of international attention for many years. Their activities carry them across State frontiers, yet they are not international in the traditional sense of being intergovernmental. As yet there is no certain body of transnational law by which to regulate these corporations.

**Types:**

- **Gov’t –**
  - State owned → Quantus, CBC, etc.
  - They mix both private national law and international law. In form they are private but often act at the behest of gov’t policy; they have access to diplomatic assistance and directly invoke certain rights explicable only in terms of a developing public commercial law.

- **Inter-gov’t corps →**
  - diff from gov corps – Chunnel is an eg. – multilateral corps – two or more states own an enterprise.
  - Like above, they appear to fall somewhere between the private and public domain and by linking gov’ts, IL seems to apply to the joint enterprise.

- **Non gov’t corps**
  - Private corps – top ten have greater econo power than the vast majority of gov’ts
  - Globalisation power of these corps is much more than states
  - They have such power to be able to negotiate and agree as equals with gov’ts. Today there is no certain body of “transnational” law resulting in a large number of legal uncertainties such as their nationality, the governing law concerning their agreements with foreign gov’ts, and their amenability to the jurisdiction of national authorities extra-territorially. Since the 1970s there have been some efforts to regulate them and define the rights and duties of states commercially connected to them (i.e. UN Code of Conduct on Transnational Corporations, Int’l Labour Organizations, WTO).
Issue of immunity – state immunity. A state cannot be sued, with certain exceptions (taking of property and torture).
An example would be FSIA – Federal State Immunity Act in the US.
Jus imperii (governmental acts) and jus gestionis (acting in a commercial capacity). Immunity only extends to jus imperii. If acting in a commercial capacity then immunity does not exist.

Issues of nationality of Corp
- Based in Bermuda, manufacture in Taiwan, sell in Us……etc,
- ICSID – International Centre for the Settlement of Investment Disputes: An arbiter for disputes b/n foreign investors and sovereign states. The claimant (corporation) cannot have the same nationality as the respondent (the state). So, they have some legal status.

Attempts at regulation
- International code of conduct
- International labour org
- Increasing blurring of lines b/n sovereigns and private bodies (WTO, NAFTA, etc)
- Increasing and substantial contribution by private actors.

6. Sources – Treaties
“International law governs relations between independent states. The rules of law binding upon states, therefore, emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these coexisting independent communities or with a view to the achievement of common aims.” – PCIJ, The Steamship Lotus

Article 38 – Statute of the International Court of Justice
1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
   a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
   b. international custom, as evidence of a general practice accepted as law;
   c. the general principles of law recognized by civilized nations;
   d. Subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Statute of the International Court of Justice
Sets forth the principles of international law, jurisdiction, and composition of ICJ
Article 38: body of laws that the court can apply to disputes between states
This is a codification of the sources of international law:
International conventions (international treaty)
International custom (a general practice accepted by law) this does not express agreements in writing, but looks at the “general practice” or actual practice of states. You look at social facts: how do the members of this society conduct themselves as an issue of obligation?
General principles: Works from the top down: not looking at the practice of states, but is rooted in principles of natural law, logic, social necessity.

There is NO hierarchy, but in practice, which would we say is the most important and why?
Treaties are the most certain source of law. We need only interpret the provisions of the treaty. But, does that make a treaty more important as a source of law?
Customary law tends to be more substantive. It requires widespread consistent practice
(Treaty law and customary law overlap a great deal) A treaty could possibly override a pre-existing custom, and a subsequent custom might supplant a treaty.

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**see page 108 text for interesting notes about customary vs. treaty law**

**Firm law versus Soft Law:**
- The rules that come from the law-making process from art. 38.1 (a) – (c) ICJ are **firm law** (*lex lata*).
- **Soft law** (*lex ferenda*) comes from instruments that are not directly enforceable in domestic or int’l tribunals but are still enforceable. (i.e. Helsinki Accords or OECD Guidelines for Multilateral Enterprises).
  - Soft law is not to be disregarded:
    - a. as stated it is still enforceable.
    - b. the objectives of hard law may require these non-treaty instruments to be achieved (i.e. UN Convention on the Law of the Sea)

*Treaties see page 113 text*
The basic principles of the law of treaties are set down in the 1969 Vienna Convention on the Law of Treaties. *see documentary supplement.* “The Convention must be viewed as virtually the constitutional basis, second in importance only to the UN Charter, of the international community of states.” – Canadian dept. of External Affairs.

Treaty law lends itself to certainty and stability that customary does not, but it is not like a piece of legislation. There are **law-making treaties** which declare what the law is or should be on a particular topic, and **treaty-contracts**, either bilateral or multilateral, which do not create general rules of international law but create special rights and obligations like private law contracts.

Treaties are generally implemented by **reciprocity**. If you don't honor your side, the other party has the right to withdraw. You can withdraw: that is one reason why int'l treaty making is quite different from contract law.

**Note:** some treaties are simply codification of already existing customary law. And, sometimes you have a treaty that becomes widespread customary law (because of widespread acceptance)

**Customary Law**
It reflects a *fait accompli*. It shows us what the actual existing consensus is. Some argue customary law goes to the foundation of int'l law.

Even if a state has not consented to be bound, it will, **by virtue of its acquiescence**, be considered as bound (if it acts in a certain way consistently...) Unless you are a persistent objector to a new principle of int'l, you can be considered bound.

Ex: US objection to the land mine treaty
Ex: UN Declaration of the Rights of Aboriginal Peoples: members of Canadian government abstained from signing. They were afraid it would become customary law and that Canadian courts could apply the elements of it over and above our internal treaties and agreements.

Treaty law is very formalistic, but in Int'l law, the **facts on the ground** tend to be more important in terms of giving something legitimacy.

**General principles**
There is now a kind of suspicion about the notion of common values (partly because of the colonial experience). So, if you say that something is “wrong” because it's just wrong, then you fall into a difficult situation in terms of juridical/moral position.

2 examples of the Court AVOIDING the question of conflict between treaties and custom:
1. Question of Hierarchy and the interplay between Treaties and Usage:

<table>
<thead>
<tr>
<th>English Channel Arbitration 1977</th>
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<tbody>
<tr>
<td><strong>Facts</strong></td>
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<tr>
<td>There was a suggested conflict between the 1958 Continental Shelf Convention (which gave states rights on the continental shelves which though not exclusive did give them control over the exploitation of the natural resources) and customary law given the evolution of the law of the sea (UN Conference on the law of the Sea was still in progress at this time).</td>
</tr>
<tr>
<td><strong>Holding concerning the hierarchy of treaties and</strong></td>
</tr>
<tr>
<td>The court agreed that there may be valid reasons to apply customary law despite the presence of a binding treaty. However they limited this to “only the most conclusive indications of the intention of the parties…to regard (the treaty) as terminated”. Despite this conclusion the court warned that they still were entitled to take into account the recent developments in customary law as relates to the case at</td>
</tr>
</tbody>
</table>
customary law

My conclusion

<table>
<thead>
<tr>
<th>customary law</th>
<th>hand.</th>
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<tbody>
<tr>
<td>My conclusion</td>
<td>Basically then the court did suggest somewhat of a hierarchy in that a treaty would take precedence over customary law if the court was not convinced that the states in question no longer wished to be bound, however the evolution of customary law would not be disregarded by the court during the proceedings and therefore may have some ultimate influence over how the courts interpret the application of the treaty to the facts.</td>
</tr>
<tr>
<td>Professor’s conclusion</td>
<td>The court has neatly sidestepped the question of priority faced with the conflict between the two.</td>
</tr>
</tbody>
</table>

2. When the rule in a Treaty can also be found in Customary Law:

_Military Activities In and Against Nicaragua, ICJ 1986_

| Facts | The U.S. argued that the existence of certain principles in the U.N. Charter or other treaties precluded the possibility that similar rules could exist independently in customary law. |
| Holding - identical content to a treaty-rule does not negate the independent existence of customary rules. | Treaty and customary norms retain a separate existence even if they have exactly the same content. The operation of a treaty process does not deprive the customary norm of its separate applicability. If A breaches a treaty-rule with B, B is exempt from his treaty-rule. But if the same rules exist in customary law the breach of treaty by A does not justify B’s refusal to apply the other rule as he is also bound by customary law. |

_Vienna Convention on the Law of Treaties_, _Articles 1, 2, 3, 5, and 6_ see documentary supplement

See page 114 text for more questions regarding treaties

The potentially binding nature of a unilateral declaration:


| Facts: France conducted nuclear tests in South Pacific as it was not a party to the Nuclear Test Ban Treaty. Not being party to the Nuclear Test Ban Treaty France did some testing. Two countries protested and started these actions. Before they were heard France stopped and unilaterally announced they would not hold any more tests in the atmosphere. | Holding: Moot case as Fr announced end of tests -→ This unilateral statement, regardless of its form (oral or in writing), was binding on France. Declarations made by way of unilateral acts can be binding if it is the intention of the state making the declaration to be so. Undertaking of this kind, if given publicly, with the intent to be bound, even when made in the context of international negotiations, is binding. |

Note: no _quid pro quo_ is needed in unilateral declaration.

In this case there is no agreement or treaty. But, the unilateral declaration is considered as imposing legal obligations.

**Canadian Treaty Practice**

For the most part, _ratification_ is required before a treaty becomes binding. The significance of ratification is especially important for _federal_ states like Canada. But, if Canada is involved in a complex negotiation with the UN (all those states are involved) there has to be compromise. So, as a Canadian diplomat, you can't check with all constituents in the country to see if they agree.

If the treaty relates to a defense pact, (domain of feds) you don't have to worry about the _distribution of powers_, but if it relates to the environment, employment, etc, you have to be aware that eventually you need to have 10 provinces signed on. _Executive/Legislative_: treaty making power is executive, but in respect to the required implementation (through legislation), then you also have to take into account whether parliament is likely to accept it or not.
**Note**: in some other countries, it's the parliament that actually ratifies the treaty directly. (Domestic implementation and ratification are one in the same. The Netherlands is like this)

**Note**: if the treaty doesn't effect the legislature at all, then parliamentary approval may not be a problem at all (this is in the minority of cases)

**Treaty Making (see page 120 text)**
1) The representative of a State must have “full powers” (article 7)
2) The mode of adoption of the treaty, whether by consensus or voting, has to be agreed upon (article 9)
3) The means to authenticate the definitive text(s) must be settled (article 10)
4) The particular steps to express consent need to be set (articles 11-16). *Signature is the usual choice*

**Signature & Ratification of Treaties (not binding until ratified/this can sometimes be upon signature)**
This is a 2 step process:

**Signature:**
- The people negotiating the treaty usually do not have the power to give it binding effect within their state
- Representative must have “full treaty making powers” to give consent of his or her state (see art 7 of Vienna Convention)

**Ratification:**
- Federal states – often require sub-unit to approve; Canada tries to put in Federal reservation but this isn’t well accepted
- Executive approval: Usually the Queen, or the Governor-in-Council
- In US – President needs approval of the Senate

**Privity of Treaties**
Just like Ks, treaties cannot bind 3rd parties (non-signatories)
Not an absolute rule → this is different when a treaty creates a *benefit*

**Art 36** Vienna Convention allow for “assumed acceptance” for treaties that confer benefits
**Art 35** allows for third party obligations, but the 3rd party must acknowledge the obligation in writing

**Entry into force** – certain number of states have to ratify it in order for it to enter into force – Vienna Convention art 24-25 – provisional application prior to ratification.
- Date varies according to intention of parties (art 24 Vienna)
- First signatories may not be bound by the convention *qua* treaty for some time (ie prior to ratification) though they are bound to refrain from acts which would defeat the object and purpose of the treaty (Art 18 of Vienna)
- **Publication and Registration**: Once it has come into force, it is registered with UN Secretariat (art 102 UNC and art 80 Vienna)
- In Canada, treaties, are published in own registries separate from “understandings”
- A bilateral treaty is relatively straightforward: unless there is a reason why the treaty shouldn't be, it will be.

**Reservations**
A state can say, fine we will sign, but we enter reservations to the following articles.
So, you might ask why they're entering into the treaty in the first place: maybe it's international prestige or wanting to have the power to negotiate the treaty
Generally accepted that a state (if they did not participate in the drafting of the text) will not become a party subject to reservation unless all other contracting states accepted this reservation (“classical theory”)
Some allow for minor reservations (within spirit of treaty) in order to encourage more states to join
- See Convention Against Genocide Case
- This disrupts the synallagmatic view of treaties
Some do not allow for any reservations, despite desire for wide adhesion:

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Cannot make reservations to treaty provisions that reflect customary norms.

**Reservations to the Convention on Genocide Case [1951] ICJ page 124 text**

Advisory opinion requested by the GA regarding the reservation that had been attached to the treaty Can states make unilateral reservations to the Convention on Genocide? 

**Holding:** General Principle: States cannot be bound to anything without their consent. No state has a right to frustrate or impair the objectives of a treaty

- seems to imply that no reservation valid until it is accepted by all parties
- but, in the past, there has been room for tacit allowance in the past, authors who have objected to reservations have nevertheless been considered parties to the treaty
- intention was to gain broad acceptance, but without sacrificing the object of the treaty
- So, the compatibility of the reservation with the object furnishes the criteria for the attitudes of both the reserving and objecting states with respect to accession
- signatories have more leeway with objections to reservations than non-signatories

**Ratio:** State can be a party to a treaty if it’s reservation is objected to by some others, as long as it is not incompatible with the purpose of the treaty 

If an objecting party considers a reservation inconsistent with the object, it can treat the other party as a non-party to the convention (b) If the objecting party accepts the compatibility it can consider the reserving party a party to the convention 

An objection to a reservation made by a signatory state that hasn’t yet ratified can have the legal effect indicated in I only on ratification, until then it is only notice of the eventual attitude of the signatory state (b) An objection to a reservation made by a state which is entitled to sign or accede but has not done so is without legal effect

The Vienna Convention has codified much of what the ICJ said in articles 2, 19, 20, 21, and 22.

**Canada** frequently strives to have a federal-state clause put into a treaty (or will enter a reservation) which has the effect of preserving Canada’s obligations at international law concerning matters within the legislative jurisdiction of the provinces.

**Note:** An interpretive declaration differs from a reservation. The ILC defines it as “a unilateral statement, however phrased or named, made by a State…whereby that State…purports to specify or clarify the meaning or scope attributed by the declarant to a treaty or to certain of its provisions.”

**Legal Effects of Treaties**

See arts. 26, 27, and 30 of Vienna Convention

- Treaties in force are binding on the parties and must be performed in good faith
- Party cannot use its internal law as justification for not performing obligations (art 27 VCLT). 
  E.g. Polish Nationals in Danzig Case (which we did not read).
- If there are successive treaties on the same matter, refer to art 30 of VCLT

**Vienna Convention on the Law of Treaties, articles 26, 27, 30**

See documentary supplement

**Free Zones Case – France v. Switzerland [1932] PCIJ page 130 text**

An advisory opinion. Treaty of Versailles, to which Switzerland was not a party, stated that the 2 (France and Switzerland) should settle the status of certain territories on their common border b/t themselves. The question was whether the Treaty creates any rights for Switzerland.

**Holding:** The treaty is NOT binding on S, except to the extent they accepted it -- A number of instruments led the court to conclude that the intention of the Powers was to create in favor of Switzerland a right to the withdrawal of the French customs barrier.

**The third state can enjoy rights, but there are no obligations bound on them.**

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• They did accept a proposal about the placement of French Customs, which therefore became a territorial agreement in their favour (by earlier agreement).
• If they hadn’t accepted it, it would still be possible for other states to grant S (any third state) certain rights so long as it can be established that that is their intention—as would have been the case here.

“The question of the existence of a right acquired under an instrument drawn b/t other states is…one to be decided in each particular case: it must be ascertained whether the states which have stipulated in favour of a 3rd state meant to create for that state an actual right which the latter has accepted as such”.

Operation of Treaties

Amendment and Modification
Article 39 of the Vienna Convention confirms that a treaty may be amended by agreement between the parties. Generally there will be a provision about this in a treaty. The UN Charter contains such a provision (article 108).

Once a treaty has been concluded, when does it cease to be operative? Because there is no global police, there is tremendous conservativeness. You want to do everything to make sure that a state cannot unilaterally walk away from it.

So, there is great restriction on when a state can withdraw. (The kind of treaty matters a great deal in this area)
Ex – if it relates to boundaries, then it is very much an eternal agreement given the fundamentally subversive nature of allowing States to walk away from such agreements.


Invalidity and Jus Cogens

Vienna Convention articles 42, 43, 46, 52, 53, 64, 69, and 71

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Jus cogens (article 53)

Jus cogens are obligations owed by a state to the int’l community as a whole. It is preemptory norms of IL that cannot be set aside by treaty or acquiescence but only by the formation of a subsequent peremptory norm of contrary effect.

i.e.: use of force, pacta sunt servanda, are inviolable norms because of their wide and deeply ingrained acceptance such as the principle of freedom of navigation on the high seas or the elementary considerations of human dignity.

Here, we’re talking about hereditary norms of int’l law. These are such fundamental importance (ex – prohibition of genocide) that states cannot conclude treaties contrary to them.

If two countries tried to create a treaty in favor of genocide, it would be invalid at the outside because of the Vienna Convention.

Termination and Suspension
Consent is the best way (but usually not the case)
Other 3 circumstances where termination is allowed: material breach (as opposed to minor breach), impossibility of performance, fundamental change of circumstance (rebus sic stantibus)

Vienna Convention on the Law of Treaties, articles 42, 54-56, 60-63, 70

Case Concerning Gabčíkovo-Nagymaros Project (Hungary/Slovakia) [1997] ICJ see page 139 text

The case regards the construction of a dam. It was no longer in the interest to Hungary whereas Slovakia still wanted to

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proceed. They had concluded a treaty to build the series of dams and Hungary abandoned the project.

The court pretty much rejected all of the 3 (above) grounds. The notification of termination (given on May 19 1992) did not have legal effect.

Akhavan mentions *Amoco International Finance Corp v. Iran* on page 146 text.

US and Iran agreed on arbitral tribunals. .....tribunals are extremely reluctant to allow a treaty to no longer apply, because of the *self-policing nature of int'l law*

### 7. Sources – Custom

**General Customary Law**

Customary International Law is composed of two elements:
1) There must be a consistent and general international practice among states
2) The practice must be accepted as law by the international community.

The concepts have been advanced to explain why “international custom, as evidence of a general practice accepted as law” is binding on states: *consent, estoppel, and reasonableness.*

Matters of protocol (eg. ships saluting other’s flags on the high seas) are *practices but are not obligations.*

- How does a new rule emerge? *Opinio Juris.* State practice that is accepted by the community.
- Violation of a norm does not create a new norm → ex injuria jus non oritur

Unilateral action when taken along parallel lines and based upon similar principles can lead to a new regional and perhaps even universal rule of law.

**Note:** Proof of the necessary *opinio juris* is rarely displayed in explicit acceptance of one state’s claims by others; rather it is shown by their tolerance of that state’s conduct.

**Qualitative question:** how much practice do you need and how much *opinio juris* → changes depending on “how important the norm is”

- For eg. crimes against humanity will adapt faster than 12 mile sea boundary line.

### The Steamship Lotus – France v. Turkey [1927] PCIJ page 550 text

**Facts:** Turkey prosecuted a French captain, after he landed in Turkey, for negligence after the French boat crashed into a Turkish boat in int’l waters.

**Issue:** Is Turkey is violating a principle of international law by prosecuting a foreign national? What is their basis for doing so?

**Holding:** No. **Territorial effect**

- Rules of IL flow from the consent of states, therefore restrictions on states can never be presumed.
- France has to show that such a violation of IL exists, rather than compelling Turkey to establish a ground for its national jurisdiction
- France raised three arguments to this effect, all of which fail—i.e. Turkey did not act in conflict with principles of IL because *France failed* to establish that any such principles exist
- Territoriality is the first, and most solid basis of jurisdiction
- There is a valid provision in the Turkish Crim code asserts extra-territorial application of Turkish law
- But, the basis of jurisdiction is actually the impact of the criminal behaviour on Turkish territory (i.e. the impact of the capts behaviour on the ship which is Turkish territory)

I.e. if the death takes place on Turkish territory, the country has TERRITORIAL jurisdiction (the ship is Turkish, so the impact of the wrongful act was felt on Turkish territory

- Jurisdiction is territorial, but it doesn’t follow that a state cannot exercise that jurisdiction with respect to events that occurred extra-territorially

Ex. If you shoot a gun across the border, and kill someone on the other side, both states have jurisdiction over the crime, on
a territorial basis

Did the court look for a specific norm of customary law that permitted jurisdiction or...look for a prohibitory norm? They looked for prohibitory norm – none, therefore it is not prohibited.


Facts: Dispute over location of delimiting of boundaries between these nations – Article 6 of the Geneva Convention on Continental shelf is not opposable to Germany – this is the equidistance principle. Question is maritime limitation “What principles and rules of int’l law are applicable to the delimitation as between the parties of the areas of the continental shelf in the North Sea which appertain to each of them beyond the partial boundary [already] determined...?” Dispute as to how to divide the continental shelf between Netherlands, Germany & Denmark. Germany has signed, but not ratified the treaty and claims it is not bound. DK and Neth argue Geneva Convention on Continental Shelf had crystallized emerging international customary law on equidistance. Germany relies on doctrine of just & equitable share as, under the equidistant theory, Germany would receive more.

Art 6 calls for agreement first – if not, equidistance. (Geneva Convention on the Continental Shelf 1958)
- provision in art 12 which allows states to derogate or enter reservations – except under art 1-3

Issue: Is equidistance theory a part of customary international law and therefore applicable to Germany even though art. 6 is not opposable to Germany?

Holding: No. Equitable principles apply and parties must hammer out agreement
- Art. 38: ICJ Statute- Int’l custom is evidence of general practice accepted at law.
- Two distinct components: 1. General practice; 2. Accepted at law → Opinio Juris
- Possibility of reservations to this provision shows that states do not think this is customary
- Consider object and purpose of the convention - in this case the issue is not against the object and purpose, therefore a reservation is possible
- If derogations exist – can this really be CIL.
- Did it become CIL because of subsequent state practice?
- no evidence that states acted the way they did because they believed they were obliged to do so, i.e. no evidence of opinio juris
- What has attained opinio juris is (a) that such delimitations are the result of agreements and (b) that they are equitable
- neither of these imply the equidistance method, in fact, (b) mitigates against it in some circumstances
- From the Lotus case – ‘only if such abstention were based on their being conscious of having a duty to abstain would it be possible to speak of an international custom.’
- State practice to date has not demonstrated a clear understanding that state were conforming b/c they believed themselves to be bound – this is the subjective component of the opinio juris.

Tanka Dissenting:
- Number of ratifications/accession must be considered in context. Should not try to seek evidence of subjective motives when investigating opinio juris, objective acts are sufficient

Lachs Dissenting:
- Ratifications alone are not conclusive with respect to general acceptance of a given instrument.
- bindingness does not require universal acceptance
- have to remember that rules of IL are never the result of fiat in the modern context, i.e. they always result from consensus and negotiations
- when we look at a state practice we should look at states with coastlines – are states are not equal in this matter.

Sorensen Dissenting:
- custom can emerge rapidly in some contexts
- Geneva Convention rules have become generally accepted
- Germany previously accepted the convention formally, in so far as it claimed it to reflect IL, and is therefore no longer in a position to escape its authority, even though it has not yet ratified
- Possibility of reservation is not relevant—many rules of IL are suppletive (all except jus cogens)
- Acting contrary to the prima facie rule but justifying the act as exempt because exceptional = recognizing the rule (Military Activities in and Against Nicaragua)

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Rule that emerged in 3rd LOS conference was: agreement on the basis of IL in order to achieve an equitable solution (i.e. the court’s ruling)

Note: General questions regarding state practice are found on page 163 text.

Regional of Special Customary Law

Right of Passage over Indian Territory Case – Portugal v. India [1960] ICJ page 165 text

Facts: Portugal held several small enclaves of territory within India. One, Daman, was on the coast, but the others were inland. Portugal claimed a right of passage to its inland enclaves and alleged that India had interfered with the exercise of this right. Basis of claim is local custom.

Issue: Can this right be asserted on the basis of local custom?

Held: Yes. Custom established.
Local custom must not involved more than two nations. During British and post-British periods, passage has been allowed and, therefore custom has been established and has given rise to a right and obligation.

Case goes back to a time when relations b/n neighboring states were reg’d by practice. Practice here was clearly established by the two parties – this must prevail over any general rules.

Asylum Case – Columbia v. Peru [1950] ICJ page 166 text

Facts: The Columbian government claimed that it had the right to give asylum to the Peruvian Haya de la Torre, who had sought refuge in the Columbian Embassy in Peru. It relied not only on the rules arising from agreements, but on an alleged regional or local custom peculiar to Latin American States.

The court found that the Columbian Government had not proved the existence of such custom.

Question:

1. The notion of customary law is merely an apology for power realities? (ex post facto legitimization)

For:

- Customary law is usually enforced by actors themselves rather than institutions. Power can be used to form law in a very clear and direct way.
- Way the court decides – powerful states are going to impose practice on weaker states – entrench power realities
- States will acquiesce based on worries of reprisals from other states.
- Can weaker states leverage themselves through treaty making process? – Treaty process is probably more fair process. States can imput reservations on a treaty. Still, bullying happens in treaty making.
- Custom codifies an existing reality whereas treaty sets out future state action.
- Law still said to exist – all law could be considered a reflection of power realities. HR could be seen to restrain that but, could be seen to impose western ideas on other states – still an imposition of power realities

Against:

- Binding selves as others should bound. Reciprocal nature of the agreement. IS THERE REALLY SUCH A THING given vastly different amounts of power. Idea that powerful would be open to an attack later on should power realities shift.
- Does IL not have to be a reflection of power realities, as we are an independent community.
- Two extremes are ideals and power realities.

2. In determining customary law, does the increasing importance of a norm imply the decreasing relevance of state practice and a propensity to substitute conduct with opinio juris?

- In cases with continental shelf – court was quite conservative in approach of rejecting use of equidistance line.
  What about cases of torture – could torture be considered under the customary law. Many nations practice this but you could not consider it “widespread”.
  - Do we just make opinio juris the basis of the argument without looking too much at state practice.
- Look to the case of use of armed force – norm is not to do so. Therefore this could be considered customary.

For:

- Post 1945 there has been a proliferation of conventions and declarations that do not go to state practice but instead on opinio juris.
- What about the Security Council resolutions – not so representative. Should it be setting standards???
- Does this not create a total distortion of reality? There is no practice is involved.
- Declarations that are far beyond the reach of states could create the illusion of progress. Danger of having platitudes out there and realities of practice down here.
- Customary law sounds like we have achieved this norm...but we have not. Should we not be calling it aspiration?
- Are declarations or regulations practice themselves.

Against:

- What about supreme court decisions? Are they state practice or opinio juris or both?
- Where does legislation fit in? Is this state practice?

Why are we so caught up with customary law? → Why not call it a General Principle and skip state practice?

- Look to Rwanda, Yugoslavia tribunals call genocide CIL – even though both countries ratified Geneva Convention. Why?
- Maybe b/c of universality. Treaty does not have that.
- CIL has something more concrete
- Look to the example of Female Genital Mutilation. → It is a general principle that it is cruel and unusual. Cultural relativists would not like this. Morality leaves open the question of whose morality? **Consensus is at the basis of custom – not the imposition of morality on another nations.**

8. Sources – General Principles of Soft Law

Where do general principles come from? → rationality, logic, natural law.

Here, one can think of social necessity, etc... There isn't one approach about extracting the principles.

The question of where you actually extract the principles is a different question.

They can be extracted from **domestic law**, for example. You could begin with a premise, and use the fact that it is found in many legal traditions as proof for the validity of your premise.

Customary law is based on **state practice** and the **opinio juris**

General principles start with a **principle** irrespective of the practice of states and social consensus

*Found in art 38(1)(c) of the Statute of the ICJ* → “the general principles of law recognized by the civilized nations”

- Most commonly accepted as those which exist in all municipal systems of law – primarily related to issues of private law or procedure
- Court has referred to principles in cases dealing with breaches of obligations, error and vitiation of consent, *res judicata*, estoppel (in relation to good faith and equity), unjust enrichment, etc.
- **Cdn Charter** includes s.11(g) which refers to general principles of law recognized by the community of nations.

General principles of law are generally considered to be less important than custom and treaty (this is confirms by Art 21(1))

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(c) of the ICC statute. Only resorted to when there are not clear answers in CIL

**Soft Law and Jus Cogens**

**Soft law:** instruments that are not legally binding *per se*, though they affect the conduct of international relations by states and may lead to the development of new international law.

It refers to an emerging norm: the law as it ought to be and not the law as it is. Often when you're speaking about the emergence of new a norm, you go back to general principles.

Very often soft law is based on the introduction of a new principle.

State practice and treaty making often follows closely behind.

**Note:** Crimes Against Humanity and Nuremburg: it was the basis for the court in prosecuting some Nazi leaders.

The problem was the retroactive use of the criminal law. The obvious defense is that “crimes against humanity” were unknown at the time of the Second World War.

Here is where general principles because particularly important. There's no treaty or customary law and no clear source, but there's the idea that it is a *fundamental principle*. You can't go around engaging in mass murder irrespective of the nationality of the victim.

**ICC statute:** after the Nuremberg judgment, the allied powers went to great pains to legitimize their claims of crimes against humanity by confirming that it was a principle of int'l law at the time that the crimes were committed. There is no retroactive application of criminal law, but “crimes against humanity” is a general principle, so it existed rightfully at the time Nuremberg trials.

General Principles have are inalienable → it's the language of natural law. We're talking about self-evident truths.

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**International Status of South West Africa Case [1950] ICJ page 169 text**

**Facts:** UN GA asked court to advise on the status of SW Africa (Namibia). Interpretation of the mandate of that territory to SA. The court drew upon general principles of law in order to determine the meaning of the “sacred trust of civilization” accepted by SA under the Mandate.

- The goal of using principles is not to enact municipal law ‘lock, stock & barrel’ but to look for general policy & principles.
- Look to Common Law and Civil Law and fiduciary duties.

J. McNair – When new legal institutions resemble rules and institutions of private law the role of the ICJ is to take the private law as an indication of policy and principles but not to import “lock, stock and barrel” a set of rules.

So the court must look at the issue (in this case the meaning of “sacred trust of civilization”) and seek to discover what the underlying policy and principles of the issue are.

To do this he looked to scholar’s writings from different countries on the meaning of “sacred trust” to identify the presence in nearly every legal system of some institutions that embody the idea of “sacred trust” – ie trustees or tuteurs for people who are not *sui juris* – devised to protect the weak.

In these various institutions McNair identified GPs common to them all:
Control without ownership
Legal obligation based on confidence and conscience to fulfill his mission
A prohibition on any attempts by the trustee to assume ownership

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**Equity in International Law**

*not the same idea as common law courts.*

3 types:

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CP Kelly
Fall 2008

Professor Akhavan

- **Equity intra legem** (adapt the law to the facts of an individual case – attempt o arrive at equitable outcome)
  - Intl tribunals may apply this type
  - E.g. – *Continental Shelf* Case → Equitable principles were applied. Application of the rule was inappropriate. Now would likely be treated differently – now equidistance/special circumstances
- **Equity prater Legem** (use equity to fill the gaps in IL)
  - More doubtful Intlational tribunals can apply this
  - Somewhat more controversial b/c it assumes that the court can engage in some sort of legislative task (less so in Common Law system where courts, to a certain extent, create the law)
- **Equity Contra Legem** (Court determines that a particular law is unjust and thus doesn’t apply it. Similar to equity in the common law)
  - Only will be applied if an international tribunal’s statute expressly allows
  - Art 38(2) of ICJ statute. “power of the court to decide the case *ex aequo et bono*”. Disregarding of a rule in favour of equity. VERY FEW cases where tribunals are given this power. → this is not the usual idea of equity

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**Diversion of Water from the Meuse Case – Netherlands v. Belgium [1937] PCIJ page 171 text**

No facts provided.
“What are widely known as principles of equity have long been considered to constitute a part of international law, and as such they have often been applied by international tribunals…”
“It would seem to be an important principle of equity that where two parties have assumed an identical or reciprocal obligation, one party which is engaged in a continuing non-performance of that obligation should not be permitted to take advantage of a similar non-performance of that obligation by the other party."
“He who seeks equity must do equity.”

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See paras. 88, 89, 91, and 98 of above.

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**Other Sources of Law**

*Subsidiary means for the Determination of Rules of Law*
See article 38(1)(d)

*Judicial Decisions*
Article 59 of the Statute of the ICJ provides that “the decision of the Court has no binding force except between the parties…” However, the Court often uses its judgments for guidance in later cases.

*Legal Commentaries*
See article 38(1)(d)

*Law Making Through International Organizations*

*Codification and Progressive Development*
ILC is engaged in codification and progressive development of int'l law.
*Codification* means you look at existing int'l law like customary and codify it for the sake of certainty. Many treaties are also codification of existing customary law.
*Progressive development* involves a process where experts engage in studies and propose drafts on a number of issues. These drafts are often submitted to the **UN general assembly** for adoption. Once they are adopted they are not just views of an expert, but move into the realm of int'l law.

**Note:** the general assembly cannot make laws. They can only make recommendations. But, what if the ICL drafts articles on state responsibility and the assembly unanimously accepts it. Is it not now part of int'l law? With time it might become part of **custom**. The resolution is evidence of **opinio juris**.
**Namibia Case [1971] ICJ page 48 text**

With resolution 2145, the UN GA terminated South Africa’s mandate, and the SC called upon South Africa to withdraw from Namibia. South Africa failed to do this, so the SC passed resolution 276 [1970] in which it declared that South Africa’s presence in Namibia was illegal and its actions there were invalid.

- Only a material breach of a treaty justifies termination → a) a repudiation of the treaty not sanctioned by the present convention; or b) the violation of a provision essential to the accomplishment of the object or purpose of the treaty.
- Basis of South Africa’s control over the area was based on a mandate and did not constitute sovereignty over the area.
  - If the mandate lapsed b/c of violations to the object or purpose of the treaty, the authority over the territory is said to have lapsed as well.
- Nature of breach - the actions of SA was designed to destroy the national unity and territorial integrity of Namibia through the establishment of Bantustans is contrary to the provisions of the UN charter.
- When the SC adopts a decision it is for all member states to comply with that decision – even those on the SC who voted against it and those members of the UN who are not represented on the SC

SA must withdraw from the territory and, until that point, remains responsible for its obligations and responsibilities to Namibia under international law. **Physical control of a territory, and not sovereignty or legitimacy of title, is the basis of State liability for acts affecting other states.**

South Africa owed duties to other nations

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**Texaco v. Libya [1978] ILM page 689 text especially paras. 83-87 and 90**

**Facts:** Libya was trying to nationalize oil resources. Texaco did not like this. Landmark cases in foreign investment arbitration. Wanted prompt, adequate and effective compensation based on resolution 1803 of 1962. In 1974 developing countries adopted the economic charter of rights and duties in resolution 3281 to change economic system for poor countries to catch up → in that, standard of compensation was left to the discretion of the state. 3281 is a resolution was abstained by practically all the western states and therefore not adopted by them even though most of the GA did adopt. 1803 was unanimous

**Issue:** Which resolution is binding? What is the relative weight of the different resolutions?

**Holding:** 1803 and 3281 are binding.

Binding effect of a UN resolution depends on the voting pattern. 1803 was voted by all countries and therefore had more weight. 3281 cannot be considered binding on countries that did not ratify it.

Recalls argument of Lachs in Continental Shelf in terms of the weight in customary law

**The point of the case:** state sovereignty is the rule and not majority rule. You can't bind a state against its will.

**Note:** 3281 is dead and could not be used in front of arbitration tribunal.

Protected investment in countries b/c based on 1803 and adequate compensation → what company would invest with thought that investment would be lost.

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**Legality of the Threat or Use of Nuclear Weapons Case [1996] ICJ page 177 text**

**Facts:** The UN GA asked the Court for an advisory opinion on the question: “Is the threat or use of nuclear weapons in any circumstances permitted under international law?” In the course of its opinion, the Court considered the significance of the UN GA resolutions for the formation of customary international law.

General assembly resolutions say that we should ban nuclear weapons. The vast majority of countries think they should be abolished. How does the court address this body of legal opinion? → It says it's an emerging norm. It's the world as it ought to be but not as it is. So, those 10 states (if not fewer) hold hostage the whole int'l community because of the principle that you can't impose a norm of int'l law against the will of sovereign states.

*paragraph 70 on page 178 important*

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**International Codes of Conduct page 181 text**

**Prosecutor v. Erdemovic [1997] International Criminal Tribunal for the Former Yugoslavia online**

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**Facts:** Erdemovic, locksmith of Croatian origin married to Serb. Caught in b/n competing factions. Part of different armies. Promised Swiss passport – went to Serb stronghold for passport, paid and was stranded in the Serb stronghold. In order to secure money for family and protect as croate, joined Bosnian Serb army. Laid land-mines, etc. In 1995, Bosnian Serb forces took Muslim civilians let the women go but bused men for execution. Erdemovic was brought with others to farm and Muslim men arrived. Told that he will be executed if he does not kill Muslim men (despite his protest). Takes part. Later on he disagrees again, is shot and taken to a hospital where he reveals what happened to journalist. This is the first exposure of what was happening in Srebrenica. Normally would not prosecute Erdemovic – small fry. Indicted to save his life – secret service would have gotten to him. Brought to the Hague – plea of guilty (common law notion). Therefore, no need for judge to be hearer of facts – prosecution and defense discuss and sentence given. In civil law there is no such thing as guilty plea – only a confession which is suspect. Defense lawyer and judge were not from common law jurisdictions.

On appeal, they say never entered a plea of guilty, only confessed. Explained that by his not participating he would have been killed (duress). In a sense, there was no plea of guilty and we don’t understand plea of guilty.

Problem: sole piece of evidence was his testimony. If it was taken back to trial, he would not be sentenced, would be sent back to Serbia (possible death) and would not be able to testify against others.

ICTY statute did not contain list of defenses – largely regulated by domestic law. Stat was rudimentary. Question revolved around distinctions b/n common and civil law.

- Common law, duress is an excuse to all crimes (had mens rea but should be excused as harm was unavoidable)… except, murder and treason against Her Majesty – more pragmatic/policy oriented

Civil Law – duress available to all crimes. All or nothing approach

**Issues:** The Court posed questions to itself: Is duress a defence in situations of crimes against humanity? (Here, mass murder but could include torture, enslavement, rape when committed on a widespread scale)

**Holding:** The soldier will not be able to rely on duress (common law defense)

Court looks to other systems (Japan and China)

- Court resolves diffs b/n civil and common by – joint opinion says that there is no general principle and that common law should be looked to b/c of policy considerations.

- Italian judge gives that a big boooo. Policy considerations are not liked by Italian judges.

Principle of legality – problematic as give judges the retroactive right to judge which law applies based on policy.

1998 ICC Statute: They adopted duress as a defense for all crimes. In Canada, it’s available for crimes against humanity for this reason.

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**9. National Application of International Law – Custom**

*In Canada*

To what extent can international legal principles be relied upon as imposing legally enforceable obligations, or conferring legally enforceable rights, on individuals in their domestic system?

This is referred to as **direct applicability** or **direct effect**.

In Canada it is the **domestic constitutional framework** that determines the degree to which international law is applied in any given circumstance.

**Two theories:**

<table>
<thead>
<tr>
<th>Adoptionist ('Incorporationist' in English law)</th>
<th>Transformationist</th>
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<tr>
<td>This stipulates that international law is part of domestic law and is incorporated into domestic law without the need of further procedures like legislative enactments.</td>
<td>Int'l law only applies in the domestic context once it has been has been transformed appropriately.</td>
</tr>
<tr>
<td>- customary international law in Canada</td>
<td>-conventional law in Canada (treaty law)</td>
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<tr>
<td>(This approach was implicitly adopted by SCR in <em>Re Nfld.</em></td>
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Monist theory: there is a single legal order. Even treaty law can be directly applied in domestic courts. Many European countries are sided with this theory.

Dualist theory: reflects more the common law tradition. This suggests there are two distinct legal systems: int'l and domestic. Points of intersection are limited and are subject to parliamentary supremacy.

In Canada, it is a mixture of the adoptionist and the transformationist theory.

Customary Law: Refers to social realities, and as such is less certain, but is directly applicable before Canadian courts.

Conventional Law:
Transformation of treaty obligations: by way of statute. It is important to determine which level of government has legitimate competence in respect of Canada's international obligations.
The Federal Government is generally regarded as having exclusive international personality in the sense that only it may bind Canada to an international agreement.

Customary International Law in Canada
Applies simply through acquiescence. This is why it can creep up on States. It is not necessarily related to the democratic process.

Exam alert – know how emerging norms become customary law and therefore binding upon States
Look to voting records and state practice. “It's just a declaration today, but tomorrow it will crystallize into customary law. Then it will directly apply in Canadian courts without enacting any legislation”
When you let the courts directly apply customary law, you allow them to interpret what a declaration means, for example. Note: If a country abstains from voting for a declaration, it will have to declare its position and adopt a position. -- why?

Constitutional Issues (re: customary law and Canada)
The Canadian Charter gives effect to Canada's obligations under the ICCPR ('66).
Note: class on human rights will relate to this part of the course.

In '82 the Charter gave effect to the ICCPR. In that sense, our fundamental law is based on int'l law. The Canadian courts will regularly evoke int'l in interpreting the Charter. (ex – Keegstra)
In this sense, int'l law is at the core of our constitutional values.

Division of Powers
The treaty-making power is an executive-made law.
Given the fact that the scope of int'l treaties now extents to a broad range of issues, one immediately sees that there are constitutional implications whereby the Feds could surreptitiously usurp things that would otherwise fall within provincial jurisdiction.
When you're in the process of negotiating multi-lateral int'l treaty, you can't get the consent of the provinces for every clause, but you always have to think of what the constitutional implications will be because of the transformationist approach.

Foreign Legations Case [1943] SCC page 188 text
Facts: The court was asked to advise whether the Ontario Assessment Act, which declared in section 4 that “all real property in Ontario...shall be liable to taxation,” rendered the property of foreign states assessable and exigible to municipal taxation. The basic question was whether Ottawa city council had the power to levy rates on a number of foreign legislations.

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**Issue**: The question, essentially, is whether under International law, a property belonging to a foreign state may be assessed for municipal purposes. (ex – embassy headquarters)

**Held**: (Taschereau J): “I have come to the conclusion that practically in all the leading countries of the world, it is a settled and acceptable rule of International Law, that property belonging to a foreign Government, occupied by its accredited representative, cannot be assessed and taxed for state or municipal purposes.”

Sovereign immunity involves immunity from taxation. **Note**: diplomats are immune from taxation as well.

The Ontario Assessment act provides a potential conflict. The issue is the scope of the OAA and whether it is in conflict with customary law. Unless there is explicit inconsistency, you interpret it in light of customary law. The statute is read to comply with customary law and not the other way around. But what if the assessment act specifically provided for this issue and required taxation from the embassies. What would the court do then? **Parliamentary supremacy** would take effect. Or, they would say the provincial legislature has to business imposing taxation on foreign property because it's involved in Federal powers (international relations). **Note**: There is an idea of state sovereign equality which leads to the consequence that foreign courts should not exercise jurisdiction over sovereigns.

**Saint John v. Fraser-Bruce Overseas Corp. [1958] SCC page 190 text**

**Facts**: Contractors in Saint John carried out work on sites in the city pursuant to an agreement between the government of Canada and the US. The materials they used were either property of the US government or held by the contractors on its behalf. Saint John imposed municipal taxes both on certain leasehold interests in the lands and on personal property situated there. The contractors paid the taxes “under protest” and brought an action to recover them.

**Issue**: The Q of tax liability of a private company for the use of property owned by the U.S. gov’t in the pursuit of the construction of a radar defense system contracted by Canada and the U.S. Irrespective as to whether there was a precedent or not (there was) the court **must apply international customary law**. “Reason and good sense” must apply. Obligations are owed to the int'l community as a whole. Here the Court has solved the problem with the precedent from the above case, but instead it makes a point that this is not necessary. The court speaks about reciprocity which relates to the sovereign equality of states.

**Held**: Rand J: “Public works of this sort are not ordinarily considered subjects of taxation. Their object is to preserve the agencies that produce national wealth, the sources of taxes. So to tax Government is simply to remit locally what has been exacted nationally. The work carried on by either Government in its own land would be untaxable, and that principle must carry over to the territory of the joint work.”

**Adoptionist approach**

The matter is not entirely clear, but the idea is that customary law does not supplant parliamentary supremacy, but it does override existing case law.

**Bouzari v. Islamic Republic of Iran [2004] page 325 text**

**Facts**: Facts: From June 1993 to January 1994 Houshang Bouzari was abducted, imprisoned, and brutally tortured by agents of the Islamic Republic of Iran. Shortly after his release, he escaped from Iran and eventually came to Canada as a landed immigrant in 1998. He now seeks to sue Iran for the damages he suffered.

**Held**: Goudge J.A: “Swinton J. found that his action is barred by the State Immunity Act, R.S.C. 1985, c. S-18 (the “SIA”) and that neither the limited exceptions in the SIA, nor public international law nor the Canadian Charter of Rights and Freedoms could relieve against this conclusion. She therefore dismissed the action. For the reasons that follow, I agree and would therefore dismiss the appeal.”

**The State Immunity Issue**

This principle is rooted in **customary international law**.

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The appellant's defence:
The appellant argued it was in the nature of a criminal proceeding because he is seeking punitive damages in the form of a fine. However, the Court disagreed, saying that punitive damages are only a remedy in a civil proceeding.

Next, the appellant argued based on the tort exception found in s. 6 of the Act:
6. A foreign state in not immune from the jurisdiction of a court in any proceedings that relate to:
   a) death or personal or bodily injury, or
   b) any damage to or loss of property in Canada.

The court didn't agree, finding that the appellant continues to suffer from physical and psychological injuries inflicted on him in Iran, and not in Canada.

Finally, the appellant relies most heavily on s. 5 of the Act:
5. A foreign state is not immune from the jurisdiction of a court in any proceedings that relate to any commercial activity of the foreign state.

The Act also defines “commercial activity” as “any particular transaction, act or conduct or any regular course of conduct that by reason of its nature is of a commercial character.”

The court doesn't agree, saying that it is not enough that the proceedings relate to acts which in turn relate to commercial activities. The many connections are with state policing and security and imprisonment powers.

Note: one more defense brought up by the intervener CLAIHR. A foreign state cannot claim immunity from something like a human rights violation.

Judicial Notice of International Law**exam alert
Judicial notice – the act by which a court, in conducting a trial or framing its decision, will of its own motion...recognize the existence and truth of certain facts, having a bearing on the controversy at bar, which, from their nature, are not properly the subject of testimony, or which are universally regarded as established by common notoriety, e.g. the laws of the state, IL, historical events, the constitution and course of nature…etc…

The practice of Canadian courts is to take judicial notice. In theory, it's treated the exact same as Canadian law. Because customary law is directly applicable, you will not be pleading the law as facts.

10. National Application of International Law – Treaties

Treaties in Canada

The treaty making power in Canada is somewhat complex because of its gradual evolution from a British colony. The BNA has no provision for the conclusion of treaties. The only section was 132.

1871 – Canadian representatives were present for the purpose of concluding the Washington treaty. The first time that Canada signed a treaty was 1919 treaty of Versailles, but it did so as part of the British Empire. The first treaty which Canada signed in its own right was 1923 'Halibut Fisheries'...

1947 – Adoption of the letter of patent issued by the GG. This authorizes the GG to exercise all powers in respect to Canada. What powers? → s. 9 powers of the BNA act. This is the basis for the treaty making power in Canada.

How does the division of powers impact this delegation? The jurisprudence would suggest that the power was delegated only to the GG.

Federal Position (from a 1968 Dept. of External Affairs Document page 195 text)
The exclusive responsibility of the Feds in the field of treaty-making rests upon three considerations:

- The principles of international law relating to the power of component parts of federal states to make treaties;
  The International Law commission has taken the position that the questions of whether a member of a federal union can have treaty-making capacity depends upon the constitution of the country concerned. The commission itself cannot decide.

- The constitutions and constitutional practices of federal states;
  Although some states allow their constituent parts to enter into certain types of agreements with foreign states, none allow

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them to do so without Federal control or intermediary. No Federal constitution authorizes the constituent parts to enter freely and independently into international agreements. (Some experts would argue even that the limited power the constituent parts have is being exercised with less frequency in recent years.)

- The Canadian Constitution and constitutional practice

The 1867 BNA vested the powers of treaty-making capacity exclusively with the Imperial Government. However, from 1871-1923, the power shifted to Canada and henceforth Canada and other dominion states were able to negotiate and enter into treaties affecting their own interests and ratification was to be effected at the instance of the dominion concerned. They were also accorded the right to establish direct diplomatic relations with foreign powers.

Quebec Position:
It is not based on a residual aspect of the royal prerogative. Quebec feels they should get to conclude treaties without consulting the Feds. But, this is an argument based on the premise of sovereignty.
Practice: with respect to certain areas, Quebec can and does conclude int'l agreements. Ex – educational exchanges, cooperation. The Fed position: Quebec does this because we let it do it.

An Act Respecting the Ministere des Relations Internationales see page 203 text
It claims though, but does not exercise, full treaty-making power for the province of Quebec. See section 22(1) → “The Minister shall see to the interests of Quebec during the negotiation of any international accord, whatever its particular designation, between the Government of Canada and a foreign government or an international organization, which pertains to any matter within the constitutional jurisdiction of Quebec. The Minister shall ensure and coordinate the implementation of any such accord in Quebec.

Treaty Implementation
In monist systems, once a treaty is ratified it becomes part of the domestic legal order.

Some treaties might not require any implementing legislation like a defense treaty. It's is obviously part of int'l relations. There are also treaties of an administrative nature:

Most treaties require implementing legislation. If it falls under provincial powers, we have to make sure all provincial legislatures adopt the necessary legislation.

Two Methods of Implementation:

<table>
<thead>
<tr>
<th>1. Incorporate the text</th>
<th>In toto (1949 Geneva Conventions, 1929 Warsaw Convention)</th>
<th>In part (Vienna Convention on Diplomatic Relations)</th>
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</thead>
<tbody>
<tr>
<td>2. Incorporate the substance of the treaty into Cdn law.</td>
<td>In this case the treaty is not part of domestic law and any rts or obligations are sourced from the domestic law that reflects the treaty’s substance.</td>
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</table>

Difficulties with this approach – how to tell whether a particular act implements a particular treaty. When individual rights are affected by the subject matter of the treaty this is especially significant.

Laskin – the answer is that implementation must be manifest and not inferred.

Reasons:
1) So claimants can directly invoke the terms of the treaty in front of Canadian courts. There's a subtle distinction between this and invoking a treaty to interpret existing legislation.
2) To transform the terms into domestic statutory language.

See p 207: Capital Cities Communications Inc v. CRTC
The terms in theory were already incorporated in the “radio act” so they wanted to interpret it in light of the new treaty. The SCC held that implementation must be manifest and not inferred. The courts should be able to say: it is implemented legislation.
So, the SCC has been quite strict about the requirement of implementing legislation.

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Labour Conventions Case  

In 1935, Canada ratified three conventions prepared by the International Labor Conference. Parliament then proceeded to pass legislation in accordance with the provisions of the conventions. On appeal from the Supreme Court of Canada, the Judicial Committee advised that the legislation was *ultra vires* the federal Parliament; the legislative competence on the subject concerned was vested in the legislatures of the provinces. There were a series of labor treaties that were adopted in '35. Canada ratified them. Labor falls under the s. 92 power in the BNA Act. It infringed on provincial jurisdiction. On the one hand the treaty-making power is the prerogative of the Feds, but on the other, the regulation of labor is provincial jurisdiction.

**Holding:** In Canada there is no such thing as treaty legislation in ss.91 and 92. Rather the distribution is based on classes of subjects which will require the participation of the legislative power having control over a particular class.

More recent SCC cases have suggested a trend towards a reconsideration of this case. Does this make sense given the increasingly interdependent nature of our world society that the fed govt have the power to not only bind Canada but implement even when proxv jurisdiction is touched upon?

POGG (referred to by Akhavan as a residual power) and the general trace and commerce power in s.91 are two sources of possible authority. (i.e. cases in which the economy of Canada is treated as a single national unit).

So what does this case tell us? → **The Feds treaty-making power can't be used as a back door into encroaching on the provinces.** There is no such thing as “treaty legislation” ...it's a class of subjects under s. 91 and 92 that determines the respective power of the level of government. **It's not the fact that it's a treaty that gives it power.**


**Facts:** The defendant was charged with dumping waste into the waters of BC contrary to the provisions of the Oceans Dumping Control Act, which implements Canada’s obligations under the London Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter. The site of the dumping was within the internal waters of BC. At trial and on appeal in BC it was held that, insofar as the internal waters of BC were concerned, the Act was ultra vires Parliament. In the Supreme Court, the validity of the Act was upheld. Le Dain J., justified in its application to the internal waters of a province under the navigation or fisheries jurisdictions of the federal government, but he considered it operable under POGG power.

**Holding:** The **nature of the subject-matter**, marine pollution, is clearly a matter of concern to all of Canada being of a **single and indivisible nature** that cannot distinguish between coastal water pollution and territorial sea pollution.

This shows a much more expansive interpretation of federal powers. Necessity is an issue here.

Conflicts between International Law and Canadian Statutes:

Re: Arrow River and Tributaries Slide and Boom Co. Ltd. [1932] SCC

Pursuant to a provincial statute, the Lakes and Rivers Improvement Act, the Arrow River Co. was incorporated to construct facilities for the movement of timber down the Arrow River and its tributaries, including the Pigeon River, which serves as a part of the border between Canada (ON) and the US. After completion of the work, the Arrow River Co. applied under the Act to the court to fix the tolls to which it was entitled. The appellant, the Pigeon Timber Co., objected to paying any tolls when floating their logs down the Pigeon River, claiming an exemption under the Webster-Ashburton Treaty of 1842, which provided “that all the water communications and all the usual portages along the line… [Including] the Pigeon River, as now actually used, shall be free and open to the use of the subjects and citizens of both countries.”

**Holding:** Riddell J.A. (CofA) – Unless the statute is so explicit as to prohibit an alternative interpretation it is acceptable to interpret it in such a way as to remove any conflict and to therefore to promote the execution of the King’s “plain duty”. Therefore, “in Ontario” in the Act does not mean “partly in Ontario” which is the case of the river in question. It was therefore not meant to be covered by the Act and the toll cannot be charged on the Pigeon River. (Echos of Legations Case,

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trying to import meaning to render the statute consistent with the treaty.)

Smith J (SCC) – Riddell incorrectly interpreted the Act. The treaty was referring to waters which were in use and navigable at the time of the treaty. The part of the Pigeon River in question was non-navigable at the time and therefore the treaty does not apply. The tolls can be charged.

Lamont J – He also construes the treaty. The treaty states that the use was to be “free and open” to any navigable waters even if they require a portage, then or in the future. He finds it an unnatural use of language to limit that liberty. Based on this the tolls cannot be charged. However he finds another reason to permit the tolls…

Lamont J – Provincial legislative power is plenary as concerns s.92 powers. As this Act is clearly within s.92 it is enforceable. To be overruled there must be affirming legislation that a treaty provision shall be enforced.

Treaties between Canada and foreign states are “only contracts binding in honour upon the contracting states…” The treaty’s provision of “free and open” access to the waters had only the force of a K b/t Canada and the U.S. and therefore cannot impose any limitation on Ontario’s legislative powers.

Here you have very different approaches by the judges in resolving what could be a conflict between provincial statues and an int'l treaty.
There is a presumption of conformity. Where else did we encounter this assumption? → Foreign Ligations case. Unless there is an express inconsistency, we interpret domestic legislation to conform to int'l law.

Power to Legislate Contrary to International Law?
See page 220 text for different arguments.

11. State Jurisdiction over Territory
Can you have jurisdiction over territory without sovereignty?
- You can exercise jurisdiction without sovereignty, with respect to continental shelf or exclusive economic zone. You can exercise jurisdiction with respect to specific matters without having sovereignty. States do not necessarily have sovereignty over EEZ because there is a freedom of passage. Pollution and environmental jurisdiction extends over EEZ in Canada but does not imply sovereignty. Sovereignty extends over the land mass and internal waters.

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Sovereignty</th>
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<tr>
<td>Does not imply sovereignty</td>
<td>Always implies jurisdiction</td>
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<tr>
<td>Used to describe the competence of a court, the scope of authority of a particular state organ, or the scope of authority of a state over its territory.</td>
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Territorial Jurisdiction in Int'l law:
The competence of a state to prescribe and enforce rules of domestic law governing conduct within its territory Authority of a state to regulate conduct within its territory is supreme and is subject only to specific limitations set by CIL or by treaty.

In traditional International Law, area of earth may be:
- **sovereignty** of a state
- **res communis** – high seas and outer space; shared by all nations and incapable of lawful appropriation by any state;
- **res nullius**: capable of lawful national appropriation.
- New legal category: “**Common Heritage of Mankind**” governed by special rules: seabed, ocean floor and subsoil thereof, moon and other celestial bodies. Similar to Res Communis, but differs it incorporates “the idea that the management, exploitation and distribution of the natural resources of the area in question are matters

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to be decided by the international community... and are not to be left to the initiative of individual States or nationals. Even though incorporated in certain conferences and agreements, it is a subject of controversy.

3 dimensions of territorial sovereignty:
The land
Below the land
Column of air above (undefined)

Land Territory: Acquisition of Territory

*Occupation* – Two conditions must be satisfied: 1) The territory thus acquired must have been res nullius and 2) The occupying state exercises effective control over such territory.

*Cession* – The transfer of territory from one state to another by a treaty of cession. (A grant of independence would be similar). (1763 Treaty of Paris is most important to Canadian history).

*Prescription* – The acquisition of title after peaceful occupation with the knowledge of and without protest from the original sovereign for a period of time (probably measured in decades).

*Conquest* – The acquisition of a territory achieved through war and subsequent annexation of all or a part of the territory of the defeated enemy state. (This mode is no longer reconciled with principles of modern int’l law)

*Accretion* – The enlargement of a state’s territory through natural forces, like the change of a river or recession of the sea.

Note: in territorial disputes, usually more than one modality of acquisition is invoked.

| Island of Palma Case: Netherlands v. United States [1928] RIAA page 435 text |
| Palmas is a small isolated island situated about 50 miles southeast from the Philippines. The dispute had its origin in the visit to Palmas by US General Leonard Wood in ’06. In the course of his visit the US official discovered that the island was considered by the Netherlands to be apart of the Dutch East Indies. In the ensuing diplomatic controversy, the US contended that the island of Palmas was included in the Philippine Archipelago ceded by Spain to the US in ’98 by the Treaty of Paris. The Netherlands claimed sovereignty by virtue of its continuous and undisputed display of authority over the island during a long period of time. Eventually, the two countries agreed to submit their differences to arbitration. |
| The Netherlands argued that Spain could only transfer title of territories it had title to. The Dutch claimed they had original title from when it was *res nullius*. The Netherlands was given title of sovereignty because it was “acquired by continuous and peaceful display of state authority during a long period of time going probably back beyond the year 1700…” |
| The question was of *superior title* because Spain must have been able to show some authority there. |
| Page 438: There were considerable gaps in the Dutch authority...but if they weren't there it was only inhabited by natives (so it was *res nullius*). |

General remarks on sovereignty in its relation to territory:
- Sovereignty in the relation between States signifies independence.
- Territorial sovereignty belongs always to one or in exceptional circumstances to several states to the exclusion of all others.
- Territorial sovereignty is a situation recognized and delimited in space.

If a dispute arises as to the sovereignty over a portion of territory, it is *customary* to examine which states claiming sovereignty possesses a title – cession, conquest, occupation, etc. – superior to that which the other State might possibly bring forward against it.

Practice and doctrine recognize that the continuous and peaceful display of territorial sovereignty is as good as a title.

Territorial sovereignty involves the exclusive right to display the activities of a State. This right has a corollary duty: the
obligation to protect within the territory the rights of other States, in particular their right to integrity and inviolability in peace and war, together with the rights which each State may claim for its nationals in foreign territory. Territorial sovereignty cannot limit itself to its negative side: excluding the activities of other States.

Essential question: whether the island of Palmas at the moment of the conclusion of the Treaty of Paris formed a part of the Spanish or Netherlands territory.
- Cannot apply principle that islands belong to lands that are closest to them.
- Did Spain have sovereignty over Palmas at the time of the coming into force of the Treaty of Paris?
  - US have not established the fact that sovereignty was displayed at any time.
- Did Netherlands display continuity?
  - Continuous display not in the literal sense. Enough that a the time another Power ascertaining the local conditions had a reasonable possibility seeing the existence of other state rights.
  - Netherlands never recorded any protests.
  - No evidence of display of sovereignty over the island by Spain or another Power.
  → Indirect proof of the exclusive display of Netherlands sovereignty.

**Legal Status of Eastern Greenland Case: Denmark v. Norway [1933] PCIJ page 440 text**

The dispute was triggered by Norway’s proclamation of sovereignty over Eastern Greenland, an uncolonized part of the island. Denmark, which claimed sovereignty over the whole island, instituted proceedings against Norway in the Permanent Court of International Justice asking the court to declare the Norwegian Act invalid.

**Holding:** Greenland had displayed through legislation enacted, treaties and conventions, during the period of 1814 to 1915 her authority over the uncolonized territory.

The Court: “It follows that, as a result of the undertaking involved in the Ihlen declaration of July 22, 1919, Norway is under an obligation to refrain from contesting Danish sovereignty over Greenland as a whole, and *a fortiori* to refrain from occupying a part of Greenland.”

Denmark’s arguments:
- Sovereignty which Denmark now enjoys over Greenland existed for a long time, has been continuous and peacefully exercised, and up until now, has not been contested by any Power.
- Norway has by treaty or otherwise recognized Danish sovereignty over Greenland as a whole and therefore cannot now dispute it.

Norway:
- Denmark possessed no sovereignty over the area in question
- At the time of occupation, area was *res nullius*.

Danish claim is not founded upon any particular act of occupation, but alleges a title “founded on the peaceful and continuous display of State authority over the island.”

To establish the contention that Denmark has exercised in fact sovereignty over all Greenland Council for D have laid stress on the long series of conventions in which a stipulation has been inserted to the effect that the convention shall not apply to Greenland. Show willingness from other states to admit D’s right to exclude Greenland. Norway has been party to these conventions.

**Thailand v. Cambodia case: (Temple of Preah Vihear) → page 443 text.**

The question of title revolved around one incident: In 1930 a Thai prince came to visit the French representative. The French flag was flying. The prince later sent photos (which were taken on the trip) to the French resident, etc...

The court decided this was a sign that Thailand was okay with the French occupation.

**Western Sahara Case**

→ see page 444. The court deals with the questions of *terra nullius*. If they're habitated by people with a certain social and political organization, then the area is not *terra nullius*. But what is the threshold? You could argue that organization is

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apparent in any human society.

### Sovereignty over Pulau Ligitan and Pulau Spadan Case: Indonesia/Malaysia [2002] ICJ page 445 text

The dispute involved two small islands in the Celebes Sea. Before the 1980s neither was inhabited. The Court rejected the argument of the two states, which suggested that the basis of title flowed from an 1891 Treaty or by succession, and instead focused on *effectivités* (effective occupation). The Court decided that the “critical date” respecting the State acts was 1969, commenting at para. 135 that “it cannot take into consideration acts having taken place after the date on which the dispute between the parties crystallized unless such acts are a normal continuation of prior acts and are not undertaken for the purpose of improving the legal position of the Party which relies on them.”

The Court: “Given the circumstances…the Court concludes that Malaysia has title to Ligitan and Sipadan on the basis of the *effectivités* referred to above.”

“Effective demonstrations of state authority”. **Note:** The turtle eggs and lighthouses were put there *after* the critical date.

The dispute arose in 1969. The court decided any demonstrations of effectivity after that day irrelevant (it's because the dispute had arisen...)**

### Boundary Disputes

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<thead>
<tr>
<th>Boundary Dispute</th>
<th>Territorial Dispute</th>
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<tr>
<td>- An exercise of dividing territory</td>
<td>- The goal is the exclusive sovereignty over a particular area.</td>
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</table>

### Case Concerning the Frontier Dispute: Burkina Faso v. Republic of Mali [1986] ICJ page 448 text

In 1960 Burkina Faso and Mali achieved independence from France. The territory of the two new states had been part of French West Africa. The question before the Chamber of the ICJ was the location of the boundary. The Chamber was required to determine the administrative boundary dividing the French colonies prior to independence. The details of the decision are not relevant, although the preliminary comments of the Court are important.

How the present dispute should be classified? –
- Frontier disputes or delimitation disputes: refer to delimitation operations affecting what has been described as “a portion of land which is not geographically autonomous”
- Disputes as to attribution of territory: attribution of sovereignty over the whole of a geographical entity.

The effect of any delimitation no matter how small the disputed areas crossed by the line, is an apportionment of the areas of land lying on either side of the line. …

Principle of “intangibility of frontiers” inherited from colonization gives rise to the principle of *uti possidetis juris*, the application of which gives rise to this respect for intangibility of frontiers.

Principle of *uti possidetis juris* was first invoked in Spanish America. But the principle is not a specific rule which pertains solely to one specific system of intl. law. It is a **general principle** which is logically connected with the phenomenon of the obtaining of independence, wherever it occurs. Its purpose is to prevent the independence and **stability** of new states from being endangered by fratricidal struggles provoked by challenging frontiers.

Different aspects of the principle of *uti possidetis juris*:
- Pre-eminence accorded to legal title over effective possession as a basis of sovereignty.
- Primary aim of securing respect for the territorial boundaries at the moment when independence is achieved.
- Upgraded former administrative delimitations, established during the colonial period, to intl. frontiers.

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- Territorial boundaries that have to be respected and also be derived from intl. frontiers.

Problems with this principle:
- **Conflicts outright with right of peoples to self-determination.** But emphasis is made on the requirement for stability in order to survive has induced African States to consent to the respecting of colonial frontiers. Deliberate choice of African States to choose uti possidetis.

International law – and the principle of uti possidetis – applies to the new State not with retroactive effect, but immediately and from that moment onwards. It applies to the State as it is, ie to the “photograph” of the territorial situation then existing.

**Uti Possidetis means intangibility of frontiers**

Should uti possidetis be restricted to colonial situations? Or where new states have a common colonial past? It was the legal opinion of the Arbitration Commission of the Conference on Yugoslavia that uti possidetis was the governing principle of intl. law respecting the boundaries between Croatia and Serbia and b/n B-H and Serbia.

The notion of juris is about pre-eminence of legal title over effective possession. This seems to be in conflict with the Island of Palmas. Uti possidetis was used to decolonize South America and they wanted to prevent the encroachment of other colonial powers. They knew that if effective possession was going to be the criterion they were going to lose their land because they could not possibly occupy all the territory. The drawing of boundaries is pre-eminent over occupation. So it may not have been about stability in the beginning.

**Canada's Territory**

**St. Catherine’s Milling and Lumber Co. v. The Queen [1887] SCC page 452 text**

The question before the court was whether under BNA Act 1867 some 50,000 square miles of timberland in Ontario belonged to the province of Ontario or the Dominion of Canada. The lands in question formed part of lands surrendered by an Indian tribe by a treaty to Canada. The excerpt that follows deals with the legal effects of the conquest of Canada by Great Britain and the subsequent cession by France by the Treaty of Paris, 1763.

**Holding:** “Now when by the treaty of 1763, France ceded to Great Britain all her rights of sovereignty, property and possession over Canada, and its islands, lands, places and coasts, including, as admitted at the argument, the lands now in controversy, it is unquestionable that the full title to the territory ceded became vested in the new sovereign, and that he thereafter owned it in allodium as part of the crown domain, in as full and ample a manner as the King of France had previously owned it.”

The Indian Treaty doesn’t matter.

**Newfoundland**

N was the last province to join. It was a result of a ’48 referendum. There was a dispute about the continental shelf. **See page 454 text.**

**Arctic Islands**

Biggest issue is whether the ice should transform the arctic into a different type of territory.

The Arctic is basically defined by the “tree line.”

**Importance of the arctic:** resources (oil + gas), environment (eco-system is very fragile), during cold war years strategic importance (early warning systems).

What is the status of “ice islands”? Canada is trying to claim that they create an archipelago. In the Law of the Sea Convention: “a group of islands and waters closely interrelated that form an intrinsic geographical and economic entity.” Indonesia is an archipelago state. Canada is not an archipelago state it has a massive land mass. There is also the fisheries case. **The ICJ case on Fisheries of Norway** holds that you draw straight base lines. Therefore Canada wants to apply the case to its Arctic islands.

**US position** is that the Northwest Passage is not part of Canada’s internal waters. You cannot draw straight baselines. Internal waters is no different then land territories, there is no right of passage therefore. The only time you can draw
straight baselines is if you are an archipelago state or if you fall under a.7. Doesn’t Baffin Island look like the Norwegian coast line? Norway case says that straight baselines need to be tempered by general international right.

**Frontiers of Canada**
See page 456 text

**Legal Status of the Arctic Regions [1979] by D. Pharand, Hague Recruiel 51 page 457 text**
While sovereignty over the land territory in the Arctic is no longer in dispute, potentially controversial issues remain unresolved. They include the limits of the continental shelf of Arctic states; the scope of Canada's jurisdiction over the waters of its archipelago; and the nature of control Canada is entitled to exercise over the straits constituting the Northwest Passage.

**Legal Status of the Arctic Ocean**
Waters of the Arctic Ocean must be considered as high seas, as in any other ocean. US considers Arctic Ocean as high seas and open to all nations. USSR has engaged in similar activities to US and therefore must subscribe to freedom of the seas. → Canada has expressed doubt to high seas, particularly the Beaufort sea, when discussing the status of the Northwest passage. But Canada did explore Lomosnov Ridge…

**Legal Status of Ice Islands**
Ice islands used for marine scientific research. They need a legal regime. No customary law has developed.

**Air Space over Arctic Lands and Islands**
Since territorial sovereignty is established, Arctic states have complete and exclusive sovereignty over the air space above their respective territories.

**Air Space over the Arctic Ocean**
Freedom of overflight exists all over the water of the Arctic Ocean beyond the territorial sea. States have respected freedom of overflight.

**Air Space over the Northeast and Northwest Passage**
No freedom of over flight where there is an overlap of territorial waters in those straits.

**Canada and Arctic Waters see page 459 text**
There is no question of Canada’s sovereignty over the islands of the Canadian Arctic.

**Antarctica see page 464 text**
The present legal regime is based on the Antarctic Treaty of December 1, 1959. -the sector theory is described.

**The Antarctic Treaty [1959] UNTS page 466 text**
Antarctica shall be used for peaceful purposes only… See page 469 for a description of the effect of the Antarctic Treaty system.

**12. Law of the Sea**
It is in effect an extension of the territory of the state. This area of International law is of great importance to Canada which has the world’s longest coastline and vast oceanic resources.

**Exclusive jurisdiction**: to the exclusion of other states. Maritime territories are a bit more complex: you can't really inhabit a maritime space. Also, claims to maritime space are a recent development.

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Territorial Sea concept has been part of int’l law for a long time. Other developments are more recent. Historically, it was important for military purposes. Invasion might come via this strip of water. States should have jurisdiction over it. Initially, the territorial sea was approximately 1 mile (the canon rule: it was about how far you could shoot a canon).

- Starts in the Roman times and continues. Famous debate b/n Grotius (free for navigation) and Selden (closed seas).
- Virtually all modern laws of the sea are grounded in custom.
- In 1958, four conventions on laws of the sea were written and ratified by many (and followed by more who believed that the conventions merely codification of existing law). First attempt to regulate the seas.
  - Contiguous zone (extended for customs and enforcement) and territorial sea
  - High seas
  - Fisheries (controversial – resistance by coastal states saying that distant states had too many rights and did not have to deal with environmental outcomes)
  - Continental Shelf. (see Continental Shelf Case which still says (in 1969) that this does not reflect CIL)
- North Sea Continental Shelf Case shows how not all the provisions were considered CIL.
- By the 1960’s, these conventions were already outdated.
  - Definition of continental shelf – technology in 1958 for drilling did not allow for it beyond 200m isobar. In 60’s this was possible and therefore convention outdated
- 1973 – UN held first conference on Law of the Sea. (Father of convention – Tommy Koh of Singapore)
- Resulting constant changes made another codification process essential. Thus, UN Convention of the Law of the Sea in 1982.
  - Very extensive – 17 parts, 320 arts, 9 annexes.
  - Does not deal with military uses
  - Entered into force (as set out in convention) 12 months after 60th ratification in 1994. Also b/c of reservations of US and other western countries who did not like the “common heritage of mankind” bit regarding the deep seabed.
  - Canada has signed (1999) but not ratified until (2003).
- Law of sea particularly important for Canada – longest coastline in the world and 70% of oil reserves in the seabed.
  - Is it an advantage for Canada to ratify. Not everyone has done so – Venezuela among others.

Customary Law of the Sea – This is a central element. Virtually all modern rules of the law of the sea are rooted in custom.

The UN Convention on the Law of the Sea
Articles 2-14
This is the most ambitious effort at codification and progressive development of int’l law ever attempted by the UN. It covers all the traditional law of the saw including territorial sea, high seas, rights of navigation, international straits, and the continental shelf.
Note: landlocked countries signed it too. (Merchant vessels, deep sea issues, common heritage of mankind)

Other important sources:
International Maritime Organization
UN Conference on Trade and Development
UN Environment Program
UN Agencies

Marine Zones
Maritime entitlement flows from land territory. The land dominates the sea.

Territorial Sea
A belt of water 12 miles in width

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See section 2 of the Convention on the Law of the Sea

Baselines
Drawn along the low-water lines. Principle here is that the land dominates the sea.
- Generally follow contour of the coast.
- **Article 7** → Straight baselines don’t force into the deep contours.
- Note the difference b/n an archipelagic state and archipelagic area.
  - Canada
    - Cabott strait, Bay of Fundy and Gulf of St. Lawrence are all considered by Canada to be internal waters.
    - Also, on the west coast, Queen Charlotte….
    - All of these based on historical waters claim.

Mouths of Rivers
- Where the fresh water ends and salt water begins the baseline is drawn
- See also art 9

When can you deviate from normal baselines under article 5 to what are called “straight baselines” under article 7?
- When there is a highly irregular coastline (like Norway which has a lot of fjords). You can draw straight baselines in this situation. Anything before the baseline is considered part of the inland territory (so they would be internal waters).

Article 7 provides that “deeply indented” areas or an area with a fringe of islands can use straight baselines. 7.2 talks about states that have deltas

**Note:** Ellesmere Island. There is a large section where the islands are separated by waters...is that following the general direction of the coastline?

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Canada participated actively. In addition to have a long coastline has particular problems in the Arctic. There is the question of the environment, etc.
With the effects of global warming and the opening of the NW Passage there is the issue of deep-sea drilling.
Despite it all, Canada only ratified the 82 convention in 2003.

**Qatar v. Bahrain Maritime Delimitation and Territorial Questions [2001] ICJ page 925 text**
The ICJ had to evaluate apparent straight baselines constructed by Bahrain.
“The Court observes that the method of straight baselines, which is an exception to the normal rules for the determination of baselines, may only be applied if a number of conditions are met. This method must be applied restrictively. Such conditions are primarily that either the coastline is deeply indented and cut into, of that there is a fringe of islands along the coast in its immediate vicinity.”

**Oceans Act [1996] SC**
Describes the law of the sea for Canada.
Territorial sea; determination of baselines; geographical coordinates of points; baselines where historic title; low-tide elevations; internal waters of Canada; part of Canada
This consolidated all the piecemeal legislation we had.

**Canada Shipping Act:** there was a distinction between internal and “inland” waters.
Internal: All waters behind the baselines
But, for the limited purpose of shipping and customs, there is a separate regime that regulates int'l shipping in internal waters: called the “inland waters of Canada” in the Shipping Act. They are considered internal waters and Canada has full jurisdiction.

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Islands and Archipelagos page 931 text
Articles 46-49, 121

Innocent Passage through the Territorial Sea
States can pass through another states' EEZ. A state doesn't have sovereignty over their EEZ of Continental shelf, but they have jurisdictional authority (access to resources, freedom to exploit them).
Freedom of navigation is not affected. This goes back to Roman law and freedom of navigation.

Exclusive Economic Zone page 945 text
Articles 55-60
- Measured from the baselines of the territorial sea to no more than 200 nautical miles. (In conflict with the Cdn Ocean’s Act which describes the zone as having its inner limit as the outer limit of the territorial sea.
Different from the continental shelf: it has a set distance. EEZ includes the water and fisheries while the continental shelf is ONLY about the shelf and the subsoil (oil and gas).
- Note the preservation of all high seas freedoms in this zone so long as they are not in conflict with the rights enjoyed by the coastal states.

Oceans Act art. 13(1) 200 nautical miles from the baselines of Canada’s territorial sea
Art. 14(a) confirms Canada’s sovereign rights in the EEZ. Canada’s EEZ also includes all the waters over which Canada has historical claims to full sovereignty.

Is this zone to be understood as “sovereign rights” or “jurisdiction”? Might have to wait and see from state practice and authoritative interpretation of the UNCLS.

Continental Shelf articles 76-82 and page 947 text
→ it is an extension of the landmass. The earth is a series of continental plates. So, the continental shelf is an extension of landmass into the sea up to the point that it descends into the “deep sea bed”. Determining it is not a simple mathematical exercise. You need to actually look at the geographical circumstances in order to determine where it begins and ends.
Canada's pacific coast has a very short continental shelf because the fault line is very close. (In the Arctic it's very far).
Where it extends farther than 200 nautical miles, it becomes a different problem. To what extent do we allow a State to stake a claim to underwater landmass which otherwise would fall under the regime of the high seas?
The question of how far the continental shelf goes is defined by a 'Commission on the Continental Shelf". Experts receive applications from states.

<table>
<thead>
<tr>
<th>The Truman Proclamation [1945] United States</th>
</tr>
</thead>
<tbody>
<tr>
<td>“The Government of the US regards the natural resources of the subsoil an sea bed of the continental shelf beneath the high seas but contiguous to the coasts of the US as appertaining to the US, subject to its jurisdiction and control…”</td>
</tr>
<tr>
<td>The US was the first State to proclaim its jurisdiction over the Continental Shelf.</td>
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<table>
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<tr>
<th>Geneva Convention on the Continental Shelf [1958]</th>
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<tbody>
<tr>
<td>“For the purpose of these articles, the term “continental shelf” is used as referring a) to the seabed and subsoil of the submarine areas adjacent to the coast but outside the areas of the territorial sea, to a depth of 200 meters or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas; b) to the seabed and subsoil of similar submarine areas adjacent to the coasts of islands.”</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Oceans Act 17.1 (page 949 text) sets out Canada’s proclamation re: continental shelf</th>
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<tr>
<th>Continental Shelf Commission</th>
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<tbody>
<tr>
<td>Claims are submitted by states to experts who consider them... By submitting your claim, you implicitly accept what the commission has to say, but it still officially doesn't make “binding decisions” Canada has not made submissions to the Commission.</td>
</tr>
</tbody>
</table>

CP Kelly
See page 953 → \textbf{R v. Perry}

A lobster fisherman was beyond Canada's exclusive economic zone. He unsuccessfully raised the defence that there was a lack of certainty as to the extent of the Canadian continental shelf, as defined by section 17 of the \textit{Oceans Act}.

When they talk about the sovereign rights of Canada in the \textit{Oceans Act}, they're really talking about jurisdiction. Canada has rights over the continental shelf for exploiting the non-living resources and organisms from \textit{sedentary species} (immobile and harvestable).

Their argument was that they couldn't know where the continental shelf is.

Once the Canadian foreign ministry issues a certificate saying an area is part of the continental shelf, that's the end of discussion. It applies under Canadian law.

The Feds chose not to use section 23.1 of the \textit{Oceans Act}. (Akhavan doesn't know the outcome of the case). Why not? → If they issued the certificate, they might have to say the full extent of the Continental Shelf. Canada wants to have ambiguity over its position for strategic reasons.

\textbf{Criminal Jurisdiction}

Beyond the territorial sea the laws don't apply, but if a sailor kills another on the ship, it's usually the law of the flag state that applies.

<table>
<thead>
<tr>
<th>\textbf{Re Newfoundland Continental Shelf}</th>
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<tbody>
<tr>
<td><strong>Jurisdiction</strong></td>
</tr>
<tr>
<td><strong>Issues</strong></td>
</tr>
<tr>
<td><strong>Holding</strong></td>
</tr>
</tbody>
</table>
| **Ratio** | Notes that this is not an issue of sovereignty but rather “sovereign rights to explore and exploit”
  • These rights are not considered proprietary.
  • For NFLD to be successful, must be shown that, prior to it joining Canada, NFLD had acquired rights to the continental shelf \textit{ipso facto} or by operation of law (without a claim being made – \textit{ab initio}) \rightarrow Was it CIL?
  • Canvassing of the different claims made prior to 1949 and work of the International law Commission on the subject which said that, although many claims had been made, still limited and recognition was not high.
  • Conclude that international law had not devel’d sufficiently by 1949 to confer rights on NFLD
  • No retroactivity with respect to laws of the sea – not conferred on NFLD retroactively |
| **NOTE** | Court went on to say that, even if the above was wrong, upon joining the union, NFLD would have transferred rights to the entity possessing external sovereignty – namely Canada. |

\textbf{High Seas page 955 text}

see Articles 86-111 of the UNCLS

freedom of navigation; flag-state jurisdiction; prohibition of piracy

\textbf{Deep Seabed}

The deep seabed is less accessible in terms of exploitation of natural resources. The technology isn't quite there yet.


“Pending the establishment of the aforementioned international regime…(a) States and persons, physical or juridical, are bound to refrain from all activities of exploitation of the resources of the area of the sea-bed and ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction; (b) No claim to any part of that area or its resources shall be recognized.”

• Third conference on the Law of the Sea instituted a Moratorium resolution until an international regime could be established.

• Resources declared to be the common heritage of mankind.

CP Kelly
Moratorium stops all exploitation


Declaration of principles governing the sea-bed and the ocean floor, and subsoil thereof, beyond the limits of national jurisdiction.

- common heritage of mankind

**Canadian position.** Is it better to have boundaries defined? (Especially in the Arctic)? Should we allow another international body to scrutinize the proposed defined boundaries?

What about Canada's claim that all the waters in the Arctic are internal? What will other states think about it? The US has vigorously contested it. Should we allow an international court to scrutinize this or should we try to negotiate our way into asserting our claims, or just enforce them?

### 13. Nationality

Nationality signifies the relationship between the state and an individual.

#### Individuals

*There must be genuine link b/n the state granting the nationality and the individual.*

- From *Re Lynch* – continuing state of things is required and not a physical fact. Membership of an independent political community.
- Not static but rather constantly dynamic.
- It is the fundamental basis for jurisdiction over persons beyond national territory.
- Rights and obligations come from nationality → Formal espousal of claims of its nationals through diplomatic channels, imposition of military service, some may refuse to extradite nationals,
- The bond between individual and the state includes allegiance (opposite: treason).
- The state owes the individual protection.
- The most fundamental right that derives from citizenship: to enter, remain in, and leave the state. (see article 6.1 *Charter*)
- In some cases there is a distinction between citizenship and nationality, but in others there isn't.

Common law has a **functional** notion of nationality. In the civil tradition, it's a more **visceral** bond.

In the common law it is sometimes distinguished from citizenship in that citizenship has whole rights and nationality implies some sort of permanent residence. (You can enjoy certain rights as a permanent citizen even if you do not have citizenship).

#### What determines nationality

- Domestic law regulates the loss and acquisition of nationality (subject to certain restrictions under HR law; no discrimination, etc…)
- Fundamental aspect of states’ sovereignty
- Serious consequences → Eg. Latvia situation at the end of the USSR. There was a deliberate migration of Russian to dilute Latvian population to the point where 40% of pop was Russian. What to do after 1991? Revoke nationality?
- Involves peace and security
- Included in Universal Declaration of HR – In Covenant on Civil and Political rights confers nationality on children.

What about the **ethno-national concept of citizenship**?

In many countries (like Armenia and Croatia), one can acquire citizenship based on ethnic descent even without prior residence. Is it discriminatory to say that a German-speaking person from abroad can acquire it and the children of migrant Turkish workers (living in Germany) can't?

CP Kelly
The basic notions of nationality are derived from *jus soli* (place of birth) and *jus sanguinis* (blood ties).

In Canada, **naturalization** is the most significant basis for citizenship. Canada also has an active policy of encouraging immigration.

**Acquisition of Nationality from “An Introduction to Int’l Law”**
- ‘National’ includes person who are not citizens but who has the right to protection of the state and owes allegiance to it.
- Art 25 of ICCPR
- Can happen by birth in the state (*jus soli*) or by birth to parents (blood) who are nationals of the state (*jus Sanguinis*) or through **Naturalization** (either directly or derivative by children) where there is minimum period of residence.

Requirements in Canada found in the *Canada Citizenship Act*. Note that marriage is not actually a ground for acquiring citizenship – it is based on residence which can be made easier by marriage.

Note also, exception is diplomats cannot claim nationality by *jus soli*.

---

**Citizenship Act [1985] page 495 text**

p. 495/6 → *jus soli* principle in Canada is qualified by the fact the person is lawfully admitted into Canada for permanent residence. It's not enough that you're lawfully admitted on vacation.

Section 5 governs naturalization. There must be **3 years of continued residence in Canada**. This creates an interesting situation for some people who have another residence in a different country.

**Note**: if you marry a Canadian citizen you don't automatically become a citizen. You only become eligible for permanent residence.

---

**Notion of Union Citizenship**
- Under the treaty of Maastricht there is a notion of European Union Citizenship. What do we think? IS this a good idea?

Akhavan thinks this is the future: it implies the right to freely migrate to any of the union states.

---

**Recognition of Nationality at International Law**

Int'l recognition becomes an issue where someone has **two or more** citizenships and is claiming the protections of one state against the other.

There are many examples of acts performed by states in the exercise of domestic jurisdiction which do not necessarily or automatically have international effect:

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**Nottenbohm Case: Liechtenstein v. Guatemala [1955] ICJ page 498 text**

**Very important case re: recognition**

German citizen who lived in Guatemala for most of his life. He acquired the citizenship of Liechtenstein because he wanted to take an action against Guatemala. Otherwise, he wouldn't have remedies.

**Holding**: Dominant nationality is not that of Liechtenstein – nationality there was granted without regard to the concept of nationality adopted in international relations. Guatemala was under no obligation to recognize Liechtenstein nationality.

**Test** for Dominant and effective nationality (not merely the verbal preference of the person seeking nationality):
1. Basis of social fact of attachment (family, place of residence).
2. Genuine connection of existence – interests and sentiments
3. Reciprocal rights and duties

Actual connections to Liechtenstein are extremely tenuous – no settled abode, no prolonged residence, no intention of settling there, no interest in economic activities there.

**See page 500 (bottom paragraph)**

There's a requirement of **genuine link** between the individual and the state. The “practice of states” that they refer to is customary law. There must be a **social fact of attachment**.

This case was decided in ‘55 → the notion of dual citizenship was probably rare.

---

CP Kelly
The test now is the **dominant nationality**.

**Flegenheimer Claim: Italian-United States Conciliation Commission [1958] page 503 text**

A man lost US nationality in 1894 to become German. He lost German nationality by law in 1940 – US espoused his claim for property damage before the commission. Commission dismissed his claim but considered nationality arguments.  
**Issue:** Even if retained US nationality, does it lack the genuine connection required by Nottebohm?  
**Holding:** No. Test is not as strict as it is argued to be. There does not exist any criterion of proving the effectiveness of a bond with a political collectivity.  
**Note** that they rely on the fact that he only has one nationality – to leave him without it would make him stateless and they seem to take this into consideration. They even make mention of the fact that international law on this subject is meant to deal with issues where there are two nationalities vested in one person – not a case like this one.

**The Right of Diplomatic Protection**

**International Law Commission, Draft Articles on Diplomatic Protection [2004] page 505 text**

In 1996, the ILC identified this topic as one “appropriate for codification and progressive development.” A state is entitled to protect their citizens.  
**Article 7:** multiple nationality and claims against a state: **controversial**  
**Article 6:** claims against a 3rd state of which you don't have nationality. The question becomes under which of the states you are a citizen of that you’ll make your claim.  
If you contrast this with article 4 of the 1938 Hague Convention on the Conflict of Nationality Laws (page 507) you see: “A State may not afford diplomatic protection to one of its nationals against a State whose nationality such person also possesses.”

**Dual and Multiple Nationality**

By application of the **jus sanguinis** and **jus soli** principles, coupled with naturalization, an individual may have more than one nationality.

**1930 Hague Convention on Conflict of Nationality Laws [1930] page 507 text**

- Person with two nationalities may be regarded as a national of both states  
- Third state required to recognize only the nationality of a person of where he habitually and principally resides or is most closely connected (art 5)

In **Canada**, the basic principle is that if you go back to a country of which you're a citizen, you will not be eligible for diplomatic protection by the Canadian government. It's because of the fear that it will become entangled into thousands of cases of people who go back to their other country and get in trouble, and ask for help from the Canadian government. They don't want to be seen as interfering.

**Question**

1. Canada may not espouse a claim on behalf of a dual national against the state of another nationality. (Think Zahra Kazemi and the right of Canada to claim reparations on her behalf even though she is a dual national)

**Zahra Kamzemi Case.** Iran to France living. Mature adult comes to Canada and acquires citizenship. Goes back as photo journalist and is......  
- Can Canada bring a claim against Iran?
  - **Hague Convention of 1930 – Art 3 – considered nationality of both states.**
  - **Art 4 - no diplomatic protection for national against a state whose nationality such person also possesses**
**Against**
  - See case A/18 (below) – interpret Art 4 of the Hague Convention very cautiously as it is more than 50 years old.

CP Kelly
In that case, jurisdiction was held despite Hague Convention.

Should question of effective remedy make a difference?

Think Nottebolhm. How would reasoning differ if he had had nationality of Guatemala? Would have been an issue of standing most likely and would not have been allowed standing. Reasoning would have been different as dominant nationality in that case was Guatemalan not that of Liechtenstein.

For

Diplomatic protection is obsolete in the present time b/c there are so many other methods of addressing the issue.

Are there circumstances where Canada should be allowed? For instance if Iran treats you as a Canadian citizen.

Distinction b/n diplomatic espousal and individual claims (eg. A/18 below) – should this make a difference?

Exercise of agreement b/n two states for this tribunal – should there be a difference if the state goes to the international forum rather than the individual going to a tribunal based on this agreement?

Giving international standing to individuals – would this diminish the importance of Art 4?

### Canevaro Case: Italy v. Peru [1912] page 508 text

**Facts:** Claim of Italy for money against Peru. (From the Canevaro brothers) One brother was Peruvian by birth but Italian under art 4 of Italian Civil Code – his dad was Italian. **Issue:** What is his nationality for the purpose of this case? **Holding:** The court holds that he's Peruvian. He could not succeed. The other Italian brothers could. Has acted as a Peruvian citizen (ran for senate, etc) and Peru has the right to deny his status as an Italian claimant.

### Iran-United States Case No. A/18 [1984] US Claims Tribunal page 509 text

A great many claims were being brought against Iran by dual US-Iranian citizens. The tribunal was requested to decide whether it had jurisdiction to hear the merits of such claims. The tribunal turned to customary international law, finding the Iranian-US Claims Settlement Declaration not sufficiently clear. **Holding:** If the dominant and effective nationality of the claimant during the relevant period was that of the US then a claim can be brought against Iran. They refer to article 4 of the 1938 Convention. They explain it is 50 years old and from a treaty that was not widely ratified.

### Allegiance

**Joyce Case:** He fraudulently obtained a British passport. The question: has he committed treason? His claim is that he never had British citizenship. The HoFL interpreted allegiance in a broad sense. The point is that he maintained ties with British. They were sufficient to impose an obligation of allegiance.

**A duty is owed to the State while at home or abroad.**

### Proof of Nationality

A passport is only *prima facie* proof, but is not conclusive. The conferring of passports is at the discretion of the minister of foreign affairs. No one has a legal entitlement to one. But, what about section 6.1 of the *Canadian Charter*? Every citizen of Canada has the right to enter, remain in and leave Canada.

### Loss of Nationality page 513 text

In Canada, it can be lost if you renounce it. See Section 7 of the *Citizenship Act*

### Statelessness

This was important in the inter-war years when int'l minorities had nationality but not citizenship. They would need to be protected by a “mother state” under a minority treaty. **Statelessness** can arise through such circumstances as conflicts of nationality laws, changes of sovereignty over territory, or denationalization by the State. **State secession:** It divides into two or more states. What about those who previously had citizenship?

### Stoeck v. Public Trustee [1921] page 515 text

CP Kelly
The plaintiff wants to be declared not to have been nor be a German national within meaning of treaty of peace of 1919. If he is, certain property effects on his stuff will take place (poetic, eh?). Was Prussian by birth but left and never became German citizen. Move to UK and was interned and sent to Holland. Went to Germany and has resided there.

**Issue:** Is his property here property belonging to a German national and, therefore, property which is charged by the Treaty of Peace Order, and which he may not deal with except with the consent of the custodian or at the risk of fine and imprisonment?

**Holding:** No. Not a German national.
But, he has no other nationality. Is statelessness possible?

**Williams S.A. And de Mestral, “Problems of the Stateless Individual”**
- Art 15 of Universal Decl of HR - Everyone has the right to a nationality.
- Perrogative of states to adopt own national laws even if makes people stateless
- Serious lacuna which threatens the application of the principles of international law.
- The only way to prevent this disabling condition is to ensure that States take a flexible approach and do in fact all for both the use of *jus soli* and *jus sanguinis*.

**Constitution on the Reduction of Statelessness [1961] page 517 text**

**Article 10** is printed in the text. Every treaty between contracting states providing for the transfer of territory shall include provisions designed to secure that no person shall become stateless as a result of transfer.

In the absence of such provisions, a contracting state which acquired territory shall confer its nationality on such persons as would otherwise become stateless.

(paraphrased)

**International Law Commission: Draft Articles on Nationality of Natural Persons in Relation to the Succession of States [1999] page 518 text**

Part II: Provisions Relating to Specific Categories of Succession of States
Articles printed in text.

**Partial Award, Civilian Claims, ...Eritrea's Claims...Ethiopia [2004] page 521 text**

It was an Italian colony, but after the defeat of Italy in the WWII, it was reintegrated into the Ethiopian state. There was a separatist movement.

The commission dealt with the issue of dual-nationals.

**Corporations**
A very important issue
Problems:
- Variety of contacts with different countries → registered, head office, place of business
- Different company laws in different countries to recognize nationality.


Classic case about corporate nationality.
Company incorporated in Canada, operated (expropriated) in Spain through subsidiaries, high percentage (majority) of shareholders are in Belgium. Bankruptcy in Spain and Belgium shareholders (through Belgium) suing Spain for the company.

**Holding:** The court holds that before the headquarters is in Canada, only Canada may espouse their claims to the SH.

**Siege Social Test** – seat or management or centre of control → sounds like genuine link.
- Rejects Nottebolhm test is too difficult. Would have to weigh shareholders and seat of corp against each other.

CP Kelly
So many countries nationals’ are shareholders – will open floodgates if we allow Belgium to do this. We will find a solution by saying the siege social is in Canada.
Problems with the restrictive definition: Can we use the same test for subsidiary corporations?

In determining the nationality of a corp. for the purpose of diplomatic espousal of claims a genuine link test should be applied. (and not just the passport – ie center of gravity, where do they vote, etc. Linked question: why should there be a difference b/n a person and a corporation. Note that genuine link as opposed to formalistic link in the Barcelona Traction case).

The court changed position. ELSI claimed that Italy had expropriated its subsidiary. The court found it didn't expropriate but imposed regulatory rules. Italian Co the wholly owed subsidiary of 2 US companies. Assets of co were requisitioned…Q whether that was a violation of Italy’s int’l obligations to the U.S. under a treaty giving their companies the right to control and manage corporations in the other country.
Here we see the emergence of the more flexible conception of corporate nationality.
Treaty of friendship, navigation and commerce under which the claim is being espoused.
- Dealing with subsidiary: rights of the subsidiary were not breached by what Italy did – skips issue of standing.
  Basically that there was nothing stopping the treaty from allowing the US to espouse its national’s interest as shareholders in the Italian company.

This Q was addressed in Barcelona Case. Sure the US companies could “control and manage” Italian corporations but that gives them no additional rights then other shareholders under Italian law.
- Should it not just have dismissed the case on standing issue? Why did it avoid it? Ok, so maybe they did grant standing – then is this inconsistent with Barcelona.

**Int'l Convention on Settling of Investment Disputes: ICSID page 537 text**
With the explosion of bilateral investment treaties and increasing ratification of this convention, There has been significant number of cases brought under ICSID.
Note: you can't go to the ICSID tribunal to bring a case against your own state.

**14. State Jurisdiction over Persons**
Issue here is co-existence with other states. Extra-territorial effect on nationals might infringe on sovereignty rights of other states. Therefore, there must be limits to a state’s jurisdiction over persons from a legislative and enforcement perspective.
- Note the difference b/n prescriptive and enforcement jurisdiction – can prescribe law but that does not mean it can be enforced.

You cannot legislate or enforce your laws in a way that would violate the laws of other states. Enforcement of your laws in another territory would cause problems of sovereignty.

**Subject Matter Jurisdiction**

**1. Scope of Jurisdiction**
In principle, a state may legislate over the subject matter of anything within its territory (as long as it is not in violation of international law)
- Jurisdiction of national courts cannot be conferred by the sovereign when he has no jurisdiction according to principles of international law.
- In Civil matters, no conventional or CIL rules governing other than must apply rules of private international law where applicable

A state can exercise jurisdiction over a person, object, or type of activity. When it comes to objects, and we're dealing with real property, then it can't be moved to another state. But, other forms (IP, etc) the issues become more complex.
Persons can move from one territory to another. Issues arise. The exercise of jurisdiction based on nationality/citizenship is a principle that emerged in the civil law tradition.

CP Kelly
Fall 2008

Criminal law will only extend to Canada on a territorial basis except for when there are specific exceptions.

**Scope of jurisdiction: the basic distinction is:**

- **Civil** – a broad basis for jurisdiction except for some minor exceptions (the case about embassies)
- **Criminal** – the means by which a sovereign state imposes its will on its citizens and those who are present on its territory

Canadian courts will never apply the criminal law of foreign states.

The ease of movement across boundaries is why citizenship and nationality is so important to the continental tradition.

<table>
<thead>
<tr>
<th>The Steamship Lotus: France v. Turkey [1927] PCIJ page 550 text</th>
</tr>
</thead>
<tbody>
<tr>
<td>The height of a laissez-faire approach to sovereignty. States could do whatever they wanted.</td>
</tr>
<tr>
<td>Post a collision on the high seas, Turkish authorities arrested M. Demons, officer of the watch, tried and convicted Demons for deaths of eight Turkish sailors and passengers.</td>
</tr>
<tr>
<td>The question was whether the French captain could be prosecuted for negligence in Turkey. The court answered the question by adopting the view that int'l law is fundamentally permissive. Absent a specific restriction, Turkey had the right to extend its legislation such that the captain of the French captain could be arrested.</td>
</tr>
<tr>
<td><strong>This is no longer permissible.</strong></td>
</tr>
<tr>
<td>The current state of the law: article 97 of the UN Convention on the Law of the Sea</td>
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</table>

**2. Basis of Criminal Jurisdiction**

6 Bases upon which claims to prescriptive or enforcement jurisdiction may be founded – no hierarchical order but some are universally accepted while others are not.

1. **Territorial Principle**
   - The state in whose territory a crime is committed has jurisdiction over the offence
   - Includes land mass, internal waters and their beds, territorial sea and its subsoil, airspace above all of the former
   - Can be extended to 200 nautical mile EEZ
   - Territoriality can be partially an extra-territorial basis for jurisdiction
   - I.e. wrongful act has effect on the territory, even if it did not occur there
   - Five possible different applications of this:
     - **Subjective or initiatory Principle:** act deemed to have been committed in the place where it commenced.
     - **Objective or Terminatory Principle:** state were act is consummated or the last constituent element of the offence occurs has jurisdiction
     - **Injured Forum Theory:** state that felt detrimental effects takes jurisdiction
     - **Diplock’s Theory in Treacy – Any Element theory: any element** of the offence occurs w/in state’s borders
     - **Reasonable and Legit Interest:** Where state has reasonable or legitimate interest in doing so compared with other states involved.
       - In *Libman* SCC took approach where significant portion of the activities took place in Canada. → **Real and Substantial Link Test**

2. **Nationality principle**
   - Based on nationality of the author of the crime – used extensively in civil law countries.
   - This is the model of French, Turkish, continental law…
   - The problem arises when the act is not prohibited in the country where it is carried out
     - These crimes are still prosecutable, unless there is some rule of international public order that would prohibit this
   - There has been a reemergence of this principle, even in states that don’t normally accept this approach → ex. Child Prostitution (sex-tourism)
   - the nationality principle is not contrary to international law, so Canada is free to change the criminal code to make more crimes illegal by Can citizens

CP Kelly
- But, as of now, if you commit a murder on a row-boat on the high seas, you cannot be charged under Canadian criminal law
- Corollary to the reluctance to extradite citizens or nationals.
- The principle is not restrictive and not permissive.

3. Passive personality principle
   - A state may claim jurisdiction over crimes committed abroad even by aliens, against its nationals.
   - This principle is not as well accepted in international law
   - This is essentially the state controlling the behaviors of the nationals of other states – this is a problem!
   - So, the provision in the Turkish Crim code in the Lotus case may actually be a problem
   - Terrorist acts has generated extensions of criminal jurisdiction on the basis of nationality of the victims: the US has jurisdiction over terrorist acts committed against US citizens abroad (traditionally US only stuck the territorial principle)

4. Principle of Protection:
   - Behaviour abroad by foreigners threatens the security of the state or its fundamental interests
   - Broad principle.
   - E.G. Spanish Trawlers on the high seas.
   - Ex. Counterfeiting abroad – if you print US dollars in Yemen with no intent to circulate them in the US, you still are offending US interests
   - Ex. Plots to organize illegal immigration to another country
   - There have been challenges to this idea
   - Ex. Singaporean law has libel laws that apply extra-territorially the NY times published an article about the president of Singapore very controversial attempt to regulate free speech of foreigners in another country
   - However, terrorism is being seen as a new ground for asserting this time of jurisdiction (i.e. planning a terrorist attack abroad)

5. Universal Jurisdiction:
   - Erga omnes obligations Based on the crime
   - Some crimes the whole world has an interest in stopping:
   - Slavery, piracy, crimes against humanity, genocide, etc.
   - This used to be the most significant area of extra-territorial jurisdiction
   - A # of treaties grant extra-territorial jurisdiction (Convention against torture)
   - The recent shift is towards international criminal tribunals
   - Recent Rwandese case prosecuting for war crimes in Canada.

6. By Agreement
   - E.g. 1985 Visiting Forces Act – Agreement b/n US and Canada which allows US to exercise jurisdiction over military personnel who are on bases on Canadian Territory.

<table>
<thead>
<tr>
<th>Territorial Principle</th>
<th>Where the crime occurred is the State that has J. (has been extended in some cases for functional reasons to the EEZ and the CS). This is Canada’s basic position. (What do we mean by occurrence?? Not easy to always say where the crime occurred? In Canada we assume J if the offence were committed in whole or in part in Canada, or if the offender committed it elsewhere knowing it would cause direct and substantial harmful effects in Canada.) There is also Lord Diplock’s Any Element Principle and lastly the Reasonable and Legitimate Interests Test which was used in the Libman Case.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Nationality Principle</td>
<td>Basis of J the nationality of the offender. Used extensively in CVL countries. (used by Canada for cases of treason, war crimes, crimes against humanity and terrorist offences).</td>
</tr>
<tr>
<td>Passive Personality</td>
<td>AKA the System of Protection. Where J is claimed based on the nationality of the victim</td>
</tr>
</tbody>
</table>

CP Kelly
<table>
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<tr>
<th>Principle</th>
<th>regardless of the offender’s nationality or the place of the crime. (is this what Spain has done against US soldiers for death of Spanish reporter in Irak?) It is largely condemned. (used by Canada when victim is an int’l protected persons representing Canada and victim to war crime, humanity crimes or hostage-taking).</th>
</tr>
</thead>
<tbody>
<tr>
<td>Protective Principle</td>
<td>J is based on the prejudice a State may suffer to its security, territorial integrity and political independence by the offence. Not favoured by Canada.</td>
</tr>
<tr>
<td>Universal Principle</td>
<td>For serious crimes of int’l relevance which other states are unwilling to prosecute and where the offender is on the territory of the forum state.</td>
</tr>
<tr>
<td>By Agreement</td>
<td>J of one state within the territory of another state may be granted by agreement.</td>
</tr>
</tbody>
</table>

**Libman v. The Queen [1985] SCC page 561 text**
Libman operated a boiler room in Toronto; would call Americans to invest in a mining operation in Costa Rica. The $ would be shipped to Costa Rica, it would be deposited in off-shore accounts. Libman is charged with fraud and conspiracy to commit fraud. There was no jurisdiction to prosecute him because the crime happened outside of Canada.

**Issue:** Is there jurisdiction to prosecute in Canada? **Holding:** Yes.
- As a basic principle, Canadian crim law does not try to apply extra territorially → Unlike Turkish law which binds the actions of all its citizens, whether at home or abroad, Anglo-American states in general attempt to refrain from extra-territorial jurisdiction
- Libman argued that b/c the execution involved victims in the US sending $ to Costa Rica, the essential crime (fraud) actually happened in the US
- La Forest J – 2 elements – territorial connection; or effect of crime is connected to Canadian territory
- Court found planning the fraud was enough of a territorial connection to prosecute him in Canada
There must be a real & substantial link between the offense and the country
If in the age of call centers one was to draw a rigid test of territoriality, then as the court says, every crime would be “here and there and nowhere at the same time”.
**Note:** He was charged under s.465 (3)(4) of the criminal code.

**Assertion of Extraterritorial Jurisdiction page 567 text**
In Canada we have the Arctic Waters Pollution Act. It regulates conduct beyond the continental shelf.
- This is the same jurisdiction that the US uses for anti-trust law (usually to protect their own companies)
- Trusts may occur abroad, but the effect is felt in the US so this is enough
- Perhaps jurisdiction not given to the US b/c he would continue to forum shopping by putting forward the same arguments – therefore practical considerations.

**Scope of Universal Jurisdiction**
Generally applies to international crimes. See crime below:

**R v. Bow Street Magistrate, ex parte Pinochet (no. 3) [2001] Chile**
An interesting discussion of Universal Jurisdiction. Spanish president wants his extradition when he goes to the UK for medical treatment. The UK allowed him to come; he came in a private capacity.
Torture is an international crime. British can choose to prosecute or extradite.
Note: know the Convention Against Torture. “Extradite or prosecute” is very important.

The HoL opinion: Millet J:
These crimes attract universal jurisdiction if 2 criterion are satisfied:
1) They must be contrary to a peremptory norm of int’l law so as to infringe a jus cogens.
2) It must be so serious ... that it can be seen as an attack on the int'l legal order.

The Belgian legislation on the other hand, did not require the presence of the accused: if you take presence out, you have a global court. This is loosely called “universal jurisdiction in absentia”

**Case Concerning the Arrest Warrant of April 11, 2000: Yerodia Case, Congo v. Belgium [2002] ICJ page 584 text**

CP Kelly
See this time, the law has retreated further and further until it is effectively gutted. At the time though: what is the problem? ...what good is a foreign minister if he has to stay at home? Congo brings a case about Belgium because they issued a universal arrest warrant. (Effectively making their foreign minister stay home). Next argument (the one that prevails): immunity. Int'l law respects the immunity of the foreign minister to the point where it is not possible to conduct int'l affairs if one court can indict the foreign minister of another state.

**Note: immunity not impunity. The immunity only lasts while you occupy the office.**

If you allow states to start indicting each other's foreign ministers, then, all of a sudden arrest warrants will proliferate.

### Suppression of Trans-National Crimes of International Concern page 589 text
Ex – Bribery, Terrorism. These are not int'l crimes as such. There is no exercise of universal jurisdiction. If someone commits a terrorist act and it’s not a war crime or crime against humanity, it's different...

**Terrorism**
- States are under an obligation to adopt criminal laws to stop these activities.
- Art 8 calls for, if state does not extradite, shall be obliged to submit the case for prosecution.

### International Convention for the Suppression of Terrorist Bombings [1997] UN page 591 text

<table>
<thead>
<tr>
<th>Purpose: This convention was adopted to remedy a gap in the piecemeal conventions. There was nothing to deal with terrorist bombings that were not associated with any other terrorist convention crimes.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Art. 4 Each State is to adopt criminal offences punishable by appropriate penalties in their domestic law. Different punishments for each State. Why? Any why hasn’t Canada implemented the treaty yet despite this article requiring it?</td>
</tr>
<tr>
<td>Art. 6 The basis of jurisdiction, both mandatory (committed in the territory on a flag-ship, or by a national) and optional (committed against a national, against a State or gov’t facility, by a stateless person who has residence etc.).</td>
</tr>
<tr>
<td>Art. 8 Mandatory requirement to extradite or prosecute without undue delay.</td>
</tr>
<tr>
<td>Art. 11 States that none of the offences in art. 2 are to be regarded as political offences or inspired by political motives for the purpose of extradition or mutual legal assistance….however….art.12….</td>
</tr>
<tr>
<td>Art.12 This eliminates any obligation to extradite or afford mutual legal assistance where the person will be prosecuted or punished on account of race, religion, nationality, ethic origin, or political opinion.</td>
</tr>
</tbody>
</table>

### Jurisdiction over the Person

**Exercising Extra-Territorial Jurisdiction: With State Consent**
- Accomplished by extradition treaties
  - These are bilateral matters – states can put whatever they want in them (limited by HR law & jus cogens norms)
  - Extradition proceedings under the law who has the person.
  - Note that extradition is different in concept to transfer to international criminal tribunals (est under Chapter 7 of the UN) which is different than an extradition to another state
- 2 essential elements:
  - Double criminality – it has to be an offense in the state requesting extradition & the state where they are
  - Speciality – a person is extradited on the basis of an allegation regarding a certain crime (can’t request extradition on the basis of assault and then prosecute them for political offenses)
- **Outside of the framework of an extradition treaty, there is no legitimate way to extradite**
  - Exception: *Aut dedere, aut judicature*
    - “either you give, or you judge” “Extradite or prosecute” rule→ states have to extradite, or prosecute the person themselves for major international crimes (eg. torture, hijacking, etc.)
    - ex. Geneva Conventions, 1949 and Montreal Convention (aircraft security)
    - but if no one is willing to prosecute the person, they will remain free.

CP Kelly
In these cases, Convention Against Torture (or other conventions dealing with similar subjects) acts as replacement for extradition treaty.

Exercising Extra-Territorial Jurisdiction: Without State Consent
- 2 ways this can happen:
  - **forcible abduction**
    - direct if done by state agents
    - indirect if non-state agents do it
  - induce criminal to come onto your territory
    - usually you get a plane to stop on your territory where you have a warrant
  - both have been used by USA
- Alvarez overturns Toscanino – since it is the US Supreme court
  - 1st approach: we don’t care how they got here, but once they are here they may be judged
    - “male captus, bene detentus”
    - this predates the rise of human rights standards

Abduction from a Foreign State
Abduction is always unlawful as it negates conceptions of due process. At least with respect to your arrest

S.A. Williams, “Conviction After Unlawful Arrest” page 599 text
“A government should set an example to its people and if it is known to be breaking the law in order to secure criminal convictions what hope is there for society in general?”


**Facts:** US kidnapped A-M in Mexico, and indicted him for the murder of a DEA agent in Mexico. Machain was a doctor accused of keeping a DEA agent alive while others tortured him. He alleged he had been brought to the USA in violation of due process guarantees

**Issue:** Can the US legally prosecute someone brought to the country illegally?

**Held:** Yes.

**Reasoning:**
- lower courts upheld motion to dismiss the indictment and repatriate A-M.
- court holds that abduction for an nation with an extradition treaty does not provide a defense, and the US courts are competent to try the case
- this treaty does not exclude other means of acquiring defendants beside extradition → **treaty was not violated**
- Because the abduction didn’t violate the treaty, the Ker-Frisbie rule applies—regardless of violation of IL
- **principle of “male captus, bene detentus” is valid**
- Distinguished from Ker v. Illinois b/c they were bounty hunters.

**Dissent:**
- UD violated territorial integrity of Mexico, and thereby undermined the purposes of the treaty.
- treaty was designed to cover the entire subject of extradition
- if the treaty did not prohibit kidnapping, it would be mere verbiage
- there is no justification for disregarding the rule of law

**Note:** Eichmann Case (1961)
**Facts:** Eichmann, a Nazi, fled to Argentina & was captured (kidnapped) by un-official Israeli agents. Brought to Israel & tried for crimes against humanity

**Notes:**
- Basis of jurisdiction → *erga omnes* – universal jurisdiction over the crime significant
- However, it is dubious that these were crimes at the time of criminal law
- It created crimes after the fact (against non-retroactivity of crim law) – this is a troubling aspect of the Nuremberg trials
- Second basis – national of victims – but during the war Israel didn’t exist so they didn’t really have Israeli nationality
- The court found it was there was a nexus between the Israeli state and the Jewish people which justified the jurisdiction on the basis of the protective principle (and that it could be applied to a ‘people’)
- Much of the norms we have today were developed after WWII; specifically to enable the int’l community to prosecute people like Eichmann
- It would have made a lot more sense to prosecute him in Germany or Poland on territoriality principles
- it is a significant challenge to have a fully justified explanation of Israel’s position in international law

Prosecutor v. Dragan Nikolic [2003] ICTY page 607 text
The accused was indicted by the International Tribunal for crimes against humanity and war crimes on Nov 1, 94. This appeal concerned the alleged illegal arrest and abduction of the accused from Serbia and Montenegro by unknown individuals and his transfer to Bosnia and Herzegovina, where he was arrested by SFOR on or about April 20, 2002 and subsequently taken to The Hague...
The Court: “Although the assessment of the seriousness of the human rights violations depends on the circumstances of each case and cannot be made in abstracto, certain human rights violations are of such a serious nature that they require that the exercise of jurisdiction be declined.”

Other Possible Remedies For the Individual
- Take into consideration when sentencing. Reduce sentence for accused.
- Could the official who “kidnapped” the individ be tried.
- Possible civil remedy – trespass on the person, battery?? Consider amount of money a police officer would have.

Basic idea is Proportionality
Remedy must be proportionate to the crime of which he is accused.

Question
2. The punishment of it international crimes is so compelling that illegal rendition should never be a bar to prosecution.
- Can abduction ever be lawful? No – it negates due process

A review of this material suggests that the subject of illegally obtained J over a person should be seen as a last option. Due process is negated by abduction and therefore there is a strong argument against it. At the end of the day what matters is the question of proportionality…
1st What should be the legal consequences attached to abduction?
- Related to the degree of violations in due process?
- Related to the type of crime?
- Related to the strength of the claim of J over the individual?

i.e. Eichmann….does it matter if Argentina was refusing to extradite him, frustrating any attempts to legally obtain J over him? Does it matter that the crimes were against humanity? Does it matter that they were committed against persons whom Israel was claiming J over under the protective and passive personality principles?

2nd What are the remedies for a violation? (▲Distinction b/t rights of the individual and rights of the offended state!)
- Release of the offender?
- Criminal charges brought against state for kidnapping?
- Civil charges brought against the state for trespass of the person?
- Official apology to the offended state for having violated their territorial sovereignty?

Does the Cdn Charter have any impact on the rule *mala captus bene detentus*?

CP Kelly
In 1973 Canada applied the rule with a small dose of concern for due process and civil rights of the accused. To date there has been no case on this point.

15. International Criminal Law

Evolved alongside international humanitarian law (a.k.a law of armed conflict)
Reflects 1) The penal aspects of international law 2) The international aspects of criminal law

**Crimes of transnational character** = common domestic crimes with constituent elements in more than one state that require international cooperation to prosecute or punish.

**International Crimes** = Offenses that are prescribed at customary and/or conventional international law.

**Examples of International Criminal Conduct:**
crimes against peace; war crimes; crimes against humanity; apartheid; genocide; torture; international terrorist acts; international traffic in narcotics and psychotropic substances.

When there was no permanent International Criminal Court there was:

*Ad hoc tribunals and mixed national/international tribunals*
such as the International Military Tribunals established after WWII in Nuremberg and Tokyo, and the *ad hoc* International Criminal Tribunals for the former Yugoslavia and Rwanda, etc.

and

**Prosecution in domestic criminal courts**

*aut dedere, aut judicare* – the obligation to extradite or to submit the accused to prosecution.

Note: You can't invoke customary law in domestic criminal courts. You can only prosecute under implemented legislation. (This is due to the principle of legality)

Development of International Criminal Law

Note: the Kellogg-Briand pact of 1928 (a.k.a the Pact of Paris) was an international treaty “providing for the renunciation of war as an instrument of national policy.” It wasn't widely ratified and failed in its purpose, but was significant for later developments of int'l law.

**Individual Responsibility After WWII**

The London Agreement [1945] page 729 Text

An agreement by the UK, US, France, and USSR for the prosecution and punishment of the major war criminals of the European axis (pursuant to the *Moscow Declaration* of 1943)

Nazi Germany was likely to be defeated: the Soviet Union indicated their intention to prosecute the top Nazi leaders. *Surfacing the truth was an important part of it.* This lead to the *International Military Tribunal* in Nuremberg. The basis was the capitulation of Germany.

(Later, 19 governments of the UN adhered to the agreement)

**Article 2** - “the constitution, jurisdiction and functions of the IMT shall be those set out in the Charter annexed to this agreement, which Charter shall form an integral part of this Agreement...”

see Charter below

The Nuremberg Charter [1945] Charter of the IMT page 729 Text

The Tribunal...shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the following crimes. (see page 730) *crimes against peace, war crimes, crimes against humanity.*

“crimes against peace” was revolutionary.

**Articles 7, 8, 9** → issues of group culpability. “just following orders” is not a sufficient defense.
### Nuremberg War Crimes Trials [1947] page 731 Text

22 defendants, the major war criminals whose crimes had no exact geographical location, were indicted before the IMT established at Nuremberg pursuant to an agreement between France, the UK, the US, the USSR and 19 other adherents. The defendants were charged with crimes against peace, war crimes, and crimes against humanity. They were also charged with participating in the formulation or execution of a common plan or conspiring to commit all these crimes.

This was the first time an int'l tribunal imposed individual liability.” Crimes are committed by men”. We can't reduce int'l law to the extraction of the sovereign state. It is a collection of individuals.

There was no treaty or customary norm available to the International Military Tribunal. So, the (least trusted) source of int'l law was evoked: general principles of law.

The tribunal said theirs was not “an arbitrary exercise of power on the part of the victorious nations, but...the expression of international law existing at the time of its creation.”

### International Humanitarian Law

Crimes against humanity are not linked with armed conflict. So, there is some ambiguity where domestic law begins. It's the widespread and systematic nature that makes is an int'l crime. It's purely a factor of scale and gravity. There's no way to identify it with any exactitude.

Note: International humanitarian law or war is more established than human rights law is. See page 734 for a list of int'l humanitarian law developments after the Nuremberg Tribunals.


**Geneva law**: relates to those in the hands of a belligerent (prisoners of war, sick and wounded, civilians). These are situations where you have exercised control over individuals or territory.

**Hague law** refers to the means and methods of war: what kind of weapons and attacks are permissible. Under which circumstances you can kill. Some would say that attempts to regulate war is futile as it is the absence of law.

**Means of warfare**: chemical weapons are prohibited all around.

**Methods of combat**: you cannot deliberately attack civilians or civilian objects (hospitals or schools)

Dual-use objects: if there is a hospital with an artillery position on top, you can fire back. However, there is still the requirement of proportionality. (you can't kill one sniper with a huge bomb)

### Geneva Convention IV [1949] (Civilians) page 737 Text **very important**

Applies to all cases of declared war or of any other armed conflict which may arise between two or more contracting states, even if the state of war is not recognized by one of them.

**Important Articles**

- **article 4**: nationals
- **article 27**: treatment of protected persons
- **article 146**: duties of contracting states vis-a-vis grave breaches of the convention. **Obligates them to prosecute people who have committed war crimes**
- **article 147**: definition of grave breaches

**Jus ad bellum** – “justice to war” a set of criteria that are consulted before engaging in war.

**Jus in bello** – “laws of war” the laws of warfare; concerns whether a war is conducted justly.

### Protocol I of the 1945 Geneva Conventions [1977] page 738 Text

Merged the Hague law and the Geneva law. It included national liberation movements under the description of armed conflicts.

A number of articles are printed.

CP Kelly
Applies to armed conflicts of a non-international character. (civil war)
**exam alert: Why would states be reluctant to invoke common article 3 in situations of civil war? To protect their sovereignty. And, because in a state of armed conflict, you can kill lawfully. If your soldiers are murdered, it would not be a crime under int'l law. That's why they're reluctant to invoke it.

Terrorism: a broad concept. It can be a suicide bomber in a situation that is not an armed conflict and it can involve Taliban insurgents against Canadian soldiers in what would be conventional war.

Unlawful combatants: if someone is a combatant and kills a Canadian soldier in Afghanistan, they are not committing a war crime. But, if they are part of a terrorist group, then they do not have the right to kill with impunity.
One of the central challenges: How can terrorism be re-configured in response to the different circumstances in which it can occur? When is it a crime and when is it an attack against legitimate targets?
The Supreme Court of the US has held that under the Geneva conventions there is no legal black hole. The question of if the terrorism is a combatant or not is to be declared by an impartial tribunal.

Protocol II to the 1949 Geneva Conventions [1977] UNTS page 742 text
“This protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts…”
See article 4: “all persons who did not take direct part…are entitled to respect for their person…”

Multilateral Conventions Specifying International Crimes
A number of treaties are listed in chapter 9, section A: “State Jurisdiction Over Persons: Suppression of Transnational Crime”

An example of a treaty beyond the Geneva Conventions. See Article 2 for definition
What is the distinction between genocide and a hate crime? → for genocide there has to be an attempt to exterminate a substantial number of the race. Does it matter if it's a group of 500 v. a group of 10,000?
Genocide has become the ultimate crime in the popular imagination.

Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment [1984] UNTS page 745 Text
Another example of a treaty beyond the Geneva Conventions
Convention against torture is significant not so much for criminalizing it (it is under customary law) but because of article 3 on page 746: an important principle.

Another example of a treaty beyond the Geneva Conventions
Article 16: Crimes of Aggression
An individual who, as leader or organizer, actively participates in or orders the planning, preparation, initiation or waging of aggression committed by a State shall be responsible for a crime of aggression.

Prosecution in the Ad Hoc International Tribunals
The atrocities committed in the territory of former Yugoslavia and in Rwanda in the 90s called for immediate action on an ad hoc basis. The extracts that follow demonstrate how the two Tribunals were established by the UN Security Council and give a sampling of some of the cases.

Charter of the UN articles 39, 41, 42

CP Kelly
The Ad Hoc International Criminal Tribunal for the Former Yugoslavia
90s → the establishment of the Yugoslav tribunal. Basis for the tribunal is Chapter 7 of the UN Charter.
There was no requirement of specific consent on the part of Yugoslavia. This was a radically different model of int'l criminal justice as compared to Nuremberg.

- Under UNC arts 39, 41 and 42 it set up tribunals and other sanctions
- Based on Resolution 827 of the Security Council under Chapter VII of the UNC, Tribunal was set up to deal with
  - Art 2: Grave breaches of Geneva Conventions
  - Art 3: (Hague law)Violations of laws or customs of war
  - Art 4: Genocide
  - Art 5: Crimes Against Humanity
- Chapter VII allows for the SC to take enforcement measures (whereas the GA cannot – it can only make recommendations)
  - Typical enforcement measures – Authorization of force, arms embargo, blockade, etc.
  - SC was seen as the pivot of the collective security system
- Judges elected by the GA from list submitted by the SC from nominations from members and non-members with permanent observer missions at the UN.
- Prosecutor’s staff appointed by the SC on recommendation from the prosecutor
- Imprisonment is limitation of punishment but property can be ordered returned to rightful owners.

About the former Yugoslavia.

What are the objectives of these tribunals?
Retribution? On the ground this appears to be the most valid objective.

Deterrence? Can really question whether or not these deter future actions. There is the argument of “General Prevention” which claims that the goal of the tribunals isn’t so much to deter (b/c of the irrationality that can create the crime itself) but focuses more on the subliminal messages the tribunals send about crime → corruption, child abuse, etc. is all wrong!

Incapacitation? This makes sense based on the context in which these mass atrocities are usually instigated by cold, calculating persons who are better incapacitated.

Why use the SC to establish a War Crimes Tribunal
- It was quicker to do this.
- International community refusal to intervene militarily – so they set up tribunal.
- Only after WWII did we stay the hand of vengeance and put people on trial…but…victor’s justice – allies not put on trial.
- ICTY puts everyone from all sides on trial…..but not going to intervene. Punishment only after the fact. Accepting crimes on the ground and then punishing.

Is it really good enough that we just impose victor’s justice on the criminals after the fact rather than intervening? Well no but it might be better than nothing.
- Examine deterrence in both the domestic context and the context of international
- General deterrence through and socio-pedagogical element of the criminal justice system (teach society). Subliminal inhibitions against crime.
- Incapacitation – appreciate the context of massive prosecution. Understand the genocides as criminal conspiracies. Nothing inevitable about genocide.

Significance of ICTY (International Criminal Tribunal for the Former Yugoslavia)

CP Kelly
Imposed criminal jurisdiction on states without their consent. It was revolutionary concept. Problem with having a treaty is that the former yugo would not consent to a treaty when its own head of state would probably be prosecuted.

Reason that it was successful was b/c there was understanding that you could not let perpetrators walk around free and still have peace and stability – HR, touchy feely combined with real politque.

Extract #1, Relevance – ▲How valid is this source of power in Chapter VII of the Charter to establish the ad hoc tribunals? Demonstrates that the ICTFY was property established and had subject-matter J.

**Prosecutor v. Dusko Tadic [1995] page 754 Text**
The first extract from the judgment of the Trial Chamber demonstrates that the ICTY was properly established and has subject-matter jurisdiction.

- Based on decisions in the Lockerbie case, Namibia Advisory Opinion and another case, there seems to be no basis for the tribunal to review the actions of the SC.
- Reference to economic etc in Chapter VII is merely demonstrative and not exhaustive.
- Not for this trial chamber to judge the reasonableness of the acts of SC, it is without doubt that with respect to the former Yugo the SC did not act arbitrarily
- Conscious decision not to have judicial review of the SC.
- Not a justiciable issue but one of policy and of a political nature.
- Art 41 of the UNC is clearly suited to this action and this situation is clearly suited to adjudication. This is not an eg of the UNSC doing anything it wants.

To argument that this tribunal could not be impartial as it was set up by a political body – but this happens world-wide

**Prosecutor v. Dusko Tadic [1995] page 759 Text**
This extract of the judgment discusses the applicability of the “grave breaches” provisions of the Geneva Conventions 1949.

- Interpreting article 2 of the Tribunal’s statute which deals with grave breaches of Geneva conventions as dealing only with **international armed conflict** is correct – Provisions in this article do not include those persons or property coming within the purview of common Art 3 of the four conventions (which deals with internal armed conflict)
- Statement by permanent member of the SC that art 2 is not limited to armed conflicts is nothing but an opinion and, with time and other opinions, could signify a change in *opinio juris* leading to a change in CIL.

**Prosecutor v. Delalic, Mucic, Delic, & Landzo [1999] ICTY page 763 Text**
This case speaks of command responsibility. It's fundamental for the implementation of the laws of war. It makes the commander responsible for the behavior of his or her subordinates.

Celebici was a prison camp where the four accused were stationed. Delalic was the commander. All four were charged under art 7(1) of the Statute (for murder, torture, rape and other horrible things) and Mucic and Delalic were also charged b/c of his responsibility as commander, causing great suffering, plunder of private property

**Holding: All are guilty**
This must be regarded as an international conflict as external forces were involved in internal conflicts (most especially the forces of the JNA) Therefore, Geneva conventions apply and statute of Tribunal is applicable.

Despicable acts performed by these men in positions of power are disturbing

**Notion of Command Responsibility**
How do you attribute responsibility?
- What about a case where there is no direct involvement but you were there.
- Elaborate comparative law exercise to import from other jurisdictions.
- Look to *Art 28 of the ICC statute* – person in position of command has:  

CP Kelly
Command and control (*de jure* or *de facto*) over subordinates - Subordinates have committed or are about to commit crimes
Knew or had reasons to know that persons under command or control were about to commit or had committed
Failure to act to prevent or to punish.

**The Ad Hoc International Criminal Tribunal for Rwanda**

What was the legal basis for the jurisdiction? -- The Security Council by virtue of its chapter 7 powers.

Enforcement powers

*After the genocide was all finished, at the request of the Rwandan non-permanent member of the SC, ad hoc tribunal was set up.*

- Akhavan – would never have been set up without ICTY – there was European and more likely to happen.
- B/c it was an internal conflict, crimes that could be prosecuted were limited to:
  - Genocide,
  - Crimes against Humanity
  - Violations of Art 3 common to the Geneva Conventions (SC just put common art 3 into the statute despite office of legal affairs.
  - Note: no grave breaches b/c not international armed conflict.
- No armed conflict but can pursue whenever committed as part of a widespread or systematic attack against any civilian population
- Note Rwanda actually voted against resolution 955 as it disagreed with a few things including Rwandese control and lack of death penalty.

For Akavan the only reason the ICTR existed is because of the precedent of the ICTY which only existed because the crimes were being committed against Europeans


Regarding the ICTR.

Genocide, Crimes Against Humanity, and Violations of Common Article 3

**Prosecutor v. Akayesu [1998] ICTR page 769 Text**

**Facts:** The accused was elected bourgmestre of Taba commune in 93 and held that position until June 94. He was indicted with 15 counts relating to genocide, crimes against humanity, and violations of common article 3. The Tribunal noted that the bourgmestre in Rwanda traditionally had extensive powers. This is the first full trial of an accused for genocide.

**Issue:** Is Akayesu guilty of genocide, inciting genocide and violations of art 3 common to conventions?

**Holding:** Yes on crimes against humanity, genocide and inciting genocide but not on art 3.

- Special intent (second mens rea) had be proven. Equation of all tutsis with infiltrators satisfied that requirement. Intent was inferred from the circumstances – every man, woman and child was killed without exception.
- Killing had specific objective – to eliminate the Tutsi not b/c they were members of the RPF but b/c they were Tutsi.
- Fact that genocide occurred while the RPF and RAF were in conflict cannot be mitigating circumstance.
- Note that for this to be genocide (a convention which Rwanda accepted by legislative decree in 1975) the crime must not be committed against an individual(s) b/c his is an individual but b/c he is a member of a group.
- All rapes were committed against Tutsi women with intent to kill afterwards
- Accused repeatedly made statements calling for the commission of genocide.

Prosecution failed to prove BRD that he was a member of the armed forces and that he was duly mandated to support and carry out the war effort.

**International Criminal Law Con’t**

**Note:** if you sign the UN Charter, you've signed the statute of the ICJ.

CP Kelly
The International Criminal Court
On July 17, 1998, in Rome, the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an ICC adopted the Statute of the ICC.

Rome Statute of the International Criminal Court [1998] page 776 Text ** important

Preamble:
** Part I: Establishment of the Court**
It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern...
...goes on to address the relationship of the court with the UN, the Seat of the Court (the Hague), and the Legal Status and Powers of the Court.

** Part II: Jurisdiction, Admissibility, and Applicable Law**
Crimes against humanity have evolved: no more requirements for armed conflict.
How many victims do you need? You can't approach this with mathematical exactitude. When is it an ordinary crime and when is it a crime against humanity?

Basis for jurisdiction
- Controversy.
- Germany said universal jurisdiction. US didn't like.
- Compromise was that territorial state or state of nationality gives jurisdiction. US didn’t like. Wanted it to be both territorial state AND state of the national.
- US has solved problem by Status of Forces agreements.
- Referral of the Security Council was another basis for jurisdiction.

** Means for triggering jurisdiction**
- State referral – art 14 of the ICC statute. [Problem is that only political interest will bring about this]
- Security Council referral (art 13b). They can refer under Chapter VII. Only basis in cases like Sudan where state is the actor and has not ratified statute.
- Prosecutor acting *proprio motu* – initiative of the prosecutor. Matter of controversy. Practically constrained as, without peace keepers or state help, how are you going to conduct investigation.

Art 17 of the ICC statute ⇒ There is no primacy of the ICC. Notion is one of Complementarity with national courts.
Only when national courts are unwilling or unable
- Unable – judicial system collapsed. Many majestrates were tutsi and had been killed, etc.

**Problem:** Would it not better to invest in capacity building and build up the judicial system

** Part III: General Principles of Criminal Law**

** Part IV: Composition and Administration of the Court**

** Part V: Investigation and Prosecution**

** Part VI: The Trial**

** Part IX: International Cooperation and Judicial Assistance**

** Part XI: Assembly of States Parties**

** Williams, S. “Core Crimes in the Rome Statute” page 801 text**

CP Kelly
“The negotiations on the crimes listed in article 5 were among some of the most delicate issues at the Rome Conference.”

Member states shall take no action inconsistent with paragraph 1 and with their international obligations.

Sudan and Darfur

National Prosecution of International Crimes
Under some international crime-creating treaties, like the Convention against Torture, states have a duty to extradite or prosecute a suspect they are able to detain.

With the establishment of the ICC, states have not lost the right to prosecute international criminals because the ICC has only complementary jurisdiction, but they have acquired considerable extra responsibilities under the Rome Statute, especially Part 9, to assist the ICC.

Eichmann Case [1961] Israeli Supreme Court page 809 Text
The Israeli Supreme Court, sitting as a court of criminal appeal on May 29, 1962, dismissed an appeal by Adolf Eichmann from the judgment and sentence of the District Court. Eichmann had been abducted in 1960 from Argentina where he had lived since 1950 under an assumed name. He signed a paper purporting to consent to trial in Israel. He was charged with offenses under the Nazi and Nazi collaborators (punishment) law 1950, inter alia, for his part in the “Final Solution of the Jewish Problem with the intent to exterminate the Jewish People.” The charges included crimes against Jewish people, crimes against humanity, and war crimes...

“It is the universal character of the crime in question which vests in every state the authority to try and punish those who participated in their commission.”

Crimes Against Humanity and War Crimes Act [2001] SCC page 810 Text ***
Implements Canada's obligations under the Rome statute.

Immunity from Arrest and Prosecution?
No individual, even a head of state, is immune from arrest and prosecution for alleged criminal acts by international law before an international court or tribunal.
Note: deportation is easier than prosecution.

R v. Bow Street Magistrate, ex parte Pinochet (No.3) [2000] page 816 Text
Spain requested the UK to extradite Pinochet to face charges involving hostage taking, torture, and murder of numerous individuals. Pinochet claimed immunity from arrest and prosecution.
An interesting discussion of Universal Jurisdiction. Spanish president wants his extradition when he goes to the UK for medical treatment. The UK allowed him to come; he came in a private capacity.
Torture is an international crime. British can choose to prosecute or extradite. They extradited him.
Note: know the Convention Against Torture. “Extradite or prosecute” is very important.

The HoL opinion: Millet J:
These crimes attract universal jurisdiction if 2 criterion are satisfied:
1) They must be contrary to a peremptory norm of int'l law so as to infringe a jus cogens.
2) It must be so serious ... that it can be seen as an attack on the int'l legal order.


CP Kelly
In int’l warrant was issued by the investigating judge in Brussels against Yerodia who was the minister of affairs for the Congo. The warrant was issued in absentia and circulated internationally. Was Belgium’s exercise of universal jurisdiction valid?

See this time, the law has retreated further and further until it is effectively gutted.

At the time though: what is the problem? ....what good is a foreign minister if he has to stay at home? Congo brings a case about Belgium because they issued a universal arrest warrant. (Effectively making their foreign minister stay home). Next argument (the one that prevails): immunity. Int'l law respects the immunity of the foreign minister to the point where it is not possible to conduct int'l affairs if one court can indict the foreign minister of another state.

**Note: immunity not impunity. The immunity only lasts while you occupy the office.**

If you allow states to start indicting each other's foreign ministers, then, all of a sudden arrest warrants will proliferate.

### 16. Protection of Human Rights – Individual Rights

**Development**

Some norms that we would now regard as human rights were adopted in the wake of WWI:
- Peace Treaties
- The League of Nations Covenant
- ILO
- International Customary Standards

**WWII**

The concept of state sovereignty was largely incompatible with the adoption of HR standards

- Holocaust and WWII acted as a catalyst for the rise of a movement seeking to integrate HR standards.
- UNC entrenches HR as one of the purposes of the UN.

**Universal Declaration of Human Rights**

- In 1948 3rd committee of the UN produced a draft of the Universal Declaration of HR (UDHR)
  - Initially, Canada voted against draft with six Soviet Bloc states – changed its mind later on and voted for it. Canada had felt that it would have to allow Marxists and Jehovah’s Witness into gov’t. Oh-no….
  - At time of adoption there were 56 member states. (Now there are 185 member states)
    - Third world at the time was under colonialism.
  - Abstentions (of which there were 8) came for different reasons
    - Accusations that UDHR was founded on western principles and did not deal adequately with collective rights and duties.
    - SA was worried that UDHR could become a binding norm of international law after being elevated..
    - Saudi Arabia – concerned with inclusion of the right to change one’s religion or belief (contradiction of the Koran)

Would the outcome be the same today? Perhaps there would be more of a balance b/n social and economic rights. Might look more like the African Charter.

Note that UDHR was not binding….but eventually become core of CIL.

- Sources: Is it more appropriate to speak of UDHR in terms of CIL or in terms of principles?
  - Value of arguing CIL: Custom reflects consensus. Obviates the need to enter the debate of culture
  - Principles: Natural law position. Inalienable rights. But…this smacks of cultural imperialism. Not really universal values

CP Kelly
• Articles of the UNC promote HR and allow for UN bodies to make decisions based on the promotion of HR – including decisions that are based in the Econo and Social Council, Declaration regarding non-self-governing territories and the international trusteeship system.

• Ideological differences delayed the commissions writing the UDHR. Eventually had to have three instruments b/c of the debate b/n Soviet Bloc and west.:  
  o ICCPR – 1966 → Negative Rights  
    ▪ Expression  
    ▪ Prohibition against torture  
    ▪ Not resource driven. Cannot argue that b/c of inadequate resources, you can torture.  
    ▪ Apolitical – or, at least more so.  
    ▪ Immediate  
    ▪ Justiciable  
    ▪ Cost free (at least characterized as such) But not really  
  o International Covenant on Economic, Social and Cultural Rights (ICESCR) – 1966 → Positive Rights  
    ▪ Employment, Social security, Food, Education  
    ▪ Resource driven – progressive rights  
    ▪ Art 2(1): Agrees to take steps “to the maximum of its available resources…”  
    ▪ Political in nature – e.g. Distribution of wealth  
    ▪ Not justiciable  
  o Optional Protocol to the ICCPR – allows a person who feels rights under ICCPR to claim from a state who ratified Optional Protocol  
    ▪ Remedies in the form of recommendations given.

• ICESCR and ICCPR are complemented by  
  o Genocide Convention  
  o 1966 International convention on the elimination of all forms of racial discrimination (CERD) – largely in response to apartheid in SA  
  o 1979 Convention on the Elimination of all forms of Discrimination against Women (CEDAW) – significant reservations have been entered.  
  o 1984 Convention Against Torture  
  o 1989 Convention on the Rights of the Child (CRC)

➤ How are these treaties implemented? Through the Optional Protocol of the ICCPR

Requirements of states parties:  
• Periodic Reporting

Charter of the UN preamble and articles 1, 8, 13, 55, 56, 62, 73, 74, 76

Special Nature of Human Rights  
HR are in some respects distinct from most international law, particularly in that they seek to govern the relations of a state and individuals under its control rather than interstate relations.

Gay activist in Aus. Petitioned HR Committee seeking a declaration that the two provisions of the Tasmanian Crim Code prohibiting “unnatural sexual intercourse” and “indecent practice b/n male persons” contravened articles 2(1), 17 and 26 of the ICCPR

CP Kelly
Claimed that ICCPR, Art 2, 17 and 26 were said to be violated.

Art 17 ➔ Privacy
Art 26 ➔ Discrimination

Claim that police were empowered to investigate and detain based on stuff that happens in private. Although not being enforced

- Tasmania argued, with respect to privacy rights, moral issues are subjective and dependant on the particular values of a society.
- Aus argued that law should be repealed as all other states had done so.

Art 26 argument

Issue: Was Toonen the victim of an unlawful or arbitrary interference with privacy? Was he discriminated against?

Holding: Yes and yes.

- Undisputed that sexual relations fall under the concept of “privacy”, and the provision interfere with it, even though they have not been enforced for over a decade – still could be enforced.
- It is arbitrary because unreasonable and disproportionate for the ends sought by the state—prevention of HIV—there is no factual or reasonable link between the two.
- Moral issues are not, as Tas claims, strictly of domestic concern.

“sex” in Art 2(1) and 26 includes sexual orientation, which means that it has been violated. Sexual orientation imported into art 26.

- Note that there was no international element to this complaint. Although non-intervention in domestic matters is reaffirmed in UNC art 2(7), HR law has carved a very significant exception to that rule placing concerns like the ones in this case within the confines of international concern.
- ICJ in Case Concerning Reservations to the Convention of Genocide put forward the idea that states do not have an interest of their own in entering HR treaties, but rather a common interest.
- IACHR: states signing HR treaties deemed to submit themselves to a legal order within which they assume obligations, not to states, but to all individuals.
- Most Int’l HR law is directed at states, and can apply to other actors only indirectly. Many, including feminists, argue that this places many egregious violations out of bounds and reinforces the harmful public/private distinction. Hard to expand the regimes because they’re all framed within the context of state responsibility.
- What is relevance of laws of other states in Aus having repealed law? If other states still had the law, would that change things?
- Is importing sexual orientation by way of “sex” in 2(1) necessary?
  - Could instead have argued CIL. Based on state practice and opinio juris. State practice must be consistent. Look at African Union or Islamic Congress ➔ would find it not to be CIL.
  - Could have done it through general principles ➔ discrimination against minorities.
  - Therefore court injected sexual orientation so that it would be part of the treaty law. Mere interpretation by the committee…hmmm.

Velasquez Rodriguez Case [1988] Inter-American Court of Human Rights page 843 text

Claim against Honduras following disappearance of a number of students after abduction by 7 armed men dressed in civilian clothing. No proof of state actors. Honduras did not investigate.

Issue: Is Honduras responsible?

Holding: The court found that Honduras is responsible on the basis of the State’s duty not only to “respect” but also to “ensure” rights, found in article 1(1) of the American Convention on Human Rights.

- State is obliged to organize the gov’t and its structures to ensure that they are capable of juridically ensuring the free and full enjoyment of HR.

Obligation to prevent, investigate and punish perps, restore right violated if possible and to compensate

Commentary

What about the basis of HR in moral beliefs? Does this change the nature of the rights or does it lend them less credibility by showing them to be western based? Integral in this are conceptions of human dignity. Different contexts shed different
lights on the rights. Also, related to cultural pluralism.

- **Scope of State responsibility** is at issue. To what extent should the state be held responsible for conduct of non-state actors.
  - *Toonen* there is reference to harassment by non-state actors as result of legislation
  - Distinction of public/private to deal with state actors. Private issues often are not responsibility of the state.
    - Think domestic violence cases – many argue that this should be issue of state responsibility.
- Under Geneva convention (IHL) – state must also protect civilians from private actors.
- Distinction b/n unwilling or unable to investigate, etc.

**Human Rights Standards page 847 text**

1. Classifying Rights
   1) *The Generational Approach – Generations of Rights*
      - Creation of HR very ad hoc/patchwork approach
      - Organizing principles: 1 theory: 3 generations of rights
    
    Author: Karel Vasak
    
    - **Liberté – Civil and Political Rights**
      - Essentially “freedom from”
      - Art 2 to 21 of the UDHR – right to life, freedom from torture, etc.
      - Inspired by natural law and laissez-faire individual rights.
      - Formal equality
    
    - **égalité – Social & economic rights**
      - “Right to”
      - gives the individuals claim against the state to something – right to education, social security, adequate housing, equality
      - Art 22 to 27 of the UDHR
      - Were promoted by East bloc countries and developing countries.
      - Equality in fact
    
    - **Fraternité – collective rights**
      - Play on interdependence of all people
      - Self-determination of nations, cultural protection, etc.
      - Sharing in global power and wealth
      - Solidarity rights. Common international commitment
      - Right to development, environment, peace
      - Not collective rights as outlined below…

This classification allows us to conceptualize these rights better – but still subject to criticism

- Seems to establish a hierarchy among these rights
- A very Eurocentric/western approach to HR
- Suggests, that you have to achieve them in order & critiqued for this reason

No consensus as to the hierarchy but this is problem b/c conflicts of rights are a constant occurrence. It would be possible to consider certain rights *jus cogens* but the controversy still exists as to which rights.

- *There is an interdependence amongst the rights? What about arguments that, for instance, Uganda is not ready for multi-party democracy and strong man at the helm is needed. Tis a balance.*

ii) *Treaty Human Rights*

The ICCPR and the ICESCR are binding translations of the UDHR which is but a statement of principles. Thus, there are several differences:

- Right to self determination included in ICCPR which was not in UDHR
- Rights of minorities
- Many Econo, social and cultural rights

CP Kelly
ICCPR provides for the creation of an 18 member HR Committee that can hear petitions from individuals or states alleging a breach of the Covenant
  - 18 member committee of states parties to the treaty
  - Every party to the ICCPR must present periodic reports on their progress in implementing the rights recognized therein
  - Committee may from time to time adopt general comments on content or meaning of rights entrenched in the covenant in question

**International Covenant on Civil and Political Rights**
See documentary supplement

**International Covenant on Economic, Social, and Cultural Rights**
See documentary supplement

<table>
<thead>
<tr>
<th>Committee on Economic, Social and Cultural Rights, General Comment 3, The Nature of States Parties Obligations (art. 2 para 1 of the Covenant) [1994] UN doc ICESCR page 852 text</th>
</tr>
</thead>
</table>
| - Art 2 of the ICESCR is seen as having dynamic relationship with all other provisions in the convenant.  
  - Two obligations are imposed despite constraints due to the limits of available resources:  
    - Undertaking to guarantee that the relevant rights will be exercised without discrimination  
    - As per art 2(1) of ICESCR, to take steps - what does this mean  
      - Steps towards goal must be taken in a reasonably short time – deliberate, concrete and targeted clearly towards meeting obligation  
      - Means should be all appropriate means, including legislation → this is not exhaustive of obligation  
      - Judicial remedies could be appropriate  
  - Must take steps towards “progressive realization” – flexibility but expeditiously

**Commentary**
- Note that the implementation provisions in the ICESCR are much weaker that the ICCPR. Committee like the HR committee was created but there is not right to petition to that committee. Only deals with reports submitted by states parties.

**Customary Human Rights**
Opposition to ratify HR covenants comes from many states for ideological reasons and concern over national sovereignty. In cases where state is not a party, CIL is at issue

|---|
| US restatement on Foreign Relations Law of the US states that certain rules are customary (eg. Genocide, slavery, etc.)  
  - Seen by authors as a conservative minimum of rights accepted as CIL  
  - Criticised by many as not including right to be free from discrimination based on sex.  
  - HR Committee has much more expansive list that is not restricted to those rights listed in the US bill of rights.

**Universality of Human Rights and Cultural Diversity**
Cultural relativism has replaced arguments based on state sovereignty as greatest challenged to HR law. This debate is pushed to the political realm at times. Posit that HR is a Western construct
Two dialogues are suggested – 1) b/n various cultures and 2) internally to states. Both cause problems as 1) UDHR is already adopted and HR already seen as Western imposition and 2) b/c internal dialogues are not allowed in certain states and do not bring all parties to the table.

Statement of the World Conference on HR states that, irrespective of cultural and religious status of a country, states are obliged to promote and protect all HR.

CP Kelly
Compliance and Enforcement
HR suffers from many compliance problems. Come types of rights systematically unprotected around the world (Social, Econo and Cultural). Creation of UNHCR in 1993 sought to provide some needed coherence.

Treaty mechanisms:
- Optional Protocol to the ICCPR, Petitions to a treaty body – for the ICCPR the competence of the Commission to hear petitions is optional, a state may ratify the Convenant but reject this competence (as of 1999 of the 144 parties to the ICCPR, 94 had accepted the Optional Protocol).
- Periodic reports – many treaties require reports. They are useful in that they incite dialogue.
- Enquiries – initiated by the treaty body itself there are a powerful tool for ensuring compliance with fundamental rights.
- Advisory opinions – though they create no obligations they can carry significant persuasive power.
- Geographic treaties like the European Committee on HR (ECHR) or the Inter-American HRC (IAHRC).

Non-treaty mechanisms:
- Most structured and influential are the institutions created by the UN Commission on HRs (a subsidiary body of the Economic and Social Council) by way of Res 1503 in 1971. ECOSOC – Economic Committee to deal with mass violations of HRs. Individuals can submit complaints then the committee has the discretion whether to make it public or not.
- Another means is domestic courts assuming jurisdiction:

Example: Resolution 1503 of 1971 → Resolution of the ECOSOC (Economic and Social Council). Gives HCR ability to look into consistent patterns of gross violations of HR. Individuals can appeal and will not receive a remedy. If consistent, issue will be made public.
- Nothing systematic about res 1503 – horsetrading. Whether issue gets on agenda of commission is very political.
- This may not be the same in cases of thematic mandates (such as torture) but may remain political in cases of country mandates.
- Thematic mandates come with a special rapporteur

What is more effective?

- Human Rights Commission – these people are state representatives
  - There is no idea of independence & influence other states & block resolutions
- Courts of Human Rights - European
  - Usually fairly independent
  - Works best with states who have well functioning court systems and does not work well in cases like Africa (specifically Sudan)
- Inter-American Court
  - The judges are not the most independent – there are serious problems with the organization

Optional Protocol to the ICCPR [1976] UN doc page 906 Text
Optional Protocol to the ICCPR, Petitions to a treaty body – for the ICCPR the competence of the Commission to hear petitions is optional, a state may ratify the Convenant but reject this competence.

Periodic Reporting page 909

Enquiries page 913

Advisory Opinions page 914

CP Kelly
Civil Suits in National Courts page 917 and case below

<table>
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<tr>
<td>Fil is a Paraguayan National – 17 year old son kidnapped and tortured by D who was Inspector Gen of police in Asuncion. Both PL and D became residents of US and Fil filed suit. The court found for Filartiga. Torture is violation of the law of nations. Prohibition is clear and unambiguous. Jurisdiction is granted b/c the US courts exercise personal jurisdiction over the parties wherever the tort occurred.</td>
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17. Protection of Human Rights – Collective Rights

Collective Rights and Self-Determination

The notion of a people as a subject of int'l law implies a population and a territory. That is the essential difference between a people and mere minority. A minority doesn't necessarily have geographic specificity. “Every group must have its own state” a problematic idea from the Westphalian period. He talks about trying to assimilate groups within a state (France during the revolution) by using education, prohibiting language, etc. The other model is ethnic cleansing.

There has been an introduction of a normative ethical view to what would otherwise be an issue of power.

De-colonization: if people can't exercise their right to self-determination, they can't even fully enjoy their individual human rights. The experience of self-determination has had a mixed record. Ghandi and India is a good example, but Congo was a bad one. It's been in a state of civil war since its self-determination.

See article 1 of the ICCPR

Note: How are indigenous peoples different from other minorities? → They have relationship with the territory that is inextricable from their cultural and spiritual identity.

<table>
<thead>
<tr>
<th>Mi'kmaq Case [1990 and 1992] page 889 Text</th>
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<tbody>
<tr>
<td>See ICCPR In 86, they weren't invited to the conference at Meech Lake where the rights of first nations were being discussed. They made a claim that their right to self-determination was violated based on s.1 of the ICCPR rights. In order to make a claim, they had to argue that they are a people as opposed to a mere minority. They're using imperial recognition of their status as a basis for their argument that they are a people. They had a relationship with the British crown. Canada was invited to respond to the Mi'kmaq claim: They made 4 arguments against the application of article 1 of the covenant: 1) Can't invoke it where it might threaten territorial integrity (this presupposes internal self-determination) 2) they aren't a people: small scattered group with no particular territory 3) Putting forth for a collective right, but they need to advance an issue about their individual rights. ** Their view is that only individual rights are the subject of positions under the covenant. 4) Halifax treaty was not an international treaty and therefore Mi’kmaq are not subjects of international law. So, they reformulate their grievance and make it about individual rights and not being invited to the conference. They invoke article 25 of the ICCPR. The constitutional conference affects their fundamental rights within the Canadian constitutional order. How does the committee deal with that argument? They say that their democratic rights don't allow you to participate in any way you see fit. You can't impose a specific modality for participation in public affairs. Is this a reasonable interpretation of article 25?</td>
</tr>
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CP Kelly
Canada abstained from a declaration → it can be invoked before Canadian courts against us (customary law binding on Canada). The concern is that first nations will bring a case before the SCC saying, “never mind what the treaties say, we have rights beyond what the treaties say…”

**UN Draft Declaration on the Rights of Indigenous Peoples [1994] UN doc page 898 Text**

| Article 12: “archeological and historical sites…” He makes the example of the Elgin marbles. |
| So, if there were artifacts in an Ottawa museum that belong to a BC tribe, they would get them back pursuant to this article. |
| But where does this stop? Should all museums be emptied? |

Article 31: “…autonomy or self-government” BUT they can't have independence. It's only about certain things listed in the article.

Article 33: “The right to promote, develop, or maintain…” sentencing circles. Courts can take the recommendations of the sentencing circles.

**Commentary**

- Under the Optional Protocol, this was the only decision possible. Collective rights cannot be asserted (but this seems odd as 14,000 people could claim at the same time and create a type of class action)
- What is the problem with collective rights?
  - Who is the beneficiary – who is the group?
  - Who is to speak for the group?

**Is integration not a better thing rather than the emphasis on collective rights which seems to reinforce marginalization?**

- Look to Art 27 of the ICCPR – minority rights. There basic assumption is that there are communal rights. Self-determination requires a certain specificity in order to have self-determination
- Brings us to Draft Covenant on Indigenous Peoples.
- Maybe something b/n minority and non-self governing territory. More than minority b/c of relationship with the land.

Perhaps apply the Western Sahara case to indigenous peoples in Canada (with exception of territory issue) and use treaties with the Brits and the French. But…WS case could be wishful retrospective thinking.

To what extent should the status of a peoples be an issue for outside intervention. Will this really help the peoples or hinder their “development”.

- Secession reference
  - SCC says: these ideas can be reconciled – self-determination is not necessarily about external self-determination
  - Relies on friendly relations treaty
  - New element → internal self determination
  - I.e the ability to freely determine political & economic & social destiny within the confines of the existing state
  - Links internal & external self-determination – if you’re not getting it inside, you can then get it outside
  - For QC the test is not met

- For Canada, this has implications for aboriginal peoples
  - The right to self-determination was originally a principle to sustain the boundaries of existing states (i.e. to make the acquisition of territory by force illegal) → to legitimize state sovereignty
  - Now though it is recognized that peoples fit nicely within the territorial boundaries of the state
  - So now the concept of self-determination threatens to delegitimize the concept of almost all states
  - Problem – infinite breakdown of individuals into sub-communities (Charles Taylor)

CP Kelly
18. State Immunities

Recognized state is entitled to immunity from the jurisdictions of the courts of other states

Immunities allowed to

- Officials
- Governmental agencies
- State property nationally operating or held in sovereign’s name

Is there justification for immunity and how far should that immunity extend?

Remember *Foreign Legations Case* – State was immune (one way or another) from taxes or otherwise exercise jurisdiction over a foreign legation. Based on principle of *Sovereign Equality*.

- States are equally sovereign which means that one state should not exercise jurisdiction over another on its territory.


- Commercial role of the state here and, still **absolute immunity employed**

---

**The Schooner Exchange v. M’Faddon**

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>US [1812] – per Marshall CJ</th>
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<tr>
<td>Facts</td>
<td>Two Americans claimed ship belonged to them when it arrived in Philadelphia – alleged it had been seized by French and improperly taken from them. US attorney stated it was a public ship of France</td>
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<tr>
<td>Issues</td>
<td>Immunity of property</td>
</tr>
<tr>
<td>Holding</td>
<td>The ship has immunity</td>
</tr>
<tr>
<td>Ratio</td>
<td>• Immunity is a relaxation in practice, in cases under certain peculiar circumstances, of that absolute and complete jurisdiction within their respective territories which sovereignty confers…</td>
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<tr>
<td></td>
<td>• Affront to dignity of a sovereign to give jurisdiction to another sovereign – immunities must be extended to him – refers specifically to the French sovereign as a person.</td>
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<tr>
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<td>• <em>domestic jurisdiction is necessarily exclusive and absolute</em></td>
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<tr>
<td></td>
<td>• <em>all exceptions thereto must be traced to consent</em>—and all sovereigns have consented to respecting the sovereignty of other states (implied consent)</td>
</tr>
<tr>
<td></td>
<td>• Sovereign understood to waive right to absolute jurisdiction with respect to (a) the person of a foreign sovereign (b) foreign ministers (c) passage of foreign troops</td>
</tr>
<tr>
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<td>• rule does not appear applicable to ships entering friendly harbours, BUT, there must be a distinction between public and private ships, because whereas the latter clearly lack immunity, the former act under immediate and direct control of the sovereign</td>
</tr>
<tr>
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<td>• All states would consent to not having their public ships subject to foreign jurisdiction; of they can be assured the same. (This is stated as a principle of public law)</td>
</tr>
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<td>• the ship should be returned</td>
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</table>

**Comments:** The customary rules of immunity that apply to the sovereign extend to his agents

- compares the ship to the king of France himself - under what conditions would he come on US territories?
- Contrasts sovereign with ordinary individuals → We as individuals subject ourselves entirely to a foreign state.

2. **Scope of Immunity**

*Cases in Britain and Canada (Dessaulles v. Repub of Poland)* call support of theory of **absolute immunity**. This is the

CP Kelly
opposite of Restrictive Immunity which was created b/c of the increasing involvement of governments in foreign countries for business purposes – why should they be immune in such cases?

- Restrictive immunity theory universally practiced now as part of CIL. Problems exist with difference b/n
  - Sovereign act (jus imperii) – conduct as a sovereign
  - Commercial Act (jure gestionis) – commercial participant.
- Mostly, state immunity is a question of CIL. But….Western Euro states, for order’s sake, have adopted Conventions on State Immunity in 1972. Based on the restrictive theory.
- Canada was only Western country that submitted to the absolute theory for a long time but then, 1985, State Immunity Act.

Recognition and Immunity – For the the foreign minister to determine whether state is recognized and therefore whether they would enjoy immunity.

Test b/n Public or Commercial Acts: Note that precise distinction may be impossible.
- Test 1: Purpose of the transaction – public act? Public object?
- Test 2: Nature of the action – commercial deal is commercial no matter who transacts

What is covered?
1. Gov’t and gov’t organs (eg. if Canada had trade office in another country, this would still be covered)
2. Leader of gov’t, foreign minister, agents, diplomatic staff.
   - Should immunity be extended to former head of states who go for medical treatment in UK or wherever (Pinochet)
   - Act of State – If you committed certain acts or were aware of acts in capacity with state, you are immune. However, does not apply to certain category of acts (genocide or etc.)
   - What about private citizens who are attached to official delegations of states? Look at basis under which enter the country (diplomatic passport or not). If criminal act, immunity has no effect in Canada – can bring a tort claim but not a criminal claim.
3. Public Corps independently created but operating in effect as an organ of gov’t
4. State owned property

Canada Act seems to be more restrictive in that it allows for criminal liability claim but not tort. What is a state to do?
- Ask other state to waive immunity.
  - If they do not waive immunity, gov’t can declare them persona non grata (get out!!) Termination of the basis for their stay on your territory. If they re-enter, you have option to prosecute.
- Convince the other state to try the diplomat.

State appearing in court to challenge does not accept jurisdiction.

State Immunity Act (Canada) [1985] page 292 text

A foreign state is immune from the jurisdiction of any court in Canada.
- As refugee, can you sue your old country? No, sovereign immunity applies.
  - Call for exceptions like in the US law (below)
- US Act is progressive – contains exceptions – claims brought against the sovereign
  - Torture etc. (but don’t forget Status of Forces of Agreements)
  - Expropriation

Particular problem with sovereign versus agent of police in tort claim (Pana’irala case) – sovereign has the case and it can go into the billions.

UK State Immunity Act [1978] page 305 text

“A state is immune from the jurisdiction of the courts of the UK except as provided in the following provisions of this Part of the Act…”

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Immunity of a foreign state from jurisdiction and exceptions...


**Facts:** TT sold cement to Nigerian to use for military barracks. The Bank of Nigeria issued a letter or credit for the price. The gov’t later, after being inundated with shipments of cement, ordered the bank not to honour the letter of credit.

**Issue:** Is the Central bank an agent of the state and therefore immune?

**Held:** No.

**Reasoning:** Denning:

- Bank claims sovereign immunity. TT claims it’s a normal commercial transaction
- The notion of universal consent to sovereign immunity is a fiction, there is no consensus on the issue:
- Traditional Notion of Absolute Immunity, but difference arise with respect to how far states will move away from that in favor of a doctrine of Restrictive Immunity, which requires a distinction between jure imperii and jure gestionis.
- UK law should uphold the restrictive doctrine
- Here, the fact that it was for a military base is immaterial, the government was purchasing just like any other private buyer would, and is therefore not subject to immunity (nature over purpose)
- Even if bound by absolute immunity, there is an issue as to whether a body is an “alter ego or organ”, which is a very elastic test. The central bank of Nigeria is recognized to be very much a public institution that largely plays are economic regulatory role, but Denning doesn’t think it should be considered a department of Nigeria.
- Prefers to rest his decision of the ground of no immunity in respect of commercial transactions

**Comments:**

- very little international law on state immunities → every state can decide whatever they want
- The driving principle is reciprocity
- Ex. US there are exceptions in foreign state immunity act for terrorist acts.

Schreiber v. Canada (Attorney General) [2002] page 323 text

Germany requested Canada to arrest and extradites Schreiber to answer criminal charges of tax evasion. Schreiber was detained in jail for eight days before being released on bail. He then sued Germany for damages for personal injuries suffered through his arrest and detention. Germany claimed state immunity from this suit.

**The Court:** “without evidence of physical harm, to find that lawful incarceration amounts to compensable mental injury would be to find that every prisoner who is incarcerated by the Canadian penal system is entitled to receive damages from the state.”

(However, some forms of incarceration may conceivably constitute international human rights violations such as inordinately long sentences or abusive conditions).

Bouzari v. Islamic Republic of Iran [2004] page 325 text

**Facts:** Facts: From June 1993 to January 1994 Houshang Bouzari was abducted, imprisoned, and brutally tortured by agents of the Islamic Republic of Iran. Shortly after his release, he escaped from Iran and eventually came to Canada as a landed immigrant in 1998. He now seeks to sue Iran for the damages he suffered.

**Held:** Goudge J.A: “Swinton J. found that his action is barred by the State Immunity Act, R.S.C. 1985, c. S-18 (the “SIA”) and that neither the limited exceptions in the SIA, nor public international law nor the Canadian Charter of Rights and Freedoms could relieve against this conclusion. She therefore dismissed the action. For the reasons that follow, I agree and would therefore dismiss the appeal.”

**The State Immunity Issue**

This principle is rooted in **customary international law**.

**The appellant’s defence:**

The appellant argued it was in the nature of a criminal proceeding because he is seeking punitive damages in the form of a fine. However, the Court disagreed, saying that punitive damages are only a remedy in a civil proceeding.

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Next, the appellant argued based on the tort exception found in s. 6 of the Act:

6. A foreign state is not immune from the jurisdiction of a court in any proceedings that relate to:
   a) death or personal or bodily injury, or
   b) any damage to or loss of property
in Canada.

The court didn't agree, finding that the appellant continues to suffer from physical and psychological injuries inflicted on him in Iran, and not in Canada.

Finally, the appellant relies most heavily on s. 5 of the Act:

5. A foreign state is not immune from the jurisdiction of a court in any proceedings that relate to any commercial activity of the foreign state.

The Act also defines “commercial activity” as “any particular transaction, act or conduct or any regular course of conduct that by reason of its nature is of a commercial character.”

The appellant claims that this applies because the torture is related to his commercial activity.

The court doesn't agree, saying that it is not enough that the proceedings relate to acts which in turn relate to commercial activities. The many connections are with state policing and security and imprisonment powers.

Note: one more defense brought up by the intervener CLAIHR. A foreign state cannot claim immunity from something like a human rights violation.

19. State Responsibility

** This section will definitely be on the exam. Be sure to use accepted terminology.

State Responsibility is a precondition and a consequence of the int'l legal system. The notion that a state must bare responsibility for a wrongful act is the basis of a legal obligation.

It is a fundamental reflection of the sovereignty of states. The breach by one state against another must result in responsibility.

Remember HLA Hart's distinction between primary and secondary rules.

Here, we're dealing with secondary rules. They don't contain substantive obligations. (Substantive obligations are found in treaties, etc...)

Secondary rules condition the application of norms and the consequences arising from their breach. The rules of state responsibility don't contain substantive norms as such, but they condition the consequences of breach of substantive norms.

State responsibility has become a central issue in int'l law.

The UN general assembly decided not to adopt a treaty on state responsibility possibly because they are of the view that it is easier to have the articles accepted by the states informally.

There is no answer to the question of what the standard is. It depends in part on the primary rules which apply. So, in the cosmos 945 case, (soviet satellite) there was almost an absolute standard of liability given the hazardous nature of the activity. Other situations have implied there must be an element of fault.

General Principles of State Responsibility

How does it attach?

- Elements required:
  - 1: Conduct that consists of act or omission (internationally wrongful act)
  - 2: Must be able to attribute conduct to the state under international law.

International crimes has been all but abandoned by the special rapporteur of the ILC in the Draft Articles. Now have a series of obligations.

Obligations erga omnes have some sort of pre-eminence in the international system. Attempt to define what some of those obligations are.

Basis for responsibility

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Two possibilities (not clear in jurisprudence which is the proper basis)
  o **Grounded in risk**
    - Objective Responsibility
    - **Most popular theory**
    - Strict Liability – no need for fault.
  o **Grounded in Fault**
    - Subjective Responsibility
    - Negligence or fault needed.

Appears as if objective standard applies but there is a great deal of confusion.

<table>
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<tr>
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<tbody>
<tr>
<td><strong>See articles 1 and 3</strong></td>
</tr>
<tr>
<td>Art 1: Every wrongful act entails responsibility of that state</td>
</tr>
<tr>
<td>Art 2: every state subject to being held to have committed a wrong (protection against states claiming immunity)</td>
</tr>
<tr>
<td>Art 3: wrong requires (1) conduct attributable to a state and (2) breach of an international obligation</td>
</tr>
<tr>
<td>Art 4: must be wrongful in virtue of international law</td>
</tr>
<tr>
<td>Art 19: every breach is an internationally wrongful act, it is an <strong>international crime</strong> if it breaches an obligation fundamental for the protection of the international community, e.g. (a) threats to peace or to (b) self-determination of peoples (c) slavery, genocide, apartheid (d) human environment</td>
</tr>
</tbody>
</table>
- everything else is an international delict
  - Problem with this is: against whom do you enforce the violation of an international crime. Hard to punish a state without punishing it’s citizens
  - Note that this intro’s a distinction b/n crime and delict.
| Art 51: international crimes entail consequences of Art 52 and Art 53 |
| Art 52: unlimited restitution |
| Art 53: every other state has obligation not to cooperate with that crime, and to cooperate with its suppression |
- **International crime != crime under international law, because the former can apply only to state action**
- **Barcelona Traction case** [1970 ICJ] established principle of obligations erga omnes (analogous to those the breach of which = int’l crime)
  o nothing about fault in the draft arts
    - What would it mean if there was a fault concept?
    - Due diligence duty with respect to the rights of other states
    - The state itself does not have to be faulty
    - If agent can be imputed to the state  →  there is a fault element

<table>
<thead>
<tr>
<th><strong>Classical case</strong></th>
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<tbody>
<tr>
<td><strong>Corfu Channel Case; UK v. Albania [1949] page 637 text</strong></td>
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<tr>
<td><strong>Facts:</strong> 2 UK ships hit mines in Albania’s territorial waters. Couldn’t prove if Albania laid them or that it colluded with Yugoslavia to do so. The UK insisted Corfu channel is an international straight – open to any ship sailing peacefully. Albania insisted it was part of its territorial waters  →  there was no open sea between the channel &amp; the island – and the waters were closed to international traffic.</td>
</tr>
<tr>
<td><strong>Issue:</strong> Are they responsible just because it was in their waters?</td>
</tr>
<tr>
<td><strong>Holding:</strong> Yes</td>
</tr>
</tbody>
</table>
| **Reasoning:**  
  o The mere fact it is on Albania territory is not enough to trigger state responsibility
  o Can’t conclude that just because it happened in their territory they know, or ought to have known
  o But UK can establish that via mere factual inference, and they do satisfy the court in this regard
  o However, there were a # of Albania watch positions on the coast – the mines could not have been laid without the knowledge of the gov’t

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Obligatory for Albania therefore to notify and warn of the existence of the mines—every state has an obligation not to allow [knowingly (not in French original)] its territory to be used for illegal acts (‘knowingly’ not present in original French).

The laying of the mines is not attributed to Albania – the basis of its responsibility is its failure to react.

No distinction in IL on the basis of the source of the obligation—treaty, custom or other

**Dissent:** have to prove culpable negligence—theory of risk is incorrect here

Big Issue: state act/omission vs. non-state act with state omission

DASR opt for the objective standard—no need to prove fault of state official

Judge Krylov (dissent) says that fault is required. He doesn't think it is present. You can't presume that because there are mines in their water they knew that they were there.

This case is not very clear on the legal standard that is applicable.

**State must not let its territory be used for acts contrary to the rights of other states.** → **No indication of which standard it is applying...sounds more subjective.**

**Comments:**

- There is no apparent reference to fault in the draft articles, but when you start digging there seems to be a fault element
  - translation error: “knowingly” is in the translation but not the original text
  - this restricts earlier statement of ICJ on wrongful act

- thus states don’t have an obligation to know about everything everywhere on their territory, but there is some sort of due diligence duty to prevent wrongful acts from occurring on their territory (this is linked to sovereignty anyway)the eng version is passive – only have to do something if you know

- the French version is active – a state has to inform itself about wrongful acts on the territory (pg 609 in case book)

**Cosmos 954 Claim (Soviet Satellite Case) Canada v. USSR [1979] page 642 text**

The satellite had a nuclear reactor. It entered the atmosphere and disintegrated in Canada. Canada had to immediately recover the debris and clean up a significant area.

Canada's claim was based on a specific treaties and general principles of int'l law.

They invoke the **Convention on International Liability for Damage Caused by Space Objects.** What is the standard set forth in that convention? → Absolute liability (bottom of page 640) You want absolute liability because of the inherently dangerous nature of the activity and the risk of sending a satellite into space.

The standard makes it easier for the tribunal to come to a conclusion.

The substantive obligation defines the standard.

Paragraph 22 on page 644: the tribunal says that the standard of absolute liability is a general principle of int'l law. It looks at the treaty and says it's a general principle because of widespread adherents to the treaty.

**Note:** this case was not decided; they settled.

If there was no clear standard, the court would have to come up with one. The court would say that it is based on an objective breach of an int'l obligation. The courts will sometimes not annunciate the standard and just say there's been a breach of an obligation.

**Attribution**

Can the act be attributed to the state? The state can't act without some sort of human agency, so you ask if their conduct is attributable to the state.

1st category: acts of the state. The int'l law commission articles at 646.

2nd category: a private person exercising elements of government authority (article 5)

**See the International Law Commission, Draft Articles on the Responsibility of States for Internationally Wrongful Acts page 646**

- Act by a state organ → Does not matter what level that entity is playing in the state apparatus
  - Municipal Court decision that upholds legislation that violates the rights of an alien – can alien’s state claim responsibility even though it was a court decision.
● Art 6 of Draft Articles – irrelevance of position of the organ in the state - Includes courts, executive, admin, legislative…..
  ○ Contracting out –
    ● e.g Sydney Jaffe Case → bounty hunters in Florida captured Canadian – is the bounty enough to trigger international responsibility –
    ● yes – the state cannot privatize its actions to avoid international responsibility
    ● There also has to be a connection to an international standard.
    ● Art 8 of Draft Articles – Acting in fact on behalf of the state.


Facts: 3 US businessmen working in Mexico – dispute w/Mexican labourers over 15 cents. They were attacked by a mob, and the local authorities called in the army, who instead joined the mob and killed all 3.
Issue: Is Mex. liable for failing to exercise due diligence to protect the aliens?
Holding: Yes
Reasoning: Not enough of a defense to argue that an agent was acting outside his competence, that would negate liability in virtually every case. The governor behaved reasonably – sent troops, but the troops (state agents) acted unreasonably - Mexico is found liable for the injury.
Ratio: State may not invoke abuse of authority by its agents to block a claim → Strict Liability Standard.

Comments:
● Precedent for awards flowing from soldier’s acting
● ILC: state must recognize that it acts whenever persons whom it allows to act in its name in a given area of activity do so
● actions must be taken ‘under the cover’ of their official character to be imputable to the state
  - theory of responsibility is vicarious liability: like responsibility rules for the acts of another (master/servant → vicarious)
  - In extra K – you can exculpate yourself from responsibility for children, but not for employees in your control
  - Justified by idea that you make $ from employees → you should be responsible for their actions while you are employed
  - Both people are state actors – there is no reason to give greater weight to one over the other (internal issues are irrelevant in international law)
  - Look at connection to the duties – is there a link of agency – not everything an employee does is an act of a state – there must be some connection to an official activity
  - There are a series of cases on this issue in Iranian tribunals → border guards asking for $ for bribes…
  - We look for an environment where they are acting an official capacity even though they are acting against orders/duties

Acts of Private Persons
In principle, the state is not responsible for the conduct of private persons or entities. Circumstances may arise, however, where such conduct is nevertheless attributable to the State because there exists a specific factual relationship of control of the State over the individuals.
● Direct or positive control (recruiting, arming, mercenaries)
● Indirect and more passive control (harboring terrorist groups on their territory)

“Conduct Directed or Controlled by a State”

Nicaragua v. US [1986] ICJ page 653

<table>
<thead>
<tr>
<th>Facts</th>
<th>Nicaragua claimed that the U.S. tried to destabilize the country by using its control of the insurgent group known as the contras.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Issue</td>
<td>Were the contras acts to be classed as private (art. 11) or for the gov’t (art. 8)?</td>
</tr>
</tbody>
</table>

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### Holding

Private. U.S. is not responsible.

### Ratio

Degree of control is very important. Here, despite the U.S.’s extensive participation in financing, training and supplying them, there is no proof that the U.S. controlled and directed the acts of the group.

Acts of private citizens are being attributed to the state. The court holds that although the US is providing financing, etc, it cannot be presumed that the acts of killing and rape can be attributed to the US unless they can be shown to be under the *effective control* of the US.

**Article 8 of the ILC draft articles** is the person acting on the instruction of, or under the direction and control of that state? In this case there was presumably no evidence.

### Insurgents

Under the Geneva conventions (common article 3), insurgents are still responsible to ensure that civilians are respected against harm.

When the insurrection succeeds to become the government, they are subject to **article 10 of the Draft Articles on the Responsibility of States for Internationally Wrongful Acts page 655**

**Exception:** when insurgents become the gov’t (they win the revolution or create their own state) they will be responsible for the past acts
- It is a retroactive attribution of actions to an actor that is not recognized in int’l law
- Difficult to reconcile with idea of continuity of gov’ts

#### Asian Agriculture Products Ltd. v. Sri Lanka [1990] ICSIDC page 655

In 1987, the Sri Lankan army destroyed a plant owned by Asian Agricultural Products Ltd on the basis of reports that it was being used by local rebels. After negotiations failed, AAPL presented a claim to the ICSID for arbitration pursuant to the Sri Lanka-United Kingdom bilateral Investment Treaty, alleging that Sri Lanka had not exercised due diligence to prevent damages by the insurgent Tamil Tigers.

**Holding:** Sri Lanka did not exercise due diligence.

“Sliding scale” at the bottom of 656: there may be differing standards of due diligence and the scale of liability adjusts based on that standard.

The fact that an **insurgent movement** is active in a country does not automatically relieve the state of any international responsibility for insurgents’ acts, even in those instances where the insurrection remains unsuccessful. The general duty of due diligence developed in the *Corfu Channel* case remains applicable, a point related not to the attribution but to the scope of a state’s primary obligations.

### ILC Draft Articles on State Responsibility: page 659 text

Art. 20 – Consent by one state to the other (excludes obligations arising out of peremptory norms of IL such as use of force). Consent may be withdrawn! (like in dispute between Congo and Rwanda/Uganda where after Congo set up new gov’t discovered much of their territory had been taken over by the other 2 countries who claimed that Congo had given their consent. So, consent may be withdrawn!)

Art. 22 – If wrongful act is b/c the other State committed an int’lly wrongful act first. (this is countermeasures or reprisals versus retortion which is excessive. The underlying principle is “self-help” in light of an int’l system that is not very good at enforcement!).

Art. 23 – Force majeure and fortuitous events (excluded if they contributed to its occurrence).

Art. 24 – Distress. (excluded if they contributed to its occurrence).

Art. 35 – State of necessity.

Art. 21 – Self-defence (remember art. 51 UN Charter).

1. **Consent of the State**
   - however, you cannot agree to violate *jus cogens* norms (like committing genocide)
   - Claim of USSR in Afghanistan, and US in Vietnam → we were invited.

**Ex: Rwanda**

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Rwanda fighting insurgency in neighbouring Zaire – helped overthrow Mubutu. Uganada assisted. Insurgency became new gov’t and Rwanda and Uganda remained in occupation of Rwanda and Uganada. Asked to leave and they don’t. Does consent apply?

- Consent is not a permanent state of affairs
- **Art 29 of Draft Articles** - Consent does not apply to a Peremptory norm of international law

2. **Self-Defense**
- specific reference to the use of force → Art 51 of UNC → Discussed later.

3. **Counter-Measures**
- Traditional term was reprisal
  - Eg. Free trade agreement breached by one party – other party response in kind by also breaching. This is reprisal or a counter-measure which is legit.
    - Note – different than retortion (where there is no obligation to continue action – eg. development aid, diplomatic ties…)
  - acts which are normally illegal but are justified as a reaction against the illegal act done by a diff state
  - its an act to prevent a state from continuing to act badly
  - This is a measure of **Self-help** which is allowed to some extent.

4. **Force Majeure**
- Unforeseen event creating impossibility of performing the obligation
- Related to sinking of “Rainbow Warrior”
  - The ship would interfere with French nuclear tests in the south pacific
  - The French paid agents to blow up the ship
  - A Dutch journalist was on board and was killed
  - The French agents were arrested by the Kiwis and were convicted for manslaughter
  - France protested – said agents were acting on orders
  - NZ & FR eventually settled – payment of $1 million to Greenpeace – allowed FR agents to serve term on a military base in the South Pacific
  - The female agent got preggers – and was flown back to France for the birth and was not returned
  - NZ complained
  - FR claimed the pregnancy was Force Majeure – NZ disagreed

5. **Distress**
- no other reasonable way to save lives or the lives of others
- people are in physical danger
- ex. Military ship adrift in territorial waters fish illegally to feed themselves

6. **State of Necessity**
- Interests of the state are threatened (not individuals)
- The act must be the only way to safeguard an essential interest against a grave and imminent peril – **Art 33 of Draft Arts**
- ICJ in the Slovakia Dam case
- Essential interest of the state must not impair an essential interest of the state at which the action is taken
- **Ex : Gabčíkovo Case - Hungary/Slovakia case**
  - Treaty obs to build Danube dams that one stopped building b/c of enviro concerns (threat of water supply to Budapest)
  - State of necessity is ground for precluding wrongfulness – must have “grave and imminent peril”
  - Here concerns were real but not perils
  - ICJ not satisfied this was the only way to protect the Danube river
- **Ex.2** - An oil tanker about to run adrift → can a state destroy it to protect itself from the imminent threat of the oilspill?
  - There must be a balancing

CP Kelly
Case Concerning the Gabcikovo-Nagymaros Project; Hungary/Slovakia [1997] ICJ page 661 text

The dam case again.
The court considers state of necessity

Holding: Even if it had been established that there was, in 1989, a state of necessity liked to the performance of the 1977 Treaty, Hungary would not have been permitted to rely upon that state of necessity in order to justify its failure to comply with its treaty obligations, as it had helped, by act or omission, to bring about.

Note: In Legal Consequences of the Construction of Wall in the Occupied Palestinian Territories, the ICJ reaffirmed the customary character of the state-of-necessity exception. In that case, the court concluded that the exception could not be invoked successfully because it had not been shown that the construction of a wall along the route chosen by Israel was the only means available to protect itself against the threat of terrorist attacks.

Consequences of International Responsibility

29, 30-37

Article 40 (serious breach), Article 41 (consequences of serious breach)

Chorzow Factory (Indemnity) Case [1928] page 666 text

<table>
<thead>
<tr>
<th>Facts</th>
<th>Claim for reparation by Germany against Poland for having taken possession of factories belonging to 2 German companies.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Holding</td>
<td>Poland owed reparation to Germany for damages suffered by the 2 companies.</td>
</tr>
<tr>
<td>Ratio</td>
<td>Restitution in kind may be demanded over other forms of reparation if it is materially possible.</td>
</tr>
</tbody>
</table>

The rules of law governing the reparation are the rules of IL in force b/t the 2 States concerned, and not the law governing relations b/t the State who has committed a wrongful act and the individual affected. However the damage suffered by the individual is never identical to that suffered by the State and can only provide a convenient scale for the calculation of reparation due to the State.

This was not expropriation but seizure. Here it is correct for Poland to restore the undertaking and if that is not possible to pay its value at the time of the indemnification. To this, in virtue of the general principles of IL, must be added that of compensating loss sustained as the result of the seizure.

Chorzow Factory Case –
- Reparation includes principle of RII (Restitutio in integrum)
- Could be return of property, removal of impeding measures

REMEDIES
- Cessation of wrongful conduct
- Reparation
  - EG. Chorzow Factory Case –
    - Reparation includes principle of RII (Restitutio in integrum)
    - Could be return of property, removal of impeding measures
- Compensation where restitution is not possible.
  - Various elements
    - Usually out of pocket expenses
    - Lost Income – future income – only if not unduly speculative – this is why new enterprise will usually not be awarded income.

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Interest
Perhaps compound interest.

**Counter Measures revisited**
- **Self-Help**
  - Is availability of dispute mechanisms categorically preclude resort to use of counter-measures? Usually can get provisional relief from a tribunal very quickly.
  - Think about it….

**General Practices:**
Unlike civil responsibility, remedies under IL can take the form of restitution as well as sanctions (especially when the state violated the rights of other states rather than those of individuals).

Art. 41 to 46 – ILC Draft Articles on State Responsibility require the offending state to cease the wrongful conduct, provide for reparation (limited in that it cannot result in the impoverishment of the population of the offending state), restitution in kind, compensation (can’t be speculative loss of income, so better to justify based on past profits than a new business plan, interest is compound), satisfaction (i.e. apology, punishment of gov’t officials responsible, etc.) and assurance for non-repetition.

**Countermeasures:**
*Why are countermeasures needed?* States are reluctant to subject their “sovereignty” to the jurisdiction of judicial or arbitral bodies and therefore infrequently use adjudication to resolve a dispute resulting from the internationally illegal act of another State. Countermeasures make a normally unlawful act licit by its character as a response to the other State’s wrongful act.

Art. 47 to 50 – ILC, Draft Articles on State Responsibility
Art. 47 – taking a countermeasure means the injured State does not comply with one of more of its obligations towards the State that has committed an int’lly wrongful act in order to induce it to comply with its obligations under art. 41 to 46 (remedies).
Art. 48 – They must first negotiate…
Art. 49 - the countermeasure must be proportional
Art. 50 – Prohibited are threats or use of force, economic or political coercion, derogations of basic HRs, conduct that contravenes a peremptory norm of general IL.

IF there are available dispute settlements is it right that States may elect whether or not to submit themselves to it? Like UNCLOS which provides the right to request provisional measures from the ITLOS. Should this be CIL, this right to choose?

**Diplomatic Protection**
The ILC in 1996 initiated a project to codify the law of diplomatic protection, which it defines in draft article 1 as the “resort to diplomatic action or other means of peaceful settlement by a State adopting in its own right the cause of its national in respect of an injury to that national arising from an internationally wrongful act of State.”

<table>
<thead>
<tr>
<th><strong>ILC, Draft Articles on Diplomatic Protection [2004]</strong></th>
<th><strong>page 707</strong></th>
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<tbody>
<tr>
<td>- protection by the State of Nationality</td>
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<td>- continuous nationality</td>
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<tr>
<td>- stateless persons and refugees</td>
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</table>

**Espousal and Nationality of Claims**
- States may espouse claims of their nationals in the diplomatic context
- **Requirement of exhaustion of local remedies** – unless express agreement to waive remedies
  - EG- Ambehelos Case – Greece v. UK
    - Claimant argued K with UK gov’t and was not respected – litigation before courts of UK. He failed to bring a witness at trial. Greece espoused claim in his favour.

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UK says internal remedies were not exhausted b/c person did not file appeal
Court agrees with UK – includes procedure of domestic courts and diligent and optimal use of remedies available – he screwed up and didn’t call a witness.
  - Similar in EHRC requires exhaustion of remedies
  - Exception: unless can show remedy unavailable or ineffective.
- Whole idea of international dispute settlement is to give the claimant opportunity to bypass exhaustion of local remedies where he might be at a disadvantage

ILC, Draft Articles on Diplomatic Protection [2004] page 710 text
- exhaustion of local remedies
- category of claims
- exceptions to the local remedies rule

Ambatielos Arbitration; Greece v. UK [1956] page 711 text
Greece espoused the claims of its national, Mr. Ambatielos, arising out of his contract with the UK government for the purchase of certain ships. In rejecting the claims, the Commission applied the international rule that requires prior exhaustion of local remedies.

North American Dredging Company (NADC) Claim (1926)
Facts
Agreement b/t govt of Mexico and NADC included a Calvo Clause giving the employees of the co the status of Mexicans in all matter concerning the execution of the work under the K and the K’s fulfillment. It stated they were deprived of any rights as aliens. The U.S. acted on behalf of the co for a claim for damages for breach of K by the govt of Mexico.

Holding
Claim for K’al breach must be presented to Mexican court pursuant to the agreement.

Ratio
In the K the rights he waived were to act as if the only remedies available to him for the fulfilment, construction and enforcement were international ones which can only be decided by his waiver by the Mexican courts.

Though the clause was meant to bind the claimant to Mexico’s laws it did not and could not deprive the claimant of his citizenship and all that implies. He could still ask the U.S. to bring a claim on his behalf for things beyond the reach of the clause.

This situation illustrates how legitimate the concerns of certain nations are respecting the abuse of the right of protection by the nationals of certain states. The NADC has acted as if the Calvo Clause didn’t even exist, only using it to get the K in the first place.

Is there a practical application of this clause?
Industrialized countries argue (with the support of writers and tribunals) that Calvo clauses cannot be given full effect b/c the right to present an int’l claim belongs to the state and not to the individual or corporation. Developed countries argue the opposite, that Calvo clauses can effectively prevent a state from espousing a claim of one of its nationals.

Canadian Practice re: Espousal of Claims page 716 text
Is it different from standard in Barcelona Traction Case – where court held Belgium had no standing b/c siege social was in Canada
  - Canadian practice deviates – Canada would protect the shareholders. → SUBSTANTIAL LINK IS ONLY REQUIREMENT
  - Normally espousal of the claim will be initiated after all domestic remedies have been exhausted.
  - Claims by companies are treated according to Barcelona Traction Case with the further requirement in Canada that there be a substantial Cdn interest so as to justify Cdn diplomatic intervention (where the business is carried on, active trading interests in Canada, and the extent to which the company is beneficially owned in Canada).
  - Losses caused to a company in which Cdn’s are shareholders may result in the Cdn govt’t intervening on their behalf.

The Procedure in Canada:
Normally Canada will attempt to negotiate with the other state in order to reach a settlement

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Invocation of State Responsibility

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<tr>
<td>- invocation of responsibility by an injured state</td>
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<td>- plurality of injured states</td>
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<td>- plurality of responsible states</td>
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<td><strong>Page 722</strong></td>
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<tr>
<td>- invocation of responsibility by a State other than an injured State</td>
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<td><strong>Page 724</strong></td>
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<tr>
<td>- object and limits of countermeasures</td>
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<td>- obligations not affected by countermeasures</td>
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<td>- proportionality</td>
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<td>- conditions relating to resort to countermeasures</td>
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<td>- termination of countermeasures</td>
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**20. International Dispute Resolution**

IDR gives force to international law. Use of force is a failure of arbitration, adjudication, etc… IDR is an *alternative* to the use of force, and this is its significance.

**The World Court**

*Predecessor was the PCIJ – it was not part of the charter of the LofN. Had its own. When UN was established, the statute of the PCIJ was modified slightly and become that of the ICJ.*

- Stat of ICJ is separate from the UNC – assumption that all states members of the UN also subscribe to the stat of the ICJ

Notion of the compulsory arbitration were central to internationalization. The Hague treaties were responsible for the creation of the permanent court of arbitration.

➡ Problem: where tensions among states are the highest, judicial mechanisms are the least effective. When there is lack of confidence states are less and less willing to submit

➡ Notion of jurisdiction has devel’d in a peacemeal way. Law of the Sea, Investment disputes, ICJ, and others. Not one body. For the most part, it is highly fragmented. This allows for practical arrangements among states who would be otherwise reticent to surrender sovereignty on all issues. Not an all or nothing thing.

- ICJ is one of six principle organs of the UN (under Ch. VII) and the principle judicial organ (art. 92)
- Court consists of 15 members elected by GA and SC.
- President is elected for 3 years by the court from among its membership

**See Art 9 of the Stat of the ICJ**

- Judges elected “regardless of nationality” but nationality plays a role – by informal understanding
- Principle legal systems must be represented.
  - *Informal rule regarding the distribution*
    - Permanent five members each have one judge
    - 5 for Western Euro and NA
    - 2 Eastern Euro
    - 3 Africa and Mid East
    - 3 Asia
    - 2 Latin America

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If case being heard from Country is of a party’s nationality, judge *ad hoc* will be appointed. This could be seen as controversial. Shows how states not always willing to relinquish all their power.

**Difference between the ICJ as an adjudicatory body and arbitration**
- Arbitration – more flexible, situation where parties resort to some sort of private justice.

**Parties before the court**
- Standing → either States or UN agencies.
  - UN – Advisory Opinion (non-binding)
  - States have standing in contentious disputes (binding) – legal obligation to accept decision….but if they don’t..
    - In reality, not so binding necessarily (*Cameroon v. Nigeria* case where Nigeria ignored decision)

*Line b/n binding and non-binding decisions might not be all that clear – just force of decision.*

- Not automatic – only a party if
  - 1. member of the UN
  - 2. By accepting the statute and accepting jurisdiction of the court and conditions laid down by the GA (eg Switzerland)
  - 3. Any other state provided accepts conditions laid down by the SC that they will accept judgement.

**Jurisdiction**
- Limited – based on voluntary acceptance by the parties. This can happen by
  - *Special agreement* –
    - *Compulsory clause in a treaty* - *Art 36(1)* → comprommисsory clause –
      - E.g. Application of the Genocide Covention Case – art 9 of the convention specificall provides for disputes being settled by the ICJ
      - E.g. *Lockerbie* case under the Montreal Convention 1976 -
    - *Declaration under art 36(2) – Optional clause* (declared in advance)
      - Different from UNCLOS art 287- if states don’t stip that they do not recog the judicial bodies (ICJ or Tribunal on the law of the sea, they are presumed to have accepted unless they make a specific declaration seeking exception on specified number of ground.
      - ICC stat debated this as to whether there was opt-in or opt-out.
      - Art 36(2) assumes you have not accepted unless you have opted-in specifically.
      - When a state opts in, it is a general jurisdiction of the court opt in. You recognise in advance.
        - But…you can stipulate exceptions to general jurisdiction.
        - E.g. India does not allow for any cases to go to the court dealing with use of force.
        - E.g. – Canada accepts except with respect to matters that that fall within our jurisdiction….which obviates point of court. Canada can decide what is within its jurisdiction
        - Canada – p. 353 para (d) → keeps control over fisheries. (*Spanish fishing trawlers case*)

*Article 2(3) of the UN Charter: “All members shall settle their int’l disputes by peaceful means…”*
*Article 33 of the UN Charter: “The parties…shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, [etc…]”*

**Jurisdiction by Treaty**
article 37 of the ICJ Statute

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Compulsory Jurisdiction under ICJ Statute Article 36(2)
2nd paragraph: they may declare at any time...(very important). Recognizing the general jurisdiction of the court over any and all disputes

The ratification of the ICJ statute implies recognition of the court’s jurisdiction.
36(1) Special agreement is the most straightforward way to establish jurisdiction of the court. States may agree to submit a dispute to the court. Jurisdiction is not an issue then.
A treaty is different. The same conception of agreement doesn't exist. It's implied. An aspect of the treaty might give the court jurisdiction.

Sample Declarations Recognizing Jurisdiction page 381 text

<table>
<thead>
<tr>
<th>Fisheries Jurisdiction Case: Spain v. Canada [1998] ICJ page 386 text</th>
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<tbody>
<tr>
<td><strong>Facts</strong></td>
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<tr>
<td><strong>Issues</strong></td>
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<tr>
<td><strong>Holding</strong></td>
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<tr>
<td><strong>Ratio</strong></td>
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</table>

Akhavan
- **Strategy of the Spanish was to try and characterize** in ways other than those that fall under the “fisheries” for Canada’s acceptance of jurisdiction
  - Freedom of transit on the high seas or use of force
- Practice of the court is to give strict effect to the intent of the party submitting to the court under 36(2).
- So, issue cannot be under the court.
- Where states in their reservations have not specified the right to withdraw after a certain period of time the court has applied the reasonable standard.

Contentious Cases
**Only states can be parties to contentious disputes before the court.** The court has an important power: to indicate provisional measures (injunction). Ex – Georgia/Russia. This is what you do when there's an urgent situation with the threat of irreparable harm.

Advisory Opinions
*This is restricted only to organs of the UN. States can not request advisory opinions of the court.*
Empowered to give advisory opinions on legal issues arising within the scope of the activities of the GA, SC and other organs and specialized agencies of the UN
- Art 96 of UNC – empowers request but must be authorized to ask for advisory opinion by the GA
  - Must be a **legal question** (not political) – this becomes a framing issue.
  - Must be w/in **scope of activities** (e.g. of a WHO question that was not answered by ICJ b/c did not fit this…..but answered GA's request on this issue.)

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Legality of the Threat or Use of Nuclear Weapons [1996] ICJ page 397 text

- GA asked for advisory opinion: “Is the threat or use of nuclear weapons in any circumstance permitted under international law?”

Holding:
- Purpose of advisory opinion is not to settle disputes b/n states (at least not directly) but to offer legal advise to the organs and institutions of the UN
- ICJ can issue advisory opinion on this question although it might have effects on disarmament negotiations.
- In giving this opinion, the court is not legislating but stating the current status of the law.

The Court held unanimously that there is in neither customary nor conventional int’l law any specific authorization of the threat or use of nuclear weapons.

Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory [2004] ICJ page 400 text

Israel is adamantly against the jurisdiction of the ICJ.
The question: should the court be exercising its advisory opinion where there is no consent by the states? It can, legally. Its advisory opinion is technically not binding.

<table>
<thead>
<tr>
<th>Issues</th>
<th>Does Israel have the legal right to construct this wall? What are the legal consequences of the construction of the wall?</th>
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<tbody>
<tr>
<td>Holding</td>
<td>What is the relevance of a lack of consent of a State concerned? Question cannot be regarded only as a bilateral matter b/t Israel and Palestine but is directly of concern to the UN. The possible effect of opinion on a political, negotiated situation to the Israeli-Palestinian conflict must be considered. Question representing only 1 aspect of the conflict and the usefulness of the opinion. The opinion is to be given to the G.A. and not to a specific State or entity.</td>
</tr>
<tr>
<td>Ratio</td>
<td>Art 49 is argued not to apply as there was no pre-existing state (Palestine was never a state) – this is said not to matter as it is a non-self-gov territory - Green Line is a fait accompli – where wall deviates from the green line then it is a violation as it represents an annexation of territory contrary to Hague Conventions</td>
</tr>
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</table>

Akhavan
- Central legal issue: National Security and protection against terrorism versus fundamental right to self-determination in terms of non-self-governing territory. What is the territorial extent of this territory.
  - Goes back to the law of occupation under the 1907 Hague Convention under IHL. What is the scope of authority of an occupying power in occupying

Judicial Review Power for the Court?
Does the ICJ have jurisdiction to review the decisions of the UN agencies and Security Council?
- In CL systems – at some point we believe courts should have the power to strike down legislation.
  - US – classic case of Marbury v. Madison – 1803. Lame duck president began to populate the courts with his cronies. First case where US case asserted powers of judicial review by saying it had “inherent power” to do so.
  - Article by Swebble suggests that something as important as Judicial Review must have been considered and left out of statute of the ICJ. Cannot be implied.
    - Lockerbie – based on Montreal Convention has “extradite or prosecute” clause and the GA wants extradition.
    - Court side-steps issue and does not deal with issue as to whether court can review GA actions or decisions.
  - ICTY – Tadic Case – Jurisdiction motion – Appeals Chamber under the doctrine of la competence de la competence had the power to pronounce of issue
    - But…Cassesse (Italian judge) comes from a tradition that does not see judicial review in the same view

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### Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie: Libyan Arab Jamahiriya v. UK [1998] ICJ page 406 text

**Relevance – its implications for a power of judicial review (nothing said directly by the Court).**

<table>
<thead>
<tr>
<th>Facts</th>
<th>Pan Am aircraft exploded over Scotland in 1988, 259 people died as well as 11 Scots on the ground as a result of bombs planted by 2 Libyan nationals (supposed members of the Libyan intelligence service). UK and US requested the surrender by Libya of the 2 culprits. The S.C. urged by resolution to comply in the fight against int’l terrorism. In response Libya brought a claim b/f the ICJ against the US and the UK under the 1971 Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation to which all 3 were parties. In the absence of any extradition treaty between Libya and the US/UK, Libya argued this treaty applied under which it is entitled to take measures to exercise its criminal J and to prosecute the accused. In response the S.C. adopted a resolution in which sanctions were imposed on Libya. The ICJ next rejected Libya’s request for provisional measures followed by another S.C. resolution in which Libya was sanctioned for its failure to assist in the int’l fight against terrorism with even further sanctions. Finally the ICJ delivered its judgement on the question of J, finding that it did have J under the Montreal Convention. The majority sidestepped the question of judicial review by focusing on the date upon which Libya brought its original application at which time there were yet no binding S.C. resolutions. President Schwebel in a strong dissent addressed the question of judicial review.</th>
</tr>
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</table>
| Issue of judicial review | He finds that the Courts decision to join the preliminary objections to the merits has frustrated the S.C.’s efforts to maintain int’l peace and security and has challenged the S.C.’s integrity and authority. The regrettable result is that the court may have opened itself up to offering a way for recalcitrant States to “parry and frustrate decisions of the S.C. by way of appeal to the Court”.

To read in a power of judicial review on the part of the ICJ would “subvert the integrity of the Charter” in which the S.C. is at the very heart of the Charter manifested by the plenitude of its powers. |

Libya’s argument: they have the option to do their own investigation. No one believes that in good faith Libya will investigate.

Does the court have the power to pronounce on the validity of a security council resolution?

Note: UN charter always prevails, so security council trumps the Montreal convention. By making that pronouncement, the court recognized that it has the power to pronounce on the legal validity of the security council.

There was a strong dissent for this reason.

**Significance of the International Court of Justice**

Lawyers have to turn to courts to convince themselves that there is such a thing as int’l law.

**Address by the President of the ICJ [1998] before the G.A. Of the U.N. page 414 text**

### 21. Use of Force

*jus ad bellum* – regulates recourse to armed force (**criminal class**)

In classical int’l law, the focus was on *jus ad bellum*. Today the question of whether a war is justified or not is a completely separate question from the rules of war.

**Prohibition of the Use of Force**

In 1928, there was a movement to try to outlaw war. Note: League of Nations did not try to outlaw war. They tried to establish guidelines, mediate disputes, etc. When it came to major acts of aggression, (Germany's invasion of Czech) the LoN failed completely. This lead to the end of the LoN.


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The Prohibition of the Use of Force and the Principle of Non-Intervention

UN Charter 2(3), 4, and 7
He mentions 2(3) in the IDR class.
Article 2(3): “peaceful means” is a positive obligation. 2(4) is a negative obligation. The “threat of force” (is a violation of the UN Charter).

Use of force isn’t completely prohibited.

Issue: should there be other forms of coercion (using things like economic coercion)? No decisive answer on this. (see an article of the Charter of Organization of American States)

Declaration on Principles of Int’l Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the UN

<table>
<thead>
<tr>
<th>Principle 1: States to refrain from threat or use of force against territorial integrity or political independence of any State</th>
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<tr>
<td>- war of aggression = crime against the peace for which there is responsibility under intl law.</td>
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<td>- States have duty to refrain from propaganda for wars of aggression</td>
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<tr>
<td>- duty to refrain from acts of reprisal involving the use of force</td>
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<tr>
<td>- refrain from organizing irregular forces/groups for incursion, acts of terrorism or civil strif in another State</td>
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<tr>
<td>- no territory can be militarily occupied as result of use of force.</td>
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<th>Principle 2: duty not to intervene in matters within domestic jur’n of any State</th>
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<tr>
<td>- violation of intl law includes threats against personality of State, its political, economic or cultural elements</td>
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<tr>
<td>- every state has inalienable right to choose its political, econ., social and cultural systems w/out interference</td>
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<tr>
<th>Principle 3: duty to co-operate w/ one another in accordance w/ Charter</th>
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<tr>
<td>- no external interference and every State must respect this right in accordance w/ Charter</td>
</tr>
<tr>
<td>- if forcible action occurs, peoples are entitled to seek and receive support to react and resist</td>
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Charter of the Organization of American States [1948] page 1112 text

Coercion is an issue here.

Art 18: goes further than UN in prohibiting intervention, directly or indirectly in the internal or external affairs of another state. Not only armed forces but also any other forms of interference or attempted threat against the personality of State, its political, economic and cultural elements

Art 19: can’t use coercive measures of economic or political character to force will or take advantage of other State

Art 20: absolute inviolability of State territory. Non recognition of territory or advantages obtained w/ force or coercion.

Art 21: No recourse to use of force except in cases of self-defence in accordance w/ treaties

Non-intervention principle never explicitly mentioned, but implicit in Charter. Legal concept of non-intervention springs from concepts of respect for the personality and political independence of the state (elements of sovereign equality) and principle of judicial equality.

- Non-intervention as corollary of principle of respect for territorial integrity and political independence of states.

Military and Paramilitary Activities In and Against Nicaragua: Nicaragua v. US [1986] ICJ page 1113 text

Most significant decision of ICJ on “prohibition on the use of force” and non-intervention in the affairs of other states. Nicaragua claimed inter alia that the US had acted in violation of article 2(4) of the UN Charter and of the customary int’l law obligation to refrain from the threat of the use of force, and that its conduct amounted to intervention in the internal
affairs of Nicaragua. The US did not file and pleadings on the merits of the case and was not represented at the hearings before the ICJ. However, in its counter-memorial on the earlier adjudicated questions of jurisdiction and admissibility, the US had claimed that by providing, upon request, proportionate and appropriate assistance to third states not before the Court it was acting in reliance on the inherent right to collective self-defence in article 51 of the Charter.

**Holding:** ICJ upheld principle of non intervention as part of CIL, even if it’s not written in UN Charter. Court of opinion that Charter was not to embody written confirmation of every essential principle of int’l law in force.

**Moreover** – ICJ rules that actions of armed attacks encompass not only those actions by regular armed groups across int’l borders, but also the sending of armed bands whose conduct is so grave as to amount to an actual armed attack conducted by regular forces. This armed attack acts includes those of rebels in the form of the provision of weapons or logistical or other support.

At **jurisdiction** phase, US had claimed that by providing, upon request, proportionate and appropriate assistance to 3rd states not before the Court it was acting in reliance on inherent right to collective self-defence in art 51 of Charter.

**Judgment:**

- Art 51 covers both collective and individual self-defence, showing right’s existence under CIL.
- Wording of principles of prohibition of force applies to the right of self-defence.
- States in GA regard exception to prohibition of force constituted by right of individual or collective self-defence as matter of CIL.

ICJ draws distinction between issue of acceptance of jurisdiction of Court and compatibility of particular acts w/ int’l law. Even if there is acceptance, states remain responsible for acts in violation of int’l law and parties should take care not to ‘aggravate or extend the dispute.’

Keep in mind that only when gov’t agents exercise unduly influence to control or subvert another state does it contravene int’l law. If it’s done by private individual or enterprises it’s not usually regarded as intervention unless there is gov’t complicity.

**Armed Bandits**

- Art 3(g) – proxy wars are no different. This is still force
- Nicaragua case – providing weapons is still use of force.

**Use of Force, Aggression and Armed Attack**

The US is supporting an insurgency. It's not necessarily operating under the order of the US or acting effectively as an organ of the US. It has some measure of independence although it is receiving support. So, does the use of paramilitary forces also violate principles of the UN Charter? Clearly it violates the prohibition on the use of force (proxy wars can be just as unlawful as if one's own armed forces are solely engaged in a war).

**Note:** the question of whether an armed conflict is internal or external is a different question than the prohibition on the use of force.

**Definition of Aggression [1974] UN page 1127 text**

Most serious violation of the prohibition of the use of force.

“Use of force” is a broad spectrum. We want to criminalize the worst end of it. There should be a narrow focus.

**Article 1 (p. 1120)** defines it.

**Preamble:** Sec Council shall determine existence of any threat to peace, breach of peace or act of aggression.

- Aggression is the most serious and dangerous form of illegal use of force. Defining it ought to have effect of deterring potential aggressor and simplify determining when it’s there, suppress it and protect its victims.

**Art 1:** Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State or in any manner inconsistent w/ Charter.

**Art 2:** first use of armed force = *prima facie* evidence of act of aggression

**Art 3:** lists what qualifies as act of aggression: invasion, military occupation, annexation by use of force; bombardment; blockage of ports; attach on land, sea or air or fleets of another State; use of armed forces stationed in the State against it; allowing other State into yours to attack a 3rd state; sending armed group to attack a State.

**Art 4:** Acts in art 3 are not exhaustive and Sec Council may deem something else as aggression.

**Art 5:** No consideration of whatever nature may serve as a justification for aggression. War of aggression = crime

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against int’l peace and gives rise to int’l responsibility.

Art 7: definition not to prejudice right to self-determination, freedom and independence of ppls

Definition received approval by consensus, without final vote.

• This is used by Sec Council when it decides, under art 39, whether direct or indirect use of armed force is an illegal use of force in contravention with the Charter.

Comments by Canadian Delegation [1974] Press Release page 1130 text

Art 1: Canada satisfied w/ basic definition, even if it does not refer to cases of indirect aggression
Art 2: Aggressive intent is another criterion to consider. It is the mens rea of criminal law. Use of armed forces raises a rebuttable presumption that an act of aggression has been committed. It must be complimented by intent.

Justifications for the Use of Force page 1136 text

The exceptional cases for legitimate intervention:

(1) Collective intervention by enforcement action under authority of Sec Council → Chapter VII
(2) Also Aka points to GA UPS 1950 → that state where there is a 2/3s majority of the SC that support armed force then the GA should be able to act on it (b.c for a long time actions were stymied by the cold war)
(3) Where state seeks to protect the rights and personal safety of its nationals who are in state it proposes to intervene
• (ie ’76 Israeli intervention in airport in Uganda. Hijacked plane – Entebbe Raid see below)
• Boxer Rebellion
• Grenada – PM had been ousted – Foreign nationals were going to be unsafe and so US and other Caribbean nations
• Panama – troops stationed in Panama – Used excuse of protection of its nationals. General Noriega took power (with the help of the CIA
(4) Individual or collective self-defence, to repel danger of armed attack.
(5) State acting in affairs of protectorate state which it’s obligated to assist (ie under treaty)
(6) Where state intervened has committed gross breach of intl law against the intervening state, “humanitarian intervention”. Argued that humanitarian considerations outweigh reasons against intervention. Where there is no personal and selfish motive by intervener, this is ok. But this can easily be used as excuse to meddle in other state’s affairs.
(7) When govt has invited the intervention in a genuine and real manner.

To use armed force there must exist:

(i) necessity of intervention of account of imminent danger - - no other recourse open for protection
(ii) proportionality in action taken
* Problem is there’s subjective decision by intervening state and it’s open to abuse.

Williams and De Mestral, “Excuses for Intervention” page 1136 text

- A list of 6 situations where there may be legitimate intervention

The Right of Self-Defence

UN Charter Article 51
Nothing in the present charter shall impair...inherent rights of self-defence if an armed attack is committed against a member of the UN.

The Legality of Anticipatory Self-Defence and Preventative Strikes
Pre-emptive self-defence: what is the standard? The UN Charter does not specifically allow for it.

The Caroline: UK v. US [1837]
A Canadian rebellion finds American volunteers who are dedicated to the revolutionary cause. The US authorities knew

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they were camping out together, did nothing about it...
The British decided to seize the Caroline and set the ship on fire, and send it over Niagara Falls. Has Canada violated the sovereignty of the US?
US knew rebels were raiding Canadian riverside and British ships during 1837 Canadian rebellion.
• The ship Caroline involved in supplying men and materials. It was seized by British on US waters, lit it and sent it over Niagara Falls. 2 US citizens killed.
• Action discussed in US-UK diplomatic correspondence when Brits sought release of McLeod, charged w/ murder and arson.

Mr Webster: The US does not believe that conditions that UK must show existed. These are:
(1) Necessity of self-defence, instant, over-whelming, leaving no choice of means and no moment of deliberation. (2) That Canada did nothing unreasonable or excessive in entering US.
(3) admonition to those on the Caroline was impracticable or would have been no remedy
(4) that there was necessity to attack the Caroline, present and inevitable, and to not separate guilty from innocent

Lord Ashburton: agree on principle of int’l law applicable to this case – particularly the inviolable character of the territory of independent nations.

Notes: There’s acceptance of (pre-emptive) self-defence justification, even if it didn’t exist here.

Nuremberg War Crimes Trials [1947] page 1140 text
Preemptive use of force was used as a defence re: Denmark and Norway.
The court said that it is justified only in an “overwhelming necessity...” etc. The reference was to the Caroline case.
The court held that the plans were not made to prevent an imminent attack.
• Crimes had no exact geographical location. Defendants indicted w/ crimes against peace, war crimes and CAH. Also charged with participating in formulation or execution of common plan or conspiring to commit all these crimes
• IMT held that to initiate war of aggression is supreme int’l crime, and there was individual responsibility for this under art 6 of IMT Charter.

Judgment:
• Hitler considered invasion of Nw and Dk in Mar ’40 memo and as early as Oct ’39. It was carried out on Apr 9.
• Defendants contends Germany was compelled to attack Nr to forestall Allied invasion, ^^ it was preventive action.
• Preventive action in foreign territory is justified only in case of “an instant and overwhelming necessity for self-defence, leaving no choice of means and no moment of deliberation.”
• Plans to attack were not made for purpose of forestalling Allied landing but prevent future Allied occupation. But it was not at all imminent.
• Df argued it was for Germany, under Kellogg-Briand Pact, to decide whether preventive action was a necessity and such decision was conclusive. But if int’l law is ever to be enforced, then whether self-defence act was aggressive or defensive must be subject to investigation and adjudication.
• Acts against Dk and Nr deemed aggressive war.

Israeli Attack on Iraqi Nuclear Research Centre
The Iraqi gov’t was building a nuclear research centre. The Israelis decided it could be used for military purposes. They engaged in an air strike.
Israel was exercising its inherent right of self defence.
So, how do you interpret the right of self defence? Arguably there is no imminent threat here.
But, should Israel wait until the threat is imminent and then act, (too late), or take matters into your own hands? This issue has now become one of the central issues in the Middle East in relation to Iran. (Nuclear energy program) The problem is that Iranians learned of the lesson of this case, and they don't have their facilities out in the open. The issue here is perception of threat.

• Iraq is party to Non-Proliferation Treaty and has applied safeguards satisfactorily.
• Israel not party to Treaty. Its premeditated attacks created danger to intl peace + security given regional tensions.
• Given art.2(4) of Charter, the attacks are strongly condemned.
• Call on Israel to refrain from such acts or threats in future and to place its nuclear facilities under IAEA regime
• Attacks constitute serious threat to IAEA regime.

CP Kelly
• Recognition of inalienable sovereign right of Iraq to establish programmes of nuclear devt for peaceful purposes consistent w/ internationally accepted objectives of preventing proliferation.
• Iraq entitled to appropriate redress for destruction it has suffered by Israel.


**Hammadi (Iraq):**
- Civilian casualties and much material damage when Israel attacked.

**Blum (Israel):**
- Pilot’s mission was to destroy nuclear reactor.
- This was elementary act of self-preservation, both morally and legally. It was an exercise of right to self-defence under art 51 and general int’l law.
- Threat of nuclear obliteration was being developed against Israel by Iraq. Israel tried diplomatic route.
- Actions taken were clean and effective. Middle East is a safer place because of it, as is int’l community.

• IAEA passed resolution condemning Israel for premeditated, unjustified attack on Iraqi nuclear research and recommended suspension of technical assistance to Israel. It reminded states of UN resolution to end transfer of nuclear materials and technology to Israel.

**Notes**
- Mr Blum argued that strikes were proportional since they were on Sunday and the loss of life was minimal.
- Sec Council voted unanimously against Israel. The US was of the view that Israelis had not exhausted peaceful means. But Israel was not party to IAEA so it could not resort to its peaceful measures or intelligence.
- Canada’s view on legality of ‘first- strike’: while use of armed force confined to situations of necessity, modern weapons that some states and not others have, and exercise of veto power have altered reality on how right to self-defence can be resorted to.
  - In practical terms, no help would be expected by some States from UN while use of rapid and all-destructive weapons leaves no room for waiting of an attack, if self-defence is to serve its original purpose.
  - It would be permissible under art 51 to engage in anticipatory self-defence if: (1) an armed aggression is imminent according to clear evidence based on facts, and (2) if allowed to happen the aggression might put in jeopardy the existence of the victim-State (as opposed to just inflicting some damage).
- Judge Schwebel of US was of view that wording and intent of art.51 do not eliminate the right of self-defence under CIL or confine its overall scope to the expression of art.51.
- ICJ, in Advisory Opinion on *Legality of the Threat or Use of Nuclear Weapons Case, 1996*, held that dual condition of necessity and proportionality applies equally to art.51 and to CIL, whatever means of force employed
- Collective self-defence: must state show that attack on victim state was also attack on itself? And are there proximity requirements? In *Nicaragua Case*, the ICJ put two prerequisites: (1) victim state must make a formal and public statement that it has been attacked, and (2) assisting states must receive a formal and public request for and from victim. This makes the right to collective self-defence as that of the assisting state, not the victim.


Regarding the threat of terrorism: the US cannot “remain idle while dangers gather. We will always proceed deliberately, weighing the consequences of our actions. The support preemptive options we will:
- build better, more integrated intelligence capacities
- coordinate closely with allies
- continue to transform our military forces to ensure abilities…”

**A More Secure World: our Shared Responsibility [2004] UN Doc**

Discusses article 51 of the *Charter* and the case where a threat is not imminent but still claimed to be real (ex – nuclear weapons)

They do not support the legality of unilateral preventative action, as distinct from collectively endorsed action. **Allowing one to act is allowing all.**

They do not favor a re-writing or reinterpretation of article 51.

CP Kelly
Attacks by Non-State Actors and Self-Defence
In view of the September 11 attacks

Security Council Resolution 1368 [2001] UN
Condenms the September 11 terrorist attacks

Security Council Resolution 1373 [2001] UN
Decides all States shall prevent and suppress the financing of terrorist acts and criminalize the willful provision or collection...of funds that will be used for terrorist attacks.

US Letter to the President of the UN Security Council, 7 October 2001 page 1153 text
The US invokes the right to self-defence.
Even if the Taliban wasn't actively encouraging Al Qaeda, they wouldn't turn over Osama Bin Laden, and that became a justification for armed force. It wasn't Afghanistan. The justification for the use of force against Afghanistan is that they allowed their territory to be used.
Note: What if it was a more developed state?

Statement by the North Atlantic Council [2001] page 1156 text
NATO and the Washington Treaty. It shall be considered “an attack against them all…”

Statement by NATO Secretary General, Lord Robertson [Oct 2, 2001]
Re: Washington Treaty

Self-Defence of Nationals
Is a state justified in taking self-help measures to protect its nationals if they are in imminent danger? (It was a protected right pre-Charter) Must all peaceful avenues first have been exhausted? See the Entebbe Raid.

The Entebbe Raid page 1158 text
On June 28, 1976, an Air France plane en route to France from Israel was hijacked by terrorists. They were flown to Entebbe airport in Uganda. The Israeli air force can't rely on the Ugandan forces (who are sympathetic to the hijackers) so they fly into Uganda and the commandos come and kill the hostage takers and fly their citizens out.

Israel (Mr Herzog):
- Uganda violated int'l law in failing to protect foreign nationals in its territory and also 1970 Hague Convention.
- Uses scholarly arguments that right of intervention has been claimed by all states and only its limits are disputed
- If UN is not in position to move in time and there’s need for instant action, then cant deny legitimacy of action in defence of nationals.
- Make arg. that hijackers are pirates, and ^^ hostis humani generis (enemies of human race).
- this was exercise of Israel’s right to self-defence.
- No consideration other than humanitarian one motivated Israel and operation was not directed at Uganda
- Means used were minimum necessary to fulfil the purpose of rescuing nationals from band of terrorists who were being sided and abetted by Ugandan authorities.
- Draws parallel with right of indiv to use appropriate means to defend himself if someone’s trying to kill him.

Cameroon (Mr Oyono)
• Israel took initiative to attack Uganda. This was hostile action and makes Israel the aggressor under int'l law.
• Asks SC to condemn ‘barbaric’ act since it violates art 2(4) and 51 of Charter. Asks for punishment of violation
• There was no attempt to solve dispute by peaceful means. UN cant allow this anarchy or for might to make right.
• There can be no justification for violation of state sovereignty.

CP Kelly
This act was necessarily a temporary breach of territorial integrity of Uganda. Normally, that’s impermissible.

But you can use limited force for protection of one’s own nationals when state they’re in is unwilling or unable to protect them. This self-defence right is limited to necessary and appropriate use of force.

Here such requirements were met – especially bc there’s evidence Uganda was helping the terrorists.

Uganda’s failures poses qn of their failure to live up to its int’l legal obligations under Hague Convention.

That Israel could’ve secured release of hostages by meeting demands does not alter these conclusions. It would be self-defeating and dangerous policy to release the prisoners and accept demands of terrorists.

This situation was unique given Uganda’s behaviour, so it should not set strict precedent.

Justification of self-defence also used in US interventions in Grenada (83) and Panama (89).

In Grenada it was precipitated by murder of PM Bishop. US invaded w/ Commonwealth troops to rescue 1000 US citizens in absence of functioning govt. W/in 2 months military w/drew leaving the internal security of Grenada in hands of participating Caribbean forces.

In Panama, principal objective was to get Noriega, charged w/ narcotrafficking and remove his unconstitutional regime. Bush said Noriega had declared state of war / US and had threatened lives of Americans in Pma. Much loss of property and life – begs qn if it met tests for self-defence in Caroline Case.

In 1993, US bombed Iraqi HQ in retaliation to plot to kill Bush. Killed 6 civilians but said acts were proportionate and linked directly to plot against Bush. Is this anticipatory self-defence or reprisal?

Humanitarian Intervention

2005 Outcome Document Refers to the Responsibility to Protect!!!

- If there is a serious violation of HR or humanitarian crisis there is a responsibility to intervene on the international community.
- Aside from necessity and proportionality, must still go through the Ch VII of SC.

19th C: right of humanitarian intervention existed where state that had abused its sovereign powers by inflicting excessively inhumane treatment on persons within its borders. It made itself liable to intervention by any state prepared to do so.

UN Charter is evidence of distrust for such unilateral action. Art 2(7) prohibits intervention in domestic affairs

Gral right to intervene forcibly for humanitarian reasons are acutely controversial. It is open to abuse and susceptible to aspersions being cast on its altruistic and genuine nature. Can be used as excuse to meddle

Now seen only as legitimate if authorized by SC under its Ch.VII powers.

1991 SC authorized assistance to Kurds in Iraq (Res.688). Most of members saw situation of Kurds as threat to int'l peace and security. Lesson is indicative of potential future role and expanded mandate that an org may have in situations where there are serious q’s of HR violations, need for humanitarian assistance and lack of democracy.

Iraq-Kuwait crisis redefined peacekeeping role of UN. Set precedent for situations where there’s serious humanitarian concern.

UN Sec Gral Perez de Cuellar:
- Sovereignty does not include right of mass slaughter or launching campaigns of decimation or forced exodus of civilian populations in the name of controlling civil strife or insurrection.
- What’s involved is not right of intervention but collective obligation of States to bring relief and redress in HR emergencies.
- Any int’l action for protecting HR must be based on decision taken in accordance w/ UN Charter. Must not be a unilateral act.


Iraq.
Condemns the repression of Iraqi civilians


CP Kelly
Somalia.

**The Responsibility to Protect [2001] ICISS page 1170 text**

- Responsibility to protect
- Principles for military intervention
- Right authority
- Operational principles

**A More Secure World Con't [2004]**

**Invitation**
When an invitation is issues by one government to another to participate in its domestic or external affairs, such involvement would not be classed as intervention or aggression.

**Collective Measures Pursuant to the UN Charter**
UN Charter Articles 2(7), 24, 25, and 39-51

**Uniting for Peace Resolution [1951] UN page 1180 text**
The effect is to “make appropriate recommendations to Members for collective measures.”
It was adopted at the time of the impasse over Korea and has been used a number of times since Korea: Suez, Hungary, Jordan and Lebanon, Congo, Afghanistan, and Namibia.

**The 1990-91 Iraq-Kuwait Crisis: Gulf War 1 page 1182 text**

*Security Council Resolution 660 [1990] UN*
Iraq and Kuwait

*Security Council Resolution 661 [1990] UN*
ibid

*Security Council Resolution 662 [1990] UN*
ibid

*Security Council Resolution 664 [1990] UN*
ibid

ETC ETC (5 more resolutions follow)

**The 2003 Invasion of Iraq: Gulf War II page 1198 text**
One resolution is printed in the text (Security Council Resolution 1441 [2002])

**US Letter to the President of the UN Security Council, March 20, 2003 page 1202 text**
Regarding the US-led invasion of Iraq

**Written Answer of the UK Attorney General to a Parliamentary Question on Iraq page 1203 text**
“The authority to use force against Iraq exists from the combined effect of resolutions 678, 687, and 1441.”

CP Kelly
US Doctrine: right to use force to pre-empt danger. If this means right to respond proportionately to imminent attack, then it’s not one that exists or is recognised in int’l law.

(2) To avert overwhelming humanitarian catastrophe → ie Kosovo
   • Controversial doctrine. Not appropriate basis for action in present circumstances.

(3) Authorisation by SC under Ch.VII → key question here is whether Res.1414 provides this authorisation

Possible Consequences of acting without Resolution

• GA could request ICJ advisory opinion. So could Iraq or 3rd state (both unlikely). It could lead to application of interim measures to stop campaign.

• ICC could have jur’n to examine whether any military campaign has been conducted in accordance w/ IHL

• Domestic courts likely to decline jur’n, unless charge is of aggression. Aggression is a crime under CIL, which automatically forms part of domestic law, so can argue intl aggression is crime recognised by cml which can be prosecuted by UK courts.

Proportionality

• Lawfulness of military action depends on legal basis AND proportionality. So use of force must:
  1) have as its objective enforcement of terms of cease-fire in res.687
  2) be limited to what’s necessary to achieve that objective
  3) be proportionate response to that objective

• This is not to say action may not be taken to remove Saddam from power if it can be demonstrated that such action is necessary and proportionate measure to secure Iraq’s disarmament. But regime change cannot be objective of military action.

Questions

1. The “responsibility to protect” civilians against human rights violations should not be an excuse for unilateral use of force in violation of the UN Charter?

Could it be that we have not achieved a state of maturity? Is this an example of the fact that fragmentation has taken over and this may be an example of a case where UNC does not have answers? Is it moving toward being an exhaustive system and how can it learn from this to create a better system. UNC is not meant to be an all encompassing tool (said in Nicaragua case) and there is a necessity to evolve.

Responses to State-Sponsored Terrorism

See “suppression of trans-national crimes”

Security Council Resolution 748 [1992] UN
Libya.

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