HD-LAWS1023-Notes - HD Laws 1023 Notes

Public International Law (University of Sydney)

LAWS1023 Summary

1. Development and Nature of Public International Law

International Law: governs the relations between nation states

Lex lata: the law as it currently is
Lex ferenda: the law as it ought to be

Theories of IL

Natural Law

The idea that power of law does not come from voice of authority. Natural law says there is a higher reason why the law is the law (e.g. morality, universal principles, religious, etc.). Under natural law, horrific immoral laws would not be valid even if they came from a legitimate authority.

Positivism

In contrast, positivism says the authority is what makes the law the law. Positivists consider international law as a unified system of rules that emanates from the states' will. International law, as it is, is an "objective" reality that must be distinguished from law "as it should be." According to extreme positivist, only rules created by means of a formal treaty process or reliance on general custom are valid.

Consent Theory

Express or implied consent by states is the source of the basis of obligation in international law. The will of the State is the source of the binding authority of international law, but they also put emphasis on the way the consent is expressed by the State. The will of the State is said to be expressed in domestic law through legislation and in the case of international law through consent to international rules. According to some theorists international law is based on the actual consent of the States, it may be implied by way of custom or it might be expressly shown through treaties or other international agreements. The State's will is manifested in the form of conventional and customary rules and since they have consented to them, the rules are binding upon them, and nothing can be law to which they have not consented.

Is International Law Really "Law"?

- While in many cases it serves as a stabilizing factor in the international system, and can even be called a force for good, some believe that IL cannot considered "law" when applied to states or state action, as its enforcement mechanisms rely on state consent, or the trust and goodwill among parties to a treaty
- "[T]heories of law ... are one of the principal causes of low morale among students of international law" – Brownlie 1955
- In Austin's view: "The law obtaining between nations is not positive law: for every positive law is set by a given sovereign to a person or persons in a state of subjection to...[the law's] author... . [T]he law obtaining between nations is law (improperly so called)... . The duties which it imposes are enforced by moral sanctions: by fear on the part of nations, or by fear on the part of sovereigns, of provoking general hostility, and incurring its probable evils, in case they shall violate maxims generally received and respected." (John Austin, Jurisprudence, 1832)
- "International law is sanctioned by habit, interest, conscience and force" (Wright, "The Outlawry of War" 19 AJIL 1 (1925) 96)

2. Sources of International Law

Sources of International Law (Article 38(1) ICJ Statute):
a) International conventions (treaties), 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) General principles of law recognized by civilized nations;
d) Judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary sources for determining the rules of law

All sources of law are independent from each other. Therefore, if a state is not party to a treaty or has made a reservation regarding a provision in a treaty, they can still be held responsible under CIL or another source of law (**Nicaragua (Merits)**)

Customary International Law (CIL)

CIL: "constant and uniform usage, accepted as law" (Asylum case)
Consists of two elements:
1) State practice: repeated acts by states
2) Opinio juris: a state's belief that it is obliged by law to act in a particular way, distinct from mere usage or habit

1) Is there a treaty?

- If the state has **ratified the treaty** → the state is bound by the rule
    - But look at the content of the treaty (e.g. the treaty explicitly bans whaling for commercial purposes, not whaling altogether. Therefore, the state is not violating the treaty for scientific purposes)
        - E.g. is there definitive language stating the behaviour should be banned?
        - E.g. is only one type of behaviour banned?
- If the state has **not ratified the treaty** → the state may still be bound by the rule if parallel obligations exist under CIL (**Nicaragua (Merits)**)
    - A treaty may… (**North Sea Continental Shelf cases**)
        - Declare CIL existent at the time the treaty was drafted
            - **Language used in the treaty**
                - Language that definitively states the rule is CIL → indicates that it is an existing rule in CIL (**distinguished from the North Sea Continental Shelf cases**)
            - **Negotiating history**:
                - Hesitation in the drafting history as to whether the rule should be included → indicates that it is not an existing rule in CIL (**North Sea Continental Shelf cases**)
            - **Reservations:**
                - If reservations to the rule are permitted under the treaty, it was not existing CIL (**North Sea Continental Shelf cases**)
        - Create CIL… (see step 2)

2) Can a treaty provision create CIL?

- For a treaty provision to create CIL (**North Sea Continental Shelf cases**)
    - The provision must be of a **fundamentally norm-creating character**: capable of being the origin of a rule that governs the behaviour of a state
        - **Framing of the rule**
            - If the rule is framed as the primary obligation → indicates it is a norm-creating provision (**distinguished from North Sea Continental Shelf cases**)
            - If the rule is framed as the fall-back obligation → indicates it is not a norm-creating provision (**North Sea Continental Shelf cases**)

        - In **NSC**, states could use other means of determining maritime boundaries, and if those failed, the treaty said they should apply the equidistant rule
    - **Reservations**
        - If states can make reservations to the provision (where they agree to be bound by the treaty, except for the specific provision containing the rule) → indicates it is not a norm-creating provision (**North Sea Continental Shelf cases**)
    - **Exceptions**
        - If the treaty contains exceptions to the rule → indicates it is not a norm-creating provision (**North Sea Continental Shelf cases**)
- There must be **very widespread & representative participation in the treaty**
    - Including the participation of states whose interests are particularly affected by the rule
- There must be general belief by states that they are **obliged by law to act in accordance with the rule**
    - If there is only practice of states who are parties to the treaty, there is a lack of clarity regarding the motivations of the states to comply with the rule
        - Is it the obligation under the treaty?
        - Is it what they consider to be an obligations under CIL?
    - Need to identify practice coming from states who are not parties to the treaty
        - These states have no obligations under the treaty, therefore by following a rule in the treaty, it is more likely they are doing this because they believe they are obligated under CIL
- **Passage of time between the treaty and it becoming CIL**
    - Passage of short period of time not necessarily a bar for a rule to become CIL (**North Sea Continental Shelf cases**)
    - But the practice should have been extensive and virtually uniform within that short period of time amongst the states with affected interests (**North Sea Continental Shelf cases**)
- A treaty norm may become a CIL norm, but "this result is not lightly to be regarded as having been attained" (**North Sea Continental Shelf cases**)
    - Consequences:
        - The treaty-turned-CIL norm binds states that are non-parties to the treaty
        - Denunciation of the treaty by a party does not absolve a state of the obligation to comply with CIL

3) Does the rule meet the requirements of CIL?
North Sea Continental Shelf Cases: confirmed that both state practice (the objective element) and opinio juris (the subjective element) are essential elements for the formation of a customary law rule.

i) State practice
- **1) Widespread practice** (**North Sea Continental Shelf cases**)
    - Number of states engaging in the practice
- **2) Representative practice** (**North Sea Continental Shelf cases**)
    - **Where there is a generally applicable rule** (e.g. use of force): the practice should be general and representative geographically
    - **Where only certain states are affected** (e.g. maritime practices): the practice of those states whose interests are specifically affected is most relevant in the formation of CIL
        - E.g. landlocked states are not affected by maritime practices
- **Timing:**
    - Passage of short period of time not necessarily a bar for a rule to become CIL (**North Sea Continental Shelf cases**)

        - When dealing with a smaller number of states interested in a particular issue (e.g. space exploration) → CIL will develop must faster
        - When dealing with an issue that affects the entire world community → CIL will develop must slower
    - But the practice should have been extensive and virtually uniform within that short period of time amongst the affected states (**North Sea Continental Shelf cases**)
- **Practice that departs from the purported rule:**
    - For a rule to be CIL, there need not be absolute rigorous conformity with the rule (**Nicaragua (Merits)**)
    - Although states may behave in a way that is inconsistent with the purported rule of state practice, this is not conclusive proof that the purported rule no longer exists as CIL (**Nicaragua (Merits)**)
        - *"In order to deduce the existence of customary rules, the Court deems it sufficient that the **conduct of States should, in general, be consistent with such rules**, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule"*
    - But where there is action that is inconsistent with the purported rule of state practice, and the affected states do not protest that action (e.g. where a state prosecutes a crime from another state's flagship in a collision case on the high seas, and there are no objections from the flagship state), this indicates that the purported rule may not be CIL (**Lotus case**)
    - Need to look at:
        - **The response of the affected states to the 'violation' - are they protesting?**
            - No → indicates the rule is no longer CIL (**Lotus case**)
            - Yes → indicates the rule is still CIL (**Nicaragua (Merits)**)
            - Was the affected state/s in a position to protest?
        - **The response of the inconsistent state:**
            - Has the inconsistent state tried to justify their behaviour by appealing to exceptions the rule, or using justifications contained within the rule itself?
                - Indicates the rule still exists as CIL (**Nicaragua (Merits)**)

ii) Opinio juris

- **The states concerned must feel that they are obliged by law to act in a particular way** (**North Sea Continental Shelf**)
    - It can be difficult to establish OJ, as it is not always clear what exactly motivated the state to act in a certain way
    - Consider other possible reasons for state compliance, rather than a sense of legal obligation under international law
        - Courtesy, convenience or tradition (**North Sea Continental Shelf**)
        - Political expediency (**Asylum case**, **ICJ 1950**)
- **When certain acts are not done (omissions)**, it must still be proven that states did not act in such a manner because they believed they were legally obliged to refrain from that action (**Lotus case**)
    - In the **Nuclear Weapons Advisory Opinion**, 50 years practice of non-use of nuclear weapons was insufficient to establish CIL, as it was not accompanied by evidence of opinio juris
- Consent to the formation of a CIL is seldom explicit, and it is rather reflected **in state acquiescence**:
    - "Failure to react over time to a practice may serve as evidence of acceptance as law (opinio juris), provided that States were in a position to react and the circumstances called for some reaction" **(International Law Commission's 2018 Draft Conclusions on Identification of CIL)**
        - If the state has not reacted over time→ indicates the rule may be CIL, as there is OJ
            - **Costa Rica v Nicaragua**: absence of protest by Nicaragua contributed to customary fishing rights for Costa Rica
        - If the state was not in a position to react → indicates the rule is not CIL, as there is no OJ
- The **onus of proof** lies on the state arguing for the existence of a custom (**Asylum case**), unless the Court has been asked to determine that question (**Nuclear Weapons Advisory Opinion**)

- **OJ may be evidenced by…** (but these are not necessarily conclusive proof) (**Nicaragua (Merits)**):
    - Statements by state representative
    - Obligations undertaken by states in international forums
    - Multilateral conventions

4) Regional custom

- **A rule of CIL can develop among only a particular geographical region** (**Asylum case**, **ICJ 1950**)
    - But the party which relies on a custom of this kind must prove that:
        - The custom is in accordance with a constant and uniform usage practiced by the states in question (state practice)
        - The custom is established in such a manner that it has become binding on the other party (opinio juris)
        - This custom usage is the expression of a right [of one or more states] and a duty [on one or more other states] (opinio juris)
- **Regional CIL can be created by a small group of states** (**even just two**) (**Rights of Passage case, ICJ 1960**)
    - **Facts**: India argued before the ICJ that practice between only two states was not sufficient to form a local custom. The ICJ rejected this reasoning, finding no reason why a century practice based on mutual rights and obligations was insufficient for local custom to arise.
- Regional CIL may deviate from CIL, but it must not violate jus cogens

5) Persistent Objector Rule

- A state is bound by CIL even if it has never explicitly consented to the rule or has not consented to the practice which created CIL (i.e. newly formed states are bound by CIL)
- But a state which fulfils the requirements of the a persistent objector, set out by **Principle 15 of the International Law Commission's 2018 Draft Conclusions CIL**, will not be bound by that particular rule of CIL:
- **1)** The state must have objected to a purported rule while it was still in the formation stage of becoming CIL, and must have continued to object to the rule after it became CIL (**Anglo-Norwegian Fisheries Case**)
- **2)** The objection must clearly expressed, made known to other States, and maintained persistently
    - **Asylum case (Colombia v. Peru) (ICJ, 1950)**
        - Even if there was a regional CIL that existed, it would not bind Peru, because Peru had persistently objected to the idea of political asylum by refraining from ratifying various treaties on political asylum
    - **Anglo-Norwegian Fisheries Case (ICJ, 1951)**
        - The ICJ found the 10-mile rule would be inapplicable to Norway, as Norway had persistently objected any attempt to apply this rule to the Norwegian coast
        - Other states had acquiesced to Norway's objection (not challenged its objection to the rule), which is not required for the PO rule, but it further supports Norway's objection being known to others
- **3)** A state cannot persistently object to a norm that has the character of **jus cogens**
    - **VCLT Art 53**: a jus cogen norm is accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character
    - There is no universal agreement regarding precisely which norms are jus cogens, however, examples of jus cogens were specified in the **ICL Report on Jus Cogens Norms:** prohibition of genocide, maritime piracy, slavery, torture, wars of aggression, and territorial aggrandisement, right to self-determination

6) UN General Assembly Resolutions / Declarations

- **Are generally not binding themselves** (**Nuclear Weapons Advisory Opinion**)
- **May potentially be indicative of existing CIL, or contribute to the formation of CIL:**
    - **State practice**

        - Adoption (strong consensus) establishes the generality of the practice
        - Repetition in later resolutions establishes the consistency and uniformity of the practice
    - **Opinio juris**
        - **Content of the resolution** (**Nuclear Weapons Advisory Opinion**):
            - Statement that the rule already exists in CIL
                - **Chagos Islands (ICJ, 2019)**: the ICJ determined that SD was part of CIL by 1960 based on the finding that the Declaration of the Granting of Independence to Colonial Countries and People was declaratory of CIL
                    - The wording of the resolution stated that "there is a right to SD" (strong, absolutist language (not ambiguous or aspirational) → indicative of 'lex lata' → existing norms of IL)
                - **Distinguished from Nuclear Weapons Advisory Opinion** - there was a statement saying that "nuclear weapons should be declared illegal")
                    - I.e. the wording indicates that there was not yet a norm under CIL that prohibited the use of such weapons, only a desire to prohibit them in future (aspirational language → indicative of 'lex feranda')
        - **Circumstances of adoption** (**Nuclear Weapons Advisory Opinion**):
            - **Voting**:
                - High number of votes and strong consensus → indicative of OJ (**Chagos Islands**: 89 votes in favour; 9 abstentions; no objections)
                - Many negative votes → lack of evidence of OJ (**Nuclear Weapons Advisory Opinion**)
                - Conflicting opinions in votes → lack of evidence of OJ (**Nuclear Weapons Advisory Opinion**)
            - **Abstentions**:
                - High number of abstentions → lack of evidence of OJ (**Nuclear Weapons Advisory Opinion**)
        - **Conduct of the states after the resolution** (whether followed or not)
- **Chagos Islands (Advisory Opinion) (ICJ, 2019):**
    - **Facts**: Chagos Islands are a part of Mauritius. M was a UK colony. In 1960s, M advocated for independence against UK. But at the same time, UK agreed to lease the CI to USA. In 1965, the UK and M made an agreement that the UK would separate the CI from M, and the CI would continue to be held by UK. The rest of M would become independent. In accordance with the deal, the UK displaced the native people from CI to other parts of M. Later, M wanted CI to be restored
    - **Held**:
    - The ICJ found that SD was part of CIL by 1960; therefore, the decolonisation of M should have been completed according to the principles of SD
        - Found this based on the finding that the Declaration of the Granting of Independence to Colonial Countries and People was declaratory of CIL:
            - Content (the wording of the resolution stated that "there is a right to SD" (strong, absolutist language (not ambiguous or aspirational) - reflective of 'lex lata' → existing norms of IL)
            - Circumstances of adoption (89 votes in favour; 9 abstentions; no objections)
- **Some argue they can create "instant CIL"**
    - In the aftermath of the 9/11 attacks, a number of UNGA Resolutions condemned the attacks and stated right of self-defence against non-state actors
    - As there was high number of votes with strong consensus and almost no objections, some argue this was a form of instant CIL
    - Seems to only exist in very exceptional circumstances

7) Consider timing (if relevant)

- CIL cannot be retrospectively applied (can't punish the state for previous breaches of CIL)

FACTS:

North Sea Continental Shelf Cases (ICJ, 1969)

- **Facts**: Germany and Denmark/Netherlands had a dispute over ocean boundaries - each state wanted to maximise its access to oil and gas reserves in the North Sea. Denmark/Netherlands used the 'equidistance' rule contained in the *1958 Geneva Convention on the Continental Shelf*, but Germany calculated division based on a "just and equitable" share.

Nicaragua (Merits) [1986]

- **Facts**: Nicaragua was unhappy with US military activity in the country (supporting the rebel movement in Nicaragua); argued that the US breached two treaty rules / parallel CIL obligations: 1) a state could not use force in another state's territory, and 2) that a state could not interfere in the affairs of another state.
- **Held:**
    - **Treaty argument**: While the US may be breaching its treaty obligations, the ICJ had no jurisdiction to deal with this, as the US had not ratified this treaty
    - **CIL argument:** Found that the US had breached a CIL on the use of force in another state, and interference in the affairs of another state
        - **The ICJ looked at 1) response of the affected states + 2) response of the inconsistent state**

Lotus Case (PICJ, 1927)

- **Facts:** Two ships collided on the high seas (under no territory) - Turkey prosecuted and convicted the French captain for manslaughter. The French Govt. demanded the release of the French captain - arguing that the Turkish Govt. had no jurisdiction to prosecute, as the crime occurred on a French flagship, therefore the crime was exclusively in the jurisdiction of France and Turkey had no concurrent jurisdiction (France argued that in practice, states abstained from prosecuting collision cases where the crime occurred on the vessel of another state. Both states referred the matter to the PICJ.
- **Held: the PICJ rejected France's argument**

Asylum case (Colombia v. Peru), ICJ 1950

- **Facts**: The leader of a failed coup in Peru sought asylum in Colombia - Peru rejected to give him safe passage to Colombia… Colombia argued there was a local custom in Latin America permitting political asylum.

Anglo-Norwegian Fisheries Case (ICJ, 1951)

- **Facts**: dispute between UK and Norway over how large an area of water surrounding Norway was Norwegian waters. UK argued the "10 mile rule" was CIL.

Relationship between CIL and Treaties

Relationship between CIL and Treaties

- **Article 38(1) ICJ Statute** does not establish a hierarchy of the sources of IL (i.e. no source is superior to another)
- **Treaties and CIL on the same topic co-exist in parallel** (**Nicaragua (Merits)**)
    - As noted in Nicaragua, where rules pertaining to the use of force existed in both CIL and treaty, the ICJ held that CIL and treaty rules can coexist for the same subject
    - Subsequent treaties do not abrogate existing CIL
    - Treaties apply only to parties, while CIL applies to the whole world
- But…
    - **CIL may displace treaties if a custom contrary to a treaty norm develops** (possible as long as it is not contrary to jus cogens)

- **Treaties may be applied instead of custom if their norms are more specific** (possible as long as it is not contrary to jus cogens)
    - I.e. if two states choose to contract out of a rule of CIL in their relations, the treaty would override custom

Coexistence of CIL and Treaty Norms

- The fact that certain rules have been codified as treaty norms (that apply to parties to the treaty) does not mean they cease to exist as rules of CIL (that apply worldwide or to a specific region) (**Nicaragua (Merits)**)
    - Rules that are identical in treaty and CIL may be distinguishable in methods of interpretation and application (e.g. a state may accept a rule contained in treaty because the treaty establishes what the state regards as desirable institutions/mechanisms to ensure implementation of the rule)

UN Security Council Resolutions

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- **UN Charter Art 25**: SC resolutions are binding on member states

General Principles of Law

ICJ Statute Art 38(1)(c): "general principles of law recognised by civilised nations"

- These principles were introduced into the ICJ statute to **aid the Court** in **deciding matters** where **treaties and CIL do not provide guidance**
- **CIL (38(1)(b))** and **general principles (38(1)(c))** are different sources of IL
    - **Ure v Cth:** CIL and general principles are two distinct systems of IL and must be treated separately
- General principles can either be principles that have been borrowed from domestic law that can be applied to international legal questions, or principles which have developed at international level
    - **Principles of municipal law:**
        - IL recruits many rules from private systems of law, such as rules of procedure, good faith, res judicata [an issue decided by a court may not be reopened), unjust enrichment, estoppel
        - The way in which IL borrows from this source of law is to adapt the principles to fit the decision-making process in the international sphere (not necessarily applied as they are under domestic jurisdictions in a "lock, stock and barrel" manner) (**International Status of South West Africa Case**)
        - These principles must have sufficient acceptance in other jurisdictions to be accepted as general principles (**International Status of South West Africa Case**)
    - **Principles developed at the international level:**
        - Sovereign equality between states
        - Precautionary principle in environmental law
- Equity in IL:
    - **Diversion of Water from the Meuse**:
        - **Facts**: Netherlands & Belgium had a treaty re: use of water from the Meuse. Netherlands approached ICJ, claiming that Belgium breached the treaty bc it had constructed canals on its territory. Belgium defended itself by saying that Netherlands had previously constructed locks on the river, which affected its use by Belgium.
        - **Held**: the court has freedom to consider principles of equity as part of IL.
    - Advantages and disadvantages of having equity as a principle of IL:
        - **Equity infra lege**: the form of equity which is used as a method of interpreting the law
            - There is no problem with engaging in the use of equity for this purpose and it has been accepted by the ICJ (**Frontier Dispute (Burkina Faso v Mali)**)
        - **Equity extra lege**: the form of equity which allows the court to create exceptions from IL norms
            - This form of equity is more problematic

Subsidiary Materials

- **Subsidiary materials: judicial decisions and the teachings of the most highly qualified publicists**
- **These are not sources of law; they provide views as to content of IL principles**
- **Judicial decisions**:
    - Including from the ICJ, international tribunals, arbitral tribunals, domestic courts (but the weight given to a domestic decision will depend on the analysis behind the reason for the judgment, and the level of the court in the hierarchy)
        - Much depends on the credibility of the court, its independence, national bias, quality of decisions
        - No precedent value, but consistency is strived for
    - **Statute of the ICJ, Art 59**: the ICJ's decisions are only binding on the state parties of a specific case; they are not binding as precedent
    - But ICJ decisions have influence and the ICJ often follows its own earlier judgments
        - Examples of ICJ contributing to the development of new IL rules:
            - Reparation case 1949: UN has international legal personhood
            - Reservations case 1950: rules on reservations to multilateral treaties
            - Nottebohm case 1955: principle of real and effective nationality
- **Teachings of the most highly qualified publicists**:
    - More common for the ICJ to refer to publicists in the 18th, 19th and early 20th centuries
    - Now it is very rare for the ICJ to refer to publicists, as their writing is just an interpretation of the law; it is not law
    - The work of the International Law Commission falls into this category (as a subsidiary source), as the ILC is made up eminent international lawyers who examine the law as it currently exists and research how the law should be develop
        - But the work of the ILC does hold a higher status than academic writing, as the ILC is a UN Body and eminence of who is involved
    - **The Paquete Habana:**
        - **Facts:** Two fishing vessels from Cuba were seized by the US blockade of Cuba, which had been created amid rising tensions between the two countries. Shortly thereafter, the Spanish–American War was officially declared.
        - **Held:**
            - Coastal fishing vessels are exempt from capture as prizes of war under CIL
            - **The works of jurists and commentators are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is (such as CIL)**

Inconsistency

Inconsistency between CIL and Treaty Norms, or Two Rules from the Same Source

- **Principle of lex posterior derogat priori: a newer law repeals an older law**
    - E.g. the 1949 Geneva Conventions on the Treatment of POWs override the 1929 Geneva Conventions on the Treatment of POWs
- **Principle of lex posterior generalis non derogat priori speciali: a later general law does not derogate from an earlier specialised law**
    - E.g. a general treaty about the sea would not override a CIL specifically about an certain maritime practice
- **Principle of lex specialis: the specific law prevails over the general law**

Soft Law

- Non-binding instruments such as GA resolutions or codes of conduct
    - These may be contained as a provision within a treaty e.g. “states should endeavour to attempt to…”
    - These encourage a certain kind of behaviour that are not supported by a binding IL
- “Soft law” can sometimes shape behaviour better than hard law

- Helpful in situations where there isn't enough specificity in a hard law norm to give more detail
- Helpful way to address new / emerging issues (e.g. cybercrime, conduct in outer-space environment)
- Gives states the space to adjust in their own way that may suit cultural and development needs
- The principles contained within soft law may eventually become CIL

3. Treaties

1) What constitutes a treaty

Treaties are evidence of the consent of states to regulate their interests according to IL

a) VCLT Art 2: Definition of a treaty

- A treaty is: an
  - An international agreement
  - Between states
  - In written form
  - Governed by international law
  - In whatever its particular designation e.g. "Treaty", "Agreement", "Covenant"…

b) Any joint communique may constitute a treaty

- **Qatar v Bahrain (ICJ, 1994)**
- **Facts**: Whether the minutes of a 1990 meeting between the governments of Qatar and Bahrain constituted a treaty. Bahrain maintained that the minutes were no more than a simple record of negotiations.
- **Held:**
  - The minutes of the meeting did indeed constitute a treaty
  - The ICJ noted that a treaty may take a variety of forms
  - The ICJ also held in another case, **Aegeon Sea Continental Shelf** , there is "no rule of IL that precludes a joint communique from constituting a treaty"
  - **To ascertain whether an agreement of that kind has been concluded**, the ICJ must have regard to:
    - 1) Its **actual terms** and..
    - 2) The **particular circumstances** in which it was drawn up
  - The ICJ held that the minutes were not a simple record of a meeting…
    - **They were created in the circumstances of attempting to find a solution to the dispute**
    - **They enumerate the commitments to which the Parties have consented. They thus create rights and obligations in IL for the Parties. They constitute an international agreement.**

c) Unilateral declarations concerning legal or factual situations are not treaties; but they may have the effect of creating legal obligations on the state that made them

VCLT Art 3: while the VCLT does not apply to unilateral declarations, this doesn't mean that they aren't legally binding!

- **Nuclear Tests (Australia v. France):**
- **Facts**: Australia brought proceedings against France in the ICJ, arising from nuclear tests by France on islands in the Pacific. Australia argued France had a legal obligation to stop this, based on series of unilateral statements by the French President & Defence Minister, stating that France would stop nuclear testing.
- **Held:**
  - **Declarations made by way of unilateral acts may have the effect of creating legal obligations when…**
  - **1)** The undertaking is made **publicly** and with an **intention to be bound** (some sense of this being a binding obligation)
  - **2)** Must be **clear and specific** (directed towards something specific)
    - Specific, definitive objects (what the state will do, when the state will do it)
    - No caveats ("in the normal course of events, we will stop X" i.e. there may be other circumstances where the state will not stop X)
  - **3)** No **requirement of reciprocity**, acceptance or even acknowledgement from other states
  - **4)** The form of the unilateral undertaking is irrelevant; it may be **oral or written** (but must be public)

    - **5)** Must be **made by someone who is authorised** by the state to make legally binding obligations on the state
        - There can be no doubt, in view of the President position as Head of State, that his/her public communications are international relations acts of the State
    - **6) States on the receiving end of the statement** have the right to believe it was made in 'good faith'
- **But in more recent cases, the ICJ has been more reluctant to fund that a unilateral statement has binding legal effect on a State…**
- **Burkina Faso v Mali (ICJ, 1985):**
    - ICJ held that a statement made by the President of Mali at a press conference did not create legal obligations on Mali
    - ICJ took the view that it has a '**duty to show even greater caution when it is a question of a unilateral declaration <u>not directed to any particular recipient</u>'**
- **DRC v Rwanda (ICJ, 2006)**
    - ICJ found that a statement made by the Rwandan justice minister concerning the withdrawal of Rwandan reservations on its human rights treaties did not constitute a unilateral declaration with binding legal effect
    - The **statement was of an indeterminant nature** (scope of commitment/content of exactly which reservations would be withdrawn was unclear (minister talked about four treaties - prevention of corruption, weapons… was the commitment just in relation to these treaties?)
    - The statement had **no precise timeframe** for withdrawal of reservations

2) Is there a treaty governed by the VCLT?

The VCLT contains **core principles** on the law of treaties - establishes a procedural framework for how treaties are formed, interpreted, terminated and limitations that state may place on their consent to be bound by a treaty. States can choose to depart from many aspects of the VCLT.

But there are some provisions that do not allow the states to depart from the VCLT rules (e.g. where it says "no exceptions", jus cogens norms)

Additionally, because some of the provisions of VCLT are regarded as codification of CIL, the application of the VCLT is extended beyond parties to the VCLT - it applies to treaties between non-parties and treaties made prior to the VCLT.

- **Pacta sunt servanda** ("agreements must be kept") (Art 26) - the preamble of the VCLT states that this is recognised as CIL
- **Hungary v Slovakia** - Arts 60, 61, 62 are part of CIL, thus binding on all states (even prior to creation of CIL)
- **Namibia Opinion** - Art 60 is CIL
- **UK v Iceland** - Art 62 is CIL, thus binding on all states
- **Libya v Chad** - Art 31 (interpretation) is CIL, thus binding on all states
- **There has actually not been any case heard by the ICJ that found a provision of the VCLT was not CIL**

Exclusions from the VCLT:

- Treaties between states and IOs, or other subjects of IL (VCLT Art 3)
- Treaties between other subjects of IL (VCLT Art 3)
- Oral agreements (VCLT Art 3)
- Unilateral statements (but these may still be legally binding)
- Agreements intended to be governed by national law
- **But the fact that the VCLT does not apply to these agreements does not mean that they can't be legally binding! (VCLT Art 3)**

3) Has the state been bound by the treaty?

a) All states possess capacity to be bound by a treaty

- **VCLT Art 6:** every State possesses capacity to conclude treaties

b) How does a state express consent itself to be bound?

- **VCLT Art 12**: signature
- **VCLT Art 13**: exchange of instruments
- **VCLT Art 14**: ratification, acceptance or approval
- **VCLT Art 15**: accession
- **VCLT Art 11**: any other agreed method specified by the treaty

c) Who has the power to bind a state? *(N.B. applies to unilateral declarations)*

- **VCLT Art 7:**
    - A person with 'full powers' (i.e. the person has a document from competent state authority which gives the person power to consent to be bound by the treaty) may bind a state to a treaty, or…
    - A person who lacks that document, but it appears from the circumstances that the State intended to give them the same power, may bind a state to a treaty
- **VCLT Art 7(2): without having to show full powers, these people may bind a state to a treaty:**
    - Heads of State, Heads of Government and Ministers for Foreign Affairs;
    - Heads of diplomatic missions;
    - Representatives accredited by their state for the particular conference.
- **DRC v Rwanda (ICJ, 2006)**
    - **Facts**: ICJ had to consider the legal effect of a statement made by the Rwandan justice minister concerning the withdrawal of Rwandan reservations on its human rights treaties.
    - **Held**:
    - The ICJ rejected Rwanda's argument that it could not be legally bound by the statement of a Minister of Justice (not a Head of Government or Minister of Foreign Affairs)
    - With increasing frequency in modern international relations, **other persons representing a State in specific fields may be authorised by that State to bind it by their statements in respect of matter falling within their purview** - e.g. for holders of technical ministerial portfolios exercising powers in their field of competence
    - But ICJ held the statement was not binding (due to other factors listed above)

d) Has treaty received the required number of parties to come into force?

- **VCLT Art 24 (entry into force)**
- ***Unless it otherwise provides, a treaty only comes into force when it has reached a requisite number of state parties via ratification***
    - 1. A treaty enters into force in such manner and upon such date as it may provide or as the negotiating States may agree.
    - 2. Failing any such provision or agreement, a treaty enters into force as soon as consent to be bound by the treaty has been established for all the negotiating States.
    - 3. When the consent of a State to be bound by a treaty is established on a date after the treaty has come into force, the treaty enters into force for that State on that date, unless the treaty otherwise provides.
    - 4. The provisions of a treaty regulating the authentication of its text, the establishment of the consent of States to be bound by the treaty, the manner or date of its entry into force, reservations, the functions of the depositary and other matters arising necessarily before the entry into force of the treaty apply from the time of the adoption of its text.
- ***From the period of time between opening for signature and reaching the requisite number of state parties, the treaty is not in force***
    - E.g. **The Rome Statute** was officially adopted in 1998, but it didn't come into force until 2002 because it required 60 state parties to ratify it
- **For any parties that consent to the treaty before it comes in force, they are not bound by its terms**
- **But any parties that consent to the treaty after it comes in force, they are bound as soon as they express their consent according to the treaty requirements** (e.g. can be signature alone, ratification, etc…)

e) Is treaty invalid for some reason?

- **See section 9**

4) If the treaty has not yet entered into force…

Obligation not to defeat the object and purpose of a treaty prior to its entry into force

VCLT Art 18: a State is obliged to refrain from acts which would defeat the object and purpose of a treaty:

- (a) between signature and ratification, **unless the state makes its intention clear not to become a party to the treaty**
- (b) between ratification and entry into force, **unless the state makes its intention clear not to become a party to the treaty**

Letter to the UN Secretary General from USA (2002)

- After signing the Rome Statute of the ICC, the USA notified the UN Secretary General of its intention not to ratify the Rome Statute, therefore having no legal obligations arising from its signature in 2000
- The USA's action in announcing its signature would have no legal effect was consistent with Art 18(a) of the VCLT, as it made its intention clear not to become a party to the treaty
- Following this announcement, the USA may act inconsistently with, and defeat the purpose of, the Rome Statute

5) What are the legal consequences of consenting to be bound?

Report on the ILC to the General Assembly (1966)

- The rule "**pacta sunt servanda**" that treaties are binding on their parties and must be performed in good faith is the fundamental principle of the law of treaties
- The principle of pacta sunt servanda is considered to be the primary explanation of why there is compliance with treaty obligations
- The principle derives from the consent of States and is a principle of CIL and possible an example of a jus cogens obligations

Every treaty in force is binding

VCLT Art 26: every treaty in force is binding upon the parties to it and must be performed by them in good faith

Domestic law cannot excuse non-performance

VCLT 27: A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46 (see invalidity)

- **Alabama Arbitration Case (USA v UK) (1872)**:
  - **Facts**: The Confederacy (Southern US states) commissioned a powerful warship to be built in the UK. The Northern US states got intelligence about these warships being built, and went to the UK Govt. saying it had breached its international undertaking to be neutral in the US civil war and that the UK had to stop the warship from leaving the UK. The UK looked at its national legislation and it found that it had no power to stop the warship from leaving the UK. The warship left the UK and caused extensive destruction to the Northern US states.
  - **Held**:
  - The arbitrators found that the UK could not rely on its domestic law as a barrier to the international obligation it had made to remain neutral.
  - The UK had breached their international obligation and had to pay damages.

Non-retroactivity of treaties

VCLT Art 28: unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party

Treaties must be registered with the UN (UN Charter, Art 102)

- To be actionable before the ICJ
- Treaties not registered with the UN cannot be relied on before UN organs
- To prevent secret diplomacy and promote availability of treaty texts

6) Any third parties affected by the treaty in terms of rights or obligations being conferred?

General rule re: third states

VCLT Art 34: a treaty does not create either obligations or rights for a third State without its consent

Treaties may provide obligations on third states (with their acceptance!)

VCLT 35: An obligation arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to be the means of establishing the obligation and the third State expressly accepts that obligation in writing.

Treaties may provide rights for third states (with their assent!)

VCLT 36:

1. A right arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to accord that right either to the third State, or to a group of States to which it belongs, or to all States, and the third State assents thereto. Its assent shall be presumed so long as the contrary is not indicated, unless the treaty otherwise provides.
2. A State exercising a right in accordance with paragraph 1shall comply with the conditions for its exercise provided for in the treaty or established in conformity with the treaty.

Rules in a treaty becoming binding on third States through international custom

VCLT Art 38: rules in a treaty can be binding on a third State if it is recognised as CIL

Exemplified in the **North Sea Shelf Case:** one of the ways CIL develops is by starting as a treaty obligation, then it becomes widespread practice, etc…

7) Have there been, or is this, an amended treaty?

VCLT Art 39-41

Art 39: treaty can be amended by consent of parties

Art 40-41: govern amendments, unless the treaty provides otherwise

Art 40:

- Amendment only binding on states which agree to it
- If a state later accedes, to the treaty, the default position is that the amendment binds that state (unless that state expresses other intent)

Art 41:

- In multilateral treaties, parties can amend provisions just between certain states
- But cannot make amendments that are:
    - Prohibited by the treaty
    - Affect the rights/obligations of other parties
    - Undermine the object and purpose of the treaty

<u>Example:</u>

- 2010 Kampala amendment to the Rome Statute (to define “aggression”)
    - This amendment satisfied a majority of parties, so this amendment is only binding on the states that agreed to the amendment clause (as required under VCLT Art 40)

Successive treaties on the same subject (VCLT Art 30)

1) Look at the treaty itself; within the treaty, it will say whether it is subject to an earlier treaty, or if it is replacing an earlier treaty

2) But it can also say the newer treaty exists in addition to the previous treaty

Parties: A & B are treaties on the same subject (A = older; B = newer)…

- Between a party to A, and a party to A and B = A applies (the common treaty)
- Between a party to B, and a party to A and B = B applies (the common treaty)

- All states are both parties to A and B = both treaties apply, but A only applies to the extent it is compatible with B (if there is a conflict, B prevails)

8) Are there any terms up for interpretation?

VCLT Art 31: General Rules of Interpretation

- 1. A treaty shall be interpreted **in good faith**, according to the **ordinary meaning to be given to the terms of the treaty** in their **context** and in the **light of its object and purpose**.
- 2. The **context** for the purpose of the interpretation of a treaty shall comprise, in additional to the **text**, including its **preamble** and **annexes**:
    - (a) Any **agreement relating to the treaty** which was **made between all the parties** in connexion with the conclusion of the treaty;
    - (b) Any **instrument which was made by one or more parties** in connexion with the conclusion of the treaty and **accepted by the other parties** as an instrument related to the treaty.
- 3. There shall be taken into account, together with the context:
    - (a) Any **subsequent agreement** between the parties regarding the interpretation of the treaty or the application of its provisions;
    - (b) Any **subsequent practice** in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
    - (c) Any **relevant rules of international law applicable** in the relations between the parties.

VCLT Art 32: Supplementary Means of Interpretation

- Recourse may be had to **supplementary means** of interpretation, including the **preparatory work of the treaty** and the **circumstances of its conclusion**, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
    - (a) Leaves the **meaning ambiguous or obscure**; or
    - (b) Leads to a **result which is manifestly absurd or unreasonable**.

When interpreting a treaty, look at:

- **VCLT 31:**
    - **The title of the treaty** (indicates the aims/objects of the treaty)
    - **The preamble** (indicates the aims/objects of the treaty)
    - **The relevant clause** (interpret the ordinary meaning of the terms)
    - **Agreement relating to the treaty**
    - **Instrument made in connection with the treaty**
    - **Context includes:**
        - **Subsequent agreement** between the parties re: interpretation of the treaty
        - **Relevant subsequent practice** that informs the meaning of the terms
        - **Applicable rules of IL**
- **VCLT 32:**
    - **Where the application of Art 31 leaves the meaning ambiguous/obscure, or leads to a manifestly absurd/unreasonable result, you may look to supplementary means of interpretation, including…**
        - **Preparatory work of the treaty**
        - **Circumstances of its conclusion**

Libya v Chad (ICJ, 1994)

- **Facts**: The disputed revolved around whether a boundary btw Libya and Chad had been settled by an annex to a treaty made between Libya and France**.**
- **Held:**
    - The ICJ held that the treaty did determine the treaty boundaries.
    - The text of the treaty clearly conveyed the intention of the parties to reach a definitive statement of the question of their common frontiers.

- The words of the treaties must be interpreted according to their ordinary meaning and in good faith (as per VLCT Art 31).

Costa Rica v Nicaragua (ICJ, 2009)

- **Facts:** Treaty between Costa Rica and Nicaragua (made in 1858) regarding Costa Rica's right of free navigation for "objectors de comercio".
- **Issue:** the meaning of the phrase:
  - Nicaragua argued for the purposes of the 1858 treaty, "commerce" covers solely the trade of physical goods and did not extend to the sale of services
  - Nicaragua argued the words should be given their meaning at the time of the treaty creation, not contemporary meaning
- **Held:**
  - **The ICJ held that the phrase could hold either of the meanings put forward, depending on the context… but the ICJ held that Nicaragua's narrow interpretation was not in line with the object of the treaty**
    - **The object was to allow free rights of navigation for commercial purposes**
  - The terms used in a treaty must be interpreted in light of what is determined to have been the parties' common intention, which is concurrent with the treaty's conclusion.
  - But there are situations in which the parties' intent in creating the treaty was, or may be presumed to have been, to give the terms meaning capable of evolving over time
  - **It is appropriate to give a term its modern meaning when:**
    - **The parties chose a generic term (as the parties necessarily having been aware that the meaning of the term was likely to evolve over time; therefore, the parties must be presumed to have intended the term to have an evolving meaning)**
    - **The parties entered into a treaty for an unlimited duration, where the treaty is intended to create rights/obligations characterised by perpetuity**
  - **Therefore, even if the meaning of the term has changed from its original meaning when the treaty was entered, it is the present meaning which must be accepted for purposes of applying the treaty**

China Measures Affecting Imports of Automobile Parts (2008)

- **Facts**: The WTO Appellate Body was called upon to consider the context in interpreting a treaty, in this case, whether a description/coding system under another treaty could be taken into account as part of the context of the treaty.
- **Held**:
  - The task of the treaty interpreter is to ascertain the meaning of particular treaty terms using the tools set out in Art 31-32 VCLT.
  - **The realm of context, as defined in Art 31(2) VCLT is broad - including the text of the treaty and may extend to 'any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty' and 'any instrument made and accepted by the parties in connection with the treaty'.**
  - **Additionally, for a particular agreement or instrument to serve as relevant context for a treaty, it must also have some pertinence to the language being interpreted.**
  - **Because the treaty was constructed using the description/coding system, the description/coding system was apt to shed light on the meaning of the terms used in the treaty**

Oil Platforms Case (Iran v USA) (ICJ, 2006)

- **Facts:** Iran claimed US breached the 1955 Treaty of Friendship by destroying oil platforms. US argued it did this because it was necessary to use force to protect its security interests (using Art 20 of the treaty as justification). The US argued when interpreting the 1955 treaty provision, it was not necessary to determine what constitutes the use of force under extraneous IL, just under the terms of the treaty.
- **Held:**

- **ICJ held that such a use of force was in contravention of the treaty obligations**
- **The ICJ determined that consideration of the extraneous legal context is relevant in the interpretation of the treaty in question - VCLT (Art 31(3)(c)) states that a treaty must be interpreted according to its context, which includes any relevant rules of IL applicable in the relations between the parties**
  - **Therefore, IL rules regarding the use of force under CIL and the UN Charter were relevant in interpreting the treaty provision**
  - **When considering these sources of IL, it was determined that the US had breached IL rules regarding the use of force**

9) Is the treaty invalid?

INVALIDITY - WHOLE TREATY

VCLT Art 44:

(2) **A ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty recognized in the present Convention may be invoked only with respect to the whole treaty except as provided in the following paragraphs or in article 60** (**see invalidity - separation of treaty**…)

(4) **In cases falling under articles 49 and 50 the State entitled to invoke the fraud or corruption may do so with respect either to the whole treaty or, subject to paragraph 3, to the particular clauses alone.**

(5) **In cases falling under articles 51, 52 and 53, no separation of the provisions of the treaty is permitted**

- **Coercion of state representative (VCLT Art 51)**
- **Coercion of state by unlawful threat or use of force (VCLT Art 52)**
- **Conflicts with a peremptory norm of general international law (jus cogens) (VCLT Art 53)**

1) MANIFEST VIOLATION OF DOMESTIC LAW OF FUNDAMENTAL IMPORTANCE

VCLT Art 46:

1. A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent **unless that violation was manifest and concerned a rule of its internal law of fundamental importance**.
2. **A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith.**

Cameroon v Nigeria (ICJ 2002)

- **Facts**: The Nigerian President agreed to be bound by a treaty. But then Nigeria argued that the treaty was invalid because it did not follow an internal procedure in the Nigerian constitution (that the treaty had to first be approved by the Military Counsel before the President could bind Nigeria)
- **Held**:
- **Even though there was a domestic limitation on the President's ability to bind Nigeria to a treaty, it does not meet the 'manifest' threshold (i.e. evident and obvious to other states), as other state parties would not have been aware of this domestic requirement.**
  - Under VCLT Art 7 - a President does have the requisite level of authority to bind a state to a treaty
  - The limitation on a Head of State's capacity is not manifest, unless it is properly publicised
- **The internal procedure was not a violation that concerned a rule of its internal law of fundamental importance**

2) ERROR

VCLT Art 48:

(1) State may **invoke an error in a treaty as invalidating its consent** to be bound by the treaty if the error relates to a fact or situation which was assumed by that State to exist at the time when the treaty was concluded and formed an essential basis of its consent to be bound by the treaty.

- **The error must relate to:**
  - **Fact or situation assumed by that State to exist at the time of treaty conclusion**

- **That is an "essential basis" of the State's consent to be bound**

(2) Paragraph 1 shall not apply if the State in question contributed by its own conduct to the error or if the circumstances were such as to put that State on notice of a possible error.

- **If the state contributed to the error, or if the state had reason to know about the error, the state may not use the error to invalidate its consent**

(3) An error relating **only to the wording of the text of a treaty does not affect its validity**; article 79 then applies.

Temple of Preah Vihear (Cambodia v Thailand)

- **Facts:** Long-running dispute between Cambodia and Thailand as to whose territory the temple was contained in. The parties agreed it was located in Thai territory and commissioned the creation of a map to conclusively verify where the temple was located. There was an error in the map - the map put the temple in Cambodia. But both parties signed off on the map and agreed it was accurate. Decades later, Thailand objected.
- **Held:**
- ICJ ruled in Cambodia's favour.
- **It held the error in the map (that Thailand relied on) was not sufficient under VCLT Art 48 to invalidate the consent of Thailand because:**
  - **Thailand contributed to the error (by creating the map), and…**
  - **The circumstances were such as to put Thailand on notice of a possible error. Thailand had the opportunity to inspect the map before signing off.**

3) FRAUD

VCLT Art 49:

If a State has been induced to conclude a treaty by the fraudulent conduct of another negotiating State, the State may invoke the fraud as invalidating its consent to be bound by the treaty.

4) CORRUPTION OF A STATE REPRESENTATIVE

VCLT Art 50:

If the expression of a State's consent to be bound by a treaty has been procured through the corruption of its representative directly or indirectly by another negotiating State, the State may invoke such corruption as invalidating its consent to be bound by the treaty.

5) COERCION

VCLT Art 51: Coercion of a representative of a State

The expression of a State's consent to be bound by a treaty which has been procured by the coercion of its representative through acts or threats directed against him shall be without any legal effect.

VLCT Art 52: Coercion of a State by the threat or use of force

A treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations

Note:

- *Threatening to withhold aid, trade, and severing economic ties, does not amount to coercion*
- *There is nothing in the VCLT about treaties between unequal states (i.e. unequal bargaining positions, different economic and military powers) being void; there must be something that amounts to coercion*
- *Coercion = threat of use of force*

Nicaragua v Colombia (ICJ, 2007)

- **Facts**: Nicaragua ratified a treaty while it was under military occupation by USA, therefore Nicaragua invoked Art 52 of the VLCT - stating that the treaty was void due to coercion. Nicaragua claimed that it remainder under the influence of the USA, even after the withdrawal of the last US troops.
- **Held**:
- **ICJ majority rejected this claim of coercion**

- **ICJ observed that for more than 50 years, even after the USA occupation ended in 1933, N treated the treaty as valid (acted consistently with the treaty) and never contended that it was not bound by the treaty**

6) INCONSISTENCY WITH JUS COGENS

VCLT Art 53:

A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

Factors in VCLT Art 53 that characterise jus cogens norms:

1) A peremptory (i.e. authoritative) norm of general IL that is accepted and recognized by the international community of States
2) A whole norm from which no derogation is permitted
3) Can only be modified only by a subsequent norm of general IL having the same character

There is no universal agreement regarding precisely which norms are jus cogens, however, examples of jus cogens were specified in the **ICL Report on Jus Cogens Norms:** prohibition of genocide, maritime piracy, slavery, torture, wars of aggression, apartheid, territorial aggrandisement, right to self-determination

INVALIDITY - SEPARATION OF CLAUSES

For other grounds of invalidity, **separation may be possible**:

VCLT Art 44(3): if the ground relates **solely to particular clauses**, it may be invoked only with respect to those clauses where:

- (a) **the said clauses are separable from the remainder** of the treaty with regard to their application;
- (b) it appears from the treaty or is otherwise established **that acceptance of those clauses was not an essential basis of the consent of the other party or parties** to be bound by the treaty as a whole; and
- (c) **continued performance of the remainder of the treaty would not be unjust**

VCLT Art 44(4): in cases falling under articles 49 (**fraud**) and 50 (**corruption**) the State entitled to invoke the fraud or corruption may do so with respect either to the **whole treaty** or, **subject to paragraph 3**, to the **particular clauses alone**.

10) Can the state terminate or withdraw from the treaty (or just suspend the treaty)?

Check whether these give state X the **right to terminate** or **just suspend** treaty…

1) Termination by Consent

VCLT Art 54: the termination of a treaty or the withdrawal of a party may take place

(a) **In conformity with the provisions of the treaty**; or
(b) **At any time by consent of all the parties after consultation with the other contracting states**

2) Denunciation or withdrawal

VCLT Art 56:

1. A treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal unless:

(à) **The parties intended to admit the possibility of denunciation or withdrawal**; **or**
(b) **A right of denunciation or withdrawal may be implied by the nature of the treaty**.

- E.g. if the treaty **relates to something temporary** (once the terms of the treaty are met (e.g. a species is removed from the endangered list), you could infer that the treaty is terminated because the object of the treaty is fulfilled)
- E.g. if the parties at a **treaty conference considered** having this element

2. A party shall give not less than twelve months' notice of its intention to denounce or withdraw from a treaty under paragraph 1.

3) Termination by Replacement of a Later Treaty

VCLT Art 59: a treaty is terminated if:

- **All parties conclude another treaty** on the **same subject matter**, and
- It appears they intended the later treaty is **now intended to govern** and
- The **later treaty is incompatible with the earlier one**
    - [Otherwise, if they are both compatible, they can both run in parallel]

4) Termination due to Material Breach

VCLT Art 60 (considered CIL by the Namibia Opinion (ICJ, 1971)

1. A material breach of **bilateral treaty** by one of the parties **entitles the other party to terminate or suspend the operation of the treaty (in whole or part)**

- **Termination** → the treaty ceases to exist, all parties are released from their rights and obligations
- **Suspension** → the treaty is still in force, but there is no obligation to follow its provisions; the idea being that when the breaching party ceases to breach, the treaty comes back into being

2. A material breach of a **multilateral treaty** by **one of the parties entitles**:

- (a) the **other parties** may **(by unanimous agreement) terminate** or **suspend the operation** of the treaty (in whole or in part) either
    - **i) between the other states and the defaulting state**
    - **ii) between all parties**
- (b) a **party specially affected by the breach** may **suspend the operation** of the treaty (in whole or in part) in relations between itself and the defaulting state
    - "Specially affected state" - same things looked at in CIL, or if there is one particular state that has special interests in the treaty and really loses out if another state breaches the treaty
- (c) **any party**, **other than the defaulting state**, may **suspend the operation** of the treaty (in whole or in part) with respect to **itself** if the material breach **radically changes the position of every party with respect to further performance of its obligations under the treaty**
    - "Radically changes the position of every party with respect… to the treaty" = a very high threshold

3. **A material breach** of a treaty, for the purposes of this article, **is**:

- (a) a **repudiation** of the treaty not sanctioned by the present Convention; or
    - E.g. *A statement saying "we are not bound by the treaty" - professing to be released of obligations without going through the proper withdrawal process*
- (b) the **violation of a provision essential to the accomplishment of the object or purpose of the treaty**
    - E.g. *A material breach of the Chemical Weapons Convention would be a state party not allowing any site inspectors to determine whether they have any chemical weapons*

4. The foregoing paragraphs are without prejudice to any provision in the treaty applicable in the event of a breach.

- If a particular treaty has its own remedies for a breach, then those remedies will prevail for a breach of that treaty
- Aim of the VCLT: not to constrain the states and their ability to do their own thing re: treaties, but to provide standardisation for treaty-making process and give default rules

5. Paragraphs 1 to 3 do not apply to provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties.

- Any provisions re: the protection of humans in a humanitarian treaty are not subject to this typical breach regime; i.e. states can't just all "opt out" of these provisions after another state breached them

Remember the fundamental principle of **pacta sundt servanda** (treaties are binding on their parties and must be performed in good faith) → a treaty should endure unless there is a key reason why it should be terminated i.e. **an immaterial breach does not give rise to a right to suspend or terminate**

5) Termination due to a Fundamental Change of Circumstances

VCLT 62:

- 1. **A fundamental change of circumstances** which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was **not foreseen** by the parties, **may not be invoked as a ground for terminating or withdrawing from the treaty unless**:
  - (a) The **existence of those circumstances constituted an essential basis** of the consent of the parties to be bound by the treaty; **and**
  - (b) The **effect of the change is radically to transform the extent of obligations still to be performed under the treaty**
- 2. **A fundamental change of circumstances** may **not be invoked as a ground** for terminating or withdrawing from a treaty if:
  - (a) If the treaty establishes a boundary; or
    - Boundary = land or maritime
  - (b) If the fundamental change is the result of a breach by the party invoking it either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.
    - A breaching party cannot do something unlawful under the treaty or another source of IL and then seek to rely on "change of circumstances" to be released by the treaty
- 3. If, under the foregoing paragraphs, **a party may invoke a fundamental change of circumstances as a ground for terminating or withdrawing** from a treaty i**t may also invoke the change as a ground for suspending** the operation of the treaty

UK v Iceland (1973, ICJ)

- **Facts**: Iceland and UK had a 1961 agreement, stating that the countries each had exclusive fishing rights for 12 miles outside of their coasts. In 1971, Iceland proposed to terminate that agreement and extend its exclusive fishing rights to 50 miles from its coast. Iceland argues there had been a fundamental change of circumstances, as there had been an increased exploitation of fishing resources and danger of further exploitation of fishing resources in future The UK pointed to the 1961 agreement, where there was an article stating that "if either party wants to extend its original 12-mile limit, and there is a dispute about this, the matter must be referred to the ICJ and both parties will respect the ICJ's decision". Iceland said that the change of circumstance meant that it was no longer under an obligation to accept the court's jurisdiction.
- **Held**:
  - **The ICJ held that the obligation in question was whether the matter was to be referred to the ICJ or not, and that this obligation was not affected by the purported change in circumstances (re: fishing).**
    - **The change in fishing techniques was irrelevant to this (maybe relevant to the merits of the dispute, but not the clause that established the court's jurisdiction)**
    - **There was no radical transformation in obligations and no unforeseen change (parties making an agreement re: fishing would have had to contemplate that fishing technology would improve over time)**
  - **To be regarded as a fundamental change of circumstance, the change must imperil the "existence or vital development of one of the parties"**

6) Supervening Impossibility of Performance

Where <u>after a state has consented to be bound</u>, it <u>becomes impossible for them to perform</u> their treaty obligations

VCLT Art 61:

1. A party may invoke the impossibility of performing a treaty as a ground for **<u>terminating or withdrawing</u>** from it **if the impossibility results from the permanent disappearance or destruction of an object indispensable for the execution of the treaty**.
If the **impossibility is temporary, it may be invoked only as a ground for <u>suspending</u> the operation of the treaty**

2. Impossibility of performance **may not be invoked by a party as a ground for terminating**, withdrawing from or suspending the operation of a treaty if the impossibility is the **result of a breach by that party** either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.

Hungary v Slovakia (1997)

- **Facts**: In 1977, Hungary and Slovakia agreed on a treaty for the joint venture to build a set of dams to prevent flooding and develop hydro-electric power. In 1989, Hungary decided not to proceed with its works due to environmental concerns. Then, Slovakia started to make plans to divert the river into its own territory so it could proceed with the plans. In 1992, Hungary purported to terminate the treaty. Months later, Slovakia completed its diversion of the river. In 1993, Slovakia became the successor of Czechoslovakia and inherited its treaty obligations. Then, Hungary and Slovakia referred the dispute to the ICJ. Hungary said before the ICJ that its notice to terminate the treaty in 1992 was lawful, because of:
    - 1) Supervening impossibility of performance;
    - 2) A fundamental change in circumstances
    - 3) A material breach by Slovakia in planning to divert the river.
- **Held:**
- **1) Supervening impossibility of performance**
    - H argued that its discovery that the dam construction would cause irreparable damage to its environment made performance impossible.
    - H said that the object was an economic investment that would be environmentally sound, and this object disappeared once Hungary discovered the potential impact, making it impossible for the treaty to be formed.
    - The ICJ rejected this; **H could not rely on this alleged impossibility because the treaty object still existed and there was flexibility in the treaty itself to allow the terms to be adjusted based on ecological demands. Even if the joint project was no longer economically viable, that was in part because H had already abandoned its obligations in 1989.**
    - **Therefore, H could not terminate on the grounds on supervening impossibility because**
        - **1) The court did not accept the object of the treaty had disappeared, and**
        - **2) Even if it had disappeared, H was responsible for this because it has abandoned its obligations in 1989**
- **2) Fundamental change in circumstances**
    - H argued a fundamental change in circumstances:
        - Because it had switched to a market economy in 1992
        - Because the project had diminishing economic viability
        - Because it had better scientific knowledge of the environmental impact
    - The ICJ rejected these claims:
        - Although the dam was in part a demonstration of socialist integration, it was not a primary aim of the treaty (main aims = prevent flooding and hydro-electric energy). Therefore, the change of political system was irrelevant
        - The court determined that the profitability (+ increased costs of the works) had not changed that much that the treaty obligations had been radically transformed

        - **The environmental impact was not an "unforeseen change of circumstance" - it is foreseeable that scientific knowledge about the environment would advance over time**
        - **ICJ: "A fundamental change of circumstances must have been <u>unforeseen</u>. The <u>existence of the circumstances at the time of the treaty's conclusion</u>, must have constituted an <u>essential basis of the consent of the parties to be bound</u>."**
            - **The court emphasised that Art 62 only applied in exceptional circumstances, and this threshold was not reached here**
- **3) Material breach**
    - The ICJ clarified that for Art 60 to apply, it must have been a **breach of the same treaty in question** (**alleged breaches of other treaties are irrelevant**)
    - The ICJ found that because H put in its notice to terminate the treaty in March 1992, and the diversion of the river occurred months later (October), H was premature in terminating as S had not actually breached the treaty
        - **One party cannot terminate a treaty on the basis of an anticipatory breach; it must wait until the breach actually occurs**

12) Has the right to invalidate / terminate / suspend the treaty been lost?

VCLT Art 45

A state may no longer invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty under articles 46 to 50 or articles 60 and 62 if, after becoming aware of the facts:

(a) It **expressly agreed** that the treaty is valid or remains in force; or

(b) It **impliedly agreed** (**by conduct**) that the treaty is valid or remains in force

13) Consequences of invalidity / termination / suspension

Consequences of Invalidity

VCLT Art 69:

1. A treaty the invalidity of which is established under the present Convention is void. The provisions of a void treaty have no legal force.

2. If acts have nevertheless been performed in reliance on such a treaty:

(a) Each party may require any other party to establish as far as possible in their mutual relations the position that would have existed if the acts had not been performed;

- I.e. a state can request that other states restore it to the position it would have been in had it not been party to the treaty

(b) Acts performed in good faith before the invalidity was invoked are not rendered unlawful by reason only of the invalidity of the treaty.

- I.e. prior acts done in good faith, before the invalidity, generally remain unaffected

3. In cases falling under articles 49, 50, 51 or 52, paragraph 2 does not apply with respect to the party to which the fraud, the act of corruption or the coercion is imputable.

- I.e. the party who did the fraud/corruption/coercion cannot request other parties to restore it to its original position

4. In the case of the invalidity of a particular State's consent to be bound by a multilateral treaty, the foregoing rules apply in the relations between that State and the parties to the treaty.

Consequences of Invalidity (Conflict with Jus Cogens Norm)

VCLT Art 71:

Conflict with an existing norm

1. In the case of a treaty which is void (due to conflict with an existing JC):

- (a) The parties must try to eliminate, as far as possible, the consequences of any act which conflicts with the norm
- (b) The parties must bring their mutual relations into conformity with the norm

Conflict with a new norm

2. In the case of a treaty which is void (due to conflict with a new JC):

- (a) Releases the parties from future obligations to perform the treaty
- (b) Any existing rights/obligations may be maintained only to the extent that they comply with the norm

Consequences of Termination

VCLT Art 70:

1. Unless the treaty otherwise provides or the parties otherwise agree, the termination of a treaty under its provisions or in accordance with the present Convention:

(a) **Releases the parties from any obligation further to perform the treaty**;

(b) **Does not affect any right, obligation or legal situation of the parties created** through the execution of the treaty prior to its termination

2. If a State denounces or withdraws from a multilateral treaty, paragraph 1 applies in the relations between that State and each of the other parties to the treaty from the date when such denunciation or withdrawal takes effect.

Consequences of Suspension

VCLT Art 72:

1. Unless the treaty otherwise provides or the parties otherwise agree, the suspension of the operation of a treaty under its provisions or in accordance with the present Convention:

(a) **Releases the parties between which the operation of the treaty is suspended from the obligation to perform the treaty in their mutual relations during the period of the suspension**;

(b) **Does not otherwise affect the legal relations between the parties established by the treaty.**

2. During the period of the suspension, parties must refrain from act that would obstruct the resumption of the operation of the treaty.

I.e. the treaty is still in force, but there is no obligation to follow its provisions; the idea being that when the breaching party ceases to breach, the treaty comes back into being… but parties cannot obstruct the resumption of the operation of the treaty.

4. Relationship Between International Law and Domestic Law

A) How national law affects international law

1) National law can be evidence of state practice or opinio juris for purposes of CIL (ICJ Statute, Art 38(1)(b))

- **State practice**: the acts of a state (includes legislation passed by Parliament, statements of the Executive, and decisions of the Judiciary)
    - E.g. **Lotus Case** (**PICJ, 1927**)
    - **Facts**: France claimed that under CIL, there was a rule that for crimes on the high seas, the flagship had exclusive jurisdiction for the crimes that happened on the ship.
    - **Held**:
        - The court examined the judgments of municipal courts to determine whether there was state practice supporting the rule that a flagship has exclusive jurisdiction over a crime on its ship in a collision case (from Britain, Turkey, France, Italy, etc…).
        - As municipal jurisprudence was too divided, the court could not find evidence of state practice to support France's contention
- **Opinio juris**: the belief that a particular rule is required under CIL.
    - E.g. **The International Law Commission** has said that:
        - Municipal legislation can be relevant in establishing evidence of opinio juris, particularly when it has been specified that "the legislation is mandated under CIL", or it is trying to give effect to CIL.
        - Decisions of municipal courts may also contain statements such as "in accordance with CIL" - further evidence of opinion juris.

2) Decisions of national courts can be a subsidiary means for determining the content of intentional law (ICJ Statute, Art 38(1)(d))

- Municipal judgments are a subsidiary source for interpreting IL (to determine the contours of a certain IL principle)

3) International courts may refer to national law to define certain legal concepts, where these do not exist in IL

- **Brazilian Loans Case (France v Brazil)**
    - **Facts**: In a case concerning a dispute over loans made by the Brazilian govt, the ICJ had to consider the meaning and effect of French national law.
    - **Held**:
        - In cases concerning the application of national law, the ICJ may obtain knowledge about the national law by evidence provided by the parties, or by independent research
        - Once the ICJ has arrived at the conclusion that it is necessary to apply the national law of a particular country, there seems no doubt that it must seek to apply it as it would be applied in that country

- **Belgium v Spain (ICJ, 1970)**
    - **Facts:** The ICJ had to have some understanding of what a corporation is to resolve a dispute. A corporation is legal category created by national law, not a concept within international law.
    - **Held:**
        - The ICJ referred to national law to define "corporation"
        - A corporate entity is recognised as an institution created by States in a domain within their domestic jurisdiction, not within IL
        - Therefore, the ICJ had to refer to the relevant rules of national law to resolve legal issues arise concerning the States with regard to the treatment of companies and shareholders

B) How international law affects national law

No standard answer. It depends on the Constitution and cultures of each State - States all have different procedures for how IL affects their national law.

1) Is the state in question a monist or dualist one?

Monism: IL and NL are part of the same legal order

- IL is deemed superior (Il prevails over any inconsistent NIL)
- Kelson: IL is the "gran norm" from which all laws gain their validity
    - The ultimate source of authority for state jurisdictions is IL (IL created states, then the states were enabled to operate their own jurisdictions)
- IL applies automatically in the domestic legal order
- In practice, monism means that state must ensure that national rights and obligations confirm to IL and if they do not, IL prevails

Dualism: IL and NL are two separate legal systems

- Developments in IL stay out of NL (IL doesn't automatically flow into NL; IL only comes into NL if there is some positive act by the state that transforms IL into domestic law)
    - Effect: the state government may be acting lawfully within its own territory, even though it is in breach of international legal obligations (e.g. Alabama Arbitration case)
- IL and NL operate in different spheres even if they may deal with the same subject matter
- IL cannot invalidate NL; and vice versa; in its own sphere (must consider - who is the decision-maker? In an international court - they will deem the IL prevails; in a national court - they will deem the NL prevails)

A third way: interaction but operation in separate spheres

- IL and NL do interact more than dualists recognise
- But IL and NL do not operate in the same sphere as monists claim
- IL and NL are separate systems of law, so they never contradict each other - each is superior in its own sphere
- Which law will prevail is dependent on the court of decision (in an international court - they will deem the IL prevails; in a national court - they will deem the NL prevails)

Incorporation or Transformation

- **Incorporation**: reflects a monist worldview
    - A rule of IL automatically becomes part of NL without the need for express adoption by the state legislature or courts, unless there is a clear provision of NL to the contrary (a statute or judicial decision)
        - E.g. IL rules on diplomatic immunity would allow a diplomat to plead immunity in a national court
- **Transformation**: reflects a dualist worldview
    - A rule of IL will not become part of NL unless expressly adopted by the state legislature or courts. IL is not necessarily part of NL - it requires a deliberate act of transformation by the state

2) Is the IL rule from treaty or CIL?

<u>UK: a dualist State largely following the transformation doctrine</u>

a) Treaties: Ratified treaties do not automatically create rights/obligations under NL; domestic legislation must be implemented that transforms treaty principles into NL

- **International Tin Council Case:**
    - **Facts**: The ITC was founded by a treaty, which operated in the UK pursuant to another treaty, but neither treaty was incorporated into the national law of the UK. The claimants argued that the treaty provided them with a right of action against the State parties directly, rather than against the ITC.
    - **Held:**
        - The HoL unanimously rejected this argument.
        - As a matter of the constitutional law of the UK, the content of treaties may not alter domestic law without the intervention of Parliament

b) CIL: However, CIL is considered to automatically become part of the English common law (Trendtex), with some exceptions (Jones v R)…

- **West Rand v The King:**
  - Whatever has received the common consent of civilised nations must have received the assent of the UK… and as such will be acknowledged and applied by the UK's domestic courts when legitimate occasions arise for those courts to decide questions to which IL doctrines may be relevant.
- **Trendtex:**
  - **Facts**: whether certain diplomatic immunity rules applied in England
  - **Held**:
  - **Lord Denning:**
    - CIL forms part of UK common law.
    - If the court today is satisfied that the IL rule on the subject has changed from what it was 50 years ago, it can give effect to that change…
      - As CIL changes over time, the parallel obligations under English common law also change over time
  - **Lord Shaw:**
    - "Here must be a greater risk of confusion if precepts discarded outside England by a majority or civilised states are preserved as effective in the English courts in a sort of judicial aspic"
      - UK common law must continue to progress in line with developments in CIL
- **R v Jones**:
  - **Facts**: Jones (a peace activist) was charged with sabotage/destroying military property in a protest against the Iraq war. Jones argued that she was trying to stop England from committing the crime of aggression against Iraq.
  - **Held**:
  - Lord Mance: "the creation and regulation of crimes is in a modern Parliamentary democracy a matter par excellence for Parliament to debate and legislate. Even crimes under public international law can no longer be, if they ever were, the subject of any automatic reception or recognition in domestic law by the courts."
    - **The general principle of CIL being part of UK common law does not extend to the creation and regulation of crimes under NL. It is the role of Parliament to create new criminal offences.**
- But as CIL is part of the common law, it can be overridden by Parliament passing unambiguous legislation to prevail over CIL.

Australia: a dualist State largely following the transformation doctrine

CIL:

1) CIL does not automatically create rights/obligations under NL; domestic legislation must be passed that transforms CIL principles into NL

- **Nulyarimma v Thompson (FCA)**:
  - **Facts**: It was alleged the politicians had committed an act of genocide through passing the Native Title Amendment Act, arguing that genocide was prohibited under principle of CIL, and therefore was autonomically incorporated into Australian NL without need for legislation.
  - **Held**:
    - Full FCA held that the crime of genocide was a part of CIL, but was not part of Australian law as Australia had not passed legislation to that effect
    - A norm of CIL, which criminalises conduct, does not automatically become part of Australian law in the absence of implementing specific legislation that states the conduct is criminal (parallel to the Jones UK case)

2) But there is a common law presumption used in statutory interpretation that Parliament intends to legislate in conformity with IL

- **Polites v Cth (HC):**

- **Facts**: Polites was a Greek national and was conscripted into the Australian Armed Forces. Polites objected on the basis that there even though Australian law that made it permissible to conscript him, under CIL there was a rule that prevented a State from conscripting a foreigner into its armed forces.
- **Held:**
  - HC held that the law was valid, even though it conflicted with CIL
  - 1) There is a common law presumption used in statutory interpretation that legislation must be interpreted as far as possible so as to conform with IL.
  - 2) Courts will not impute to the legislature an intention to curtain fundamental rights/freedoms unless intention is clearly manifested by unambiguous language.
  - 3) But if Parliament uses clear and unambiguous language, Parliament may override a CIL principle with legislation to the contrary

3) Also, CIL is a legitimate and important influence on the development of the common law (Chow Hung Ching; Mabo)

- **Chow Hung Ching v R (HC)**
  - **Facts**: Members of a foreign visiting armed force were arrested/prosecuted in an Australian territory for a criminal offence. The HC had to consider the issue as to whether those persons enjoyed sovereign immunities under IL.
  - **Held (Dixon J):**
    - The HC acknowledges that CIL is influential for the common law
    - "The theory of Blackstone that the law of nations (whenever any question arises which is properly the object of its jurisdiction) is here adopted in its full extent by the common law, and is held to be a part of the law of the land' is now regarded as without foundation. The true view, it is held, is that international law is not a part, but is one of the sources, of English law"
- **Mabo v Queensland (No 2) (HC)**
  - **Facts**: Considered the validity of the doctrine of terra nullius.
  - **Held (Brennan J (Mason CJ and McHugh J concurring)**:
    - "The common law does not necessarily conform with IL, but IL is a legitimate and important influence on the development of the common law, especially when IL declares the existence of universal human rights"
    - "A common law doctrine, founded on unjust discrimination, demands reconsideration. It is contrary both to international standards and to the fundamental values of our common law to entrench a discriminatory rule"
    - "If the IL notion that inhabited land may be classified as terra nullius no longer commands general support, the doctrines of common law which depend on that notion… can hardly be retained"
    - "If it were permissible in past centuries to keep the common law in step with IL, it is imperative in today's world that the common law should not be frozen in an age of racial discrimination"

Treaties:

1) Ratified treaties do not automatically create rights/obligations under NL; domestic legislation must be implemented that transforms treaty principles into NL

- **Nulyarimma v Thompson (1999) (FCA)**
  - **Facts**: It was alleged the politicians had committed an act of genocide through passing the Native Title Amendment Act. Australia had ratified the Genocide Convention in 1949, but the Genocide Convention Act 1949 (Cth) merely approved that Convention without implementing into NL.
  - **Held**:
    - Ratification of a treaty/convention does not directly affect Australian domestic law unless and until specific legislation is passed implementing the provisions

        - To guarantee entry into force of law, Parliament must explicitly say that the treaty has the force of law in Australia, or Parliament creates new legislation using terms and language of treaty
        - International crimes, recognised as CIL or in a treaty, will not become part of Australian NL unless implemented by legislation.

2) There is a common law presumption in statutory interpretation that when construing ambiguous domestic legislation, the courts will presume that Parliament intended to legislate in accordance with its international obligations

- **Dietrech v The Queen (1992) (HC)**
    - **Facts**: Appeal to HC in grounds that a miscarriage of justice arose because the accused was unrepresented by counsel at trial. The HC had to consider whether the right to a fair trial, with legal representation, was reflective of IL as found in Art 14 of the ICCPR. Australia had ratified the ICCPR, but had implemented it into NL.
    - **Held**:
        - Ratification of a treaty/convention does not directly affect Australian domestic law unless and until specific legislation is passed implementing the provisions
        - However, there is a common law presumption in statutory interpretation that when construing ambiguous domestic legislation, the courts will presume that Parliament intended to legislate in accordance with its international obligations
- **Minister of State for Immigration v Teoh (HC)**
    - **Facts:** Concerned the CROC - ratified, but not implemented into NL.
    - **Held:**
        - Where a statute is ambiguous, the courts should favour that construction which accords with Australia's obligations under a treaty or international convention to which Australia is a party. That is because there is a common law presumption that Parliament, prima facie, intends to give effect to Australia's obligations under international law
        - Ratified, but unimplemented, treaties create a legitimate expectation that government decisions will be made in accordance with the treaty

3) If Parliament uses clear and unambiguous language, Parliament may override an IL principle with legislation to the contrary

- **Al-Kateb v Godwin (HC)**
    - **Facts**: Whether it was lawful for a stateless person with no prospect of removal in the reasonably foreseeable future to remain indefinitely in immigration detention, given that the Migration Act 1958 (Cth) did not expressly provide for any other possible. Under IL, being held indefinitely in detention is a violation of human rights.
    - **Held**:
        - The majority held that Migration Act was not ambiguous - the provisions expressly intend to ignore fundamental rights regarding a person's right to not be detained against the will

4) The courts may have regard to international obligations to help resolve uncertainty or ambiguity in judge-made law

- **Dietrech v The Queen (1992) (HC)**
    - The courts may have regard to international obligations to help resolve uncertainty or ambiguity in judge-made law

5) Are there any constitutional issues?

The 'external affairs' power of s 51(xxix) gives the Commonwealth Parliament power to enable legislation regarding international law concerning:

- Australia and other countries
- Matters external to Australia

- Implementation of international law (including treaties and conventions to which Australia is a party)
- Supports legislation applicable to matters geographically outside of Australia

The external affairs power used in Tasmanian Dams Case:

- **Tasmanian Dams Case (HC)**
    - **Facts**: The case centred on the proposed construction of a hydro-electric dam on the Gordon River in Tasmania, which was supported by the Tasmanian government, but opposed by the Australian federal government. In 1982, UNESCO declared the Franklin area a World heritage site. The federal government then passed the World Heritage Properties Conservation Act, 1983 (Cth), which prohibited the dam. The federal government claimed the Act was giving effect to the Convention Concerning… Natural Heritage, which governs UNESCO's World heritage program and to which Australia was a party.
    - **Held**:
        - Under s 51(xxix), the Australian Government has the power to enact legislation to fulfill Australia's international legal obligations.
            - Ratification of a treaty can be seen as a commitment to upholding its aims, and an acceptance of obligations under it
        - Due to the large number of international obligations that Australia has accepted under international treaties, the external affairs power in section 51(xxix) gives the Australian Government a very wide constitutional power to make laws on many subjects, including protecting the environment

5. Personality, Statehood, Self-Determination, Recognition

Personality

International Legal Personality: an international legal person is a subject of international law; a body or entity capable of possessing and exercising rights and duties under international law (**Reparations case**)

- Abilities of an international legal person:
    - Have rights and obligations under IL
    - Make claims under international courts and tribunals
        - But the ICJ only accepts claims from States (Art 34 of ICJ Statute)
    - Have power to make valid international agreements binding in IL
    - Enjoy some or all immunities from the jurisdiction of national courts

Who has international legal personality?

- **Traditional subjects of IL were states**: IL originated as a system of rules governing the relations of states
- **But especially since 1945 (creation of the UN), there has been increasing recognition of rights and duties of non-state actors**
- **Legal personality varies according to the entity which claims it:**
    - States have full capacity in IL
    - Other entities (organisations, corporations and individuals) have limited capacity under IL (only some aspects of legal personality, bestowed upon them for only certain purposes)

1) States (see statehood section)

- If an entity is not a State, can't bring matters before the ICJ (Art 34 of ICJ Statute)

The extent to which other entities have international legal personality depends largely on what States have decided - need to look at the particular context, especially if there is a constituent treaty which prescribes certain rights/duties

Subjects of law, in any legal system, are not necessarily identical in the extent of their rights and their nature depends on the needs of the community - Reparations Case (ICJ, 1949)

2) International organisations

Is the entity an ORGANISATION who possesses some abilities of an international person?

- Examples - UN, EU, WTO (economic), NATO (military)
- Whether an international organisation has international personality depends on the manner of their creation and the role they are designed to fulfil within the international legal order
- **Reparations Case (ICJ, 1949)**
    - **Facts**: Following the assassination of a UN official, the UN requested the ICJ give an advisory opinion on whether the UN (as an organisation) had the capacity to bring an international claim against the responsible government to obtain reparations
    - **Held:**
        - **The international legal personality bestowed upon organisations is limited to what powers the organisation must exercise to achieve its purpose**
            - **The extent of an organisation's personality will depend on its constituent treaty - the rights/duties allocated to the organisation by the treaty**
        - The UN "was intended to exercise functions and rights which can only be explained on the basis of the possession of international personality and the capacity to operate on an international plane"
            - The purpose of the organisation
                - UN: harmonising the actions of nations in the attainment of common ends
            - The nature of the organisation

        - UN: a political body, charged with tasks of an important character, covering a wide field in the maintenance of international peace and security
    - The powers of the organisation
        - UN: gives its members legal capacity and privileges in their territories
- **Nuclear Weapons Advisory Opinion (ICJ, 1996)**
    - International organisations are governed by the 'principle of speciality': they have powers bestowed upon them by the States which create them, and the limits of these powers are a function of the common interests whose promotion those States entrust to them

3) Corporations

Is the entity a (transnational) CORPORATION capable of having abilities of or the character of international personhood?

- **Texaco Overseas Petroleum v Libyan Arab Republic**
    - Stating that a contract between a State and a private corporation falls within the international legal order means that for the purposes of interpretation and performance of the contract, it should be recognised by a private contracting party has specific international capacities. But unlike a State, the private corporation has only limited capacity to act internationally in order to invoke only the rights/obligations derived from the contract

4) Individuals

Is the entity an INDIVIDUAL who possesses some abilities of an international person?

- Individuals have very narrow international legal personality, limited to whatever IL recognises for individuals
    - Cannot enter treaties
    - Cannot bring a complaint against a State before the ICJ
    - But there are certain bodies that accept complaints from individuals against States who have allegedly violated their rights under IL
        - E.g. the Optional Protocol to the ICCPR allows individuals to make complaints to the Human Rights Committee where the State is a party to the Covenant
- **Pinochet**
    - **Facts:** Pinochet was accused by a Spanish judge of torture, a crime under international law which can be prosecuted in any country under the doctrine of universal jurisdiction. Pinochet was arrested in London. Pinochet's lawyers argued that as Pinochet was head of state at the time of the alleged crimes, he was immune from the jurisdiction of British courts. The Divisional Court ruled Pinochet had state immunity.
    - **Held:**
        - IL provides that jus cogens offences may be punished by any State because the offenders are 'common enemies of all mankind and all nations have an interest in their apprehension and prosecution'

Statehood

1) Theories of Statehood

Constitutive Theory:

- **Holds that a State only comes into existence when it is recognised as such by other States**
- Limitations:
    - Practical difficulties - what happens a State is only partially recognised in the international community? There is no answer under this theory
    - Makes the existence of a State subject to the political discretion of other States

Declarative Theory (*theory mostly favoured by the international community*)

- **Holds that the existence of a State does not depend on its recognition by other States** (recognition merely declares what already exists at law)

- Non-recognition does not imply inexistence (e.g. **Kosovo** - only 116 States have recognised Kosovo as a State, but Kosovo exists and functions as a State)
- Difficulties still remain to decide when an entity becomes a State; but must meet core criteria outlined in the Montevideo Convention
- However, certain consequences do arise from the recognition or otherwise of a State
    - A State will not establish diplomatic relations with an entity it does not recognise as a State
    - A State will not grant immunity to officials of an entity it does not recognise as a State

Montevideo Convention (**Art 3**)
The political existence of the state is independent of recognition by the other states. Even before recognition the state has the right to defend its integrity and independence, to provide for its conservation and prosperity, and consequently to organize itself as it sees fit, to legislate upon its interests, administer its services, and to define the jurisdiction and competence of its courts. The exercise of these rights has no other limitation than the exercise of the rights of other states according to international law.

2) Criteria for statehood listed in the Montevideo Convention (Art 1) (while the MC is not widely ratified, it is accepted as part of CIL)

a) Permanent population

- No minimum size (e.g. Vatican City (a State) has only 800 people), but it must be a permanent population

b) Defined territory

- No minimum size requirement (e.g. Vatican City is only 0.44 sq km)
- Boundaries need not be fixed or undisputed (e.g. Israel)

c) Government

- An entity must have the ability to exercise control over its territory before it can be considered a State
    - An organised and effective government exercises executive and legislative power, and is proof of a stable political community
    - Effectiveness of government is essential, but the form of government is immaterial (e.g. whether democratic or not)
- But the requisite level of government required to be State also depends on whether the Colonial Power has or has not granted the entity independence:
    - Where an entity has been granted independence from a Colonial Power, the requirement of government is typically quite minimal (i.e. government is not expected to be strong or secure) to be considered a State
    - But where an entity has not been granted independence from a Colonial Power, an organised and effective government is required for the entity to be considered a State
        - **Aaland Islands dispute (1920):**
        - The Commission required a high level of government from Finland to recognise it as a State, independent from Russia:
        - A definitely constituted sovereign state exists when a **stable political organisation** has been created, and **the public authorities are strong enough to assert themselves** throughout the territories of the state without the assistance of foreign troops
- Failed States don't cease to be States

d) Capacity to enter into relations with the other states

- An entity is not a State if it is legally subordinate to another State
- A State must be independent of any other State, so agreements with other States can be freely entered into
    - **Austro-German Customs Case (ICJ, 1931)**
    - **Facts**: alleged loss of sovereignty because Austria entered into a burdensome treaty
    - **Held:**

        - Restrictions upon a State's liberty arising out of IL or treaty obligations do not affect its independence. As long as these restrictions do not place the State under the legal authority of another State, the former remains an independent State, however burdensome its obligations may be.

3) Other considerations

- Although the criteria of the Montevideo Convention have been accepted as the indicia of Statehood and have now passed into CIL, there is the question whether these criteria are sufficient for Statehood
- More recently, Crawford has suggested additional criteria:
    - **1) The independence has been achieved in accordance with the principle of self-determination**
        - The State has been created because peoples who exercise their right to SD wanted that entity to become a State
    - **2) The State was not created in violation of the UN Charter (disqualifying factor)**
        - **Creation of 'Turkish republic of Northern Cyprus' by Turkey:**
            - Turkey invaded Cyprus by force and took control of the northern part of Cyprus
            - Turkey unilaterally made a declaration, purporting to create a new state "Turkish republic of Northern Cyprus"
            - The UN Security Council considered the state invalid, as it violated the IL prohibition on the use of force
    - **3) The State was not created in pursuance of racist policies (disqualifying factor)**
        - **Creation of South African 'Bantustans'**
            - During the apartheid-era (from 1976), South Africa unilaterally created 'Bantustans' - lands for black people to be moved into. These states met the 4 Montevideo criteria.
            - UN Security Council did not consider the Bantustans legitimate states; strongly condemned them as perpetuating White minority domination and dispossessing African people of their inalienable rights.

Self-Determination

Self-Determination (SD): collective right for a group of people to freely determine their own political status and pursue their economic, social and cultural development (commonly regarded as a jus cogens norm)

- **SD has two aspects (it does not necessarily entail secession):**
    - **Internal SD**: the right of a people to pursue political, economic, social and cultural development within the framework of an existing state
    - **External SD**: the right of a people to determine their own political status and to be free of alien domination, including formation of their own independent state
- **It is enshrined in various pieces of IL:**
- **1945 UN Charter**: one purpose of the UN is to develop friendly relations among nations based on respect for the principle of SD of people
- **1960 UNGA Declaration on the Granting of Independence to Colonial Countries and Peoples:** "*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*"

Territorial Integrity (TI): the State that already exists has a right not to have its land disseminated

- **It is enshrined in various pieces of IL:**
- **1945 UN Charter**: emphasised that respect for existing boundaries is a fundamental principle in IL
- **1960 UNGA Declaration on the Granting of Independence to Colonial Countries and Peoples:** *"any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations"*

Both SD and TI are fundamental principles in IL; affirmed in IL instruments

- SD and TI sit in tension; neither are absolute or superior to the other, and there must be some compromise between these two principles

<u>Requirements of the right to SD:</u>

1) SD requires a specific group that are considered a 'people'

- **Reference re Secession of Quebec (a subsidiary means of elucidating the law - a national court decision):**
  - **Facts**: Quebec (part of Canada) sought to secede (become its own State).
  - **Held:**
  - "A people" is not necessarily the entire population; it may include only a portion of the population of an existing State.
    - The Quebec population could be considered "a people", entitled to SD
    - But it was not necessary for the court to determine whether the Quebec constituted a 'people' because the Quebec people were able to adequately exercise internal SD within the framework of Canada
- **Kosovo (ICJ, 2008):**
  - The ICJ did not rule out that Kosovar Albanians are 'a people' - i.e. by implication that 'a people' can be a minority within a State, not the entire State population
- **Wall in Occupied Palestinian Territory (ICJ, 2004):**
  - The Israeli Prime Minister recognised the Palestinian community as "a people"
- **Gunme, et al v Cameroon (2009) (a national court decision: subsidiary means of elucidating the law):**
  - **Facts**: The Southern Cameroon people argued that they had a right to SD and to secede due to serious disenfranchisement/oppression
  - **Held:**
  - The Southern Cameroon qualify to be referred to as a "people" because they manifest **numerous features** and **affinities** that **characterise a people**:
    - **Objective factors:**
      - Common history; linguistic tradition (English); territorial connection; and political outlook (contrasted from the majority population of the State)
    - **Subjective factors:**
      - Self-identification of themselves as a people with a separate and distinct identity

2) SD requires a free and genuine expression of the will of the people concerned

- **Western Sahara Advisory Opinion (ICJ, 1975):**
  - The right of SD requires a free (not been coerced) and genuine expression (not achieved through deceit) of the will of the people concerned
- **Chagos Islands (Advisory Opinion) (ICJ, 2019):**
  - **Facts**: Chagos Islands are a part of Mauritius. M was a UK colony. In 1960s, M advocated for independence against UK. But at the same time, UK agreed to lease the CI to USA. In 1965, the UK and M made an agreement that the UK would separate the CI from M, and the CI would continue to be held by UK. The rest of M would become independent. In accordance with the deal, the UK displaced the native people from CI to other parts of M. Later, M wanted CI to be restored
  - **Held**:
  - The ICJ found that the 1965 agreement btw UK/M was not a free and genuine expression of will of the M people, because M was still under the authority of the UK when the agreement was made
  - The UK therefore has an obligation to conclude its colonisation of the CI

3) SD does not prescribe a particular form of government (e.g. democracy)

- **Western Sahara Advisory Opinion (ICJ, 1975):**
  - The right of SD leaves the General Assembly a measure of discretion with respect to the forms/procedures by which that right is to be realised

- **Separate Opinion of Judge Dillard (SD):**
  - It is for the people to determine the destiny of the territory; SD is satisfied by a free choice, not by a particular consequence of that choice or a particular method of exercising it
  - No prescriptive form for SD; so long as it is a free and genuine choice

4) The right of SD of the people concerned is defined by reference to the entirety of a non-self-governing territory (not part of it)

- **Chagos Islands (Advisory Opinion) (ICJ, 2019)**
  - **Facts**: Chagos Islands are a part of Mauritius. M was a UK colony. In 1960s, M advocated for independence against UK. But at the same time, UK agreed to lease the CI to USA. In 1965, the UK and M made an agreement that the UK would separate the CI from M, and the CI would continue to be held by UK. The rest of M would become independent. In accordance with the deal, the UK displaced the native people from CI to other parts of M. Later, M wanted CI to be restored
  - **Held**:
  - The right to SD of the people concerned is defined by reference to the entirety of a non-self-governing territory (not part of it)
  - It follows that any detachment by the administering Power of part of a non-self-governing territory, unless based on the free and genuine expression of will of the people from the territory concerned, is contrary to the right to SD

5) All States are obligated to respect the right of other States to SD

- **Wall in Occupied Palestinian Territory (ICJ, 2004):**
  - **Facts**: A series of escalating suicide-bomb attacks in Israel prompted Israel to build a wall in the At-Tur neighbourhood in Jerusalem (Israel) in 2002. Israelis justified this as a security measure to prevent terrorism. However, some of the wall enclosed parts of Palestinian territory (17% of the West Bank was enclosed between the wall and the "green line" - home to many Palestinians).
  - **Held:**
  - As many Palestinians were forced to reside in almost completely encircled communities due to the construction of the wall, the wall severely impedes the exercise by the Palestinian people of its right to self-determination, and is therefore a breach of Israel's obligation to respect that right
- **Namibia Opinion (ICJ, 1971):**
  - The ICJ held that all States should refrain from relations with South Africa that in any way constituted recognition of the illegal occupation of Namibia

6) The principle of SD has evolved within a framework of respect for the TI of existing states; therefore, SD is typically fulfilled through internal SD

- **Reference re Secession of Quebec:**
- **Facts**: Quebec (part of Canada) sought to secede (become its own State)
- **Held**:
  - The recognised sources of IL establish that the right to SD of a people is normally fulfilled through internal SD: a people's pursuit of its political, economic, social and cultural development within the framework of an existing state
  - There is no necessary incompatibility between the maintenance of TI of an existing state and the right of a people to achieve SD. A state whose government represents the whole of the peoples resident within its territory, on a basis of equality and without discrimination, and respects the principles of self-determination in its internal arrangements, is entitled to maintain its territorial integrity under IL and to have its territorial integrity recognised by other states
    - On the facts, the Quebec population was able to adequately exercise internal SD within the framework of Canada:

- Q not denied access to government - occupied prominent positions within the government of Canada
- Q able to make free political choices (can vote) and pursue economic, social and cultural development
- Q were equitably represented in legislative, executive and judicial institutions

7) The right to external SD (secession) arises in only extreme cases under carefully defined circumstances

- **Reference re Secession of Quebec (a subsidiary means of elucidating the law - a national court decision)**
- **Facts**: Quebec (part of Canada) sought to secede (become its own State)
- **Held**:
    - The right to secede arises in situations of oppression where:
        - 1) Where a people wish to exercise SD to achieve independence from a colonial empire
        - 2) Where a people is subject to alien subjugation, domination or exploitation, outside of colonial context
        - 3) Possibly - when a people is blocked from the meaningful exercise of its right to SD internally, it is entitled, as a last resort, to exercise SD by secession
            - It remains unclear whether this third scenario is accepted in IL (has been suggested by a number of commentators), but the current case did not even begin to approach this threshold
                - It would involve total denial of any role in government

8) Is an act of unilateral declaration of independence unlawful?

- **Unilateral declaration of independence (UDI)**: a formal process leading to the establishment of a new state by a subnational entity which declares itself independent and sovereign without a formal agreement with the state from which it is seceding
- **Kosovo (Advisory Opinion) (ICJ, 2010):**
- **Facts**: In 2008, Kosovo made a unilateral declaration of independence from Serbia**.**
- **Held**:
    - There is no general prohibition in IL on the making of a UDI by a people exercising their SD
    - The making of a UDI by an internal entity exercising SD does not breach the principle of TI: the scope of TI is confined to relations between States
        - It does not apply to non-State actors, i.e. groups within a State
        - The fact that an internal entity declares its independence does not violate TI
    - But a UDI would be unlawful under IL if it involved a violation of jus cogens norms:
        - Past examples (have violated fundamental IL principles that are now considered jus cogens norms):
        - **Creation of 'Turkish republic of Northern Cyprus' by Turkey:**
            - Turkey invaded Cyprus by force and took control of the northern part of Cyprus
            - Turkey unilaterally made a declaration, purporting to create a new state "Turkish republic of Northern Cyprus"
            - The UN Security Council considered the declaration invalid, as it violated the IL prohibition on the use of force
        - **Creation of 'Southern Rhodesia' by white minority in Southern**
            - White minority in Southern Africa purported to create a new State, 'Southern Rhodesia', in 1965, did so because it was seeking to prevent the self-determination of the indigenous people in creating their own State/Government
            - The UN Security Council considered the declaration invalid, as it violated the indigenous people's self-determination
        - **Creation of 'Bantustans' in South Africa**

        - The UN Security Council considered the declaration invalid, as it violated the IL prohibition on apartheid
    - A UDI does not automatically give rise to secede

Recognition

Recognition indicates that a State is willing to engage with another State as a member of the international community

Recognition can be:

- **Explicit**: e.g. formal statement that it recognises the entity as a State
- **Implicit**: e.g. establishing diplomatic relations, commercial relations, treaties
    - Because these activities are considered typical of state-to-state relations, this conduct constitutes implicit recognition of an entity as a State

Recognition can be:

- **De jure**: recognition that a State exists as a matter of right
- **De facto**: recognition of factual existence, but concern about legitimacy

Limits on Recognition of a 'State'

Recognition is largely political act, rather than a legal act, done at the discretion of the State. But there are certain limits IL places on recognition:

- **1) Stimson doctrine: states should not recognise a purported state which has been created as the result of a use of force against another state**
    - **Creation of 'Turkish republic of Northern Cyprus' by Turkey:**
        - Turkey invaded Cyprus by force and took control of the northern part of Cyprus
        - Turkey unilaterally made a declaration, purporting to create a new state "Turkish republic of Northern Cyprus"
        - The UN Security Council considered the state invalid, as it violated the IL prohibition on the use of force
- **2) States should not recognise a purported state which has been created as the result of a breach of jus cogens norms**
    - **Creation of 'Southern Rhodesia' by white minority in Southern**
        - White minority in Southern Africa purported to create a new State, 'Southern Rhodesia', in 1965, did so because it was seeking to prevent the self-determination of the indigenous people in creating their own State/Government
        - The UN Security Council considered the declaration invalid, as it violated the indigenous people's self-determination
- **3) States should not recognise a purported state which has been created as the result of apartheid policies**
    - **Creation of South African 'Bantustans'**
        - During the apartheid-era (from 1976), South Africa unilaterally created 'Bantustans' - lands for black people to be moved into. These states met the 4 Montevideo criteria.
        - UN Security Council did not consider the Bantustans legitimate states; strongly condemned them as perpetuating White minority domination and dispossessing African people of their inalienable rights.

Legal Functions of Recognition

1) Serves as evidence of statehood and a condition to establish formal relations with other states
2) Domestic legal consequences of recognising a state: e.g. immunity
3) Powerful political tool to pursue national interests
4) But non-recognition does not deny legal personality or the ability of a State to function

Montevideo Convention on Rights and Duties of States (Art 3)

The political existence of the state is independent of recognition by the other states. Even before recognition the state has the right to defend its integrity and independence, to provide for its conservation and prosperity, and consequently to organize itself as it sees fit, to legislate upon its interests, administer its

services, and to define the jurisdiction and competence of its courts. The exercise of these rights has no other limitation than the exercise of the rights of other states according to international law.

Reference re Secession of Quebec:

- **Facts**: Quebec (part of Canada) sought to secede (become its own State)
- **Held**:
    - Although recognition by other States is not necessary to achieve statehood, the viability of a would-be State in the international community depends on, as a practical matter, upon recognition by other States
    - However, international recognition is not alone constitutive of statehood, and does not related back to the date of secession to serve retroactively a source of a 'legal right' to secede in the first place. Recognition occurs only after a territorial unit has been successful, as a political fact, in achieving secession

6. Title To Territory

The Doctrine of Intertemporal Law

Doctrine of Intertemporal Law (Island of Palmas)

- **1) A juridical event must be appreciated in the light of the law as it stood at the time of that event**
  - The effects of the Spanish discovery of the Island in the 16th century were to be established based on the law at the time;
- **2) The continued existence of rights over territory is to be demonstrated according to the law at the critical date. A distinction was made between the creation of the right in relation to territory and the continued existence of that right. The creation of the right is to be judged by the law applicable at the time, and the continued existence of the right is established according to the evolving law.**
  - Spain (and the US, which acquired title by cession) had to show that it had maintained the title up to the critical date, in compliance with whatever changes in the law that may have occurred from the acquisition to the critical date;

Theoretical Modes of Acquisition of Sovereignty over Territory (Land)

1) Cession

Cession: the transfer of territory , from one sovereign to another, by agreement

Examples:

- When a colonial empire transfers back sovereignty to the local people
- Following war/conflict
- Commercial transitions (e.g. 1917: Denmark sold the Danish West Indies (now Virgin Islands) to USA)

1) Did the state giving the territory have the right to title? (Island of Palmas)

- A state can only transfer the rights it possesses (it cannot transfer land that it does not have title over)
  - In **Island of Palmas**, the arbitrator held that at the time of the 1898 treaty of cession between Spain and US, Spain did not actually have title over the Island of Palmas. Therefore, it could not have transferred that territory to the US.
- Due to the **right of self-determination**, now there is a requirement to consult the inhabitants of a territory before cession occurs.

2) States may agree to 'share' sovereignty

- Such as envisioned by the potential agreement between UK and Spain concerning Gibraltar.
- But the propose arrangement did not eventuate, as the people of Gibraltar overwhelmingly rejected the principle of shared sovereignty at a 2002 referendum.

2) Occupation

Occupation: the exercise of sovereignty (often initially by discovery) over previously unclaimed territory (terra nullius)

1) Was the land terra nullius?

a) Only land that belongs to no one is capable of being acquired through occupation (Western Sahara Advisory Opinion)

- In the **Western Sahara Advisory Opinion**, the ICJ held that the WS was not terra nullius at the time of purported Spanish colonisation in 1884
  - Because although the native people were nomadic, they were sufficiently organised, socially and politically, to constitute a permanent population and Spain recognised this (the Spanish had been conducting treaties and agreements with the leaders of the people)
  - Therefore, applying the intertemporal law (the law as it stood at the time of the purported Spanish colonisation), the Western Sahara was not terra nullius and not capable of being acquired through occupation

- But in **Ure v Australia**, it was held that the rules of IL to acquire territory through occupation only apply to states, not individuals
    - In this case, private citizens found a shipwreck and claimed they acquired title by occupying the 'terra nullius

b) Discovery of terra nullius land

- **Island of Palmas**: discovery alone, without any subsequent act, is not sufficient to acquire title.
- At most, it gives a state an inchoate title, which will not be completed until the territory is actually occupied by the state (evidence of effectivities - continuous act of state)
- Therefore, in **Island of Palmas**, Spain had not acquired title by discovery
    - Facts in Island of Palmas:
    - *Netherlands and US argued over the Island of Palmas - an isolated island off the coast of the Philippines. The treaty of cession (Spain ceded Philippines to US after Spanish/American war) indicated that the Island was part of the territory ceded to the US. But the Netherlands claimed it had sovereignty over the islands since the 1600s*
    - ***Issue**: at the time of the 1898 treaty, did Spain actually have any title to the Island?*

2) Does the identification of the critical date have any implications?

The court must determine the critical date of when the dispute crystallised between the parties.

Evidence of acts of state intending to show sovereignty are only applicable for acts done up to that date (Malaysia v Singapore)

Any acts of state that occurred after the dispute crystallises are usually not relevant to determining title, unless they are a continuation of acts done prior to this date (Indonesia v Malaysia)

E.g. in **Indonesia v Mayalsia**, the ICJ determined that 1980 was the critical date. Therefore, the only relevant acts of states were those complete prior to that date.

3) Is there a contesting claim to the territory?

Disputes over title to territory are relative; one party must make a stronger claim than the other.

Which has the better case in terms of continuous exercise of state sovereignty?

4) Effectivités

Effectivités: acts in which a state displays its sovereignty over a territory

TYPES OF EFFECTIVITES

Examples: of actions that have been found to constitute effectivités

- In **Legal Status of Eastern Greenland**, the PCIJ recognised these acts by Denmark (following its dissolution with Norway) as effectivités on Eastern Greenland:
    - Enacting **legislation** with respect to Eastern Greenland (involving government of EG): reserved certain waters for exclusive fishing rights, divided the colonies into North and South EG
        - **The court described legislation as one of the most obvious forms of declaration of state power**
    - Granting of **licences** to trade, hunt and mine in Eastern Greenland
- In **Island of Palmas**, the court recognised these acts by the Netherlands as effectivités:
    - **Made treaties** with the local princes of the island, which gave the Netherlands power over the foreign policy of the islands and bound the local people to refuse to allow people from other nationalities onto the island
    - **Collected taxes** on the island
    - **Flown the Dutch flag** on the island
- In **Indonesia v Malaysia**, the ICJ recognised these acts by Malaysia as effectivités:
    - **Legislative regulation of collection of turtle eggs**

        - Licensing system
        - Prohibition in certain areas
    - **Legislation** which made Sipadan "a reserve for the purpose of bird sancturaries"
    - **Built structures** (e.g. lighthouses)

Examples: of actions that were not found to constitute effectivités

- In **Indonesia v Malaysia**, the ICJ emphasised that:
    - Indonesia had **failed to enact any legislation**
    - Indonesia had **poor evidence to support its purported effectivités:**
        - Alleged presence of Indonesian navies, but no documentation in the navy's records that they regarded the island as part of Indonesia
        - Waters were traditionally used by Indonesian fisherman; but the fisherman were private people acting in a private function, which could not be attributed to an act of state
- In the **Western Sahara Advisory Opinion**, the ICJ held that Morocco had not acquired sovereignty over WS due to a lack of effectivités
    - Morocco had done very little state functions and its claims were not supported by evidence
        - **Treaties** showed that the Sultan of Morocco had **some personal influence** over leaders in WS, but this **did not amount to sovereignty** over them (appeared that while some of the Sheikhs had loyalty to Morocco, others merely regarded them as an alliance; no evidence that Morocco had superiority over the Sheikhs)
        - **No evidence** that Morocco had been taxing people

Where sovereignty may pass from one state to another:

- In **Malaysia v Singapore**, there was a dispute over an uninhabited island. In 1979, M published a map showing the island as part of M's territory. In 1980, S protested the map by sending a diplomatic note to the M govt requesting the map to be amended showing the island in S's territory.
    - M argued that the island had been part of its sultanate, then passed on to M after M was created (couldn't point to effectivités it had done)
    - S argued that it had completed effectivités, through British acts (was S's predecessor) and further S acts
- **The ICJ held that sovereignty had passed to Singapore by the critical date, based on key evidence:**
    - **A 1953 letter on behalf of the M sultan to S, which said the sultan's government did not want to claim ownership of the island**
    - **Singapore's effectivités:**
        - S's investigation of shipwrecks around the island
        - S had been acting as though it had sovereignty by:
            - Granting/denying Malaysian officials access to the island
            - Publishing plans to extend the island
    - Based on these **cumulative factors** (S's acts + S's predecessors' acts), by 1980, sovereignty had passed to S

DEGREE OF EFFECTIVITES

The degree of effectivités required to achieve title to territory will depend on:

a) The population (permanent population vs transient population)

<u>Uninhabited = low bar of effectivités</u>

- In **Clipperton Island**, it was held while the taking of possession typically requires a state to undertake positive acts exercising its exclusive authority in the territory, this was not necessary in this case because Clipperton Island was uninhabited
    - Therefore, France's proclamation declaring Clipperton Island to be part of French territory, which was published in a local Hawaiian journal, was sufficient state action to acquire the land, and defeat Mexico's claim 40 years later (which was only supported by declaring that the island belonged to Mexico and requesting the locals to raise a Mexican flag)

- In **Indonesia v Malaysia**, the ICJ held that there is a low bar of effectivités required to establish title over an uninhibited land
- In **Legal Status of Eastern Greenland**, the PCIJ recognised that although Denmark had done little in the way of exercise of actual sovereign rights, the acts were nevertheless sufficient to acquire sovereignty over Eastern Greenland because the land was so uninhabitable/thinly populated, and Norway could not make out a superior claim.
    - E.g. the fact that Denmark had not established a permanent colony on Eastern Greenland, the PICJ found that this was not necessary for title, since the land was so extreme and uninhabitable

<u>Inhabited = high bar of effectivités</u>

- In the **Western Sahara Advisory Opinion**, the ICJ held that Morocco had not acquired sovereignty over WS due to a lack of effectivités
    - The ICJ distinguished Morocco's position from Denmark's position in **Legal Status of Eastern Greenland**… unlike EG (uninhabited), WS was inhabited, therefore it required more in terms of sovereign acts
- In **Island of Palmas**, there was little evidence of any acts done by Spain:
    - The arbitrator placed weight on this absence of acts, given that the island was permanently inhabited
- In **Island of Palmas**, there was substantial evidence of acts done by the Netherlands:
    - Made treaties with the local princes of the island, which gave the Netherlands power over the foreign policy of the islands and bound the local people to refuse to allow people from other nationalities onto the island
    - Collected taxes on the island
    - Flown the Dutch flag on the island

b) The nature of the territory (climate, fertility, navigable)

- In **Legal Status of Eastern Greenland**, the PCIJ recognised that although Denmark had done little in the way of exercise of actual sovereign rights, the acts were nevertheless sufficient to acquire sovereignty over Eastern Greenland because the land was so uninhabitable/thinly populated, and Norway could not make out a superior claim.
    - E.g. the fact that Denmark had not established a permanent colony on Eastern Greenland, the PICJ found that this was not necessary for title, since the land was so extreme and uninhabitable
    - <u>Facts in Legal Status of Eastern Greenland:</u>
    - *Dispute between Norway and Denmark over who had sovereignty of Eastern Greenland. Eastern Greenland: extreme climate, difficult to traverse, not fertile.*
        - *From 1380-1814, Norway and Denmark were one state.*
        - *In 1920, after the union had been dissolved, D sought assurances from various countries asking them to recognise D's sovereignty over all of Greenland. All of the countries disputed this.*
        - *In 1931, N published a proclamation declaring it was occupying parts of EG. D disputed this, saying that EG was subject to Crown of D.*
        - *D argued it had sovereignty over EG since 1721, as the King of D granted a D missionary permission to set up a colony there. D argued since that time, D retained EG.*

c) The continuity and duration of the effectivités

- In **Island of Palmas**, the arbitrator found that the Netherlands's claim of sovereignty "acquired by continuous and peaceful display of State authority during a long period of time going back beyond the year 1700, therefore holds good"

5) Consent by other states

As sovereignty over territory is determined on the basis of relative title, the acts of the other party, as well as the acts of the international community in respect of the disputed territory, are relevant.

a) Consent by the other party to the dispute

- In the **Temple of Preah Vihear** dispute between Cambodia and Thailand, both parties agreed it was located in Thai territory and commissioned the creation of a map to conclusively verify where the temple was located. There was an error, as the temple was placed in Cambodian territory. However, both parties signed off on the map and agreed it was accurate. Decades later, Thailand objected.
- The ICJ held that the **failure of Thailand to object to the map**, especially the lack of objection following the visit to the Temple paid by Prince Damrong (where he was received by clear affirmations of French-Cambodian title including the French flag and greeting by French officials) **indicated Thai consent** to the temple falling within Cambodian territory.

b) Consent by other states

- In **Legal Status of Eastern Greenland**, Denmark pointed to a variety of treaties in which it indicated that Eastern Greenland fell under Danish sovereignty by stating that the treaties did not apply to Eastern Greenland.
- The PICJ held that these treaties showed a willingness on the part of other states in consenting to Denmark's intention to exercise sovereignty over Eastern Greenland.

3) Prescription

Prescription: acquiring title by possession where territory previously under another sovereign

1) Type of possession

Adverse possession: exercising sovereign authority over the territory for so long that the previous sovereign is regarded as having forfeited title

Immemorial possession: for so long that any competing claims have been forgotten

2) Does the identification of the critical date have any implications?

- See occupation

3) Is there a contesting claim to the territory?

Disputes over title to territory are relative; one party must make a stronger claim than the other.

Which has the better case in terms of continuous exercise of state sovereignty?

4) Are there adequate effectivités?

- See occupation

It is important that the sovereign actions of a state be public and open, so that all interested states are aware of the actions and have the ability to protest if necessary.

- However, as seen **in Malaysia v Singapore**, one piece of conduct appeared **particularly influential** on the ICJ's final decision was **1953 letter** on behalf of the M sultan which said the sultan's government did not want to claim ownership of the island. This was **not a public and open action**.

5) Consent by other states

The doctrine of prescription provides that defects in a title can be cured by the passage of time and the acquiescence of other states. If a state has been in peaceful possession of a territory for a period of time, IL considers that it is a better result to recognise that state has gained good title to the territory, unless other states have protested.

A key characteristic of possession serving as a foundation for prescription is that it should be peaceful (i.e. no protest or challenge from other states)

- In the **Chamizal Arbitration**, treaties between US and Mexico stated that the border between the countries was situated along the Rio Grande. But overtime, the Rio Grande moved and the Chamizal Tract was created between a divergence of the Rio Grande. US asserted that since the riverbed had moved, it had possession of the Chamizal Tract.

- **The court held that the possession of the US was not of such a character as to found a prescriptive title, because the physical possession of the Chamizal tract by the US had been constantly challenged by Mexico**
    - Upon the evidence adduced it is impossible to hold that the possession of El Chamizal by the United States was undisturbed, uninterrupted, and unchallenged.
    - The physical possession taken by citizens of the US and the political control exercised by the local and Federal Governments of the US, had been constantly challenged and questioned by Mexico through its accredited diplomatic agents.

As sovereignty over territory is determined on the basis of relative title, the acts of the other party, as well as the acts of the international community in respect of the disputed territory, are relevant.

a) Consent by the other party to the dispute

- In the **Temple of Preah Vihear** dispute between Cambodia and Thailand, both parties agreed it was located in Thai territory and commissioned the creation of a map to conclusively verify where the temple was located. There was an error, as the temple was placed in Cambodian territory. However, both parties signed off on the map and agreed it was accurate. Decades later, Thailand objected.
- The ICJ held that the **failure of Thailand to object to the map**, especially the lack of objection following the visit to the Temple paid by Prince Damrong (where he was received by clear affirmations of French-Cambodian title including the French flag and greeting by French officials) **indicated Thai consent** to the temple falling within Cambodian territory.

b) Consent by other states

- In **Legal Status of Eastern Greenland**, Denmark pointed to a variety of treaties in which it indicated that Eastern Greenland fell under Danish sovereignty by stating that the treaties did not apply to Eastern Greenland.
- The PICJ held that these treaties showed a willingness on the part of other states in consenting to Denmark's intention to exercise sovereignty over Eastern Greenland.

4) Conquest

Conquest: acquisition of territory by the use of force

UN Charter 1945 (Art 2(4)): prohibits member states from using threat or use of force against territorial integrity or political independence of any other state

Declaration on Friendly Relations 1970: prohibits threat or use of force as a means of territorial acquisition

1) Was it before or after 1945 UN Charter?

From the signing of the UN Charter in 1945, the use of force has been illegal in IL.

For cases involving conquest prior to this date, the **doctrine of intertemporal law** applies, as held in the **Island of Palmas case**:

- **1) A juridical fact must be appreciated in the light of the law contemporary with it and not of the law in force at the time when a dispute in regard to it arises or falls to be settled**
    - The effects of the Spanish discovery of the Island in the 16th century were to be established based on the law at the time;
- **2) The continued existence of rights over territory is to be demonstrated according to the law at the critical date. A distinction was made between the creation of the right if relation to territory and the continued existence of that right. The creation of the right is to be judged by the law applicable at the time, and the continued existence of the right is established according to the evolving law.**
    - Spain (and the US, which acquired title by cession) had to show that it had maintained the title up to the critical date, in compliance with whatever changes in the law that may have occurred from the acquisition to the critical date;

5) Accretion / Avulsion

A state may acquire territory through **accretion** or **avulsion**:

- **Accretion** is **slow** e.g. estuary island formed by deposit of silt
- **Avulsion** is **sudden** e.g. volcanic eruption creating an island within territorial waters

If an international boundary is affected, e.g. a river:

- **Accretion**: **if change is gradual** (e.g. gradual movement of a riverbed) **the boundary will change with it**
- **Avulsion**: **if change is sudden** (e.g. flood suddenly altering course of river) **the boundary will not change**
    - **Chamizal Arbitration**

Limitation on Sovereignty over Territory

1) The Right to Self-Determination

The **right of self-determination** has a major impact on sovereignty over territory.

2) Uti Possidetis Juris

Uti possidetis juris: the principle that newly-formed sovereign states should retain the internal borders that their preceding dependent area had before their independence

Uti possidetis juris has been used to establish the frontiers of newly independent states by ensuring that the frontiers followed the original boundaries of the old territorial entities from which they emerged.

It is often applied to prevent foreign intervention by eliminating any contested terra nullius, or no man's land, that foreign powers could claim, or to prevent disputes that could emerge with the possibility of redrawing the borders of new states after their independence.

It originated in South America in the 19th century with the withdrawal of the Spanish Empire. By declaring that uti possidetis applied, the new states sought to ensure that there was no terra nullius in South America when the Spanish withdrew and to reduce the likelihood of border wars between the newly independent states and the establishment of new European colonies.

In **El Salvador v Honduras**, the dispute concerned the land boundary of the Gulf of Fonesca. Uti possidetis juris protects a boundary independently of title to territory.

3) Indigenous People

In the **Western Sahara Advisory Opinion**, the ICJ held that territories inhabited by people having a social and political organisation were not terra nullius.

This decision has impacted on the claims of many indigenous peoples, particularly those where no treaty was entered into by a colonial power.

In **Mabo**, the HC recognised that Australia was not terra nullius prior to British arrival and that Indigenous people had land rights. The HC held that these rights, where they still exist today and have not been legally extinguished, will have the protection of the Australian law

Extent of Territory

1) Territorial Sea

a) What is the territorial sea:

Art 3 UNCLOS:

- **Territorial sea:** everything up to **12 nautical miles from baseline** is part of a state's territorial sea

Art 5 UNCLOS:

- **Baseline:** the normal baseline for measuring the breadth of the territorial sea is the low-water line along the coast as marked on large-scale charts officially recognized by the coastal State

Art 6 UNCLOS:

- **Baseline (reefs)**: In the case of islands situated on atolls or of islands having fringing reefs, the baseline for measuring the breadth of the territorial sea is the seaward low-water line of the reef, as shown by the appropriate symbol on charts officially recognized by the coastal State.

Art 7 UNCLOS:

- Special rules apply in relation to deeply indented coastlines and fringing islands in the immediate vicinity of the coast

b) Rights over territorial sea:

Art 2(1) UNCLOS:

- **The state has sovereignty over its territorial sea, airspace above it, its soil and subsoil**

Limitations to sovereignty in territorial sea:

- All foreign ships have right of innocent passage through territorial sea (art 17)
    - 'Passage' – navigation through territorial sea for the purpose of traversing it or to proceed to or from internal waters (art 18(1))
    - Passage must be 'continuous and expeditious' (art 18(2))
    - Passage is innocent if not prejudicial to peace, good order or security of coastal state (art 19(1)).
    - Examples on non-innocent passage (art 19(2)):

(a) any threat or use of force against the sovereignty, territorial integrity or political independence of the coastal State, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations;
(b) any exercise or practice with weapons of any kind;
(c) any act aimed at collecting information to the prejudice of the defence or security of the coastal State;
(d) any act of propaganda aimed at affecting the defence or security of the coastal State;
(e) the launching, landing or taking on board of any aircraft;
(f) the launching, landing or taking on board of any military device;
(g) the loading or unloading of any commodity, currency or person contrary to the customs, fiscal, immigration or sanitary laws and regulations of the coastal State;
(h) any act of wilful and serious pollution contrary to this Convention;
(i) any fishing activities;
(j) the carrying out of research or survey activities;
(k) any act aimed at interfering with any systems of communication or any other facilities or installations of the coastal State;
(l) any other activity not having a direct bearing on passage.

Jurisdiction over foreign government ships and warships:

- When such ships are operated for non-commercial purposes, they are immune from the jurisdiction of the coastal state (art 32),
- But may be required to leave territorial sea immediately if they do not comply with the law of the coastal state in relation to passage (art 30)

c) Criminal jurisdiction:

Art 27 UNCLOS: criminal jurisdiction on board a foreign ship

1. The criminal jurisdiction of the coastal State should not be exercised on board a foreign ship passing through the territorial sea to arrest any person or to conduct any investigation in connection with any crime committed on board the ship during its passage, save only in the following cases:

(a) if the consequences of the crime extend to the coastal State;
(b) if the crime is of a kind to disturb the peace of the country or the good order of the territorial sea;
(c) if the assistance of the local authorities has been requested by the master of the ship or by a diplomatic agent or consular officer of the flag State; or
(d) if such measures are necessary for the suppression of illicit traffic in narcotic drugs or psychotropic substances.

2. The above provisions do not affect the right of the coastal State to take any steps authorized by its laws for the purpose of an arrest or investigation on board a foreign ship passing through the territorial sea after leaving internal waters.
3. In the cases provided for in paragraphs 1 and 2, the coastal State shall, if the master so requests, notify a diplomatic agent or consular officer of the flag State before taking any steps, and shall facilitate contact between such agent or officer and the ship's crew. In cases of emergency this notification may be communicated while the measures are being taken.
4. In considering whether or in what manner an arrest should be made, the local authorities shall have due regard to the interests of navigation.
5. No criminal jurisdiction over offences committed before entry into territorial waters, except if the ship enters internal waters

d) Civil jurisdiction:

Art 28 UNCLOS: civil jurisdiction in relation to foreign ships:

1. The coastal State should not stop or divert a foreign ship passing through the territorial sea for the purpose of exercising civil jurisdiction in relation to a person on board the ship.
2. The coastal State may not levy execution against or arrest the ship for the purpose of any civil proceedings, save only in respect of obligations or liabilities assumed or incurred by the ship itself in the course or for the purpose of its voyage through the waters of the coastal State.
3. Paragraph 2 is without prejudice to the right of the coastal State, in accordance with its laws, to levy execution against or to arrest, for the purpose of any civil proceedings, a foreign ship lying in the territorial sea, or passing through the territorial sea after leaving internal waters.

2) Contiguous zone

a) What is the contiguous zone:

Art 33 UNCLOS:

Territorial sea: everything up to 24 nautical miles from the baseline

b) Rights over contiguous zone:

Art 33 UNCLOS:

- A coastal State may exercise the control necessary to:
  - Prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea
  - Punish infringement of the these laws and regulations committed within its territory or territorial sea

3) Exclusive economic zone

a) What is the exclusive economic zone:

Exclusive economic zone: everything up to 200 nautical miles from the baseline

b) Rights over the exclusive economic zone:

- Coastal state has:
  - Sovereign rights of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the sea-bed and of the sea-bed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds (art 56)
    - Jurisdiction re marine scientific research, protection and preservation and of the marine environment etc
  - But all states have freedom of navigation, overflight, laying of cables and pipelines (art 58)

4) Continental shelf

a) What is the continental shelf:

Art 76 UNCLOS:

Continental Shelf: to outer edge of continental margin, or 200 nautical miles from the baseline, whichever is greater, but no more than 350 nautical miles

b) Rights over the continental shelf:

- Coastal state has exclusive rights to explore and exploit its natural resources
    - Includes mineral and other non-living resources and sedentary living organisms
    - But unlike EEZ, does not cover fishing rights
- Other states have right to lay cables, pipelines, etc.
- Does not include airspace

5) High seas

High seas: areas outside of territorial waters of all states

Art 87 UNCLOS:

The high seas are open to all States, whether coastal or land-locked, for fishing, research, navigation, etc.

Art 89 UNCLOS:

No state may validly purport to subject any part of the high seas to its sovereignty.

Art 97 UNCLOS:

1. In the event of a collision or any other incident of navigation concerning a ship on the high seas, involving the penal or disciplinary responsibility of the master or of any other person in the service of the ship, except before the judicial or administrative authorities either of the flag State or of the State of which such person is a national.
2. In disciplinary matters, the State which has issued a master's certificate or a certificate of competence or licence shall alone be competent, after due legal process, to pronounce the withdrawal of such certificates, even if the holder is not a national of the State which issued them.
3. No arrest or detention of the ship, even as a measure of investigation, shall be ordered by any authorities other than those of the flag State.

6) Airspace

1944 Chicago Convention on International Civil Aviation

- State has complete and exclusive sovereignty over airspace above its territory
- But airspace over EEZ, contiguous zone and continental shelf is open to freedom of overflight

7) Outer space

1967 Treaty on the Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and other Celestial Bodies

- Celestial bodies not subject of sovereign appropriation
- Celestial bodies are ‘the province of all mankind

8) Antarctica

1959 Antarctic Treaty

- Antarctica is to be used for peaceful purposes and be nuclear-free; scientific research and cooperation is encouraged
- No acts or activities taking place while the present Treaty is in force shall constitute a basis for asserting, supporting or denying a claim to territorial sovereignty in Antarctica or create any rights of sovereignty in Antarctica. No new claim, or enlargement of an existing claim, to territorial sovereignty in Antarctica shall be asserted while the present Treaty is in force

7. Jurisdiction

State Jurisdiction

Jurisdiction:

The power of a state to affect persons and property by prescribing and enforcing its laws

Jurisdiction can be civil or criminal:

- **Criminal jurisdiction**: prohibiting certain conduct by making it a criminal offence; prosecuting and punishing offenders
- **Civil jurisdiction**: everything else

Types of Jurisdiction:

1) Legislative jurisdiction: a state's power to make laws

2) Judicial jurisdiction: the power of municipal courts to adjudicate a case

3) Executive jurisdiction: the power to ensure compliance with laws

- **Is restrictive:** a state cannot enforce its jurisdiction in another state's territory unless it has been given permission to do so
    - Common example of permission = SOFAs (agreement between states re: a state can enforce its jurisdiction over its troops when they are acting in another state)
- **Lotus case** (PICJ): "the first and foremost restriction imposed by IL upon a state is that - failing the existence of a permissive rule to the contrary - it may not exercise its power in any form in the territory of another state"

State civil jurisdiction

There are different views as to when international law permits a municipal court to exercise civil jurisdiction over proceedings with a foreign element (e.g. facts occurred abroad, or involving a non-national)

- Most states require some connection with the state, e.g.
    - Defendant's presence within jurisdiction at time of service of writ
    - Defendant has assets within the jurisdiction
    - Plaintiff's nationality or domiciles
    - Subject-matter
- Usually not an issue in practice

N.b. this topic relates to criminal jurisdiction

1) Who is seeking to exercise jurisdiction?

State Jurisdiction

- A municipal court may not exercise criminal jurisdiction over acts with a foreign element (i.e. an offence committed abroad, or by a non-national) unless permitted to do so by a rule of IL
- IL recognises five bases for the exercise of criminal jurisdiction:
    - Territoriality
    - Nationality
    - Protective principle
    - Passive personality
    - Universal jurisdiction
    - Possibly the effects doctrine (but this is not widely accepted)

ICC Jurisdiction

The International Criminal Court (ICC) has jurisdiction from 2002 onwards for Rome Statute crimes if:

- The situation was referred to the ICC Prosecutor by the UN Security Council, or…
- A state party (to the Rome Statute) had jurisdiction over the crimes based on territoriality or nationality

2) Can the ICC seek to exercise jurisdiction?

Subject Matter Jurisdiction

Art 5, Rome Statute: the jurisdiction of the ICC is limited to:

(a) The crime of genocide

- **Art 6**: "Genocide" means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.

- **(b) Crimes against humanity**
  - **Art 7**: "Crimes against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:
  - (a) Murder;
  - (b) Extermination;
  - (c) Enslavement;
  - (d) Deportation or forcible transfer of population;
  - (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
  - (f) Torture;
  - (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
  - (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
  - (i) Enforced disappearance of persons;
  - (j) The crime of apartheid;
  - (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.
- **(c) War crimes**
  - **Art 8**: "war crimes" means:
  - (a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:
  - (i) Wilful killing;
  - (ii) Torture or inhuman treatment, including biological experiments;
  - (iii) Wilfully causing great suffering, or serious injury to body or health;
  - (iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
  - (v) Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;
  - (vi) Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;
- **(d) The crime of aggression**
  - **Art 8**: “Crime of aggression” means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.

Jurisdiction Ratione Temporis

Art 11, Rome Statute: the jurisdiction of the ICC is limited to crimes committed after the entry into force of this Statute (1 July 2002).

Preconditions for the Exercise of Jurisdiction

The ICC may exercise its jurisdiction if:

- **Art 12, Rome Statute**: A state party (to the Rome Statute) had jurisdiction over the crimes based on **territoriality** or **nationality**, or…
    - **Territoriality**: the conduct in question occurred on the state's territory, or on board an vessel or aircraft registered to that state
    - **Nationality**: the accused person is a national of the state
- Art 13, **Rome Statute:**
    - (a) The situation is referred to the Prosecutor by a **State Party**
    - (b) The situation is referred to the Prosecutor by the **UN Security Council**
    - (c) The Prosecutor has initiated an investigation in respect of such a crime

2) If domestic courts are seeking to exercise jurisdiction, on what basis are they seeking to rely?

a) Jurisdiction on grounds of territoriality

Every state claims jurisdiction over crimes committed on its own territory, including by non-nationals

Crimes occurring fully in a state's territory:

- **Land**, **airspace**, **aircraft**, **territorial sea**
    - In **US v Yousef**, the US convicted Yousef of conspiracy to bomb US aircraft located in the Philippines because the aircraft were considered US territory
    - In **R v Disun; R v Nardin**, the operators of the MV Tampa (a Norwegian ship) were subject to Australian territorial jurisdiction because they transported 433 rescued asylum seekers into Australian territorial waters without permission
- **Contiguous zone**, **continental shelf** and **exclusive economic zone** for certain purposes
- **Foreign embassies**
    - The grounds of a foreign embassy, contained within a state's territory, are part of the state's territory for the exercise of the state's criminal jurisdiction (**R v Turnbull; ex parte Petroff**)
    - *Facts: Attempted terrorist attack at USSR embassy in Australia (tried to plant bombs inside the embassy). Accused argued that Australia does not have criminal jurisdiction over a foreign embassy.*

Crimes occurring partly in a state's territory:

- **Subjective territoriality**: if an offence is initiated within the state, but completed abroad, it is part of the state's criminal jurisdiction
- **Objective territoriality**: if an offence is initiated abroad, but completed in the state, it is part of the state's criminal jurisdiction
    - **The Lotus Case**
        - Following the French ship's collision into the Turkish ship, the PICJ held that because the crime occurred on the Turkish vessel (as that's where the people died), it was part of Turkish territory for the exercise of the state's criminal jurisdiction
    - **ICC's decision re: jurisdiction in Bangladesh (2018)**
        - Rohingya people had been persecuted in Myanmar, causing an influx of people to flee Myanmar and seek refuge in Bangladesh
        - The ICC has jurisdiction from 2002 onwards for Rome Statute crimes if:
            - The situation was referred to the ICC Prosecutor by the UN Security Council, or…
            - A state party (to the Rome Statute) had jurisdiction over the crimes based on territoriality or nationality
        - Controversial because:
            - The crimes were initiated in Myanmar - which is not a state party to the Rome Statute; and there was no referral by the UN Security Council

- ICC prosecutor argued that Bangladesh (a state party to the Rome Statute) had jurisdiction over the crimes based on territoriality…
    - Argument - Bangladesh has state territoriality over the crime through objective territoriality (i.e. the crime was initiated in Myanmur, but the crime was completed in Bangladesh)

b) Jurisdiction on grounds of nationality

Every state has jurisdiction over crimes committed by its nationals, wherever they are in the world

Example: s 272.6 of the Criminal Code Act 1995 (Cth)

XYZ v Cth (HCA, 2006):
Facts: HC asked to rule on the constitutional validity of Cth legislation which enabled the Cth to prosecute Australians for child sex offences committed abroad.
Held (majority):
Legislation is constitutional

- Gleeson CJ: "the territorial principle of legislative jurisdiction over crime is not the exclusive source of competence recognised by IL. Of primary relevance to the present case is the nationality principle, which covers conduct abroad by citizens or residents of a state"

Statement of the Prosecutor of the ICC on the alleged crimes committed by ISIS:

- Where members of ISIS are 'foreign fighters' - citizens of countries which are state parties to the Rome Statute - the nationality jurisdiction can be used by the ICC to prosecute these individuals

c) Jurisdiction on grounds of the protective principle

Every state has jurisdiction to prosecute crimes which threaten or injure their national interest or security, even when committed outside the state by non-nationals.

It is limited to offences which involve infringements on **vital state interests.**

Problem: what is lawful in one state (e.g. free speech) may be a crime against national interest/security in another

Examples:
Joyce v DPP (1946)
Facts: D was an American citizen but held a British passport. After the outbreak of war between Britain and Germany in 1939, he delivered from German territory broadcast talks in English that were hostile to Britain. D was convicted of **treason**.
Held:

- **By holding a passport, a person claims continued protection of the state and thereby pledges the continuance of his fidelity to the state.**
- **Such a person may be convicted of treason where they adhere to the state's enemies.**

A-G (Israel) v. Eichmann (1961)
Facts: Following WWII, Eichmann (a Nazi leader) hid out in Argentina. Secret Israeli agents snatched him from Argentina and brought him back to Israel to prosecute him for **crimes committed against Jewish people**.
Held:

- The prosecution relied on the protective principle to convict Eichmann
- Eichmann argued that Israel could not rely upon the protective principle because at the time of the relevant crimes, there was no such state as Israel
    - Rejected by the court:
    - **If an injured group or people attains political sovereignty after a crime committed against them, it may make use of such sovereignty for the enforcement of its natural right to punish the offender who injured it**

US v. Benitez (1984)
The court relied upon the protective principle to convict D (a Colombian national) of **conspiracy to murder Drug Enforcement Administration (DEA) agents** engaged in the performance of their official duties in the country of Colombia.

d) Jurisdiction on grounds of passive personality

Every state has jurisdiction to prosecute crimes committed abroad where the victim is a national of the state.

This principle was controversial in the past and not universally accepted due to concern about the "bubble effect": alien surrounded by protective and invisible "bubble" of his/her own national laws

But now, this principle has become increasingly accepted.

Treaties:
International Convention Against the Taking of Hostages 1979 (article 5)

State Practice:
US v. Benitez (1984)
The US relied upon the passive personality principle to prosecute D (a Colombian national) of **conspiracy to murder Drug Enforcement Administration (DEA) agents** (US nationals) engaged in the performance of their official duties in the country of Colombia.

US v Yunis (1998, DC District Court… upheld by the DC Court of Appeal)
The US relied on the passive personality principle to prosecute Yunis (a Lebanese national) for hijacking a Jordanian airline (in the territory of Jordan). Two of the passengers on the plane were US citizens.

US v Neil (2002, US Court of Appeal)
The US relied on the passive personality principle to prosecute D (Grenadine nationality) for child sex offences committed on a Mexican vessel in Mexican territorial waters on a child who was a US citizen.

Malaysian Airline Flight MH17
The Dutch have commenced prosecution of suspects re: attack on MH17 over Ukraine in 2014 on the basis of passive personality jurisdiction (as there were Dutch victims).

e) Jurisdiction on grounds of universal jurisdiction

Princeton Principles on UJ 2001 (non-binding expert guidance): universal jurisdiction is criminal jurisdiction based solely on the nature of the crime, without regard to any nexus between state, victim and/or accused

Difficult to discern a coherent theory for those offences to which UJ applies - it has developed on a case-by-case basis:

Crimes over which universal jurisdiction may be exercised:
Arrest Warrant Case (ICJ, 2002)
Facts: Belgium issued an arrest warrant for the DRC Foreign Minister for war crimes and crimes against humanity. Belgium claimed it had criminal jurisdiction due to the principle of universal jurisdiction.
Held:

- Majority of ICJ did not actually decide if Belgium could rely on UJ, because in any case, the defendant had immunity from prosecution by other states due to his role as the Foreign Minister
- **But in their separate opinions, Higgins, Kooijmans and Buergenthal JJ said:**
    - **"Universal criminal jurisdiction can be exercised only over those crimes regarded as the most heinous by the international community." They cited examples of piracy, war crimes, crimes against humanity**
    - **A state may exercise UJ in abenstia (i.e. without custody of the alleged offender), although it must ensure fair trial rights are protected**

Piracy (attacks on vessels on high seas for private ends)

- **UNCLOS, Art 101:** piracy is…
  - An act of violence, detention or depredation (attacking or plundering)
  - Committed for private ends
  - By people on a private craft, against another vessel
  - Both vessels are outside the jurisdiction of any State e.g. high seas
- **UNCLOS, Art 105:**
  - On the high seas, any state may seize a pirate ship or aircraft (or one taken under control of pirates) and arrest the persons + determine the penalty to be imposed + action to be taken with regard to the property… subject to the rights of third parties acting in good faith
- **Arrest Warrant Case**: piracy is a classic example of a crime for which UJ may be exercised
- **Dire v US**: attempted/frustrated robbery is sufficient to constitute piracy
- **ICR v Sea Shepherd**: an act is committed for private ends unless the act is committed on behalf of a sovereign state

Genocide (killing and other crimes with intent to destroy in whole or in part, a national, ethnical, racial or religious group)

- **Convention on the Prevention and Punishment of the Crime of Genocide, Art 2:** genocide is any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group:
  - (a) Killing members of the group;
  - (b) Causing serious bodily or mental harm to members of the group;
  - (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
  - (d) Imposing measures intended to prevent births within the group;
  - (e) Forcibly transferring children of the group to another group.
- **A-G v Eichmann**: the court held that the Holocaust constituted genocide, which is a "grave offence against the law of nations itself" and that "the jurisdiction to try such crimes under international law is universal"
- **Nulyarimma v Thompson**: the fact that a state may exercise UJ over a crime does not necessarily mean a domestic court would automatically be able to try such offences in the absence of statutory authorisation

War crimes (serious breaches of the laws of war, such as intentional attacks on civilians)

- **Polyukhovich v Commonwealth**: the HC found the War Crimes Act, which allowed Australia to prosecute war crimes committed during WWII was constitutional, despite its retrospective effect, as "a law which vested in an Australian court a jurisdiction recognized by international law as a universal jurisdiction is a law with respect to Australia's external affairs...international law recognizes a State to have universal jurisdiction to try suspected war criminals…" per Brennan J

Crimes against humanity (certain acts including murder committed as part of a widespread or systematic attack directed against any civilian population)

- **Polyukhovich v Commonwealth**: the HC found the War Crimes Act, which allowed Australia to prosecute crimes committed during WWII was constitutional, despite its retrospective effect, as "a law which vested in an Australian court a jurisdiction recognized by international law as a universal jurisdiction is a law with respect to Australia's external affairs...international law recognizes a State to have universal jurisdiction to try suspected war criminals…" per Brennan J

Torture (state infliction of pain/suffering to obtain information etc.)

- **Pinochet**: "the jus cogens nature of the international crime of torture justifies states in taking universal jurisdiction over torture wherever committed. International law provides that offences jus cogens may be punished by any state"

- **National Commissioner of the South African Police Service v South African Human Rights Litigation Centre (2014)**: SA Constitutional Court approved use of UJ to start investigating alleged torture perpetrated in Zimbabwe, by and against Zimbabwean nationals

Crimes and situations in which universal jurisdiction may not be exercised:

- Aggression is not subject to UJ under IL
- Terrorism is not subject to UJ under IL , because there is no clear definition under IL as to what exactly 'terrorism' encompasses (**US v Youseff**)
- In **Criminal Complaint against Donald Rumsfeld (2007)**, a German Court did not allow use of UJ to investigate of American nationals regarding alleged torture and war crimes in Iraq
    - This occurred due to Rumsfeld's alleged immunity as former Minister of Defense

Custody of the Offender

- Controversy over the exercise of universal jurisdiction without custody of the offender (i.e. in absentia) (**Arrest Warrant Case (ICJ, 2002**):
    - Belgium asserted universal jurisdiction in absentia over Minister for Foreign Affairs of the DRC; no Belgian victims, nor other links with accused
    - In separate opinions, several judges considered universal jurisdiction in absentia
    - **A state may choose to exercise a universal criminal jurisdiction in absentia provided certain safeguards are in place**...[i.e. no violation of immunity, jurisdiction only over 'most heinous' crimes, including war crimes and crimes against humanity]' per Judges Huggins, Kooijmans and Buergenthal

Controversies & Difficulties

- It is politicised and its exercise may lead to political consequences for a state exercising universal jurisdiction (Ratner 2003 re Belgium; AU position re alleged abuses of universal jurisdiction);
- Risk of forum shopping by aggrieved individuals or interest groups that have absolutely no connection to the prosecuting state (Ratner 2003 & *Criminal Complaint against Donald Rumsfeld* 2007 (Germany));
- Implications for the right to a fair trial of the accused;
- The above concerns may be addressed by limiting the exercise of universal jurisdiction:
    - 'Presence requirement' – likely for trial but nor for investigation (*National Commissioner of the SAPS*, SA CCT 2014); but see conflicting views in *Arrest Warrant* (above);
    - Subsidiarity pple – universal jurisdiction as a last resort (only when states with closer jurisdictional ties are not willing to exercise jurisdiction); unlikely that this is a pple of CIL;
    - Authorisation by Attorney-General (or equivalent) – examples, UK and Au (Div 274.3 *Criminal Code Act* 1995 (Cth)).

f) Potential jurisdiction on grounds of effects doctrine

A state has jurisdiction where the offence has consequences in its territory (i.e. the crime occurred in another state, but there are consequences in the territory of the current state)

US v Alcoa:
Facts: US charged Alcoa with illegal monopolisation of aluminium and demanded that the company be dissolved.
Held: US did have jurisdiction to prosecute due to the disadvantageous economic effects within America of foreign economic activity

But this principle is not widely accepted because potential consequences (e.g. economic effects) are so broad (i.e. a very slippery slope)…

3) Do any states have concurrent criminal jurisdiction?

Note which states have concurrent criminal jurisdiction and on what grounds.

If there is concurrent criminal jurisdiction:

- Priority given to the state which has custody of the offender
- Rule against double jeopardy

4) Does the principle of complementarity apply?

Principle of Complementarity

- Even if the ICC has jurisdiction to prosecute a crime, it does not have primacy of jurisdiction over national states.
- National states have the primary right and prerogative to prosecute a crime.
  Rome Statute, Art 17: Only if the national state is not completing a genuine and legitimate prosecution of the crime, or is unwilling or unable to prosecute, the ICC will step in to prosecute.

5) Any contentions about duty to prosecute or extradite?

Extradition

Extradition is the process of one state sending to another a person charged with (or convicted of) an offence under the law of the requesting state.

There is **no general duty under CIL** to extradite, or prosecute if extradition is refused, in absence of a treaty (**Aerial incident at Lockerbie, 1992 ICC**)

- Judges Evensen, Tarassov, Guillaume and Aguilar Mawdsley: "Insofar as general CIL is concerned, extradition is a sovereign decision of the requested State, which is never under an obligation to carry it out. Moreover, in general international law there is no obligation to prosecute in default of extradition."

However, some **treaties** include a **"prosecute or extradite" clause**, which is binding between the parties.

- E.g. Under the **1984 Convention Against Torture (CAT),** if a person charged with torture is in a State Party's territory, that State must either prosecute or extradite him/her.
- But CAT also says: "No State Party shall expel, return or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture."
- CIL contains some general principles on extradition, including "double criminality": the crime for which extradition is sought must be a crime in both states at date of commission of offence (**Pinochet**)

Summary of common conditions/grounds for refusal to extradite

- Conditions:
  - Must be minimum penalty or time left to serve
  - Double criminality rule
  - Speciality – person will only be prosecuted for the specified conduct
- Grounds for refusal:
  - Political offences
  - Person will be prosecuted or punished, or prejudiced at trial, on account of his or her race, religion, nationality or political opinions
  - The person will be subjected to torture
  - The person will be subjected to the death penalty
  - Offence under military law
  - The person has been punished, acquitted or pardoned in either country for the same conduct
  - Surrender is likely to have exceptionally serious consequences for the person whose extradition is sought, including because of the person's age or state of health

6) Was custody illegally obtained?

Relevance of illegally obtained custody

Views differ as to whether illegally obtained custody renders unlawful the exercise of criminal jurisdiction by a domestic or international criminal court

Domestic courts

A-G v Eichmann

- Eichmann argued that the Israeli court lacked jurisdiction to prosecute him due to his unlawful arrest & kidnap from Argentina
- The court referred to common law authorities to determine that **illegality of arrest is irrelevant**
    - "The courts in England, the United States and Israel have ruled continuously that the circumstances of the arrest and the mode of bringing of the accused into the area of the state have no relevance to his trial"
- Bearing in mind that Argentina had waved its claim to request Eichmann's return, the court further held that: "the right to plead violation of the sovereignty of a state is the exclusive right of that state. Only the sovereign state may raise, or waive, that contention, and the accused has no right to represent the rights of that state."

Same outcome in **US Supreme Court's Alvarez-Machain (1992)**, even though in that case, the invaded State (Mexico) had objected.

State v Ebrahim (1992, Supreme Court of South Africa)

- The accused, a member of ANC, was abducted by South African Agents from Swaziland
- He was convicted of treason in SA… Swaziland did not object
- On appeal, the SA Supreme Court held that trial court **had no jurisdiction because his arrest was unlawful** and therefore conviction must be set aside
- *"The individual must be protected from unlawful arrest and abduction, jurisdictional boundaries must not be exceeded, international legal sovereignty must be respected, the legal process must be fair towards those affected by it, and the misuse thereof must be avoided in order to protect and promote the dignity and integrity of the judicial system. This applies equally to the State. When the State is itself party to a dispute, as for example in criminal cases, it must come to court "with clean hands" as it were. When the State is itself involved in an abduction across international borders as in the instant case, its hands cannot be said to be clean."*

Moti v The Queen (2011, HCA)

- An Australian citizen was accused and charged under Australian law of child sex offences committed in Vanuatu & New Caledonia
- He was unlawfully deported from Solomon Islands, with Australia's assistance (supply of travel documents)
- The HC held that the proceedings must be permanently stayed due to the abuse of process by Australian officials re: his unlawful arrest

International courts

Prosecutor v Nikolić (2003, International Criminal Tribunal for former Yugoslavia - Appeals Chamber)

- The accused, who was charged with war crimes, challenged the Tribunal's jurisdiction because he was allegedly arrested in breach of Serbia's sovereignty and in violation of his human rights
- The Appeals Chamber found that this was irrelevant to his prosecution
    - **1) When the offence is universally condemned, the jurisdiction of an international court or tribunal will not be set aside if the suspect was apprehended in violation of another state's sovereignty**
        - Conclusions from domestic case-law: for crimes such as genocide, crimes against humanity and war crimes the courts found in their seriousness and special character a reason not to set jurisdiction aside; if the state whose sovereignty has been breached does not complain or if the dispute is resolved diplomatically, the courts find it easier to assert jurisdiction
        - Although the state that breaches the sovereignty of another state may be held internationally responsible

- **2) When the human rights of the accused are violated, jurisdiction should not be exercised in certain cases of very serious mistreatment, inhuman, cruel or degrading treatment, torture**
    - Thus, 'certain human rights violations are of such a serious nature that they require that the exercise of jurisdiction be declined'
- *'Universally condemned offences are a matter of concern to the international community as a whole. ... There is a legitimate expectation that those accused of these crimes will be brought to justice swiftly. Accountability for these crimes is a necessary condition for the achievement of international justice, which plays a critical role in the reconciliation and rebuilding based on the rule of law of countries and societies torn apart by international and internecine conflicts...This legitimate expectation needs to be weighed against the principle of State sovereignty and the fundamental human rights of the accused.'*

7) When a state has human rights obligations within its jurisdiction, how far do these extend abroad?

Al Skeini et al v. United Kingdom (European Ct HR, 2011)

- Re: killings of Iraqis by British forces in Basrah (Iraq).
- Under European Convention on Human Rights (ECHR), state parties must ensure adequate investigation of killings
- Under ECHR Art. 1, state parties must secure the rights enshrined in the Convention "to everyone within their jurisdiction".
- European Ct HR held that the killings fell within the UK's jurisdiction because "the United Kingdom, through its soldiers engaged in security operations in Basrah during the period in question, exercised authority and control over individuals killed in the course of such security operations."
- Hence, by not properly investigating the deaths, UK had violated its obligations under the ECHR

Boumediene v Bush (US Supreme Court 2008)

- Concerning Constitutional right to challenge the legality of one's detention (a writ of habeas corpus).
- Supreme Court ruled that Congress could not lawfully remove this right for the roughly 600 prisoners In Guantanamo Bay.
- "The detainees ... are held in a territory that, while technically not part of the United States, is under the complete control of our Government."
- The Constitutional writ of habeas corpus "has full effect at Guantanamo Bay."

8. Immunity from Jurisdiction

Immunity

In principle, a state has complete and exclusive jurisdiction within its territory.

But certain foreign entities or individuals may have immunity from that jurisdiction.

- **Principal classes of immunity**:
  - State (or sovereign) immunity
  - Diplomatic immunity

Immunity is a procedural bar to enforcement of a state's jurisdiction.

- Immunity doesn't stop jurisdiction from existing, but it means a state cannot actually exercise or enforce that jurisdiction when a party to the proceedings is another state/or a representative of the state.
- Where immunity applies, no civil or criminal action can be taken against entity or individual in another state's courts

State (Sovereign) Immunity

Rationale:

- State immunity is a consequence of the notion of equality of sovereign states - *par in parem non habet imperium* or "perfect equality"
  - Idea that states are peers; none are superior to each other
  - Matter of respect for the dignity, equality and independence of foreign sovereigns
- Triggs: "traditional international law recognises the absolute right of the sovereign state and its representatives to immunity from the jurisdiction of other states"
- State immunity is one of the oldest principles of CIL – but its precise extent and application remaines unclear

Two schools of thought:

- **Absolute Immunity**:
  - "Perfect equality and absolute independence of sovereigns" means **state immunity is plenary** - no state can be made subject to the jurisdiction of another against its will (***The Schooner Exchange v McFaddon***)
  - However, throughout the 20th C, states increased commercial transactions (such as trading resources and leasing land) with other states, which required a right to recovery if states did not comply with the terms of the transaction. Most states now possess a more restrictive approach.
    - **Lord Denning in *Trendtex***: *"In the last 50 years, there has been a complete transformation in the functions of a sovereign state. Nearly every country now engages in commercial activities… This transformation has changed the rules of international law relating to sovereign immunity"*
  - Rationale: to ensure fairness in commercial situations
- **Restrictive Immunity**:
  - **States have immunity in a foreign domestic court only for sovereign (governmental) activities** (acta jure imperii), not commercial or non-governmental acts (acta jure gestionis)
    - Acta jure imperii: **acts related to the core governmental functions of the state - these attract immunity**
    - Acta jure gestionis: **commercial or non-governmental acts - these do not attract immunity**

The current situation:

- Traditionally, immunity was complete – the state was immune from proceedings in a foreign state, no exceptions (ie "absolute" approach)
- Now most states follow restrictive immunity – state only immune for governmental acts (acta jure imperii), not commercial or non-governmental acts (acta jure gestionis)

    - Debate about whether test is the nature of the act or its purpose – trend seems to be the nature of the act
- So only governmental or 'sovereign' acts will be immune – e.g. those things that only a government can do

In Australian law:

- FSIA 1985 follows restrictive approach, by setting out principle of immunity of a foreign state from civil proceedings but with several exceptions, usually re: commercial or non-governmental acts
    - Exceptions:
        - Commercial contracts (eg s.11 FSIA 1985 (Cth))
        - Certain contracts of employment (eg s.12 FSIA 1985 (Cth))
        - Actions for personal injury or death occurring in forum state (eg s.13 FSIA 1985 (Cth))

A) STATE IMMUNITY

1) International court or domestic court?

International court

Al-Bashir Case (ICC): under CIL, there is no immunity before an international court

- **CIL does not recognise immunity before the ICC, because the ICC is different in character before a national court**
    - **The notion of equality of sovereign states applies to national courts**
    - **But this theory does not apply to an ICC, because the ICC is superior to national courts; acts on behalf of the international community as a whole**

Art 27 Rome Statute

(1) This **Statute shall apply equally to all persons without any distinction based on official capacity**. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.

(2) **Immunities or special procedural rules which may attach to the official capacity of a person**, whether under national or international law, shall **not bar the Court from exercising its jurisdiction over such a person**.

Al-Bashir Case (ICC)

Facts: AB, a sitting President of Sudan, was accused of war crimes and genocidal crimes. The UNSC referred the situation to the ICC (means that any member state of the UN Charter is legally obligated to cooperated with the decisions of the UNSC). Sudan is not party to the Rome Statute, but is a member state to the UN Charter. Arrest warrants were served against AB by the ICC re: war crimes and genocide.
Issue: whether or not AB enjoyed immunity before an international court
Held:

- Under CIL, there is no immunity before an international court
- Therefore, a Head of State has no immunity from criminal prosecution by international criminal courts exercising proper jurisdiction, and by extension, no immunity from arrest and surrender by foreign authorities acting on behalf of the court
- There is no need to obtain a waiver of immunity from Sudan, because no immunity actually existed before the ICC

Domestic court

Immunity rules apply before a domestic court

- The "perfect equality and absolute independence of sovereigns" (***The Schooner Exchange***) means that states are entitled certain immunity in foreign domestic courts

2) Acts that attract immunity under the restrictive approach

Restrictive Immunity: states have immunity in a foreign domestic court only for sovereign acts

Where restrictive immunity is followed, it is necessary to distinguish between:

- **Acts jure imperii** (**acts related to core governmental functions**), and
- **Acts jure gestionis** (**commercial, or non-governmental, acts**)

a) Nature of the act

Lord Wilberforce in *I Congreso del Partido* (1983, HoL): to determine under the restrictive theory whether state immunity should be granted or not, **the court must consider the whole context** in which the claim against the state is made to assess whether the act should be considered within the sphere of governmental activity, or commercial/private activity. Here, the focus is on the **nature of the act** (**rather than the purpose or motivation of the act**).

- In **I Congreso del Partido, the HoL held that the nature of the act by Cuba (to cancel the shipment of sugar to Chile) was a commercial decision to breach a contract and sell to a different purchaser**
    - The character of the act was the type of act any business could make, it was not exclusive to a sovereign state, so it was characterised as a commercial act
    - No entitlement to immunity
- Facts in **I Congreso del Partido:**
- *Two Cuban ships were sent to deliver sugar to Chile. At the time of departing Cuba, Chile was a communist country like Cuba. But while on the journey, there was a military coup in Chile and the communist government was toppled by a right-wing government. Due to the result of this coup, Cuba and Chile no longer had an alliance and ordered one of the ships to return to Cuba and the other ship to deliver the sugar to Vietnam. The owner of the ships sued Chile, because they would have made more money if the cargo was offloaded in Chile.*

Similarly, in **Kuwait Airways v Iraqi Airlines (1995, Supreme Court of Canada)**, the court determined that **the ultimate test to determine if an act constitutes an acta jure imperii is whether the act in question is, of its own character, a governmental act, as opposed to an act that any private citizen can perform**.

- Because Iraqi Airlines was a government-owned airline, the act of seizing the Kuwait planes following the invasion of Iraq by Kuwait was deemed an act of war (i.e. a governmental act)
- But once Iraq utilised the planes and engaged in commercial airline activities, this was considered to be a commercial act
- No entitlement to immunity.
- Facts in **Kuwait Airways v Iraqi Airlines**:
- *Following the invasion of Iraq by Kuwait, Iraq seized Kuwait planes and said they were now the property of Iraq. Kuwait later sued Iraq, as 4 out of 10 of the planes were destroyed by Iraq and to recover damages for repairs/costs of replacement planes.*

b) Purpose of the act

Although state practice emphasises that the nature of the act (not the purpose of the act) should be considered to determine whether an act is a governmental act, **Art 2(2) of the 2004 UN Convention on Jurisdictional Immunities** states that:

*"in determining whether a contract or transaction is a "commercial transaction"… **reference should be made primarily to the nature of the contract or transaction**, but **its purpose should also be taken into account if the parties to the contract or transaction have so agreed**, or if, in the practice of the State of the forum, that **purpose is relevant to determining the non-commercial character** of the transaction"*

3) Whose acts can be sovereign acts that attract immunity?

a) Individuals acting for the purposes of the state itself

Lord Bingham in **Jones v Saudi Arabia (2006, HoL)**: **a state can only act through servants and agents; their official acts are the acts of the state; and the state's immunity in respect of them is fundamental to the principle of state immunity**

- Immunity belongs to the state, not the individual.
- Immunity covers the act of a state official performed in an official capacity (not in a personal capacity)
    - In **Holland v Lampen-Wolfe** (2000, HoL), the HoL held that when LW wrote the allegedly defamatory memo criticising H's performance as a teacher, LW was acting in a capacity because the memo was in relation to the US armed forces
- Including official acts by:

- Head of State
- Independent sovereign states
- The executive government
- A department or organ of executive government

b) An agency or organisation that is part of the executive government of a state

1) Lord Denning in **Trendtex**: **the doctrine of state immunity grants immunity to a foreign government, or its department, or any instrumentality which can be regarded as an 'alter ego or organ' of the government**

- To determine this, you must look to the functions and control of the organisation to determine whether there is evidence that supports the argument that the organisation is under government control and exercise governmental functions… you cannot merely rely on the statement of the foreign law
- Although the Nigerian Bank exercised some governmental functions such as issuing currency, the court held that it had enough independence from the Nigerian Government to operate as an independent organisation

2) Art 2(1)(b)(iii) of the UN Convention on Jurisdictional Immunities:

State immunity extends to "**agencies or instrumentalities of the state** or other entities, **to the extent that they are entitled to perform and are actually performing acts in the exercise of sovereign authority of the state**"

- Immunity applies agencies or instrumentalities of the state to the extent that they are performing governmental functions
- E.g. in **Trendtex**, the court examined the nature of the disputed act of the Nigerian Bank in its relationship with Trendtex. Breaching a promise to honour a credit is a commercial function, it is not a sovereign function, therefore the Bank could not rely on immunity

3) Cf Wilhelm Finance (UKHC, 2009) – the Argentine shipyard was a state owned entity, board of director nominated by the state, accountable to the government and financed by the government… yet the UKHC found it was not an organ of the state, rather it was a separate entity:

- It did not exercise sovereign acts. Rather, it carried out work regarding the shipyard that a private company might do. It was "an organisation aimed at the production of goods and services".
- It had the capacity to sue and be sued and was distinct from the executive organs of the government.
- Therefore, the Argentine shipyard had no immunity.

c) An agency or organisation that is separate to the government of a state

Art 2(1)(b)(iii) of the UN Convention on Jurisdictional Immunities:

State immunity extends to "agencies or instrumentalities of the state or **other entities**, **to the extent that they are entitled to perform and are actually performing acts in the exercise of sovereign authority of the state**"

- Immunity applies to all entities to the extent that they are performing governmental functions

s 22 of Australian Foreign States Immunities Act 1985 Cth):

A "separate entity" [an agency or instrumentality that is not a department or organ of the foreign State] is entitled to immunity to the extent that it performs sovereign (i.e. governmental) functions

PT Garuda Indonesia Ltd v ACCC (2012, HC)

Facts: The ACCC brought proceedings against Garuda Airlines, alleging anti-competitive conduct in relation to a commercial transaction.

Held:

- Here, although Garuda Airlines was an Indonesian state-owned airline, it was regarded as a separate entity as it did not exercise governmental functions.
- Furthermore, Garuda Airlines was not entitled to immunity due to the commercial nature of the disputed conduct.

d) Political subdivisions

The position of a province, constituent unit of a federation or other political subdivision (e.g. Australian state or territory) remains unclear:

- **Mellenger v New Brunswick Dev Corp (1971):** the UKCA held that under Canadian Constitution, provinces are sovereign states and therefore entitled to sovereign immunity
- **Cf Alamieyeseigha v CPS (2005)**: UKHC did not accept that Bayelsa (constituent territory of the Federal Republic of Nigeria) was entitled to immunity – no power to conduct foreign relations on its own behalf

Brownlie suggests three possibilities:

- Political subdivisions are organs of a state and entitled to same immunity
- Sovereignty for this purpose inheres only in the central organs of a state, or
- Functional – e.g. is it exercising sovereign authority of the state
    - This seems most appropriate

4) State immunity for individuals

Immunity ratione materiae (by reason of the nature of the act)

- **What:** Only acts performed in an official sovereign capacity (not private acts!)
- **Why:** Exists due to sovereign equality; the courts of one state cannot sit in judgment on the sovereign acts of another
- **Who:** All state officials
- **When:** Begins when the person assumes the role and is permanent (because their acts are deemed to be the will of the state)

Immunity ratione personae (by reason of the person's status)

- **What:** All acts: official, private, commercial
- **Why**: Exists so that officials are not impeded in their duties when they are representing a state (to facilitate the smooth interaction of foreign relations); also to respect the dignity of sovereign states (notion that all states are equal and it would be an affront to a state if its representative was brought before a foreign court)
- **Who**:
    - Head of State
    - Head of Government
    - Foreign ministers
    - High-ranking diplomats
- **When**: Starts when a person assumes a role, and ceases once they leave the role
    - Head of State has absolute immunity for all acts while still in office
    - Once out of office, former Head of State…
        - Has immunity in respect of official acts performed while in office (ratione materiae)
        - Can be held accountable in criminal and civil proceedings for all acts that are not considered ratione materiae

a) Official act or private act?

Immunity rationae materiae: extends to only acts performed in an official sovereign capacity + lasts forever
Immunity rationae personae: extends to private acts + only lasts while the person retains the role

Pinochet Case (HoL, 1999):
Lord Goff: A head of state will, under international law, enjoy state immunity *ratione personae* so long as he is in office, and after he ceases to hold office will enjoy the concomitant **immunity *ratione materiae* 'in respect of acts performed [by him] in the exercise of his functions [as head of state]', the critical question being 'whether the conduct was engaged in under colour of or in ostensible exercise of the head of states public authority'**. … In this context, the contrast is drawn between governmental acts, which are functions of the head of state, and private acts, which are not.

Ex-King Farouk of Egypt v Christian Dior:

Facts: Ex-King bought clothes and did not pay for them. Ex-King claimed he had immunity.
Held:

- Ex-King had to pay for the clothes, as this was private act.
- Immunity rationae personae would not protect him for an that was act done in a private capacity, because he was no longer the Head of State.

Arrest Warrant Case (DRC v Belgium) (2002, ICJ)
Facts: In 2000, a Belgium judge issued an arrest warrant against a current serving Foreign Minister, alleging he had committed war crimes and crimes against humanity prior to his appointment as Foreign Minister.
Held:

- Majority found that Belgium could not issue arrest warrant, due to operation of immunity rationae personae (the arrest warrant was a violation by Belgium to respect the immunities of the DRC)
- **Purpose of the immunity rationae personae is to ensure that the state official is not hindered from representing the state because they are tied up in foreign litigation or in prison, therefore immunity applies:**
    - **To all acts, whether the acts in question were performed in "official" or "private" capacity**
    - **To acts that occurred during and before the person assumed the official role**
    - **To all acts, regardless of whether acts in question were crimes under IL**
        - But immunity rationae personae does not affect individual criminal responsibility: the person in question has committed a crime, he just cannot be arrested for it yet

b) Who does immunity rationae personae extend to?
Arrest Warrants: certain high-ranking individuals are entitled to immunity by virtue of their position – this is immunity ratione personae…

Includes the Troika: **Head of State, Head of Government, and Minister for Foreign Affairs**

- In **Arrest Warrants**, the ICJ immunity rationae personae is accorded to certain individuals to ensure the effective performance of their functions, and that in the performance of these functions, [the person entitled to immunity] is frequently required to travel internationally, and thus must be in a position freely to do so
    - In **Bo Xilai** and **Re Mofaz**, UK courts applied this 'travel' requirement to extend immunity rationae personae beyond the so-called 'troika' to include Finance and Defence Ministers, respectively
- But in **Djibouti v France (2008, ICJ)**: chief prosecutor and head of national security did not have immunity at CIL
- Recent work by the ILC on the **Immunity Ratione Personae of Foreign Government Officials** suggests that immunity rationae personae should be limited to the troika

c) Criminal or civil jurisdiction?
Criminal jurisdiction:

Pinochet Case (HoL, 1999)
Facts: From 1973-1990, Pinochet was Chile's Head of State. In 1998, while in the UK, he was arrested pursuant to Spanish warrant requesting his arrest. Charges relating to his role in organising and authorising torture in Chile between 1988-1992.

- Chile, UK and Spain all parties to Convention Against Torture (CAT)
- CAT made state torture an international crime, subject to universal jurisdiction, and sets out an obligation on state parties to extradite + prosecute for torture
- Crime of torture is defined in CAT as being committed "by or with the acquiescence of a public official or other person acting in an official capacity" (i.e. by definition, an official function)
- If state torture was an official function protected by immunity, major purpose of CAT would be defeated: torture would be a crime but no-one could be punished for it outside Chile because state immunity would protect them
- "How can it be for international law purposes an official function to do something which international law itself prohibits and criminalises?" – Lord Brown Wilkinson

Held:

- **Pinochet was not entitled to immunity for state torture committed while in office**
- **In this case, it was held that the Torture Convention had removed immunity rationae materiae from protecting individuals who perpetrate torture from criminal prosecution**
    - By definition, torture under the Torture Convention is an official act (committed by state officials or with state endorsement).
    - The Torture Convention required the prosecution and criminalisation of torture by all state parties;
    - The Torture Convention (to which Chile, Spain and UK were parties) made torture a crime subject to universal jurisdiction (and it obliged these states to assume universal jurisdiction in relation to torture);
    - Therefore, any perpetrator of an 'official' act of torture must be held criminally liable, according to the Torture Convention. The Convention had effectively removed immunity rationae materiae from protecting individuals who perpetrate torture from criminal prosecution.

Arrest Warrant Case (DRC v Belgium) (2002, ICJ)

Facts: In 2000, a Belgium judge issued an arrest warrant against a current serving Foreign Minister, alleging he had committed war crimes and crimes against humanity prior to his appointment as Foreign Minister.

Held:

- **Majority found that under CIL, there is no exception against the operation of immunity rationae personae for crimes, including crimes such as war crimes and crimes against humanity. Belgium could not issue arrest warrant, due to operation of immunity rationae personae (the arrest warrant was a violation by Belgium to respect the immunities of the DRC).**
    - But immunity rationae personae does not affect individual criminal responsibility: the person in question has committed a crime, he just cannot be arrested for it yet
- The court explained that, notwithstanding immunity rationae personae, there were four scenarios in which someone with such immunity could still face prosecution…
    - **1)** Minister's own state could prosecute him at any time (IL grants such persons no immunity before their own national courts)
    - **2)** Minister's own state could waive immunity (immunity belongs to the state, not the individual)
    - **3)** Minister could be prosecuted in international criminal courts where they have jurisdiction
    - **4)** Minister can be prosecuted after he ceases to hold public office for:
        - Any acts committed before or after the minister's period of office
        - Any acts not considered rationae materiae committed during his or her tenure

Civil jurisdiction:

Jones v Ministry of Interior of the Kingdom of Saudi Arabia (2007, HoL)

Facts: Jones alleged he was tortured in a Saudi Arabian prison. Sued the Saudi Arabian state and four Saudi Arabian individuals (two police officers and two high level ministers in charge of the prison)

Held:

- **There is no exception to immunity when a claimant is using a foreign state for torture (there is immunity in a civil claim for torture)**
- The Torture Convention sets out an obligation on state parties to extradite and prosecute for torture (criminal accountability), but there is no corresponding obligation to allow individuals to sue for torture (civil accountability)
    - Distinguished from *Pinochet* (immunity does not extend to an individual who committed torture in a criminal case) because *Jones* was a civil case against a state
- Held that the four individuals were entitled to this immunity because they were acting in official duties; it was material that there was no suggestion that the conduct occurred outside of the scope of their official duties

Al-Adsani v UK (2001, ECHR)

Facts: AA tried to sue UK, saying that when the UK barred his claim (saying he couldn't sue Kuwait for torture due to immunity), the UK was violating his human rights by denying him access to the courts.
Held:

- **Majority (9:8 split) of ECHR found there is no exception to immunity when a claimant is using a foreign state for torture (there is immunity in a civil claim for torture).**
    - **Therefore, the UK had complied with its obligations under international law to respect Kuwait's sovereign immunity.**
- Held that no basis in international law to conclude that a state does not enjoy immunity from civil jurisdiction for acts arising from alleged torture committed outside the forum state.
- Court distinguished Pinochet (criminal liability of individual) from Al-Adsani (civil liability of the state)

d) Violations of jus cogens norms

In Germany v Italy (2012, ICJ), the ICJ held that under CIL as it presently stands **a state (including a state organ) is not deprived of immunity ratione materiae** by reason of **a serious violation of international human rights law, or even a jus cogens norm, in the course of conducting a sovereign act (such as conducting an armed conflict), at least in civil suits.**
Facts: Italian people tried to sue Germany before Italian courts for injuries they sustained and deaths of family members during WWII. Italian courts heard the cases and started making reparation orders. Germany objected to this - brought a case to the ICJ, claiming Italy failed to recognise Germany's sovereign immunity.
Held:

- The ICJ found in Germany's favour - G was entitled to immunity
- The ICJ tried to discern CIL regarding whether there were any exceptions to sovereign immunity re: grievous violations of IL
    - "Apart from the decisions of Italian courts, which are the subject of the present proceedings, there is almost no state practice which might be considered to support the proposition that a state is deprived of its entitlement to immunity in such a case"
    - The ICJ referred to the HoL Jones case to support the notion that the majority of state practice demonstrates there is no exception
    - The ICJ distinguished the Pinochet case, on the basis that Pinochet was a state official who was involved criminal proceedings, and this was a civil suit against a state
        - Moreover, the Pinochet was related to the specific language of the Torture Convention
- The ICJ concluded that there is no immunity exception re acts of armed forces (or other organs) of a state, committed in forum state, in course of conducting an armed conflict – no state practice in support; state practice and opinio juris are to the contrary

In the Arrest Warrant Case (2002, ICJ), the ICJ held that **immunity rationae personae is not precluded** by reason of **a serious violation of international human rights law, or even a jus cogens norm.**
Facts: In 2000, a Belgium judge issued an arrest warrant against a current serving Foreign Minister, alleging he had committed war crimes and crimes against humanity prior to his appointment as Foreign Minister.
Held:

- Majority found that Belgium could not issue arrest warrant, due to operation of immunity rationae personae (the arrest warrant was a violation by Belgium to respect the immunities of the DRC)
- **Purpose of the immunity rationae personae is to ensure that the state official is not hindered from representing the state because they are tied up in foreign litigation or in prison, therefore immunity applies:**
    - **To all acts, regardless of whether acts in question were crimes under IL**
        - But immunity rationae personae does not affect individual criminal responsibility: the person in question has committed a crime, he just cannot be arrested for it yet

The European Court of Human Rights recently confirmed immunity, in civil actions at least, even for jus cogens violations…
Jones v United Kingdom, European Court of Human Rights (Fourth Section), 2014

Facts: Jones's UK lawsuit against Saudi Arabia was unsuccessful. Jones then sued the UK in the ECHR, arguing that by upholding the Saudi immunity, the UK had breached his human right under the European Convention by unduly refusing to give him access to a court.

Held:

- Majority (6:1 split) of ECHR found that the UK was justified in denying his claimed, because a state enjoys immunity when being sued for torture in a foreign court.

Essay: should immunity be removed for violations of jus cogens?

Intro:

- Define immunity: ordinarily under IL, there is a procedural bar to exercise of criminal jurisdiction for those who hold immunity
- Define jus cogens
- Because no immunity exists before international courts (AB case; Arrest Warrants case), it must be considered within the context of whether national courts would have the ability to prosecute

Arguments in favour of immunity extending to violations of jus cogens:

- In **Jones v UK,** the ECHR's decision was widely criticised by human rights defenders and scholars of international law
    - Christopher Hall (Amnesty International) argues that there needs to be reform to immunity (via a protocol to the 2004 Convention) to ensure that there is an exception for serious violations of international law
- Character of jus cogens norm - violations that the IL has deemed so serious, that no derogation is ever permitted from them
- There has already been some movement in that direction re: specific prohibitions e.g. torture in the Pinochet case
    - Lord Brown Wilkinson in Pinochet - how can it be for IL purposes an official function to do something which international law itself prohibits and criminalises?
- Protection of human rights
    - Need accountability
    - Potentially acts as a deterrent
- Certain immunities endure for a very long time (especially in dictatorships), and some even last after the person has left the position

Arguments against immunity extending to violations of jus cogens:

- Immunity is not a personal right; it exists for the benefit of the state in its exercise of foreign relations
    - Gaps in immunity could impede this exercise of foreign relations
    - Some states may have greater resources/economic power to exert their jurisdiction than others (conflicts with the notion of sovereign equality)
    - Could cause instability in the international system
- Must respect the authority/sovereignty of states - responsibilities exist within most states to address violations of jus cogens norms
    - A state could hold the individual accountable via state prosecution
    - A state could choose to waive the immunity
- No clear/exhaustive list of jus cogens norms; concept is fluid; therefore it would be difficult to bring this exception about if the concept is hazy
- As immunity is no bar in the ICC, the ICC can prosecute - does that mean there is no longer a need for horizontal prosecution by states?
    - No… ultimately very few cases are heard by the ICC
    - Other barriers e.g. need parties to certain treaties to cooperate
        - Needs to be a UNSC Resolution to involve a non-state party
    - Therefore, argument that there is need to widen the scope of state jurisdiction

How could it be achieved:

- Need limitations - perhaps only removing one type of immunity (e.g. RP - so long as the individual is in office, they enjoy immunity, but can be held accountable afterwards)
    - Minimise the problems prosecution would cause if it occurred while an official was trying to carry out their duties
- Because states do have the ability to prosecute their own individuals for such crimes… only where the state is manifestly unwilling/unable to prosecute, perhaps another state should have secondary jurisdiction as a last resort

5) Application of FSIA (Cth) - Australian Legislation

Position in Australia

Restrictive approach applies

PT Garuda Indonesia Ltd v ACCC: **Foreign states can only claim immunities under FSIA** (not at common law)

Foreign states

s9 FSIA: 'Except as provided by or under this Act, a foreign State is immune from the jurisdiction of the courts of Australia in a proceeding.'

s3 FSIA: "Foreign State" means a country the territory of which is outside Australia, being a country that is:

- (a) an independent sovereign state; or
- (b) a separate territory (whether or not it is self- governing) that is not part of an independent sovereign state'.

s3(3) FSIA:A reference in this Act to "Foreign State" includes a reference to:

- (a) a province, state, self-governing territory or other political subdivision (by whatever name known) of a foreign State;
- (b) the head of a foreign State, or of a political subdivision of a foreign State, in his or her public capacity; and
- (c) the executive government or part of the executive government of a foreign State or of a political subdivision of a foreign State, including a department or organ of the executive government of a foreign State or subdivision;

… but does not include a reference to a separate entity of a foreign State.

Exceptions from immunity (commercial transactions)

s11(1) FISA: A foreign State is not immune in a proceeding in so far as the proceeding concerns a commercial transaction'.

s11(3) FISA: Commercial transaction defined (non-exhaustively) as:

'commercial, trading, business, professional or industrial or like transaction into which the foreign State has entered or a like activity in which the State has engaged and, without limiting the generality of the foregoing, includes:

(a) a contract for the supply of goods or services;

(b) an agreement for a loan or some other transaction for or in respect of the provision of finance; and

(c) a guarantee or indemnity in respect of a financial obligation; but does not include a contract of employment or a bill of exchange'.

But s11(2) retains the immunity of states:

s11(2) FISA: 'Subsection (1) does not apply:

(a) if all the parties to the proceeding:

(i) are foreign States or are the Commonwealth and one or more foreign States; or (ii) have otherwise agreed in writing; or

(b) in so far as the proceeding concerns a payment in respect of a grant, a scholarship, a pension or a payment of a like kind'.

Exceptions from immunity (death, personal injury, damage to property)

s13 FISA: A foreign State is not immune in a proceeding in so far as the proceeding concerns:

- (a) the death of, or personal injury to, a person; or
- (b) loss of or damage to tangible property;

… caused by an act or omission done or omitted to be done in Australia'

Separate entities

Separate entities of foreign states acting as an instrumentalities of that state benefit of same immunity, subject to some exceptions:

s22 FSIA: 'The preceding provisions of this Part (other than subparagraph 11(2)(a)(i), paragraph 16(1)(a) and subsection 17(3)) apply in relation to a separate entity of a foreign State as they apply in relation to the foreign State'.

s3 FSIA: '"separate entity ", in relation to a foreign State, means a natural person (other than an Australian citizen), or a body corporate or corporation sole (other than a body corporate or corporation sole that has been established by or under a law of Australia), who or that:

- (a) is an agency or instrumentality of the foreign State; and
- (b) is not a department or organ of the executive government of the foreign State'.

P.T. Garuda Indonesia v ACCC (HC):

- ACCC commenced proceedings against Garuda for anticompetitive practices;
- Garuda claimed foreign state immunity (as company owned and controlled by the Indonesian government)
- Court agreed that Garuda was a separate entity which would normally qualify for immunity under ss 9 and 22 of FSIA
- However, because Garuda was involved in commercial transactions, it did not benefit from immunity (s 11(1) FSIA)

Individuals other than the HOS

Zhang v Zemin (2010)

- A member of the Political Bureau of the Chinese Communist Party(among others) was sued for damages arising from alleged acts of torture committed in China
- s3(3)(c) FSIA definition of a 'foreign state' includes an individual acting as a government official of a foreign state (reflects the position at common law);
- Not to recognise immunity to individual officials (other than the head of state) would lead to FSIA being 'virtually devoid of practical significance' (per Spigelman CJ)

B) DIPLOMATIC IMMUNITY

1) Inviolability of the diplomatic mission

Vienna Convention on Diplomatic Relations 1961 (VCDR):

Art 1 VCDR: The premises of the mission = the buildings or parts of buildings and the land ancillary thereto, irrespective of ownership, used for the purposes of the mission including the residence of the head of the mission (e.g. foreign embassy building and land)

- But the premises of the mission are no longer regarded under IL as an extension of the sending state's territory (**R v Turnbull ex parte Petroff**);
- **Inviolability extends to:**
    - **Premises, furnishings** and **means of transport (embassy cars)** are immune from search, requisition, attachment or exclusion (art. 22)
    - **Mission archives** and documents are inviolable (art. 24)
    - **Diplomatic bag** – official correspondence of mission, and diplomatic courier (e.g. a pilot of an aircraft), are inviolable (art. 27)
        - It is essential for a diplomatic embassy to be able to communicate with its home state without interference from the receiving state
    - The **person**, **private residence**, **papers** and **property of a diplomatic agent** are inviolable (arts. 29, 30)

Duties of the receiving state re: inviolability of the mission

Art 22 VCDR:

- **The premises of the mission shall be inviolable. The receiving state cannot enter the premises without consent of the head of the mission**. [covers violations by the host state]

- **The receiving State is under a special duty to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity**. [covers violations by anybody]

Art 45(a) VCDR: situation of armed conflict

- If diplomatic relations are broken off between two States, or if a mission is permanently or temporarily recalled:
    - (a) The receiving State must, even in case of armed conflict, respect and protect the premises of the mission, together with its property and archives

Case law:

DRC v Uganda (ICJ, 2005): ICJ held that DRC violated Art 22 due to the long-term occupation of the Ugandan Embassy in Kinshasa by DRC soldiers and maltreatment of persons on Embassy premises (whether diplomats or not)

US v Iran (ICJ, 1980): ICJ held that Iran violated Art 22 due to the Iranian students occupying the US Embassy in Tehran and taking US diplomats/citizens hostage

- Inviolability of diplomatic missions and its members applies even in cases of armed conflict or breaking down of diplomatic relations between states
- Iran failed to protect the mission and the personnel; and
- Iran failed to make every effort to bring the infringements of inviolability to a speedy end, restore the status quo and repair the damage.

Minister for Foreign Affairs v Magno (1992): The court held that the crosses placed on the Indonesian embassy by protestors was an "impairment of dignity of the embassy". Therefore, the police were authorised to go onto the embassy property to remove the crosses.

Exceptions to the inviolability of the mission

- Possible exception for violations of human rights and self-defence

2) Who is entitled to diplomatic immunity?

Criminal Jurisdiction

Art 31 VCDR: a "diplomatic agent" [Art 1: head of mission and staff having diplomatic rank] is completely immune from the criminal jurisdiction of the receiving state

Civil Jurisdiction

Art 31(1) VCDR: a "diplomatic agent" is completely immune from the civil jurisdiction of the receiving state, except where:

- Private immovable property (unless held for mission purposes on behalf of the sending state (i.e. real estate)
- A succession action where the diplomatic agent is involved as executor, heir etc in his or her private capacity (i.e. wills and probate)
- Professional or commercial activity outside his or her official functions

Evidence and Execution of a Judgement

Art 31 VCDR: a "diplomatic agent" is not obliged to give evidence.

Art 31 VCDR: a "diplomatic agent" is immune from the execution of any judgment (i.e. a judgement against a diplomatic agent cannot be enforced), with the same exceptions as from immunity from jurisdiction, provided the execution does not infringe inviolability of person or residence (art. 31(3))

Taxes and Duties

A "diplomatic agent" is immune from customs duties, certain taxes (arts. 34, 36)

- E.g. UK argues that the London congestion charge is not a tax (it says it is a levy for service, covered by art. 34(e) Vienna Convention on Diplomatic Relations 1961
- Many foreign embassies disagree, owe £118,543,795 (over $250 million) in unpaid charges

Who is entitled to immunity?

Art 1 VCDR: "diplomatic agent" means

- Head of mission
- All staff of mission having diplomatic rank

Art 37 VCDR: diplomatic immunity extends to:

- **Family of diplomatic agent** forming part of his/her **household**
- **Administrative and technical staff** and **their families**, but **only** (**re: civil or administrative jurisdiction**) for **acts in the course of their duties** (they have complete criminal immunity)
- **Service staff** (e.g. cleaners, cooks, groundskeepers, drivers) but only for **acts in the course of their duties** (if it occurred in criminal or civil jurisdiction) **and from certain taxes**
- **Private servants** of members of the mission (e.g. personal assistant, nannies - in houses, rather than in the embassy itself), **from certain taxes only**
- **Provided all of the above are not nationals or permanent residents of the receiving state**

Art 38 VCDR: immunities of those who are nationals or permanent residents of receiving state:

- **In the case of a diplomatic agent – in respect of official acts performed in the exercise of his or her functions**
- **In the case of other staff members of mission and private servants – only to the extent granted by receiving state**

"Sham Appointments"

Can the courts of the receiving states ever question the genuineness of the diplomatic appointment?

Recent UK cases confirm that genuineness of diplomatic appointment cannot usually be questioned:

- **Estrada v Al-Juffali [2016]:** *AJ got himself appointed as a "diplomat" (maritime representative to another country) and pleaded immunity from being required to pay maintenance to his ex-wife - arguing he could not be sued in the UK court.*
    - **The Court of Appeal held that it is not for the courts to question the genuineness of a diplomatic appointment.**

This case confirms that in the UK, the courts will not generally go behinda certificate from the executive stating that the relevant person is a diplomat (UK Court will not therefore investigate whether person is actually performing diplomatic functions)

Waiver of Immunity

Art 32 VCDR: immunity can be waived by sending state

- **A waiver generally must be clear and express**
- **A waiver can be implied in one instance: where the actual person has initiated proceedings themselves (but separate waiver is needed re execution - art. 32)**

Duration of immunity of diplomatic agent (attached to the personal status of a diplomat)

Art 39 VCDR: Immunity begins:

- At moment person enters the receiving state, or
- If already in receiving state, at moment his or her appointment is notified to relevant ministry of receiving state (art. 39(1))

Art 39 VCDR: Immunity continues until:

- Moment he/she leaves the receiving state, or
- Expiry of a reasonable period in which to leave (art. 39(2))
    - A "reasonable period" will depend on the circumstances of the case

When does a diplomat's functions come to an end?

- On notification by sending state that the person's functions have come to an end (art. 43(a)), or
- On notification by receiving state under art. 9(2) (art. 43(b))
    - By declaring the person a "persona non grata" and sending state has not, within a reasonable time, either recalled the person or terminated their functions with the mission
    - Under the VCDR, the obligation of the sending state is to immediately recall the person… if they don't, the person will lose their immunity after a reasonable period has expired (art 39(2))
    - A receiving state does not need any explanation for declaring a person a "persona non grata"

Duration of immunity for official acts (completed while a diplomat)

Art 39(2) VCDR: Immunity continues forever "with respect to acts performed ... in the exercise of his functions as a member of the mission"

3) Duties of the sending state and consequences for violating the rights of the receiving state

Duties of the sending state

Art 41 VCDR:

- **Respect local laws**
- **Not interfere with internal affairs** of **receiving state**
- **Not use mission premises** in any **manner incompatible with the functions of the mission** or with **IL generally**
    - **Art 3 VCDR: functions of the mission include**:
        - Representing sending state
        - Reporting on conditions and developments in receiving state
        - Protecting interests of sending state and its nationals in receiving state
        - Promoting friendly relations between the two states

Rights of the receiving state

- **If a sending state (or diplomat from a sending state) does not fulfil its duties, the ultimate right of a receiving state is to break off diplomatic relations** (e.g. shutting down the embassy)
    - But this is very rare, does not always occur even in armed conflict
    - E.g. Taiwan and Solomon Islands September 2019
        - The SI decided it would formally recognise the People's Republic of China and cease to recognise the Republic of Taiwan
- **More common is that the receiving state may, at any time and without giving any reason, declare any diplomatic agent persona non grata (art. 9)**
    - **Sending state must then either recall the person or terminate their functions with the mission within a reasonable period**
    - **If the sending state does not do this within a reasonable period, receiving state may refuse to recognise the person as a member of the mission (the person's functions come to an end on notification of this refusal (art. 43(b))**

Duties of third states

Art 40 VCDR:

"1. If a diplomatic agent passes through or is in the territory of a third State, which has granted him a passport visa if such visa was necessary, while proceeding to take up or to return to his post, or when returning to his own country, the third State shall accord him inviolability and such other immunities as may be required to ensure his transit or return. The same shall apply in the case of any members of his family enjoying privileges or immunities who are accompanying the diplomatic agent, or travelling separately to join him or to return to their country."

Rest of article deals with other staff, official correspondence etc.

4) Theoretical basis of diplomatic immunity

1) The embassy is supposed to represent part of sending state's territory?

- Not the case → the premises of the mission are no longer regarded under IL as an extension of the sending state's territory (**R v Turnbull ex parte Petroff**)
- The physical premises is part of the receiving state; it is merely inviolable

2) Diplomatic immunity is a functional necessity to allow diplomats to fulfil their roles.
- Most persuasive

C) IMMUNITY OF INTERNATIONAL ORGANISATIONS

Convention on the Privileges and Immunities of the United Nations 1946
- Covers the UN and its specialised agencies
- 162 parties
- Implemented in Australia by the International Organisations (Privileges and Immunities) Act 1963 (Cth)

The UN is completely immune (Art II of 1946 Convention): The UN, its property and assets wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity

Therefore, UN peacekeepers are completely immune from acts and omissions
Mothers of Srebrenica v The Netherlands (ECHR, 2013)
- Dutch Supreme Court had upheld immunity of UN in 2012
- ECHR rejected claim that this was a denial of an effective remedy under ECHR art 13

D) IMMUNITY OF CONSULAR RELATIONS

Vienna Convention on Consular Relations 1963 (VCCR)
There are similar, but less extensive, immunities for consular officials to diplomats

Art 5 VCCR: consular functions consist in:
(a) protecting in the receiving State the interests of the sending State and of its nationals, both individuals and bodies corporate, within the limits permitted by international law;
(b) furthering the development of commercial, economic, cultural and scientific relations between the sending State and the receiving State and otherwise promoting friendly relations between them in accordance with the provisions of the present Convention;
(c) ascertaining by all lawful means conditions and developments in the commercial, economic, cultural and scientific life of the receiving State, reporting thereon to the Government of the sending State and giving information to persons interested;
(d) issuing passports and travel documents to nationals of the sending State, and visas or appropriate documents to persons wishing to travel to the sending State;
(e) helping and assisting nationals, both individuals and bodies corporate, of the sending State

La Grand Cases
Facts: Series of cases in the ICJ where nationals of different states were accused of terrible crimes carrying the death penalty in the US. They were not granted consular assistance from the US, an apparent violation of Art 5 of the VCCR.
Held:
- The ICJ held that this was a breach of Art 5. The ICJ therefore ordered that all of these cases be reviewed to see whether the individual concerned had suffered any prejudice as a result of not being given consular assistance.
- The US Supreme Court recognised this order from the ICJ, but argued that it had no influence over domestic law in the US states. The US states therefore ignored this order, and proceeded with executing the accused people.

9. The Law of State Responsibility

A) State Responsibility (for whose acts is a state responsible in IL?)

1) Is the wrongful act or omission a breach of international obligations?

ILC Draft Articles on State Responsibility for Internationally Wrongful Acts (2001) (ILC ASR)

- Not yet a Convention, but are widely cited and considered authoritative by the ICJ
- Generally considered CIL

Art 2 ILC ASR:

- **There is an internationally wrongful act of a State when conduct consisting of an action or omission:**
  - (a) is **attributable to the State** under international law; and
  - (b) **constitutes a breach** of an **international obligation of the State**
    - CIL (to which the state hasn't persistently objected)
    - Treaty obligation

Art 3 ILC ASR:

- **Lawfulness or otherwise under domestic law is irrelevant**

Art 12 ILC ASR:

- **There is a breach of an international obligation when an act is not in conformity with what is required by that obligation**
  - Obligation must be in force at the time of breach (**art. 13**)
  - Breach occurs when act is performed, but may continue if obligation is a continuing one (**art. 14**)

2) Is the wrongful act attributable to the state?

a) What constitutes 'the State' for the purposes of state responsibility:

Art 4 ILC ASR:

- The conduct of **any state organ** [**whether legislative, executive, judicial or other**] shall be considered an act of that state under international law"
  - Includes **armed forces**, a **court**, a **government department**, **police**
  - Includes any person or entity having **official status under internal law** (no matter how junior)
  - Includes **units in a federal state** (e.g. **states**)
    - **'Australia-Salmon' dispute**, where Tasmanian had placed bans on importing Salmon and Canada argued that these bans breached IL because they had an adverse effect on its trade.
    - **The WTO held that this was a breach, and Australia was responsible for rectifying the breach (by having Tasmania amend its laws) because Tasmania's breach was attributable to Australia**

Art 5 ICL ASR:

- **Any person or entity empowered by internal law to "exercise elements of governmental authority" and who is acting in that capacity**
  - I.e. any entity exercising **public or regulatory functions**: privatised prisons, airlines with delegated immigration and quarantine functions

Simple questions of attribution:

Corfu Channel (1949): here Albania responsible for failing to warn other states of presence of landmines in the Corfu Channel because it had knowledge of the existence of landmines in the location (not because it actually placed the landmines in the channel)

Belgium v Senegal (2012, ICJ): Belgium issued an extradition request against Chad's former dictator Hissane Habre who was hiding in Senegal. The ICJ held that Senegal did have to extradite or prosecute under IL, as Senegal a state would be held responsible for a failure to extradite or prosecute.

b) When will the wrongful conduct of individuals be attributed to the state:

State organ or entity empowered to exercise elements of the governmental authority:

Unauthorised "official" conduct vs unauthorised "private" conduct

Art 7 ILC ASR:

- **The conduct of an organ or state official will be attributed to the state where the organ or individual acts in an apparently official capacity (but not in a private capacity)**
    - Even if the organ or individual exceeds their authority or disobeys instructions ("ultra vires acts")
    - Even if the organ or individual has improper motives or is abusing public power

Southern Pacific Properties v Arab Republic of Egypt: the unlawful nature of ultra vires acts by public authorities under domestic law does not exculpate the state under international law

TEST: Are the officials acting with apparent authority using official means at their disposable? If so, even if the conduct is contrary to their powers under domestic law, the conduct is still attributable to the state.

Caire Case (1929):

Facts: Caire (French national) killed by two Mexican army officers after failing to extort money from him.

Held:

- **Although the Mexican army officers conduct was unauthorised, they "acted under cover of their status as officers and used official means placed at their disposal on account of that status". Therefore the conduct was attributable to the state and engaged Mexico's responsibility:**
    - Use of official means:
        - Presented themselves as soldiers
        - Used army weapons
        - Took Caire to the army barracks

Mallén Case (1927):

Facts: Mexican consul (Mallén) assaulted in El Paso twice (two months apart) in 1907 by same person, a US policeman of Mexican origin (Franco).

Held:

- **First was an assault in the street found to be purely private: "a malevolent and unlawful act of a private individual who happened to be an official; not the act of an official"**
- **Second was official: assaulted Mallén on a streetcar – showed his police badge to the conductor, used his police pistol, took Mallén to the county jail. Because he used official means at his disposal to conduct the assault, the act was attributable to the state.**

Private persons, groups and entities:

Degree of direction or control:

Arts 8-10 ILC ASR:

- Deal with conduct of private persons, groups or entities
- **ICL commentary on Art 8**:
    - **As a general principle, the conduct of private persons or entities is not attributable to the State under international law**
    - **But the conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct**

KEY TEST: The conduct of private people or groups will be attributable to the state if the people or group are acting on the instructions of, or under the direction or control of, the state in carrying out the conduct.

Case law indicates that the state must have "effective control" over the conduct of the people or groups. Effective control has a very high bar:

Nicaragua Case (ICJ 1986):

- **The ICJ held that the US did not have effective control over the contras, sufficient to attribute their conduct to the US, despite…**
    - The US **financing**, **organising**, **training**, **supplying** and **equipping** of the contras, selection of its targets, and the planning of the whole of its operation
- **The ICJ emphasised that while the contras had a high degree of dependence on the US, they also had key areas of independence, including selecting their own targets, without direction from the US**

Genocide Case (Bosnia and Herzegovina v Serbia and Montenegro) ICJ 2007:
Facts*: Massacres committed by the VRS in the Srebrenica area [VRS was the army of the Republika Srpska, a militia breakaway Serbian entity in B&H]*
Held:

- **The ICJ held that the massacres, committed by the VRS, militia breakaway of the Serbian army, were not attributable to Serbia and Montenegro (FRY)**
    - **The ICJ held that the VRS was not an organ of Serbia:**
        - **A militia breakaway is not an organ**
        - **Nor was it equated with an organ of the state because of its financial dependence on the state – no "complete dependence" - key areas of autonomy in selecting its own targets**
            - **Mercenaries may be equated to state organs if they have complete dependence on the state**
    - **The ICJ held that Serbia had no effective control over the VRS**
        - **No effective control over the specific operation - the massacre**
            - **Control must be "in respect of each operation in which the alleged violations occurred, not generally in respect of the overall actions taken by the persons or groups of persons having committed the violations"**

Nuhanovic v The State of the Netherlands:
Facts: *Claim for damages for acts of Dutch peacekeepers at Srebrenica in forcing family to leave Dutchbat compound – killed by Serbs.*

- **The court held that the conduct of the Dutch Battallion was attributable to The Netherlands on the basis of effective control:**
    - **The Dutch Government continually gave instructions to its troops**
        - **"Effective control" includes power to prevent**
        - **Dutch Government had the power to prevent the alleged wrongdoing e.g. by ordering Dutchbat not to force individuals to leave compound**

Absence of default of official authorities (e.g. during revolution or conflict):
Art 9 ILC ASR:

- In absence or default of the official authorities, conduct of person or group will be attributable to the State if:
    - In fact exercising elements of the governmental authority, and
    - Circumstances are such as to call for the exercise of those elements of authority

E.g. during revolution, armed conflict or foreign occupation, when usual authorities not operative

- E.g. Revolutionary Guards in Iran following 1979 revolution performed migration, customs and similar functions at Tehran airport

Insurrectional movements:
General principle: the conduct of an insurrectional or other movement not attributable to the state

- But if the state is guilty of breach of good faith or negligence in suppressing insurrection, it will be responsible for that breach or negligence → i.e. responsible for its own conduct/failure to act

Art 10 ICL ASR:

- If the insurrectional movement becomes the new government, all its conduct will be considered acts of that state under international law

Art 11 ICL ASR:

- Conduct which is not attributable to a state shall nevertheless be considered an act of that state under international law if and to the extent that **the state acknowledges and adopts the conduct in question as its own**

USA v Iran (ICJ, 1980):
***Facts**: Iranian students invaded the US embassy in Tehran and took hostages.*
Held:

- **The ICJ held the initial act of the students invading the US embassy and taking hostages could not be attributed to Iran.**
- **But the ICJ held that the continuation of the hostage situation could be attributed to Iran:**
    - **Iran failed to stop the situation**
    - **Many state officials had actually endorsed the situation**
        - **The conduct could be considered to have been "adopted" by a state as its own, under Art 11 ILC ASR**

c) State responsibility "in connection with" acts of another state:

Art 16 ICL ASR:

- A state (A) which **aids or assists another state** (B) in the commission of an internationally wrongful act is itself internationally responsible for doing so if two conditions satisfied:
    - 1) It (A) does so knowing the circumstances of the internationally wrongful act, and
    - 2) B's act would be internationally wrongful if it had been committed by A
        - I.e. the obligation must be one owed by both A and B so not an obligation owed only by B to another state under a bilateral treaty
- Both states (A and B) may be internationally responsible (**art. 19**)
- But A will be responsible only for its own conduct: i.e. its assistance; it will not be responsible for B's act

Art 17 ICL ASR:

- A state (A) which **directs and controls another state** (B) in the commission of an internationally wrongful act is itself internationally responsible for that act if two conditions satisfied:
    - 1) It (A) does so knowing the circumstances of the internationally wrongful act, and
    - 2) B's act would be internationally wrongful if it had been committed by A
        - I.e. the obligation must be one owed by both A and B so not an obligation owed only by B to another state under a bilateral treaty)
- Both states (A and B) will be internationally responsible for the act (**art. 19**)

Art 18 ICL ASR:

- A state (A) which **coerces another state** (B) to commit an act is itself internationally responsible for that act if two conditions satisfied:
    - 1) It (A) does so knowing the circumstances of the act, and
    - 2) B's act would be internationally wrongful if not for the coercion
        - Note relationship between coercion and force majeure – see later, art. 23 – i.e.
            - B's act might appear to be internationally wrongful (eg a breach of a treaty)
            - But wrongfulness might be precluded under art. 23
            - So act is not internationally wrongful so far as B is concerned
        - But **art. 18** makes it clear that even if this happens and B is therefore not internationally responsible, A is

3) Are there any defences (circumstances precluding wrongfulness) that apply?

An otherwise wrongful act or omission will not be considered wrongful in certain circumstances.

ILC Commentary: They do not annul or terminate the obligation; rather they provide a justification or excuse for non-performance while the circumstance in question subsists.

a) Consent:

Art 20 ICL ASR:

Valid consent by a State to the commission of a given act by another State precludes the wrongfulness of that act in relation to the former State to the extent that the act remains within the limits of that consent.

b) Lawful Self-Defence:

Art 21 ICL ASR:

The wrongfulness of an act of a State is precluded if the act constitutes a lawful measure of self-defence taken in conformity with the Charter of the United Nations.

c) Countermeasures:

Art 22 ICL ASR:

- When a state has breached IL, other states may take countermeasures against the violating state
- The countermeasure must be proportional to the injury suffered
- There are procedural limitations:
    - Art 52: before taking countermeasures, the state must notify the breaching state to give the breaching state a chance to rectify its behaviour
    - Art 49: as a first resort, the state should resort to reversible countermeasure
    - Art 53: countermeasures can only last so long as the violation persists
- There are certain types of countermeasures that are never acceptable (e.g. breaching a peremptory norm; unlawful use of force)

d) Force Majure:

Art 23 ICL ASR:

The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the act is due to force majeure:

- The occurrence of an irresistible force or of an unforeseen event, beyond the control of the State, making it materially impossible in the circumstances to perform the obligation.
    - It must amount to an "absolute and material impossibility"
    - A circumstance rendering performance more difficult or burdensome does not constitute a case of force majeure - **Rainbow Warrior 1990**.

e) Distress (save human life):

Art 24 ICL ASR:

(1) The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the author of the act in question has no other reasonable way, in a situation of distress, of saving the author's life or the lives of other persons entrusted to the author's care.

(2) Paragraph 1 does not apply if:

- (a) The situation of distress is due, either alone or in combination with other factors, to the conduct of the State invoking it; or
- (b) The act in question is likely to create a comparable or greater peri

f) Necessity:

Art 25 ICL ASR:

(1) Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:

(a) is the only way for the State to safeguard an essential interest against a grave and imminent peril; and

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

(2) In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:

(a) the international obligation in question excludes the possibility of invoking necessity; or
(b) the State has contributed to the situation of necessity.

ICL ASR Commentary: Necessity seems to only be arguable in very strict situations, such as where the very existence of the State and its people is threatened

Gabcikovo-Nagymaros: Necessity can only be found where the action taken is the 'only way' available to safeguard that interest

g) Circumstances precluding wrongfulness do not apply re jus cogens norms:

Art 26 ICL ASR:
Nothing in this chapter precludes the wrongfulness of any act of a State which is not in conformity with an obligation arising under a peremptory norm of general international law.

h) Effect of circumstances precluding wrongfulness:

Art. 27: reliance on circumstance precluding wrongfulness does not affect underlying obligation, and may be duty to compensate.

- Once the circumstance ceases to exist, the obligation still exists and must be complied with
- If a state suffers material loss, there may be a duty to compensate

Same facts may amount to force majeure under art.23 and supervening impossibility of performance under art. 61 VCLT, but different consequences:

- Force majeure excuses non-performance for the time being, but a treaty is not automatically terminated by supervening impossibility: at least one of the parties must decide to terminate it.

4) Consequences of state responsibility

a) Legal consequences generally:

Art 28 ICL ASR: state responsibility entails legal consequences

Art 29 ICL ASR: the legal consequences do not affect continuing duty to perform the obligation breached.

- The breaching state must continue with the IL obligations

Art 30 ICL ASR: responsible state must cease any continuing wrongful act and offer appropriate assurances and guarantees of non-repetition (i.e. a legal declaration) if circumstances so require.

- **But legal declarations will only be ordered in exceptional circumstances, as the court will assume in good faith that the state will rectify its conduct - ICJ *Costa Rica v Nicaragua* Judgment**

b) Reparation:

Art 31 ICL ASR:
(1) The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.
(2) Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State.

Factory at Chorzow also established that the **purpose of reparation** is "as far as possible, wipe out all the consequences of the illegal act and re-establish a situation which would, in all probability, have existed if the act had not been committed."

- Repair the damage from a breach
- Proportional to the breach
- Not punitive

Art 34 ICL ASR:

- **Reparation can be restitution, compensation and satisfaction (or a mix)**

c) Restitution:

Art 35 ICL ASR:

- **Restitution → action to reverse the situation**
  - E.g. **Arrest Warrant Case**: where Belgium issued arrest warrants against the Foreign Affairs Minister of the DRC in relation to alleged war crimes/crimes against humanity. The DRC claimed that this act was an affront to its sovereignty, since the Foreign Affairs Minister enjoys immunity against foreign courts).
    - **The ICJ found that Belgium had violated a CIL rule - the obligation to respect the immunity of a Minister.**
    - **The ICJ ordered Belgium to withdraw the arrest warrants (an example of restitution**)
  - Not available in certain situations (e.g. where a person has been killed)

d) Compensation:

Art 36 ICL ASR:

- **Compensation → for financially calculable losses suffered by a state or its nationals**
  - **For material damage and non-material damage (e.g. a moral affront)**
  - **Eritrea v Ethiopia Award**: **the function of compensation is remedial; not punitive**
  - **Eritrea v Ethiopia Award**: **poverty is relevant to compensation**
    - **The Commission stated a breaching state must be able to afford to pay the compensation without it crippling its domestic economy**
      - Here, the Commission noted that the compensation claims that each state made against each other was enormous, and would place crippling burdens on each other (would require a large diversion of national resources away from the citizens of each state)
    - **The Commission stated that compensation must be proportionate to the economic situation of the state that has experienced damage**
      - E.g. land value + income lost was of lower value in a developing country than it would have been in a wealthy country

e) Satisfaction:

Art 36 ICL ASR:

- **Satisfaction → symbolic measures taken to ameliorate the loss suffered**
  - Typically where the state acknowledges what it has done
    - Public acknowledgement of a breach
    - Public apology to a state affected
  - Must be proportionate and are not intended to be humiliating

e) Particular consequences for serious breaches of jus cogens norms:

Art 41 ICL ASR:

- No state shall recognize as lawful a situation created by a serious breach within the meaning of article 40 (breach of peremptory norm), nor render aid or assistance in maintaining that situation
- States must cooperate to end the breach lawfully

5) Collective injury and responsibility

States can be collectively injured or responsible:

Art 42 ICL ASR:

A State is entitled as an injured State to invoke the responsibility of another State if the obligation breached is owed to:

(a) that State individually; or

(b) a group of States including that State, or the international community as a whole, and the breach of the obligation:

(i) specially affects that State; or

(ii) is of such a character as radically to change the position of all the other States to which the obligation is owed with respect to the further performance of the obligation.

Art 46 ICL ASR:
Each of several injured states may separately invoke responsibility

Art 47 ICL ASR:
(1) Where several States are responsible for the same internationally wrongful act, the responsibility of each State may be invoked in relation to that act.
(2) Paragraph 1:
(a) does not permit any injured State to recover, by way of compensation, more than the damage it has suffered;
(b) is without prejudice to any right of recourse against the other responsible States.

Art 48 ICL ASR:
Non-injured state can invoke responsibility in certain circumstances:
(1) Any State other than an injured State is entitled to invoke the responsibility of another State in accordance with paragraph 2 if:
(a) the obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or
(b) the obligation breached is owed to the international community as a whole.
(2) Any State entitled to invoke responsibility under paragraph 1 may claim from the responsible State:
(a) cessation of the internationally wrongful act, and assurances and guarantees of non-repetition in accordance with article 30; and
(b) performance of the obligation of reparation in accordance with the preceding articles, in the interest of the injured State or of the beneficiaries of the obligation breached.
(3) The requirements for the invocation of responsibility by an injured State under articles 43, 44 and 45 apply to an invocation of responsibility by a State entitled to do so under paragraph 1.

6) Procedural conditions to invoking another state's responsibility

Art 44 ICL ASR:
The responsibility of a State may not be invoked if:
(a) the claim is not brought in accordance with any applicable rule relating to the nationality of claims;
(b) the claim is one to which the rule of exhaustion of local remedies applies and any available and effec- tive local remedy has not been exhausted.

Art 45 ICL ASR:
The responsibility of a State may not be invoked if:
(a) the injured State has validly waived the claim;
(b) the injured State is to be considered as having, by reason of its conduct, validly acquiesced in the lapse of the claim.

B) Diplomatic Protection

a) Diplomatic protection generally

Diplomatic protection: the right of a State to complain about the treatment of its national by another State

ILC Draft Articles on Diplomatic Protection (2006) (ILC ADP):

- Not yet a Convention, but are widely cited and considered authoritative by the ICJ
- Generally considered CIL

Art 1 ILC ADP:

- ILC Commentary to Art 1:
    - **A state is responsible for injury to an alien caused by its wrongful act or omission**
    - **Diplomatic protection is the procedure employed by the state of nationality of the injured person to secure protection of that person and to obtain reparation for the internationally wrongful act inflicted**

a) Diplomatic protection is a right of the state

Mavrommatis Palestine Concessions case (1924, PCIJ)):

- By exercising diplomatic protection, a state is in reality asserting its own rights – its right to ensure, in the person of its subjects, respect for the rules of international law
- Once a State has taken up a case on behalf of one of its subjects before an international tribunal, in the eyes of the latter the State is sole claimant.

b) Debate whether a state has duty to exercise diplomatic protection of its nationals:

Previous view: no duty

ILC Commentary to Art 2 ILC ADP: A state has the right to exercise diplomatic protection on behalf of a national. It is under no duty or obligation to do so

Barcelona Traction case (1970, ICJ): The state must be viewed as the sole judge to decide whether its protection will be granted, to what extent it is granted, and when it will cease

Current view: possible obligation

Hicks v Ruddock 2007: Argued that diplomatic protection is not an enforceable duty, but has legal consequences for decisions by government

ILC Commentary to Art 2 ILC ADP: Today there is support in domestic legislation and judicial decisions for the view that there is some obligation, however limited, either under national law or international law, on the State to protect its nationals abroad when they have been subjected to serious violation of their human rights

Art 19 ILC ADP: A State entitled to exercise diplomatic protection according to the present draft articles, should give due consideration to the possibility of exercising diplomatic protection, especially when a significant injury has occurred

b) Conditions for the exercise of the right of diplomatic protection:

Art 44 ILC ASR:

The responsibility of a State may not be invoked if:

(a) the claim is not brought in accordance with any applicable rule relating to the nationality of claims;

(b) the claim is one to which the rule of exhaustion of local remedies applies and any available and effective local remedy has not been exhausted.

ICL ADP: **"The present draft articles give content to this provision by elaborating on the rules relating to the nationality of claims and the exhaustion of local remedies."**

i) Nationality of claims

a) Nationality generally

Art 3 ILC ADP:

To exercise diplomatic protection, the injured individual must be a national of the complaining state

- **Exceptions - Art 8**

Art 4 ILC ADP:

For the purposes of the diplomatic protection of a natural person, a State of nationality means a State whose nationality that person has acquired, in accordance with the law of that State, by birth, descent, naturalization, succession of States or in any other manner, not inconsistent with international law.

Art 8 ILC ADP:

1. A State **may exercise diplomatic protection** in respect of a **stateless person** who, at the date of injury and at the date of the official presentation of the claim, is lawfully and habitually resident in that State.
2. A State **may exercise diplomatic protection** in respect of a **person who is recognized as a refugee** by that State, in accordance with internationally accepted standards, when that person, at the date of injury and at the date of the official presentation of the claim, is lawfully and habitually resident in that State.

3. Paragraph 2 does not apply in respect of an injury caused by an internationally wrongful act of the State of nationality of the refugee.

Is there a requirement of genuine connection between state and its national?

- In the past, **Nottebohm (Liechtenstein v Guatemala) (ICJ 1955)** held that in order to exercise diplomatic protection, **there must be a genuine connection between the state and the national:**
    - Genuine connection characterised by based on factors such as habitual residence, centre of interests, family ties, participation in public life, attachment to the country
    - Genuine connection shows that an individual is 'more closely connected with the population of the State conferring nationality than with that of any other State.'
    - The ICJ held that the legal bond of nationality that Nottebohm had with Lichtenstein was not entitled to respect by Guatemala because there was no 'genuine connection' between Lichtenstein and Nottebohm
        - **Facts**: German national; lived in Guatemala for 34 years
- However, **Nottebohm is limited by its facts** to cases **where the national has a tenuous relationship** with the state offering protection against a state with which the individual has an extremely close link
- In **Diallo (Preliminary Objections) 2007**, **the ICJ did not require 'genuine connection'** (Mr Diallo lived for close to 30 years in the DRC, without acquiring latter's nationality).
- The **ILC ADP do not include the 'genuine connection test'**

b) Dual or multiple nationality

Art 6 ILC ADP:

Any state of which a dual or multiple national is a national may exercise diplomatic protection against a state of which that person is not a national

- E.g. person X has dual Australian/US nationality, 'injured' by France; claim can be brought by Australia or US against France

Two or more states of nationality may jointly exercise diplomatic protection in respect of a dual or multiple national

- E.g. in above example, Australia and US can both claim v France

Art 7 ILC ADP:

A State of nationality may not exercise diplomatic protection in respect of a person against a State of which that person is also a national unless the nationality of the former State is predominant, both at the date of injury and at the date of the official presentation of the claim.

- **Factors to establish predominant nationality**: habitual residence, date of naturalisation, financial interests, education, family ties, participation in social and public life (**Comm to art 7, para 5**)
- **Also see factors in Nottebohm case:**
    - **"Genuine connection"** based on factors such as habitual residence, centre of interests, family ties, participation in public life, attachment to the country.
- **Prior to ICL ASR - conflicting case law:**
    - Reparation for Injuries (not possible)
    - Mergé Claim (1955) – the Italian-US Conciliation Commission – if the claimant state is the state of predominant nationality
    - Iran–United States Case No.A/18, 1984 – if the dominant and effective nationality is that of the claimant state

c) Corporations

Art 8 ILC ADP:

For the purposes of the **diplomatic protection of a corporation**, **the State of nationality means the State under whose law the corporation was incorporated**.

Art 9 ILC ADP:

However, if the **corporation is controlled by nationals of another State** or States and **has no substantial business activities in the State of incorporation**, and the seat of management and the financial control of the corporation are both located in another State, **that State shall be regarded as the State of nationality**.

Barcelona Traction (ICJ 1970):
Facts: *Company established under Canadian law. Operated in Spain. Was "injured" by Spanish authorities. 88% of shares owned by Belgian nationals. Belgium brought claim on their behalf. Spain objected that injury was to the company not the shareholders and that Belgium lacked locus standi to bring claim.*
Held:

- **The ICJ held that Belgium lacked locus standi to bring claim:**
  - **The state of nationality of shareholders may only bring a claim if their own rights have been infringed (e.g. right to a dividend, to attend general meetings), or a claim for damage to the company if the company had ceased to exist or company's national state was legally unable to bring claim;**
- **Otherwise, only the national state of the corporation could claim as it was the company itself whose rights were infringed**
- **The national state of a corporation is the state of incorporation or place of registered office**

d) Shareholders

Art 11 ILC ADP: Injury to the corporation
A State of nationality of shareholders in a corporation shall not be entitled to exercise diplomatic protection in respect of such shareholders in the case of an injury to the corporation unless:
(a) the corporation has ceased to exist according to the law of the State of incorporation for a reason unrelated to the injury; or
(b) the corporation had, at the date of injury, the nationality of the State alleged to be responsible for causing the injury, and incorporation in that State was required by it as a precondition for doing business there.

- Exceptional situation: ***Diallo (Preliminary Objections) 2007***
  - **"Protection by substitution**": Guinea sought to exercise diplomatic protection on Mr. Diallo's behalf, arguing that the state of nationality of shareholders may exercise protection by substitution if the state that causes injury is the state of nationality of the company
  - As the Company possessed Congolese nationality, the Court upheld the DRC's objection to admissibility and held that Guinea was without standing to offer Mr. Diallo diplomatic protection regarding the alleged unlawful acts of the DRC against the rights of the Companies by "substitution".
  - **Also, the exception in art 11(b) was not met – no indication that DRC required the incorporation of Diallo's company in order for him to be allowed to do business in DRC**
- A limited version of protection by substitution is recognised in art 11(b), but Diallo expresses no view in relation to the CIL status of this article:
  - Some states require incorporation (thus acquisition of nationality) for foreign businesses to be able to operate therein
  - Shareholders/ partners remain foreign

Art 12 ILC ADP: Injury to shareholders
To the extent that an internationally wrongful act of a State causes direct injury to the rights of shareholders as such, as distinct from those of the corporation itself, the State of nationality of any such shareholders is entitled to exercise diplomatic protection in respect of its nationals.

Case concerning Diallo (Guinea v DRC) (ICJ, 2007):
Facts: *Guinea national; lived in the DRC for almost 30 years; established two businesses there; 1995/96 – arrested and deported to Guinea. Guinea exercised right to diplomatic protection on three grounds: Mr Diallo as an individual (arrest, detention, deportation); as an associé in his two companies; and in the name of his two companies.*
Held:

- **Guinea was entitled to exercise diplomatic protection in relation to Mr Diallo individually and as an associé. No 'genuine connection' with Guinea required by the ICJ.**
- **Diplomatic protection in relation to injuries to a company when injury caused by state of nationality:**
    - **No general right of protection by substitution when injury caused by state of incorporation**
    - **The exception in art 11(b) was not met – no indication that DRC required the incorporation of Diallo's co's in order for him to be allowed to do business in DRC**

ii) Exhaustion of local remedies

Art 14 ILC ADP:

1. A State may not present an international claim in respect of an injury to a national or other person referred to in draft article 8 before the injured person has, subject to draft article 15, exhausted all local remedies.

2. "Local remedies" means legal remedies which are open to an injured person before the judicial or administrative courts or bodies, whether ordinary or special, of the State alleged to be responsible for causing the injury.

3. Local remedies shall be exhausted where an international claim, or request for a declaratory judgement related to the claim, is brought preponderantly on the basis of an injury to a national or other person referred to in draft article 8.

Art 15 ILC ADP:

Local remedies do not need to be exhausted where:

(a) there are no reasonably available local remedies to provide effective redress, or the local remedies provide no reasonable possibility of such redress;

(b) there is undue delay in the remedial process which is attributable to the State alleged to be responsible;

(c) there was no relevant connection between the injured person and the State alleged to be responsible at the date of injury;

(d) the injured person is manifestly precluded from pursuing local remedies; or

(e) the State alleged to be responsible has waived the requirement that local remedies be exhausted.

Case concerning Diallo (Guinea v DRC) (ICJ, 2007):

- **Only remedies which may result in a binding decision must be exhausted**

Elettronica Sicula (US v Italy), ICJ 1989)

- **Sufficient to raise 'the essence of the claim' in the municipal proceedings**

c) Mistreatment of aliens

If a state mistreats an alien – a foreign national – then the alien's state may bring a claim against the mistreating state

What amounts to mistreatment / is there is a duty at IL to treat aliens better than the state's own nationals?

- **"International minimum standard" view**: favoured by developed states
- **"National treatment" view**: favoured by developing/Latin American/Russian states

Chattin Claim (US v Mexico) (1926):

- **Distinction made between indirect state liability (e.g. acts of the judiciary, as in *Neer*) and direct state liability (e.g. mistreatment in jail, as in *Roberts*):**
    - **Indirect cases** = the standard is lower; the breach of the standard is more difficult to prove
    - **Direct cases** = the standard is higher; the breach of the standard is easier to prove → against "international standards of civilization"

Neer Claim (US v Mexico) (1926)

Facts: *Alleged lack of diligence by Mexico in failing to arrest and prosecute murderers of US national.*

Held:

- **The claim failed because Mexico had at least investigated the murder**
    - The propriety of governmental acts should be put to the test of international standards, and ... **the treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency**. Whether the insufficiency proceeds from deficient execution of an intelligent law or from the fact that the laws of the country do not empower the authorities to measure up to international standards is immaterial."

Roberts Claim (US v Mexico) (1926):
Facts: US national held in same (appalling) prison conditions as Mexican nationals.
Held:

- **Test was: broadly speaking, whether aliens are treated in accordance with ordinary standards of civilization.**

d) ILC Recommendations

Art 19 ILC ADP:
A State entitled to exercise diplomatic protection according to the present draft articles, should:
(a) give due consideration to the possibility of exercising diplomatic protection, especially when a significant injury has occurred;
(b) take into account, wherever feasible, the views of injured persons with regard to resort to diplomatic protection and the reparation to be sought; and
(c) transfer to the injured person any compensation obtained for the injury from the responsible State subject to any reasonable deductions.

10. The Use of Force

History of IL prohibition on the use of force

Early attempts to limit war

League of Nations Covenant 1919

- Recourse to war limited in certain circumstances
- State parties must first try to negotiate, and if that doesn't resolve the dispute, refer matter to PICJ or arbitration

1924 Geneva Protocol would have abolished general right to go to war – but not adopted

Kellogg-Briand Pact (Pact of Paris) 1928

- "The High Contracting Parties solemnly declare ... that they condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with one another"
    - Enforced by Nuremberg Tribunal (1945-1946)

The 1945 UN Charter

- The first attempt to prohibit, not just limit, the use of force
- Preamble: WE THE PEOPLES OF THE UNITED NATIONS DETERMINED to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind ....

1) Was the act a use of force under Art 2(4) UN Charter?

Art. 2(4) UN Charter: prohibits the use, or threat, of force by states:

"All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations"

- **"In their international relations": only inter-state force is covered**
    - Does not prevent a state from using force within its borders (i.e. to suppress a rebel movement)
- **"Against ... any state" – universal application**
    - It is not just between members of the UN
- **Prohibits "the threat or use of force**"
    - Defined below

Nicaragua v USA Case - the ICJ held that the UN Charter 2(4) reflects CIL (there is a parallel customary norm in CIL that prohibits the use, or threat, of force) → it is binding on all states except persistent objectors.

Use of force: **the use, by one state against another, of armed force (not political or economic pressure)** – including:

- **Direct armed force**: Invasion, projectiles, laying mines, nuclear, chemical weapons
- **Indirect armed force**:
    - Sending "armed bands" into another state's territory – **Nicaragua v USA**
    - Actively extending military, logistic, economic and financial support to irregular forces in another state – **Armed Activities 2005** (**DRC v Uganda**)
    - Providing weapons, logistical or other support to armed insurgents in another state – **Nicaragua v USA**
        - But "merely supplying funds" to irregular forces does not constitute a use of force– **Nicaragua v USA**

Threat of force: **threatening to do any of the above**

- E.g. an ultimatum – threat to attack a state if it does not comply with a demand
- Where use of force would be illegal, then the threat to do so is too – **1996 Nuclear Weapons Advisory Opinion**

- BUT: the threat of nuclear weapons (i.e. policy of nuclear deterrence) is not per se unlawful because the ICJ did not determine that the threat/use of nuclear weapons was unlawful – **1996 Nuclear Weapons Advisory Opinion**

2) If so, are there any exceptions that the state can invoke?

1) Self-Defence (under Art 51 UN Charter)

Art. 51 UN Charter

"Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security."

- **Recognises the inherent right to individual or collective self-defence against an armed attack**
  - **Nicaragua v USA (ICJ 1986)**: ICJ held that the Charter acknowledges the existence of the right of individual & collective self-defence under CIL.
- **But when the Security Council has "taken measures necessary to maintain international peace and security", the right of self-defence lapses.**
  - However, the right of self-defence is preserved in situations where the SC cannot or will not act

To invoke self-defence, the use of force must…

1) Be a response to an initial "armed attack"

Under Art 51, the use of self-defence must only be exercised in response to an initial "armed attack"

a) What is an "armed attack":

Oil Platforms Case:

- **An armed attack must be specifically directed at the state invoking self-defence; an armed attack does not constitute a general use of violence against all states**
  - In **Oil Platforms case**: even taken cumulatively, missile attack, laying mines and firing on US ship by Iran did not amount to armed attack on the US where no evidence that attacks were aimed specifically at the US
  - In **Armed Activities case**, Ugandan military assaults that resulted in the taking of several towns near the DRC/Uganda border were an "armed attack"

Nicaragua v USA (ICJ 1986):

- **Whether action will be an "armed attack" will depend on "scale and effects" of the operation**
- **An "armed attack" includes:**
  - Action by regular armed forces across an international border;
  - When state sends armed groups or mercenaries which carry out acts of armed force against another state of such gravity as to amount to an actual armed attack conducted by regular forces (in terms of their scale and effects)
- **But merely providing assistance to rebels in the form of the provision of weapons or logistical support is not an armed attack**
  - The concept of an armed attack is therefore narrower than the "use of force" (the use of force includes providing assistance via weapons or logistical support)

In the **Ethiopia v Eritrea Partial Award**, the Commission held

- **"Localised border encounters between small infantry units, even those involving the loss of life, do not constitute an armed attack for the purposes of the UN Charter".**

b) When does an "armed attack" begin:

- **Generally not until a state's territory is affected**
- **Exception**: "**Accumulation of events" theory**
  - Series of attacks should be viewed as a whole, so that action to prevent future attacks in the series:
    - Is not anticipatory SD but SD against one attack that is continuing

        - And is not merely retaliation for past attacks
    - **Implied accepted by the ICJ in the Oil Platforms case 2003**

2) Can be collective self-defence

Art 51 UN Charter: refers to the inherent right of individual or collective self-defence

- Requirements:
    - 1) There must be a victim state: Nicaragua v USA 1986 Case.
    - 2) The victim state must request assistance
        - In the Nicaragua v USA 1986 Case, the ICJ held that: "Where collective self- defence is invoked, it is to be expected that the State for whose benefit this right is used will have declared itself to be the victim of an armed attack."
        - I.e. there is no rule allowing the exercise of collective self-defence in the absence of a request by the state which regards itself as the victim of an armed attack, and a declaration by the attacked state

3) Must satisfy the requirements of necessity

Requirements apply to self-defence under both Article 51 and CIL

Caroline Incident: sets out requirements of necessity → to justify its use force, a state must show:
1) A necessity of self-defence
2) To an instant and overwhelming threat
3) Leaving no choice of means (no alternative means of repelling the attack)

1837 'Caroline incident:
Facts: *In 1837, Canada was still part of UK. In Canada, there were several rebel groups that were trying to overthrow the British monarchy in Canada. The rebels had supporters in the USA who were bringing them supplies on a ship called the Caroline. The British forces attacked the Caroline, set it on fire, and forced it into the current - where it was pulled over Niagara Falls. The British forces argued that its actions were lawful in self-defence - the Caroline was being used as part of an insurgency against the British Government and the British Government was entitled to respond.*
Held:

- Letter from the US Secretary of State Daniel Webster (1841): **to justify its use force, Britain must show "a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation".**
- Recognises that if Britain could satisfy those criteria, it would be justified

4) Must satisfy proportionality (response must be proportional to repel the attack)

Requirements apply to self-defence under both Article 51 and CIL

Proportionality: the measures taken in self-defence proportional to the purpose of repelling the attack

Nuclear Weapons Advisory Opinion 1997: the proportionality principle may... not in itself exclude the use of nuclear weapons in self-defence in all circumstances

Oil Platforms 2003 (Iran v US): US destruction of oil platforms and Iranian naval vessels not proportionate or necessary response to rocket attack and mining

DRC v Uganda 2005: Uganda's taking of airports and towns far from border not proportionate or necessary response to trans-border attacks

5) Must notify the Security Council of immediately intention to use self-defence

Under Art 51 UN Charter: for a state to exercise its right to self-defence, it must immediately notify the Security Council

- Practice of "Article 51" letters to notify the Security Council of intention to use self-defence

- ICJ has been less willing to accept that a State truly was acting in self-defence where it failed to immediately notify the SC, and only made that claim ("we were acting in self-defence") when taken to court
    - E.g. Oil Platforms case (Iran v USA ICJ 2003)

6) The Security Council retains its powers to take action

Under Art 51 UN Charter, even if a state has used self-defence, the Security Council retains its powers to take action to maintain or restore international peace and security

Ambiguous issues re: self-defence

i) Anticipatory self-defence and pre-emptive self-defence

Distinction between anticipatory self-defence and pre-emptive self-defence:

- **Anticipatory self-defence** generally accepted as referring to action when an attack is imminent
- **Pre-emptive self-defence** refers to action to render other state incapable of launching attack (in response to threats which have not yet crystallised but which might materialise in the future)

Anticipatory Self-Defence:

Art 51 UN Charter: "the inherent right of individual or collective self-defence if an armed attack occurs"

- The language of the UN Charter presupposes an attack has already occurred
- On its face, this language does not support anticipatory self-defence

Nuremberg Tribunal re: Germany's attack on Norway

Facts: *Germany claimed it was compelled to attack Norway to forestall an allied attack.*

Held:

- **The Tribunal held that in theory, preventative actions of self-defence are justified if there is an overwhelming necessity of self-defence in response to an instant and imminent threat.**
- **But the tribunal was not satisfied that this necessity was present here:**
    - Prior to Hitler's announcement re: Germany acted in SD, there was evidence that Germany was intending to invade Norway to claim bases - no mention of fear of an allied attack
    - Diary entries stated that Hitler was looking for an 'excuse' to claim bases in Norway
    - Based on this evidence, the tribunal rejected Germany's claim it invaded Norway in self-defence - it did so due to strategic reasons/self-interest

But the issue has not yet been resolved by ICJ. The ICJ expressly reserved opinion in Military & Paramilitary Activities 1986 (Niguragua v USA) and Armed Activities 2005 (DRC v Uganda).

UN reports 2004-2005 (A More Secure World High-Level Panel Report; In Larger Freedom Report): asserted right of self-defence could be exercised in face of imminent threat

Former ICJ Judge Rosalyn Higgins, writing non-judicially in (1994) agrees with anticipatory self-defence:
"It is the potentially devastating consequences of prohibiting self-defence unless an armed attack has already occurred that leads one to prefer this interpretation-although it has to be said that, as a matter of simple construction of the words alone, another conclusion might be reached."

Australian Attorney General in 2017: Australia regards anticipatory self-defence as a right of States under CIL

- Test for imminence:
    - Part of a pattern
    - Likely scale and damage
    - Alternative reactions available
    - Nature and immediacy
    - Probability
- Also identifying the "last window of opportunity" is crucial i.e. the last opportunity for the state to defend itself unless it acts in anticipatory self- defence

Pre-emptive Self-Defence:

"Bush Doctrine" in US National Security Strategy 2002, 2006:

- "America will act against ... emerging threats before they are fully formed."
- "We do not rule out the use of force before attacks occur, even if uncertainty remains as to the time and place of the enemy's attack...
- "We must be prepared to stop rogue states and their terrorist clients before they are able to threaten or use weapons of mass destruction against the United States and our allies and friends."
- "We make no distinction between terrorists and those who knowingly harbor or provide aid to them."
- "We cannot let our enemies strike first"

Australian Attorney General in 2017:

- Australia does not adhere to any doctrine of so-called 'pre-emptive' self-defence. Pre-emptive use of force is an entirely different thing from the use of force in anticipation of an imminent threat.
- Pre-emptive self-defence is not accepted application of the principle of self-defence ... Australia's view, maintained over a long period, is that States are not permitted to use force to respond to threats which have not yet crystallised but which might materialise in the future.

Arguments in favour of pre-emptive self-defence:

- Changed nature of the threat since 1945
    - Weapons of mass destruction have been developed due to technological advances
    - Terrorism
- UN Charter system not adequate to respond to these threats (these threats did not exist when the Charter was drafted)
- Unreasonable/impractical for state to wait until attack has occurred or is imminent
- No guarantee Security Council will act under Chapter VII
- Security Council delay or failure to act leaves threatened state without protection
- Even if Security Council does act, may be too late

Arguments against of pre-emptive self-defence:

- Too vague, arbitrary, subjective - contradicts the aim of the UN Charter, which was to constrain the use of force to very limited circumstances
- When may the right be exercised?
- How are necessity and proportionality assessed?
- In the anticipatory approach - a state knows the threat and knows its imminence, therefore the state can determine what will be a proportionate response
- Risk that doctrine would erode entirely the prohibition on use of force
- Must be based on sound intelligence – is it available?
- Destabilising – doctrine could be relied on by any state e.g. North Korea

ii) Use of force against non-state actors (e.g. terrorists), without the consent of the affected state

E.g. Where a terrorist group from New Zealand conducts an armed attack on Australia, then the terrorists retreat to their base in New Zealand.

1) Seek consent of the affected state

The use of force is not unlawful if done with consent of the territorial state

Art 20 ICL ASR:

Valid consent by a State to the commission of a given act by another State precludes the wrongfulness of that act in relation to the former State to the extent that the act remains within the limits of that consent.

2) If no consent, need to try to prove that the armed attack is attributable to the affected state

If the armed attacked can be attributed to the affected state in accordance with the Law of State Responsibility, the victim state may exercise self-defence against the responsible state.

3) No consent + no attribution = unclear whether SD can be exercised

An unsettled area of law.

UNSC Resolutions 1368 (2001) and 1373 (2001), passed in response to 9/11, recall "the inherent right of individual or collective self-defence in accordance with the Charter"

- These resolutions may indicate that a state can exercise SD against terrorist groups in another state when the state does not consent and the act can't be attributed to the state
- But the resolutions stop short of expressly saying SD applies to non-state actors

Arguments in favour of self-defence against non-state actors:

- **Text of Article 51 UN Charter**: *"Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security."*
    - The text states "**an armed attack**" - does not necessitate that SD can only be exercised against an armed attack by a state; it could be by any person or entity
    - The UN Charter was developed in accordance with the principles set by The Caroline Incident - which was in response to an attack by rebel supporters from the USA, not the state of the USA
    - **Wall in Occupied Palestinian Territory (ICJ, 2004)**: in their separate opinions, **Higgins and Buergenthal JJ** noted that Article 51 does not explicitly specify it must be an attack by a "state"; i.e. it could arguably constitute an act by any person or entity
        - In her separate opinion, Judge Higgins expressed her doubts about this point given text of Art. 51. (the Article does not specify it must be an attack by a "state")
        - In his separate opinion, Judge Buergenthal, "the United Nations Charter, in affirming the inherent right of self-defence, does not make its exercise dependent upon an armed attack by another State")
- **Examples of state practice:**
    - E.g. US invasion of Afghanistan after 9/11 (2001) attacks (these were not condemned by the UNSC)
    - E.g. USA, UK, Australia, Canada and others since 2014 (ISIL in Syria)
- **Rise of "unwilling or unable" test:** there appears to be a developing doctrine in CIL, where a state in which a terrorist group is based is either unwilling or unable to eliminate the terrorist threat that presents a danger to the international community within its borders, other states are entitled to act in self-defence even without the state's consent.
    - **Exemplified in USA's 2014 Article 51 letter to the SC re: ISIL**
        - *States must be able to defend themselves, in accordance with the inherent right of individual and collective self-defence, as reflected in Article 51 of the Charter of the United Nations, when, as is the case here,* ***the government of the State where the threat is located is unwilling or unable to prevent the use of its territory for such attacks****. The Syrian regime has shown that it cannot and will not confront these safe havens effectively itself. Accordingly, the United States has initiated necessary and proportionate military actions in Syria in order to eliminate the ongoing ISIL threat to Iraq ...*
    - Repeated in Australia's 2015 article 51 letter re ISIL:
        - ***States must be able to act in self-defence when the Government of the State where the threat is located is unwilling or unable to prevent attacks originating from its territory****. The Government of Syria has, by its failure to constrain attacks upon Iraqi territory originating from ISIL bases within Syria, demonstrated that it is unwilling or unable to prevent those attacks. In response to the request for assistance by the Government of Iraq, Australia is therefore undertaking necessary and proportionate military operations against ISIL in Syria in the exercise of the collective self-defence of Iraq.*
- **Judge Greenwood (in Max Planck Encyclopedia of Public International Law):**

- Whether an armed attack, for the purposes of the right of self-defence, must be the responsibility of a State should therefore be regarded as unsettled.
- On the one hand, the increasing capacity of groups acting outside the responsibility of a State to engage in acts of extreme violence suggests that any such limitation would be an unreasonable restriction on the right of the victim to defend itself. Contemporary State practice supports the notion that no such broad restriction exists.

Arguments against the use of self-defence against non-state actors:

- **Art 51 cannot be read in isolation**: the UN Charter also emphasises that a state has a right to territorial integrity
- **Caroline incident** is **not instructive** because it was political, not legal, and/or because this one incident cannot establish CIL
  - It occurred at a time where the use of force was lawful, the case is therefore not reflective of opinion juris
  - USA / Canada emphasised political justifications
- **US invasion of Afghanistan is not evidence of OJ** because US seemed to view Afghanistan as partially responsible for AQ's attack
  - I.e. the US perceived that Al Qaida's act of the 9/11 attacks could be attributed to Afghanistan
- **DRC v Uganda:**
  - States have CIL obligation to disallow territory to be used for terrorism
  - But there is no state responsibility for acts of non-state actors unless the conduct can be attributable to the state
- **Wall in Occupied Palestinian Territory (ICJ, 2004)**: Israel claimed SD per UN Charter 51. Court rejected this, noting "Article 51 of the UN Charter thus recognises the existence of an inherent right of self-defence in the case of armed attack by one State against another State. However, Israel does not claim that the attacks it are imputable to a foreign State."

Arguments for and against the use of self-defence against non-state actors:

- **Judge Greenwood (in Max Planck Encyclopedia of Public International Law):**
  - Whether an armed attack, for the purposes of the right of self-defence, must be the responsibility of a State should therefore be regarded as unsettled.
  - On the other hand, there is an understandable concern that a State which has been the victim of an attack by a group unconnected with any other State should not inevitably be free to take action against that group in the territory of other States.
  - **Counter-argument: but it is possible that this latter concern can be met by a proper application of the principle that action in self-defence must be limited to what is necessary and proportionate.** If the State, in whose territory a group which has perpetrated a terrorist attack against another State is located, is prepared to take effective action against that group, then military action in that territory by the victim of the terrorist attack cannot be regarded as necessary. **Only if the former State has shown itself to be unwilling (or, perhaps, unable) to act effectively against the group it can be said that military action in its territory in the exercise of the right of self-defence meets the criterion of necessity**.

iii) Rescuing nationals abroad

An unsettled area of law.

1) Seek consent from the state in question

The use of force is not unlawful if done with consent of the territorial state

Art 20 ICL ASR:
Valid consent by a State to the commission of a given act by another State precludes the wrongfulness of that act in relation to the former State to the extent that the act remains within the limits of that consent.

2) Apply strict conditions argued by Cassese

Some argue that an attack on a state's nationals abroad is not tantamount to an attack on the state itself because the state is a separate entity to its nationals (**EU Report on Conflict in Georgia (2009)**)

However, others argue that the right to self-defence includes rescue operations for the state's nationals abroad, on strict conditions (**Cassese**)

Cassese: it is said that the right to self-defence includes rescue operations for the State's nationals abroad where…
1) Serious threat to the nationals' lives due to terrorist attack, or if the state authorities condone the terrorist attack, or have collapsed;
2) No peaceful means of saving their lives are available;
3) Armed force is used for the exclusive purpose of rescuing the nationals;
4) That force is proportionate to the threat;
5)The force stops as soon as nationals have been saved.
6) Use of force in self-defence and justification is immediately reported to UNSC

2) Collective Security (under Chapter VII UN Charter)

1) Art. 39: relevant criteria

Has the UNSC identified any relevant criteria under Art 39 of the UN Charter which allows the UNSC to determine what measures should be taken to maintain or restore peace?

Art 39:
The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.

The UNSC shall determine the existence of any:

- **Threat to the peace**
  - UNSC takes wide view; has included:
    - Testing of nuclear weapons (illegally) – e.g. North Korea
    - Terrorism
    - Refusing to sign or implement peace agreements
    - Not implementing SC resolutions
    - Illegal arms trading
    - Large-scale violations of human rights or war crimes
- **Breach of the peace**
  - Hostilities between armed forces of two States, e.g. Iraqi invasion of Kuwait in 1990.
- **Act of aggression**
  - **UNGA Resolution 3314:** the **use of force by one state against another** (e.g. bombardment, invasion, blockade of another State's ports or coasts) **depending on gravity**

…And shall decide what measures should be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security

2) Art. 40: UNSC can call on states to take provisional measures

Art 40:
In order to prevent an aggravation of the situation, the Security Council may, before making the recommendations or deciding upon the measures provided for in Article 39, call upon the parties concerned to comply with such provisional measures as it deems necessary or desirable. Such provisional measures shall be without prejudice to the rights, claims, or position of the parties concerned. The Security Council shall duly take account of failure to comply with such provisional measures.

Examples of provisional measures:

- Provide information
- Ceasefire

3) Art 41: UNSC may take non-military measures to restore & maintain international peace/security

Art 41:

The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

4) Art 42: UNSC may authorise use of force by UN member states

Art 42:

Should the Security Council consider that measures provided for in Article 41would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.

- **Note**: **this would appear to allow anticipatory use of force and pre-emptive use of force**, because Art 39 refers to measure to 'threats' to peace; not to an armed attack that has "occurred".

5) Art 25: If the UNSC makes a decision (e.g. to allow the use of force), it is binding on UN member states.

Art 25:

The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.

History of situations where the UNSC has authorised the use of force

- Only three Chapter VII authorisations to use force before 1990:
  - Korea 1950 (US & coalition of willing states)
  - Congo 1961 (to prevent civil war and to remove all non-UN military personnel; member states under UN command)
  - Southern Rhodesia 1966 (UK command, to enforce sanctions)
- Then:
  - Operation Desert Storm Iraq/Kuwait 1990-91
  - Yugoslavia 1992+
  - Somalia 1992
  - And over a dozen times since, including Libya 2011

3) Humanitarian intervention (only a *possible* exception)

Can a state use force in another state to assist the people of that state?

A developing area of IL. While not expressly recognised in the UN Charter, CIL is evolving in a way that allows a humanitarian intervention doctrine.

1) Seek consent from the state in question

The use of force is not unlawful if done with consent of the territorial state

Art 20 ICL ASR:

Valid consent by a State to the commission of a given act by another State precludes the wrongfulness of that act in relation to the former State to the extent that the act remains within the limits of that consent.

Key issue: is the consent valid?

1) Was it made under duress?
2) Consent **must be given by the State Government**

- Consent from an **opposition party** or **rebel movement** does not validate the use of force by foreign state (**Nicaragua v USA**)

3) Is the consent **ongoing**, or has it been **withdrawn**, or is there an **exception**?

- Difficulty is determining whether consent existed at the time of foreign use of force
- **DRC v Uganda (2005, ICJ)**
    - **Facts**: *In April 1998, DRC and Uganda agreed on their armies' cooperation on the shared border. In August 1998, the DRC President requested for all foreign military forces in the DRC, but Uganda expanded its activities in DRC. By July 1999, the Lusaka Agreement was made - DRC and Uganda agreed on a plan for "the final orderly withdrawal of all foreign forces from the national territory of the DRC.". But Ugandan troops did not completely leave until 2003.*
    - **Issue**: Was presence of Ugandan army in DRC after Lusaka Agreement "by consent"?
    - **The ICJ held that DRC terminated its consent in August 1998. The Lusaka Agreement was not giving fresh consent for the Ugandan troops to leave the DRC, rather it provided a schedule for the orderly withdrawal of troops from DRC, in order to give effect to DRC's termination of consent in August 1998. But there was an exception - the presence of Ugandan troops along the border, as agreed to in April 1998.**

2) If no consent, it is for the UNSC to determine what measure should be taken

Kosovo War (1999)

Facts: *Kosovar Albanian people were being persecuted in Kosovo (a province in Serbia). No UNSC Resolution was given to allow the use of force against Serbia. There was a multilateral invasion by NATO allies, which decided to take air-strikes in Serbia to pressure the Serbian Government to stop the persecution of the Kosovar Albanian people. The air-strikes ended with the agreement by the Serbian Government to allow peacekeepers into Serbia.*

Controversial:

- **Kosovo were not a collective "victim state" that could request assistance request self-defence under Art 51 UN Charter**
- **It did not gain the approval of the UN Security Council**
- **It caused at least 488 Yugoslav civilian deaths, including Kosovar Albanian refugees**

Hilary Charlesworth (2002): "the events in Kosovo have been a big occasion for international lawyers" - it is unclear exactly what the IL community should have done about it

- Some scholars argue that the air-strikes were justified on a "humanitarian intervention"
    - Professor Greenwood argues this is correct
- But others argue argued that it was unlawful without the approval of the UNSC, which would undermine the IL rules regarding the use of force
    - 2000 UK Parliamentary Commission later concluded that IL rule regarding use of force for "humanitarian intervention" is "legally questionable"
    - Professor Brownlie argued that there is no exception under IL regarding the use of force for a "humanitarian intervention"

UN World Summit Outcome (2005)

- **Should there be a third exception for "humanitarian intervention"**
    - No humanitarian exception was noted
    - The UN emphasised "we reiterate the obligation of all Member States to refrain in their international relations from the threat or use of force in any manner inconsistent with the Charter"
- **But there is a responsibility of a territorial state to protect its own people against serious violations of human rights**
    - **If a state breaches this responsibility, then it is for the UNSC to take measures to address this breach (not for other states to randomly engage in the use of force without authorisation from the UNSC)**
    - **The UNSC emphasised it is prepared to engage in the use of force to take actions against serious violations of human rights within a state**

3) But if the UNSC does not act or give approval, developing areas of CIL *possibly* indicate that a state may be able to use force for "humanitarian intervention"…

In recent years, CIL has continued to develop:

Chemical Weapon Use by Syrian Regime: UK Government Legal Position (2013)

The UK argued that even it was not granted UNSC approval, its planned use of force in Syria to destroy chemical weapons would be lawful under the doctrine of humanitarian intervention, provided that:

1) There is convincing evidence, generally accepted by the international community as a whole, of extreme humanitarian distress on a large scale, requiring immediate and urgent relief;
2) It must be objectively clear that there is no practicable alternative to the use of force iflives are to be saved; and
3) The proposed use of force must be necessary and proportionate to the aim of relief of humanitarian need and must be strictly limited in time and scope to this aim (i.e. the minimum necessary to achieve that end and for no other purpose).

Ultimately, there is not enough state practice to establish this as concrete CIL. Therefore, it remains the role of the UNSC to determine what measure should be taken.

11. Peaceful Settlement of International Disputes

Introduction to dispute settlement

Art 1(1) UN Charter: purposes of the UN

- To maintain international peace and security, and to that end: ... to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace

Principles include:

- All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered. (**Art. 2(3)**)

Art 33 UN Charter:

- (1) The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.
- (2) The Security Council shall, when it deems necessary, call upon the parties to settle their dispute by such means.

Methods of Dispute Settlement

- Negotiation
  - Diplomatic, involving only parties themselves
- Mediation and ”good offices”
  - Diplomatic, involving third party
- Conciliation
  - Quasi-legal (may lead to non-binding conciliation report), involving third party
- Enquiry/Fact-Finding
  - Independent inquiry into facts behind dispute

1) Are the parties using judicial or non-judicial methods to resolve the dispute?

Non-judicial methods

International Arbitration

ILC definition of international arbitration: a procedure for the **settlement of disputes between states by a binding award** on the basis of law and as the result of an undertaking voluntarily accepted [and by] arbitrators ... freely selected by the parties

Arbitration Procedure

- Less formal than judicial process
- More flexible: parties can choose own arbitrator, applicable law, procedural rules, location
- Can be single arbitrator or several
- Single arbitrator was/is often ahead of state or person of high standing eg the UN Secretary-General or IL expert in the relevant field
- Usually each party appoints one arbitrator, umpire appointed jointly by the parties or by the other arbitrators – “mixed commission”
- Proceedings and award are confidential unless parties agree otherwise
- In international law, an arbitral award is binding on the parties (but with no clear enforcement mechanism) and constitutes res judicata unless otherwise agreed (**Maritime Delimitation (Qatar v Bahrain) 2001**)

Permanent Court of Arbitration

- Initially popular, but hardly used at all until very late 20th century
- Now very busy, accommodates arbitrations involving corporations as well as states
- Important cases include Island of Palmas 1928
- Current/recent cases include:

- Conciliation between Timor-Leste and Australia under the Timor Sea Treaty 2002
- Arbitration re the "Enrica Lexie" Incident (Italy v. India)

Judicial methods

International Court of Justice (ICJ)

Makeup of the ICJ

- Principal judicial organ of the UN – Art 1 Statute of the ICJ; sits in the Peace Palace, The Hague
- Composition: 15 judges representing "the main forms of civilization and ... principal legal systems of the world"
  - 5 Western European and Others – 3 African
  - 3 Asian
  - 2 Eastern European
  - 2 Latin American/Caribbean
- Including one from each of P5 (until 2018!)
- Judges elected by GA and SC for 9 years (five every three years)

ICJ Procedure

- **Only states can be parties to a case before the ICJ (Art 34 ICJ Statute)**
- **All members of the UN are ipso facto parties to the ICJ Statute (Art 93 UN Charter)**
- **But the ICJ cannot hear a case unless the parties have expressly consented to the jurisdiction of the Court**

2) If judicial, is the state seeking a judgment from the ICJ or advisory opinion?

JUDGEMENT

i) If one party is seeking a judgment, does the ICJ have jurisdiction?

The ICJ cannot hear a case unless the parties have consented to the jurisdiction of the ICJ in order to have the particular dispute heard by the ICJ.

This applies even if the case concerns a jus cogens violation: Armed Activities on the territory of the Congo (DRC v Rwanda) 2006.

Art 36(1) ICJ Statute: a state may consent to the jurisdiction of the ICJ by…

1) Special agreement:

Where states agree to refer a specific dispute to the ICJ for resolution

- E.g. **Frontier Dispute (Burkina Faso/Niger)**: In 2010, the Government of Burkina Faso and the Government of the Republic of Niger, submitted the frontier dispute between them concerning a section of their common boundary to the ICJ for adjudication

2) Expressly consenting to the court's compulsory jurisdiction:

a) In a treaty (a **"compromissory clause"** - e.g. "any dispute arising re: this treaty will be settled by the ICJ)

- But still, the ICJ must be satisfied that the particular dispute has actually arisen in relation to the treaty

b) By a declaration under Art 36(2) of the ICJ statute (the "**optional clause**")

- **Parties may agree to the compulsory jurisdiction of the court over all disputes concerning:**
  - The interpretation of a treaty
  - Any question of IL
  - Existence of a breach of an international obligation
  - Nature and extent of reparation for a breach of an international obligation
- **The acceptance of jurisdiction under Art 36(2) can be limited:**
  - **'Lowest common denominator' effect:**
    - The ICJ only has jurisdiction to the extent that the jurisdiction is accepted by all the states in the dispute (looking at both parties qualifications, what have both parties agreed to?)

- **Reservations may concern:**
  - Matters within domestic jurisdiction
  - Time: determined or undetermined duration
  - Subject matter
  - Parties to the dispute
- **Reciprocity:**
  - Art 36(2) provides for general reciprocity with the words "in relation to any other state accepting the same obligation"
  - States that make reservations to the Court's jurisdiction may find that their reservations may be relied upon by the other side for their own purpose (**Norwegian Loans Case 1950**)
  - **Norwegian Loans Case (France v Norway) (ICJ 1957):**
    - In its Art 36(2) declaration, France excluded the jurisdiction of the ICJ in matters considered by France to be domestic matters; France accepted the jurisdiction of the ICJ on condition of reciprocity;
    - Norway made no similar reservation, but its declaration of acceptance of the jurisdiction of the ICJ was on condition of reciprocity;
    - ICJ decided that Norway was allowed to rely on the reservation made by France to its advantage (i.e. it could argue that the dispute was a matter essentially under Norwegian domestic jurisdiction and thus excluded from under the jurisdiction of the ICJ);
    - Norway did so and the ICJ decided it had no jurisdiction.

3) Forum prorogatum:

Under Art 38(5) Rules of Court, a state may make a unilateral application to the ICJ and await the response of the other party – but the other party must then consent to jurisdiction

- E.g. **Marshall Islands cases**: The Marshall Islands has argued there is a legal obligation on nine world powers to undergo nuclear disarmament and has invited the respondent states to submit to the ICJ jurisdiction (but the majority have refused)

ii) Is the claim admissible to the ICJ?

ICJ often makes a preliminary judgment on jurisdiction or admissibility:

- **Jurisdiction**: whether court is competent to rule (e.g. have States made art. 36(2) declaration or otherwise consented to the court's jurisdiction; does the putative parties' consent cover the dispute in question)
- **Admissibility**: whether claim is inadmissible on some ground other than its ultimate merits (e.g. failure to exhaust local remedies, absence of essential third state)
  - E.g. **Georgia v. Russian Federation (2011):**
    - Georgia relied on art. 22 **CERD**: "**any dispute ... which is not settled by negotiation or by the procedures expressly provided for in this Convention**, shall, at the request of any of the parties to the dispute, be referred to the International Court of Justice for decision, unless the disputants agree to another mode of settlement"
    - **But the ICJ held that the parties' failure to attempt negotiation meant it did not have jurisdiction**

iii) Is there an issue of third states?

The Monetary Gold Rule: the ICJ cannot adjudicate the case if the decision would directly affect the rights or interests of States who have not consented to the ICJ's jurisdiction

- E.g. **Monetary Gold case** – Italy sought the restitution of Albanian gold confiscated by Allies from a an Italian bank, basing its claim on a unliquidated claim against Albania. The ICJ rejected the claim as inadmissible as the matter could not be decided without joining Albania as a party.
- E.g. **East Timor case (Portugal v Australia) 1995** – the question of whether Australia breached Portugal's rights as administering power and the self-determination rights of East Timor depended on

the lawfulness or otherwise of Indonesia's conduct. Indonesia did not accept the jurisdiction of the Court and could not be joined as a party. Therefore, the Court refused to hear the matter.

Interventions without becoming a party:

- **Art 62 ICJ Statute**: A state with a legal interest which may be affected by a decision in a case may ask to intervene.
    - The state does not become a party to the dispute and thus the judgment is not binding on the intervening state (Art 59 ICJ Statute).
- **Art 62 ICJ Statute**: 1. Whenever the construction of a convention to which states other than those concerned in the case are parties is in question, the Registrar shall notify all such states forthwith. 2. Every state so notified has the right to intervene in the proceedings; but if it uses this right, the construction given by the judgment will be equally binding upon it'.
    - **The interpretation of the treaty given by the ICJ is binding on any intervening state which is a party to that treaty, despite the state not formally becoming a party to the case.**

iv) Provisional measures

Art 41 ICJ Statute: The ICJ can order provisional measures to **preserve the respective rights of either party**.

- Provisional measures are taken:
    - To preserve the rights in dispute, of either party if there is urgency, in the sense that there is a **real and imminent risk that irreparable prejudice will be caused before the Court gives its final decision** (**Iran v US, 2018**)
        - E.g. **La Grand (Germany v US)1999** – to prevent the execution of death row inmate when the death penalty was allegedly imposed in violation of international law norm
        - E.g. **Georgia v Russia 2008** – Georgia sought provisional measures "in order to preserve its rights under CERD to protect its citizens against violent discriminatory acts by Russian armed forces". The ICJ ordered provisional measures e.g. Russia to refrain from performing, sponsoring, or defending any act of racial discrimination
        - E.g. **Iran v US, 2018** – to prevent serious detrimental impact on the health and lives of Iranian civilians, the ICJ imposed provisional measures requiring the United States to remove any impediments on export of humanitarian goods, equipment and services to Iran
- Provisional measures are binding on the parties: **La Grand case**

v) Procedure

- Parties submit written pleadings (memorials, counter-memorials etc), make oral submissions (Art 43 ICJ Statute)
- Proceedings generally public
- Court usually sits together: all 15 (quorum of 9) (plus an ad hoc judge if there is no judge of the nationality of a state party)
- Judgments are given as a single judgment (in English and French), plus:
    - Individual separate [concurring] opinions
    - Dissenting opinions

vi) Enforceability

Art 94 UN Charter:

(1) All UN Member States undertake to comply with the decision of the ICJ in any case to which it is a party.
(2) If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment.

- The UNSC has not exercised its power to take measures to enforce an ICJ judgement
- But if the UNSC did decide to give effect to an ICJ judgment, it would be binding on all UN Member States under **Art 25 UN Charter**

In reality, international politics is the main reason why states abide by an ICJ judgment (+ the states had to consent to the ICJ to decide the case in the first place)

- The judgments of the ICJ are not always complied with (Higgins in Dixon says, however, that compliance is quite high)

ADVISORY OPINION

i) If the parties are seeking an advisory opinion, either the GA or SC must have put forward a legal question

Art 61(1) ICJ Statute:

The ICJ may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request

- Can only give advisory opinions at the request of a body authorised by or in accordance with the UN Charter
- **Art 96 UN Charter:**
    - (1) The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question
    - (2) Other organs of the United Nations and specialized agencies, which may at any time be so authorized by the General Assembly, may also request advisory opinions of the Court on legal questions arising within the scope of their activities

Advisory opinions are not binding, but considered as stating the law

- E.g. In the Marshall Islands cases, for ex, the MI argued a failure of compliance with the international law obligations as spelled out by the ICJ in the Nuclear Weapons opinion
- Advisory jurisdiction assists the political organs in settling disputes or gives clarity on points of law raised by the functions of UN political organs and its specialised agencies.

The ICJ has been asked to give 28 advisory opinions:

- Subjects have included:
    - Apartheid – ***Namibia*** 1971
    - Use of nuclear weapons – ***Legality of Nuclear Weapons*** 1996
    - Self-defence – ***Israeli Wall*** 2004
    - Legality of Kosovo's declaration of independence
    - Whether "the process of decolonization of Mauritius was lawfully completed" in 1968 (**Chagos Islands case**)