**Cours 3 : how an entity qualifies for statehood**

Cours 3

State-Hood : State : matter of fact, matter of law

Approach of the Badinter commission :

Montevideo convention: 1933? Adoption of three criteria to objectively determine if a state was a state.

Even if states are not parties to the Montevideo criteria, the criteria are still relevant.

3 criterias to define a state:

* Territory
* Population
* Effective government

If an entity does not fulfil those criteria, an entity cannot be seen as a state.

* capacity to enter into international relations
  + all the modern conception of the state is territorial
    - need to rethink the Montevideo Criteria?
      * Published in 1933, only 51 states in the world…The world and the international community have evolved
      * So these the criteria may have evolved as well
        + For instance: Issue of climate change: territory submerged : what would be the status of that state ? is it still considered as a state ?

Statehood: “state vis à vis a state”=> recognition then could be a criteria for instance

* If the international community does not recognise a country: impossible to be a state
  + Objective laws: Kosovo case
    - Need of an objective body of law and an objective assertion to avoid unpredictability
  + Palestine is now a state: part of the UNESCO member
    - US stopped founding
* Need to have legal predictability in the system
* The capacity to enter in legal relations:
  + Refers to the international legal personality of the state:
    - Possibility to have rights and obligations ate the international level
      * Agreement between Marshall Islands, Micronesia and the US: consultancy of the US before any foreign affairs decisions
        + And still Marshall Islands and Micronesia are both two real independent states
    - An effective government: able to exercise the government activities
      * Ex: Vatican

Sovereignty: article 1 of the Montevideo Convention does not mention sovereignty as a criteria to statehood, but it is the sine qua non element: without sovereignty there is no state. A state is first and foremost a sovereign entity.

Sovereignty:

* Max Uber: great arbitrator, Suisse professor beginning 20th century, gave a definition of sovereignty in the Palamas case.
  + Island of Palmas case, 1928
    - “**Sovereignty in the relations between states signifies independence, independence in relations to a portion of the globe is the right to exercise there in, to the exclusion to any other state, the function of a state**”
      * right to adopt regulation, exercise jurisdiction over your people,… sovereignty is independence.
        + Within your borders, only authority that imposes its decisions
        + And no state is exercising these rights

No external pressure

However, possible to accept a reduction of the sovereignty: but independent decision

* Are you able to be independent?
  + Colonised: no independent
  + But if there is occupation: still independent
* Without sovereignty an entity cannot claim being a state
* These criteria are basics: but other criteria? Two new criteria

1. Legitimacy: today more and more states and scholars think that legitimacy should be a criteria for statehood
   * + Ex: Cyprus – creation of northern Cyprus, involved force
   * **Inter-temporal law**: the assessment of a legality of a situation has to be made in light of the applicable law when the situation occurred (Max Uber, in Island of Palmas Case)
     + Inter-temporal law apply for the creation: whether it was legally created, look at the law at that time, but, not the case of maintenance: discrimination in Australia for instance
       - Many states has been created on the use of force, but only prohibited since 1955
   * Crime against humanity: crimes that allow a retrospective condemnation
     + Exception to the inter-temporal law
   * Legitimacy criteria: more and more considered when tackling the questions of the state criterions

* Fundamental principles: cannot reject the rules, pillars
  + The social contract of the international community is based on fundamental laws
* Violations: legal framework but in international relations, different situations can occur
  + Lawless World, Philip Sands, made investigations with regards to the Iraqi World.

1. Recognition

* Basically 2 theory
  + The constitutive theory of recognition:
    - For a state to exist, need first to be recognized as a state:
      * Recognition has a constitutive effect
  + The declaratory theory of recognition:
    - Recognition has only a declaratory effect
      * Recognition does not mean that the entity has achieved statehood

Montevideo convention, article 3: recognition does not have any constitutive effect, only a declaratory. That you are recognized or not you can live as a state

* but is this the reality in the system ?
  + today if there is no recognition, you are not a state: if no recognition, you cannot accomplish the act of a state
    - “Being a state is a way of life”
    - if you are an entity and want to be a state, you have to live like a state, and then you need to be recognized
      * without recognition you cannot be a state
      * and it is also about who is recognizing you.
        + Ex: Kosovo is not a UN member
        + But does it mean it does not exist as a state?
      * Recognition is necessary to live as a state but you can live without
        + Just a political effects?
  + Dilemma recognition/capacity:

There is an objective legal definition of statehood: situation of uncertainty that can be abused, but if an entity has to demonstrate that an entity is not a state based on criteria: objectively the entity has the right to behave as a state.

The modes of acquisition of territorial sovereignty: a state is first a territory: how do you acquire that territory?

* how can an existing state can expand its sovereignty ? or a state saying this is my territory?
* Comment acquiert on la souveraineté territorial ?
  + Conquest: For long time it was conquest: no longer possible
  + Discovery: outdated, but even at the time could only give you an inchoate title: meaning was not giving you title of the territory: still need to do several things for the territory to belong t you
  + The main way today is exercise of effective control : how you are proving you have a territory: you have been displaying peaceful and continuous authority (Max Uber)
    - Islands of Palmas: US v Netherlands:
      * Netherlands: continuously and peacefully exercising authorities other there
        + Most important thing to acquire sovereignty

Les effectivités

Cours 4

Legitimacy: a criteria of statehood?

* entity has to be created with regards to international law
  + However, is the Islamic State a state?
    - In this case, an entity based on racial discrimination, religion discrimination… even if we admit that the basic criteria are fulfilled: how can we accept that such an entity is a state with regards to all the un-legitimate elements of the Islamic State: a state created on the basis on the violation of international principles regarding human rights perhaps cannot and should not be recognized as a state
      * Brach of all the fundamental values of the system

The modes of acquisition of international sovereignty: it is seen as a territorial notion

* **Discovery**
  + But in quiet title: need effective control : evidence of continuous and peaceful display of sovereignty
* **Occupation**: can only happen in a terra nullus
  + The only type of occupation that can give you sovereignty would be an occupation of a territory occupied by nobody:
    - Ex of the occupation by the Brits of Australia
* **Cession**: a state can accept to cede some part of its territory
  + Ex: Louisiana against monetary compensation, HongKong and the Brits
* **Prescription**: also an occupation of a territory, but occupation of a territory that used to be
  + Occupation can only occurs when res nullus
  + Prescription: territory that used to belong to a sovereign but as your occupation has been peaceful, public and that it lasted for a certain time, you are then perceived as the new state
    - Falkland islands: Malvinas according to Argentina, Falkland
      * Implicit acquiescence
    - Referendum organized by the UK and people said they were Brits
* **Accretion**: when your territory is extended because of a natural phenomenon
  + Ex: river that has dried up
    - For instance : El Chamizol at the frontier between US and Mexico
  + Avultion: with volcano
  + Artificial Island: in your territorial sea: still on your territory
* **Uti possidetis juris**:
  + The principle of the intangibility of frontiers inherited from colonization
    - It came from Latin America: colonial powers drew artificial frontiers, but when independence came, they said that if they started to discuss the frontiers, there would be war everywhere.
  + *Self determination*: people under colonial colonisation should have the right to freely choose whether they want to become independent as a new state or whether they want to integrate the former colonial power
    - Ex: Comorres
  + Two types of self determination
    - *Internal self determination*
      * People leave under a state and pretend to have a self existence: they have a right to internal self determination:
        + The government needs to provide them for institutions, study in the language,

Quebec: not under colonisation, people are different but everything is made to grant you internal self determination

Already exercising self determination inside Canada

* + - *External self determination*
      * Under colonisation, and then the right to self determined
* **Secession**:
  + Is considered as a way of becoming a new sovereign state: you separate yourself from an existing state
    - Ex: South Sudan
    - Problem is the unilateral declaration of secession
* **Exercise of effective control**:

* Today, we do have more statehood problems than it appears.
  + Lex lata (hard law)/lex referenda (what it shoud be)

Cours 5

* Sahara
* Israël/Palestine
* Cyprus
* Vatican

1929: the Lateran Accords: recognizes the Holy See

180 diplomatic missions

Sui generis territorial entity

* Kosovo

Terrorist organisation, drugs

Legal advisement of 2010: silent meaning permission for the ICJ, and hope for a change

**International organizations**

They are derived subjects of international law: states are the first subjects of international law.

* Comparison with Frankenstein’s creature.

They are derived subjects.

What is an international organisation?

They can only be created by states

In the typology is the distinction between:

* Public and private international organizations
  + Private international organisations: NGO’s : they are not international organisations as with regards to international law
  + International organizations under international law can only be public international organization
* Open international organization and close international organisation
  + Open: to which potentially any state can become a member
    - Based on universal membership
      * But to what extent are they really “open”?
      * Conditions are set to become members
        + “semi-open”?
        + potentially any international subject can become a member

ex: IMF: to become member of the IMF you have to become member of the World Bank

* + Close:
    - Not opened to every state, set of criteria:
      * Functional organisations:
        + OECD: high level of development, capitalistic form of economy, promotion of capital markets…
        + OPEC: only countries that export oil can become oil
      * Regional :
        + Regional criteria, it is because of your links with a region, territorial link
        + EU, Asean, Mercosur,…
      * Based on a common background:
        + Share the same language, religion, culture,…

Commonwealth, Organisation de la Francophonie, league of Arab States, Organisation of the Islamic conference,

Cours 6

International organizations are the product of states.

* Distinction between public and private international organization
* International organization: recent phenomenon : appear with a new raison d’être
* In 1941: advisory opinion of the International Court of Justice about the reparation case:
  + Injury suffered
* The New International order: new subject of international law
  + Until 1945: states were the main actors/subjects
  + The court said that “*subject of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends on the needs of the community. Throughout its history, the development of international life, and the progressive increase in the collective activities of states have already given rise to instances of actions, upon the international plane, by certain entities which are not state*”
    - The court came with this very important phrase to confirm the appearance of new subjects

What is a public international organization? For an international institution to be a international organization:

* First thing is needed is a treaty establishing such an organization
  + Need of a constitutive act
    - There is no international treaty implementing the GATT: never institutional treaty
      * Common Wealth? no treaty and no proof : it is a voluntary association of independent state
      * The ASEAN: 1947: not yet an international organization, but it became an international organization when they negotiated the treaty in 2008
  + You have a treaty: agreement between subjects of international law in agreement
    - Not all treaties are called treaties
* The second criteria: the organization has to be predominantly composed by states
  + Its functions are mainly governed by international law
    - But some aspects are governed by domestic law for instance if they want to buy material, equipment: need to conclude contract: local providers
  + Examples
    - International Labour Organisation: based on tri-partism
      * It’s a very unique structure that characterise the ILO: delegates of states, delegate of employees and delegate of employers: only international organization based on tri-partism
    - ITSO: international telecommunication satellites organisation : states and a private structure into it
* Third criteria : an international organization is governed by international law
  + - ICRC: not an international organization
    - The Office of Public Health
      * International organization must be governed by international law
    - The bank of international settlement: governed by Swiss law :
  + Governed by international law does not mean there is no relevance of the domestic law
* The organization need to be autonomous of the member states
  + WTO
  + Difference between Principle organs vs Subsidiary organs
    - Principle organs: organs established in the treaty as principle organs
      * UN: General Assembly, the International Court of Justice, Security Council, ECOSOC, the Secretariat of the UN
    - Subsidiary organs: the ones created by the principle organs:
      * Unicef, UN Development Program,
    - Specialised agency : international organizations that have an agreement with the UN which authorize them to ask for an advisory opinion of the ICJ and which report to the ECOSOC
      * Unesco, International Civil Aviation Organization, IMF, the World Bank is a group (IBRD, IFC, IDA, MIGA, ICSID…)
      * The WTO is not a UN specified organisation
  + Plenary vs. non plenary
    - Plenary : everyone : UN General Assembly,….
    - Non plenary: not everyone : UN Security Council
* Last criteria: international legal personality: subjectivity: the capacity of being subject of rights and obligations at the international level : most important criteria
  + The capacity to conclude treaty: to be a party to dispute, to conduct diplomatic relations, the possibility to make international claims
  + Many treaties, in particular the one ratified the last 20 years, do not specify that
    - The WTO: shall have legal personality
    - Sometimes it is not written but the international organization has it
      * Problem when the treaty is silent or not clear
        + The UN charter does not say anything: the most important international organization is silent on the international personality of the
        + Article 104 of the UN Charter: “domestic legal personality”

On the territory of each of its members shall have legal capacity

Story with Comte Bernadott: Can the UN bring any claim in front of the ICJ?

Silence of the charter

* + - * The court deduce the international personality of the organization: using the aims, goals, powers,… the intent was to gran the UN
        + Advisor opinion in 1949
  + Therefore it is no because it is not written that there is no international personality: functions, powers, aims… : “domestic international personality” is not international legal personality

The interpretation of the powers of international organizations

* when interpreting their powers : need to go to their constitutive act: the treaty
  + need to start with the explicit powers
  + but these organizations also have implicit powers: powers that are necessarily implied by the explicits powers
* International organizations are not only explicit powers, once you know explicit powers you can deduce implicit power
  + Ex: Tadic case, ICTY
    - Subsidiary organ of the UN
    - Created to judge persons who had committed crimes
    - Tadic : his lawyers claimed the ICTY had no jurisdiction
    - The judges went to the verify the jurisdiction
      * In the explicit powers: not written
      * However “primary responsibility for the international peace and security”
        + Therefore also created in order to prevent such crimes to exist

Implicit powers: pursuing of the maintenance of international peace and security

* + - * + So the Tribunal was legally created
  + Implicit powers can be deduced from explicit powers
* Principle of speciality: an international organization can only do things that are related to its special function or mandate:
  + Principle of speciality: keep in mind the very purpose for which they have been created
    - In the 90’s WHO: request in 1996 a legal advisory on the nuclear weapons: legality of use of nuclear weapons in the system.
      * The ICJ refused to answer: no competence regarding such a matter
        + Principle of speciality: specialisation is health
        + Epistemologic line:
    - principle of Speciality is what rationalize the implicit powers
  + Individuals are not on the international plane yet

Cours 6

Eurofirma :

Public intergovernmental corporation

* need to replace railroad equipment after WWII
* Brownlie: “where there is…”
* five criterias:
  + a treaty: the case 1956
  + specific composition
  + specific requirement about the governing law
  + specific organization of the institution
  + Last criterion: international legal personality
* New definition of legal personality: an international coporation is a specific case of international organization that rely on a treaty on state cooperation and that fulfil a task of material excecution for the benefit of individuals

ITSOS : check the structure, created by a treaty, but inside a private entitee

ICRC:

* Creation in 1863: statutes as an “association under” the Suisse Civil Code provisions
  + But ICRC action heavily rely on international law: governed by international law
  + Geneva convention
* Membership today: 18 Swiss citizen
  + Not states: only individuals
* Third criterion fulfil
* The mandate of the ICRC
* The activities of the ICRC are explicitely mentioned in the Geneva convention

Ian Brownlie: restricted definition

It is not an international organisation, domestic legal personality, however, its mandate : international community recognized privilege

Three international actors that have accepted the ICRC personality: States in their legislation, observer status in the US and International jurisdictions

Class:

Legal framework governing the relation through which international person cooperate

How do you create/make international law?

Article 38 of the statutes od the ICJ: but only a start, there had been changes in the system

**Article 38**

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.

2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.

Nobody can deny that international convention are the most important source : States have the possibility to derogate to international law through international convention : there is a hierarchy.

* First source: international conventions -> refer to treaties, it is the “source par excellence”
  + Most of the time international lawyers: applying a treaty
  + The basic notions of the laws of treaties
  + What is a treaty?
    - The customery definition is found in **Article 2 of the Vienna convention of 1969**
      * Codifies the customery rules on the law of treaties “Bible of treaties”

Article 2: Use of terms

1. For the purposes of the present Convention:

(a) “treaty” means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation;

* + - The first condition for an agreement to be concluded you need it to be passed between subject of international law
    - The second criteria: need to be in written form, taciyt agreements are not recognized as being a treaty
    - The third criteria: the agreement must be governed by international law: the fact that the implementation for instance is governed by Russian law
    - The fourth criteria: whether embodied in a single instrument or two or more related instrument: a treaty is not necessarily one piece, one document: Annexes of a treaty : an integral part of the treaty : they relay on the same instruments
    - Last but not least: whatever its particular designation : states are free to designates its treaty as its want
      * Be careful with the title, a treaty can be called a declaration, the DSU of the WTO…a memorandum d’accord
      * Very important point to be careful about: title are not bound
      * The Vienna Convention does not really give importance to the form
      * For instance exchange of letters can be a treaty
        + Danger today: everything can be a treaty
        + Pandora Box opened by the court : Case in 1978 Agean Sea : press communiqué – Greece went to the ICJ and asked the join press communiqué : ICJ agreed with Greece that the Communiqué could be a treaty
        + What matters is the actual terms of the document and tge context in which the terms were formulated
        + “They decided that these issues should be solved by peaceful means and therefore by the International court at the Hague”
        + But the court said that it could only be agreed if the two were going jointly to the court
        + It can be a treaty even if it does not fulfil the domestic criteria
      * Other instance: Qatar and Bahrain
        + Saudi Arabia as a mediator
        + If after 6 months, the scope of the dispute was still not decided, one could go to the ICJ
        + The Court considered the “minutes of the meeting” to found its competence
        + The Court said that intent did not matter: objectively the terms and the context are sufficient
      * Today: anything can be called a treaty
  + Three persons can generally bind a state: head of state, prime minister and the minister of foreign affairs
  + The principles of treaties
    - **The principle of consent**: treaties are only binding upon states that have expressed their consent to be bound according to its internal law– the ways of expressing consent to be bound by a treaty depends of the constitution: whenever you want to determine in a specific country to express the consent : usually through ratification or approval in accordance with constitutional law
      * One thing important to keep in mind: 2 types of countries:
        + Monist: in monist systems: treaties are directly applicable once ratified or approved according to the domestic procedure: France
        + Dualist: in other countries, you need incorporation of the treaties in domestic law: you need domestic legislation to incorporate the treaty which then can be applicable: Uk
      * The legal effects will be different even if consent
      * The difference between signature and ratification:
        + Signature: when states signed a treaty the first effect is the authentication of the treaty: evidence that it is the real version. The second effect of signature is only to create a temporary or provisional consent to be bound: then need to bring the treaty at home, but iyt produces legal effects:

Vienna Convention: once a treaty is signed you have to refrain to defeat the treaty from its object and purpose : the legal effect of signature: coorperation in good faith

L’obligation de s’abstenir de priver le traité de son objet et de son but

As long as the states do not expressly manifest their intent not to be bound, not possible to defeat the treaty

Ex: USA: does not have any intent to be bound by the Rome statutes

Signature does produce legal effect: therefore when a state has signed he has to refrain to defeat the treaty from its purpose and objective and that until the state has not publicly expressed his will not to be bound

* + - * + Signature is a way to show what is negotiated is important and that the states want to cooperate and discuss the matter internally

“The curtain of states”: other states do not look behind: “domaine réservé” : Article 7 of the Un Charter

Ratification:

* + - The second Pacta sunt servanda : Article 26 of the Vienna Convention : “the soul of the international system”: every treaty enforce is binding upon the parties to it and must be performed by them in good faith
      * Gabcikovo – Magymaros : “the Dam dispute”: parties are bound and performance in good faith
        + In 1977, Hungary and Slovakia concluded a treaty to build a join system of dam, but with the will of change in the Eastern Europe there was more and more an antiecological project, so Hungary decided to unilaterally terminate the treaty. To punish Hugary, Slovakia decided to modify the Danube and deprive Hungary of the water
        + They went to the court which said that even if the wording does not provide for something, the principle imposes to the parties to implement the treaties so need for them to find means to implement the treaties
      * Belgium and the Netherlands: treaties are leaving instrument – pacta sunt servanda: the obligation to perform the treaty even if circumstances change: the principle obliges the parties to comply anyways
        + Fundamental change of circumstances: need to prove that it was unforeseeable, unpredictable, and also, that the state was not part at all in the change : Article 16.2 of the Vienna Convention
      * Pacta sunt servanda: whatever the states are trying to avoid their commitment, answer that the treaties are leaving instrument
    - The third principle: res inter alios acta
      * The principle of relative effect of treaties, effet relatif des traités
        + It means that a treaty between two states cannot create effects for a third states > linked to the consent principle and to pacta sunt servanda
        + However, the treaties can give rights to other states, but cannot create obligations

Ex of Nicaragua

* + - The fourth principle: the principle according to which internal law cannot be invoked not to apply a treaty : A state cannot invoke its internal law to justify non performance with a treaty obligation, even if it’s its constitution
      * Article 27 of the Vienna Convention
      * Every state claim there is a constitutional or internal law preventing them from implementing
        + US and prisoners
        + But also the Italian crimes: two weeks ago the constitutional court said the courts could go to Courts against Germant whereas the ICJ said no
      * Also example of the dispute between the US and the UN
    - A treaty cannot violate jus cogens : a peremptory law of international law: a treaty can never be against the article 53 of the Vienna Convention:
      * Jus cogens: self determination, prohibition of the use of force, genocide, slavery…prohibition of mass violation of human rights,… fundamental principles
        + France has not ratified the Vienna Convention, but consider it reflects customary international law : basis (socle) but
      * Jus cogens:
  + Treaty interpretation: three schools of thought when it comes to the interpretation of treaties
    - The textual school puts emphasis on the text, on the words “the ordinary meaning of the words” : this is a school: giving primacy to the ordinary meaning of the words
      * Ex: WTO
    - The intent school: l’intention: they care about the intent of the parties: give primacy to the intent of the parties
      * Ex: India and Pakistan: Indus water treaty: lawyer asserting the treaty was meant to be a divorce and not a cooperation treaty
    - The third : teleological school of interpretation: puts an emphasis on the object and purpose: raison d’être du traité: what is the treaty trying to achieve?
      * Object
      * Ex: Shrimp Turtles: India, Pakistan, Malaysia and Indonesia against the US
      * The US were imposing to everyone how to fish shrimps and were also claiming they were imposing those measures to protect biological resources
      * It was clear that the drafters never though biological resources : the Judge at the WTO said the purpose was sustainable development
        + Therefore need to look at the text and give an evolutive interpretation
        + You care about how can you achieve the object and purpose
        + The teleological view allows the evolutionary interpretation of treaties; Evolutionary interpretation : treaties are “living instruments”
    - Article 31§1: mixture of the three schools in the Vienna Convention

The Vienna Convention: Bible of treaties, it has opted for a balanced approach. The three schools of interpretation are contained in the Vienna Convention. Categorical rules of interpretation: basis of treaty interpretation : Article 31§1

Today every international court recognizes Article 31, they will claim they apply that article, however, at the end of the day no one arrives at the same interpretation

Article 31§1 says that a treaty shall be interpreted in good faith in accordance with the ordinary meaning of the terms in that context in light of his object and meaning

* Ordinary meaning, then adjustment according to both the context and object and purpose

In the law of treaties: historical context and preliminary discussions : seconds.

A treaty has an objective existence regardless of the subjective that were said in the travaux préparatoires and the history of the treat

Context means: preamble, the annexes to a treaty : any kind of instrument that have been concluded in reaction to the treaty: states common interpretation,…

Sometimes to understand an article you need to read the article of the entire treaty, you don’t isolate a provision

A treaty has to be read as a all: every provision needs to be meaningful and take into account the all context

However, states usually isolate a provision: ex Japan saying killing whales for scientific purposes was possible in a protection whales treaty

The ordinary meaning implies that terms can evolve in terms of international law

The object and purpose is what is going to balance between the ordinary meaning and intent

Whaling treaty : interpreted as a conservation and sustainable exploitation treaty

* Hannibal Khadafi Geneva and subsequent: need to play the interpretation of subsequent event : play with ordinary meaning, with the intent of the parties and context

Article 2 of the Vienna Convention : Supplementary means of interpretation

Circumstances of interpretation of treaties: only when interpretation leads to something to something that is unreasonable or obscure or to confirm the meaning.

Travaux préparatoires et historical context are only supplementary means.

In situation where two treaties are saying contrary things : Article 31 is not helpful

The all spirit behind 31§3: only rules that are applicable between the parties.

**Reservation on treaties**

A reservation means a declaration of a state that excludes the application of a treaty provision or that modifies a treaty provision.

The main debate: basically the solution that was retain in the Vienna Convention in Article 23 was provocked by the International Court of Justice.

In 1948: Genocide Convention was concluded, Convention on prevention and punishment of the crime of Genocide

The Convention does not say reservation are not accepted.

Some states were saying the reservations were prohibited to this convention.

The matter was brought to the court: the ICJ said there was a clash between integrity of treary and universality of participation. The treaty should not be cut but at the same time, it is also good to have a semi applied treaty but universality. Which should be given the more importance ? The court said the universality was more important

The court made the choice of universal participation: as long as the reservation are contained in the treaty or as long as there are not contrary to the object and purpose of the treaty.

The court created nexus of bilateral reservation: a mess. There is no external mechanism that would decide of the reserve.

1969: Vienna Convention

To make it clear is that Article : a state is able to make reservation at any time before the entry into force unless the treaty prohibits the reservation and only allowed for specific provisions or when the reservation is not incompatible with the object and purpose

The Vienna convention has created a system based on: silence, acceptance, objection and double objection

* S. Silence: If the reservation is not prohibited: you can make a reservation : if after 12 months a state did not object, then the reservation is **accepted**
  + Example Vienna convention of 1977: no nation has the right to open the diplomatic bag
  + Libya is the reserving state: every state has the right to choose
  + It means that the treaty is modified between the US and Libya
* Acceptance: the treaty is modified
* Objecting state: if only objection, it means that there is no rule between the parties: none of them can invoke international law
  + the provision: can or cannot apply : no law regarding this provision
  + the rest of the try applies
* Double Objection : OO: for instance the French government: object to the reservation and goes further saying that the reservation is so scandalous that the entire treaty won’t be applied: objection to the reservation and objection to the entry into force
* Create different treaties regime under the same treaty
  + The treaty will be different between all

It is also very dangerous for human right treaties: main problem.

The Human right committee said that it had the right whether to say reservation were possible or not.

Article 9 of the Genocide convention: punishment : opportunity for the court

Reservation: integrity of treaties

You have the option to go out

Switzerland: reservation to a right of fair trial

Benlilos and Switzerland: HREC – Invalidity of the provision : stayed in the treaty

Loizidou v Turkey: cannot limit the territorial application

Examples of how in the field of human rights there is a resistance against the system of the Vienna Convention

Integrity or universal participation

No allowing universal participation does not prevent participation

It is still important to say that something is beyond treaty law

For centuries, diplomatic law was based on customary law

What is customary law ? Two elements are in the definition :

In order to determine whether a law has become customary there are two elements:

* The objective element: practice
  + Need to show it is general practice: the majority of interested states are behaving the same way and adopting the same conduct
    - General: the majority
  + The uniformirty of the practice or consistency of the practice: you need the practice to be the same
    - The states need to behave the same way
  + The constancy: duration : the practice has been there for several time
* the psychological element: ***opinion juris sive necesitatis***
  + the states need to feel that they are bound by international law when behaving in a certain way
    - because you feel or think that it is what law requires you to do, if not this feeling there is not opinion juris, there is no customary law
    - in the real life, before courts they would say that in the majority of state behaviour is going there so opinion juris

There are lots of cases where Court just say it is customary but without trying to apply the elements.

Treaty law and customary law

Class 11 //

Class 12:

International responsibility of a state: “internationally wrongful fact”

It is composed of two elements:

* the wrongful act is attributable to te state
* and that it constitutes actually a breach of an international obligation

Article 4 : organs de jure: state organs

Conduct of a state organs: attributable to the state

We don’t look behind the curtains to see whether it is federeal state or something different… even the mayor of a city is a state organ

If a state organ : conduct attributable to the state

However you might not be able to prove the entity is a state entity

Article 5

If the conduct at stake was conduct in the exercise of governmental activity: attributable to the state

Private lawyer in Congo: and advises Crimes against humanity

Not a state entity under article 4, and no exercise of governmental authority so not under article 5

Article 8: Organ de facto; de jure you are not a state organ, not empowered, but in reality, the facto you are under the government or the control or instructions to the French government

Need to prove that the person was under the control, the instructions or directions

Hostages in Teheran: students, but also example of the US in Nicaragua: the US were trading and financing the Contras.

How can you say that the organs/individuals are controlled or directed by the states?

What is the test to say someone was actually control by a state

The **effective control test**: it means that need to prove that every single act was committed under the direction or control of the accuse state : every single act : so almost impossible to attribute to the state

In 1995: Tadic case: general accused of crimes: first accused of the ICTY

Need to prove that in general there is a link of dependence: control

Confirmation in 2007 in the genocide convention case : Bosnie v Slovenia : returned to the effective control test

Article 11: another option is the endorsement of conduct

Endorsed the behaviour of the students: accepting it such as it can be said to be your conduct

Second element: the breach of the international obligation, the second element of the internationally wrongful act

Breach of an international obligation: the use of the word breach can be explained as a breach is taking into accounts different incompatibility of the behaviour with the regulations

Article 12: not in conformity, whatever its character or origin, as long as it is an international obligation

If a judgement is requiring the troops of a country to get out and the troops don’t: it is an international obligation

Customary obligation : whatever the character or the origin of the obligation

It might happen that a state has committed an internationally wrongful act or it can be justified or excusable: then there is no international responsibility of the state : it is called : “circumstances precluding wrongfulness” : “circonstances excluant la responsabilité”

Circumstances precluding wrongfulness:

* self-defence is an example
* consent is a circumstance

The two circumstances precluding wrongfulness are :

* counter measures
* state of necessity

The two main circumstances:

A countermeasure :

* Sicilianos ”les reactions illicites à l’illicites”
* When a state reacts to a violation of another state
  + Ex between Hungary and Slovakia 1977
  + It has to be temporary, reversible, and proportionnate

Argentina: invoked the state of necessity

The state of necessity : art 29 of the article on state responsibility: “A grave and imminent peril”

Essential interest vs international obligations

What is an essential interest? National security, the economic independence,… ecological balance

Argentina is always invoking that

But you also need to prove you have not participated to the state of necessity : that is not an

Ecological state of necessity: contribution to it

The consequences of state responsibility:

Internationally wrongful act: can escape by the invocation of circumstances precluding wrongfulness : but if you cannot escape ? Then consequences.

The first consequence is that: session of the internationally wrongful act shall stop article 30, you must stop it : secession and non repetition : secession and then guarantee of no repetition

Not only secession but also guarantee of no repetition

Not sufficient: need remedies

Remedies :

The obligation of full reparation

Restitutio in integrum

Three pillars:

* Restitution : bring back the statu quo ante
  + If it is enough, you stop there
  + sometimes not easy
* Therefore second pillar: compensation : not in all cases you can bring back the status quo ante
  + Usually pecuniary indemnisation
  + And if not enough
* Satisfaction: third pillar
  + Djibouti/France